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Whren v United States and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police

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WHREN V. UNITED STATES AND PRETEXTUAL TRAFFIC STOPS: THE SUPREME COURT DECLINES TO PLUMB COLLECTIVE CONSCIENCE OF POLICE

I. INTRODUCTION

What are the constitutional limits of a routine traffic stop? For a police officer engaged in the competitive enterprise of ferreting out crime, a motorist's minor traffic violation can be the key to unlocking a Pandora's box of other suspected criminal activity.[1] To illustrate, suppose a police officer has a hunch that you are carrying drugs, and he or she wants to stop your car to investigate this hunch. The hunch could be based on anything: your race, your age or that deadhead sticker on your Cadillac. Although the officer does not have the necessary suspicion to stop you to investigate whether you are carrying drugs, he or she can stop you if you are violating the traffic code.[2] Because few drivers comply with all of the requirements of the traffic code, the requirement that the officer observe a traffic violation is not a serious impediment to stopping you.[3]

Once you pull over, the police officer can order you and your passengers out of the car.[4] The officer can then ask you to consent to a general search of your car and can use the opportunity to ask you questions unrelated to the traffic stop.[5] If at any time the officer observes any contraband in plain-view, then he or she can seize it without going through the trouble of obtaining a warrant.[6] The police officer can also frisk you or your passengers and search areas of the

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[1] *See* Whren v. United States, 116 S. Ct. 1769, 1777 (1996).

[2] *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979). An officer may stop a motorist when the officer has "at least articulable and reasonable suspicion" that the motorist has violated a traffic regulation. *See id.*

[3] *See, e.g.*, United States v. Scopo, 19 F.3d 777, 782 (2d Cir. 1994) (failing to signal a lane change); United States v. Fernandez, 18 F.3d 874, 877 (10th Cir. 1994) (violation of Utah window tinting law); United States v. Harvey, 16 F.3d 109, 111 (6th Cir. 1994) (exceeding speed limit and equipment violations); United States v. Ferguson, 8 F.3d 385, 387 (6th Cir. 1993) (en banc) (no visible license plate); United States v. Meyers, 990 F.2d 1083, 1084 (8th Cir. 1993) (following too closely); United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990) (failure to signal right turn); United States v. Smith, 799 F.2d 704, 706 (11th Cir. 1986) (weaving); Skelly v. State, 880 P.2d 401, 404 (Okla. Crim. App. 1994) (burnt out license plate light).

[4] *See* Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

[5] *See* Ohio v. Robinette, 116 S. Ct. 417, 419 (1996).

[6] *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

car where you might have stashed a weapon, if he or she believes that you are armed.[7] Moreover, in most states, the officer can place you under arrest, which would justify an even more thorough search of you, your car and any containers in your car, such as purses or luggage, all because of a mere traffic violation.[8]

The breadth of these powers makes for efficient law enforcement. If a motorist is carrying drugs or weapons, the police have a fair chance of catching him or her. Yet for each motorist who is trafficking drugs, how many motorists are not? How many purses, suitcases or briefcases will the police have to rummage through in order to nab one drug trafficker? The United States Constitution places limits on searches and seizures to protect the privacy and dignity interests of ordinary citizens, and society's need for efficient law enforcement must be balanced against these competing individual rights.[9]

The Framers of the Constitution sought this balance in enacting the Fourth Amendment of the United States Constitution, which guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures."[10] For a search to be reasonable it must be based on probable cause that the item sought will be found in the place searched, and in most cases, the Constitution requires a warrant from a neutral magistrate.[11] The Framers enacted the Fourth Amendment largely in response to the open-ended writs issued to officers of the British Crown.[12] These writs gave officers unlimited discretion to search any person or place.[13] The Framers crafted the Fourth Amendment to limit law enforcement's discretion and to require prior judicial approval of searches and seizures.[14] In response to the needs of law enforcement, the Supreme Court has

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[7] *See* Michigan v. Long, 463 U.S. 1032, 1034 (1983).

[8] *See* New York v. Belton, 453 U.S. 454, 460 (1981) (authorizing search of interior of motorist's car); United States v. Robinson, 414 U.S. 218, 235 (1973) (authorizing search of person); 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, 250 n.188 (1989) (listing 28 states that place no limitations on a police officer's discretion to arrest a driver for a traffic offense). Police still retain wide discretion in the states that have some legislative limitations on police authority. *See* Salken, *supra*, at 251 & n.189. This is because police are only required to issue citations in a small number of instances or because the limitations on police authority contain broad exceptions. *See id.* at 251 n.189.

[9] *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

[10] U.S. CONST. amend. IV.

[11] *See T.L.O.*, 469 U.S. at 354–55 (Brennan, J., concurring in part and dissenting in part).

[12] *See* Payton v. New York, 445 U.S. 573, 583–84 & 583 n.21 (1980).

[13] *See id.* at 583 n.21.

[14] *See id.* at 585.

carved out some exceptions to the warrant requirement and has allowed for some searches and seizures on grounds less than probable cause.[15]

In 1996, the United States Supreme Court revisited the issue of the proper balance between individual rights and efficient law enforcement. The Court, in *Whren v. United States*, held that pretextual traffic stops—stops where the officer pulls a motorist over for a minor violation in order to investigate a more serious offense for which the officer does not have the requisite justification—are constitutionally permissible.[16] As long as a police officer is authorized to stop a motorist for the stated reason, it is immaterial that the officer had another motive for initiating the stop.[17] In this author's opinion, the Court correctly decided *Whren*. Investigating a police officer's motive for stopping a motorist is an unproductive exercise and only marginally increases protection of individual rights. Even though the Court correctly decided *Whren*, however, taken in context with other recent decisions, *Whren* tilts the precarious balance between efficient law enforcement and individual rights too far to the side of efficient law enforcement. Because the Court is not going to concern itself with whether an officer's reason for stopping a person is a pretext, there must be another check on a police officer's authority to expand a traffic stop into a much wider search. Rather than examine an officer's motive for initiating a stop, this Note argues that the better approach is for the states to take steps to limit the authority of police to expand their search beyond the apparent justification.

In Section II, this Note examines when a police officer can stop a motorist and how the officer can use the stop to investigate other crimes.[18] It then discusses in Section III the different approaches that federal courts have taken in dealing with pretextual stops.[19] Section IV follows with a discussion of the *Whren* decision.[20] Finally, Section V concludes that the Court rightly decided *Whren*, but that there is a need for states to limit police discretion to expand a traffic stop into a much wider search.[21]

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[15] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[16] 116 S. Ct. 1769, 1774–75, 1777 (1996).

[17] *See id.* at 1774, 1777.

[18] *See infra* notes 22–147 and accompanying text.

[19] *See infra* notes 148–66 and accompanying text.

[20] *See infra* notes 167–221 and accompanying text.

[21] *See infra* notes 222–76 and accompanying text.

II. The Limits of Police Discretion

Police can turn a routine traffic stop into a very intrusive search. This section introduces the techniques police can use to legally justify wider and wider searches. To initiate a stop, police must have a reasonable suspicion of some wrongdoing.[22] A traffic code violation is a convenient way of getting around the justification requirement because few, if any, motorists are in complete compliance with all traffic regulations.[23] Although the traffic violation only justifies the initial stop, once the police have stopped a motorist, the custodial arrest doctrine, the plain-view warrant exception, the ability to conduct a consensual search and the opportunity to interrogate all create opportunities for the police to discover evidence of other criminal activity.[24] Thus, a minor traffic violation can be the key to circumventing the requirement that a police officer have reasonable suspicion of criminal activity before the officer can initiate a stop.[25]

A. *The Initial Stop*

Police use pretextual stops because otherwise they would have no way to stop a motorist whom they only vaguely suspect of criminal activity. A traffic stop implicates the Fourth Amendment; thus, it requires some reasonable, objective justification.[26] Given the breadth of state traffic regulations, catching a motorist technically violating some regulation is not difficult.[27] Accordingly, the inability of motorists to follow all of the rules of the road provides police with a detour around the Fourth Amendment's prohibitions and in the process, exposes citizens to arbitrary police searches and seizures.

If a police officer has a hunch that a pedestrian is involved in criminal activity, the officer may approach the person and inquire about the individual's activities without implicating the Fourth Amendment.[28] The individual may or may not choose to answer the officer's

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[22] *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979).

[23] *See* 1 W. LaFave, Search and Seizure § 1.4(e), at 123 (3d ed. 1996).

[24] *See* Ohio v. Robinette, 116 S. Ct. 417, 419 (1996); Texas v. Brown, 460 U.S. 730, 739–40 (1983); United States v. Robinson, 414 U.S. 218, 235 (1973); United States v. Causey, 834 F.2d 1179, 1181 (5th Cir. 1987) (en banc).

[25] *See Robinette*, 116 S. Ct. at 419; *Brown*, 460 U.S. at 739–40; *Robinson*, 414 U.S. at 235; *Causey*, 834 F.2d at 1181.

[26] *See Prouse*, 440 U.S. at 663.

[27] *See supra* note 3.

