Journal of Criminal Law and Criminology

Volume 87
Issue 2 *Winter*

Article 5

Winter 1997

Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops

David A. Harris

0091-4169/96/8702-0544
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 87, No. 2
Printed in U.S.A.

ESSAY

"DRIVING WHILE BLACK" AND ALL OTHER TRAFFIC OFFENSES: THE SUPREME COURT AND PRETEXTUAL TRAFFIC STOPS

DAVID A. HARRIS*

I. INTRODUCTION

The Supreme Court's decision in *Whren v. United States*[1] could not have surprised many observers of the Court's Fourth Amendment jurisprudence. In *Whren*, police officers used traffic violations as a pretext to stop a car and investigate possible drug offenses; the officers had neither probable cause nor reasonable suspicion to stop the driver for narcotics crimes.[2] In the Supreme Court, the government advocated the "could have" standard: any time the police *could have* stopped the defendant for a traffic infraction, it does not matter that police *actually* stopped him to investigate a crime for which the police had little or no evidence.[3] The defense asked the Court to adopt a "would have" rule: a seizure based on a traffic stop would only stand if a reasonable officer *would have* made this particular stop.[4] The Court sided with the government. If police witness a traffic violation, the

* Eugene N. Balk Professor of Law and Values, University of Toledo College of Law. J.D. 1983, Yale Law School; LL.M. 1988, Georgetown University Law Center. My thanks to Jeffrey Gamso, Deborah Jeon, Mark Kappelhoff, Tom Perez, Daniel Steinbock and Lisa Burget Wright for helpful comments on an earlier draft of this piece. Thanks also to Eric Crytzer and Mary L. Sawyers for research and editorial assistance.

1 116 S. Ct. 1769 (1996).

2 *See infra* notes 15 through 19 and accompanying text. To legally stop a person, a police officer must have at least reasonable suspicion of criminal activity. Terry v. Ohio, 392 U.S. 1 (1968).

3 Brief for the United States at 5-6, United States v. Whren, 116 S. Ct. 1769 (1996) (No. 95-5841).

4 *Whren*, 116 S. Ct. at 1773 (defendant petitioners asked that the standard be "whether a police officer, acting reasonably, *would have* made the stop for the reason given" (emphasis added)).

Court said, they have the simplest and clearest type of probable cause imaginable for a stop.[5] Requiring more would force lower courts to make post hoc Fourth Amendment judgments based on either the mindset of a reasonable officer or the actual (perhaps ulterior) motives of the arresting officer, neither one of which the Court saw as necessary, useful, or relevant to the task of judging the constitutionality of a seizure.[6] After *Whren*, courts will not ask whether police conducted a traffic stop because officers felt the occupants of the car were involved in some other crime about which they had only a hunch; rather, once a driver commits a traffic infraction, the officer's "real" purpose will make no difference at all.[7]

For the sake of of argument, I will concede that the decision in *Whren* makes some sense, at least from the point of view of judicial administration. But examined more carefully, *Whren* does more than opt for a more workable rule: it approves two alarming law enforcement practices. Neither are secret; on the contrary, the law of search and seizure has reflected both for a long time.[8] But both represent profoundly dangerous developments for a free society, especially one dedicated to the equal treatment of all citizens.

First, the comprehensive scope of state traffic codes makes them extremely powerful tools under *Whren*. These 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* 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. Given how important an activity driving has become in American society, *Whren* changes the Fourth Amendment's rule that police must have a reason

---

5 *Id.* at 1772.

6 *Id.* at 1773-76.

7 *Id.*

8 *See, e.g., infra* note 27; WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.1, at 2 (1996 Supp.). Indeed, I would be remiss not to mention that the subject of pretextual Fourth Amendment activity has garnered a considerable amount of attention over the years. *E.g.*, John M. Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 ORE. L. REV. 151 (1979); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639 (1985); *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's Hard Choices*, 18 U. MICH. J.L. REF. 695 (1985); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 1.4(e) (3d ed. 1996). This excellent commentary has framed the debate well. But my argument is different. *Whren* means that as long as a traffic infraction occurs—and one almost always will—no inquiry into pretext of any type is even necessary.

to forcibly interfere in our business—some basis to suspect wrongdoing that is more than a hunch.[9] Simply put, that rule no longer applies when a person drives a car.

This alone should worry us, but the second police practice *Whren* approves is in fact far worse. It is this: Police will *not* subject *all* drivers to traffic stops in the way *Whren* allows. Rather, if past practice is any indication, they will use the traffic code to stop a hugely disproportionate number of African-Americans and Hispanics. We know this because *it is exactly what has been happening already*, even before receiving the Supreme Court's imprimatur in *Whren*. In fact, the stopping of black drivers, just to see what officers can find, has become so common in some places that this practice has its own name: African-Americans sometimes say they have been stopped for the offense of "driving while black."[10] With *Whren*, we should expect African-Americans and Hispanics to experience an even greater number of pretextual traffic stops. And once police stop a car, they often search it, either by obtaining consent, using a drug sniffing dog, or by some other means.[11] In fact, searching cars for narcotics is perhaps *the* major motivation for making these stops.

Under a Constitution that restrains the government vis-a-vis the individual[12] and that puts some limits on what the authorities may do in the pursuit of the guilty, the power of the police to stop any particular driver, at almost any time,[13] seems oddly out of place. And with

---

9

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Delaware v. Prouse, 440 U.S. 648, 663 (1979); *see* Terry v. Ohio, 392 U.S. 1, 27 (1968).

10 I heard this phrase often from clients I represented in Washington, D.C. and its surrounding Maryland counties; among many of them, it was the standard way of describing the common experience of constant stops and harassment of blacks by police. Thus I was not surprised to see the phrase show up recently in the popular press. *E.g.*, Michael Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, March 29, 1996, at A1 (black men are stopped so often they say they are stopped for the offense one of them "calls DWB—driving while black."). *See also* Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59 (constant stops by police is what "many African-Americans know as D.W.B.: Driving While Black.").

11 *See infra* notes 184-193 and accompanying text.

12 *See, e.g.*, WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT, § 1.1, at 3-5 (1996) (Fourth Amendment grew out of English and colonial experiences with abuses of general warrants and writs of assistance); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 5-6 (1994) (noting that the history and purpose of Fourth Amendment is about limitation of executive and police power).

13 Indeed, described this way, the Court would no doubt disagree and say that police behavior like this surely *does* violate the Fourth Amendment. *E.g.*, Delaware v. Prouse, 440

the words "equal justice under law" carved into the stone of the Supreme Court itself, one might think that the use of police power in one of its rawest forms against members of particular racial or ethnic groups might prompt the Court to show some interest in curbing such abuses.[14] The defendant-petitioners presented both of these arguments—the almost arbitrary power over any driver inherent in the "could have" approach, and the racially biased use of traffic stops—to the Court. Yet the Court paid little attention to these obvious implications of its decision. *Whren* is more than a missed opportunity for the Court to rein in some police practices that strike at the heart of the ideas of freedom and equal treatment; *Whren* represents a clear step in the other direction—toward authoritarianism, toward racist policing, and toward a view of minorities as criminals, rather than citizens.

II. THE CASE

Whren presented the Court with relatively simple facts. Plain clothes vice officers in an unmarked police car saw two young men driving a vehicle with temporary tags in an area known for drug activity.[15] The police observed the vehicle pause at a stop sign for longer than usual.[16] While the officers did not see the men do anything to indicate involvement in criminal activity, they still became suspicious.[17] The driver turned without signalling and sped off.[18] The police stopped the vehicle, and observed the passenger holding a bag of cocaine in each hand.[19]

The government argued that the traffic violations the driver committed—not giving "full time and attention to the operation of the vehicle,"[20] failing to signal,[21] and travelling at a speed "greater than is

U.S. 648 (1979) (random stops of automobiles prohibited). This may be true, but my intent is to describe what the law *does*, not what it *says*.

14 Brief for Petitioners at 17-30, *Whren* (No. 95-5841).

15 Whren v. United States, 116 S. Ct. 1769, 1772 (1996). Both of the young men were African-Americans.

16 *Id.*

17 *Id.* While the Court's opinion notes that the occupants were "youthful," that the vehicle was "a dark Pathfinder," and that the driver seemed to be looking down into the lap of the passenger, *id.*, there was no indication of criminal activity. As the Brief for the Petitioners notes, the main officer involved testified that the stop of the car was performed not to investigate specific acts of the occupants indicating criminality, but simply to speak to the driver about his poor driving. Brief for Petitioners, *Whren*, at 5-7 (No. 95-5841). This seems a transparently obvious lie; with *Whren* on the books, police will have no reason to tell such stories, since pretextual stops have been approved, and no "innocent" motivation need be voiced for the court reviewing a motion to suppress.

18 *Whren*, 116 S. Ct. at 1772.

19 *Id.*

20 18 D.C. Mun. Regs. § 2213.4 (1995).

21 *Id.* at § 2204.3.

reasonable and prudent under the conditions"[22]—gave the police probable cause to stop the car. The government contended that with probable cause arising from the traffic violations, the stop of the car passed constitutional standards, regardless of the fact that the officers may actually have intended to investigate drug offenses and not traffic infractions.[23] The defense asserted that the officers had no actual interest in traffic enforcement, and had used the traffic infraction only as a pretext. For the real objective of the police—searching for evidence of possible drug offenses—no probable cause or reasonable suspicion existed.[24] The defense contended that this made the stop (and the resulting seizure of the cocaine) unconstitutional.[25] The District Court admitted the evidence, and at trial both defendants were found guilty.[26] The U.S. Court of Appeals for the District of Columbia Circuit affirmed, stating that "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation," despite the fact that the officer may subjectively believe that those in the car may be engaging in some other illegal behavior.[27]

The Supreme Court adopted the "could have" theory. The Court said that any time a police officer observes a traffic violation, she has probable cause to stop the vehicle, regardless of the fact that the detailed nature of traffic codes enables any officer that wishes to do so to stop virtually any motorist at almost any time by using the traffic in-

---

22 *Id.* at § 2200.3.

23

> When a police officer has observed a motorist commit a traffic offense, the officer has probable cause to justify a stop. . . . [A]ny argument [to the contrary] . . . conflicts with this Court's teaching that the validity of a search or a seizure under the Fourth Amendment turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . .

Brief for the United States, *Whren*, at 7-8 (No. 95-5841).

24 Transcript, U.S. v. Whren, U.S. D. Ct., D.D.C., Nos. 93-cr00274-01 and 93-cr00274-02, at 122-24, 126-30; *see also* Brief for Petitioners, *Whren*, at 13-14 (No. 95-5841).

25 Transcript, *supra* note 24, at 124, 130; Brief for Petitioners, *Whren*, at 14 (No. 95-5841).

26 *Id.* at 10-11.

