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## Whren v. United States: An Abrupt End to the Debate Over Pretextual Stops

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**WHREN v. UNITED STATES: AN ABRUPT  
END TO THE DEBATE OVER  
PRETEXTUAL STOPS**

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# WHREN v. UNITED STATES: AN ABRUPT END TO THE DEBATE OVER PRETEXTUAL STOPS

## I. INTRODUCTION

In *Whren v. United States*,<sup>1</sup> the United States Supreme Court held that a traffic stop is reasonable under the Fourth Amendment<sup>2</sup> if a police officer has probable cause to believe that a traffic violation has occurred, even if the stop is a pretext for the investigation of a more serious offense. The Court affirmed the convictions of Michael A. Whren and James L. Brown, who had been arrested on federal drug charges after Washington, D.C., police stopped Brown for minor traffic infractions. The Court's unanimous opinion, delivered by Justice Scalia, brought an end to a long-running debate over the proper Fourth Amendment treatment of pretextual police conduct, and pretextual traffic stops in particular.<sup>3</sup> The United States Courts of Appeals, state appellate courts, and various commentators were sharply divided over the question of whether pretextual stops violate the Fourth Amendment and, if so, what the test for identifying such unconstitutional conduct should be. *Whren*, however, was the first case in which the Supreme Court directly addressed the issue.

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

2. The Fourth Amendment to the United States Constitution states:

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

U.S. CONST. amend. IV.

3. This Note uses the term "pretextual stop" to mean a traffic stop that occurs when an officer has probable cause or reasonable suspicion to believe that a motorist has violated a traffic law, but which the officer would not have made absent a desire, not supported by probable cause or reasonable suspicion, to investigate a more serious offense. A classic pretextual stop occurs when an officer stops a motorist who is driving one mile per hour over the speed limit with the real motivation of investigating a hunch that the motorist is a drug dealer.

Pretextual police conduct can take other forms beside traffic stops; the most common of these is the use of outstanding arrest warrants for minor charges (traffic offenses, failure to appear, nonsupport, etc.) as a pretext to investigate more serious crimes. *See, e.g.,* *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (failure-to-appear warrant used as pretext to arrest robbery suspect); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc) (traffic warrant used as pretext to arrest murder suspect). Most of what this Note says with regard to pretextual stops is applicable to these situations, *see* *United States v. Hudson*, 100 F.3d 1409, 1415-16 (9th Cir. 1996) (holding that *Whren* applies to pretextual arrests); but the problem of pretextual arrests is perhaps less pressing for the simple reason that most people are not the subject of outstanding arrest warrants, while most people do regularly violate the traffic laws.

This Note will analyze the *Whren* decision as the last word in the pretextual stop debate. Supreme Court search and seizure precedents and the holdings of lower courts on both sides of the issue will be discussed by way of background, and then the *Whren* opinion itself will be considered. This Note concludes that the holding of *Whren* is correct both because it is dictated by precedent and because there are insurmountable logical and practical barriers to a holding that pretextual stops violate the Fourth Amendment. Because only the Fourth Amendment issue was presented, however, the Court did not examine the other factors that make pretextual stops a real problem, and therefore failed to suggest any solutions. This Note will therefore briefly examine possible alternative solutions.

## II. BACKGROUND

### A. Supreme Court Precedents and the Problem of Pretextual Stops

A person is subject to a "seizure" within the meaning of the Fourth Amendment when his liberty is restrained by an officer of the law by means of physical force or show of authority.<sup>4</sup> A seizure can take the form of a custodial arrest, a pedestrian "stop-and-frisk," or a traffic stop.<sup>5</sup> The Fourth Amendment, applied to the states through the Fourteenth Amendment, requires that a seizure in whatever form not be "unreasonable."<sup>6</sup> A traffic stop is normally considered reasonable if the officer has either probable cause to believe that a violation of law has occurred, or a reasonable articulable suspicion that a violation may be occurring.<sup>7</sup> Outside a limited number of exceptions—such as stops made at a roadblock<sup>8</sup>—a stop made without probable cause or reasonable suspicion is unreasonable, and any evidence obtained from the stop may not be used in court.<sup>9</sup>

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4. See *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968).

5. See *id.* at 16; *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

6. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985).

7. See *Delaware v. Prouse*, 440 U.S. at 661; *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-81 (1975).

8. See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (holding temporary drunk-driving roadblocks valid despite lack of particularized suspicion because police discretion limited by regulations); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding permanent roadblocks for illegal aliens valid despite lack of particularized suspicion).

9. See *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying exclusionary rule to states); *Weeks v. United States*, 232 U.S. 383 (1914) (evidence obtained in violation of Fourth Amendment must be excluded from federal criminal trial). See also *Delaware v. Prouse*, 440 U.S. 648 (1979) (excluding drug evidence seized after traffic stop violating Fourth Amendment).

The Supreme Court has repeatedly held that in determining whether a police action is reasonable, it is inappropriate to examine the officer's motivation. The clearest statement of this doctrine came in the 1978 case of *Scott v. United States*.<sup>10</sup> The petitioner in *Scott* was convicted on drug dealing charges based on evidence obtained in a telephone wiretap.<sup>11</sup> He argued that the evidence should have been suppressed because the federal agents conducting the wiretap had acted with the intent to violate statutory requirements that they minimize the number of calls intercepted.<sup>12</sup> In affirming his conviction, the Court held that subjective intent cannot make otherwise lawful conduct unconstitutional,<sup>13</sup> the proper inquiry under the Fourth Amendment is "an objective assessment of an officer's actions in light of the facts and circumstances then known to him."<sup>14</sup>

Pretextual stops present a special problem, however, that the Supreme Court had never directly addressed before *Whren*. By definition, the officer making the stop has probable cause or reasonable suspicion that the motorist is violating a traffic law. At the same time, though, the violation is a minor one which is normally not enforced. The most common examples are driving less than five miles an hour over the speed limit, turning or changing lanes without signaling, and swerving slightly out of one's lane. On any given day, one or more of these violations are surely committed by the majority of drivers on the road. Almost any driver, if observed over sufficient time, will be seen to commit a traffic infraction. If a traffic stop—a seizure of the person, a physical restraint upon the liberty of the citizen—can be justified by probable cause or reasonable suspicion of a traffic violation, the police have a tremendous amount of discretion. They can stop any driver they like, for any reason they like, if they can catch him breaking the most insignificant section of the motor vehicle code. The real reason may be a mere hunch that the driver is committing a more serious crime, or it may depend upon "the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin."<sup>15</sup> Even when not based upon discriminatory criteria, pretextual stops seem to allow police an easy way to lower the barriers the Supreme Court has erected against unfettered police discretion. This produces an instinctive reaction on the part of most observers that, in some way that

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10. 436 U.S. 128 (1978).

11. *See id.* at 131-34.

12. *See id.* at 135.

13. *See id.* at 136-37.

14. *Id.* at 137.

15. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974). This classic article, containing the text of the 1974 Oliver Wendell Holmes Lectures, is cited in many cases and practically all law review articles dealing with the pretext issue.

eludes easy definition, pretextual stops are a problem. For many judges, law professors, and defense lawyers, this instinctive reaction coalesced into a belief that pretextual stops violate the Fourth Amendment.

### B. The "Would Have" Test

Appellate courts thus began, in the late 1970s and early 1980s, to develop a test to discover when the justification offered for a stop is a pretext. Initially, some courts simply inquired into the officer's motivation: if his real reason for making the stop was a desire to investigate a hunch or harass a racial minority, rather than a desire to enforce the traffic laws, the stop was invalid and the evidence (drugs, weapons, stolen goods, etc.) must be suppressed. Thus the stop assertedly made for driving one mile per hour over the speed limit is invalid because the officer's true motivation, a hunch that the driver is a drug dealer, is not supported by probable cause or reasonable suspicion. Such a test was used for a time by the United States Courts of Appeals for the Fifth and Ninth Circuits.<sup>16</sup> Apart from the practical difficulties of discovering subjective motivation,<sup>17</sup> however, this line of thinking ran squarely into the Supreme Court's directive, in *Scott* and elsewhere, that the Fourth Amendment reasonableness inquiry cannot be a subjective one.

