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Could this be the End of the Fourth Amendment Protections for Motorists

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"COULD" THIS BE THE END OF FOURTH AMENDMENT PROTECTIONS FOR MOTORISTS?

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

I. INTRODUCTION

In *Whren v. United States*,[1] the Supreme Court established a bright-line rule that a police officer's traffic stop is justified by probable cause to believe that a traffic violation has occurred.[2] The Court declined to adopt a standard that would take police officers' subjective motivations into account, asserting that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[3] Thus, the Court, with its decision, legitimated a purely objective "could" test, which simply asks whether a police officer "could have" stopped a vehicle for a traffic infraction.[4]

This Note argues that the Court's decision to adopt a purely objective approach to police traffic stops is problematic. First, this Note asserts that the Court's bright-line rule actually facilitates arbitrary searches and seizures, and, therefore, runs counter to the proscriptions of the Fourth Amendment. Second, this Note maintains that the Court's purely objective approach facilitates and, indeed, protects, the use of impermissible bases by police officers to effect traffic stops, and that the Court's proposed remedy to this problem—the Equal Protection Clause—is insufficient. Finally, this Note contends that, in light of the above consequences and competing objectives and issues, the Court should have adopted a modified objective standard—a "totality of the circumstances" approach—that takes police officers' subjective intentions into account, as such a standard is fully consistent with Supreme Court precedent.

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1 116 S. Ct. 1769 (1996).

2 *Id.* at 1777.

3 *Id.* at 1774.

4 For a discussion of the "could" test, see *infra* notes 85-90 and accompanying text.

II. BACKGROUND

A. THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution prohibits the violation of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[5] In order "to safeguard the privacy and security of individuals against arbitrary invasions,"[6] the Amendment imposes a standard of "reasonableness" upon the discretion of government officials.[7] Invasions are "arbitrary" if they are "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize."[8] Indeed, a law enforcement officer "must be able to point to specific and articulable facts" before he can effect a seizure or undertake a search.[9]

B. PRETEXTUAL SEARCH AND SEIZURE

A pretextual search or seizure is one conducted by law enforcement officers at least partially for reasons other than the justifications later submitted by the government.[10] In other words, activity is pretextual when law enforcement officers engage in conduct on the basis of constitutionally invalid reasons, but behave in an "objectively reasonable" way.[11] This allows prosecutors to later justify police conduct by utilizing a valid Fourth Amendment rationale that is consistent with the conduct's "objective appearance."[12] For example, a pretextual investigatory stop occurs when a police officer, who lacks the requisite "reasonable suspicion" to conduct a search of an automobile and its occupants for drugs, uses a sound justification, such as a traffic violation, as a pretext to pull over the automobile and conduct the search.[13]

C. THE SUPREME COURT'S PRETEXT DOCTRINE

Previous to *Whren*, the Supreme Court offered little useful guidance regarding pretextual investigatory activity. Describing the doc-

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5 U.S. CONST. amend. IV.

6 Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

7 Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

8 Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974).

9 Terry v. Ohio, 392 U.S. 1, 21 (1968).

10 *See* Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 479 (1994).

11 *Id.*

12 *Id.*

13 *See id.*

trine, one commentator said:

> The pretextual search doctrine lies between two distinct and important considerations: (1) unfettered police discretion leading to arbitrary intrusions into the private rights of everyday citizens and (2) unproductive inquiries into a police officer's subjective intent.[14]

Indeed, several of the Court's cases prior to *Whren* suggest that governmental employment of pretext and unbridled discretion is unconstitutional. Conversely, some of the Court's other cases favor "objective" standards of review that do not require courts to engage in a subjective investigation into the officer's state of mind.

1. *Early Supreme Court Disapproval of Governmental Use of Pretext and Unbridled Discretion*—Lefkowitz, Abel, *and* Terry

An early example of Supreme Court condemnation of government agents' use of pretext occurred in *United States v. Lefkowitz*.[15] In *Lefkowitz*, government agents arrested the respondent for conspiracy to violate the National Prohibition Act, and made subsequent searches and seizures of the respondent's property.[16] In deciding whether the searches and seizures were reasonable as incidental to the arrest, the Court asserted in dicta that "[a]n arrest may not be used as a pretext to search for evidence."[17]

In *Abel v. United States*,[18] the Supreme Court again indicated disapproval with governmental pretextual activity.[19] In *Abel*, the F.B.I. suspected the petitioner, an illegal alien, of espionage but did not possess sufficient evidence to make an arrest.[20] The F.B.I. notified immigration officials as to the petitioner's illegal status.[21] After the immigration officials arrested the petitioner, the F.B.I. agents immediately searched his hotel room.[22] Speaking for the Court, Justice Frankfurter upheld the search, premising his ruling on the district court's finding that the government agents acted in good faith.[23] Frankfurter noted, however, that had the district court found "bad faith" on the part of the agents, "it would indeed reveal a serious misconduct by law enforcing officers . . . [that] must meet stern resistance

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14 *Id.* at 517.
15 285 U.S. 452 (1932).
16 *Id.* at 458.
17 *Id.* at 467.
18 362 U.S. 217 (1960).
19 *See id.* at 226.
20 *Id.* at 221.
21 *Id.* at 222-23.
22 *Id.* at 225.
23 *Id.* at 226-28.

by the courts."[24] The *Abel* Court thus seemed to suggest that "bad faith" pretextual intrusions were not constitutionally valid.

Lastly, the Supreme Court denounced the use of unbridled discretion by police officers in the landmark case of *Terry v. Ohio*,[25] as it condemned police usage of "inarticulate hunches" to justify intrusions.[26] In *Terry*, a police officer stopped and frisked the defendant on a city street, basing his action on the defendant's "suspicious" behavior.[27] The Court stated that:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate. *Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.*[28]

Thus, while *Terry* created an "objective" test, the "evil" against which the test was directed—the "hunch"—is, as one commentator describes, "most assuredly a creature of the officer's subjective consciousness."[29]

2. *The Supreme Court Addresses Traffic Violation Arrests*—Robinson *and* Gustafson

The Supreme Court seemed to favor objective standards of review as it addressed issues involving traffic violation arrests in the companion cases of *United States v. Robinson*[30] and *Gustafson v. Florida*.[31] In *Robinson*, a police officer pulled over and arrested the respondent for driving an automobile after the revocation of his license.[32] The officer subsequently searched him, resulting in the discovery of her-

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[24] *Id.* at 226.

[25] 392 U.S. 1 (1968).

[26] *Id.* at 22.

[27] *Id.* at 6-7.

[28] *Id.* at 21-22 (emphasis added).

[29] Scott Campbell, Comment, *United States v. Ferguson: The Sixth Circuit Adds a Third Test for Pretextual Police Conduct*, 56 OHIO ST. L.J. 277, 294 (1995).

[30] 414 U.S. 218 (1973).

[31] 414 U.S. 260 (1973).

[32] *Robinson*, 414 U.S. at 220.

oin.[33] The Court, in a footnote, rejected the respondent's claim that the arrest for a traffic violation served simply as pretext for a police officer to conduct a narcotics search.[34] The Court stated: "We think it is sufficient for purposes of our decision that [the] respondent was lawfully arrested for an offense and that . . . placing him in custody following that arrest was not a departure from established police department practice."[35] Furthermore, the Court did not take subjective factors into account.[36]

In *Gustafson*, a police officer pulled over and arrested the petitioner for failure to produce a driver's license.[37] The officer subsequently searched him, resulting in the discovery of marijuana cigarettes.[38] The petitioner argued for suppression of the marijuana, claiming that, unlike *Robinson*, there was neither a police regulation that obligated the officer to take the petitioner into custody, nor a police policy requiring body searches upon field arrests.[39] The Court rejected these differences as not "determinative of the constitutional issue," holding that it was "sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody."[40]

3. Supreme Court Concern Over Unfettered Police Discretion—Brignoni-Ponce *and* Opperman

The Court exhibited a substantial concern for unfettered police discretion in *United States v. Brignoni-Ponce*.[41] At issue in *Brignoni-Ponce* was the constitutionality of a U.S. Border Patrol policy that allowed roving patrols near the Mexican border to stop vehicles and question occupants about their immigration status and citizenship based solely on the occupants' apparent Mexican ancestry.[42] Referring to the hazards posed by unobstructed government power, the Court held that this policy was unconstitutional.[43] The Court noted that "the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the

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33 *Id.* at 223.

