Kentucky Law Journal

Volume 90 | Issue 1 Article 3

2001

Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads

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Racial Profiling and *Whren*: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads

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I. INTRODUCTION

The political kaleidoscope that brought uncommon phrases like "hanging chad" and "presidential pardon" into focus also blurred a common message reflected in recent statements made by the individuals with whom those phrases are inextricably linked. President Bush called racial profiling "wrong" and asked Attorney General John Ashcroft to "develop specific recommendations to end racial profiling" in his first speech to Congress on February 27, 2001.[1] During his final days in office, President Clinton similarly urged Congress to pass a federal law banning racial profiling in an effort to complete some of the work left unfinished by his administration.[2]

In general, racial profiling refers to the police practice of using broad racial descriptions of individuals likely to be involved in a specific crime to suspect one particular individual of that crime based, in part, upon that individual's race.[3] In the context of highway patrol and drug law enforce-

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[1] *President Bush's Address to Congress on February 27, 2001*, INDIANAPOLIS STAR, Feb. 28, 2001, at A8.

[2] William Jefferson Clinton, Editorial, *Erasing America's Color Lines*, N.Y. TIMES, Jan. 14, 2001, § 4, at 17.

[3] *See* Randall Kennedy, *Suspect Policy*, NEW REPUBLIC, Sept. 13-20, 1999, at 30, 35 (defining racial profiling); *see also* JOHN MONOHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW 355 (3d ed. 1994).

ment, for example, a Louisiana State Police Department training film racially profiled potential suspects of drug trafficking as being "males of foreign nationalities, mainly Cubans, Colombians, Puerto Ricans, or other swarthy outlanders."[4] Whatever value broad racial descriptions might have as a police technique,[5] the presidential calls to end racial profiling symbolize another manifestation of our nation's " 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."[6]

The recent presidential attention to racial profiling comes approximately three years after a series of events unfolded that brought the issue to the forefront of the national consciousness. On April 23, 1998, four young men, three African-Americans and one Hispanic, set out for Durham, North Carolina, to attend a basketball camp that they hoped would net them college scholarships.[7] While traveling south on the New Jersey Turnpike in their van, two members of the New Jersey State Police stopped the van for an alleged speeding violation.[8] Within a very short time, the two white troopers fired eleven shots into the van and seriously wounded three of the unarmed boys.[9] The two troopers, according to their account of events, fired their weapons in self-defense as the van began to roll backward so as to threaten one of the trooper's lives.[10] Although the state brought attempted murder and aggravated assault charges against the two troopers,

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[4] *See* MONOHAN & WALKER, *supra* note 3, at 41 (citing United States v. Thomas, 787 F. Supp. 663, 676 (E.D. Tex. 1992)).

[5] *See* DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 283-84 (1995) (utilizing data of this nature is a reasonable tool of law enforcement because of the statistical differences in criminality between the races—this is "a kind of rational discrimination"). *But see* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 146-48 (1997) (arguing that tolerating any involvement of race in police decision-making processes is equivalent to tolerating race as the potentially decisive characteristic; as a result, police decision-making should be race neutral because making race-based decisions sends the wrong message given the nation's history of making racial distinctions).

[6] McCleskey v. Kemp, 481 U.S. 279, 309 (1987) (citing Batson v. Kentucky, 476 U.S. 79, 85 (1986)).

[7] David Kocieniewski, *Reported Plea Bargaining in Turnpike Shooting Causes Concern in New Jersey*, N.Y. TIMES, Oct. 20, 2000, at B6 [hereinafter Kocieniewski, *Reported Plea Bargaining*]; Owen Moritz, *N.J. Att'y General: We Targeted Minorities*, DAILY NEWS (New York), Nov. 29, 2000, at 29.

[8] David Kocieniewski, *U.S. to Open Civil Rights Inquiry in New Jersey Turnpike Shooting*, N.Y. TIMES, Nov. 4, 2000, at A1 [hereinafter Kocieniewski, *U.S. to Open Civil Rights Inquiry*].

[9] *Id.* (noting that the troopers opened fire "[w]ithin a minute").

[10] *Id.*

a New Jersey judge found that state prosecutors violated the troopers' civil rights during a grand jury hearing and dismissed the charges.[11]

The judge's decision to dismiss all charges against the troopers outraged civil rights leaders who viewed the incident as yet another instance where police unfairly targeted racial minorities on the road for criminal investigation.[12] In fact, minority drivers in New Jersey had complained that police singled them out for inspection on the state's thoroughfares based upon nothing more than skin color for years prior to the 1998 Turnpike shooting.[13] Amid the highly charged political climate and public scrutiny, the Attorney General of New Jersey released 91,000 pages of internal state records documenting New Jersey state troopers' searches of automobiles on the Turnpike over the past decade.[14] For example, one 1998 New Jersey

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[11] David Kocieniewski, *Charges Dismissed in Shooting Case Against Troopers*, N.Y. TIMES, Nov. 1, 2000, at A1 [hereinafter Kocieniewski, *Charges Dismissed in Shooting Case*] (stating that the judge ruled that "prosecutors had violated the troopers' civil rights by taking so inappropriately adversarial an approach before the grand jury that the hearings were essentially a 'mini-trial.'"); *see also* Kocieniewski, *U.S. to Open Civil Rights Inquiry*, *supra* note 8 (reciting that the judge criticized prosecutors for failing to provide the grand jury with proper instruction as to when police are justified in using force); Kocieniewski, *Reported Plea Bargaining*, *supra* note 7 (reporting that two witnesses came forth nearly two years after the shooting and gave testimony that corroborated some of the troopers' account of the incident).

[12] *See* Kocieniewski, *U.S. to Open Civil Rights Inquiry*, *supra* note 8; *see also* Kocieniewski, *Charges Dismissed in Shooting Case*, *supra* note 11 (stating that the decision so angered civil rights leaders that they planned to ask the Justice Department to handle the case because, according to one civil rights leader, "the judge's decision was the latest sign that the state government lacked both the ability and the resolve to address the problem of racial discrimination").

[13] *See* Kocieniewski, *U.S. to Open Civil Rights Inquiry*, *supra* note 8; *see also* Kocieniewski, *Charges Dismissed in Shooting Case*, *supra* note 11 (reporting that African-American and Latino drivers asserted that they had been stopped on New Jersey highways because of their race for more than ten years).

[14] David Kocieniewski & Robert Hanley, *Racial Profiling Was the Routine, New Jersey Finds*, N.Y. TIMES, Nov. 28, 2000, at A1 [hereinafter Kocieniewski & Hanley, *Racial Profiling*] (noting that the attorney general released the documents on November 27, 2000); *see also* Kocieniewski, *Charges Dismissed in Shooting Case*, *supra* note 11 (adding to the charged political climate was the fact that a justice of the New Jersey Supreme Court was the attorney general of New Jersey when several important decisions in the case were made. Not only did evidence of the attorney general's knowledge of race-based stops surface, but evidence also indicated that the prosecutorial abuse occurred, in part, because of the need to quell the public scrutiny of the police. The abuse that troubled the judge when he dismissed the charges against the officers occurred while the state legislature

report prepared by the state police intelligence bureau revealed that police targeted specific roadways thought to be arteries of the drug and weapon trades frequented by minority offenders to further their "criminal, particularly narcotics-related, endeavors."[15] Moreover, the documents revealed that eight out of every ten automobile searches performed by state troopers during most of the preceding ten years were conducted on vehicles driven by African-Americans or Hispanics.[16] Statistically, thirty percent of these searches resulted in the seizure of contraband while seventy percent of the searches proved utterly fruitless.[17] Based upon the compelling evidence that supported the allegations of the State's minority drivers, both the Governor and Attorney General of New Jersey admitted that the New Jersey State Police unfairly targeted minority drivers by using a racial profile.[18]

Evidence, like that from New Jersey, suggests that the practice of racial profiling, at least on its face, violates the protection guaranteed citizens by the Fourth Amendment. Included in the Constitution as both a response to abuses experienced under English law and a political compromise,[19] the Fourth Amendment declares that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

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considered the attorney general's nomination to the state supreme court); *see also* Laura Mansnerus, *Racial Profiling Case in New Jersey Puts Supreme Court Justice Under More Scrutiny*, N.Y. TIMES, Nov. 3, 2000, at B4 (describing the troubles of New Jersey Supreme Court Justice Peter G. Verniero).

[15] David Kocieniewski & Robert Hanley, *An Inside Story of Racial Bias and Denial: New Jersey Files Reveal Drama Behind Profiling*, N.Y. TIMES, Dec. 3, 2000, § 1, at 53 [hereinafter Kocieniewski & Hanley, *An Inside Story*].

[16] Kocieniewski & Hanley, *Racial Profiling*, *supra* note 14.

[17] *Id.*

[18] *See id.*; *see also* Kocieniewski & Hanley, *An Inside Story*, *supra* note 15 (discussing evidence of racial profiling such as an internal memorandum suggesting that profiles could be used to identify potential criminals after making a valid traffic stop for a legitimate motor vehicle violation, training documents that labeled "Colombian men, Hispanic men, Hispanic men and black men together," and Hispanic couples as possible drug couriers, testimony from a former state trooper who asserted that he was instructed to use "the profile" to make traffic stops for searches while the violation(s) for which the stop was made were "afterthoughts," and other documents demonstrating the public officials knew about racial profiling in the state long before their admission in November, 2000).

[19] *See generally* Boyd v. United States, 116 U.S. 616, 624-32 (1886) (describing the historical background that influenced the development of the Fourth Amendment at the time of the Constitutional Convention; among the abuses levied upon the colonists were the Writs of Assistance, which authorized the search of ships or

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[20]

As a result, the Fourth Amendment not only condemns unreasonable searches, but makes it a "cardinal principle"[21] that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[22] The exceptions notwithstanding, a court generally examines the "totality-of-the-circumstances" associated with a search to see whether there is an objective justification to believe that contraband exists in a particular location to determine the reasonableness of the search.[23] In short, the Fourth Amendment seeks to prevent searches without "adequate justification" and those that are arbitrarily conducted at the whims of officials.[24]

Despite the Amendment's facial relevance to this police practice, the Supreme Court's decision in *Whren v. United States*[25] effectively blunted any efforts to challenge racial profiling under the Fourth Amendment. The

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vessels and those aboard them for the purpose of finding contraband); WILLIAM CUDDIHY, FROM GENERAL TO SPECIFIC WARRANTS: THE ORIGINS OF THE FOURTH AMENDMENT IN THE BILL OF RIGHTS 96 (Jon Kukla ed., 1987) (explaining that Anti-Federalists feared failing to include a Bill of Rights in the Constitution allowed the federal government to issue warrants and undertake searches like the English had done in the past).

[20] U.S. CONST. amend. IV.

[21] Mincey v. Arizona, 437 U.S. 385, 390 (1978).

[22] Katz v. United States, 389 U.S. 347, 357 (1967). The exceptions include, among others, exigent circumstances arising because a criminal suspect is fleeing (McDonald v. United States, 335 U.S. 451, 454-56 (1948)); safety concerns arising from impounding a car for use as evidence in a forfeiture action (Cooper v. California, 386 U.S. 58, 62 (1967)); and emergency situations that endanger lives (Warden v. Hayden, 387 U.S. 294, 298-300 (1967).

[23] Illinois v. Gates, 462 U.S. 213, 230-32 (1983) (stating that the "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause" and defining probable cause as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules").

[24] Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 449 (1990) (citing Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974)).

[25] Whren v. United States, 517 U.S. 806 (1996).

purpose of this Article is to examine searches associated with racially motivated traffic stops after *Whren* in conjunction with the "totality-of-the-circumstances" approach to reasonableness under the Fourth Amendment. Part II of this Article briefly outlines the origins of the profiling technique and its application on the roadways.[26] Part III describes the Fourth Amendment as applied to pretextual stops and its truncation in *Whren v. United States*.[27] Part IV suggests that racial profiling victims must separate their search and seizure claims to attack racial profiling under the Fourth Amendment post-*Whren*. After severing search and seizure claims, racial profiling victims can point to Court decisions regarding random stops by roving patrols and drug checkpoints to support their unreasonable search claims.[28] Because minority motorists may voluntarily consent to be searched, which makes a search reasonable under the Fourth Amendment, Part V investigates the nature of voluntary consent in the context of police-minority citizen encounters during a traffic stop.[29] Part VI describes the steps New Jersey agreed to take to fight racial profiling on its roads and concludes that more data must be recorded during traffic stops to improve protection for minority drivers before the New Jersey plan can serve as a model for federal legislation.[30]

II. ORIGINS OF THE DRUG COURIER PROFILE AND ITS APPLICATION ON THE ROAD

During the 1980s, the nation initiated a "war on drugs" that not only increased penalties for violations of narcotics laws, but also created the need to build more prisons amid the cries for more punishment of crime in general.[31] As an effort to wage a war on drugs, federal police authorities turned to profiling as a method to enhance their chances of catching drug smugglers. Knowing that drug couriers often used air travel to transport drugs, the Drug Enforcement Agency ("DEA") used information from both local law enforcement agencies and airline personnel to create a probabilistic picture of those most likely to smuggle drugs on airlines based upon shared characteristics of past offenders.[32] The DEA utilized the drug

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[26] *See* discussion *infra* Part II.

[27] *See* discussion *infra* Part III.

[28] *See* discussion *infra* Part IV.

