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Whren v. United States: The Constitutionality of Pretextual Stops*

I. INTRODUCTION

Fred Guerrero, a 25 year old male of Mexican descent, is travelling at night with his wife from Florida to Mexico during the Christmas holidays to visit his family. He is travelling along a 100 mile stretch of Interstate 10 between Jefferson Davis Parish and the Texas state line which is known for its high incidence of drug trafficking. Two vice squad officers, observing the Mexican occupants and out-of state plates during routine drug surveillance, become suspicious of Guerrero and begin to follow him although they have no articulable facts to support their suspicions. Over the 25 mile surveillance, Guerrero never abridges the speed limit, but on one occasion he fails to use his turn signal while changing lanes—a clear violation of the traffic code. Seizing upon this violation as an opportunity to search for drugs or other illegal paraphernalia and question Guerrero and his wife, the officers stop Guerrero for failing to use his signal. The officers then arrest Guerrero on the minor traffic charge in order to validly search him and question both he and his wife. During their search, the officers discover a large sum of money which Guerrero explains to be a portion of his income to be brought back to his family in Mexico. The officers also discover what appears to be a single marijuana cigarette in Guerrero's shirt pocket. Based on the officers' assessment that, more likely than not, the objects had been involved in activities related to drug trafficking, the officers confiscate both the car and the money, pursuant to the state's property forfeiture act.

Although this scenario might appear somewhat incredulous, law enforcement officers have, in fact, been increasingly utilizing arrests for minor traffic violations as potent investigatory tools to search persons and vehicles which they would not otherwise be constitutionally authorized to search.[1] Moreover, while these methods are not unique to Louisiana or to officers patrolling the Interstate 10 drug corridor, the consequences of pretextual stops are potentially greater in this state, as the search resulting from a pretextual stop and arrest often supplies the condition precedent to the application of the "Seizure and Controlled

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1. *See, e.g., infra* text accompanying notes 11-19.

Dangerous Substances Property Forfeiture Act of 1989"[2]—one of the nation's toughest forfeiture statutes. Prior to a recent U.S. Supreme Court ruling, the constitutionality of these pretextual stops was unresolved.[3] However, *Whren v. United States*[4] definitively resolved this issue and, more importantly, highlighted the real source of the problem of pretextual stops.

Acting with neither probable cause nor reasonable suspicion of drug activity, District of Columbia vice-squad officers temporarily detained James Brown in a known drug area of the city for failing to signal before making a right turn, a traffic violation. After making the stop, an officer approached the vehicle and "immediately observed two large plastic bags of what appeared to be crack cocaine" in the hands of the passenger, Thomas Whren.[5] Both Whren and Brown were arrested on felony drug charges.[6] At a pretrial suppression hearing, defendants challenged the legality of the stop, arguing that the seizure of their persons was unreasonable under the Fourth Amendment because it had not been justified by reasonable grounds to believe that they were engaged in illegal, drug-related activity.[7] Instead, the defendants alleged that the officers used the traffic violation as a pretext for what in actuality was a search for drugs without reasonable justification.[8] The district court denied the motion to suppress, and the defendants were convicted on the drug charges. After the D.C. Circuit Court of Appeals affirmed the convictions, the Supreme Court granted certiorari to consider the suppression issue.[9] *Held*: Regardless of officer motivation, probable cause to believe a civil traffic violation has been committed is sufficient to seize a motorist by effecting a stop.[10]

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2. La. R.S. 40:2601-2622 (1992 and Supp. 1996) (effective January 1, 1990).

3. For the purposes of this note, "a pretextual stop occurs when the police use a legal justification to make [a] stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime" for which they have no legal justification to arrest the person. United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).

4. 116 S. Ct. 1769 (1996).

5. *Id.* at 1772.

6. Petitioners were subsequently indicted for possession with the intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) (1994) and 841(b)(1)(A)(iii) (1994); possession with intent to distribute cocaine base within 1,000 feet of a school in violation of 21 U.S.C. § 860(a) (1994); possession of marijuana in violation of 21 U.S.C. § 8449(a) (1994); and possession of phencyclidine in violation of 21 U.S.C. § 844(a) (1994).

7. Reasonable grounds is used herein to encompass the minimum factual justification needed to comport with Fourth Amendment reasonableness. It includes not only the traditional probable cause test, but also the lesser *Terry* standard which entitles an officer to a more limited right to search and seize when the officer concludes, in light of his experience, that criminal activity is afoot. *See* Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968). Common to each standard, however, is the requirement of articulable facts sufficient to justify the additional intrusion.

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

9. Whren v. United States, 116 S. Ct. 690 (1996).

10. *Whren*, 116 S. Ct. at 1774. Although the holding in *Whren* encompassed only civil traffic violations, it should be interpreted to extend to criminal traffic violations as well. Municipalities, like the District of Columbia in *Whren*, are generally without the authority to enact "criminal" law. Thus, the violation of a municipal ordinance is nominally considered to be a civil violation although the

Whren is examined here to analyze the Court's reasoning, assess its consequences, and evaluate its implications for Louisiana. To do so, it is necessary to examine the jurisprudential framework within which this case has evolved, analyze *Whren* itself, and examine Article I, section 5 of the Louisiana Constitution—the state's counterpart to the Fourth Amendment—along with its related jurisprudence.

II. PRIOR JURISPRUDENCE

Prior to *Whren*, the Supreme Court had never resolved the constitutionality of pretextual Fourth Amendment stops. Accordingly, the federal appellate courts were split as to the proper standard by which pretextual conduct should be measured.

