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Whren v. United States: Buckle-up and Hold on Tight Because the Constitution Won't Protect You

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I. INTRODUCTION

The cars of today come equipped with various safety and precautionary devices. The horn, hazard lights, seat-belts, and now air bags, are installed for extra protection. Even with all of these safety features, there is still one risk that cannot be avoided—the police.

On June 10, 1996, the United States Supreme Court handed down its unanimous decision of *Whren v. United States*.[1] *Whren* held that the reasonableness of a traffic stop under the Fourth Amendment[2] will be determined by a purely objective standard.[3] The Court also held that any minor traffic violation can give a police officer probable cause[4] to stop a motorist.[5] This holding effectively eliminates the pretext issue,[6] as well as any inquiry by a court into the arresting officer's subjective intent with regard to traffic stops.[7]

With the pretext issue gone, this Casenote argues that the Fourth Amendment no longer affords meaningful protection from intrusive police searches while a person is in a motor vehicle. The Supreme Court, in dicta, dismissed Whren's claims that the low "objective" standard will be abused by the police to conduct unreasonable searches as well as to allow the police the ability to harass minorities.[8] The Court suggested that the Equal Protection Clause[9] is available to protect minorities from

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1. 116 S. Ct. 1769 (1996).

2. *See* U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Id.

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

4. Probable cause exists where "the facts and circumstances within [the officer's] knowledge and of which [the officer] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). *But see* Camara v. Municipal Court (San Francisco), 387 U.S. 523, 534-35 (1967) (holding that in the context of administrative searches, probable cause exists if the administrative reasons for conducting a search outweigh an individual's Fourth Amendment privacy interests).

5. *Whren*, 116 S. Ct. at 1775.

6. The pretext issue arises when the officer's reasons for using a specific Fourth Amendment power on a particular occasion diverges from the reasons advanced by the courts for allowing such Fourth Amendment activity. *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 124 n.36 (1982) (defining a "pretext arrest" as one in which the arresting officer pretends to arrest for a proper reason, but is really arresting in order to conduct a search incident to arrest for which there is no independent probable cause); *see also* James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 641 (1985) (asserting that where a police officer is acting within the letter of the law, it is improper to focus upon the officer's specific motivations).

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

8. *See infra* note 153 and accompanying text (addressing Whren's argument that police officers will be able to use the "could have" test to harass minorities).

9. *See* U.S. CONST. amend. XIV, § 1 ("... No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.").

such concerns.[10] However, this Casenote examines whether the shield of the Equal Protection Clause is too limited in the traffic stop context to provide any meaningful protection.[11]

This Casenote examines the case law dealing with searches and seizures that led to the *Whren* decision[12] as well as the legal ramifications that will follow from this decision.[13] Although concluding that the decision in *Whren* was consistent with the precedent of the Supreme Court, this Casenote develops how the Court started down the path of eliminating meaningful Fourth Amendment protection for motorists and explores alternative approaches that could be used to avoid the likely consequences of the *Whren* decision.[14]

II. AUTOMOBILE SEARCH AND SEIZURE CASES LEADING TO *WHREN*

A. *Early Search and Seizure Cases*

Prior to *Katz v. United States*,[15] the Supreme Court concluded that a search would only be invalidated under the Fourth Amendment if the search had been a physical intrusion into a "constitutionally protected area."[16] In *Katz*, FBI agents had placed an electronic listening and recording device on the outside of a public telephone booth in order to eavesdrop on the defendant's conversation regarding illegal wagering information.[17] *Katz* determined that the Fourth Amendment protection reaches beyond individual privacy from government intrusion into areas that have nothing to do with privacy at all.[18] Therefore, the Court reasoned that inquiring into whether an area is "constitutionally protected" did not really address the problem because "the Fourth Amendment protects people, not places."[19] The Court clarified that the Fourth Amendment protects what a person "seeks to preserve as private, even [if] in an area accessible to the public."[20] Thus, the correct inquiry was not whether a telephone booth is a constitutionally protected area, but whether the defen-

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

11. *See infra* Part IV.C. (analyzing whether the Equal Protection Clause affords protection to minorities with regard to unreasonable searches and seizures in the traffic stop context).

12. *See infra* Part II.B. (discussing the Supreme Court precedent which paved the way for the *Whren* decision).

13. *See infra* Part IV.A. (describing the possible effects of *Whren* on the future of automobile search and seizure cases).

14. *See infra* Part V (setting forth a legislative solution to potential abuse under *Whren*).

15. 389 U.S. 347 (1967).

16. *See* Silverman v. United States, 365 U.S. 505, 512 (1961). A "constitutionally protected area" is one of the areas enumerated in the Fourth Amendment: "persons," "houses," "papers," and "effects." WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.2, at 124 (2d ed. 1992).

17. *Katz*, 389 U.S. at 348.

18. *Id.* at 351.

19. *Id.*

20. *Id.*

dant had a reasonable expectation of privacy while using the telephone booth.[21] The Court concluded that the government's eavesdropping violated Katz's expectation of privacy "upon which he justifiably relied while using the telephone booth."[22]

Six months after *Katz*, the Supreme Court decided *Terry v. Ohio*.[23] *Terry* analyzed whether a police officer could "stop"[24] and "frisk"[25] individuals without a warrant when an officer suspects that individuals are involved in criminal activity.[26] In *Terry*, the arresting officer observed three men repeatedly look into a store as if "casing" it for a robbery.[27] This observation led to the officer detaining the men and patting them down for weapons.[28] After balancing the need of a police officer to be protected in potentially dangerous situations against the invasion which the search entails, the Court held that there must be authority to permit a reasonable search for weapons when the officer "has reason to believe that he is dealing with an armed and dangerous individual."[29] In order to justify a particular intrusion, the police officer must be able to point to a reasonably articulated suspicion from the facts which warrant the intrusion.[30]

B. The Automobile Cases

Cases such as *Katz* and *Terry* set forth the basic guidelines to determine permissible searches and seizures. Even before these two cases, the Supreme Court had determined that there was a difference between the search of a structure and the search of an automobile.[31] In *Carroll v. United States*, the Court recognized that a vehicle could be quickly moved from a locality where an arrest was made.[32] The Court held that this characteristic permitted a warrantless search of a vehicle upon

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21. *Id.* at 361 (Harlan, J., concurring).
22. *Id.* at 353.
23. 392 U.S. 1 (1968).
24. A "stop" was defined as briefly detaining an individual for questioning upon suspicion that the individual may be involved with criminal activity. *Terry*, 392 U.S. at 10. The Court held that a "stop" could not be distinguished from a seizure for Fourth Amendment purposes. *Id.* at 16.
25. The term "frisk" was used to describe a pat-down of a suspect to check for weapons. *Id.* at 10. The Court determined that a "frisk" also could not be distinguished from a search for Fourth Amendment purposes. *Id.* at 16-17.
26. *Id.* at 4.
27. *Id.* at 6.
28. *Id.* at 6-7.
29. *Id.* at 27.
30. *Id.* at 21; *see* Pennsylvania v. Mimms, 434 U.S. 106, 112 (1977) (holding that, after lawfully ordering the defendant out of his vehicle following a stop for a traffic violation, a bulge in the defendant's jacket "permitted the officer to conclude that [the defendant] was armed and thus posed a serious and present danger to the officer," and that a "pat-down" search of the defendant was therefore justified); *see also* Maryland v. Wilson, 117 S. Ct. 882, 886 (1997) (concluding that police, having lawfully stopped a vehicle, may order the occupants to exit the vehicle).
31. Carroll v. United States, 267 U.S. 132 (1925).
32. *Id.* at 153.

probable cause of a crime in order to find evidence of that crime.[33] Aside from allowing a warrantless evidence search, prior to 1973, the Court had not yet determined the permissible scope of a warrantless search of an automobile and its occupants.

On December 11, 1973, the Supreme Court decided two cases which set the standards for the future of automobile search and seizure cases.[34] The first of these cases was *United States v. Robinson.*[35] In *Robinson*, the arresting officer executed a full search of the defendant's person after arresting him for driving without a valid driver's license.[36] During this search the officer felt an object in the defendant's left breast pocket which the officer knew was not a weapon, but which he could not identify.[37] Removing the object, the officer found that it was a crumpled up cigarette package.[38] Upon searching its contents, he found fourteen gelatin capsules containing heroin.[39] The Court held that when an officer has probable cause to arrest a motorist and has effected a full custodial arrest,[40] a permissible search of the defendant's person without a search warrant could include the inspection of packages found on a suspect's person as well as the seizure of items found within the packages even if the items found were not related to the reason for the initial stop.[41] The Court reasoned that there is a danger to a police officer when the officer makes an arrest.[42] The Court recognized that not only is there a need to preserve evidence discovered on the suspect's person, but also that there is a need to disarm the suspect to ensure the officer's safety.[43]

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33. *Id.; see* California v. Carney, 471 U.S. 386, 392-93 (1985) (opining that the warrant exception for automobiles is also applicable to a motor home because a motor home is readily mobile and because there is a reduced expectation of privacy due to the fact that it is subject to regulations inapplicable to dwellings).

34. *See* John K. Sutherland, *Searches of the Person Incident to Traffic Arrests: State and Federal Approaches*, 26 HASTINGS L.J. 536, 537 (1974) (stating that *Robinson* and *Gustafson* were the first cases in which the Supreme Court ruled on the permissible scope of a search of a person incident to arrest for a traffic violation).

35. 414 U.S. 218 (1973).

36. *Robinson*, 414 U.S. at 220-22.

37. *Id.* at 223.

38. *Id.*

39. *Id.*

40. A "full custody arrest" is an arrest in which an officer arrests a person and subsequently transports that person to a police facility for booking. *Id.* at 223 n.2.

41. *Id.* at 235-36; *see* United States v. Mota, 982 F.2d 1384, 1388 (9th Cir. 1993) (opining that because the custodial arrest of the defendants for a mere traffic infraction was invalid, the search of the defendants should not have been exempted from the warrant requirement of the Fourth Amendment as a search incident to arrest); United States v. Wallraff, 705 F.2d 980, 991 (8th Cir. 1983) (finding that because the arrest of the defendant, a suspected drug courier, in an airport by Drug Enforcement Administration agents was lawful, a search of the defendant's bag incident to his arrest was likewise valid); United States v. Polito, 583 F.2d 48, 57 (2d Cir. 1978) (holding that the apprehension of a parolee is a "custodial arrest" and evidence seized during the course of a search of the parolee is admissible).

42. *Robinson*, 414 U.S. at 234.