27 Whren v. United States, 53 F.3d 371, 374-75 (D.C. Cir. 1995). The D.C. Circuit's decision put it in line with eight other circuits that had adopted some form of the "could have" rule. U.S. v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); U.S. v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995), *petition for cert. filed*, No. 95-6724 (Nov. 13, 1995); U.S. v. Scopo, 19 F.3d 777, 782-84 (2d Cir 1994), *cert. denied*, 115 S. Ct. 207 (1994); U.S. v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994); U.S. v. Hassan El, 5 F.3d 726, 729-30 (4th Cir. 1993) *cert. denied*, 114 S. Ct. 1374 (1994); U.S. v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); U.S. v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989); U.S. v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). Two other circuits had adopted the "would have" rule. U.S. v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994); U.S. v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).

fraction as a pretext.[28] The Court discounted statements in prior cases that seemed to cast pretextual stops in an unfavorable light,[29] and stated that the law actually supported the opposite proposition: An officer's motive does not "invalidate[ ] objectively reasonable behavior under the Fourth Amendment."[30] Relying heavily on *United States v. Robinson*[31] and *Scott v. United States*,[32] the Court said that the officer's state of mind in a Fourth Amendment situation is irrelevant, "as long as the circumstances viewed objectively, justify that action."[33] "We think," the Court went on, that *Robinson* and other cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivation of the individual officers involved."[34]

Addressing the "would have" standard that the defendant proposed, the Court rejected the notion that the results of a suppression motion should turn on whether a reasonable officer, under the police practices and regulations in the jurisdiction in which the case arose, would have made the stop for the purposes of traffic enforcement.[35] Trial courts would find such a test much too difficult to administer, the Court said, and would end up "speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[36] The result would be that the application of Fourth Amendment law would vary from place to place, depending on police regulations and practices, a result the Court found unacceptable.[37] But the Court failed to acknowledge that the district court in *Whren* would not have needed to speculate to apply the "would have" standard. District of Columbia Police regulations prohibited officers in plain clothes and officers in unmarked vehicles from making traffic stops unless the violations posed an immediate threat to others.[38] The officers clearly violated this rule in *Whren*; thus, there is little

---

28 Whren v. United States, 116 S. Ct. 1769, 1772-1773 (1996).

29 *Id.* at 1773-74 (citing Florida v. Wells, 495 U.S. 1 (1990) (impoundment of vehicles); Colorado v. Bertine, 479 U.S. 367 (1987) (same); New York v. Burger, 482 U.S. 691 (1987) (administrative inspections of businesses)).

30 *Whren*, 116 S. Ct. at 1774.

31 414 U.S. 218 (1973).

32 436 U.S. 128 (1978).

33 *Whren*, 116 S. Ct. at 1774 (quoting *Scott*, 436 U.S. at 138).

34 *Id.* at 1774.

35 *Id.* at 1775.

36 *Id.*

37 *Id.* at 1775.

38 D.C. Metropolitan Police Department General Order 303.1 (Traffic Enforcement) (eff. April 30, 1992) ("Traffic enforcement may be undertaken as follows: . . . Members who are not in uniform or are in unmarked vehicles may take enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.").

doubt that their conduct was not what a reasonable officer in their department would do, at least assuming that a reasonable officer follows regulations. Additionally, there was no doubt that their traffic enforcement actions were a pretext for drug investigation without probable cause or reasonable suspicion.[39]

The Court gave short shrift to the argument that police would use the power to make traffic stops disproportionately against minorities. Of course, the Constitution forbids racially biased law enforcement, the Court said, but the proper source for a remedy is the Equal Protection Clause, not the Fourth Amendment.[40] Dismissing this point in a few tepid lines buried in the middle of the opinion, the Court read the racial question out of the case without any substantive discussion. The real reasons police act, as opposed to the legal justification proffered for their actions, "play no role in ordinary, probable-cause Fourth Amendment analysis."[41] It is difficult to say what is more striking: the blandness of these words, or the blindness of what they assert.

The Court's brief treatment of a position so central to the petitioners' case suggests that the Justices may not have taken the argument seriously. But it is the substance of the Court's answer, not its

---

39 The main officer involved in the case testified that he was "out there almost strictly to do drug investigations" and that he stops drivers for traffic offenses "[n]ot very often at all." Transcript, *supra* note 24, at 78. Despite these statements, and the fact that the district judge was troubled by a "lengthy pause" before the officer's answer to the question whether he in fact stopped the vehicle because he was suspicious of a new car with two young black men inside, *id.* at 66-67, 76-77, 138, the court found the traffic stop proper under the "could have" test.

The Court also declared that the case need not be resolved by a balancing of interests. Past cases, the Court said, made a balancing of the government's interest in such stops against the individual's interests in freedom from such interference necessary only in situations without probable cause or in cases featuring an extraordinary search or seizure—for example, seizing a fleeing suspect by using deadly force. *Whren*, 116 S. Ct. at 1776 (citing Tennessee v. Garner, 471 U.S. 1 (1985) (balancing interests to determine that using deadly force to seize a fleeing felon is an unreasonable seizure)). Since, by hypothesis, probable cause exists in a pretextual traffic stop case, courts need not do any balancing because "[t]he making of a traffic stop out-of-uniform does not remotely qualify as such an extreme practice." *Id.* at 1777. While a stop by an individual in plain clothes in a nondescript car may not be as "extreme" as shooting someone, the experience could still be quite frightening or even dangerous. *See, e.g.*, State v. Auxter, No. OT-96-004, 1996 WL 475926, at *2 (Ohio Ct. App. August 23, 1996) (drunk driving case dismissed because officer made stop and arrest in unmarked car, and Ohio law prohibits officer who does so from testifying in case in order to curb abusive use of speed traps and *"to provide for the safety of persons being stopped"* (emphasis added)); Rose Kim, *Family Wants Answers*, NEWSDAY, March 20, 1996, at 4 (family members allege that physician killed by police officers because police officers were in unmarked cars and not in uniform, precipitating violent incident); *Pennsylvania Bill Would Bar Use of Unmarked Police Cars*, N.Y. TIMES, Oct. 13, 1996, at A12 (proposed bill targeted at crimes by police impostors using unmarked cars).

40 *Whren*, 116 U.S. at 1774.

41 *Id.*

brevity, that confirms this feeling. On the practical level, equal protection will provide few of those subjected to this treatment with any solace; indeed, for each of the few successful suits brought to protest racially biased law enforcement practices,[42] police may stop and search thousands of people who have no hope of redress. They do not have the resources, knowledge, or wherewithal to complain; they have learned that complaining about this treatment brings nothing (except maybe trouble), or that they may make unattractive plaintiffs unlikely to engender any jury's sympathy, regardless of the injuries to their rights.[43]

Aside from these practical considerations, the Court's reference to the Equal Protection Clause seems to mean that persons aggrieved by racially biased stops and searches should attempt a statistical demonstration that pretextual traffic stops have a racially disproportionate impact. But plaintiffs in such suits would have to confront the Court's long-standing precedents barring proof of equal protection claims by a showing of disparate impact.[44] Moreover, the Court has shown hos-

---

42 *See infra* notes 89-161 and accompanying text.

43 *See infra* note 120.

44 In making this suggestion, the Court seemed to ignore its cases, which say disparate racial impact of a practice or policy is not enough to prove a violation of the Equal Protection Clause. Rather, to prove such a violation, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976); *see also* Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-65, 271 (1977) (proof of racially discriminatory aim is required to show a violation of the equal protection clause, and inference of discriminatory "ultimate effect" did not make out a constitutional claim). While the exact contours of *what* the Court would require in order to make out a claim remain unclear, *Davis* and the cases that follow seem to say that lawsuits over the racially discriminatory effect of facially race-neutral rules are to be "conducted as a search for a bigoted decision-maker," LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1509 (2d ed. 1988), a difficult standard to meet in contemporary America. Thus a case like that of Robert Wilkins, *see infra* notes 112-134 and accompanying text, may succeed, since the evidence uncovered in the case includes an actual memorandum explicitly targeting black men for pretextual stops. But the Wilkins case will prove to be the rare exception, because in most cases decision-makers will not commit such ideas to paper. The only equal protection cases that might provide some underpinning for the Court's equal protection suggestion in *Whren* are the peremptory challenge cases, in which discriminatory use of peremptory challenges may make out a prima facie case of discrimination that an adversary must then explain as stemming from nonracial reasons. *E.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (applying rule to prosecutor's use of peremptories in criminal case); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (applying rule to civil cases); Powers v. Ohio, 499 U.S. 400 (1991) (exclusion of white jurors in trial of black defendant prohibited). But the underlying rationale of these cases has to do not just with discriminatory racial impact and equal protection, but with barring particular groups from an important civic function—jury service—and in the undermining of public confidence in the jury system that might then result. *Batson*, 476 U.S. at 87; Georgia v. McCollum, 505 U.S. 42, 48-50 (1992) (same). Thus it is not at all clear that the Court would find the peremptory challenge cases applicable.

tility toward the demonstration of constitutional violations through statistics. In *McCleskey v. Kemp*,[45] a statistical study showed undeniable racial patterns in the administration of the death penalty in Georgia. If the victim was white and the perpetrator was black, the state sought the death penalty 70 percent of the time;[46] if the victim was black and the defendant was white, the state sought the death penalty in only 19 percent of the cases.[47] If the victim and defendant were either both white or both black, the figures were 32 percent and 15 percent, respectively.[48] McCleskey claimed that the statistics demonstrated that he was discriminated against because of his race and the race of his victim.[49] As striking as these statistics may have been, the Court found them meaningless. "At most," the Court said, "the . . . [statistical] study indicates a discrepancy that appears to correlate with race," but it "does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital-sentencing process."[50] McCleskey, the Court said, "must prove that the decision-makers in *his* case acted with discriminatory purpose."[51] In other words, only evidence of racial animus of the most direct nature in the defendant's own case could prove an equal protection violation; statistical proof showing patterns of racial bias, the more logical way to demonstrate discriminatory application of the law, would be unacceptable.[52]

Another example is *United States v. Armstrong*,[53] a selective prosecution case decided during the same Supreme Court term as *Whren*. In *Armstrong*, the defendants presented a study that showed that all 24 crack cocaine cases the district federal public defender had closed over the prior year involved only black defendants.[54] Finding this evidence insufficient, the Court sided with the government and made the already daunting challenge of proving a selective prosecution claim even more difficult: the defendant will have no right of access to the prosecutor's files unless he first introduces evidence that the prosecutor did not prosecute others similarly situated and acted out of racial hostility in the defendant's case.[55] Thus, the defendant must

---

45 481 U.S. 279 (1987).

46 *Id.* at 287.

47 *Id.*

48 *Id.*

49 *Id.* at 292.

50 *Id.* at 312-13.

51 *Id.* at 292.

52 *But cf.* United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987) (error to reject "racial impact or results evidence," given defendant's allegations of selective prosecution of vote fraud laws by targeting majority-Black counties).

53 116 S. Ct. 1480 (1996).

54 *Id.* at 1483.

55 *Id.* at 1488-89.

furnish evidence of the correctness of his claim, without access to the very evidence needed to prove his claim—a Catch 22 if ever there was one.[56]

McClesky and *Armstrong* make a jarring backdrop for the Court's blithe assertion in *Whren* that the Equal Protection Clause represents the proper way to address claims of discrimination in law enforcement. It is hard to avoid the conclusion that, given *McClesky* and *Armstrong*, the Justices do not mean for many equal protection cases to succeed.

Even though I disagree strongly with some parts of *Whren*, I will concede for the sake of argument that the Court's reasoning is not entirely wrong. There is no question that it will be easier for lower courts to work with the "could have" rule than the "would have" rule. The "could have" rule requires very little evidence; the officer need only testify that she observed a traffic violation and stopped the car. The court will either believe the testimony or reject it.[57] By contrast, the "would have" test might require testimony about regular police practices, departmental regulations, and in the end a judgment from the court about whether the actions of the officer in a particular case were those a reasonable officer would have taken. These difficulties do not persuade me that courts *could not* cope with a "would have" rule; in fact, they make such judgments all the time in *Terry* stop cases, which require a decision about the reasonableness of the officer's actions in a given situation.[58] Nevertheless, the "could have" test would no doubt prove easier to administer.