[28] *See* Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968).

questions, but so long as a reasonable person would believe that he or she is free to leave or to decline the officer's request, no Fourth Amendment seizure has occurred.[29] These investigative encounters are valuable tools for police to dispel or develop the necessary suspicion to warrant further searches.[30] In 1968, in *Terry v. Ohio*, the Court established the constitutional standard for these police investigatory stops.[31]

In *Terry*, the Court held that a police officer who had "reasonable suspicion" that a crime was about to be committed could stop and frisk a person suspected of planning the robbery of a store.[32] In *Terry*, a police officer observed two men suspiciously walking back and forth in front of a store.[33] The officer approached the men, asked them to identify themselves and frisked them.[34] The officer found pistols on both men.[35] The Court found the frisk constitutional and established "reasonable suspicion" as the standard for police investigatory stops, which have become known as "*Terry*" stops.[36] The Court selected the reasonable suspicion standard by balancing the individual's liberty interests against the State's need to prevent crime.[37] Consequently, *Terry* held that police investigatory stops need only be based on a reasonable suspicion that an individual is engaging in criminal activity.[38]

Because a routine traffic stop implicates *Terry*, police have no effective way of initiating a consensual traffic stop.[39] Unlike a consensual conversation with a pedestrian, once an officer pulls a motorist over, a seizure has already occurred.[40] Without justification for the seizure, a judge must exclude all discovered evidence from the criminal trial.[41] Consequently, because police lack an effective way to initiate a consensual encounter with a passing motorist, they use a traffic violation as the basis for the initial stop.[42]

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[29] *See* Florida v. Bostick, 501 U.S. 429, 439 (1991).
[30] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).
[31] 392 U.S. 1, 30–31 (1968).
[32] *Id.*
[33] *Id.* at 6.
[34] *See id.* at 6–7.
[35] *See id.* at 7.
[36] *See Terry*, 392 U.S. at 27.
[37] *Id.* at 22, 24, 27.
[38] *Id.* at 27.
[39] *See* Whren v. United States, 116 S. Ct. 1769, 1772 (1996).
[40] *See id.*
[41] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).
[42] *See supra* note 3.

B. *The Permissible Scope of the Stop*

The pretext problem arises when the police expand the scope of the stop to investigate crimes for which there is no reasonable suspicion and no probable cause.[43] Although motorists may begrudge the officer who stopped them, a traffic stop is a reasonable response to an observed traffic violation: it is minimally intrusive, it lasts for only a short time, and it is in public.[44] When motorists are stopped, they expect that the police officer will require them to render their driver's license and registration, that the officer may question them about the observed infraction and that the officer will cite them for the offense.[45] Motorists do not expect to be arrested for the traffic offense, to have their cars searched for drugs or to be interrogated about unrelated crimes.[46] Thus, the underlying problem is not the pretextual reason for stopping the motorist but, rather, the subsequent scope of the search, which can vastly exceed the initial justification for the search.[47] The pretextual stop violates a motorist's expectation of privacy by unreasonably expanding the scope of the search into areas in which the motorist has a continued expectation of privacy.[48]

The Supreme Court has increased police discretion to expand searches by rolling back Fourth Amendment coverage through the creation of exceptions to the warrant requirement and the adoption of bright-line tests to aid police in knowing what is constitutional.[49] In creating exceptions to the warrant requirement, the Court limited the

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[43] *See* 1 LAFAVE, *supra* note 23, § 5.2(c), at 85–86.

[44] *See* Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

[45] *See, e.g.*, United States v. Shabazz, 993 F.2d 431, 437 (5th Cir. 1993) ("[W]e have no doubt, that in a valid traffic stop, an officer can request a driver's license, insurance papers, vehicle registration, run a computer check thereon, and issue a citation.")

[46] *See* State v. Retherford, 639 N.E.2d 498, 505 (Ohio Ct. App.) ("The very thought of American citizens, not suspected of any wrongdoing, being asked by the police to search their cars and luggage before exercising their right to drive the highways of this state is clearly repugnant to American institutions and ideals."), *dismissed, jurisdictional motion overruled by* 635 N.E.2d 43 (Ohio 1994); *see also* State v. Kerwick, 512 So. 2d 347, 348–49 (Fla. Dist. Ct. App. 1987) (describing routine consensual searches of bus passengers). The *Kerwick* court wrote:

> [O]ne officer . . . admitted that during the previous nine months he, himself, had searched in excess of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck. It certainly shocks the Court's conscience that the American public would be "asked," at badge-point, without the slightest suspicion, to interrupt their schedules, travels and individual liberties to permit such intrusions.

Id.

[47] *See* 1 LAFAVE, *supra* note 23, § 5.2(e), at 85–86.

[48] *See id.*

[49] *See, e.g.*, New York v. Belton, 453 U.S. 454, 460 (1981) (bright line rule that police can

judiciary's review of police-initiated searches and thus increased police discretion.[50] Once police have stopped a motorist, the search incident to arrest doctrine, the plain-view doctrine and the occasion to initiate a consensual search provide the police with the opportunity to find and seize evidence of criminal activity without the permission of a neutral magistrate. Furthermore, the pretextual stop offers police the opportunity to question a motorist about other criminal activity, usually without requiring that they provide *Miranda* warnings.[51]

1. Custodial Arrest and the Search Incident to Arrest Exception

In most states, an officer may arrest a motorist for a traffic violation.[52] If an officer arrests a motorist, as a matter of course, the officer may search the motorist and the interior of the motorist's car.[53] The Court has held that the Constitution allows these limited searches to prevent evidence from being destroyed and to secure weapons that might endanger the officer.[54] These vast warrantless search powers incident to an arrest give police a powerful tool to investigate suspected criminal activity. Such general searches can occur because neither the Court nor the state legislatures have stepped in to limit the scope of police powers of investigation to comport with the justification provided.[55]

For their part, the state legislatures have given police wide latitude to arrest motorists for minor offenses.[56] Incredibly, most states do not impose any limits on an officer's discretion to arrest a driver for a

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search inside of auto pursuant to arrest); United States v. Robinson, 414 U.S. 218, 235 (1973) (bright line test that police can search person incident to arrest).

[50] The court has carved out several exceptions to the general requirement that police obtain a warrant from a neutral and detached magistrate: searches of suspects incident to arrest (but still requires probable cause that person committed offense), *see Robinson*, 414 U.S. at 235; searches for items in an automobile (but still requires probable cause that item will be found in car), *see* California v. Acevedo, 500 U.S. 565, 576 (1991); searches initiated because of exigent circumstances, *see* Warden v. Hayden, 387 U.S. 294, 298 (1967); seizures of items in plain view, *see* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); searches based on an administrative or inventory scheme, *see* Colorado v. Bertine, 479 U.S. 367, 369 (1987); consensual searches, *see* Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973); short investigative detentions, *see Terry*, 392 U.S. at 30–31.

[51] *See* Berkemer v. McCarthy, 468 U.S. 420, 440 (1984); Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[52] *See* Salken, *supra* note 8, at 250 n.188.

[53] *See Belton*, 453 U.S. at 460.

[54] *See Robinson*, 414 U.S. at 235.

[55] *See* Salken, *supra* note 8, at 274–75 (arguing that custodial arrest for traffic offenses is unreasonable and the Court should use Fourth Amendment to limit police authority to arrest motorists for traffic offenses).

[56] *See* Salken, *supra* note 8, at 250 n.188, 251 n.189.

traffic offense.[57] Many states that do limit discretion have broad exceptions that circumvent the general prohibition and allow an officer to make a pretextual stop.[58] This wide discretion to arrest for a minor offense, coupled with the power to search incident to the arrest, gives police the equivalent of a general warrant to seize persons and search them.[59] By failing to define the circumstances under which the police may arrest a motorist, legislatures have effectively given police the power to decide when a search will be reasonable.[60]

The Supreme Court has also taken a hands-off approach to supervising police searches incident to arrest.[61] In a series of cases, the Court adopted bright-line tests to help the police decide whether a search is permissible.[62] These tests are valuable in that they provide police specific guidance as to what is permissible. In achieving clarity, however, the Court has given police broad authority to search persons and places, even when an officer does not expect to find evidence or weapons.[63]

In 1973, in *United States v. Robinson,* the Court held that the power to search a suspect was automatic, and that courts should not conduct a case-by-case determination of whether the police should have searched an arrestee.[64] In *Robinson,* an officer arrested a motorist for driving with an expired license.[65] While searching Robinson, the officer discovered heroin tablets inside a cigarette package.[66] Robinson argued that the police officer had no justification for searching inside the cigarette package because the package was unlikely to contain further evidence that Robinson was driving without a license, and a weapon could not fit inside the small package.[67] The Court rejected this case-by-case analysis, however, reasoning that the power to search an arrestee is automatic and should not depend on whether a judge later decides that the officer had a sufficient probability of finding weapons or evidence.[68] Thus, although the prospect of finding weapons or evi-

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[57] *See* Salken, *supra* note 8, at 250 n.188.

[58] *See* Salken, *supra* note 8, at 251 n.189 (listing states that require issuance of a citation for some offenses and exceptions).

[59] *See Belton,* 453 U.S. at 460; *Robinson,* 414 U.S. at 235.

[60] *See* Salken, *supra* note 8, at 274.

[61] *See, e.g., Belton,* 453 U.S. at 460; *Robinson,* 414 U.S. at 235.

[62] *See Belton,* 453 U.S. at 460; *Robinson,* 414 U.S. at 235.

[63] *See Belton,* 453 U.S. at 460; *Robinson,* 414 U.S. at 235.

[64] 414 U.S. at 235; *see also* Gustafson v. Florida, 414 U.S. 260, 262 (1973) (driver arrested for driving without license, and subsequent search uncovered marijuana inside a cigarette package).

[65] *Robinson,* 414 U.S. at 220.

[66] *See id.* at 223.

[67] *See id.* at 233.

[68] *Id.* at 235.

dence of the suspected crime generally justifies a search incident to arrest, the Court does not require this justification in any specific case.[69]

In 1981, in *New York v. Belton*, the Court expanded the permissible scope of a search incident to an arrest by holding that the entire passenger compartment could be searched incident to the arrest of the driver and passengers even though the police had removed the arrestees from the car prior to the search.[70] In *Belton*, the police officer stopped the driver for speeding.[71] While examining the driver's license and registration, the officer smelled marijuana.[72] Based on the detection of drugs, the officer expanded the scope of his investigation.[73] He ordered the four occupants out of the car, frisked and handcuffed them, and then searched the interior of the car.[74] The officer found cocaine in the pocket of Belton's jacket, which lay on the back seat.[75] Similar to its approach in *Robinson*, the Court concluded that the need to secure weapons and evidence justified the search.[76] Rather than conduct a case-by-case analysis of the appropriate scope of the search, the Court followed its approach in *Robinson* by adopting a bright-line test, permitting the police to search the interior of a car after arresting the motorist.[77] In short, *Robinson* and *Belton* give police the equivalent of a general warrant to search a motorist and the interior of his or her car for the crime of driving with an expired license.[78]

2. Plain-View Exception

If state law does not allow the police to arrest a motorist for a traffic violation, they might still be able to use the plain-view doctrine to justify seizing evidence or initiating a more intrusive search.[79] Once an officer stops a motorist, the plain-view doctrine allows the officer to seize any evidence within the officer's plain view without a warrant.[80] In order for the plain-view warrant exception to apply, an officer's initial stop must be lawful (the officer must have had probable cause

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[69] *Id.*

[70] 453 U.S. at 460.