43. *Id.; see* Abel v. United States, 362 U.S. 217, 236 (1960) (holding that Immigration and Naturalization Service agents acted lawfully when they searched through the defendant's belongings in his hotel room looking for weapons and documents to evidence his "alienage" after making a valid administrative arrest). *But see* Agnello v. United States, 269 U.S. 20, 30-31 (1925) (determining that a search of the defendant's house, several blocks from

The traffic violation in *Robinson*, driving without a valid license, carried a mandatory jail term and fine in the District of Columbia.[44] Under these circumstances, the officer had no discretion whether to arrest the defendant; an arrest was mandatory.[45] Thus, the valid arrest based on probable cause gave the officer the right to execute a search incident to that arrest.[46]

The other automobile search and seizure case decided on December 11, 1973, was *Gustafson v. Florida*.[47] The facts and holding of *Gustafson* are essentially the same as *Robinson* with one difference. In *Gustafson*, the defendant was arrested for driving an automobile without a valid operator's permit in his possession.[48] Florida law gave the arresting officer the discretion whether to effect a full custodial arrest of, or simply to issue a ticket to, Gustafson.[49] The effect of the *Gustafson* holding is to allow police officers the right to search the entire person of an arrestee and the contents of any items found whenever it is within the officer's discretion to make a full custodial arrest.[50]

Six years after *Robinson* and *Gustafson*, the Supreme Court's decision in *Delaware v. Prouse*[51] seemed to reassure the country that the Fourth Amendment was still a viable protection for drivers against unreasonable searches and seizures.[52] In *Prouse*, the defendant was arrested for the possession of marijuana which was in plain view[53] of the arresting officer.[54] However, the officer testified that he had

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the site of the arrest, was not a search incident to the arrest).

44. *Robinson*, 414 U.S. at 220.

45. *Id.* at 221 n.1.

46. *Id.* at 224.

47. 414 U.S. 260 (1973).

48. *Gustafson*, 414 U.S. at 262.

49. *Id.* at 263.

50. *See* Sutherland, *supra* note 34, at 548 (asserting that the *Gustafson* Court "found affirmative authority to uphold searches limited only by the [police officer's] discretion").

51. 440 U.S. 648 (1979).

52. *See* Vicki G. Golden, *Search Incident to Arrest for Traffic Violation*, 12 AM. CRIM. L. REV. 401, 413-14 (1974) (asserting that *Robinson* and *Gustafson* purport to leave the exclusionary rule intact, but, in fact, deny the availability of the rule to all persons subject to a search incident to a custodial arrest); Sutherland, *supra* note 34, at 537 (suggesting that *Robinson* and *Gustafson* substantially diluted the protections which the Fourth Amendment is supposed to provide by authorizing "the police to conduct a 'no-holds-barred' search after any custodial arrest").

53. The Court has explained that the "plain view" doctrine authorizes seizure of illegal or evidentiary items when the officer is "lawfully located in a place from which the object can be plainly seen" and when the officer had a "lawful right of access to the object itself." Horton v. California, 496 U.S. 128, 137 (1990); *see id.* (holding that the Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view, even if the discovery of the evidence was not inadvertent). The Court reasoned that if an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. Arizona v. Hicks, 480 U.S. 321, 325 (1987) (finding that although a stereo was in plain view, the officer's actions in moving the stereo to locate its serial numbers constituted a search which had to be supported by probable cause since the serial numbers were not in plain view). In *Prouse*, the marijuana was sitting on the car floor which could be seen by the officer while standing outside the car. *Prouse*, 440 U.S. at 650.

54. *Prouse*, 440 U.S. at 650.

neither probable cause nor reasonable suspicion[55] to stop the vehicle, but that he stopped the vehicle in order to check the driver's license and registration.[56] The Court held that stopping a vehicle and detaining the driver in order to check the driver's license and registration, without reasonable suspicion that the driver is unlicensed or that the automobile is not registered, is unreasonable under the Fourth Amendment.[57] The Court explained that although the use of automobiles is heavily regulated, the use of an automobile does not open the door for unlimited government intrusion.[58] Further, the Court noted that there was no empirical evidence that making random stops in order to apprehend unlicensed drivers and unsafe vehicles would be an effective means of promoting roadway safety.[59] In addition, the Court stated that an individual does not lose all expectations of privacy simply by using an automobile which is subject to state regulation.[60]

Two years after *Prouse*, the Court gave more search power to arresting officers with *New York v. Belton*.[61] In *Belton*, the officer had probable cause to stop the defendant's vehicle because of the driver's excessive speed.[62] When the officer stopped the vehicle, he smelled marijuana emanating from the car's interior and found that none of the occupants owned the vehicle.[63] Once the officer had all of the occupants outside and away from the vehicle, he went back and searched the driver and passenger compartments.[64] During this search, the officer found cocaine in the pocket of the defendant's jacket which was in the back seat of the automobile.[65] The Court adopted a "bright line" rule[66] holding that when a police officer has made a lawful custodial arrest of the occupants of an automobile, the officer may search the passenger compartment of the vehicle and may also examine the contents of any

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55. "Reasonable suspicion" exists when an officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry v. Ohio, 392 U.S. 1, 30 (1968); *see* Sheri L. Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 216 (1983) (asserting that probable cause is a more demanding standard to meet than reasonable suspicion because the former reaches only completed or ongoing crimes, while the latter encompasses imminent criminal activity).

56. *Prouse*, 440 U.S. at 650.

57. *Id.* at 663.

58. *Id.* at 662-63.

59. *Id.* at 659. *But see* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that a highway sobriety checkpoint program did not violate the Fourth Amendment because the State's interest in preventing drunk driving, the extent to which the system can advance that interest, and the degree of intrusion upon individual motorists who were briefly stopped weighed in favor of the state program).

60. *Prouse*, 440 U.S. at 662.

61. 453 U.S. 454 (1981).

62. *Belton*, 453 U.S. at 455.

63. *Id.* at 455-56.

64. *Id.* at 456.

65. *Id.*

66. The Court noted that the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interests of law enforcement." *Id.* at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142).

container found within the passenger compartment.[67] The Court reasoned that a lawful custodial arrest justifies a contemporaneous warrantless search of the person and of the immediate surrounding area because of the need to remove any weapons that the arrestee might seek to use to resist arrest or effect escape, as well as to prevent the concealment or destruction of evidence.[68]

The holding of *Belton* seemed to contradict the holding of *Chimel v. California,*[69] which had been decided twelve years earlier.[70] In *Chimel,* the Court limited a search incident to an arrest to the defendant's person and the immediate area from which the defendant might obtain a weapon or tamper with evidence.[71] The contents of the driver and passenger compartments in a vehicle may consist of an area within a defendant's control under the *Chimel* test.[72] Because the defendant in *Belton* was outside the vehicle and no longer had access to the area within the car, the search in *Belton* should have been invalidated under *Chimel. Belton* evidenced the Court's willingness to allow broad discretion to police officers to conduct searches in automobile cases.[73]

After *Belton* was decided, a police officer had the right to search: (1) The person arrested; (2) any items found on the arrestee's person; (3) the entire passenger compartment of a vehicle once probable cause to arrest the occupants of that vehicle was established; and (4) closed containers, including luggage, found within the passenger compartment.[74] One issue that remained was what would give police the initial probable cause to stop a vehicle which may lead to such a search.

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67. *Belton,* 453 U.S. at 460-61; *see* California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that a police officer may conduct a warrantless search of a container found in an automobile even if the officer lacks the requisite probable cause to search the vehicle as a whole when the officer has probable cause to believe that the container itself is holding contraband or evidence).

68. *Belton,* 453 U.S. at 457 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

69. 395 U.S. 752 (1969).

70. *See* Steven M. Hartmann, *Search and Seizure,* 70 ILL. B.J. 722, 722 (1982) (asserting that "the *Belton* bright-line rule represents a departure from the underlying justifications for the *Chimel* exception to the search warrant requirement").

71. *Chimel,* 395 U.S. at 762-63.

72. *See* Hartmann, *supra* note 70, at 724 (suggesting that the lower courts must determine whether a container is within the arrestee's control).

73. *See* Deborah L. Fries, *Privacy Rights v. Law Enforcement Difficulties: The Clash of Competing Interests in* New York v. Belton, 59 DEN. U. L. REV. 793, 807 (1982) (arguing that *Belton* expands the scope of a search incident to arrest at the expense of privacy interests because under *Belton* any container within the driver and passenger compartment can be lawfully searched); Hartmann, *supra* note 70, at 724 (opining that *Belton* should have required that lower courts strictly adhere to the basic *Chimel* principles because the *Chimel* principles "would have focused the attention of lower courts and police officers on the exigencies which justify this search warrant exception").

74. *See supra* notes 35-46, 47-50, 61-68 and accompanying text (discussing the holdings of *Robinson, Gustafson,* and *Belton* respectively).

C. The Tests

Prior to *Whren*, there were two competing tests that courts used to determine whether a police officer had probable cause to stop a vehicle under the Fourth Amendment: the "would have" test and the "could have" test.[75]

1. The "Would Have" Test

Under the "would have" test, a stop was valid only if under the same circumstances a reasonable officer *would have* made the stop in the absence of any pretextual purpose.[76] For example, suppose a police officer was following a motorist, who the officer believed to be a drug dealer, and observed the motorist change lanes without signaling. Under the "would have" test, the inquiry is whether a reasonable officer would have stopped the motorist for changing lanes without signaling absent the desire to gain the opportunity to find evidence of drug-related activity. Courts that applied this test inquired not only into the legality of the stop, but also into its conformity with regular police practices.[77] These courts reasoned that the "would have" test provided useful judicial review of discretionary police actions and still preserved the requirement of an objective inquiry into Fourth Amendment activity.[78] By inquiring into what a "reasonable" officer would do, the test preserves the objective inquiry requirement of the Fourth Amendment.[79] In addition, by exploring what a reasonable officer *would* do, the test allows a standard which enables a court to detect any pretextual activity on the officer's part.[80] By the time *Whren* was decided, only the Ninth and Eleventh Circuits used the "would have" test.[81]

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75. *See* Andrew J. Pulliam, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 483 (1994) (characterizing the "substantial split of authority among the federal courts" regarding the "would have" and "could have" tests as reflecting "the confusion surrounding the issue of pretextual investigatory stops").

76. *See* United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994) (finding that a reasonable officer would have stopped the defendant for driving with a suspended license even without information about the defendant's drug trafficking); *cf.* United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986) (establishing that the fact that two men from out of state were driving in accordance with all traffic regulations and chose not to look at the state trooper in a marked police car did not give rise to reasonable suspicion of drug activity to warrant the trooper to stop the vehicle, and that a reasonable officer would not have stopped the men).

77. *Cannon*, 29 F.3d at 475.

78. *See* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (declaring that if officers rarely stop seat belt law violations without some other reason to stop a vehicle, lack of objective facts of commission of a more serious crime makes the stop unconstitutionally pretextual), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995).

79. *See Smith*, 799 F.2d at 710 (asserting that the "would have" test's focus on the objective reasonableness of a police officer, rather than on subjective intent or theoretical possibility, is fully consistent with Supreme Court precedent).

80. *Id.* at 708.