34 *Id.* at 221 n.1.

35 *Id.*

36 *Id.* at 236. The *Robinson* court proclaimed that since the custodial arrest gave rise to the authority to search, the fact that the police officer did not indicate subjective fear of the respondent and did not believe that the respondent was armed was irrelevant. *Id.*

37 Gustafson v Florida, 414 U.S. 260, 262 (1973).

38 *Id.*

39 *Id.* at 263.

40 *Id.* at 265.

41 422 U.S. 873 (1975).

42 *Id.* at 874-76.

43 *Id.* at 882-83.

Government," and warned that "[t]o approve roving patrol stops . . . without any suspicion . . . would subject residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers."[44]

In *South Dakota v. Opperman*,[45] the Supreme Court again criticized police use of pretext. The Court concluded that inventory searches made pursuant to standardized police procedures were reasonable under the Fourth Amendment, stating that "there [was] no suggestion whatever that [the] standard procedure . . . was a pretext concealing an investigatory police motive."[46] The Opperman court seemed to imply, as one commentator noted, "that the absence of a standard procedure would provide objective evidence of . . . a pretextual motive—a subjective state of mind . . . ."[47] While the Court did not declare this "subjective state of mind" unconstitutional, it certainly seemed troubled by it.[48]

4. Supreme Court Enunciation of a Purely Objective Approach—Scott

The Court took a different approach in *Scott v. United States*,[49] which signalled the first Supreme Court enunciation of an entirely objective approach to search and seizure issues.[50] Indeed, *Scott* seemed to discard the claim that officers' conduct could be unlawful based on their subjective motivation. In *Scott*, federal agents intercepted the defendant's telephone conversations pursuant to an authorized wiretap, but did not make a good faith effort to minimize the interception of calls unrelated to the investigation.[51] The pertinent issue was whether the federal agents' failure to comply with the minimization requirement of the Omnibus Crime Control and Safe Streets Act of 1968[52] violated the Fourth Amendment.[53] In concluding that the agents' activity was constitutional, the Court held that the appropriate standard for evaluation of alleged Fourth Amendment violations was one of "objective reasonableness without regard to the underlying intent or motivation of the officers involved."[54] The Court

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44 *Id.* at 882.
45 428 U.S. 364 (1976).
46 *Opperman*, 428 U.S. at 376.
47 Campbell, *supra* note 29, at 297.
48 *Id.*
49 436 U.S. 128 (1978).
50 Laurie A. Buckenberger, *Pretextual Arrests: In* United States v. Scopo *the Second Circuit Raises the Price of a Traffic Ticket (Considerably)*, 61 BROOK. L. REV. 453, 467 (1995).
51 *Scott*, 436 U.S. at 132-34.
52 18 U.S.C. § 2518(5) (1976).
53 *Scott*, 436 U.S. at 135.
54 *Id.* at 138.

essentially pronounced that a law enforcement official's subjective intent alone would not make otherwise lawful conduct unconstitutional.[55]

5. *The "Refinement" of the Supreme Court's Investigatory Stop Doctrine—From* Prouse *to* Wells

In *Delaware v. Prouse*,[56] the Court attempted to refine its investigatory stop doctrine. In *Prouse*, police officers, acting without probable cause or reasonable suspicion that drivers were operating their vehicles in violation of the law, conducted routine stops of vehicles to check operators' driver's licenses and automobile registrations.[57] The Court held that the stops and subsequent detentions of motorists, absent "at least articulable and reasonable suspicion that a motorist" had violated the law, were "unreasonable," and, thus, unconstitutional.[58] The Court further proclaimed that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers."[59]

The Court's invalidation of an officer's pedestrian stop in *Brown v. Texas*[60] further contributed to the investigatory stop doctrine.[61] In *Brown*, two policemen stopped and questioned the defendant after seeing him walk away from another man in an alley known to have a high incidence of drug activity.[62] In reversing the defendant's conviction, the Court held that:

> the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on

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55 *See id.* at 135-37. The Court addressed the pretext issue again, albeit briefly, in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). In *Villamonte-Marquez*, customs officers, after receiving an informant's tip about a drug shipment, boarded a sailboat to inspect the ship's documents pursuant to a federal statute. *Id.* at 584 n.3. The Court upheld the respondents' drug convictions, dismissing the respondents' argument that the search of the ship was based on a pretextual motive. *Id.* The Court offered little insight into the pretext issue, stating, in a footnote:

> Respondents . . . contend . . . that because the . . . officers . . . were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana [sic], they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in *Scott v. United States*, 436 U.S. 128, 135-39 (1978), and we again reject it.

Id. The Court gave no further indication as to what "line of reasoning" it was referring.

56 440 U.S. 648 (1979).

57 *Id.* at 650.

58 *Id.* at 663.

59 *Id.*

60 443 U.S. 47 (1979).

61 Pulliam, *supra* note 10, at 497.

62 *Brown*, 443 U.S. at 48-49.

the conduct of individual officers.[63]

Two years later, in *United States v. Cortez*,[64] the Court found, in upholding an investigatory stop of a pickup truck, that "detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity."[65] The Court noted that constitutionally sufficient reasonable suspicion required two necessary elements.[66] First, the "officer's assessment of the entire situation must be based upon all of the circumstances."[67] Second, the officer's assessment "must raise a suspicion that the particular individual being stopped is engaged in wrongdoing."[68] Despite the *Cortez* Court's attempt to clarify the investigatory stop doctrine, the standard of reasonable suspicion in the area of investigatory stops remained vague.[69]

The Court reiterated its bright-line "objective reasonableness" standard in *Maryland v. Macon*.[70] In *Macon*, an undercover police detective purchased two magazines from an adult bookstore.[71] After meeting with fellow officers and concluding that the magazines were obscene, the detectives returned to the store and arrested the respondent.[72] At this time, they also retrieved the marked fifty-dollar bill the detective used to make the purchase from the cash register.[73] The officers failed to return the change given to the detective upon the original purchase.[74] Arguing that the detectives' subjective intent to retrieve the marked bill without returning the change converted the "purchase" into an illegal seizure, the respondent moved to suppress the magazines.[75] The Court concluded that the detectives' subjective intent was irrelevant in the inquiry, noting that "[o]bjectively viewed,

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63 *Id.* at 51.

64 449 U.S. 411 (1981).

65 *Id.* at 417-18.

66 *Id.* at 418.

67 *Id.*

68 *Id.*

69 Pulliam, *supra* note 10, at 498. The trend of objective inquiry that was developing in cases such as *Brown* and *Cortez* was not without its "blips"—i.e. cases that were concerned with police use of pretext. *See, e.g., Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam). In *Bannister*, a police officer stopped a motorist for speeding, and, upon his approach to the side of the car, saw items matching the description of some that had been recently stolen in the vicinity. *Id.* at 2. The officer subsequently arrested the occupants of the automobile on charges unrelated to the original stop. *Id.* In a footnote, the Court stated: "There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." *Id.* at 4 n.4.

70 472 U.S. 463 (1985).

71 *Id.* at 465.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* at 470.

the transaction was a sale in the ordinary course of business . . . [and] is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence."[76]

Despite the conclusion in *Macon* that subjective motives were irrelevant, the Court, in subsequent cases, indicated that it was concerned with unhindered police discretion. In *Colorado v. Bertine*,[77] the Court approved a police officer's inventory search, stating that "there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."[78] In *New York v. Burger*,[79] the Court upheld an administrative junkyard inspection, noting that "[t]here is . . . no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws."[80] And in *Florida v. Wells*,[81] the Court struck down an inventory search because the Florida Highway Patrol did not have a "standardized criteria or established routine" for the search, mentioning that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."[82]

As this examination of pretext cases indicates, the Supreme Court's pretextual search doctrine is far from clear. On many occasions, the Court suggests that governmental use of pretext and unfettered discretion is unconstitutional. On other occasions, the Court patently eschews investigations into a government agent's subjective state of mind.