To be sure, there are negative points to the opinion beyond those I have already mentioned. For example, one can make a good argument that the Court used a strained reading of its cases to reject the "would have" test. This seems especially true of the Court's treatment of *Robinson*. The Court was correct in *Whren*: *Robinson* said that the actual motivation of the officer does not determine the search's objec-

---

56 *See* David Cole, *See No Evil, Hear No Evil*, LEGAL TIMES, July 29, 1996, at S29 ("In effect, one must provide evidence of one's claim without access to the very evidence necessary to establish the claim.").

57 Given that lower courts nearly always take the word of the officer in these matters, even when it is obvious that the officer is lying, it seems unlikely in the extreme that courts will disbelieve officers' proffered justifications based on the traffic stops which *Whren* permits. *See, e.g.*, David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 6 (1994) (testifying falsely on search and seizure issues is an accepted practice in lower courts); Alan M. Dershowitz, *Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A15 (when judges accept perjurious police testimony, they bear responsibility for it).

58 *See* Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (the question is whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate").

tive reasonableness.[59] But this is hardly a fair description of the actual thrust of the case. *Robinson* posed the question whether the search of the defendant incident to arrest met constitutional standards. The facts did not point to any danger to police or to the destruction of any evidence—the twin justifications for a search incident to an arrest until the *Robinson* decision.[60] Nevertheless, the Court in *Robinson* found that the arrest alone justified the search. In other words, a full search can always follow a legitimate arrest; that is, an arrest which police make for the purpose of apprehending an offender, not for the purpose of making the search. Thus, while the irrelevancy of the actual beliefs of the officer is consistent with the rest of *Robinson*, it hardly seems substantial enough to be the basis of the decision in *Whren*. Indeed, from the point of view of the proper use of cases and doctrine, the Court should simply have conceded in *Whren* that precedent did not supply a ready answer to the question of how to handle pretextual stops. The opinion could have said (1) our cases do not dictate which way to decide this issue, so (2) we think the "could have" rule clearly preferable for reasons of judicial administration, police understanding of the rule, and crime control.

But these arguments are not the primary reasons that *Whren* should disturb us. The real danger of *Whren* is not its use of precedent, its facile logic, or its rejection of one proposed test for another. Rather, *Whren*'s most troubling aspects lie in its implications—the incredible amount of discretionary power it hands law enforcement without any check—and what this means for our everyday lives and our freedom as citizens.

III. THE FOURTH AMENDMENT AND TRAFFIC OFFENSES

Commentators have criticized the Supreme Court's Fourth Amendment jurisprudence, with considerable justification. As the Court lurches between protecting what it considers bedrock Fourth Amendment values—the sanctity of the home, for example[61]—and the undesirable and distasteful result of suppressing probative evidence of guilt, it has generated a hodgepodge of conflicting rules so technical that law professors—let alone law *enforcers*—find them difficult to understand.[62] Even so, some basic search and seizure rules

59 *Whren*, 116 S. Ct. at 1774, (citing United States v. Robinson, 414 U.S. 218, 221 n.1 and 236 (1973)).

60 *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969).

61 *See, e.g.*, Payton v. New York, 445 U.S. 573, 589-90 (1980) (the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest).

62 *E.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994)

seem firmly ensconced in the law. Perhaps this is because they are so fundamental that disturbing them would create an even larger doctrinal mess than the one that already exists; perhaps it is because there is present-day consensus accompanied by historical evidence on these points. Whatever the reason, we can discuss two key rules, secure in the knowledge that they are accepted by the Court.

First, the police must usually have a reason to forcibly stop a person.[63] When I say "forcibly stop," I do not mean the application of force to a suspect, though that may be part of a seizure. And I am not referring to casual encounters with police, in which a citizen is asked whether he or she would mind talking to police. Even though it seems more than just plausible to argue that such encounters always carry with them some element of coercion,[64] I am willing to accept, for the purposes of argument, the idea that such encounters remain consensual. In contrast, a forcible stop *is* by its nature coercive. When a police officer *orders* a citizen to halt, questioning, a search of some kind, or even arrest may follow. Police cannot force a citizen to stop and submit in this way without probable cause or at least reasonable suspicion to believe that a crime has been or is about to be committed by the suspect.[65] The Supreme Court reaffirmed this standard just a few years ago in *Minnesota v. Dickerson*,[66] in which Justice White stated clearly that this rule had not changed. The police must still have a reason to force a citizen to stop and submit to their authority, something more than just a hunch.[67]

The other basic rule important to our discussion is this: if police

(describing Fourth Amendment jurisprudence as a mess); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985) (chaotic state of Fourth Amendment law comes from the pulling of courts between the poles of following the law as decided in previous cases and suppressing evidence, and the desire to have the evidence of crime that will convict the guilty admitted).

63 *Terry v. Ohio*, 392 U.S. 1 (1968), is of course the source of the rule that at least reasonable suspicion is necessary for a stop. I say this is usually the rule, because there are exceptions, such as the cases in which there is a special governmental need, *e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (permitting suspicionless searches at roadblocks due to the special need to fight drunk driving), or administrative searches, *e.g.*, New York v. Burger, 482 U.S. 691 (1987) (administrative inspection of junkyards).

64 Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 249-50 (1991) (describing encounters between police and citizens as always carrying some element of coerciveness).

65 *Terry*, 392 U.S. at 30. Even in the context of a *Terry* stop, the same rules have always applied. Justice Harlan's concurring opinion in *Terry* makes this clear. Without a justifiable stop, Harlan said, officers could not frisk to assure their safety. It is the right to stop the suspect in the first place that justifies getting close enough to the suspect that the officer might be in danger; the police cannot generate that danger by putting themselves at risk in the first place. *Id.* at 32-33 (Harlan, J., concurring).

66 508 U.S. 366 (1993).

67 *Id.* at 372-73.

do not have the probable cause or reasonable suspicion necessary for a forcible stop, a citizen may ignore police requests to stop, respond to questions, produce identification, or submit to any further intrusion. The Supreme Court has reiterated this rule in a number of cases stretching over many years. For example, in *Brown v. Texas*,[68] police stopped a man in an area with a "high incidence of drug traffic"[69] because "the situation 'looked suspicious and we had never seen [the] subject in that area before.'"[70] The officers arrested the man under a Texas statute that criminalized any refusal to give police a name and address upon a legitimate stop.[71] The Supreme Court invalidated the statute, and declared that nothing in the facts of the case allowed the officers to make a legitimate stop, even the defendant's presence in an area known for narcotics trafficking. The defendant had every right to walk away and to refuse to produce identification in such a situation, and any law to the contrary did not meet constitutional standards.[72] The Court carried this doctrine forward in *Florida v. Royer*,[73] in which it stated that "[a citizen] may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."[74] And in *Florida v. Bostick*,[75] the Court reaffirmed this principle, declaring that while the police may question a person about whom they have no suspicion, "an individual may decline an officer's request without fearing prosecution."[76]

To be sure, I have not made the mistake of assuming that these legal rules necessarily reflect reality. I know that even though the cases discussed here may guarantee citizens the right to walk away from curious police without interference, the right may exist more in theory than in practice.[77] It may be that the mere appearance of au-

---

68 443 U.S. 47 (1979).

69 *Id.* at 49.

70 *Id.*

71 *Id.*

72 *Id.* at 52-53. *See also* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979) (holding that police had no reasonable suspicion to detain the customer of a tavern, even if the police had a warrant to search the tavern and a general suspicion that drug sales took place at the tavern, when there was no indication that the customer himself was involved or armed).

73 460 U.S. 491 (1983).

74 *Id.* at 498 (citing United States v. Mendenhall, 446 U.S. 544 (1980) ("a citizen who does not wish to answer police questions may disregard the officers questions and walk away")).

75 501 U.S. 429 (1991).

76 *Id.* at 437.

77 Professor Tracey Maclin has made this point in a persuasive way: It is all very well to say that a citizen need not respond to police inquiries; it is another to ask how many would actually resist and why they should have to do so. "The point is not [only] that very few persons will have the moxie to assert their fourth amendment rights, although we know

thority—nothing more than the officer's uniform, badge and squad car, to say nothing of her weapon—will cause most people to do what she says or answer her questions. But the point is that even if the law remains more an ideal than anything else, the Court's pronouncements on the subject all point in one direction: the police need at least reasonable suspicion to forcibly interfere with one's movement, and if they do not have it the citizen may walk away.

Whren alters all of this for anyone driving a car. Simply put, it is difficult to imagine a more American activity than driving a car. We use our cars for everything: work (both as transportation to get to and from work and as mobile offices and sales platforms), play, and myriad other activities that make up everyday life. Of course, many Americans do not own cars, and some have even found it unnecessary to learn to drive. But this is not the norm. Most American kids date their emergence from adolescence not from high school graduation or a religious or cultural ceremony, but from something far more central to what they really value: the day they receive their driver's licenses. Americans visiting Europe for the first time often return with the observation that one can get to and from almost any little town entirely on public transportation. Europeans visiting America are often surprised at the lack of public transportation facilities and options outside of major urban centers, and at the sizeable cities that rely entirely on automobile transportation. Despite energy crises, traffic congestion, and the expense of owning a car, most Americans prefer to drive wherever they go.[78] In short, there are few activities more important to American life than driving.[79]

With that in mind, consider traffic codes. There is no detail of driving too small, no piece of equipment too insignificant, no item of automobile regulation too arcane to be made the subject of a traffic

---

that most will not. It is whether citizens in a free society should be forced to challenge the police in order to enjoy [their rights]." Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1306 (1990). Professor Maclin has also argued that the situation may be worse for some members of our society than for others, depending on the color of their skin. MACLIN, *supra* note 63, at 251-53 (describing numerous less-than-legal encounters between police and black men).

78 Thus it was no accident when, several years ago, the company that provides "genuine" General Motors parts and service for that company's automotive products ran a series of commercials in which a chorus of hearty voices sang out the words: "It's not just your car, it's your freedom." This jingle represented a perfect blending of the American attitude toward the automobile—the essential part of life, without which one surrenders the "freedom" to come and go at will—with a huckster's willingness to appropriate patriotic feelings and symbolism.

79 Steven Stark, *Weekend Edition Sunday: America's Long-Term Love Affair with the Automobile*, (National Public Radio broadcast, Aug. 18, 1996) ("It's virtually impossible to overstate the importance of the car in American life.").

offense. Police officers in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation. Reading the codes, it is hard to disagree; the question is how anyone could get *as far as three blocks* without violating the law.

When we think of traffic offenses, we think of "moving violations"—exceeding the speed limit, crossing dividing lines, and the like. But in fact traffic codes regulate many other aspects of driving-related activity, including some that seem almost wildly hypertechnical. And some of these offenses have nothing to do with driving at all. Rather, they are "equipment violations"—offenses in which driving with incorrect, outdated, or broken equipment constitutes the violation. And then there are catch-all provisions: rules that allow police to stop drivers for conduct that complies with all rules on the books, but that officers consider "imprudent" or "unreasonable" under the circumstances, or that describe the offense in language so broad as to make a violation virtually coextensive with the officer's unreviewable personal judgment.