To address the pretext problem in a more objective way, a new test was developed, most often called the "would have" test.<sup>18</sup> The question under this test is "whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose."<sup>19</sup> According to its proponents, "[t]his test prop-

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16. See, e.g., *United States v. Smith*, 802 F.2d 1119 (9th Cir. 1986) (holding drug arrest valid because arrest was not motivated by DEA agents' desire to search defendant); *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978) (en banc) (holding traffic stop invalid despite officer's observation of illegal U-turn, because officer's real motivation was to investigate hunch defendants were transporting illegal aliens). The former Fifth Circuit's concern with pretext carried over after its 1981 division to the new Eleventh Circuit, but not to the new Fifth Circuit. See *infra* notes 22 and 31.

17. See, e.g., *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources."); *Amsterdam*, *supra* note 15, at 436 ("[S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen . . .").

18. The "would have" test is also known as the reasonable officer test, police practices test, the usual police activities test, or the modified objective test.

19. *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988) (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)). *Smith* was apparently the first case to formulate the test in these terms, but it was not a pretextual stop case in the sense that term is used in this Note. The *Smith* court found that the officer did not have probable cause to make a traffic stop, and that the alleged traffic violation had not occurred but was merely a post-hoc justification invented by the prosecutor. See *United States v. Smith*, 799 F.2d at 709. For the distinction between

erly preserves the Supreme Court's requirement of an objective inquiry into Fourth Amendment activity and provides meaningful judicial review of discretionary police action."<sup>20</sup> In theory, the inquiry under the "would have" test focuses not on the officer's motivation in making the stop, but on whether his action deviated from standard police practice.<sup>21</sup> The stop assertedly made for driving one mile per hour over the speed limit is thus invalid not because of the officer's ulterior motive, but because the stop deviates from standard practice in that a reasonable officer would not have made the stop absent the ulterior motive.

The "would have" test was adopted by the Ninth, Tenth, and Eleventh Circuits, and by a number of state appellate courts.<sup>22</sup> The Maine Supreme Judicial Court, sitting as the Law Court, adopted the test in the 1993 case of *State v. Izzo*.<sup>23</sup> In *Izzo*, a late-night traffic stop in Pittsfield for a broken taillight and an inoperable plate light led to a drug-trafficking arrest.<sup>24</sup> In reviewing the superior court's denial of Izzo's motion to suppress, the Law Court adopted the "would have" test, but rejected the defendant's argument that the stop was pretextual.<sup>25</sup> The officer testified that, consistent with his own standard practice, he would have stopped the car regardless of any ulterior motive.<sup>26</sup> The stop was therefore held to be the action of a reasonable officer.<sup>27</sup>

In Maine, the "would have" test first resulted in the suppression of evidence in *State v. Haskell*,<sup>28</sup> in which a stop for driving four miles per hour over the speed limit, made by an East Millinocket officer at 1:20 a.m. "when the nearby bars were closing," was found

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this type of "fabrication pretext" and pretext as used in this Note ("legal pretext"), see *infra* notes 130-132 and accompanying text.

20. *United States v. Guzman*, 864 F.2d at 1517 (citations omitted).

21. The focus becomes sharper when standard practice can be measured against a set of regulations promulgated by the law enforcement agency, describing under what circumstances and by which officers minor traffic laws should be enforced. Some commentators have urged that courts require conformity with such regulations as an element of a reasonable stop. See 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.4(e), at 124-25 (3d ed. 1996); Amsterdam, *supra* note 15, at 416-28.

22. See, e.g., *United States v. Cannon*, 29 F.3d 472 (9th Cir. 1994); *United States v. Valdez*, 931 F.2d 1448 (11th Cir. 1991); *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988). For a list of state courts adopting the "would have" test, see the amicus curiae brief filed in *Whren* by the California District Attorneys Association (CDAA). Brief of CDAA, as Amicus Curiae in Support of Respondent at 26-27, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

23. 623 A.2d 1277 (Me. 1993).

24. See *id.* at 1278-79.

25. See *id.* at 1280-81. The only authority cited by the court to support the "would have" test was a previous edition of LAFAYE, *supra* note 21.

26. See *State v. Izzo*, 623 A.2d at 1280.

27. See *id.* at 1281.

28. 645 A.2d 619 (Me. 1994).

to be a pretextual "fishing expedition" for OUI offenders.<sup>29</sup> The court rejected the officer's testimony that it was his standard practice to stop drivers at night for any traffic violation, no matter how minor, and held that a reasonable officer would not have made such a stop absent the invalid purpose of "fishing" for drunk drivers.<sup>30</sup>

### C. The "Could Have" Test

While a number of courts adopted the "would have" test, most courts considering the issue—including the majority of the United States Courts of Appeals—rejected it.<sup>31</sup> These courts simply refused to participate in the pretext hunt at all, and instead used what is known as the "could have" test.<sup>32</sup> Under this test, a stop is valid "so long as a reasonable police officer *could* have made the stop."<sup>33</sup> The only question under this inquiry is whether, based on the facts and circumstances known to the officer, there was probable cause or reasonable suspicion that a traffic violation has occurred.<sup>34</sup> Courts adopting the "could have" test generally reasoned that the "would have" test is not really objective and thus is both contrary to the Supreme Court's precedents and difficult (or impossible) to apply.<sup>35</sup> Certainly a court's job is substantially easier if the only relevant question at the suppression hearing is whether the defendant really was driving fifty-six miles per hour in a fifty-five zone, rather than whether a reasonable officer would have stopped him for doing so.

Among the courts using this approach was the D.C. Circuit. In *United States v. Mitchell*,<sup>36</sup> that court rejected a challenge to a pretextual stop for driving at an unspecified "high rate of speed" and turning without signaling that resulted in an arrest and conviction on federal drug charges.<sup>37</sup> That the officer—who was bravely

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29. *Id.* at 620-21.

30. *See id.* at 621-22.

31. *See, e.g.,* *United States v. Johnson*, 63 F.3d 242 (3d Cir. 1995) *cert. denied*, 116 S. Ct. 2528 (1996); *United States v. Scopo*, 19 F.3d 777 (2d Cir.), *cert. denied*, 115 S. Ct. 207 (1994); *United States v. Jeffus*, 22 F.3d 554 (4th Cir. 1994); *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 297 (1994); *United States v. Meyers*, 990 F.2d 1083 (8th Cir. 1993); *United States v. Trigg*, 925 F.2d 1064 (7th Cir.), *cert. denied*, 502 U.S. 962 (1991); *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987) (en banc). For the Tenth and D.C. Circuits, see *infra* notes 36-45 and accompanying text. The First Circuit never directly addressed the issue.

32. The "could have" test is also called the authorization test or the purely objective test.

33. *United States v. Johnson*, 63 F.3d at 246.

34. *See, e.g.,* *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993) ("The standard relies solely on the objective facts and circumstances surrounding the stop.").

35. *See, e.g.,* *United States v. Johnson*, 63 F.3d at 247 (stating that the "would have" test "requires a reviewing court to examine the motivations and hopes of a police officer").

36. 951 F.2d 1291 (D.C. Cir. 1991).

37. *See id.* at 1293-94.

patrolling Northeast D.C. on a motor scooter<sup>38</sup>—witnessed a traffic violation was enough to support a finding that “the objective circumstances clearly justified stopping the car.”<sup>39</sup> Without explicitly speaking of the “would have” or “could have” tests, the court endorsed the basic principle of the latter: that an “otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity.”<sup>40</sup>

Perhaps the most significant pre-*Whren* pretext decision was handed down in December 1995 when the Tenth Circuit reversed its earlier position and adopted the “could have” test. In *United States v. Botero-Ospina*,<sup>41</sup> a Utah sheriff’s deputy stopped the defendant and arrested him on drug charges, after seeing him straddling lanes on an interstate highway.<sup>42</sup> The court rejected the defendant’s claim of pretext, holding that the stop was justified both by probable cause—because Utah law prohibits lane-straddling—and by a reasonable articulable suspicion that the defendant was driving under the influence.<sup>43</sup> In doing so, the court overruled *United States v. Guzman*, the 1988 case in which it had originally adopted the “would have” test.<sup>44</sup> The court’s reasons for the reversal were that the “would have” test is unworkable (for which the court cited its own inconsistent application of the standard), that it is contrary to the Supreme Court’s insistence on an objective inquiry, and that it usurps the legislative task “of determining what the traffic laws ought to be, and how those laws ought to be enforced.”<sup>45</sup> This decision may have marked a trend,<sup>46</sup> but until *Whren* the Supreme Court had not spoken directly on the issue, and indeed had refused to do so on a number of occasions.<sup>47</sup>

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38. *See id.* at 1293.

39. *Id.* at 1295.

40. *Id.* (quoting *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991)).

41. 71 F.3d 783 (10th Cir. 1995) (en banc).

