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## Race and the Fourth Amendment

Tracey Maclin

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# Race and the Fourth Amendment

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Tracey Maclin

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*In Whren v. United States, the Supreme Court held that pretextual traffic stops do not raise Fourth Amendment concerns. In this Article, Professor Maclin contends that by requiring only probable cause of a traffic offense to justify pretextual seizures, the Court mistakenly ignores racial impact when marking the protective boundaries of the Fourth Amendment. Professor Maclin argues that race matters when measuring the dynamics and legitimacy of certain police-citizen encounters. Pretextual traffic stops unreasonably use racial targeting, therefore, the Court should make racial impact a factor in determining the constitutionality of the pretextual seizure.*

*Professor Maclin begins by examining objective, empirical evidence that police officers seize minority motorists for arbitrary traffic stops. Although Whren concluded that a police officer's subjective intentions are irrelevant, this evidence of racial targeting is more objective and reliable than other evidence the Court has sanctioned in Fourth Amendment analysis. The Article then turns to the Court's Fourth Amendment precedent, concluding that prior cases recognize the relevance of race, and that disparate racial impact is a proper consideration for Fourth Amendment analysis. Finally, the Article criticizes Whren because it fails to consider the real world of law enforcement and to reconcile that reality with a meaningful right to be free from unreasonable seizures. The Court ignores the fact that police discretion, police perjury, and the mutual distrust between black motorists and the police are issues intertwined with traffic enforcement. As a result, Whren assures that minority motorists will continue to feel like second-class citizens on the nation's roads.*



# Race and the Fourth Amendment

Tracey Maclin\*

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## I. INTRODUCTION

In America, police targeting of black people for excessive and disproportionate search and seizure is a practice older than the Republic itself.<sup>1</sup> Thus, it was not startling to learn that a special

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\* Professor of Law, Boston University. I thank Amanda Metts and Lisa Dickstein for their research and editing assistance. I also want to thank members of the Boston University School of Law faculty workshop and Karen Tosh for their suggestions and comments.

1. A recent dispatch from the *Pittsburgh Post-Gazette* is illustrative of the low-visibility, high-tension police confrontations that often occur in black neighborhoods and with black men:

It was 72 degrees and sunny in Homestead, a town just south of Pittsburgh, whose better days saw steel mills ablaze, and streets busy with people on their way to well-paying jobs. . . .

At 3:10 in the afternoon, the police and the young black men standing on Amity are playing the usual cat-and-mouse game. Two officers in a cruiser drive slowly past the men and stare, silently sending the word: don't hang too long. The men shrug the police off, walking casually away, but only until the car is out of sight. Then they regroup.

The game continues for the rest of the day and into the night. Police drive quietly by three more times. On the fourth pass, they order the men to move on or "someone's going to jail."

Finally, two of the men give it up and leave for home. On the way, police stop and search them. An officer notices a marijuana cigarette on the sidewalk and asks where it came from. The men say they don't know. The police let them go.

squad of the North Carolina Highway Patrol that uses traffic stops to interdict illegal narcotics charged black male drivers with traffic offenses at nearly twice the rate of other troopers patrolling the same roads.<sup>2</sup> The commander of the drug team issued more than sixty percent of his traffic citations to black men. When confronted with this evidence, he could not explain why he disproportionately stopped black men: "I can't say I'm surprised, and I can't say I'm not surprised. It doesn't bother me either way, to be honest with you."<sup>3</sup>

The commander's conduct comes from an ancient pedigree. In 1693, court officials in Philadelphia responded to complaints about the congregating and traveling of blacks without their masters by authorizing the constables and citizens of the city to "take up" any black person seen "gadding abroad" without a pass from his or her master.<sup>4</sup> Of course, the order to stop and detain any Negro found on the street did not distinguish between free and enslaved blacks.<sup>5</sup>

Three years later, colonial South Carolina initiated a series of measures that subjected blacks to frequent and arbitrary searches and seizures. One such measure required state slave patrols to search the homes of slaves for concealed weapons on a weekly basis.<sup>6</sup>

A half-hour later, officers stop three more of the original group on Amity Street and pat them down.

No arrest is made. But the message has been sent.

Ann Belser, *Suspect Black Men Are Subject To Closer Scrutiny From Patrolling Police, And The Result Is Often More Fear, Antagonism Between Them*, PITTSBURGH POST-GAZETTE, May 5, 1996, at A15. The searches described above are plainly unconstitutional. See *Sibron v. New York*, 392 U.S. 40, 64 (1968) ("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries."). Unless the men engaged in furtive gestures indicating possession of a weapon or were members of a gang known to carry weapons, points which the officers surely would have noted, there is no legal basis for the searches. Stories like this involving black men and the police are not hard to find, but seldom does one read of similar stories involving the police and white men.

2. See Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, NEWS & OBSERVER (Raleigh, North Carolina), July 28, 1996, at A1. The fact that black drivers received twice as many traffic citations as white drivers might not be objectionable if black drivers, as a group, were worse drivers than white drivers. There is, however, no empirical evidence to support this proposition. See *infra* note 108.

3. *Id.*

4. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 276 (1978).

5. See *id.* Judge Higginbotham explained:

Since the presentment required that all Negroes carry passes from their master, it is probable that its authors did not consider the distinction between free and enslaved blacks important. Technically, any person in Philadelphia could 'take up' any Negro who was simply 'gadding abroad' without a ticket from his master. The black was to be imprisoned overnight without food and given thirty-nine lashes, more physical punishment than white servants generally received for a major theft.

*Id.* (footnote omitted).

6. See William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 602-1791, at 440 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author).

These searches became biweekly in 1712 and extended to contraband as well as weapons. In 1722, South Carolina authorized its slave patrols to forcibly enter any home where the concealed weapons of blacks might be found,<sup>7</sup> and to detain suspicious blacks they encountered. By 1737, slave patrols had power to search taverns and homes suspected of serving blacks or housing stolen goods.<sup>8</sup> Three years later, South Carolina authorized its justices of the peace to conduct warrantless searches for weapons and stolen goods and to seize any slave suspected of any crime "whatsoever."<sup>9</sup>

To inhibit seditious meetings, Virginia, in 1726, permitted its slave patrols to arrest slaves on bare suspicion.<sup>10</sup> By 1738, Virginia's patrols conducted mandatory searches of the homes of all blacks. The patrols also possessed power to arrest blacks whose presence excited suspicion and to detain any slave found off his master's property without a pass.<sup>11</sup> In Virginia, as in its sister colonies, judges did not supervise the activities of state slave patrols. Throughout the southern colonies, "no neutral and detached magistrate intervened between a patrolman's suspicions and his power to arrest or search, for that power was *ex officio*."<sup>12</sup>

By the mid-1700s, oppressive British search and seizure practices that affected white colonists became a potent political issue throughout the colonies.<sup>13</sup> But resistance to high-handed British intrusions did not inspire colonial officials to check the search and seizure powers of southern slave patrols. In the mid-1760s, Virginia, South Carolina, and Georgia reaffirmed their laws on slave patrols enacted earlier in the century.<sup>14</sup> A black resident of Savannah recalled that in 1767, the slave patrol of that city would "enter the house of any black person who kept his lights on after 9 P.M. and fine, flog, and extort food from him."<sup>15</sup>

While many white colonists experienced arbitrary and suspicionless intrusions of their homes and businesses, these practices

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7. See *id.* at 441-442.

8. See *id.* at 442.

9. See *id.* at 444.

10. See *id.* at 437.

11. See *id.*

12. *Id.* at 449 (emphasis added).

13. See generally NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937); M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* (1978); Cuddihy, *supra* note 6; O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *THE ERA OF THE AMERICAN REVOLUTION* 40 (Richard B. Morris ed., 1939).

14. See Cuddihy, *supra* note 6, at 1150.

15. *Id.* at 1152 (footnote omitted).

paled in comparison to the indignities and invasions suffered by blacks at the hands of colonial officials.<sup>16</sup> White colonists rightfully protested that certain British search and seizure practices conferred "a power that places the liberty of every man in the hands of every petty officer,"<sup>17</sup> but at the same time, colonial officials denied blacks the privacy and personal security that white colonists claimed as a birthright. Blacks, both slave and free, were targeted for searches and seizures solely because of their race—a phenomenon never experienced by white colonists.

Today, police departments across the nation, like the special narcotics unit of the North Carolina Highway Patrol, continue to target blacks in a manner reminiscent of the slave patrols of colonial America. Using minor, generally under-enforced, traffic violations as a pretext, officers target and stop black and Hispanic<sup>18</sup> motorists because they hope to discover illegal narcotics or other criminal evidence.<sup>19</sup> Despite criticism of this practice,<sup>20</sup> a unanimous Supreme Court recently stated that pretextual stops of black motorists do not implicate the Fourth Amendment's guarantee against unreasonable searches and seizures. In *Whren v. United States*, the Court acknowledged that race-based enforcement of traffic laws violates the Constitution,<sup>21</sup> but it explained that "the constitutional basis for objecting to intentionally discriminatory application of laws is the

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16. See *id.* at 433 ("The subjugation of servants and slaves in the colonial South included the most intensely general searches in pre-Revolutionary America.").

