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Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio

Janet K. Levit

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I. INTRODUCTION

Officer Barney is a member of the Tulsa County Police Department's drug task force. Late one night, as he is patrolling the deserted streets on the north side of town, Officer Barney sees a young black man driving a brand new BMW, a car which seems relatively incongruous for the area. He becomes suspicious that this young black man may be a drug dealer. Recalling his training for the drug task force, he knows that unsubstantiated hunches provoked his suspicions. He also knows that such hunches do not provide the requisite reasonable suspicion to stop and investigate the driver for the suspected drug crime.[1] But Officer Barney is resourceful. He decides to follow the suspect closely and wait for the inevitable—wait for him to violate one of a litany of traffic laws that govern the roads.

And then it happens. Our suspect forgets to signal a left turn,[2] and Officer Barney gains probable cause to make the traffic stop.[3] Officer Barney pulls the car over, approaches the car, and shines a flashlight at the front seat. At this moment, Officer Barney may: 1) seize a bag containing a white, powdery substance that is sitting on the front seat in plain view;[4] 2) ask the driver to get out of the car, frisk the driver, and find drugs on his body;[5] 3) search the car for weapons and find

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1. *See infra* Part III, discussing the reasonable suspicion requirement of *Terry v. Ohio*, 392 U.S. 1 (1968); *see also infra* notes 165-79 and accompanying text.

2. *See, e.g.*, COLO. REV. STAT. ANN. § 42-4-903 (West 1995); KAN. STAT. ANN. § 8-1548 (1991); N.M. STAT. ANN. § 66-7-325 (Michie 1978); OKLA. STAT. ANN. tit. 47, § 11-604 (West 1988); UTAH CODE ANN. § 41-6-69 (Michie 1993); WYO. STAT. § 31-5-217 (1994).

3. *See, e.g.*, New York v. Class, 475 U.S. 106, 118 (1986) (probable cause for a vehicle stop is established if an officer witnesses a traffic offense); United States v. Hamby, 59 F.3d 99, 101 (8th Cir. 1995) (same).

4. *See infra* notes 58-62 and accompanying text.

5. *See infra* notes 54-57 and accompanying text.

drugs during that protective search;[6] 4) run a check on the driver's license and license plate, determine that the car is not registered to the driver, detain the driver and develop reasonable suspicion to continue the investigative detention or even probable cause to arrest the suspect;[7] 5) arrest the suspect for the traffic offense and search the suspect's body and the vehicle, including all containers in the vehicle, pursuant to the arrest;[8] or 6) after returning the license, ask the driver for permission or consent to conduct an extensive search of the vehicle.[9] Regardless of which permutation Officer Barney chooses, he has wide latitude to structure an extensive search of the suspect's body and vehicle. In each case, Officer Barney seizes the drugs and arrests the suspect for possession or some other appropriate charge. After booking our suspect, Officer Barney returns to his car to finish his shift. He is giddy, believing that he has served law and order, and has rid the streets of Tulsa of one more drug dealer. He has made his fellow members of the drug task force proud.

In this hypothetical, Officer Barney has conducted what is known as a pretextual traffic stop. It is pretextual because Officer Barney's real motivations for making the stop, the desire to investigate for drugs, had nothing to do with the traffic violation, the driver's failure to signal. The traffic violation was a smokescreen, a mere facade, to disguise Officer Barney's true motives.

The United States Supreme Court recently upheld the constitutionality of pretextual traffic stops in *United States v. Whren.*[10] This Article argues that *Whren* signals the death of an earlier case, *Terry v. Ohio.*[11] In *Terry,* the Supreme Court established a two-pronged test to determine if an investigative stop passed constitutional muster. First, the traffic stop must be reasonable in its inception; that is, the original contact between the state and the individual must be reasonable.[12] Second, the ensuing search or seizure must be narrowly tailored in scope to match the original reason for the stop.[13] However, over the years, the Supreme Court greatly diluted the second prong, making it effectively vacuous.

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6. *See infra* notes 50-53 and accompanying text.
7. *See infra* notes 78-80 and accompanying text.
8. *See infra* notes 63-77 and accompanying text.
9. *See infra* notes 81-88 and accompanying text.
10. 116 S. Ct. 1769 (1996).
11. 392 U.S. 1 (1968).
12. *Id.* at 19-20.
13. *Id.* at 20.

Unlike the second prong, *Terry*'s first prong, known as the reasonable suspicion test, remained intact. Nevertheless, in the context of traffic stops, the circuits eventually split over the interpretation of the reasonable suspicion standard. In *Whren,* the Supreme Court settled this circuit split, and, as this Article argues, the result was the death of *Terry*'s first prong.

Reasoning that *Whren* signifies the death of *Terry,* this Article first reviews the *Terry* decision.[14] In particular, the Article considers the two-pronged test established in *Terry*[15] and the subsequent cases that diluted the second prong.[16] Next, this Article examines the circuit split that led to the *Whren* decision.[17] The Article then discusses and critically analyzes the *Whren* decision.[18] The critical analysis recognizes, first, that *Whren* kills *Terry*'s first prong,[19] and, second, that much of the *Whren* Court's reasoning is susceptible to viable counterarguments.[20] Finally, this Article concludes that, with the death of *Terry*'s first prong, drivers and passengers have lost virtually all of their Fourth Amendment protections.[21]

II. *TERRY V. OHIO* AND THE FOURTH AMENDMENT IN THE WAKE OF A TRAFFIC STOP

A. Terry v. Ohio

In *Terry v. Ohio* the Court sanctioned the "stop-and-frisk" when consistent with the Fourth Amendment's reasonableness requirement.[22] In *Terry,* police officers stopped and frisked two defendants who appeared to be loitering and planning a shoplifting expedition.[23] During the frisk, the officer discovered concealed weapons on defendants' bodies.[24]

Defendants were charged with possession of concealed weapons.[25] They filed a pretrial motion to suppress the weapons, relying on the

14. *See infra* Part II.
15. *See infra* Part II.A.
16. *See infra* Part II.B.
17. *See infra* Part III.
18. *See infra* Parts IV - VI.
19. *See infra* Part V.
20. *See infra* Part VI.
21. *See infra* Part VII.
22. *Terry,* 392 U.S. at 16-20.
23. *Id.* at 5-6.
24. *Id.* at 7.
25. *Id.*

Fourth Amendment's protection from unreasonable searches and seizures.[26] Specifically, defendants argued that the officer lacked probable cause to stop them, and thus any ensuing search was per se unreasonable.[27] In other words, the defendants argued that the stop-and-frisk was tantamount to a search and seizure and therefore probable cause was a predicate. The state countered by arguing that the stop-and-frisk fell outside the confines of the Fourth Amendment and therefore was not susceptible to the probable cause threshold. The Ohio trial court denied the motion, the court of appeals affirmed, and the Ohio Supreme Court dismissed the appeal.[28] The U.S. Supreme Court granted certiorari to explore the constitutionality of the "stop-and-frisk."[29] The Court held that, although the Fourth Amendment governed the stop-and-frisk, reasonableness, as distinct from probable cause, was the constitutional bulwark.[30] On the basis of reasonableness, the actions in *Terry* did not violate the Fourth Amendment.[31]

Reasonableness, according to the Court, was a two-pronged inquiry. First, was the search or seizure reasonable in its inception? In answering this question, the Court recognized and balanced the individual and state interests at stake. The state interest, according to the Court, is the need to prevent and deter crime with maximally efficient flexibility.[32] The individual interests, on the other hand, are protection from state infringement on privacy and personal security.[33] In defining the first prong of the reasonableness standard, the Court attempted to forge a fair, but inevitably precarious, balance between these two interests.

Thus, officers must be able to justify intrusions into the "protected interests" of private citizens by pointing "to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[34] Alternatively stated: "[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the

26. *Id.*
27. *Id.* at 7-8.
28. *Id.* at 8.
29. *Id.*
30. *Id.* at 19-20.
31. *Id.* at 22-23.
32. *Id.* at 22. The Court noted that "in dealing with the rapidly unfolding and dangerous situations on city streets the police are in need of an escalating set of flexible responses." *Id.* at 10.
33. *Id.* at 24-25.
34. *Id.* at 21.

action taken was appropriate?"[35] The Court further cautioned that police conduct based upon inarticulable hunches erodes the protections of the Fourth Amendment.[36] With regard to the particular facts in *Terry*, the Court concluded that the officer had observed "a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation," thus making the officer's conduct reasonable.[37] This first prong has evolved into a well-entrenched reasonable suspicion requirement.[38]

After answering the first question, the Court then asked whether the search was reasonable in its scope and intensity, emphasizing that any search must "be strictly circumscribed by the exigencies which justify its initiation."[39] The Court identified the primary "exigency" in *Terry* as police officer safety and held that a frisk is reasonable if "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."[40] Given the specific facts of *Terry*, the scope of the search was reasonable because the officer "confined his search strictly to what was minimally necessary to learn whether the men were armed . . . [h]e did not conduct a general exploratory search for whatever evidence of criminal activity he might find."[41]

B. Terry's Second Prong

While the Court articulated a clear, two-pronged test in *Terry*, the Court subsequently diluted the second prong, making it effectively vacuous. Specifically, since *Terry*, the Supreme Court has held that, when an officer stops an automobile for a traffic violation, the officer may legitimately conduct one of several searches or seizures. The officer may: 1) conduct a protective search of the driver, passengers, and car;[42] 2) seize items in plain view;[43] 3) search the driver pursuant to an arrest;[44] 4) prolong the investigative detention to facilitate investigation of the driver's license and the vehicle registration;[45] and

35. *Id.* at 21-22.
36. *Id.* at 22.
37. *Id.*
38. *See infra* Part III, discussing the reasonable suspicion requirement of *Terry*.
39. *Terry*, 392 U.S. at 26.
40. *Id.* at 27.
41. *Id.* at 30.
42. *See infra* notes 50-57 and accompanying text.
43. *See infra* notes 58-62 and accompanying text.
44. *See infra* notes 63-77 and accompanying text.
45. *See infra* notes 78-80 and accompanying text.

5) conduct a consensual search.[46] Using any permutation of these techniques, an officer can legally conduct a rather comprehensive search of an automobile and its occupants, provided that the stop, the initial reason for the officer coming into contact with the driver or the car, passes constitutional muster. The following section highlights the breadth and force of an officer's search and seizure powers in the wake of a traffic stop.

First, an officer may conduct a protective search of the driver and the car. This search derives from *Terry* itself, but subsequent cases have broadened its scope.[47] *Terry*'s stop-and-frisk principles are pertinent in the traffic stop context because traffic stops are analogous to *Terry* stops.[48] The frisk or protective search in *Terry* was more limited than a full-fledged search because it was necessarily tailored narrowly to search for weapons that could harm the stopping officer.[49]

In the context of an automobile stop, *Michigan v. Long*[50] extended *Terry*'s sanction of the protective search to include a limited search of the automobile's interior.[51] A protective sweep of an automobile's interior includes not only the passenger compartment itself but also all containers in that area.[52] If, while conducting a search for weapons, an officer discovers contraband other than weapons, the Fourth Amendment does not require him to ignore the contraband.[53] Thus, an officer may implicitly search for drugs while conducting a protective search of an automobile.

Furthermore, upon a legitimate stop, the officer may conduct a protective search (a frisk) of the driver and passengers. In

46. *See infra* notes 81-88 and accompanying text.

47. *See infra* notes 50-57.

48. *See* Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

49. *Terry*, 392 U.S. at 25-26.

50. 463 U.S. 1032 (1983).

51. *Id.* at 1051. In this case, police officers stopped to investigate when a car swerved into a ditch. The defendant exited his car to meet the officers. The defendant did not produce his license and registration at the officer's initial request, but instead started walking towards the car. The officers followed him and noticed a hunting knife on the floorboard of the car. The officers subjected the defendant to a patdown search. They found no weapon but proceeded to shine the flashlight into the car, where they spotted an open pouch of marijuana protruding from the armrest of the front seat. They immediately searched the car and found no more drugs, but when the vehicle was impounded, the police found marijuana in the trunk. *Id.* at 1035-36.

52. *Id.* at 1049 (discussing *New York v. Belton*, 453 U.S. 454 (1981), and holding that a protective search extends to any area in the interior of the automobile from which the arrestee might reach for a weapon, including not only the passenger compartment, but also any closed containers therein). *See also* California v. Acevedo, 500 U.S. 565, 573 (1991) (holding that passenger compartment includes glove compartment).

53. *Long*, 463 U.S. at 1050.

Pennsylvania v. Mimms[54] the Court concluded that a protective search of a driver following a legitimate traffic stop was reasonable.[55] However, *Terry* frisks are justified for purposes of police officer protection, and the use of a frisk to conduct a general search for evidence is unconstitutional.[56] Nonetheless, as noted in *Michigan v. Long*, officers need not ignore incriminating contraband evidence discovered during a legitimate protective search, but such evidence is only admissible if the incriminating nature of the contraband is immediately apparent.[57]

Second, the officer may seize items in plain view without a warrant.[58] The plain view doctrine only justifies seizure if "the initial intrusion which brings the police within the plain view of such an article," is itself consistent with the Fourth Amendment.[59] To come within the plain view exception, "a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer."[60] The use of a flashlight to illuminate the interior of a vehicle does not vitiate the functioning of the plain view doctrine because when driving or parked on a public road, courts discount individual expectations of privacy.[61]

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54. 434 U.S. 106 (1977).

