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STRANDED IN THE WASTELAND OF UNREGULATED ROADWAY POLICE POWERS: CAN "REASONABLE OFFICERS" EVER RESCUE US?

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I. INTRODUCTION

In *Whren v. United States*,[1] the United States Supreme Court decided that bad faith seizures by police were beyond Fourth Amendment regulation so long as they could be objectively justified in some way.[2] Five years later, in a 5-4 decision, the Court held in *Atwater v. City of Lago Vista*[3] that police are free under the Fourth Amendment to arrest for such minor infractions as the failure to wear a safety belt.[4] Together, these two decisions leave drivers at the almost unchallengeable discretion of the police. This Article describes the present state of roadway police power and explores the vulnerability of drivers and occupants to police abuse, specifically through the use of pretextual stops. The judicial trend of limiting constitutional protections against unreasonable searches and seizures is contrasted with the response by the Texas Legislature to offer drivers some minimal protection from arbitrary arrests. After exploring the efforts to address the pretext problem, the Article proposes that the Texas Court of Criminal Appeals extend its "reasonable officer" test, already employed for the analysis of arrests and searches, to traffic stops and detentions, and that the Texas Legislature remove police authority to arrest for fine-only traffic offenses.

II. THE EXPANDING SUPERHIGHWAY OF POLICE POWERS

"The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."[5] Much has hap-

1. 517 U.S. 806 (1996).
2. Whren v. United States, 517 U.S. 806, 811-12 (1996).
3. 532 U.S. 318 (2001).
4. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).
5. Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971). "What is it about automobiles that has caused the Court to undermine the protection afforded by the warrant

pened to the Fourth Amendment in the thirty-two years since the United States Supreme Court made this remark. Today, state and federal courts have made so many police power accommodations to the constitutional reasonableness requirement that if Fourth Amendment protections have not completely disappeared, they seem a distant speck on the expanding superhighway of police powers. Current Fourth Amendment jurisprudence justifies almost all conceivable police seizures of people in vehicles:

> The vehicle was suspiciously dirty and muddy, *or* the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, *or* the driver was too clean; the vehicle was suspiciously traveling fast, *or* was traveling suspiciously slow (*or* even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, *or* the driver made eye contact too readily; the driver appeared nervous (*or* the driver even appeared too cool, calm, and collected); the time of day [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when "they" tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), *or* suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, *or* the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, *or* the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on *ad nauseam*.[6]

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requirement under the Fourth Amendment?" asks a commentator on the Supreme Court's decision in *Wyoming v. Houghton*, 526 U.S. 295 (1999). Carol A. Chase, *Privacy Takes a Back Seat: Putting the Automobile Exception Back on Track After Several Wrong Turns*, 41 B.C. L. REV. 71, 72 (1999); *see also* Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (holding that it is permissible under the Fourth Amendment for police to search entire passenger compartments and occupants' belongings when the driver has been found with a hypodermic needle in a pocket)

6. United States v. Zapata-Ibarra, 223 F.3d 281, 282-83 (5th Cir. 2000) (Wiener, J., dissenting) (citations omitted). The Fifth Circuit has more recently "judicially blessed" as justifiable reasons to stop, in addition to the factual scenarios listed in Judge Wiener's dissent, "spending five seconds at a Stop sign prior to turning left, and driving 20 mph through a school zone when the blinking light was off." United States v. Jacquinot, 258 F.3d 423, 431 (5th Cir. 2001) (Parker, J., concurring).

The Supreme Court recently gave new vitality to this state of affairs in *United States v. Arvizu*.[7] Ralph Arvizu, his sister, and her three children were driving in a minivan in the afternoon near campgrounds and picnic areas in the Coronado National Forest area in Arizona, near the U.S.–Mexico border.[8] A Border Patrol agent spotted the minivan and became suspicious because the vehicle was traveling at about an hour before the shift change for border agents (when smugglers allegedly synchronize their movements), on an unpaved road (which can be used to bypass the Border Patrol station), and because a fellow officer had stopped a minivan on the same road a month earlier and discovered contraband.[9] The agent drove to an intersection and watched the minivan as it slowed down.[10] The agent thought the driver looked "rigid and nervous" and observed that the driver kept his hands on the steering wheel.[11] Arvizu also failed to acknowledge the agent, which was significant in the officer's view, "because drivers in the area habitually 'give us a friendly wave.'"[12] Two of the children in the back had their feet propped up on something.[13] The agent followed the minivan and saw the children wave.[14] Facing forward, the children continued to wave from time to time for about four or five minutes,[15] in the agent's estimation. After running the license plate identification through a police database, he discovered that the van was registered to Leticia Arvizu in an area of Douglas, Arizona—a place the agent said was "notorious" for smuggling.[16] The agent stopped the van, searched it, and found marijuana in a duffle bag.[17] Arvizu was convicted of possession of marijuana after the district court refused to suppress the evidence.[18]

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7. 534 U.S. 266 (2002).

8. United States v. Arvizu, 232 F.3d 1241, 1245-46 (9th Cir. 2000), *rev'd*, 534 U.S. 266 (2002).

9. *Id.* at 1245.

10. *Id.* at 1246.

11. *Id.*

12. *Id.*

13. *Arvizu*, 232 F.3d at 1246.

14. *Id.*

15. *Id.*

16. *Id.* at 1245.

17. *Id.* at 1246-47.

18. *Arvizu*, 232 F.3d at 1247.

The U.S. Ninth Circuit Court of Appeals reversed. The court viewed the fact that a vehicle slows down at the sight of police as "an entirely normal response" that does not suggest criminal activity.[19] The fact that a minivan on the same road was stopped "is insufficient to taint all minivans with suspicion," and the fact that the vehicle's registration reflected an address in a city block known for smuggling deserved no weight in the suspicion calculus.[20] Arvizu's failure to wave at the agent also proved nothing.[21] As for the waving children, the court observed:

> If every odd act engaged in by one's children while sitting in the back seat of the family vehicle could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes. More to the point, if a driver's failure to wave at an officer provides no support for a determination to stop a vehicle, it would be incongruous to say that the vehicle could be stopped because children who were passengers in the car did wave.[22]

But the Supreme Court saw it differently.[23] Chief Justice Rehnquist, writing for a unanimous Court, found the time of day (an hour before a shift change) reasonably suspicious, as well as Arvizu's "slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer . . . quite unusual in . . . a remote portion of rural southeastern Arizona."[24] The Court also found Arvizu's driving suspicious as a "commonsense inference"[25] because he had passed up "easier to reach" recreational areas and went the opposite direction from other known picnicking spots.[26] As for the children's waving, the Supreme Court insisted on deferring to the district court's observation of the agent's courtroom demonstration of the waving (described as "abnormal," "mechanical," and "methodical"): "[The children's waving] wasn't in a normal pattern. It looked like they were instructed to do so. They kind of stuck their hands up and began waving to

19. *Id.* at 1249.
20. *Id.* at 1249-50.
21. *Id.* at 1249.
22. *Id.*
23. United States v. Arvizu, 534 U.S. 266, 266 (2002).
24. *Id.* at 276.
25. *Id.* at 277.
26. *Id.*

me like this."[27] While the Court agreed that "each of these factors alone is susceptible [to] innocent explanation," collectively they formed a reasonable basis for suspecting criminal activity and therefore justified the agent's seizure of the van.[28]

This diminution of constitutional protections on the roadway is due in part to the application of the reasonable suspicion standard under *Terry v. Ohio*[29] to automobile stops.[30] The reasonable suspicion standard accommodates police interests by enabling them to stop drivers even when the indications of criminal conduct are ambiguous.[31] Because criminal conduct includes any infraction under the Transportation Code (among other Texas codes),[32] the police have a wide array of laws to justify automobile stops based on admittedly ambiguous behavior.[33]

More recently, the Texas Court of Criminal Appeals has approved stops for behavior that was not suspicious or indicative of

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27. *Id.* at 276 n.2.

28. *Arvizu*, 534 U.S. at 277-78.

29. 392 U.S. 1 (1968); *see also* Berkemer v. McCarty, 468 U.S. 420, 437-40 (1984) (applying *Terry* to traffic stops because the "traffic stop is presumptively temporary and brief" and the driver can expect to "spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way").

30. *See* Viveros v. State, 828 S.W.2d 2, 4 (Tex. Crim. App. 1992) (en banc) (noting that "[f]or a stop to be legal under the reasonable suspicion standard, there must exist articulable facts used by the officer to create some reasonable inference of criminal conduct. . . . [T]his means there must be a reasonable suspicion that there is something out of the ordinary occurring and some indication that the unusual activity is related to crime"); Fatemi v. State, 558 S.W.2d 463, 466 (Tex. Crim. App. 1977) (finding no specific, articulable facts to justify detention).

31. *See Berkemer*, 468 U.S. at 439 (noting that a police officer who lacks probable cause may stop a person).

32. *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 107 (Vernon 1995) (regulating importation and transportation of beer, liquor, and wine); TEX. PARKS & WILD. CODE ANN. § 62.003 (Vernon 2002) (restricting hunting from a vehicle); *id.* § 62.007 (criminalizing the refusal to permit a search); *id.* § 62.068 (authorizing a warrantless arrest for any violation of subchapter 62).

33. Illinois v. Wardlow, 528 U.S. 119, 126 (2000) (holding that the seizure of a person who fled in a high crime area was not a violation of the Fourth Amendment). *Terry v. Ohio*, 392 U.S. 1 (1968), recognized that the officers could detain the individuals to resolve the ambiguity. *Wardlow*, 528 U.S. at 126. "In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." *Id.*

crime whatsoever.[34] If executed as part of police community caretaking duties, the court rationalized that such seizures are constitutionally permissible because police powers are not confined to criminal investigations, but include accident investigations and traffic direction.[35] Although the case from which this rationale springs, *Cady v. Dombrowski*,[36] involved an investigation for a criminal offense (an intoxicated driver who accidentally drove through a guard rail and crashed into a bridge abutment), the Court of Criminal Appeals nevertheless expanded it to permit stops of cars in order to "care" for passengers,[37] regardless of whether criminality is suspected. Under this rubric, Texas courts have approved seizures of people who are merely sitting in a car (under the rationale that the officer needs to determine whether their car is operable),[38] briefly leave their lane of traffic while driving fifty-two miles-per-hour in a sixty-five mile-per-hour zone during early morning hours (the driver might be sleepy and could crash),[39] are driving too slowly (under the rationale that the officer needs to determine if the driver is having problems with his vehicle),[40] are stopped at a

34. *See* Wright v. State, 7 S.W.3d 148, 152 (Tex. Crim. App. 1999) (en banc) (recognizing a community caretaking function in Texas).

35. The logic appears to be that because police powers are not confined to criminal investigations, they must therefore include "caretaking" duties as well.

36. 413 U.S. 433 (1973).

37. *Wright*, 7 S.W.3d at 150 (addressing a stop in which a vehicle passenger was seen vomiting out of a window).

38. Morfin v. State, 34 S.W.3d 664, 667 (Tex. App.—San Antonio 2000, no pet.). In *Morfin*, a policeman approached a parked car with two people sitting in it for the stated justification of determining whether they were: "committing any crimes, or if they lived in the area, had problems, if they were broken down or what was wrong." *Id.* at 666. He focused his spotlight on the car and checked for identification, then, upon noticing a bullet on the car console, removed the occupants from the car and frisked them. *Id.* He then searched the car, saw a six-pack of beer, picked it up and found underneath a baggie of cocaine. *Id.* The appellate court helpfully noted that despite the officer's statement, "his overall concern was that something was wrong," and therefore justifiable under the "community caretaking function." *Id.* at 667.

39. *See* Corbin v. State, 33 S.W.3d 90, 94-95 (Tex. App.—Texarkana 2000) (en banc) (holding that the officer's belief that the driver needed assistance was reasonable given the evidence), *rev'd*, 85 S.W.3d 272 (Tex. Crim. App. 2002).

40. Ortega v. State, 974 S.W.2d 361, 362-63 (Tex. App.—San Antonio, 1998, pet. ref'd). The *Ortega* decision was based in part on *McDonald v. State*, 759 S.W.2d 784 (Tex. App.—Fort Worth 1988, no pet.). In *McDonald*, the police noticed a driver sitting slumped over the wheel of his still-running car on the side of the highway, went over to the driver, and knocked on the window. *McDonald*, 759 S.W.2d at 784. The driver woke up and attempted to drive away, but the police stopped him. *Id.* The appellate court decided that "when a police officer has a demonstrable reason to believe that a particular individual

university campus entrance barricade and are leaving the car (the driver might be lost and need directory assistance),[41] or are driving with a flat tire at about five miles per hour on the shoulder of a road (because police may wish to assist the driver in changing the flat tire).[42] In none of these cases did the drivers or passengers seek any assistance from the police, a fact which alone would seem to undermine the propriety of expanding the community caretaking doctrine. In its present state, it has become a police power to "care" for people, creating a new class of seizures of drivers and passengers merely to ensure their comfort and security.[43]

Once validly stopped, the police have broad authority to continue the detention and search the vehicle—again, due to the application of *Terry v. Ohio* to vehicle stops. Police may detain a driver, order her from her vehicle,[44] and "frisk" the vehicle as well as the occupants, when indicated.[45] While the stop must be reasonably

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may be unfit to drive for medical or other reasons, a temporary stop is justified for the limited purpose of investigating that person's well-being." *Id.* at 785.

41. Chilman v. State, 22 S.W.3d 50, 53-55 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd).

42. Cunningham v. State, 966 S.W.2d 811, 813 (Tex. App.—Beaumont 1998, no pet.). The officer said that he followed the driver for a short distance, then turned on his overhead lights so that the driver "would stop" and "would know it was a police officer who was willing to assist." *Id.* at 812. The appellate court not only approved the seizure, but praised the officer in his "legitimate role as a public servant to assist those in distress and to maintain and foster public safety activity." *Id.* at 813. The stop was justified, the court said, because the officer wanted to "inquire about [the driver's] safety." *Id.*

43. *See* Nathan Koppel, *Court Says Police Don't Need Warrant If Public Safety Jeopardized*, TEX. LAW., Jan. 3, 2000, at 1-3 (advancing the idea of these circumstances being coined "love stops").