A. The "Could" Test

A majority of the federal circuits, including the Fifth Circuit, upheld pretextual stops under the Fourth Amendment as long as a reasonable police officer *could* have made the stop.[11] In *United States v. Causey*,[12] the police unearthed and executed an eight-year old misdemeanor arrest warrant for failure to appear in court in order to question the suspect on an unrelated bank robbery charge for which the police had no probable cause to arrest him. Under police interrogation, Causey confessed to the robbery charge but later sought to suppress the confession on the grounds that it was the fruit of an unreasonable seizure.[13] The Fifth Circuit held that the confession was admissible because the officers were legally permitted to execute the eight-year old warrant, reiterating its position that "so long as police do no more than they are objectively authorized

proceedings and penalties are criminal in nature. *See* 62 C.J.S. *Municipal Corporations* § 316 (1949). The Court has, in fact, applied the *Whren* holding without discussion in the context of a criminal traffic violation, implying that *Whren* encompassed both. Ohio v. Robinette, 117 S. Ct. 417 (1996).

11. *See* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995); United States v. Whren, 53 F.3d 371 (D.C. Cir. 1995); United States v. Scopo, 19 F.3d 777 (2d Cir. 1994); United States v. Hassan El, 5 F.3d 725 (4th Cir. 1993); United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993); United States v. Cummins, 920 F.2d 498 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989); United States v. Hawkins, 811 F.2d 210 (3d Cir. 1987); and United States v. Causey, 834 F.2d 1179 (5th Cir. 1987).

12. 834 F.2d 1179 (5th Cir. 1987).

13. If a confession is obtained as a result of an unlawful arrest, the confession will be excluded unless the causal connection between the illegality and the confession is broken. Mere giving of *Miranda* warnings will not suffice to break the causation. Wrongful intent of the police, intervening acts between arrest and confession, and lack of free will are also factors which weigh in determining whether the connection is severed. Brown v. Illinois, 422 U.S. 590, 602-04, 95 S. Ct. 2254, 2261-62 (1975).

and legally permitted to do, their motives . . . are irrelevant and hence not subject to inquiry."[14]

In *United States v. Trigg*,[15] a team of narcotics officers who suspected Trigg of drug trafficking followed him by car after he left a known crack house. It was undisputed, however, that the officers lacked probable cause to believe that Trigg was engaged in narcotics activity at this time. The officers, remembering that Trigg's license had previously been suspended, ran a check which revealed that the license was still suspended. Trigg was stopped and arrested for driving with a suspended license. A search incident to the arrest revealed narcotics on his person, for which he was prosecuted.[16] Although Trigg sought to exclude the evidence because the officer did not have reasonable cause to believe that he was engaged in drug-related activity, the court stated that constitutional reasonableness depends on whether or not the arresting officer had probable cause to believe that the defendant had committed or was committing an offense—driving with a suspended license.[17] The court deemed irrelevant the fact that Trigg's appearance at the crack house may have been the primary—and sole—motivation for the arrest.[18]

B. The "Would" Test

While a majority of the federal circuits interpreted the objective standard to mean that the officer *could* have stopped the person for the offense, the Ninth and Eleventh Circuits, taking a more restrictive approach, interpreted the standard to require that the officer objectively *would* have stopped the person.[19] In *United States v. Smith*, an automobile driver who fit a drug-courier profile was being followed by an officer.[20] When he drifted out of his lane on one occasion, the officer pulled him over, contending that the driver, Smith, had violated a statutory offense.[21] Pursuant to a search, the officer discovered a kilogram of cocaine. The government contended that the seizure was reasonable because the officer could have stopped the car to issue a ticket or investigate for drunk driving. However, the court stated that "the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of

14. *Causey*, 834 F.2d at 1184.

15. 878 F.2d 1037 (7th Cir. 1989).

16. The fact of a full-custody arrest is justification for an additional search of the area within the arrestee's immediate control to prevent danger to the officer or destruction of evidence. *See* United States v. Robinson, 414 U.S. 218, 94 S. Ct 467 (1973).

17. *Trigg*, 878 F.2d at 1041.

18. *Id.* at 1042.

19. *See* United States v. Robles-Alvarez, 75 F.3d 559, 561 (9th Cir. 1996) and United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986).

20. *Smith*, 799 F.2d at 704.

21. Fla. Stat. Ann. § 316.192 (West 1990) (reckless driving) and Fla. Stat. Ann. § 316.089(1) (West 1990) (failure to change lanes safely).

the invalid purpose."[22] Applying the test to this case, the court held the seizure to be unreasonable because it was evident that an officer would not have been interested in Smith's behavior absent an underlying purpose to search for drugs. While the "would" test has not gained widespread acceptance among the federal circuits, the test has received academic support.[23]

III. *WHREN V. UNITED STATES*

Justice Scalia, writing for a unanimous Court, began by reiterating the basic standard for constitutionality under the Fourth Amendment, which guarantees "the right of the people to be secure in their *persons*, houses, papers, and effects, against unreasonable searches and *seizures* . . . ."[24] Because a temporary stop of an automobile has been held to constitute a "seizure" within the meaning of the Fourth Amendment, the stop in this case was required to meet the standard of reasonableness.[25] Probable cause had historically been sufficient to satisfy constitutional reasonableness, and the defendants conceded that the officers had probable cause to believe that the D.C. traffic code had been violated.[26] However, they contended that in the unique context of traffic regulations—where the multitude of regulations make compliance nearly impossible and create the temptation to use traffic stops as a means of investigating without reasonable grounds—more than probable cause is necessary. In examining this contention, the Court evaluated two possible alternatives to probable cause for determining reasonableness under the Fourth Amendment: the subjective test and the objective "would" test. Finally, the Court considered the Fourth Amendment balancing inquiry, although the Court deemed the defendants' reliance on this to be merely an elaboration of the objective "would" test.[27]

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22. *Smith*, 799 F.2d at 709 (emphasis added).

