

# ADDRESSING RACIAL PROFILING IN THE STATES: A CASE STUDY OF THE "NEW FEDERALISM" IN CONSTITUTIONAL CRIMINAL PROCEDURE

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## INTRODUCTION

Some have described the Warren Court's far-reaching criminal procedure cases as a "revolution." These decisions included everything from the application of the exclusionary rule to the states,<sup>1</sup> to the insistence on a right to counsel any time a state court imprisoned a defendant,<sup>2</sup> to the requirement that police give suspects the warnings contained in *Miranda v. Arizona*.<sup>3</sup> Little wonder, then, that when the Court shifted toward a more conservative view of criminal defendants' rights, it is not surprising that at least one commentator criticized this change as a "revolution to the right."<sup>4</sup> This characterization is almost certainly somewhat overblown. While Justices Brennan and Marshall certainly viewed the Burger and Rehnquist Courts as leading nothing less than a full-scale retreat from the Warren Court's path,<sup>5</sup> the new conservative majority sometimes limited Warren Court doctrine but seldom overturned its best-known cases.<sup>6</sup> While we can debate the magnitude of this conservative shift, the direction was unquestionably away from the protection of criminal defendants' rights and toward a more expansive view of police and prosecutorial power.

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<sup>1</sup> See *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying the Fourth Amendment to the states via the Fourteenth Amendment).

<sup>2</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (ruling that the right to counsel applies to the States); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that a prisoner may not be detained unless represented by counsel).

<sup>3</sup> 384 U.S. 436 (1966). To be precise, the Court said that the defendant had to receive the prescribed warnings, or "other procedures which are at least as effective in apprising accused persons of their right[s]. . . ." *Id.* at 467.

<sup>4</sup> See generally JOHN F. DECKER, *REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA* (1992).

<sup>5</sup> See *New York v. Quarles*, 467 U.S. 649, 679 (1984) (Brennan, J., dissenting) ("In a chimerical quest for public safety, the majority has abandoned the rule that brought 18 years of doctrinal tranquility to the field of custodial interrogation."); *Rhode Island v. Innis*, 446 U.S. 291, 305 (1980) (Marshall, J., dissenting) ("I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation.").

<sup>6</sup> Cases interpreting *Miranda* are a good example. In the first years after the *Miranda* decision the Court interpreted it narrowly. See, e.g., *Harris v. New York*, 401 U.S. 222 (1971) (approving impeachment with statements taken with defective warnings); *Oregon v. Hass*, 420 U.S. 714 (1975) (holding that the State may use statements taken after defendant asserted *Miranda* rights for the purpose of impeachment). However, in the 1980s the Court's reading of *Miranda* was more generous. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980) (defining "interrogation" broadly); *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that police cannot question a suspect about other offenses after an assertion of right to counsel); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (ruling that once a defendant invokes right to counsel, no further questioning may take place until counsel is present).

All of this brought about a reaction that few could have anticipated. An effort began—"movement" may be too strong a word—to keep alive the Warren Court's legacy of expanded constitutional protections for the criminally accused by utilizing state constitutional provisions. This "new federalism,"<sup>7</sup> as it came to be known, seemed surprising. Prior to the 1960's, state constitutional law often served to regulate criminal procedure, but only on the most obvious level dictated by the actual commands in the constitutions themselves.<sup>8</sup> Constitutional interpretation by state courts provided little additional content. Once the Warren Court began to increase federal constitutional regulation of state criminal procedure through the use of the selective incorporation doctrine, state courts turned their attention to interpreting and applying U.S. Supreme Court rulings, and did very little with their state constitutions. Indeed, the governing assumption seemed to be that state constitutional provisions went only as far (or less far) than the similar provisions of the newly incorporated federal Bill of Rights.<sup>9</sup> Thus, turning to state constitutions for the protections of criminal defendants represented not a return to the past, but the discovery of a heretofore almost unused source of law. Nevertheless, proponents of the new federalism, chief among them Justice Brennan,<sup>10</sup> took the position that the states could and should use their own constitutions to impose greater limitations on police practices than the Burger and Rehnquist Courts seemed inclined to do. In his article, Brennan argued that:

The decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. . . . [A]lthough in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.<sup>11</sup>

<sup>7</sup> The phrase "new federalism" comes from Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974) [hereinafter Wilkes, *New Federalism*].

<sup>8</sup> See, e.g., WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 2.4 (1999).

<sup>9</sup> *Id.*

<sup>10</sup> William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) [hereinafter Brennan, *State Constitutions*]; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) [hereinafter Brennan, *The Revival*]. Justice Brennan may have been the best known proponent of these views, but many others have also taken part in the debate. Ronald K. L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5 (1989); Justice Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Wilkes, *New Federalism*, *supra* note 7; Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873 (1974-75) [hereinafter Wilkes, *More New Federalism*]; George E. Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 TEX. L. REV. 1369 (1990); Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081 (1985). See generally BARRY LATZER, *STATE CONSTITUTIONAL CRIMINAL LAW* (1995); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (3d ed. 1999).

<sup>11</sup> Brennan, *State Constitutions*, *supra* note 10, at 502.

In order that our system retain a "healthy federalism," Justice Brennan urged state courts to respond to the Burger Court's weakening of federal protection for individual liberties by using their state constitutions to do more to protect those freedoms.<sup>12</sup> Others—not only academics, but also the criminal defense bar—joined Justice Brennan's call for state constitutional action to protect the rights of criminal defendants and gradually a number of state courts began to act.<sup>13</sup> Between 1970 and 1989, state courts published more than 450 opinions that interpreted state constitutional provisions as exceeding what federal constitutional guarantees required.<sup>14</sup> More than a third of these cases concerned fundamental aspects of the criminal justice process.<sup>15</sup>

New federalism has had its share of critics. They have decried it as inappropriate and unseemly, as a destructive force in the important desire for uniformity in our law, and as nothing but a result-oriented liberal tool dressed up as doctrine.<sup>16</sup> The Supreme Court has played a part in this debate by limiting the new federalism, declaring that such state court decisions will stand only when they are clearly and unambiguously based on adequate and independent state grounds.<sup>17</sup> Others, while perhaps sympathetic to Justice Brennan's call to protect the Warren Court legacy, have attempted to describe the new federalism in more defensible terms and to set clear and unambiguous standards for its use.<sup>18</sup>

<sup>12</sup> *Id.* at 503.

<sup>13</sup> LAFAYE, CRIMINAL PROCEDURE, *supra* note 8, § 2.5, at 94-95. Donald E. Wilkes described these cases as born of "a stubborn independence that displays a determination to keep alive the Warren Court's philosophical commitment to protection of the criminal suspect." *More New Federalism*, *supra* note 10, at 873.

<sup>14</sup> See Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27 (1989) ("Recent developments in state court jurisprudence bring the proper scope of state judicial review into public debate with a frequency approaching that of the United States.").

<sup>15</sup> See, e.g., *State v. Glass*, 583 P.2d 872 (Alaska 1978) (rejecting *United States v. White*, 401 U.S. 745 (1971), and holding that "participant monitoring" must satisfy state constitutional requirements); *People v. Houston*, 724 P.2d 1166 (Cal. 1986) (rejecting the ruling in *Moran v. Burbine*, 475 U.S. 412 (1986), stating that the failure to inform a defendant that his lawyer is trying to reach him does not vitiate Miranda waiver); *People v. Disbrow*, 545 P.2d 272 (Cal. 1976) (rejecting *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975), because the state constitution prohibits use of statements obtained in violation of *Miranda* for impeachment); *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985) (rejecting "totality of the circumstances" test in *Illinois v. Gates*, 462 U.S. 213 (1983), because the state constitution "provides more substantive protection [than] does the Fourth Amendment in the determination of probable cause."); *State v. Novembrino*, 519 A.2d 820 (N.J. 1987) (rejecting *United States v. Leon*, 468 U.S. 897 (1984), and holding that good faith rule does not comport with state constitution); *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976) (holding that automobile inventory search upheld in *South Dakota v. Opperman*, 428 U.S. 364 (1976), violated state constitution).

<sup>16</sup> See, e.g., LAFAYE, CRIMINAL PROCEDURE, *supra* note 8, § 2.10, at 96-97.

<sup>17</sup> See *Michigan v. Long*, 463 U.S. 1032, 1033 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent state grounds, this Court will not undertake to review the decision.").

<sup>18</sup> See Hans A. Linde, *E. Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165,

I do not wish to revisit this debate here. Rather, I want to take its result as a given: the new federalism exists, and state courts sometimes decide cases in accordance with it. The question I want to ask, more than twenty years after it became a topic of debate, is *how well*, or even *whether*, the new federalism has served to protect not just Warren Court decisions but the important themes or purposes underlying those cases. I wish to do this by examining one of those purposes—the elimination of the racial bias in police practices.

Surely, eliminating racial bias in police practices was one of the Warren Court's consistent themes. Numerous Supreme Court decisions reflect this idea, and they were themselves reflective of the greater forces and governmental initiatives of this period—the Civil Rights Movement, federal voting rights and public accommodations legislation, and organized protests against social injustices and the Vietnam War. Thirty years later, the Supreme Court has clearly and unambiguously pulled back from the goal of addressing problems of criminal justice and race.<sup>19</sup>

I propose that we use this aspect of the Warren Court's criminal procedure jurisprudence as a case study in the new federalism. When the Supreme Court abandons a basic part of the Warren Court legacy—the protection of minorities from discrimination and bias in the criminal justice process—what response do we see at the state level? The example of retreat from the goal of eliminating racial bias in law enforcement that will be used here is *Whren v. United States*,<sup>20</sup> in which the Justices examined the role of pretext traffic stops in law enforcement. At first blush, *Whren* would seem to have little to do with issues of race, and in fact the Court decided it in just this way. But on closer examination, we see that the issue of racial discrimination in the way police enforce the law ran through the whole case, and was brought directly to the Court's attention. The Justices' cavalier dismissal of the issue gives us an opportunity to examine how states have reacted, for good and for ill. When we look at state cases on pretext stops decided since *Whren*, we see signs both hopeful and discouraging from the point of view of racial justice. And that, above all, is what we should learn from this case study: The results of the new federalism seem a decidedly mixed bag. On the other hand, efforts other than litigation, such as state legislative proposals, have shown that state institutions other than courts can also serve as effective guarantors of civil liberties in ways perhaps not considered by the new federalism's proponents.

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179 (1983) ("The right question is not whether a state's guarantee is the same as or broader than its federal counterpart as interpreted by the Supreme Court. The right question is what the state's guarantee means and how it applies in the case at hand.").

<sup>19</sup> See *supra* notes 5-7 and accompanying text.

<sup>20</sup> 517 U.S. 806 (1996).