D. FEDERAL CIRCUIT COURT TREATMENT OF PRETEXTUAL POLICE ACTIVITY

As a result of the uncertain guidance of the Supreme Court, the Circuit Courts of Appeal have employed two different approaches to determine the validity of pretextual challenges to temporary detentions of motorists—the "could" test[83] and the "would" test.[84]

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76 *Id.* at 471.

77 479 U.S. 367 (1987).

78 *Id.* at 372.

79 482 U.S. 691 (1987).

80 *Id.* at 716 n.27.

81 495 U.S. 1 (1990).

82 *Id.* at 4.

83 *See infra* notes 85-90 and accompanying text.

84 *See infra* notes 91-98 and accompanying text.

1. *The "Could" Test*

The majority of circuits have adopted the purely objective "could" test.[85] Under this test, an officer's investigative stop of a motor vehicle is constitutionally valid under the Fourth Amendment "if the officer *could* have stopped the vehicle for a traffic infraction."[86] In other words, so long as a police officer pulls over a driver for a traffic violation, the stop is protected. Under the "could" test, police officers' motives are irrelevant and not subject to inquiry "so long as police do no more than they are objectively authorized and legally permitted to do . . . ."[87] The "could" test thus ignores the officer's subjective intent as well as the possibility that the stop was made on the basis of discriminatory animus.[88] Therefore, this test places only a minimal limitation on police discretion: the jurisdiction's motor vehicle operation statute.[89] This is significant because a jurisdiction's motor vehicle operation statute is "usually a highly detailed regulatory code that, if enforced rigidly, would eventually snare even the most punctilious, perfectionist driver."[90]

2. *The "Would" Test*

The "would" test, adopted by a minority of circuits,[91] is a modified objective test. The Eleventh Circuit enunciated the test in *United States v. Smith*,[92] a case in which the court found that a police officer's

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85 Eight circuits have adopted the "could" test. *See* United States v. Botero-Ospinoza, 71 F.3d 783, 787 (10th Cir. 1995) (en banc), *cert. denied*, 116 S. Ct. 2529 (1996); United States v. Johnson, 63 F.3d 242, 245-47 (3rd Cir. 1995); United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir. 1994); United States v. Jeffus, 22 F.3d 554, 557 (4th Cir. 1994); United States v. Myers, 990 F.2d 1083, 1085 (8th Cir. 1993); United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir. 1989), *cert. denied*, 502 U.S. 962 (1991); United States v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc). The Sixth Circuit, in *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993), adopted a variation that is functionally similar to the "could" test. The *Ferguson* court held that:

> so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment. We focus . . . on whether this particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop . . . It is also irrelevant whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the officer making the stop.

Id. at 391. For further discussion of this variation, see generally Campbell, *supra* note 29.

86 Campbell, *supra* note 29, at 280 (emphasis added).

87 United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc).

88 Campbell, *supra* note 29, at 280.

89 *Id.*

90 *Id.*

91 Two circuits have adopted the "would" test. *See* United States v. Cannon, 29 F.3d 472, 474-76 (9th Cir. 1994); United States v. Valdez, 931 F.2d 1448, 1450 (11th Cir. 1991); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986).

92 799 F.2d 704 (11th Cir. 1986).

stop of the defendant's automobile based on a quick instance of "weaving" was unreasonable:[93] "[I]n determining when an investigatory stop is unreasonably pretextual, the proper inquiry . . . is . . . whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose. . . ."[94] The courts adopting this test agree with the "could" courts that the appropriate examination of the facts and circumstances of a pretextual traffic stop is an objective one.[95] However, these courts disagree with the "could" courts regarding the nature of the objective elements used in the inquiry.[96] One commentator framed the issue well, stating that the "would" test

> establishes a modest judicial check on police, by imposing a "believability" standard: While an officer may profess to have been concerned with traffic safety, do the circumstances, or, for example, local citation-writing statistics, suggest that the stop would not have taken place if the driver were not in an unusual place at an unusual time, or of the wrong racial or ethnic background, or already under observation for some graver offense? The "would" test also proclaims, at least by implication, that the motor vehicle statutes should not be a means to the end of, say, narcotics law enforcement, but an end in themselves.[97]

The courts utilizing the "would" standard reason that it is the proper standard because it affords advantageous judicial review of discretionary police conduct while providing the requirement of an objective inquiry into Fourth Amendment action.[98]

III. Factual and Procedural Background

On the evening of June 10, 1993, plain-clothes District of Columbia police officers were patrolling a "high drug area" of Washington, D.C. in an unmarked car.[99] Officers Efraim Soto, Jr. and Homer Littlejohn were in a car driven by another officer, Investigator Tony Howard.[100] As the officers turned left off of 37th Place onto Ely Place, Officer Soto noticed a dark Nissan Pathfinder with temporary license plates at a stop sign on 37th Place in a school zone.[101] The Pathfinder's driver, James L. Brown, was looking down into the lap of the passenger to his right, Michael A. Whren.[102] As the officers pro-

93 *Id.* at 711.
94 *Id.* at 706-07 (emphasis added).
95 Pulliam, *supra* note 10, at 484-85.
96 *Id.* at 485.
97 Campbell, *supra* note 29, at 280.
98 Pulliam, *supra* note 10, at 485.
99 Whren v. United States, 116 S. Ct. 1769, 1772 (1996).
100 United States v. Whren, 53 F.3d 371, 372 (1995).
101 *Id.*
102 *Id.*

ceeded slowly onto 37th Place, Soto continued to watch the Pathfinder, which remained stopped at the intersection for more than 20 seconds, obstructing at least one car behind it.[103] Officer Soto's suspicions aroused, the officers initiated a U-turn in order to continue surveillance of the Pathfinder.[104] As the officers executed the U-turn, the Pathfinder suddenly turned right onto Ely Place without signalling.[105] The Pathfinder "sped off quickly" and proceeded at an "unreasonable speed."[106]

The officers followed the Pathfinder and pulled up parallel to the vehicle when it stopped behind other traffic at an intersection.[107] At this point, Officer Soto did not intend to issue a traffic ticket.[108] He only wished to ask the driver of the Pathfinder why he obstructed traffic and sped off without signalling.[109] Officer Soto exited the unmarked car and approached the driver's-side door of the Pathfinder.[110] After identifying himself as a police officer, he directed the driver to put the vehicle in park.[111] As he spoke, Officer Soto noticed that the passenger, Whren, held two large bags of what he suspected to be crack cocaine.[112] The officers immediately arrested Brown and Whren, both of whom were African-American,[113] and searched the Pathfinder, recovering several types of illegal drugs, including marijuana laced with PCP and crack cocaine.[114]

Brown and Whren were charged in a four-count indictment with (1) possession with intent to distribute 50 grams or more of cocaine base, or crack, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(iii); (2) possession with intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a); (3) possession of marijuana in violation of 21 U.S.C. § 844(a); and (4) possession of phencyclidine (PCP) in violation of 21 U.S.C. § 844(a).[115]

Brown and Whren moved to suppress the physical evidence.[116] They argued that the traffic stop had not been merited by probable

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103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.* at 373.
109 *Id.*
110 *Id.* at 372-73.
111 *Id.* at 373.
112 *Id.*
113 *Whren*, 116 S. Ct. at 1773.
114 *Whren*, 53 F.3d at 373.
115 *Id.* at 372.
116 *Whren*, 116 S. Ct. at 1772.

cause or even reasonable suspicion to believe that they had been engaged in illegal narcotics activity, and that the officers' asserted ground for stopping the Pathfinder was pretextual.[117] The district court noted that the facts surrounding the traffic stop were not disputed and that there was no evidence that demonstrated that the officers' actions were different from those of an ordinary traffic stop.[118] Accordingly, the court concluded that the government demonstrated that the officers' conduct was "appropriate" and denied the suppression motion.[119] Brown and Whren were subsequently convicted on all four counts.[120]

On appeal, Brown and Whren urged the Court of Appeals for the District of Columbia Circuit to adopt the minority view "would" test.[121] In rejecting Brown and Whren's argument, the court utilized the "could" standard employed by the majority of circuits.[122] The Court stated two reasons why the majority rule provided a "more principled method of determining reasonableness."[123] First, consistent with previous Supreme Court admonitions, it eliminated the need for a court to inquire into the subjective state of mind of a police officer.[124] Second, it provided a "principled limitation" on the abuse of police power, as police officers could not stop a vehicle "unless they ha[d] probable cause to believe a traffic violation ha[d] occurred or a reasonable suspicion of unlawful conduct based upon articulable facts."[125] Applying this standard to the instant facts, the appeals court found that the officers had probable cause to stop the Pathfinder because they witnessed Brown's traffic violations.[126] Accordingly, the court rejected the defendants' Fourth Amendment arguments, and sustained their convictions.[127]

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117 *Id.*

118 *Whren*, 53 F.3d at 373.