42. *See id.* at 785.

43. *See id.* at 788.

44. 864 F.2d 1512 (10th Cir. 1988).

45. *United States v. Botero-Ospina*, 71 F.3d at 787-88.

46. *See, e.g.*, *State v. Mease*, 842 S.W.2d 98 (Mo. 1992) (en banc) (holding arrest of murderer on nonsupport warrant valid despite pretextual motive), *rev'g* *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc) (holding arrest on outstanding parking violation warrant an invalid pretext where real motive was desire to investigate murder, and suppressing defendant’s confession).

47. *See, e.g.*, *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993), *cert. denied*, 115 S. Ct. 97 (1994); *United States v. Hassan El*, 5 F.3d 726 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1374 (1994); *United States v. Mans*, 999 F.2d 966 (6th Cir.), *cert. denied*, 510 U.S. 999 (1993); *United States v. Kelley*, 981 F.2d 1464 (5th Cir.), *cert. denied*, 508 U.S. 944 (1993); *United States v. Cummins*, 920 F.2d 498 (8th Cir. 1990), *cert. denied*, 502 U.S. 962 (1991); *United States v. Hope*, 906 F.2d 254 (7th Cir. 1990), *cert. denied*, 499 U.S. 983 (1991); *Limonja v. Commonwealth*, 383 S.E.2d 476 (Va. Ct.

III. *WHREN V. UNITED STATES*A. *Facts and Procedural History*

On June 10, 1993, Officers Efrain Soto, Jr., and Homer Littlejohn of the District of Columbia Metropolitan Police Department were patrolling for drug activity in Southeast D.C. in an unmarked car driven by Investigator Tony Howard.<sup>48</sup> The officers, who were in plain clothes, became suspicious as they passed a Nissan Pathfinder at a stop sign.<sup>49</sup> There were two young black men in the vehicle, which had temporary license plates.<sup>50</sup> The truck was stopped at the intersection for more than twenty seconds, and one of the officers saw the driver, James Lester Brown, looking down into the lap of the passenger, Michael A. Whren.<sup>51</sup> As Howard made a U-turn to follow the truck, it made a right turn without signaling and sped off at an "unreasonable speed."<sup>52</sup> Howard caught up with the truck at a red light, with cars in front, behind, and to the right of it. Howard pulled up on the car's left, into the lane of oncoming traffic, to box it in.<sup>53</sup> Officer Soto jumped out, followed by Officer Littlejohn, identified himself as a police officer, and ordered Brown to put the Pathfinder in park.<sup>54</sup> Whren, who had been holding two clear plastic bags containing crack cocaine, attempted to stuff one of these bags into a hidden compartment in the passenger-side door.<sup>55</sup> Soto opened the driver's side door, dove across Brown and, while Littlejohn restrained Brown, grabbed the other bag from Whren.<sup>56</sup> Whren and Brown were arrested.<sup>57</sup> A search of the Pathfinder made on the scene disclosed a small quantity of marijuana laced with PCP in addition to the two bags of crack cocaine.<sup>58</sup>

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App. 1989), *cert. denied*, 495 U.S. 905 (1990); *United States v. Hawkins*, 811 F.2d 210 (3d. Cir.), *cert. denied*, 484 U.S. 833 (1987). *See also* *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc), *cert. granted*, 474 U.S. 1049 (1986), and *cert. dismissed as improvidently granted*, 480 U.S. 698 (1987).

48. *See* *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995).

49. *See id.*

50. *See id.*

51. *See id.*

52. *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996). Note the interesting coincidence that the defendant in *Mitchell* was also stopped for driving at a "high rate of speed" and turning without signaling. *See supra* notes 36-40 and accompanying text. After the result in that case, the D.C. police may have realized the value of using these traffic infractions as a drug enforcement tool. *See United States v. Whren*, 53 F.3d at 375 ("*Mitchell* provides strikingly similar facts to this case.>").

53. *See United States v. Whren*, 53 F.3d at 372.

54. *See id.* at 372-73.

55. *See id.* at 373.

56. *See id.*

57. *See id.*

58. *See id.*

Whren and Brown were indicted on four counts by a federal grand jury.<sup>59</sup> They moved to suppress the evidence, arguing that the stop was pretextual and therefore unreasonable under the Fourth Amendment.<sup>60</sup> At the suppression hearing, Officer Soto testified that the stop was made because he wanted to ask Brown why he had stopped for so long at the stop sign, which Soto believed was a "failure to pay 'full time and attention'" to his driving in violation of the traffic code.<sup>61</sup> Soto also testified that Brown had committed the additional offenses of turning without signaling and driving at an unreasonable speed.<sup>62</sup> Soto denied that the defendants' race had anything to do with the decision to stop the Pathfinder.<sup>63</sup> The defense claimed that these violations were fabricated by Soto, pointing to several discrepancies in the testimony of Soto and Littlejohn.<sup>64</sup> The defendants argued that, even if the violations had occurred, the stop was pretextual because, as Soto testified, he was a drug investigator who seldom made traffic stops, and he had no intention of issuing a ticket to Brown.<sup>65</sup> The district court<sup>66</sup> denied the suppression motion, finding that "the facts of the stop were not controverted. There was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."<sup>67</sup> The defendants were convicted by a jury on all counts and sentenced to fourteen years in prison.<sup>68</sup>

A panel of the D.C. Circuit affirmed the convictions.<sup>69</sup> Relying on its *Mitchell* opinion, the court<sup>70</sup> found the stop was justified because Soto had probable cause to believe Brown had committed a traffic violation.<sup>71</sup> The court explicitly adopted the "could have" test and rejected the "would have" test in a way that it had not in *Mitchell*.<sup>72</sup> Two reasons were given for choosing the "could have" test: it avoids an inquiry into the officer's subjective state of mind,

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59. *See id.* at 372.

60. *See id.* at 373.

61. *Id.*

62. Petitioners' Brief at 5-6, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

63. *See United States v. Whren*, 53 F.3d at 373.

64. *See* Petitioners' Brief at 9.

65. *See id.* at 6.

66. Norma Holloway Johnson, District Judge. *See id.* at 3.

67. *United States v. Whren*, 53 F.3d at 373 (quoting unreported suppression decision below).

68. *See id.*

69. *See id.* at 376.

70. Sentelle, Circuit Judge, writing for a panel also including Circuit Judges Buckley and Williams. *See id.* at 372.

71. *See id.* at 376.

72. *See id.* at 375. "[R]egardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car . . ." *Id.*

and the requirement of probable cause or reasonable suspicion provides enough restraint to satisfy “appellants’ legitimate concerns regarding police conduct.”<sup>73</sup> The court also made clear that it did not matter that the officers making the stop were plainclothes vice-squad investigators rather than uniformed traffic patrolmen: “[W]hether a stop can be made depends on whether the officers had an objective legal basis for it, not on whether the police department assigned the officer in question the duty of making the stop.”<sup>74</sup> Motions for rehearing and rehearing en banc were denied,<sup>75</sup> and the Supreme Court granted certiorari.<sup>76</sup>

### B. Arguments of the Parties

Petitioners Whren and Brown made a number of arguments in support of their contention that the Court should adopt the “would have” test.<sup>77</sup> First, they argued that that test is consistent with the Court’s concern, expressed in numerous previous cases, with the

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73. *Id.* at 375-76.

74. *Id.* at 376.

75. *See id.* at 371.

76. *See Whren v. United States*, 116 S. Ct. 690 (1996). Speculation on why the Court finally granted certiorari in a pretext case after denying it so many times previously would be idle, but it might plausibly be argued that *Whren* was a perfect test case. *Whren* involved a stop by drug investigators who obviously had no concern with enforcing the traffic laws, in contrast to the stops by state troopers or highway patrolmen that seem to make up the majority of pretext cases. Despite lame argument to the contrary by the government, there was no credible reason to believe that the stop was not exactly what Whren and Brown alleged, a pretext to allow the officers to investigate a hunch that the defendants were drug dealers. In addition, despite the defendants’ attempt to elicit a contrary statement by Officer Soto in cross-examination at the suppression hearing, there was no evidence that the stop was racially motivated. Finally, although the defendants suggested that Soto had fabricated the traffic violations, *see* Petitioners’ Brief at 2-9, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841), they apparently made no attempt on appeal to challenge the district court’s finding of probable cause. *United States v. Whren*, 53 F.3d at 374, 376. These factors combined to present an ideal test case for pretextual stops.