## I. THE WARREN COURT'S CRIMINAL PROCEDURE JURISPRUDENCE AND THE ELIMINATION OF RACIAL BIAS

Surely, no aspect of the work of the Warren Court drew more fire than its role in helping to bring about the dismantling of racial apartheid in twentieth-century America. The Court's labors in this area include *Brown v. Board of Education*,<sup>21</sup> as well as landmark rulings in other cases involving race and other issues, such as voting rights<sup>22</sup> and public accommodations.<sup>23</sup> Equally important, the Court also attacked racial bias in another sphere—the enforcement of the criminal law, particularly police investigative procedure.

Prior to 1961, efforts by the Supreme Court to regulate police procedure were both infrequent and not particularly substantial. The Court based these modest efforts on the Due Process Clause:<sup>24</sup> the selective incorporation approach had not yet appeared in this area of law.<sup>25</sup> Beginning with *Mapp v. Ohio*<sup>26</sup> in 1961, the Court started to apply some of the provisions of the Bill of Rights to the states in an effort to regulate the everyday conduct of police officers, with an eye to the racial injustice that had often pervaded the relationship between police and minority groups.

Much of this new constitutional rulemaking was aimed at constraining police discretion. From the Reconstruction period onward, law enforcement had played a key role in the harassment and intimidation of minorities, particularly blacks.<sup>27</sup> This sometimes took the

<sup>21</sup> 347 U.S. 483 (1954).

<sup>22</sup> See *Baker v. Carr*, 369 U.S. 186 (1962) (examining reapportionment).

<sup>23</sup> See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (holding that Congress had the power under the Commerce Clause to pass Title II of the Civil Rights Act and that the Act prohibited discrimination in a public hotel).

<sup>24</sup> See U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .").

<sup>25</sup> See generally LAFAYE, *CRIMINAL PROCEDURE*, *supra* note 8, § 2.4 (explaining the Court's due process cases in criminal procedure before the adoption of the selective incorporation approach in this area of law).

<sup>26</sup> 367 U.S. 643 (1961).

<sup>27</sup> See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 *GEO. L.J.* 1153, 1156 (1998) (describing the use of law enforcement to harass, intimidate, and even murder blacks and other minorities from the close of Reconstruction to the modern civil rights movement). See also RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 76-135 (1997) (describing the unequal protection afforded to minorities by law enforcement beginning with pre-Civil War era); Carol S. Steiker, *Second Thoughts About First Principles*, 107 *HARV. L. REV.* 820, 839-40 (1994) (suggesting that the changes in law enforcement institutions and race relations during the nineteenth and twentieth centuries provided the basis for the creation of modern Fourth Amendment law); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 *COLUM. L. REV.* 551, 596-600 (1997) (describing how law enforcement used vagrancy laws and police procedure to harass minorities); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones").

form of abusive use of open-ended investigation; even more often, blacks found themselves subject to "chronic, low-level harassment" with vagrancy laws and other so-called public order offenses.<sup>28</sup> All of these racially-tainted practices informed the Warren Court's criminal procedure cases; institutionalized racial bias in law enforcement forms their underlying context.<sup>29</sup> Talking about these cases without understanding the critical role that race played is like trying to explain to an extraterrestrial visitor what a fish is without mentioning the existence of water.

One of the best examples of a Warren Court criminal procedure case decided against this background is *Terry v. Ohio*.<sup>30</sup> *Terry*'s main thrust was to validate temporary, limited searches and seizures—"stops and frisks"—based on reasonable suspicion of criminal activity and the presence of weapons; probable cause would henceforth no longer be required.<sup>31</sup> But this simple statement of the *Terry* "rule" cannot begin to convey its importance in the racial context of the time in which the Court decided it. Just a few months before the Court issued its opinion in *Terry*, an assassin killed Dr. Martin Luther King, Jr., and racial unrest that had plagued large urban centers in previous years flared again.<sup>32</sup> Just three months before *Terry*, the report of the National Advisory Commission on Civil Disorders (often called the Kerner Commission) explained the connection between the urban riots of the 1960's and police conduct toward minorities in unambiguous terms. Hostility between blacks and police was a major factor—indeed, sometimes the precipitating factor—in several of these riots.

Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police.<sup>33</sup>

The Kerner Commission's report was not the first to make this point. Just a year before, the President's Commission on Law Enforcement and the Administration of Justice had come to a very simi-

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<sup>28</sup> See Kahan & Meares, *supra* note 27, at 1156.

<sup>29</sup> See, e.g., *id.* at 1156 and cases cited therein (noting that "[n]early all the landmark procedure cases of the 1960's and early 1970's arose from this [racial] context"); Steiker, *supra* note 28, at 838, 843-44.

<sup>30</sup> 392 U.S. 1 (1968).

<sup>31</sup> *Id.* at 30.

<sup>32</sup> See, e.g., *Widespread Disorders*, N. Y. TIMES, Apr. 5, 1968, at A1 (cataloguing outbreaks of violence that occurred in the wake of Dr. King's murder); *Mobs Run Wild in the Nation's Capital*, U.S. NEWS & WORLD REP., Apr. 15, 1968, at 8 (reporting rioting in Washington, D.C., where "[n]egro mobs terrorized the Nation's capital, burning, looting, beating whites, attacking police and firemen and threatening wholesale slaughter.").

<sup>33</sup> Report of the National Advisory Commission on Civil Disorders 158 (1968). The Report noted that police departments had begun to adopt so-called aggressive patrol tactics utilizing stops and frisks, "without weighing their tension-creating effects [between police and blacks] and the resulting relationship to civil disorder." *Id.* at 159-60.

lar conclusion. The Commission wrote that:

Misuse of field interrogation . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt "aggressive patrol," in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.<sup>34</sup>

In case the Justices had somehow missed the unmistakable evidence in these reports and elsewhere that racial injustice at the hands of the police was unavoidably intertwined with the issues in *Terry*, the amicus brief filed by the NAACP Legal Defense and Education Fund made the point in the starkest possible terms. It leaves little doubt that how police treated minorities in street encounters was a matter of grave concern to those combating discrimination against blacks. According to the NAACP:

The ill effects of stop and frisk practices, particularly in the ghetto, is as strong at least as any evidence of their good effects "from a purely law enforcement point of view." . . . We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does not need is more stop and frisk.<sup>35</sup>

The Court's opinion in *Terry*, which emerged against this background, could not be mistaken for an effort to protect citizens from overly aggressive policing. In fact, the decision extended the ability of police to make an intrusion that crossed then-existing Fourth Amendment lines, with less evidence than many had previously thought required.<sup>36</sup> In short, *Terry* is a decision favoring law enforcement enabling it to act more quickly and aggressively and with less evidence than permitted under preexisting law.<sup>37</sup> Nevertheless, it is also unmistakably clear that the Court understood that certain aggressive police practices, including stops and frisks, disproportionately impacted minorities, particularly urban blacks. These tactics—"the wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"<sup>38</sup>—often exacerbated tensions between police and communities of color. The Supreme Court wrote:

We have noted that the abusive practices which play a major, though by

<sup>34</sup> United States President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 184 (1967).

<sup>35</sup> Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae, at 60-62, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74, and 67) (quoting Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1140 (1967)).

<sup>36</sup> *Terry*, 392 U.S. at 30.

<sup>37</sup> See David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1, 13-14 (1994) ("At bottom, *Terry* clearly favors the police, regardless of the care with which the Court seemed to balance the needs of law enforcement against the rights of citizens.").

<sup>38</sup> *Terry*, 392 U.S. at 14.

no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.<sup>39</sup>

These words may appear a bit puzzling. The Court appeared to give credence to the idea that aggressive police practices like stops and frisks impact blacks and other minorities disproportionately. At the same time, it says that it will not require the use of the exclusionary rule in these situations, since excluding evidence cannot affect police conduct not targeted at securing evidence. Understandably, commentators have drawn different implications from these seemingly opposed strands of argument.<sup>40</sup> Nevertheless, the effect of racial discrimination by law enforcement did indeed make up an important part of what the Supreme Court hoped to accomplish. By acknowledging the racial implications of the police practices it decided to allow and regulate, it brought the issue within the realm of proper consideration in constitutional criminal procedure. *Terry* represents a clear signal that the racial aspects of police procedure did indeed make a difference, and could be addressed in discussion of the constitutional regulation of police procedure.

## II. THE SUPREME COURT ABDICATES: RACIAL JUSTICE AND *WHREN V. UNITED STATES*

Twenty-eight years after *Terry*, the Court decided *Whren v. United States*.<sup>41</sup> In *Whren*, the Court confronted a police practice just as common as the street-level stops and frisks at issue in *Terry*—the use of traffic infractions as a pretext (an excuse) to stop and investigate citizens about whom the police have no basis for suspicion of criminal involvement. In *Whren*, police officers followed the car of two young African-American men based on a suspicion of drug activity.<sup>42</sup> The police saw nothing to indicate that the defendants were committing a crime; but, when the officers saw the vehicle violate the traffic code, they pulled it over and immediately observed contraband in

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<sup>39</sup> *Id.* at 17 n.14.

<sup>40</sup> Compare, e.g., Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 965, 971-72 (arguing that this language exhibits a minimizing of racial concerns and a stripping of race out of the case) and Adina Schwartz, "Just Take Away Their Guns": *The Hidden Racism of Terry v. Ohio*, FORDHAM URB. L. J. 317 (1996) (arguing that while *Terry* acknowledged racial concerns, the opinion made racial facts and arguments irrelevant to the decision), with Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 365 (1998) (noting that while evidence of racial harassment may not have been decisive, it was clearly a central matter to the Court).

<sup>41</sup> 517 U.S. 806 (1996).

<sup>42</sup> *Id.* at 808, 811.



plain view.<sup>43</sup> The legal issue, which had split a number of federal circuit courts of appeal,<sup>44</sup> was what legal standard would apply to these pretext stops. The defendants argued that a traffic offense should constitute probable cause only when a reasonable officer would have made the stop; if a reasonable officer would not have bothered with the traffic offense, it could not be a sufficient legal basis for the stop.<sup>45</sup> The Court disagreed, stating that any time a police officer could have stopped the vehicle—that is, any time the officer observed a traffic offense—this constituted probable cause, and the actual motivation for the stop—not traffic enforcement, but something else entirely—did not matter.<sup>46</sup> The defendants made sure that the Justices knew the implications of such a decision. In their briefs, the defendants told the Court in no uncertain terms that the government's objective standard would give police almost unlimited discretionary power to stop any driver at any time, and that police would almost certainly use this power to stop minorities, especially African-Americans, in numbers well out of proportion to their presence on the road.<sup>47</sup> Indeed, the briefs even cited recent statistics from studies in Maryland and New Jersey that substantiated this very fact.<sup>48</sup> Thus, as in *Terry*, the Justices could not have missed the racial context of *Whren*; it was there before them in black and white.