119 *Id.*

120 *Id.*

121 *Id.* at 374. For a discussion of the "would" test, see *supra* notes 91-98 and accompanying text.

122 *Whren*, 53 F.3d at 375. For a discussion of the "could" test, see *supra* notes 85-90 and accompanying text.

123 *Whren*, 53 F.3d at 375.

124 *Id.*

125 *Id.* at 376.

126 *Id.* The provisions of the District of Columbia traffic code that the officers had probable cause to believe Brown had violated were D.C. MUN. REGS., tit. 18, §§ 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of the vehicle"); 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions."). Whren v. United States, 116 S. Ct. 1769, 1772-73 (1996).

127 *Whren*, 53 F.3d at 376.

The United States Supreme Court granted certiorari[128] to consider whether the officers' temporary detention of Brown and Whren violated the Fourth Amendment prohibition against unreasonable searches and seizures.[129]

IV. SUMMARY OF THE COURT'S OPINION

In a unanimous opinion written by Justice Scalia, the United States Supreme Court endorsed "the traditional common-law rule that probable cause justifies a search and seizure" in "run-of-the-mine"[130] cases.[131] Utilizing this rule, the Court found that the traffic stop at issue was "reasonable" under the Fourth Amendment, and upheld the petitioners' convictions.[132]

The Court began its opinion with a review of the requirements articulated in *Delaware v. Prouse*[133] regarding the temporary detention of motorists.[134] The Court asserted that only "reasonable" temporary detentions of motorists pass constitutional muster and then concluded that "reasonable" meant probable cause existed to believe a traffic violation has occurred.[135]

Next, the Court addressed the petitioners' contention that the "reasonable" probable cause standard was not sufficient "in the unique context of civil traffic regulations" and that the Fourth Amendment test for traffic stops should instead be whether a "reasonable" police officer, "would have made the stop for the reason given."[136] The Court declared petitioners' reliance on *Florida v. Wells*,[137] *Colorado v. Bertine*,[138] and *New York v. Burger*[139] to be misplaced, stating that "only an undiscerning reader would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to be-

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

129 *Id.* at 1771-72.

130 "Run-of-the-mine" is defined as "ordinary, mediocre, run-of-mill." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1990 (1966).

131 *Whren*, 116 S. Ct. at 1777.

132 *Id.*

133 440 U.S. 648 (1979). For a further discussion of this case, see *supra* notes 56-59 and accompanying text.

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

135 *Id.*

136 *Id.* at 1773.

137 495 U.S. 1 (1990). For a further discussion of this case, see *supra* notes 81-82 and accompanying text.

138 479 U.S. 367 (1987). For a further discussion of this case, see *supra* notes 77-78 and accompanying text.

139 482 U.S. 691 (1987). For a further discussion of this case, see *supra* notes 79-80 and accompanying text.

lieve that violation of law has occurred."[140] The Court likewise discarded the petitioners' reliance upon *Colorado v. Bannister*,[141] stating that the dictum upon which they relied only demonstrated the *Bannister* court's decision not to inquire into the issue at hand, not that it was certain of the issue's resolution.[142]

The Court then buttressed its endorsement of the *Prouse* probable cause standard with a discussion of *United States v. Villamonte-Marquez*,[143] *United States v. Robinson*,[144] and *Scott v. United States*[145] to foreclose the petitioners' argument that ulterior motives can invalidate police conduct justified on the basis of probable cause.[146] While the Court agreed with the petitioners that the Constitution prohibited "selective enforcement of the law based on considerations such as race,"[147] it articulated that the Equal Protection Clause, not the Fourth Amendment, serves as the constitutional basis for objecting to the intentionally discriminatory application of laws.[148] The Court added that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."[149]

Next, the opinion examined the petitioners' proposed standard of "whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[150] The petitioners argued that their standard was not "subjective" and, therefore, not inappropriate under the Supreme Court's Fourth Amendment jurisprudence.[151] The Court disagreed, finding that the proposed test, even though couched in empirical terms, was "plainly and indisputably driven by subjective considerations," and was clearly designed to combat the perceived "danger" of pretextual stops.[152] The Court also asserted that the petitioners' standard conflicted with prior Supreme

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140 *Whren*, 116 S. Ct. at 1773.

141 449 U.S. 1 (1980) (per curiam). For a further discussion of this case, see *supra* note 69.

142 *Whren*, 116 S. Ct. at 1773. The Court characterized petitioners' reliance on a statement in the per curiam *Bannister* opinion as an indication of the Supreme Court's reversal of prior law as "anomalous, to say the least." *Id.* at 1774.

143 462 U.S. 579 (1983). For a further discussion of this case, see *supra* note 55.

144 414 U.S. 218 (1973). For a further discussion of this case, see *supra* notes 30-36 and accompanying text.

145 436 U.S. 128 (1978). For a further discussion of this case, see *supra* notes 49-55 and accompanying text.

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

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

Court directives, stating that the Fourth Amendment's concern with "reasonableness" allowed certain actions to be taken in certain circumstances, regardless of the officer's subjective intent.[153] Continuing its criticism, the Court said it would be "somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."[154] While the Court acknowledged that police manuals and standard procedures might sometimes provide objective assistance in determining whether a "reasonable officer" would have acted upon a traffic violation, it concluded that "speculating about the hypothetical reaction of a hypothetical constable" would be "an exercise that might be called virtual subjectivity."[155]

Moreover, the Court maintained that Fourth Amendment search and seizure protections could not depend on police enforcement practices that varied among jurisdictions.[156] The Court utilized the petitioners' case to illustrate the difficulty of relying on local police practice to define Fourth Amendment protections.[157] The petitioners claimed that a "reasonable officer" would not have stopped the Pathfinder because the operative District of Columbia police regulations permitted plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others."[158] The Court noted that it could not apply this test in jurisdictions that employed different practices.[159] Additionally, the Court noted that this ground of invalidation would not have even applied in the District of Columbia "if Officer Soto had been wearing a uniform or patrolling in a marked police cruiser."[160]

The Court then refuted the petitioners' claim that Supreme Court precedent required police to adhere to standard procedures as an objective method of eliminating the use of pretext.[161] The Court asserted that the petitioners cited no holding to support their argument, and that they improperly relied on dicta from *Abel v. United States*[162] and *United States v. Robinson*.[163] The Court denied that indica-

153 *Id.* at 1774-75.
154 *Id.* at 1775.
155 *Id.*
156 *Id.*
157 *Id.*
158 *Id.* (quoting Metropolitan Police Dep't, Washington, D.C., General Order 303.1, pt.1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992), *reprinted in* Addendum to Brief for Petitioners, *Whren* (No. 95-5841)).
159 *Id.*
160 *Id.*
161 *Id.*
162 362 U.S. 217 (1960). For further discussion of this case, see *supra* notes 18-24 and

tions in the *Abel* decision amounted to a "proposition that failure to follow regular procedures proves (or is an operational substitute for) pretext."[164] Moreover, the Court continued by stating that *Abel* "did not involve the assertion that pretext could invalidate a search or seizure for which there was probable cause."[165] With regard to *Robinson*, the Court noted that the dictum on which the petitioners relied did not provide a resolution to the problem, but merely left the question open.[166]