For example, in any number of jurisdictions, police can stop drivers not only for driving too fast, but for driving too slow.[80] In Utah, drivers must signal for at least three seconds before changing lanes; a two second signal would violate the law.[81] In many states, a driver must signal for at least one hundred feet before turning right; ninety-five feet would make the driver a offender.[82] And the driver making that right turn may not slow down "suddenly" (undefined) without signalling.[83] Many states have made it a crime to drive with a malfunctioning taillight,[84] a rear-tag illumination bulb that does not work,[85] or

---

80 *E.g.*, N.M. STAT. ANN. § 66-7-305 (Michie 1994) (prohibits driving "at such a slow speed as to impede the normal and reasonable movement of traffic"); 18 D.C. Mun. Regs. § 2200.10 (1995).

81 UTAH CODE ANN. § 41-6-69 (1993).

82 MD. CODE ANN. TRANSP. II § 21-604(d) (signal must "be given continuously during at least the last 100 feet"); N.M. STAT. ANN. § 66-7-325B (Michie 1994) (same); OHIO REV. CODE ANN. § 4511.39 (Banks-Baldwin 1993) (same); S.C. CODE ANN. § 56-5-2150(b) (Law Co-op. 1991) (same).

83 *E.g.*, MD. CODE ANN. TRANSP. II § 21-604(e) (1992) ("If there is an opportunity to signal, a person may not stop or suddenly decrease the speed of a vehicle until he gives an appropriate signal"); N.M. CODE ANN. § 66-7-325C (1994) ("No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal . . ."); S.C. CODE ANN. § 56-5-2150(c) (Law Co-op. 1991) (same).

84 *E.g.*, MD. CODE ANN. TRANSP.II § 22-204(a) (1992) ("[e]very motor vehicle . . . shall be equipped with at least 2 tail lamps mounted on the rear, which . . . shall emit a red light plainly visible from a distance of 1000 feet to the rear"); N.D. CENT. CODE § 39-21-04(1) (1987) (same); S.C. CODE ANN. § 56-5-4510 (Law Co-op. 1991) (same, except that red light must be visible from a distance of 500 feet).

85 *E.g.*, MD. CODE ANN. TRANSP. II § 22-204(f) (1992) (requiring "a white light" that will illuminate the rear registration plate "and render it clearly visible from a distance of fifty feet"); N.D. CENT. CODE § 39-21-04(3) (1987) (same); S.C. CODE ANN. § 56-5-4530 (Law

tires without sufficient tread.[86] They also require drivers to display not only license tags, but yearly validation stickers, pollution control stickers, and safety inspection stickers; driving without these items displayed on the vehicle in the proper place violates the law.[87]

If few drivers are aware of the true scope of traffic codes and the limitless opportunities they give police to make pretextual stops, police officers have always understood this point. For example, the statements by police officers that follow come from a book written in 1967:

> 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 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.[88]

These officers may not fully understand search and seizure law; for example, even in 1967, it was far from clear that a search could follow any traffic stop that police "legitimately" made. But they are absolutely correct on the larger point: with the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is "tail [a driver] for a while," and probable cause will materialize like magic. *Whren* is the Supreme Court's official blessing of this practice, despite the fact that police concede that they use this technique to circumvent constitutional requirements.

But the existence of powerful and unreviewable police discretion to stop drivers is not the most disturbing aspect of *Whren*. That dubious honor is reserved for the ways in which the police will *use* this discretion.

Co-op. 1991) (same).

86 *E.g.*, MD. CODE ANN. TRANSP. II § 22-405.5(b) (1992) (tire considered unsafe if tread wear indicators are "flush with the tread at any place on the tire" or, in absence of tread wear indicators, do not meet precise measurements at three locations on the tire); S.C. CODE ANN. § 56-5-5040 (Law Co-op. 1991) (tires "shall be in a safe operating condition").

87 *E.g.*, S.C. CODE ANN. § 56-5-5350(a) (Law Co-op. 1991) ("No person shall drive . . . any vehicle . . . unless there shall be in effect and properly displayed thereon a current certificate of inspection").

88 LAWRENCE F. TIFFANY ET AL., DETECTION OF CRIME 131 (1967). In its most recent case on traffic stops, in which the Supreme Court gave police making these stops the power to order passengers out of vehicles without any suspicion of wrongdoing or danger, Justice Kennedy's dissent points out just how powerful a tool *Whren* is. Maryland v. Wilson, No. 95-1268, 1997 U.S. Lexis 1271 (Feb. 19, 1997) (Kennedy, J., dissenting) (when coupled with *Whren*'s grant of power to "stop vehicles in almost countless circumstances," majority opinion in *Wilson* "puts tens of millions of passengers at risk of arbitrary control by the police.").

IV. WHO WILL BE STOPPED?

Once we understand that *Whren* will permit police to stop anyone driving a car whenever they observe the ever-present violations of the traffic code, the question becomes *who* the police will stop. At first blush, the question might seem unnecessary. After all, if *Whren* allows the police to stop any driver at virtually any time, everyone faces the risk of a pretextual stop. But while *Whren* certainly makes it *possible* for the police to stop anyone, the fact is that police *will not* stop *just anyone.* In fact, police will use the immense discretionary power *Whren* gives them mostly to stop African-Americans and Hispanics. I say this not to imply that individual officers will act out of racist motivations. Though some will, I believe most will not. Rather, my point is that whatever their motivation, viewed as a whole, pretextual stops will be used against African-Americans and Hispanics in percentages wildly out of proportion to their numbers in the driving population.

It may seem bold that I make this assertion as a fact. In fact, I lack the kind of systematically gathered and analyzed data anyone making such a statement would prefer to have. This is because virtually no one—no individual, no police department, and no other government agency—has ever kept comprehensive statistics on who police stop: basis for the stop, race of suspect, type of police activity after stop (e.g., questioning, search of suspect, search of car, use of drug-sniffing dog, whether consent was given), and the like. Of course, one type of record does follow some percentage of stops: traffic tickets and warnings, and arrest, charging and prosecution records of those suspects police find with contraband. But looking only at the records of those charged and prosecuted can mislead, and says nothing about the many other stops that result in no ticket and yield no contraband.

Even so, information uncovered in the last few years has begun to shed light on the use of pretextual traffic stops. This data reveals several patterns, which African-Americans and Hispanics understand quite well already: police use traffic regulations to investigate many innocent citizens; these investigations, which are often quite intrusive, concern drugs, not traffic; and African-Americans and Hispanics are the targets of choice for law enforcement. So even if we lack systemic data, we now have something that gives us a strong indication of current law enforcement realities and the direction of future trends. We can comfortably predict the effect of *Whren*: police will use the case to justify and expand drug interdiction efforts against people of color.

Here are four different stories of pretextual stops. They originate from different areas of the country: Florida in the South, Maryland in

the Northeast, Illinois in the Midwest, and Colorado in the West. All involve independent police agencies. Other stories of this type of police activity exist,[89] but those presented here are among the best documented. Each of them teaches the same lesson. And with *Whren* on the books, we should expect more of what these stories tell, not less.

A. VOLUSIA COUNTY, FLORIDA

Located in central Florida, Volusia County surrounds a busy stretch of Interstate 95. In the late 1980's, this portion of highway became the focus of Sheriff Bob Vogel and his deputies. Using a group of officers called the Selective Enforcement Team, Vogel operated a major drug interdiction effort against drivers moving narcotics by car through his jurisdiction.[90] The deputies aimed not only to make arrests, but to make seizures of cash and vehicles, which their agency would keep.[91]

As with most police agencies, the Volusia County Sheriff's Department did not keep records of stops and searches in which no arrests or seizures occurred in the three years that the Selective Enforcement Team operated.[92] Thus no one might ever have learned about the Selective Enforcement Team's practices, except for one thing: Volusia County deputies' were cars fitted with video cameras.[93] Deputies taped some of the I-95 stops; using Florida's public records law, *The Orlando Sentinel* obtained 148 hours of the videotapes.[94] Deputies made no tapes for much of the duration of the interdiction effort, and they sometimes taped over previously recorded stops.[95] But the tapes the newspaper obtained documented almost 1,100 stops, and they showed a number of undeniable patterns.

First, even though African-Americans and Hispanics make up only about five percent of the drivers on the county's stretch of I-95,[96]

---

89 *E.g.*, Duke Helfand & Susan Steinberg, *Charges of Police Racism Tear at Beverly Hills' Image*, L.A. TIMES, December 27, 1995, at A1 (African-Americans "go out of their way to avoid Beverly Hills for fear of being stopped by police" and six have filed suit as a result of stops); Barbara White Stack, *The Color of Justice: The Race Question*, PITTSBURGH POST-GAZETTE, May 5, 1996, at A1 (common experience of police harassment has led some African-Americans to file suit).

90 Henry Pierson Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, August 23, 1992, at A11.

91 *Id.*; Jeff Brazil and Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, August 23, 1992, at A1.

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.*

96 Curtis, *supra* note 90, at A11 (during five days of sampling, "about 5 percent of the drivers of 1,120 vehicles counted were dark skinned").

more than *seventy percent* of all drivers stopped were either African-American or Hispanic.[97] The tapes put this in stark terms. One African-American man said he was stopped seven times by police; another said that he was stopped twice *within minutes.* Looking at figures for all of Florida, seventy percent is vastly out of proportion to the percentage of Blacks among Floridians of driving age (11.7 percent), the percentage of Blacks among all Florida drivers convicted of traffic offenses in 1991 (15.1 percent), or to the percentage of Blacks in the nation's population as a whole (12 percent).[98] (Hispanics make up about nine percent of the population).[99] Second, the deputies not only stopped black and Hispanic drivers more often than whites; they also stopped them *for longer periods of time.* According to the videotapes, deputies detained Blacks and Hispanics for twice as long as they detained whites.[100] Third, the tapes showed that police followed a stop with a search roughly half the time; *eighty percent* of the cars searched belonged to Black or Hispanic drivers.[101]

It should not surprise anyone to know that deputies said they made these 1,100 stops based on "legitimate traffic violations."[102] Violations ranged from "swerving" (243), to exceeding the speed limit by up to ten miles per hour (128), burned-out license tag lights (71), improper license tags (46), failure to signal before a lane change (45), to a smattering of others.[103] Even so, only nine of the nearly eleven hundred drivers stopped—considerably less than one percent—received tickets,[104] and deputies even released several drivers who admitted to crimes, including drunk driving, without any charges.[105] The tapes also showed that the seizure of cash remained an important goal of the stops, with deputies seizing money almost three times as often as they arrested anyone for drugs.[106] With regard to the seizures

---

97 *Id.*; Brazil and Berry, *supra* note 91, at A1 ("Almost 70 percent of the motorists stopped were black or Hispanic, an enormously disproportionate figure because the vast majority of interstate drivers are white.").

98 Curtis, *supra* note 90, at A11.

99 *Id.*

100 Brazil & Berry, *supra* note 91, at A1 (Average length of stop in minutes: minority drivers, 12.1, white drivers, 5.1).

101 *Id.* at A1 (in 507 searches shown by the tapes, four out of five were of cars with Black or Hispanic drivers; note, however, that these numbers do "not include 78 possible searches/incomplete video").