Perhaps it is the absolute certainty that the Justices knew the racial implications of their decision that makes the *Whren* opinion so striking. Writing for a unanimous court, Justice Scalia said that the Court had indeed heard the racial argument,<sup>49</sup> but had decided it had nothing to do with the Fourth Amendment.<sup>50</sup> Of course, the Constitution forbids racially biased law enforcement, Scalia said, but if this happens, those aggrieved should look not to the Fourth Amendment and its exclusionary rule but to the Equal Protection Clause,<sup>51</sup> presumably

<sup>43</sup> *Id.* at 809.

<sup>44</sup> The federal circuits had divided, with some ruling that any time an officer *could have made* a traffic stop, based on a traffic infraction, it was legitimate for the officer to do so. See *Whren v. United States*, 53 F.3d 371, 374-76 (D.C. Cir. 1995); *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); *United States v. Johnson*, 63 F.3d 242, 247 (3d Cir. 1995); *United States v. Scopo*, 19 F.3d 777, 782-84 (2d Cir. 1994), *cert. denied*, 513 U.S. 877 (1994); *United States v. Ferguson*, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc) *cert. denied*, 513 U.S. 828 (1994); *United States v. Hassan El*, 5 F.3d 726, 729-30 (4th Cir. 1993), *cert. denied*, 513 U.S. 827 (1994); *United States v. Cummins*, 920 F.2d 498, 500-01 (8th Cir. 1990); *United States v. Trigg*, 878 F.2d 1037, 1039 (7th Cir. 1989); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc). Two other circuits have ruled that a traffic stop was sufficient to constitute probable cause only when a reasonable officer *would have made* the stop. See *United States v. Cannon*, 29 F.3d 472, 475-76 (9th Cir. 1994); *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986).

<sup>45</sup> *Whren*, 517 U.S. at 811.

<sup>46</sup> *Id.* at 811-13.

<sup>47</sup> Briefs for Petitioner, *Whren*, at 25-27 (No. 95-5841).

<sup>48</sup> *Id.*

<sup>49</sup> *Whren*, 517 U.S. at 810.

<sup>50</sup> *Id.* at 813.

<sup>51</sup> *Id.*

through a civil suit. Brushing the Fourth Amendment aside, the Court did exactly what the defendants warned against: gave law enforcement *carte blanche* to stop any driver, at any time, with only the none-too-potent threat of a lawsuit<sup>52</sup> to deter racially biased law enforcement *in the face of evidence that this was already happening*. The opinion is a slap in the face to African-Americans and other minority group members who must suffer the indignities of these stops. But, just as important, it is a disavowal of one of the basic underlying principles of the Supreme Court's criminal procedure cases in the Warren era: Racial bias in the enforcement of the criminal law constituted a disgraceful legacy of the past that could not and would not be tolerated in the future. Even if, as some argue, *Whren* represents not so much a break with the Warren Court's cases as a legacy of that Court's failure to fully come to grips with racial issues raised by discriminatory policing,<sup>53</sup> one still cannot help but hear *Whren's* message: Whatever else the Fourth Amendment does or used to do, it will no longer serve as a tool to prevent racially biased policing.

This sets the stage for a return to our initial question. The new federalism says that states can and should set higher standards for the protection of the rights of the criminally accused than the federal Constitution requires if their own constitutions point in this direction. Some state courts have shown some willingness to do this, rejecting any number of the Supreme Court's pronouncements on search and seizure questions.<sup>54</sup> In the nearly four years since the U.S. Supreme Court decided *Whren*, how have states reacted?

### III. RESPONSES OF STATE COURTS

State court opinions show that a small number of these bodies have, indeed, responded to *Whren* in exactly the way Justice Brennan advocated: They have found that their state constitutions give citizens a higher degree of protection than the federal constitutional provisions. In one other state that has not yet confronted *Whren* directly, state constitutional and case law indicate that the state's courts would likely decline to follow *Whren*. Perhaps most interestingly, all

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<sup>52</sup> For a catalogue of the formidable array of legal obstacles and practical difficulties plaintiffs in such Equal Protection Clause suits would face, see Maclin, *supra* note 40, at n.22 (detailing the numerous legal and evidentiary burdens plaintiffs in such suits would have to carry); David A. Harris, *'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 550-53 (1997) (describing both legal and practical difficulties plaintiffs in Equal Protection cases face).

<sup>53</sup> See Thompson, *supra* note 40, at 962 ("[T]he error actually did not take place in the Court's recent decision in *Whren*, but rather three decades earlier in the landmark case of *Terry v. Ohio*.").

<sup>54</sup> See, e.g., *Commonwealth v. Upton*, 476 N.E.2d 548 (Mass. 1985) (rejecting "totality of circumstances" test for warrant based on anonymous tip); *State v. Novembrino*, 519 A.2d 820 (N.J. 1987) (rejecting good faith exception); *State v. Opperman*, 247 N.E.2d 673 (S.D. 1976) (invalidating use of automobile inventory searches under the state constitution).

of these cases refer explicitly to the race of the defendants as a factor in their decisions. The racial legacy of the Warren Court's criminal procedure cases lives in these decisions, at the very least as an unmistakable subtext. In several other cases, however, state courts have rejected state constitutional law challenges to *Whren's* pretext stop rule.

A. *Washington State: State v. Ladson*

In *State v. Ladson*,<sup>55</sup> the Supreme Court of the state of Washington confronted facts that brought them face to face with the issue in *Whren*: Does a pretext traffic stop comport with the law? There was no question that the actions of the police officers involved in the case constituted a pretext stop: the officers were part of a "proactive gang patrol," and they explained to the trial court that "they do not make routine traffic stops while on proactive gang patrol although they use traffic infractions as a means to pull over people in order to initiate contact and questioning."<sup>56</sup> The officers did not deny that the stop was pretextual,<sup>57</sup> and the Washington Supreme Court was careful to say that both driver and passenger were black.<sup>58</sup> After the stop resulted in the arrest of the driver for a suspended license, the police searched the passenger's belongings and found contraband.<sup>59</sup> The trial court granted the passenger's motion to suppress because the officers had engaged in a pretext stop. The state appealed, and the U.S. Supreme Court decided *Whren* shortly thereafter: the state intermediate appellate court reversed based on *Whren*, without addressing the state constitutional claims the defendant had made.

The Washington Supreme Court reversed, finding that Article 1, Section 7 of Washington's constitution<sup>60</sup> provided broader protection against pretext stops than the federal Fourth Amendment. Carefully parsing the state constitutional provision, the court declared that it "clearly expresses an individual's right to privacy with no express limitations."<sup>61</sup> Turning to the central argument, the court explained its view of pretext stops under the "unique and substantially greater protection" afforded by the Washington constitution. The court noted:

We have observed that ultimately our state constitutional provision is designed to guard against unreasonable search and seizure. . . . However, the problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., specula-

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<sup>55</sup> 979 P.2d 833 (Wash. 1999).

<sup>56</sup> *Id.* at 836.

<sup>57</sup> *Id.*

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

<sup>59</sup> *Id.*

<sup>60</sup> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. 1, § 7.

<sup>61</sup> *Ladson*, 979 P.2d at 837 (quoting *State v. Young*, 867 P.2d 593 (1994)).

tive criminal investigation) but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure without a warrant. Pretext is result without reason.<sup>62</sup>

The court in *Ladson* sees the pretext stop doctrine for what it is—a legally-sanctioned result given a mask of legitimacy by objective rules. This is exactly the type of decision Justice Brennan envisioned—grounded completely in state constitutional law, more protective of the rights of citizens than the federal Constitution, and boldly undeterred by arguments for uniformity. In addition, the opinion acknowledged the racial context of the issue, even if it did not emphasize it. By noting the race of the defendants in describing the reason for the stop, the court makes the issue plain: a pretext stop was made in the case because, at least in part, driver and passenger were black. This seems a fair inference to draw; otherwise, there is absolutely no other reason to mention this fact in the opinion.

#### B. New York: *People v. Dickson*

In *People v. Dickson*,<sup>63</sup> a court in New York confronted *Whren*'s pretext rule in yet another case involving a traffic stop in which race likely played a role.<sup>64</sup> Police engaged in an unrelated undercover drug operation observed a group of three people of different races in a car. After an illegal U-turn, the defendant joined the other three persons in the car, and it drove off. The police had observed no criminal conduct, but apparently became so suspicious that they aborted the entire drug operation, pursued the car, and stopped it after nine or ten blocks for the illegal U-turn. Officers recovered a small amount of cocaine from the defendant. The officer in charge testified frankly that he would not have aborted the drug operation to stop the car just for a traffic violation;<sup>65</sup> in other words, the stop was based on a pretext, pure and simple.

The court analyzed the actions of the police in the context of prior New York decisions. Noting that the state's highest court had not, since *Whren*, expressly passed on the question of whether New

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<sup>62</sup> *Id.* at 838.

<sup>63</sup> 690 N.Y.S.2d 390 (1998).

<sup>64</sup> This is more than just speculation based on the racial composition of the group in the car. The court noted that "[w]hile denying that the racial composition of the men in the car had served to enhance his suspicions, [the officer] admitted on cross-examination that he might have told the defendant after his arrest that he should have left the group's one white male at home." *Id.* at 392. In other words, the officer admitted that he might have told the defendant that the racial mix of people in the car did, indeed, make a difference, notwithstanding his answer to the direct question whether this factor enhanced his suspicions.

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

York's constitution and law permitted pretext stops, the court said that it still seemed clear that *Whren* could not stand in New York. The state had long had its own rule on pretext stops—the primary motivation test. Examining the evidence to determine both the objective and subjective reasons for the stop, if the police acted primarily to enforce the traffic laws, the presence of a traffic violation will constitute a sufficient legal basis for the stop.<sup>66</sup> But if the evidence shows that the police acted not primarily to enforce traffic laws but instead for constitutionally inadequate reasons—e.g., investigation of a crime based on a hunch or unsubstantiated suspicion—courts invalidate these stops.<sup>67</sup>

The opinion in *Dickson* notes that a number of New York intermediate appellate court cases had all confronted *Whren* and concluded, relying at least implicitly on the New York constitution, that the state rule against pretext stops remains in place.<sup>68</sup> One of these cases rejecting *Whren* relied strongly on *People v. Scott*,<sup>69</sup> a 1992 case in which New York's highest court discussed the state's own constitutional protections against unreasonable searches and seizures. The *Scott* court wrote:

Although the language of the State and Federal constitutional proscriptions against unreasonable searches and seizures generally tends to support a policy of uniformity, we have not hesitated in the past to interpret article I, section 12 of the State Constitution independently of its Federal counterpart when necessary to assure that our State's citizens are adequately protected from unreasonable government intrusions.<sup>70</sup>

Since *Whren* explicitly purported not to announce a change in the law but only to re-enunciate a rule in place since 1973,<sup>71</sup> the court in *Dickson* concluded that the proper decision was to follow New York's rule disallowing pretext stops, which the state's courts had followed since well before *Whren*.

