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Stubbornness of Pretexts

Daniel B. Yeager
California Western School of Law, dby@cwsl.edu

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The Stubbornness of Pretexts

DANIEL B. YEAGER*

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I. INTRODUCTION

On May 29, 2001, the United States Supreme Court decided *Arkansas v. Sullivan*,¹ a seemingly unremarkable per curiam opinion that facilitated the conviction of a small time methamphetamine dealer whose trial had been aborted by pretrial rulings that were affirmed by his state's highest court.² The U.S. Supreme Court reversed, ruling that in suppressing Sullivan's drugs, the state court had ruled "flatly contrary to this Court's controlling precedent,"³ *Whren v. United States*.⁴ Five years earlier, *Whren* had confronted the very question before the Court in *Sullivan*:

* Professor, California Western School of Law.

1. 532 U.S. 769 (2001) (per curiam).

2. *State v. Sullivan*, 11 S.W.3d 526 (Ark. 2000), *opinion supplemented on denial of reh'g*, 16 S.W.3d 551 (Ark. 2000), *and rev'd*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

3. *Sullivan*, 532 U.S. at 771.

4. 517 U.S. 806 (1996).

Does the Fourth Amendment's injunction against unreasonable searches and seizures prevent the prosecution from using evidence that police discovered by way of a so-called "pretext"? *Whren* held that it does not; *Sullivan* followed suit.⁵

The pretext problem had been percolating in the U.S. Supreme Court for at least four decades before its putative burial in 1996 by *Whren*.⁶ Indeed, it is one of those areas of criminal procedure where the term "confused patchwork,"⁷ to lift a term of Justice White's, would be apt. "Pretext" refers to an action that was done for fishy reasons. In other words, calling something "a pretext" is not so much a criticism of the action as it is of its motive. And while in just seven years *Whren* already has been cited over one thousand times in court opinions and has been the central subject of some fifty law review articles,⁸ the criteria of pretexts seem to be taken as given; it is their consequences that get all the play. Because no agreement on what those criteria are has been reached, I hope to establish them here. This Article, therefore, will reflect on (1) how *Whren*'s failure to acknowledge what *counts* as a pretext accounts for the residual confusion as to whether or not *Whren* really has killed off the pretext argument in constitutional criminal procedure, and (2) the extent to which the Court in *Sullivan* compounded that failure, which I hope to lightly correct here by distinguishing motives from intentions and then by elaborating the role that each plays, or at least should play, in Fourth Amendment jurisprudence.

II. WHAT IS A PRETEXT?

Consider Jean-Paul Sartre's use of the term "pretext" in the following garden-variety example, which appears in his autobiography:

By classifying authors in order of merit, he was paying lip-service; this surface hierarchy ill concealed his preferences, which were utilitarian: de Maupassant provided the best translation material for his German pupils; Goethe, beating Gottfried Keller by a nose, could not be equalled for compositions in French. As a humanist, my grandfather held novels in low esteem; as a teacher, he valued them because of their vocabulary. He ended by reading only selected passages,

5. *Sullivan*, 532 U.S. at 771; *Whren*, 517 U.S. at 819.

6. See, e.g., *Abel v. United States*, 362 U.S. 217 (1960). There is a brief reference even earlier. See *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence.").

7. *Brecht v. Abrahamson*, 507 U.S. 619, 649 (1993) (White, J., dissenting) (describing the Court's federal habeas corpus cases).

8. See, e.g., Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 U. COLO. L. REV. 693, 694 & n.7 (1998) (citing articles discussing pretext arrests). Among the more frequently cited is David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

and I saw him, some years later, enjoy an extract from *Madame Bovary* in Mironneau's *Readings* when the complete Flaubert had been awaiting his pleasure for twenty years. I felt that he lived on the dead, which to some degree complicated my relations with them. *Under the pretext of worshipping them, he kept them in chains and did not refrain from cutting them up in order to carry them more conveniently from one language to another.*⁹

Here, Sartre's grandfather, Charles Schweitzer, is depicted as someone whose action in question is his classifying authors in their order of merit. What makes it a pretext is that the reason, if any, one would ordinarily have for doing so would be the authors' imagination, their compassion, their expressiveness, not their tendency to make teaching a foreign language easier. And how do we conclude that Grandfather Schweitzer's rankings were pretextual? The most telling evidence here is the shakiness of his claim to classification by merit in light of the fact that young Sartre observed that his grandfather had a practice of citing canonical works, but never settling down to actually read them.¹⁰ That is to say, Grandfather Schweitzer *used* the great works, but not because they were great. Instead, his real reasons for the classification by merit might have been to conceal from his grandson his lowbrow tastes, his preference for minor authors, or that what he liked about the great authors was not that they were great authors but that their books were somehow useful to his trade.

It is important to note that Sartre points out that his grandfather's real interest in the great authors was "ill concealed." Ill concealed or not, it *was* concealed, or at least it was meant to be concealed. If Grandfather Schweitzer had admitted that his rankings were not really based on merit, then the claim that the classification by merit was pretextual would be empty, given that a pretext is an action that is characterized by a special sort of underlying reason, a reason at odds with those reasons, if any, that ordinarily provide the grounds for the action. If Grandfather Schweitzer owned up to classifying authors by their vocabulary, then there would be no appearance to penetrate; there would be no special reason at odds with or underlying the action. We would just say: "Grandfather classifies authors by their vocabulary." The action would not be pretextual.

9. JEAN-PAUL SARTRE, *THE WORDS* 65–66 (Bernard Frechtman trans., 1964) (emphasis added).

10. Earlier in the text, when Grandfather Schweitzer complains that he does not comprehend a text, his wife explains that his failure is due to the fact that he reads from the middle, not the beginning, of a text. *Id.* at 43.

The same would be true of young Sartre, who calls his grandfather's ranking "pretextual." Because Sartre does in fact read the canonical works, we have no occasion to question why *he* would rank the great authors as he does; there would be nothing to suggest that his classification is *not* by merit. When he ranks by merit, there is very likely no motive for the action at all, given that motives exist only when the reasons for the action are at odds with the action in some way. With the ordinary action, there may be no answer at all to the question: "Why did you do that?" With pretextual action, oppositely, there is an answer. If there were not, then the term "pretext" would have no specific application to the speech situation.

So too, if the classification was *not* by merit, then the whole notion of pretext would be inapposite. In other words, pretext presupposes here that it really is a classification by merit. If it is a classification by ease of translation or breadth of vocabulary, then it is not a *pretextual* classification by merit, but not a classification by merit at all. Pretext, properly understood, operates only in settings where the criteria for the action *are* met: it *is* a classification by merit. The best authors are intentionally rated or placed at the top.

In the hope of correcting one of the great misconceptions or abuses of the term "pretext," it bears repeating that to say that the action claimed (here, classification by merit) is not the action that occurred (here, classification by vocabulary) is not to describe the action as pretextual, except in a too loose or extravagant sense. With pretexts, the action is not feigned. What is concealed is a special reason, a motive, which, like all motives, cuts against or deviates from the action; what is concealed is something in the world to be achieved or set up by the action, something that normally would not strike someone as the upshot of the action.

Soon after the term's first appearance, Sartre uses the term "pretext" again. This time, Sartre imagines himself riding a train without having purchased a ticket. In this reverie, he deflects the ticket collector's demands for a ticket by reversing the situation:

I therefore revealed that I had to be in Dijon for important and secret reasons, reasons that concerned France and perhaps all mankind. If things were viewed in this new light, it would be apparent that no one in the entire train had as much right as I to occupy a seat. Of course, this involved a higher law which conflicted with the regulations, but if the ticket-collector took it upon himself to interrupt my journey, he would cause grave complications, the consequences of which would be *his* responsibility. *I urged him to think it over: was it reasonable to doom the entire species to disorder under the pretext of maintaining order in a train?*¹¹

11. SARTRE, *supra* note 9, at 111 (emphasis added).

Here, one would ask this question: If maintaining order on the train by insisting that passengers have tickets is a pretext, then what was the ticket collector really getting at? For pretext to be used in anything but a loose sense, the answer would have to be that the ticket collector was demanding a ticket in order to doom the entire species while *holding himself out* as maintaining order. But here the evidence is weak. Even if the ticket collector believed Sartre's claim about the fate of mankind, that does not necessarily mean that demanding the ticket anyway demonstrates an intention to doom the species. Even once alerted to what is staked in demanding the ticket, that stake (dooming the species) could still remain incidental to the ticket collector's original plan of maintaining order or enforcing the regulations or doing his job. As long as he demands the ticket despite the fact that it will doom the species, rather than in order to doom the species, then maintaining order or enforcing the regulations or doing his job would not be a pretext at all. Instead, that would be precisely the point or upshot of demanding the ticket.

A pretext, therefore, is a criticism we make of an action that has a motive that is, like all motives, at odds in some way with the action: the motive for the generous action toward the fragile relative is to inherit under the will. The motive could be greed (because greed is directed at something—here, at the money that the will would make available). If the generous action is just plain generous without such directedness, then it is nonsense to speak in terms of motive, though there may be reasons for the generosity (for example, feeling good about oneself). But such reasons are not motives if they are psychological or inner,¹² even though we tend to think of motives as inner states rather than as explanations of something to be attained in the world by a certain course of action.¹³ And while it is common among psychologists to suggest that all actions have motives (or are motivated),¹⁴ in fact we use the word "motive" only infrequently in ordinary speech.¹⁵ We use the word only in reference to actions we feel the need to assess, to make sense of.¹⁶

12. See Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 72–73 (1991).

13. See, e.g., *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) (“[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.”).