55. *Id.* at 111-12. The Court reasoned that a protective search was justified when an officer pulled an arrestee over for an expired license plate. The officer asked the defendant to step out of the car and noticed a bulge under his jacket. *Id.* at 107-12.

56. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (stating that, because police protection was not needed, a search of the defendant's car was unconstitutional).

57. *Id.* at 374. The Court concluded that a search and seizure of cocaine vials found on the defendant during a protective search was invalid because the nature of the contraband was not immediately apparent. *Id.* at 378. Upon conducting the frisk, the officers encountered a lump in the defendant's pocket and used that lump to justify a continued search, eventually finding and seizing the cocaine. *Id.* Because the lump's identity was not "immediately apparent," the continued search for contraband exceeded the scope of a legitimate *Terry* frisk and therefore exceeded the bounds of the Fourth Amendment. *Id.* at 378-79.

58. *See* Coolidge v. New Hampshire, 403 U.S. 443, 484-90 (1971) (holding that police may seize evidence in plain view as long as the discovery of the evidence is inadvertent), *overruled in part by* Horton v. California, 496 U.S. 128 (1990).

59. *Id.* at 465-66. *See also Horton*, 496 U.S. 128; Texas v. Brown, 460 U.S. 730 (1983).

60. Robbins v. California, 453 U.S. 420, 428 (1981), *overruled on other grounds by* United States v. Ross, 456 U.S. 798 (1982).

61. *See* United States v. Dunn, 480 U.S. 294, 305 (1987) (holding that shining a flashlight into a barn suspected of containing chemicals used to make drugs did not constitute an unreasonable search under the Fourth Amendment). *See also, e.g.*, United States v. Ortiz, 63 F.3d 952, 954 (10th Cir. 1995) (holding that shining a flashlight into a car, in which there was an underage passenger, to check for alcohol was within the scope of the Fourth Amendment).

Some courts include a "plain smell" counterpart to the "plain view" doctrine. Thus, if an officer smells marijuana emanating from the car, his seizure of the marijuana would be consistent with the Fourth Amendment.[62]

Third, if the officer decides to arrest the driver for the traffic offense, as he is able to do with unfettered discretion in twenty-six states[63] and subject to minimal constraints in sixteen states,[64] the officer may conduct a search pursuant to the arrest. In *Chimel v. California*,[65] the Supreme Court authorized warrantless searches of the

62. *See, e.g.*, United States v. Pierre, 958 F.2d 1304, 1310 (5th Cir. 1992) (concluding that where a border patrol agent smelled marijuana coming from a car stopped at a checkpoint, the agent had probable cause to search the car for illegal drugs); United States v. Martinez-Miramontes, 494 F.2d 808, 810 (9th Cir. 1974) (finding no distinguishing difference between looking inside a vehicle for items in plain view and leaning down and smelling marijuana coming from the trunk).

63. DEL. CODE ANN. tit. 21, § 701 (1985 & Supp. 1994) (warrantless arrest allowed when officer has probable cause to believe violation committed in his presence and probable cause to believe person to be arrested committed the offense); KAN. STAT. ANN. § 8-2104 (1991) (officer has discretion to arrest or issue citation for misdemeanor motor vehicle offenses); N.J. STAT. ANN. § 39: 5-25 (West 1990 & Supp. 1996) (officer may arrest without warrant any person committing motor vehicle violation in or out of officer's presence); OHIO REV. CODE ANN. § 2935.03(a) (Baldwin 1994 & Supp. 1996) (warrantless arrest permitted if misdemeanor committed or ordinance violated in presence of officer). *See also* ARIZ. REV. STAT. ANN. § 13-3883 (1989 & Supp. 1995); ARK. CODE ANN. § 16-81-106 (Michie 1987 & Supp. 1995); CONN. GEN. STAT. ANN. § 54-1f (a) (West 1994 & Supp. 1996); FLA. STAT. ANN. § 901.15 (West 1996); GA. CODE ANN. § 17-4-23 (Harrison 1996); HAW. REV. STAT. § 803-5 (1994); IDAHO CODE § 19-603 (1987 & Supp. 1996); 725 ILL. COMP. STAT. ANN. 5/107-2 (West 1992 & Supp. 1996); IOWA CODE ANN. § 804.7 (West 1994 & Supp. 1996); ME. REV. STAT. ANN. tit. 15, § 704 (West 1980); MISS. CODE ANN. § 99-3-7 (1994 & Supp. 1995); MO. ANN. STAT. § 544.216 (Vernon 1987 & Supp. 1996); NEV. REV. STAT. § 484.795 (1993); N.H. REV. STAT. § 594:10(I)(a) (1986 & 1995 Supp.); N.Y. CRIM. PROC. LAW § 140.10(1)(a) (McKinney 1992 & Supp. 1996); N.C. GEN. STAT. § 20-183 (1993); 75 PA. CONS. STAT. ANN. § 6304 (1996); R.I. GEN. LAWS § 12-7-3 (1994); TEX. REV. CIV. STAT. ANN. art. 6701d (West 1977 & Supp. 1996); UTAH CODE ANN. § 77-7-2 (1995 & Supp. 1996); W. VA. CODE § 15-5-18 (1995); WYO. STAT. § 31-5-1204 -1205 (1994).

64. ALA. CODE § 32-1-4 (1989) (when any person arrested for motor vehicle misdemeanor, officer shall release upon written bond to appear, unless officer has good cause to believe person has committed any felony, or person charged with offense resulting in injury or death or offense of DWI); N.M. STAT. ANN. § 66-8-122-3 (Michie 1994) (officer must issue summons with five exceptions); OKLA. STAT. ANN. tit. 22, § 1115.1(A) (West 1996) (officer shall release upon written promise to appear, person committing misdemeanor traffic offense, except in certain instances; *see also* ALASKA STAT. § 12.25.180(B) (Michie 1995); IND. CODE ANN. § 9-30-2-4 (Burns 1992); KY. REV. STAT. ANN. § 431.015(2) (Baldwin 1985); MD. CODE ANN. TRANSP. § 26-202(a) (2) (1992); MASS. GEN. LAWS ANN. ch. 90 (West 1988); MINN. STAT. ANN. § 169.91 (West 1996); NEB. REV. STAT. § 60-684 (1993); N.D. CENT. CODE § 39-07-07, 09 (1995); OR. REV. STAT. § 810.410 (1989); S.C. CODE ANN. § 56-25-30 (Law. Co-Op. 1996); S.D. CODIFIED LAWS ANN. § 32-33-2 (1989); TENN. CODE ANN. § 40-7-118(b)(1) (1996); WASH. REV. CODE ANN. § 46.63.020 (West Supp. 1996).

65. 395 U.S. 752 (1969).

arrestee and the area within his immediate control.[66] Two underlying justifications originally supported *Chimel*: 1) the search assured the safety of the arresting officer; and 2) the search maintained the integrity of any relevant evidence.[67]

Later, in *United States v. Robinson*[68] and *Gustafson v. Florida*,[69] the Supreme Court severed the search incident to an arrest from the safety and evidentiary concerns addressed in *Chimel*. *Robinson* and *Gustafson* held that the power to search derived from the authority to arrest itself and not from any particular, case-specific circumstances.[70] Otherwise, an officer's authority to search would be based on post hoc judicial determinations of "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[71]

Significantly, the arrests in *Robinson* and *Gustafson* derived from traffic-like offenses, the defendant in the former driving with a suspended operator's permit[72] and the defendant in the latter driving without a license.[73] The Court has not differentiated between arrests for traffic violations and arrests for more serious offenses. Thus, the authority to search pursuant to an arrest is constant among all offenses, including traffic offenses.[74] Most recently, in *New York v. Belton*[75] the Court held that in every instance in which a "policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger

66. *Id.* at 762-63.

67. *Id.* at 763.

68. 414 U.S. 218 (1973).

69. 414 U.S. 260 (1973).

70. *Robinson*, 414 U.S. at 235; *Gustafson*, 414 U.S. at 263-64. Justice Powell in his concurrence in *Robinson* emphasized the essential premise of the decision. He explained:

> No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to be the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee.

Robinson, 414 U.S. at 237.

71. *Id.* at 235.

72. *Id.* at 220.

73. *Gustafson*, 414 U.S. at 261.

74. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 230 (1989) (arguing in favor of distinguishing between arrests for traffic offenses and arrests for other offenses, but conceding that the Court has not drawn such distinctions).

75. 453 U.S. 454 (1981).

compartment of that automobile."[76] This search of the passenger compartment includes any containers found therein.[77]

Fourth, as part of the legitimate investigative detention in the wake of a traffic stop, an officer may investigate the driver's license and the vehicle registration.[78] If, during the investigation of the driver's license and the vehicle registration, the officer develops reasonable suspicion "of illegal transactions in drugs or of any other serious crime," he may continue the investigative detention and ask questions directed at drug-related suspicions.[79] Reasonable suspicion is not based on any one factor but rather on the totality of the circumstances.[80] Questioning during the drug-related detention may generate information sufficient to support probable cause to search for evidence of a more serious crime or even arrest for a more serious crime.

Finally, following a legitimate auto stop, the officer may ask for consent to search the vehicle and thus conduct a consensual search.[81] Sometimes officers ask for consent to circumvent the strictures of the warrant requirement.[82] More often, the officers ask for consent because there is no other legitimate basis for conducting the search.[83] A consensual search is constitutional if it is voluntary: if it is the product of an "essentially free and unconstrained choice."[84] In assessing voluntariness, the Court borrowed the pre-*Miranda v. Arizona*[85] approach to coerced confession cases,[86] holding that the

76. *Id.* at 460.

77. *Id.* (concluding that the search of defendant's jacket in automobile's interior was proper despite low probability that jacket (container) contained drugs or weapons).

78. Delaware v. Prouse, 440 U.S. 648, 657-59 (1979) (noting that license checks permitted on vehicle stops upon reasonable suspicion of a traffic violation). *See also, e.g.*, United States v. Rusher, 966 F.2d 868, 876 (4th Cir. 1992), *cert. denied,* 506 U.S. 926 (1992); United States v. Zucco, 71 F.3d 188, 190 (5th Cir. 1995) (citing United States v. Shabazz, 993 F.2d 431, 437 (5th Cir. 1993)); United States v. Johnson, 58 F.3d 356, 357 (8th Cir. 1995), *cert. denied,* 116 S. Ct. 348 (1995); United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995).

79. *Jones*, 44 F.3d at 872 (quoting Florida v. Royer, 460 U.S. 491, 498-99 (1983) (plurality opinion)).

80. *See* United States v. Sokolow, 490 U.S. 1, 8 (1989) (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)); *Rusher*, 966 F.2d at 875; United States v. Johnson, 58 F.3d 356 (8th Cir. 1995), *cert. denied,* 116 S. Ct. 348 (1995). *See also infra* notes 170-72 and accompanying text.

81. Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

82. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.1, at 596 (1996).

83. *Id.* at 597.

84. *Schneckloth,* 412 U.S. at 225.

85. 384 U.S. 436 (1969).

86. *See* Escobedo v. Illinois, 378 U.S. 478, 485 (1964).

inquiry is factual and depends on the totality of the circumstances.[87] While "knowledge of the right to refuse consent is a factor to be taken into account," it is not determinative of consent.[88]

While officers enjoy broad authority to conduct searches and seizures in the wake of a traffic stop, the decisions discussed above did not fundamentally alter the standard governing the initiation of contact between the police and the driver, between the state and the individual. The aforementioned Supreme Court decisions rested on a common assumption that the police officer legitimately came into contact with the individual, that reasonable suspicion served as a bulwark, as a formidable threshold, between the state's interests and individual rights.

A reasonable suspicion requirement prevents the state from stopping individuals based merely upon whims, hunches, suspicions, and prejudices. Thus, while greatly diluting *Terry*'s second prong, the line of decisions described above preserved the integrity of *Terry*'s first prong, which requires reasonable suspicion as a minimum predicate to any investigative detention. Judicial sanction of pretextual traffic stops threatens this limited protection.