[29] *See* discussion *infra* Part V.

[30] *See* discussion *infra* Part VI.

[31] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 460 (1993).

[32] *See id.*

courier profile by stationing plainclothes agents at various places within airports. The agents then observed travelers to see if any of them matched the characteristics of the profile.[33] If any of the travelers matched some of the profile's traits, in the eyes of the patrolling officer, the officer then scrutinized their behavior more closely and could approach sufficiently suspicious individuals for brief questioning.[34] In short, the profile allowed police officials to focus on individual travelers who matched predetermined criteria while largely ignoring most of the flying public.

Although intended to identify those most likely to commit drug trafficking offenses, the malleable nature of the drug courier profile allowed officers to use a great deal of discretion when matching travelers to the profile. In *United States v. Van Lewis*,[35] the first case to discuss the drug courier profile, the characteristics that aroused the suspicion of federal agents included: "(1) the use of small denomination currency for ticket purchases; (2) travel to and from major drug import centers, especially for short periods of time; (3) the absence of luggage or use of empty suitcases on trips which normally require extra clothing; and (4) travel under an alias."[36] As the number of court challenges increased, the number of characteristics in the undocumented profile expanded because of their discussion and favorable treatment by the courts.[37] Travelers aroused the suspicion of agents by being the first to deplane,[38] being the last to deplane,[39] being nervous during an investigative stop,[40] being calm during

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[33] *See* Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye,"* 65 N.C. L. REV. 417, 427-28 (1987).

[34] *See id.*

[35] United States v. Van Lewis, 409 F. Supp. 535 (E.D. Mich. 1976).

[36] *Id.* at 538.

[37] *See* Becton, *supra* note 33, at 436-37 (stating that "DEA agents often gave no testimony on the particular profile used. Rather, courts in some instances simply listed the observed characteristics supporting the agents' reasonable suspicions." Moreover, other courts discussed "profile references" in their decisions but did not define whether the discussion was merely illustrative or substantive evidence presented in the case).

[38] *See* United States v. Moore, 675 F. 2d 802, 803 (6th Cir. 1982).

[39] *See* United States v. Mendenhall, 446 U.S. 544, 564 (1980).

[40] *See* United States v. Tolbert, 692 F.2d 1041, 1043 (6th Cir. 1982) (noting that defendant "became increasingly nervous" during investigative stop); United States v. Elmore, 595 F.2d 1036, 1038 (5th Cir. 1979) (noting that federal agents observed defendant "appear[ ] to be extremely nervous").

an investigative stop,[41] traveling alone,[42] having a traveling companion,[43] buying a round trip ticket,[44] buying a one-way ticket,[45] carrying a small bag of luggage,[46] carrying a medium bag of luggage,[47] or carrying large pieces of luggage,[48] among a number of other factors.[49] In addition to these traits associated with travel, other characteristics not associated with travel, such as being African-American and Hispanic, also caught the attention of ever vigilant agents.[50] In sum, the "informal, apparently unwritten, checklist"[51] of all-encompassing factors that comprised the drug courier profile gave police authorities unbridled discretion to stop and investigate anyone traveling by air.

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[41] *See* United States v. Andrews, 600 F.2d 563, 564-65 (6th Cir. 1979) (stating that DEA agents noted the defendant did not appear nervous while his two companions did).

[42] *See* United States v. Smith, 574 F.2d 882, 883 (6th Cir. 1978); United States v. Ballard, 573 F.2d 913, 914 (5th Cir. 1978) (noting that DEA agent observed defendant deboard flight alone).

[43] *See* United States v. Fry, 622 F.2d 1218, 1219 (5th Cir. 1980) (noting that DEA agent observed defendant disembark flight with companion).

[44] *See* United States v. Craemer, 555 F.2d 594, 595 (6th Cir. 1977).

[45] *See* United States v. Sullivan, 625 F.2d 9, 12 (4th Cir. 1986); United States v. Lara, 638 F.2d 892, 894 (5th Cir. 1981).

[46] *See* United States v. Sanford, 658 F.2d 342, 343 (5th Cir. 1981) (noting that agents saw that the defendant was carrying only a small gym bag and the suspect's ticket had no baggage claim attached).

[47] *See* United States v. West, 495 F. Supp. 871, 872 (D. Mass. 1980) (noting that officers observed, among other things, that the defendant was carrying a medium sized bag), *vacated by* 463 U.S. 1201 (1983).

[48] *See* United States v. Borys, 766 F.2d 304, 306 (7th Cir. 1985) (noting that agents observed the defendant "carrying two bulky garment bags").

[49] For a thorough list of factors, see Becton, *supra* note 33, at 474-76. Judge Becton impressively groups the characteristics of the profile as discussed in court cases into factors involving reservations and ticket purchases, airports and flights, nervousness and associated behavior, significance of luggage, companions, personal characteristics, and miscellany. *See also* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1077-78 (1999) (providing a list of factors comprising the DEA's drug courier profile).

[50] *See* United States v. Vasquez, 612 F.2d. 1338, 1353 n.10 (2d Cir. 1979) (being Hispanic as part of the profile); United States v. Coleman, 450 F. Supp. 433, 439 n.7 (E.D. Mich. 1978) (being an African-American male as part of the profile); United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977) (being an African-American female as part of the profile).

[51] United States v. Price, 599 F.2d 494, 502 n.10 (2d Cir. 1979).

Bolstered by court approval[52] and alleged statistical success in airports,[53] the DEA decided to implement the profiling technique on the nation's highways, thereby bringing the war on drugs to the streets and individual motorists.[54] To interdict drugs on the highway, in contrast to the profile used in airports, police chiefly used broad racial descriptions as a basis to suspect individual motorists of involvement in drug trafficking. For example, one profile used to identify potential drug couriers using the highways of Florida during the 1980s, listed among other racial categories, African-American males, twenty to fifty years old; Colombian males, twenty-five to thirty-five years old; and African-Americans and Colombians wearing "lots of gold."[55] In Colorado, one sheriff's department implemented a profile of those likely to be drug traffickers that included being African-American or Hispanic as one of its key factors.[56]

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[52] *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1989). In that case the Supreme Court upheld an investigative stop at an airport because DEA agents had reasonable suspicion that the defendant committed a drug crime before approaching him for questioning. *Id.* at 10-11. Chief Justice Rehnquist, writing for the Court, directly addressed the drug courier profile issue: "A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent." *Id.* at 10.

[53] Becton, *supra* note 33, at 434 n.98 (reporting that agents found illicit drugs in seventy-seven of ninety-six encounters during the first eighteen months of a program at the Detroit International Airport and arrested 122 travelers); MONAHAN & WALKER, *supra* note 3 (reporting that one study found the suspicion of agents warranted based upon the discovery of narcotics in forty-eight percent of encounters (citing ZEDLEWSKI, THE DEA AIRPORT SURVEILLANCE PROGRAM: AN ANALYSIS OF AGENT ACTIVITIES (1984))).

[54] David Kocieniewski, *New Jersey Argues That the U.S. Wrote the Book on Race Profiling*, N.Y. TIMES, Nov. 29, 2000, at A1 [hereinafter Kocieniewski, *New Jersey Argues*] (quoting one commentator on racial profiling as stating that "[t]he D.E.A. has been the great evangelizer for racial profiling on the highways. . . . They had used the technique in airports to nab drug couriers and thought this held great promise on the highways").

[55] DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 49 (1999) (citing Joseph P. D'Ambrosio, *The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?*, 12 NOVA L. REV. 273, 289 n.120 (1987)) (among the others listed were, unusually, white males, twenty to thirty years old, and "whites wearing boots.").

[56] *Id.* at 37 (the Eagle County Sheriff's Department in Colorado is the office cited).

Police officials justify the connection between race and drug trafficking activities without individualized suspicion because, according to the former Superintendent of the New Jersey State Police, "it's most likely a minority group that's involved with that."[57] In the minds of many police officers, suspecting minorities of drug-related crimes is not racism, but "an unfortunate byproduct of sound police policies."[58] Thus, police culture embraces the vague racial descriptions that indiscriminately place minority drivers under a generalized web of suspicion for drug trafficking in the name of continuing the war on drugs.

III. RACIAL PROFILING, THE FOURTH AMENDMENT, AND THE *WHREN* DECISION

Given the broad racial descriptions of potential drug traffickers, racial profiling victims naturally turn to the Fourth Amendment as a means of redress. To place their claims squarely within the ambit of Fourth Amendment protection, racial profiling victims set forth two distinct, but closely related, claims. First, victims maintain that police exercise their discretion in enforcing the traffic code to unjustifiably seize them on the road by stopping them for minor infractions while letting other drivers, guilty of identical infractions, pass without interference.[59] To bolster their argument, racial profiling victims rely on statistical evidence such as that from Ohio indicating that minority drivers in that state are twice as likely to be stopped for a traffic infraction as a nonminority driver.[60]

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[57] Joe Donahue, *Boss Warns Troopers: Don't Target Minorities*, NEWARK-STAR LEDGER, Feb. 28, 1999, at 1 (the Governor of New Jersey fired the Superintendent following remarks such as this that appeared in the story).

[58] Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, WASH. POST, Mar. 29, 1996, at A1 (quoting a spokesman for the Maryland State Police).

[59] *See generally* Terry v. Ohio, 392 U.S. 1, 16 (1968) (recognizing that a seizure occurs "whenever a police officer accosts an individual and restrains his freedom to walk away").

[60] David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 288 (1999) [hereinafter Harris, *The Stories*] (referring to a study conducted in Akron, Dayton, Toledo, and Franklin County, Ohio, using the number of traffic tickets issued by police as an indicator of the likelihood to be stopped. According to one expert who looked at the results, the risk to which minority drivers are exposed are likely to be greater because minorities drive fewer miles than nonminorities which means police have fewer chances to stop minority drivers).

The second claim of racial profiling victims is that police violate the Fourth Amendment by conducting searches of their vehicles for drugs without probable cause[61] or reasonable suspicion[62] to believe that the driver committed a drug-related crime. Using the information revealed in the New Jersey documentation, for example, minority drivers point to the failure to recover any evidence of contraband after the search in the vast majority of cases as evidence of the absence of a justification for the search.[63] At the heart of racial profiling claims, then, is the fundamental assertion that stopping minorities for traffic infractions merely serves as a pretext to search minority driven vehicles for drugs based upon suspicion justified by nothing more than a broad racial classification of potential drug traffickers.

The Supreme Court described the justification police must have to conduct a search of a vehicle after stopping its driver for a violation of the traffic code in *Whren v. United States.*[64] In *Whren*, plainclothes officers patrolling a "high drug area" in an unmarked car observed a young driver of a truck look down into the passenger's lap while waiting at a stop sign for over twenty seconds.[65] The officers decided to follow the truck after it made a sudden right turn without signaling and then drove away at an "unreasonable" speed.[66] Once the officers stopped the truck, one of the officers approached the truck on foot and saw two large plastic bags of crack cocaine in the hands of the truck's passenger.[67]

The defendants challenged their drug-related indictments by arguing that the officers did not have probable cause or reasonable suspicion to believe that they had violated any narcotics laws at the time of the traffic

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[61] The Supreme Court has stated that to establish probable cause requires an assessment of the "totality-of-the-circumstances" to discover whether there is a "fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

[62] Reasonable suspicion has been articulated by the Supreme Court to mean that the officer must be able to point to "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that crime is afoot. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

[63] *See supra* note 14 and accompanying text.

[64] Whren v. United States, 517 U.S. 806 (1996).

[65] *Id.* at 808.

[66] *Id.* Their suspicion aroused, the officers made a U-turn to follow the truck, which prompted the sudden right turn and attempt to get away from the unmarked car. *Id.*

[67] *Id.* at 808-09. The officers overtook the truck when it stopped behind other vehicles at a red light. *Id.*

stop.[68] In other words, the defendants asserted that the traffic violation served as a pretext to conduct a search of their truck for drugs. The defendants brought the issue of pretextual traffic stops to the forefront by urging the Court to investigate whether a reasonably acting officer "would have made the stop for the reason given" instead of its traditional examination into whether probable cause existed to justify the stop.[69]

The defendant's proposed test, according to the Court, amounted to a thinly veiled attempt to transform the traditional test of inquiring into the objective justification for a traffic stop into one of divining the subjective motivations of officers during allegedly pretextual stops.[70] Declining to invoke the defendant's proposal, the Court reiterated the general rule that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[71] In addition, the Court stated that not only had it never held an officer's subjective intentions capable of invalidating a search based upon probable cause, but also that its jurisprudence consistently held the opposite.[72] The Court reiterated that it had held "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[73] The Fourth Amendment's reasonableness requirement, according to the Court, simply validated some police actions "*whatever* the subjective intent" of the officer.[74] In sum, the Court concluded that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[75]

Despite its refusal to investigate the subjective intentions of individual officers to make a traffic stop, the *Whren* Court recognized that the Fourth Amendment's concern with the reasonableness of a search involved balancing all factors related to the traffic stop.[76] Indeed, the Court noted

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[68] *Id.* at 809.

[69] *Id.* at 810-11.

[70] *Id.* at 814.

[71] *Id.* at 810 (citing Delaware v. Prouse, 440 U.S. 648, 659 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam)).

[72] *Id.* at 812-13 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (upholding a valid warrantless search of a vessel despite following an informant's tip suggesting the presence of contraband on board); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (holding that an arrest for a traffic violation is not violative of the Fourth Amendment simply because it serves as "a mere pretext for a narcotics search")).