14. R.S. PETERS, *THE CONCEPT OF MOTIVATION* 31 (R.F. Holland ed., 1958).

15. *Id.* at 28; N.S. Sutherland, *Motives as Explanations*, 68 MIND 145, 153 (1959).

16. PETERS, *supra* note 14, at 29.

Among those actions that do have reasons, not all reasons are necessarily directed. Considerateness or punctuality, for example, are reasons for actions, yet they are not motives; they have no aim, no directedness; they are not setting anything up.¹⁷

Thus, references to motives come up in moral discourse where we need to make sense of an action. If we say, "What was his motive?" it must be because it looks to us as though the action had to be directed at something unusual or untoward, but we cannot figure out what it was. When we say that Macbeth's motive in killing Duncan was ambition, we are not referring to a feeling or some internal perturbation of Macbeth;¹⁸ instead, the motive of ambition refers to some other actions, some other ends in the world to be attained by the killing, whether or not the actions are known to him.¹⁹ Likewise, "if a man looks pleased when praised for something trivial, or upset when mildly criticized, we can say he is vain, but we cannot say vanity is his motive for being pleased when praised."²⁰ In other words, vanity may explain certain actions, but it cannot be considered a motive for them.²¹ Pretext is therefore an inquiry into a motive that the actor is covering up. Any actor, once put on the spot by being questioned about his motives, will either confirm or dispel our suspicions by going on record and offering a reason for the action or denying having any reason at all. If we accept that the action had no motive, or perhaps had no reason whatsoever (as in "I just did it" or "I just felt like doing it"),²² then the action cannot be pretextual. Thus "pretext" is the term we apply to an action that we conclude was directed in an unconventional or untoward way that the actor was aware of, regardless of whether he is willing to admit to it when questioned later. Put slightly differently, if after confronting the explanation for the action, we cannot accept the action as ordinary or conventional, then we may be inclined to call it a pretext. For example, we may say: "Your motive in marrying her was greed; you married her for her money." If the accused in such a pinch were to respond: "No, I married for love," to that we may respond: "No, you are incapable of love. The marriage is for you just a pretext for moneymaking." That is to say, love is the conventional, ordinary reason for marriage, but it is not the reason for this one. Accordingly, in its most boiled down form, pretext is a way of criticizing an action that had a motive that is incompatible with the ordinary, conventional reasons, if any, for the action.

17. *Id.* at 32.

18. Gudel, *supra* note 12, at 73.

19. *Id.*

20. *Id.*

21. See ROY LAWRENCE, MOTIVE AND INTENTION 23 (1972).

22. Gudel, *supra* note 12, at 75.

III. PRETEXTUAL POLICE ACTION

Likewise, pretextual police action occurs when police do the right thing for the wrong reasons;²³ they perform a lawful action with an improper motive. For example, the U.S. Supreme Court has held that a search of an arrestee follows automatically from a lawful arrest.²⁴ This bright line rule is meant to prevent the destruction of evidence and to protect the arresting officers from weapons within the arrestee's reach.²⁵ But what happens if an officer arrests and searches someone who has violated a law against, say, public drunkenness, when the officer's motive in arresting—the whole upshot of the police action—is to look for obscene materials in the arrestee's satchel?

Defense attorneys plausibly insist that obscene materials or other evidence of crime found on the arrestee should be suppressed on grounds of pretext, sham, or bad faith.²⁶ The suppression hearing, their argument runs, should demand from the arresting officer an account of his reasons for his actions: "Why did you arrest *that* person *then*? You had no interest at all in enforcing the public drunkenness laws, did you?"²⁷ It is the trial judge's job, under such a view, to decide whether the officer did the right thing (arrest a drunk) for the wrong reason (to search for obscene materials). If the officer did arrest the drunk *just* to explore for obscene materials, defense attorneys have long argued that the trial judge should invalidate the otherwise lawful police action on grounds of pretext.²⁸ Invalidating the arrest would be to hold it unconstitutional, thereby justifying the exclusion of the evidence, if any, "come at by exploitation of that illegality."²⁹

A. *Whren v. United States*

The viability of this defense strategy culminated seven years ago in *Whren v. United States*.³⁰ In *Whren*, an unmarked police car containing two officers and an investigator stopped two African-American youths

23. See John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 101 (1982).

24. *Chimel v. California*, 395 U.S. 752, 763 (1969).

25. *Id.*

26. Burkoff, *supra* note 23, at 72–84.

27. See James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 641–43 (1985).

28. See *id.* at 644–46.

29. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, *EVIDENCE OF GUILT* 221 (1959)).

30. 517 U.S. 806 (1996).

in a Nissan Pathfinder for some trivial traffic offenses.³¹ In effecting the stop, police peered into the truck and saw in passenger Michael Whren's lap some cocaine that was later used to convict him and driver James Brown of serious drug, not traffic, offenses.³² Because it was plainclothes vice-squad officers in an unmarked car enforcing the District of Columbia's traffic laws—an action that their own departmental regulations prohibited—Whren and Brown insisted that the traffic stop was a mere pretext.³³ The traffic stop, the officers indicated, was a pretext for a drug investigation that could not have warranted the car stop based merely on the officers' flimsy (but accurate) hunch that drug activity was afoot.

Though the case made it all the way to the U.S. Supreme Court, it is unclear just what the parties or the courts take to be the criteria of pretexts. For example, in its amicus brief, the American Civil Liberties Union (ACLU) asserted: “[H]ad the police conducted themselves in accordance with the regulation a court could presume, subject to rebuttal, that the search was not pretextual.”³⁴ Yet in actuality, it is not the search that was even arguably pretextual; it is the traffic stop. As for the relevance of the departmental regulations, as dissonant as this may sound, compliance with them would make a stronger, not weaker, case of pretext. That is, police compliance with departmental regulations would make easier our concluding that it really was a traffic stop, which is a necessary condition of a pretextual traffic stop.

Most of the fifty minute oral argument in *Whren* involved discussion of a regulation found in the Metropolitan Police Department's Objectives and Policies, which held that plainclothes officers in unmarked cars may make traffic stops only when the traffic violation “is so grave as to pose an *immediate threat* to the safety of others.”³⁵ To the petitioners' attorney Lisa Burget Wright, the police who stopped Whren—Officers Efrain Soto, Homer Littlejohn, and Investigator Tony Howard³⁶—should be held accountable by the Fourth Amendment because reasonable

31. *Id.* at 808, 810; *see also* United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996).

32. *Whren*, 517 U.S. at 808–09. “Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently.” *Whren*, 53 F.3d at 373. Brown received a nearly identical sentence. *Id.*

33. *Whren*, 517 U.S. at 815.

34. Brief Amicus Curiae of the American Civil Liberties Union in Support of Petitioners at 14 n.6, *Whren*, 517 U.S. 806 (No. 95-5841).

35. *Whren*, 517 U.S. at 815 (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt.1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

36. *Whren*, 53 F.3d at 372. The Supreme Court mentions only Officer Soto by name. *See Whren*, 517 U.S. at 808–10.

officers would not have made a stop that their employer precluded them from making.³⁷ To this, the Court responded that all the Department need do is have the unmarked car ask a marked car to make the stop.³⁸ The Court's suggestion, however, would merely make Whren's concern that his stop was pretextual vanish in a puff of smoke. That is to say, the problem would vanish but not be solved, as Attorney Wright had posed this question: How should the Fourth Amendment, not the police, respond when the police violate their own rules?³⁹

There is some uneven precedent on point (which could support just about any position), which is cited in the Court's opinion.⁴⁰ As for additional authority on point, it is unclear that either the attorneys or the Court maximized the potential payoff that could have been provided by a discussion of what Wayne LaFave has been advocating for nearly forty years, including in his doctoral dissertation on arrests:⁴¹ administrative control of discretion.⁴² His emphasis on the importance of police having rules and on courts interpreting breaches of those rules as unreasonable within the meaning of the Fourth Amendment could help get at whether police are abusing their discretion, a concern that LaFave has insinuated into contemporary discussions of policing.⁴³ But the real payoff of a discussion of the fact that Soto, Littlejohn, and Howard deviated from departmental regulations lies in its ability to tell us not whether police abused their discretion (so what if they did?), but more importantly, to tell us *what they were doing*. The real relevance of their breaking their own regulations, accordingly, is that it is a piece of evidence that bears on the issue of *what they were actually doing*. An officer's pulling someone over when he lacks the authority to do so does not, without more, make the stop a traffic stop, much less a pretextual traffic stop.

37. See Brief for the Petitioners at 32, *Whren*, 517 U.S. 806 (No. 95-5841); Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioners at 6-7, *Whren*, 517 U.S. 806 (No. 95-5841). *But cf.* Brief for the United States at 4-7, *Whren*, 517 U.S. 806 (No. 95-5841) (discussing the "purely objective" approach).

38. Official Transcript at 13, *Whren*, 517 U.S. 806 (No. 95-5841).

39. See *id.* at 3-29.

40. *Whren*, 517 U.S. at 812-17.

41. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (Frank J. Remington ed., 1965); 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, 445-46 (1990).

42. See, e.g., WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2(e) (3d ed. 1996).

43. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 377-81 (1987) (Marshall, J., dissenting).