Next, the Court focused on the petitioners' "elaboration" on the "reasonable officer" standard.[167] The petitioners maintained that all Fourth Amendment inquiries into traffic stops such as the instant one required the Court to balance the governmental and individual interests involved.[168] The petitioners further asserted that this balancing did not support the investigation of minor traffic infractions by plain-clothes police officers in unmarked vehicles because such investigations "only minimally advanced the government's interest in traffic safety," and actually might impair the government's interest "by producing motorist confusion and alarm."[169]

The Court acknowledged that every case involving the Fourth Amendment turned upon a "reasonableness" inquiry, and, therefore, involved "a balancing of all relevant factors."[170] However, the Court asserted that, except in rare situations that did not apply to the instant matter, "the result of that balancing is not in doubt where the search or seizure is based upon probable cause."[171] The Court remarked that actual "balancing" analysis was only necessary in cases such as *Delaware v. Prouse*,[172] which involved police encroachment without probable cause.[173] In this regard, the Court noted that *Prouse* expressly distinguished the stop involved in that case from one in which there existed probable cause to believe that a driver was in violation of a traffic or

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accompanying text.

163 414 U.S. 218 (1973). *Whren*, 116 S. Ct. at 1775-76. For further discussion of *United States v. Robinson*, see *supra* notes 30-36 and accompanying text.

164 *Whren*, 116 S. Ct. at 1775 (emphasis in original).

165 *Id.*

166 *Id.* at 1776.

167 *Id.*

168 *Id.*

169 *Id.* Petitioners relied on the D.C. Metropolitan Police regulations to bolster their contentions. *Id.*

170 *Id.*

171 *Id.*

172 440 U.S. 648 (1979). For a further discussion of this case, see *supra* notes 56-59 and accompanying text.

173 *Whren*, 116 S. Ct. at 1776.

equipment violation.[174] The Court reiterated the *Prouse* avowal that the principal method of enforcing the traffic code is acting upon observed violations of these rules which afforded the "'quantum of individualized suspicion' necessary to ensure that police discretion is sufficiently constrained."[175] The Court also relied on *United States v. Martinez-Fuerte*[176] and *United States v. Brignoni-Ponce*[177] to support the proposition that the type of detailed "balancing" analysis propounded by the petitioners was only necessary in cases involving seizures without probable cause.[178]

The opinion then addressed cases in which the Supreme Court performed a "balancing" inquiry despite the existence of probable cause.[179] The Court maintained that such cases "involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body."[180] The Court noted that the instant facts did not rise to such an extreme level.[181] Consequently, the Court maintained that these facts were "governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[182]

Finally, the Court rejected the petitioners' argument that the expansive scope of pertinent traffic and equipment regulations renders essentially every driver guilty of a violation.[183] The petitioners argued that a police officer could basically select whomever he or she wished to stop.[184] The Court maintained that it was not aware of a principle that would allow it to determine at what point a body of law becomes so vast "and so commonly violated that an infraction itself could no longer be the ordinary measure of the lawfulness of enforcement."[185] The Court further remarked that, even if it could identify such excessive codes, it did not know by what measure or by what right it could decide which specific provisions were sufficiently significant to justify

174 *Id.*
175 *Id.* (quoting *Prouse*, 440 U.S. at 654-55).
176 428 U.S. 543, 556-62 (1976) (engaged in "balancing" to uphold checkpoint stops).
177 422 U.S. 873, 882-84 (1975). For a further discussion of this case, see *supra* notes 41-44 and accompanying text.
178 *Whren*, 116 S. Ct. at 1776.
179 *Id.*
180 *Id.* at 1776-77 (citations omitted).
181 *Id.* at 1777.
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.*

enforcement.[186]

The Court concluded that there was "no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure" in cases such as the one at hand.[187] It therefore declared that the officers stop of the petitioners was "reasonable" under the Fourth Amendment, and the evidence subsequently discovered was admissible.[188] Accordingly, the Court upheld the petitioners' convictions.[189]

V. ANALYSIS

This Note argues that the *Whren* Court's holding—that a police officer's traffic stop is justified by probable cause to believe that a traffic violation has occurred—is problematic. By declining to adopt a standard that takes police officers' subjective motivations into account, the Court essentially legitimated the purely objective "could" test. This Note maintains that the *Whren* court was wrong to adopt this test for three reasons. First, by ensuring that police officers' underlying subjective intentions are not subject to judicial inquiry, the Court has effectively given police officers carte-blanche to engage in pretextual activity. This grant of unfettered discretion runs counter to the Fourth Amendment's proscriptions against arbitrary searches and seizures. Second, the Court's bright-line rule actually facilitates and, indeed, protects the use of impermissible factors, such as race or ethnic origin, by police officers to effect traffic stops. While the Court maintained that the Equal Protection Clause provides a remedy for such discriminatory stops, this Note contends that this remedy is insufficient. Finally, the Court could have selected an alternative based on a totality of the circumstances analysis—the "would" test. Given the grave problems posed by the adoption of the purely objective "could" test and the competing objectives at issue, this modified objective standard would have been the correct choice.

A. A BRIGHT-LINE RULE FACILITATES "ARBITRARY" SEARCHES AND SEIZURES

The Supreme Court's bright-line rule in *Whren*, which ignores the subjective motivations of law enforcement officers, not only fails to protect against arbitrary searches and seizures, but actually facilitates such invasions. It is well-settled that the Fourth Amendment prohibits

186 *Id.*
187 *Id.*
188 *Id.*
189 *Id.*

"arbitrary" searches and seizures.[190] As the Supreme Court has previously recognized, "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[191] Indeed, the Fourth Amendment protects individuals from seizures "conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize," and "it condemns the petty tyranny of unregulated rummagers."[192]

Police officers have been aware of the utility of using minor traffic infractions as pretexts for the investigation of other suspected crimes even before the Court's decision in *Whren*. The following actual interview statements by police officers illustrate the problem:

> You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.
> You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.
> In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.[193]

The Supreme Court was aware of the use of this type of police discretion long before *Whren*. Indeed, as far back as 1949 Justice Jackson warned: "We must remember that the extent of every privilege of search and seizure without warrant which we sustain, . . . [police] officers interpret and apply themselves and will push to the limit."[194]

It is not surprising, therefore, that Supreme Court decisions prior to *Whren* have repeatedly suggested that pretextual activity is unconstitutional.[195] In *Whren*, however, the Court turned its back to the dan-

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190 "Arbitrary" action is that which is "depending on choice or discretion" and "arising from unrestrained exercise of the will, caprice, or personal preference." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 110 (1966).

191 Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled in part on other grounds*, Mapp v. Ohio, 367 U.S. 655 (1961).

192 Amsterdam, *supra* note 8, at 411.

193 LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 131 (1967).

194 Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

195 In *United States v. Lefkowitz*, the Court stated that "[a]n arrest may not be used as a pretext to search for evidence." 285 U.S. 452, 467 (1932). In *Abel v. United States*, the Court asserted that a "bad faith" search "would indeed reveal a serious misconduct by law-enforcing officers . . . . [that] must meet stern resistance by the courts." 362 U.S. 217, 226 (1960). In the landmark *Terry v. Ohio* decision, the Court stated that "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches" were a result that it had "consistently refused to sanction." 392 U.S. 1, 22 (1968). And in *Opperman v. South Dakota*, the Court was troubled by pretextual police motives allowed to run rampant and uncontrolled by standard police procedure. *See* 428 U.S. 364, 376 (1976). Even after its elucidation of an "objective" approach to search and seizure

gers posed by pretextual police activity, allowing certain police officers to make an end-run around its own previously-constructed framework of probable cause and reasonable suspicion. Indeed, by proclaiming that the subjective motivations of police officers would not be subject to judicial scrutiny no matter what the specific circumstances of the detention, the *Whren* Court has essentially gutted Fourth Amendment protections against arbitrary searches and seizures.