III. THE PRETEXTUAL STOP PROBLEM: THE "WOULD" VERSUS "COULD" TESTS

An examination of the two judicial standards for pretextual traffic stops demands an understanding of the chronology of such a stop. Recall the hypothetical in the introduction of this Article. In that

87. *Schneckloth*, 412 U.S. at 233, 248-49. Factors relevant to the voluntariness inquiry are: false claim of authority to search, Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) (falsely claiming that search warrant authorized regardless of consent); coercive surroundings, including number of police officers, United States v. Sanchez-Valderuten, 11 F.3d 985, 990 (10th Cir. 1993), *aff'd sub nom.* State v. Bumpek, 275 S.E.2d 456 (N.C. 1969), United States v. Jones, 846 F.2d 358, 361 (6th Cir. 1988), United States v. Marshall, 488 F.2d 1169, 1188-89 (9th Cir. 1973); whether weapons were displayed, United States v. Perez, 37 F.3d 510, 515 (9th Cir. 1994), United States v. Brooks, 2 F.3d 838, 842 (8th Cir. 1993), United States v. Rice, 995 F.2d 719, 724 (7th Cir. 1993), United States v. Hall, 969 F.2d 1102, 1107 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 980 (1992); whether the person who consented was in police custody, United States v. Hall, 565 F.2d 917, 920 (5th Cir. 1978), although custody alone is insufficient to demonstrate coercion, United States v. Watson, 423 U.S. 411, 424 (1976); and whether the defendant was mentally or intellectually able to consent, United States v. Jones, 846 F.2d 358, 360 (6th Cir. 1988) (noting that the defendant "had no formal education"), United States v. Rodriguez, 525 F.2d 1313, 1316 (10th Cir. 1975) (noting that the defendant did not understand English), United States v. Duran, 957 F.2d 499, 503 (7th Cir. 1992) (extreme emotional distress), United States v. Elrod, 441 F.2d 353, 356 (5th Cir. 1971) (mental incapacity).

88. *Schneckloth*, 412 U.S. at 249.

Diagram I.

Anatomy of Pretextual Auto Stop

A. Officer lacks reasonable suspicion to stop car for drugs

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B. Reasonable suspicion (probable cause) to stop for traffic violation (failure to signal)

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C. Stop for traffic violation (failure to signal)

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D. Search for drugs:

• plain view

• protective search of passengers and passenger compartment

• search pursuant to arrest

• develop reasonable suspicion in process of checking driver's license and vehicle registration; detain for further questioning; develop probable cause for arrest and/or search

• consent to search

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E. Seize drugs and arrest for possession

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F. Motion to suppress drugs in trial for drug crime

hypothetical, Officer Barney conducted a pretextual traffic stop, which has a unique anatomy, as depicted in Diagram I.

(See Diagram I: Anatomy of Pretextual Auto Stop)

The pretextual traffic stop began when Officer Barney became suspicious that the driver was involved in drug trafficking but knew that he lacked the particularized reasonable suspicion necessary to make the stop to investigate his drug-related hunches (Step A). However, because he witnessed the traffic offense, Officer Barney had reasonable suspicion, even probable cause, to stop the car for failing to signal (Step B). He stopped the car for the traffic violation (Step C), seized the car and driver, and then searched the car and driver using one of the methods described in Part I.B. (Step D). Officer Barney found drugs, seized the drugs, and arrested (seized) the driver (Step E). The defendant then moves to suppress the drugs (Step F), arguing that the stop is unconstitutionally pretextual.

Notably, Officer Barney conducted several searches and seizures. In stopping the car for the traffic violation, he seized the car and its occupants; he seized evidence (drugs) following his search for drugs; and he ultimately seized the driver via the arrest. These searches and seizures fall squarely within the ambit of the Fourth Amendment. To pass constitutional muster, by the very language of the Fourth Amendment, the initial seizure, the initial traffic stop, must be reasonable.[89]

In determining the reasonableness of Officer Barney's actions, a paradox emerges. On the one hand, Officer Barney is a good guy. He is a police officer who is enforcing the law, a traffic ordinance, as promulgated by a state or local legislative body. His actions are not only technically justified, but also bear the imprimatur of a democratically enacted traffic law. On the other hand, Officer Barney is a bad guy. The initial stop is a mere pretext to effect an investigative seizure and an ensuing search on less than reasonable suspicion, something which is patently illegal under *Terry v. Ohio* and its progeny.[90] Which personality controls our examination of the Fourth Amendment reasonableness inquiry?

The United States Courts of Appeals developed two approaches for determining when pretextual use of police power violates the Fourth Amendment, thereby tainting evidence seized in its wake.[91] The first,

89. U.S. CONST. amend. IV.

90. *See infra* Part V.

91. *Compare* United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995), *with* United States v.

called the "would" approach, asks whether a reasonable officer would have made the stop absent ulterior motives.[92] The second, the "could" approach, asks only whether a reasonable officer could have made the stop.[93] Before examining these approaches, however, it is useful to explore a third possibility—the purely subjective approach.

Under a purely subjective test, courts would ask: Was the officer stopping the vehicle because of a hunch that more serious illegal activity was transpiring? Were the subjective intentions of the officer at the time of the stop pretextual? If the courts answered either of these questions in the affirmative, then the stop would be labeled unreasonable, violative of the Fourth Amendment, and the fruits of any ensuing search or seizure would be excluded.[94] If the core concern with pretextual stops is that officers' ostensible motives (traffic stop) do not match ulterior motives (search for evidence to substantiate hunches of serious criminal activity), then logic requires a direct look at the nature of those officers' motives.

However, most commentators[95] and courts[96] concede that the Supreme Court foreclosed this approach in a triad of cases: *Scott v. United States,*[97] *United States v. Villamonte-Marquez,*[98] and *Maryland*

Botero-Ospina, 71 F.3d 783 (10th Cir. 1995), *cert. denied,* 116 S. Ct. 2529 (1995). *See also infra* note 94.

92. *See infra* notes 106-13 and accompanying text, analyzing the "would" standard.

93. *See infra* notes 123-26 and accompanying text, analyzing the "could" standard.

94. *See* Mapp v. Ohio, 367 U.S. 643, 647-50, 655 (1961) (extending *Weeks v. United States*, 232 U.S. 383 (1914), and holding that evidence seized in violation of the Constitution is inadmissible in state courts as well as federal courts); Weeks v. United States, 232 U.S. 383, 393-94 (1914) (holding that evidence seized in violation of the Constitution is inadmissible in federal courts).

95. Laurie A. Buckenberger, Note, *Pretextual Arrests: In* United States v. Scopo *The Second Circuit Raises the Price of a Traffic Ticket (Considerably)*, 61 BROOK. L. REV. 453, 467-72 (1995); Scott Campbell, Comment, United States v. Ferguson*: The Sixth Circuit Adds a Third Test for Pretextual Police Conduct*, 56 OHIO ST. L.J. 277, 289-92 (1995); Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 495-99 (1994).

96. *See, e.g., Guzman*, 864 F.2d at 1515; United States v. Trigg, 878 F.2d 1037, 1040 (7th Cir. 1989).

97. 436 U.S. 128 (1978). In *Scott*, the electronic surveillance system in question intercepted all the phone calls on a phone line for a given period in the face of a statute requiring that law enforcement officials minimize the interception of communications. *Id.* at 131-32. The Supreme Court upheld the wiretap search as objectively reasonable, despite the fact that the investigators admitted they had no intent to comply with the minimally intrusive requirements of the order. *Id.* at 143. The Court concluded that the behavior was objectively reasonable given the order's parameters: "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138.

98. 462 U.S. 579 (1983). Customs officials boarded a vessel for purposes of

v. Macon.[99] These cases rest on the concern that subjective inquiries are inevitably difficult to substantiate, given that they hinge upon the credibility of the stopping officers' testimony. This rationale is sound and should be followed.

Nonetheless, the Court's elimination of the purely subjective test did not solve the pretext puzzle. If *Scott* and its progeny mandate objective inquiries, what constitutes an objective inquiry? In answering this question the courts inescapably focused on the application of one of two possible objective tests: what *would* a reasonable officer do in similar circumstances, or what *could* an officer do? Recent case law in the Tenth Circuit will serve as a window through which to examine these two approaches.

Until December 5, 1995, *United States v. Guzman*[100] governed the issue of pretextual traffic stops in the Tenth Circuit. In *Guzman*, the police officers ostensibly stopped the defendant for not wearing a seat belt, but the progression of the stop clearly suggests that the officer's true ulterior motive was to search for drugs.[101] After convincing the defendants to sign a consent-to-search form,[102] the officers searched the car, found cocaine, and consequently charged the defendants with possession of cocaine with intent to distribute.[103] The defendants filed a motion to suppress, and the district court granted the motion after entertaining defendants' allegations of pretext from a wholly subjective vantage point.[104]

On appeal, the Tenth Circuit explored the issue of pretextual traffic stops, examining when a stop becomes unconstitutionally pretextual.

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inspecting documentation, as they were statutorily authorized to do. *Id.* at 583. There was evidence that the agents were interested in investigating suspected drug activity. The Court held that subjective intentions of officers were, under *United States v. Scott*, irrelevant in the Fourth Amendment inquiry. *Id.*

99. 472 U.S. 463 (1985). An officer purchased obscene material with marked money, with the subjective intent to gain evidence of violations of Maryland's obscenity laws. *Id.* at 465. The respondent argued that this purchase was a warrantless seizure in violation of the Fourth Amendment. *Id.* at 466. The Court held that the purchase was a "transaction in the ordinary course of business," *id.* at 471, and not a seizure in violation of the Fourth Amendment. *Id.* The Court bolstered its conclusion by citing *Scott* for the proposition that the identification of a Fourth Amendment violation "'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 470 (quoting *Scott*, 436 U.S. at 136, 138, and 139 n.13).

100. 864 F.2d 1512 (10th Cir. 1988).

101. *Id.* at 1514.

102. *Id.*

103. *Id.*

104. *Id.* at 1514-15.

The Tenth Circuit first concluded that the Supreme Court's previous decisions had foreclosed subjective review. The court further concluded that pretext must be judged by an objective standard.[105] Objectivity, however, was not a self-defined term, and the Tenth Circuit struggled over what type of objective standard to apply, ultimately concluding that evidence seized during traffic stops is inadmissible unless a reasonable officer would have made the stop absent the ulterior motive.[106] In terms of the opening hypothetical, if a reasonable officer in Officer Barney's position would not have stopped the vehicle for failure to use a turn signal absent suspicions regarding drugs, then the stop is unconstitutionally pretextual, and the drug evidence should be suppressed in the drug offense case.

In arriving at this standard, the Tenth Circuit in *Guzman* balanced two competing interests.[107] The first is police autonomy.[108] The second is curbing arbitrary police action.[109] By focusing on an officer's deviation from usual practices, the Tenth Circuit simultaneously observed the Supreme Court's admonition against subjective inquiries into police officers' states of mind and preserved meaningful judicial review of discretionary police action.[110] In

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105. *Id.* at 1515.

106. *Id.* at 1517.

107. *Id.* at 1516.

108. *Id.*

109. *Id.* The Court stated:

> [A]n objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary intrusions in situations such as traffic stops. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy and intrusive interrogation when we forget to wear our seat belts, turns on no more than "the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness or our hair or the color of our skin."

Id. (quoting Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974)).

110. Other Tenth Circuit cases that follow the approach adopted in *Guzman* include: United States v. Harris, 995 F.2d 1004, 1005 (10th Cir. 1993) (following *Guzman* and holding "[w]hether the officers were otherwise suspicious about defendant's activity is irrelevant, so long as a reasonable officer would have stopped defendant under the circumstances"); United States v. Deases, 918 F.2d 118, 121-22 (10th Cir. 1990) (following *Guzman*); United States v. Rivera, 867 F.2d 1261, 1263-64 (10th Cir. 1989) (same).

The *Guzman* court relied heavily on Eleventh Circuit precedent in reaching its conclusion. *See* United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986) (defendant's weaving once into emergency lane provided only a pretextual reason for stop because

applying this standard, typically called the "would" standard, courts examine "usual practices" in police departments.[111] These include testimony by the stopping police officer indicating that he routinely stops drivers for such violations,[112] and formal and informal police regulations.[113]

The Tenth Circuit overruled *Guzman* in *United States v. Botero-Ospina*.[114] In that case, a police officer observed the defendant swerve over the center line and swerve back into the outside lane, an act that allegedly aroused suspicion that the defendant was falling asleep or driving under the influence of drugs or alcohol.[115] During the course of the stop, the defendant's answers to questions regarding his license and vehicle registration aroused the officer's suspicions.[116] This prompted the officer to ask the defendant if he was carrying weapons or drugs.[117] When the defendant answered negatively, the officer asked to search his car, and the defendant consented.[118] The officer then found 74 kilograms of cocaine.[119] The defendant moved for suppression, arguing that the traffic stop was pretextual.[120] The district court denied the motion and convicted the defendant.[121] On appeal, the Tenth Circuit *sua sponte* moved to review *en banc* the

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officer would not have made stop in absence of invalid purpose); *see also* United States v. Harris 928 F.2d 1113, 1116 (11th Cir. 1991) (following *Smith* and "would" approach); United States v. Stickland, 902 F.2d 937, 940 (11th Cir. 1990) (same); and United States v. Bates, 840 F.2d 858, 860 (11th Cir. 1988) (same).

The Ninth Circuit also followed the "would" approach. *See* United States v. Hernandez, 55 F.3d 443, 445 (9th Cir. 1995) ("We focus on the objective facts and ask whether a reasonable officer, given the circumstances, would have made the stop absent a desire to investigate an unrelated serious offense."); United States v. Millan, 36 F.3d 886, 888 (9th Cir. 1994) ("[A] stop is pretextual unless a 'reasonable officer,' given the same circumstances, 'would have made the stop anyway, apart from [his or her] suspicions about other more serious criminal activity.'") (quoting United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994)); United States v. Lillard, 929 F.2d 500, 502 (9th Cir. 1991) (holding that stop for speeding is not pretextual because stopping officer would have stopped the car despite his hunch).