[73] *Id.* at 813 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).

[74] *Id.* at 814.

[75] *Id.* at 813.

[76] *Id.* at 817.

that some of its past decisions implemented a balancing test when assessing the reasonableness of traffic stops.[77] However, those cases involved police intrusions without the probable cause typically used to justify the search.[78] Where probable cause exists, as in this case, the only cases invoking a balancing analysis involved "searches or seizures conducted in an extraordinary manner."[79] Cases involving the use of deadly force to effect a seizure, warrantless entry into a home, and physical invasion of the body are examples of those rare instances where the Court balanced an individual's Fourth Amendment right against the justification for the intrusion offered by the state.[80] The Court held that it would apply the usual rule that probable cause to believe that an individual committed a crime outweighed that individual's interest in avoiding contact with the police, in the absence of an "extreme practice" harmful to an individual's privacy or bodily interests.[81]

IV. RACIAL PROFILING CLAIMS AFTER *WHREN*

By declaring that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," the Court erected a major barrier to the Fourth Amendment claims involving alleged pretextual encounters with police.[82] In effect, the *Whren* holding permits officers to manufacture reasons to investigate individuals in an effort to uncover evidence of criminality even if the evidence sought is wholly unrelated to the objective reason for the investigation.[83] The decision jeopardizes both the unjustified seizure and unreasonable search elements of racial profiling victims' Fourth Amendment claims. *Whren* suggests that despite the "mind-numbing" details of the traffic code,[84] a violation of which most any driver

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[77] *Id.* at 818.

[78] *Id.*

[79] *Id.*

[80] *Id.* (citing Tennessee v. Garner, 471 U.S. 1 (1985) (using deadly force); Welsh v. Wisconsin, 466 U.S. 740 (1984) (entering a home without a warrant); Winston v. Lee, 470 U.S. 753 (1985) (physical invasion of the body)).

[81] *Id.*

[82] *Id.* at 813.

[83] *See* COLE, *supra* note 55, at 39 (arguing that "[t]he decision gives a green light to dishonest police work").

[84] David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 559-60 (1998) [hereinafter Harris, *Car Wars*] (noting that state vehicle codes contain numerous provisions that could be used to stop drivers beyond typical moving violations such as speeding).

can be stopped for if followed by an officer for a sufficient length of time,[85] police officers can use the traffic code to stop or search vehicles for reasons other than legitimate traffic-law enforcement.[86] In other words, the *Whren* decision threatens to transform pretextual searches and seizures based upon undetectable invidious police motives into reasonable searches and seizures under the Fourth Amendment.[87] As a result, the Fourth Amendment search and seizure claims that result from a racially motivated traffic stop stand or fall based upon the availability of supporting objective evidence.

Although the Fourth Amendment attack on the seizures associated with racially motivated stops appears persuasive, the argument fails to account for the objective role of police officers in society—to enforce the law as written. Whatever its intricacy or volume, the traffic code is the law and police officers are charged with the duty to enforce the law regardless of the severity of the infraction. The essence of the unlawful seizure claim is not that the police seized the motorist pursuant to a fictitious provision of the traffic code or that the motorist failed to violate the traffic laws at all, but that police failed to stop other motorists for similarly minor infractions. However, cognizant of the fact that police could legally stop most any motorist for a traffic violation after following her for a sufficient period of time, racial profiling victims concede that some traffic violation, however minor, occurred to instigate the stop. To this end, most claims of racial profiling do not challenge the factual basis of the underlying traffic violation. Furthermore, courts do not possess the authority to decide that a body of law is so intricate or voluminous as to escape meaningful enforcement simply because others also commonly transgress its provisions without penalty.[88] Even if such voluminous codes of law could be identified, courts do not have the authority to determine which particular sections of these codes should be enforced and which should be ignored;[89] to do so would, presumably, raise separation of powers concerns. The unreasonable seizure prong of a racial profiling claim lacks the force that it seems to have at first glance, absent legislative reform of the traffic code that police officers are charged with enforcing (albeit with some discretion).

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[85] *See* LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 131 (1967) (citing a police officer who stated that "[y]ou can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made").

[86] *See* Harris, *The Stories*, *supra* note 60, at 311-12.

[87] *See* COLE, *supra* note 55, at 39.

[88] *See* Whren v. United States, 517 U.S. 806, 818 (1996).

[89] *Id.* at 818-19.

While a violation of the traffic code serves as a legislatively enacted objective justification to make a traffic stop, a search conducted subsequent to the initial traffic stop is not justified by any such legislative enactment. Regardless of the underlying motivation for the traffic stop, the Court still requires the presence of an objective justification for the search based upon the totality-of-the-circumstances to make that search comporting with the mandates of the Fourth Amendment. In some cases, an officer will have probable cause to believe that a motorist committed a traffic violation, which makes the decision to stop a motorist objectively reasonable in the eyes of the Court, but that does not mean that a subsequent search of the vehicle is objectively justified.[90]

As a result, racial profiling litigants must dissect the search and seizure aspects of their claims regardless of the initial police motivation for the encounter and exhibit objective evidence to support their unreasonable search claims. To that end, the statistics demonstrating that a vast majority of police searches of minority vehicles, such as those in New Jersey, fail to uncover contraband alludes to the absence of an objective justification for many searches.[91] Nevertheless, racial profiling victims must first distinguish the searches in their cases from that in *Whren*, thereby freeing their claims from *Whren*'s Fourth Amendment straitjacket.

To support its broad refusal to investigate subjective motivation in *Whren*, the Court cited to several cases purporting to demonstrate that it "flatly dismissed the idea that an ulterior motive might serve to strip [police officials] of their legal justification" to make these stops.[92] In *Colorado v. Bannister*,[93] an officer stopped a vehicle for speeding and subsequently arrested the defendants after observing car parts on the vehicle that were reported to be stolen and recognizing that the vehicle's occupants matched a description of the suspects.[94] In *United States v. Villamonte-Marquez*,[95] customs officials boarded a vessel to inspect documentation, smelled burning marijuana aboard the boat, and arrested the defendants for drug offenses after seeing packages of what proved to be marijuana through an

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[90] *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 659 (1979); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

[91] *See supra* note 17 and accompanying text.

[92] *Whren*, 517 U.S. at 812.

[93] Colorado v. Bannister, 449 U.S. 1 (1980).

[94] *Id.* at 2-3. The officer initially observed the car speeding, but lost track of the car. Thereafter, the officer received the information regarding the stolen car parts and the description of the suspects. The speeding car reappeared at which time the officer stopped the car after it pulled into a gas station. *Id.*

[95] United States v. Villamonte-Marquez, 462 U.S. 579 (1983).

open hatch in the vessel.[96] Synthesizing the facts of *Bannister* and *Villamonte-Marquez* shows that the officers in those cases, like *Whren*, visually observed the contraband during their respective investigative stops. As a result, the searches in those cases fall squarely within an exception to the requirements of the Fourth Amendment that allows searches of persons or premises if contraband is in the "plain view" of the investigating officer.[97] In other words, the visual sighting of contraband provided the officers with the requisite suspicion to conduct warrantless searches and rendered their subjective motivations for the initial stop irrelevant.

Comparing the authority of police to search in *Whren*, *Bannister*, and *Villamonte-Marquez* demonstrates that those cases do not address the unreasonable search claims made by racial profiling victims. In contrast to the "plain view" sightings of contraband in those cases, the unreasonable search claims of racial profiling victims often involve situations where police neither observe nor recover contraband during the investigative stop. In Maryland, for example, data gathered for a lawsuit against the state police found that African-Americans constituted 16.9% of drivers on one particular stretch of the I-95 corridor but drove 72.9% of the cars searched by police for evidence of criminal activity.[98] Notably, police found contraband in only 28% of the searched cars, which means that 72% of the searches uncovered no evidence of any criminal act.[99] As another example, a 1997 study in Orange County, Florida, revealed that although minorities represented only 16.3% of the driving public stopped by a sheriff's drug squad on the Florida turnpike, local police subjected minority drivers to more than 50% of the total hand searches and over 70% of the total dog searches of their vehicles.[100] Much like the data from Maryland, the Orange

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[96] *Id.* at 584. The marijuana was contained in burlap bags as seen through the open hatch. *Id.*

[97] *See, e.g.*, Horton v. California, 496 U.S. 128, 136-37 (1990) (discussing the "plain view" exception to the warrant requirement allowing an officer to seize contraband in her plain view if the officer sees the material from a lawful vantage point, can rightly gain physical access to the material, and if the material's nature is apparently contraband).

[98] Motion for Enforcement of Settlement in *Wilkins v. Maryland State Police* at 4, 5, Civ. No. CCB-93-468 (D. Md. 1996) (report of John Lambeth).

[99] *Id.* Interestingly, the report found no difference in the discovery of contraband according to race of the driver. Police found contraband in 28.4% of vehicles driven by African-Americans and 28.8% of vehicles driven by nonminority drivers. *Id.*

[100] Roger Roy & Henry Pierson Curtis, *When Cops Stop Blacks, Drug Search Often Follows: Orange County Deputies Deny Race Plays a Role in Stops on the Turnpike, but Some Police Officials Agree Blacks Have a Right to Be Unhappy,*

County Florida Police failed to recover contraband in 80% of the searches it conducted.[101] Relating these statistics to *Whren*, the failure to recover or even observe contraband during these vehicle searches suggests that police failed to possess the authority to conduct a search under the circumstances. As a result, *Whren*'s "plain view" sighting cases do not address Fourth Amendment search claims made by racial profiling victims following a traffic stop if no contraband is observed or recovered during the stop.

In addition to *Bannister* and *Villamonte-Marquez*, the Court in *Whren* cited two other cases related to traffic stops to support its conclusive remark that subjective intentions fail to implicate traditional Fourth Amendment concerns. In *United States v. Robinson*,[102] an officer arrested a motorist for driving without a license and a subsequent pat-down search revealed that the driver had heroin on his person.[103] Noting that the officer possessed probable cause to effect the full custody arrest, the Court found the search to be constitutionally reasonable because the officer conducted the search incident to a lawful arrest.[104] In *Gustafson v. Florida*,[105] a companion case to *Robinson*, an officer arrested the driver of a car for failing to produce an operator's permit when asked to do so during a traffic stop after which a pat-down search revealed that the driver possessed marijuana.[106] Answering the defendant's claim that the search violated the

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ORLANDO SENTINEL, June 8, 1997, at A1.

[101] *Id.*

[102] United States v. Robinson, 414 U.S. 218 (1973).

[103] *Id.* at 218-24. The officer had stopped the defendant four days earlier and had probable cause to believe that the driver was driving without an operator's permit based upon the prior encounter. Once the officer arrested the defendant, the officer conducted a full pat-down search and found a cigarette packet in the left breast pocket of the defendant's coat. Although the officer stated that he did not know the packet contained heroin, he did know that the packet did not contain cigarettes. The officer subsequently opened the packet and found fourteen capsules of heroin. *Id.*

[104] *Id.* at 225-36 (observing that a search incident to a lawful arrest is an exception to the Fourth Amendment's warrant requirement). Moreover, an officer may not only search the person of the arrested individual, but also search the accompanying premises. The need to disarm the person in custody and to preserve evidence, according to the Court, justified the exception embodied in search incident to arrest situations. *Id.*

[105] Gustafson v. Florida, 414 U.S. 260 (1973).

[106] *Id.* at 261-62. The officer observed the driver weave across the center line divider three or four times and began to follow the car. The car's two occupants noticed that they were being followed, drove behind a grocery store, and proceeded down a different street. The officer eventually pulled the car over and found that

Fourth Amendment, the Court reasoned as it had in *Robinson* and deemed the search constitutional because the officer conducted it in conjunction with a lawful arrest.[107] In sum, the custodial arrest of the defendants endowed police officers with the authority to conduct the searches.

Upon closer inspection, *Robinson* and *Gustafson*, like *Bannister* and *Villamonte-Marquez*, fail to dispel the claims of racial profiling victims regarding the unreasonable searches of their vehicles after being stopped for minor traffic infractions. In both *Robinson* and *Gustafson*, the Court employed the search incident to a lawful arrest exception to the Fourth Amendment's warrant and probable cause requirements. Indeed, the Court in *Gustafson*, citing *Robinson*, stated that

> [i]t is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.[108]

Although officers frequently possess the authority to do so,[109] victims of racial profiling are not generally placed under arrest for the minor traffic violations that serve as pretexts to conduct a search. As an extreme example, the New Jersey police stopped one minority driver approximately sixty times over a period of thirty years, but only issued a citation to the driver once during all of those stops and did not place the driver in custody at any time.[110] If officers consistently enforced the traffic code by stopping and arresting individual motorists for petty traffic offenses, the practice would incite public outrage because a vast number of the general public would be taken into custody. Because victims of racial profiling, like members of the driving public as a whole, are not placed in custody during

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the driver did not have an operator's permit; therefore, the officer arrested the driver. The officer found the marijuana in a cigarette box obtained from the defendant's left front coat pocket. *Id.*

[107] *Id.* at 266.

[108] *Id.* at 263-64 (quoting *Robinson*, 414 U.S. at 235).

[109] Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 222-23 (1989) (stating that officers often have discretion to arrest drivers for even minor infractions of the traffic code).