77. *See* Petitioners’ Brief at 15-49. Their preferred version of the test states that stops are unreasonable “if they deviate so far from standard police practices that a reasonable officer in the same circumstances would not have made the intrusion on the basis asserted.” *Id.* at 31.

Amicus curiae briefs in support of the petitioners were filed by the National Association of Criminal Defense Lawyers (NACDL), Brief of Amicus Curiae NACDL in Support of Petitioners, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) and the American Civil Liberties Union (ACLU), Brief of Amicus Curiae ACLU in Support of Petitioners, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). The NACDL argued chiefly that the “would have” test is an objective “totality of circumstances” standard that is consistent with *Terry v. Ohio*, 392 U.S. 1 (1968). *See* NACDL Brief at 3-6. The ACLU argued that the proper standard is to invalidate a pretextual stop if it was made in violation of police regulations, or if a reasonable officer would not have made the stop, or if the officer’s subjective motivation was improper. *See* ACLU Brief at 15-20.

danger posed by arbitrary police actions.<sup>78</sup> The danger is especially acute, they claimed, where the breadth of traffic regulations has given police essentially unfettered discretion to stop motorists and where that discretion is often used to discriminate against racial minorities.<sup>79</sup> Second, they argued that the “would have” test is “purely objective” and thus is consistent with the Court’s insistence on an objective inquiry into Fourth Amendment reasonableness.<sup>80</sup> The “reasonable officer would have” standard, they claimed, is essentially the same as the test set forth in *Terry v. Ohio*: “would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate?”<sup>81</sup> Third, they argued that the stop of Whren and Brown clearly violated the “would have” test because it was made in violation of D.C. Metropolitan Police Department regulations prohibiting plainclothes officers in unmarked cars from enforcing traffic laws unless the violation is “so grave as to pose an immediate threat to the safety of others.”<sup>82</sup> To support this argument they cited Supreme Court cases holding conformity with regulations to be a necessary part of a reasonable search or seizure in some circumstances.<sup>83</sup> They also claimed that under the balancing test required by the Fourth Amendment, an individual’s interest in not being seized by plainclothes officers in unmarked cars outweighs the government’s interest in using such officers to enforce the traffic laws.<sup>84</sup>

The government responded by arguing, in similar terms to the Tenth Circuit in *Botero-Ospina*, that the “would have” test is unworkable, necessarily subjective in practice, and inconsistent with the Court’s precedents.<sup>85</sup> It argued that the proper remedy for the

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78. See Petitioners’ Brief at 16-18.

79. See *id.* at 18-26.

80. See *id.* at 30-32.

81. *Id.* at 36 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

82. *Id.* at 41 (quoting Metropolitan Police Department General Order 303.1(1)(A)(2)(a)(4) (1992)). See *infra* note 154 for the full text of this order.

83. See *id.* at 36. The cases cited included *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (drunk-driving roadblock must follow standard procedure); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (same); *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976) (inventory search must follow standard procedure).

84. See Petitioners’ Brief at 37-49, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

85. See Respondent’s Brief at 13-20, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). Amicus briefs in support of the respondent were filed by the Criminal Justice Legal Foundation (CJLF), Brief Amicus Curiae of CJLF in Support of Respondent, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841), the California District Attorneys’ Association (CDAA), Brief of CDAA, as Amicus Curiae in Support of Respondent, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841), and the State of California (on behalf of 13 other amici states), Brief of the State of California, et al., as Amici Curiae in Support of Respondent, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). Their arguments essentially

problem of pretextual stops, if there is a problem, is recourse to the legislative bodies whose traffic laws have given the police so much discretion, or resort to the Equal Protection Clause for racially motivated stops.<sup>86</sup> In fact, the government argued pretextual stops are often good, because considering other objectives in deciding how and when to enforce the traffic laws is an efficient use of law enforcement resources.<sup>87</sup> As for the regulations on which the petitioners placed so much reliance, the government argued that they are constitutionally irrelevant as long as the officer's conduct is justified by probable cause or reasonable suspicion.<sup>88</sup>

### C. *The Supreme Court's Decision*

In a unanimous opinion authored by Justice Scalia, the Supreme Court affirmed the judgment of the D.C. Circuit.<sup>89</sup> First, the Court made it clear that the precedents were entirely against the petitioners' view of pretextual conduct.<sup>90</sup> The petitioners cited three cases for the proposition that an improper investigatory motive can make otherwise valid police conduct unreasonable, but the Court pointed out that these cases all involved inventory or administrative searches made in the absence of probable cause, which are valid only if made for the purposes justifying the exceptions.<sup>91</sup> The petitioners also cited dicta in a case with similar facts, *Colorado v. Bannister*,<sup>92</sup> suggesting that the justification offered for the stop was acceptable because it was not a pretext.<sup>93</sup> This, the Court said, was perhaps a recognition that no pretext issue was raised, but it simply may have meant that the justification had not been fabricated.<sup>94</sup> More important, any weak support petitioners may have derived from these cases was more than canceled out by holdings directly contrary to

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mirrored those of the government. The one addition was an argument by the CJLF that even if pretextual stops are unreasonable under the Fourth Amendment, they should not be subject to the exclusionary rule because, being the rare acts of "rogue officers," they are not deterrable. See CJLF Brief at 19-20.

86. See Respondent's Brief at 28-29.

87. See *id.* at 23-25.

88. See *id.* at 22-24.

89. See *Whren v. United States*, 116 S. Ct. 1769, 1771, 1777 (1996).

90. See *id.* at 1773-74.

91. See *id.* at 1773. The three cases cited were *Florida v. Wells*, 495 U.S. 1 (1990) (stating inventory search must not be ruse to search for evidence); *Colorado v. Bertine*, 479 U.S. 367 (1987) (holding inventory search valid where police followed standard procedure and had no investigatory purpose); and *New York v. Burger*, 482 U.S. 691 (1987) (holding administrative search valid where not a pretext for criminal investigation).

92. 449 U.S. 1 (1980) (per curiam) (involving traffic stop for speeding made when officer may have been motivated by desire to investigate robbery).

93. See *id.* at 4 n.4.

94. See *Whren v. United States*, 116 S. Ct. at 1773. See *infra* note 131 and accompanying text, regarding such "fabrication pretexts."

their arguments.<sup>95</sup> These included *United States v. Villamonte-Marquez*,<sup>96</sup> in which a valid boarding of a sailboat to check documentation by Customs Service officers was not rendered invalid by the fact that they had received a marijuana-smuggling tip and were accompanied for that reason by a state trooper; *United States v. Robinson*,<sup>97</sup> in which a traffic arrest was held proper although it may have been a pretext for a search, and a search incident to arrest, a type of search the Court had previously justified only because of officer-safety concerns, was held proper even though the officer had no fear for his safety; and *Scott v. United States*.<sup>98</sup> The Court also dismissed the petitioners' concerns about racially motivated pretextual stops by noting that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."<sup>99</sup>

Second, the Court rejected the petitioners' argument that the "would have" test, especially if focused on police adherence to regulations and standard practices, is acceptable as an objective substitute for an improperly subjective pretext inquiry.<sup>100</sup> The "would have" test, the Court said, though framed objectively, "is plainly and indisputably driven by subjective considerations."<sup>101</sup> "Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind."<sup>102</sup> Such a test is incompatible with the precedents not just because of its evidentiary difficulties, but because the teaching of the cases—"which applies equally to attempts to reach subjective intent through ostensibly objective means—is simply that the Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."<sup>103</sup> In addition, the Court held that reliance on police practices is improper because such practices vary from place to place in a way that the Fourth Amendment cannot.<sup>104</sup> Any sugges-

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95. *See id.* at 1774.

96. 462 U.S. 579 (1983).

97. 414 U.S. 218 (1973). *See also* *Gustafson v. Florida*, 414 U.S. 260 (1973), the companion case to *Robinson*, which was decided the same day with the same holding on similar facts. But see *Amsterdam*, *supra* note 15, at 416, for an argument that the Court missed a great opportunity in failing to distinguish between the two cases: the officer in *Robinson* was required by departmental policy to make an arrest, rather than issue a summons, and to make a search incident to the arrest, while in *Gustafson* these choices were completely within the officer's discretion.

98. 436 U.S. 128 (1978). *See supra* notes 10-14 and accompanying text.

99. *Whren v. United States*, 116 S. Ct. at 1774.

100. *See id.* at 1774-76.

101. *Id.* at 1774.

102. *Id.*

103. *Id.* at 1775.