111. *See infra* notes 212-18 and accompanying text. This "would" standard is also known as the "modified objective standard." Pulliam, *supra* note 95, at 485.

112. *See infra* notes 217-18 and accompanying text.

113. *See infra* notes 213-16 and accompanying text.

114. 71 F.3d 783 (10th Cir. 1995).

115. *Id.* at 785.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

pretext issue,[122] revisiting the proper standard for determining whether a traffic stop is unconstitutionally pretextual.

The Tenth Circuit held that as long as the officer could root his actions in a concrete statute, regulation, or ordinance, as long as the officer *could* have made this stop because the vehicle swerved over the center line, then there is no Fourth Amendment violation.[123] In other words, "if the stop is based on an observed traffic violation or if the police officer has a reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring," the stop passes constitutional muster.[124] Another court articulated the "could" standard as follows:

> When an officer observes a traffic offense—however minor—he has probable cause to stop the driver of the vehicle. . . . [T]his otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity. . . [T]hat stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions.[125]

The key issue under the "could" test is legitimacy rather than reasonableness: 1) Does the officer have probable cause to make the stop for a particular traffic violation?; and 2) Is there a municipal ordinance or state law that legitimates the stop? On the eve of the *Whren* decision, the overwhelming majority of circuits had adopted the "could" approach.[126]

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122. *Id.*

123. *Id.* at 787.

124. *Id.*

125. United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993) (quoting United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990)).

126. *See Whren*, 53 F.3d at 375 (involving a traffic stop for failure to signal and speeding); United States v. Scopo, 19 F.3d 777, 782 (2nd Cir. 1994) (holding that the police require only probable cause to make a traffic stop regardless of whether or not they would have done so absent investigatory motives), *rev'g* 814 F. Supp. 292 (E.D.N.Y. 1994), *cert. denied*, 115 S. Ct. 207 (1994); United States v. Johnson, 63 F.3d 242, 247 (3rd Cir. 1995) (holding that as long as a traffic stop is authorized by Pennsylvania law, it does not violate the Fourth Amendment), *cert. denied*, 116 S. Ct. 2528 (1996) ; United States v. Hassen El, 5 F.3d 726, 730 (4th Cir. 1993) (upholding traffic stop made by officer even if the "officer would not have made the stop but for some hunch"), *cert. denied*, 114 S. Ct. 1374 (1994); United States v. Harvey, 16 F.3d 109, 111 (6th Cir. 1994) (following United States v. Ferguson 8 F.3d 385, 391 (6th Cir. 1993) (en banc), *cert. denied*, 115 S. Ct. 97 (1994)), *cert. denied*, 115 S. Ct. 258 (1994); *Ferguson*, 8 F.3d at 391 ("[S]o long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment."); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir. 1991) (adopting "could" standard in conjunction with discussion of pretextual arrests rather than pretextual stops), *cert. denied sub nom.* Cummins v. United States,

IV. THE WHREN DECISION

The Supreme Court resolved the debate over the appropriate car stop standard in *United States v. Whren*.[127] Plainclothes police officers in an unmarked car patrolled a "high drug area" in the Washington, D.C. metropolitan area on the evening of June 10, 1993.[128] They became suspicious of drug activity upon passing a dark Pathfinder truck with

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502 U.S. 962 (1991); United States v. Myers, 990 F.2d 1083 (8th Cir. 1993) (stating that a stop for following too closely behind another car is not a pretextual stop); United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990) (stating that the "stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions"), *cert. denied,* 502 U.S. 962 (1991) ; United States v. Gallo, 927 F.2d 815, 819 (5th Cir. 1991) (en banc) (although not a traffic stop case, stating that an arrest is valid so long as the police do what "they are objectively permitted to do" without regard to usual practices).

However, many of the decisions that the courts characterized as unequivocal "could" cases can actually be distinguished. Recall the definition of pretext: lacking reasonable suspicion or probable cause for a suspected crime, a police officer stops a car for a traffic violation for which he has probable cause in an effort to obtain evidence to meet the reasonable suspicion or probable cause standard for another suspected crime. In some of the "pretext" cases where the courts address the "would" versus "could" issue, the courts held that the police had independent reasonable suspicion to stop the vehicle for the more serious crime. In other words, a pretextual stop did not occur, and the discussion of pretext in the text is dicta. *See* United States v. Stapleton, 10 F.3d 582, 584 (8th Cir. 1993) (upon anonymous tip that car was carrying drugs, the police followed suspect's car and stopped the suspect when car reached 70-75 m.p.h. in a 65 m.p.h. zone, irrelevant that officers may not have ordinarily stopped the car for only exceeding the speed limit by 5 to 10 m.p.h.); *Ferguson*, 8 F.3d 385 (6th Cir. 1993) (police stopped the car, after observing in parking lot, for not having a visible driver's license plate, but court found that police had independent, reasonable suspicion of drug activity); United States v. Hawkins, 811 F.2d 210 (3d Cir. 1987) (suspect stopped for passing a bus, crossing the double yellow line, and running a red light, but police had independent reasonable suspicion that the defendant was engaged in drug activity); *but see* United States v. Harvey, 16 F.3d 109, 111 (6th Cir. 1994) (en banc) (relying solely on the reasoning of *Ferguson*, which is not a true pretext case, holding as long as traffic violations occurred, stop was not pretextual), *cert. denied,* 115 S. Ct. 258 (1994).

In other cases, courts explicitly state that they will follow the "could" standard, but, in applying that standard, they utilize *Guzman*-type analysis, relying on the officer's testimony regarding tendency to stop cars for particular offenses. In *United States v. Rivera*, 906 F.2d 319 (7th Cir. 1990), for example, the police stopped the defendant for erratic driving and obstruction of the dashboard. Although the court stated that a "could" standard should govern, it heavily weighed the findings of the district court that the officer would have stopped the car to issue the citation on the obstruction charge and would have stopped the car to investigate possibly dangerous or intoxicated driving upon seeing the erratic behavior. *Id.* at 321. Thus, under the guise of a "could" case, the Seventh Circuit relied on "would" reasoning. *But see Trigg*, 925 F.2d at 1065 (adopting "could" standard in conjunction with discussion of pretext in the context of initial decision to arrest rather than initial decision to *stop* the vehicle); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989) (same).

127. 116 S. Ct. 1769 (1996).

128. *Id.* at 1772.

temporary license plates and youthful occupants.[129] After the driver looked into the lap of the passenger, the police made a U-turn, heading back toward the Pathfinder.[130] Then the Pathfinder made a sudden right turn, without signaling, and proceeded at an "unreasonable speed."[131] The police officers then stopped the vehicle for various traffic code violations.[132] Upon approaching the driver's door, one officer observed in plain view two large plastic bags of what appeared to be crack cocaine.[133] The bags in plain view gave the officers probable cause to arrest the driver and passenger and search the Pathfinder. The officers found several types of illegal drugs during the search.[134]

Petitioners were charged with violations of several federal drug laws. In response they moved to suppress the confiscated drug evidence, arguing that the traffic stop had been illegal.[135] Specifically, they asserted that the officers' purported basis for stopping the vehicle was unconstitutionally pretextual.[136] Petitioners based their motion in great part on the fact that District of Columbia police regulations "permit plainclothes officers in unmarked vehicles to enforce traffic laws 'only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.'"[137]

The district court denied the motion to suppress, relying on would-test-like reasoning to sanction the stop: "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."[138] The court concluded that the police would have made the stop absent the ulterior motives. The court of appeals affirmed, relying instead on prototypical could-type reasoning: "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same

129. *Id.*

130. *Id.*

131. *Id.*

132. 18 D.C. Mun. Regs. tit. 40 § 2213.4 (1995) ("An operator shall . . . give full time and attention to the operation of a vehicle"); § 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"); § 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions").

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

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 1775 (citing Metropolitan Police Department—Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)).

138. *Id.* at 1772.

circumstances could have stopped the car for the suspected traffic violation."[139]

The Supreme Court affirmed, embracing the "could" standard. The Court held that probable cause to stop a vehicle for a traffic violation justifies all subsequent searches and seizures made in its wake.[140] The Court characterized the petitioners' argument as follows: "'[I]n the unique context of civil traffic regulations' probable cause is not enough .... [T]he Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given."[141] Otherwise stated, petitioners argued that courts should engraft a reasonableness test onto the extant test for traffic stops, namely probable cause.

The Court rejected this position, holding that probable cause to believe that a traffic violation is occurring per se justifies a stop (seizure) and those ensuing searches and seizures now permissible under *Terry*'s second prong.[142] The Court recognized that certain "extraordinary" circumstances "unusually harmful to an individual's privacy or even physical interests" mandate subjecting even probable cause determinations to an additional reasonableness inquiry before a search or seizure on the basis of such probable cause receives constitutional imprimatur.[143] However, a "run-of-the-mine" traffic violation is not such an extraordinary circumstance.[144] Thus, after *Whren*, petitioners' concession that the officers had probable cause to make the traffic stop[145] is the beginning and end of the Fourth Amendment inquiry.

In reaching its conclusion, the Court entertained and refuted the common arguments in favor of the "would" standard. First, it refuted petitioners' argument based on precedent. Petitioners anchored their arguments in a line of cases which expressed disapproval and

139. United States v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 690 (1996), *and judgment aff'd*, 116 S. Ct. 1769 (1996).

140. *Whren*, 116 S. Ct. at 1776-77.

141. *Id.* at 1773.

142. *Id.* at 1776-77; *see also supra* Part II.B.

143. *Id.* at 1776 (citing cases such as Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (unannounced entry into a home); Tennessee v. Garner, 471 U.S. 1 (1985) (seizure by means of deadly force); Welsh v. Wisconsin, 466 U.S. 740 (1984) (entry into a home without a warrant)).

144. *Id.* at 1777.

145. *Id.* at 1772.

skepticism toward pretextual uses of police power.[146] The Court distinguished these cases because each involved an inventory search or administrative inspection. The Court characterized inventory searches and administrative inspections as searches made in the absence of probable cause, and claimed that the statements upon which petitioners relied for precedential support do not endorse the "principle that ulterior motives can invalidate police conduct that is justifiable on the basis of *probable cause* to believe that a violation of the law occurred."[147] The Court further noted that the statements in such cases are mere dictum, having little to no precedential weight.[148]

Second, the Court argued that while petitioners can at best rely on faint and tangentially relevant precedential support for their position, a line of cases squarely precludes subjective examination of police officers' motives.[149] The Court stated that petitioners' efforts to convince the Court that their standard was indeed an objective one were unconvincing, noting that "although framed in empirical terms, [petitioners'] approach is plainly and indisputably driven by subjective considerations."[150]

Third, the Court appeared concerned about the evidentiary difficulties inherent in the "would" standard. The Court stated that "[w]hile police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable."[151] Furthermore, the Court appeared concerned that linking Fourth Amendment protections to local practices would make such protections impracticably variant.[152]

Fourth, the Court apparently recognized that pretextual traffic stops leave the police with virtually unfettered discretion to stop vehicles and

146. *Id.* at 1773; *see* Florida v. Wells, 495 U.S. 1, 4 (1990) ("[A]n inventory search must not be used as a ruse for a general rummaging in order to discover incriminating evidence."); Colorado v. Bertine, 479 U.S. 367, 372 (1987) (approval of an inventory search after noting that there had been "no showing that the police, who were following standard procedures, acted in bad faith or for the sole purpose of investigation"); New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987) (upholding the constitutionality of an administrative inspection, noting that the search did not appear to be a "'pretext' for obtaining evidence of . . . violation of . . . penal laws").

147. *Whren,* 116 S. Ct. at 1773 (emphasis added).

148. *Id.* (dismissing petitioners' reliance on Colorado v. Bannister, 449 U.S. 1 (1980) (per curium), because statements regarding pretext appear in mere dictum).

149. *Id.* at 1774. *See also supra* notes 95-99 and accompanying text.

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

151. *Id.* at 1775.

152. *Id.*

conduct ensuing searches.[153] It further recognized that impermissible considerations, such as race, may seep into the calculus.[154] However, the Court asserted that the Equal Protection Clause, rather than the Fourth Amendment, is the appropriate vehicle through which to combat selective enforcement or discriminatory application of the law.[155]

Fifth, the Court appeared cognizant of separation of powers concerns. In response to petitioners' argument that some traffic stops, even if based on probable cause, are violative of the Fourth Amendment, the Court noted:

> [W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.[156]

Whren, therefore, can roughly be divided into two parts: 1) the Court's affirmative argument in support of the "could" standard—namely, probable cause for traffic violations justifies all subsequent searches and seizures; and 2) the Court's reasons for rejecting the "would" standard. The following sections separately critique these components of the Court's opinion.

V. THE "COULD" STANDARD: THE DEATH OF *TERRY'S* FIRST PRONG

The "would" approach comports with the Fourth Amendment. The "could" approach does not. Simply stated, the "could" approach clashes with the well-established Supreme Court jurisprudence that requires reasonable suspicion as a predicate to investigative stops. The adoption of the "could" standard, thereby blindly sanctioning pretextual traffic stops, ignores and circumvents reasonable suspicion and, concomitantly, undermines the purpose behind the Fourth Amendment.