This angle is only adumbrated in the Assistant to the Solicitor General's portion of oral argument, where the interlocutors briefly touch on snippets from Soto's and Littlejohn's testimonies from the suppression hearing in *Whren*.⁴⁴ There, Soto testified that the truck was stopped at a stop sign for over twenty seconds,⁴⁵ though earlier, at the preliminary hearing, he had said he did not know how long the truck waited at the stop.⁴⁶ And while Soto testified at the suppression hearing that the truck failed to signal before turning right,⁴⁷ he had made no mention of that infraction at the preliminary hearing or in the police report.⁴⁸ The only infraction that Soto insisted on throughout the case was that the truck "sped off quickly," presumably after seeing the unmarked police car perform a u-turn.⁴⁹ But even with regard to the infraction for speeding, Soto admitted at the suppression hearing that he "wasn't going to issue a ticket to him at all."⁵⁰ Rather, he explained, "My intention[] was to pull him over and talk to him [about the full time and speed violations]."⁵¹ As fate would have it, however, departmental regulations prohibited oral warnings except under very narrow circumstances not present there.⁵² As for Officer Littlejohn, he never saw the stop as a response to any traffic violations at all. For him, the delay at the stop sign gave them reasonable suspicion, though he never came out and said that the reasonable suspicion was specifically of drug activity.⁵³

Although the suppression hearing transcript reveals details that were not alluded to in the oral argument, the fact remains that the attorneys' colloquy with the bench brought out not only that the officers acted contrary to departmental regulations, but also that (1) the officers were neither in agreement nor consistent in their claims that they observed any traffic violations, and (2) the officers admitted that they did not intend to *enforce* the traffic laws at all. And what, exactly, is the relevance of these details? The officers' deviation from their department's own rules, along with the way they comported themselves during the pursuit and stop of the truck (as well as when they went on record about the pursuit and stop in subsequent legal proceedings), gives us an account of what

44. Official Transcript at 38–40, *Whren*, 517 U.S. 806 (No. 95-5841).

45. Brief for the Petitioners at 5, *Whren*, 517 U.S. 806 (No. 95-5841).

46. *Id.* at 5 n.5.

47. *Id.* at 6.

48. *Id.* at 6 n.6.

49. *Id.* at 5.

50. *Id.* at 6–7.

51. *Id.* at 7 (second alteration in original).

52. *Whren v. United States*, 517 U.S. 806, 815 (1996) (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt.1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

53. Official Transcript at 39–40, *Whren*, 517 U.S. 806 (No. 95-5841); Brief for the Petitioners at 6 n.7, *Whren*, 517 U.S. 806 (No. 95-5841).

they were doing. To figure out what police were doing is a crucial matter; it is much more important than why they were doing it, which is potentially interesting but doctrinally irrelevant. While the Court asked the Assistant to the Solicitor General whether “pretextual stops are fine,”⁵⁴ I would agree that certainly they are, provided that there is agreement on the grammar of *what* they are. The real issue is whether this was a constitutional, that is, plain view sighting of drugs pursuant to a lawful traffic stop.⁵⁵

In upholding the convictions, however, the Court never fully engages the real issue, thus replicating the indirection of the oral argument. Rather, the Court puts most of its capital into an uninspired attempt at distinguishing earlier precedents that had referred to how Fourth Amendment doctrine must be fashioned to deter police from pretextual searches and seizures of suspects.⁵⁶ Whatever degree of success the *Whren* Court might have had in attempting to reconcile its prior pretext cases, it did succeed in establishing that there is very little room for pretext arguments in Fourth Amendment law.⁵⁷ The conclusion makes good sense; what remains opaque is why.

To be sure, *Whren*’s argument is hard to take too seriously, given that it directs reviewing courts to zero in, not so much on *what* police were doing (enforcing traffic laws? enforcing drug laws? both?), but *why* they were doing it (to make the roads safer? to catch drug dealers? to get promoted? to kill time?). Recall that Attorney Wright argued that what justifies a search or seizure is not merely whether police have a certain amount of suspicion or knowledge about whether crime is afoot—“probable cause” in Fourth Amendment terms—but in addition, “whether a police officer, acting reasonably, would have made the stop for the reason given.”⁵⁸ Indeed, the implications of suggesting that police articulate *why* they decided to stop a bad driver are potentially absurd, leading inexorably to the following: two drivers speeding down the street, one of whom police believe (but not strongly enough to justify a stop) is also a drug dealer.⁵⁹ The implication of what Attorney Wright

54. Official Transcript at 40–41, *Whren*, 517 U.S. 806 (No. 95-5841).

55. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

56. *Whren*, 517 U.S. at 811–13.

57. *Id.* at 813.

58. *Whren*, 517 U.S. at 810.

59. Haddad, *supra* note 27, at 690; James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 211 (1977) [hereinafter Haddad, *Well-Delineated Exceptions*].

was arguing for Whren and Brown is that, in such circumstances, police should be allowed to stop *only* the speeder whom they do *not* also suspect of some other crime. In other words, to rule in Whren's favor would leave us with a doctrine which says, at least to a point, that the more suspicions you have, the less justification you have to act on them.⁶⁰ This, however, is not to say that Whren had no case, just that he could have made a stronger one.

In dismissing Whren's suggestion that reviewing courts ask questions along these dead end lines ("Why, officer, did you stop *that* bad driver?"), the Court was certainly on the right track in remarking that it saw "no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."⁶¹ And this much is true: If Whren really had been driving in violation of D.C. law, then police were right to stop him. Indeed, if police saw him break traffic laws, then who cares whether police hoped for or even expected a bonus (be it drugs or whatever) to be realized during the stop? What matters is *whether* they were enforcing the traffic laws, not why.

B. Pretextual or Unconstitutional? How to Tell the Difference

Certainly the happy part of the *Whren* opinion is the Court's insistence that probable cause that traffic laws had been violated is the key to any evaluation of the constitutionality of the stop and subsequent search of the truck. The unhappy part is that the Court made no effort to establish *how* we would determine that it was the probable cause on which the officers were relying when they worked themselves into a position to see one⁶² or two⁶³ baggies of cocaine in Whren's hands. Nowhere does the Court acknowledge that, even with probable cause to stop the car, police still might have performed an unconstitutional seizure to verify a hunch about drug activity rather than perform a lawful traffic stop.

And how would we tell the difference between a lawful traffic stop and an unlawful drug investigation? That depends on whether what the officers claim to have done is consistent with what was seen in the public, observable world. In other words, it is at this point that the

60. See *Abel v. United States*, 362 U.S. 217, 253 (1960) (Brennan, J., dissenting); Brief for the United States at 13, *Whren*, 517 U.S. 806 (No. 95-5841) ("[I]t would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses."); Haddad, *Well-Delineated Exceptions*, *supra* note 59, at 211.

61. *Whren*, 517 U.S. at 815-18.

62. Officer Littlejohn testified that he saw one bag of cocaine in Whren's lap. Brief for the Petitioners at 8, *Whren*, 517 U.S. 806 (No. 95-5841).

63. Officer Soto testified that he saw two bags of cocaine in Whren's lap. *Id.*

distinction between intentions and motives, and their roles, should begin to reveal itself. Suppose, for example, a case in which officers search a house at night under the authority of a daytime-only search warrant, discover evidence of crime, and claim later in the litigation that their intent in entering the house was to make a warrantless emergency arrest.⁶⁴ That the officers did not intend to execute a warrantless emergency arrest is demonstrated by the fact that they applied for a search warrant for evidence of an illegal distillery, took the warrant to the house, produced it before entering, and searched the house after locating the suspect. This is not a pretextual, warrantless entry to arrest; it is not a warrantless entry to arrest at all because it lacks the characteristics of an action directed at arresting rather than searching. As a result, any evidence obtained in the house or on the arrestee's person should be excluded.⁶⁵ Indeed, this is an unconstitutional warrantless entry to search, *even if* there was probable cause to believe the search victim was a dangerous felon. Unless police conducted themselves at the house in a way that is consistent with an intention to rely on the doctrine they now cite as the authority for their actions, then it is not so much that police were *arresting* pretextually (so what if they were?), but that they were *searching* unconstitutionally.

If it really was a warrantless entry to arrest, then who cares why it was performed? What matters is what the police were doing. Did they have probable cause that a serious crime had been committed? Did they conclude that getting a warrant posed a danger to themselves or the public? Did they enter the premises without a warrant and commit themselves in a way that indicated that they were looking to get their hands on a dangerous person, not for evidence squirreled away in the house?⁶⁶ If so, then they have performed a lawful, warrantless entry to arrest a dangerous criminal, and any reason or motive external to the action that they might have had is irrelevant.⁶⁷

Once we insinuate the enforcement of traffic laws into the world of the Fourth Amendment, however, determining what police really were doing

64. Haddad, *supra* note 27, at 655–57 (citing *Jones v. United States*, 357 U.S. 493 (1958)). This hypothetical is based very loosely on *Jones*, which in actuality was a much closer case, far too close to demonstrate much of anything. There, despite what the majority found, police really did have reason to believe that Jones, who they knew was running an illegal still, was inside at the time of the entry. See *Jones v. United States*, 357 U.S. 493, 500–03 (Clark, J., dissenting).