### C. New Jersey: *State v. Kennedy* and *State v. Soto*

Cases from New Jersey illustrate another way that states have dealt with the issues presented in *Whren*. While agreeing with the idea presented in *Whren* that questions concerning police motive have no place in the analysis of pretext stops, courts in New Jersey have come to the conclusion under their own law that racially-biased law enforcement practices create cognizable legal injuries that courts may

<sup>66</sup> *Id.* at 394

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* 394-95.

<sup>69</sup> 593 N.E.2d 1328 (N.Y. 1992).

<sup>70</sup> *Id.* at 1342 (citations omitted).

<sup>71</sup> In *Whren*, the Court restated that a traffic-violation arrest as well as a post-arrest search are valid even if the arrest is a pretext for a narcotics search. See *Whren*, 517 U.S. at 812-13 (citing *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973)).

address through the suppression of evidence.

In *State v. Kennedy*,<sup>72</sup> African-American defendants in several consolidated cases claimed that police stopped them because of their race. These stops all led to searches that uncovered contraband. The opinion concerned the defendants' selective prosecution claim.<sup>73</sup> Defendants had requested discovery of several types of records in order to attempt to substantiate their claims, and the state refused. *Kennedy* thus presented the court with an unusual situation—allegations of racially-biased law enforcement activity in the context of a discovery request to support a claim of selective prosecution.<sup>74</sup>

The court granted the defendants access to the records they sought, stating that they had met the burden of showing a "colorable basis" for their claim.<sup>75</sup> But the more significant aspect of the case for our purposes is the court's discussion of the very issues underlying *Whren*. The court in *Kennedy* explicitly adopted the objective approach to police stops, exactly as *Whren* did five years later. This approach questioned "whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent."<sup>76</sup> The court cited many federal cases to support its conclusions.<sup>77</sup> But almost in the same breath, the court in *Kennedy* restated the continuing vitality of New Jersey's unique rule—the exclusion of evidence based on racially discriminatory law enforcement.<sup>78</sup> Allegations of racially biased law enforcement, the court said, were different than inquiring into the motivations of individual officers; rather, the defendants sought information concerning an alleged course of conduct, evidence of which could show up in statistics, records, or even departmental policies.<sup>79</sup> Since exclusion of evidence aims both to deter police wrongdoing and to assure judicial integrity,<sup>80</sup> these goals would be well served by the use of this remedy when defendants make claims of ra-

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<sup>72</sup> 588 A.2d 834 (N.J. Super. Ct. App. Div. 1991).

<sup>73</sup> Defendants claimed that even if, viewed in isolation, their arrests were objectively reasonable, they "were tainted by a long-standing, systematic practice of invidious discrimination against minorities reflected in the selective enforcement of New Jersey's traffic laws." *Id.* at 837. They alleged that the materials they had requested in discovery would support them. *Id.*

<sup>74</sup> Since *Kennedy*, the U.S. Supreme Court has decided a very similar case. See *United States v. Armstrong*, 517 U.S. 454 (1996) (considering discovery request in the context of claim of selective prosecution of African-Americans for crack cocaine offenses, in which particular U.S. Attorney's Office had prosecuted more than twenty such cases, the overwhelming majority of which involved African-American defendants).

<sup>75</sup> *Kennedy*, 588 A.2d at 840.

<sup>76</sup> *Id.* at 837.

<sup>77</sup> *Id.* (citing *United States v. Sokolow*, 490 U.S. 1, 10 (1989); *Maryland v. Macon*, 472 U.S. 463, 470 (1985); *Scott v. United States*, 436 U.S. 128, 138 (1978); *United States v. Hawkins*, 811 F.2d 210, 214 (3d Cir. 1987); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986); *State v. Bruzzese*, 94 N.J. 210, 219-221 (1983)).

<sup>78</sup> *Kennedy*, 588 A.2d at 838.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 838-39.

cial bias in law enforcement.<sup>81</sup> Citing many New Jersey cases, the court took pains to explain that "we live with a legacy of a racist past" in this country; and, that while discrimination today takes more subtle forms, it remains a pernicious evil that the state must eradicate.<sup>82</sup>

While not a case that explicitly focused on the constitutionality of pretext stops, *Kennedy* looms large as a statement of New Jersey law and policy on the subject. It would be impossible not to understand that the court intends to rid the criminal justice system of searches and seizures based on race. And if that takes suppression of probative evidence of criminal activity, so be it. It is a price the state must pay to deter "police officers who invade the privacy of citizens as a means of racist or political harassment."<sup>83</sup>

*State v. Soto*<sup>84</sup> continued this line of thinking. In *Soto*, defendants claimed that police stopped them—African-American and Latino drivers—based on race.<sup>85</sup> Evidence in the case supported these claims. Statistics showed that while approximately thirteen percent of the drivers on the highway in question were black, nearly thirty-six percent of those stopped, questioned, searched, and arrested were black.<sup>86</sup> A statistical expert in the case testified that it was "highly unlikely such statistics could have occurred randomly or by chance."<sup>87</sup> In addition, the evidence showed that the state police command structure and hierarchy had done much to encourage and even condone this behavior by officers.<sup>88</sup> The court said that in such a context, *Kennedy* and other New Jersey cases called for the exclusion of evidence.

[W]here objective evidence establishes "that a police agency has embarked upon an officially sanctioned or *de facto* policy of targeting minorities for investigation and arrest," any evidence seized will be suppressed to deter future insolence in office by those charged with enforcement of the law and to maintain judicial integrity.<sup>89</sup>

In case *Kennedy* was not clear enough, *Soto* makes the point even more directly: Under New Jersey law, courts will scrutinize allegations of racially-biased pretext stops with great care. If the facts substantiate charges of racially-biased law enforcement, the court must suppress the evidence in order to deter this conduct. In other words, this is a remedy that exists apart from the question of pretext stops, but it addresses *Whren's* implications—law enforcement actions that disproportionately impact people of color—head on, by applying the

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<sup>81</sup> *Id.* at 839.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996).

<sup>85</sup> *Id.* at 352.

<sup>86</sup> *Id.* at 353.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 357-60.

<sup>89</sup> *Id.* at 360 (quoting *State v. Kennedy*, 588 A.2d 834 (N.J. 1991)).

exclusionary rule.<sup>90</sup>

*D. Acceptance of Whren Under State Constitutions:  
Tennessee and Ohio*

In at least two states, courts have faced the question whether or not their state constitutions bar the use of pretext stops. Both concluded that their state constitutional provisions governing search and seizure dovetailed with the Fourth Amendment as interpreted in *Whren*.

The Tennessee Supreme Court decided the issue in *State v. Vineyard*.<sup>91</sup> Officers suspected the defendants of involvement with marijuana trafficking. They used traffic violations as a justification to stop the defendant's vehicle, and the resulting search uncovered contraband. The defendants argued that, while pretext stops might indeed meet the federal constitutional standard in *Whren*, they nevertheless do not comply with Article I, Section 7 of the Tennessee Constitution.<sup>92</sup> That provision, defendants said, afforded the citizens of Tennessee more protection than the Fourth Amendment to the U.S. Constitution. The Tennessee Supreme Court rejected this argument, finding the Tennessee provision co-extensive with the Fourth Amendment.<sup>93</sup> Departing from Fourth Amendment interpretations is appropriate, the court said, only where using the federal standard would require a departure from settled state law, or when linguistic differences between the two justify different interpretations.<sup>94</sup> Neither of these was the case in *Vineyard*, the court said, and it found its own cases that purported to disapprove of pretext stops unpersuasive.

An Ohio appellate court followed the same path in *State v. Dennewitz*.<sup>95</sup> Faced with a pretext stop, the court eschewed any concern for the officer's ulterior motive in the stop. Both the U.S. Supreme Court (in *Whren*) and the Ohio Supreme Court (in *Dayton v. Erickson*)<sup>96</sup> "have rejected the notion that pretextual stops are uncon-

<sup>90</sup> It is certainly true that under the *Kennedy/Soto* rule, police could perform pretext stops based on some criterion other than race, and those would not be objectionable. For example, police might use traffic offenses to target those who traffic in guns, or who drink and drive, in situations in which race is not thought to have any predictive value. While such pretext stops would present the danger of the abuse of police power in a general sense—something that is certainly not trivial—my concern here is with the abuse of these powers in ways that have a decidedly racial cast.

<sup>91</sup> 958 S.W.2d 730 (Tenn. 1997).

<sup>92</sup> Article I, Section 7 of the Tennessee Constitution provides "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ."

<sup>93</sup> See *Vineyard*, 958 S.W.2d at 731 ("[A] stop based upon probable cause is valid under the Tennessee Constitution, without regard to the actual subjective motivations of police officers.").

<sup>94</sup> *Id.* at 733-34.

<sup>95</sup> No. 99 CA 2491 (Ohio Ct. App. Nov. 5, 1999).

<sup>96</sup> 76 Ohio St. 3d. 3, 11 (1996). Following the *Whren* decision by just days but for some reason not citing it, the Ohio Supreme Court used *Erickson* to announce a clarification of the split



stitutional,"<sup>97</sup> the court said. Yes, the stop was a pretext, but "[a] pretextual stop is not an unreasonable seizure within the meaning of the Ohio or United States Constitutions."<sup>98</sup>

Courts in other states faced with the question of the state constitutionality of pretext stops have deferred decisions, preferring to receive clarification from higher courts in their states before deciding whether their state constitutions support or reject the *Whren* rule. In *State v. Caldwell*,<sup>99</sup> the Delaware Superior Court decided that the defendant's argument that the Delaware Constitution did not allow for pretextual stops was "better suited at the appellate level where the Delaware Supreme Court can be afforded the opportunity to address whether the *Whren* decision is a consistent interpretation of the State of Delaware's Constitution."<sup>100</sup> And in *Darby v. State*,<sup>101</sup> a case that began with a stop ostensibly for the violation of driving with a cracked windshield and ended in a drug arrest, the Court of Appeals of Georgia refused to answer the defendant's argument that the Georgia Constitution provided greater protection to citizens of the state than did the Fourth Amendment to the U.S. Constitution. "This is a question of constitutional construction which will have to be decided by the Supreme Court of Georgia."<sup>102</sup>

#### *E. State Cases Interpreting Federal Law: The More Traditional Route*

More common than decisions that either accept or reject *Whren* based on state constitutional law are cases in which courts use more traditional methods of analysis to interpret *Whren*. For example, in *Whitehead v. State*,<sup>103</sup> the Maryland Court of Special Appeals examined a pretextual traffic stop in which the defendant's detention extended beyond the point necessary to determine that his driver's license, vehicle registration, and warrant status were in order.<sup>104</sup> During this continued custody, the officer took a variety of actions that, he said, were designed "to judge the person's reaction to . . . [decide]

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of authority, *id.* at 6, on the question of pretext stops in Ohio courts. The court's opinion was clear and unequivocal:

a traffic stop based upon probable cause is not unreasonable, and . . . an officer who makes a traffic stop based on probable cause acts in an objectively reasonable manner. Accordingly, we . . . hold that where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment to the United States Constitution even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity.