[110] Kocieniewski & Hanley, *An Inside Story*, *supra* note 15. The driver, a Korean War veteran, said he had been stopped an average of twice a year simply because he drove a late model BMW or Lincoln. The officers issued the citation for a broken taillight. *Id.*

routine traffic stops, the search incident to arrest exception to the Fourth Amendment's warrant requirement is inapplicable to claims alleging unreasonable searches during racially motivated traffic stops.

A. A Better Analogy—Roving Patrols

Rather than analogizing the unreasonable search claims to the "plain view" or search incident to arrest exceptions invoked in *Whren*, the better analogy is to a series of cases construing the ability of police to conduct searches of motorists at random near the United States—Mexico border. In *Almeida-Sanchez v. United States*,[111] a roving United States border patrol stopped an individual at random without a warrant, probable cause, or reasonable suspicion of wrongdoing and seized marijuana from his car after searching the vehicle without consent.[112] Investigating the defendant's Fourth Amendment challenge to a drug indictment, the Court recognized that the doctrine from *Carroll v. United States*[113] provided for warrantless searches of vehicles in limited situations, but the exception did not "declare a field day for the police in searching automobiles."[114] The Court asserted

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[111] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[112] *Id.* at 267-68. The defendant, a Mexican citizen with a valid United States work permit, was convicted of "having knowingly received, concealed, and facilitated the transportation of a large quantity of illegally imported marihuana" after being stopped twenty-five air miles north of the Mexican border. The government argued that the Constitution allowed random searches and seizures by roving patrols without individualized suspicion of wrongdoing "within a reasonable distance from any external boundary of the United States." *Id.* at 268. However, the defendant asserted that the roving searches and seizures violated the Fourth Amendment. *Id.* at 267. As a result, the Court faced the issue of whether the Fourth Amendment's requirement that searches and seizures be reasonable allowed for random searches and seizures of motorists on the highway.

[113] Carroll v. United States, 267 U.S. 132 (1925).

[114] *Almeida-Sanchez*, 413 U.S. at 269. *Carroll* was the first case to delineate the movable vehicle exception to the Fourth Amendment's warrant requirement. In *Carroll*, three federal prohibition agents stopped a vehicle they suspected of carrying whiskey in violation of the National Prohibition Act. Once they stopped the vehicle, the agents searched the car and uncovered sixty-nine quarts of whiskey behind the upholstering of one seat. *Carroll*, 267 U.S. at 174. Challenging their convictions, the defendants asserted that the search violated the Fourth Amendment because the officers failed to obtain a warrant for the search. *See id.* at 132. The Court upheld the convictions reasoning that a search and seizure are valid if made upon probable cause in light of all the circumstances known to the seizing officer. *Id.* at 149. In reaching its decision, the Court noted that Congress historically deemed searches of movable vessels valid because:

that "[a]utomobile or no automobile, there must be probable cause for the search."[115] Although the government contended that the difficulty of patrolling the border justified the random stops, the Court held that such intrusions by "roving patrols" without any suspicion of wrongdoing violated the rights of motorists to be free from "unreasonable searches and seizures."[116] The Court feared that allowing officers in the field to conduct searches and seizures at their discretion led to random violations of the

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> the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153. *See also* California v. Carney, 471 U.S. 386 (1985). In *Carney*, Drug Enforcement Administration agents entered a motor home without a warrant or consent where they seized marijuana, plastic bags, and a scale. *Id.* at 388. The Court opined that the ready mobility of vehicles did not constitute the only basis for the movable vehicle exception. In addition to their ready mobility, according to the Court, the public had a decreased expectation of privacy in their cars than in their homes. *Id.* at 391. The limited expectation of privacy arose not because the area to be searched was in plain view, but because of the "pervasive regulation of vehicles capable of traveling on the public highways." *Id.* at 392. As a result, the Court declared that the traveling public was fully aware of a limited right of privacy in their cars because of the "compelling governmental need for regulation." *Id.* Moreover, the Court reasoned that the public has long been on notice that moving vehicles could be stopped and searched by authorities based upon facts giving rise to a probable cause to believe that the vehicle contains illegal materials. *Id.*

[115] *Almeida-Sanchez*, 413 U.S. at 269.

[116] *Id.* at 273. The government also argued that precedent involving warrantless administrative searches justified the random stops based upon *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967) (administrative searches to enforce community health standards), *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (warrantless searches to enforce liquor regulations), and *United States v. Biswell*, 406 U.S. 311 (1972) (administrative searches that burden gun dealers). The Court disagreed, reasoning that it had demanded a warrant or consent in *Camara* and that the other administrative cases involved closely-regulated businesses where participation in the business, in effect, included consent to inspection. *Almeida-Sanchez*, 413 U.S. at 270-71. Moreover, the Court pointed out that the officers in *Colonnade* and *Biswell* knew that "the individual searched was within the proper scope of official scrutiny." *Id.* at 271.

Fourth Amendment.[117] Characterizing the depth of its concern, the Court declared that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[118]

Taking the Court's concerns in *Almeida-Sanchez* out of the border control context and placing them on the nation's roads adds significant weight to the unreasonable search claims made by racial profiling victims. In cases involving racial profiling, police typically possess a great deal of latitude in deciding whom to stop based upon a nonspecific description of potential criminal offenders that emphasizes the race of such individuals. Evidence in one racial profiling case in Maryland, for example, revealed that the Maryland State Police instructed troopers to look out for drug couriers and identified such individuals as "predominantly black males and black females."[119] Evidence from another case in Maryland further revealed that its state police encouraged troopers to stop and search minority drivers using a race-centered profile that targeted "1) young, black males wearing expensive jewelry; 2) driving expensive cars, usually sports cars; 3) carrying beepers; and 4) in possession of telephone numbers."[120] These descriptions provide officers with not only a reason to suspect any minority driver of drug-related crimes at their discretion, but also to search minority driven vehicles, particularly since facts such as the presence of beepers and telephone numbers cannot be discovered without a search. As evidence that race is the underlying motivation for traffic stops and searches, one officer testified in *United States v. Harvey*[121] that "if the occupants had not been African-Americans, he would not have stopped the car."[122] Similarly, an officer in Florida consoled a nonminority driver after stopping the motorist for a traffic infraction by saying that things "[c]ould be worse—could be black."[123] Thus, using race-based descriptions to suspect individuals of

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[117] *See Almeida-Sanchez*, 413 U.S. at 270 (calling the unfettered discretion of officers in the field "precisely the evil" the Court attempted to prevent in its past jurisprudence).

[118] *Id.* at 274 (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)).

[119] COLE, *supra* note 55, at 36 (referring to the *Wilkins* case in Maryland).

[120] *ACLU's Class-Action Suit Over Racial Profiling*, ¶ 23, *at* http://www.courttv.com/legaldocs/rights/raceprofiling.html (last visited Sept. 14, 2001) (recounting the testimony of a Maryland State trooper from a published opinion by the Maryland Court of Appeals).

[121] United States v. Harvey, 16 F.3d 109 (6th Cir. 1994).

[122] *Id.* at 113-14.

[123] Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos: The Tapes Show That Most Stops and Searches by Volusia County's Drug Squad Involve Minorities*, ORLANDO SENTINEL TRIB., Aug. 23, 1992, at A1.

criminal acts in the absence of individualized suspicion translates into arbitrary stops and searches of minority drivers based upon the immutable fact of the driver's race.

In addition to *Almeida-Sanchez*, roving patrols again caught the attention of the Court two years later in *United States v. Brignoni-Ponce*.[124] In *Brignoni-Ponce*, two roving border patrol officers stopped a vehicle solely based upon the Mexican appearance of the car's occupants.[125] After brief questioning, the officers learned that two of the passengers in the car had illegally entered the country and arrested the defendant for knowingly transporting illegal immigrants.[126] The defendant argued at trial that testimony about the passengers should be suppressed because it emanated from an unlawful seizure.[127] The Court first addressed the issue broadly by using the balancing test to weigh the interests of both the public and the individual to be free from arbitrary police interference.[128] According to the Court, the government made a "convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border."[129] The illegal movement of aliens across the border caused an unwarranted increase in competition for jobs and created an extra burden on social services providers, each of which generated significant economic and social costs.[130] The Court observed that past precedent established that the Fourth Amendment did not ban searches or seizures without probable cause to arrest or search an individual under some limited circumstances and allowed such stops on the basis of an officer's reasonable suspicion.[131] In this case, the Court characterized the intrusion result-

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[124] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[125] *Id.* at 875.

[126] *Id.*

[127] *Id.* The government asserted authority to conduct random searches based upon the Immigration and Nationality Act, which authorized governmental officers "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." *Id.* at 876-77. Upon appeal to the Supreme Court, the case presented the Court with the issue of "whether a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry." *Id.* at 876.

[128] *Id.* at 878 (citing Terry v. Ohio, 392 U.S. 1, 20-21 (1968); Camara v. Mun. Court of San Francisco, 387 U.S. 523, 536-37 (1967)).

[129] *Id.*

[130] *Id.* at 878-79 (noting that the illegal aliens themselves are placed in a precarious position because when exposed to inferior working conditions they cannot complain without risking discovery).

[131] *Id.* at 880 (citing *Terry*, 392 U.S. at 21, which requires that an officer "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" a fear of his own or others' safety; Adams v.

ing from the roving patrol stops on the interests of the individual as "modest."[132] Officers only asked brief questions of a car's occupants and only conducted limited visual inspections of the car; therefore, the investigative stops did not consume much time.[133] Given the low standard of reasonable suspicion applicable to brief investigative stops on the highway, the Court found that the governmental interest in protecting the public and crime prevention outweighed the minimal intrusion upon privacy created by the stop.[134] As a result, the Court held generally that a roving officer's reasonable suspicion that a vehicle contains illegal aliens allows the officer to stop the car briefly to conduct further investigation.[135]

Despite generally allowing brief investigative stops, the Court refused to let border patrol officers do away with the requirement of reasonable suspicion to make the stop at issue in *Brignoni-Ponce*.[136] The Court reasoned that the Fourth Amendment required more than nondescript suspicion and broad discretion to make an investigative stop.[137] In the context of patrolling the border, the Court noted that the roads carried not only illegal aliens, but also a vast number of legal citizens who are entitled to Fourth Amendment protection from unreasonable searches and seizures.[138] Allowing police to use roving patrol stops without individualized suspicion would expose residents of border areas to a constant risk of police interference with their ability to travel.[139] Requiring reasonable suspicion maintained the balance between public interest and the right of the individual to be free from police intrusions for Fourth Amendment purposes.[140]

Williams, 407 U.S. 143 (1972), which allows a brief stop of an individual to obtain more information before crime occurs based upon facts known to the officer at the time of action).

[132] *Id.*

[133] *Id.* (noting that the Government estimated that the stops generally take less than one minute).

[134] *Id.* at 881.

[135] *Id.*

[136] *Id.* at 882.

[137] *Id.*

[138] *Id.* (noting that the population of San Diego, California was 1.4 million people, the population of El Paso, Texas, was 360,000, and that of Brownsville-McAllen, Texas, was 320,000 at the time of the case).

[139] *Id.* at 883 (stating that "if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law").

[140] *See id.*

As a final matter, the Court suggested that officers could use a number of factors as indicia of reasonable suspicion, such as attempts to avoid police contact or aspects of the vehicle itself.[141] In this case, however, the Court found that the officers relied only on the Mexican appearance of the car's occupants to justify stopping the car.[142] According to the Court, the race of the individuals in the car did not provide reasonable suspicion to conclude that the car contained illegal aliens given the large number of citizens in the area with the same physical traits.[143] Although the probability that a person with those physical characteristics is an illegal alien is high enough to make it relevant, the race of an individual, standing alone, did not justify stopping everyone for questioning who exhibited those characteristics.[144] As a result, the Court diminished the discretion of officers to stop individuals for questioning about criminal acts based upon the immutable trait of race.

Although the Court generally upheld brief investigative stops in *Brignoni-Ponce*,[145] its concerns in that case apply with equal force to the searches conducted during racially motivated stops.[146] While the initial questioning might be brief like that in *Brignoni-Ponce*, a racially motivated traffic stop can consume a great deal of time in its entirety. Evidence from a class action suit in Maryland, for example, indicates that police searches of minority driven vehicles take at least forty minutes.[147] In one particularly egregious example, Maryland State Police officers allegedly detained a minority driver for three hours while searching for narcotics in his

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[141] *Id.* at 884-85 (citing United States v. Larios-Montes, 500 F.2d 941, 943-44 (9th Cir. 1974) (erratic driving near Border Patrol traffic checkpoint); United States v. Bugarin-Casas, 484 F.2d 853, 855 (9th Cir. 1973) (certain models of station wagons used to transport illegal aliens in floor compartment); United States v. Wright, 476 F.2d 1027, 1029 (5th Cir. 1973) (station wagon spare tire compartments used to transport illegal aliens); Duprez v. United States, 435 F.2d 1276, 1277 (9th Cir. 1970) (evading the police)).

[142] *Id.* at 885-86.

[143] *Id.* at 886 (stating that the officers only caught "a fleeting glimpse of the persons in the moving car, illuminated by headlights").

[144] *Id.* at 886-87.

[145] *Id.* at 881 ("[I]n appropriate circumstances the Fourth Amendment allows a properly *limited* 'search' or 'seizure' on facts that do not constitute probable cause to arrest or search for contraband or evidence of a crime.") (emphasis added).