[71] *Id.* at 455.

[72] *See id.*

[73] *See id.* at 456.

[74] *See id.*

[75] *See Belton*, 453 U.S. at 456.

[76] *Id.* at 459, 460.

[77] *Id.*

[78] *See id.*; *Robinson*, 414 U.S. at 235.

[79] *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987).

[80] *See id.*; *see also* Texas v. Brown, 460 U.S. 730, 739–40 (1983) (authorizing police officer to seize evidence discovered when he shined his flash light into car during road side stop).

to believe a traffic violation occurred); the officer must discover the item within the confines of a lawful stop; and the officer must immediately recognize that the item is contraband or evidence of a crime.[81] Thus, the plain-view doctrine would not allow a police officer to rummage through a motorist's possessions to "discover" evidence.[82] The rationale behind the plain-view exception is that it makes no sense to require police to obtain a warrant to seize items that they have already lawfully discovered.[83]

Prior to 1990, the plain-view exception applied only to items that the police inadvertently discovered.[84] If the police expected to find an item in the area searched, then they had to include that item in a warrant.[85] In 1990, the Supreme Court did away with the inadvertence requirement, finding that it offered no additional privacy protection to the defendant.[86] The effect of this decision is that police do not need to go through the trouble of obtaining a search warrant if they expect the item to be in plain view and they have a pretextual reason for lawfully entering.[87]

The scope of the plain-view exception is further broadened by an officer's ability to ask drivers and passengers to exit a vehicle incident to a traffic stop.[88] This power provides an officer with a better view of the motorist and passengers, where they were sitting and anything that might happen to fall out of the car when they exit. Until recently, police could only order passengers out of a car if they had a reason, however, following the 1997 decision in *Maryland v. Wilson*, they can now do so as a matter of course.[89]

In *Wilson*, the Court held that an officer may routinely order passengers out of a car pending the completion of a traffic stop.[90] A state trooper observed a speeding car and signaled for it to pull over.[91] After continuing for another mile and a half, the car finally pulled over.[92] During the pursuit, the passengers repeatedly turned to look at

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[81] *See* Horton v. California, 496 U.S. 128, 130, 136–37 (1990).

[82] *See Hicks*, 480 U.S. at 328.

[83] *See id.* at 327.

[84] *See Horton*, 496 U.S. at 130.

[85] *See id.*

[86] *See id.* at 141–42. The death of the inadvertence requirement foreshadowed *Whren* in that the *Horton* Court indicated that pretext and subjective motivations were no longer important. *See id.*

[87] *See id.* at 130.

[88] *See* Maryland v. Wilson, 117 S. Ct. 882, 884 (1997).

[89] *See id.*

[90] *Id.*

[91] *See id.*

[92] *See id.*

the trooper and then ducked out of sight.[93] When the trooper approached the car, he noticed that Wilson, a passenger, was sweating and appeared extremely nervous, thus he ordered him out of the car.[94] As Wilson exited, crack cocaine fell to the ground.[95] The officer subsequently arrested Wilson, and Wilson moved to suppress the narcotics on the grounds that the order to exit the car was an unreasonable seizure.[96] The Court reversed the lower courts' decisions and held that the evidence was admissible.[97] In reaching this decision, the Court balanced the government's interest in protecting the safety of police from attacks by passengers against the liberty interests of the passengers.[98] The Court concluded that the danger to police outweighed the minimal intrusion upon passengers' liberty and thus, established a bright-line rule that police may order passengers out of a car pending the completion of a traffic stop.[99]

The danger of *Wilson* is that an officer bent on using a traffic stop as an opportunity to investigate drug trafficking can, as a matter of course, order all of the passengers out of a vehicle in order to expand his or her plain view.[100] This would give an officer an unrestricted view of the interior of the car and all the passengers. If the officer observes anything suspicious—a bulge in a passenger's pocket or narcotics paraphernalia on a seat—the officer would then be justified in further expanding the search.[101]

3. Consent Exception

Another powerful tool for police to turn a routine traffic stop into a full-scale search for evidence of criminal activity is the consensual search. A consensual search does not require a warrant.[102] It does not

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[93] *See Wilson*, 117 S. Ct. at 884.

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *Id.*

[98] *Wilson*, 117 S. Ct. at 885, 886.

[99] *Id.* at 886.

[100] *See id.*

[101] *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 111–12 (1977) (officer justified in patting down motorist who had bulge in jacket).

[102] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). In *Schneckloth*, a police officer stopped a car because one of the headlights and the license plate light were burnt out. *Id.* at 220. The police officer asked if he could search the car. *See id.* Consent was given and in the trunk, the officer found three wadded up checks that came from a car wash that had been robbed. *See id.* The Court held that a consensual search must be voluntary based on the totality of the circumstances and rejected the idea that voluntary consent required informing the subject of the search that he had the right to refuse consent. *Id.* at 227. In reaching this holding the Court

require any suspicion of wrongdoing.[103] It does not require that the consenting person know that he or she has the right to refuse consent.[104] Moreover, the scope of a consensual search is limited only by what a reasonable officer would believe the person has consented to.[105] This is troubling because the line dividing where a stop ends and where a consensual search begins is probably not obvious to the average motorist, and there is a danger that motorists are not voluntarily consenting to these searches.

Once police have lawfully stopped a motorist, they may expand their search after obtaining the consent of the motorist.[106] Unlike a waiver of the right to counsel or the right against self incrimination, a waiver of a person's Fourth Amendment right against unreasonable searches does not have to be informed; it need only be voluntary.[107] The Supreme Court has held that the Fourth Amendment does not require that a person know he or she has the right to refuse consent before consenting.[108] This is disturbing because the Court has implicitly authorized police to take advantage of a citizen's ignorance of his or her rights.[109] In determining whether consent is voluntary, the Court only asks whether a reasonable person would feel free to decline the officer's request.[110]

In 1996, in *Ohio v. Robinette*, the Supreme Court overturned the Ohio Supreme Court and again held that the Fourth Amendment does not require the police to inform a lawfully-seized motorist that he is

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reasoned that consensual searches are important to law enforcement: "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.*

[103] *See id.* at 227.

[104] *See id.*

[105] *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991).

[106] *See Schneckloth*, 412 U.S. at 219, 222, 227.

[107] *See id.* at 227.

[108] *See id.*

[109] *See id.*

[110] *See* Florida v. Bostick, 501 U.S. 429, 434 (1991). In *Bostick*, two officers boarded a bus and asked to inspect Bostick's ticket and identification. *Id.* at 431. They advised Bostick that they were searching for drugs and asked if they could search his luggage. *See id.* at 431–32. Bostick was informed that he did not have to consent. *See id.* at 432. Bostick consented, drugs were found and he was arrested. *See id.* Bostick moved unsuccessfully to suppress the drugs. *See Bostick*, 501 U.S. at 432. On appeal, Bostick argued that the drug sweep of the bus per se implicated the Fourth Amendment. *See id.* at 433. The Florida Supreme Court accepted this argument but was overturned by the Supreme Court of the United States which held that a seizure was determined by looking at whether under the totality of the circumstances a reasonable person would have felt free to decline the officer's request. *Id.* at 434.

free to go before his consent will be considered voluntary.[111] In *Robinette*, the officer stopped the motorist for speeding—69 mph in a 45 mph zone.[112] After issuing a verbal warning and returning Robinette's license, the police officer said, "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[113] Robinette answered in the negative.[114] He then consented to a search from which the police officer discovered drugs.[115] The Court reasoned that voluntariness is determined by analysis of all the circumstances and that the officer's failure to advise Robinette that he was free to go did not per se make the consent involuntary.[116] Thus the Court struck down the prophylactic warning that the Ohio Supreme Court had required in order for the motorists' consent to be voluntary.[117]

Robinette illustrates an interesting wrinkle in Fourth Amendment analysis: how do motorists know when a stop is finished and they are free to go? If a police officer approaches a person sauntering down the street and asks this person if he or she will consent to a search, it is reasonable to believe that the pedestrian would think he or she has the right to refuse.[118] After all, the pedestrian has done nothing to give the officer the necessary suspicion to justify a search. If, however, a police officer lawfully stops a motorist and then asks him or her to consent to a search, it is not clear how this motorist would know he or she had the right to decline the officer's request absent an express statement that the motorist is free to leave.[119] This is because two separate Fourth Amendment events are occurring: the traffic stop and the consensual search.[120] Because the consensual search is intertwined

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[111] Ohio v. Robinette, 117 S. Ct. 417, 419 (1996). *Schneckloth* had previously held the same thing. *See* 412 U.S. at 227.

[112] *Robinette*, 117 S. Ct. at 419.

[113] *Id.*

[114] *See id.*

[115] *See id.*

[116] *Id.* at 421.

[117] *Robinette*, 117 S. Ct. at 421.

[118] *See, e.g.*, Florida v. Royer, 460 U.S. 491, 497–98 (1983) ("[O]fficers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in a criminal prosecution his voluntary answers . . . .").