81. *See supra* note 76 (giving examples of Ninth and Eleventh Circuit decisions which used the "would have" test).

Although the "would have" test is arguably an objective one, when a court determines if the officer acted reasonably, the test steps into a subjective stance and looks to the officer's motives.[82] This subjective inquiry, arguably, goes against the language of the Fourth Amendment.[83] Courts believed that by suppressing any evidence seized after a lawful stop if a reasonable officer would not have made the stop,[84] the "would have" test avoided arbitrary police action and prevented abuse of discretion.[85] This test did not limit the "reasonableness" inquiry to whether the stop was made with an improper motive.[86] Thus, this test could lead to the suppression of evidence even when there was no pretextual motive.[87]

The Tenth Circuit recently abandoned the "would have" test after determining that its application had been "inconsistent and sporadic" and essentially unworkable.[88] The court explained that, in applying the "would have" test, the court, at times, had measured stops against the practices of the entire state's police force,[89] at other times against the practices of a particular unit,[90] and at other times against the practices of the individual officer that made the stop.[91]

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82. *See* United States v. Rusher, 966 F.2d 868, 886 n.1 (4th Cir. 1992) (Luttig, J., concurring in part and dissenting in part) (referring to the "would have" test as a "subjective" standard because the test invalidates "objectively reasonable law enforcement actions if . . . the law enforcement officer is deemed to have acted out of pretextual motives").

83. *See* Beck v. Ohio, 379 U.S. 89, 97 (1964) (suggesting that if an officer's subjective intent was the test, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police") (quoting the Fourth Amendment of the Constitution). *But see* New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987) (emphasizing that there was no reason to believe that the administrative search of the defendant's automobile junkyard was actually a pretext for obtaining evidence of the defendant's violation of New York penal laws).

84. *See Smith*, 799 F.2d at 712 (holding that the officer's justification of stopping the defendant based on a drug courier profile was unreasonable because a reasonable officer would not have made the stop, and, therefore, ordering the suppression of the cocaine found in the defendant's car following the unreasonable stop).

85. *See supra* notes 78-80 and accompanying text (explaining courts' reasons for using the "would have" test).

86. *See Rusher*, 966 F.2d at 888 (Luttig, J., concurring in part and dissenting in part) (explaining that under the "would have" test, even if an officer proved that the decision to stop a motorist was not pretextual, the officer must still show that other reasonable officers would have made the stop).

87. *Id.*

88. United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995) (overruling United States v. Guzman, 864 F.2d 1512 (10th Cir. 1988)).

89. *See Guzman*, 864 F.2d at 1518 (asserting that the district court did not have enough information about general police practices to apply the "would have" test).

90. *See* United States v. Fernandez, 18 F.3d 874, 877 (10th Cir. 1994) (asserting that evidence of the arresting officer's habit of making stops for violation of a window tinting law more often than his counterparts may show that a reasonable officer in the same circumstances would not have made the stop).

91. *See* United States v. Harris, 995 F.2d 1004, 1006 (10th Cir. 1993) (finding that the fact that an arresting officer routinely stopped vehicles for pulling away from the curb without signaling made the stop "business as usual").

2. *The "Could Have" Test*

Under the "could have" test, "an alleged pretextual stop is valid as long as the officer "could have" stopped the car in question because of a suspected traffic violation."[92] The majority of the circuits which use this test "simply ask (1) whether the arresting officer had probable cause to believe the defendant was committing a traffic offense and (2) whether municipal law authorizes a stop for such an offense."[93] This test was more widely accepted than the "would have" test at the time *Whren* was decided.[94] Courts which follow the "could have" test reason that if the stop was objectively legal, the excusionary rule[95] should not be used to suppress evidence since it was designed to deter unlawful police actions.[96]

The problem with the "could have" test is that it takes away some of the Fourth Amendment's protection.[97] The "could have" test allows arbitrary, discriminatory,

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92. Whren v. United States, 53 F.3d 371, 374 (D.C. Cir. 1995), *aff'd* 116 S. Ct. 1769 (1996); *see* United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir. 1994) (holding that the police officers were authorized to stop the defendant after observing the defendant change lanes without signaling which is a state traffic law violation), *cert. denied*, 115 S. Ct. 207 (1994); United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993) (determining that the police officers had probable cause to stop the defendant's vehicle after observing that the defendant failed to stop at an intersection), *cert. denied*, 114 S. Ct. 1374 (1994).

93. United States v. Cannon, 29 F.3d 472, 475 (9th Cir. 1994) (citation omitted).

94. *See, e.g.*, United States v. Smith, 80 F.3d 215, 218 (7th Cir. 1996) (finding that the arresting officers in three separate stops had probable cause to stop the defendants after observing violations of Illinois traffic regulations including changing lanes without signaling, driving with a cracked windshield and crossing over the white fog line on the shoulder of the highway, and driving with an air freshener hanging from the rear-view mirror); United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (holding that the inquiry for determining the reasonableness of a traffic stop is whether the "particular officer had reasonable suspicion that [the] particular motorist violated 'any one of the multitude of applicable traffic' . . . regulations of the jurisdiction") (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)); *Scopo*, 19 F.3d at 782-84 (holding that the police officers were authorized to stop the defendant after observing the defendant change lanes without signaling which is a state traffic law violation); United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993) (holding that the state trooper had a legitimate basis for stopping the defendant's van after observing the defendant change lanes without signaling, and that the stop was, therefore, reasonable); *Hassan El*, 5 F.3d at 730 (determining that the police officers had probable cause to stop the defendant's vehicle after observing that the defendant failed to stop at an intersection).

95. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (holding that to admit evidence illegally seized by federal officers would put a stamp of approval on their unconstitutional conduct); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in state court).

96. For instance, in *United States v. Causey*, the police executed a seven-year-old arrest warrant for the defendant's failure to appear in court on a misdemeanor charge in order to gain the opportunity for custodial interrogation of the defendant regarding a bank robbery for which the defendant was a suspect. United States v. Causey, 818 F.2d 354, 355-56, *rev'd en banc*, 834 F.2d 1179 (5th Cir. 1987). The Fifth Circuit held that because the arrest of the defendant was pretextual in order to obtain a confession, the deterrent rationale of the Fourth Amendment would not be served unless the confession was suppressed. *Id.* at 362.

97. *See* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (explaining that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents in order to safeguard the privacy and security of individuals against arbitrary invasions"); *see also* William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 553 (1984) (asserting that "[e]ven when the governmental interest at stake might otherwise justify a search or seizure, that search or seizure may be illegal if allowing it would confer

or abusive searches based on trivial violations.[98] In addition, unlike the "would have" test, the "could have" test does not protect motorists against pretextual stops.[99] Although the "could have" test can be better justified under the Fourth Amendment than the "would have" test because of the "could have" test's purely objective inquiry, the "could have" test destroys the same part of the Constitution that gives it life with its low standard for "reasonableness."[100] However, the debate between the circuits regarding the "would have" and "could have" tests was settled on June 10, 1996, when the United States Supreme Court decided *Whren v. United States*.[101]

III. *WHREN V. UNITED STATES*

A. *The Facts*

On the evening of June 10, 1993, plainclothes vice squad officers Efrain Soto, Jr., and Homer Littlejohn, and Investigator Tony Howard, members of the District of Columbia Metropolitan Police Department, were patrolling a high drug activity area of the city in an unmarked car.[102] The officers spotted a dark Nissan Pathfinder with two young African-American males inside.[103] The Pathfinder was stopped at a stop sign for what seemed an unusually long time, more than twenty seconds, and was obstructing the traffic behind it.[104] Officer Soto observed the driver, Brown, looking down at the lap of the passenger, Whren.[105] As the officers made a U-turn in order to follow the truck, the Pathfinder made a right turn without signaling and sped off at an unreasonable speed.[106]

The officers pulled along side the Pathfinder when it stopped at a red light.[107] Officer Soto identified himself as a police officer as he approached the driver's side

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too broad a discretionary authority on the police").

98. *See* United States v. Causey, 834 F.2d 1179, 1188-89 (5th Cir. 1987) (en banc) (Rubin, J., dissenting) (suggesting that the "could have" test makes a whole more than a sum of its parts, meaning that the police combine insufficient constitutional bases to produce a constitutionally acceptable arrest, such as an arbitrary execution of a warrant added to a suspicion that does not amount to probable cause).

99. *See* United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir. 1991) (recognizing that under the "could have" test, the chance that a court would discover pretextual seizures was virtually eliminated); *supra* note 6 (explaining the "pretext issue").

100. *See* Pulliam, *supra* note 75, at 526-29 (suggesting that a solution to the "would have"/"could have" test debate is a new test which encompasses both tests and would: (1) Preserve the pretext doctrine, (2) permit a court to differentiate between legal and fabricated pretexts, (3) require limited judicial resources, (4) allow police departments to easily understand and apply the test, and (5) permit application of the good faith doctrine).

101. 116 S. Ct. 1769 (1996).

102. United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 1769 (1996).

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

104. *Whren*, 53 F.2d at 372.

105. *Id.*

106. *Id.*

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

of the Pathfinder and directed the driver, Brown, to put the vehicle in park.[108] When Officer Soto reached the driver's side window, he observed the passenger, Whren, holding two plastic bags of what appeared to be crack cocaine.[109] Soto yelled "C.S.A." to notify the other officers that he had observed a Controlled Substance Act violation.[110] As Soto reached for the driver's side door, he heard Whren yell "pull off, pull off," and observed Whren pull the cover off of a power window control panel and put one of the bags inside a secret compartment.[111] Officer Soto then opened the door, dove across Brown, and grabbed the other bag from Whren's hand.[112] Officer Littlejohn pinned Brown to the back of the driver's seat so that Brown could not move.[113]

After arresting Brown and Whren, the officers searched the Pathfinder at the scene.[114] The officers recovered marijuana laced with PCP, a bag of crack cocaine, and a large white rock of crack cocaine from the hidden compartment on the passenger side door.[115] The officers also seized numerous unused zip-lock bags, a portable phone, and personal papers.[116]

Brown and Whren were charged with violating various drug laws in a four-count indictment.[117] At trial, Whren argued that, at the time of the stop, the officers did not have probable cause, or even a reasonable suspicion, that the defendants were engaged in illegal drug-dealing activity.[118] Whren asserted that the officers' reasons for stopping the vehicle were pretextual and were based on the fact that Brown and Whren are African-Americans.[119]

Officer Soto testified that his reason for stopping the Pathfinder was that the driver was "not paying full time and attention to his driving."[120] Soto also testified that he did not intend to issue a ticket to the driver for stopping too long at the stop sign, but that he wished to inquire why the driver was obstructing traffic and why he sped off without signaling in a school area.[121] Soto stated that the decision to stop the