23. *See* 1 Wayne LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.4(e), at 90-97 (2d ed. 1987); John Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. Rev. 70, 81 (1982) (hybrid subjective/objective approach); and Robert Snook, *Criminal Law—Pretextual Arrests and Alternatives to the Objective Test*, 12 W. New Eng. L. Rev. 105, 127 (1990) (two-step objective "would" test).

24. U.S. Const. amend. IV (emphasis added).

25. *See* Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 1396 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556, 96 S. Ct. 3074, 3082 (1976); and United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 2578 (1975).

26. The courts have often required a warrant to satisfy Fourth Amendment reasonableness, although the Fourth Amendment, by its text, does not require one. For an excellent discussion of this issue, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994). Nevertheless, in the case of pretextual stops, the absence of a warrant is not at issue because a warrant is not constitutionally required where the arrest occurs outside of the home. *See* Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371 (1980). Furthermore, in Louisiana, as in most states, a statute authorizes a peace officer to make an arrest without a warrant if the offense has been committed in his presence, and the arrest is made immediately or on close pursuit. *See, e.g.*, La. Code Crim. P. art. 213.

27. Whren v. United States, 116 S. Ct. 1769, 1776 (1996).

A. The Subjective Test

Defendants first argued that the reasonableness of a seizure should depend on the subjective intent of the officer effecting the seizure. This standard would be consistent with the Supreme Court's past disapproval of "police attempts to use valid bases of action . . . as pretext for pursuing other investigatory agendas."[28] However, the Court distinguished these cases because "each . . . address[ed] the validity of a search in the *absence* of probable cause."[29] Outside of the context of inventory and administrative inspections—*where probable cause exists*—the Court emphasized that it had never held that an officer's motive would invalidate objectively justifiable behavior under the Fourth Amendment:

> In *U.S. v. Robinson*, we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," and that a lawful postarrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches.[30]

The Court concluded that as long as the circumstances objectively justify the officer's action, "the 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."[31]

The defendants further suggested that an officer might stop a motorist based on impermissible factors, such as race or gender, if the actual motivations of that officer could not be considered. However, the court dismissed the claim that the standard of reasonableness under the Fourth Amendment should be heightened because invidious factors might be used to selectively enforce the law. Though acknowledging that "the Constitution prohibits selective enforcement of the law based on considerations such as race," the Court stated that the Equal Protection Clause of the Fourteenth Amendment would be the basis for objecting to such discriminatory treatment.[32]

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28. *Id.* at 1773 (referring to Florida v. Wells, 495 U.S. 1, 4, 110 S. Ct. 1632, 1635 (1990) (holding that an 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, 107 S. Ct. 738, 741 (1987) (permissible inventory search where no showing of bad faith or improper purpose); and New York v. Burger, 482 U.S. 691, 716-17, 107 S. Ct. 2637, 2651 (1987) (administrative inspection did not appear to be pretext for obtaining evidence)).

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

30. *Id.* at 1774 (citations omitted); *see also* Gustafson v. Florida, 414 U.S. 260, 266, 94 S. Ct. 488, 492 (1973).

31. *Whren*, 116 S. Ct. at 1774 (quoting Scott v. United States, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723 (1978)); *see also* United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3, 103 S. Ct. 2573, 2577 n.3 (1983) (ulterior motive will not strip agents of their legal justification).

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

B. The Objective "Would" Test

The Court next considered the defendants' primary argument: that the Court should adopt an objective standard as formulated by the Ninth and Eleventh Circuits such that constitutional reasonableness is determined by whether a reasonable officer in the same circumstances *would* have made the stop. The Court concluded that this "objective" test is "plainly and indisputably driven by subjective considerations."[33] Instead of asking whether it was plausible to believe that the individual officer acted with improper motivations, the Court would have to ask whether a reasonable officer, in the same circumstances, would have acted in the same manner. Accordingly, the Court concluded that it would be easier to discern the intent of an individual officer than to "plumb the collective consciousness of law enforcement in order to determine whether a reasonable officer would have been moved to act upon the traffic violation."[34]

Defendants contended that police manuals and standard procedures would provide an objective guide to measure constitutional reasonableness. In the instant case, the D.C. police manual permitted plainclothes officers to enforce traffic laws only when there was a violation which presented an immediate threat to others.[35] Thus, applied here, the seizure of Brown would have been unreasonable since his failure to signal posed no immediate threat to the public. However, the Court noted two problems with the defendants' argument. First, while standard procedures might sometimes aid the inquiry, "ordinarily one would be reduced to speculating about a hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[36] More importantly, however, this formulation would be unworkable, because police enforcement practices vary from place to place and from time to time. In this case, the D.C. guidelines would have been satisfied if Officer Soto had either been wearing a uniform or patrolling in a marked car. Furthermore, the same arrest would have been permissible in a jurisdiction with different departmental regulations. The Court could not "accept that the search and seizure protections of the Fourth Amendment [were] so variable . . . and [could] be made to turn upon such trivialities."[37]

C. Balancing Test

Finally, the defendants argued that the balancing inquiry inherent in Fourth Amendment analysis required a finding that pretextual traffic stops are unreason-

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33. *Id.*

34. *Id.* at 1775.

35. *Id.* (referring to Metropolitan Police Department—Washington D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (April 30, 1992)). Many police manuals are similar in this respect because plain-clothes officers must deal with questions to authority when they attempt to detain someone for a traffic violation.