17. SMITH, *supra* note 13, at 342 (quoting James Otis, Jr.'s argument to the Massachusetts Superior Court in the 1761 Writ of Assistance case).

18. In some places, Hispanic motorists have been the targets of unusual police attention. See Jennifer McKim, *Arrests of Hispanic Drivers Challenged*, BOSTON GLOBE, May 29, 1995, at Metro/Region 15; Louise Taylor, *A Fine Line. The Issue: How Police Target Drug Suspects*, THE SUN HERALD (Biloxi), Dec. 3, 1989, at A1. This Article, however, will focus on the interaction between police and black motorists.

19. The practice has prompted one Congressman to introduce a bill that would require the collection of data about all routine traffic stops by police officers. See 143 CONG. REC. E10-01 (daily ed. Jan. 7, 1997) (Statement of Representative John Conyers, Jr., of Michigan on the introduction of Traffic Stops Statistics Act of 1997) ("African-Americans across the country are familiar with the offense of DWB, driving while black. There are virtually no African-American males—including Congressmen, actors, athletes, and office workers—who have not been stopped at one time or another for an alleged traffic violation, namely driving while black."). Professor David Harris has written an excellent essay cataloguing the practice. See generally David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); see also Tracey Maclin, *Can a Traffic Offense Be D.W.B. (Driving While Black)?*, L.A. TIMES, Mar. 9, 1997, at M2.

20. See, e.g., Harris, *supra* note 19, at 546 n.10, 561 n.89; Andrea Ford, *United by Anger*, L.A. TIMES, Nov. 6, 1996, at B1.

21. 116 S. Ct. 1769 (1996).

Equal Protection Clause, not the Fourth Amendment.”<sup>22</sup> According to the Court, the subjective intentions of the police, including police

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22. *Id.* at 1774. Thus, *Whren* does hold out the possibility that a black defendant could raise a Fourteenth Amendment equal protection challenge to a race-based pretextual stop.

Before a black motorist can obtain access to or challenge an officer's past practices regarding traffic stops under an equal protection challenge, the defense may have to overcome a heavy evidentiary burden. In *United States v. Armstrong*, 116 S. Ct. 1480 (1996), decided three weeks before *Whren*, the Court held that the essential elements of a selective prosecution claim must be shown before the prosecution is required to provide access to its files for discovery purposes. Thus, the defense must show both a discriminatory effect and purpose by governmental actors. *See id.* at 1487. Under *Armstrong*, “[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.” *Id.* The Court reserved the question of whether a criminal defendant must satisfy the similarly situated requirement in a case where the prosecutor admits a discriminatory purpose. *See id.* at 1488 n.3.

Of course, a black motorist might argue that the reasoning of *Armstrong* follows from the Court's reluctance to examine executive branch decisions on whom to prosecute, *see id.* at 1486, and is thus inapplicable where the enforcement policies of the police are challenged, because police are not entitled to the same degree of deference accorded prosecutors. But lower court decisions subsequent to *Armstrong* and *Whren* have not read *Armstrong* narrowly, and have applied its strict evidentiary burden to claims of selective enforcement by the police. *See United States v. Bullock*, 94 F.3d 896, 899 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 966 (1997) (applying *Armstrong* to affirm district court's ruling refusing defendant's attempt to present evidence and to cross-examine the arresting officer about his past practice of using traffic stops of young black males as a pretext for drug searches because the defendant “failed to lay any foundation for an equal protection challenge based on racially selective enforcement procedures”); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 372 (1996) (holding that a black defendant raising discriminatory enforcement claim against the police must show “people of another race violated the law and the law was not enforced against them” and while Bell showed that only blacks were arrested for violating bicycle headlamp law during a certain month, he “failed to show white bicyclists also violated the statute and police chose not to arrest them”). More importantly, *Armstrong* itself noted that the “requirements for a selective prosecution claim draw on ‘ordinary equal protection standards,’” *Armstrong*, 116 S. Ct. at 1487 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)), which presumably would also apply to an equal protection claim brought by a black motorist. *See Janet Koven Levit, Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 181 (1996) (“The Equal Protection claim [in a pretextual traffic case] would be a selective enforcement claim.”).

Even if a defendant is able to overcome the obstacles to discovery erected by *Armstrong*, to prevail on the merits of an equal protection claim, he will have to show that he was singled out because of his race or ethnicity, and that similarly situated white motorists were not stopped. In the typical case, this means that a black defendant must show a specific intent or purpose by either the officer or his department to target blacks for traffic stops. *See Armstrong*, 116 S. Ct. at 1487 (stating that a selective prosecution claimant must demonstrate that the prosecution policy “had a discriminatory effect and that it was motivated by a discriminatory purpose”) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)); *Washington v. Davis*, 426 U.S. 229 (1976) (finding that disparate racial impact standing alone does not constitute equal protection violation and the challenger must show a discriminatory intent or purpose). Unless an officer were to testify that the motorist was stopped because he was black or Hispanic, the specific intent standard will doom the typical pretextual traffic stop case involving a black motorist. In the atypical case involving a defense able to conduct a systematic study of the enforcement practices of a particular police department, there is a better chance of success if statistics suggest that officers are targeting black motorists. But even where statistics show a strong correlation between race and a particular outcome, the Court has still required the individual criminal defendant to prove that the government officials in his case were motivated by a



motives based on racial stereotypes or bias, are irrelevant to ordinary Fourth Amendment analysis.<sup>23</sup>

The Court's conclusion that the Fourth Amendment has nothing to say about pretextual stops of black motorists is not surprising. The reasonableness analysis of recent Fourth Amendment cases emphasizes objective standards.<sup>24</sup> The Court disfavors criteria and standards that require judges to ascertain the motivations and expectations of police officers and citizens enmeshed in confrontations that rarely have neutral observers. Moreover, the *Whren* Court's unwillingness to consider the impact that pretextual traffic stops have on black and Hispanic motorists is consistent with the modern Court's trend of ignoring evidence of racial impact as a factor in the reasonableness analysis mandated by the Fourth Amendment.<sup>25</sup>

For example, in two earlier decisions, the Court refused to consider or discuss evidence of racial impact. In *Florida v. Bostick*,<sup>26</sup> narcotic officers boarded an interstate bus, randomly and without suspicion, approached seated passengers, requested to see their identification and tickets, and asked for permission to search their luggage.<sup>27</sup> Despite being informed that drug interdiction raids on inter-

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discriminatory intent. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[T]o prevail under the Equal Protection Clause, *McCleskey* must prove that the decisionmaker in *his* case acted with discriminatory purpose.").

Finally, even if a black defendant challenging a pretextual traffic stop is able to obtain discovery and prevail on the merits of an equal protection claim, there is the question of remedy. The Court has shown no sign that it interprets the Equal Protection Clause to embody an exclusionary rule remedy, or that the Clause even requires the dismissal of criminal charges in a case involving a race-based prosecution. See *Armstrong*, 116 S. Ct. at 1484 n.2 (noting that the Court has "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"); cf. *Levit*, *supra*, at 181 ("A selective enforcement claim is not an attack on the merits of a criminal charge. It is an affirmative defense or serves as the basis for a collateral attack under 42 U.S.C. § 1983.")

For these reasons, successful equal protection challenges to pretextual traffic stops by minority motorists will be rare. Thus, the *Whren* Court's apparent accord with the constitutional challenge in that case, 116 S. Ct. at 1774 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race."), seems hollow.

23. See *Whren*, 116 S. Ct. at 1774 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

24. See, e.g., *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

25. Cf. *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1498 (1988) [hereinafter *Race and the Criminal Process*] (stating that the Court's current interpretation of the Fourth Amendment "ignores the distinctive class of harms that racially discriminatory police behavior inflicts. The resulting [F]ourth [A]mendment case law, not surprisingly, is remarkably silent on the racial dimension of encounters between citizen and police").

26. 501 U.S. 429 (1991).