44. Goodwin v. State, 799 S.W.2d 719, 727 (Tex. Crim. App. 1990) (en banc). During a lawful traffic stop, an officer may order a driver from his or her car. *Id.* The officer can then "establish a 'face-to-face confrontation' which 'diminishes the possibility, otherwise substantial, that the driver can make unobserved movements; this, in turn, reduces the likelihood that the officer will be the victim of an assault.'" *Id.* (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110-11 (1977)). "The safety of the officer is a 'legitimate and weighty' justification for allowing 'this additional intrusion [which] can only be described as *de minimis*.'" *Id.*

45. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court authorized a "frisk" of the passenger compartment of an automobile for weapons when

> limited to those areas in which a weapon may be placed or hidden, . . . if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.

related to its initial purpose,[46] the officer can nevertheless prolong the detention if he can point to other "articulable" suspicious facts, even if those facts are consistent with innocent activity.[47] While

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Michigan v. Long, 463 U.S. 1032, 1049 (1983). This includes a frisk of the occupants for weapons. *See* Pennsylvania v. Mimms, 434 U.S. 106, 122 (1977) (holding that an articulable reason to suspect criminal activity and possible violence is needed to justify a stop and frisk). *But see* United States v. Ryles, 988 F.2d 13, 16 (5th Cir. 1993) (rejecting the notion that *Michigan v. Long* should be extended to all cases where drivers are stopped for traffic violations).

46. *See* Terry v. Ohio, 392 U.S. 1, 19-20 (1968) (stating that the "inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place"); United States v. Melendez-Gonzalez, 727 F.2d 407, 410-11 (5th Cir. 1984) (outlining several factors to be taken into account in determining whether a stop would be justified and reasonable at the border). The *Melendez-Gonzalez* factors include:

> (1) characteristics of the area in which the vehicle is encountered; (2) proximity to the border; (3) usual patterns of traffic on the road; (4) previous experience with alien traffic; (5) information about recent illegal crossings in the area; (6) behavior of the driver; (7) appearance of the vehicle; and (8) number, appearance and behavior of the passengers.

Id. at 410-11; *see also* Commonwealth v. Parker, 619 A.2d 735, 738 (Pa. 1993) (determining that the seizure exceeded purposes of the traffic stop under *Terry* when the officer asked to search the car for drugs after the officer had issued traffic citations); Saenz v. State, 842 S.W.2d 286, 287 (Tex. Crim. App. 1992) (en banc) (quoting the test laid out in *Brignoni-Ponce*, 422 U.S. 873, 883 (1975), which determines the reasonableness of a search during a stop).

47. *See* Woods v. State, 956 S.W.2d 33, 37 (Tex. Crim. App. 1997) (en banc) (providing that the "principal function of . . . investigation is to resolve . . . ambiguity [of behavior] and establish whether the activity is in fact legal or illegal—to 'enable the police to quickly determine whether they should allow the suspect to go about his business or hold him to answer charges.'" (quoting *In re* Tony C., 582 P.2d 957, 960-61 (Cal. 1978))). "[C]ircumstances . . . 'consistent with criminal activity,' . . . permit—even demand—an investigation: the public rightfully expects a police officer to inquire into such circumstances 'in the proper discharge of the officer's duties.'" *Id.* (quoting *In re* Tony C., 582 P.2d 957, 960-61 (Cal. 1978)). Almost anything will suffice for reasonable suspicion developed after the stop. In *Spight v. State*, 76 S.W.3d 761 (Tex. App.—Houston [1st Dist.] 2002, no pet.), the driver, stopped for speeding, gave the officer his license and registration a bit too quickly (before it was formally requested) and he appeared nervous. Spight v. State, 76 S.W.3d 761, 764 (Tex. App.—Houston [1st Dist.] 2002, no pet.). These circumstances justified his continued detention during which the officer interrogated the driver and developed additional suspicion, namely, the driver's obvious reluctance to engage in conversation. *Id.* at 766. On the other hand, taking too long to locate a driver's license is also suspicious. *See, e.g.*, Crittenden v. State, 899 S.W.2d 668, 669, 673-74 (Tex. Crim. App. 1995) (en banc) (agreeing that nervousness and a lengthy time to find a license is suspicious); State v. Kloecker, 939 S.W.2d 209, 209-10 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (indicating that the inability to promptly retrieve a license raises suspicion that a driver may be intoxicated). Failure to produce either a license or proof of insurance are offenses which entitle the officer to arrest the driver. *See* TEX. TRANSP. CODE ANN.

the detention should be brief,[48] and the officer's methods should be the "least intrusive means" to settle his suspicions,[49] those seized on a roadside are unlikely to know these limits to the officer's powers, or that limits exist. The citizen's ignorance of Fourth Amendment limitations on police authority is a circumstance exploited by police through "consent" searches of vehicles[50] and surprise roadblocks.[51]

Police ordinarily need more than reasonable suspicion to conduct a search, other than a frisk for weapons, and both probable

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§ 521.021 (Vernon 1999) (requiring persons to be licensed in order to operate motor vehicles); *id.* § 601.195 (requiring drivers to show proof of financial responsibility).

48. *Terry*, 392 U.S. at 19-20; *see also* Amores v. State, 816 S.W.2d 407, 412 (Tex. Crim. App. 1991) (en banc) (recognizing that a *Terry* stop "is one during which the police are allowed to briefly question a suspicious person respecting his identity, his reason for being in the area or location, and to make similar reasonable inquiries of a truly investigatory nature"); Holladay v. State, 805 S.W.2d 464, 469 (Tex. Crim. App. 1991) (en banc) (holding that a *Terry* stop is a "temporary detention for questioning"), *overruled on other grounds by* Hunter v. State, 955 S.W.2d 102 (Tex. Crim. App. 1997) (en banc).

49. Florida v. Royer, 460 U.S. 491, 500 (1983).

50. Once the police have immobilized the driver, they may ask him for consent to search. The driver may refuse with impunity, but is unlikely to know this, and the investigating officer is under no duty to inform him of this right. On the contrary, the officer who has a hunch about possible criminal activity or is merely curious can obtain consent through the deft use of his authority. "Of course any individual has a right to approach any other individual . . . . But it is not quite the same when the police stop someone. There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?" Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161, 1162 (1966).

51. The legitimacy of roadblocks derives in part from constitutional approval of border patrol checkpoints. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (approving the use of routine checkpoints at borders). The Supreme Court reasoned that individualized suspicion is not required to stop persons at fixed checkpoints near an international border because "the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior." United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985). Yet, just five years later, the Court approved roadblocks anywhere in the interior of this country, remarking that there is "virtually no difference" between a fixed border checkpoint and DWI roadblocks. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990). Before *Sitz*, Texas courts had previously decided that DWI roadblocks were unconstitutional per se under the Fourth Amendment. *See* State v. Wagner, 810 S.W.2d 207, 208 (Tex. Crim. App. 1991) (en banc) (reversing on the ground that the precedent had been overruled); King v. State, 800 S.W.2d 528, 529 (Tex. Crim. App. 1990) (en banc) (noting that *Sitz* overruled *Higbie v. State*, 780 S.W.2d 228 (Tex. Crim. App. 1989) (en banc), which had condemned roadblocks in Texas). Random "spot checks" to ensure compliance with license and registration laws *do* constitute unreasonable seizures under the Fourth and Fourteenth Amendments. Delaware v. Prouse, 440 U.S. 648, 663 (1979).

cause and a warrant are necessary.[52] But both of these requirements can be avoided if the inquisitive officer can persuade the driver to consent to the officer's otherwise impermissible behavior. Compliance is not difficult for police to obtain, particularly where the person is not told of his right to refuse the officer's entreaties.[53] In light of the psychological and other advantages available to the police, submission from the driver has become one widespread investigative technique used shrewdly to broaden police authority during roadside detentions.[54]

In addition to the use of consent searches, police have also found surprise checkpoints equally helpful for conducting investigations of people for whom they have no probable cause to believe were involved in criminal activity.[55] For example, the Kleberg County

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52. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Juarez v. State, 758 S.W.2d 772, 776 (Tex. Crim. App. 1988) (en banc); Brick v. State, 738 S.W.2d 676, 681 (Tex. Crim. App. 1987) (en banc).

53. Most states, including Texas, view an officer's failure to inform a person of his right to refuse to consent to a search as merely a factor to be considered in deciding whether consent was genuinely voluntary. *See* State v. Forrester, 541 S.E.2d 837, 841 n.5 (S.C. 2001) (reviewing sister states' interpretations under their state constitutions); Allridge v. State, 850 S.W.2d 471, 493 (Tex. Crim. App. 1991) (en banc) (observing that informing one of his rights concerning consent is of evidentiary value). However, one state requires the police to inform the person of the right to decline a consensual encounter. *See* State v. Kearns, 867 P.2d 903, 909 (Haw. 1994) (detailing the requirements of an investigative encounter). The court in *Kearns* held that

> an investigative encounter can only be deemed "consensual" if (1) prior to the start of questioning, the person encountered was informed that he or she had the right to decline to participate in the encounter and could leave at any time, and (2) the person thereafter voluntarily participated in the encounter.

Id.

54. As one commentator has noted, "in an incredible number of drug cases, the encounter with the police commenced with a seemingly innocuous traffic violation." Wayne R. LaFave, *The Present and Future Fourth Amendment*, 1995 U. ILL. L. REV. 111, 118.

55. *See* White. v. State, 574 S.W.2d 546, 547 (Tex. Crim. App. [Panel Op.] 1978) (addressing the use of a "spot check statute" to seize people because they were "riding around with no purpose in mind"). The Court of Criminal Appeals recognized and condemned the practice of using roadblocks as a method for investigative fishing expeditions: "A driver's license check may not be used as a subterfuge to cover up an unlawful stop based on mere suspicion unsupported by articulable facts necessary for an investigative detention." *Id.* at 547-48; *see also* Meeks v. State, 692 S.W.2d 504, 508 (Tex. Crim. App. 1985) (en banc) (holding that "[i]f a license check is not the sole reason for a detention, that detention is not authorized by [Article 6687b § 13 V.A.C.S.] and cannot be upheld" under the Fourth Amendment and Article I, § 9 of the Texas Constitution). The Court of Criminal Appeals also decided that roadblocks could not be used in Texas without legislative authorization. Holt v. State, 887 S.W.2d 16, 18 (Tex. Crim. App. 1994) (en banc). To date, the Texas Legislature has refused to create police authority for roadblocks. The Michigan

Sheriff decided to set up a roadblock on Highway 77 between midnight and 8 a.m. for the ostensible purpose of checking drivers' licenses and insurance.[56] At a suppression hearing, however, the officers who conducted the roadblock admitted that they intended "'to do a wide range' of things, including looking for contraband in vehicles, and for nervousness or signs of intoxication . . . ."[57] One officer's primary task was to conduct field sobriety tests, and another brought his drug-detecting dog.[58] Not surprisingly, the court of appeals found "the driver's license checkpoint to be a subterfuge for more general investigation."[59]

The utility of roadblocks for police is that they are incapable of avoidance, as an attempt to take another path can itself be deemed suspicious, thereby necessitating the seizure of the driver and search of his vehicle. For example, various police agencies in Smith County conducted a driver's license roadblock and something the police called "a safety check" at about ten o'clock at night.[60] A peace officer, Trooper Perdue, testified that "the officers were checking headlights, the high beam indicator, taillights and tires on the passing vehicles."[61] A driver stopped about thirty feet from the roadblock rather than continuing into it, which aroused the suspicion of the various officers at the scene.[62] According to the appellate court, "Perdue was concerned for his safety."[63] This safety concern, in turn, partially justified the seizure of the vehicle. In another case, Fort Worth police creatively set up what can best be described as an investigative gauntlet:

> [F]ive to eight [Fort Worth] police officers stood along a forty-yard stretch of [the street] with flashlights looking in car windows as they

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Supreme Court also rejected the legitimacy of DWI roadblocks. *See* Sitz v. Mich. Dep't of State Police, 506 N.W.2d 209, 223 (Mich. 1993) (holding sobriety checkpoints unconstitutional under the Michigan Constitution, on remand from the Supreme Court).

56. Garcia v. State, 853 S.W.2d 157, 158 (Tex. App.—Corpus Christi 1993, pet. ref'd).

57. *Id.* at 159.

58. *Id.*

59. *Id.*

60. Murphy v. State, 864 S.W.2d 70, 73 (Tex. App.—Tyler 1992, pet. ref'd).

61. *Id.* It is unclear from the opinion why police need roadblocks to check car lights.

62. *Id.*

63. *Id.* The trial court found only that the police had set up nothing more than a driver's license checkpoint. Because the Supreme Court had all but explicitly approved a roadblock to check for driver's licenses, the appellate court found no Fourth Amendment violation, yet ultimately decided the issue on the basis of the driver's behavior in approaching the roadblock.

> drove past the officers. When the officers saw a violation of the traffic laws, they would pull that car into the blocked off lane to write the ticket."[64]

These techniques exemplify the creative investigative pursuits on Texas roadways and the "competitive enterprise of ferreting out crime"[65] well-known to the judiciary. To this end, traffic laws offer police a wellspring of illegalities easily exploited for pursuit of otherwise impermissible searches and seizures.

The usefulness of traffic laws to conduct an otherwise impermissible detention or search is fully acknowledged by police. "You can always get a guy legitimately on a traffic violation if you tail him for a while," one officer admitted, "and then a search can be made."[66] "Very few drivers can traverse any appreciable distance without violating some traffic regulation,"[67] another freely admitted. Said yet another: "You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway."[68] As one commentator has put it:

> [G]iven the pervasiveness of . . . minor [traffic] offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, [the requirement of a traffic violation] hardly matters, for . . . there exists "a power that places the liberty of every

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64. State v. Skiles, 870 S.W.2d 341, 342 (Tex. App.—Fort Worth 1994), *rev'd*, 938 S.W.2d 447 (Tex. Crim. App. 1997) (en banc). The State argued that the police action was not a checkpoint at all, but "merely a stationary foot patrol along a single lane street that incidentally observed traffic and handed out tickets for violations it observed." *Id.* Moreover, "the State offered no data to the trial court about the necessity and effectiveness of the traffic checkpoint deterrence in relation to traditional means of deterring traffic violations," nor did any of the evidence adduced before the trial court militate in favor of the State's contention. *Id.* The court of appeals held that the trial court "had sufficient evidence to conclude that the police action was a traffic checkpoint," and other evidence "suggest[ed] that enforcement of the DWI laws may have been a motive for" the police gauntlet. *Id.* at 343.

65. Johnson v. United States, 333 U.S. 10, 14 (1948).

66. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMPLE L. REV. 221, 236 n.114 (1989) (quoting L. TIFFANY ET AL., DETECTION OF CRIME 131 (1967)).

67. *Id.* at 236 (quoting B.J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 23 (1966)).

68. *Id.* at 236 n.114; *see also* United States v. Causey, 834 F.2d 1179, 1186 (5th Cir. 1987) (en banc) (Rubin, J., dissenting) (discussing pretext seizures in the context of the police using an unrelated "seven-and-a-half-year-old bench warrant, long forgotten" in order to arrest and interrogate a suspect for a bank robbery).