36. *Id.*

37. *Id.*

able under the Fourth Amendment. Under a balancing inquiry, the Court must weigh society's interest in enforcing these minor traffic violations against the individual's interest in resisting intrusion.[38] The defendants contended that "balancing" did not justify the investigation of minor traffic violations by plain-clothes police in unmarked cars because it only minimally advanced safety and increased anxiety in citizens who were unaware of their authority.[39] However, the Court concluded that a balancing test was rarely applicable when a search or seizure was based on probable cause.[40] The cases relied on by the defendants, such as *Delaware v. Prouse*, involved inventory and administrative searches based on police intrusion without probable cause.[41] Where probable cause existed, the only cases that had utilized a balancing test involved searches and seizures performed in an extraordinary manner.[42] The Court, rejecting the defendants' suggestion, concluded that a traffic stop by a plain-clothes officer "does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[43]

Ultimately, the Court returned to probable cause as the touchstone of constitutional reasonableness. In doing so, the Court noted that there is "no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."[44] Thus, because the officer *could* have stopped Brown for the traffic violation based on probable cause, the seizure was reasonable under the Fourth Amendment.[45]

IV. ANALYSIS OF *WHREN*

A. Standard Police Procedures

Although the Court dismissed the argument, the defendants' suggestion that standard police procedures be used to define objective reasonableness merits closer scrutiny. The primary purpose of standard procedures is to prevent the

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38. *See* Camara v. Municipal Court, 387 U.S. 523, 536-37, 87 S. Ct. 1727, 1735 (1967).

39. *Compare with* Delaware v. Prouse, 440 U.S. 648, 661, 99 S. Ct. 1391, 1406 (1979) (where random stopping of vehicles to check registration and license constituted unreasonable seizure).

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

41. *See also Camara*, 387 U.S. at 523, 87 S. Ct. at 1727; Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990); and United States v. Villamonte-Marquez, 462 U.S. 579, 103 S. Ct. 2573 (1983).

42. *See* Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (unannounced entry into a home); Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611 (1985) (physical penetration of the body); Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694 (1985) (seizure by deadly force); and Welsh v. Wisconsin, 466 U.S. 740, 104 S. Ct. 2091 (1984) (entry into home without warrant).

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

44. *Id.*

45. *Id.*

arbitrary exercise of police power.[46] These procedures have been used in the past to define reasonableness in areas such as inventory and administrative searches.[47] However, the very reason that these procedures have been used to determine reasonableness is because no independent reasonable ground exists to justify the particular search. Inventory searches are performed to protect against disputes over stolen property after a vehicle is impounded.[48] Administrative searches are justified because they provide the only means capable of insuring adherence to regulatory guidelines.[49] However, probable cause does not exist for the search in either of these two areas. Thus, to insure that officers do not act with unfettered discretion, adherence to standard procedures satisfies the Fourth Amendment requirement of reasonableness.

However, the situation in *Whren* is clearly distinguishable from that of an inventory or administrative search. The purpose behind the standard procedures approach—to prevent the arbitrary exercise of police power—is not relevant when the police conduct is not arbitrary. While a DWI roadblock or a random inspection of a commercial structure might be arbitrary, a pretextual stop, by definition, is based on probable cause.[50] Here, because Brown failed to signal before turning, the decision to stop him was not arbitrary for Fourth Amendment purposes. Thus, the defendants' suggestion that standard procedures be used to *supply* reasonable grounds for the stop was misplaced because reasonable grounds—probable cause—already existed.

B. Constitutional Reasonableness vs. Exclusionary Policy

Whren is important for another reason: it implicitly reinforces the distinction between the nature of the constitutional right and the policies behind the exclusionary sanction. The Fourth Amendment was designed not to remedy all misconduct on the part of the police, but rather to guarantee that all searches and seizures are reasonable.[51] On the other hand, the exclusionary rule was *created* to deter unconstitutional searches and seizures.[52] However, the rule does not purport to reach *all* improper conduct by officers and does not apply to deter conduct that does not violate the Fourth Amendment.[53] In fact, the Court has clearly repudiated the application of the exclusionary rule in the absence of a Fourth Amendment violation.[54] Likewise, the exclusionary sanction is not to

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46. 1 LaFave, *supra* note 23, at 94-97.

47. *See* South Dakota v. Opperman, 428 U.S. 364, 96 S. Ct. 3092 (1976) and Camara v. Municipal Court, 387 U.S. 523, 87 S. Ct. 1727 (1967).

48. *Opperman*, 428 U.S. at 364, 369, 96 S. Ct. at 3092, 3097.

49. *Camara*, 387 U.S. at 530-32, 87 S. Ct. at 1731-32.

50. *See supra* note 3 for the definition of pretextual stop.

51. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 347, 94 S. Ct. 613, 619-20 (1974).

52. *See* United States v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987).

53. *See, e.g.*, United States v. Butts, 729 F.2d 1514, 1519 (5th Cir. 1984).

54. *See* Arizona v. Evans, 115 S. Ct. at 1185, 1190-92 (1995).

be administered mechanically to a constitutional violation, but rather should be applied in light of its deterrent effect.[55]

In examining the nature of the defendants' argument in *Whren*, the emphasis on officer motivations is more appropriately one of exclusionary policy than of constitutional reasonableness. Rather than suggesting that an officer is acting unreasonably in seizing a person who has violated the law, the defendants are, in reality, arguing that improper motivations of police officers should be deterred. Both the subjective test and the objective "would" test focus on this aspect by invalidating police conduct which is impermissibly motivated. However, in doing so, each test inverts the established analytical framework and defines the Fourth Amendment by the goals of exclusionary policy rather than by applying the exclusionary sanction only where there is a violation of the Fourth Amendment. In rejecting defendants' arguments, the Court correctly maintained its principled distinction between the Fourth Amendment requirement of reasonableness and the exclusionary rule.