27. See *id.* at 431.

state buses have a disparate impact on minority citizens,<sup>28</sup> the Court, without commenting on the racial impact of this confrontation, held that a bus raid did not automatically trigger Fourth Amendment protection because this tactic was not a *per se* seizure under the amendment.<sup>29</sup>

Likewise, in *Tennessee v. Garner*,<sup>30</sup> the Court ignored evidence of racial impact. *Garner* concerned the validity of police using deadly force to prevent the escape of an unarmed, fleeing felon.<sup>31</sup> As in *Bostick*, the *Garner* Court had evidence before it indicating that unrestricted deadly force had a disproportionate impact on blacks.<sup>32</sup> But neither the majority nor dissenting opinions discussed the fact that unregulated deadly force policies result in the police shooting, or shooting at, a disproportionate number of blacks.<sup>33</sup> The majority opinion did not even acknowledge that Edward Garner, who was shot in

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28. See Brief for the American Civil Liberties Union et al. as Amicus Curiae at 8 n.19, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717) (noting that "[i]nsofar as the facts of the reported bus interdiction cases indicate, the defendants all appear to be [black or Hispanic]"). Even Americans for Effective Law Enforcement, an organization that prior to *Bostick* had filed 86 amicus briefs in the Court supporting law enforcement interests, argued that drug interdiction raids on buses violated the Fourth Amendment and alluded to the discriminatory impact that these confrontations had on minority citizens. See Brief for the Americans for Effective Law Enforcement, Inc. as Amicus Curiae at 8, *Bostick* (No. 89-1717) (noting that the Court has not extended the rationale of prior cases authorizing suspicionless seizures to the setting of passengers sitting on a bus and "moreover, any such extension would be constitutionally invalid. Setting aside equal protection issues, it is difficult to imagine a scenario of police activities, as in the present case, upon a planeload of business class air passengers arriving at a busy air terminal after an interstate flight.").

29. While the majority in *Bostick* ignored the racial impact of bus raids, the relevance of race in police bus sweeps did not escape the scrutiny of Justice Marshall. In his dissent, Justice Marshall noted that race was a factor influencing some officers' decisions about which passengers to approach during a bus raid. *Bostick*, 501 U.S. at 441 n.1 (Marshall, J., dissenting) ("Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be inarticulable than unspeakable.").

30. 471 U.S. 1 (1985).

31. See *id.* at 3.

32. See Appellee's Brief at 23-26, *Tennessee v. Garner*, 471 U.S. 1 (1985) (Nos. 83-1035, 83-1070) (noting statistical data that reveal "significant disparities in the use of deadly force based on the race of the shooting victim/suspect and that virtually all of this disparity occurs as the result of the Memphis policy that allows officers to exercise their discretion to shoot fleeing property crime suspects").

33. In Memphis, the data indicated that "black property crime suspects were more than twice as likely to be shot at than whites . . . four times more likely to be wounded, and 40% more likely to be killed." Appellee's Brief at 24, *Garner* (Nos. 83-1035, 83-1070); see also James J. Fyfe, *Blind Justice: Police Shootings In Memphis*, 73 J. CRIM. L. & CRIMINOLOGY 707, 721 (1982) ("The data strongly support the assertion that police [in Memphis] did differentiate racially with their trigger fingers, by shooting blacks in circumstances less threatening than those in which they shot whites."). See generally POLICE FOUNDATION, READINGS ON POLICE USE OF DEADLY FORCE 128-213 (James J. Fyfe ed., 1982).

the back of the head by a Memphis officer as he fled the scene of a burglary, was a skinny, unarmed black teenager.

Considering the Court's prior rulings, the decision in *Whren* to ignore racial impact when marking the protective boundaries of the Fourth Amendment was predictable. But predictability is not equivalent to correctness. In *Whren*, the Court repeats its earlier mistakes in *Garner* and *Bostick* by neglecting racial concerns when constructing Fourth Amendment rules that govern police-citizen interactions.

Although the casual reader of the Court's Fourth Amendment opinions would never know it, race matters<sup>34</sup> when measuring the dynamics and legitimacy of certain police-citizen encounters.<sup>35</sup> Indeed, in light of past and present tensions between the police and minority groups, it is startling that the Court would ignore racial concerns when formulating constitutional rules that control police discretion to search and seize persons on the street. The Court currently focuses solely on whether probable cause of a traffic offense exists when judging the legality of pretextual seizures. Curiously, this analysis, taken from the Fourth Amendment's mandate of "reasonable" searches and seizures, fails to consider a factor that often stands at the core of pretextual traffic stops and makes those encounters particularly unreasonable—race. In this Article, I argue that the Court should make racial concerns a part of its Fourth Amendment analysis. In particular, where evidence indicates racial

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34. The phrase "race matters" is borrowed from Cornel West's enlightening and provocative book, *Race Matters*. See CORNEL WEST, *RACE MATTERS* (1993).

35. For a sample of some of the legal scholarship on this point, see Harris, *supra* note 19, at 544 (1997); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994) [hereinafter Harris, *Reasonable Suspicion*]; Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L. REV. 214 (1983); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER J. (forthcoming 1998); William R. O'Shields, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion: Florida v. Bostick and the Merits of Adopting a Per Se Rule Against Random, Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875 (1992); Adina Schwartz, "Just Take Away Their Guns": The Hidden Racism of *Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996); Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person"*, 36 HOW. L.J. 239 (1993); Randall S. Susskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994).

Professor Randall Kennedy has written a powerful book on race and the criminal law. See RANDALL KENNEDY, *RACE, CRIME AND LAW* (1997). A chapter in his book is devoted to whether it is proper to use race as a proxy for criminal suspicion. Professor Kennedy strongly opposes governmental use of race in this context. See *id.* at 162.

targeting by the police, the state should be required to provide a race-neutral explanation for the seizure other than probable cause of a traffic violation.<sup>36</sup>

Part II of this Article offers objective evidence that police officers seize black and Hispanic motorists for arbitrary traffic stops. Much of this evidence consists of empirical data indicating that black motorists are stopped for traffic offenses at a rate highly disproportionate to the percentage of black motorists eligible for lawful traffic detentions. *Whren* concluded that the subjective intentions of the police are irrelevant in Fourth Amendment cases, but the evidence of racial targeting discussed here does not measure the subjective motivations of officers. Rather, this evidence describes the racial population of motorists actually stopped by officers. Ironically, this evidence is more objective and reliable than other evidence the Court has sanctioned in determining the reasonableness of investigative detentions.

Part III argues that the Rehnquist Court's disjunction of race and the Fourth Amendment is wrong as a matter of precedent. Prior cases recognize the relevance of race. Indeed, these cases acknowledge two things: (1) disparate racial impact of police search and seizure methods is a proper consideration for Fourth Amendment analysis; and (2) where government officials submit that racial factors promote law enforcement interests, the court has allowed the police to

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36. Pretextual seizures are emphasized for two reasons. First, pretextual seizures are quintessential Fourth Amendment claims. When an officer uses a traffic violation as a pretext to stop a motorist for other investigatory purposes, the motorist's right to enjoy the freedom of movement protected by the amendment is impaired. Second, empirical evidence, case law, and anecdotal evidence shows that race matters in the effectuation of many pretextual seizures.

Although space constraints prevent discussion of the matter here, race may also be a factor in excessive force cases—another type of Fourth Amendment seizure—but the Court's constitutional analysis in this context omits discussion of race. See *Graham v. Connor*, 490 U.S. 386, 397 (1989) (holding that the reasonableness inquiry in an excessive force claim is an objective test: Were the officer's actions reasonable in light of the facts, without regard to their underlying intent or motivation?). For a recent discussion on race and excessive force by the police, see William A. Geller & Hans Toch, *Understanding and Controlling Police Abuse of Force*, in *POLICE VIOLENCE* 292, 305-09 (William A. Geller & Hans Toch eds., 1996); Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *POLICE VIOLENCE* 129-49 (William A. Geller & Hans Toch eds., 1996). For more focused discussion of the issue of race and police brutality, see AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 1 (1996) ("[T]he evidence suggests that the large majority of the victims of police abuses are racial minorities, particularly African-Americans and people of Latin American or Asian descent. Racial disparities appear to be especially marked in cases involving deaths in custody or questionable shootings."); Steven Stycos, *The Force of Law*, THE PROVIDENCE PHOENIX, May 27, 1994, at 4 (detailing police brutality against minority persons in Providence, Rhode Island).

utilize racial and ethnic factors when deciding who will be seized and searched in certain investigatory contexts.

Part IV contends that when police target a black or Hispanic motorist for a pretextual traffic stop, this stop violates the Fourth Amendment. Currently, the Amendment protects a black motorist only when there is no probable cause that he has committed a traffic offense; if probable cause exists, police are free to conduct a traffic stop at their whim. The procedural right established under this regime does not stop arbitrary seizures because it fails to consider that police discretion, police perjury, and the mutual distrust between blacks and the police are issues intertwined with the enforcement of traffic stops.