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108. *Id.*
109. *Id.*
110. *Whren*, 53 F.3d at 373.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. The four count indictment consisted of: (1) Possession with the intent to distribute 50 grams or more of cocaine base, or crack, in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(A)(iii); (2) possession with the intent to distribute cocaine base within 1000 feet of a school in violation of 21 U.S.C. § 860(a); (3) possession of a controlled substance (marijuana) in violation of 21 U.S.C. § 844(a); and (4) possession of a controlled substance (phencyclidine ("PCP")) in violation of 21 U.S.C. § 844 (a). *Id.* at 372.
118. *Id.* at 373.
119. *Id.*
120. *Id.*
121. *Id.*

defendants' Pathfinder was not based on the "racial profile"[122] of the occupants, but rather on the actions of the driver.[123]

B. The District Court

Despite Whren's arguments that the traffic stop was pretextual, the district court denied Whren's motion to suppress the physical evidence.[124] At this time, the D.C. Circuit had already adopted the "could have" test.[125] In *United States v. Mitchell*, the D.C. Circuit determined that the Fourth Amendment did not preclude the police from "stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense [was] a minor one."[126] The *Mitchell* court explained that in determining the legitimacy of police conduct under the Fourth Amendment, a court must look to objective circumstances rather than to an officer's state of mind.[127] Following these standards, the district court in *Whren* concluded that "the government [had] demonstrated through the evidence presented that the police conduct was appropriate and, therefore, there [was] no basis to suppress the evidence."[128] The district court noted that there was nothing to demonstrate that the actions of the officers were contrary to a normal traffic stop.[129] After trial, Whren was convicted on all four counts of his indictment.[130]

C. The Court of Appeals

On appeal, Whren argued that the district court erred in denying his motion to suppress the physical evidence under the Fourth Amendment.[131] Specifically, Whren contended that even if an objective circumstances test was used [*i.e.*, the "could

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122. A "racial profile" stop is a stop in which a police officer chooses to stop a vehicle based on the race of the vehicle's occupants in order to search for drugs since race has been used as a factor in drug courier profiles. *See* Brief for Appellant at 27-28, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841) [hereinafter Appellant's Brief].

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

124. *Id.*

125. *See* United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991) (holding that after the police officer observed the defendant turn without signaling and speeding, the officer had probable cause to stop the motorist even though the officer had not decided whether to cite the defendant for the violations).

126. *Id.* at 1295.

127. *Id.* (citing United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983)); *see id.* (upholding the stop of a boat for registration inspection even though the arresting officers intended to search for drugs); *see also* Scott v. United States, 436 U.S. 128, 138 (1978) (determining that an officer's intent does not invalidate a search as long as the objective circumstances justify that action).

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

129. *Id.*

130. For the four counts, Whren received a 30-year prison sentence and 17 years of supervised release. *Id.* Whren was also fined $8800 for each count, and was charged a special assessment of $150. *Id.*

131. *Id.* at 374-76.

have" test], the stop was not justified because "its intrusiveness far outweighed any legitimate governmental interest in acting contrary to established police practices."[132]

Whren urged the court to adopt the "would have" test used by the Ninth and Eleventh Circuits.[133] The court, instead, applied the "could have" test.[134] Relying on D.C. Circuit precedent, the court reasoned that under the Fourth Amendment, once a police officer witnesses or suspects a violation of traffic laws, even if the offense is a minor one, the officer may stop and question the motorist.[135] Under the court's analysis, "witnessing" or "suspecting" a violation provided the probable cause or reasonable suspicion required by the Fourth Amendment to stop Whren's vehicle.[136]

The court further justified the "could have" test by asserting that it provides a more principled way for determining the reasonableness of a stop.[137] The court cited two reasons for this assertion. First, the "could have" test eliminates the necessity of inquiring into an officer's subjective state of mind.[138] This follows the Supreme Court's holding that Fourth Amendment inquiries depend "on an objective assessment of the officers' actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind."[139] Second, the test limits abuse of power by the police because the police cannot stop a vehicle "unless they have probable cause to believe a traffic violation has occurred or a reasonable suspicion of unlawful conduct based upon articulable facts."[140]

The court commented that the duties of the officer as assigned by the police department are irrelevant as long as there is an objective legal basis to make the stop.[141] Thus, it was irrelevant that Officers Soto and Littlejohn were undercover vice squad officers who were not assigned the duty to cite motorists for traffic violations.[142] When the officers observed the defendant's violation of traffic laws, "they,

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132. Whren argued that because the officers acted contrary to police procedure, stopped the defendants in an unmarked car, were undercover agents, and only stopped the defendants for not paying full time and attention to the road, the intrusiveness of the stop outweighed any legitimate governmental interest in making the stop. Appellant's Brief, *supra* note 122, at 37.

133. *Whren*, 53 F.3d at 374; *see supra* notes 76-81 and accompanying text (developing the theory behind the "would have" test and discussing cases from these circuits).

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

135. *Id.; see* United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991) (asserting that "[t]he Fourth Amendment does not bar the police from stopping and questioning motorists when [the officers] witness or suspect a violation of traffic laws, even if the offense is a minor one"); United States v. Montgomery, 561 F.2d 875, 880 (D.C. Cir. 1977) (explaining that "[e]ven a relatively minor offense that would not itself lead to an arrest can provide a basis for a stop for questioning and inspection of [a] driver's permit and registration").

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

137. *Id.* at 375.

138. *Id.*

139. *Id.* (quoting Maryland v. Macon, 472 U.S. 463, 470-71 (1985)). In *Maryland v. Macon*, the Court held that the police "officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the [bookstore] did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment." *Macon*, 472 U.S. at 469.

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

141. *Id.*

142. *Id.*

as officers of the law, were constitutionally justified in stopping the appellants."[143] The court concluded that the district court properly denied Whren's motions to suppress the evidence.[144]

D. The Supreme Court

1. Whren's Arguments

Whren presented several arguments to the Supreme Court, all centering around the contention that the stop in question was unreasonable and, therefore, in violation of his Fourth Amendment rights.[145] Whren first argued that by allowing a mere observation of any technical traffic violation to justify a pretextual traffic stop, the "could have" test failed to prevent arbitrary and unreasonable seizures because with the existence of hundreds of minor traffic regulations the police possess exceedingly broad discretion to stop a motorist.[146] Whren contended that, in this context, the "reasonableness" of a stop "requires more than the 'minimum' of individualized suspicion of a [traffic] 'violation.'"[147] In addition, Whren argued that "the ["could have"] test applied by the D.C. Circuit . . . subjects motorists 'to unfettered governmental intrusion every time [they] enter[] an automobile.'"[148]

In support of this argument, Whren stated that "[t]he essential purpose of the proscriptions in the Fourth Amendment was to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"[149] In addition, Whren argued that allowing the police to stop a motorist after observing a violation of a minor traffic regulation could lead to unrestrained authority to seize motorists.[150] Whren explained that because there are so many traffic regulations, the police could always allege a breach of a minor civil traffic regulation.[151] Further, Whren maintained that it is so unusual to drive in accordance with all traffic regulations that some police officers consider it suspicious and have attempted to use driving in accordance with all traffic regulations as a factor in a "drug courier profile."[152] Whren predicted that the police would abuse this almost

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143. *Id.*
144. *Id.*
145. Appellant's Brief, *supra* note 122, at 14-49.
146. *Id.* at 15-29.
147. *Id.* at 17.
148. *Id.* at 17-18 (quoting Delaware v. Prouse, 440 U.S. 648, 663 (1979)).
149. Appellant's Brief, *supra* note 122, at 15 (quoting Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)).
150. *Id.* at 17.
151. *Id.*
152. *Id.* at 19. A "drug courier profile" is a set of factors which a police officer relies on to evidence a drug courier, *e.g.*, age, time of travel, overly cautious, etc. *See* United States v. Smith, 799 F.2d 704, 707 (11th Cir. 1986) (finding that the state trooper's reliance on a drug courier profile to stop a vehicle did not justify stopping the vehicle because the factors relied upon would likely apply to many of those traveling for perfectly legitimate

limitless discretion and harass minorities under the "could have" test by stopping minorities whenever an officer observes a minor traffic violation, even though that officer has no reasonable suspicion of any criminal activity on the motorist's part.[153]

Whren reasserted his claim that a seizure based on a minor traffic infraction is unreasonable if a reasonable officer in the same circumstances *would* not have made the stop.[154] He contended that the "would have" test falls within the objective inquiry standard of the Fourth Amendment, and explained that the test looks at "the objective circumstances through the eyes of a 'reasonable officer,' not at the subjective state of mind of the particular officer who made the stop."[155]

In support of his argument that a deviation from standard police practices is unreasonable, Whren cited prior Supreme Court cases which stated that "[i]t is the fact of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is [this] arbitrariness which . . . constitutes the Fourth Amendment violation."[156] Whren explained that controlling arbitrary police conduct lies in limiting police discretion, which entails a determination that police action taken against one individual corresponds to action taken against another similarly situated individual.[157] Further, such a determination becomes more meaningful if there are preexisting police regulations on the subject to establish standards by which a court could measure the reasonableness of the officer's conduct.[158]

Finally, Whren argued that the Court should impose a balancing test to show that the intrusiveness of the stop in question far outweighs any legitimate governmental interest in acting contrary to established police procedure.[159] Whren relied on *Delaware v. Prouse*[160] to support his proposed balancing test.[161] *Prouse* clarified that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion

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purposes).

153. Appellant's Brief, *supra* note 122, at 22-28.

154. *Id.* at 30.

155. *Id.* at 32.

156. *Id.; see* United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (rejecting the defendant's argument that customs officers could not rely on a statute allowing suspicionless boarding to inspect a vessel's documentation because they were accompanied by state police and were following a tip that a vessel in the area was carrying drugs); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (opining that the officer's placing the defendant in custody after an arrest for operating a motor vehicle after the revocation of his license was not a departure from established police department practices because the offense carried a mandatory fine and/or imprisonment); Abel v. United States, 362 U.S. 217, 226 (1960) (finding that the use of an administrative warrant for the purpose of gathering evidence in a criminal case is a violation of the Fourth Amendment because "[t]he preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States").

157. Appellant's Brief, *supra* note 122, at 36.

158. *Id.*

159. *Id.* at 37.

160. 440 U.S. 648 (1979); *see supra* notes 51-60 and accompanying text (discussing the *Prouse* case).