C. Separation of Powers

Finally, in considering the alleged extraordinary nature of traffic violations, the Court implicitly recognized the doctrine of separation of powers. The defendants contended that automobiles are so highly regulated that full compliance with applicable rules is virtually impossible.[56] Thus, in order to keep police from avoiding the traditional requirements of the Fourth Amendment and allowing them to "single out almost whomever they wish for a stop," the Court, according to the defendants, should have created a heightened standard for constitutional reasonableness in this area.[57] However, the Court stated that:

> we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and 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.[58]

The power to enact laws is vested in the legislative branch.[59] Where a legislature has proscribed certain conduct as a violation of the law, the enforcement of these laws should not present a question of Fourth Amendment

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55. *See, e.g.*, United States v. Leon, 468 U.S. 897, 916, 104 S. Ct. 3405, 3417-18 (1984); *Calandra*, 414 U.S. at 347, 94 S. Ct. at 619-20.

56. Whren v. United States, 116 S. Ct. 1769, 1777 (1996).

57. *Id.*

58. *Id.*

59. *See, e.g.*, U.S. Const. art. I, § 1 and La. Const. art. III, § 1.

reasonableness.[60] Lawmakers need not authorize arrests for petty offenses or detention for certain conduct. However, when such laws are promulgated, the public is put on notice as to the standard of conduct which must be followed in that jurisdiction and should not be surprised when those laws are enforced. The role of courts with respect to the Fourth Amendment in this process should be limited to ensuring that reasonable grounds exist for any seizure resulting from a violation of the law.[61] Where the judiciary invalidates the enforcement of a law, absent a Fourteenth Amendment challenge, it transgresses improperly into the sphere of the legislature.

D. Stewart's Concurrence in Gustafson *and the "Real" Pretextual Stop Problem*

Although *Whren* answers the question of when a *stop* is constitutionally reasonable, it does not address the independent, but related question which lies at the heart of the pretext problem—whether the additional actions by the officer, under the circumstances, are justified by the nature of the stop. The real source of the problem of pretextual stops is not the initial stop, which, according to *Whren*, is made *with* legal justification, but stems instead from the additional intrusions that an officer may make without further justification.

Where an officer exercises his discretion to place a person under arrest for a traffic offense, the officer obtains the additional justification to search that person and his vehicle by the mere fact of that arrest. The *Robinson* rule allows an officer to search the person of a custodial arrestee.[62] Moreover, the *Belton* rule permits a further search of the passenger compartment of the vehicle and all containers therein.[63] Finally, during the past term, the Supreme Court extended the rule of *Pennsylvania v. Mimms*[64] to authorize a police officer to order a passenger to exit the vehicle during a traffic stop without further factual justification.[65] Together, the potential benefits to be derived from the searches provide police with a powerful incentive to use the initial stop as a potent investigatory tool.[66]

Whren does not present this problem because the officers did not use the custodial arrest to effect a search. In fact, no search was executed following the

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60. Where a law is discriminatory on its face or in its application, an equal protection claim may arise. Moreover, as discussed *infra* in text accompanying notes 74-76, substantive due process limitations might regulate an abuse of legislative power. However, these actions would be in the nature of Fourteenth—rather than Fourth—Amendment claims.

61. *See also infra* text accompanying notes 103-104.

62. United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467 (1973); *see also* Gustafson v. Florida, 414 U.S. 260, 94 S. Ct. 488 (1973).

63. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981).

64. 434 U.S. 106, 98 S. Ct. 330 (1977) (holding that the Fourth Amendment permits officer to routinely order driver out of vehicle during a traffic stop as a safety precaution).

65. Maryland v. Wilson, 117 S. Ct. 882, 886 (1997).

66. *See* United States v. Trigg, 878 F.2d 1037, 1039 (7th Cir. 1989).

stop because the drugs appeared in "plain view."[67] However, suppose that the drugs were in the glove compartment of the vehicle rather than in "plain view." Upon custodial arrest of Brown for failing to signal, the officers would have had the justification to search Brown and the entire passenger compartment of his car and all containers therein. Because the glove compartment would fall within the permissible scope of the search, the incentive to utilize the stop and arrest to effect a subsequent search would be alluring. While *Whren* supports the contention that the initial stop based on probable cause is reasonable, this hypothetical highlights the analytically-distinct question of whether any constitutional limitations exist to regulate placing the passenger in full custody arrest and thus triggering the power of the police to search without additional justification.

Justice Stewart recognized this potential problem in *Gustafson v. Florida*[68] when he noted, in concurrence, that the custodial arrest of a person detained for a minor traffic offense might violate Fourth and Fourteenth Amendment rights.[69] In that case, Gustafson was stopped for erratic driving by a municipal police officer. Because he did not have his driver's license in his possession, he was placed under arrest. Following the arrest, the officer searched his person and discovered illegal drugs, for which he was prosecuted and convicted. Gustafson argued that because the offense for which he was initially arrested was trivial and because no department policies required full body searches following arrest, the search of his person incident to arrest was unreasonable. The Supreme Court upheld his conviction and followed *United States v. Robinson*[70] in holding that the fact of a lawful custodial arrest entitled the officer to perform the subsequent search.[71]

Although Gustafson conceded the constitutional validity of his arrest, Justice Stewart noted that "a persuasive claim might have been made . . . that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments."[72] Simply put, although the initial stop based on probable cause was reasonable, it does not necessarily follow that the custodial arrest for a minor traffic violation was also reasonable. Placing a person under custodial arrest involves an additional intrusion which might need to be justified by reasonable grounds. Because police have unfettered discretion in deciding whether to warn, issue a summons, or arrest a person, the decision might require regulation to comport with Fourth Amendment reasonableness. While the decision to make the initial stop is not arbitrary—it is based on probable

67. *See* Harris v. United States, 390 U.S. 234, 236, 88 S. Ct. 992, 993 (1968) (observation of objects in the "plain view" of an officer who has the right to be in the position to have that view does not constitute a search under the Fourth Amendment).

68. 414 U.S. 260, 94 S. Ct. 488 (1973).

69. *Gustafson*, 414 U.S. at 266-67, 94 S. Ct. at 492 (Stewart, J., concurring).

70. 414 U.S. 218, 94 S. Ct. 467 (1973).