65. See *Wong Sun v. United States*, 371 U.S. 471 (1963).

66. See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

67. *Id.*

becomes harder. Take, for example, the case of a male officer that stops an attractive female motorist who comes to suspect that she has been stopped for his amusement, not to make the roads safer. Of course it is always open to the officer to *invent* a traffic offense, but the motorist in such a case has worries quite apart from why the traffic stop occurred, that is, quite apart from whether it was pretextual. Indeed, to claim that the stop was pretextual is incompatible with a claim that the police later invented the justification for the stop. Although police perjury is far from trivial,⁶⁸ it is an altogether different sort of problem from that of pretexts.

The only concern here is with suspects whom police *do* have some justification in stopping. What the motorist who really is a traffic offender is expressing when she complains about her encounter with the overly friendly officer is either (1) despite facts justifying some police action, it is not that justified action which police were really taking, or (2) despite facts justifying this police action, the action was motivated by social objectives. While these two objections to what police have done tend to be treated as though they are coterminous, they are not. The first objection is to call the stop unconstitutional; the second objection is to call it pretextual. Pretexts may be dead or near dead, but the core of what many defendants claiming pretext are getting at is not, if only because of a snag in distinguishing pretextual from unconstitutional police action. That is, what remains open to defendants who could justifiably have been stopped, but who question the conditions of the stop anyway, is to argue that police were not doing what they said they were doing: their actions (regardless of their motives, if motives there be) did not have the *intention* that police claim at the suppression hearing to have had on the street.

Assuming the motorist was speeding or otherwise violating the traffic laws, there must be some procedures that can be used to reveal what this officer was putting himself to. If the officer approached the car and asked the driver out for a date, then it was not a pretextual traffic stop; it was an unconstitutional one, that is, it was not a *traffic stop* at all, even with probable cause. It could have been a traffic stop, but the officer chose to conduct a social stop instead. If, however, the officer asked her for her license, registration, and proof of insurance before advising her of what she had done and issuing her a ticket or warning, then we can conclude that the officer acted, in the public, observable world, like someone who intended to enforce the traffic code. In other words, he *was* enforcing the traffic code.

68. See, e.g., Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

When I discussed this issue with some San Diego police officers who had been admonished for mixing the personal with the professional in this very way, I received a range of responses, which included this one: “So you mean that if I give her a ticket first and then ask her out it’s okay, but if I ask her out first then it’s not?” The answer to this is, of course, “Yes, from a Fourth Amendment standpoint.” In other words, there is little more we can ask when being asked to take positions on what has occurred in the public, observable world than that people act in a way that can be reconciled with their claims about their own actions. (If I am always nice to you—I treat you uniformly well, attentively, even tenderly—then it makes little difference whether I really like you.)

Yet to require only that the officer have the intent to rely on the doctrine in question may not sufficiently protect against pretexts or abuse of the doctrine. Professor Haddad suggests that when a doctrine is intolerably susceptible to abuse—to pretextual police action—the doctrine should be fashioned to defend against that susceptibility.⁶⁹ The Court recognized as much in *Chimel v. California*⁷⁰ by putting a stop to thorough searches of residences incident to the arrest of occupants.⁷¹ Before *Chimel*, officers were conducting arrests at suspects’ residences and converting those arrests into exploratory searches of the residences without first obtaining search warrants.⁷² The arrests, one could say, were pretextual means of realizing the motive of ransacking the house. Unhappy with the hazards posed by a doctrine that permitted such police action—such abuse of the power to arrest—the Court limited the permissible scope of a search incident to arrest to the arrestee and the area within his immediate reach.⁷³

This approach, which Haddad dubs “the hard-choice approach,”⁷⁴ has the appeal of avoiding intractable attempts at uncovering the motive or motives behind the action, in favor of changing the law in order to take away the incentive to stage pretextual police actions. Take, for example, a hypothetical of Haddad’s:

69. Haddad, *supra* note 27, at 652–53.

70. 395 U.S. 752 (1969).

71. *Id.* at 764–68.

72. *See, e.g.,* United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

73. *Chimel*, 395 U.S. at 764–68.

74. Haddad, *supra* note 27, at 651–53.

Suppose that defense counsel claims that the police have executed a dated but valid traffic arrest warrant as a pretext to enter a narcotics suspect's house, hoping to discover heroin either in plain view or within the scope of a search incident to arrest.

One approach would be to narrow the scope of the underlying power: the right to enter a home to execute an arrest warrant. The Supreme Court could declare that arrest warrants expire after a certain period of time, at least where the police efforts to execute the warrant have lapsed. Or the Court could make a less drastic alteration in fourth amendment law by declaring that after a period of time, absent continuous diligent effort to execute a *misdemeanor* arrest warrant, the warrant, though still valid for some purposes, would not authorize entry into a suspect's home. The Court would reason that if authorities place such a low priority on a prompt arrest, the governmental interest does not outweigh the individual's right to be free from police entry into his home at the nearly unbridled discretion of the police.⁷⁵

In other words, Haddad's hard-choice approach, which itself is traceable to Justice Brennan's thoughtful dissent in a 1960 case,⁷⁶ would treat the pretext problem as resolvable *doctrinally*: not by condemning a given police search or seizure as pretextual, but by changing the background rules against which police act. Quibbling over whether the entry was a pretext fails to tell us much, even if the real reason for the action (why the officer was doing that) rather than what the action was (the intention of the action) was easily accessible to us. Accordingly, when a pretext problem arises, if we do not like what police are doing in such cases, then we should ask, as Haddad would: Did police demonstrate the intent to rely on the doctrine in question? And if their having done so does not dispel our concerns about abuse of the doctrine, then we should consider altering, that is, narrowing, the doctrine.

Whren, however, is an exceedingly difficult case, highly resistant to evaluating what it was that police were really doing. Assume that the traffic violations alluded to by Officer Soto did occur. When Officers Soto and Littlejohn took the stand at the pretrial hearing where *Whren* and Brown moved to suppress the cocaine, one could have asked: What, if anything, was said between the officers before the stop? Did they discuss the Nissan's erratic movements? Did they discuss their then-unsubstantiated suspicions about drug activity? Did the officers explain the point of the stop to the driver? If not, then why not? Was it due to their being distracted? By what? Seeing the drugs? Did the officers ultimately ticket the driver? Why not? Because it seemed trivial compared with what was discovered? By questioning the intentions of the officers in this manner, we get, in their elaboration of what they were doing, a chance to respond to their commitment—to their going on record—when

75. *Id.* at 652 (footnotes omitted).

76. *Abel v. United States*, 362 U.S. 217, 248–56 (1960) (Brennan, J., dissenting).

they tell us, and expect us to rely on them when they tell us, what their intentions were. And despite what the U.S. Supreme Court may say, this inquiry into intentions is a way of determining what happened and is not meant to be a way of inquiring into what went on *behind* what happened.

In Whren's case, even if the police did initiate a traffic stop, in light of their prompt plain view sighting of a bag or bags of cocaine, there was good reason for their not following through on that original intention or plan. The traffic stop well might have been the original plan, but it might have dropped out when, after undertaking that original plan, police saw that they had their hands on some drug offenders.⁷⁷ In this situation, their failure to follow through—their failure to treat this as a traffic stop—by no means demonstrates that the stop was, at its inception, a drug investigation, though it may certainly give us pause.

The difference between this case and the case of the officer who used the traffic laws to improve his social life has something to do with what changes in plan, what sorts of distractions, can count in our attempt to come to grips with what action the officer was performing. In other words, we could ask: Was *Whren* a drug investigation (masquerading as a traffic stop), and was the officer who stopped the attractive motorist embarking on a social adventure (also masquerading as a traffic stop)? When the officers converted Whren's traffic stop into a drug investigation, their overlooking the traffic offenses makes good sense (though it would certainly lead to their being given a hard time in the witness box at the suppression hearing). After all, the plain view discovery of evidence that could lead to decades of imprisonment is just the sort of distraction to which we may expect law enforcers to yield when the plan began as a stop that could by itself culminate in no more than the issuance of a citation and summons.

But then why suggest that the failure to pursue the traffic infractions in *Whren* “may certainly give us pause”? Because that is a response that is open whenever someone says that they were doing something—here, enforcing the traffic laws—that is at least arguably at odds with the way they comported themselves. But with the officer who asks the motorist for a date, we would likely be a good deal more skeptical about the basis of the distraction. Why be distracted by *that*? And even if the distraction is understandable, quite literally natural, that does not adequately explain

77. Cf. Haddad, *supra* note 27, at 678 n.178 (citing cases that hold that a traffic stop need not culminate in a citation or warning in order to be constitutional).

actually yielding to it, not in the context of policing. Indeed, the basis of the distraction in such a case is trivial when compared to that in *Whren*: trivial, again, in light of the objectives of policing. And even if the officer who asked the motorist for a date really did observe a traffic offense and really saw himself as committed, *at first*, to performing a traffic stop, all we have to evaluate the action is what we see in the public, observable world, including of course his account of it. While it is perfectly plausible that the officer who asked the motorist for a date was every bit as committed to carrying out the original plan as the officers in *Whren* were, I am suggesting only that when his actions suggest a social call, it is an account that is more likely to be rejected, given that it is hard to count desire as a distraction *in that context*. And the rejection would not be on the ground that it is false, but that it would have no real sway, not in light of what could pass for a commitment to enforce the traffic laws in the first instance.⁷⁸

C. *The Role of Intentions in Fourth Amendment Analysis*

By now, this Article has at least begun to establish procedures by which people may unravel the problem posed by pretextual police action. These procedures entail questioning police in order that we may take a position on what they were doing (confronting their intentions) as opposed to why they were doing it (confronting their reasons, their motives, their purposes). *Whren*'s weakness is not that it kills off pretext claims—that is really no weakness at all—but that it threatens to kill off any meaningful evaluation of what police do. For instance, at one point the *Whren* Court remarks that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”⁷⁹ For reasons that remain mysterious, this is a phrase of which the Court is particularly fond.⁸⁰ And it is safe to say the parties only compound the problem.⁸¹

78. *But cf.* Haddad, *Well-Delineated Exceptions*, *supra* note 59, at 205 (suggesting that evidence discovered against a traffic offender who was stopped as a pretext for asking the driver out on a date would be less likely to be challenged by defense counsel as a pretext than would evidence discovered against a traffic offender who was stopped as a pretext for a drug investigation).