## II. PRETEXTUAL SEIZURES

In *Whren*, the two black defendants argued that plain clothes vice-squad officers of the District of Columbia Metropolitan Police Department conducted a pretextual stop of their car in violation of the Fourth Amendment. That is, the officers used the existence of a traffic violation as an excuse to stop the defendants' car when the officers lacked evidence of other criminal conduct.<sup>37</sup> The officers did not intend to enforce the District's traffic code,<sup>38</sup> but suspected the defendants of narcotics violations. As happens so often, the officers observed, in plain view, drugs in the lap of one of the defendants before the investigation could unfold.<sup>39</sup>

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37. See Petitioner's Brief at 1-8, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841). At the time of the stop, D.C. Metropolitan Police Regulations barred plain-clothes officers in unmarked police cars from making traffic stops except where a traffic violation was so grave as to create an immediate threat to the safety of persons. See *id.* at 1-2.

38. See *id.* at 7. One of the arresting officers in *Whren*, Officer Soto, testified: "The only circumstances that I would issue tickets—I'm a vice investigator; I'm not out there to give tickets—is for just reckless, reckless driving." He also stated that as a vice officer, he is "out there almost strictly to do drug investigations," and that he rarely stops motorists for traffic offenses. *Id.* (emphasis added).

39. After reviewing so many cases where police officers testify that they discovered illegal drugs in plain view or after a consent search, judges may begin to wonder why drug dealers are so stupid. See Official Transcript Proceedings Before The Supreme Court of United States at 16-17, *Florida v. Bostick*, 501 U.S. 429 (1991) (No. 89-1717) ("QUESTION [from Justice Marshall]: And it is always interesting to me that all of the drug pushers, when you ask to search them, they say, oh, come on." . . . "Ms. Fowler [for State of Florida]: I think a reasonable person would do it . . . [b]ecause they are trying to be cooperative.").

Of course, there is an alternative explanation other than drug dealers' desire to cooperate with the police for the type of police testimony seen in *Whren* and other cases where drugs are claimed to be found in plain view or after a consent search: police perjury. As Joseph D. McNamara, the former Police Chief of Kansas City and San Jose, has explained:

In addition to their argument that the Court's precedents disfavored pretextual seizures as a general matter,<sup>40</sup> the defendants also pointed to evidence that officers often target black and Hispanic motorists for pretextual traffic stops to launch unwarranted criminal investigations.<sup>41</sup> According to the defendants, this evidence indicated that police discretion and bias, rather than a bona fide interest in enforcing the traffic code, motivated the traffic stops.<sup>42</sup> Without questioning the validity of the defendants' evidence, the Court rejected the argument and dismissed the notion that the Fourth Amendment is concerned about the racial motives of police officers when making traffic stops. The Court concluded that if there is objective probable cause of a traffic violation, a stop is always reasonable under the Fourth Amendment regardless of the subjective reasons that may have actually motivated the challenged stop.<sup>43</sup>

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[H]undreds of thousands of police officers swear under oath that the drugs were in plain view or that the defendant gave consent to a search. This may happen occasionally but it defies belief that so many drug users are careless enough to leave illegal drugs where the police can see them or so dumb as to give cops consent to search them when they possess drugs.

Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?*, L.A. TIMES, Feb. 11, 1996, at M1; see also Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 695-96 (1996):

On its face, the police account is highly improbable. Why would a cocaine smuggler consent to a search that could send him to prison for decades? We can suppose that criminals are not rocket scientists and that Freud's insights apply to criminals no less than to anyone else. But even if a self-destructive error of the sort posited by the police is possible, it is not probable.

*Id.* For more on the connection between police perjury and pretextual traffic stops, see Part IV.B.

40. See Petitioners' Brief at 31-37, *Whren* (No. 95-5841).

41. See *id.* at 21-28.

42. See *id.*

43. The Court reasoned that precedent and Fourth Amendment theory "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996). The Court's response to the petitioners' argument about racial impact was so terse one gets the impression "that the Justices may not have taken the argument seriously." Harris, *supra* note 19, at 550. While the *Whren* Court's analysis of race and the Fourth Amendment is wrong, see discussion *infra* Part III, other aspects of *Whren* have also been the subject of severe criticism. See, e.g., WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 1.4, at 13. (3d ed. Supp. 1997). Professor Lafave stated:

The Court's analysis in *Whren* is, to put it mildly, quite disappointing. By misstating its own precedents and mischaracterizing the petitioners' central claim, the Court managed to trivialize what in fact is an exceedingly important issue regarding a pervasive law enforcement practice. Certainly one would have expected more from an opinion which drew neither a dissent nor a cautionary concurrence from any member of the Court.

*Id.* See also Morgan Cloud, *Judges, "Testilying," and the Constitution*, 69 S. CAL. L. REV. 1341, 1366 (1996) (noting that a flaw in an "objective" test for pretext claims is that the Fourth Amendment exists "to regulate the actual conduct of actual government agents in actual cases. The task of a judge reviewing government searches and seizures in a specific case is to analyze

The reasoning of *Whren* begs the obvious question of why the Court considers police reliance on race when making a traffic stop reasonable conduct under the Fourth Amendment. Although the Court reaffirmed its unwillingness to consider subjective motives in Fourth Amendment analysis,<sup>44</sup> it mistakenly suggests that the evidence of racial impact connected with pretextual traffic stops falls into a category of "subjective" evidence. On the contrary, evidence of racial decisionmaking by officers often rests on solid empirical data and indicates much more than the subjective bias of a few rogue officers. Not only does evidence of racial impact linked to pretextual traffic stops indicate arbitrary and discriminatory seizures, but much of the evidence produced to date is far more objective than other types of evidence the Court has sanctioned when upholding police detentions of persons and effects.<sup>45</sup>

### A. Objective Evidence of Racial Targeting

Those familiar with law enforcement methods know that police target black and Hispanic motorists for pretextual traffic stops.<sup>46</sup> The police in Avon, Connecticut, a predominately white suburb near the City of Hartford, for example, have been conducting pretextual stops for years. They even have a name for the practice: the "Barkhamsted Express." They use the expression "to refer to carloads of black and Puerto Rican people traveling through town in the summer from Hartford to the Barkhamsted reservoir."<sup>47</sup> The town's attorney wrote

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both the conduct of the officers and the motives that generated that conduct"). See generally Levit, *supra* note 22 (concluding that the result in *Whren* subverts the protections established by the Court's investigative detention cases, and leaves motorists subject to arbitrary police seizures); Sean Hecker, Note, *Race and Pretextual Traffic Stops: An Expanded Role For Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551 (1997) (criticizing *Whren* for failing to address the point that arbitrary police seizures abuse the community's confidence in police, which in turn, undermines the rule of law).

44. See *Whren*, 116 S. Ct. at 1774 ("Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment, but we have repeatedly held and asserted the contrary.").

45. See *infra* notes 113-120 and accompanying text.

46. See, e.g., MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 170 (1988). The Author relates this story:

A patrolman ran a warrant check on a car with a broken rear taillight and four young blacks in it. He found the car had a warrant, and stepped the car and checked the driver for warrants. The driver was not wanted, and the patrolman did not cite him for the rear taillight because, as he put it, the man had the "right attitude." Later the patrolman said he investigated the car in the first place because there were blacks in it, and with blacks "there is always a greater chance of something wrong.

*Id.*

in a report that the supervising sergeant of the Avon Police Department instructed his officers to find a reason to stop black and Hispanic motorists driving through Avon.<sup>48</sup> The sergeant thought it proper to scrutinize and run license plate checks on motorists who “do not appear to have business in Avon.”<sup>49</sup> He also believed that “the presence of a large number of blacks or Hispanics in a vehicle would fall within the category of people ‘not appearing to have business in Avon.’”<sup>50</sup>

After public disclosure of the sergeant’s instructions, other officers and former officers in the department admitted that “top Avon police officials have long tolerated a practice of targeting blacks and Hispanics” who drive through Avon.<sup>51</sup> It was alleged that nearly one-third of the department’s officers targeted minority drivers, although no formal policy ordered the practice.<sup>52</sup> A subsequent internal police investigation also showed that the department accepted the practice of pretextual traffic stops of minority drivers.<sup>53</sup> This later report stated that higher-ranking officers told patrol officers to stop vehicles containing minorities to “‘see what they are up to out here.’”<sup>54</sup>

The practice of targeting black and Hispanic motorists is not confined to police departments that patrol white suburbs surrounding America’s urban centers. Police also employ the tactic on the nation’s

47. Kathleen Gorman, *Avon Police Target Black, Hispanic Drivers, Report Says*, THE HARTFORD COURANT, Apr. 13, 1994, at A1.

48. *See id.* Not surprisingly, Sgt. Thomas Transue, in defending the practice, noted that no minority motorist was stopped without probable cause of a traffic violation. *See id.*

49. *Id.*

50. *Id.*

51. Kathleen Gorman, *Racial Checks Routine, Ex Avon Officer Says*, THE HARTFORD COURANT, Apr. 17, 1994, at A1.

52. *See id.* (Four former and current police officers said that “the practice of targeting blacks and Hispanics is not condoned by a majority of the members of the police department. But they say as many as 10 of the department’s 30 members are known to follow the practice.”).