71. *Gustafson*, 94 S. Ct. at 492.

72. *Id.*, 94 S. Ct. at 492.

cause—the decision as to the subsequent course of action is arbitrary. Thus, because of the greater intrusions that may result from a full custody arrest, the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment might require limitations on discretion with regard to custodial arrests.

Assuming Justice Stewart is correct, a critical question would be presented in determining whose job it is to define the offenses which give rise to a custodial arrest. Normally, the legislative branch would be empowered to define the parameters of a custodial arrest pursuant to its constitutional grant of power.[73] Courts have historically given great deference to the power of the legislature to define offenses and regulate the procedures under which its laws are enforced because these decisions represent value choices which are more appropriately made by a legislature than a court.[74] A court will not subject a legislature's decision "to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[75] However, some consideration must be "given to the possibility that legislative discretion may be abused to the detriment of the individual."[76] Thus, if the legislature were to abandon its duty entirely, providing no limitations on the offenses or events giving rise to custodial arrest, the judiciary might create *sua sponte* a constitutional standard for custodial arrests as a component of Fourteenth Amendment due process.

In doing so, a court might utilize the "standard procedures" doctrine to define the parameters of a custodial arrest. This approach would not be inconsistent with *Whren* because, although the decision to effect the initial stop is not arbitrary, the decision to make a custodial arrest without further justification or standard practice is. Adopting a "standard procedures" approach in this context would further the purpose of preventing the arbitrary enforcement of laws. However, a court would be faced with many of the same difficulties and anomalies recognized in *Whren* which result from a constitutional standard which varies from jurisdiction to jurisdiction.[77]

V. IMPACT OF *WHREN* ON LOUISIANA

Louisiana courts have not directly considered the standard of reasonableness by which pretextual stops should be measured.[78] Thus, this note examines

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73. *See, e.g.*, U.S. Const. art. I, § 1 and La. Const. art. III, § 1.

74. *See* Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491 (1991) and Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319 (1977). *See also* Medina v. California, 505 U.S. 437, 443, 112 S. Ct. 2572, 2576 (1992) ("[E]xpansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.").

75. *Patterson*, 432 U.S. at 202, 97 S. Ct. at 2322 (citations omitted).

76. *Id.* at 211 n.12, 97 S. Ct. at 2327 n.12 (citing Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881 (1975)).

77. *See supra* text accompanying notes 36-37.

78. The Louisiana Second Circuit Court of Appeal recognized the split of authority among the

Article I, section 5 of the Louisiana Constitution, its relevant jurisprudence, and the state exclusionary rule to develop a coherent framework for determining the proper standard for constitutional reasonableness in Louisiana. Finally, this note assesses the future of pretextual stops in Louisiana.

A. Article I, Section 5—The Louisiana Right to Privacy

Article I, section 5 of the Louisiana Constitution states, in pertinent part: "Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy." The text alone of Article I, section 5 is clearly broader than that of the Fourth Amendment. The Louisiana Constitution extends to protect *property* and *communications* against unreasonable searches, seizures, or *invasions of privacy*.[79] The framers explained that "property" was included to clarify that all of a person's property is to be protected—not merely houses, places, and effects.[80] Furthermore, communications were included to cover "government censorship of the mails, wiretapping, eavesdropping, and other interference with private communications."[81] Finally, the constitutional protection against invasions of privacy was "intended to give the courts wide latitude in invalidating state laws and actions."[82] Nevertheless, the invasion of privacy must be unreasonable to merit constitutional protection.[83]

In addition to these textual differences, Louisiana courts have interpreted the reasonableness clause of Article I, section 5 to be more broad than that of the Fourth Amendment with respect to D.W.I. checkpoints,[84] automobile searches incident to arrest,[85] the definition of sei-

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federal circuits as to the proper Fourth Amendment standard to be applied for pretextual stops. However, the court took judicial notice that excessive speeding would provide reasonable justification for a stop, alleviating the need to apply either the objective "would" or "could" test. State v. Bostic, 637 So. 2d 591, 594 (La. App. 2d Cir. 1994).

79. Article I, section 5 of the Louisiana Constitution also expands standing and heightens the particularity requirements for a warrant. However, these provisions are not relevant to the issue of pretextual arrests.

80. Woody Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 27 (1975).

81. *Id.*

82. *Id.* at 28.

83. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 21 (1974).

84. *Compare* State v. Church, 538 So. 2d 993 (La. 1989) (D.W.I. roadblocks constitute unreasonable seizure under Article I, section 5 of the Louisiana Constitution) *with* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 110 S. Ct. 2481 (1990) (The initial stopping of a motorist at a D.W.I. checkpoint, together with brief questioning and observation, does not violate the Fourth Amendment).

85. *Compare* State v. Hernandez, 410 So. 2d 1381 (La. 1982) (*Belton* rule that search of automobile passenger compartment incident to arrest and all containers therein is reasonable under the Fourth Amendment is not the correct rule under Louisiana Constitution) *with* New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860 (1981).

zure,[86] inventory searches,[87] and private party searches.[88] In these cases, Louisiana courts have recognized that Article I, section 5 is "not a duplicate of the Fourth Amendment or merely coextensive with it; it is one of the most conspicuous instances in which our citizens have chosen a higher standard of individual liberty than afforded [by the federal constitution]."[89] Thus, these cases might suggest that a pretextual stop, deemed constitutionally reasonable in *Whren*, might nonetheless be unreasonable under the more expansive Louisiana Constitution.