[119] As the Court noted in *Berkemer v. McCarthy*, "Certainly few motorists would feel free to . . . leave the scene of a traffic stop without being told they might do so." 468 U.S. 420, 436 (1984). In *Berkemer*, the Court noted that in most states it is a crime to drive away without permission. *Id.*

[120] *See* United States v. Werking, 915 F.2d 1404, 1408 (10th Cir. 1990).

with the traffic stop, motorists may not believe they have the right to decline the officer's request.[121] If the officer does not tell the motorist that the stop is concluded and that the motorist is free to go, then the motorist must decide the extent of his rights by himself.[122]

4. Interrogation for Unrelated Crimes

Beyond offering an opportunity to search, pretextual stops also provide an officer the opportunity to interrogate a motorist about an unrelated crime.[123] Police are not generally required to provide *Miranda* warnings during routine traffic stops.[124] The Supreme Court only requires police to give *Miranda* warnings during custodial interrogations, and the Court does not consider routine traffic stops to be custodial.[125] Accordingly, the police can ask a motorist questions in order to generate the necessary suspicion to justify further detention or a search.[126] Even if the custodial nature of a traffic stop rises to a level requiring *Miranda* warnings, once a motorist waives his or her *Miranda* rights, the police may question the motorist about any criminal activity.[127] In some cases, police have arrested suspects on outstanding warrants for minor crimes just so they can obtain custody and interrogate the suspects about other crimes.[128]

In 1987, in *United States v. Causey*, the Court of Appeals for the Fifth Circuit upheld a pretextual arrest when it held that the police could lawfully arrest and interrogate a suspected bank robber based on an outstanding arrest warrant.[129] The police suspected that Causey

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[121] *See, e.g.*, State v. Retherford, 639 N.E.2d 498, 507 (Ohio App. Ct. 1994) ("[I]t strains credulity to imagine that any citizen, directly on the heels of having been pulled over to the side of the road by armed and uniformed police officers in marked patrol cars, would ever feel 'free to leave' or 'at liberty to ignore the police presence and go about his business' in spite of being told otherwise, when she is then asked investigatory questions by the officers and faced with a request to search her vehicle for contraband.").

[122] Some courts have used the return of a motorist's license and registration as the point at which the motorist should know the stop has ended. *See, e.g.*, Werking, 915 F.2d at 1408 (holding that the return of motorist's license and registration manifested to him that he was free to leave and that in answering the officer's subsequent questions and consenting to a search, Werking was engaging in a consensual encounter).

[123] *See* United States v. Causey, 834 F.2d 1179, 1181 (5th Cir. 1987) (en banc).

[124] *See Berkemer*, 468 U.S. at 440 (holding that motorist's incriminating statements were admissible because routine traffic stops are not a police dominated atmosphere and thus *Miranda* warnings were not required).

[125] *See id.*

[126] *See Causey*, 834 F.2d at 1181.

[127] *See* Colorado v. Spring, 479 U.S. 564, 576–77 (1987) (holding that a waiver of *Miranda* rights does not require police to inform a suspect about all possible subjects of questioning).

[128] *See, e.g., Causey*, 834 F.2d at 1181.

[129] *Id.* at 1185.

was involved in a bank robbery but did not have sufficient cause to arrest him for the robbery.[130] Instead of arresting him for the bank robbery, the police arrested him on an outstanding petty theft arrest warrant.[131] During questioning, Causey confessed to the bank robbery.[132] In holding that the confession was admissible, the Fifth Circuit gave tacit approval for the police to use a pretextual reason to initiate an interrogation of a person whom the police did not otherwise have sufficient evidence to interrogate.[133]

The Supreme Court has also held that police can interrogate suspects about unrelated crimes without violating a suspect's *Miranda* rights.[134] In 1987, the Court in *Colorado v. Spring* held that a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect properly waived his Fifth Amendment privilege.[135] Spring was suspected of murder and the interstate transportation of stolen firearms.[136] Alcohol, Tobacco and Firearms ("ATF") agents set up an undercover operation and arrested Spring for a firearms violation.[137] Spring waived his *Miranda* rights and was interrogated about the firearms transactions that led to his arrest.[138] The agents then questioned Spring about the murder and he made an incriminating statement.[139] At trial, Spring moved to suppress the statement, arguing that he should have been advised he was a murder suspect before the questioning and that the police's failure to do so rendered his statement inadmissible.[140] The Court held that the statement was admissible on the grounds that a valid *Miranda* waiver does not require that an individual be informed of all information that would affect his decision to speak or stand by his rights.[141] Accordingly, the ATF agents' failure to inform Spring of their intent to question him about the murder was held not to violate Spring's Fifth Amendment right against self-incrimination.[142]

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[130] *See id.* at 1180.
[131] *See id.*
[132] *See id.*
[133] *Causey*, 834 F.2d at 1185.
[134] *See Spring*, 479 U.S. at 576–77.
[135] *Id.*
[136] *See id.* at 566.
[137] *See id.*
[138] *See id.* at 567.
[139] *See Spring*, 479 U.S. at 567.
[140] *See id.* at 568–69.
[141] *Id.* at 576–77.
[142] *See id.* at 577.

C. *The Pretext Problem*

The Fourth and Fifth Amendments exist as bulwarks against the vast discretionary powers of the police.[143] One of the bedrock foundations of the Fourth Amendment is a healthy fear of unchecked power.[144] The Framers were clearly concerned with the broad discretionary powers that the general writs of assistance provided to agents of the Crown.[145] This general suspicion of unchecked power led them to adopt the Fourth Amendment as a guarantee of a citizen's right against unreasonable searches and seizures and the Fifth Amendment to protect citizens from self-incrimination.

The pretext problem arises when police use expansive and vague state traffic codes to get around these carefully crafted Fourth and Fifth Amendment protections; in this regard the traffic codes are the same as the writs of assistance that prompted the adoption of the Fourth Amendment.[146] A traffic stop is not only an opportunity to issue a citation, but it is also an opportunity to interrogate a suspect and to search a motorist and his or her car for incriminating evidence. Given this vast unsupervised power to expand a routine traffic stop into an increasingly wider and invasive investigation, prior to the Supreme Court's decision in *Whren*, some courts had attempted to curb the use of pretextual stops.[147]

III. The Law Prior to *Whren*

The Supreme Court made it quite clear in a trilogy of decisions beginning in 1978 that the subjective intent of the officer conducting a search is not relevant in determining the constitutionality of the search.[148] Although the Court forbade inquiry into an individual officer's subjective reasons for conducting a search, it was not clear whether the Court would demand that trial courts ask whether a reasonable officer

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[143] *See* Payton v. New York, 445 U.S. 573, 583 n.21 (1980).

[144] *See id.* at 583 n.21, 584 & n.23.

[145] *See id.* at 583 n.21.

[146] *See supra* note 3 (listing vague offenses for which police can easily stop motorists).

[147] *See, e.g.*, United States v. Hernandez, 55 F.3d 443, 445 (9th Cir. 1995); United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986).

[148] *See* Maryland v. Macon, 472 U.S. 463, 470–71 (1985); United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983); Scott v. United States, 436 U.S. 128, 136–37 (1978).

There was a time when the Supreme Court was concerned with pretext. In 1932, in *United States v. Lefkowitz*, the Court remarked in dicta that "[a]n arrest may not be used as a pretext to search for evidence." 285 U.S. 452, 467 (1932). Later in *Jones v. United States*, the Court held that a search was unconstitutional because the officer's purpose in entering the defendant's home

would have conducted the search absent the pretextual motive.[149] In other words, prior to *Whren*, the Supreme Court had not explicitly decided whether the police could use the legal justification of a minor crime as a pretext to stop a person in order to search or interrogate that person for an unrelated, more serious crime for which the police did not have reasonable suspicion—a so-called pretextual stop.[150]

Prior to *Whren*, the federal courts were split on how to address pretextual stops.[151] Some courts tried to discourage pretextual stops by adopting a test that authorized the stop only if a reasonable police officer in similar circumstances would have made the stop absent the pretext.[152] The courts referred to this as the "Would Have Test." Other federal courts had adopted a test that only looked at whether the officer had probable cause to make the stop without regard to whether a reasonable officer would have made the stop.[153] The courts refereed to this as the "Could Have Test."

The United States Court of Appeals for the Eleventh Circuit was the leading proponent of the Would Have Test. In 1986, in *United States v. Smith*, the Eleventh Circuit held that a reasonable officer would not have stopped the appellants unless the officer had an invalid purpose to obtain additional evidence of criminal activity, and thus, it reversed the appellants' convictions.[154] In *Smith*, a police officer stopped the appellants because they matched the officer's drug profile: they were approximately thirty years old; the car had out-of-state tags; the driver was overly cautious; and the appellants did not look at the police officer when they passed him.[155] On appeal, the government argued that the

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was to search for evidence and not to arrest. 357 U.S. 493, 499–500 (1958). In *Jones*, the Court was willing to consider an officers' subjective motivation for conducting the search—namely the officers' testimony about their intent. *Id.* at 500. Pretext still retains some force for searches, such as administrative searches, conducted in the absence of suspicion. *See* Colorado v. Bertine, 479 U.S. 367, 369 (1987).

[149] The Federal Circuit Courts were split on the issue. *Compare Hernandez*, 55 F.3d at 446, *and Smith*, 799 F.2d at 708, *with* United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc), *and* United States v. Scopo, 19 F.3d 777, 784 (2d Cir. 1994), *and* United States v. Hassan El, 5 F.3d 726, 730 (4th Cir. 1993), *and* United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991), *and* United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990), *and* United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989), *and* United States v. Causey, 834 F.2d 1179, 1185 (5th Cir. 1987) (en banc), *and* United States v. Hawkins, 811 F.2d 210, 213 (3d Cir. 1987).

[150] *See supra* note 149 (comparing circuit split).

[151] *See id.*

[152] *See Hernandez*, 55 F.3d at 446; *Smith*, 799 F.2d at 708.

[153] *See Botero-Ospina*, 71 F.3d at 787; *Scopo*, 19 F.3d at 784; *Hassan El*, 5 F.3d at 730; *Mitchell*, 951 F.2d at 1295; *Cummins*, 920 F.2d at 501; *Trigg*, 878 F.2d at 1041; *Causey*, 834 F.2d at 1185; *Hawkins*, 811 F.2d at 213.