104. *See id.*

tion in *Abel v. United States*<sup>105</sup> that pretextual conduct in violation of standard procedures is unreasonable must be rejected, the Court said, as inconsistent with the later cases.<sup>106</sup>

Finally, the Court noted that while the balancing test urged by the petitioners is always theoretically present in any Fourth Amendment inquiry, in practice the balance has almost always been tilted conclusively in the government's favor by the presence of probable cause.<sup>107</sup> The exceptional cases where more than probable cause was required have involved extraordinary intrusions of a type decidedly not present in this case,<sup>108</sup> such as seizure by deadly force,<sup>109</sup> search by physical invasion of the body,<sup>110</sup> or warrantless or unannounced entry into a home.<sup>111</sup> That police are granted great discretion by the multiplicity of traffic laws does not change the balance which is normally met by probable cause; even if the Court could decide that the laws are so expansive that more than probable cause is required, "we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement."<sup>112</sup>

The Court therefore concluded, in affirming the convictions of Whren and Brown, that "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."<sup>113</sup>

#### IV. DISCUSSION

##### A. *Precedents*

The Supreme Court's decision in *Whren* was essentially correct both because it was dictated by the precedents and because of the inadequacies of the "would have" test. First, the Court's previous cases required a purely objective test under which the officer's ac-

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105. 362 U.S. 217 (1960).

106. See *Whren v. United States*, 116 S. Ct. at 1775. But see *infra* notes 130-32 and accompanying text, for Professor Butterfoss's view that *Abel* is actually consistent with later cases because it condemns "fabrication" rather than "legal" pretexts.

107. See *id.* at 1776.

108. See *id.* at 1776-77.

109. See *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that shooting fleeing burglary suspect is unreasonable despite probable cause to support arrest).

110. See *Winston v. Lee*, 470 U.S. 753 (1985) (finding involuntary surgery under general anesthesia to recover bullet unreasonable despite probable cause and full judicial hearing).

111. See *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995) (holding common-law "knock and announce" normally necessary before entering home despite probable cause and warrant); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (holding warrantless entry to arrest drunk driver unreasonable, despite probable cause, absent exigent circumstances).

112. *Whren v. United States*, 116 S. Ct. at 1777.

113. *Id.*

tual motive is irrelevant. These cases included *Scott, Robinson*, and *Villamonte-Marquez*, cited in the *Whren* opinion, and other cases as well. In *Maryland v. Macon*,<sup>114</sup> for example, the Court, quoting *Scott*, dismissed the suggestion that an officer's subjective intention to retrieve the money paid could transform a purchase of an obscene magazine into an unreasonable warrantless seizure.<sup>115</sup> In *Graham v. Connor*,<sup>116</sup> the Court held that whether an officer, the defendant in a section 1983 action,<sup>117</sup> intended to harm the plaintiff by use of excessive force was irrelevant to the question of whether his actions were reasonable.<sup>118</sup> "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [action]; nor will an officer's good intentions make an objectively unreasonable [action] constitutional."<sup>119</sup> Even the persistently liberal Justice Brennan, who dissented in many search and seizure cases during his long tenure on the Court, never argued that subjective intent is relevant to Fourth Amendment reasonableness; instead, he generally thought that the objective justification for particular types of searches and seizures should be more stringent than the Court required.<sup>120</sup>

The only exceptions to the broad rule of objectivity are the inventory and administrative search cases, on which the petitioners placed great emphasis.<sup>121</sup> As the Court pointed out, however, these cases

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114. 472 U.S. 463 (1985).

115. See *id.* at 470-71. "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' . . . and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)).

116. 490 U.S. 386 (1989).

117. 42 U.S.C. § 1983 (1994) (Ku Klux Klan Act) establishes civil liability for violation of constitutional rights by agents of state or local government.

118. See *Graham v. Connor*, 490 U.S. at 397.

119. *Id.*

120. See, e.g., *New York v. Burger*, 482 U.S. 691, 718 (1987) (Brennan, J., dissenting) (arguing that warrantless administrative searches should not be allowed when business not closely regulated); *Maryland v. Macon*, 472 U.S. 463, 473-75 (1985) (Brennan, J., dissenting) (arguing that warrantless seizure of evidence should not be allowed when First Amendment values are implicated); *United States v. Villamonte-Marquez*, 462 U.S. 579, 599 (1983) (Brennan, J., dissenting) (arguing that boarding of vessels in coastal waters should not be allowed without probable cause or reasonable suspicion); *United States v. Martinez-Fuerte*, 428 U.S. 543, 574 (1976) (Brennan, J., dissenting) (arguing that checkpoint stops for illegal aliens should not be allowed without particularized suspicion); *Abel v. United States*, 362 U.S. 217, 254-55 (1960) (Brennan, J., dissenting) (arguing that search incident to arrest should not be allowed when arrest is on administrative warrant not supported by probable cause; "It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the 'intent' of the invading officers.").

121. See Petitioners' Brief at 30, 36, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) (citing *Florida v. Wells*, 495 U.S. 1 (1990) (inventory search); *New York v. Burger*, 482 U.S. 691 (1987) (administrative search); *Colorado v. Ber-*

allowed for an exceptional inquiry into subjective intent only to assure that the exception to the general rule requiring probable cause applies only to searches for the purpose of inventory or administrative regulation.<sup>122</sup> The limited departure from objectivity is thus necessary to prevent the exception from swallowing the rule.

Despite its consistently objective approach, in a number of cases the Court seemed concerned about the problem presented by pretextual conduct, although it never invalidated a search or seizure on those grounds.<sup>123</sup> The most noteworthy, and most problematic, of these cases is *Abel v. United States*.<sup>124</sup> The FBI, suspecting Rudolf Abel of being a Soviet spy but lacking probable cause to arrest him for espionage, informed the INS that Abel was an illegal alien.<sup>125</sup> INS agents, accompanied by FBI agents, arrested Abel on a valid administrative deportation warrant, and the FBI agents searched his hotel room, finding evidence that led to his conviction for espionage.<sup>126</sup> In Justice Frankfurter's majority opinion, the Court held the arrest and search to be constitutional, but noted several times that this holding rested on the good faith of the agents.<sup>127</sup> If the use of the administrative warrant had been pretextual, the Court stated, this would have constituted "serious misconduct" which would have rendered the search and seizure invalid; but the record precluded a finding of pretext in this case.<sup>128</sup> This holding seems odd, to say the least, both because the facts seem to leave little doubt, as one of the dissenting opinions pointed out,<sup>129</sup> that the warrant *was* used as a pretext to search Abel's room, and because it seems so inconsistent with the later cases.

A convincing explanation, however, is offered by Professor Edwin Butterfoss.<sup>130</sup> He suggests that the "pretexts" which the Court condemned in *Abel* and elsewhere were not "legal" pretexts (such as pretextual stops as that term is used in this Note), but "fabrication" pretexts.<sup>131</sup> That is, the conduct the Court disapproved occurs not

time, 479 U.S. 367 (1987) (inventory search); and *South Dakota v. Opperman*, 428 U.S. 364 (1976) (first authorizing the inventory search exception)).

122. See *Whren v. United States*, 116 S. Ct. 1769, 1773 (1996).

123. For the Court's discussion of some of these cases, cited by the petitioners, see *supra* notes 91-95 and accompanying text.

124. 362 U.S. 217 (1960).

125. See *id.* at 221-22.

126. See *id.* at 223-25.

127. See *id.* at 226, 230.

128. See *id.*

129. See *id.* at 246-47 (Douglas, J., dissenting).

130. 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 (1990).

131. Butterfoss elaborates:

In a "legal" pretext [case], the government offers a justification that is not the true reason for the police activity, but that, if the motivation of the

when an officer makes an objectively justified seizure for a minor offense with the purpose of investigating a more serious charge, but rather when he fabricates the initial justification.<sup>132</sup> There is no question, of course, that "fabrication" pretexts violate the Fourth Amendment, because when they occur the initial stop or arrest is in fact unsupported by probable cause or reasonable suspicion; but the problem is essentially one of fact-finding, not of constitutional law.<sup>133</sup> Thus the "serious misconduct," in Justice Frankfurter's eyes, would have occurred if the agents had fabricated a suspicion that Abel was an illegal alien in order to get an administrative warrant which would justify a search, rather than if they had used an actual suspicion to get an objectively justified warrant which would be executed with the ulterior motive of making the search—because the latter is exactly what they did.