[146] *Id.* at 882 (noting the "potentially unlimited interference with [residents'] use of the highways" that would result if officers had complete discretion).

[147] *See ACLU's Class-Action Suit Over Racial Profiling*, *supra* note 120, ¶¶ 46-54 (documenting the experiences of minority drivers who were detained for as long as forty minutes to three hours).

vehicle.[148] The state troopers subjected the minority motorist to two searches—one by hand and the other by use of a drug-sniffing dog, which increased the length of the stop because the dog had to be transported to the location.[149] Similarly, Maryland state troopers allegedly spent ninety minutes conducting hand and dog searches of a minority driven vehicle after stopping the motorist for a violation of a Maryland law regulating car air fresheners.[150] Thus, unlike the stop in *Brignoni-Ponce*, where the Court characterized the intrusion upon individual privacy as "modest" in light of its brevity,[151] searches conducted during a racially motivated traffic stop typically cannot be considered "brief" in any sense of the word.

The time consumed by a racially motivated search is not only long, but the nature of the search itself unjustifiably intrudes upon the privacy interest of an individual minority driver to an extent not addressed in *Brignoni-Ponce*. Searching minority driven vehicles by hand is a particularly invasive method to detect the presence of contraband. In one case, officers allegedly unpacked a minority driver's belongings and placed them along the roadside for inspection.[152] After finding no contraband, the officers told the minority driver that he would have to repack his car by himself.[153] Even more troubling is a case where troopers allegedly first searched a minority driver's luggage by hand and then proceeded to search the vehicle itself by dismantling part of a door panel, a seat panel, and part of the sunroof.[154] Again finding no contraband, one of the troopers handed the minority driver a screwdriver and told him "you're going to need this."[155] Similarly, an officer who allegedly left a minority driver's belongings unpacked along the roadside after finding no evidence of drug-related crimes told the individual to "have a good day."[156] The evidence in

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[148] *Id.* ¶ 51.

[149] *Id.* (noting that the driver refused to consent to a search after which an argument about the issue continued for forty minutes).

[150] *Id.* ¶ 49 (reporting that the police subjected the driver to a hand search of the driver's belongings and car and a dog sniffing search).

[151] *Brignoni-Ponce*, 422 U.S. at 879-80.

[152] *ACLU's Class-Action Suit Over Racial Profiling*, *supra* note 120, ¶ 47.

[153] *Id.*

[154] *Id.* ¶ 48 (alleging that the police officers made the occupants of the vehicle stand outside of the vehicle in the rain while they searched in vain for evidence of narcotics violations). When one of the occupants informed the officer that he had contracted pneumonia twice in the recent past and desired to get out of the rain, one of the officers threatened to take him to jail. *Id.*

[155] *Id.*

[156] *Id.* ¶ 53 (characterizing the belongings as strewn along the roadway).

Maryland also revealed the equally invasive practice of police conducting dog searches of vehicles by releasing the dogs inside the vehicles to sniff the interior of the cars.[157] The complaint also alleges that Maryland troopers routinely removed a driver's belongings, such as a piece of luggage, from the car so that the dog could sniff them by the roadside.[158] In sum, the nature of either hand or dog searches conducted during racially motivated traffic stops exposes minority drivers to an unacceptable degree of intrusion and humiliation.

The Court's concern in *Brignoni-Ponce* that unfettered police discretion risked unlimited police intrusion into the lives of citizens has been shown to be well-founded. Searches conducted in conjunction with a racial profile place vast numbers of innocent motorists at risk of being searched without justification. Racial descriptions like those from Louisiana or Maryland fail to provide officers with any measure of individualized suspicion and place all minority drivers under suspicion for committing drug-related crimes. While police possess a great deal of discretion in enforcing the traffic code, such discretion fails to translate into successful detection of drug-related crimes in the context of racially motivated traffic searches. The number of racially motivated searches that uncover no contraband serve as evidence of the risk to which minority drivers are unreasonably exposed. For example, a Colorado sheriff's department admittedly used traffic violations as a pretext to search minority driven vehicles for drugs.[159] Evidence from a lawsuit against the department revealed that police had stopped and searched over 400 motorists based upon the profile, yet the police did not issue one single traffic citation to these minority drivers nor did they make any drug arrests.[160] As another example, a review of 1000 police stops in Volusia County, Florida on an interstate highway revealed that minorities drove eighty percent of the cars searched for drugs; however, only *nine* of these stops and searches resulted in as much as a traffic citation.[161] In short, the general failure of police to make drug arrests after searching minority driven cars suggests that they did not have probable cause to conduct a search, thereby unduly infringing upon the privacy of the individual minority driver.

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[157] *Id.* ¶ 43.

[158] *Id.*

[159] COLE, *supra* note 55, at 37-38 (noting that the overt switch in policy to pretextual stops resulted after a district attorney dismissed drug charges against three minority defendants after evidence showed that the defendants' race and out of state plates on the car motivated the initial traffic stop).

[160] *Id.* at 38 (noting that the county settled the lawsuit for $800,000 in 1995).

[161] *Id.* at 37.

B. The Road as a Drug Checkpoint

Since police officers search minority driven vehicles for drugs, claims of Fourth Amendment violations by racial profiling victims are not only comparable to those involved at the border, but also to those conducted at drug checkpoints. Given the frequency of searches and seizures of minority drivers on the road, the road itself is like one continuous drug checkpoint where patrolling officers exercise unfettered discretion to stop and search minority drivers for alleged drug violations. For example, one traveler in Oklahoma found that he could not drive with his son for a mere thirty minutes on the roads in that state without being confronted by police *twice*, once for questioning and the other for a two and one-half hour full-vehicle search that produced no contraband.[162] Moreover, a vast number of minority drivers describe similar encounters with police while driving on the nation's roads.[163] Indeed, being stopped and searched while driving has become so common for African-Americans that the experience has its own acronym—DWB—driving while black.[164]

The Supreme Court highlighted its concerns underlying the implementation of drug checkpoints and addressed their constitutionality in *City of Indianapolis v. Edmond*.[165] The Court began by recognizing that its precedents created several exceptions to the Fourth Amendment's general requirement of individualized suspicion of criminal activity.[166] For example, the Court noted that its past decisions upheld the constitutionality

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[162] David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways, An American Civil Liberties Union Special Report*, June 1999, at 1, http://www.aclu.org/profiling/report/index.html (documenting the case of U.S. Army Sergeant First Class Rossano V. Gerald and his son as they drove into Oklahoma. The second stop lasted 2.5 hours during which time the officers searched the vehicle but found nothing.).

[163] *Id.* at 8-17 (recounting numerous newspaper articles from around the country involving searches of minority drivers after being stopped for a traffic infraction); *see also infra* note 200 (listing newspaper stories linking police stops and searches of a vehicle to the race of the driver).

[164] Fletcher, *supra* note 58.

[165] City of Indianapolis v. Edmond, 531 U.S. 32 (2000) (analyzing the constitutionality of drug checkpoints set up at various points on Indianapolis' roads in an effort to catch those involved in drug trafficking). After being stopped at one of the checkpoints, two individuals initiated a class action suit on behalf of themselves and all who had been or would be stopped at the checkpoints asserting that the drug checks violated the Fourth Amendment. *Id.* at 36.

[166] *Id.* at 37 (characterizing the exceptions as occurring under "limited circumstances").

of searches and seizures at border patrol checkpoints based upon the nation's interest in policing its borders and at sobriety checkpoints because of the compelling public interest in highway safety.[167] However, the Court observed that it had also invalidated a suspicionless stop to check a driver's license and registration at the discretion of the investigating officer in *Delaware v. Prouse*.[168] According to the Court, the "standardless and

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[167] *Id.* (citing to United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)).

[168] *Id.* at 39-40 (citing to Delaware v. Prouse, 440 U.S. 648 (1979)). In *Prouse*, the Court observed that the Fourth Amendment protected the privacy interests of individuals by serving as a check against arbitrary searches and searches performed at the discretion of governmental officials. *Prouse*, 440 U.S. at 653-54. As a result, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 654. Attempting to justify tipping the balance in its favor, the government contended that license and registration checks furthered the state's interest in highway safety and outweighed the privacy concerns of the individual motorist. *See id.* at 658. The Court, however, analogized the spot license and registration checks to other police measures previously declared unconstitutional. In a prior case, the Court held random stops of vehicles near an international border to determine whether they contained illegal aliens or contraband under the Fourth Amendment to be unconstitutional because of their intrusive nature. *Id.* at 655 (referring to United States v. Brignoni-Ponce, 422 U.S. 873 (1975)). Like the previous case, the spot checks at issue in *Prouse* physically and psychologically intruded upon the motorists in a manner greater than that allowed by the Fourth Amendment. *See id.* at 657. Both of the practices involved a "possibly unsettling show of authority," "interfere[d] with freedom of movement," inconvenienced the motorist, and consumed time. *Id.* From a psychological standpoint, each practice also created the potential for "substantial anxiety." *Id.* As a result, the Court deemed the intrusions visited upon motorists in this case to be equivalent to those occasioned by prior police practices prohibited by the Fourth Amendment. *Id.* In addition to highlighting the intrusive nature of the random license and registration stops, the Court noted that the state had vehicle regulations regarding registration, annual inspections, and insurance that served to further the state's interest in highway safety. *Id.* at 658-59. The Court presumed that unlicensed drivers violated such traffic and equipment regulations in greater numbers when compared to licensed drivers. *Id.* at 659. As a result, the Court deemed the state's spot checks to be inefficient because licenses and registrations are typically presented to officers as part of a routine traffic stop, which is more likely to involve unlicensed as opposed to licensed drivers. *Id.* at 659-60. Any contribution to public safety on the highways by performing spot checks in this fashion would be "marginal at best." *Id.* at 660. Thus, the Court found that the random investigative stop for a license and registration check did "not appear sufficiently productive to qualify as a reasonable law enforcement practice under

unconstrained discretion" exercised by officers implementing the license and registration program in *Prouse* made those stops unconstitutional.[169] Thus, the common link among the Court's checkpoint jurisprudence is that it found them constitutional when supported by a substantial and particularized public interest.

Investigating the constitutionality of the drug checkpoints at issue in *Edmond*, the Court maintained that the appropriate test to determine the constitutionality of such programs involved considering the public interests threatened in relation to the police tactics at issue.[170] In *Edmond*, the Court found that unlike its past decisions upholding the constitutionality of checkpoints, the city of Indianapolis operated its checkpoint program solely to interdict illegal narcotics.[171] Comparing the primary purpose of the Indianapolis checkpoints to the "general interest in crime control" in *Prouse*, the Court pronounced that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing."[172] Although the Court observed that the detection of criminal wrongdoing indirectly served to promote community safety, the drug checkpoints in *Edmond* failed to protect an "immediate, vehicle-bound threat" to the public interest.[173] As a result, the Court refused "to suspend the usual requirement of individualized suspicion" where checkpoints are justified "only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."[174] If allowed to search and seize individuals in this manner, the Court feared that "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."[175]

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the Fourth Amendment." *Id.* Noting that a motorist retained a reasonable expectation of privacy in her vehicle, the Court found that the minimal benefit to public safety in light of the physical and psychological intrusions experienced by a motorist due to random license and registration checks outweighed the state's professed interest in roadway safety. *Id.* at 655-62.

[169] *Edmond*, 531 U.S. at 39 (quoting *Prouse*, 440 U.S. at 661).

[170] *Id.* at 39-40.

[171] *Id.* at 40-41 (noting that both parties stipulated to the interdiction of drugs as being the purpose for the checkpoints, which coincided with the findings of courts previously involved with the case). Documents in the case explicitly referred to "drug checkpoints" or "drug roadblocks" and a checkpoint was identified as a "NARCOTICS CHECKPOINT" to oncoming drivers. *Id.* at 41.

[172] *Id.* at 41.

[173] *Id.* at 43 (observing that the sobriety checkpoints at issue in *Sitz* guarded against an "immediate, vehicle-bound threat to life and limb").

[174] *Id.* at 44.

[175] *Id.* at 42.

Attempting to circumnavigate the Court's finding that the city used the checkpoints for the ordinary investigation of crime, Indianapolis asserted that *Whren* precluded an examination of the purpose of its program.[176] However, the Court responded that its "cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level."[177] According to the Court, the *Whren* decision itself demonstrated that inquiries into the programmatic purposes of schemes undertaken without individualized suspicion are relevant to Fourth Amendment analysis.[178] While it recognized the difficulty inherent in determining the purposes underlying any program, the Court noted that it normally undertook such inquiries to differentiate between lawful and unlawful governmental conduct.[179] In this case, the Court urged that "[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here . . . stops can only be justified by some quantum of individualized suspicion."[180] Although it warned that its conclusion did not amount to an "invitation to probe the minds" of police officers, the Court found the Indianapolis drug checkpoints to be "indistinguishable from the general interest in crime control" and held that the Indianapolis program ran afoul of the Fourth Amendment.[181]

The concerns driving the Court's decision in *Edmond*—the purpose and programmatic nature of the checkpoints—apply with equal force to the unreasonable search claims of racial profiling victims on the roadways. The fundamental and only reason to conduct a search of a racial profiling victim's vehicle is to discover evidence of criminal behavior. In the context of race-based searches, significant evidence exists indicating that the motive for the stops is the interdiction of unlawful drugs. For example, some police agencies admit to utilizing special police units that make traffic stops as a precursor to drug searches.[182] The Court has held that police

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[176] *Id.* at 45 (Indianapolis cited to *Whren v. United States*, 517 U.S. 806 (1996) and *Bond v. United States*, 529 U.S. 334 (2000) to support its position).