53. *See* Brian M. Trotta, *Report: Avon Police Targeted Minorities; Internal Probe Supports Ex-Officer’s Discrimination Claims*, THE HARTFORD COURANT, Nov. 22, 1994, at A1.

54. *Id.* The internal report, written by three sergeants in the Avon Police Department noted:

Sgt. Transue would not come out and say to stop them [Hispanics] for no reason, but it was implied, such as, “Today is Sunday, you can all bring up your motor vehicle activity. The [Barkhamsted] is coming through,” or “Why don’t you get out and jump on the Express today.”

The sergeant’s report also noted that a second officer, when asked whether he had been instructed to target minority drivers, replied:

Yes, by both Sgt. Transue and by [acting Sergeant Stanley] Barnett. . . . There would be times on the midnight shift when Sgt. Transue was parked next to me and a car with blacks or Hispanics would drive by and he would say “Go stop that car, see what they are doing out here. They don’t belong out here, see where they are coming from.” Barnett would do the same thing or describe a car on the air, infer that it contained minorities and direct me to “Step it and see what they are up to out here.”



interstate highways.<sup>55</sup> Two recent court cases, from New Jersey and Maryland,<sup>56</sup> indicate that state troopers target black motorists for pretextual traffic stops on America's busiest highway, Interstate 95.

In the late 1980s, New Jersey criminal defense lawyers and civil rights advocates often complained that state troopers targeted black motorists on the New Jersey Turnpike for pretextual traffic stops to launch unwarranted narcotics investigations. State officials denied the charges and critics of the state police could not produce a "smoking gun" to substantiate their charges.<sup>57</sup> But in 1990, the newly appointed State Police Superintendent made an astonishing statement: He conceded that "a very small number" of troopers engaged in racially discriminatory stops.<sup>58</sup> Then, in April 1993, a Superior Court judge found that twenty troopers may have arrested motorists based on racial considerations.<sup>59</sup> A few months later, after urging the dismissal of 618 narcotics cases, the Middlesex County Prosecutor stated: "Twenty particular state troopers may have enforced the law in a racial[ly] selective way on their own initiative."<sup>60</sup>

Complaints of race-based traffic enforcement continued, but no empirical evidence supported the allegations until *New Jersey v.*

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*Id.*

55. See *Dateline NBC: Probable Cause?; Policemen In Louisiana Harass Motorists And Seize Their Property For No Apparent Reason* (NBC television broadcast, Jan. 3, 1997) [hereinafter *Dateline*]; Jeff Brazil & Steve Berry, *Color Of Driver Is Key To Stops In I-95 Videos; The Tapes Show That Most Stops And Searches By Volusia County's Drug Squad Involve Minorities*, ORLANDO SENTINEL, Aug. 23, 1992, at A1. The videotapes show that:

Almost 70 percent of the motorists stopped were black or Hispanic, an enormously disproportionate figure because the vast majority of interstate drivers are white. . . . More than 80 percent of the cars that were searched were driven by blacks and Hispanics. . . . Although deputies contend they stop cars only for legitimate traffic violations . . . only nine of 1,084 drivers stopped—less than one percent—received traffic tickets.

*Id.*

56. See Letter from Judge Robert E. Francis to Counsel, *RE: State v. Pedro Soto* (Mar. 4, 1996) (on file with author); Harris, *supra* note 19, at 564 (discussing *Wilkins v. Maryland State Police*, unreported).

57. See Bill Sanderson, *Reining in State Troopers; Drug Searches to be Curtailed*, RECORD (Northern New Jersey), Feb. 23, 1990, at A1.

58. See Robert Schwaneberg & Dan Weissman, *Troopers Warned on Driver Rights; Dintino Issues Strict New Guidelines Following Cases of Abuse on Pike*, STAR-LEDGER (Newark, New Jersey), Feb. 23, 1990, available in 1990 WL 3507300. Superintendent Justin Dintino's admission that even "a very small number of troopers [may] have abused their power and the public" by targeting black motorists for traffic stops is astonishing because traditionally police officers and their advocates, particularly high-ranking officials, are reluctant to publicly admit police misconduct.

59. See Thomas Zambito, *Judge Dismisses Turnpike Arrests; Public Defender Said Troopers Demonstrated Pattern Of Bias*, RECORD (Northern New Jersey), Aug. 8, 1993, at A3; *Charges Are Dropped Against 618 Drivers In Some Of The New Jersey Turnpike Cases, Racial Discrimination Had Been Alleged In The Stops*, PHILADELPHIA INQUIRER, Aug. 9, 1993, at S4.

60. Mike Kelly, *Race On The Road*, RECORD (Northern New Jersey), Aug. 10, 1993, at C1.

*Pedro Soto*.<sup>61</sup> In *Pedro Soto*, decided three months before *Whren*, the black defendants were stopped by troopers on the southern portion of the Turnpike. The trial court judge ruled that the defendants proved that state troopers seized black motorists for traffic stops because of their race.<sup>62</sup> The trial judge found that the defendants had established a *prima facie* case of selective enforcement which the State failed to rebut. The trial judge required the suppression of all contraband and evidence seized by troopers patrolling the exits in question for a three-year period.<sup>63</sup>

The trial judge based his conclusion on a voluminous record. The prosecution and defense agreed upon a database of 3,060 traffic stops, which were broken down according to the race of the occupants of the vehicles.<sup>64</sup> Relying on testimony and statistical surveys provided by experts for the defense, the trial judge noted the following statistical data for traffic patterns on the Turnpike between exits 1 and 7A: A count of the traffic indicated that 13.5% of the automobiles carried a black occupant. A count of the traffic surveyed for speeding indicated that 98.1% of the vehicles on the road exceeded the speed limit. Fifteen percent of the speeding vehicles had a black occupant. Fifteen percent of the automobiles that both violated the speed limit and committed some other moving violation also had a black occupant.

Comparing these percentages with the data on racially identified stops, the trial judge found that while automobiles with black occupants represented only 15% of the motorists who violated the speeding laws, 46.2% of the race identified stops between exits 1 and 3 were of black motorists.<sup>65</sup> Using the data for the entire portion of the Turnpike patrolled by the troopers of the Moorestown Station,<sup>66</sup> the trial judge concluded that 35.6% of the race identified stops be-

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61. Letter from Judge Francis, *supra* note 56, at 1.

62. Superior Court Judge Robert E. Francis's opinion in *Pedro Soto* was first made available in the form of a letter-opinion to the counsel involved in the case. *See id.*

63. *See id.* at 1.

64. *See id.* Of the 3,060 traffic stops in the agreed upon database, the state claimed that 1,212 (39.6%) stops involved racial minorities, while the defense claimed that 1,146 (37.4%) stops involved racial minorities. *See id.*

65. *See id.* at 2-3. Statistically speaking, Judge Francis explained that the 46.2% figure of blacks stopped constituted "an absolute disparity of 32.7%, a comparative disparity of 242% (32.7% divided by 13.5%) and 16.35 standard deviations." *Id.* at 3. According to Judge Francis, "something is considered statistically significant if it would occur by chance fewer than five times in a hundred (over two standard deviations)." *Id.*

66. The same troopers patrolled between exits 3 and 7A as patrolled between exits 1 and 3. *See id.*

tween exits 1 and 7A involved vehicles with black occupants.<sup>67</sup> The trial judge did not dispute the defense expert's opinion that "it is highly unlikely such statistics could have occurred randomly or by chance."<sup>68</sup>

The trial judge also took note of another defense survey designed to measure the discretion of troopers when issuing traffic tickets. The database for this survey contained 533 racially identified tickets issued by three different trooper units.<sup>69</sup> The "Radar Unit" concentrated on speeding vehicles "using a radar van and chase cars and exercised limited discretion regarding which vehicles to stop."<sup>70</sup> The "Tactical Patrol Unit" focused on "traffic problems at specific locations and exercise[d] somewhat more discretion as regards which vehicles to stop."<sup>71</sup> Troopers of the "Patrol Unit" were responsible for providing general law enforcement and exercised "by far the most discretion among the three units."<sup>72</sup>

The statistical study of race identified traffic tickets indicated the following:

18% of the tickets issued by the Radar Unit were to blacks, 23.8% of the tickets issued by the [Tactical Unit] were to blacks while 34.2% of the tickets issued by the Patrol Unit were to blacks. South of exit 3, [the defense expert] computed that 19.4% of the tickets issued by the Radar Unit were to blacks, 0.0% of the tickets issued by the [Tactical Unit] were to blacks while 43.8% of the tickets issued by the Patrol Unit were to blacks.<sup>73</sup>

Based on all of this statistical evidence, the trial judge concluded that the defendants established a "*de facto* policy" by Moorestown Station troopers of "targeting blacks for investigation and arrest between April 1988 and May 1991 both south of exit 3 and be-

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67. See *id.* According to Judge Francis, the "35.6% of the race identified stops between exits 1 and 7A . . . constitut[ed] an absolute disparity of 22.1%, a comparative disparity of 164% and 22.1 standard deviations." *Id.* Judge Francis wrote that the defense's statistical expert should have used the 15% figure from the "violation survey" instead of the 13.5% figure from the "traffic survey" as the benchmark when making statistical comparisons with race identified stop data in the agreed-upon database. Despite this error, Judge Francis found that "whatever the correctly calculated disparities and standard deviations . . . they would be nearly equal to those calculated by [Dr. John Lambertb, the defense expert]." *Id.* at 3, n.3. Dr. Lambertb, Chairman of the Psychology Department at Temple University, designed the defense "traffic" and "violation" surveys. Judge Francis found that Dr. Lambertb was qualified as an expert in statistics and social psychology.