> man in the hands of every petty officer," precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.[69]

Texas had over seven million dispositions of non-parking traffic misdemeanors in fiscal year 2000 alone.[70] This figure does not include all traffic stops, but only those with traffic dispositions.[71] Under the Texas Transportation Code, police may seize drivers for such things as failing to have windshield wipers in good working condition,[72] violations of the brake fluid[73] or tire[74] regulations, a lack of an inspection sticker,[75] having a muffler that fails to "prevent excessive or unusual noise,"[76] and infractions of the light illumination requirements.[77] It is not necessary that the driver actually violate any one of these laws, only that an officer have reasonable suspicion that the driver is violating any of these regulations for a detention and commencement of an investigation. Un-

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69. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 1.4(e), at 123 (3d ed. 1996) (quoting 2 L. WROTH & H. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 141-42 (1965)).

70. *See* 2001 TEX. OFF. OF CT. ADMIN. ANNUAL REPORT 323, 346, 372 (indicating 1,771,409 traffic fine-only misdemeanor dispositions in Justice of the Peace Courts, 5,334,909 traffic misdemeanor dispositions in municipal courts, 73,854 traffic offenses in county courts, and 103,399 dispositions for driving while intoxicated and after consumption), *available at* http://www.courts.state.tx/publicinfo/AR2000/toc.htm.

71. *Id.* These figures may not accurately reflect the number of valid traffic stops in which the driver is ultimately charged with some greater offense.

72. TEX. TRANSP. CODE ANN. § 547.603 (Vernon 1999).

73. *Id.* §§ 547.407-.408. Braking force for passenger vehicles must be not less than 52.8% of its gross weight. *Id.* § 547.408(a)(1)(A).

74. *Id.* § 547.612.

75. *Id.* § 548.602. The statute not only authorizes police to stop a vehicle not displaying an inspection certificate on the windshield, but may also "require the owner or operator to produce an inspection certificate for the vehicle." *Id.* This law contemplates that the driver will be arrested for a lack of a certificate, as it provides the driver a defense to prosecution "that an inspection certificate for the vehicle [was] in effect *at the time of the arrest.*" *Id.* (emphasis added).

76. *Id.* § 547.604.

77. TEX. TRANSP. CODE ANN. §§ 547.301-.305, 547.321-.335 (Vernon 1999). Texas drivers who fail to meet the lighting and reflector requirements as specified in 49 C.F.R. § 571.108 may be seized. *Id.* § 547.3215. For example, drivers may be seized if their automobile's turn signal flashers' "lowest voltage drop," as measured between the "input and load terminals," exceeds "0.8 volt[s];" taillight "candlepower output," however, may not exceed a candlepower value of eighteen, but must be more than two. 49 C.F.R. § 571.508 (2003). This list of permissible seizures is not exhaustive. *See* TEX. HUM. RES. CODE § 121.007 (Vernon 2001) (sanctioning the arrest of drivers who fail to take "necessary precautions to avoid injuring or endangering" blind pedestrians); TEX. TRANSP. CODE ANN. § 705.001 (Vernon 1999) (sanctioning an arrest for the offense of permitting a person with a suspended driver's license to drive a car).

less judges and lawmakers are content to leave Texas drivers vulnerable to arrest for any traffic infraction by any law enforcement officer,[78] they must fashion workable regulations and bright-line limits on police authority tailored to the peculiar circumstances of the traffic stop.

III. THE UNIQUENESS OF AUTOMOBILE STOPS

Vehicle stops are unique in the world of citizen encounters with police. Unfortunately, the judiciary has long failed to recognize the uniqueness of a vehicle stop, and instead has adopted the reasonable suspicion standard for the seizure of drivers and occupants of vehicles—a test that grew out of a street encounter in *Terry v. Ohio*.[79] An appreciation of the nature of the liberty interest at stake, and the nature of police authority in such circumstances, is crucial for any judicial or legislative solution in regulating the limits of police investigation. Traffic stops are warrantless encounters, so police action is not subject to judicial controls until after the motorist has been stopped and his liberty or privacy is more extensively invaded. It is the no-man's-land of the traffic stop where the police officer is the sole and virtually unchecked dispenser of discretionary justice. It is an area of police behavior that does not resemble most searches and seizures authorized by warrant, where police power is derived from and circumscribed by judicial authority as expressed within the four corners of the warrant.

Moreover, a traffic stop is unlike the warrantless street encounter. The psychology at play in roadside confrontations can be more intense, and the citizen may often have more at stake. No lights or sirens precede the ordinary stop on the sidewalk, but in traffic stops, the police in effect accuse the motorist of some offense even before the officer and motorist actually face each other. Because both police and citizen are often in open view and in public places in proximity to others, the details of street encounters are subject to being witnessed by third parties. The citizen will expect that a merely investigatory stop by a police officer on the street will end whenever he concludes his consensual conversation. But the mo-

78. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974) (declaring that boundless discretion to search by government agents, one commentator has observed, leads to a "tyranny of unregulated rummagers").

79. 392 U.S. 1 (1968).

torist, forced off the road and accused of a traffic offense, undoubtedly views himself as seized, isolated, and under the whim of the police.[80] He is also encased within one of his more expensive pieces of property, and unconsciously or otherwise, he appreciates the fact that the seizure of his person necessarily means the seizure of his vehicle and all belongings within it.

There is at least one other significant factor inherent in a traffic stop: the architecture of a car creates a space within which arises a privacy interest for the motorist, one which is invaded in a traffic stop. While everything that a pedestrian exposes certainly cannot be regarded as private, everything that a motorist puts in his car certainly cannot be regarded as public. For this reason, a traffic stop carries with it, as a matter of circumstance, an invasion of privacy not often present on the street.

In these ways, traffic stops are psychologically and qualitatively different from any other police encounter. From the police officer's perspective, the traffic stop has certain advantages. The relationship between officer and citizen is established in terms dictated by the officer and favorable to the officer's authority. The officer never really stops the motorist; rather, he orders the driver to stop himself merely by activating a siren and flashing lights. The police officer's equipment advertises to the world that the driver has committed some offense, and their roles, official accuser and accused citizen, are instantly created. By pulling over, the driver completes his first act of submission to police power. Thus, before the first words are uttered between citizen and police officer, their roles and relationships are already established, much to the advantage of the investigating officer, under conditions that make him the sole and therefore apparently supreme arbiter of law.

IV. The Rise of the Pretext Doctrine

These factors—the ease with which traffic stops can be made, the hope of discovering criminality, the absence of judicial oversight—combine to invite police exploitation. The traffic stop could be used pretextually for a wide variety of other purposes, as police

80. A policeman appears to the motorist as a figure of almost unlimited power. The Supreme Court has recognized this dimension of traffic stops. *See* Delaware v. Prouse, 440 U.S. 648, 657 (1979) (discussing the "substantial anxiety" wrought by police upon stopping a vehicle).

clearly recognize. Judicial review of police motivations in this context developed as a judicial doctrine in response to a problem highlighted by a seminal event during the civil rights movement in the 1950s.

In 1956, Dr. Martin Luther King, Jr., was pulled over for allegedly driving thirty miles-per-hour in a twenty mile-per-hour zone in Montgomery, Alabama.[81] His arrest and incarceration on this pretext underscored the existence of this sort of police action, and courts began to at least recognize the reality of racially or politically motivated seizures of citizens.[82] As reviewing courts began to

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81. United States v. Harvey, 16 F.3d 109, 114 (6th Cir. 1994) (Keith, J., dissenting). Judge Keith lamented:

> As the old adage warns, the more things change, the more they remain the same. In Montgomery, Alabama, on January 26, 1956, police officers arrested and jailed Dr. Martin Luther King, Jr. for allegedly driving thirty miles per hour in a twenty-five mile per hour zone. Today, everyone readily acknowledges the police officers stopped, arrested, jailed and harassed Dr. King because he was an African-American and because he actively and vigorously sought equal protection and equal treatment for African-Americans. Today, almost thirty years later, [current Fourth Amendment jurisprudence] allow police officers to stop individuals based on their race under the guise of an insignificant traffic violation. It is a sad commentary that [the judiciary] not only approves disparate treatment based on race but legitimizes a "legal" basis for disparate treatment.

Id.

82. Much has been written in recent years regarding pretextual stops based on race. *See, e.g.*, David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 560 (1997) (arguing that law enforcement uses the "immense discretionary power" granted by the Supreme Court in *Whren v. United States*, 517 U.S. 806 (1996) to stop African-Americans and Hispanics disproportionately more often than caucasians); David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 266-67 (1999) (discussing the overwhelming belief of African-Americans that they are stopped and ticketed more often than caucasians and providing the empirical data in support of such belief); Jennifer A. Larrabee, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 293-95 (1997) (stating that African-Americans and other minority drivers are routinely stopped nationwide solely on the basis of race and arguing that the Equal Protection Clause should preclude the consideration by law enforcement of the race of a motorist when deciding whom to detain for a traffic violation); Lu-in Wang, *"Suitable Targets"? Parallels and Connections Between "Hate Crimes and "Driving While Black"*, 6 MICH. J. RACE & L. 209, 233-34 (2001) (explaining the effects of racial profiling); *see also* Edmond v. Goldsmith, 183 F.3d 659, 670 (7th Cir. 1999) (stating that "[s]ome officers will stop people for the 'offense' of DWB ('driving while black')"), *aff'd*, Indianapolis v. Edmond, 531 U.S. 32 (2000). Although reprehensible, it is but one species of pretextual police behavior, so laws focused only on "racial profiling" fail to address the larger issue of police authority and judicial oversight.

discern the ulterior police motives for automobile stops, the judiciary discovered that pretextual stops had become a useful technique for police to conduct broader searches and more prolonged detentions than otherwise permitted under law. In the past, the judiciary has condemned this police action under judicial review identified as the "pretext doctrine."

The pretext arrest in Texas was defined as one that is effectuated "only because law enforcement officials desire to investigate that individual for a different offense—i.e., an offense for which they do not have valid legal grounds to stop or arrest."[83]

The doctrine involved conscious judicial inquiry into the reasonableness of a search or seizure that included an inquiry into the mind and motivation of the officer who conducted an allegedly pretextual invasion of a citizen's liberty or privacy.[84] In this sense, it was a familiar and well-established legal inquiry, as courts and factfinders are required to discern *mens rea* as a routine matter of criminal administration.

Despite this familiar quality of judicial review, the Supreme Court has remained apprehensive about conducting any sort of inquiry into the officer's state of mind when reviewing the reasonableness of police searches and seizures. For instance, the Supreme Court was reluctant to even undertake the effort to discern pretextual police action.[85] The case most often cited as proof that subjective intent of police was always constitutionally irrelevant is *Scott v. United States*.[86] In *Scott*, Justice Rehnquist announced:

> We think the Government's position . . . embodies the proper approach for evaluating compliance with the minimization requirement. Although we have not examined this exact question at great

83. Garcia v. State, 827 S.W.2d 937, 939-40 (Tex. Crim. App. 1992) (en banc).

84. *See id.* at 941-44 (providing insight into the subjective and objective analyses and the corresponding evolution of case law).

85. This reluctance may have been due in part to the view that automobile stops would best be regulated by state courts. *See* Cady v. Dombrowski, 413 U.S. 434, 441 (1973) (reasoning that local police "have much more contact with vehicles [than federal officers] for reasons related to the operation of vehicles themselves"); *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 561 n.14 (1976) (noting that stops for questioning are widely used at state and local levels to enforce traffic and safety laws); United States v. Brignoni-Ponce, 422 U.S. 873, 883 n.8 (1975) (holding that the Court's opinion does not imply that state and local law enforcement agencies are without power to conduct limited stops necessary to enforce traffic and safety matters).

86. 436 U.S. 128 (1978).

> length in any of our prior opinions, almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him.
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> . . . .
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> We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.[87]

Scott was subsequently cited for the proposition that the review of the subjective state of mind of a police officer is never to be undertaken, at least not by the federal judicial branch of government. Other opinions[88] did little more than reaffirm another pronouncement from a thirty-year-old dissent to the dismissal of a petition for writ of certiorari, *Massachusetts v. Painten*,[89] wherein Justice White, joined by Justices Harlan and Stewart, expressed his view that an inquiry into the subjective intent of police officers

> would be defensible only if we felt it important to deter policemen from acting lawfully but with the plan—the attitude of mind—of going further and acting unlawfully if the lawful conduct produces insufficient results. We might wish that policemen would not act with impure plots in mind, but I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions—if not thoughts—entirely in accord with the Fourth Amendment and all other constitutional requirements. In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.[90]

This apparent aversion to the "attitude of mind" of police officers has not prevented that Court from dispatching Fourth Amendment jurisprudence on a trip through the minds of police

87. Scott v. United States, 436 U.S. 128, 137-38 (1978).

88. *See* United States v. Villamonte-Marquez, 462 U.S. 579, 592-93 (1983) (holding that the boarding of the *Henry Morgan II* by customs officers was reasonable under the Fourth Amendment); *see also* Maryland v. Macon, 472 U.S. 463, 469 (1985) (explaining that the officer's examination did not constitute a search under the Fourth Amendment).

89. 389 U.S. 560 (1968).

90. Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (per curiam) (White, J., dissenting).

officers in search of their "good faith" intentions,[91] their "understandable" mistakes,[92] or for regularly gauging their levels of suspicion.[93] In each of these inquiries, the Court never expressed any difficulty in discerning the subjective state of mind of police officers. The Supreme Court evidently believes that "the catch is worth the hunt"[94] when the Court expects constitutionally defensible police thoughts; however, anticipated thoughts of illegality, subterfuge, circumvention, or fraud by policemen are grounds for cancellation for what is then decried by the Supreme Court as a "grave and fruitless" safari.[95]

This approach is neither consistent nor even-handed. The Supreme Court, like every other court in this country, regularly peers into the minds of defendants; the minds of police officers should be no less penetrable. Nevertheless, the Supreme Court refused to peek, and its failure to squarely confront the pretext problem left more interested state and federal appellate courts floundering for a solution.

V. STATE AND FEDERAL COURTS GRAPPLE WITH THE PRETEXT PROBLEM

By 1993, all but one federal circuit court had purported to adopt an objective approach to pretextual police action, while one was still applying a wholly subjective test.[96] But despite the ostensible

91. *See* United States v. Leon, 468 U.S. 897, 925-26 (1984) (modifying the exclusionary rule to allow the admission of evidence seized in a reasonable, good-faith reliance on a search warrant, even if such warrant is subsequently found to be defective).

92. *See* Hill v. California, 401 U.S. 797, 802 (1971) (refusing to disturb the findings of the California courts that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest").

93. *See* Terry v. Ohio, 392 U.S. 1, 33 (1968) (holding that where a police officer "observed circumstances that would reasonably lead an experienced, prudent" officer to suspect a burglary was imminent, the officer's "justifiable suspicion afforded a proper constitutional basis for accosting [and] restraining" the defendant's freedom of movement).

94. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974) (discussing three possible curbs on the stop-and-frisk police power).

95. *See* Scott v. United States, 436 U.S. 128, 143 (1978) (affirming that agents did not act unreasonably in making wiretap interceptions).