*Id.* at 11.

<sup>97</sup> *Dennowitz*, slip op. at 3.

<sup>98</sup> *Id.* at 4.

<sup>99</sup> Nos. 9807006121, 9807006069 (Del. Super. 1999).

<sup>100</sup> *Id.*, slip op. at 3.

<sup>101</sup> 521 S.E.2d 438 (Ga. Ct. App. 1999).

<sup>102</sup> *Id.* at 441. On procedural grounds, the court refused to transfer the case to the state supreme court for a decision on the issue. *See id.*

whether I am going to search for contraband or not."<sup>105</sup> The defendant's reactions encouraged the officer to search, and use a drug-sniffing dog, which resulted in the recovery of cocaine in a backpack.<sup>106</sup> The court noted that under *Whren* it did not matter that the police were motivated by something other than traffic enforcement, but it put a decidedly unfriendly gloss on this practice.

By all indications, pretextual traffic stops have increased markedly all over the country since the *Whren* decision. Using the traffic laws as pretexts for stopping to search the occupants and the interior of the vehicles has created intense criticism and some allegations of racism in the enforcement of the laws of Maryland, as well as in other states.<sup>107</sup>

Since the record contained no evidence on allegations of racism, the court took no position on them, but it noted pointedly that both the defendant and his passenger were African-Americans.<sup>108</sup> The court said that, although pretext stops had become a standard anti-narcotics strategy, police must still comply with settled search and seizure rules, including those in Maryland case law. Under those cases, police using pretext stops cannot detain motorists beyond the time necessary to resolve any traffic issues.<sup>109</sup> Further, when traffic enforcement serves as the pretext for a stop, police may not engage in activities unrelated to traffic enforcement in order to attempt to observe indications of other types of illegal activity.<sup>110</sup> An interpretation of *Whren* consistent with Maryland cases on the subject of pretext stops "requires the police to issue the citation or warning efficiently and expeditiously with a minimum of intrusion, only that which is required to carry forth the legitimate, although pretextual, purpose for the stop."<sup>111</sup> In other words, *Whitehead* does not rule out pretext stops based on state constitutional law; instead, it interprets *Whren* narrowly, in light of Maryland's existing case law, and limits its reach considerably.

In Ohio, one of the states that has rejected a challenge to *Whren* based on its state constitution,<sup>112</sup> several courts have limited *Whren* in a traditional fashion similar to *Whitehead*. For example, in *State v. Montoya*,<sup>113</sup> a police officer stopped a driver for speeding. He began to question the driver about facts unrelated to the violation; almost

<sup>105</sup> 698 A.2d 1115 (Md. Ct. Spec. App. 1997).

<sup>104</sup> *Id.* at 1116.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1117 (citations omitted).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1117-18 (citing *Snow v. State*, 578 A.2d 816 (Md. App. 1990), and *Munafa v. State*, 660 A.2d 1068 (Md. App. 1995)).

<sup>110</sup> *Id.* at 1120.

<sup>111</sup> *Id.*

<sup>112</sup> See *supra* notes 97-99 and accompanying text.

<sup>113</sup> 1998 Ohio App. LEXIS 824 (Mar. 6, 1998).

simultaneously with the traffic stop, a canine officer arrived with a drug-sniffing dog. The officer who stopped the vehicle immediately ordered the canine officer to use the dog to perform a drug search.<sup>114</sup> The trial court granted the defendant's motion to suppress the narcotics that the police recovered, and the appellate court affirmed. Characterizing the officer's actions after the stop as a "fishing expedition,"<sup>115</sup> the appellate court said that:

based on his experience as a state trooper, [the officer] had a reasonable and articulable suspicion that Montoya was breaking a traffic law by driving over the posted speed limit. Thus, his initial stop of appellees' vehicle was justified. [The officer's] subsequent questions, however, were irrelevant to the purpose of the stop and he thereby unlawfully expanded the scope of the detention.<sup>116</sup>

In other words, the court accepted *Whren*, but used Ohio case law to give *Whren* a grudging reading, just as the Maryland court had in *Whitehead*. Hardly "new federalism," but worth noting as part of the whole picture when examining how state courts have reacted to *Whren*.

#### IV. UNANTICIPATED CONSEQUENCES: LEGISLATIVE, ADMINISTRATIVE, AND OTHER "OLD FEDERALISM" RESPONSES

When we think of the new federalism, we think of courts. The theory's early exponents had judicial responses in mind when they urged the preservation of the Warren Court legacy: their writing aims to influence those litigating and deciding cases in state courts. The idea was to adapt the same tactic used throughout the 1960's—litigation based on a constitutional-level guarantee, but at the state level. Other institutions that might provide some of the relief sought through other institutional devices were largely—perhaps wholly—ignored.

Nevertheless, one cannot think about responses to *Whren* without considering several unexpected, even surprising, developments that have come from other, nonjudicial institutions. Indeed, these responses to *Whren* have proven perhaps more important, and certainly more dynamic, than those coming from courts; which, after all, are relatively slow-moving since they can only react to cases before them and remain institutionally bound by *stare decisis* to follow authoritative cases in their own jurisdictions. These reactions have come not from courts, but from legislatures, law enforcement agencies, and the public itself.

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<sup>114</sup> *Id.* at \*2.

<sup>115</sup> *Id.* at \*5.

<sup>116</sup> *Id.* at \*7.

### A. Legislative Responses

In the wake of the *Whren* decision, those concerned with the problem of pretext stops decried the case, explaining its likely implications—more pretext stops, almost certainly targeted at minorities.<sup>117</sup> The first legislative response to *Whren* came just six months later—the federal Traffic Stops Statistics Act of 1997,<sup>118</sup> sponsored by Representative John Conyers. This bill, the first of its kind, would have required that all police departments keep data on each traffic stop made, including the race and ethnicity of the driver, the reason for the stop, whether any search was performed and its legal basis, and what, if any, evidence was recovered.<sup>119</sup> The Department of Justice would then collect and analyze the data.<sup>120</sup> The bill constituted a modest first step—a way of understanding and coming to grips with the existence and scope of the problem. If the statistics gathered bore out the concerns that African-Americans and other minorities had long expressed, the results could then form the basis for further, more substantive action. The bill passed the House of Representatives unanimously in March of 1998,<sup>121</sup> but the Senate held no hearings on it before the end of the Congress.<sup>122</sup>

House Report 118 (now H.R. 1443<sup>123</sup>) is still not law, and while there are reasons to be more optimistic about its chances than a year ago, it may never pass Congress, given that body's current conservative majority. Nevertheless, it has already had an effect few might have anticipated: It has spawned a host of state-level bills across the country. These bills are almost all clones of the Conyers bill, as they call for data collection on all traffic stops for a particular period of time, and then mandate a statistical analysis. All have been "customized" for the circumstances of their individual states. Although none is perfect, almost all of them make collection of data mandatory—the centerpiece of the Conyers approach. As of this writing, legislators

<sup>117</sup> See, e.g., Diana Roberto Donahoe, "Could Have," "Would Have." *What the Supreme Court Should Have Decided in Whren v. United States.*, 34 AM. CRIM. L. REV. 1193 (1997); Christopher Hall, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence: Whren v. United States, United States v. Armstrong, and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083 (1998); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693 (1998); David A. Harris, 'Driving While Black', *supra* note 52.

<sup>118</sup> The Traffic Stops Statistics Act, H.R. 118, 105th Cong. (1997).

<sup>119</sup> *Id.* at § 2(2).

<sup>120</sup> *Id.* at § 3.

<sup>121</sup> The Traffic Stops Statistics Act, *supra* note 118.

<sup>122</sup> The Senate delayed holding hearings on the bill, and by the end of the session the entire government was involved in the impeachment process. The measure expired at the end of the session.

<sup>123</sup> H.R. 118 died at the end of the 105th Congress, but was reintroduced in 1999 as H.R. 1443, The Traffic Stops Study Statistics Act. The new bill is similar to H.R. 118; the major difference is that instead of calling for a nationwide study, it mandates gathering of data from a select number of representative police departments.

have introduced bills in more than a third of the states, including Ohio,<sup>124</sup> Illinois,<sup>125</sup> Pennsylvania,<sup>126</sup> Oklahoma,<sup>127</sup> South Carolina,<sup>128</sup> Massachusetts,<sup>129</sup> Rhode Island,<sup>130</sup> Virginia,<sup>131</sup> Maryland,<sup>132</sup> Florida,<sup>133</sup> Kentucky,<sup>134</sup> Alabama,<sup>135</sup> Iowa,<sup>136</sup> Kansas,<sup>137</sup> Tennessee,<sup>138</sup> Georgia,<sup>139</sup> Wisconsin,<sup>140</sup> Missouri,<sup>141</sup> Washington State,<sup>142</sup> and New Jersey.<sup>143</sup> Two of these bills have become law. In North Carolina, the first state to pass such a bill, all state law enforcement officers will collect fifteen points of data on each traffic stop they make.<sup>144</sup> In Connecticut, the

<sup>124</sup> H.B. 363, 123d Leg., Reg. Sess. (Ohio 1999) (requiring statewide collection of statistics on all traffic stops).

<sup>125</sup> H.B. 3911, 91st Gen. Ass., Reg. Sess. (Ill. 2000) (requiring collection of traffic stop statistics).

<sup>126</sup> H.B. 1649, 182d Gen. Ass., Reg. Sess. (Pa. 1999) (requiring collection of data on traffic stops in most to the state's largest municipalities); *see also* H.B. 2157, 182d Gen. Ass., Reg. Sess. (Pa.1999) (requiring training for law enforcement officers).

<sup>127</sup> S. 1444, 47th Leg., 2d. Sess. (Okla. 2000) (requiring municipal police departments, county sheriff's offices, and department of public safety to collect statistics on all traffic stops).

<sup>128</sup> S. 915, 114th Gen. Ass., Reg. Sess. (S.C. 2000) (mandating particular anti-profiling policy); *see also* the predecessor bill, S. 778, 113th Gen. Ass., Reg. Sess. (S.C. 1999) (requiring the collection of traffic stop data by the Highway Patrol and the State Police).