[177] *Id.* at 46.

[178] *Id.* at 45-46.

[179] *Id.* at 46-47.

[180] *Id.* at 47.

[181] *Id.* at 48. The Court stated that its holding did not affect border patrol searches, airport searches, searches conducted beyond the general interest in crime control, or checkpoints conducted pursuant to a lawful primary purpose even though such a check might result in an arrest unrelated to the purpose of the checkpoint. *See id.* at 47.

[182] *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 352-53 (1998) (referring to the Criminal Patrol Unit of the Orange County, Florida Sheriff's Office and the Special Emphasis Team of the North Carolina

forces can utilize drug sniffing dogs without establishing probable cause or reasonable suspicion to justify the drug search.[183] Thus, the intent underlying the searches of minority drivers without any objective justification (other than a non-specific correlation between minorities and criminality) is to detect narcotics in the car of the minority driver. In other words, using the language from *Edmond*, the primary purpose underlying the searches of racial profiling victims is to uncover "evidence of ordinary criminal wrongdoing."[184]

While deterring drug usage and associated crimes benefits the community, drug trafficking does not sufficiently threaten community safety to justify searches based on race. The transportation of drugs does not pose the "life and limb" threat to public safety on the highways that other activities, such as drunk driving, do.[185] Moreover, the practice of searching minority motorists cannot be justified by pointing to a national interest in searching minorities for potential drug violations. Indeed, the candidates in the most recent Presidential election spent little time debating the enforcement of narcotics laws and instead focused on issues such as education, taxes, and prescription drugs. The only justification for these searches is the chance that the searches will uncover evidence of a crime; however, *Edmond* explicitly proscribes searches of this nature. Nonetheless, the frequency with which minority drivers are searched without probable cause makes the Court's fear that routine searches of this nature would render the Fourth Amendment meaningless unusually insightful.[186] The DWB acronym stands as a concrete testament to the reality of that fear.[187]

Not only is the primary purpose of racial profiling searches to uncover evidence of ordinary criminal wrongdoing, but the effort to search minority drivers implements a broad program that takes the war on drugs to the streets. As a result of the success of the profile in airports, the DEA

Highway Patrol).

[183] *See* United States v. Place, 462 U.S. 696, 707 (1983) (declaring that having a dog sniff luggage in a public place did not amount to a search for Fourth Amendment purposes because the sniffing dog was a limited intrusion and the dog only gave investigators limited information, i.e., whether or not drugs were present). As a result, the narcotics canines can be used without a warrant, probable cause, or reasonable suspicion to conduct a search.

[184] *Edmond*, 531 U.S. at 41.

[185] *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (upholding the constitutionality of sobriety checkpoints based in part upon the risk to the welfare of the driving public).

[186] *See supra* note 175 and accompanying text.

[187] *See supra* note 164 and accompanying text.

initiated a program in 1986 to detect drug traffickers on major highways in the country with the aid of a profile.[188] This nationwide program, called Operation Pipeline, taught drug interdiction programs to local police forces that highlighted the ethnic and racial characteristics of narcotics organizations.[189] Specifically, Operation Pipeline instructed police how to single out drivers and cars that might contain contraband by using race as a primary indicator of involvement in drug-related crimes.[190] For example, Operation Pipeline suggested that officers should look at "people with dreadlocks and cars with two Latino males traveling together" as possible suspects for drug trafficking violations.[191] Furthermore, the program included courses that taught officers to associate individual races with specific types of crime, thereby embedding the alleged link between race and criminality within police culture. The state police training bureau offered a course to officers during the 1990s entitled "Sociology for the Police Officer."[192] Within the course materials, the topic of "ethnic and racial minorities" included an outline with the following subheadings:

IV. Police Stereotypical View of Minorities
  A. Wary of minority people.
  B. Believe minorities are more likely to be involved in criminal activities.
    1. Chinese Americans more likely to be involved in crimes of gambling.
    2. Italian Americans more likely to be involved in organized crime.
    3. Black Americans are more likely to be involved of crimes of violence.
    4. Spanish-speaking Americans are more likely to be involved in fights or taunting officers.
  C. Greater degree of hostility directed toward police.
V. Minority stereotypical view of police
  A. Are much more critical of police action.
  B. More willing to see racial slights in police actions.
  C. Feel more subject to mistreatment, harassment and brutality.

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[188] *See* Kocieniewski, *New Jersey Argues*, *supra* note 54.

[189] *Id.*

[190] *Id.*

[191] *Id.* (noting that West Indians and Latinos in general were also singled out because those ethnic groups allegedly dominated the drug trade at the time).

[192] Kocieniewsky & Hanley, *An Inside Story*, *supra* note 15.

D. Police are symbolic, stand for the power and authority of the majority, visible signs of majority dominated.
E. Police perceived in the punishment business.
F. Police are a "blue minority."

VI. Ethnic and Racial Cultures
C. Differing Cultures, attitudes and values.
1. Black Americans
a. Blacks value their families.
b. Blacks value religion.
c. Blacks value material goods as well.
1. Blacks who are not able to purchase their own home put money into cars.
a. Cars important—show individual's style and personality, just as home would.[193]

In total, the DEA used Operation Pipeline to train more than 25,000 officers in forty-eight states to correlate minority races with drug trafficking.[194]

Despite repeated denials from DEA officials regarding the nationwide teaching of racial profiling,[195] the evidence suggests otherwise. For example, one New Jersey trooper testified that he had been taught about racial profiling during various DEA seminars.[196] The New Jersey officer testified that he "was directed and urged to stop and search persons who fit the profile if [he] wanted to make 'good arrests.'"[197] Furthermore, the officer stated that the instructors taught those in attendance "how to justify in our subsequent reports our stops and searches so that we would utter the

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[193] *Id.*

[194] *See* Kocieniewski, *New Jersey Argues*, *supra* note 54.

[195] *Id.* (reporting that DEA officials maintain that local law enforcement agencies are misapplying DEA intelligence reports circulated to them). To support its contention, the DEA can point to findings from a Department of Justice review concluding that the DEA did not teach or encourage profiling. Similarly, a DEA spokesman states that the DEA taught officers not to use race when making the decision to stop a vehicle and to use it as one of several factors when deciding to search a vehicle. This same spokesman states that the DEA taught officers that profiling was illegal and a "bad investigative technique." *Id.*

[196] *See* Kocieniewski & Hanley, *An Inside Story*, *supra* note 15 (the testimony was given during the Gloucester County case in New Jersey).

[197] *Id.* ("We were given wide discretion to follow our hunches. If we wanted to stop and search someone or some persons, we would stop and search. Any possible violations such as speeding, improper equipment, were afterthoughts.").

right words, which would stand up in court...whether or not that is what actually occurred on the roadway."[198] In addition to such testimony, recent DEA reports support the contention that it continues to embrace racial profiling by local police forces to fight the war on drugs. In a report entitled "Heroin Trends," the DEA sought to combat the flow of heroin into the country and noted that: "[p]redominant wholesale traffickers are Colombian, followed by Dominicans, Chinese, West African/Nigerian, Pakistani, Hispanic and Indian. Midlevels are dominated by Dominicans, Colombians, Puerto Ricans, African-Americans and Nigerians."[199] Finally, the proliferation of complaints about racial profiling in the newspapers,[200] combined

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[198] *Id.* In 1989, the New Jersey State Police placed the officer who gave the testimony regarding the seminars and two of his fellow officers on probation for five years for stealing $500 from three people they had stopped on the roadway. *Id.*

[199] Kocieniewski, *New Jersey Argues*, *supra* note 54. The DEA is not alone in its use of such racial descriptions—the Department of Transportation has made similar observations and the director of the White House Office of National Drug Control Policy gave detailed ethnic and racial information regarding sellers, users, and traffickers. *Id.*

[200] *See, e.g.*, Jim Adams & Shannon Tangonan, *Police To Record Race of Drivers: Louisville Policy Bans Profiling in Traffic Stops*, COURIER-JOURNAL (Louisville, Ky.), Dec. 6, 2000, at A1; Paul Bird, *Suit Claims Police Used Racial Profiling; Former New York City Officer Claims He Was Target of '98 Traffic Stop in Greenwood Because He's Black*, INDIANAPOLIS STAR, Dec. 2, 2000, at B5; T.C. Brown, *O'Connor Says Racial Profiling Not a Problem*, PLAIN DEALER (Cleveland, Oh.), Dec. 8, 2000, at B8; Bruce Cadwallader, *Federal Officials Expand Their Look at Detroit's Police Department*, COLUMBUS DISPATCH, Dec. 17, 2000, at 1D; Michael H. Cottman & Avis Thomas-Lester, *Where Families Fear Police: Pr. George's Black Parents Caution Teens to be Careful with Officers*, WASH. POST, Dec. 8, 2000, at A1; Lewis W. Diuguid, *On Permanent Probation*, KAN. CITY STAR, Dec. 27, 2000, at B7; Bob Jackson, *Collecting of Profiling Data Urged*, DENVER ROCKY MOUNTAIN NEWS, Nov. 30, 2000, at A61; Victor Landa, *Driving While Brown Will Get You Stopped Too*, HOUSTON CHRONICLE, Jan. 2, 2001, at A21; David A. Love, *The Time Has Come to End Racial Profiling*, BALT. SUN, Dec. 11, 2000, at A13; Solomon Moore, *Survey Finds Optimism in State About Race Relations; Demographics: But Many in Poll Disagree on Issues such as Affirmative Action and Whether Police Use Racial Profiling*, L.A. TIMES, Jan. 4, 2001, at B1; Greg Moran, *Database To Let Attorneys See Conduct of Officers*, SAN DIEGO UNION-TRIB., Dec. 24, 2000, at A1; Connie Piloto, *Racial Profiling Discussed: Dallas Police Unsure of Problem's Extent*, DALLAS MORNING NEWS, Dec. 27, 2000, at 21A; Hernan Rozemberg, *Racial Profiling Condemned: Napolitano, State Police Set Policy Against Practice*, ARIZ. REPUBLIC, Dec. 20, 2000, at B1; Amanda Vogt, *Court Lets Police Conduct Seat-Belt Stops*, CHI. TRIB., Dec. 12, 2000, at 1.

with the national scope of the training program in terms of officer and state numbers, contradict the numerous denials by the DEA. In the end, the evidence links the DEA to programmatic racial profiling by local police forces in a manner that insulated the DEA from accountability because its officials did not pull over the cars.[201]

V. CONSENT AS A ROADBLOCK FOR RACIAL PROFILING CLAIMS

Even though racially motivated drug searches conducted by roving patrols on roads implicates the Fourth Amendment, racial profiling victims must overcome one last challenge to their Fourth Amendment unreasonable search claims. Although the Court allows officers to make brief investigative stops based upon reasonable suspicion, the law has long required that police acquire voluntary consent from an individual to conduct a search without a warrant to meet the requirements of fairness in the investigative process. During investigative traffic stops, the investigating officer generally walks to the driver's side window and requests to see a driver's license and registration.[202] The officer visually inspects both the car and driver while asking questions of the driver for any sign that the individual might be involved in criminal activity.[203] If any information derived from the visual checks or the questioning raises further suspicion in the mind of the officer, the officer can then ask for the driver to consent to a search of the vehicle.[204] When asking for consent, police officers need not inform the motorist that she is free to refuse consent to the search.[205] Not surprisingly,

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[201] *See* Kocieniewski, *New Jersey Argues*, *supra* note 54.

[202] Harris, *Car Wars*, *supra* note 84, at 568.

[203] *See id.* at 568-69 (noting that an officer may also illuminate both the interior of the car and the driver if it is dark under *United States v. Lee*, 274 U.S. 559, 563 (1927), and that if an arrest is made, a full-scale search can be conducted pursuant to the arrest under *New York v. Belton*, 453 U.S. 454, 460-63 (1981)). The idea behind the initial "friendly chat" after a stop has been made is to put the driver and officer on a "friendly basis," making consent more likely. *Id.* at 571.

[204] *Id.* at 570; *see also* Edward McGlynn Gaffney, Jr., *Removing the Blindfold from Lady Justice: No Equal Justice*, 88 GEO. L.J. 115, 120 (1999) (reviewing DAVID COLE, RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999)) (suggesting that officers only ask for consent to search "when they have no reason to suspect that the individual they wish to search has engaged in criminal activity").

[205] Harris, *Car Wars*, *supra* note 84, at 570-71 n.110 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227-32 (1973)).

most minority drivers consent to a search of their vehicles.[206] Once consent is obtained, an officer has the authority to conduct a full-scale search of the vehicle, including vehicle compartments and personal effects of the driver.[207] Thus, voluntarily consenting to a search of a vehicle ostensibly eliminates any concern about the reasonable nature of the search.

The Court described the nature of voluntary consent in *Schneckloth v. Bustamonte*[208] as being a balance between two competing values.[209] On one end of the balance is the need for police searches and questioning as a tool for meaningful enforcement of criminal laws.[210] Because of the potential for police abuse, the other end of the balance embodies society's belief that criminal law and its tools of enforcement cannot be used in an unfair manner in light of "civilized notions of justice."[211] As a result, the Court opined that the test used to determine the voluntariness of a confession is

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[206] *Id.* at 571 (observing that this consent may arise out of "desire to help, fear, intimidation, or a belief that they cannot refuse.").