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* Even in these stops, race sometimes played a role. When a stopped white driver told a deputy he was not doing well, the deputy replied, "could be worse, could be black." *Id.*

106 *Id.* (89 seizures of cash and 31 drug arrest, respectively). Note also that almost 87 percent of stops were in the southbound lanes, "where any drug traffickers would more

of cash, race also played a role: Ninety percent of the drivers from whom cash was taken, but who were not arrested, were Black or Hispanic.[107]

Notwithstanding these numbers, Sheriff Vogel said there was no racial bias in his department's work. Prior to the release of the tapes, he stated that the stops were not based on skin color and that deputies stopped "a broad spectrum of people."[108] The tapes eventually led to two lawsuits in federal court in which plaintiffs alleged violations of their civil rights because they were targeted for stops on the basis of their race.[109] In both cases, a judge refused to certify a class of all minority citizens illegally stopped; this resulted in the dismissal of the cases when they went to trial.[110] On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissals.[111]

The experience of drivers in Volusia County shows what we can expect under *Whren*. Police will use traffic regulations as an excuse to stop drivers they suspect of narcotics trafficking, and most of those stopped will be people of color. Of course, this is exactly the type of police activity that African-Americans and Hispanics have complained of for years, but few have listened.

B. ROBERT WILKINS AND THE MARYLAND STATE POLICE[112]

In the early morning hours of May 8, 1992, a Maryland State Police officer stopped a new rental car carrying four African-Americans on Interstate 68. The four, all relatives, were returning to the Washington, D.C. area from a family member's funeral in Chicago.[113] After

---

likely be carrying cash to Miami," and "[o]nly 13 percent of stops were in the northbound lanes, where the catch would more likely be drugs." *Id.*

107 *Id.*

108 *Id.*

109 Steve Berry, *Drug Squad's I-95 Tactics Going On Trial*, ORLANDO SENTINEL, Jan 6, 1995, at A1; *I-95 Cash-Seizure Stops*, ORLANDO SENTINEL, June 10, 1995, at D3 (first case denied class action status).

110 Washington v. Vogel, 880 F. Supp. 1542 (M.D. Fla. 1995); Steve Berry, *Judge Throws Out Suit Against Vogel*, ORLANDO SENTINEL, Jan. 14, 1995, at A1 (cases dismissed because "plaintiff had not produced enough evidence to show that Vogel had used illegal tactics," but did not address "whether Vogel had a policy of targeting minority motorists"); Steve Berry, *Bob Vogel Breezes Through Minorities' Legal Challenge*, ORLANDO SENTINEL, January 15, 1995, at A1 (first case dismissed at trial because judge refused to certify a class).

111 Washington v. Vogel, Nos. 95-2190, 95-3123, slip op. at 7 (11th Cir. Jan. 7, 1997) ("[The plaintiff's] evidence of a race-based policy, while highly disturbing, fails to demonstrate that the policy, and not traffic violations, prompted the individual officers in this case to conduct [plaintiff's] traffice stops.").

112 The facts described here are taken from the Complaint in the lawsuit Mr. Wilkins and others filed after the incident. *See* Complaint, Wilkins v. Maryland State Police et al., Civil No. MJG-93-468, (D. Md. 1993) [hereinafter Complaint].

113 *Id.* ¶ 16.

obtaining the driver's license, the officer asked the driver to step out of the car and sign a form giving consent to a search.[114] At that point, Robert Wilkins, one of the passengers in the car, identified himself as an attorney with a 9:30 a.m. court appearance in the District of Columbia Superior Court. Wilkins told the officer that he had no right to search the car without arresting the driver; the officer replied that such searches were "routine." After all, the officer said, if Wilkins and his relatives had "nothing to hide, then what [was] the problem?"[115] Another officer joined the first, and they detained the group for an additional half hour while other officers brought a drug-sniffing dog to the scene.[116] The driver asked whether he would receive a ticket; the officer said he would only give the driver a warning. The driver asked that the warning be written so that the group could leave, and Wilkins asserted that continued detention in order to bring the dog violated the Constitution; the officer ignored both of them.[117] When the dog arrived, the officers ordered Wilkins and his relatives out of the car, despite their expressed fears of the dog and the fact that it was raining.[118] They were forced to stand in the rain as the dog sniffed in and around the car.[119] When the dog failed to react in any way, Wilkins and the others were then allowed back in the car—while the officer who had stopped them wrote the driver a $105 speeding ticket.[120]

Civil rights lawyers sometimes say that despite the volume of complaints they receive about racially biased traffic stops, victims of this treatment feel reluctant to become plaintiffs in legal actions for redress.[121] Perhaps they fear retaliation; others may want to avoid the hassle of becoming involved in a very public way in complex and often politically charged litigation. Still others may fear that opposing lawyers may discover dirt in their pasts and use it against them. Not so with Robert Wilkins. A Harvard Law School graduate, Wilkins worked as a public defender for the highly-regarded Public Defender Service in Washington, D.C.[122] As an attorney with an active practice in criminal law, he was no doubt thoroughly familiar with the law that gov-

---

114 *Id.* ¶ 19.
115 *Id.* ¶ 20.
116 *Id.* ¶ 22.
117 *Id.* ¶ 23.
118 *Id.* ¶ 24-25.
119 *Id.* ¶ 26.
120 *Id.* ¶ 26-27.
121 Mark Pazniokas, *Discrimination by Police Often Hard to Prove*, HARTFORD COURANT, May 2, 1994, at A11 ("[V]ictims [of racially biased police practices] are reluctant to sue" and "shrug off the [racially biased] stops as an annoying fact of life.")
122 Complaint, *Wilkins*, at ¶ 20 (Civ. No. MJG-93-468).

erned the situation in which he and his family members found themselves.[123] The prospect of public litigation against a police agency obviously did not scare him. Individually and on behalf of a class of all others treated similarly, he and his family members sued the Maryland State Police, supervisory and command personnel at the agency, and the individual officers involved. They alleged civil rights violations and other wrongs, stating that the officers had illegally stopped and detained them on the basis of a "profile" that targeted people based on their race.[124] State Police officials denied Wilkins' allegations; a spokesman said the practice of stopping a disproportionate number of blacks simply represented "an unfortunate byproduct of sound police policies."[125] The implication was clear: African-Americans commit the most crime; to stop crime, we must stop African-Americans. Officials maintained this supposedly race-neutral explanation even in the face of an official document that surfaced during litigation. Dated just days before the State Police officers stopped Wilkins and his family members, it warned officers operating in Allegheny County—the very county in which police stopped the Wilkins group—to watch for "dealers and couriers (traffickers) [who] are predominantly black males and black females . . . . utilizing Interstate 68 . . ."[126]

The case eventually produced a settlement, in which the Maryland State Police agreed not to use any race-based drug courier profiles and to cease using "race as a factor for the development of policies for stopping, detaining, and searching motorists."[127] The State Police also agreed to conduct training that would reflect the prohibition on the use of race as both departmental policy and state law,[128] and to pay monetary damages and attorney's fees.[129] Perhaps more significantly, the State Police agreed that for a period of three years, they would:

> maintain computer records of all stops in which a consent to search was given by a motorist stopped on any Maryland roadway by the Maryland State Police and all stops on any Maryland roadway by Maryland State Police in which a search by a drug-detecting dog is made, "minimally

123 As recited in the Complaint, Wilkins demostrated his familiarity with the law. *Id.* ¶ 20.

124 *Id.* ¶¶ 21, 37-57.

125 Fletcher, *supra* note 10, at A1.

126 Maryland State Police, Criminal Intelligence Report (April 27, 1992) (on file with author).

127 Settlement Agreement, Wilkins v. Maryland State Police, Civ. No. MJG-93-468 (D. Md.), Jan. 5, 1995, at ¶ 6 [hereinafter Settlement Agreement].

128 *Id.* ¶¶ 7, 8. Both of these paragraphs reference *Derricott v. State*, 611 A.2d 592 (Md. 1992), which outlaws the use of racial profiles in Maryland.

129 Settlement Agreement, *supra* note 127, at ¶¶ 13, 14.

> including in such records: date, time, and location of consent or search, name of officer(s) requesting consent to search or directing search by drug dog; race of persons(s) stopped, detained, or searched; year make and model of vehicle; and grounds for requesting that consent to search be given or search by drug dog made, if any."[130]

The State Police have, in fact, maintained these records, and submitted them to the court. The latest figures available track stops followed by consent searches and dog sniffs from January 1995 through June 1996, and they bear a striking similarity to the information revealed by the Volusia County videotapes. Of the 732 citizens detained and searched by the Maryland State Police, 75% were African-Americans, and 5% were Hispanics.[131] The Maryland numbers are also broken down by officer; of the twelve officers involved, six stopped over 80% African-Americans, one stopped over 95% African-Americans, and two stopped only African-Americans.[132] Based on this information, provided to the court by the State Police, the plaintiffs and their attorneys are preparing to reopen the litigation, as the Settlement Agreement allows.[133] Sad to say, the numbers show that very little has changed, despite the Wilkins suit and the Settlement Agreement.[134]

C. PESO CHAVEZ AND THE ILLINOIS STATE POLICE

During recent years, African-Americans and Hispanics have made hundreds of complaints to the Illinois affiliate of the American Civil Liberties Union, alleging that the Illinois State Police targeted them for pretextual traffic stops.[135] The A.C.L.U. eventually filed suit; a

---

130 *Id.* ¶ 9. Note that such records might tend to underestimate the total number of racially biased stops on the highways, because they only include stops that are followed by searches, and only two kinds of searches at that: searches by consent and searches with dogs. As the Volusia County data indicates, there are often significant numbers of citizens stopped who are not searched. *See supra* note 101 and accompanying text.

131 Summaries of records of Maryland State Police searches, January 1995 through June 1996 [on file with the author]. These data were provided to the court and plaintiff's counsel in raw form; the summaries on file with the author were produced by the plaintiff's legal team.

132 *Id.*

133 Settlement Agreement, *supra* note 127, at ¶ 10. *See also* Plaintiff's Motion for Enforcement of Settlement Agreement and Further Relief, Wilkins v. Maryland State Police, Civ. No. CCB-93-468 (D. Md. Nov. 4, 1996).

134 Thus it was not surprising to find that the continuation of these practices by the Maryland State Police has led to the filing of yet *another*, separate lawsuit. Michael Schneider, *State Police I-95 Drug Unit Found to Search Black Motorists 4 Times More Often than White*, BALTIMORE SUN, May 23, 1996 (detailing the "deeply humiliating" roadside search of the vehicle and possessions of Charles and Etta Carter who were travelling on the occasion of their 40th wedding anniversary).

135 Andrew Fegelman, *Suit Charges State Police Improperly Stop Minorities*, CHI. TRIB., August 31, 1994, at 4 (Chavez's suit "echo[ed] complaints the organization has received from motorists for six years"); *Illegal Searches Used in Illinois, Suit Alleges*, N.Y. TIMES, Sept. 4, 1994, at 24 (suit filed after "hundreds of complaints from motorists") (hereinafter *Illegal Searches*);

man named Peso Chavez became the lead plaintiff. However, Mr. Chavez's 1994 encounter with the Illinois State Police did not happen by chance.

Chavez was a private investigator with twenty years of experience and a former elected official in Santa Fe, New Mexico. In 1994, a lawyer for an Hispanic man who alleged that Illinois State Police had stopped him illegally hired Chavez to drive a late model sedan across areas of Illinois that had been the source of complaints of illegal stops and searches of minority motorists.[136] The plan called for Chavez, a man with an Hispanic appearance, to drive cautiously, taking care not to break the traffic laws; a paralegal in another car would follow at a distance to observe his driving. The idea was a "reverse sting"[137]—an attempt to catch police in the act of making illegal stops and searches.