Given the scope of local traffic codes and the facility with which a police officer so inclined can identify minor traffic violations, limiting traffic stops to those in which a police officer has witnessed such an infraction, as the Court did here, "is, as a practical matter, no limitation at all."[196] After *Whren*, picayune traffic violations, such as "[a] string hanging from the rearview mirror, a tire touching the shoulder stripe, a lane change signal a moment too brief, or a pause at a stop sign to look at a map, are all unquestionable grounds for seizure . . . ."[197] Therefore, after *Whren*

> if a police officer wants to stop someone for questioning and perhaps a search, but has no constitutional grounds for doing so, he need only wait until the individual gets into his car, follow him until he inevitably violates one of the myriad traffic regulations that rule the road, and use that infraction as a pretext for a stop.[198]

A police officer can also contrive a traffic violation ex post facto to justify an otherwise unlawful intrusion. Thus, in the wake of Court's ruling in *Whren*, a motorist can be subjected "to unfettered governmental intrusion every time [he or she] ente[rs] an automobile."[199]

Unfortunately, there is an even greater danger underlying the *Whren* court's enormous grant of discretionary power to the police to effect temporary detentions of vehicles. Using these seizures, the government can "do indirectly through the use of a combination of Fourth Amendment exceptions what it cannot do directly."[200] First, a police officer can effect a traffic stop using a minor traffic violation as a basis. The officer can then arrest the driver for the infraction, and perform, as incidental to the arrest, searches of both the driver's per-

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issues beginning with *Scott v. United States*, 436 U.S. 128 (1978), the Supreme Court demonstrated concern with pretextual police activity in cases such as *Colorado v. Bannister*, 440 U.S. 1 (1980) (per curiam), *Colorado v. Bertine*, 479 U.S. 367 (1987), *New York v. Burger*, 483 U.S. 691 (1987), and *Florida v. Wells*, 495 U.S. 1 (1990). These decisions suggest that the Court has always exhibited concern over police officers' subjective motives, albeit through objective means of measurement. *See* Campbell, *supra* note 29, at 294.

196 Brief for the Petitioners at 29, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841).

197 *Id.*

198 David Cole, *See No Evil, Hear No Evil*, RECORDER, Aug. 28, 1996, at 4.

199 Delaware v. Prouse, 440 U.S. 648, 663 (1979).

200 Pulliam, *supra* note 10, at 492.

son and automobile, effectively "bootstrapping" the search onto the valid traffic stop.[201] As one commentator noted:

> This combination of exceptions results in a Fourth Amendment warrant doctrine that an informed police force can use in tandem to construct a constitutionally valid pretextual search of an individual's vehicle based solely on a broken tail light or speeding violation. Thus, the whole can become greater than the sum of its individual parts.[202]

The egregious end-result is that an individual can lose all Fourth Amendment protections against arbitrary seizures *and* searches when he or she gets behind the wheel of a car.[203]

Since its decision in *Whren*, the Court has further exacerbated the problem. In the term immediately following *Whren*, the Court, in *Ohio v. Robinette*,[204] ruled that once police have stopped a car for a traffic violation, they may go on to ask the driver's permission to search the car without first informing the driver that the routine, traffic detention is over, and that he or she is, in fact, "free to go."[205] In the wake

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201 Regarding the search of the arrestee's person after the arrest, see *United States v. Robinson*, 414 U.S. 218, 222-23 n.2 (1973) (full search of arrestee's person is permitted for every custodial arrest, including those for minor traffic infractions); *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) ("[i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody . . . [T]he arguable absence of 'evidentiary' purpose for a search incident to a lawful arrest is not controlling."). Regarding the search of the arrestee's car after an arrest, see *New York v. Belton*, 453 U.S. 454, 460 (1981) (police officer, as contemporaneous incident of lawful custodial arrest of automobile's occupant, may search auto's passenger compartment and any containers found therein) (footnote omitted). For a discussion of "bootstrapping," see generally Pulliam, *supra* note 10, at 492-93.

202 Pulliam, *supra* note 10, at 493.

203 Indeed, police officers bent on conducting a search of a person's car now can use the traffic code in essentially the same way as British customs officers used the hated writs of assistance in colonial America. Arguably one of the major impetuses of the Revolutionary War, the "writs of assistance" gave British customs officers the unrestricted authority to forcibly enter private homes and rummage indiscriminately. This author argues that the test enunciated in *Whren* grants, as James Otis said in his fiery arguments against the writs of assistance, "a power that places the liberty of every man in the hands of every petty officer." John Adams, Abstract of the Argument, *in* 2 LEGAL PAPERS OF JOHN ADAMS 141-42 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). For a discussion of the writs of assistance, see generally M.H. SMITH, THE WRITS OF ASSISTANCE CASE (1978). For a discussion of how the writs of assistance influenced the drafters of the Fourth Amendment, see Amsterdam, *supra* note 8, at 398-99.

204 117 S. Ct. 417 (1996).

205 *See id.* at 421. In *Robinette*, a sheriff's deputy stopped the defendant for speeding on an interstate highway in Ohio. The deputy conducted a background check, and finding the defendant's documents in order, gave him a warning and returned his driver's license. *Id.* at 419. At this point, the deputy asked the defendant, "One question before you get gone: Are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" *Id.* (quoting App. to Brief for Respondent 2 (internal quotation marks omitted)). The defendant answered "no" to these questions, and the deputy then asked if he could search the car. *Id.* The defendant consented, and the deputy searched the car, finding a small quantity of marijuana and a pill of methylenediox-

of *Robinette*, a police officer may now use *Whren* as the constitutional basis to effect a traffic stop for a picayune infraction, and then "'turn [the] routine traffic stop into a fishing expedition for unrelated criminal activity.'"[206]

In its most recent case involving traffic stops—*Maryland v. Wilson*[207]—the Court granted police officers the ability to order passengers out of the vehicles they stop, even without any suspicion that the passenger has committed a crime or presents a threat to the officer's safety.[208] In his dissent, Justice Kennedy acknowledged the dangers lurking in *Whren*, asserting that "[t]he practical effect of [the Court's] holding in *Whren* . . . is to allow police to stop vehicles in almost countless circumstances."[209] Kennedy further maintained that the rule announced in *Wilson*, when coupled with the Court's prior *Whren* decision, "puts tens of millions of passengers at risk of arbitrary control by the police."[210] Indeed, cases such as *Robinette* and *Wilson* are indicative of the further "whittling away" of Fourth Amendment protections for individuals who use automobiles.

B. A BRIGHT-LINE RULE FACILITATES AND PROTECTS DISCRIMINATORY ENFORCEMENT BASED ON IMPERMISSIBLE FACTORS

Besides undercutting the protections of the Fourth Amendment in a general sense, the *Whren* court's bright-line rule condoning pretextual police activity actually facilitates and protects discriminatory enforcement. As one federal judge commented:

> The risk inherent in such a practice is that some police officers will use the pretext of traffic violations or other minor infractions to harass members of groups identified by factors that are totally impermissible as a basis for law enforcement activity—factors such as race or ethnic origin, or simply appearances that some police officers do not like, such as young men with long hair, jewelry, and flashy clothing.[211]

Therefore, if the Fourth Amendment is "concerned with avoiding in-

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ymethamphetamine ("ecstasy"). *Id.*

206 Linda Greenhouse, *Supreme Court Upholds Police Methods in Vehicle Drug Searches*, N.Y. TIMES, Nov. 19, 1996, at A23 (quoting the Ohio Supreme Court).

207 117 S. Ct. 882 (1997).

208 *See id.* at 886. In *Wilson*, a state trooper pulled over a car for speeding on an interstate highway in Maryland. During the encounter, the state trooper "noticed that the front-seat passenger . . . was sweating and . . . appeared extremely nervous," and ordered the passenger out of the vehicle. *Id.* at 884. As the passenger obeyed the state trooper's order and exited the car, a quantity of crack cocaine fell to the ground. *Id.*

209 *Id.* at 890 (Kennedy, J., dissenting).

210 *Id.* (Kennedy, J., dissenting).