96. *See* Garcia v. State, 827 S.W.2d 937, 942 (Tex. Crim. App. 1992) (en banc) (noting that eleven of the twelve federal circuit courts have adopted an objective approach to determining the legality of pretextual stops, with only the Ninth Circuit still applying a wholly

adoptions of these tests, federal analysis was not always consistent with the purported standard of review.[97] In summarizing the state of federal affairs, one commentator concluded that

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subjective test); *see also* United States v. Ruesga-Ramos, 815 F. Supp. 1393, 1397-98 (E.D. Wash. 1993) (reviewing the federal circuit courts' opinions); United States v. Scopo, 814 F. Supp. 292, 299-303 (E.D.N.Y. 1993) (presenting an overview of the federal appellate analysis of pretext), *rev'd*, 19 F.3d 777 (2d Cir. 1994).

97. One example of judicial double-talk is found in *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989), where a panel of the Seventh Circuit Court of Appeals did indeed espouse a purely objective standard to assess the reasonableness of traffic stops, but the majority was hardly enthusiastic about it. "[W]e, as an intermediate appellate court, do not feel empowered to evaluate the reasonableness of a particular arrest based on the arrest's conformance to usual police practices." United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989). Despite the apparent disdain of appellate review of subjective intent, the court's observation that "the adoption of [a purely] objective standard substantially diminishes the chances of discovering pretextual arrests," belied a federal discomfort with an objective standard which so completely ignores the intentions of police officers under any circumstances (stops, arrests or searches). *Id.* at 1040. It was not surprising then that the Seventh Circuit insisted that "[t]he adoption of an objective standard does not of course end the inquiry in the present case for the relevant objective facts remain to be determined," and then briefly flirted with an analysis which considers certain "factors" in making an objective assessment of Fourth Amendment reasonableness: "One such factor might be the participation of police officers in activities they would ordinarily not be engaged in." *Id.* "Another potentially relevant objective factor would be the usual police practice in the area." *Id.* at 1041. "Under this standard, an arrest would be unreasonable if the usual police practice in the area is not to arrest an individual for a particular offense." *Id.* This latter factor, the court admitted, would represent an unprecedented but "far reaching check on the discretion of individual police officers to effect custodial arrests." *Id.* Judge Ripple concurred in *Trigg*. *Id.* at 1042 (Ripple, J., concurring). In resolving "a most difficult" issue, the concurrence observed that

> many thoughtful jurists and commentators take the position that "the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of an invalid purpose." By contrast, others have maintained that a more narrow inquiry ought to measure the objective reasonableness of police actions.

Id. (quoting United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)); *see also* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (adopting the Eleventh Circuit's test for determining whether an investigatory stop is unconstitutional: the issue is "not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose"), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995); United States v. Causey, 834 F.2d 1179, 1187 (5th Cir. 1987) (en banc) (Rubin, J., dissenting) (adopting the Eleventh Circuit's inquiry into objective reasonableness "not as an examination of what an officer *could* do, but as an examination of what a reasonable officer *would* do"); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 121 (3d ed. 1996) (providing examples of situations that demonstrate police misconduct "*in spite of* rather than *because of*" the police's "underlying intent or motivation"). After assaying the merits and costs of this standard, the concurrence, like the majority, accurately predicted that this approach "may well not be open to us to pursue" given the recent Supreme Court's atti-

> the courts of appeals have not adopted clear or consistent approaches to the pretext issue. At times, courts recharacterize the search or seizure according to the subjective intent of the officer. . . . In other instances, courts simply ignore the subjective intent and focus on the objective facts of the fourth amendment predicate. . . . In still other instances, courts attempt to decide whether a reasonable officer would have taken the same action in the absence of an illegal motive . . . ."[98]

Out of this array of approaches grew the reasonable officer test. In *United States v. Smith*,[99] the United States Court of Appeals for the Eleventh Circuit was one of the first courts to adopt the "reasonable officer" analysis, an approach it found fully consistent with *Terry v. Ohio*. Smith was pulled over in his white Mercury by a Florida state trooper during a "special operation to intercept drug couriers on Interstate 95."[100] Although he said he saw the car "weaving," the trooper confirmed that he had stopped the car to investigate a felony.[101] While he lacked probable cause, the trooper nevertheless believed the Mercury was "hauling drugs."[102] The court decided not to "decide when, if ever, a stop for probable cause resulting from an observed traffic violation might be invalid as pretextual, . . . for it is clear that there was no probable cause here" because the trial court "expressly found that no traffic violation had occurred."[103] Nevertheless, the court spoke to the much

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tude. *Trigg*, 878 F.2d at 1043. Nevertheless, the concurrence suggested that the court "leave open . . . the possibility that gross abuse of authority, antecedent to the police action directly under scrutiny, might require a determination that the police action, taken as a totality, violates the fourth amendment." *Id.*; *see also* United States v. Rivera, 906 F.2d 319, 321 (7th Cir. 1990) (affirming the use of an objective standard).

98. Daniel S. Jonas, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1806-07 (1989).

99. 799 F.2d 704 (11th Cir. 1986).

100. United States v. Smith, 799 F.2d 704, 705 (11th Cir. 1986).

101. *Id.*

102. *Id.* He suspected the car because there were two people in the car about thirty years of age, the car was traveling fifty miles an hour at 3 a.m. with out-of-state tags and the fact that "the driver appeared to be driving overly cautious and did not look in our direction as he proceeded past us." *Id.* at 706.

103. *Id.* at 709. In other words, the traffic infraction did not actually occur, but was fabricated, a distinction the courts should make. In *United States v. Hawkins*, 811 F.2d 210 (3d Cir. 1987), the Third Circuit correctly concluded that its case (which involved a fabricated and not pretextual stop) was "distinguishable from those cases where the police, having no valid basis for a stop or arrest, relied on a pretext to justify their actions." United States v. Hawkins, 811 F.2d 210, 215 (3d Cir. 1987) (citations omitted).

more difficult issue of whether the trooper could have made a stop of the car on suspicion of drunk driving: "[T]he proper inquiry, again, is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose."[104]

It is significant that the Eleventh Circuit based its decision on *Terry v. Ohio* because, while pretextual traffic stops require analyses specific to the unique scenario of such seizures, pretextual arrests and pretextual searches may require wholly different and individualized approaches. As the Eleventh Circuit explained:

> By looking to what a reasonable officer *would* do rather than to what an officer validly *could* do, the standard we apply today to determine the validity of an allegedly pretextual investigative stop is supportive of the rationales that make *Terry*-stops reasonable under the Fourth Amendment. *Terry*-stops are reasonable not only because of the government's interest in investigating and alleviating officers' suspicions of illegal activity but also because of the limited intrusiveness of such stops. To maintain this balance between the competing interests of the government and the individual, each *Terry*-stop must be both "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." If officers were permitted to conduct *Terry*-stops based on what conceivably *could* give rise to reasonable suspicion of minor violations, the necessary connection between a seizure's justification and its scope would inevitably unravel.[105]

The court recognized the lack of protection that a contrary or diluted rule would afford:

> With little more than an inarticulate "hunch" of illegal activity an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course. This possibility was denounced more than 30 years ago by the Florida Supreme Court in a case remarkably similar to the present one: A holding that such a feeble reason would justify a halting and searching would mean that all travelers on the highway would hazard such treatment, for who among them would not be guilty of crossing the center line so much

104. *Smith*, 799 F.2d at 709.
105. *Id.* at 711 (citations omitted).

as a foot from time to time. All could, therefore, be subjected to inconvenience, ignominy and embarrassment . . . .[106]

The Eleventh Circuit's approach was perhaps clearer than the Fifth Circuit's decision some years earlier in *United States v. Cruz*,[107] which the *Smith* court found persuasive:

> In *Cruz,* a deputy sheriff noticed that a vehicle he had just passed on the highway did not follow him over the next hill. After he turned around to find the vehicle, he saw that it was traveling in the opposite direction. He testified that he surmised that the vehicle had made an illegal u-turn and so decided to stop the vehicle to issue a traffic warning. When several of the occupants could not produce documentation regarding their immigration status, the deputy arrested the driver and the occupants for violations of the immigration laws. The former Fifth Circuit held the stop an unreasonable seizure under the fourth amendment because its purported rationale was merely a pretext for an invalid purpose. Finding the testimony of the deputy inherently unbelievable, the court concluded that the deputy did not stop the car because of a possible traffic violation but instead was "hunting for illegal aliens and stopped [the] automobile to inspect its occupants."
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> . . .
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> *Cruz* did not delineate a precise definition of when an investigative traffic stop is invalid as pretextual. A standard for making that determination, however, easily can be derived from the decision. Based on the objective facts, the *Cruz* court did not believe that a police officer would have stopped the car to issue a warning for a possible u-turn. That an officer theoretically *could* validly have stopped the car for a possible traffic infraction was not determinative. Similarly immaterial was the actual subjective intent of the deputy. The stop was unreasonable not because the officer secretly hoped to find evidence of a greater offense, but because it was clear that an officer would have been uninterested in pursuing the lesser offense absent that hope.[108]

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106. *Id.* at 711 (quoting Collins v. State, 65 So. 2d 61, 63 (Fla. 1953)).

107. 581 F.2d 535 (5th Cir. 1978) (en banc).

108. *Smith*, 799 F.2d at 710 (citations omitted). *Cruz* was a decision the Eleventh Circuit felt "bound" to follow in *United States v. Smith.* A year after the Eleventh Circuit rendered its decision in *United States v. Smith*, the Fifth Circuit decided in *United States v. Causey* that "[i]nsofar as such cases as *Amador-Gonzalez*, *Cruz* and *Tharpe* . . . may have sought to lay down a contrary rule for our Circuit, they are overruled." United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) (Rubin, J., dissenting).

United States v. Valdez[109] affirmed the standard of review for pretextual traffic stops. In *Valdez*, the police followed a car from a house that they had under surveillance.[110] The driver of the car, Valdez, eventually committed a traffic offense and was stopped.[111] He was asked for his driver's license, which he produced, and his registration (Valdez explained that the car was loaned), and said he knew why he was stopped.[112] He then consented to the search of the car, in which police found contraband.[113] Finding that the officers would not have stopped Valdez "absent their hope of finding evidence of violation of the narcotics laws," the federal appellate court reaffirmed that "the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose."[114]

State courts, too, struggled with finding a workable approach to regulating pretext searches and seizures. But by the mid-1990s, the reasonable officer standard was gaining ground, as one court summarized:

> One camp, which includes . . . the courts of Florida, Georgia, North Carolina, Utah, and Virginia, has adopted the view that "in determining when an investigatory stop is unreasonably pretextual, the proper inquiry . . . is not whether the officer *could* validly have made the stop but whether under the same circumstance a reasonable officer *would* have made the stop in the absence of the invalid purpose." Under this view, it would appear that the State must establish two things in order to overcome an otherwise supportable motion to suppress: (1) that the officer himself purported to base the stop at least in part on the traffic violation, thus raising the basis for the pretextual argument, and (2) apart from the officer's declared motive or subjective intent, a "reasonable officer *would* have made the seizure in the absence of illegitimate motivation." The Fifth, Seventh, and Eighth Circuit Courts of Appeal and the courts of Idaho, Oregon, and Texas have rejected that approach and have looked in-

109. 931 F.2d 1448 (11th Cir. 1991).

110. United States v. Valdez, 931 F.2d 1448, 1449 (11th Cir. 1991).

111. *Id.*

112. *Id.* at 1450.

113. *Id.*

114. *Id.* at 1450-51 (quoting United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986)).

> stead to whether the officer *could,* not *would,* have stopped the vehicle but for his other suspicions.[115]

The trend throughout the mid-1990s appeared to favor state court adoption of the reasonable officer test, particularly in the traffic stop circumstance.[116] Courts began to recognize and articulate the importance of regulating this police practice:

> There can be little dispute that in our society, minor traffic and equipment violations are pervasive. Allowing police officers to stop vehicles for any minor violation when the officer in fact is pursuing a hunch would allow officers to seize almost any individual on the basis of otherwise unconstitutional objectives. Such unfettered discretion offends the Fourth Amendment. Further, allowing police

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115. Thanner v. State, 611 A.2d 1030, 1032 (Md. 1992) (citations omitted).

116. *See, e.g.*, State v. Izzo, 623 A.2d 1277, 1280 (Me. 1993) (adopting the reasonable officer test); State v. Morocco, 393 S.E.2d 545, 548 (N.C. App. 1990) (discussing that "[i]n determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer validly *could* do"); State v. Whitsell, 591 N.E.2d 265, 272-73 (Ohio Ct. App. 1990) (disagreeing specifically about the reasonable officer standard), *rev'd*, Dayton v. Erickson, 665 N.E.2d 1091 (Ohio 1996); *see also* State v. Harmon, 910 P.2d 1196, 1204 (Utah 1995) (surveying state judicial responses to pretext stops). Other states maintained their own customized standard for the review of pretextual police activity. *See, e.g.*, Brenk v. State, 847 S.W.2d 1, 5 (Ark. 1993) (asserting that pretext concerns intent, to be determined by the "circumstances of the arrest"); State v. Myers, 798 P.2d 453, 455 (Idaho Ct. App. 1990) (holding that motive is irrelevant when a police officer has "an objectively reasonable basis for making an investigative stop"); People v. Alvarez, 613 N.E.2d 290, 294 (Ill. App. Ct. 1993) (concluding that the proper inquiry is whether the stop is "objectively reasonable"); People v. Mendoza, 599 N.E.2d 1375, 1383 (Ill. App. Ct. 1992) (stating that the proper inquiry is if a reasonable police officer "would have" made the stop); State v. Hoven, 269 N.W.2d 849, 852 (Minn. 1978) (stating that pretextual activity by police officers cannot justify illegal searches and seizures); King v. State, 839 S.W.2d 709, 713 (Mo. Ct. App. 1992) (stating that whether a stop is pretextual is a question of credibility); State v. Prahin, 455 N.W.2d 554, 559 (Neb. 1990) (holding "an arrest may not be used as a pretext" to search for evidence); State v. Bolton, 801 P.2d 98, 105 (N.M. Ct. App. 1990) (suggesting a test based upon subjectivity); People v. Camarre, 569 N.Y.S.2d 223, 224 (N.Y. App. Div. 1991) (noting that police cannot arrest for a traffic offense as a "pretext for an otherwise impermissible arrest and search"); People v. Carvajales, 543 N.Y.S.2d 740, 741 (N.Y. App. Div. 1989) (concluding an arrest was pretextual and therefore the search was unlawful). Most state courts appeared to believe that pretextual police activity ought to be subject to judicial review and regulation, and none expressed judicial approval of pretext stops. But neither was there a widespread expression that a case-by-case approach judging the subjective mindset of police officer would be a desirable method of judicial review. Most courts seemed to lie somewhere between the case-by-case approach and one which ignores pretextual behavior altogether, until this latter approach was adopted wholesale by the United States Supreme Court in *Whren v. United States*, 517 U.S. 806 (1996), discussed *infra*.

officers to make pretext stops implicates equal protection concerns and policies [as well].[117]

The struggle of the state and federal courts underscores the importance of categorizing the pretext issue and further fashioning a specific analysis to fit the unique scenarios wherein the pretext issue arises. Federal appellate courts have sometimes overlooked the reality that pretext arises in very different circumstances, and an analysis or standard for one scenario may not properly fit another frequently-encountered scenario. Thus, a standard for a pretextual traffic stop may not invariably suit an analysis for a pretextual arrest or search.