68. *Id.* at 3 (footnote omitted).

69. See *id.* at 5.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

tween exits 1 and 7A of the Turnpike.”<sup>74</sup> According to the trial judge the “statistical disparities and standard deviations revealed are indeed stark.”<sup>75</sup>

In the second case demonstrating racial targeting of black motorists for pretextual traffic stops on Interstate 95, *Wilkins v. Maryland State Police*, a state trooper stopped an automobile with four black occupants for speeding in April 1992 in Allegheny County.<sup>76</sup> One of the occupants was Robert Wilkins, a Washington, D.C., criminal defense lawyer, who with his family, was returning to Washington after attending a funeral in Chicago.

The officer requested permission for a consent search, but Wilkins told the trooper that he was an attorney who had a court appearance later in the morning, and that the officer had no right to search the car without arresting the driver. After the request to search was denied, the officer ordered the occupants out of the car and detained them while a drug-sniffing dog was brought to the scene. The canine sniff revealed no narcotics. The officer then permitted Wilkins and his family to leave after more than a half-hour detention. The driver was given a \$105 speeding ticket.

Wilkins subsequently filed a class action lawsuit alleging Maryland troopers were illegally stopping black motorists because of their race. During the initial stages of the litigation, a state police intelligence report was discovered which warned troopers in Allegheny County to be alert for “dealers and couriers (traffickers) [who] are predominately black males and black females . . . utilizing Interstate 68.”<sup>77</sup> As part of the final settlement, the Maryland State Police were required to provide the federal district court and plaintiffs’ counsel with data on state police searches of motorists conducted from January 1995 through September 1996.<sup>78</sup>

In addition to the police data, the plaintiffs’ expert designed a statistical plan to determine whether Maryland troopers stop and search black motorists at a rate disproportionate to their numbers on the roads. Part of this plan included a “rolling survey” which determined, *inter alia*, the racial composition of motorists on Interstate 95 in the counties north of Baltimore, and the racial

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74. *Id.* at 16.

75. *Id.*

76. See Harris, *supra* note 19, at 564.

77. See *id.* at 565 (quoting MARYLAND STATE POLICE, CRIMINAL INTELLIGENCE REPORT (Apr. 27, 1992)).

78. *Id.* at 565-66.

composition of those motorists on Interstate 95 in the counties north of Baltimore who were violating traffic laws.<sup>79</sup>

The rolling survey indicated that 93.3% of the drivers on Interstate 95 "were violating traffic laws and thus were eligible to be stopped by State Police. Of the violators, 17.5% were black, and 74.7% were white."<sup>80</sup> Data from the Maryland State Police measured the number of motorists stopped and searched by troopers on Interstate 95, north of Baltimore between January 1995 and September 1996. The police data indicated the following: 72.9% of the motorists stopped and searched were black; 80.3% of the motorists searched were black, Hispanic or some other racial minority group; 19.7% of those searched were white.<sup>81</sup>

The police data also measured the number of searches conducted by individual troopers on Interstate 95 north of Baltimore. This data indicated that thirteen troopers conducted 85.4% of the searches. With the exception of one trooper, all of these troopers searched black and other minority motorists at much higher rates than these motorists travel on the highway. The trooper (omitting the trooper who searched black motorists at a rate close to their presence on the roads) with the lowest percentage of black motorist searches still searched black motorists at nearly twice the rate they were found to travel on the highway. The trooper with the highest percentage of black motorist searches searched *only* black motorists. Ten of the thirteen troopers searched minority motorists at least 80% of the time.<sup>82</sup>

The police data also included information on motorists searched by the police who traveled on roads outside of the northern portion of Interstate 95. This data contrasted significantly with the searches conducted on Interstate 95. For example, while troopers searched white motorists 19.7% of the time on Interstate 95, troopers patrolling outside of Interstate 95 searched white motorists 63.7% of the time. Troopers searched 72.9% of the black motorists on Interstate 95, but only 32% on other state roads.<sup>83</sup> According to the

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79. See Report of John Lamberth, 1 (on file with author).

80. *Id.* at 2.

81. The federal district judge did not order the Maryland State Police to keep track of all stops conducted by troopers. Instead, only stops that included consent or canine searches were required to be recorded. Thus, the state-supplied data "might tend to underestimate the total number of racially biased stops on the highways, because they only include stops that are followed by searches, and only two kinds of searches at that: searches by consent and searches with dogs." Harris, *supra* note 19, at 566 n.130.

82. See Report of John Lamberth, *supra* note 79, at 4.

83. See *id.* at 3-4.

plaintiffs' expert, black motorists "traveling I-95 are searched by state police more than twice as often as are black motorists traveling other Maryland roadways."<sup>84</sup>

Finally, the police data included information on the number of searches that revealed contraband. Troopers found contraband in 28.1% of the cars they searched. The success rate of troopers on Interstate 95 was approximately the same as for searches on other state roads: Troopers found contraband in 29.9% of the cars on Interstate 95 and in 27.1% of the cars on roads outside of Interstate 95.<sup>85</sup> According to the plaintiffs' expert, the police data reported no statewide differences in the success rate of troopers when searching black and white motorists: Troopers recovered contraband from 28.4% of the black motorists searched and from 28.8% of the white motorists searched. Thus, seventy percent of the searches uncovered no contraband.<sup>86</sup> Finally, of all the searches conducted on Interstate 95, troopers arrested the driver in 29.9% of the searches.

According to the plaintiffs' expert, the sum of this information "reveals dramatic and highly statistically significant disparities between the percentage of black Interstate 95 motorists legitimately subject to stop by Maryland State Police and the percentage of black motorists detained and searched by [Maryland State Police] troopers on this roadway."<sup>87</sup> Particularly noteworthy is the difference between the percentage of blacks subject to lawful stops (17.5%) and the percentage of blacks actually stopped and searched (72.9%).<sup>88</sup> The percentage of blacks stopped and searched on Interstate 95 (72.9%) also contrasts significantly with the percentage of blacks stopped and searched on other state roads (32%).<sup>89</sup> Put in simpler terms, "the probability that black Interstate 95 drivers are subjected to searches

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84. *Id.* at 4.

85. *See id.* at 4-5.

86. *See id.* at 5.

87. *Id.*

88. According to the plaintiffs' expert, this percentage differential represents 34.6 standard deviations, the absolute disparity is 55.4% and the comparative disparity is 316%. The plaintiffs' expert also noted that:

An ideal comparison would be the percentage of black traffic law violators to the percentage of blacks *stopped* by the Maryland State Police. Stop data has not been made available by Maryland State Police however. In the absence of that data, the percentage of blacks searched provides a rough approximation of the percentage of blacks stopped, given the fact that in 70% of the cases the search turned up no contraband.

*Id.* at 6 n.8.