The "fabrication" pretext/"legal" pretext distinction also seems to explain other cryptic comments by the Court. Justice Scalia recognized this in *Whren* when he dismissed a footnote from *Colorado v. Bannister*<sup>134</sup> which indicated that the traffic stop involved was not a pretext: "[I]f by 'pretext' the Court meant that the officer really had not seen the car speeding, the statement would mean only that there was no reason to doubt probable cause for the traffic stop."<sup>135</sup> When the cases are viewed in the light of this distinction, the petitioners really did not have a leg to stand on in their argument that precedent supports their claim that pretextual stops are unconstitutional.<sup>136</sup>

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officer is not considered, legally justifies the activity. In a fabricated pretext [case], the government offers a justification that is not the true reason for the police activity and, in fact, is legally insufficient because it is not supported by the facts.

*Id.* at 5-6 (footnotes omitted).

132. *See id.* at 7.

133. For a recent example of a case involving an unconstitutional "fabrication" pretext and the difficult fact-finding involved in discovering such a pretext, see *United States v. Pearl*, 944 F. Supp. 51 (D. Me. 1996). A Kittery police officer arrested Pearl and a companion on federal drug charges after detaining them in a rest area on Interstate 95. The justification offered for the stop was that the officer had observed one of the men dumping a car ashtray on the ground, in violation of Maine's littering statute. *See id.* at 52. Before *Whren*, the stop might have been challenged as a "legal" pretext which would not pass the "would have" test; after *Whren*, the issue did not even arise. Instead, Judge Carter ordered the evidence suppressed because he found that the officer had not observed the littering, but had fabricated his story after later seeing the ashes on the ground, in order to provide a justification for the stop. *See id.* at 52-54.

134. 449 U.S. 1, 4 n.4 (1980) (per curiam) ("There was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants.").

135. *Whren v. United States*, 116 S. Ct. 1769, 1773 (1996).

136. In correctly sorting out the precedents relevant to the pretext question, the *Whren* Court has also resolved the long-running debate on that issue between Professors James Haddad and John Burkoff in favor of Haddad. *See* John M.

B. *Flaws of the "Would Have" Test*

The Court was correct in holding that the "would have" test is unacceptable. First, as the Court correctly pointed out, the test is "plainly and indisputably driven by subjective considerations."<sup>137</sup> The evil that the test is meant to ferret out is pretextual stops—the enforcement of traffic laws with ulterior motives of investigating other crimes. Thus no matter how objectively it is phrased, the "would have" test's "whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons."<sup>138</sup> The subjective nature of the "would have" test is clearly shown from its usual formulation: "whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose."<sup>139</sup> The last phrase proves the defect of the test, because the whole point of the Supreme Court's cases dictating an objective inquiry is that there is no such thing as an "invalid purpose." An action can be invalid, if it is not justified by the facts and circumstances known to the actor, but a purpose cannot because purpose is irrelevant to Fourth Amendment reasonableness. While the petitioners managed to avoid the tell-tale words in their proposed version of the "would

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Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363 (1989); John M. Burkoff, *Rejoinder: Truth, Justice, and the American Way—or Professor Haddad's "Hard Choices,"* 18 U. MICH. J.L. REFORM 695 (1985); John M. Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REFORM 523 (1984); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70 (1982); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639 (1985); James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198 (1977). Burkoff argued that the Supreme Court had approved a case-by-case subjective inquiry into pretextual motivation. Haddad argued that to the extent the Court was concerned with pretextual conduct, it took that concern into consideration in making "hard choices" of what objective criteria to require for a certain type of search or seizure. While Haddad seemed correct overall, he was unable to explain the occasional times, like *Abel*, when the Court seemed to look at pretext on a case-by-case basis. Butterfoss's "legal"/"fabrication" distinction, however, reconciles Haddad's view to these cases. See Butterfoss, *supra* note 130, at 14-15. The Butterfoss-Haddad synthesis has in turn been vindicated by *Whren*. See *Whren v. United States*, 116 S. Ct. at 1773-74.

137. *Whren v. United States*, 116 S. Ct. at 1774. Even some of the "would have" test's more perceptive advocates admit its subjective character, arguing that a subjective inquiry is necessary despite the contrary precedents. See Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1384 (1996) ("[T]he 'would have' test . . . despite Professor LaFave's claims to the contrary . . . actually incorporates the officer's subjective purpose into the analysis."). See also Brief of Amicus Curiae ACLU in Support of Petitioners at 17-20, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) (supporting subjective inquiry); *supra* note 136 (citing John M. Burkoff articles).

138. *Whren v. United States*, 116 S. Ct. at 1774.

139. *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988) (emphasis omitted) (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)).

have” test,<sup>140</sup> their argument is clearly that such “invalid purposes” make a pretextual stop invalid: “If an officer wants to ‘check out’ a motorist for some reason short of reasonable suspicion of wrongdoing, he has a tremendous incentive to find a way to evade the bar the Fourth Amendment would otherwise impose to stopping the car.”<sup>141</sup> This focus on what the officer “wants” is inconsistent with the petitioners’ claim that they were proposing an objective test.

Another claim advanced by the petitioners was that the “would have” test is objective and constitutionally acceptable because it is essentially the same as the test for reasonable suspicion adopted by the Court in *Terry v. Ohio*.<sup>142</sup> This purported similarity is apparently based on nothing more than the fact that the “would have” test speaks of a “reasonable officer,” while the *Terry* standard refers to a “reasonable man.”<sup>143</sup> The difference between the two tests, however, is fundamental. *Terry* asks whether the hypothetical reasonable man would agree that the facts and circumstances known to the actual officer added up to probable cause or reasonable articulable suspicion. The “would have” test goes much further and asks its hypothetical reasonable officer whether, assuming the existence of probable cause or reasonable suspicion, he would have done what the actual officer did. Since suppression motions are decided by the judge,<sup>144</sup> the practical difference is that *Terry* asks His Honor, “does this add up to probable cause or reasonable suspicion to you?” while the “would have” test asks him, “would you have stopped this car?” The former question is a variant of the traditional one which the Fourth Amendment explicitly contemplates will be considered by magistrates before issuing warrants; the latter asks the judge to play a strange game of “you be the cop.”

The nature of that game provides the next fundamental reason to reject the “would have” test: its unworkability. This is only hinted at briefly by the Court, in Justice Scalia’s characteristically sarcastic style: courts applying the “would have” test “would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.”<sup>145</sup> The lower courts provide evidence of just how unworkable that exercise

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140. See *supra* note 77.

141. Petitioners’ Brief at 22, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

142. 392 U.S. 1 (1968). For the petitioners’ argument on this point, see Petitioners’ Reply Brief at 11-15, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841); see also Petitioners’ Brief at 36.

143. See *supra* note 81 and accompanying text.

144. This is in contrast to “reasonably prudent person” questions common in tort law, to which the petitioners analogized the “reasonable officer” inquiry, but which are normally decided by the jury. See Petitioners’ Reply Brief at 13 (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 32, at 175-76, 185 (5th ed. 1984)).

145. *Whren v. United States*, 116 S. Ct. 1769, 1775 (1996).

is. The Tenth Circuit, in abandoning the “would have” test after seven years of use, admitted that it had been unable to apply the test in a consistent manner.<sup>146</sup> The California District Attorneys’ Association, in its amicus curiae brief in *Whren* in support of the government, devoted several pages to a study of the inconsistent way in which state and federal courts have applied the “would have” test.<sup>147</sup> The problem is that the “reasonable officer” is incapable of definition; thus many courts simply perform a subjective inquiry despite their adoption of the purportedly objective “would have” test. Among those that do examine standard police practices, there is no agreement as to whether the relevant practices are those of the individual officer, or his unit, or his department, or all the officers in the state.

The Maine Law Court has regrettably contributed to this inconsistency. In *State v. Izzo*,<sup>148</sup> it held that the officer’s actions were reasonable because they were consistent with his own practice of stopping drivers with broken taillights.<sup>149</sup> In *State v. Haskell*,<sup>150</sup> on the other hand, it held that the officer’s actions were unreasonable although they were consistent with his own practice of stopping drivers late at night for every traffic violation he witnessed; the court did not explain just what wider practices the officer had apparently violated.<sup>151</sup> It is fair to assume that if appellate courts have applied the “would have” test in this inconsistent way, trial courts (whose suppression decisions are usually unreported) have done no better. The petitioners’ only response to this was to argue that “[t]here is no reason to believe that, with proper guidance from this Court, lower courts cannot consistently and objectively apply” the “would have” test.<sup>152</sup> They made no attempt to say what this guidance should consist of, other than repeating the “would have” test with which the lower courts are already familiar, and they could point to no jurisdiction where the test has been applied consistently. Furthermore, they could not explain how police officers can be fairly expected to understand the test when appellate judges cannot.