While the history of the Fourth Amendment is incredibly rich and complex, its animating purpose appears to be curbing arbitrary use of

153. *Id.*
154. *Id.* at 1774.
155. *Id.*
156. *Id.* at 1777.

police power.[157] The framers authored the Fourth Amendment to avoid the type of arbitrary and indiscriminate use of police power that had become commonplace through use of general warrants and writs of assistance to search colonists' homes.[158] Reflecting on this history, much Fourth Amendment jurisprudence evinces concern about arbitrary use of state-sanctioned police power.[159] By condoning Officer Barney's actions, and in essence condoning the pretextual use of police power, courts will de facto resuscitate the general warrant and writ of assistance.

The logic of this conclusion hinges on the assumption that we all violate traffic laws almost every time we enter the car. Perhaps we drive thirty-six miles per hour in a thirty-five mile per hour zone;[160] maybe we drive down the block to a friend's home without our seat belt;[161] or maybe we swerve as little as six inches over the center line

157. *See generally* Akil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Amsterdam, *supra* note 109.

158. *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19-44 (1969); J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 20, 31, 33-36 (1966); Amsterdam, *supra* note 109, at 412. *See also* Payton v. New York, 445 U.S. 573, 583-84 (1980); Salken, *supra* note 74, at 254-56 (arguing that the Fourth Amendment was designed to stem arbitrariness inherent in general warrants and writs of assistance).

159. The Supreme Court has repeatedly expressed concern about arbitrary use of police power. *See* Delaware v. Prouse, 440 U.S. 648 (1979) (holding that systematic roadblocks do not offend the Fourth Amendment because they do not unleash unbridled discretion of police officers); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (in holding that fixed checkpoints, as opposed to roving patrols, are constitutional, the Court stated, "[T]he Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); Camara v. Municipal Court, 387 U.S. 523 (1967) (holding that warrants for housing inspections must meet articulable standards so that occupant is not subject to unbridled police discretion).

Precisely because pretextual traffic stops strike at the Fourth Amendment's core goal of curbing arbitrary use of police power, Professor LaFave expresses strong concern:

> [G]iven the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

1 LAFAVE, *supra* note 82, § 1.4(e), at 123 (quoting 2 L. ROTH & H. ZOBEL, LEGAL PAPERS OF JOHN ADAMS, 141-42 (1965)).

160. *See, e.g.*, ALA. CODE ANN. 32-5A-171 (1996); ARIZ. STAT. ANN. § 28-701.02 (Michie 1995) (repealed effective Jan. 1, 1997); N.J. STAT. ANN. § 39:4-98 (West 1995); OKLA. STAT. tit. 47, § 11-801a (1995).

161. *See, e.g.*, ALA. CODE ANN. § 32-5B-4 (1996); ALASKA STAT. ANN. § 28.05.095 (Michie 1995); D.C. CODE ANN. § 40-1602 (1996); N.D. CENT. CODE § 39-21-41.4 (1995); OKLA. STAT. tit. 47, § 12-417 (1995).

on the road.[162] When couched in these terms, this assumption becomes tenable. If we accept this traffic violation as a legitimate springboard from which to conduct the types of searches and seizures that Officer Barney could have conducted in the opening hypothetical, then we all become susceptible to the arbitrary whims and unsupported hunches of police officers. We have in essence recreated a general warrant or writ of assistance.

What if an officer disliked all men with earrings and therefore decided to enforce esoteric traffic violations only when a glaring gold earring sparkled through the windshield? What if an officer did not like your looks, or the type of car you were driving, or the neighborhood through which you were driving? Or, what if the officer believed that women, blacks, or Hispanics were more inclined to commit drug and firearm crimes?[163] Under the "could" approach, the answers to these questions are irrelevant as long as the stop is grounded in a statute.

Consider another example. It would be repugnant to American notions of justice if our government were to allow, much like the former South African government allowed, random stopping of individuals on the street to check for citizenship or identification papers. It would be equally objectionable to allow random stopping of cars to check the validity of the driver's license and vehicle registration, a practice that the Supreme Court explicitly invalidated in *Delaware v. Prouse*.[164] Our repulsion at the South African example, like the Supreme Court's rejection of the practice of random car stops, is motivated by a fear that unfettered discretion creates opportunity for arbitrary and abusive uses of police power. But how different is it to sanction stops of vehicles to conduct intrusive and extensive searches and seizures on the basis of minor traffic violations that we all commit every time we enter our cars? The case law demonstrates that no meaningful distinction exists.

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162. *See, e.g.*, OKLA. STAT. tit. 47, § 11-301 (1995).

163. *See generally* United States v. Scopo, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring), *cert. denied*, 115 S. Ct. 207 (1994). In *Scopo*, the court stated:

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

Id.

164. 440 U.S. 648 (1979).

In the context of a traffic stop, the courts have chosen reasonable suspicion as the line between arbitrary and legitimate uses of police power. In *Terry v. Ohio*, the Court held that reasonable suspicion was a necessary predicate to an investigative search.[165] Automobile stops are deemed analogous to "Terry stops,"[166] and therefore *Terry* and its progeny govern the constitutionality of pretextual stops. Recall that the Court in *Terry* concluded that the stop and frisk satisfied the reasonableness requirements of the Fourth Amendment as long as "the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate."[167]

Terry's legacy is a well-entrenched reasonable suspicion requirement. Significantly, the Court in *Terry* confronted the same competing concerns as the Supreme Court faced in *Whren* and the Tenth Circuit faced in both *Guzman* and *Botero-Ospina*—balancing enhancement of police discretion to further effective law enforcement against containment of arbitrary police action.[168] The *Terry* Court resolved this tension by giving birth to the reasonable suspicion requirement.[169] Defined in terms of what a reasonable officer would do under similar circumstances, defined almost identically to the "would" test, reasonable suspicion provides a balanced check on arbitrary police behavior.

The Court in *Terry* clearly demanded some type of particularized suspicion to satisfy its standard. However, the Court deliberately did not delineate a series of black and white, safe-harbor-type rules. Officers may satisfy *Terry*'s reasonable suspicion requirement by offering specific facts and logical inferences to substantiate the reasons for their investigatory stop.[170] These facts and inferences must be objective and reasonable in light of a trained officer's experience.[171] Furthermore, reasonable suspicion is a "totality of the circumstances" test.[172] Through their confrontations with fact-bound cases, the circuit courts developed a set of ad hoc rules from which lower courts can

165. 392 U.S. 1 (1968).

166. *See supra* note 48.

167. *Terry*, 392 U.S. at 21-22. *See also supra* notes 34-38 and accompanying text.

168. *Terry*, 392 U.S. at 14-15. The *Terry* Court was clearly animated by concern over "wholesale harassment" of "minority groups, particularly Negroes." *Id.* at 14.

169. *See supra* notes 32-38 and accompanying text.

170. *Terry*, 392 U.S. at 21.

171. United States v. Cortez, 449 U.S. 411, 417-18 (1981).

172. *Id.*

discern, often by imperfect analogy, whether officers satisfied the reasonable suspicion requirements prior to stopping an automobile.

For instance, courts are increasingly accepting "drug profiles" to satisfy reasonable suspicion requirements. A drug profile is a set of factors established over many years by law enforcement officials to help predict which individuals might engage in criminal activity.[173] Drug profiles, upheld by the Supreme Court, have been used in the context of airport stops.[174] The Court has never explicitly sanctioned the use of a drug profile in the context of an automobile stop but has implicitly sanctioned such use by viewing clusters of acts, which are innocent in and of themselves but which are typical constituent elements of drug profiles, as satisfying *Terry*'s reasonable suspicion requirement. The facts which courts apparently consider relevant when determining whether a driver or passenger satisfies reasonable suspicion for a drug offense include: whether multiple vehicles traveled together, whether the route was a known drug trafficking route, whether the vehicle was of a type commonly used to transport drugs, whether the vehicle appeared heavily loaded, whether the driver evaded law enforcement, and whether the driver was nervous.[175] In

173. *See* Wayne R. LaFave, *Controlling Discretion by Administrative Regulation: The Use, Misuse and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 479 (1990).

174. *See* United States v. Sokolow, 490 U.S. 1, 10 (1989) ("A court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent."). *See also* Florida v. Rodriguez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980). Piecing together holdings from these cases, the following facts contribute to a drug profile used to sustain airport searches: source city, luggage peculiarities, a sudden change in travel plans, form of payment for ticket, the match between identification and name on the ticket, veracity of facts given to the ticket agent, and nervousness. *See* 4 LAFAVE, *supra* note 82, § 9.4(e), at 166-73.

175. *See, e.g.*, United States v. Sharpe, 470 U.S. 675, 677-79, 682 n.3 (1985) (holding that stop for drugs based upon reasonable suspicion because location of stop was under surveillance for drug trafficking, several vehicles typically used to transport drugs traveled in tandem, one of the vehicles was "riding low," and vehicles attempted to evade law enforcement). *See also* United States v. Jones, 44 F.3d 860, 872 (10th Cir. 1995) (reasonable suspicion based on several factors, including size of car, source and destination cities, location of stop, defendants' reluctance to stop car, and inability to prove authorization to operate automobile); United States v. Soto, 988 F.2d 1548, 1556 (10th Cir. 1993) (holding that defendant's shaking and nervousness support reasonable suspicion); United States v. Arango, 912 F.2d 441, 447 (10th Cir. 1990) (allowing detention by patrol trooper upon driver's inability to prove lawful possession of automobile), *cert. denied*, 499 U.S. 924 (1991); United States v. Walraven, 892 F.2d 972, 975 (10th Cir. 1989) (including failure to promptly stop an automobile as a reasonable cause for suspicion); United States v. Espinosa, 782 F.2d 888, 891 (10th Cir. 1986) (explaining that source and destination cities of suspects are relevant

assessing reasonable suspicion, courts' implicit acceptance of drug profiles, or clusters of ostensibly innocent facts, has transformed that standard into one that is relatively easy to meet. "Suspicious" combinations of location, vehicle appearance, and driver behavior apparently satisfy the strictures of *Terry*.

Yet reasonable suspicion remained a threshold nonetheless. While courts are increasingly using drug-profile-like clusters of facts to satisfy the reasonable suspicion requirements, reasonable suspicion requires more than a mere hunch[176] and cannot rest on broad profiles which cast suspicion on entire categories of people.[177] Neither those decisions that expand the officers' ability to search in the wake of a traffic stop,[178] nor those decisions that allow drug-profile-like characteristics to satisfy reasonable suspicion,[179] fundamentally jeopardized the reasonable suspicion requirement. However, adoption of the "could" standard for pretextual traffic stops does not merely jeopardize the reasonable suspicion requirement but eliminates it.

Reconsider Officer Barney's stop in the opening hypothetical.[180] When one dissects Officer Barney's stop, its essence and hallmark is that Officer Barney did not meet reasonable suspicion requirements. Instead, he relied on unsubstantiated hunches based on the driver's race and the make of the car. He did have reasonable suspicion, even probable cause, to make the stop on the basis of a traffic violation that likely would not have been of import but for his unsubstantiated hunch. Absent a reasonable suspicion, he was able to conduct a variety of searches and seizures, functionally conducting his investigation for drugs during the traffic stop. The traffic stop becomes a crafty means to circumvent *Terry*'s reasonable suspicion requirement. It becomes a loophole around *Terry*.

The courts in both *Whren* and *Botero-Ospina* conspicuously steered from *Terry* in reaching their decisions, and thus illustrate this loophole in action. In *Botero-Ospina* the court recognized that traffic stops are

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considerations).

176. *Sokolow*, 490 U.S. at 7.

177. *See* United States v. Garcia-Camacho, 23 F.3d 1331 (8th Cir. 1994) (rejecting "profile" that targeted Hispanics); United States v. Gutierrez-Rosales 53 F.3d 244 (9th Cir. 1995) (rejecting profile targeting Mexicans). *See also* United States v. Tapia, 912 F.2d 1367 (11th Cir. 1990) (rejecting "profile" because of factors that could plausibly describe the behavior of a large portion of motorists engaged in travel upon our interstate highways); United States v. Hernandez-Alvarado, 891 F.2d 1414, 1418-19 (9th Cir. 1989) (rejecting "profile" because describes "too many individuals" including "many law abiding motorists").

178. *See supra* Part II.B.

179. *See supra* notes 173-75 and accompanying text.

180. *See supra* Part III, and Diagram I, Anatomy of Pretextual Auto Stop, p. 156.

analogous to *Terry* stops.[181] Nonetheless, it did not analyze the traffic stop under the principles of *Terry*. Instead, the Tenth Circuit reached its decision by canvassing authority in other circuits,[182] noting the importance of subjective inquiries, namely by emphasizing the *Scott* line of cases,[183] and making blanket statements implicating *Guzman* under separation of powers principles.[184] The majority necessarily abandoned *Terry* when it analyzed the issue because the "could" approach, which potentially exposes almost all drivers to seizures and searches based on mere hunches, patently violates *Terry*.