Once pretextual traffic stops are recognized as *sui generis*, they must be distinguished from those scenarios wherein the police falsify a cause to stop a car.[118] In those circumstances, a traffic violation that proved to be a fabrication cannot be said to be a pretext for anything because it did not occur. The reasonable suspicion is absent, not because the police acted pretextually, but because no grounds existed for the stop. Pretext and perjury are different forms of deception. In the former, a valid legal infraction is used as cover for a covert investigative purpose; in the latter, the police falsely claim that a valid legal infraction ever existed. This distinction, too, is sometimes overlooked.[119]

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117. State v. Lopez, 831 P.2d 1040, 1045 (Utah Ct. App. 1992) (citations omitted), *overruled by* 873 P.2d 1127 (Utah 1994). The Utah appellate court stated the allocation of the burden of proof: "If the defendant sufficiently raises the pretext issue, the burden of proof is then ultimately upon the State to show that a reasonable officer would have made the stop absent the alleged illegal motivation." *Id.* at 1049. However, the Utah discretionary court decided that the pretext doctrine should be removed because it was "unnecessary to protect citizens from unlawful searches and seizures, . . . requires courts to assess the reasonableness of police conduct under the Fourth Amendment according to a subjective standard, . . . discourages equal protection of the law, . . . [and is] superfluous and conceptually flawed." *Lopez*, 873 P.2d at 1135.

118. *See* United States v. Daniel, 804 F. Supp. 1330, 1335 (D. Nev. 1992) (holding that the inquiry for determining a pretext is found by looking to the officer's motivation in arresting); *see also* State v. Everett, 472 N.W.2d 864, 867 (Minn. 1991) (making a distinction between "fabricated pretexts" and "legal" pretexts).

119. Courts have too often failed to distinguish between the very different circumstances in which pretext arises. The Fifth Circuit's opinion in *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987), is a paradigm of confusion: the majority addresses one form of pretext (use of a minor offense for custodial arrest to investigate for a more serious crime), while the dissent is concerned with another (use of a valid traffic stop to investigate for a more serious crime). However, the Court of Criminal Appeals has recognized an important distinction between two subcategories of pretext seizures: "(1) those involving admin-

One of the objections raised against judicial review of police motivations is largely evidentiary. A policeman who testifies that he stopped a driver for some barely believable traffic infraction may be doubted; a policeman who testifies that he stopped a driver for some plausible traffic offense may be believed. Unfortunately, courts have left unarticulated how they discern the pretextual officer from the honest one.

The usefulness of the reasonable officer test is that it lends courts a more objective basis upon which to judge police behavior in a traffic stop, as state and federal courts have discovered.[120] Courts need not be limited to an entirely intuitive task of gauging police credibility. By measuring the police officer's behavior against a standard, be it his own or his department's policy, courts thereby employ a more empirical method of determining whether a citizen was stopped for the alleged traffic violation, or whether a traffic infraction was being used as a springboard from which an officer may be merely satisfying his own curiosity.

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istrative or regulatory stops which lack initial suspicion of wrongdoing on the part of detainees; and (2) those situations in which an individual is suspected of having committed a criminal act and is either temporarily detained for investigation or arrested." Gordon v. State, 801 S.W.2d 899, 903 (Tex. Crim. App. 1990) (en banc) (citations omitted).

120. *See* United States v. Hernandez, 55 F.3d 443, 445 (9th Cir. 1995) (choosing to apply the reasonable officer test, "[r]ather than examining the subjective motivations of individual officers," when determining "whether a particular stop is pretextual"); United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (adopting the reasonable officer approach), *overruled by* United States v. Botero-Ospina, 71 F.3d 783 (10th Cir. 1995); United States v. Smith, 799 F.2d 704, 709 (11th Cir. 1986) (holding that determining whether there has been a violation of the Fourth Amendment requires "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time" (quoting Maryland v. Macon, 472 U.S. 463, 470 (1985))); Metford v. State, 990 S.W.2d 799, 804 (Tex. App.—Austin 1999) (holding that "[t]he legality of a *Terry*-type frisk on appeal is judged by the 'reasonable officer' standard"), *vacated*, 13 S.W.3d 769 (Tex. Crim. App. 2000). *But see* United States v. Jeffus, 22 F.3d 554, 556-57 (4th Cir. 1994) (noting that the reasonable officer standard is the minority approach, and choosing to follow the Fifth, Seventh, and Eighth Circuits in applying the majority approach "that any traffic stop, which is legally justified at its inception, is constitutionally valid for the purpose of a search later conducted on probable cause"); United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc) (focusing not on the "would" test or the "could" test, but rather "on whether this particular officer had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop").

The reasonable officer standard of review became as familiar among appellate courts as the review of a *Terry* stop.[121] Like a *Terry* stop, a traffic stop must be justified at its inception. It must be temporary, and it must last no longer than is necessary to effectuate the purpose of the stop.[122] The reasonable officer test not only lends a helpful and familiar analogous standard of review, it also offers the criminal courts all the same advantages that civil courts have enjoyed since the institution of the reasonable person test in deciding civil claims of negligence or contractual disputes. It is verifiable, practical, and relatively easy to apply. It is a clear statement of law to guide reviewing courts and police. Further, it is a test that need only be applied to allegedly pretextual traffic stops, for which it seems almost custom-made to regulate. Just as the reasonable officer test was gaining favor among the courts, legal commentators who studied the pretext problem were coming to some similar conclusions of their own.

VI. COMMENTATORS' ANALYSES: SUBJECTIVE APPROACH, THE "REASONABLE OFFICER" TEST, AND HARD CHOICES

Academic suggestions regarding how the judiciary should address the pretext problem have also varied.[123] Some seem to be too limited and do not address the uniqueness of pretextual traffic stops.[124] Other reviews are too general and fail to address specifi-

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121. This may be perhaps because "[a] traffic stop is [seen as] analogous to a . . . '*Terry* stop.'" Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

122. United States v. Ruesga-Ramos, 815 F. Supp. 1393, 1397 (E.D. Wash. 1993).

123. *See, e.g.*, Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 79 KY. L.J. 1, 7-13 (1990) (providing an overview of the diversity of opinions regarding the pretext problem); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 234-52 (1989) (exploring a variety of academic opinions regarding the use of traffic offenses as pretext for searches); Alexander E. Eisemann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U. L. REV. 223, 226 (1983) (summarizing the pretext issue, the exercise of police power, and exceptions). *See generally* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-30 (1974) (exploring the manner in which the Supreme Court has handled search and seizure cases).

124. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974) (delineating three ways to curb police abuses of stop-and-frisk powers).

cally the realities and practicalities of pretextual policing.[125] However, despite the array of opinions among legal scholars, three approaches have engendered the most discussion in legal academic circles. One approach is referred to as the "hard choice" approach, favored by Professor James B. Haddad.[126] Professor John M. Burkoff has argued a purely subjective standard.[127] Yet another approach is the reasonable officer test, favored by Professor Wayne R. LaFave.[128]

Under the hard choice approach, the subjective intent of a police officer in conducting a given search or seizure is irrelevant. Instead, the issue is whether the police should have the authority to conduct the search or seizure in the first place—the legality of the seizure or search is completely dependent upon whether or not the police do have the authority.[129] "If I am troubled by doctrines which permit the police to arrest and search minor traffic offenders," Haddad wrote, "it is not primarily because I fear use of these doctrines as pretexts in the hope of discovering criminal evidence. It is rather because the powers on their face are too broad."[130]

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125. *See* Alexander E. Eisemann, Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U. L. REV. 223, 254-55 (1983) (discussing the limitations of Anthony G. Amsterdam's approach to curbing pretextual arrests).

126. James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 212 (1977) (discussing the balance between "the societal need for a particular governmental power against the intrusions on privacy and liberty which are occasioned by the use of the doctrine").

127. John M. Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. REV. 70, 111-22 (1982).

128. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 115 (3d ed. 1996).

129. James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 212 (1977). As Haddad explained it, the judiciary

> reevaluates the search and seizure doctrine which law enforcement agents allegedly have misused. The court once more balances the societal need for the particular governmental power against the intrusions on privacy and liberty which are occasioned by the use of the doctrine. If it sees that a particular power is rarely used *except* as a guise for discovering evidence, then it is not very likely to be impressed by the argument that the government needs the power for no other purpose. . . . The court then either reaffirms the doctrine, rejects the doctrine, or narrows its scope.

Id.

130. *Id.* at 213.

The proponent of the subjective approach, Professor Burkoff, appears to be Haddad's chief critic.[131] Burkoff, who has written extensively on the pretext issue,[132] advocates a judicial review that looks to the motivations and bad faith of police officers in carrying out otherwise permissible searches, seizures, and stops.[133] If the otherwise valid stops, arrests, or searches of an officer are found to be instigated by a desire to conduct some more intrusive investigation for which the officer had no probable cause, then the officer would be said to act pretextually.[134]

Under the reasonable officer approach, like the hard choice theory, the subjective intent of a police officer remains irrelevant. The judiciary instead decides whether a reasonable officer would have conducted the search or made the arrest in the absence of the improper motivation.[135] This analysis has been stated as "whether on the basis of the objective facts and absent bad faith, a 'reasonable' officer would have acted as the actual officer did."[136]

Professor LaFave has been the leading proponent of the reasonable officer test. As he states: "[I]f the police stop X's car for minor offense A, and they 'subjectively hoped to discover contraband during the stop' so as to establish serious offense B, the stop is nonetheless lawful if 'a reasonable officer *would* have made the stop in the absence of the invalid purpose.'"[137] Standardized pro-

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131. *See* John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REFORM 695, 695-703 (1985) (discussing why Professor Haddad's approach "is dead wrong").

132. *See generally* John M. Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. REV. 70 (1982) (analyzing the significance of searching a police officer's state of mind under the Fourth Amendment); John Burkoff, *Pretext Searches*, 9 SEARCH & SEIZURE L. REP. 25 (1982) (examining the constitutionality of pretextual searches under the Supreme Court's *Scott* decision); John M. Burkoff, *The Pretext Search Doctrine: Now Your See It, Now You Don't*, 17 U. MICH. J.L. REFORM 523 (1984) (alerting to the destruction of the pretext search doctrine); John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363 (1989) (advocating continued recognition and application of the pretext search doctrine): John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REFORM 695 (1985) (providing a rejoinder to Haddad's hard-choice approach).

133. John M. Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. REV. 70, 112-22 (1982).

134. *Id.*

135. United States v. Johnson, 815 F.2d 309, 315 (5th Cir. 1987).

136. Ed Aro, *The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases*, 70 BOSTON L. REV. 111, 167 (1990) (concluding that this test "is not doctrinally complex, nor is it difficult to apply in practice").

137. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 118 (3d ed. 1996).

cedures would be the touchstone of this approach. As LaFave sees it, the judiciary's concern under this analysis is not

> *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.[138]

There is nothing to preclude adoption of each of these approaches, given the context of the search or seizure issue. The reasonable officer test may be regarded as the touchstone for determining pretextual stops, but an officer who freely admits that he acted pretextually should likewise be subject to judicial review.

The hard choice test in no way negates a reasonable officer approach, but may be more appropriate when police authority itself is challenged. Statutes that authorize police to arrest for non-jailable traffic violations may be reviewed as a straightforward matter by simply determining whether the legislature has granted such arrest authority; the hard choice for the states would be whether police authority to arrest for minor offenses (such as minor non-jailable traffic crimes) should be limited, an approach which can be readily undertaken by the legislature. The officer's behavior may also be challenged as pretextual, and the reasonable officer inquiry may then be employed to aid a reviewing court in making a more objective and verifiable assessment of police behavior. But despite its usefulness and growing acceptance as a standard for review, opponents of any judicial regulation succeeded in removing the pretext issue altogether from the realm of judicial review in *Whren v. United States*.[139]

VII. THE SUPREME COURT'S *WHREN* DECISION TO REVIEW NO EVIL

In *Whren*, two young African-Americans in a dark Nissan Pathfinder truck with temporary license plates stopped at a stop sign for more than twenty seconds.[140] The driver appeared to be looking at the passenger's lap.[141] Vice-squad officers on patrol in an un-

138. *Id.* § 1.4(e), at 120-21.
139. 517 U.S. 806 (1996).
140. Whren v. United States, 517 U.S. 806, 808-09 (1996).
141. *Id.*

marked car saw this behavior and made a U-turn back toward the Pathfinder.[142] Eventually, the officers pulled alongside the car while it was stopped at a traffic light. One got out, identified himself as a police officer, and "immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren's hands," and arrested Whren.[143]

The government justified the stop by claiming the officer was merely attempting to warn the driver about traffic violations he had observed, namely the driver's failure to signal and driving at a speed the vice-squad officer deemed unreasonable.[144] Undermining this explanation was the officers' own police department regulation prohibiting stops for minor traffic violations by plainclothes officers in unmarked cars.[145] Whren moved to suppress evidence of the drugs because the stop had not been justified by a reasonable suspicion that the driver or his passenger were engaged in criminal activity and because the officers' justification for the stop was merely a pretext to seize the driver and search the car.[146]

Justice Scalia, speaking for a unanimous Court, first pointed out that Whren had in fact committed traffic violations under the municipal code, such as failing to "give full time and attention to the operation of the vehicle,"[147] failing to give "an appropriate signal," and driving "at a speed greater than [was] reasonable and prudent under the conditions."[148] The Court found that the motivations or intentions of the police play no role in determining the reasonableness of their seizures because prior cases had foreclosed any inquiry into the subjective state of mind of police officers.[149]

Scalia ridiculed Whren's insistence that a reasonable officer test was not a subjective standard by pointing out that a court would necessarily discern the subjective state of mind—the officer's true purpose in making the stop—in the course of deciding whether a

142. *Id.*

143. *Id.* at 809.

144. *Id.* at 809-11.

145. *Whren*, 517 U.S. at 809-11.

146. *Id.* at 808.

147. *Id.* at 810.