The one way that the petitioners did attempt to distinguish their proposed test from the “would have” test as usually applied was to

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146. See *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995) (“Time has proven the *Guzman* [“would have”] standard unworkable. In our own circuit, its application has been inconsistent and sporadic.”).

147. See Brief of CDAA, as Amicus Curiae in Support of Respondent at 6-14, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

148. 623 A.2d 1277 (Me. 1993).

149. See *id.* at 1280-81.

150. 645 A.2d 619 (Me. 1994).

151. See *id.* at 620-22.

152. Petitioners’ Reply Brief at 18, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

place a greater emphasis on requiring police to follow regulations.<sup>153</sup> This argument was easy to make in this case because there was no credible question that the officers were violating departmental regulations by stopping the Pathfinder in plainclothes, in an unmarked car that was not equipped with a siren or emergency lights, for violations that posed no real threat to public safety.<sup>154</sup> There are at least two problems with this approach, however. First, as the Court pointed out, the protections of the Fourth Amendment cannot be as variable as the police regulations will inevitably be.<sup>155</sup> The implausibility of the petitioners' argument is clear when it is distilled to its essence: that a stop that violated the Fourth Amendment in Washington, D.C., would have been acceptable grounds for sending them each to a federal penitentiary for fourteen years if made in a city whose regulations permitted plainclothes officers to make traffic stops in unmarked cars. Second, if this argument were accepted by the Court, every police department in the nation could adopt the regulations of the latter city, and every claim of a pretextual stop could soon be met by a citation to the regulations justifying it. This would render the test useless and would erase any positive effect that prior regulations might have had in limiting police discretion.

Another weakness of the petitioners' argument that the Court barely touched on is the insistence on a balancing test. It is unclear how exactly this fits into the "would have" test—they did not explain whether the court is supposed to do the balancing as a part of determining what a reasonable officer would do, or as an additional element of the inquiry. The Court correctly held that a balancing test was inappropriate, because the only cases where probable cause did not tilt the balance all the way to one side involved extraordinary police practices, and extremely important individual interests, of a type not present here.<sup>156</sup> In addition, the issue in these cases was the manner of the search or seizure, rather than whether or not a search or seizure was justified. In any event, even if a balancing test were appropriate here, it would have weighed against the petitioners. The balance posed in this case is not, as the petitioners claimed, between the government's interest in promoting traffic safety by means of traffic stops by out-of-uniform officers in un-

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153. See Petitioners' Brief at 30-31, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

154. "Members who are not in uniform or are in unmarked vehicles may take [traffic] enforcement action only in the case of a violation that is so grave as to pose an immediate threat to the safety of others." Petitioners' Brief at Addendum 4a (quoting Metropolitan Police Department General Order 303.1(A)(2)(a)(4) (1992)).

155. See *Whren v. United States*, 116 S. Ct. 1769, 1775 (1996) (citing *Gustafson v. Florida*, 414 U.S. 260, 265 (1973); *United States v. Caceres*, 440 U.S. 741, 755-56 (1979)).

156. See *Whren v. United States*, 116 S. Ct. at 1776-77. For the relevant cases, see *supra* notes 109-111 and accompanying text.

marked cars and the individual's interest in being free from such stops.<sup>157</sup> Instead, the real balance is between the government's interest in using the traffic laws to catch drug dealers like Whren and Brown—as the petitioners themselves insisted, that and not traffic safety was the purpose of the stop here—and the individual's interest in being free to violate minor traffic laws, as the petitioners were doing, without being pulled over.

The “would have” test has some other fundamental flaws. First, no proponent of the test seems to be able to explain exactly *how* a pretextual stop violates the Fourth Amendment. If an officer makes a traffic stop without probable cause or reasonable suspicion, it is easy to say how he has violated the Fourth Amendment: he has made a seizure which is unreasonable because it lacks the required justification. But if he makes a stop with probable cause, for an infraction which is usually ignored, because he has a hunch that the driver may be a drug dealer, the nature of the constitutional violation is elusive at best. Professor LaFave, oft-quoted author of the leading Fourth Amendment treatise and a proponent of the “would have” test, offers this explanation: “It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.”<sup>158</sup> LaFave follows this quotation by citing a number of Supreme Court cases condemning arbitrary police conduct,<sup>159</sup> thus completing the unstated syllogism: pretextual stops are arbitrary police actions, arbitrary police actions violate the Fourth Amendment, therefore pretextual stops violate the Fourth Amendment. The problem with this is that LaFave and the Court have very different definitions of “arbitrary.” For LaFave, a search or seizure is arbitrary when it departs from the norm; for the Court, however, as shown by the very cases LaFave cites, a search or seizure is arbitrary when it is made without the limit on police discretion provided by the requirement of a warrant, probable cause, or reasonable suspicion. Viewed this way, the syllogism collapses, because pretextual stops, being by definition supported by probable cause or reasonable suspicion, are necessarily excluded from the Court's definition of arbitrary conduct. At least LaFave attempts a definition of “arbitrary,” albeit a novel one; most proponents of the “would have” test simply use the word

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157. See Petitioners' Brief at 30-49.

158. 1 LAFAVE, *supra* note 21, § 1.4(e), at 120-21.

159. See *id.* at 122-23 (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Delaware v. Prouse*, 440 U.S. 648 (1979)).

as a talisman, throwing it around whenever their arguments seem weak.<sup>160</sup>

Furthermore, it is hard to understand why pretextual stops are necessarily wrong, in the sense of being immoral or socially undesirable. To some degree, at least, it would seem that the contrary is true. If everyone violates the traffic laws, and full enforcement is impossible, it seems perfectly reasonable that traffic enforcement priorities should be influenced by more important objectives like catching drunk drivers or drug dealers. If an officer sees a driver committing a minor traffic violation and has a hunch that the driver is involved in a more serious crime, it seems a socially desirable and efficient use of limited law enforcement resources to stop the car. The driver is likely to be annoyed, of course, but he really has no right to complain that his Fourth Amendment rights have been violated by a police officer doing exactly what the people are paying him to do—enforcing the laws that they, through their representatives, have made.

### C. *Flaws and Omissions in Whren*

Despite the correctness of its holding, the *Whren* opinion does have a few weaknesses. The first of these is that, in all its discussions of how an objective justification makes a traffic stop reasonable, the only justification mentioned is probable cause.<sup>161</sup> Reasonable suspicion is not mentioned.<sup>162</sup> This was perhaps just sloppy writing,<sup>163</sup> because there can be no doubt under the whole line of vehicle stop cases that a stop is justified if the officer has a reasonable articulable suspicion short of probable cause.<sup>164</sup> Any suggestion that the Court meant to overturn all these cases *sub silentio* is absurd. Nevertheless the suggestion has already been made.<sup>165</sup>

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160. The petitioners, for example, used the word "arbitrary" twenty-three times in their brief and ten times in their reply brief without attempting a definition. See Petitioners' Brief *passim*; Petitioners' Reply Brief *passim*, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

161. The Court states its conclusion as, "there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure." *Whren v. United States*, 116 S. Ct. at 1777.

162. See *id.* *passim*.

163. The omission may have been suggested by James A. Feldman, Assistant to the Solicitor General, who argued the case for the United States. At oral argument he repeatedly spoke of probable cause without mentioning reasonable suspicion. See Transcript of Oral Argument at 29-51, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). In contrast, the government's brief argued that either probable cause or reasonable suspicion justifies a traffic stop. See Respondent's Brief at 13, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

164. See cases cited *supra* notes 5, 7-8.

165. See *United States v. Phillips*, No. 96-10006-01, 1996 WL 432377, at \*4 n.2 (D. Kan. July 12, 1996) (stating *Whren* may require probable cause for a traffic stop, but probably does not); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmak-*

One would hope that this mistake will not result in the erroneous suppression of evidence, but such a result would not be surprising. Much time and money will probably be wasted on pointless appeals before the muddied waters run clear again.

The second shortcoming is that the opinion barely acknowledges that pretextual stops present a problem, though not one which implicates the Fourth Amendment. Although pretextual stops may sometimes be an efficient use of law enforcement resources, they are still a problem—or, perhaps, part of a larger problem. When the traffic laws sweep so broadly that practically every driver can be stopped on any given day, and when the majority of citizens are subject to physical seizure by the police, more or less at the whim of every officer, something *is* wrong. This is especially true in those states where even minor traffic violations can result in a full custodial arrest, often at the discretion of the officer. It seems fundamentally inconsistent with our notions of constitutional liberty that the state should have so much power over the individual. The problem is especially acute because this power is often used to target racial minorities.<sup>166</sup> Further proof of the problem, if not the solution, comes from the many judicial opinions adopting the “would have” test or some other method of ferreting out pretextual police conduct. The judges of three federal courts of appeal and a number of state appellate courts cannot credibly be painted as a band of deluded radical civil libertarians; the problem that they saw is real. In short, when the police have this much authority, it can and will be abused.