89. According to the plaintiffs' expert, the "absolute disparity in these figures is 40.9%, and the comparative disparity is 128%. This difference encompasses 20.45 standard deviations." *Id.* at 5.

at so high a rate by *chance* is less than one in one quintillion. It is wildly significant by statistical measures."<sup>90</sup>

The statistics from *Pedro Soto* and *Wilkins* demonstrate that some state troopers in New Jersey and Maryland are seizing black motorists for traffic violations at a rate highly disproportionate to the percentage of black motorists eligible for lawful stops. The evidence in these cases is distinctive only because the statistics were generated in actual court cases. The phenomenon that produced the data is hardly unique, nor has it dissipated. In a report published a year after *Whren* was decided, the *Orlando Sentinel* newspaper found that the Criminal Patrol Unit of the Orange County Sheriff's Office is six-and-a-half times more likely to search black motorists on the Florida Turnpike than white motorists.<sup>91</sup>

The Criminal Patrol Unit is a special patrol squad that uses routine traffic stops to search for narcotics. Reviewing records of more than 3,800 stops by the Unit, the *Sentinel* report noted that black drivers represented 16.3% of the drivers stopped, but constituted more than 50% of the searches and more than 70% of the canine searches.<sup>92</sup> The *Sentinel* report also found that troopers search black motorists after traffic detentions at a rate substantially higher than white motorists. For example, a traffic count of more than 10,000 vehicles in April and May 1997 found that blacks constituted less than 5% of the motorists on the Florida Turnpike. But receipts from traffic tickets and warning notices for stops from January 1996 through April 1997 reveal that "39.6% of black motorists were

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90. *Id.* A lawyer for the Maryland State Police disputed the relevance of the traffic stop statistics gathered by the plaintiffs' expert. See Kris Antonelli, *State Police Deny Bias*, BALTIMORE SUN, Jan. 11, 1997, at 1B. According to counsel for the State Police, the proper point of comparison for the statistical data supplied by the State Police is not the percentage of black motorists stopped for traffic violations, but the percentage of black motorists displaying traits justifying an investigatory detention. *Id.* The problem with the state's response, of course, is the absence of proof that Maryland State Troopers were detaining black motorists for valid *Terry* stops. See also Hecker, *supra* note 43, at 563 ("[T]here is no evidence that [Maryland] police justified a majority or even substantial minority of the stops by anything other than a pretextual traffic violation. Moreover, if an officer had *Terry*-level suspicion, she would not need to use a traffic violation as an excuse to investigate criminal conduct."). While denying that Maryland had an official policy of stopping black motorists, counsel for the State Police seemed to concede, however, that the state supplied data indicated that individual troopers were targeting black motorists. See Antonelli, *supra*, at 1B (noting counsel's statement that statistics, at most, show discriminatory targeting by 14 individual troopers, but such action by specific troopers cannot be used to prove a policy that the entire state police target black motorists).

91. See Roger Roy & Henry Pierson Curtis, *When Cops Stop Blacks, Drug Search Often Follows: Orange County Deputies Deny Race Plays a Role in Stops on the Turnpike, But Some Police Officials Agree Blacks Have a Right to Be Unhappy*, ORLANDO SENTINEL, June 8, 1997, at A1.

92. See *id.*

searched, compared with 6.2% of white motorists. Motorists listed as Asian, Hispanic or other ethnicities were searched 17.9% of the time.<sup>93</sup> Eighty percent of all the searches uncovered no contraband.<sup>94</sup>

The data on the searches conducted by the supervising sergeant of the Criminal Patrol Unit is particularly revealing. The sergeant "led by example, stopping as many cars as possible [for traffic violations] to increase the odds of finding drugs."<sup>95</sup> He searched only 2% of the white drivers he stopped, but searched 35.5% of the black drivers he stopped. Asked about the disparity, the sergeant stated: "I run through the same thing every time, whether they're black, white or Hispanic. I just don't know."<sup>96</sup> While the sergeant and other officers denied that race influences their decisions to search motorists, the sergeant could not explain why black motorists were six-and-a-half times more likely to be searched than white motorists.

Faced with similar evidence of racial targeting, the supervising sergeant of a special drug patrol squad in western North Carolina expressed indifference to the fact that his drug squad stopped black motorists for traffic violations more frequently than other troopers patrolling the same roads, and that his squad searched black motorists at a higher rate than white motorists after routine traffic stops.<sup>97</sup> The *News & Observer* newspaper of Raleigh, North Carolina, conducted a study of 1995 patrol records of the Special Emphasis Team of the North Carolina Highway Patrol, whose goal was to interdict narcotics through traffic stops on Interstates 85 and 95. The study found that the Team "charged black male drivers [with traffic offenses] at nearly twice the rate of other troopers working the same roads."<sup>98</sup>

According to the *News & Observer* report, black male drivers received almost 45% of the traffic citations issued by the Special

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93. *Id.* According to Roger Roy, one of the authors of the *Sentinel* report, the Orange County Sheriff's Office does not keep records on the race of motorists who are subjected to canine or consent searches by the Criminal Patrol Unit during traffic stops. However, extensive statistics about stops, seizures and arrests are maintained. The *Sentinel* report was able to determine the race of motorists who were searched by examining the receipts that drug squad deputies kept after issuing traffic tickets or warning notices to motorists. After every traffic stop, deputies were required to issue either a traffic ticket or warning notice, and the tickets and warnings contained biographical information about the driver. On the back of these receipts deputies would indicate whether a search occurred during the stop, and if so, what type of search. Telephone Interview with Roger Roy, Reporter *Orlando Sentinel* (July 24, 1997).

94. See Roy & Curtis, *supra* note 91, at A1.

95. *Id.* From January 1996 through April 1997, he detained over one thousand drivers, the most among his Unit. *Id.*

96. *Id.*

97. See Neff & Stith, *supra* note 2, at A1.

98. *Id.*



Emphasis Team, while black male drivers received only 24.2% of the traffic citations issued by other North Carolina troopers patrolling the same highways. The report explained that statistical experts believed that it was "wildly improbable" that two groups of troopers patrolling the same highways would produce such disparate results by chance.<sup>99</sup> The supervising sergeant for the Special Emphasis Team, like other government officials, refused to disclose what criteria troopers use in determining which cars to search. But the *News & Observer* report determined that in 1995, the "Special Emphasis Team searched about 3,501 vehicles and found drugs in 210—about one in every 17 vehicles searched."<sup>100</sup> According to the sergeant, his squad was doing a good job and the success rate was good enough: "You may have had 17 cars searched where drugs are only found one time," he said. "But that's not to say that that person who didn't have it wasn't involved."<sup>101</sup>

### *B. Why Should Evidence of Racial Impact Matter?*

While reasonable minds may differ over whether contraband found in only one of every seventeen vehicles searched (a five percent payoff) is worth the cost in constitutional liberty and privacy that is imposed by these intrusions, the above statistics on traffic stops in New Jersey, Maryland, Florida, and North Carolina should raise judicial eyebrows and trigger Fourth Amendment questions concerning the enforcement practices of officers in these jurisdictions. As the official who trained the Orange County drug squad noted, police statistics on traffic stops "should reflect the ratio of people who

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99. Joseph Neff & Pat Stith, *Could it Happen by Chance?* NEWS & OBSERVER (Raleigh, North Carolina), July 28, 1996, at A15. The report explained:

Could the different racial patterns in citations issued by the Special Emphasis Team and other troopers be a coincidence? . . . For the Special Emphasis Team, the statistical question is this: If the two groups of troopers are equal in their propensity to ticket black men, how often would such differing results occur? The most common method is to use the Chi square test. When applied to citations issued on Interstates 85 and 95 by the Special Emphasis Team and other troopers, the test gives an answer of 515. This answer is off the chart. An answer of 6.6 means the odds are one in a hundred. An answer of 10.8 means such a divergence would happen one in a thousand. College textbook charts end there. An answer of 515 is so far off the chart that the odds are in the millions or billions to one, according to statistical experts. "This is a wildly improbable difference," said Phil Meyer, a professor of journalism at UNC-Chapel Hill who has written extensively on the use of numbers. "Something other than chance is causing it."

*Id.*

100. Neff & Stith, *supra* note 2, at A1.

101. *Id.*

are passing through or reside in the area, neighborhood or on the highway."<sup>102</sup>

In the constitutional context of equal protection, similar statistical evidence has failed to prove that a particular state actor or group of actors acted with a specific intent to discriminate.<sup>103</sup> The same might be said about these statistics: While they indicate substantial racial disparities in the percentage of black motorists that troopers stop and search, the statistics do not prove that any particular officer discriminated against any particular black motorist. Like other provisions of the Bill of Rights that have been interpreted to incorporate equality norms as part of the substantive right accorded by the provision,<sup>104</sup> the Fourth Amendment right against unreasonable searches

102. Roy & Curtis, *supra* note 91, at A1. Cf. Hecker, *supra* note 43, at 569 (noting while some of the statistical disparity of black motorists stopped "may be justified if, in fact, race is probative of drug activity or correlatos with race-neutral factors that are probative of drug activity," it is unlikely that the vast disparity of blacks stopped for traffic violations can be explained by legitimato reasons).

103. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 291-92 (1987) (holding that a comprehensive statistical study showing that black defendants who kill white victims have the greatest chance of receiving the death penalty in Georgia is insufficient to prove a violation of the Equal Protection Clause because the defendant "must prove that the decision makers in *his* case acted with discriminatory purpose"); *Washington v. Davis*, 426 U.S. 229 (1976) (finding the fact that black applicants failed test given to applicants for pellice force at a rate four times higher than whitto applicants does not constituto equal protection violation; disproportionate racial impact, standing alone, does not trigger strict judicial scrutiny of a facially neutral statute or law).