79. *Whren v. United States*, 517 U.S. 806, 813 (1996).

80. *E.g.*, *United States v. Knights*, 534 U.S. 112, 123 (2001) (Souter, J., concurring); *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000); *Bond v. United States*, 529 U.S. 334, 338 n.2 (2000); *Crawford-El v. Britton*, 523 U.S. 574, 604 (1998) (Rehnquist, C.J., dissenting); *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

81. *E.g.*, Brief for the United States at 15, *Whren*, 517 U.S. 806 (No. 95-5841) (“An inquiry into whether an officer’s action was ‘pretextual’ is inherently an inquiry into his subjective intent.”).

But what could this utterance possibly mean? In this context the word “subjective” is nonsense, as it must be whenever used to modify “intention” or any other term of inculcation or exculpation. In other words, there is no such thing as a subjective intention. Subjective as opposed to what? Objective? What would the difference denote, exactly? Could one imagine any specific application of utterances such as, “His subjective intention was *X* but his objective intention was *Y*”? If so, then what would it be? Your intention according to you (subjective) as opposed to your intention according to others that we may identify through laborious questioning (objective)? In other words, is it to say that a subjective intention is a claim you make about your intentions, but an objective intention is a claim someone else makes about your intentions? If so, then what makes others’ claims objective? Their distance? That is, their ability to know how things are with us better than we do ourselves? So there really are two *kinds* of intentions? That cannot be the law (or the grammar of “intention” either).

When we refer to intentions, we are trying to make sense out of an action in a context where subjective and objective have no specific application. Indeed, speaking in terms of intentions as subjective *or* objective plays into one of the great myths of legal notions of responsibility: references to intentions are references to something inside us.⁸² Intentions are said to be subjective because they are secret “mental states,” which can only be inferred by others (objectively) through close observation of behavior.⁸³ Take this perfectly conventional and representative account from a leading book of criminal law theory, where legal philosopher Michael Moore holds: “My own intentions are usually known to me in a way

82. See *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716–17 (1983).

The state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

Id. (quoting *Edgington v. Fitzmaurice*, 29 Ch. D. 459, 483 (1885)).

83. See Richard A. Posner, *So What Has Pragmatism to Offer Law?*, in *OVERCOMING LAW* 397 (1995).

Judges and juries do not, as a precondition to finding that a killing was intentional, peek into the defendant’s mind in search of the required intent. They look at the evidence of what the defendant did and *try to infer* from it whether there was advance planning or some other indication of a high probability of success, whether there was concealment of evidence or other indicia of likely escape, and whether the circumstances of the crime argue a likelihood of repetition

Id. (emphasis added).

different from how they are known to a third-person observer, the latter having to make behavioural inferences since he lacks my first-person experience.”⁸⁴ Moore says we must infer, a second-rate form of knowing, but if close enough attention is paid to the data, to the way the body moves and what the mind must have willed it to do, then we can discover this thing called the “intention.”

This psychologizing of intentions, however, misses out on the function of discussions of intentions:

Descriptions of mental events or processes are not acceptable as answers to questions about what our intentions are. A request for our intentions is not a request for a description of something inside us, but a request for us to perform a certain act that requires us to go on record or to commit ourselves in a certain way that justifies the reliance of other persons on what we profess our intentions to be.⁸⁵

Indeed, Paul Gudel’s thoughtful repudiation of the prevailing view about human action is worth quoting at length:

If intentions are not internal things or happenings, what are they? What sorts of things can fill in for the variable in the assertion, “My intention is *X*”? Most commonly, the place of the *X* is taken by a verb in the infinitive signifying an action or achievement. Therefore, the most general definition of an intention is “an action in prospect.”

It is not, then, that intentions are difficult to observe or to have “direct evidence” of. Intentions simply are not the sorts of things that *can* be observed, any more than one can observe the number five (not some particular written or printed instance of the number five, but the number itself). This does not mean they are necessarily hidden; it only means that the concept of “observation” has no obvious application to them. When we say something like, “The intentions of another cannot be directly observed,” we have no coherent idea of what it would mean to “observe another’s intention.” If anything is meant by this phrase at all, it probably is something along the lines of “observe his intention as he himself observes it.” But there is no such thing as this; there is no thing called “the intention” we observe by introspection just before every action we take. Intentions are not observed, either by ourselves or by others.

We use the language of intentions, and impute intentions to persons, *as a way of making human actions intelligible to ourselves*. We do not make actions intelligible to ourselves by adverting to an inner event that preceded that action. *Our interest in human actions is not usually in how they were produced, but in how they can be more fully understood*. Because this is what the attribution of intentions does, the language of intentions has reference to the public, observable world, not to an inaccessible world of inner events.⁸⁶

Gudel offered this as a response to the U.S. Supreme Court’s so-called “mixed motives” problem in employment discrimination cases,⁸⁷ but it

84. MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* 94 (1993).

85. Gudel, *supra* note 12, at 84 (footnotes omitted).

86. *Id.* at 85 (emphasis in third paragraph added).

87. *See id.* at 18.

[I]magine a supervisor who is biased against women and who actively dislikes

has point in any context where questions of responsibility arise. References to intentions are made in order to limit responsibility by demanding that the accused go on record, typically by proffering an excuse. That is, in asking what your intentions were, we are asking for an explanation of your actions, but we are not asking for you to make reports about something inside you, be it a mental state or any other sort of internal perturbation.

So if we get rid of that misleading referent—subjective—we are left with the following utterance: “[I]ntentions play no role in ordinary, probable-cause Fourth Amendment analysis.”⁸⁸ Now what? Could the Court really emphasize that probable cause to stop the car was what made the stop impervious to criticism in *Whren*, but say at once that what police intended to do is irrelevant? But what makes probable cause critical to the constitutionality of searches and seizures is that it is strongly suggestive that when police act on that knowledge, they do so with a certain intention. If the police officers’ account of their intentions—their going on record and telling us that we can rely on them when they tell us what they were doing—is irrelevant, then how would we even know what it was that they were doing? How would we be able to tell that it was the traffic violations that occasioned the stop and not some unsubstantiated hunch, or racism, or spite? Without confronting their intentions, we would know it was a stop sure enough, but we would not know if it was a traffic stop, a stop to investigate drug activity, a stop to kill time, or whatever. In other words, we cannot know what to make of the action once it is called into question unless we take a stab at getting the accused to go on record about how things were with him. *Of course* the intentions of police matter; investigating intentions and finding out what was done are on the same level, part of the same enterprise. When we get to the suppression hearing in criminal cases, questioning police

dealing with women in the workplace. Imagine also that one of his employees is a woman who has her failings as an employee—perhaps she is chronically absent from work or achieves consistently low performance levels. At some point, the supervisor fires her.

Now imagine that the woman sues the employer for sex discrimination and at trial introduces evidence that her supervisor was biased against women. The employer introduces evidence that the woman was fired because she was a poor employee. This is what the courts have called a “mixed motives” case. How do we sort out the relationship between the facts submitted by both sides and the employer’s decision?

Id.

88. See *Whren v. United States*, 517 U.S. 806, 813 (1996).

about their intentions is essential to our evaluation of what they have done. Otherwise we would not know how to respond to what happened. But to say, as the Court did in *Whren* (and has reiterated since), that the intentions of police are irrelevant⁸⁹ is to say that our interest in what police have *done* is irrelevant. And that much is wrong.

But in this particular, and peculiar, utterance it is evident what the Court is getting at, or more accurately, what it is revealing: a view of intentions which casts them as internal states, the meaning of which is inferred through close observation. Yet if intentions are part of the secret, subjective selves, then how can we ever avoid being held hostage by lies and indirection (“No one can tell me what I was thinking!”) except by, in the *Whren* Court’s words, “root[ing] out . . . subjective intent through ostensibly objective means”⁹⁰ (whatever that means). By making this recommendation, what the Court is responding to is the difficulty in knowing others, that difficulty accounting for the development of a doctrine that makes the hidden, secret selves—the “state of mind”⁹¹ of others—irrelevant whenever possible. This, however, badly mischaracterizes what an intention is, which is simply a device, a way of talking about human action, for making action intelligible where there is some reason to question what was done.