161. Appellant's Brief, *supra* note 122, at 37.

of legitimate governmental interests."[162] According to Whren, such a balancing test in this case would show that the government's interest in allowing plainclothes police officers in unmarked police cars to investigate minor traffic violations would be outweighed by the anxiety of an individual being stopped by a plainclothes police officer.[163]

2. *The Government's Arguments*

The Government asserted that the Fourth Amendment permits a police officer who witnesses a traffic violation to stop the motorist's vehicle.[164] The Government argued that any inquiry into whether a stop was pretextual is "inherently an inquiry into [the officer's] subjective intent."[165] According to the Government, an inquiry into the subjective intent of an officer is irrelevant in Fourth Amendment analyses.[166]

The Government also contended that there is no requirement that an officer's actions must conform to internal police practices when an action is otherwise valid under the Fourth Amendment.[167] A "usual practices" standard "would generally be simply . . . an aggregation of the subjective intentions of officers in the regions [of the nation]."[168] Such a standard would result in arbitrary police action because different departments and jurisdictions would have different practices.[169] Therefore, a stop for a particular violation would be constitutional when carried out by an officer in a police department whose regular procedure was to enforce all observed traffic violations.[170] However, a similar stop when carried out in an identical fashion by an officer in an adjoining jurisdiction whose police department had more specific enforcement priorities might be unconstitutional.[171]

The Government claimed that there was no need for a heightened Fourth Amendment standard of justification in cases involving traffic stops.[172] According to the Government, because automobiles are subject to such extensive regulation, an

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162. *Id.* at 654; *see supra* note 59 (discussing the case of *Michigan Department of State Police v. Sitz* and how the Court applied a balancing test to uphold a state's sobriety checkpoint).

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

164. Brief for Respondent, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841) [hereinafter Respondent's Brief].

165. *Id.* at 15.

166. *Id.* at 13-14; *see* Horton v. California, 496 U.S. 128, 138 (1990) (asserting that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer"); Graham v. Connor, 490 U.S. 386, 397-99 (1989) (verifying that the Fourth Amendment inquiry is one of objective reasonableness under the circumstances, and subjective concepts have no place in that inquiry).

167. Respondent's Brief, *supra* note 164, at 16-25.

168. *Id.* at 22 (quoting United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 207 (1994)).

169. Respondent's Brief, *supra* note 164, at 23.

170. *Id.*

171. *Id.*

172. *Id.* at 25-27.

operator of a motor vehicle must expect that the state will intrude, to some extent, on that operator's privacy.[173] The Government further contended that "a motorist who commits a traffic infraction has even less of an expectation of privacy."[174] The Government explained that motorists know that police stop and examine vehicles without current registration stickers or if safety equipment is not properly working.[175] Therefore, if motorists violate traffic regulations, they must know that they are subject to being stopped by the police.[176]

The Government asserted that the "would have" test was unworkable because it "[was] difficult to apply, produce[d] inconsistent results, and provide[d] uncertain guidance to officers in the field."[177] The necessity of looking at usual police practices under the "would have" test is cumbersome and produces different results depending on the jurisdiction in which a stop was made.[178] In addition, the need for police officers to make split second decisions would be hindered due to confusion which would be caused by the officer's need to determine whether another officer "would have" stopped a vehicle based on the objective circumstances as analyzed by the officer present.[179]

Finally, the Government asserted that the stop in *Whren* was lawful and the search reasonably limited in scope and manner because the officers had observed the driver of the Pathfinder commit several traffic offenses which gave them the necessary probable cause to make the stop.[180] Further, the scope of the search was reasonably limited because Officer Soto remained outside of the Pathfinder until he saw the cocaine in Whren's hands, which justified Officer Soto's entry into the vehicle to retrieve the cocaine and apprehend the defendants.[181]

3. *The Decision of the Supreme Court*

The Supreme Court's unanimous decision in *Whren* began by explaining that an automobile stop constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment, and, therefore, the stop must not be "unreasonable" under the circumstances.[182] The Court set forth the standard, which essentially is the "could

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173. *Id.* at 26; *see* New York v. Class, 475 U.S. 106, 113 (1986) (holding that the defendant had no reasonable expectation of privacy in his vehicle identification number); South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (clarifying that police officers stop and examine vehicles as an everyday occurrence, and therefore, motorists understand that they may be stopped).

174. Respondent's Brief, *supra* note 164, at 26 (quoting *Class*, 475 U.S. at 113).

175. *Id.*

176. *See id.*

177. *Id.* at 30.

178. *Id.* at 31-32.

179. *Id.*

180. *Id.* at 39.

181. *Id.* at 41.

182. Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

have" test, that a "decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[183]

The Court then rejected Whren's contention that the Supreme Court's past cases supported the "would have" test.[184] According to Whren, past cases which involved inventory searches[185] and administrative inspections[186] showed that the Court "disapprov[ed] of police attempts to use valid [constitutional] action against citizens as pretexts for pursuing other investigatory agendas."[187] The Court, however, interpreted the cases relied on by Whren to show that the inventory search and administrative inspection exceptions to the warrant requirement were only accorded to searches that were made for administrative or inventory purposes.[188] The Court went on to say that outside the context of inventory searches and administrative inspections, its past cases have held that an officer's subjective motivations are irrelevant under the Fourth Amendment.[189]

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183. *Id.; see* Delaware v. Prouse, 440 U.S. 648, 659 (1979) (determining that the "foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations"); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (finding that the police officer's decision to stop the defendant's vehicle for driving an automobile with expired license tags was reasonable).

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

185. *See id.* at 1773 n.1 (explaining that an "inventory search" is the search of property lawfully seized and detained, in order to ensure that it is harmless, to secure valuable items, and to protect against false claims of loss or damage); *see also* Florida v. Wells, 495 U.S. 1, 4 (1990) (delineating that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); Colorado v. Bertine, 479 U.S. 367, 372 (1987) (holding that in absence of a showing of bad faith, evidence discovered during an inventory search of the defendant's van was admissible).

186. *See Whren*, 116 S. Ct. at 1773 n.2 (defining an "administrative inspection" as the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme); *see also* New York v. Burger, 482 U.S. 691, 702 (1987) (setting forth the three criteria which must be met before a warrantless administrative search will be deemed "reasonable": (1) "[A] 'substantial' governmental interest that informs the regulatory scheme pursuant to which the inspection is made," (2) "the warrantless inspection must be 'necessary to further [the] regulatory scheme,'" and (3) "'the statute's inspection program . . . [must] provide[] a constitutionally adequate substitute for a warrant'") (last two changes in original) (quoting Donovan v. Dewey, 452 U.S. 594, 600, 603 (1981)); Camara v. Municipal Court (San Francisco), 387 U.S. 523, 538 (1967) (holding that warrants for housing inspections could be issued without the traditional quantum of case-by-case probable cause if appropriate legislative or administrative standards for area or periodic inspections were met). This case established that the Constitution imposed a lower requirement for administrative searches than it did for searches in the course of a criminal investigation. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 47, at 98-100 (1995).

187. *Whren*, 116 S. Ct. at 1773; *see* Florida v. Wells, 495 U.S. 1, 4 (1990) (delineating that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"); *Burger*, 482 U.S. at 716-17 n.27 (finding that "the New York Legislature had proper regulatory purposes for enacting the administrative scheme at issue and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations").

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

189. *Id.* at 1774. In *United States v. Villamonte-Marquez*, the Court held that customs officers could rely on a statute allowing suspicionless boarding to inspect a vessel's documentation even though they were accompanied by state police and were following a tip that a vessel in the area was carrying drugs. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983); *see* Scott v. United States, 436 U.S. 128, 138 (1978) (noting that as long as the objective circumstances justify the officer's action, the fact that the officer did not have the state of mind which was hypothecated by the reasons which provide the legal justification for the officer's action did not

The Court also disagreed with Whren that the "would have" test is an "objective" one.[190] The Court suggested that the "would have" test asks whether "it is plausible to believe that the officer had the proper state of mind" for making the stop.[191] The Court reasoned that the purpose of the "would have" test is to prevent pretextual police activity and is, thus, "plainly and indisputably driven by subjective considerations."[192] In addition, the test would necessitate that courts look to police manuals and standard procedures which would reduce issues to "speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[193] The Court agreed with the Government that the differing police practices from jurisdiction to jurisdiction would cause the protections of the Fourth Amendment to vary beyond an acceptable limit because different practices and standards would bring different definitions of "reasonableness."[194]

The Court further disagreed with Whren that a balancing test should be employed in this case.[195] The Court stated that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations,"[196] and that observing such a violation gives an officer probable cause to stop a vehicle.[197] The only cases in which the Court has found it necessary to perform a balancing test involving searches and seizures based on probable cause are when the searches or seizures have been "conducted in an extraordinary manner, unusually harmful to the individual's privacy or . . . physical interests."[198] The Court concluded that "[t]he making of a traffic stop out-of-uniform does not qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken [always] 'outbalances' private interest in avoiding police contact."[199]

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invalidate the action); United States v. Robinson, 414 U.S. 218, 236 (1973) (indicating that it is the custodial arrest which gives rise to the authority to search and that it is therefore irrelevant that the arresting officer did not show any subjective fear of the defendant or that he did not suspect that the defendant was armed).

190. *Whren*, 116 S. Ct. at 1774-75.

191. *Id.* at 1774.

192. *Id.*

193. *Id.* at 1775.

194. *Id.*

195. *Id.* at 1776-77.

196. *Id.* at 1776 (quoting Delaware v. Prouse, 440 U.S. 648, 659 (1979)).

197. *Id.* at 1772.

198. *Id.* at 1776; *see* Wilson v. Arkansas, 115 S. Ct. 1914, 1919 (1995) (promulgating that although a search or seizure of a dwelling might be unreasonable if police officers enter without prior announcement, law enforcement interests, such as the preservation of evidence, may establish the reasonableness of an unannounced entry); Tennessee v. Garner, 471 U.S. 1, 11 (1985) (using a balancing test to determine that a seizure by deadly force against fleeing suspects is constitutionally unreasonable); Winston v. Lee, 470 U.S. 753, 766 (1985) (holding that a physical penetration of the body to recover a bullet from the defendant's chest was unreasonable under the Fourth Amendment because the surgery required the defendant to be put under general anesthesia, the medical risks were in dispute, and there was no need to recover the bullet in light of other available evidence); Welsh v. Wisconsin, 466 U.S. 740, 750 (1984) (mandating that "before agents of the government may invade the sanctity of the home [without a warrant], the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries").

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

The Court also addressed Whren's argument that because the use of automobiles is so extensively regulated the police are able to single out almost anyone that they wish to stop since it is virtually impossible for someone to observe all the traffic laws.[200] The Court commented that it is "aware of no principle that would allow [it] 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."[201]

The Court did not address the issue that a purely objective test for determining the reasonableness of a search and/or seizure may open the door for police to stop vehicles based on the race of its occupants.[202] According to the Court, "the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause,[203] not the Fourth Amendment."[204]

Although the Court never expressly adopted the "could have" test, it concluded that "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."[205] Therefore, the Court upheld the defendants' convictions by the district court.[206]

IV. LEGAL RAMIFICATIONS OF THE *WHREN* DECISION

The Constitution of the United States was written over two hundred years ago. The *Whren* decision may be evidence that the Framers could not plan for all modern circumstances. Although the Bill of Rights, and later the Fourteenth Amendment, were adopted in order to protect individuals' rights from government infringement, the holding of *Whren* continues the stripping away of the constitutional protections of individuals when they are in their automobiles.