148. *Id.*

149. *Id.*; *see also* Arkansas v. Sullivan, 532 U.S. 769, 771 (2001) (reversing the Arkansas Supreme Court for failing to follow the *Whren* decision).

reasonable officer would have made the stop.[150] There was some objective reason for stopping Whren (his traffic code violations), which promptly ended the inquiry, so far as the federal judiciary would be concerned.[151]

Justice Scalia may be right when he points out that a reasonable officer test possesses, as a consequence of its application, a revelation about a policeman's state of mind. Why this collateral result should defeat the reasonable officer test or its salutary effects, Scalia left unexplored. At best, Scalia merely recognized the failure, if not futility, of making enduring distinctions between what is truly a "subjective" analysis and what is a truly "objective" one,[152]

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

151. *Id.*

152. The objective/subjective distinction itself has questionable philosophical legitimacy. *See* THOMAS NAGEL, THE VIEW FROM NOWHERE 5 (1989) (noting that the "distinction between more subjective and more objective is really a matter of degree," and objectivity is "overrated by those who believe it can provide a complete view of the world on its own, replacing the subjective views from which it has developed"). Courts have demonstrated the impossibility of a standard of review wholly unrelated to the subjective mindset of policemen. For example, take the Sixth Circuit's somewhat confusing opinion in *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (en banc), where the court announced first that "[w]e hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment." United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993) (en banc). But then the majority insisted that its standard was *not*

> whether a reasonable officer "would" have stopped the suspect (even though he had probable cause to believe that a traffic violation had occurred), or whether any officer "could" have stopped the suspect (because a traffic violation had in fact occurred), but on whether this particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop.

Id. The court then noted that its determination "is fact-dependent and will turn on what the officer knew at the time he made the stop." *Id.* After noting the majority's doublespeak about its new standard, Judge Keith would have adhered to the reasonable officer test, which the court previously indicated it would follow. Judge Jones dissented, claiming that the majority's test allows an officer to:

> 1) see a driver whom he wants to stop to search for illegal drugs, for no reason other than, perhaps, the driver's race, looks, or attire, 2) follow the driver until he can stop him for some minor, and rarely enforced, traffic violation, and 3) search for drugs pursuant to the valid stop for the traffic offense.
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> . . . [The courts] are entrusted with a duty as guardians of the Bill of Rights to apply limitations upon the legislature's power. . . . The majority does not engage in "judicial restraint" merely because it expands the power of the legislature; rather, it does precisely the opposite when it makes policy judgments that lead this court to neglect its solemn duty to enforce—not eviscerate—the Constitution.

a distinction he insists on elsewhere.[153]

Whren is a paradigm of an all-too-familiar judicial technique of invoking objectivity as an excuse to eliminate *all* judicial review of the subjective states of mind of the police when assessing the reasonableness of police behavior. Reviews of *Terry* stops routinely assay both what an officer knew and what he believed—inquiries that necessarily describe an officer's state of mind.[154] The Court's repeated admonition to eschew reviewing "the officer's actual state of mind at the time the challenged action was taken"[155] ignores the reality that the judiciary already undertakes this inquiry in probable cause reviews, which includes assessment of an officer's own police experience and training—an inescapably personal inquiry.[156] But this reality has yet to cause the Court to resist any application of these standards when *approving* police behavior. The Supreme Court's purported subjective/objective dichotomy has served only to justify its refusal to scrutinize police action, and contributed little else to the administration of the Fourth Amendment's reasonableness requirement.

When one state court declined to believe that *Whren* really meant to remove all consideration of police intent from Fourth Amendment enforcement, the Supreme Court promptly rebuked it. In *Arkansas v. Sullivan*,[157] a policeman pulled over a driver for speeding and for having an improperly-tinted windshield.[158] Once the driver produced his driver's license, the officer "realized that

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Id. at 397-98 (Jones, J., dissenting) (citations omitted).

153. *Whren*, 517 U.S. at 814 (holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"). It may be that Justice Scalia himself does not subjectively appreciate the limits of this objective/subjective distinction, which is the dominant philosophical theme in his *Whren* opinion.

154. *See* Scott v. United States, 436 U.S. 128, 137 (1978) (explaining that reasonableness is made by assessment of the officer's actions "in light of the facts and circumstances then known to him"); Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (stating that the test is whether "the facts available to the officer at the moment of the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate" (citing Carroll v. United States, 267 U.S. 132 (1925), and Beck v. Ohio, 379 U.S. 89, 96-97 (1964))).

155. Maryland v. Macon, 472 U.S. 463, 470-71 (1985).

156. *See Whren*, 517 U.S. at 811-13 (considering that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action").

157. 532 U.S. 769 (2001) (per curiam).

158. Arkansas v. Sullivan, 532 U.S. 769, 770 (2001) (per curiam).

he was aware of 'intelligence on [the driver] regarding narcotics.'"[159] While the driver searched for his registration and insurance, the officer saw that he had a roofing hatchet in his car and decided to arrest him, which then permitted the officer to "inventory" the vehicle.[160]

The trial court found that the arrest was pretextual.[161] While the prosecution successfully defended the officer's conduct to the state appellate court with the *Whren* analysis, the Arkansas Supreme Court simply could not believe that the United States Supreme Court really meant what it said in *Whren*, and affirmed the trial court.[162] But the Supreme Court did mean to sanitize manipulative police action by removing it from judicial review, as it promptly reversed the Arkansas court.[163]

Justice Ginsburg concurred in *Sullivan* with three other Justices, pointing out that in fact the Supreme Court has deemed that "such exercises of official discretion are unlimited by the Fourth Amendment."[164] She expressed the hope that "if experience demonstrates 'anything like an epidemic of unnecessary minor-offense arrests,' . . . the Court will reconsider its recent precedent."[165] Unfor-

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159. *Id.* (quoting State v. Sullivan, 16 S.W.3d 551, 552 (Ark. 2000), *rev'd*, 532 U.S. 769 (2001) (per curiam)).

160. State v. Sullivan, 11 S.W.3d 526, 526 (Ark. 2000), *rev'd*, 532 U.S. 769 (2001).

161. *Sullivan*, 11 S.W.3d at 528.

162. State v. Sullivan, 16 S.W.3d 551, 552 (Ark. 2000).

163. *See* Whren v. United States, 517 U.S. 806, 814 (1996) (stressing the Court's resistance to Fourth Amendment challenges based on the motivation of the police officer). The Arkansas Supreme Court also announced that it was not precluded from interpreting federal rights more broadly than the United States Supreme Court. *Sullivan*, 16 S.W.3d at 552. But state courts have adopted the *Whren* standard as a matter of state constitutional law. *See* People v. Robinson, 767 N.E.2d 638, 649 (N.Y. 2001) (adopting *Whren* under the New York Constitution and listing the majority of other states which have adopted or follow *Whren* analysis as a matter of state constitutional law). Despite official state court obedience to *Whren*, the pretext controversy continues, even after the *Whren* decision. *See, e.g.*, *Sullivan*, 16 S.W.3d at 553 (distinguishing *Whren* from pretextual arrests, which the state court remarked "[s]urely . . . flies in the face of reasonableness, which is the essence of the Fourth Amendment"); State v. Varnado, 582 N.W.2d 886, 892 (Minn. 1998) (reaffirming that the "pretext factor is relevant to determining whether the intrusion is reasonable"); State v. Ladson, 979 P.2d 833, 839 (Wash. 1999) (explaining that the state constitution prohibits pretextual searches and seizures: "[W]e look beyond the formal justification for the stop to the actual one. In the case of pretext, the actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.").

164. Arkansas v. Sullivan, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring).

165. *Id.* (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 353 (2001)). One commentator has asked, "Why is an epidemic necessary before the Court decides that arrests

tunately, the *Sullivan* concurrence misunderstands the pretext technique of investigation. Police can stop and detain drivers for any infraction arguably and ambiguously arising anywhere within the expanse of broadly-written traffic violations, but more likely arrest only if their seizure results in the discovery of serious criminality.

Drivers will not be arrested invariably for traffic violations, but rather for whatever other illegality (at least those more serious than some fine-only traffic offense) may be discovered. In this way, police may well insulate pretextual behavior from judicial notice altogether. Only the Texas Court of Criminal Appeals could rescue Texas drivers from this state of affairs, but unfortunately, that court had already led the way to the destruction of the Texas pretext doctrine even before the Supreme Court's *Whren* decision.

VIII. THE TEXAS COURT OF CRIMINAL APPEALS AND THE "REASONABLE OFFICER" STANDARD

For drivers on Texas roads, the *Whren* decision had little impact, as the Court of Criminal Appeals had already dispatched its state constitutional review of pretextual behavior a year earlier. In *Crittenden v. State*,[166] an individual called police complaining that someone in a white pickup truck was "possibly trying to buy drugs."[167] The police appeared, spoke briefly with the driver of a white pickup truck, and released him.[168] However, after he drove off, the driver failed to give a proper signal as he made a right turn.[169] The police pursued him, stopped him in what one officer described as a "kind of research-type situation," and then asked for his driver's license and proof of insurance.[170] When the driver—described as "cooperative"—was not immediately able to locate his insurance papers, the police asked him to step out of his truck

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for minor traffic offenses provide opportunities for officers to impose punishment without trial and to engage in searches that have nothing to do with the traffic violations that they investigate?" Stephen A. Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity (Lecture)*, 40 AM. CRIM. L. REV. 133, 156 (2003).

166. 899 S.W.2d 668 (Tex. Crim. App. 1995) (en banc).

167. Crittenden v. State, 899 S.W.2d 668, 669 (Tex. Crim. App. 1995) (en banc).

168. *Id.*

169. *Id.*

170. *Id.* (noting that the officer testified that he intended to issue a traffic citation, although he did not carry a citation book in the patrol car).

and obtained his consent for a search of his person.[171] When the police found contraband, he was arrested.

On appeal, Crittenden insisted that the pretext doctrine existed under Article I, Section 9 of the Texas Constitution.[172] But the Court of Criminal Appeals expressly rejected the reasonable officer test as a matter of state constitutional law.[173] The *Crittenden* majority relied primarily on its previous decision in *Garcia v. State*,[174] which had rejected the reasonable officer test, at least as a matter of federal constitutional law.[175]

In *Garcia*, the court found the reasonable officer approach to be "in practice . . . at worst unworkable and at best highly problematic" for two stated reasons.[176] First, the Court concluded as a matter of federal jurisprudence that it made

> little sense to maintain the pretext arrest doctrine solely to deter the subjectively bad intentions of law enforcement personnel when these intentions do not ultimately manifest themselves in any objectively ascertainable Fourth Amendment violations. Thus, as long as the facts and circumstances show a valid and legal detention, it serves no actual Fourth Amendment function to attempt to unearth the subjective reasons for such detention.[177]

The *Garcia* majority failed to recognize that the pretext doctrine's *sole* purpose is not to deter bad intentions, although subjecting pretextual police behavior to judicial scrutiny does tend to have that salutary effect. Like search and seizure provisions themselves, the pretext doctrine's other purposes include vindicating a constitutional right against unreasonable police behavior, limiting police authority, and regulating police behavior.[178] While it might be true that it is senseless to do no more than maintain power of judicial review over police behavior that the judiciary cannot confidently and reliably regulate, it is just as senseless to abdicate that power

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171. *Id.* The driver disputed that he consented to a search of his person. *Id.* at n.1.

172. *Crittenden*, 899 S.W.2d at 669.

173. *Id.* at 672-73.

174. 827 S.W.2d 937 (Tex. Crim. App. 1992) (en banc).

175. Garcia v. State, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992) (en banc).

176. *Id.* at 942-43.

177. *Id.* at 944.

178. *See* Stephen A. Saltzberg, *The Supreme Court, Criminal Procedure and Judicial Inquiry*, 40 AM. CRIM. L. REV. 133, 153 (2003) (discussing protections against arbitrary invasion).

on the same basis. It would seem that the judicial remedy is to articulate a more reliable way of regulating and deterring unreasonable searches and seizures. Stated another way, if judicial eyesight is so poor that it cannot tell a traffic stop from a pretext stop, the solution is to improve the vision, not cut out the eyes. Blindness and clarity are competing values in a system priding itself on justice, but, in the pretext context, focus is better than occlusion, particularly where the former may be obtained with removal of a self-imposed blinder.

One of the insurmountable obstacles for the judiciary, *Garcia* suggests, is that there is no "objectively ascertainable" manifestation of pretextual behavior.[179] However, the reasonable officer test does offer a way of determining pretext wholly apart from the subjective state of mind of the police officer: the officer's standard practice or his agency's policies. If the officer claims that he always stops, or arrests, or searches drivers who have fuzzy dice hanging from their rearview mirrors,[180] for example, then such records may be discovered, produced, and reviewed. It is a separate question whether a state's own constitution would permit an officer to make traffic stops (or greater intrusions) on this basis. The only question for a determination of pretext is whether or not an officer deviated from some readily-determinable standard of behavior. The use of a standard creates an objectively ascertainable way of sifting legitimate traffic stops from pretextual ones.

Secondly, the court doubted the judiciary's "ability to successfully determine a police officer's state of mind at the time of the detention . . . . [Such a determination] is neither easily nor consistently ascertained by courts. . . ."[181] But as Justice Holmes remarked, "If justice requires [a] fact to be ascertained, the difficulty of doing so is no ground for refusing to try."[182] Fortunately, the reasonable officer test removes these difficulties and offers both greater ease and consistency of review. Courts need not base their

179. *Id.*

180. *See, e.g.*, People v. Alvarez, 613 N.E.2d 290, 294 (Ill. App. Ct. 1993) (discussing cases dealing with the concern of that state's police with fuzzy dice hanging from rear-view mirrors); People v. Mendoza, 599 N.E.2d 1375, 1377 (Ill. App. Ct. 1992) (upholding the validity of a traffic stop based on fuzzy dice being an obstruction to the driver's view, in violation of statute).

181. *Garcia*, 827 S.W.2d at 944.

182. O.W. HOLMES, THE COMMON LAW 48 (1881).

conclusions of pretext entirely on an officer's state of mind. The reasonable officer test lends a standard with which to make a more objective assessment.

Quoting Professor Anthony G. Amsterdam,[183] a majority of the court also seemed to reason that such an inquiry into the state of mind of a police officer "is not worth the trouble of the hunt"[184] because valid justifications "can be fabricated all too easily and undetectably" by clever police officers.[185] The rationale seems to be that because police officers may lie too well, the judiciary should not bother with regulating their behavior.[186] Apart from the merits of this reasoning, such observations confuse pretextual stops with fabricated ones. The officer who lies about events which did not happen defeats his probable cause for making the stop, but he is not behaving pretextually. Both actions constitute reprehensible police conduct, but they are subject to different forms of analysis, and each can be judicially regulated.

The *Crittenden* majority was also concerned that the adoption of a standard under the Texas Constitution differing from a standard it had previously adopted under the federal constitution would "stretch judicial credibility to the breaking point," particularly because the court had found federal interpretation so sensible in *Garcia*.[187] In his dissent, Judge Baird answered this logic, remarking that "judicial convenience should not be the controlling factor when determining whether the Texas Constitution provides greater protection than the United States Constitution."[188] Judge Baird observed that the court had not decided, under any of its cited

183. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974).

184. *Garcia*, 827 S.W.2d at 944.