211 United States v. Scopo, 19 F.3d 777, 785-86 (2d Cir. 1994) (Newman, C.J., concurring).

defensible inequities in treatment,"[212] the Court's ruling further undercuts the goals of the Fourth Amendment.

1. The Impact on Members of Minority Groups

While the *Whren* Court's enormous grant of discretionary power to police officers impacts upon all motorists, some will, inevitably, be more affected than others. Indeed, members of minority groups will be most affected, as evidence supports the proposition that they are already the victims of discriminatory enforcement in the context of traffic stops.[213]

In 1992, reporters from the *Orlando Sentinel* obtained 148 hours of videotaped traffic stops from the Sheriff's drug squad in Volusia County, Florida.[214] The videos, which were made by dash-mounted cameras in deputies' cars, documented 1,084 traffic stops of motorists along Interstate 95.[215] After viewing the videos, the reporters found that while African-Americans and Hispanics accounted for only five percent of the drivers on the highway, they accounted for almost 70 percent of those stopped.[216] Of the cars that were searched, more than 80 percent were driven by African-Americans and Hispanics.[217] Most stops were for minor violations, such as "following too closely," "swerving," "speeding 1-10 mph over limit," and "burned out tag light."[218] Although all of the stops were reportedly based on such legitimate traffic infractions, less than one percent—only nine drivers out of the 1,084 drivers stopped—actually received traffic tickets.[219] The videos also showed that, on average, stops of African-American and Hispanic drivers lasted over twice as long as those of white drivers—12.1 minutes vs. 5.1 minutes.[220]

Other examples of the practice abound. A New Jersey state court judge reviewing traffic stops that occurred on the New Jersey Turnpike between 1988 and 1991 discovered that even though there was

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212 JOHN HART ELY, DEMOCRACY AND DISTRUST 97 (1980). For a discussion of how the Fourth Amendment is "an another harbinger of the Equal Protection Clause," see *id.* at 96-97.

213 For a complete and detailed discussion of this phenomenon, see generally David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

214 Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1. For a detailed discussion of this activity in Volusia County, see also Harris, *supra* note 213, at 561-63.

215 Brazil & Berry, *supra* note 214, at A1.

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

no notable racial distinction in observable traffic violations, there was a large racial disparity in the drivers who were stopped.[221] While African-Americans constituted 13.5 percent of drivers on the road, they constituted 46 percent of those stopped.[222] Along the same lines, records maintained by the Maryland State Police indicate that of the 732 motorists stopped and searched from January 1995 through June 1996, 79 percent of them were African-American and five percent were Hispanic.[223] Indeed, pretextual traffic stops are so repeatedly targeted at African-Americans that such stops have ironically come to be known in the African-American community as "DWB"—"Driving While Black."[224]

2. The Insufficiency of Equal Protection Clause-based Remedies

Perhaps the most problematic implication of *Whren* is that, even if affirmative evidence exists that an officer effecting a traffic stop subjectively relied on an unconstitutional pretextual basis, such as the motorist's race or ethnic origin, the constitutionality of the stop is not an issue so long as the officer can claim that he or she was acting in response to an observed "traffic violation." While the *Whren* court noted that the Constitution prohibits "selective enforcement of the law based on considerations such as race,"[225] the Court asserted that the proper tool to challenge such impermissible stops is the Equal Protection Clause.[226] The Court's reliance on the Equal Protection Clause, however, is problematic and impracticable. Indeed, after *Whren*, such impermissible traffic stops are virtually unchallengeable on constitutional grounds.

a. The Equal Protection Clause and the Selective Enforcement Claim

The Equal Protection Clause gives rise to selective enforcement and selective prosecution claims "because discriminatory application of the law amounts to a denial of equal justice."[227] A selective enforcement claim can form the basis for a civil suit for monetary damages or injunctive relief under 42 U.S.C. § 1983, or can be raised as an affirmative defense to a criminal charge.[228] Such a claim does not assail a

221 Cole, *supra* note 198, at 4.
222 *Id.*
223 Harris, *supra* note 213, at 563-66 (citing statistics gathered by the Maryland State Police).
224 Cole, *supra* note 198, at 4. *See also* Harris, *supra* note 213, at 560-61.
225 United States v. Whren, 116 S. Ct. 1769, 1774 (1996).
226 *Id.*
227 Buckenberger, *supra* note 50, at 492-93.
228 *Id.* at 493.

case's merits.[229] Rather, the claim challenges police enforcement of a law against one person and the lack of enforcement of that same law against others who are as apparently equally liable and discernible.[230] The selective enforcement remedy is appealing because it allows the introduction of incriminating evidence at a criminal trial, while still providing a remedy for the violation of a defendant's constitutional rights. The effectiveness of the selective enforcement remedy is dubious, however, because of the strict legal standards necessary to establish a claim and the practical improbability of winning on the merits.[231]

b. Problems with Establishing a Selective Enforcement Claim

A selective enforcement claim is to be judged according to "ordinary equal protection standards."[232] To succeed, an individual must show (1) that the practice of selective enforcement "had a discriminatory effect" and (2) "that it was motivated by a discriminatory purpose."[233] As to the first element, it is highly unlikely that a claimant could introduce the requisite proof of specific instances of nonenforcement.[234] For example, while traffic citation records show how often the traffic laws are enforced, they do not indicate how often such violations are disregarded.[235] With regards to the second element, even if a plaintiff is able to obtain the requisite evidence of nonenforcement, this evidence will probably be insufficient to show that the officer was motivated by a discriminatory purpose.[236] Indeed, courts are not generally willing to infer discriminatory intent solely from nonenforcement statistics, and additional evidence of intent will most likely be in police departments' control.[237]

A claimant attempting to raise a selective enforcement claim is, as one commentator noted, "placed in a Catch-22 type bind . . . [because] [he or she] cannot obtain discovery unless [he or] she first makes a threshold showing . . . . Yet making a sufficient preliminary showing of discriminatory intent may be impossible without some discovery."[238] Because of the deficiency of documentary evidence denot-

229 *Id.* at 492.
230 *Id.* (citation omitted).
231 *Id. See also id.* at 498.
232 Wayte v. United States, 470 U.S. 598, 608 (1985).
233 *Id.*
234 Buckenberger, *supra* note 50, at 496-97.
235 *Id.* at 497.
236 *Id.*
237 *Id.*
238 Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373-74 (1987).

ing nonenforcement and the impediments to obtaining discovery of evidence, the selective enforcement claimant may ironically be compelled to rely on the arresting officer's testimony in order to succeed.[239] Indeed, "[a]n equal protection claim in the selective traffic enforcement setting would require determination of the very subjective intent of the officer that [the Supreme Court in *Whren* stated] is so difficult to establish."[240]

Besides the above obstacles to establishing legal sufficiency, there are other practical difficulties with the Court's exclusive reliance on the Equal Protection Clause to remedy a pattern of impermissible discrimination in the context of traffic stops.[241] First, it is not likely that a jury will award significant monetary damages to an individual who has been convicted of a crime.[242] Indeed, even given statutory guarantees of minimum recovery, empathy for the claimant is often necessary to establish liability.[243] Second, it is debatable whether monetary damages constitute adequate compensation to an individual who has been incarcerated as a result of selective enforcement.[244] Finally, in the case of a defendant who has been convicted based on evidence obtained as a result of selective enforcement, institution of a selective enforcement action for monetary damages under 42 U.S.C. § 1983 may be prevented by the doctrine of collateral estoppel.[245]

3. Consequences of the Insufficient Remedy

The inability of the Equal Protection Clause to curb discriminatory application the laws in the context of traffic stops has grave consequences. The perception that the law discriminates on the basis of factors such as race erodes respect for the criminal justice system. As one criminologist stated:

> The ability of police to do their jobs efficiently and effectively presupposes a high level of community support and cooperation. If everyone becomes distrustful of the police, or worse yet, fearful of them, you create a dangerous vacuum in between law enforcement and the public in which everyone loses.[246]

On this same note, the United States Court of Appeals for the Second

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239 Buckenberger, *supra* note 50, at 497.