On February 18, 1993, in Bureau County, Illinois, Officer Thomas of the Illinois State Police began to follow Chavez. He followed Chavez for twenty miles, through Bureau and LaSalle Counties.[138] Eventually, Thomas activated his emergency lights and pulled Chavez over.[139] Thomas was soon joined at the scene by another officer. Officer Thomas told Chavez that he had stopped him for a traffic violation, and asked Chavez for his license and rental agreement. Chavez supplied both.[140] After questioning Chavez, Thomas gave Chavez a warning for failing to signal when changing lanes. This supposed infraction was an obvious and unfounded pretext for the stop; the paralegal following Chavez saw no such violation.[141] The other officer then asked Chavez if he could search his car. Chavez asked whether he had to allow the search; the officer said that he wanted a drug-sniffing dog to walk around Chavez' car. Chavez unequivocally refused and asked to be allowed to leave, but the officers detained him.[142] Another officer then led a dog around Chavez' car; the officers told Chavez that the dog had "alerted" to the presence of narcotics, and ordered him into the back seat of a patrol car.[143] For the next hour, Chavez watched as the interior, trunk, and engine compartment of his car were thoroughly searched. The police opened his

Profiles in Prejudice, ST. LOUIS POST-DISPATCH, September 19, 1994, at 6B.

136 *Illegal Searches, supra* note 135, at 24.

137 *Illinois Drug Searches Prompt Lawsuit By ACLU*, ORLANDO SENTINEL, September 1, 1994, at A12.

138 Fourth Amended Complaint, Chavez v. Illinois State Police, Civil No. 94 C 5307 (N.D. Ill. 1994), at ¶¶ 23, 24 (on file with author).

139 *Id.* ¶ 25.

140 *Id.* ¶ 26.

141 *Id.* ¶ 22; Sam Vincent Meddis, *Suit Says Suspect 'Profiles' Are Racist*, USA TODAY, September 1, 1994, at 3A.

142 Fourth Amended Complaint, *Chavez*, at ¶ 29.

143 *Id.* ¶¶ 30, 31.

luggage and searched through his personal possessions.[144] Meanwhile, an officer in the patrol car with Chavez questioned him about his personal life.[145] The police found nothing, and eventually allowed Chavez to leave.[146]

Despite his background as an investigator, his government experience, and the knowledge that he was part of a reverse sting, Chavez found the experience more than unnerving. Watching police search his car and being told that the dog had detected drugs, Chavez said, "I became very frightened at what was happening. I never had my mouth as dry as it was—it was like cotton."[147]

Chavez is now the named plaintiff in a lawsuit in federal court that seeks injunctive relief against the State Police to stop racially based searches and seizures, as well as other relief and damages. The suit seeks certification of a class of persons subjected to the same treatment. Many other African-Americans and Hispanics who were subjected to illegal stops and searches have become named plaintiffs.[148] At this writing, discovery is ongoing.[149]

D. EAGLE COUNTY, COLORADO

In the late 1980's, the Eagle County, Colorado Sheriff's Department established a highway drug interdiction unit. The "High Country Drug Task Force" used a drug courier profile made up of twenty-two "indicators" to stop cars along Interstate 70; prominent among them was "race or ethnicity, based on 'intelligence information' from other law agencies . . . ."[150] Although the Task Force used traffic infractions as a pretext to stop many people, not one person received a ticket.[151]

The story of one of the people stopped speaks volumes about what happened in Eagle County. On May 3, 1989, Eagle County deputies stopped Jhenita Whitfield as she drove from San Diego to Denver

144 *Id.* ¶¶ 32, 33.

145 *Id.* ¶¶ 33.

146 *Id.*

147 Meddis, *supra* note 141, at 3A.

148 Fourth Amended Complaint, *Chavez*, at ¶¶ 39-129. Many of these plaintiffs were stopped by the Illinois State Police more than once.

149 Telephone interview with Fred Tsao, Public Information Director of the American Civil Liberties Union, Chicago, Ill. (July 23, 1996).

150 Patrick O'Driscoll, *'Drug Profile' Lawsuit Settled*, DENVER POST, November 10, 1995, at A1.

151 Robert Jackson, *Minorities Win Suit Over Unfair I-70 Stops*, ROCKY MOUNTAIN NEWS, November 10, 1995, at 4A ("Of the 402 people stopped between August 1988 and August 1990 on I-70 between Eagle and Glenwood Springs, none was ticketed or arrested for drugs. . . .").

to visit relatives. With her were her sister and their four children.[152] A disabled vehicle in the roadway forced them to change lanes; soon after, an officer pulled them over for failing to signal before changing lanes.[153] The deputies told her explicitly that she " 'fit the profile' of a possible drug runner," and asked if they could search her car.[154] Whitfield wanted to refuse, but felt concerned that if she did, she might be "set up."[155] She also felt she had no choice because the children were hungry and one needed to use a bathroom, so she consented.[156] The experience left Whitfield, an African-American, shaken, and it has changed her life in a significant way. Despite the fact that she has family out of town, she does not visit them. "I do not travel anymore," she said.[157]

Seven people who, like Jhenita Whitfield, had been stopped by Eagle County deputies filed a class action suit in 1990, asking the court to halt the Task Force's practice of race-based profile stops.[158] The court eventually certified a class consisting of 400 individuals who had been stopped.[159] Among them were African-Americans and a large number of Hispanics, who alleged that deputies stopped them because of their ethnicity.[160] In November of 1993, a federal court ruled that the Task Force had violated constitutional protections against unreasonable searches and seizures. With appeals pending, the parties reached a settlement requiring Eagle County to pay damages to each person searched, amounting to a total of $800,000. The County also agreed to abandon the Task Force program, and agreed not to stop, search, seize evidence or detain a person "unless there is some objective reasonable suspicion that the person has done something wrong."[161]

E. LIVING WITH PRETEXTUAL STOPS

These cases from Florida, Maryland, Illinois and Colorado show in no uncertain terms the impact *Whren* will have: The drivers police will stop for pretextual traffic violations will come from minority

152 O'Driscoll, *supra* note 150, at A1.
153 *Id.*
154 *Id.*
155 *Id.*
156 Jackson, *supra* note 151, at 4A.
157 O'Driscoll, *supra* note 150, at A1.
158 *Id.* For a criminal case in which a suppression motion grew out of the Eagle County deputies' use of pretextual stops, see United States v. Laymon, 730 F. Supp. 332 (D. Colo. 1990), finding that an Eagle County deputy had used a traffic stop as a pretext, and that the consent that followed the stop was not valid.
159 O'Driscoll, *supra* note 150, at A1
160 *Id.*
161 Jackson, *supra* note 151, at 4A.

groups in disproportionate numbers. Police have done it in the recent past; in the Maryland case, police continue to do so despite a settlement reflected in a court order specifically prohibiting these practices. *Whren* insulates this activity by pronouncing any stop for a traffic violation proper and reasonable, whatever its real purpose.

But seeing the big picture should not prevent us from asking what effect pretextual stops have on the individuals who experience them. The answer highlights the hidden cost of racially skewed law enforcement techniques in a profound way.

For those stopped, the situation may produce fear, anger, humiliation, and even rage. Jhenita Whitfield, the African-American woman stopped in Eagle County, has given up travelling because she once had to balance her desire not to submit to a search against her fear that not consenting would lead the police to plant evidence on her.[162] Peso Chavez, the experienced investigator stopped while driving through Illinois, knew he had no narcotics with him, knew he had a witness to prove that he had broken no laws, and knew and insisted upon his rights. Still, his mouth went dry with fear as officers reported that a dog had been alerted to drugs in his car and the officers proceeded to search through the car and his private effects.[163] Robert Wilkins and his family members, forced to stand in the rain while a dog sniffed through their car, felt degraded. "You can't imagine the anger and humiliation I felt during the entire episode," said Aquila Abdullah, a passenger in the car with Wilkins that night.[164] Wilkins himself expressed a sense of helplessness. "Part of me feels like there is nothing that I could have done to prevent what happened. You know, I was calm and respectful to the police. I tried to explain to the officer what my rights are."[165] Beyond the price paid by the person stopped, other African-Americans and Hispanics feel the effects, too. Because these pretextual police stops of blacks are so common—frequent enough to earn the name "driving while black"—many African-Americans regularly modify the most casual aspects of their driving behavior, travel itineraries, and even their personal appearance, to avoid police contact. Salim Muwakkil, an academic and journalist, makes trips in the Midwest in a nondescript rental car, strictly obeys the speed limit, and never wears his beret behind the wheel.[166] Before he adopted this strategy, police stopped Muwakkil so often that

162 *See* O'Driscoll *supra* note 150, at A1.
163 *See* Meddis, *supra* note 141, at 3A.
164 *ACLU Sues Maryland Police*, LOUISVILLE COURIER-JOURNAL, February 14, 1993, at 20A.
165 Fletcher, *supra* note 10, at A1.
166 *Id.*

he would compute the time these stops took into his travel time.[167] When lawyer and lobbyist Wade Henderson drives from Washington, D.C., to Richmond, Virginia, to teach, he eschews flashy rental cars for conservative ones, even though he is graying and wears a suit.[168] Others restrict their movements; they avoid driving in areas where a black person attracts "stares."[169] And when police stop Christopher Darden, one of the prosecutors in the O.J. Simpson case, he doesn't move, keeps his hands on the wheel, and makes no sudden gestures; he calls these "African American survival techniques."[170]

But perhaps we should examine the issue from another perspective: that of law enforcement.[171] And that outlook would no doubt seem quite different from what I have said so far. In a nutshell, it is this: Stopping a disproportionate number of African-Americans is not racist; it is just plain good police work. After all, African-Americans make up a large share of those arrested, prosecuted and jailed in this country. Police know jails are full of criminals, a substantial portion of whom are black, and that a high percentage of black males are under the control of the criminal justice system in one way or another.[172] The police have no interest in harassing black or Hispanic people; rather, their motivation remains the apprehension of criminals. Race may play a part in law enforcement, but only as a proxy for a higher probability of criminal activity. In other words, racial disparities in stops and searches are nothing more than "an unfortunate byproduct of sound police policies."[173] Lt. Col. Ernest Leatherbury, commander of field operations for the Maryland State Police, puts it this way: "The facts speak for themselves . . . [W]hen you got a high number of these consent searches resulting in drug arrests do we in law enforcement or the public want to say the state police should discontinue these searches?"[174] In other words, police target blacks and Hispanics because they are the right ones, and this technique gets results. And

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

171 Indeed, I would be remiss if I did not look to the position of law enforcement, given the Supreme Court's pronouncements on the right way for lower courts to make judgments on whether or not officers had reasonable suspicion or probable cause. *See* United States v. Cortez, 449 U.S. 411, 418 (1981) ("[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.").

172 MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 3 (1995) ("Almost one in three (32.2% of black men in the age group 20-29) is under criminal justice supervision on any given day—in prison or jail, on probation or parole.").

173 Fletcher, *supra* note 10, at A1.

174 *Id.*

if it works, we should not let the niceties of search and seizure law get in the way of catching the bad guys.

But this argument contains a flaw, and it is not a small one. Behind the race-neutral reasons police give lies a stark truth. When officers stop disproportionate members of African-Americans because this is "just good police work," they are using race as a proxy for the criminality or "general criminal propensity" of an entire racial group.[175] Simply put, police are targeting *all* African-Americans because *some* are criminals. In essence, this thinking predicts that all blacks, as a group, share a general propensity to commit crimes. Therefore, having black skin becomes enough—perhaps along with a minimal number of other factors, perhaps alone—for law enforcement to stop and detain someone. Under this view, all black citizens become probable criminals—suspects the minute they venture out of their homes.