The real problem is not that the great power of the police may be used pretextually, but that the police have so much power at all.<sup>167</sup> Because the Supreme Court hardly recognized the problem, however, it did almost nothing to suggest a solution once it rejected the incorrect answer of the “would have” test. The only suggestions the Court made were a plain statement, without elaboration or citation to authority, that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment,”<sup>168</sup> and a vague suggestion that the proper remedy for an overly broad traffic code lies with the

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ing, 62 BROOK. L. REV. 1, 290 n.1116 (1996) (*Whren* “implies” that probable cause is required for a traffic stop).

166. See Petitioners’ Brief at 22-28, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). See also, e.g., David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237; Randall S. Suskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994).

167. See Butterfoss, *supra* note 130, at 54 (“[T]he best solution to the problem of unbridled discretion to arrest citizens for minor offenses is a reexamination of that authority rather than a case-by-case pretext doctrine aimed at legal pretexts . . .”).

168. *Whren v. United States*, 116 S. Ct. at 1774.

political branches, not the courts.<sup>169</sup> This restraint is probably a good thing, and it is best that the Court confine itself to the precise issue before it. The failure to acknowledge the pretext problem is thus more of a rightful omission than a weakness, but the problem remains.<sup>170</sup>

#### D. Potential Solutions to the Problem of Pretextual Stops

A number of solutions are possible,<sup>171</sup> though each is either incomplete in scope or unlikely to succeed.<sup>172</sup> A partial answer suggested by the Court is that the Equal Protection Clause offers a remedy for discriminatory police conduct.<sup>173</sup> This is certainly correct in theory, but without exploring an issue beyond the scope of

169. *See id.* at 1777.

170. In stating that the pretext problem remains after the rejection of the "would have" test, this Note assumes that that test has no continued viability as a matter of state constitutional law. Shepardizing in mid-January 1997 reveals that no state court has yet rejected the holding of *Whren*, while many have followed it. It is possible in theory, of course, that a state supreme court could be so opposed to pretextual stops that it would find them to violate its state constitution's search and seizure provision. This is extremely unlikely, however, given the legal and logical shortcomings of the "would have" test, and the traditional deference of most state courts to the U.S. Supreme Court.

In Maine, for example, the Law Court has declared that in interpreting the state constitution "we write on a clean slate . . . [and] reject any straitjacket approach by which we would automatically adopt the federal construction of the fourth amendment ban of 'unreasonable searches and seizures' as the meaning of the nearly identical provision of the Maine Constitution." *State v. Bouchles*, 457 A.2d 798, 801-02 (Me. 1983). Yet the Law Court has never found the Maine Constitution to extend greater protection than the Fourth Amendment; to do so, the court would have to get over the initial hurdle that it has never adopted a state exclusionary rule. *Bouchles* itself, despite its bold language of state constitutional independence, is an example of the court reversing previous holdings in order to bring itself in line with developing U.S. Supreme Court search and seizure precedent. *See id.* at 800-02. Considering the weak reasoning of *Izzo* and *Haskell*, *see supra* notes 23-30, 148-51 and accompanying text, it seems a sure bet that this deference will be repeated when the Law Court revisits the pretextual stop issue.

171. *See Gama v. State*, 920 P.2d 1010, 1013 & n.3 (Nev. 1996) (recognizing that *Whren* correctly overrules previous Nevada cases adopting the "would have" test, and declining to re-adopt it under the state constitution, but insisting that pretextual stops are a problem which must be remedied by other constitutional provisions or the state legislature).

172. One interesting solution so unlikely to succeed that it is not discussed in the main text is offered by Professor Barbara Salken. *See 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 (1989). Professor Salken suggests that if the offense is insignificant enough, like a minor traffic violation, courts should consider a warrantless arrest unreasonable under the Fourth Amendment. Her basic argument, which makes sense in an abstract way, is that it is unreasonable to allow a seizure so far out of proportion to the seriousness of the offense. The chances of this idea catching on with the present Supreme Court, however, would seem to be on the low end of the scale between slim and none.

173. *See Whren v. United States*, 116 S. Ct. at 1774.

this Note, it has two obvious problems in practice. The first is procedural: The Supreme Court has never approved a remedy for an Equal Protection violation which has any direct impact on a criminal trial. In its last term, the Court set a high hurdle for defendants seeking discovery on the basis of allegedly racially discriminatory prosecution, without deciding what the result would be if a defendant could prove such discrimination.<sup>174</sup> The Court has never ordered the suppression of evidence obtained through racially motivated law enforcement. The only sure remedy for an Equal Protection violation, then, is a section 1983 action for damages or injunctive relief.<sup>175</sup> If Whren and Brown could prove that the Pathfinder was stopped because they were black, the best they could hope for under current law would be to have a damage award waiting for them when they finish their fourteen years in prison. The second problem is evidentiary: The difficulties of proving discrimination are likely to be insurmountable in the great majority of cases.<sup>176</sup>

The primary solutions to the pretext problem, however, must come not from asking courts to limit the expansive powers given to police but from recourse to the legislative bodies that granted those powers. In short, law enforcement officers have so much power to intrude upon the liberty of citizens only because legislatures have passed so many laws for them to enforce. To some degree this is inevitable—the widespread use of the automobile and other features of modern life make a large amount of regulation necessary—but certainly our solons could be more mindful of the effect of their enactments on personal liberty than they are at present.

Thus states should consider reforming their traffic codes so that violations which justify traffic stops become rarer. Speed limits should be made more realistic; vague offenses (such as the driving at “unreasonable speed” for which the petitioners were stopped) should be defined with greater specificity or eliminated; and the temptation to fill the state’s coffers by turning traffic policemen into tax collectors should be resisted. These suggestions would all serve to reduce the number of pretextual stops by reducing the frequency

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174. See *United States v. Armstrong*, 116 S. Ct. 1480, 1484 n.2 (1996) (“We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.”).

175. See *supra* note 117.

176. The standard for proving discriminatory policing would likely be the same as that for proving discriminatory prosecution: “The claimant must demonstrate that the . . . prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’ To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.” *United States v. Armstrong*, 116 S. Ct. at 1487 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)) (citations omitted). The difficulty of making such a showing in a traffic-stop case can easily be imagined.

with which officers have probable cause to stop motorists. In addition, traffic codes should be reformed in all states, as they have been in many,<sup>177</sup> to remove the discretion to make a full custodial arrest, with incident body search, and impoundment and inventory search of the car, for minor traffic infractions. This too would limit the temptation to make pretextual stops because the chances of discovering incriminating evidence would be much reduced; it would also make the intrusiveness of the seizure more commensurate with the magnitude of the violation. Finally, it should be recognized that the majority of pretextual stops are made in the hope of finding drugs. If by some bizarre chance a legislative body in this country were ever to engage in a rational debate over the necessity, purpose, and effect of the drug laws, the fact that those laws are the driving force behind the problem of pretextual stops should be considered.

#### V. CONCLUSION

*Whren v. United States* provided the Supreme Court's answer to the long-running debate over the problem of pretextual stops: that it is not a Fourth Amendment problem. As this Note has demonstrated, that answer was correct. The "would have" test for pretextual stops advocated by petitioners *Whren* and *Brown*, and adopted by a number of lower courts, was incompatible with the Supreme Court's consistent teaching that subjective intent is irrelevant to the question of whether a seizure is reasonable under the Fourth Amendment. In addition, the "would have" test had a number of other flaws, not the least of which was its proven unworkability. But this Note has also argued that pretextual stops remain a problem, albeit not a Fourth Amendment one. When police are granted the authority to stop—that is, seize—virtually every motorist, such authority can and will be abused. Legislatures should limit that authority, remembering that alongside their laudable goals of a society that is free of crime, drugs, and traffic accidents should be the more noble goal of a society that is free.

*Brian J. O'Donnell*

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177. Maine's new traffic code, for example, specifically provides that a traffic infraction is not a crime and that an officer stopping a motorist for a traffic violation may issue a summons but may not make an arrest. ME. REV. STAT. ANN. tit. 29-A, §§ 103, 105 (West 1996).