185. *Id.* (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974)).

186. Given admissions such as those in *Black v. State*, 739 S.W.2d 240 (Tex. Crim. App. 1987) (en banc), one wonders how hard it really is to elicit police testimony regarding their pretextual behavior. In *Black*, a detective testified that he followed a homicide suspect because "[w]e wanted to talk to him in reference to a homicide case and . . . we followed him for some distance and in the process he committed several traffic violations," which they used to seize and interrogate him, and search his car and home. *Id.* at 241-42. Note that *Black* was later overruled on other grounds by *Gordon v. State*, 801 S.W.2d 899 (Tex. Crim. App. 1990) (en banc), wherein the court made it clear that it would not apply the pretext doctrine. *Gordon*, 801 S.W.2d at 911.

187. Crittenden v. State, 899 S.W.2d 668, 673 (Tex. Crim. App. 1995) (en banc).

188. *Id.* at 674 (Baird, J., dissenting).

opinions, anything about the validity of the pretext doctrine under the Texas Constitution—even explicitly refusing to decide that question.[189]

There is no reason for the court to balk at adoption of a rationale independent of the Fourth Amendment, the dissent argued, particularly in light of the court's declaration of constitutional analysis independent of the nine federal appointees who occupy the Supreme Court.[190] Finally, the dissent warned that the rejection of the reasonable officer test

> will prevent judicial review of the arbitrary use of power by police officers. A pretextual arrest typically stems from the exercise of an officer's discretionary authority, such as a traffic stop. The objective standard precludes review of the reasons behind the traffic stop as well as the actions committed by the officer in conducting a stop. Thus the objective standard precludes our examination of whether the arrest resulted from standard police procedures, or whether it was a pretext to allow an investigation greater than that allowed under our Constitution. Under the majority opinion, the officer need only "make [his] conduct appear (objectively) as if it is lawful" in order to avoid the exclusionary measures of Article I, § 9.[191]

The reasonable officer test was also seen as a review that addresses only the arbitrariness of police action, as *Garcia* insisted in a footnote:

> The modified objective approach requires a determination of standard police procedure and practice in a given locale.
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> . . . .
>
> [T]he rationale for this test is to limit the arbitrariness of police action, particularly when a traffic offense is the stated basis for the stop. Because police officers have discretion whether to stop a person for a traffic offense, the concern is that the ease with which law enforcement officials may detect and detain individuals for these frequent offenses will vest in the hands of the police too great a possibility for the arbitrary exercise of discretionary police power in pretext situations. It can be argued that this arbitrary action is un-

189. *Id.* at 675-76.

190. *Id.* at 671; *see also* Heitman v. State, 815 S.W.2d 681, 688 (Tex. Crim. App. 1991) (en banc) (rejecting the "lockstep" doctrine, previously advanced by some members of the Court of Criminal Appeals, which requires a state constitution to be interpreted in "lockstep" with the interpretation of the federal constitution).

191. *Crittenden*, 899 S.W.2d at 678-79 (Baird, J., dissenting).

> reasonable . . . because the police seek to investigate for an offense for which they cannot legally stop or arrest. Thus, evaluating a detention under the limited objective approach eliminates the allegedly arbitrary nature of the pretext stop by evaluating the propriety of the stop according to local procedural standards.[192]

The purpose of the reasonable officer test is not merely to limit arbitrariness, but also to subject pretextual police activity to judicial review. It is not only arbitrariness which is sought to be regulated; deterrence of police behavior aimed at circumventing constitutional constraints can also be achieved. The utility of the reasonable officer analysis aside, let it not be assumed that the sole aim of the reasonable officer test is to do nothing more than constrain arbitrary police decision-making. The existence of oversight has deterrent value apart from express enforcement in specific cases.

The *Garcia* footnote also confuses pretext with fabrication. In the former, the police actually observe some minor traffic infraction and use it as an excuse to conduct some greater intrusion for which they have no cause to conduct. In the latter, the police fabricate a traffic offense, then use it as a basis to make further inquiry. Under any interpretation, the latter—where police institute a stop, arrest, or search based on events that simply did not occur—is clearly unconstitutional[193] because the probable cause is fiction.

Furthermore, the *Garcia* footnote also assumes that the reasonable officer test is limited to ascertaining whether a local standard exists. With that assumption, the court then criticized the approach on the grounds that

> it fails to recognize the inherent discretion given police officers in dealing with traffic offenses. The "standard" practice of a particular geographic area may vary greatly . . . . [A] practical flaw in the limited objective test is that there may not be an easily discernable "standard" or procedure against which to analyze an individual officer's actions.[194]

The reasonable officer test considers the existence and content of a local standard in assaying whether a reasonable officer would

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192. Garcia v. State, 827 S.W.2d 937, 943 (Tex. Crim. App. 1992) (en banc).

193. It is only the former scenario in which some minor infraction of the law actually occurs—that is the subject of the pretext doctrine and with which this Article is concerned.

194. *Garcia*, 827 S.W.2d at 942 n.7.

have made the traffic stop, but it is hardly determinative. As other cases have shown, the test is even employed in measuring the propriety of the officer's own standards.[195]

The criticism that the reasonable officer test fails to recognize the inherent discretion given police officers in dealing with traffic offenses begs the question of how to objectively limit police discretion in traffic stops. The problem is that police have virtually limitless discretion on roads, streets, and highways. The solution is not to immunize police behavior from judicial review, but to derive a method of regulating pretextual traffic stops in a more lucid and workable manner.

Texas has over 2500 law enforcement agencies[196] with almost 61,000 officers,[197] and standards are likely to vary greatly, as the *Garcia* opinion noted.[198] But it is a separate question whether the reasonable officer test is flawed because "there may not be an easily discernible 'standard' or procedure against which to analyze an individual officer's actions," as the court complained.[199] The first observation assumes the existence and the discoverability of local standards, while the latter assumes that such varied standards will always be undiscoverable. The latter assumption is untenable.

While different agencies may have different standards, it does not follow that the judiciary will be unable to detect any written or verifiable standards in a given police agency. It would be the odd and constitutionally suspect police force that did not have some standards that are subject to verification; indeed, it would seem that having standards is one of the qualities that distinguishes police officers from vigilantes. It is sheer indolence for a court to make no effort to discern this police behavior because any attempt to do so will not always be successful, or at least will not be expli-

195. *Cf.* United States v. Harris, 928 F.2d 1113, 1116 (11th Cir. 1991) (noting an officer testifying that he "routinely stops cars where the driver is weaving," and reasonable officers would have made the stop); United States v. Deases, 918 F.2d 118, 121 (10th Cir. 1990) (stating that the "'policy' of the Kansas Highway Patrol [is] to stop all vehicles driving five to six miles over the speed limit and issue warning[s]").

196. Telephone Interview with Roger Floyd, Investigator, Texas Commission on Law Enforcement (Feb. 3, 2004).

197. *Id.*

198. *Garcia*, 827 S.W.2d at 943 n.7.

199. *Id.*

cated easily. Surely, this is a poor reason to eliminate altogether the judicial review of pretextual traffic stops.[200]

Finally, the Court of Criminal Appeals suffers no difficulty in applying a reasonable officer test in the context of arrests, as demonstrated in *Hamilton v. State*.[201] In *Hamilton*, police spotted a car parked on the wrong side of a residential street, ran a check on the car, and learned that the car was owned by a business.[202] When the defendant, Hamilton, was seen leaving the house, getting into the car, and driving off in the wrong lane,[203] the officers stopped him and ordered him to leave the car.[204] The officers demanded that he display his driver's license and proof of insurance, but he had neither document.[205] When asked his name, Hamilton gave a name he had difficulty spelling and offered an address, but he could not give a zip code or telephone number.[206] When asked about the car, Hamilton said that he borrowed it from "Sherry," a person whose address or last name he could not recall, explaining that she did not have a local address and was staying at a local motel.[207] Hamilton was then arrested for driving on the wrong side of the road and failing to produce a driver's license or proof of insurance.[208]

Ostensibly rejecting an analysis concerning pretext, the Court of Criminal Appeals simultaneously applied—even emphasized—the reasonable officer test for making just such a determination: "An arrest of a person is not a pretext arrest if the police *would have*

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200. Moreover, the task may be easier than is imagined. After all, even the Supreme Court itself has already demonstrated its ability to discern "standard procedures in the local police department" so well that it was confident enough to ground a decision in it. South Dakota v. Opperman, 428 U.S. 364, 375 (1976).

201. 831 S.W.2d 326 (Tex. Crim. App. 1992) (en banc).

202. Hamilton v. State, 831 S.W.2d 326, 327-28 (Tex. Crim. App. 1992) (en banc).

203. *Id.* at 328.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Hamilton*, 831 S.W.2d at 328.

208. *Id.* Contrary to the "objective" approach elsewhere endorsed by the court, the *Hamilton* opinion relied upon some very subjective "facts," e.g., that the officer's subjective (and perhaps capricious) decision to arrest was grounded in Hamilton's nervousness, his difficulty spelling his last name, his inability to give a complete mailing address, the police officers' inability to contact anyone to verify Hamilton's representations, and something called "proper police procedure," which the officer subjectively believed precluded any other action but custodial arrest. *Id.*

arrested that person in any event, even if the police had not had an ulterior motive at the time of the arrest."[209] The court even cited and relied upon LaFave's search and seizure treatise, apparently oblivious to the fact that he is the chief proponent of the reasonable officer standard of review, which the court was clearly utilizing. The court dismissed pretext challenges to arrests even while embracing reasonable officer analysis, evidently unconscious that it was doing so. If the court can confidently apply this test to arrests of drivers, surely it can apply as well to stops of drivers.

The Court of Criminal Appeals applies the reasonable officer standard to searches as well, perhaps just as obliviously. In a recent analysis of an officer's frisk of a driver, the court stated the inquiry of its legality as "whether *a reasonably prudent [police officer] would justifiably believe* that his safety or that of others was in danger."[210]

In *O'Hara v. State*,[211] a truck driver was stopped by a state trooper for what the court described as malfunctioning clearance lights.[212] While detained, O'Hara complied with all the trooper's inquiries except that he declined to permit the officer to search his suitcase.[213] The trooper had O'Hara sit in his squad car, but as a matter of his own standard procedure, the officer searched him for safety with a pat-down.[214] However, the frisking trooper insisted that he was not fearful at all for his own safety, but merely wished to search the driver as a matter of routine.[215]

According to the court, when the trooper patted the driver, he found marijuana.[216] Under a section of the opinion entitled "Articulation of Fear," the court found such a real fear requirement irrel-

209. *Id.* at 331 (citing 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(e), at 92-3 (2d ed. 1987)).

210. O'Hara v. State, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000) (en banc) (emphasis added).

211. 27 S.W.3d 548 (Tex. Crim. App. 2000) (en banc).

212. O'Hara v. State, 27 S.W.3d 548, 549 (Tex. Crim. App. 2000) (en banc).

213. *Id.*

214. *Id.*

215. *Id.* at 551.

216. *Id.* at 549. The "plain feel" doctrine invented by the Supreme Court in *Minnesota v. Dickerson*, 508 U.S. 366 (1993), to justify such searches was left wholly unexplored in the *O'Hara* majority opinion. In *Dickerson*, the United States Supreme Court expanded the scope of a *Terry* search, holding that "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already author-

evant.[217] Because the trooper was "alone in his patrol car at 3:30 a.m. in a rural area," the court decided that a reasonable officer would have feared for his own safety, even though the trooper in question experienced no such concern.[218] Given the ease and regularity with which the court applies an inquiry that investigates what a reasonable officer would have done or even experienced, there is no reason to exempt the circumstance where it is most needed, namely, traffic stops.

Having refused to consider police intent or adopt the reasonable officer test, the Supreme Court and the Court of Criminal Appeals left roadway detentions and investigations wholly in the hands of the police. The consequences of judicial deregulation on police behavior became extremely clear later in the *Atwater v. Lago Vista* case.[219]

IX. GAIL ATWATER'S ENCOUNTER WITH TEXAS ROADWAY POLICE POWER UNDER THE FOURTH AMENDMENT: *ATWATER V. CITY OF LAGO VISTA*

If the judiciary was insistent that pretext was irrelevant for traffic stops, then perhaps it would at least provide protection from an even more intrusive, though more straightforward, police action: custodial arrests for minor traffic infractions. Whatever else the police might do to a driver detained on a minor traffic offense, it was undecided whether the police could make a custodial arrest for

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ized by the officer's search for weapons . . . ." Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

217. *O'Hara*, 27 S.W.3d at 551. For those at the trial court level, this conclusion leads all proof of fear to the same conclusion: the frisk is justified. If the officer testifies that he feared for his safety, the appellate court will look to every fact and inference which supports that belief, and if one exists, then the trial court's ruling that the frisk was justified will be upheld. If the officer testifies affirmatively that he had no fear whatsoever, perhaps even ridiculing the idea, the *O'Hara* opinion steps in to justify the frisk even over the officer's objections. And if the officer says nothing? *O'Hara* reminds bench and bar of the rationale that silence on the issue from the State means nothing because "there is 'no legal requirement that a policeman must feel "scared" by the threat of danger' because 'some foolhardy policemen will never admit fear.'" *Id.* For authority, the court quoted from *United States v. Tharpe*, 536 F.2d 1098, 1101 (5th Cir. 1976), which the *O'Hara* Court said was "overruled in part on other grounds" by *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). *Id.* The court would have more accurately stated that it was a rationale embraced once again by the Supreme Court in *Whren*.

218. *O'Hara*, 27 S.W.3d at 549.

219. 532 U.S. 318 (2001).

an offense punishable by fine only. This clear and narrow issue presented itself to the Supreme Court in *Atwater v. Lago Vista*.[220]

Gail Atwater was driving her two small children home from their soccer practice in her pickup truck at fifteen miles-per-hour through her own residential neighborhood in a little Texas town, Lago Vista.[221] Local police officer Bart Turek pulled her over for failing to seatbelt her children.[222] Turek then yelled at Atwater, aggressively jabbing his finger in her face and frightening her children.[223] Atwater coolly asked Turek to lower his voice.[224] Turek, in response, yelled, "You're going to jail,"[225] verbally abused her, and accused her of negligently caring for her children because she had failed to secure them in seatbelts.[226]

As bystanders gawked at Turek's tirade, he called for backup.[227] He demanded Atwater's driver's license and proof of insurance,[228] but when she told him that she did not have the papers because her purse had been stolen the day before, Turek said he had "heard that story two-hundred times."[229] She gave him her driver's license number and address from her checkbook.[230]

Atwater asked the officer for permission to take her children only two houses away to a friend's home, but he refused and prepared to have her two children, ages three and five, accompany their mother to the police station.[231] A friend intervened and took custody of the children while Turek handcuffed Atwater and drove her to the local police station, where she was made to empty her

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220. *Id.*

221. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).