In *Whren*, the Supreme Court did not even mention that traffic stops are analogous to *Terry* stops. Nor did the Court give any lip service to *Terry*. Instead, the Court focused on the stop, beginning with step B—Officer Barney has probable cause to make the stop based on a traffic violation.[185] This approach conveniently blocked step A—Officer Barney lacked reasonable suspicion to make the stop for the drug crime[186]—from the Court's range of vision and permitted the Court to write a clean, relatively uncontroversial opinion restating the basic proposition that probable cause supports a traffic stop. Yet the simplicity of this opinion is both elusive and specious, for the stop began prior to step B, when Officer Barney developed an unsubstantiated hunch that drug activity was occurring (Step A). This is a hunch that, standing alone, he could not have corroborated because *Terry* and its progeny require reasonable suspicion as a predicate to any investigative search. Reasonable suspicion (even probable cause) for a traffic violation becomes a surrogate for reasonable suspicion to stop the driver for the more severe crime, call it a suspected drug crime.

Thus, *Whren* turns a blind eye to circumvention of *Terry*'s reasonable suspicion requirement. Through inserting a traffic violation into the process, police officers replicate that which they are unable to accomplish directly under *Terry*. The "would" standard, which the Court rejected in *Whren*, would have re-injected *Terry* into the mix. By asking whether reasonable suspicion or probable cause for the traffic offense was the proximate animus for the stop or whether it was a subterfuge designed to circumvent the requirements of *Terry*, the

181. *Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

182. *Id.* at 787.

183. *Id.* at 787-88.

184. *Id.* at 788.

185. *See supra* Part III; Diagram I, Anatomy of Pretextual Auto Stop, p. 156.

186. *See supra* Part III; Diagram I, Anatomy of Pretextual Auto Stop, p. 156.

"would" standard places constraints on state action. It limits arbitrary use of police power by explicitly borrowing the objective, reasonable officer standard from *Terry*.[187] As such, the "would" standard is respectful of and true to the mandate of *Terry* and its progeny.

Instead, *Whren* embraced the "could" standard, thereby sanctioning Officer Barney's pretextual use of his police powers. In so doing, *Whren* opened the door to arbitrary and whimsical use of police power without reasonable suspicion as a protective, initial threshold. Individuals long ago lost the protections in *Terry*'s second prong;[188] by ignoring *Terry*'s mandate of reasonable suspicion, *Whren* destroys much of the first prong. When cloaked with the "could" standard, the individual driver or passenger stands naked before the state.

VI. ARGUMENTS AGAINST THE "WOULD" STANDARD: MERE PRETEXTS

In reaching its conclusion in *Whren*, the Court also refuted arguments in support of the "would" standard.[189] The first is a precedential one: the Court's own precedent mandates acceptance of the would standard.[190] Petitioners did not argue that the Court had decided a case directly on point; instead, petitioners argued that a faint, yet continual strain of allusions to pretext signaled the Court's implicit approval of the would standard.[191]

The Court rejected this argument by distinguishing from *Whren* three cases, *Florida v. Wells*,[192] *Colorado v. Bertine*,[193] and *New York v. Burger*,[194] because they involved inventory and administrative searches which, as opposed to a traffic stop, need not be rooted in probable cause. Of course, the Court may characterize its precedent as it deems appropriate, and it may choose to weigh tangential statements

187. *See supra* notes 34-38 and accompanying text.

188. *See supra* Part II.B.

189. *See supra* notes 146-56 and accompanying text.

190. *See supra* notes 146-48 and accompanying text. *See also* Petitioner's brief 1996 WL 75758, at 30-37; Whren v. United States, 116 S. Ct. 1769, 1773 (1996).

191. *Id.* at 1773. The argument is as follows: The Court, through its history, recognized and expressed concern about pretextual use of police power. The "could" standard emasculates the very notion of pretext. Pretext is inextricably linked to a tension between obstensible motives and ulterior motives. The "could" standard dispenses with ulterior motives altogether and therefore destroys the heart and soul of pretext. Under the "could" standard, pretext does not exist. Thus the Court cannot consistently voice concern about pretext and also embrace the "could" standard. They are mutually exclusive positions.

192. 495 U.S. 1 (1990); *see also supra* note 146.

193. 479 U.S. 367 (1987); *see also supra* note 146.

194. 482 U.S. 691 (1987); *see also supra* note 146.

in prior opinions as it wishes. For completeness, however, it bears noting that the Court's exploration of its own precedent was incomplete and rather narrow.

While admittedly the Supreme Court had not decisively explored the pretext issue within the context of a traffic stop, it has, throughout this century, expressed disapproval of the duplicity inherent in pretextual uses of police power beyond that of the administrative and inventory search. On two occasions, Supreme Court Justices have suggested that probable cause to stop an automobile for a traffic or motor vehicle violation may not be used as a surrogate for the probable cause necessary to search the car and passengers.[195] On other occasions, the Court has stated that probable cause to arrest, embodied in an arrest warrant, cannot be a substitute for the probable cause necessary to sustain a search.[196] While the Court correctly grouped and distinguished the aforementioned inventory/administrative cases, it could have offered a more generic, softer, interpretation—inventories/administrative searches cannot be used as a subterfuge, as a means to circumvent those Fourth Amendment requirements attached

195. New York v. Class, 475 U.S. 106, 122 n.* (1986) (Powell, J. concurring) (stating that although a police officer may enter a car following a valid traffic stop to retrieve a vehicle identification number (VIN) that is not in plain view, "[a]n officer may not use VIN inspection [a logical outgrowth of a traffic stop based on probable cause] as a pretext for searching a vehicle for contraband or weapons"). *See also* Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam). In *Bannister*, an officer saw a car speeding and then lost sight of the car. *Id.* at 2. Meanwhile, the officer heard a report of theft of chrome auto parts. *Id.* The officer saw the original car again, still speeding, and stopped the car for speeding. *Id.* In plain view, the officer saw the chrome auto parts and then arrested and seized the auto parts as evidence to use in the theft case. *Id.* The Court held that the officer had probable cause to arrest the car's occupants and seize the evidence. *Id.* at 4. In a footnote, however, the Court noted that "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." *Id.* at 4 n.4. The implication is that if the officer's presence had been a pretext, the ensuing search may have been more suspect.

196. Steagald v. United States, 451 U.S. 204, 215 (1981) (noting that an arrest warrant for one party is not a surrogate to search a third party's home and that a warrant may not serve as a "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place"); Abel v. United States, 362 U.S. 217, 225-26 (1960) (noting that use of an INS arrest warrant as a "subterfuge" or "sham" to search for evidence would "reveal a serious misconduct by law-enforcing officers" and must meet "stern resistance by the courts"); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) (search warrant based on probable cause to arrest for violations of prohibition laws does not serve as a substitute for requisite probable cause to sustain a search of a home for incriminating evidence). *See also* United States v. Robinson, 414 U.S. 218, 238 n.2 (Powell, J., concurring) (*concurring with* Gustafson v. Florida, 414 U.S. 260 (1993) (probable cause to arrest cannot be used as a "pretext for a search actually undertaken for collateral objectives")).

to distinct searches or seizures.[197] Past Supreme Court statements do not control the pretextual traffic stop question, and indeed in many cases they are pure dicta. However, taken as a whole, they suggest that satisfaction of the Fourth Amendment requirements for one stop or search should not become a loophole around another, equally important, Fourth Amendment requirement. The Court's persistent reconnaissance reflects its fear that loopholes create room for abusive, discriminatory, and arbitrary use of police power.[198]

The Court's second argument against the "would" standard is that the standard is not objective[199] and therefore violates the trilogy of cases—*Scott*, *Villamonte-Marquez*, and *Macon*—that foreclose subjective review of police officers' actions.[200] This argument is simply incorrect. The "would" test asks whether a reasonable officer would have made the traffic stop absent an infirm ulterior motive. This test explicitly mirrors the language in *Terry v. Ohio*,[201] and courts

197. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983). The police stopped defendant pursuant to a standard procedure — a roadblock to look for licenses. The officers saw a green balloon in plain view which they suspected contained drugs. *Id.* at 734. They seized the evidence, arrested the driver, and searched the vehicle. *Id.* at 734-35. In holding that the seizure did not violate the inadvertence requirement of the "plain view doctrine," the Court stated, "[t]he circumstances of this meeting between [officer and defendant] give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for driver's licenses." *Id.* at 743. In *Brown*, therefore, the Court suggests that a roadblock (administrative search) could not be substituted for the reasonable suspicion necessary to stop a car to investigate for drugs. *See also* South Dakota v. Opperman, 428 U.S. 364 (1976). The police impounded an illegally parked car and inventoried its contents. During the inventory, the police discovered marijuana. *Id.* at 366. The Court held that inventories made pursuant to standard procedures are constitutional, but mentioned that "there is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." *Id.* at 376. The Court here hints that an inventory search cannot be a surrogate for the reasonable suspicion necessary to support an investigative search.

198. *See, e.g.*, *Steagald*, 451 U.S. at 215 (noting that if an arrest warrant could serve as a surrogate for probable cause to search a third party's home, there would be "significant potential for abuse. Armed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances. Moreover, an arrest warrant may serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.").

199. *See supra* notes 149-50 and accompanying text. *See, e.g.*, United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996); United States v. Ferguson, 8 F.3d 385, 388 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 97 (1994); United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994); *Whren*, 53 F.3d at 371, 375 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 1769 (1996).

200. *See supra* notes 95-99 and accompanying text.

201. *See supra* notes 34-38 and accompanying text.

consider *Terry*'s standard to be an objective one.[202] Indeed, *United States v. Scott* relies heavily on *Terry* in precluding subjective inquiries. This reliance implicitly suggests that *Terry* is an objective rather than subjective test.[203]

Furthermore, objective standards are common in the criminal law, and courts implement an objective approach through use of a reasonable person standard. When asking whether a defendant's violent but passionate response triggers the "heat of passion" defense to murder, we ask whether the response was reasonable.[204] When asking whether a defendant can invoke self-defense, we ask whether the defendant reasonably believed that he was in imminent threat of unlawful bodily harm.[205] We even ask these questions when police activity is under scrutiny. A police officer may use force to effect an arrest only if its use is reasonable.[206] Furthermore, in deciding whether a suspect invoked the right to counsel under *Edward v. Arizona*,[207] the relevant inquiry is whether the suspect articulated his desire to have counsel so that "a *reasonable police officer* in the circumstances would understand the statement to be a request for an

202. Graham v. Connor, 490 U.S. 386, 396-97 (1989) (labeling the standard set forth in *Terry* an objective standard); *see also* United States v. Robinson, 30 F.3d 774, 782 (7th Cir. 1994) (characterizing *Terry* as an objective test); United States v. Melendez-Garcia, 28 F.3d 1046, 1051 (10th Cir. 1994) (same); United States v. McKie, 951 F.2d 399, 402 (D.C. Cir. 1991) (same); United States v. Richardson, 949 F.2d 851, 857 (6th Cir. 1991) (same).

203. *Scott*, 436 U.S. at 137.

204. *See, e.g.*, ALA. CODE § 13A-6-3 (1994); ARIZ. REV. STAT. ANN. § 13-1103 (1989); GA. CODE ANN. § 16-5-2 (1989) (amended 1994); 720 ILL. COMP. STAT. ANN. 5/9-2 (West 1993); ME. REV. STAT. ANN. tit. 17-A. § 203 (West 1983) (amended 1995); MINN. STAT. ANN. § 609.20 (West 1987) (amended 1996); N.J. STAT. ANN. § 2C:11-4 (West 1995); OHIO REV. CODE ANN. § 2903.03 (Baldwin 1994) (amended 1996); TEX. PENAL CODE ANN. § 19.04 (West 1994).

205. ALA. CODE § 13A-3-23 (1994); ARIZ. REV. STAT. ANN. § 13-404 (1989); FLA. STAT. ANN. § 776.012 (West 1992); GA. CODE ANN. § 16-3-21 (1996); 720 ILL. COMP. STAT. ANN. 5/7-1 (West 1993); LA. REV. STAT. ANN. § 14:19 (West 1986); ME. REV. STAT. ANN. tit. 17-A § 108 (West 1983) (amended 1995); MINN. STAT. ANN. § 609.06 (West 1987) (amended 1996); N.J. STAT. ANN. § 2C:3-4 (West 1995); N.Y. PENAL LAW § 35.15 (McKinney 1987); TEX. PENAL CODE ANN. § 9.31 (West 1994) (amended 1996); WIS. STAT. ANN. § 939.48 (West 1996).

206. ALA. CODE § 13A-3-27 (1994); ARK. CODE ANN. § 5-3-610 (Michie 1993); FLA. STAT. ANN. § 776.05 (West 1992); IND. CODE ANN. § 35-41-3-3(1986) (amended 1996); 720 ILL. COMP. STAT. ANN. 5/7-5 (West 1993); KAN. STAT. ANN. § 21-3215 (1995); ME. REV. STAT. ANN. tit. 17-A § 107 (West 1983) (amended 1995); MINN. STAT. ANN. § 609.06 (West 1987) (amended 1996); N.J. STAT. ANN. § C: 3-7 (West 1995); N.Y. PENAL LAW § 35.30 (McKinney 1987); TEX. PENAL CODE ANN. § 9.51 (West 1994); UTAH CODE ANN. § 76-2-403 (1995).