[154] 799 F.2d at 708.

[155] *Id.* at 706.

stop was proper because the officer had observed the car weaving, and thus, he could have stopped the car to investigate whether the driver was drunk.[156] The Eleventh Circuit observed that the officer had no interest in investigating a drunk driving charge.[157] He saw that the driver was driving with an abundance of care; he began pursuit before noticing the weaving; and once he stopped the vehicle, he did not investigate the possibility of intoxication.[158] Based on this record, the court concluded that a reasonable officer would not have stopped the appellants to investigate a drunk driving charge, that this rationale was pretextual and, accordingly, that the stop was unreasonable.[159] The Eleventh Circuit was concerned with the underlying rationale for *Terry* stops.[160] The court thought that if police could conduct *Terry* stops based on reasonable suspicion of minor violations, the nexus between the justification for the seizure and the scope of the seizure would necessarily break down.[161] Consequently, the court applied the Would Have Test—whether a reasonable police officer would have stopped the appellants absent the invalid purpose—to prevent the police from initiating the random, arbitrary stops that *Terry* denounced.[162]

Although the Tenth and Fifth Circuits at one point followed the Eleventh Circuit, by the time the Supreme Court decided *Whren* the Eleventh and Ninth Circuits were the only proponents of the Would Have Test.[163] In June of 1996, the Supreme Court of the United States finally addressed the split.[164] In *Whren v. United States*, the Court reaffirmed that an officer's motive for stopping a suspect is irrelevant and held that the determination that a search was unreasonable for Fourth Amendment purposes does not depend upon whether a reasonable

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[156] *See id.* at 708.

[157] *Id.* at 710–11.

[158] *See id.*

[159] *Smith*, 799 F.2d. at 711.

[160] *See id.* Unlike an arrest or full search, which must be based on probable cause, *Terry* stops are of a limited nature; short in duration and limited in scope, police must use the least intrusive means available to verify or dispel their suspicion. *See* Florida v. Royer, 460 U.S. 491, 500 (1983). *Terry* stops are an accommodation of the government's need to investigate crime and stop criminal activity before it occurs and the individual's right to be free from unreasonable searches. Terry v. Ohio, 392 U.S. 1, 26–27 (1968). *Terry* stops are predicated on a showing of reasonable suspicion. *See id.* at 21–22. This lower standard of suspicion is justified in part because of the limited intrusiveness of the stop. *See id.* at 26–27.

[161] *Smith*, 799 F.2d at 711.

[162] *Id.*

[163] *See Hernandez*, 55 F.3d at 445; *Smith*, 799 F.2d at 708. Eight of the federal circuits had explicitly or implicitly adopted some form of the Could Have Test. *See Botero-Ospina*, 71 F.3d at 787; *Scopo*, 19 F.3d at 784; *Hassan El*, 5 F.3d at 730; *Mitchell*, 951 F.2d at 1295; *Cummins*, 920 F.2d at 501; *Trigg*, 878 F.2d at 1041; *Causey*, 834 F.2d at 1185; *Hawkins*, 811 F.2d at 213.

[164] *See* Whren v. United States, 116 S. Ct. 1769, 1774–75 (1996).

police officer would have stopped the defendant for the pretextual reasons given—thus adopting the Could Have Test.[165] The Court also reaffirmed that when an officer has probable cause to search or arrest, there is no requirement to balance the governmental and individual interests to figure out the reasonableness of the search.[166]

IV. *WHREN V. UNITED STATES*

A. *The Facts*

On the evening of June 10, 1993, plainclothes vice officers of the Washington, D.C. police department were patrolling a "high drug use" area in two unmarked cars when they noticed a Nissan Pathfinder with temporary tags stopped at a stop sign.[167] Officer Ephraim Soto observed the driver looking at the lap of the passenger.[168] The Pathfinder remained at the stop sign for more than twenty seconds, obstructing the traffic behind it.[169] The police officers decided to tail the Pathfinder and initiated a U-turn.[170] As the police returned to the intersection, they observed the Pathfinder turn suddenly without signaling and speed off at an "unreasonable" speed.[171] The police caught up with the Pathfinder while it was stopped at a light and one of the officers approached the driver, James Brown.[172] After telling Brown to put the vehicle in park, Officer Soto observed two large bags of cocaine in passenger Michael Whren's lap.[173] The police arrested Brown and Whren and a subsequent search of the vehicle turned up additional illegal narcotics.[174] Brown and Whren were charged with violating multiple federal drug laws and they moved to suppress the seized drugs.[175] The defendants argued that the stop was illegal because the police lacked reasonable suspicion to believe they were involved in drug activity.[176]

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[165] *Id.*

[166] *Id.* at 1777. The Court did concede that in extraordinary circumstances, which are not present in a routine traffic stop, the Court would require more than probable cause for a search to be reasonable. *Id.*

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

[168] *See id.*

[169] *See id.*

[170] *See id.*

[171] *See id.*

[172] *See Whren*, 53 F.3d at 372–73.

[173] *See id.* at 373.

[174] *See id.*

[175] *See id.*

[176] *See Whren*, 116 S. Ct. at 1772.

Furthermore, they argued that the reason given for stopping the Pathfinder, to issue a traffic warning, was a pretext.[177]

The District Court for the District of Columbia denied the defendants' motion to suppress and the court subsequently convicted and sentenced them.[178] On appeal, petitioners argued that the police used the traffic violations as a pretext for investigating suspected drug activity.[179] Petitioners argued that the Court of Appeals for the D.C. Circuit should adopt the Would Have Test used at that time by the Ninth, Tenth and Eleventh Circuits.[180] The D.C. Circuit affirmed the denial of defendants' motion to suppress and reaffirmed that a traffic stop is permissible if a reasonable officer could have stopped the car for the suspected traffic violation.[181] Whren and Brown then petitioned the Supreme Court for a grant of certiorari and, after having denied certiorari on cases raising the same issue at least seven times, the Court decided to resolve the circuit split.[182]

B. *The Petitioners' Argument*

Whren and Brown argued that the Court should adopt the Would Have Test and, alternatively, that the Court should balance the government's need to conduct traffic stops by plainclothes officers in unmarked vehicles against the defendants' rights to be free from unreasonable searches.[183] Petitioners argued that the purpose of the Fourth Amendment is to prevent arbitrary invasions by the police and thus probable cause is a necessary but not a sufficient requirement for a search.[184] In other contexts, they argued, the Court has required more than probable cause.[185] Petitioners argued that the Court should re-

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[177] *See id.*

[178] *See id.*

[179] *See Whren*, 53 F.3d at 374–76.

[180] *See id.* at 374.

[181] *See id.* at 375–76. The D.C. Circuit had earlier implicitly adopted the Could Have Test in *United States v. Mitchell*, 951 F.3d 1291, 1295 (D.C. Cir. 1991).

[182] *See* United States v. Scopo, 19 F.3d 777 (2d Cir.), *cert. denied*, 513 U.S. 877 (1994); United States v. Ferguson, 8 F.3d 109 (6th Cir. 1993) (en banc), *cert. denied*, 513 U.S. 828 (1994); United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993), *cert. denied*, 511 U.S. 1006 (1994); United States v. Mitchell, 951 F.2d 1291 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 923 (1992); United States v. Cummins, 920 F.2d 498 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991); United States v. Trigg, 878 F.2d 1037 (7th Cir. 1989), *cert. denied*, 502 U.S. 962 (1991); United States v. Hawkins, 811 F.2d 210 (3d Cir.), *cert. denied* 484 U.S. 833 (1987).

[183] *See* Petitioner's Brief at 13–15, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841).

[184] *See id.* at 15–16.

[185] *See id.* at 16–17 (citing Wilson v. Arkansas, 514 U.S. 927 (1995); Tennessee v. Garner, 471 U.S. 1 (1985); Winston v. Lee, 470 U.S. 753 (1985); Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).

quire more than probable cause here as well because seizure based on a traffic code violation does not sufficiently restrain police behavior given that motorists often violate the traffic code.[186] This unlimited discretion to stop motorists invites police abuse, they claimed.[187]

In addition, petitioners argued that the Court's previous decisions supported adopting the Would Have Test.[188] Petitioners based their contention on the Court's previous rejection of the pretextual use of government authority in administrative searches and inventory searches.[189] Although the Court had said that it would not consider an individual officer's subjective motivations in determining the reasonableness of the search, the Court had not previously said what standard should govern pretextual searches.[190] Petitioners argued that the Would Have Test was consistent with the Court's precedent because it did not evaluate the state of mind of the officer who made the stop, but instead evaluated what a reasonable officer would have done.[191] They argued that if the actual officer did not follow the procedures a reasonable officer would have followed, the officer acted arbitrarily.[192] Because the officers in *Whren* were not following Washington D.C. police procedures when they stopped Brown, the petitioners asked the Court to conclude that the stop was arbitrary and a violation of the Fourth Amendment.[193]

Furthermore, petitioners asked the Court to conclude that the stop was also unreasonable because its intrusiveness outweighed the government's interest in acting contrary to its own procedures.[194] The reasonableness of a search is determined, petitioners argued, by balancing the competing interests.[195] Petitioners asserted that allowing plainclothes officers to pursue traffic violators did not promote the government's interest in safety.[196] To support this assertion, they cited Metropolitan Police Department regulations which showed that the offenses Brown committed were minor and that officers out of uniform

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[186] *See* Petitioner's Brief at 17–18.

[187] *See id.* at 21.

[188] *See id.* at 30.

[189] *See id.* (citing Florida v. Wells, 495 U.S. 1, 4 (1990); Colorado v. Bertine, 479 U.S. 367, 372 (1987); New York v. Burger, 482 U.S. 691, 716–17 n.27 (1987); and dicta in Colorado v. Bannister, 449 U.S. 1, 4 n.4 (1980)).

[190] *See id.* at 31.

[191] *See* Petitioner's Brief at 32.

[192] *See id.* at 36–37.