All this seems to only glance off the Court. When the Court elaborates in *Whren* that “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent,”⁹² it is hard to get a picture of what, in the Court’s view, would constitute an action without an intention, subjective or otherwise. By definition, an action has an intention.⁹³ If you are pushed or stung by a bee or are having a seizure, then you are not *acting* at all; if you harm someone by mistake or accident, then you have acted, though there your intentions in one way or another misfire: you stray or something befalls. In other words, an action without an intention is a happening or an occurrence, but not an action.⁹⁴ You perform an action intentionally only if you have some idea of what you are doing, when

89. See cases cited *supra* note 80.

90. *Whren*, 517 U.S. at 814.

91. *Id.*

92. *Id.*; see also Kenneth Gavsic, Note, *Making the Best of “Whren”: The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 387 n.22 (1998) (“[P]robable cause for any traffic violation will suffice for a reasonable stop regardless of an officer’s true intentions.”).

93. See J.L. Austin, *Three Ways of Spilling Ink*, in PHILOSOPHICAL PAPERS 280–81 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979) (“I may ‘have no purpose (whatsoever)’ in doing something, just as I may take no care. But I don’t ‘have no intention (whatsoever)’ in doing something.”).

94. See CARLOS J. MOYA, *THE PHILOSOPHY OF ACTION* 12 (1990).

you are putting yourself to whatever is realized.⁹⁵ J.L. Austin captures what he calls this “most subtle . . . notion[.]” of intention when he writes:

I must be supposed to have *as it were* a plan, an operation-order or something of the kind on which I'm acting, which I am seeking to put into effect, carry out in action: only of course nothing necessarily or, usually, even faintly, so full-blooded as a plan proper. When we draw attention to this aspect of action, we use the words connected with intention.⁹⁶

As Austin's most celebrated student put it, “[Y]ou can't be intending to do a thing if you don't *know* you're doing it, or rather don't know how what you are doing could have that consequence (if you didn't know about the child, you can't have intended to frighten it).”⁹⁷ That is, when committing yourself to a course of action that could be called intentional, you must see far enough ahead to appreciate the implications of your actions. Austin likens this aspect of intentions to “a miner's lamp on our forehead which illuminates always just so far ahead as we go along.”⁹⁸ Austin is careful to note that the lamp does not illuminate very well or far because the circumstances under which actions take place dictate that even when people take care, much remains outside of or incidental to their intentions.⁹⁹

Thus, a police officer who does not mean to do anything at all is not acting, period. Accordingly, “in assessing official responsibility for police acting *as police*, it makes good sense to require that police *intend* to investigate crime or enforce laws before they may be held responsible in their investigative or enforcement capacities.”¹⁰⁰ Likewise, when we are confronting the question of whether a search or seizure is constitutional, we cannot get an accurate picture of what was done without confronting what it was that police were putting themselves to. A traffic stop is characterized not merely by the fact that police pull someone over intentionally; that would demonstrate only that it was a stop. But by claiming to foreclose on inquiries into police intentions, the Supreme Court threatens to foreclose on our telling the difference between a plan (though nothing so concrete as a plan) to effect a traffic stop, a drug investigation, or an

95. Austin, *supra* note 93, at 283.

96. *Id.* (footnote omitted).

97. Stanley Cavell, *A Matter of Meaning It*, in *MUST WE MEAN WHAT WE SAY?* 233 (1969).

98. Austin, *supra* note 93, at 284.

99. *Id.*

100. Daniel Yeager, “Oops!”: *Inadvertence, Intentionality, and the Police*, 24 *SEARCH & SEIZURE L. REP.* 157 (1997).

instance of harassment, racial or otherwise. Evaluating the constitutionality of the stop entails coming to grips with the officers' account of their intentions in the context of the other facts available. And to the extent that the Court says otherwise—and they do—is more than a little misleading.

IV. *ARKANSAS V. SULLIVAN*: CONFRONTING THE REMNANTS OF *WHREN*

In *State v. Sullivan*, Officer Joe Taylor, then an eleven-year veteran of policing in various Arkansas police departments,¹⁰¹ followed Kenneth Sullivan to a gas station in Conway, Arkansas to admonish Sullivan for driving forty miles per hour in a thirty-five mile-per-hour zone.¹⁰² When asked to produce registration and insurance documents, Sullivan opened his door, allowing Taylor to see that Sullivan, a disabled, unemployed roofer, had a rusted roofing hatchet corroding into the carpet of the car.¹⁰³ After stopping Sullivan, Taylor “recognized him as someone that he had seen intelligence on regarding narcotics, and . . . rather than write citations, he physically arrested him”¹⁰⁴ for speeding, failure to produce registration or proof of insurance, carrying a weapon (the hatchet), and having improperly tinted windows and a broken speedometer.¹⁰⁵ Taylor performed an inventory search of the car, which revealed, inter alia, methamphetamine and drug paraphernalia stashed in a black bag under the armrest.¹⁰⁶ Sullivan was eventually charged with everything but the failure to produce registration and insurance.¹⁰⁷

The trial court granted Sullivan’s motion to suppress the drugs.¹⁰⁸ In a brief opinion, the Arkansas Supreme Court affirmed¹⁰⁹ and then published its 4-3 denial of the State’s request for rehearing.¹¹⁰ According to the state’s high court, the arrest “was pretextual in nature, in that it was made solely for the purpose of searching [Sullivan’s] vehicle for controlled substances.”¹¹¹

101. Hearing on Motion to Suppress at 38, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732).

102. *State v. Sullivan*, 11 S.W.3d 526, 526 (Ark. 2000), *opinion supplemented on denial of reh'g*, 16 S.W.3d 551 (Ark. 2000), *and rev'd*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

103. *Id.*

104. *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000) (supplemental opinion on denial of rehearing).

105. *Sullivan*, 11 S.W.3d at 526.

106. *Id.* at 527.

107. *Id.*

108. Hearing on Motion to Suppress at 80–87, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732).

109. *Sullivan*, 11 S.W.3d at 528 (mentioning *Whren* nowhere).

110. *State v. Sullivan*, 16 S.W.3d 551 (Ark. 2000) (supplemental opinion on denial of rehearing) (discussing *Whren*).

111. *Sullivan*, 11 S.W.3d at 527.

This is a correct, that is, technical use of the term “pretext,” provided that the Arkansas Supreme Court means that in approaching *Sullivan*, Taylor was relying on his radar gun, though his motive in enforcing speeding laws was to further a drug investigation that otherwise would not have permitted a search or seizure of *Sullivan*. But as is so often the case, it is not clear just what is meant here by “pretext,” especially once the court elaborates its position. The court continues, first by stating “that ‘pretext’ is a matter of the arresting officer’s intent,”¹¹² and second, that pretext is a matter of evaluating “whether an ulterior motive prompted an arrest.”¹¹³ This ulterior motive would make the police action unlawful as long as the “covert motive” is “dominant” over another, that is, “dual,” but somehow not covert (not ulterior), motive.¹¹⁴

Pretext is indeed informed by the officer’s intent and motive, if any, but the Arkansas Supreme Court, like the U.S. Supreme Court in *Whren*, makes no effort at all to clarify for us what the officer must, or must not, intend in order for the action in question to *be* a pretext. Again, the officer’s intention *is* relevant to a claim of pretext: if the officer is not doing what the Constitution permits—if it is not a justified search or seizure—then it is not a pretextual action, but an unconstitutional one. That is, if the officer lacks the antecedent suspicion that the Constitution requires for the search or seizure in question, then putting himself to the task in such circumstances—intending to search or seize, but lacking the authority on these facts—makes the action plainly and simply unconstitutional, not pretextual.

There is no way to know what the Arkansas Supreme Court had in mind in *Sullivan* because, rather than explicating what it meant for pretexts to be “a matter of the arresting officer’s intent,”¹¹⁵ it went on to state that the lawfulness of the actions in question depends on which of two motives dominates: the ulterior (covert?) or some other motive that is dual but not ulterior (or covert). This, the so-called “mixed motive” problem,¹¹⁶ is a description of human action that has pervaded Title VII litigation for years and has turned out to be an unhappy-at-best way of talking about motives, indeed, about responsibility.¹¹⁷ I assume here that

112. *Id.*

113. *Id.*

114. *Id.* at 528.

115. *Id.* at 527.

116. See discussion *supra* note 87.

117. See Gudel, *supra* note 12 (providing excellent treatment of the problem).

the ulterior, or covert, motive is to conduct a drug investigation, which, for the court, undermines or corrupts the intention to enforce the traffic laws. This is indeed a pretext, provided, of course, that the officer is aware of the motive—that he sees himself relying on the traffic offense in order to pursue a drug investigation. A person can have conscious or unconscious motives.¹¹⁸ There is no such thing, however, as an unconscious motive that can count as a pretext, given that “pretext” has the overtone of connivance or manipulation, neither of which can be done inadvertently.

But what is the other motive the court has in mind, the one that makes the motives dual? Here I assume it to be the “motive” to enforce the traffic laws. But that could not be the motive for enforcing the traffic laws any more than racial discrimination could be the motive for an act of racial discrimination. If an officer is enforcing the traffic laws for the usual reasons (sense of duty, boredom, angling for a promotion), or for no reason at all (he just felt like it), then there is no motive for his actions, ulterior or otherwise. This is not to say that two motives could not operate in the same case. They could: the officer stops a speeding motorist on good probable cause both to ask the motorist out for a date and to facilitate a drug investigation. Please note that both objectives here fit the criteria of motives. They have that directedness (not inwardness) that a motive must have and are outside of, or incompatible with, the conventional aim (if any) of the action. Traffic stops are not social calls and drug investigations are justified by suspicion of drug activity, not of bad driving.