207. 451 U.S. 777 (1981).

attorney."[208] For purposes of determining qualified immunity, courts ask whether a reasonable officer could have believed that he had probable cause to make the arrest in question.[209] To suggest, as the Court does, that the "would" approach is subjective is misleading and ignores the fact that reasonableness, or the reasonable person test, is a prototypical objective standard.

The "would" standard does not examine the officer's subjective ulterior motives but rather creates a proxy for these motives by examining how a reasonable officer would behave when confronted with similar circumstances. The Court nonetheless argues that the "would" standard is subjective because it is driven by subjective considerations. However, neither *Scott, Villamonte-Marquez,* nor *Macon* stand for the proposition that subjective considerations transform an objective standard into a subjective one. These cases merely state that courts cannot inquire about the subjective motivations of a particular officer. As stated above, the "would" standard avoids this subjective inquiry. By asking whether a reasonable officer would have made the arrest absent the pernicious ulterior motive, the courts deliberately incorporate a *Terry*-like objective inquiry rather than falling into the subjective pitfall that the *Scott/Villamonte-Marquez/Macon* trilogy condemned.

Third, the Court noted that the "would" standard is unworkable.[210] How should courts determine what a reasonable officer would do? By looking at the practices of that officer? The practices of police departments? Written policies? The practices among police departments throughout the state? By looking at the length of time that the police officer followed the suspect? By looking at whether officers are members of some type of drug task force or whether they are more generally charged with enforcing the traffic laws? While, admittedly, courts have not answered these questions consistently, even intra-circuit,[211] neither has there been complete disarray or anarchy among courts that attempt to apply the "would" standard.

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208. Davis v. United States, 114 S. Ct. 2350, 2355 (1994) (emphasis added).

209. Hunter v. Bryant, 502 U.S. 224, 227 (1991).

210. *See supra* notes 151- 52. *See also* United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 2529 (1996).

211. For example, in the Tenth Circuit, more particularly in Utah, some courts focus on past practices of the stopping officer. *See, e.g.*, State v. Marshall, 791 P.2d 880, 883 (Utah Ct. App.) (officer routinely pulls cars over for failing to properly use turning signal), *cert. denied* 800 P.2d 1105 (Utah 1990). Other courts focus more broadly on the practices of a particular police department. *See, e.g.*, State v. Lovegren, 798 P.2d 767, 770 n.10 (Utah 1990) (looking to local practices, court asked whether officers in the area routinely stop cars for following too closely behind other cars).

Generally, courts apply the "would" test in one of two ways, although they tend to use "usual practices" as shorthand for both.[212] The first examines practices in a particular locality, typically focusing on a particular police department.[213] Often relevant to this inquiry are written regulations,[214] as well as a determination of whether practices are routine[215] or the local *modus operandi*.[216] The second focuses on the behavior of the individual stopping officer, usually examining whether the officer tends to stop vehicles for the infraction in question.[217] Particularly relevant to the latter inquiry is whether the police department specifically charged the officer with writing traffic tickets or whether the officer has a particular, unrelated duty, such as Officer Barney's affiliation with the drug task force in our hypothetical.[218] While the courts have not consistently applied the

212. *See generally* 1 LAFAVE, *supra* note 82, § 1.4(e), at 115-26.

213. For cases within the Tenth Circuit, see, *e.g.*, United States v. Greenspan, 26 F.3d 1001, 1005 (10th Cir. 1994) (practices of police department); United States v. Fernandez, 18 F.3d 874, 877 (10th Cir. 1994) (policy of police department to stop vehicles for violations of the law regarding tinted windows); United States v. Deases, 918 F.2d 118, 121 (10th Cir. 1990) (practices of highway patrol), *cert. denied*, 501 U.S. 1233 (1991); United States v. Arnold, 898 F. Supp. 818, 821 (D. Kan. 1995) (ask whether police routinely stop individuals for such violations); United States v. Hernandez, 893 F. Supp. 952, 958 (D. Kan. 1995) (common practice of Kansas highway patrol). For cases outside the Tenth Circuit, see, *e.g.*, State v. Haskell, 645 A.2d 619, 621 (Me. 1994); State v. Bostic, 637 So.2d 591, 594 (La. Ct. App. 1994); State v. Chapin, 879 P.2d 300, 305 (Wash. Ct. App. 1994); Commonwealth v. Santana Uscozo, 649 N.E.2d 717, 720 (Mass. 1995).

214. *See* United States v. McDonald, 65 F.3d 178 (10th Cir. 1995) (department procedures), *cert. denied*, 502 U.S. 897 (1991); State v. Lopez, 831 P.2d 1040, 1049 (Utah Ct. App. 1992) (written departmental procedures), *vacated*, 873 P.2d 1127 (Utah 1994). *See also* State v. Whitsell, 591 N.E.2d 265, 272-73 (Ohio Ct. App. 1990).

215. United States v. Martinez, 983 F.2d 968, 972 (10th Cir. 1992), *cert. denied*, 508 U.S. 922 (1993); United States v. Guzman, 864 F.2d 1512, 1518 (10th Cir. 1988), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995).

216. *See, e.g.*, United States v. Neu, 879 F.2d 805, 808 (10th Cir. 1989).

217. *See* United States v. Harris, 995 F.2d 1004, 1006 (10th Cir. 1993) (relying on officer's testimony that he made traffic stops under particular circumstances); United States v. Dirden, 38 F.3d 1131, 1140 (10th Cir. 1994) (focusing on practice of stopping officer); United States v. Sandoval, 829 F. Supp. 355, 359-60 (D. Utah 1993) (looking at past history of particular officer), *rev'd on other grounds*, 29 F.3d 537 (10th Cir. 1994); State v. Apodaca, 814 P.2d 1030, 1032 (N.M. Ct. App. 1991) (relying on officer's testimony about his practice of stopping vehicles for violations of safety belt law), *cert. denied*, 813 P.2d 1018 (N.M. 1991). *See also* Alejandre v. State, 903 P.2d 794, 796 (Nev. 1995), *overruled by* Gama v. State, 920 P.2d 1018 (Nev. 1996); State v. Vosseteig-Nash, No. 93-2187, 1994 WL 32319, at *1 (Wis. Ct. App. Feb. 8, 1994).

218. *See, e.g.*, *Alejandre*, 903 P.2d at 797 (if an officer has no traffic related duties and pulls over vehicle for a traffic offense, the court may deem the stop pretextual); *but see* Miller v. State, 868 S.W.2d 510, 512 (Ark. Ct. App. 1993) (if the stopping officer's duties do not include traffic stops, traffic stop is not necessarily pretextual), *cert. denied sub nom.* Miller v. Arkansas, 114 S. Ct. 2137 (1994).

"would" standard, vacillating between a more general examination of local practices and a more specific examination of an individual's practice, the standard is far from unworkable. Courts have developed two ways to apply the standard: local versus the individual—hardly the state of confusion that the "would" standard's opponents like to portray.

But the viability of a legal test hinges on its ability to consistently and predictably separate legal from illegal behavior, and application of the "would" test has been wrought with inconsistency. However, inconsistencies in application are not synonymous with problems in the theoretical and constitutional underpinnings of the "would" standard. Inconsistency may merely suggest that the standard needs to be refined. The "reasonable officer" standard could be more definitively constituted, a mere issue of modification and revision that can take place within the confines of the "would" framework.

The more general, local practices mode is the most appropriate, and focusing on practices in a particular locality is most logical. An officer's decision to stop a vehicle for a traffic violation depends on factors unique to a particular locality, including weather, speed limit, terrain, visibility, and past accident history. Of course, as a member of the local law enforcement team, a particular officer's past stopping history is relevant in determining local practices, but it is not decisive. A standard which encompassed more than a particular locality would skew the reasonable officer by diluting the relevance of such local characteristics. On the other hand, a narrower standard, one focusing on a particular officer's past history, dangerously approaches the purely subjective standard that has been definitively rejected.

In *Whren*, the Court states that linking the "would" standard to local practices will make Fourth Amendment protections insufferably variant. Yet, local practices and norms permeate, to greater and lesser degrees, almost any reasonableness inquiry. Why is it more problematic to determine whether a police officer acted according to local practices in making a traffic stop than to determine whether an investigative stop is rooted in reasonable suspicion? Reasonable suspicion is a contextual construct. Suspicious activity in small-town America may look different from suspicious activity in New York City, and the Court has deliberately left the contours of the reasonable suspicion requirement to local courts that are more closely connected to the local context. Just as courts are adept at molding reasonable suspicion to reflect a particular context, so would courts become adept at scrutinizing traffic stops in terms of local practices.

Furthermore, application of the "could" standard will breed inherent confusion and inconsistency. Courts will inescapably be torn between *Terry*, requiring reasonable suspicion before initiating an investigative stop, and the "could" standard, which implicitly condones investigative stops absent reasonable suspicion. This tension was apparent in *Botero-Ospina*. On the one hand, the *Botero-Ospina* court recognized that *Terry*'s principles should govern.[219] On the other hand, the court did not and could not rely on *Terry* in reaching its decision.[220] Follow the "could" standard? Or follow *Terry*? This is the irreconcilable dilemma that will confront courts bound by the "could" standard. Thus confusion and inconsistency are inherent in the "could" standard because that standard embodies a legal contradiction.

The Court's fourth argument against the "would" standard is that a distinct pretext doctrine is unnecessary because the Equal Protection Clause serves to check arbitrary and discriminatory police power.[221] In theory this argument has some weight, but in practice it does not. The Equal Protection claim in this context would be a selective enforcement claim.[222] A selective enforcement claim is not an attack on the merits of a criminal charge.[223] It is an affirmative defense[224] or serves as the basis for a collateral attack under 42 U.S.C. § 1983.[225]

While selective enforcement of criminal laws implicates the Constitution,[226] the proof threshold is formidable because of a strong presumption in favor of prosecutorial discretion and, thus, that a prosecutor has not violated the Equal Protection Clause.[227] A criminal defendant must present "clear evidence to the contrary" to dispel these

219. *Botero-Ospina*, 71 F.3d at 786.

220. *See supra* notes 181-84 and accompanying text.

221. *See supra* notes 153-55 and accompanying text; *see also* United States v. Scopo, 19 F.3d 777, 786 (2d Cir. 1994) (Newman, C.J., concurring), *cert. denied*, 115 S. Ct. 207 (1994).

222. United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996); *see also* Wayte v. United States, 470 U.S. 598, 608 (1985) (selective prosecution claims governed by equal protection standards). Selective enforcement and selective prosecution claims are synonymous. *See* Buckenberger, *supra* note 95, at 492-94.

223. *Armstrong*, 116 S. Ct. at 1486; *see also* Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1369 (1987).

224. Reiss, *supra* note 223, at 1370 n.14.

225. Buckenberger, *supra* note 95, at 493.

226. *See Armstrong*, 116 S. Ct. at 1486; United States v. Batchelder, 442 U.S. 114, 125 (1979); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (explaining that a decision to prosecute may not be based on "race, religion, or other arbitrary classification").

227. *Armstrong*, 116 S. Ct. at 1486.

presumptions.[228] A selective enforcement claim demands proof of: 1) discriminatory effect—does the enforcement of the traffic law have a discriminatory effect?[229] and 2) discriminatory purpose or animus.[230] A plaintiff faces a formidable burden of proof, especially with the second prong.[231] To satisfy the first prong, plaintiffs must show that: similarly situated individuals of a different race were not prosecuted.[232] In general, plaintiffs may satisfy the first prong of the test through reliance on statistical evidence regarding the frequency with which others have been prosecuted.[233] But even this first prong becomes difficult to prove when the object of a selective prosecution claim is a traffic offense. Arrest records do not indicate when officers failed to enforce laws,[234] and traffic tickets do not generally have race or ethnicity statistics.[235] Even if non-enforcement statistics were available, discovery is frequently a necessary predicate to proving that similarly situated individuals were not prosecuted. Yet, in many jurisdictions, discovery has been denied absent prima facie evidence of discriminatory effect and purpose.[236] Other jurisdictions have allowed discovery upon a less stringent standard—a finding of a "colorable"

228. *Id.*

229. *Id.* at 1487. In the context of selective prosecution, this prong has been stated as follows: "[T]hat, while others similarly situated have not generally been proceeded against because of [the] conduct of the type forming the basis of the charge against him, he has been singled out for prosecution . . . ." United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

230. *Armstrong*, 116 S. Ct. at 1487; *see also Wayte*, 470 U.S. at 608 (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)).

231. Discriminatory animus requires proof of more than "awareness of consequences." *Feeney*, 442 U.S. at 279. Discriminatory animus requires that the officer choose to prosecute or enforce a particular claim "'because of' not merely '[sic] in spite of' its adverse effects on an identifiable group." *Id. See also* Reiss, *supra* note 223, at 1373, stating:

> Because of the myriad of factors that could affect a prosecutor's decision to bring charges, including the strength of the evidence, the culpability of the offender, and the need to send our various enforcement signals, courts are generally unwilling to infer a discriminatory intent from nonenforcement statistics. Yet it is usually difficult to get evidence of discriminatory intent beyond such statistics.