240 Reply Brief for the Petitioners at 19, Whren v. United States, 116 S.Ct. 1769 (1996) (No. 95-5841).

241 Buckenberger, *supra* note 50, at 498.

242 *Id.*

243 *See id.*

244 *Id.*

245 *Id.*

246 Richard C. Reuben, *Police Under the Gun*, A.B.A. J., June 1996, at 44 (quoting Charles Thomas, criminologist at University of Florida).

Circuit stated, "Nothing can corrode respect for the law more than the knowledge that the government looks beyond the law itself to arbitrary considerations such as race . . . as a basis for determining its applicability."[247] One commentator has described the perception that the law is enforced discriminatorily against African-Americans as "[t]he single greatest threat to the legitimacy of the criminal justice system."[248] This same commentator notes that "[t]he cost of that perception is revealed in all sorts of ways, from the racially divided reactions to the O.J. Simpson verdict [in the criminal case], to the persistently high crime rate in the black community."[249] No matter which way, it is clear that this situation can only do harm.

C. THE COURT SHOULD HAVE ADOPTED THE "WOULD" TEST, WHICH TAKES LAW ENFORCEMENT OFFICERS' SUBJECTIVE MOTIVATIONS INTO ACCOUNT, AND IS CONSISTENT WITH SUPREME COURT PRECEDENT

The root of the problem with the *Whren* decision lies in the Court's resolution that a police officer's subjective motivations are irrelevant in an analysis of the constitutionality of a search or seizure.[250] On the contrary, the Court should have adopted the modified objective "would" test, as it takes police officers' subjective motivations into account in a way that is consistent with Supreme Court precedent, and better addresses the competing objectives at issue.

In reaching its conclusion, the *Whren* court relied on its prior decisions in *Scott v. United States*,[251] *United States v. Villamonte-Marquez*,[252] and *United States v. Robinson*.[253] While these cases suggest that police officers' subjective motivations should be beyond judicial inquiry, they do not foreclose courts from second-guessing "police conduct for its comportment with the underlying policies that inform the amendment,"[254] nor do they suggest "that an officer's possible or likely motives are never material to the Fourth Amendment inquiry."[255] In fact, "[t]he whole point of Fourth Amendment doctrine has been to send

247 Cole, *supra* note 198, at 4 (quoting the U.S. Court of Appeals for the Second Circuit).

248 *Id.*

249 *Id.*

250 *See* Whren v. United States, 116 S. Ct 1769, 1774 (1996).

251 436 U.S. 128 (1978). For a discussion of this case, see *supra* notes 49-55 and accompanying text.

252 462 U.S. 579 (1983). For a discussion of this case, see *supra* note 55.

253 414 U.S. 218 (1983). For a discussion of this case, see *supra* notes 30-36 and accompanying text. *Whren*, 116 S. Ct. at 1774.

254 Campbell, *supra* note 29, at 293.

255 *Id.*

messages to officers about their conduct in order to protect constitutional values."[256] Therefore, it would not make sense to ignore the actual reasons that police officers act, and, instead, only consider whether there might be a satisfactory reason that could justify the behavior of the police officer.[257] Indeed, "[n]othing in [the Supreme] Court's Fourth Amendment jurisprudence . . . requires a trial judge to ignore evidence of unconstitutional motive when it comes to light."[258]

With this in mind, the proper standard to be applied in the context of determining the constitutionality of traffic stops is the "would" test, which asks whether, under the same circumstances, a "reasonable officer" would have made the stop for the reason given.[259] This modified objective standard is no different from the *Terry v. Ohio* framework which has been "applied in every other variety of brief, on-the-street seizure. . . ."[260] In *Terry*, the Court held that seizures are permissible only if they are shown to be objectively reasonable in light of the totality of the circumstances.[261] The point of *Terry* is:

> that while the officer's actual subjective motives in making a search or seizure may be beyond judicial scrutiny, the "objective" officer test—the "man of reasonable caution" hypothesized—is a means of ensuring compliance with a minimum standard that, in its application, eliminates a great deal of police conduct tainted with subjectively improper motives . . . . While the test may be an "objective" one, the evil it is aimed at—the "hunch"—is most assuredly a creature of the officer's subjective consciousness.[262]

Using the "would" test, police officers' subjective intentions are not the sole factor in the constitutional analysis. As under the *Terry* rationale, they are but one part of the totality of the circumstances analysis.

Despite claims that the "would" standard is unworkable, the *Terry* foundation has been applied successfully to a wide variety of factual situations since it was announced in 1968.[263] For example, deciding whether a reasonable officer would effect a stop for a minor traffic infraction is no more arduous than determining the reasonableness of

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256 Brief Amicus Curiae of the American Civil Liberties Union at 32, *Whren* (No. 95-5841).

257 *Id.*

258 *Id.* at 15.

259 For a further discussion of the "would" test, see *supra* notes 91-98 and accompanying text.

260 Brief Amicus Curiae National Association of Criminal Defense Lawyers at 17, *Whren* (No. 95-5841). Importantly, the *Terry* standard was acknowledged by the Court in arriving at its decision in *Scott*—a case upon which the *Whren* Court relied. *See* Scott v. United States, 436 U.S. 128, 137 (1978).

261 *Id.* at 10-11 (discussing Terry v. Ohio, 392 U.S. 1 (1968)).

262 Campbell, *supra* note 29, at 293-94.

263 Brief Amicus Curiae National Association of Criminal Defense Lawyers at 10, *Whren* (No. 95-5841).

a seizure based on innumerable observations in complicated, multiple-suspect cases in which knowledge and data are exchanged between police officers from different agencies with different interests.[264] Also important is the fact that most state courts addressing the issue have followed the objective totality of the circumstances model.[265] This is significant because "[w]hile the federal courts are primarily responsible for interpreting and enforcing the Constitution, the state courts quite naturally have far greater experience with the enforcement of traffic laws."[266]

The notion that the "would" test usurps the legislature's law-making function is also misplaced. Despite claims to the contrary, the "would" test does not presume that traffic violation arrests are per se unconstitutional.[267] While legislatures are authorized to determine the most appropriate means for law enforcement, courts are "entrusted with [duties] as guardians of the Bill of Rights to apply limitations upon the legislature's power."[268] Indeed, as one commentator stated, "[l]egislative mandates cannot insulate police conduct from constitutional review."[269]

In fairness, the modified objective "would" test is not ideal. However, given the tremendous negative implications of the purely objective "could" test, the "would" test, which is supported by Supreme Court precedent, is the most viable alternative.

VI. CONCLUSION

In *Whren v. United States*, the Supreme Court, in upholding the traffic stop at issue, adopted the "could test," holding that a police officer's traffic stop is justified by probable cause to believe that a traffic violation has occurred.[270] The Court concluded that police officers' subjective motives were irrelevant in an analysis of the constitutionality of searches and seizures, asserting that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[271]

The Court's decision in *Whren* is problematic for three reasons. First, by insuring that police officers' underlying subjective motivations are irrelevant in an analysis of the constitutionality of a search

264 *Id.* at 18.
265 *Id.*
266 *Id.*
267 Buckenberger, *supra* note 50, at 491.
268 United States v. Ferguson, 8 F.3d 385, 398 (6th Cir. 1993) (Jones, J., dissenting).
269 Buckenberger, *supra* note 50, at 491.
270 Whren v. United States, 116 S. Ct. 1769, 1774 (1996).
271 *Id.*

and seizure, the Court has given police officers the unfettered ability to engage in pretextual activity. This grant of unhindered discretion runs squarely counter to the Fourth Amendment's proscriptions against arbitrary searches and seizures. Second, the Court's bright-line rule actually facilitates and protects the utilization of impermissible factors, such as race or ethnic origin, by police officers in effecting traffic stops. While the Court maintained that the Equal Protection Clause provides a remedy for such discriminatory stops, this remedy is insufficient, and has threatening implications. Finally, the Court should have selected an alternative standard—the "would" test—which takes police officers' subjective motivations into account as one of the factors in "totality of the circumstances" analysis. Given the grave problems posed by the adoption of the purely objective "could" test and the competing objectives at issue, the Court should have adopted this modified objective standard.

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