However, reliance on the above jurisprudence for the proposition that the Louisiana Constitution requires more than probable cause would be misplaced. The Louisiana Supreme Court has read broader protection into Article I, section 5 only in those cases where no reasonable grounds existed. In *State v. Church*, the court invalidated D.W.I. checkpoints where motorists were detained without reasonable cause.[90] There, motorists were summarily stopped at preestablished roadblocks. Similarly, in *State v. Hernandez*, the court declined to adopt the federal *Belton* rule, which gave an officer the right to search the passenger compartment of an automobile and all containers therein based solely on the custodial arrest of its driver.[91] Finally, *State v. Jewell* held that pretextual inventory searches were unreasonable under the Louisiana Constitution.[92] Inventory searches, by definition, are not based on reasonable grounds to believe an offense has been committed, but instead on other policies.[93] Thus, although Louisiana courts have interpreted Article I, section 5 to be more expansive than its federal counterpart, the courts have been unwilling to extend this reasoning and abandon the traditional reasonable cause analysis as the basis for constitutionally-permissible searches and seizures.[94]

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86. *Compare* State v. Tucker, 619 So. 2d 38 (La. 1993) (seizure under Louisiana Constitution exists upon actual stop or when the actual stop is imminent) *with* California v. Hodari D., 499 U.S. 621, 111 S. Ct. 1547 (1991) (no seizure takes place where suspect does not yield to a show of authority).

87. State v. Jewell, 338 So. 2d 633, 639 (La. 1976) (pretextual inventory search of automobile is constitutionally unreasonable under Article I, section 5).

88. *Compare* State v. Hutchison, 349 So. 2d 1252 (La. 1977) (Ambit of Article I, section 5 extends protection to unreasonable private party searches) *with* Burdeau v. McDowell, 256 U.S. 465, 41 S. Ct. 574 (1921) (Fourth Amendment encompasses only unreasonable searches and seizures by public actors).

89. *Hernandez*, 410 So. 2d at 1385. *See also Hutchison*, 349 So. 2d at 1252, 1254 and State v. Abram, 353 So. 2d 1019, 1022 n.1 (La. 1978).

90. 538 So. 2d 993 (La. 1989).

91. *Hernandez*, 410 So. 2d at 1385.

92. 338 So. 2d 633, 639 (La. 1976).

93. Inventory searches have been permitted in order to protect against false claims of loss or damage. *Id.*; *see also* South Dakota v. Opperman, 428 U.S. 364, 369, 96 S. Ct. 3092, 3097 (1976).

94. It might be argued that State v. Jones, 308 So. 2d 790 (La. 1975), created a higher standard of reasonableness than probable cause. There, police arrested Jones for erratic driving after following him from a known drug house. A search of Jones at the police station revealed marijuana, for which he was prosecuted. *Id.* at 791. Although Jones contended that the traffic stop was made without

B. The Exclusionary Rule in Louisiana

It has been suggested that Louisiana has an exclusionary rule with a basis in Article I, section 5 that is independent of the federal exclusionary rule as developed in *Mapp v. Ohio*.[95] To the extent that the exclusionary sanction has been invoked for violations of the state constitution, this argument appears valid.[96] Although the court has, on occasion, allowed exclusionary policy to define the Louisiana Constitution,[97] more recent jurisprudence has suggested that these cases were anomalies, so that the state exclusionary rule should be applied in the same principled framework as the federal exclusionary rule.[98] That is, the exclusionary sanction should be considered only where there has been a violation of the Louisiana Constitution. In *State v. Matthieu*, the court stated that the primary purpose of the exclusionary rule is to "deter unconstitutional methods of law enforcement."[99] It explicitly recognized that "[o]ur law . . . stresses the importance of constitutional violations in cases involving the exclusionary rule."[100] This interpretation is further supported by the language of Louisiana Code of Criminal Procedure article 703, which states in pertinent part:

> Article 703. Motion to suppress evidence
> A. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was *unconstitutionally* obtained.

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probable cause, the trial court denied his motion to suppress the drugs because the police testified that he had crossed the center line on several occasions. *Id.* On appeal, the supreme court reversed the trial court essentially on grounds of officer credibility, which is traditionally the province of the trial court. *Id.* at 793. It refused to allow the "highly suspect testimony to supply the reasonable cause necessary to validate the stop when it is so clear that the officers' claim of erratic driving was no more than a pretext to justify the stop." *Id.* However, significant weight should not be given to the court's opinion because it failed to properly distinguish exclusionary policy from the constitutional right itself. *See infra* text accompanying notes 97-101. Moreover, it is highly unlikely that this rarely cited opinion without a complete analysis would have changed the standard of reasonableness in Louisiana. Instead, *Jones* appears to be the only aberration in a long line of Louisiana jurisprudence holding that probable cause is sufficient to satisfy Article I, section 5 reasonableness.

95. P. Raymond Lamonica, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pretrial Criminal Procedure*, 37 La. L. Rev. 535, 542 (1977).

96. *See, e.g.*, State v. Longlois, 374 So. 2d 1208 (1979); State v. Patton, 374 So. 2d 1211 (La. 1979); and State v. Case, 363 So. 2d 486 (La. 1978).

97. *See, e.g.*, State v. Parker, 355 So. 2d 900 (La. 1978) and State v. Fearn, 345 So. 2d 468 (La. 1977).

98. *See, e.g.*, State v. Matthieu, 506 So. 2d 1209 (La. 1987); State v. Davis, 375 So. 2d 69 (La. 1979); and State v. Sutton, 494 So. 2d 1371 (La. App. 2d Cir. 1986); *see also supra* text accompanying notes 51-55.

99. *Matthieu*, 506 So. 2d at 1212.

100. *Id.*

B. A defendant may move on any *constitutional* ground to suppress a confession or statement of any nature made by the defendant. (emphasis added).