[193] *See id.* at 37.

[194] *See id.*

[195] *See id.*

[196] *See* Petitioner's Brief at 38.

or in unmarked cars were only to enforce traffic violations that were so grave as to pose an immediate threat to the safety of others.[197]

Weighed against these factors, Brown and Whren insisted that their Fourth Amendment interests were decisive.[198] They argued that traffic stops by plainclothes officers in unmarked cars are more intrusive than normal roadside stops because motorists are uncertain of the identity of the person who is stopping them.[199] Traffic stops by plainclothes police in unmarked cars are also more arbitrary than stops by uniformed police in cruisers, petitioners argued.[200] On balance, petitioners contended, their rights to be free from arbitrary, intrusive searches outweighed the marginal contributions to safety gained by such stops.[201] Thus, the petitioners asked the Court to suppress all evidence from the illegal search.[202]

C. *The Decision*

Writing for a unanimous bench, Justice Scalia began the Court's analysis by recognizing that a traffic stop is a seizure for Fourth Amendment purposes and thus requires probable cause that a traffic violation has occurred.[203] Noting that the district court had found that the police had probable cause to believe that Brown had violated the traffic code, the Court rejected petitioners' argument that the proper standard for determining the constitutionality of a traffic stop is whether a reasonable police officer would have stopped Brown for the reasons given.[204] The proper standard for determining the constitutionality of a traffic stop, the Court stated, is whether the police officer had probable cause to stop the motorist.[205]

In addition, the Court did not find petitioners' proposed standard, the Would Have Test, consistent with its precedent.[206] Justice Scalia distinguished the cases upon which petitioners relied as cases where

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[197] *See id.* at 40–41.

[198] *See id.* at 47.

[199] *See id.* at 45.

[200] *See id.* at 46.

[201] *See* Petitioner's Brief at 47.

[202] *See id.* at 50.

[203] Whren v. United States, 116 S. Ct. 1769, 1772 (1996).

[204] *Id.* at 1774–75, 1777.

[205] *Id.* at 1777.

[206] *Id.* at 1773. Justice Scalia distinguished petitioners' cases, Florida v. Wells, 495 U.S. 1 (1990); Colorado v. Bertine, 479 U.S. 367 (1987); and New York v. Burger, 482 U.S. 691 (1987), as cases where the searches were conducted in the absence of probable cause. These cases all dealt with administrative or inventory searches. *See id.*

the type of search did not require any suspicion of wrongdoing.[207] Those cases all dealt with administrative or inventory searches.[208] In cases where the search required probable cause, Justice Scalia said that the Court's precedent clearly established that an officer's subjective intent is irrelevant to the constitutional reasonableness of a search.[209]

Having foreclosed the possibility that an officer's actual, subjective intent determined the reasonableness of a search founded on probable cause, the Court then rejected the petitioners' proposed objective test, declaring that subjective criteria influenced it as well.[210] The Court explained that the petitioners' test asked whether the judge found it plausible to believe that the officer had the proper state of mind.[211] Justice Scalia stated that the Court was not concerned with the perceived danger of the pretextual stop.[212] The Fourth Amendment allows certain actions in certain circumstances regardless of the officer's subjective intent, he said.[213] For example, the Court authorizes officers to search incident to a custodial arrest because of a concern that the person might be armed.[214] It is, however, irrelevant whether a particular officer believes a particular arrestee is armed; the custodial arrest authorizes the search regardless.[215] Justice Scalia also rejected the idea that the Court's prior decisions required police to follow standardized procedures when conducting searches founded upon probable cause.[216] Justice Scalia noted that if the Court were concerned with pretext, which it was not, figuring out the officer's subjective intent would be easier than figuring out what a reasonable officer's motive might have been.[217] Furthermore, the Court spurned linking Fourth Amendment protections to the vagaries of individual police districts.[218]

Finally, the Court acknowledged that the reasonableness of a search does require a balancing of the government's and the individual's interests; however, except in extreme situations, the fact that an officer

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[207] *Whren*, 116 S. Ct. at 1773.

[208] *See id.* at 1774.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Whren*, 116 S. Ct. at 1774–75.

[213] *Id.* at 1775.

[214] *See id.*

[215] *See id.*

[216] *Whren*, 116 S. Ct. at 1775–76.

[217] *Id.* at 1775. "[I]t seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation." *Id.*

[218] *See id.*

has probable cause to believe that an offense has occurred is dispositive for determining the reasonableness of the search.[219] A traffic stop conducted by a plainclothes officer in an unmarked vehicle is not such an extreme practice that warrants heightened protection.[220] Thus, the Court upheld the lower courts' decisions and ruled that the evidence could be admitted.[221]

V. Analysis and Recommended Limitations on Police Discretion

In adopting the Could Have Test, *Whren* ends the debate about pretextual stops for federal courts. Where there is probable cause to stop a motorist, the Court will not snoop for pretext.[222] The *Whren*

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[219] *See id.* at 1776.

[220] *See id.* at 1777. There are many examples of extreme conduct that warrant requiring more than probable cause. *See* Tennessee v. Garner, 471 U.S. 1 (1985) (seizure by deadly force); Wilson v. Arkansas, 514 U.S. 927 (1995) (unannounced entry into a home); Winston v. Lee, 470 U.S. 753 (1985) (searches that physically penetrated the body); Welsh v. Wisconsin, 466 U.S. 740 (1984) (entry into a home without a warrant).

[221] *Whren*, 116 S. Ct. at 11777. In that the evidence was not suppressed, *Whren* reflects a larger federal judiciary trend to limit the applicability and scope of the Exclusionary Rule. The Berger/Rehnquist Court has limited the Exclusionary Rule by restricting a defendant's standing to challenge tainted evidence. *See* Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980); United States v. Payner, 447 U.S. 727, 735–36 (1980); Rakas v. Illinois, 439 U.S. 128, 133 (1978). The Court has also narrowly confined the applicability of the Exclusionary Rule to certain aspects of criminal trials. The Exclusionary Rule does not apply to habeas corpus review, *see* Stone v. Powell, 428 U.S. 465, 494 (1976); immigration hearings, *see* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984); impeachment of defendant's testimony, *see* United States v. Havens, 446 U.S. 620, 626–27 (1980); civil trials, *see* United States v. Janis, 428 U.S. 433, 453–54 (1976); or grand jury proceedings, *see* United States v. Calandra, 414 U.S. 338, 354–55 (1974). The Court has also circumscribed the applicability of the exclusionary remedy to police misconduct; it does not apply to misconduct by legislatures, *see* Illinois v. Krull, 480 U.S. 340, 352–53 (1987) or court personnel, *see* Arizona v. Evans, 514 U.S. 1, 14–15 (1995). Nor does the Exclusionary Rule apply to unintentional misconduct by police. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (establishing a good faith exception).

[222] *See Whren*, 116 S. Ct. at 1774. The Government and the Court did not care if a stop was pretextual. This is seen in the following exchange, when respondent's counsel struggled to explain why it was reasonable for the police to have stopped Brown:

"QUESTION: Is there anything else to explain why officer Soto, who said, I don't ordinarily do this, would have done it in this case when the traffic violations were not particularly egregious?

MR. FELDMAN [respondent's counsel]: There—I'm not sure how egregious they were. Driving at an unreasonable speed in particular can be thought to be a serious offense.

QUESTION: Of course, you really don't care, Mr. Feldman, do you?

MR. FELDMAN: No. No. In our—

QUESTION: Let's be honest.

(Laughter.)

Mr. Feldman: In our view o—166 mean, these are the facts—

QUESTION: You said you will allow pretextual stops.

MR. FELDMAN: In our—

Court adopted the correct standard for evaluating whether a traffic stop is initially justified. The petitioner's proposed test would have been difficult for courts to apply, administratively costly, confusing to police and ineffective in limiting unjustified searches.[223] The Could Have Test, on the other hand, provides a workable standard for determining whether an officer was justified in stopping a motorist.[224] Neither test, however, addresses the real problem underlying pretextual traffic stops, which is that police have vast, unchecked discretion to expand the scope of the initially justified traffic stop into an unjustified general search.[225] State legislatures and state courts should correct this shortfall.

A. *The Would Have Test Would Not Have Helped*

The Would Have Test would have proven problematic because it is difficult and administratively costly for courts to decide what a reasonable officer would have done.[226] Furthermore, the Would Have Test does not provide clear guidance to law enforcement on whether a stop is reasonable.[227] Finally, the Would Have Test ignores the real problem because it focuses on whether a reasonable police officer in the same situation would have exercised his or her legal authority and not on whether a police officer should have such authority in the first place.

Under the Would Have Test, in order to establish pretext, a defendant has to show that a reasonable officer would not have stopped him.[228] But who is this reasonable officer? Should courts look at what

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QUESTION: So long as he has a proper reason to stop, pretextual or not, you're (sic) don't care.

MR. FELDMAN: That's correct.

QUESTION: You're just being nice to Justice Ginsburg in trying to give her some reasons why—

(Laughter)."

Transcript of Oral Arguments, Whren v. United States (April 17, 1996), *available in* WESTLAW, 1996 WL 195296, at 40–41.

The Court did indicate, however, that the Equal Protection Clause would apply if there was a discriminatory animus lurking behind the pretext. *See Whren*, 116 S. Ct. at 1777. In this subset of pretextual cases, defendants may have federal recourse through the Equal Protection Clause. *But see generally* Randall S. Susskind, Note, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327, 339–42 (1994) (discussing the difficulties of making an equal protection claim).

[223] *See* United States v. Botero-Ospina, 71 F.3d 783, 787–88 (10th Cir. 1995) (en banc); United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (en banc).

[224] *See Ferguson*, 8 F.3d at 392.

[225] *See* 1 LAFAVE, *supra* note 23, § 1.4(e), at 123.

[226] *See Botero-Ospina*, 71 F.3d at 787–88; *Ferguson*, 8 F.3d at 392.

[227] *See Botero-Ospina*, 71 F.3d at 787–88; *Ferguson*, 8 F.3d at 392.