A. No More Fourth Amendment Protection

That *Whren* strips away constitutional protection for people while in their automobiles is evident from the Court's holding which takes away from a driver any meaningful Fourth Amendment claim of unreasonable seizure when the driver has done something as minor as changing lanes without signaling.[207] According to

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200. *Id.*

201. *Id.*

202. *Id.* at 1774; *see supra* note 153 and accompanying text (setting forth Whren's argument that the "could have" test may be used by the police to harass minorities).

203. *See* U.S. CONST. amend. XIV, § 1 ("... No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.").

204. *Whren*, 116 S. Ct. at 1774; *see infra* Part IV.C. (discussing how an equal protection claim might be an inadequate avenue in traffic stop cases).

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

206. *Id.*

207. *See id.* at 1777 (holding that when the police officers observed the defendant violate the traffic code, the officers had probable cause to stop the vehicle).

Whren, even an arbitrary decision to stop the vehicle based on a minor traffic violation gives the officer probable cause to stop the vehicle.[208]

Such broad discretion awarded to the police opens the door for abuse and sends the police the message that pretextual stops can be constitutional. For instance, assume an officer believes that a motorist is engaged in drug dealing, but that the officer's "belief" does not satisfy the probable cause or reasonable suspicion requirements. The officer then follows the motorist and observes the motorist changing lanes without signaling, a city traffic law violation. The officer then has probable cause to stop the motorist.[209] Once the vehicle is stopped, the officer can then look through the windows of the vehicle in order to spot evidence of illegal activity,[210] speak to the occupants to gain reasonable suspicion of illegal activity, or look to state law for the authority to make an arrest.[211] If one of these elements is satisfied, the officer can place the occupants under arrest and search the occupants as well as the passenger compartment and any packages within the automobile.[212] Thus, after making a valid "*Whren* stop,"[213] the *Whren* decision and its precedent allow the police to turn a simple traffic stop into a search of the car and its occupants.[214]

According to *Whren*, the police officer in the hypothetical above did not violate the occupants' constitutional rights. The officer had probable cause to stop the vehicle and did not engage in a search until he had probable cause or a reasonable suspicion of a crime that would allow him to arrest the occupants. Once the officer has legally arrested the occupants, then the officer may engage in a warrantless search of the occupants, the driver and passenger compartments, and any containers found within the car.

Prior to *Whren*, the defendants would at the minimum have an argument that the stop was unreasonable,[215] and, therefore, the subsequent fruits of the search should

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208. *Id.*

209. *Id.*

210. *See supra* note 53 and accompanying text (discussing how officers may seize evidence which is in plain view).

211. *See supra* notes 47-50 and accompanying text (explaining the holding of *Gustafson v. Florida* which allows officers to conduct a warrantless search of a motorist incident to arrest whenever it is within the officer's discretion to arrest the motorist based on state law).

212. *See supra* notes 61-68 and accompanying text (discussing the holding and effects of *New York v. Belton*).

213. "*Whren* stop" is used here to describe a stop in which a police officer detains a motorist for violating a minor traffic regulation in order to conduct an inquiry into possible criminal activity for which the officer has no probable cause or reasonable suspicion.

214. *See supra* Part II.B. (developing the line of cases which led to the *Whren* decision). The occupants may be searched when a police officer has probable cause to believe that the occupants are involved in illegal activity. *See, e.g.*, New York v. Belton, 453 U.S. 454, 455-56 (1981) (finding that the arresting officer smelled burnt marijuana and had seen an envelope marked "Supergold" which the officer associated with marijuana and, thereafter, placed the occupants of the vehicle under arrest for unlawful possession of marijuana).

215. For example, a motorist may have argued that the stop was pretextual. *See* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (declaring that if officers rarely stop seat belt law violations without some other reason to stop a vehicle, the lack of objective facts as to the commission of a more serious crime makes the stop unconstitutionally pretextual), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995).

be inadmissible.[216] However, the holding of *Whren* eliminates this argument. If a plain clothed police officer stops a motorist for changing lanes without signaling in order to investigate the officer's feeling that the motorist is involved in illegal drug activity, the motorist cannot claim that the initial stop was unconstitutional because *Whren* allows stops to be made whenever a police officer observes a minor traffic violation. If there is no valid argument that the initial seizure was unreasonable, as long as the subsequent search was lawful, the motorist cannot argue that the "fruits" of the search should be inadmissible. The subsequent search may be lawful if the items seized were in plain view,[217] if the search was conducted incident to arrest for a traffic violation,[218] or if the officer gained probable cause or reasonable suspicion of criminal activity during the course of the stop and effected a search incident to arrest.[219]

B. Whren*'s Conformance to Precedent*

Despite the seemingly controversial holding in *Whren*, the case can be supported by prior cases of the United States Supreme Court. Examining the automobile Fourth Amendment cases dating back to *United States v. Robinson*[220] reveals the Court's desire to allow broad discretion for police officers in traffic situations.[221] Although some of the automobile cases arguably may not follow general Fourth Amendment

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216. *See* Nardone v. United States, 308 U.S. 338, 341 (1939) (establishing the "fruit of the poisonous tree" doctrine to describe inadmissible evidence which is discovered following unlawful police activity such as an illegal search); *see also* Brown v. Illinois, 422 U.S. 590, 609 (1975) (Powell, J., concurring) (describing the doctrine of "attenuation" as "attempt[ing] to mark the point at which the detrimental consequences of illegal police action becomes so [diminished] that the deterrent effect of the exclusionary rule no longer justifies its cost"); Wong Sun v. United States, 371 U.S. 471, 487 (1963) (declining to "hold that all evidence is the 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police"); *id.* at 487-88 (proposing that the exclusionary rule also has no application when "the Government learned of the evidence from an independent source"); *Nardone*, 308 U.S. at 341 (establishing the doctrine of "attenuation" as an exception to the "poisonous tree" doctrine).

217. *See supra* note 53 and accompanying text (describing how officers may seize evidence which is in plain view).

218. *See supra* Part II.B. (discussing the line of Supreme Court cases which established the automobile exception to the warrant requirement of the Fourth Amendment).

219. *See, e.g., Belton*, 453 U.S. at 455-56 (finding that the arresting officer, after smelling marijuana upon approaching the vehicle, had probable cause to arrest the vehicle's occupants for possession of a controlled substance, and could thus effect a search of the driver and passenger compartments of the car as well as any containers found therein when the officer's purpose for stopping the vehicle was for speeding).

220. 414 U.S. 218 (1973).

221. *See supra* Part II.A. (discussing the United States Supreme Court cases that led to *Whren*); *see also* Tracey Maclin, New York v. Class*: A Little-Noticed Case with Disturbing Implications*, 78 J. CRIM. L. & CRIMINOLOGY 1, 3 (1987) (asserting that in the context of routine traffic stops, the Court is willing "to grant police the unfettered discretion to search [an] . . . automobile where it is necessary to expedite law enforcement and administrative functions, even if the police lack any objective justification for such an intrusion").

precedent,[222] the special problems posed by automobile cases can justify many of the differences.[223]

Whren helps define the standard by which a police officer may lawfully stop a vehicle.[224] The Court supported its decision to adopt the "could have" test not only with policy arguments,[225] but also based on its past cases.[226] The Court analyzed the Fourth Amendment's reasonableness inquiry as it had in the past and determined that "the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred."[227] The Court also looked to past cases for support that subjective intent alone does not invalidate otherwise lawful conduct.[228] In addition, the Court used precedent in reasoning that an action by a police officer will not be invalidated as long as the objective circumstances justify the officer's action.[229] Between the precedent that established these standards and the fact that the "reasonableness" standard embodied in the Fourth Amendment is inherently an objective standard, unsurprisingly the Court chose to adopt the "could have" test and eliminate the pretext issue with regard to automobile stops.[230]

A few cases have arguably used a subjective standard to determine the reasonableness of a Fourth Amendment search or seizure.[231] However, it appears that these

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222. *See supra* notes 69-73 and accompanying text (analyzing the discrepancies between *New York v. Belton* and *Chimel v. California*).

223. *See* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (determining that one has a lesser expectation of privacy in an automobile because it is used for transportation and it is seldom used as one's residence or a place to deposit one's personal effects); Chambers v. Maroney, 399 U.S. 42, 51 (1970) (finding that the opportunity to search an automobile is fleeting since the automobile is readily moveable); Carroll v. United States, 267 U.S. 132, 151 (1925) (recognizing that a difference between a search of a dwelling house, store, or other structure and an automobile is that the automobile can be quickly moved).

224. *See supra* Part II.C. (describing the "would have" and "could have" tests and the surrounding debate); *supra* Part III.D.3 (discussing how the Court in *Whren* expressly rejected the "would have" test).

225. *See supra* notes 193-94, 200-201 and accompanying text (addressing the Supreme Court's policy arguments in support of the "could have" test as including the ease of police in following the "could have" test and that there is no need to distinguish among varying police practices in different jurisdictions with the "could have" test).

226. Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

227. *Id.; see* Delaware v. Prouse, 440 U.S. 648, 659 (1979) (determining that the "foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations"); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (finding that the police officer's decision to stop the defendant's vehicle for driving an automobile with expired license tags was reasonable). *But see supra* note 4 (setting forth the different standards for probable cause which the Court uses depending on the purpose of the search).

228. *Whren*, 116 S. Ct. at 1774; *see* Scott v. United States, 436 U.S. 128, 137 (1978) (holding that the proper approach for evaluating alleged violations of the Fourth Amendment is to objectively assess the officer's actions in light of the circumstances confronting him at the time without regard to underlying motive or intent).

229. *Whren*, 116 S. Ct. at 1774; *see* United States v. Robinson, 414 U.S. 218, 236 (1973) (holding that the fact that the arresting police officer did not indicate any subjective fear of the defendant did not invalidate the officer's search of the defendant because it was the custodial arrest which gave rise to the authority to search).

230. *See supra* Part II.C. (analyzing the "would have" and "could have" tests and concluding that the "could have" test is the better test for ensuring an objective standard).

231. *See, e.g.*, New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987) (emphasizing that there was no reason to believe that the administrative search of the defendant's automobile junkyard was actually a pretext for obtaining evidence of the defendant's violation of New York penal laws); Colorado v. Bertine, 479 U.S. 367, 372 (1987)

cases only defined the limits of "reasonableness," and that the Court did not intend that the arresting officer's subjective intent in making the arrest should be taken into account in order to hold the search unreasonable and unconstitutional.[232] Similarly, *Whren* can be construed to define the scope of reasonableness when holding that following any observed traffic violation, a subsequent stop by a police officer is "reasonable" under the Fourth Amendment.[233]

That the Court's decision to adopt the "could have" test can be supported by precedent does not necessarily mean that the decision is correct. Although the "reasonableness" standard of the Fourth Amendment is inherently an objective standard, a "reasonable" standard should not allow arbitrary and discriminatory police action.[234] The problem with the *Whren* decision does not lie in that decision alone, but in the line of cases leading to *Whren* as well.[235] *Whren* represents only one step in the Court's process allowing broad discretion to the police and taking away protection from individuals in the traffic stop context.[236] Even prior to *Whren*, motorists did not have strong Fourth Amendment protections once in their automobiles.[237] If illegal items were within plain view the officer could seize the items and arrest the motorist for possession of the items.[238] Also, if the officer had probable cause to arrest the motorist, the officer could seize any items found on the motorist's person or found in the driver or passenger compartments of the motorist's vehicle.[239] However, by establishing such an easy standard of probable cause to stop a motorist, *Whren* makes

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(finding that the police did not act "in bad faith or for the sole purpose of investigation" before approving an inventory search).