The wrongheadedness and unfairness of treating *all* members of a group as criminals just because *some* are seems obvious. But even if not everyone feels this way, treating race as a proxy for criminality suffers from other serious problems. First, implicit in this view is the assumption that blacks are disproportionately more likely than whites and others to be involved with street crimes.[176] Even if this is true, African-Americans being more likely than whites to be involved in street crime is a far cry from any evidence that would strongly support the assertion that any *particular* black person is committing a crime. Yet *that* is the way police use this information. Second, even if we accept the assumption of the disproportionate involvement of blacks in street crime, police still greatly overestimate the value of race as a predictor of criminal behavior.[177] Using race as a proxy for criminality may result in "double counting."[178] If, for example, criminal involvement is strongly correlated with poverty, with presence in so-called "high crime areas," or with both, and if African-Americans are disproportionately poor and living in such neighborhoods,[179] race would add little to a police officer's ability to predict criminal involve-

175 Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L. J. 214, 220, 236-237, 237-39 (1983) (police use minority race as a proxy for a greater probability of criminal involvement, even though, statistically and logically, this is problematic at best).

176 Professor Johnson makes this assumption, but is careful to say that if so-called "white collar crime" were counted, the numbers might look very different. *Id.* at 237.

177 *Id.* at 237-39.

178 *Id.* at 238-39.

179 *See, e.g.*, David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677-678 (1994) (noting that segregation of urban areas usually means that minority group members often live and work in "high crime areas").

ment beyond what poverty and geography already reveal.[180] As Professor Sheri Lynn Johnson has said, "(a)lthough probabilistic constraints may not preclude general racial propensities to commit crime, they clearly militate against according them substantial weight."[181]

V. WHAT HAPPENS AFTER THE STOP?

Once police stop a person for a traffic offense, what happens? By posing this question, I do not mean to imply that the stop itself is insignificant. On the contrary, the stop is itself not only unnerving but potentially dangerous, especially if it is ordered by an officer in plain clothes or in an unmarked car.[182] Although pretextual traffic stops may be problematic in themselves, they are also disturbing because they may lead to searches. What rules govern what happens *after* a pretextual stop?

First, if police have probable cause to stop a vehicle, this alone does not entitle them to search it. There must be something more than the traffic offense to justify a search, some combination of facts that gives police probable cause to believe that an offense has been or is being committed or that the vehicle contains contraband. While we can argue *whether* any particular set of facts actually gives rise to probable cause or reasonable suspicion, the bottom line is that *something* is required to justify a search.[183]

There are several variations on this theme. If police arrest the driver, they may search not only the driver but the interior of the car, closed parts of the interior like the glove box, and any closed containers inside the interior.[184] And if the police see evidence of crime in

---

180 Johnson, *supra* note 175, at 238-39. Perhaps another way of looking at this, instead of "double counting," is that race becomes a proxy for poverty and presence in a high crime area, a view which makes little more sense than the one articulated in the text.

181 *Id.* In fact one commentator has gone even further, arguing that using race as a proxy for criminality "results from a self-fulfilling statistical prophecy: racial stereotypes influence police to arrest minorities more frequently than nonminorities, thereby generating statistically disparate arrest patterns that in turn form the basis for further selectivity." *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1507-08 (1988). This argument involves some major assumptions, not the least of which is that because blacks are disproportionately arrested and incarcerated, we can assume that a disproportionate number are being stopped. I do not think it is necessary to my argument to go this far.

182 *See supra* note 39 and accompanying text.

183 Terry v. Ohio, 392 U.S. 1, 27 (1968) (reasonable suspicion requires more than officer's "inchoate and unparticularized suspicion or 'hunch,' [rather, it requires] the specific reasonable inferences which he is entitled to draw from the facts in light of his experience")

184 New York v. Belton, 453 U.S. 454 (1981). Note that *Belton* does not allow the police to search the trunk of the car, but once an arrest is made, the trunk might be opened and

plain view, of course, they may seize it and then arrest and search as appropriate. This, in fact, is what happened in *Whren*: Police stopped the vehicle, and upon looking inside—without any further searching—saw two bags of cocaine.[185]

But in the great bulk of cases, there is no offense other than the traffic violation, no arrest occurs for the traffic offense, and police find nothing incriminating in plain view. Instead, police accomplish their goal of searching those they stop in two other ways.

The first is simple: officers ask the people they stop to consent to a search. While those asked need not consent, many do. The reasons for this seem as varied as human beings are, but several causes predominate. People simply may not know that they can refuse, and the Constitution does not require the police to tell citizens that they can withhold their consent.[186] Consequently, some undoubtedly feel they have no choice. Others surely feel intimidated, as Jhenita Whitfield said she did in Eagle County. Intimidation was no doubt what the Maryland State Police officer intended when he told Robert Wilkins that searches were "routine" and that if he had nothing to hide, he should permit the search—leaving in the air the obvious implication that a refusal would show Wilkins' guilt.[187]

But the predominant reason drivers consent lies with police officers. Their goal, plain and simple, is to get people to agree to a search. They are accomplished at the verbal judo necessary to subjugate their "opponents," they have the authority of their office behind them, and they make it their business to get what they want. The officer starts with innocuous sounding questions: Where are you coming from? Where are you headed? Who's the person you're visiting? What's her address? Who's with you in the back seat? Then the questions often get more personal. They are designed to find contradictions that show the driver might have something to hide, and to put the driver in the frame of mind of responding to the officer's authority. Police call it "sweet talk," and it almost always leads to a consensual search. None of this is accidental; rather, it is a well-honed, calculated psychological technique that police departments teach their officers.[188] And it works. In the course of 150 stops over two

searched under proper inventory procedures, *Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987), or if a drug sniffing dog alerts to the presence of narcotics in the trunk.

185 Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

186 Ohio v. Robinette, 117 S. Ct. 417, 421 (1996) (Fourth Amendment does not require lawfully seized suspects to be told they are free to leave before suspect's consent to search is considered voluntary).

187 Kate Shatzkin & Joe Hallinan, *Highway Dragnets Seek Drug Couriers—Police Stop Many Cars For Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6.

188 *Id.* ("'We definitely tell [our officers] to try to talk their way into a search,' said Lt.

years, one Indiana state trooper said, "I've never had anyone tell me I couldn't search."[189]

But what if the occupants of the car refuse? Must the police allow them to leave, ending the encounter? Not necessarliy, as the Wilkins case and others show. If police encounter a person like Wilkins—one who knows he does not have to answer questions or consent to a search, one who will insist on his rights—they use another technique: they use a dog trained to detect drugs. If the dog gives the signal that it has smelled drugs, this provides the police with probable cause for a full-blown search of the vehicle and its contents. According to *United States v. Place*,[190] the use of such a dog does not constitute a search for purposes of the Fourth Amendment; therefore, use of the dog requires neither probable cause nor reasonable suspicion. *Place* gives the police just what they need if a driver refuses consent: a search for which consent is not necessary, which may yield the justification they need to do the very search the driver refused to allow.

There is one important wrinkle in this argument. Once the driver refuses consent, the police must not hold her any longer unless there is probable cause or reasonable suspicion to do so. Can the police hold someone long enough to have a drug detecting dog brought to the scene? The Supreme Court has not yet supplied a definitive answer, but analogous cases indicate that if the police have reasonable suspicion to suspect someone of involvement in a crime, they can detain the person for a "reasonable" period of time to allow the dog to be brought. In *Place*, a passenger's luggage was held for ninety minutes to allow for a dog to sniff it; the Court found this unreasonable, because the law enforcement officials had advance warning and could have gotten the dog there in much less time.[191] And in *United States v. Sharpe*,[192] the Court found a twenty minute detention reasonable, because the delay was caused by the suspect's flight.[193]

Mike Nagurny of the Pennsylvania State Police bureau of drug law enforcement.").

189 *Id.*

190 462 U.S. 696 (1983).

191 *Id.* at 706. *But see* State v. Dickey, 684 A.2d 92 (N.J. Super Ct. App. Div. 1996) (hours-long detention of motorist before dog sniff held constitutional).

192 470 U.S. 675 (1985).

193 In *Sharpe*, a DEA agent became suspicious of a Pontiac travelling in tandem with an overloaded truck and camper. The agent stopped the Pontiac, but the truck continued on, pursued by another officer. Once another officer arrived at the place where the Pontiac had been stopped, the DEA officer went in pursuit of the truck, which had been stopped and detained some miles up the road for about twenty minutes in anticipation of the agent's arrival. The Supreme Court said that in assessing whether an investigatory stop is too long, "we consider it appropriate to examine 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." *Id.* at 686. Since the DEA agent

How the Court will ultimately resolve this question is anyone's guess; the most likely possibility is case by case discussion of what length of detention is reasonable under the circumstances. But given the Court's unbounded analysis of the Fourth Amendment implications of the use of dogs, the argument over the reasonableness of the length of detention will be the only argument any driver has left.

VI. RECOMMENDATIONS

Whren represents the Supreme Court's official approval for the use of pretextual stops by police. Defendants may no longer argue successfully that particular traffic stops were purely excuses to allow investigation of other crimes about which there was neither probable cause nor reasonable suspicion.[194] If I am right, all motorists are now fair game for police, and African-Americans and other people of color will suffer the great bulk of this treatment. Where does all of this leave us? Can anything be done to address these practices and the disparate impact they seem almost certain to have?

If *Whren* does nothing else, it takes courts out of the business of supervising this type of police conduct. Now, police need not come up with any rationale for stopping motorists save the easy and obvious one: violation of the traffic code.[195] Given that the door of judicial redress has closed, and that the Supreme Court's suggested equal protection remedy seems unlikely to bear any fruit, what other avenues are open to help grapple with the police practices highlighted here? Two modest suggestions follow.

A. ADMINISTRATIVE REGULATIONS

In a time when we continue to focus on courts to control police discretion, another tool is often overlooked: Police department policy and regulation. If unchecked discretion and racially biased traffic enforcement tactics infect a police agency's operations, written policies and regulation could fill the vacuum created by the Supreme Court's abdication of supervisory responsibility. Any time official discretion exists, we must ask not only how to eliminate unnecessary discretion, but also how to regulate and constrain the discretion that must exist as

acted "expeditiously" and the delay was attributable to the driver's own "evasive actions," the Court found the detention of twenty minutes entirely reasonable. *Id.* at 687-88.

194 Of course, given that there was a circuit split before *Whren* on the question of the correct standard to review pretextual traffic stops, *see supra* note 27, *Whren* did not change either the law or practice in some places.

195 Thus we can find at least one possible benefit of the decision, however else one feels about it: police will no longer have to perjure themselves in order to make these stops stand up in court. *See supra* note 17; Dershowitz, *supra* note 57.

part of the system.[196] Departmental regulations have the potential to do both.

In the recent past, courts, especially the Supreme Court, played the dominant rulemaking role for law enforcement at the level of constitutional enforcement. This has been especially true in the Fourth Amendment area. This resulted from the fact that other agencies—the legislative branch, executive agencies, and police departments themselves—failed to take any significant role in regulation of police.[197] Courts in the post-*Mapp* era rushed to fill this void; in the Fourth Amendment field, this has been done through adjudication of search and seizure cases.