<sup>129</sup> S. 1180, 181st Leg., Reg. Sess. (Mass. 1999) (requiring the collection and study of information relating to routine traffic stops).

<sup>130</sup> S. 2143, 2000 Leg., Jan. Sess. (R.I. 2000) (requiring data collection and authorizing attorney general to conduct a study of all routine traffic stops). H.B. 7164 is the same bill. There was a predecessor to the current bill. H.B. 8430, 2000 Leg., Jan. Sess. (R.I. 1998) (requiring superintendent of the state police to keep statistical data on traffic stops and publish it annually).

<sup>131</sup> S. 743, 2000 Leg., 1st Reg. Sess. (Va. 2000) (requiring superintendent of state police to keep statistical data on all traffic stops). A predecessor bill called for the establishment of a subcommittee of the legislature to study the issue. H.J.R. Res. 687, 1999 Leg., 1st Reg. Sess. (Va. 1999).

<sup>132</sup> H.B. 225, 414th Leg., 1st Reg. Sess. (Md. 2000) (requiring collection of data on all traffic stops). The predecessor bill was much weaker. S. 430, 413th Leg., 1st Reg. Sess. (Md. 1999) (establishing a task force to study stops for routine traffic violations).

<sup>133</sup> *See* H.B. 1113, 102d Leg., 1st Reg. Sess., (Fla. 2000). A predecessor bill, S. 1456, 101st Leg., 1st Reg. Sess., died in committee on April 30, 1999.

<sup>134</sup> S. 286, 2000 Leg., 1st Reg. Sess. (Ky. 2000) (requiring police departments to have written anti-profiling policies and to collect data on all traffic stops).

<sup>135</sup> H.B. 7, 181st Leg., 1st Reg. Sess. (Ala. 1999) (requiring data collection in connection with seat belt law); S. 374, 181st Leg., 1st Reg. Sess. (Ala. 2000) (forbidding profiling and requiring police departments to have written anti-profiling policies and to collect data on all traffic stops).

<sup>136</sup> S. 2183, 78th Leg., 2d. Reg. Sess. (Iowa 2000) (requiring police departments to collect data on all traffic stops).

<sup>137</sup> H.B. 2683, 78th Leg., 1st Reg. Sess. (Kan. 2000) (requiring that proposals be sought for traffic stops study that would include data collection).

<sup>138</sup> S. 2415, 101st Leg., 1st Reg. Sess. (Tenn. 2000) (requiring data collection on traffic stops).

<sup>139</sup> S. 376, 145th Leg., 1st Reg. Sess. (Ga. 2000) (condemning racial profiling).

<sup>140</sup> S. 354, 94th Leg., 1st Reg. Sess. (Wis. 2000) (requiring data collection on traffic stops).

<sup>141</sup> H.B. 2056, 90th Leg., 2d. Sess. (Mo. 2000) (requiring police departments to collect data on all traffic stops).

<sup>142</sup> S. 6683, 56th Leg., 1st Reg. Sess. (Wash. 2000) (requiring data collection on traffic stops).

<sup>143</sup> S. 863, 209th Leg. (N.J. 2000) (requiring the superintendent of state police to collect and analyze data on all traffic stops); A.B. 3502, 209th Leg. (N.J. 2000) (criminal charges); S. 650 209th Leg. (N.J. 2000) (filing of complaints).

<sup>144</sup> An Act to Require the Division of Criminal Statistics to Collect and Maintain Statistics on

law now requires each police agency in the state to record and retain five points of data for each traffic stop, including the race or ethnicity of the driver.<sup>145</sup> These data would then become the basis for a state-wide study.<sup>146</sup> Connecticut's statute also explicitly bans profiling and making stops based solely on race, and requires every police department in the state to have an antiprofiling policy in place by Jan. 1, 2000.<sup>147</sup> Two other bills—one in California<sup>148</sup> and one in Wisconsin<sup>149</sup>—suffered gubernatorial vetoes<sup>150</sup> after passing their respective state legislatures. Nevertheless, there are more than twice as many bills pending now than there were at the end of last year, and there is interest in other states in introducing similar legislation.<sup>151</sup> The trend is unmistakable.

Obviously, when such legislation passes, the landscape changes; the state legislature has, at such a point, begun to address the implications of *Whren* in a very direct, if basic, way. But even when these bills do not pass, they can serve as the focal point for discussions of the whole cluster of policing and race issues, of which racial profiling is but one.

#### *B. Administrative Changes: Responses of Police Departments to the Racial Profiling Controversy*

As some state legislatures began efforts to address the post-*Whren* controversy concerning pretext stops and racial profiling, another set of unexpected responses arose. In fact, given vocal police opposition

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Traffic Law Enforcement, N.C. GEN. STAT. § 114-10 (1999) (requiring the collection of information "the age, race and sex of the offender.").

<sup>145</sup> An Act Concerning Traffic Stops Statistics, 1999 CONN. ACTS 99-198 (Reg. Sess.) (requiring police officers to record the "race, color, ethnicity, gender and age" of people stopped for traffic violations).

<sup>146</sup> *Id.*

<sup>147</sup> *See id.* (stating that "[t]he race or ethnicity of an individual shall not be the sole factor" in an officer's decision to stop and search a vehicle, or to make an arrest).

<sup>148</sup> S. 1389, 1999-2000 Leg., Reg. Sess. (Cal. 2000). A predecessor bill was vetoed in 1999 by Governor Gray Davis. S.B. 78, 1999-2000 Leg., Reg. Sess. (Cal. 1999) (requiring collection and analysis of data on routine traffic stops).

<sup>149</sup> The proposal was part of Wisconsin's omnibus two-year budget bill, and as such did not have its own separate bill number. Telephone Interview with Robert Buchanan, Legislative Aide to State Senator Gwendolynne Moore (Mar. 13, 2000). A new bill with similar provisions has been introduced this year, despite last year's veto. S. 354, 94th Leg., 1st Reg. Sess. (Wis. 2000).

<sup>150</sup> Carl Ingram, *Davis Vetoes Racial Data Legislation*, L.A. TIMES, Sept. 29, 1999, at A3 (noting that California Governor Gray Davis vetoed the bill because he believes "the state has no business scrutinizing local police."); *Racial Profiling Panel Holds Its First Meeting*, MILWAUKEE J. SENTINEL, Jan. 14, 2000, at 5 (noting that the governor created a panel to study possible racial profiling by police "shortly after he vetoed a bill" that would have required collection of data on traffic stops); *see also* Wisc. Exec. Order No. 28, 94th Leg. Sess. (Dec. 27, 1999) ("Executive Order Relating to the Creation of the Governor's Task Force on Racial Profiling.").

<sup>151</sup> *See supra* notes 124-45 and accompanying text.

to the Conyers bill,<sup>152</sup> these reactions surprised almost everyone.

In the wake of the passage of the Conyers bill in the U.S. House of Representatives in March of 1998, law enforcement organizations mounted a strong campaign against the legislation.<sup>153</sup> The National Association of Police Organization (NAPO), an umbrella group that purported to represent more than 4,000 police organizations across the country, led the opposition of the bill.<sup>154</sup> NAPO opposed the bill because officers would "resent" having to collect this data, and because, despite statistical evidence, there was "no pressing need or justification" for the legislation.<sup>155</sup>

Thus, it shocked many when, in February 1999, San Diego Police Chief Jerome Sanders announced that his agency would become the first major city police department to begin collecting traffic stop data on its own initiative, without any federal or state mandate.<sup>156</sup> His reasoning was simple and straightforward. Sanders, whose police department had had great success with community policing, put a premium on his department's relationship with the community.<sup>157</sup> He knew that for community policing to continue to succeed, he needed the cooperation and trust of the citizens his department served; he also knew that there was a perception—right or wrong—that police stopped, questioned, and searched people of color in numbers out of proportion to their presence on the road.<sup>158</sup> And whether he agreed with it or not, Sanders knew that overcoming this perception—either through demonstrating that it was mistaken or by rooting the offensive practice out—depended on obtaining data that would tell the real story.<sup>159</sup> He ordered data collection to begin early in the next year.<sup>160</sup>

In the months after Sanders' announcement, other departments decided that they, too, would begin collecting traffic stop data, including large municipal police departments in San Jose, California,<sup>161</sup> and Houston, Texas,<sup>162</sup> and by state police agencies in Washington

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<sup>152</sup> See *supra* notes 118-22 and accompanying text.

<sup>153</sup> See Robert L. Jackson, *Push Against Bias in Traffic Stops Arrested*, L.A. TIMES, June 1, 1998, at A5 (noting that Senate would most likely vote down the racial-profiling legislation).

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

<sup>155</sup> *Id.*

<sup>156</sup> See Michael Stetz & Kelly Thornton, *Cops to Collect Traffic-Stop Racial Data: S.D. Chief Acts to Find if Minority Drivers are Pulled over too Often*, SAN DIEGO UNION-TRIB., Feb. 5, 1999, at A1.

<sup>157</sup> See *id.* (noting that Sanders was concerned about the growing public perception that police target minority drivers which was "eroding public trust and needs to be addressed if community policing . . . is to be successful.").

<sup>158</sup> *Id.*

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

<sup>160</sup> *Id.* See also Julie Ha, *Groups Seek Data on Race-Based Police Stops*, L.A. TIMES, Apr. 16, 1999, at B3 (discussing San Diego's decision to collect data because, as a police department spokesman said, "we as an organization have nothing to hide.").

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

<sup>162</sup> S.K. Bardwell & Lori Rodriguez, *HPD to Collect Profiling Data; Police Chief, Mayor Want to Find Out if Minorities Unfairly Targeted*, HOUSTON CHRONICLE, Aug. 12, 1999, at A1.

state,<sup>163</sup> Florida,<sup>164</sup> and Michigan,<sup>165</sup>—more than one hundred departments nationwide.<sup>166</sup> President Clinton has given his public support to these efforts, even directing federal agencies to begin collecting data on their own traffic stop activity.<sup>167</sup>

Voluntary data collection cannot constitute the whole answer to these problems. Those agencies that are most open and presumably have the least significant problems with racially biased traffic stops will be most likely to step forward; those departments with the biggest problems will undoubtedly be most reluctant. Thus the picture that may emerge from voluntary efforts could be skewed, reflecting only the behavior of the best agencies, and none of the worst behavior of the worst. Nevertheless, it is difficult not to construe police agencies' voluntary self-scrutiny of a volatile, currently controversial area of police/community relations is a net gain for police and local communities. As a consequence, issues of race, crime, and policing are being discussed, and (at least some) action is being taken in these communities.