[207] *Id.*; *see also* David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 566-68 (1997) (reporting that a stop might involve a search not only of a car's interior, but also the trunk and even the engine); Gary Webb, *DWB*, ESQUIRE, Apr. 1999, at 125 (comparing the right to search to the right to dismantle the car).

[208] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[209] *Id.* at 224-25. In *Schneckloth*, an officer stopped a vehicle containing six men and asked to see identification from each of them. After obtaining identification from only one of the six men in the car, the officer asked the men to step out of the car and for consent to conduct a search of the vehicle. In response to the request to conduct a search, one of the men replied, "Sure, go ahead." Once the officer began to search the car, he asked one of the defendants if the trunk opened and the defendant answered in the affirmative. The defendant obtained the keys and opened the trunk for the officer after which the officer found three checks stolen from a car wash. *Id.* at 220. Challenging his conviction for possession of stolen property, the defendant asserted that the search of the car and the subsequent seizure of the stolen checks violated the Fourth Amendment. *Id.* at 221-23. The defendant claimed that the officer failed to obtain voluntary consent to conduct a search and conducted the subsequent investigation without consent or a warrant. *Id.* Thus, the Court faced the issue of what "voluntary consent" means in the context of Fourth Amendment search and seizure law. *Id.*

[210] *Id.* at 225 (suggesting that without such an aid, the "innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved").

[211] *Id.* ("[T]he possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.").

whether the statement is "the product of an essentially free and unconstrained choice by its maker."[212] To determine whether the defendant produced a statement voluntarily, the Court reiterated that it examined "the totality of all the surrounding circumstances," which included information about the defendant and the facts regarding the police interrogation.[213] In addition, the Court held that a review of all circumstances required that account not only be taken of "subtly coercive police questions," but also of "the possibly vulnerable subjective state of the person who consents."[214] Thus, the Court considered all of the facts surrounding a police-citizen interaction to be relevant to its voluntariness inquiry and stated that no one factor alone controlled the issue.[215]

In reaching its decision, the Court distinguished its investigation into the voluntariness of consent from that of a waiver of a constitutional right, which requires the state to show that an individual made "an intentional relinquishment or abandonment of a known right or privilege."[216] The Court reasoned that its waiver test, "applied only to those rights which the Constitution guarantees to a criminal defendant," thereby allowing the criminal defendant to use every avenue available under a "constitutional model of a fair criminal trial."[217] For example, the strict standard of a knowing and intelligent waiver most often applied to criminal cases involves a waiver of the right to counsel, the right of confrontation, the right to a speedy trial, or the right to a jury trial.[218] The Court also noted that it utilized the standard for waiver to inspect pre-trial processes to protect the fairness of the trial itself, such as a defendant's knowledge before the abandonment of the right to counsel during pre-trial lineups and

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[212] *Id.* The court continued stating that "if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." Id. at 225-26 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[213] *Id.* at 226 (citing Davis v. North Carolina, 384 U.S. 737 (1966) (advice regarding constitutional rights); Payne v. Arkansas, 356 U.S. 560 (1958) (educational level); Haley v. Ohio, 332 U.S. 596 (1948) (age of accused); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (nature of interrogation)).

[214] *Id.* at 229.

[215] *Id.* at 226.

[216] *Id.* at 235 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

[217] *Id.* at 237-41.

[218] *Id.* at 237 (citing Glasser v. United States, 315 U.S. 60 (1942) (waiver of counsel at trial); Brookhart v. Janis, 384 U.S. 1 (1966) (right to confront); Barker v. Wingo, 407 U.S. 514 (1972) (speedy trial); Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) (jury trial)).

the right against self-incrimination during custodial interrogations in a coercive environment.[219] In the end, if constitutional protections failed to apply in the criminal context, the criminal justice process could reach an unfair result by penalizing innocent individuals.[220]

The Fourth Amendment, on the other hand, protected rights of a "wholly different order" and had "nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial."[221] In fact, the Court announced that the "Fourth Amendment 'is not an adjunct to the ascertainment of truth.'"[222] Instead of preserving the fairness of criminal trials, the Fourth Amendment merely served to protect the "security of one's privacy against arbitrary intrusions by the police."[223] The Court found nothing "constitutionally suspect" in one's consenting to a search because a consent search may yield the same information as one conducted with a warrant.[224] Moreover, the Court declared that no part of the underlying justification for the Fourth Amendment served "to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."[225] Rather, the principles underlying the Fourth Amendment encourage consent because the search may uncover evidence necessary to prosecute an individual for a crime thereby insuring that another "wholly innocent person is not wrongly charged with a criminal offense."[226] For these reasons, the Court found a "vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."[227]

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[219] *Id.* at 239-40 (citing United States v. Wade, 388 U.S. 218 (1967) (waiver of counsel at pre-trial lineup); Miranda v. Arizona, 384 U.S. 436 (1966) (waiver of protection against self-incrimination)).

[220] *Id.* at 241 (using the right to counsel as an example of a right without which "a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted").

[221] *Id.* at 242.

[222] *Id.* The Court found in the case that there was "no reason to believe" that police used coercion to elicit the consent. *Id.* at 247. Specifically, the Court held

> that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth . . . Amendment[ ] require[s] that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Id. at 248.

[223] *Id.* at 242 (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

[224] *Id.* at 243.

[225] *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).

[226] *Id.*

[227] *Id.* at 241.

Although the Court dissociated the Fourth Amendment from the criminal context in *Schneckloth*, the difference between the concerns of the Fourth Amendment and those protecting the criminal process is not as "vast" as it appears to the Court. While the text of the Fourth Amendment differs from those traditionally associated with the criminal process, such as the Fifth and Sixth Amendments,[228] the Fourth Amendment is in fact an "adjunct to the ascertainment of truth" because the criminal process begins in part with a search for evidence. The fundamental reason to conduct a search of a person or premises is to discover evidence of criminal wrongdoing to be used at a trial for the alleged crime. If Fourth Amendment concerns are not associated with finding the truth in criminal matters, then the Court need not justify consent searches by pointing out that they protect the innocent from being wrongly accused of criminal acts. However, the Court specifically observed that a consent search may be the *only* method of obtaining incriminating or exonerating evidence where police possess facts indicating possible illegal activity but lack probable cause to search or arrest an individual.[229] In such a case, the evidence uncovered after consent is obtained could serve as the basis for further investigation and prevent the innocent from being prosecuted for a crime.[230] Moreover, a consent search is valuable even in cases where police possess probable cause but lack a search warrant because the search might not uncover evidence upon which to base an arrest.[231] In this light, the Fourth Amendment is more than an "adjunct to the ascertainment of truth," it is the gateway to the assertion of other rights, such as the Fifth Amendment, later in the criminal process.

As further evidence of the close relationship between the Fourth Amendment and the criminal process, *Schneckloth*'s concern with the voluntariness of statements made to police mirrors a similar concern involving the statements of individuals to police during the criminal process described in *Miranda v. Arizona*.[232] In *Miranda*, the Court investigated a series of cases where police-defendant interactions resulted in police

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[228] *See* U.S. CONST. amends. IV-VI. The Fourth Amendment protects all citizens of this country from "unreasonable searches" whether or not suspected of criminal behavior. By way of comparison, the Fifth Amendment announces that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself," and the Sixth Amendment guarantees that "the accused shall . . . have the Assistance of Counsel."

[229] *Schneckloth*, 412 U.S. at 227.

[230] *Id.* at 228.

[231] *Id.*

[232] Miranda v. Arizona, 384 U.S. 436 (1966).

acquisition of incriminating evidence used to convict the defendant at trial.[233] The police questioned the individuals in each case without advising them of their right not to incriminate themselves under the Fifth Amendment.[234] Basing its decision on the importance of Fifth Amendment rights, the Court found the police practice of interrogating individuals without apprising them of their right not to incriminate themselves to be unconstitutional.[235] As a result, the Court created a procedural safeguard designed to inform the individual of his Fifth Amendment right in the form of a litany of rights recited to the individual before the interrogation.[236] Among these now familiar rights are the right to remain silent, the knowledge that any statement can be used against the person's interest in a court of law, the right to have an attorney present during questioning, and that an attorney will be provided if the individual cannot afford one.[237]

Pivotal to its conclusion, the Court emphasized that the coercive environment in which police questioned individuals unduly pressured them to provide incriminating evidence in a manner forbidden by the Fifth Amendment. Noting the psychological orientation of questioning, the Court described the environment in which questioning occurred as one where "antagonistic forces"[238] minimized one's "freedom of action"[239] and exacted a "heavy toll on individual liberty."[240] Because the questioning occurred in private, the setting lacked the participation of impartial observers to guard against police intimidation.[241] As a result, the Court opined that both the tactics and environment of police questioning created "inherently compelling pressures which work[ed] to undermine the individual's will to resist

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[233] *Id.*

[234] *Id.* at 456-57. The reported decision actually involved four separate cases: No. 759, *Miranda v. Arizona* (indigent defendant who confessed after being taken to a special interrogation room); No. 760, *Vignera v. New York* (defendant made oral admissions to an interrogating police officer and then later signed a confession); No. 761, *Westover v. United States* (defendant held overnight after questioning by local authorities who signed incriminating statements the next day after being handed over to federal authorities); and No. 584, *California v. Stewart*, (local police held defendant for five days and questioned him on nine occasions after which they obtained a confession). *Id.*

[235] *Id.* at 445, 471-72.

[236] *Id.* at 467.

[237] *Id.* at 444-45.

[238] *Id.* at 461.

[239] *Id.* at 444.

[240] *Id.* at 455.

[241] *Id.* at 461.

and to compel him to speak where he would not otherwise do so freely."[242] In light of the respect given to individual dignity, a fair investigative process demanded that "the government seeking to punish an individual produce the evidence against him by its own independent labors" rather than by compelling self-incrimination from the citizen.[243] In sum, the compulsion implicit in police questioning persuaded the individual to make self-incriminating statements where they would otherwise not be made.

Reflecting the underlying analysis in both *Schneckloth* and *Miranda*, the fundamental reason that minority drivers consent to unreasonable searches is the compulsion they face during police encounters. When an officer stops a minority motorist on the highway, the officer carries with him a "badge of intimidation"[244] that prevents truly voluntary action in a *Schneckloth* or *Miranda* sense on the part of the motorist. From slavery to Jim Crow to the racially discriminatory practices of the Civil Rights Era, social injustice and racial discrimination permeate the experiences of minority citizens with governmental entities throughout the history of this nation. In the context of police-minority experiences, minority communities are acutely aware of police violence perpetrated against their members such as the Rodney King incident in Los Angeles or the Amadou Diallo shooting in New York.[245] As a result, minorities justifiably project a negative image onto police officers with state authority behind their badges. Unlike those in the majority, the repeated discrimination experienced by minorities in this country counsels them to assume a defensive posture in the face of a questioning police officer with an accompanying sense of "what did I do wrong—now?"[246] As Justice Stevens recognized in *Michigan Dept. of State Police v. Sitz*, "those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop

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[242] *Id.* at 467 (referring to previously noted police trickery and relentless questioning used to wear down the individual in the hope of eliciting an incriminating statement).

[243] *Id.* at 460 (citing Chambers v. Florida, 309 U.S. 227, 235-38 (1940)).

[244] *Id.* at 457.

[245] *See* William K. Rashbaum, *U.S. Says City Has Failed to Release Data on Frisks*, N.Y. TIMES, Jan. 31, 2001, at B5 (discussing the 1994 videotaped beating of Rodney King by Los Angeles Police Department officers and describing the shooting of Amadou Diallo, an unarmed African immigrant at whom New York police officers fired forty-one shots and struck nineteen times).

[246] *See* Harris, *The Stories*, *supra* note 60, at 273 (reporting the feeling of one African-American woman pulled over by police, but common to the sentiments expressed throughout minority communities).

designed to elicit signs of suspicious behavior."[247] In other words, "[b]eing a minority in America is like being on permanent probation. You never know when your privileges of being 'one of the good ones' will be revoked."[248]

This subtle change in the outlook by minorities upon police encounters on the roadways, the question of whether justice or judge, jury, and executioner is stopping them, belies the compulsion inherent during police-minority driver interactions.[249] However, the Fourth Amendment, according to the *Schneckloth* Court, requires that consent not be coerced irrespective of the subtlety of the coercion.[250] Moreover, a determination of the voluntariness of consent during a police encounter must account for the "possibly vulnerable subjective state of the person who consents."[251] During racially motivated stops, the imbalance of power between police and minority drivers, fortified by reports of police brutality and years of racial discrimination,[252] subjectively instructs minorities to consent to unjustified requests to search their vehicles. Indeed, many minority drivers believe that if consent is withheld, the police will continue to observe and harass them until consent is obtained.[253] If a minority driver believes this, consent given to authorities during an investigative traffic stop is not voluntarily given in the sense that she who consents exercises free will in the absence of compelling pressures and in the spirit of cooperation among a universe of options. Minority consent during investigative traffic stops is nothing more than submitting to state police authority for fear that failing to do so will result in adverse legal or physical consequences.

As evidence that consent is mere submission based upon experience, the actions of minority citizens prior to police interactions demonstrate the

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[247] Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 465 (1990) (Stevens, J., dissenting).