But, as Professor LaFave has said, this has begun to change.[198] Many police departments now put their practices down in written form as official policies or guidelines.[199] And the fact that police agencies themselves construct these self-regulatory systems has some important advantages. First police rulemaking makes for better police decisions, if only because it focuses the department on policy making and on the implications to the community of the police practices being regulated.[200] Second, rules reduce the influence of bias because they make training more uniform, and because they guide and control discretion.[201] Third, police-made rules are most likely to be followed and enforced by police.[202] Last—but certainly not least—is the fact that, in cases such as *Whren*, the Supreme Court has simply taken the judiciary out of the equation. If there is no regulation at the agency level, there may simply be no regulation at all.

One line of the Supreme Court's own cases suggests that the practices highlighted in this essay might be successfully addressed through police regulation. Beginning with *South Dakota v. Opperman*,[203] the Court passed upon the reasonableness of searches done pursuant to departmental inventory procedures. In *Opperman*, the police discovered marijuana in the glove compartment of a vehicle they had towed to an impound lot before they inventoried the contents of

196 KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 51 (1969).

197 Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

198 Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 446 (1990) (police use of written policies as instruments to control discretion grew "immeasurably but [to] a noticeable degree" between 1965 and 1990).

199 *Id.*

200 *Id.* at 451 (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN L. REV. 349, 421 (1974)).

201 *Id.*

202 *Id.*

203 428 U.S. 364 (1976).

the car. The Supreme Court found the inventory search reasonable, perhaps because police performed the inventory "pursuant to standard police procedures."[204] In the most recent inventory case, *Colorado v. Bertine*,[205] police discovered contraband in a backpack found in the defendant's vehicle during an inventory search. In *Bertine*, the Court was much clearer in delineating the place of police rules and rulemaking in search and seizure law: "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure."[206] As Professor LaFave points out, to the extent that *Opperman* and *Bertine* encourage or require departments to make rules for inventories, this is all to the good. Since, according to *Bertine*, an inventory search may be reasonable without either probable cause or a warrant,[207] standardized police procedures for inventories will limit and channel police discretion and prevent arbitrary police action.[208]

We should consider using the same approach to confine and regulate police discretion vis-a-vis the conduct of traffic stops. While *Whren allows* the police to stop motorists any time an officer could have done so, this *need not* be the rule within any given police depart-

---

204 *Id.* at 372. I say "perhaps" because while there is no majority opinion, the plurality does say that "inventories pursuant to standard police procedures are reasonable," *id.*, and Justice Powell, concurring, also takes care to say that the inventory "was conducted strictly in accord with the regulations of the Vermillion Police Department," under which all impounded vehicles are inventoried, including the glove compartment. *Id.* at 380 and n.6.

205 479 U.S. 367 (1987). Note that *Illinois v. Lafayette*, 462 U.S. 640 (1983), which came between *Opperman* and *Bertine*, also dealt with an inventory search: a search of the contents of the backpack of a person who had been arrested. Since it was "standard procedure" to inventory all of an arrested person's possessions, *id.* at 642, the Court said that it was not unreasonable "for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures." *Id.* at 648.

206 *Bertine*, 479 U.S. at 374.

207 *Id.* at 371.

208 LaFave, *supra* note 198, at 454. It is worth noting that the majority opinion in *Bertine* treats the facts as if there were, in fact, regulations strictly governing inventory searches, *Bertine*, 479 U.S. at 374 n.6, and that three of the seven justices signing the majority opinion joined in a separate concurring opinion to say, explicitly, that inventory searches must follow "standardized police procedures" that ensure an "absence of [police] discretion" such that "it is permissible for police officers to open closed containers . . . only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle." *Id.* at 376-77 (Blackmun, J. concurring). But the dissenters vehemently disagreed with the majority's characterization of the regulations at issue. In fact, the regulations allowed the police a choice: upon the arrest of the driver, they could give custody of the vehicle to a third party; the vehicle could be parked and locked in the nearest public parking facility; or the vehicle could be impounded and its contents inventoried. *Id.* at 379-80. Thus the dissenters argued that "the record indicates that *no* standardized criteria limit [the] officer's discretion." *Id.* at 379 (Marshall, J., dissenting).

ment. In fact, it was not the rule in the District of Columbia, where *Whren* arose; departmental regulations prohibited the making of traffic stops except within certain well-defined parameters.[209] Departments could make rules that set out criteria for situations in which officers can stop cars when there is no intention of giving a traffic citation or performing other enforcement activities related to operation of the vehicle. At the very least, departmental regulations could prohibit the targeting of racial or ethnic groups for traffic stops and searches. To encourage rulemaking (or review of existing rules) along these lines, federal and state governments might offer incentives in the form of increased funding to those departments that make changes in their existing regulations or implement new ones. Alternatively, of course, there might be financial penalties for departments that do not comply, or some combination of carrot and stick.

B. COLLECTION OF DATA ON TRAFFIC STOPS AND SEARCHES AND THE RULES PUT IN PLACE TO GOVERN THEM

A second step we might take to address the problem of pretextual stops involves the collection of data. Police departments could be required (or financially encouraged) to collect data on all traffic stops. This data should include the reason for the stop, the race, ethnicity, and other identifying information concerning the person stopped, whether the driver received a citation or warning and for what, whether a search followed the stop, the basis for the search (consent, observation of incriminating items, or the like), whether a dog was used as part of the procedure, whether contraband was found and if so what kind, and whether any property was seized under forfeiture laws.

The collection of this data would allow for large-scale study of traffic stops and the issues they raise, and would allow for a more rigorous analysis than I have presented here. While the numbers of persons stopped in my examples are large—in Volusia County alone, for example, the number of stops on the video tapes is almost eleven hundred—any social scientist would no doubt prefer a more systematic collection of data. And even in the Maryland case, in which stops must be recorded, the court did not order Maryland State Police to collect all the information that might prove useful to someone studying these practices. On the contrary, only stops followed by consent searches or searches with dogs are included, whereas a more complete picture would, at the very least, require that all stops be tallied, whether or not followed by a search. A widespread, standardized

209 *See supra* notes 38-39 and accompanying text.

study of a number of police departments in a wide variety of geographic areas would give us the opportunity to arrive at a better understanding. If the data show that, in fact, African-Americans or other racial or ethnic groups are being targeted by police,[210] there would be no dismissing their experiences as isolated incidents or the work of just one or another particular police department. We might at last have the information necessary to understand fully what happens in these situations, and perhaps to finally persuade legislators and other leaders that we must take concrete steps toward solutions.[211]

Such data collection would also allow us to study the effectiveness of the police regulations proposed above. Departments with and without such regulations could collect data, and the side by side comparison this would allow would give us a better understanding of the effectiveness of this approach.

One can imagine at least two possible problems that might be suggested concerning the collection of data on police/motorist encounters. First, individual police officers might be reluctant to report information concerning their traffic stops. After all, would academics, policy makers, and others not use the data to attempt to prove police racism, either on the part of the individual or the institution? And would this concern not result in either incomplete and perhaps stilted reporting, or even reluctance to report at all, especially if the officer could be seen to be acting in contravention of departmental regulations? While these concerns are understandable, they would not be hard to address. Data collection could be anonymous, certainly as to the activities of individual officers. And if part of what we wish to study is whether departmental regulations might help limit or curb objectionable elements of police discretion in this area, the identity of the police *department* the data have come from might be hidden, too. With anonymity safeguarding them from implicating themselves in any way, there is no reason to believe that police and their superiors would not fairly and fully report their traffic stop activities. As an example, recall that the Maryland State Police have been reporting all

210 To make a valid comparison, we would also need to know the relative frequency of traffic violations by African-Americans vis-a-vis other groups. If this information is not already available, it should be easy to collect.

211 In fact, legislation has been introduced in the 105th Congress that would mandate just such a study. Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997). H.R. 118's sponsor is Representative John Conyers of Michigan. In its current form, the Act would mandate collection of a number of categories of statistical information on drivers stopped for traffic offenses, including race and ethnicity, the reason for the stop, and the rationale for any search that follows a stop. It also obligates the Attorney General to publish an annual summary of the data acquired, and attempts to encourage full and complete reporting by masking the identities of reporting officers and departments.

stops resulting in canine and consent searches for many months now. While they do this pursuant to a court order, there is still every reason to believe that the Maryland State Police officers might feel reluctant to report fully and accurately for just the reasons I have described. In fact, their feelings might even be somewhat more intense, since the data collected in Maryland is broken down officer by officer, with names attached. Thus if one could imagine a scenario in which police might fail to fully and fairly report their actions, the Maryland case would be it. But that does not seem to be happening. While no one but the individual officers involved knows for sure whether some stops are not being reported, it would seem that underreporting would skew the data away from any racial bias in stops, since all of the officers know that this was the problem from which the reporting obligation arose in the first place. Yet after eighteen months, the data show that roughly eighty percent of the stops counted still involve people of color. In other words, if the officers were trying to affect the numbers (and one could argue that if anyone had incentive to do so, they do), they are doing a poor job of it. The other explanation, of course, is that they are not doing this at all.

The other problem that might be raised concerns the practical side of reporting. What officer will want to fill out a form, even a simple one, for every traffic stop? Police are already busy trying to do the job we send them out to do. Why should they do extra paperwork to help study that job? The first answer to this objection is that many police departments already request a short report on every stop, whether or not the officer issues a citation or a warning. The second answer lies with technology. Already, many police vehicles carry not just radios, but computer terminals that can be used to check a car's license plate number or a motorist's drivers license, or to see if a person is wanted on outstanding warrants. It would take little more to enter the basic information on traffic stops discussed above into such a computer. The process would involve little more than punching agreed-upon code numbers into the available machine. In fact, small hand-held units now exist that can handle quite a bit of simple data. Waiters and waitresses in restaurants sometimes carry these small devices, on which an order can be taken, transmitted to the kitchen, tallied for billing purposes, and then saved for marketing and other business purposes. Such a machine would be more than capable of receiving and storing the relatively small amount of data that would be generated by traffic stops, and transfer of the data into analyzable form would involve no extra work. Another possibility is to do what Volusia County did: have the police cars in departments under study fitted with video cameras which would be turned on and off each time

a stop was made. This arrangement would also benefit the police by providing evidence in stops resulting in arrests. Police could simply turn the tapes in, without having to do extra paperwork. Researchers would then gather the statistics. While particulars would have to be worked out, using video cameras might be the easiest way to do this.

VII. CONCLUSION

Whren leaves us in an unsatisfactory situation. Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible. And we can feel relatively certain that past will be prologue: African-Americans and Hispanics will suffer the bulk of this treatment. Whites will not have to endure it very often; if they did, it probably would not happen. And, once police stop drivers, the officers will be able to search almost everyone they want, some with consent and others with dogs. I, for one, feel considerably less than comfortable with this outcome.

We may not always agree on the full contours of the Fourth Amendment, but if nothing else it stands for—indeed, imposes—restraint on the government's power over the individual in the pursuit of crime. At the very least, the police must have a reason—probable cause, or at least reasonable suspicion—to pursue, stop and search citizens. The point is not that the police are powerless until criminals strike, but rather that police cannot treat everyone like a criminal in order that some secretive wrongdoers be caught. From every practical vantage point, *Whren* upends this venerable and sensible principle in the name of the war on drugs. Its implications are clear: everyone is fair game; members of minority groups will pay the largest price, but there are casualties in war, so African-Americans and Hispanics will just have to bear the cost. The Supreme Court could have used *Whren* as an occasion to repudiate the worst of what this tragic and ultimately unwinnable war has brought us. Instead, it increased police power and discretion. We are all the losers for it, but unfortunately some of us—those of us with dark skin—will lose a lot more than the rest. Perhaps police departmental regulation, and further study, can lead us in new directions.