### C. Public Perception and Awareness

The post-*Whren* controversy has had another unexpected effect: It has put the issue of race and crime more generally, and racial profiling in particular, on national, state, and local agendas. This discussion, which has helped push forward the legislative and administrative initiatives described above, has changed public perception concerning policing that impacts particular racial groups in disproportionate ways, and has built awareness of the undesirability of racially biased policing.

Two examples will illustrate how things have changed. There has long been a great gulf between the attitudes of blacks and whites concerning the fairness of the police and the justice system. This was quite evident in the wake of the O.J. Simpson trial. Polling data

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<sup>163</sup> Angela Galloway, *State Patrol to Note Race, Gender in Stops; Effort is Instituted to Deter Racial Profiling*, SEATTLE POST-INTELLIGENCER, Sept. 24, 1999, at A1.

<sup>164</sup> Mike Brassfield, *Most Believe Racial Stops Widespread*, ST. PETERSBURG TIMES, Dec. 11, 1999, at 3A.

<sup>165</sup> David Shepardson, *Cops Will Log Race of Drivers*, DETROIT NEWS, December 10, 1999, at A1.

<sup>166</sup> See *Oversight Hearing on the Civil Rights Division of the Department of Justice Before the House Subcomm. on the Constitution of the House Comm. on the Judiciary*, July 12, 2000 (statement of Bill Lan Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice) ("Today, our 100 jurisdictions are implementing data collection programs. . ."); Scott Bowles, *Bans on Racial Profiling Gain Steam*, USA TODAY, June 2, 2000, at 3A (over fifty cities in California alone began voluntary data collection in 1999).

<sup>167</sup> Steven A. Holmes, *Clinton Orders Investigation On Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A22; Edwin Chen, *'Corrosive' Racial Profiling Must End, Clinton Insists; President Orders Federal Agencies to Collect Data on People They Stop to Learn if Practice is Taking Place*, L.A. TIMES, June 10, 1999, at A18; Michael A. Fletcher, *Clinton Orders Data Collection In Effort to Halt Racial Profiling*, WASH. POST, June 10, 1999 at A2.



showed the country was divided along racial lines on the question of Simpson's guilt,<sup>168</sup> and that blacks perceived the entire criminal justice system as stacked against them. More recent data show that the same racial divide still exists, but with a surprising twist. In December 1999, the Gallup Organization released a poll on racial profiling showing that most blacks and a clear majority of whites believe that racially-biased pretext stops are a widespread problem.<sup>169</sup> Moreover, four out five people of both races characterized profiling as a pernicious practice that should be addressed and eliminated.<sup>170</sup> Surely we would expect this high level of awareness of the problem and its negative implications among African-Americans, those most likely to find themselves stopped. But the data for whites shows that the public discussion of the issue, which might not have occurred but for *Whren*, has, indeed, educated many other people on the realities of what people of color face on the street.

These changes in perception and attitude are also visible in media coverage of the issue. It is interesting, for example, to contrast the coverage of the *Whren* decision in 1996, with the coverage of *Illinois v. Wardlow*,<sup>171</sup> decided just a few weeks ago. *Whren* received rather perfunctory coverage. Many of the largest news organizations did not feature it prominently,<sup>172</sup> and even among those that did, few highlighted the racial implications of the decision, which had been explicitly (if briefly) addressed in Justice Scalia's opinion.<sup>173</sup> *Wardlow* concerned similar issues in the context of a *Terry* stop. The defendant in

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<sup>168</sup> In July of 1994, 66% of whites interviewed said that Simpson was probably guilty. In contrast, only 24% of blacks agreed. Frank Newport and Linda Saad, *Civil Trial Didn't Alter Public's View of Simpson Case*, Gallup News Service, at <http://www.gallup.com/poll/releases/pr970207.asp> (Feb. 7, 1997). This same racial division of opinion continued after the verdict in the Simpson civil case. Almost 70% of whites interviewed in 1997 say that the civil jury made the right decision when it found Simpson responsible for the murders, but only 26% of blacks interviewed say that the civil jury's decision was correct. *Id.* In a February 1999 poll, not much had changed: 79% percent of whites say the charges are true, compared to 35% of blacks. Frank Newport, *Fifth Anniversary of Nicole Brown Simpson and Ron Goldman Murders Finds Americans Still Pointing at O.J. Simpson*, Gallup News Service, at <http://www.gallup.com/poll/releases/pr990614.asp> (June 14, 1999).

<sup>169</sup> See Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, Gallup News Service, at <http://www.gallup.com/poll/releases/pr991209.asp> (Dec. 9, 1999) (stating that 77% of blacks and 56% of whites said they believed "racial profiling," which was described in detail, is widespread).

<sup>170</sup> See *id.* (stating that 81% of those surveyed disapproved of profiling when asked a question that is "neutral in tone").

<sup>171</sup> 528 U.S. 119 (2000).

<sup>172</sup> See, e.g., Linda Greenhouse, *Supreme Court Roundup: If Traffic Stop Is Valid, Arrest On Other Charges Is Allowed*, N.Y. TIMES, June 11, 1996, at A22 (discussing the Court's decision in *Whren*); David G. Savage, *Early Retirees Can Lose Rights, Justices Rule*, L.A. TIMES, June 11, 1996, at A1 (describing *Whren* at end of story as one of Court's "other actions").

<sup>173</sup> See, e.g., Joan Biskupic, *Police May Use Traffic Stops For Drug Pretext, Court Says; Officers' Motive Doesn't Matter if Violation Occurs, Justices Rule 9-0*, WASH. POST, June 11, 1996, at A1 (addressing drug courier profile without mentioning racial implications); *Cops Get More Room in Searches; High Court Expands Power to Stop Drivers*, CHI. TRIB., June 10, 1996, at 1 (ignoring the racial issue).

*Wardlow* ran when he observed police.<sup>174</sup> The Court refused to adopt a per se rule that any time a person ran at the sight of the police, this constituted “reasonable suspicion” justifying a temporary stop.<sup>175</sup> Instead, the majority ruled that in the context of all of the facts, most notably the suspect’s presence in a high crime/drug area, flight was certainly a significant indicator of guilt and could, along with other factors, support a finding of reasonable suspicion.<sup>176</sup> In contrast to the meager media coverage of *Whren*, stories on *Wardlow* appeared on the front page of *The New York Times*.<sup>177</sup> Numerous news organizations not only featured the case, but gave prominent play to the fact that African Americans and other minority citizens seemed much more likely than whites to suffer the treatment that the case allowed.<sup>178</sup> For example, *The New York Times* quoted an expert who stated that he was struck by the Court’s “obliviousness” to what minorities face out on the street every day.<sup>179</sup>

## V. ASSESSMENT: A MIXED BAG

The U.S. Supreme Court decided *Whren* over four years ago. In the grand scheme of constitutional and legal change, this is not a long time. Perhaps it is premature to measure how state courts have reacted to *Whren*. On the other hand, the idea of the new federalism in criminal procedure is no longer new; the theory’s advocates have urged it upon courts and counsel for almost thirty years.<sup>180</sup> State courts inclined to believe that their constitutions might differ from Supreme Court interpretations of the federal Constitution and Bill of

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<sup>174</sup> *Wardlow*, 528 U.S. at 119.

<sup>175</sup> *Id.* at 121-22.

<sup>176</sup> *Id.*

<sup>177</sup> Linda Greenhouse, *Flight Can Justify Search By Police, High Court Rules*, N.Y. TIMES, Jan. 13, 2000, at A1.

<sup>178</sup> See Steve Lash, *Decision Clears Way For Chases By Police; High Court Splits 5-4 in Stop-and-Frisk Case*, HOUST. CHRON., Jan. 13, 2000, at 1 (noting that minority advocates “assailed the ruling as enabling police to harass minorities, particularly in high-crime neighborhoods”); Jackie Judd, ABC World News Now: *Supreme Court Gives Congress Power to Protect Privacy and Police Right to Pursue Suspicious Bystanders* (ABC television broadcast, Jan. 13, 2000) (stating that “minority and civil liberties group say the ruling ignores what life is like in violent neighborhoods”); Jan Crawford Greenburg, *Top Court: Cops Can Chase Those Who Flee*, CHI. TRIB., Jan. 13, 2000, at 1 (quoting experts who said that the burden of the ruling “would fall unfairly on minorities, who, they said, may have good reason to flee police because of legitimate concerns about harassment or brutality.”). While some of this coverage was no doubt the result of Justice Stevens’ dissent, which discussed the possible racial implications of the decision, news organizations often ignore dissenting opinions. The fact that they did not ignore this one likely has less to do with the dissent than its subject.

<sup>179</sup> Greenhouse, *supra* note 177, at A1 (quoting an expert who called the case a “troubling indication of the court’s obliviousness to what’s really going on in the country” that did not acknowledge the “growing evidence of police practices of ‘racial profiling’ and the singling out of black people and members of other minority groups.”).

<sup>180</sup> See *supra* notes 7-16 and accompanying text.

Rights began acting on this idea long ago;<sup>181</sup> it no longer breaks any new ground. Given this reality, it seems fair to attempt to assess responses to *Whren*.

Looked at fairly, state court reactions to *Whren* present a decidedly mixed bag of results. Several states have rejected *Whren* based on their state constitutions, or could dependably be predicted to do so. The Supreme Court of Washington, a leader in state constitutionalism under Justice Robert Utter, has broken with the Supreme Court over *Whren*.<sup>182</sup> So far, it remains the only state supreme court to do this. Lower courts in New York have rejected *Whren*; the analysis in *Dickson* makes a reasonably good case that the New York Court of Appeals would agree, based on its prior cases on pretext stops.<sup>183</sup> In New Jersey, no state court has yet faced the question whether *Whren* should stand under the state constitution. But the state's unique and strong protection against racial discrimination, under which courts may suppress evidence in criminal cases when police enforce the law in a racially biased way, makes it likely that New Jersey courts would disapprove of the pretext stops *Whren* authorizes when the evidence shows racially disproportionate enforcement.<sup>184</sup> In fact, the judge in the *Soto* case, in which defendants charged racial profiling, used the state law in exactly this way and suppressed the evidence.<sup>185</sup>

All of these decisions explicitly show concern with racial bias in law enforcement, very clearly in the New Jersey cases but still forthrightly in the others. Thus, a central theme of the Warren court's criminal procedure cases finds a clear reflection in this case law; one would have to imagine that these are exactly the types of decisions that would satisfy Justice Brennan, one of the new federalism's earliest advocates.