[248] Lewis W. Diuguid, *On Permanent Probation*, KANSAS CITY STAR, Dec. 27, 2000, at B7.

[249] *See* COLE, *supra* note 55, at 23 (quoting the statement of a California Assemblyman).

[250] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

[251] *Id.* at 229.

[252] *See* Maclin, *supra* note 182, at 336, 363 (comparing the targeting of African-Americans for criminal investigation to the slave patrol of early America and citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 158 (1968) for the proposition that African-Americans believe that police brutality and harassment occur more frequently to African-Americans and in their neighborhoods).

[253] *See* COLE, *supra* note 55, at 33-34.

degree to which free will is stripped during police encounters. Undermining the free will of minority individuals begins during childhood as minority parents teach their children how to behave during police encounters. Because minorities believe that unjustified traffic stops and searches are a "fact of life," minority parents sadly offer their children advice such as "[i]t doesn't make a difference [that you did nothing wrong]. Just do what they tell you to do" and "[t]hey say you did something, say 'O.K.' and let them get out of your life."[254] As a manifestation of childhood warnings, minority citizens employ various strategies as adult drivers to cope with the ever-present threat of police interference. For example, minority drivers who have dealt with the police in the past instruct others to keep their hands on the steering wheel and to remain motionless so as not to give officers an excuse to use physical force against them.[255] Moreover, some minority drivers obtain prepaid legal assistance to combat the inevitable interaction with police on the road.[256] Apart from coping with the actual police encounter, some minority motorists drive cars that are unlikely to attract police attention or change their attire to reduce suspicion while driving in an attempt to avoid the police encounter in its entirety.[257] Some drivers even take routes specifically designed to avoid driving through areas where police will consider them to look out of place thereby creating the suspicion of wrongdoing.[258] In sum, consenting to a search is not an exercise of free will, but a manifestation of an ongoing effort to avoid or survive police

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[254] Harris, *The Stories*, *supra* note 60, at 274 (recounting the instructions of two minority parents to their children); *see also Rash of Racial Profiling Forces Black Parents to Prepare Young Drivers for Police Stops*, JET, Mar. 29, 1999, at 7 (describing the instructions that African-American parents give their children such as not to travel with anything that looks like illegal material and to cooperate while answering questions while keeping both hands in plain view on the steering wheel).

[255] Harris, *The Stories*, *supra* note 60, at 274-75 (citing one mother who will instruct her young son that he should "[k]eep (his) hands on the steering wheel, and do not run, because they will shoot you in your back." Also recounting the advice of Mr. Christopher Darden, whose advice is "[d]on't move. Don't turn around. Don't give some rookie an excuse to shoot you.").

[256] Michael H. Cottman & Avis Thomas-Lester, *Where Families Fear Police: Pr. George's Black Parents Caution Teens to be Careful with Officers*, WASH. POST, Dec. 8, 2000, at A1.

[257] *See* Harris, *The Stories*, *supra* note 60, at 273-74.

[258] *See, e.g.*, Price v. Kramer, 200 F. 3d 1237, 1243 (9th Cir.), *cert. denied*, 531 U.S. 816 (2000) (reporting that one City of Torrance police officer said "[y]ou're not supposed to be here" to one young African-American male during a traffic stop).

encounters based upon the cumulative effects of racial prejudice experienced by minority individuals throughout their lives.

VI. NEW JERSEY'S CONSENT DECREE AS A MODEL FOR PROTECTIVE LEGISLATION

In the absence of voluntary consent, the combination of its programmatic nature and the roving patrol-like exercise of discretion to search minority driven vehicles pushes the practice of racially motivated searches into the realm of Fourth Amendment protection despite the Court's decision in *Whren*. The Fourth Amendment protects citizens of this nation against "arbitrary intrusion by the police."[259] Indeed, "standardless and unconstrained" discretion of police officials that allows for unfettered interference with the lives of citizens is the problem the Court sought to circumscribe in its past decisions.[260] Although officers must have some discretion in fighting the drug trade based upon the difficulty of the task, police cannot be allowed to subject minorities to arbitrary "intrusion[s] upon constitutionally guaranteed rights based upon nothing more substantial than inarticulate hunches"[261] that fail to uncover evidence of criminality in an overwhelming majority of the searches. The combination of the legitimacy of the traffic code with the broad, non-specific racial classifications used as a basis for suspicion of drug crimes provides police with unlimited discretion to stop minority drivers. Using a racial profile, however, is simply a substitute for probable cause or reasonable suspicion to conduct searches where race becomes a proxy for criminal wrongdoing. Moreover, implementing a racial profile makes the job of police officers less burdensome because the costs of individualized suspicion need not be paid before searching a minority citizen. However, the decreased police burden comes at the expense of minority Fourth Amendment rights, which cannot be sacrificed for the sake of simplicity.[262] Nonetheless, the egregious practice of racial profiling continues because state governments and courts fail to hold police departments and officers accountable for their actions.

Fighting the arbitrary application of racial profiling in their state, New Jersey officials entered into a Consent Decree with the federal government

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[259] Wolf v. Colorado, 338 U.S. 25, 28 (1949).

[260] *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Camara v. Municipal Court, 387 U.S. 523, 532-533 (1967).

[261] Terry v. Ohio, 392 U.S. 1, 22 (1968).

[262] *See* Mincey v. Arizona, 437 U.S. 385, 393 (1978); United States v. Chadwick, 433 U.S. 1, 6-11 (1977).

that attempts to eliminate the use of race at all levels of decision-making when enforcing the traffic code.[263] From a general standpoint, the agreement attacks racial profiling by either circumscribing police discretion in the field during traffic stops or recording some facts to justify the exercise of discretion in particular cases. The Decree begins by stating that officers may not use race as a factor when deciding to stop or search a vehicle unless officers know specific facts regarding the race of a suspect before deciding to stop an individual motorist.[264] Limiting the exercise of officer discretion, the decree not only requires the establishment of specific criteria outlining which drivers may be stopped, but also mandates that officers request consent to search a vehicle only if they have a reasonable suspicion that a search will reveal evidence of criminal activity.[265] If an officer fails to obtain consent to search a vehicle, the officer must record the basis upon which he made the request.[266] Furthermore, the officer must notify the driver that she has the right to refuse consent by presenting the motorist with a consent form to be signed by the motorist as an objective indication of the driver's consent to be searched.[267] On a statewide level, the agreement requires that officers document the races of those drivers from whom consent is requested and of those drivers who are searched in the absence of consent to keep abreast of any racial disparity in the drivers searched or asked for consent to search.[268]

As a general proposition, the Consent Decree is a positive step toward reducing the instances and effects of racial profiling. While requiring officers to document facts justifying suspicion risks increasing lawsuits against police officers and departments, the benefits of recording such facts far outweigh the minimal increase in administrative burden to the individual officer. An individual driver obtains valuable objective evidence regarding the facts of the search, before the actual search, that can be used as evidence in any subsequent litigation to vindicate Fourth Amendment values. During litigation based upon the "extreme practice" of racial

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[263] *See* Consent Decree in United States v. New Jersey, Civ. No. 99-5970 (D. N.J. 1999) (also providing, for example, that in-car cameras be used to record traffic stops, statistics be kept as to who is searched, establishment of a twenty-four hour hotline to receive complaints, and requiring all complaints be investigated), *available at* http://www.usdoj.gov/crt/split/documents/jerseysa.htm.

[264] *Id.* ¶ 26.

[265] *Id.* ¶ 28.

[266] *Id.* ¶ 32-33 (including documenting the basis for using a drug-sniffing dog if one is used).

[267] *See id.* ¶ 31 (the consent form is to be printed in both English and Spanish).

[268] *See id.*

profiling, evidence recorded on the justification sheet could be injected into the traditional balancing analysis implemented by the trier of fact to determine the reasonableness of the search. If an officer fails to discover any evidence of wrongdoing after searching a vehicle, the trier of fact might find that the facts on the justification sheet do not support a finding of reasonable suspicion to conduct a search. For example, if an officer records that he suspects the presence of marijuana in the vehicle based upon an odor and uncovers no evidence of marijuana after a search, the likelihood that something other than reasonable suspicion of criminal activity motivated the search increases. In such a case, the burden to show that an officer possessed reasonable suspicion to conduct a search in light of the documentation shifts to the officer and his representatives.

While the absence of evidence after a search combines with the justifying facts recorded prior to the search to make the shifted burden a heavy one, the failure to uncover contraband does not transform the search into a *per se* violation of the Fourth Amendment. Officer discretion to search a vehicle and the absence of recovered contraband is accounted for by the balancing test applied by the trier of fact in determining the reasonableness of the search. For example, an officer may record that he believed that the car contained marijuana, but what he thought was marijuana turned out to be ordinary, run-of-the-mill cigarettes. In such a case, a trier of fact could find that an officer reasonably exercised his discretion to conduct a search based upon the similarity between a marijuana cigarette and a legal cigarette among other factors. Such a case is vastly different from a situation where a search fails to uncover the presence of anything closely resembling contraband. In other words, comparing the justifying facts recorded prior to the search to the results thereof goes straight to the heart of the reasonableness of the search. Under such a scheme, police are allowed to make mistakes and will do so because of their well-deserved discretion based upon the difficulty of law enforcement. Recording facts justifying a search prior to conducting one does not require that an officer's hunches be validated by discovery of incriminating evidence, but it does require that those hunches be reasonable, which coincides with the mandate of the Fourth Amendment.

VII. CONCLUSION

A fine line exists between the exercise of police discretion in the pursuit of criminal law enforcement and transgressing the protection bestowed upon citizens by the Fourth Amendment. Racial profiling crosses that line by subjecting individual minority drivers to unreasonable searches

based upon the race of the individual driver. Indeed, the practice is called "racial profiling" for a reason—because race is the determinative factor in the alchemy of investigative traffic stops. However, an individual's race is insufficiently correlated with narcotics violations to justify placing all minority drivers under suspicion of drug-related crimes without individualized suspicion of wrongdoing. Statistics show that minorities do not use drugs to a larger extent than their demographic makeup would predict, which suggests that the suspicion levied upon minority drivers is unwarranted.[269] Nevertheless, the legitimacy of the traffic code masks the illegitimate use of race and its alleged link to criminality in search decisions by providing police officers with a justifiable reason to stop vehicles whether or not the officers normally enforce the given traffic code provisions. Moreover, the Court's totality of circumstances test further blurs the reasonableness determination because it neither accounts for the initial objective facts upon which an officer bases his suspicion nor the compulsion inherent in a police-minority encounter. To provide one or more pieces of evidence to be weighed among the "totality of circumstances" in the individual case, the New Jersey Consent Decree requires that officers document the facts that they used prior to the search that led them to suspect an individual motorist of criminal wrongdoing. A record of the facts patrols the fine line between justifiable police discretion and Fourth Amendment violation by making an individual officer more accountable for the exercise of discretion during an individual traffic stop and the damage thereof.

As a corollary to the benefits accruing to individuals who possess a record of the facts upon which an officer based suspicion prior to the search, evidence of unreasonable searches in individual cases serves as a foundation to challenge the practice of racial profiling as a general investigative tool. Armed with evidence recorded prior to searches, minority groups could ban together to bring a class-action suit against police departments and states utilizing racial profiling to identify potential criminals on the highways. In fact, the American Civil Liberties Union recently filed a class-action suit alleging that the Maryland State Police use racial profiling to target minorities along one particular Maryland interstate.[270] In each case, police found no evidence of criminal wrongdoing

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[269] *See* Harris, *The Stories*, *supra* note 60, at 296 (citing SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. NAT'L ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SERVS., NAT'L HOUSEHOLD SURVEY ON DRUG ABUSE, 1997 PRELIM. RESULTS, at 13, 58 tbl.1A).

[270] *See ACLU's Class-Action Suit Over Racial Profiling*, *supra* note 120.

in the minority driven vehicles.[271] Because the lack of contraband recovery is not the *sine qua non* of unreasonable searches, a record of the facts used by the officer to justify suspicion provides the trier of fact with a clearer picture of the totality of circumstances involved with the search in the case. In the end, if class-action suits are successful, using documented evidence of suspicion not only strengthens individual challenges to racial profiling, but also removes the incentive for police officers to search minority driven cars following minor, normally unpunished traffic violations without justifiable suspicion. If the fruits of the unreasonable search sour, the desire to pursue the fruits erodes.

On a fundamental level, the failure to hold officers accountable for unreasonable discretionary searches highlights the disparate experiences with criminal law enforcement by the various racial segments of the nation's population. Any police practice where racial disparities in enforcement exist not only serves to heighten the tension between police and minority communities, but also challenges the race-neutral legitimacy of the law. If police search the vehicles of minority drivers for drugs, the numbers of minorities charged with narcotics violations reflect their efforts. In turn, the elevated number of minorities charged with drug-related crimes provides a foundation to continue using the racial profile. As a result, a feedback loop develops where the suspicion of minority drivers on the road not only justifies racial disparities in law enforcement in the eyes of the police, but also generates the general minority perception that the eyes of Justice do not see them as equal citizens. Despite the ostensible success of the civil rights movement, a vast schism remains between theory and reality in the most penal aspect of our body of law. Although Justice is theoretically blind in criminal matters, she sees color—particularly on the road.

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[271] *Id.* Subsection C, entitled "Incidents involving the individual named plaintiffs" recounts the encounters between eleven minority motorists and Maryland State Police officers. *Id.*