232. *See Burger*, 482 U.S. at 702 (setting forth the three criteria which must be met before a warrantless administrative search will be deemed "reasonable:" (1) "[A] 'substantial' governmental interest that informs the regulatory scheme pursuant to which the inspection is made," (2) "the warrantless inspection must be 'necessary to further [the] regulatory scheme,'" and (3) "'the statute's inspection program . . . [must] provide[] a constitutionally adequate substitute for a warrant'") (last two changes in original) (quoting Donovan v. Dewey, 452 U.S. 594, 600, 603 (1981)).

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

234. *See* United States v. Causey, 834 F.2d 1179, 1188-89 (5th Cir. 1987) (en banc) (Rubin, J., dissenting) (suggesting that the "could have" test makes a whole more than a sum of its parts, meaning that the police combine insufficient constitutional bases to produce a constitutionally acceptable arrest, such as an arbitrary execution of a warrant added to a suspicion that does not amount to probable cause).

235. *See supra* Part II.B. (analyzing the Supreme Court automobile cases that led to *Whren*).

236. *See, e.g.*, New York v. Belton, 453 U.S. 454, 459-63 (1981) (establishing the permissible scope of a search of an automobile incident to the arrest of its occupants); *Robinson*, 414 U.S. at 235 (establishing the scope of a search incident to arrest of the arrestee's person).

237. *See supra* Part II.B. (discussing the automobile cases which led to *Whren* and the discretion allotted to the police under those decisions).

238. *See supra* note 53 and accompanying text (discussing how officers are able to seize evidence which is within plain view).

239. *See supra* Part II.B. (discussing Supreme Court precedent which set forth the scope of a warrantless search of an automobile and of a motorist).

it easier for an officer to get to a position where the officer might see illegal items in plain view or be able to arrest the motorist.[240]

C. The Equal Protection Clause Will Not Help

As a result of *Whren*, officers may use the decision's rule to continue to harass minorities.[241] Officers may harass minorities by stopping motorists simply because of their race in order to question them.[242] Although the officer may suspect that the "minority" driver may be involved in illegal activity based on the driver's racial profile,[243] the officer can lawfully stop that motorist under *Whren* after the officer observes a minor traffic violation.[244] Because the reasonableness of a traffic stop under the Fourth Amendment does not depend on the actual motivations of the arresting officer, the Court explained that a claim of selective enforcement of the law based on race could not be brought under the protections of the Fourth Amendment.[245] The *Whren* Court addressed this concern in passing by commenting that the Equal Protection Clause would be the proper vehicle for such concerns.[246] Although the Court suggested that the Equal Protection Clause is the proper vehicle for such a concern, this clause will likely provide little assistance to minority defendants alleging such harassment.

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240. *Whren*, 116 S. Ct. at 1777 (explaining that acting upon observed violations of traffic regulations justifies a police officer in stopping a motorist).

241. *See* Appellant's Brief, *supra* note 122, at 22-26 (arguing that the "could have" test allows the police to choose to stop a vehicle based on the color of one's skin by waiting until the driver violates a minor traffic regulation). Police officers may use *Whren* to harass anyone, not only minorities, once a violation of a traffic regulation is observed. *See Whren*, 116 S. Ct. at 1777.

242. *See Whren*, 116 S. Ct. at 1777; *see also* Johnson, *supra* note 55, at 225 (analyzing whether and when race may be used as a factor in determining whether a police officer has probable cause or reasonable suspicion in order to detain an individual); *id.* at 226 (indicating that "[p]olice manuals often instruct officers to become familiar with their beat and question persons who do not 'belong'"); Joseph Green-Bishop, *Black Frederick Attorney Uses Courts to Battle Racism*, DAILY RECORD, Jan. 16, 1993, at 1 (addressing the experience of an African-American attorney who was "pulled over and charged by the local police for drunk driving, speeding, reckless driving, and not wearing his seatbelt 17 times over a 10-year period"); Nancy Hill-Holtzman, *Council OKs Curfew, 5-2, Amid Protest from Youths*, L.A. TIMES, Aug. 5, 1993, at J1 (illustrating the experiences of a young Latino man who was stopped by the police countless times for resembling a robbery suspect, having a broken tail-light, or having too many people in his car); Eric Slater, *U.S. Probes Allegations of Racism by Torrence Police Law Enforcement*, L.A. TIMES, Jan. 16, 1995, at B1 (addressing a lawsuit brought by two young African-American men who, just celebrating their graduation from a Studio City prep school, were stopped in Torrence, "ordered from the car at gunpoint, patted down and made to sit cross-legged on the sidewalk while two Torrence officers searched the car for nearly an hour [with a result of] citations for a defective turn signal and a passenger not wearing a seatbelt, both of which were later dismissed"); Jeffrey Tylicki, *Long Beach Businessmen Seek $10,000 Apiece from City*, L.A. TIMES, Jan. 11, 1986, at B1 (recounting the experience of two African-American men who were harassed at gunpoint by police officers and security guards during a trip to Fashion Island mall because they were black).

243. *See supra* note 122 (explaining the significance of a "racial profile" and how it is used by the police).

244. *See supra* Part III.C.3. (explaining the holding of *Whren*).

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

246. *Id.*; *see supra* notes 202-04 and accompanying text (describing the Court's response to Whren's fear that the "could have" test will lead to harassment of minorities).

As a hypothetical, suppose there is a traffic regulation which makes turning without signaling a violation. An officer may lawfully stop a vehicle after the officer observes that vehicle turn without signaling. Thus, the only claim that the occupants of the vehicle could argue is that there has been a violation of their equal protection rights under the Fourteenth Amendment.

With regard to an equal protection claim, the Court will give great discretion to the state's legislature in enacting the traffic regulation unless the claimant can show that the state has discriminated based on a racial classification.[247] If a claimant can overcome this hurdle, the Court will apply a strict scrutiny test,[248] otherwise the Court will apply a rational basis test.[249]

A person's right to be free from police detention has never been considered a "fundamental interest"[250] for equal protection purposes.[251] Therefore, in order to con

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247. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (asserting that "the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the most rigid scrutiny"); United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (intimating that a more stringent standard of review might apply to statutes "directed at particular religious or national or racial minorities").

248. Under a strict scrutiny test, it must be shown that the statute in question is "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." *Loving*, 388 U.S. at 11; *see* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (determining that the trial court's decision to award custody to the father only after the mother remarried an African-American man could not be upheld under strict scrutiny even if it was in the best interest of the child because private biases are outside of the scope of the law).

249. Under a rational basis test, a "legislative classification is [presumed] valid unless [it] bear[s] no rational relationship to the State's objectives." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); *see* New York City Transit Auth. v. Beazer, 440 U.S. 568, 590 (1979) (holding that the transit authority's decision to not hire methadone patients was rational because of the authority's goal of ensuring passenger safety); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (finding that it is not a requirement of equal protection "that all evils of the same genus be eradicated or none at all" and, therefore, a New York traffic regulation prohibiting the use of advertising vehicles, but permitting advertising on vehicles engaged in business, could not be invalidated on equal protection grounds).

250. The Court has deemed there to be various fundamental interests in the first eight amendments of the Bill of Rights which have been incorporated to the states through the Fourteenth Amendment. *See* Washington v. Texas, 388 U.S. 14, 18-19 (1967) (finding a fundamental right to compulsory process for obtaining witnesses per the Sixth Amendment); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (holding that there is a fundamental interest in the right to a speedy trial per the Sixth Amendment); Pointer v. Texas, 380 U.S. 400, 403 (1965) (delineating a fundamental right to confrontation of opposing witnesses per the Sixth Amendment); Malloy v. Hogan, 378 U.S. 1, 3 (1964) (delineating there to be a fundamental interest in the right to be free of compelled self-incrimination granted by the Fifth Amendment); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (finding a fundamental interest in the Sixth Amendment right to counsel); Mapp v. Ohio, 367 U.S. 643, 657 (1961) (finding a fundamental interest in the Fourth Amendment rights to be free from unreasonable searches and seizures and to have illegally obtained evidence excluded from trial); *In re* Oliver, 333 U.S. 257, 257 (1948) (finding a fundamental interest in a public trial per the Sixth Amendment); Fiske v. Kansas, 274 U.S. 380, 385 (1927) (holding that there is a fundamental interest in the speech, press, and religion rights granted by the First Amendment); Chicago, B. & Q.R. Co. v. Chicago, 166 U.S. 226, 240-41 (1897) (finding a fundamental right to compensation for property taken by the state in the Fifth Amendment). In addition to these rights the Supreme Court has determined that there is a fundamental interest in "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *see* Washington v. Harper, 494 U.S. 210, 221-22 (1990) (holding that a mentally ill state prisoner possessed a significant liberty interest in avoiding an unwanted administration of antipsychotic drugs under the due process clause of the Fourteenth Amendment); Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (holding as fundamental the decision to bear or beget a child);

vince a court to use a strict scrutiny analysis to invalidate a traffic regulation, a petitioner must show a racially discriminatory purpose in enacting the regulation or in the application of the regulation.[252]

A petitioner will almost never be able to show that there was a discriminatory purpose in enacting a traffic regulation.[253] If the regulation in question makes turning without signaling unlawful, such a regulation is facially neutral.[254] Unless a petitioner is able to show that a certain class of minorities makes turns without signaling more often than others, and that the legislature's motivation in enacting the regulation was to discriminate against that minority group, it would be impossible to prove a discriminatory purpose for a traffic safety regulation.[255]

Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (finding that decisions regarding family living arrangements are fundamental rights); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972) (determining that there is a fundamental right in the personal decision to use contraception); *Loving*, 388 U.S. at 12 (finding a fundamental interest in decisions relating to marriage); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (delineating that there is a fundamental interest in decisions regarding procreation); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding a fundamental interest in decisions regarding child rearing and education). The Court has also determined that there is a fundamental interest in the right to vote, the right to use the courts, and the right of interstate migration. *See* Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971) (holding that the plaintiff's fundamental right to use the courts was violated when the state denied the plaintiffs "an opportunity to be heard on their claimed right to a dissolution of their marriages"); Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (finding that a statutory prohibition of welfare benefits to residents of less than one year impaired the fundamental right of interstate movement); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (finding a Virginia poll tax to be unconstitutional because the tax infringes on the fundamental right to vote); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that the right to use the courts included the right of an indigent criminal defendant to be provided with a trial transcript by the state when such a transcript is necessary for effective appellate review).