232. *Armstrong*, 116 S. Ct. at 1487.

233. Reiss, *supra* note 223, at 1371-72 n.20-21.

234. Buckenberger, *supra* note 95, at 497.

235. *Id.* at 497 n.173.

236. *See* United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1994); United States v. Penagaricano-Soler, 911 F.2d 833, 838 (1st Cir. 1990); St. German of Alaska Eastern Orthodox Catholic Church v. United States, 840 F.2d 1087, 1095 (2d Cir. 1988); United States v. Johnson, 577 F.2d 1304, 1308 (5th Cir. 1978).

claim.[237] The Supreme Court opted for the more stringent standard last term, requiring prima facie evidence of discriminatory effect: "We think that the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution."[238]

Selective enforcement claims can also fall prey to waiver rules and procedural bars. In some jurisdictions, the selective enforcement claim is waived as an affirmative defense if not raised prior to trial.[239] A criminal defendant may be collaterally estopped from bringing a post-conviction section 1983 selective prosecution claim if he or she fails to raise the claim at trial.[240] On the other hand, if a criminal defendant unsuccessfully raises the defense at trial, then he or she may be collaterally estopped from raising the same claim again.[241]

In addition, the Supreme Court recently held that convicted and incarcerated defendants may not bring a section 1983 damages claim challenging the constitutionality of incarceration unless the defendant first proves that the sentence has been invalidated.[242] Thus, the combination of stringent proof thresholds and procedural impediments, both at the criminal trial and on collateral appeal, transforms the conceptual nicety of the selective prosecution claim into a vacuous remedy.

The most incisive argument against the "would" standard rests on separation of powers principles. Legislative bodies should determine the content of traffic laws; the executive (police) should enforce the traffic laws; and federal courts (absent a valid selective enforcement claim) should not become involved.[243] In other words, courts should

237. United States v. Armstrong, 48 F.3d 1508, 1513-14 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 377 (1995) *and rev'd*, 116 S. Ct. 1480 (1996); United States v. P.H.E., Inc., 965 F.2d 848, 860 (10th Cir. 1992); United States v. Heidecke, 900 F.2d 1155, 1158 (7th Cir. 1990); United States v. Adams, 870 F.2d 1140, 1146 (6th Cir. 1989); Attorney General of the United States v. Irish People, Inc., 684 F.2d 928, 948 (D.C. Cir. 1982); In re Grand Jury, 619 F.2d 1022, 1030 (3d Cir. 1980).

238. *Armstrong*, 116 S. Ct. at 1489.

239. *See, e.g.*, United States v. Moon, 718 F.2d 1210, 1229 (2d Cir. 1983).

240. *See, e.g.*, Green v. City of New York Med. Exam'r Office, 723 F. Supp. 973, 975-76 (S.D.N.Y. 1989).

241. Buckenberger, *supra* note 95, at 498 n.177.

242. *See* Heck v. Humphrey, 114 S. Ct. 2364 (1994).

243. *See supra* note 156 and accompanying text. *See also* United States v. Botero-Ospina, 71 F.3d 783, 788 (10th Cir. 1995) ("[B]y abandoning the *Guzman* standard for pretext, we rightly leave to the state legislatures the task of determining what the traffic laws ought to be, and how those laws ought to be enforced."), *cert. denied*, 116 S. Ct. 2529 (1996); United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (by adopting the "could" standard, "we assure [sic] that the courts leave to the legislatures the job of

not tell police how and when to enforce democratically enacted traffic laws.

This argument simply misperceives the breadth of the pretext doctrine. The "would" standard does not impede or intrude upon enforcement of the traffic laws. Unless a viable selective enforcement claim emerges, which is relatively unlikely due to the difficulties involved in enforcing such claims,[244] there is nothing unconstitutional about the stop for the traffic offense and the issuance of a traffic citation. Even under the "would" standard, police officers would be free to enforce the traffic laws and even issue citations for violation of those laws.[245] The "would" standard merely posits that officers, judged against a reasonable officer standard, may not freely use the enforcement of the traffic laws as a fishing expedition to search for evidence to corroborate a more serious crime. If officers use traffic offenses in that manner, it will be to no avail because the exclusionary rule will bar introduction of the evidence.[246]

Reconsider the anatomy of a pretextual stop.

(See Diagram II: Anatomy of Pretextual Auto Stop)

If one looks at a traffic stop in myopic terms, focusing solely on steps B and C as represented in the box above, the traffic stop is perfectly legitimate, and a traffic citation is an entirely appropriate response. When one broadens the focus to include step A, the traffic stop becomes one step in a larger process designed to circumvent the Fourth Amendment and search for drugs. Depending on whether the officer passes the "would" test, the fruits of this search may be excluded as unconstitutional.

Otherwise stated, when a pretextual stop occurs, there are really two simultaneous stops occurring. The officer stops for the more serious crime—stop for drugs—without having reasonable suspicion for that stop, and the officer stops for the traffic violation upon probable cause. The former implicates the Fourth Amendment, and all evidence

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determining what traffic laws police officers are authorized to enforce and when they are authorized to enforce them"), *cert. denied,* 115 S. Ct. 97 (1994).

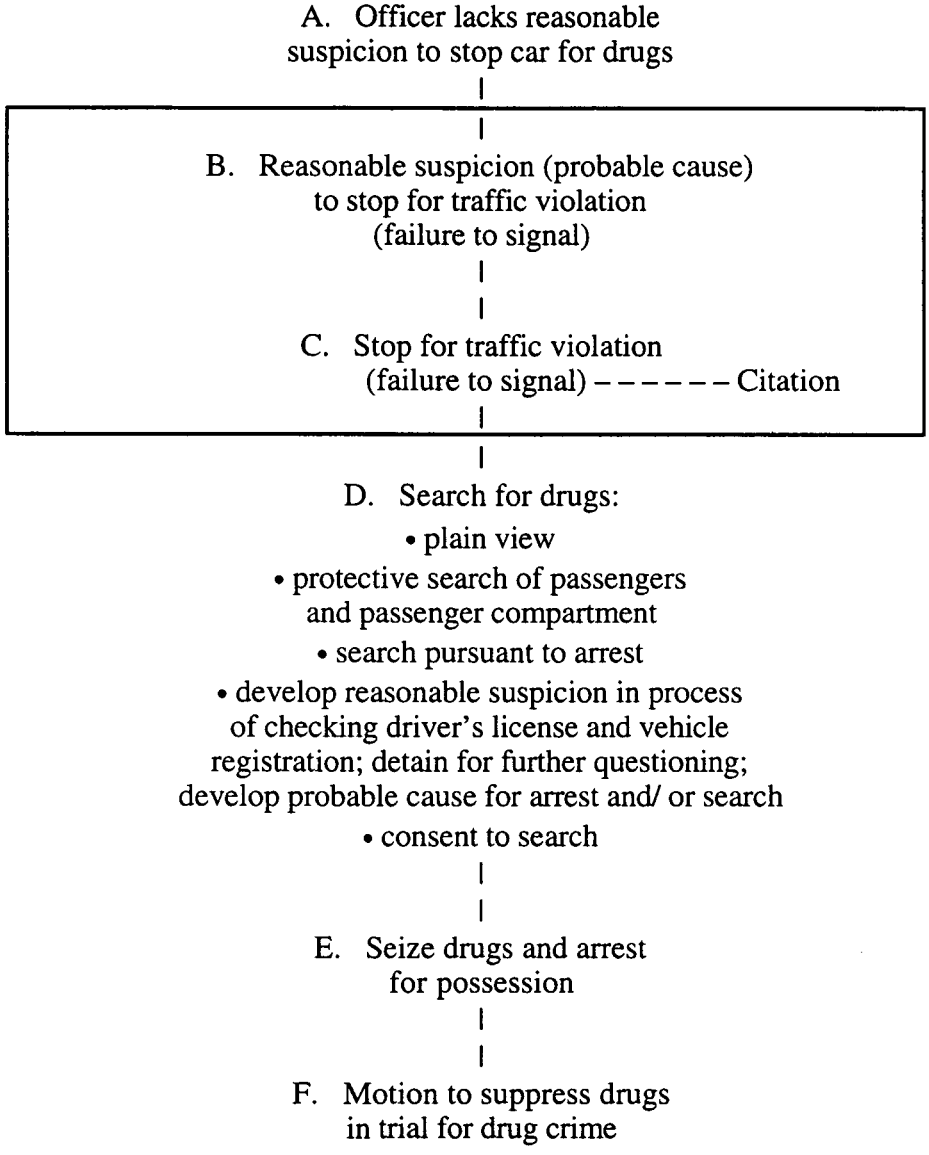
244. *See supra* notes 227-42 and accompanying text.

245. *See* United States v. Guzman, 864 F.2d 1512, 1518 (10th Cir. 1988) ("Contrary to the Government's argument, our approach will not 'severely' curtail 'the ability of the New Mexico state police . . . to enforce traffic laws.' No prosecution for violation of a traffic regulation will be affected. Police officers may always issue appropriate citations to drivers who violate traffic violations."), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995). *See also Ferguson,* 8 F.3d at 397 (Jones, J., dissenting) ("Even in the most egregious case of pretext, I agree that the citizens can be issued the citation for his traffic violation.").

246. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).

Diagram II.

Anatomy of Pretextual Auto Stop



searched and seized in its wake should become a casualty of the exclusionary rule. But the latter stop, that which is represented in the box in Diagram II, is valid and would remain untouched even if the Court had accepted the "would" approach. The officer's ability to issue a citation, or otherwise do what would be done in the wake of a pure traffic stop, is not at all hindered through use of the "would" standard. Police officers may not choose to enforce minor traffic violations when precluded from introducing the fruits of such searches.[247] Nonetheless, they retained the option of doing so, even in a jurisdiction that followed the "would" test. "Eliminating the search incentive is not tantamount to barring the issuance of traffic tickets."[248]

Whren bolsters its conclusion by assailing the "would" standard. Upon closer examination, the strength of such arguments dissipate. *Whren* stands alone on its affirmative conclusion that probable cause for a traffic violation per se satisfies Fourth Amendment requirements. We are left with a decision that functionally transforms this probable cause into reasonable suspicion for the more serious drug offense. We are left without *Terry*.

VII. CONCLUSION

Whren may have been the inescapable, albeit lamentable, tragedy of happenstance. This Article examines automobile stops. In that context, both investigative impulses and impulses to enforce traffic laws play out in identical ways—stopping (seizing) an automobile and its passengers. This complete congruity makes the stop virtually impossible to parse. Thus, on a blank slate, the most promising resolution to the pretext problem lies at a point beyond the initial stop, during any subsequent search or seizure that may follow the stop, where the distinctness of the investigative stop and the traffic stop may again manifest itself. Yes, *Terry*'s second prong, the prong limiting the scope of searches and seizures in the wake of a stop, would have been the most appropriate place to locate a solution to the pretext problem.

Yet, in the context of a traffic stop, little is left of *Terry*'s second prong. *Robinson* and *Gustafson* sanctioned searches incident to arrest for a traffic violation.[249] *New York v. Belton* expanded the scope of a

247. Buckenberger, *supra* note 95, at 490.

248. *Id.*

249. *Robinson*, 414 U.S. 218 (1973); *Gustafson*, 414 U.S. 260 (1973); *see supra* notes 68-73 and accompanying text.

search incident to an arrest to include the entire passenger compartment of a car, including all containers therein.[250] *Michigan v. Long* held that *Terry*'s stop-and-frisk principles sanctioned protective searches of the whole passenger compartment of the car.[251] *Coolidge v. New Hampshire* allowed for seizure of all items in plain view of a stopping officer.[252] By expanding the scope of permissible searches and seizures and affirmatively opting not to treat traffic stops as a unique genre, the Court in these cases effectively precluded itself from combating pretextual traffic stops through narrowly circumscribing ensuing searches and seizures.

Absent a desire to topple decades of precedent, the Court in *Whren* encountered a sub-optimal landscape for its decision. Whether the Court adopted the "would" or "could" approach, it inevitably had to locate its decision in *Terry*'s first prong. When faced with two admittedly sub-optimal alternatives, the Court chose the one that rendered *Terry*'s first prong vacuous.

When we allow the police carte blanche authority to use minor traffic violations as a pretext to stop an individual to search for evidence to support reasonable suspicion of a more serious crime, we nullify *Terry*'s first prong. We sanction investigatory auto stops on a standard less stringent than reasonable suspicion—in fact on the basis of a standard that we all meet almost every time we enter a car—a minor traffic offense. And we remove that lone remaining, yet fundamentally important, barrier between the state and an individual who happens to be traveling on this country's roads. The Supreme Court's adoption of the "could" test in *Whren* means that we all become prey to police officers' arbitrary whims, hunches, suspicions, and prejudices. As students of the law, we realize that the reach of our constitutional rights is limited—that the Constitution has its bounds. What we probably did not realize is those bounds are now as close as the end of our driveways.

250. 453 U.S. 454 (1981). *See supra* notes 75-77 and accompanying text.
251. 463 U.S. 1032 (1983). *See supra* notes 50-53 and accompanying text.
252. 403 U.S. 443 (1971). *See supra* notes 58-62 and accompanying text.