[228] *See* United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986).

the individual officer normally does, what police in his or her unit normally do or what police throughout the state normally do?[229] What circumstances should courts take into account in determining what a reasonable officer would do? For example, should it matter that an officer is more or less likely to pull someone over because it is late at night, because it is rush hour or because it is close to the end of the month? The search for this reasonable officer character proves just as elusive as the search for that other legal incarnation, the reasonably prudent person.

Besides being subjective, the search for what the reasonable officer would have done is administratively expensive.[230] In each traffic stop case, the Would Have Test compels courts to hold hearings to decide what a police department's practices were and whether the officers followed them.[231] In some cases, the presence of police regulations may help the courts to identify a standard procedure, but often no regulation will cover the questioned practice.[232] If no regulations exist, courts must either try to learn what the standard practice is by interviewing a representative sample of police officers or decide for themselves whether the police officer's conduct was reasonable.[233] The former is time consuming; the latter is speculative. The few instances where

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[229] The Tenth Circuit's experience is illuminating. In 1988, the Court of Appeals for the Tenth Circuit adopted the Would Have Test. *See* United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988). The court framed the inquiry as whether, in pulling the motorist over, the officer had deviated from the usual practices of the police officers in the state. *See id.* But how do you determine what the "usual practices of the police" are? The Tenth Circuit could not find a consistent approach. *See, e.g.*, United States v. Fernandez, 18 F.3d 874, 877 (10th Cir. 1994) (defining in terms of the practices of an individual unit of the highway patrol); United States v. Harris, 995 F.2d 1004, 1006 (10th Cir. 1993) (defining in terms of the common practices of particular officers); *Guzman*, 864 F.2d at 1518 (defining in terms of an entire state police force). In part because of the inconsistencies inherent in the *Guzman* standard, the Tenth Circuit finally abandoned the Would Have Test as "unworkable" in *Botero-Ospina*. *See* 71 F.3d at 788.

[230] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436–37 (1974).

[231] Inquiry into a police department's standard procedures may be counterproductive. In many cases there is no established practice, and once courts start scrutinizing standard practices, there may be little incentive for a police department to establish them. *But see* 1 LAFAVE, *supra* note 23, § 1.4(e), at 124–25 (arguing for greater use of police standard procedures as a check on police arbitrariness).

[232] *See* Garcia v. State, 827 S.W.2d 937, 942 n.7 (Tex. Crim. App. 1992).

[233] Courts could require police to establish and follow standard procedures. Given the unpredictable situations a police officer is likely to encounter, however, standard procedures might be difficult to design. There is also a danger that standard procedures would tend to limit creative police work.

pretext will be proven does not justify the administrative expense in ferreting it out.[234]

If the Court had adopted the Would Have Test, it would have found that this search for the reasonable officer not only perplexes courts but that it also befuddles police.[235] One of the goals of Fourth Amendment jurisprudence is to provide police with a clear standard as to the constitutionality of their actions.[236] The Would Have Test does not do this. The Would Have Test would require an officer to make the same inquiries that the trial court will conduct. The officer would have to ask in each instance: Would a reasonable officer make this stop? How many officers are going to think that the reasonable officer would act differently? Given the difficulty courts have had in deducing what a reasonable officer would have done, why should we expect police officers in the heat of the chase to figure it out?

Moreover, the reasonable officer is going to do what works. If police find it productive to use traffic stops to investigate drug trafficking, then it will become the standard procedure of police to stop motorists for every possible minor infraction.[237] Once police link drug enforcement with traffic code enforcement, showing that a reasonable police officer would not have stopped a motorist for the traffic offense alone will be difficult, because a reasonable officer would not consider these separate events.[238] The reasonable officer will believe that strict enforcement of the traffic code is necessary in part because the stop might potentially yield drugs. Thus, standard police procedures are going to gravitate toward what is efficient, and there is no assurance that these standard procedures will properly consider a motorist's individual liberty interests. Whether a traffic stop violates the Fourth

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[234] *See* Amsterdam, *supra* note 230, at 436–37.

[235] *See Ferguson*, 8 F.3d at 392.

[236] *See* United States v. Belton, 453 U.S. 454, 460 (1981).

[237] *See* Amsterdam, *supra* note 230, at 436–37 ("Motivation is . . . a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second.").

[238] Suppose that a motorist argues that a police officer would not have stopped him or her except for the invalid purpose—to investigate drug trafficking. Under the Would Have Test, the motorist would have to show that no reasonable officer would have pulled him or her over for the traffic code violation unless they also wanted to investigate drug trafficking. But a reasonable officer in this jurisdiction does strictly enforce the traffic code. When the courts ask other police officers if they would have stopped the motorist for the traffic offense, they will find that they do. Of course, the enforcement is in part because they hope to find drugs. But this pretextual reason is absorbed into the standard procedures and culture of police such that it is no longer a pretextual reason but part of the justification for strict enforcement of the traffic code.

Amendment should not depend upon the vagaries of police department procedures concerning which laws they enforce and which ones they do not enforce.[239] Arbitrary police behavior should not be permissible simply because it is standardized.[240]

Because the Would Have Test lets the reasonable officer define the constitutionality of a search, it does not address the real issue, which is that police have too much discretion to conduct searches when little or even no justification exists.[241] Given the difficulty in proving pretext and the ease with which police officers can hide their subjective motivations, defendants would rarely succeed in showing that a reasonable officer would not have stopped them except for the invalid reason.[242] Consequently, the reasonable officer standard is an illusory guarantor of individual liberty.

B. *The Could Have Test Is a Workable Standard*

The *Whren* decision was pragmatic in that the Court adopted a workable standard for evaluating the justification for initiating a traffic stop.[243] If the police have probable cause that an infraction has occurred, they can initiate the stop.[244] This makes sense because, as Justice Scalia observed, there is no principle for determining when a legal code becomes so expansive or so ignored that the infraction itself is no longer a measure of the lawfulness of enforcement.[245] Furthermore, there is no judicial principle for determining which sections of a code the courts should ignore.[246] If citizens do not want the police

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[239] *See* Whren v. United States, 116 S. Ct. 1769, 1775 (1996); *see also Botero-Ospina*, 71 F.3d at 788; *Ferguson*, 8 F.3d at 392.

[240] The Orlando Sentinel investigation revealed that the Volusia drug squad had adopted standard procedures. *See* Steve Berry, *Legal Experts Say Seizures Appear Illegal*, ORLANDO SENTINEL, August 23, 1992, at A11. After stopping the driver, usually a minority, for a minor traffic offense, the officer would ask to see the license. *See id.* While returning the license, the officer would say, "By the way, you're not carrying any drugs, guns or bombs, are you?" Following the driver's response the officer would ask "You mind if I take a quick look?" *See id.*

[241] *See* 1 LAFAVE, *supra* note 23, § 5.2(e), at 86.

[242] The paucity of protection the Would Have Test provides is illustrated by the fact that the Tenth Circuit only once relied on the Would Have Test to reverse an order denying suppression, and in that one case, the search would have been invalid under the Could Have Test as well. *See Botero-Ospina*, 71 F.3d at 786.

[243] *See* Maryland v. Wilson, 117 S. Ct. 882, 890 (1997) (Kennedy, J., dissenting).

[244] *See Whren*, 116 S. Ct. at 1777. Pretextual traffic stops that are limited in scope are not inherently dangerous and they may even be beneficial in some circumstances. For example, police can use minor violations as a way to investigate whether a driver is intoxicated or unalert. In these situations the intrusion is minor and the benefits to public safety are potentially great.

[245] *See id.*

[246] *See id.* The *Whren* decision was driven by the practical concerns surrounding how a court

to enforce a provision of the code, they should have the legislature remove it.[247] The danger of pretextual traffic stops does not stem from the strict enforcement of minor traffic violations, but from the expansion of a limited stop into a full-blown search and seizure without the attendant justification or prior judicial approval.

C. *Addressing the Real Problem—Limiting the Scope of the Stop*

In so far as it chose the correct standard for determining whether the initial traffic stop is justified, the Court correctly decided *Whren*. *Whren* does not, however, address the problems associated with the virtually unlimited discretion that police officers have to arbitrarily increase the scope of the initial stop. Now that the Court's decision in *Whren* has made it easier for police to initiate a stop, more attention needs to be paid to limiting the intrusiveness of a traffic stop. *Whren* and other recent decisions indicate the Court's unwillingness to use the Federal Constitution to protect the rights of motorists. The Court has left this matter to the states, and states should move to limit the broad search and seizure powers that police are authorized to use during routine traffic stops.

Citizens should fear the arbitrary expansion of routine traffic stops into broader searches and seizures because some police officers abuse their discretion both in choosing which individuals to stop and in using the stop solely for investigating unrelated crimes. For example, in Florida, the *Orlando Sentinel* obtained video tape from 1,084 traffic stops on Interstate 95.[248] The tape revealed that the police issued only nine citations, yet they searched and frisked motorists in almost half the stops and they made arrests in five percent of the stops.[249] Reports from other states are also disturbing. On the New Jersey Turnpike, African-Americans and Hispanics made up approximately seventy percent of the arrests of one group of troopers, even though African-

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would determine that a stop was pretextual. As Justice Kennedy noted in *Wilson*, the *Whren* Court could find no other workable rule. *See Wilson*, 117 S. Ct. at 890 (Kennedy, J., dissenting).

[247] Both the Tenth and Sixth Circuits adopted the Could Have Test in part because they concluded that courts should leave to the state legislatures the task of determining how the traffic laws should be enforced. *See Botero-Ospina*, 71 F.3d at 788; *Ferguson*, 8 F.3d at 392.