251. *See* Johnson, *supra* note 55, at 225 (explaining that because the individual interest affected by decisions to detain has never been deemed a "fundamental interest" for equal protection purposes, the detention must only pass a rational basis analysis).

252. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-68 (1977) (determining that several factors for showing a discriminatory intent in enacting legislation include: (1) The specific sequence of events leading up to the challenged regulation or legislation, (2) departures from normal legislative procedures, (3) the ignoring of factors usually considered important by the decisionmaker, (4) the act's legislative or administrative history, and (5) testimony by legislators); Washington v. Davis, 426 U.S. 229, 240 (1948) (holding that racial discrimination in violation of the Equal Protection Clause exists only where it is a product of a discriminatory purpose); Snowden v. Hughes, 321 U.S. 1, 8-9 (1944) (finding that the element of intentional or purposeful discrimination, necessary in a claim of denial of equal protection, may be proven by extrinsic evidence, but is not presumed).

253. *See supra* notes 247-52 and accompanying text (discussing the standard for bringing an equal protection claim).

254. "Facially neutral" means that on the face of the statute there is nothing that appears to disadvantage a minority class of people. *See* Johnson, *supra* note 55, at 242 (explaining that a statute is discriminatory if, on its face, it disadvantages racial or ancestral minorities); *see also* Yick Wo v. Hopkins, 118 U.S. 351, 373-74 (1886) (finding a local ordinance prohibiting the operation of a laundry not located in a brick or stone building without the consent of the board of supervisors to be facially neutral, but invalidating the ordinance based on the discriminatory administration of the statute).

255. *See* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (finding a statute changing the city boundaries for voting purposes from a square to a 28-sided figure, which eliminated almost all African-American voters from the city, to be racially motivated).

Alternatively, a petitioner may attempt to prove that there has been selective enforcement[256] of the regulation. In order to prove selective enforcement, a petitioner would have to prove that either a police department policy or the policy of the arresting officer, "had a discriminatory effect and that it was motivated by a discriminatory purpose."[257] To prove a discriminatory effect, the petitioner would have to show that "similarly situated individuals of a different race" were not stopped for violating the traffic regulation.[258] If a petitioner sought to prove this, he would have to show the officer's motivation in stopping the vehicle.[259] The petitioner would likely have to rely on statistics unless a police officer or police department admitted to a selective enforcement policy. If the petitioner relied on statistics, he would be limited to using statistics from the jurisdiction in which the petitioner brought the claim.[260] The petitioner would bear the burden of using the statistics to show that other individuals that could have been stopped for turning without signaling were not stopped.[261] Even if a court finds a discriminatory purpose, the government can simply

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256. "Selective enforcement" occurs when the application of a regulation is based on an unjustifiable standard such as race, religion, or other arbitrary classification. Oyler v. Boles, 368 U.S. 448, 456 (1962).

257. *See id.* (holding that some selectivity in applying the West Virginia recidivist statute was not an equal protection violation without selection deliberately based on unjustifiable standards such as race, religion, or other arbitrary classification).

258. *See* United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996) (holding that a defendant must show that the government declined to prosecute similarly situated suspects of other races in order to be entitled to discovery on a claim of selective prosecution).

259. *See* McCleskey v. Kemp, 481 U.S. 279, 292-97 (1987) (holding that the "Baldus study," statistics from across the state of Georgia showing that African-Americans are sentenced to death more often than whites, cannot prove a discriminatory purpose with regard to the defendant's death sentence because the statistics did not prove that the defendant's jury acted with a discriminatory purpose).

260. *See id.* at 295-96 n.15 (asserting that "any inference from statewide statistics to a prosecutorial 'policy' is of doubtful relevance").

261. *Armstrong*, 116 S. Ct. at 1487; *see* United States v. Parham, 16 F.3d 844, 846-47 (8th Cir. 1994) (determining that to establish a prima facie case of selective prosecution of a statute outlawing voting more than once, the defendants must show that they had been singled out based on an impermissible factor such as race and that similarly situated individuals had not been prosecuted for similar conduct); United States v. Fares, 978 F.2d 52, 59-60 (2nd Cir. 1992) (finding that the defendant had not proven that he had been singled out for prosecution for unlawfully reentering the United States after being deported based on his membership to a terrorist organization); United States v. Peete, 919 F.2d 1168, 1172, 1176 (6th Cir. 1990) (holding that the defendant, who was charged with violating the Hobbs Act for "knowingly and willfully attempting to affect interstate commerce by extortion under color of his position as a city councilman, . . . did not point to any evidence that others similarly situated were not prosecuted"); C.E. Carlson, Inc. v. Securities Exch. Comm'n, 859 F.2d 1429, 1437-38 (10th Cir. 1988) (opining that the petitioners, who were charged with violating federal securities fraud laws for borrowing funds to purchase the minimum number of shares necessary to close public offering of common stock and then repaying the loans with proceeds from the offering, were unable to show that others similarly situated were not subjected to enforcement proceedings); United States v. Greenwood, 796 F.2d 49, 52-53 (4th Cir. 1986) (finding that the defendant, an FBI agent charged with submitting false reimbursement vouchers to his employer, "offered nothing beyond pure speculation showing discrimination by or improper influence on the independent agency which made the decision to prosecute"); United States v. Mitchell, 778 F.2d 1271, 1277 (7th Cir. 1985) (determining that there was no evidence that the defendant, who was charged with kidnaping, "was singled out for prosecution because of his race").

put forth its own statistics which demonstrate that similarly situated individuals of another race were also stopped for turning without signaling.[262]

Because a petitioner in the hypothetical would be unlikely to meet the standards for a court to use a strict scrutiny test in analyzing the traffic regulation, the decision to detain need only bear some fair relationship to a legitimate public purpose.[263] In the case of a "*Whren* stop," the legitimate public purpose would be traffic safety.[264] Once the legislature has determined the standards for ensuring traffic safety, a decision by a police officer to detain a motorist in order to enforce traffic safety regulations would undoubtedly bear a fair relationship to the purpose of ensuring traffic safety.

Therefore, the government would probably get around an equal protection claim involving the hypothetical traffic stop. Although the Equal Protection Clause exists to ensure equal application of the laws, in the area of traffic violations its shield is unlikely to protect minorities from police harassment. Therefore, the Court's suggestion that minorities would be protected by the Equal Protection Clause seems empty.

V. SOLUTIONS FOR POTENTIAL ABUSES UNDER *WHREN*

Given the possible problems with the broad discretion that *Whren* imparts to the police, a discussion of alternatives that are available to limit potential abuse is necessary. Short of overruling *Whren*, there is no viable solution to the problem of police using a minor traffic violation to stop a motorist if one of the officer's intentions is to harass a vehicle's occupants or to conduct a search for which the officer does not have the requisite probable cause. *Whren* allows a police officer to stop a vehicle lawfully once the officer observes a minor traffic violation even if the officer's real reason for stopping the vehicle is because the driver is a minority, has long hair, or somehow looks suspicious.

However, rules may be formulated to limit potential abuse of *Whren* by police officers in situations where a police officer intends to use a minor traffic violation to enhance the officer's chances of finding a reason to search the vehicle and its occupants. The way to prevent this abuse is to take away the officer's incentive of stopping the vehicle in the first place.

To circumvent this problem, legislators should pass a law that would require a police officer to issue a citation every time an officer stops an automobile. Such a

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262. *See* Johnson, *supra* note 55, at 225 (asserting that the minimal scrutiny in equal protection cases "dovetails with the definitional requirements of probable cause and reasonable suspicion since it allows consideration of any statistically relevant information").

263. *See* Williamson v. Lee Optical, Inc., 348 U.S. 483, 487-88 (1955) (determining that an Oklahoma statute which made it unlawful for anyone but a licensed optometrist or ophthalmologist to fit or duplicate eyeglasses could be upheld for the legitimate purpose of protecting health and safety).

264. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979) (holding that ensuring subway passenger safety was a legitimate public purpose).

law would require police officers not only to observe a traffic violation which justifies a seizure, but to take the time to issue a citation once the vehicle is stopped. This may cause a police officer to think twice before stopping a vehicle for failing to use a turn signal and to stop only vehicles in which the driver has committed a more serious traffic offense. This is because the officer would have to justify the stop with a citation and, instead of taking a quick look into the car, the officer would have to take time filling out the necessary paper work.

In addition, such a rule would allow review of a particular officer's conduct. If there was a citation for every stop, there would be a record which specifies how many stops that officer made and the reasons why each motorist was stopped. This would allow for review of whether an officer harasses certain groups of motorists by providing specific statistics for that officer's stops. With such statistics, it would be easier for a defendant to bring an equal protection claim and prove selective enforcement of traffic laws by the defendant's arresting officer.[265] Of course, the public would have to tolerate this rule. A rule requiring a police officer to issue a citation every time an officer stops an automobile would take away a motorist's hope of talking an officer out of writing a ticket.

VI. CONCLUSION

The broad holding of *Whren v. United States* has effectively eliminated the pretextual issue with regard to traffic stops. The effect is to afford police officers the right to stop drivers of vehicles after the officer observes the driver commit any minor traffic violation. Under *Whren*, it is irrelevant whether the officer stops the driver because of the traffic violation itself or because the officer hopes to find evidence of a more serious crime.

Until the Supreme Court limits the holding of *Whren*, the police have the opportunity to abuse their discretion and stop drivers based on almost any subjective purpose.[266] The potential for abuse by the police may be heightened in light of the Court's recent decision in *Maryland v. Wilson*.[267] Therefore, legislation is needed to protect against this abuse.[268]

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265. *See supra* Part IV.C. (discussing how an equal protection claim might be an inadequate avenue in traffic stop cases).

266. *See, e.g.*, United States v. Roberson, 6 F.3d 1088, 1091-92 (5th Cir. 1993) (holding that the state trooper had a legitimate basis for stopping the defendant's van after observing the defendant change lanes without signaling).

267. 117 S. Ct. 882 (1997). In *Maryland v. Wilson*, the Court held that, following a routine traffic stop, the driver and all occupants can be ordered to exit the vehicle. *Wilson*, 117 S. Ct. at 886. In vigorous dissent, Justice Kennedy asserted that "[w]hen *Whren* is coupled with [*Maryland v. Wilson*], the Court put tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way." *Id.* at 890 (Kennedy, J., dissenting).

268. *See supra* Part V (setting forth a legislative solution to potential abuse under *Whren*).

The next time you drive your car, be careful to follow all of the rules and regulations of the road. If you fail to follow one, you may find yourself at the side of the road speaking to a police officer. If you do, do not bother claiming the Fourth Amendment's protection because it might not be there.