But even though this handful of cases shows that states may reject *Whren*, an almost equal number point in the opposite direction.<sup>186</sup> These cases evidence no desire by States to venture beyond what the U.S. Supreme Court has commanded, and have indicate an uncritical adoption of the Court's reasoning. Just as many courts at the intermediate appellate level have deferred any decision to their state supreme courts on whether state constitutional provisions allow pretext stops. Perhaps most telling, the greatest number of cases that have rejected *Whren* have done so not on the basis of state constitutional law, but in far more conventional ways that have nothing to do with the new federalism; for example, ruling that stops have continued beyond the time necessary for their ostensible, traffic-related reasons.<sup>187</sup>

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<sup>181</sup> See *supra* notes 15-16 and accompanying text.

<sup>182</sup> See *supra* notes 55-62 and accompanying text.

<sup>183</sup> See *supra* notes 63-71 and accompanying text.

<sup>184</sup> See *supra* notes 72-90 and accompanying text.

<sup>185</sup> See *supra* notes 84-90 and accompanying text.

<sup>186</sup> See *supra* notes 91-102 and accompanying text.

<sup>187</sup> See *supra* notes 103-16 and accompanying text.

All in all, one would have to guess that Justice Brennan would find the post-*Whren* state court cases a mixed result: A few states have followed his lead or seem likely to do so, about as many have rejected this approach, and others have used more traditional approaches. The people of Washington, New York, and New Jersey have the right to be free from pretext searches, and Brennan would no doubt approve, but citizens of other states have exactly the level of Fourth Amendment protection from these stops described in *Whren*—that is, none.<sup>188</sup> It is difficult to conclude that Brennan would find this a ringing triumph.

But the whole picture is both more complex and more nuanced than that. It would be a mistake to simply count up cases on both sides of the issue and call this battle both a draw and a minor skirmish. When we broaden our vision of the issue of pretextual stops, we see that more has happened by way of reaction to *Whren* than just the cases discussed here. The constitutional process has many actors; it has always had a multi-layered, dynamic quality that involved not just courts, but the legislative and executive branches of the government, too. Legislative response to U.S. Supreme Court decisions has a long history in our nation;<sup>189</sup> executive and administrative agencies at every level of government have responded as well, time and time again. These kinds of responses were not what Justice Brennan and the other advocates of the new federalism had in mind. Supporters of new federalism only said that American constitutionalism should not be so narrowly focused on the nine Justices of the U.S. Supreme Court and the U.S. Constitution. Put in context, these views seem reasonable. These judges, lawyers, and academics were, after all, reacting to the fact that the Court had a (if not *the*) leading role in many of the important legal and social changes since *Brown v. Board of Education*.<sup>190</sup> In fact, on issues of racial justice, Supreme Court litigation has been the chief, and arguably the most successful, instrument of change in so many areas of the law, not the least criminal procedure. Finding this door closing, proponents of new federalism sought to preserve their gains in the way most analogous to what they knew—the protection of rights with constitutional provisions, albeit those provisions of the states. Perhaps post-*Whren* events illustrate that we need to redefine the new federalism in a wider, more expansive and traditional way; in essence, to adopt an approach that views the responses of non-judicial institutions as an important part of the discussion.

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<sup>188</sup> While the Court in *Whren* left open the possibility of bringing a civil suit under the Equal Protection Clause, this avenue of relief is fraught with many problems, both legal and practical. See *supra* note 53 and accompanying text.

<sup>189</sup> For a relatively recent example that was much discussed in light of the U.S. Supreme Court's decision in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), see 18 U.S.C.A. § 3501 (legislating procedures for interrogation after *Miranda v. Arizona*).

<sup>190</sup> 349 U.S. 294 (1955).

To be sure, this vision is not as sweeping as the idea of a single Supreme Court decision that answers an important legal question or prescribes a unified national standard of police procedure in a particular situation. Nor is it as easy for lawyers and judges to understand and use. Further, one can argue with much force that none of the post-*Whren* developments surveyed here could have the same strong or sweeping effect that a contrary decision in *Whren* would have had. If the Supreme Court had simply decided that police could only use traffic stops when a reasonable officer would have made the stop—the position the defendants had advocated—courts in all fifty states would have been obliged to force police to follow this rule. No house to house fighting in state courts, state legislatures, and other nonfederal institutions would have been necessary. It would have been an altogether cleaner solution.

But reality intrudes here: Not only did the Court not decide the case this way, but the decision went the other direction on a 9-0 vote, without even a single cautioning concurring opinion recognizing the potential dangers in the implications of the decision. In a world like this, it is probably not too far-fetched to think that advocates for the criminally accused would have been driven to the new federalism and state constitutional law, even if the way had not been pointed out to them.

Perhaps more importantly, the lessons of the post-*Whren* world are especially vital for advocates of racial justice in the criminal process. It is clearly no longer enough to think of this struggle as something that can be won in the U.S. Supreme Court or other federal courts. It must be reconceptualized as a multi-front war, something nonlawyer advocates have long known.<sup>191</sup> To be sure, this piecemeal multi-front approach has many drawbacks. It leads to a patchwork of legal rights, not a national standard, and the battles involved in this approach are often political in the rawest sense. Further, it has to some great degree been forced upon those seeking protection for the rights of the criminally accused by the reality that neither the U.S. Supreme Court nor the lower federal courts are receptive to their arguments. Nevertheless, the multi-front approach has many benefits. Had the Supreme Court decided *Whren* the opposite way, it is far from clear that the national dialogue on racial profiling would have blossomed as it has, with even the President and the Attorney General joining in.<sup>192</sup> This conversation has spread to other issues where race and criminal justice intersect, and has become an issue in state politics as well because of pending legislation and investigations.<sup>193</sup>

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<sup>191</sup> See Steve Bachmann, *Lawyers, Law and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1, 20 (1984) (noting the importance of social and political factors, in addition to litigation, during the labor movement and the civil rights movement).

<sup>192</sup> See *supra* note 169-70 and accompanying text.

<sup>193</sup> See *supra* notes 117-51 and accompanying text.

Actions by police departments responding to the idea that pretext stops have a disproportionate racial impact show that law enforcement agencies and organizations nationwide have begun to consider the impact of their practices on minorities in ways they may not have before.<sup>194</sup> The result has been a re-invigoration of the struggle against police abuse on the state and local level, where it can have an impact on people and their everyday lives in a way that acts of Congress or decisions of the Supreme Court generally do not.

An example will illustrate the far reaching effect of the post-*Whren* debates. About two years ago, John Timoney, a former top administrator with the New York Police Department, became the Commissioner of the Philadelphia Police Department.<sup>195</sup> In his brief time in the job, Timoney has made many changes. He has brought modern statistical and analytical methods to Philadelphia's police for the first time, and some even credit him with bringing down the city's homicide rate, something that had not happened even as other large cities saw killings drop dramatically.<sup>196</sup> Perhaps less noticed has been Timoney's action, and forthright stand, on issues of race and policing, especially the use of pretext stops in a racially disproportionate fashion. Timoney has testified in the Pennsylvania legislature that police "would have to be brain dead" not to see, and react to, the fact that issues of race and policing must be confronted directly and forthrightly.<sup>197</sup> And he has taken steps to begin the process. For years, Philadelphia police earned credit with their superiors based, simply, on how many drivers they stopped, regardless of the outcome of the stop.<sup>198</sup> This led to predictable abuses and community frustration with traffic stops; police officers had an incentive to make stops, and, not surprisingly, made as many as possible, regardless of their effect on law-abiding members of the community. Timoney has now changed these rules. Now, officers get credit not for the sheer number of stops they make, but for their quality.<sup>199</sup> Stops for the sake of stops are no longer encouraged.<sup>200</sup>

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<sup>194</sup> See *supra* notes 156-66 and accompanying text.

<sup>195</sup> See Francis X. Clines, *Philadelphia Police Chief Borrows from Bronx Beat: Blends Old Toughness and New Technology*, N.Y. TIMES, Jan. 16, 2000, at 13 (noting that John Timoney was appointed police commissioner of Philadelphia police in 1990).

<sup>196</sup> *Id.*

<sup>197</sup> *Traffic Stops and Racial Profiling: Hearing Before Subcomm. on Crimes and Corrections of the House Comm. on the Judiciary*, 182d Gen. Ass., Reg. Sess. (Pa. 1999) (statement of John F. Timoney, Philadelphia Police Commissioner).

<sup>198</sup> *Id.*

<sup>199</sup> See *id.* ("I have ordered that the number of stops be eliminated as a basis for measuring an officer's activity. Giving credit for stops misses the point that the stops must be lawful and encourages marginal stops or even the reporting of non-existent stops to pad an officer's activity.")

<sup>200</sup> See Clines, *supra* note 195, at 16 (concerning former policy of credit for number of stops, Commissioner Timoney says, "Can you believe that nonsense? [Under the new policy], [w]e've reduced our stops by 50 percent. You get credit when you lock them up.")

Commissioner Timoney may have instituted this change regardless of the Supreme Court's decision in *Whren*; but it is difficult to imagine that he would have understood or known of the problem without the nationwide discussion on racial profiling and the way race and policing intersect. Perhaps the pending legislation in Pennsylvania, which would require data collection on traffic stops,<sup>201</sup> helped prod him toward making this change in the incentives his officers have had to make stops. It is impossible to imagine Timoney's "brain dead" comment in a climate uninfluenced by the racial justice debate. The Commissioner has made it absolutely and publicly clear that one of his goals is to deal with these issues himself so as to avoid federal Department of Justice intervention that has taken place in New Jersey.<sup>202</sup> And none of this—the New Jersey case, the Pennsylvania legislation, changes in public awareness and attitudes, and the national discussion of pretext stops, which put the issue of race and criminal justice on the agenda—would likely have taken place without the *Whren* decision that slammed the door on Fourth Amendment challenges to pretextual stops.

#### CONCLUSION

As the Burger and Rehnquist Courts began to dilute the effects of the Warren Court's criminal cases, Justice Brennan and others called for lawyers and judges to look to a new source for protection of the rights of criminal defendants: state constitutions. This argument sometimes proved controversial, but gained adherents nonetheless. News that a state court has rejected a U.S. Supreme Court decision on state constitutional law grounds no longer surprises us. The new federalism lives; it is part of the legal landscape.

Using state court treatment of *United States v. Whren* as a case study of this theory, we can see that it offers a mixed bag of results at the judicial level. But we can also see that we need to take a wider view of the constitutional process. A distinct set of benefits has emerged from *Whren*, separate and apart from the handful of state courts that have forged their own paths on the issue of pretextual stops. We need to refocus ourselves, away from courts and cases and toward multi-layered efforts on questions of racial justice. When we do—or rather, when we are forced to—we should see opportunity. Perhaps we will not win the battle in one sweeping decision but wait for democratic institutions to guide us to the beginnings of new solutions to some of our most difficult problems.

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<sup>201</sup> See *supra* note 126.

<sup>202</sup> See Clines, *supra* note 195 at 16. (stating that "right now, my selfish ancillary goal is to keep the feds out of Philadelphia.").