Moreover, the official revision comment to the article explains that Article 703 applies "to evidence obtained as a result of an *unconstitutional* search or seizure."[101] Apparent in each of the passages above is the idea that a constitutional violation is a condition precedent to the exclusionary sanction, rather than the converse. Thus, although Louisiana has an exclusionary sanction independent of the federal one, it operates in a similar, principled manner by requiring a constitutional violation to trigger its application.[102]

C. The Future of Pretextual Stops in Louisiana

Although reasonable cause should remain the touchstone of Article I, section 5, Louisiana is in a unique position to better handle the problem of pretextual stops in a coherent framework because Louisiana courts have required further factual justification to expand the scope of a search or seizure than have the federal courts. As explained above, in *State v. Hernandez*, the court declined to extend the officer's right to search the passenger compartment of an automobile and all containers therein upon the custodial arrest of its driver.[103] Thus, in order to search the passenger compartment of a vehicle in Louisiana, an officer must have further articulable facts beyond the fact of a traffic arrest. *State v. Jewell* further limited the ability of an officer to search an arrestee's vehicle where the inventory search is used as a subterfuge for a warrantless search.[104] These holdings have limited the powerful incentive to use full custody arrest as a tool for further investigation.

Nevertheless, Louisiana courts continue to recognize the constitutionality of a search incident to arrest of the person.[105] Furthermore, the courts have extended the search incident to a traffic stop to include a limited search of the passenger of a car whose driver has been subjected to the stop.[106] The court explained in *State v. Landry* that "either the driver or the passenger of a stopped automobile can present a significant threat to the safety of the stopping

101. La. Code Crim. P. art. 703 cmt. b. (emphasis added).

102. Consideration of its application does not mean that the exclusionary rule is to be applied upon a constitutional violation. Rather, it should be applied in light of the policies from which the exclusionary rule was created. *See supra* text accompanying notes 51-55.

103. 410 So. 2d 1381, 1385 (La. 1982).

104. 338 So. 2d 633 (La. 1976).

105. *See, e.g.*, State v. Breaux, 329 So. 2d 696 (La. 1976); State v. King, 322 So. 2d 205 (La. 1975); State v. Thomas, 310 So. 2d 517 (La. 1975).

106. *See, e.g.*, State v. Landry, 588 So. 2d 345 (La. 1991) (holding a search incident to a traffic stop provides the officer with the same authority to search a person as a search incident to arrest. In each case, the policy behind the search is the protection of the officer from bodily harm).

officer."[107] Although the supreme court examined this case using Fourth Amendment analysis—extending the rule of *Pennsylvania v. Mimms*[108]—the holding in *Landry* should apply equally to Article I, section 5 because the *Landry* Court explicitly reversed its holding in *State v. Williams*,[109] which was based entirely on Article I, section 5.[110]

While Louisiana courts have played an effective role in extending protection beyond the federal constitution to require additional justification for additional intrusions, the future of pretextual stops in Louisiana will rest primarily on the shoulders of the legislature. Thus, to the extent that the state legislature can limit the discretion of officers with regard to certain minor violations by requiring a summons rather than a custodial arrest, the state can more effectively respond to the problem that Justice Stewart highlighted in *Gustafson*. At present, Article 211 of the Louisiana Code of Criminal Procedure gives a great deal of discretion to officers in determining whether to issue a summons or arrest a person.[111] The legislature must consider whether additional guidelines should be considered to curb discretion or delimit those minor offenses which should be removed from the realm of custodial arrest. In the event that the legislature declines the task, the Louisiana Supreme Court has hinted at a possible substantive due process claim, akin to the one explored above,[112] explaining that "[w]e expressly do not hold however that an arbitrary or non-customary decision of an officer to arrest a person instead of issue a summons for a misdemeanor will justify as reasonable any search incident to it."[113]

VI. CONCLUSION

Pretextual stops invoke a great deal of resentment and legitimate concern because of the potential for abuse. However, this problem must be handled within a coherent, principled framework. While both the United States and Louisiana Constitutions protect against unreasonable searches and seizures, they

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107. *Id.* at 347.

108. 434 U.S. 106, 98 S. Ct. 330 (1977) (holding Fourth Amendment permits an officer to routinely order the driver out of the vehicle during a traffic stop as a safety precaution).

109. 366 So. 2d 1369 (La. 1978).

110. *Landry*, 588 So. 2d at 347.

111. Article 211. Summons by officer instead of arrest and booking

A. When it is lawful for a peace officer to arrest a person without a warrant for a misdemeanor, . . . he may give a written summons instead of making an arrest if all of the following exist:

(1) The officer has reasonable grounds to believe that the person will appear upon summons;

(2) The officer has no reasonable grounds to believe that the person will cause injury to himself or another or damage to property . . .;

(3) There is no necessity to book the person to comply with routine identification procedures.

112. *See supra* text accompanying notes 73-77.

113. State v. Breaux, 329 So. 2d 696, 700 n.4 (La. 1976).

do not protect against all misconduct by police officers where reasonable grounds exist for their action. *Whren* correctly held that probable cause is sufficient to seize a motorist, regardless of the officer's subjective motivations. More importantly, however, its impact highlights the problem posed by Justice Stewart in his concurrence in *Gustafson*—that is, whether any constitutional limitations exist to regulate custodial arrests. Although the answer to this question is far from certain, Louisiana is in a better position to handle the problem of pretextual stops because its courts have declined to extend the state constitution to encompass certain federal decisions which give an incentive to police officers to use an arrest as an investigatory tool. The continued propensity of Louisiana courts to require additional factual justification as a component of Article I, section 5 reasonableness will help to ensure that the abuse of the custodial arrest is controlled. Yet, the resolution of the problem of pretextual stops will ultimately be a function of the state's ability to define the parameters of a custodial arrest. While the primary burden will fall on the state legislature pursuant to its constitutional grant of legislative power, coupled with judicial deference to the value judgments of the legislature in balancing the needs of law enforcement with the privacy rights of its citizens, the courts may play a key role through substantive due process if the legislature neglects its duty.

Geoffrey S. Kay