Although the Arkansas Supreme Court’s compressed opinion tells us little about pretexts and their relation to intentions and motives, the court’s opinion bears a striking resemblance to the approach that Attorney Wright took for her clients, Whren and Brown. Wrapping up its decision to affirm the trial court’s order suppressing the evidence found in Sullivan’s car, the court explained:

The question then becomes whether appellee would have been *arrested* simply for traveling forty miles per hour in a thirty-five mile-per-hour zone and possessing a roofing hatchet that had clearly been in his vehicle for quite a long time, given that it was corroding into the carpet. We find that to be doubtful. His vehicle may have been impounded due to his failure to provide proof of insurance and registration. However, appellee was never *charged* with having no proof of insurance or vehicle registration.¹¹⁹

118. LAWRENCE, *supra* note 21, at 10 (“[I]magine that a particularly memorable abomination of Caligula’s afforded his assassin a motive to kill him, yet that the man struck in ignorance of *that* reason but for a different one (say, because Caligula had made his horse a priest). Or, what is less likely, for no reason.”).

119. *Sullivan*, 11 S.W.3d at 528. Although the Arkansas Supreme Court emphasized that Sullivan was an unemployed roofer, that the hatchet was for roofing, and that the hatchet was rusted into the carpet, the suppression hearing transcript reveals, as well, that

Would Officer Taylor have arrested Sullivan based merely on the traffic offenses and the roofing hatchet? This is what Attorney Wright had pressed the U.S. Supreme Court to adopt as the standard in *Whren*.¹²⁰ When asked by Sullivan's attorney, Taylor insisted not only that he would have, but also that, as a Class A misdemeanor, possession of a weapon *required* arrest in order to assure that the offender be fingerprinted.¹²¹ He even indicated, rather reluctantly, that his decisions to arrest rather than cite depend generally in part on how productive a shift he has had.¹²² But the vices of such a line of questioning deeply outweigh its virtues. Now that Taylor has been asked what role the hatchet played in the arrest, now what? Would it help if defense counsel could point to similar cases in which that officer did not arrest the suspect?¹²³ All that would prove is that discretion operates in policing, but that is by no means a condemnation of it. Again, what matters is whether the traffic laws were being enforced, not why.¹²⁴

the hatchet was over a foot long and was found on the narrow strip of carpet between the driver's seat and door—hardly the place one would store tools. Hearing on Motion to Suppress at 41–42, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732).

120. See Brief for the Petitioners at 31, *Whren v. United States*, 517 U.S. 806 (1996) (No. 95-5841).

The question that has divided the lower courts is what standard of objective justification applies when the defendant alleges that the asserted basis for a search or seizure was a pretext to evade applicable Fourth Amendment constraints. Although this Court has never had to decide that question, its precedents and the purposes of the Fourth Amendment support the rule that such intrusions are unreasonable if they deviate so far from standard police practices that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted. This standard prohibits arbitrary intrusions without "immunizing" defendants suspected of greater crimes from stops that would otherwise have been made.

Id.

121. Hearing on Motion to Suppress at 59, 62, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732).

122. *Id.* at 57–58.

123. In fact, Sullivan's counsel did just that. *Id.* at 61–65.

124. This is not to say that there are no impermissible reasons for police action. A discriminatory stop would violate the constitutional guarantee of equal protection. Nonetheless, such stops based on race, national origin, gender, alienage, or "legitimacy," while unconstitutional, do not have what one could call a "discriminatory motive." Rather, they are plainly and simply, discriminatory actions. See, e.g., *Gudel*, *supra* note 12, at 79.

[I]t is not clear what a "discriminatory motive" is. . . .

If discriminatory acts do have motives, they would have to be motives other than those such as "racial bias." Moreover, discriminatory acts may be performed without a "discriminatory motive." An employer's motive for refusing to hire more blacks could be that his customers might refuse to deal

Indeed, the second half of the passage quoted above hints at this essential condition of evaluating police responsibility. If the search of the car had been to inventory its contents for administrative purposes, then we would need to know what, under Arkansas law, justifies an inventory search. Arkansas law holds, “A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.”¹²⁵ In addition, police “shall inventory the passenger compartment of said vehicle and any other area of said vehicle for the purpose of protecting any valuables which may be found in said vehicle,” but that “any locked containers found within the vehicle shall be . . . noted” as locked.¹²⁶

One can see what the Arkansas Supreme Court was worried about here: if the inventory search was justified by an arrest for failure to produce registration and insurance, then it seems a little fishy that prosecutors never charged Sullivan with the very offense that is said to have justified the search. Still, the fact that *prosecutors* never followed up on the case that *police* began tells us almost nothing,¹²⁷ even if the failure to produce registration and insurance was the only lawful basis for the inventory search, which it was not. According to Arkansas law,

with him if he had a largely black work force. This is not a discriminatory motive, except in the tautological and therefore completely uninformative and irrelevant sense of “whatever motive a discriminatory act had.” But it does not matter that this employer’s motive is not discriminatory, because the act is a discriminatory one, and therefore illegal, regardless of its motive.

Id.

125. ARK. R. CRIM. P. 12.6(b).

126. See Memorandum from Timothy P. Daley, Chief of Police, Conway Police Department, to Conway Police Department Personnel (July 25, 1994) (presented as State’s Exhibit No. 1, Hearing on Motion to Suppress at 88, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732)). This likely complies with the U.S. Supreme Court’s injunction in *Florida v. Wells*, 495 U.S. 1 (1990), which demanded that police departmental inventory procedures take a position on whether or which closed containers discovered in the car may be searched. *Id.* at 4. Recall that in *Sullivan*, the drugs were found in a closed container, a black bag, under the armrest. *State v. Sullivan*, 11 S.W.3d 526, 527 (Ark. 2000), *opinion supplemented on denial of reh’g*, 16 S.W.3d 551 (Ark. 2000), *and rev’d*, *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

127. Cf. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 44 (J.O. Urmson & Marisa Shisà eds., 2d ed. 1975).

I must, of course, have the intention, if I am not to be insincere, at the time of my utterance: but what exactly is the degree or mode of the infelicity if I do not afterwards do it? Or again, in ‘I bid you welcome’, to say which is to welcome, intentions of a kind are presumably vaguely necessary: but what if one then behaves churlishly? Or again, I give you advice and you accept it, but then I round on you: how far is it obligatory on me not to do so? Or am I just ‘not expected’ to do so?: or is part of asking-and-taking advice definitely to make such subsequent conduct out of order? Or similarly, I entreat you to do something, you accede, and then I protest—am I out of order? Probably yes.

Id.

which for now¹²⁸ reflects the U.S. Supreme Court's view as well,¹²⁹ any offense is arrestable. But the court's point here, though it is certainly not made explicit, is that not all arrests necessarily make the car in which the arrestee is found subject to impoundment. As sensible as that limitation may be, nothing in Arkansas law suggests that only some arrests can trigger the inventory procedure.¹³⁰

This rather broad power to arrest allowed Officer Taylor to arrest Sullivan for offenses that Taylor (or his employer) had no interest in pursuing. The majority suspected that, instead, the pretextual arrest was made with the motive of exploiting a rather broad power to conduct a thorough inventory search of the car. Indeed, though the Arkansas Supreme Court took no note, *Whren* itself distinguished three of the U.S. Supreme Court's own precedents, which insist that administrative searches, including inventory searches, "must not be a ruse for a general rummaging in order to discover incriminating evidence."¹³¹

In response to the State's request for a rehearing, the Arkansas Supreme Court elaborated that the stop was justified by the radar gun, but that in arresting Sullivan and coming up with the weapons charge, Officer Taylor had not comported himself "appropriate[ly]."¹³² The court did not elaborate. Positing that *Whren* does not go

128. See ARK. R. CRIM. P. 4.1(a)(iii). On remand to the Arkansas Supreme Court, the parties briefed whether Arkansas law places any limitations on police officers' power to arrest for trivial offenses and pretextual police action that the U.S. Constitution does not. See Appellees' Motion to Rebrief Issues on Remand from U.S. Supreme Court, *Sullivan*, 11 S.W.3d 526 (No. 99-1140).

129. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

130. See, e.g., *Mounts v. State*, 888 S.W.2d 321, 324 (Ark. Ct. App. 1994); *Folly v. State*, 771 S.W.2d 306, 310-11 (Ark. Ct. App. 1989) (noting that inventory searches can occur (1) before the impoundment, (2) without regard for whether alternatives to impoundment are feasible, or (3) whether the car is lawfully parked).

131. *Whren v. United States*, 517 U.S. 806, 811 (1996) (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990); see *id.* (quoting *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (approving inventory search because there was "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation")); *id.* (quoting *New York v. Burger*, 482 U.S. 691, 717 n.27 (1987) (upholding administrative inspection of junkyard because search did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws"))).

132. *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000) (supplemental opinion on denial of rehearing); Hearing on Motion to Suppress at 81, *State v. Sullivan* (Ark. Cir. Ct. filed Nov. 18, 1998) (No. 98-732).

so far as to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity,¹³³

the court denied the State's request. It is one thing, the court concluded, for someone like *Whren* to be arrested when police see him with cocaine in his lap; it is another thing altogether to "effect[] a pretextual arrest for purposes of a search, such as we have in the instant case."¹³⁴ Anything in *Whren* that could be read otherwise is, in the Arkansas Supreme Court's opinion, dicta.