[248] *See* Jeff Brazil et al., *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1. The Orlando Sentinel investigation revealed how easily the traffic code can be exploited. Of the 1,084 stops, 253 were for swerving, 237 for following too closely, 128 for speeding 1–10 mph over the limit, 71 for a burned out license tag light, 46 for an improper tag, 45 for failure to signal a lane change, 27 for speeding 11 mph or more, 22 for an unsafe lane change, 17 for weaving and 228 unknown or miscellaneous. *See id.*

[249] *See id.*

Americans and Hispanics represented only five percent of the drivers on the relevant section of the turnpike.[250] In Utah, a trooper admitted that he was trained to stop Hispanic motorists and that in eighty percent of these stops he asked permission to search the vehicle.[251] And in Texas, the Fifth Circuit noted the remarkable record of a state trooper who had made 250 drug arrests in conjunction with traffic stops.[252] Yet, how many innocent motorists did this trooper search in order to unearth the 250 drug traffickers?

Past police abuse points to the need to maintain appropriate checks on police discretion. Accordingly, state courts and legislatures should concern themselves with limiting the authority of police forces to expand a search beyond the apparent justification. It seems unlikely that in Utah eighty percent of Hispanic drivers warrant a full-blown vehicle search; the state would be well advised to step in and protect individuals from such arbitrary police intrusions. More specifically, states should limit an officer's discretion to make custodial arrests for minor traffic offenses. States should also require police to inform motorists that they are free to leave prior to asking permission for a consensual search. Finally, states should recognize that *Maryland v. Wilson*, which allowed police to order passengers out of cars during traffic stops, illustrates the Court's no-frills view of Fourth Amendment liberty, and therefore states should provide greater protection of passengers' rights.[253]

1. Limit the Power to Arrest

States should limit the power of police officers to make custodial arrests for traffic violations.[254] Most states give police complete discretion to arrest a motorist for minor traffic offenses.[255] Other states have

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[250] *See* Henry P. Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, Aug. 23, 1992, at A11.

[251] *See* State v. Arroyo, 796 P.2d 684, 688 n.3 (Utah 1990).

[252] *See* United States v. Roberson, 6 F.3d 1088, 1092 (5th Cir. 1993).

[253] *See Wilson*, 117 S. Ct. at 884.

[254] Limiting the authority of the police to arrest a motorist for a minor offense such as a traffic offense is not a new idea. *See, e.g.*, Edwin J. Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court's Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 7 (1990); Thomas R. Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custodial Arrests*, 48 U. CIN. L. REV. 321, 323 (1979); Salken, *supra* note 8, at 252. The need to limit police authority, however, is now more urgent because *Whren* explicitly authorizes police to use a minor traffic violation as a means of investigating more serious crime. *See* 116 S. Ct. at 1777.

[255] *See* Salken, *supra* note 8, at 250 n.188.

only minimal checks on police discretion to arrest.[256] States should take the lead in limiting custodial arrests to serious offenses, such as drunk driving, and they should clearly define with objective criteria the offenses for which an officer may arrest and those for which an officer is limited to issuing a citation.[257] By limiting the officer's power to arrest, the legislature would limit the concomitant power to search and thus curb the temptation to stop a motorist for an alternative pretextual purpose.

Where legislatures are slow to enact such reforms, state courts should consider declaring custodial arrests for minor traffic violations to be unreasonable under their own constitutions.[258] A full custodial arrest for a minor traffic violation is arguably a violation of the Fourth Amendment of the United States Constitution.[259] State courts should construe similar provisions in state constitutions to forbid custodial arrests for traffic violations.[260] By limiting custodial arrests and the broad search powers that attend them, the states can protect the privacy and liberty rights of citizens who are guilty merely of minor traffic infractions—namely, just about everyone.

2. Require Informed Consent

The Supreme Court of the United States has provided minimal constitutional protection for consensual searches—they need only be voluntary.[261] Although the Supreme Court has declined to create a requirement that police inform a person that he or she can refuse to consent to a search, state courts are free to do so.[262] Because of the coercive nature of consensual searches during traffic stops, states should

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[256] *See id.* at 251 n.189.

[257] Instead of limiting an officer's options to arrest or cite, states could adopt a broad array of procedures. For example, where states are concerned that an out-of-state driver would not pay the fine, they could require the motorist to post a bond on the spot using a credit card or cash.

[258] The Supreme Court of the United States has not addressed the constitutionality of custodial arrest for minor offenses. However, in *Gustafson v. Florida*, Justice Stewart wrote a concurring opinion suggesting that a full custodial arrest for a minor traffic violation might have violated the defendant's Fourth Amendment rights. *See* 414 U.S. 260, 266–67 (1973) (Stewart, J., concurring). The Court did not rule on this issue because Gustafson had not raised it below. *See id.*

[259] *See generally* Salken, *supra* note 8, at 259–273 (arguing custodial arrests for minor traffic stops are unconstitutional).

[260] *See, e.g.*, FLA. CONST. art. I § 12; OHIO CONST. art. I § 14; MASS. DECLARATION OF RIGHTS Pt. 1 art. XIV.

[261] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

[262] *See* Ohio v. Robinette, 116 S. Ct. 417, 419 (1996).

expand upon this federal protection by adopting prophylactic measures such as the bright-line informed consent test in *Robinette*—a search will be consensual only if a motorist consents after the police officer informs him that he is free to leave.[263]

Considering the difficulty the courts have had articulating the standard for when a stop occurs and what its proper scope is, the courts should not naively believe that citizens will routinely correctly decide what is in their best interest.[264] States should not allow police to prey on citizens' ignorance of their rights to justify expansive fishing expeditions.[265] An informed consent rule would reduce random searches, but it would still allow police to expand their search if they had a reasonable suspicion of criminal activity.[266] Reasonable suspicion is not an overly burdensome requirement.

In *Robinette*, the Ohio Supreme Court established the bright-line test because the court found it difficult to believe that citizens were voluntarily consenting to intrusive searches.[267] Prior to the Ohio Supreme Court's *Robinette* decision, the Ohio Court of Appeals had observed that traffic stops were routinely used as a pretext for narcotics searches.[268] The Court of Appeals had noted that hundreds, and perhaps thousands, of Ohio citizens were being routinely delayed in their travels and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to practice his drug interdiction technique.[269]

In reviewing, the United States Supreme Court overturned the Ohio Court because its decision appeared to be based on federal constitutional law and not independent state grounds.[270] However, on remand, the Ohio court was free to adopt such protection under its own constitution.[271] Other states should follow Ohio's lead.

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[263] *See* State v. Robinette, 653 N.E.2d 695, 697 (Ohio 1995), *rev'd sub nom*, Ohio v. Robinette, 116 S. Ct. 417, 419 (1996).

[264] *See* Berkemer v. McCarthy, 468 U.S. 420, 436 (1984).

[265] *See Robinette*, 653 N.E.2d at 699.

[266] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[267] *See Robinette*, 653 N.E.2d at 697.

[268] *See* State v. Retherford, 639 N.E.2d 498, 503 & n.3 (Ohio Ct. App.), *dismissed, jurisdictional motion overruled by* 635 N.E.2d 43 (Ohio 1994).

[269] *Id.* (The Deputy involved had asked motorists to consent to a search of their vehicles 786 times in 1992).

[270] *See Robinette*, 116 S. Ct. at 422 (Ginsburg, J., concurring).

[271] *See id.*

3. Limit the Reach of *Wilson*

By itself, *Maryland v. Wilson* may be a reasonable accommodation of the states' interests in protecting police officers and the liberty interests of passengers.[272] In light of *Whren*, however, and its holding that an officer's subjective intent in making a traffic stop is irrelevant for purposes of the Fourth Amendment, the possibility of abuse is great.[273] For an officer bent on pushing the law to its limit in order to investigate drug trafficking, *Wilson* provides the authority to expand the officer's plain view dramatically.[274] The Court now permits such an officer to routinely empty a car so that he or she can see all of the passengers and the entire interior of the car.

States should limit the power of police to use *Wilson* as an investigatory tool. Rather than allow police the automatic right to empty a car, state courts and legislatures should require police to articulate some minimal objective basis for suspecting that a passenger could pose a danger.[275] While still protecting police, this would reduce the temptation to use a traffic stop to investigate other crimes. Although the Supreme Court has provided passengers minimal Fourth Amendment protection, states are free to expand protection of passengers' rights—and should do so.[276]

VI. Conclusion

In the aggregate, *Whren*, *Robinette* and *Wilson* profoundly change the rights of motorists and alter the complexion of traffic stops. In *Whren*, the Supreme Court correctly decided that an officer may stop a motorist if the officer has reasonable suspicion that a traffic offense has occurred.[277] There is no need to ask whether a reasonable officer would have stopped the motorist—reasonable suspicion that an offense has been committed is sufficient.[278] This is the proper standard

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[272] *See* 117 S. Ct. 882, 885–86 (1997).

[273] *See id.* at 890 (Kennedy, J., dissenting) ("When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police.").

[274] *See id.* at 884.

[275] *See id.* (Kennedy, J., dissenting) ("The requisite showing for commanding passengers to exit need be no more than the existence of any circumstance justifying the order in the interests of the officer's safety or to facilitate a lawful search or investigation.").

[276] *See* Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.").

[277] *See* 116 S. Ct. 1769, 1777 (1996).

[278] *See id.*

for determining whether the initial stop is justified. Nevertheless, suspicion that a motorist has violated the traffic code is not a sufficient restraint on police discretion to justify an officer's expansion of the scope of the stop into a full-scale search for criminal activity. Weaving, swerving and following too closely are insufficient indicators of serious crime and, given the potential intrusiveness of a stop, additional limits must be placed on a police officer's discretion so that the scope of the search comports with the justification. The Supreme Court has left this task to the states, and state courts and legislatures should adopt measures to limit the scope of a traffic stop. By limiting the power to arrest, ensuring that a motorist's consent is informed, and limiting an officer's right to remove passengers from a stopped car, states can help ensure that the intrusion is limited to the justification. If the legislature or the courts confine the search to the logical limits of a traffic stop—citation, registration check and questioning about the offense—then a police officer's motive for initially stopping a motorist is not so important. It is only when the police are permitted to conduct unrestrained fishing expeditions that pretext matters.

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