222. *Id.* at 324. Another statute invoked by Texas police allows the driver operating a vehicle containing unbelted children to be charged with the felony offense of child endangerment. *See* TEX. PEN. CODE ANN. § 22.041 (Vernon 2001) (stating in pertinent part that it is a second-degree felony to negligently place children in "imminent danger of . . . bodily injury").

223. *Atwater*, 532 U.S. at 368 (O'Connor, J., dissenting).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 324.

228. *Atwater*, 532 U.S. at 324.

229. *Id.*

230. *Id.*

231. *Id.*

pockets and remove her shoes, jewelry, and eyeglasses.[232] The police took her "mug shot" and jailed her for about an hour.[233] She was eventually released on a $310 bond.[234] Atwater paid a $50 fine for the seatbelt violations, then filed suit contending, among other things, that her arrest constituted an unreasonable seizure under the Fourth Amendment.[235]

The United States Supreme Court granted Atwater's petition for writ of certiorari on the question and, in a 5-4 decision, decided that Turek's behavior was completely constitutional because the Fourth Amendment authorizes police to arrest without a warrant for fine-only offenses.[236] Justice Souter, writing for the majority, made a lengthy historical review of the police authority and concluded that the Fourth Amendment as originally understood did not necessarily forbid peace officers to make warrantless arrests for minor offenses or that any such limitation on police power was ever sufficiently "woven" into the legal fabric.[237] As for adoption of a straightforward, bright-line rule forbidding arrests for fine-only offenses, Justice Souter rejected any such rule on the grounds that "an officer on the street might not be able to tell" whether the observed conduct is a jailable offense.[238] A rule forbidding arrests for fine-only offenses posed too many difficulties for judges and would "promise very little in the way of administrability."[239]

The majority questioned "whether warrantless misdemeanor arrests [even] need constitutional attention," and indicated that the issue was better suited for state legislatures:

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232. *Id.* The Fifth Circuit Court of Appeals had affirmed the district court's grant of summary judgment in favor of Turek. Judge Wiener dissented, pointing out that Turek had stopped Atwater about two months earlier and discovered she and the children were in fact wearing their safety belts. Atwater v. City of Lago Vista, 195 F.3d 242, 248 (5th Cir. 1999) (en banc) (Wiener, J., dissenting). Given his behavior, Judge Wiener believed a jury could have reasonably inferred that Turek had gone to "extreme lengths to satisfy a personal crusade or possibly even a vendetta" against Atwater, in part because when Turek seized Atwater, he "screamed that they had 'had this conversation before' and that this time she (Atwater) was going to jail." *Id.*

233. *Atwater*, 532 U.S. at 324.

234. *Id.*

235. *Id.* at 324-25.

236. *Id.* at 340.

237. *Id.* (quoting Wilson v. Arkansas, 514 U.S. 927, 933 (1995)).

238. *Atwater*, 532 U.S. at 348.

239. *Id.* at 349-50.

> It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle. It is, in fact, only natural that States should resort to this sort of legislative regulation . . . .[240]

Justice O'Connor dissented, finding Turek's arrest a clear violation of the right to be free from unreasonable seizures.[241] The rule that the police have the authority to arrest for fine-only offenses "gives officers unfettered discretion to choose that course without articulating a single reason why such action is appropriate."[242]

> Such unbounded discretion carries with it grave potential for abuse. . . . Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. . . . The Court neglects the Fourth Amendment's express command in the name of administrative ease. In so doing, it cloaks the pointless indignity that Gail Atwater suffered with the mantle of reasonableness.[243]

However, the Justices failed to consider the cumulative effect that *Atwater* and *Whren* would have not only on police behavior, but on prosecution behavior as well.

X. THE *WHREN-ATWATER* INTERPLAY

Atwater leaves drivers open to arrest for even the most trivial traffic infraction; *Whren* prohibits inquiry into police intent. Together, these holdings may have some unintended consequences on police behavior—namely, encouragement for police to make custodial arrests where legality of their stops is doubtful.

If police seize a driver and wish to do no more than issue a traffic citation, then they will characterize the seizure as a traffic stop. However, if the police conduct a more intrusive investigation, then any subsequent search or prolonged detention based on a stop has distinct disadvantages: questions arise about whether the scope of

240. *Id.* at 352.
241. *Id.* at 360 (O'Connor, J., dissenting).
242. *Id.* at 372.
243. *Atwater*, 532 U.S. at 372.

the search was reasonably related to the stop, whether other articulable suspicious facts were involved to justify a continued detention, and whether the officer utilized the least intrusive means to confirm or dispel his suspicions. These inquiries vanish if police have arrested—not merely stopped—the driver.

If a police officer wishes to conduct a search of the driver or her car, then, under *Whren-Atwater*, the most constitutionally defensible action he can take is to arrest the driver for whatever traffic infraction he can identify. If a police officer wishes to detain a driver at length, in order to impress his absolute authority over the driver and her passengers, he will insist that he arrest the driver, thereby nullifying the inquiry into the reasonableness of the detention and any subsequent searches of the people or the vehicle. In this way, the *Whren-Atwater* interplay rewards what would otherwise be dubious searches arising from traffic stops, or even illegal detentions, were the officer to state that his actions arose from a traffic stop.

The prosecution may now successfully defend under the Fourth Amendment every lengthy roadside detention for any trivial traffic infraction he can claim. Every vehicular search can be likewise defended on the grounds that the search was incident to arrest, even if the arrest was for suspicion of low brake fluid or inappropriate tire pressure. In theory, the government can now justify questionable stops by transforming them into custodial arrests. It seems the more intrusive the government's invasion of the liberty and privacy of drivers, the greater is its insulation from judicial review and regulation. The police may find it most advantageous to declare that a continued detention was merely a stop when no criminal activity is detected (other than violations of the Transportation Code), but label a similar detention an arrest whenever some greater criminality is discovered. In this way, the reasonableness of subsequent searches can be shielded from judicial scrutiny.

The Supreme Court has said that "a search is not to be made legal by what it turns up . . . it is good or bad [at its inception] and does not change character from its success."[244] The *Whren-Atwater* philosophy reverses this view, confirming instead that the seizures of drivers are made legal by their *post-hoc* characterization. With

244. United States v. Di Re, 332 U.S. 581, 595 (1948).

the combination of *Whren* and *Atwater*, the courts have stranded people on the road with reduced protection from arbitrary police action, encouraging the tyranny of unregulated rummagers that the Fourth Amendment was meant to preclude. While the courts were retreating from addressing the potential for abuse on the roads and highways, Texas lawmakers were making various efforts at reform, all of which were nullified by Governor Rick Perry.

XI. THE TEXAS LEGISLATIVE RESPONSE AND GOVERNOR RICK PERRY'S EXTERMINATION OF REFORM

On April 24, 2001—the same day that the Supreme Court was removing significant protections to drivers from arrest for traffic infractions in *Atwater*—the Texas House of Representatives approved House Bill 363, sponsored by Representative Pete Gallego, which required police to issue citations for fine-only offenses rather than arrest.[245] The bill never received a hearing in the Senate Jurisprudence Committee. This prompted proponents of the measure to amend Senate Bill 730, which ultimately won both House and Senate approval.[246]

In relevant part, Senate Bill 730 generally required the issuance of a written notice to appear for fine-only misdemeanors if the person displayed a valid identification and made a written promise to appear in court.[247] However, the bill created exceptions which preserved the officer's discretion to arrest. If the officer believed that arrest was "necessary to prevent imminent bodily injury to the person or another," or that the offense committed in the officer's presence posed a continuing and "substantial risk of harm" unless the person was arrested, or because the circumstances would make it unlikely that the person would appear in court (such as proof that the person habitually refuses to show up for court), then the officer could arrest the person.[248] These qualifications were added to the legislation to answer law enforcement objections to a blanket rule forbidding arrests for fine-only offenses. Despite the compromises

245. Tex. H.B. 363, 77th Leg., R.S. (2001).

246. Tex. S.B. 730, 77th Leg., R.S. (2001).

247. *Id.*

248. *Id.*

to the original legislation, Governor Rick Perry nevertheless vetoed the bill on June 17, 2001.[249]

The 77th Legislature also considered other ways to regulate police authority, including adoption of a limited reasonable officer test and a ban on racial profiling. The Senate approved Senate Bill 242, sponsored by Senator Elliot Shapleigh, which codified the reasonable officer test, but limited its application to stops based on "community caretaking."[250] The bill was referred to, but died in, the House Criminal Jurisprudence Committee.[251]

The one relevant piece of legislation that won legislative approval in 2001 and was not vetoed was the racial profiling bill, Senate Bill 1074, sponsored by Senator Royce West.[252] The bill prohibited the practice of racial profiling, which it defined as "a law enforcement-initiated action based on an individual's race, ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity."[253] Each of these measures reflected a legislative concern for the protection of citizens from unreasonable seizures and created a framework for regulating police behavior, which the judiciary has steadfastly refused to notice.

The 78th Legislature, however, did far less. Representative Senfronia Thompson sponsored House Bill 1835,[254] but it never won a hearing. Thompson joined Representative Harold Dutton's House Bill 383,[255] but it suffered the same fate. Senator Juan Hinojosa sponsored Senate Bill 1597.[256] Each bill sought to re-enact the bill vetoed in the last legislative session. Only Hinojosa's bill became

249. *Id.*

250. Tex. S.B. 242, 77th Leg., R.S. (2001). The Act created a new article in the Code of Criminal Procedure: "Art. 38.24. Caretaking Stops and Detentions. An unreasonable community caretaking stop or detention is prohibited under this chapter. A community caretaking stop or detention is unreasonable if a reasonable peace officer, acting under the same circumstances, would not have made the stop or detention." *Id.*

251. *Id.*

252. Tex. S.B. 1074, 77th Leg., R.S. (2001); *see also* TEX. CODE CRIM. PROC. ANN. art. 2.131-.138, 3.05 (Vernon 2001) (stating law enforcement's policy on racial profiling and related procedures).

253. TEX. CODE CRIM. PROC. ANN. art. 3.05 (Vernon 2001).

254. Tex. H.B. 1835, 78th Leg., R.S. (2003).

255. Tex. H.B. 383, 78th Leg., R.S. (2003).

256. Tex. S.B. 1597, 78th Leg., R.S. (2003).

law. While it was a remnant of its original language,[257] the new law merely required police agencies to have stated policies for warrantless arrests of class C misdemeanants. Unfortunately, on June 20, 2003, Governor Rick Perry vetoed that bill as well.[258]

XII. CONCLUSION

As Justice Jackson pointed out, shortly after his return from the Nuremberg Trials:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[259]

As it stands now, *Atwater* and *Whren* together have expanded in an unprecedented fashion the formerly regulated area of police detentions, a consequence most directly and most often experienced by drivers. Detentions were formerly reviewed according to *Terry*'s requirement that they be connected with and reasonably related to the original purpose of the stop. But under *Atwater* and *Whren*, the time periods for roadside detentions (rightfully called "arrests" as minutes melt into hours) may now expand and contract according to the whim of the officer. The prosecution can now answer any objection to the duration of a detention by pointing out that the driver was actually under arrest for the traffic violation. It does not matter that the officer stopped the driver because she was attractive or because the officer was bored or because he suspected that a search of the car might turn up contraband. If the pretextual officer can point to any traffic law violation, then he can arrest. And if he can arrest under those circumstances, then the already blurred line between detention and arrest is of no moment, constitutionally speaking.

In this way, police are not deterred from creating unnecessarily long detentions, as they can always say that the driver was under arrest for such infractions as low brake fluid levels or poor wind-

257. *See* Tex. S.B. 730, 77th Leg., R.S. (2001) (comparing the introduced version that mirrored the language of Senate Bill 730 from the previous session).

258. *Id.*

259. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

shield wipers. Far from deterring police, arrests for traffic violations offer the windfall of escaping review of the scope or duration of their detention altogether.[260] Because the judiciary retreated from review, police officers may entitle themselves to lengthier seizures and more intrusive searches, as *Atwater* and *Whren* encourage them to do. Where deterrence was needed, the judiciary gave approval, leaving statutory law as the only potential source of protection from unreasonable officers.

After *Atwater*, any officer can search any car if there has been any traffic citation at all, simply by placing the driver under arrest. Pretext is no longer even a relevant consideration. That doctrine, so far as the judiciary is concerned, remains dead.

At the moment, both the Court of Criminal Appeals and the United States Supreme Court refuse to conduct any review of pretextual seizures of drivers. This already widespread problem is destined to become greater still, in light of the judiciary's green light to law enforcement that such behavior is constitutionally approved. Unless the Court of Criminal Appeals rethinks and overrules its *Crittenden* decision, there is only one other law-making body that can create a limitation on police authority in this state—the Texas Legislature. Unfortunately, Governor Perry has vetoed recent attempts at reform, including something as slight as requiring every police agency to have a policy in place.[261]

To paraphrase James Madison, if policemen were angels, no Fourth Amendment would be necessary.[262] Police officers, of course, are no more angels than anyone else. It ill-serves the inter-

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260. *See* Knowles v. Iowa, 525 U.S. 113, 114 (1998) (holding that the Fourth Amendment is violated when an officer who elects to issue a traffic citation rather than arrest the driver conducts a full-blown search of an automobile and its driver).

261. *See* Tex. S.B. 1597, 78th Leg., R.S. (2003) (mandating that "each law enforcement agency . . . adopt a detailed written policy relating to the arrest of persons . . . for misdemeanor offenses, including traffic offenses, that are punishable by fine only"); Tex. S.B. 730, 77th Leg., R.S. (2001) (mandating that an officer issue a written notice to appear where "the offense charged is a misdemeanor punishable by fine only," and not just where speeding or open container violations are concerned, if the driver presents a valid license and signs a promise to appear). Conversely, legislation was enacted that broadened law enforcement discretion by allowing a warrantless arrest where "a person makes a statement to the peace officer that would be admissible" which the officer believes "establishes probable cause . . . that the person has committed a felony." Act of June 20, 2003, 78th Leg., R.S., ch. 989, § 1, 2003 Tex. Gen. Laws 2887 (to be codified as an amendment to TEX. CODE CRIM. PROC. art. 14.03(a)(5)).

262. THE FEDERALIST NO. 51, at 349 (James Madison).

ests police are sworn to serve to pretend otherwise. The less virtuous dimensions of human nature will inevitably manifest themselves, at which time the courts may be inclined to take another look at pretextual behavior, and legislators may decide to become more aggressive in providing protections for drivers. Until then, no one is safe from the pretextual traffic stop or the potentiality of arbitrary arrest and virtually unlimited search which accompanies this common roadside detention. No police policies are required. No remedy exists. No law prevents the police from invoking on a whim these broad, unregulated powers. One can only hope that every police officer can always resist the temptation to act arbitrarily when he makes a traffic stop. Without the rule of law, that resistance is currently the only protection afforded the innocent traveler of the public roadways.

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.