In his dissent, Justice Glaze pointed out that Sullivan had committed a series of violations, which Taylor explained to him were the basis of his arrest.¹³⁵ Without worrying whether the hatchet really was a weapon,¹³⁶ Justice Glaze added that Arkansas law permits arrests even for minor traffic infractions and permits inventory searches incident thereto.¹³⁷ He agreed with the majority that *Whren* prohibits police from stalking motorists until they commit an infraction.¹³⁸ Evidently, it mattered to Justice Glaze that Sullivan was not suspected as a drug dealer until Taylor recognized him after the stop. Why this mattered he did not say. Nonetheless, Justice Glaze relied on a U.S. Supreme Court case that ruled that "a traffic-violation arrest would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search.'"¹³⁹ To hold otherwise, he concluded, "will generate considerable confusion among the rank and file of law enforcement, the bench, and the bar alike."¹⁴⁰

The U.S. Supreme Court granted the State's petition for certiorari and reversed.¹⁴¹ In a short, per curiam opinion, the Court insisted that the Arkansas Supreme Court had ruled "flatly contrary" to *Whren*.¹⁴² Specifically intending to re-establish *Whren* as the controlling precedent in cases like these, the Court reiterated its "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers," and that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹⁴³ Nothing more

133. *Sullivan*, 16 S.W.3d at 552.

134. *Id.* at 553.

135. *Id.* (Glaze, J., dissenting).

136. *Id.* at 554.

137. *Id.*

138. *Id.* at 554–55.

139. *Id.* at 555 (quoting *United States v. Robinson*, 414 U.S. 218, 221 n.1 (1973)).

140. *Id.*

141. *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001).

142. *Id.* at 771.

143. *Id.* at 771–72 (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)) (alterations in original).

was said.¹⁴⁴ Justice Ginsburg concurred separately, joined by Justices Stevens, O'Connor, and Breyer. She emphasized that while the Court did not answer the state high court's concerns about whether police could stalk a motorist hoping for a traffic infraction, arrest the motorist, and search incident to that arrest, *Whren's* ban on pretextual claims certainly makes that very strategy perfectly constitutional.¹⁴⁵ That the four concurring Justices, who have come to accept that implication of *Whren* as the law of the land, find it nonetheless regrettable is manifest.

What happened here? Why, given that at least seven times since *Whren* was decided the Court in criminal cases has declaimed the irrelevancy of intentions, motivations, and other subjective matters,¹⁴⁶ would the Court have to decide yet another case to establish this already well-established, oft-uttered, proposition? What should the Arkansas courts have seen that they did not? And perhaps more importantly, if *Sullivan* was decided in order to straighten out a misconception about the meaning of *Whren*, then what exactly has been straightened out by *Sullivan*?

By now it should be evident that what went wrong in the Arkansas Supreme Court owes to *Whren*. Not even certain what to *count* as relevant, the state high court was convinced that what Officer Taylor had done was fishy, but it could not seem to find a way to voice what, exactly, he had done wrong. If Taylor's actions were in fact not appropriate,¹⁴⁷ then what made them so? What would have legitimated them? A different motive? What sort of motive would that be? As for the dissenters, crucial to their position was that Sullivan's drug activity was a surprise to police, at least until he was pulled over. But that fact, without more, neither makes nor breaks the State's case.

Ultimately, what went wrong in the Arkansas Supreme Court was not so much the result, but the way it was reached—by a complete failure to see the difference between intentions and motives, that is, between action and a very particular sort of reason for action. That failure is what doomed the

144. The Court seemed so intent in slapping down the lower court that it appears not to have noticed that the case presented the intriguing issue of whether the *Bertine* exception to the pretext-is-irrelevant rule would permit challenge of a vehicle inventory made possible only by a post-arrest impoundment itself linked to a pretextual arrest. Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 270 n.17 (2001); see *supra* note 131 and accompanying text.

145. *Sullivan*, 532 U.S. at 772–73 (Ginsburg, J., concurring).

146. See cases cited *supra* note 80.

147. *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000) (supplemental opinion on denial of rehearing).

state court's attempt to distinguish some constitutional from unconstitutional police practices. And given *Whren's* having established that (1) subjective intentions play no role in Fourth Amendment analysis, (2) subjective intentions and actual motivations evidently are the same phenomenon, and (3) nothing matters but probable cause, it is certainly safe to say that both the majority and the dissenters in the Arkansas Supreme Court were doing their best to follow an impenetrable law of the land.

But what has *Sullivan* done to correct what was flatly contrary to the law of the land? Reiterated the law of the land? But that threatens only to perpetuate the problem, that "considerable confusion" of which Justice Glaze wrote.¹⁴⁸ Indeed, the courts that have employed *Sullivan* thus far have continued to interpret it in different ways,¹⁴⁹ most of them perfectly plausible in light of the way the compressed opinion was drafted. Simply put, nothing has been straightened out. *Sullivan* seems more to have pointed to *Whren* than to have explicated it. By reiterating its "unwilling[ness] to entertain Fourth Amendment challenges based on the actual motivations of individual officers" and that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"¹⁵⁰ the Court not only fulfilled its goal of deleting pretexts from Fourth Amendment discourse, but also incidentally banned any reference to intentions. This, in turn, would have the effect of foiling any attempt to understand what happened in any given case. Based on the cases that already allude to *Sullivan*, the problem is not going to go away, not until it is made clearer just what pretexts are. Since neither *Whren* nor *Sullivan* established the criteria of pretexts, pretexts will continue to plague constitutional criminal procedure.

V. CONCLUSION

It is not so much the stubbornness of defense counsel or of courts that accounts for the tendency of pretext arguments to somehow continue to rehabilitate themselves. The U.S. Supreme Court keeps enjoining such arguments from Fourth Amendment discourse, but it is difficult to abide by an injunction whose terms you do not comprehend. The situation is

148. See *supra* text accompanying note 139.

149. *United States v. Callarman*, 273 F.3d 1284, 1286 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1950 (2002); *United States v. Bookhardt*, 277 F.3d 558, 565–67 & n.11 (D.C. Cir. 2002); *Jefferson v. United States*, 776 A.2d 576, 580 (D.C. 2001); *United States v. Page*, 154 F. Supp. 2d 1316, 1319 (M.D. Tenn. 2001); *United States v. Robinson*, 56 M.J. 541, 545–46 (A.F. Ct. Crim. App. 2001); *People v. Patterson*, 111 Cal. Rptr. 2d 896, 900 (Ct. App. 2001); *Powell v. State*, 776 A.2d 700, 714 (Md. Ct. Spec. App. 2001); *People v. Robinson*, 767 N.E.2d 638, 641–42 & n.1 (N.Y. 2001); *State v. Lamont*, 631 N.W.2d 603, 610 (S.D. 2001).

150. *United States v. Whren*, 517 U.S. 806, 813 (1996) (alterations in original).

far from hopeless, however. To see that pretext arguments posit that police acted with a particular motive, a motive known to them, would make possible our seeing as well that to call something a pretext is to acknowledge that the action was indeed constitutional. But getting to the point that we accept that the action in question really was constitutional requires a confrontation with the officer's account of his intentions, a confrontation that the U.S. Supreme Court, in both *Whren* and *Sullivan*, threatens to preclude.

The Justices' concerns about subjectivity would be well founded if such inquiries really did require mind reading—encounters with inner, hidden, secret selves. If that is what confrontations with intentions entail, as so often it is suggested they do,¹⁵¹ then they *should* be enjoined. But confrontations with intentions are not attempts to penetrate privacy; they are attempts to evoke responses about how things were with the person whose intentions we question. And by asking that they explain how things were with them—what they were doing, what the plan was, what remained incidental, what went wrong—we are asking them to elaborate the public, observable world when we feel the need to make sense of an action that strikes us as unusual or untoward. Without leaving room in constitutional criminal procedure for so central, so homely an activity as the proffering of an excuse, we impede the entire project of regulating police, whose actions can be neither meaningfully praised nor meaningfully blamed if they cannot be understood.

By arguing here for the relevance, even centrality, of intentions in any regime directed at regulating the police, I am not suggesting that motives themselves are hidden or inner and should, for that reason, be banished from criminal-procedure discourse. They are not. Motives themselves are directed in a way that they can be assessed, given that they tend to culminate in the realization or setting up of a plan. It is not, therefore, that motives are interior any more than intentions are. The problem with motives, that is, what accounts for their irrelevancy to evaluations of human action, is that motives are by definition external to the action: their “directedness” points the actor at other actions, other plans, other

151. See, e.g., Diana Roberto Donahoe, “*Could Have, “Would Have:” What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1200–01 (1997) (“Although pretext, by definition, entails an assessment of motive, the Supreme Court has clearly held that an inquiry into the officer’s subjective state of mind is inappropriate. This rule makes sense when one considers the difficulty of reading the officer’s mind as he makes quick decisions on the street.” (footnotes omitted)).

upshots. And given that in moral discourse, be it in the context of law or in garden-variety settings, we are generally more concerned with what people are doing than why they are doing it (what they hope to get out of it), the U.S. Supreme Court is correct to deeply discount the importance of motives in evaluations of police practices. What is left now is only to see the extent to which the criteria of motives diverge from those of intentions; to acknowledge as much is essential in assessing whether a search or seizure is pretextual as opposed to unconstitutional, a serious matter for the Fourth Amendment.