104. Indeed, because equal treatment under the law is such a fundamental value under the Constitution and for individual liberties, the Court has not confined equality norms to the exclusive province of the Equal Protection Clause. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1, at 1437 (2d ed. 1988) ("[N]o single clause or provision [of the Constitution] is the exclusive fount of [equality] doctrine."). Several parts of the Constitution and provisions of the Bill of Rights have been interpreted to incorporate equality norms as part of the substantive right accorded by the provision.

For example, the scope of the First Amendment's right of free speech is informed by equality norms. See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). See generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975). Similarly, the Eighth Amendment's ban against cruel and unusual punishment has been read to incorporate a principle of equality. See *McCleskey*, 481 U.S. at 323 n.1 (Brennan, J., dissenting), stating:

While the Equal Protection clause forbids racial discrimination, and intent may be critical in a successful claim under that provision, the Eighth Amendment has its own distinct focus: whether punishment comports with social standards of rationality and decency. It may be, as in this case, that on occasion an influence that makes punishment arbitrary is also proscribed under another constitutional provision. That does not mean, however, that the standard for detormining an Eighth Amendment violation is superseded by the standard for determining a violation under this other provision[.]

*Id.* at 341 ("That a decision to impose the death penalty could be influenced by *race* is thus a particularly repugnant prospect, and evidence that race may play even a modest role in levying a death sentence should be enough to characterize that sentence as 'cruel and unusual.'");

and seizures is sufficiently important and spacious enough to include a concern with equality. Further, the history and purpose of the Fourth Amendment provide ample justification for embracing equality norms when deciding the reasonableness of an intrusion. At its core, the Amendment is aimed at discretionary police power. Traffic enforcement obviously affords police officers "a good deal of low visibility discretion. In addition they are likely in such situations to be sensitive to social station and other factors that should not bear on the decision."<sup>105</sup> Therefore, where unequal or arbitrary enforcement exists, the protection afforded by the Fourth Amendment is properly directed at such intrusions and "can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment."<sup>106</sup> Moreover, because these statistics do not

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Furman v. Georgia, 408 U.S. 238, 257 (1972) (Douglas, J., concurring) (noting that the challenged death penalty statutes "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments"); *id.* at 310 (Stewart, J., concurring) (concluding that although racial discrimination was not proven, the Eighth Amendment "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); ELY, *supra*, at 97 (noting that the protection against cruel and unusual punishment "surely had to do with a realization that in the context of imposing penalties . . . there is tremendous potential for the arbitrary or invidious infliction of 'unusually' severe punishments on persons of various classes other than 'our own.'").

Finally, a generation ago, when litigants challenged discriminatory conduct by federal officials, the Court adopted a literal interpretation of the Fifth Amendment's Due Process Clause and rejected the contention that the federal government was controlled by equality norms. *See, e.g.,* Detroit Bank v. United States, 317 U.S. 329, 337 (1943) (noting that because the Fifth Amendment's Due Process Clause contains no explicit equal protection clause, it imposes "no guaranty against discriminatory legislation by Congress"). The modern Court has repudiated this approach. It now reads the Fifth Amendment's Due Process Clause to impose on federal officials the same equality norms that the Fourteenth Amendment imposes upon the states. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 213-17 (1995); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (recognizing that the "liberty" component of the Fifth Amendment's Due Process Clause protects the same equality principles embodied in the Fourteenth Amendment's Equal Protection Clause). In fact, "the due process clauses of the fifth and fourteenth amendments have . . . been held to yield norms of equal treatment indistinguishable from those of the equal protection clause." TRIBE, *supra*, § 16-1, at 1437 (citations omitted). When individual liberties are jeopardized by discriminatory and arbitrary government action, "principles of equal treatment have emerged in ways fairly independent of particular constitutional phrases." *Id.*; *see also* Turner v. Murray, 476 U.S. 28, 36-37 (1986) (holding that because the risk of racial prejudice may have affected his capital sentencing, the Sixth Amendment's guarantee of an impartial jury entitled a black defendant accused of capital murder involving an interracial crime the right to inform prospective jurors of the race of the victim and to question those jurors on the issue of racial bias).

105. ELY, *supra* note 104, at 97.

106. *Id.*; *see also* Wayne R. LaFare, *Controlling Discretion By Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 449 (1990) ("Protection against arbitrary searches and seizures lies in controlling police discretion, which requires a determination that the police action taken against a particular individual corresponds to that which occurs with respect to other persons similarly situated.").

show actual racial discrimination in a particular case does not render them constitutionally worthless. On the contrary, the statistics, considered as a whole, provide concrete evidence that state police officers are targeting black motorists for unwarranted narcotics investigations under the guise of traffic enforcement. The statistics indicate large-scale, arbitrary, and biased police seizures that implicate essential Fourth Amendment protections.<sup>107</sup>

The statistical disparities discussed above cannot be explained away by claiming that blacks are worse drivers than whites, simply because there is no evidence that blacks as a group drive differently from whites.<sup>108</sup> When statistical surveys indicate the type and degree of racial disparities shown above, courts should, at the very least, require state officials to provide race-neutral explanations for the statistics.<sup>109</sup> When officials cannot explain the disparities, then the statistics offer conclusive evidence that race matters in predicting which types of motorists are more likely to be stopped for traffic offenses, and which vehicles will probably be searched during such stops. Under this model, if the State is unable to rebut the statistical proof that race matters in making traffic stops, the defense has established a Fourth Amendment violation notwithstanding probable cause for a particular traffic stop.

Nor should this statistical evidence be dismissed because the *Whren* Court stated that the subjective motives of an officer will not undermine "objectively justifiable behavior under the Fourth

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107. The disparate impact of the statistics illustrates another reason why constitutional analysis of race-based seizures should include Fourth Amendment norms, as well as equal protection precepts. Under traditional equal protection rules, governmental conduct that causes a disparate racial impact alone does not violate the Fourteenth Amendment. The Court rejected a disparate impact test for equal protection cases because it feared that such a rule "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Davis*, 426 U.S. at 248. Under the Fourth Amendment, however, a judge could find that the traffic stops revealed by these statistics violate the Fourth Amendment's prohibition against unreasonable seizures because of their disparate and arbitrary impact on black motorists without fear that her ruling could be used to invalidate other types of governmental conduct unrelated to police searches and seizures that have a disparate impact on blacks or other discrete and insular groups.

108. In *Pedro Soto*, the head of the New Jersey State Police and individual troopers all "testified that blacks drive indistinguishably from whites." Letter from Judge Francis, *supra* note 56, at 6. In addition, Dr. James Fyfe, a criminal justice professor and qualified expert in police science and police procedures testified that "there is nothing in the literature or in his personal experience to support the theory that blacks drive differently from whites." *Id.* (footnote omitted).

109. In *Pedro Soto*, the prosecution did attempt to rebut the statistical proof offered by the defense, but Judge Francis concluded that the prosecution's expert witness did not undermine the validity or accuracy of the defense's statistical evidence. *See id.*

Amendment."<sup>110</sup> The statistical data proffered in *Pedro Soto* and *Wilkins*, and uncovered in Orange County, Florida, and North Carolina does not purport to measure the subjective motives of officers. On the contrary, this evidence depicts the racial composition of motorists eligible for traffic stops, and describes which motorists are actually stopped and searched by the police, regardless of the subjective bias or motives of individual officers. This empirical data provides the type of specific and articulable evidence that the Court traditionally looks for in Fourth Amendment cases.<sup>111</sup> Moreover, the statistical evidence developed in these cases and obtained from police records is more probative than other evidence the Court has sanctioned when judging the reasonableness of investigative detentions and searches.<sup>112</sup>

For example, in *United States v. Sokolow*, the Ninth Circuit invalidated an investigatory stop because federal drug agents did not have reasonable suspicion to justify the detention.<sup>113</sup> Believing the agents to have relied on a "drug courier profile" to seize Sokolow,<sup>114</sup> the appellate court ruled that the drug courier profile by itself could not provide the basis for a lawful seizure. The court explained that personal characteristics of suspected drug couriers, such as nervousness, style of dress, type of luggage, and destination or arrival cities, would not support a finding of reasonable suspicion unless agents provided "[e]mpirical documentation" that "'innocent' behavior is not so innocent."<sup>115</sup>

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110. *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996).

111. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("[I]n justifying a particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.") (footnote omitted).

112. *See infra* notes 113-20 and accompanying text.

113. *See* 831 F.2d 1413 (9th Cir. 1987), *rev'd*, 490 U.S. 1 (1989).

114. Since 1974, the Drug Enforcement Administration has developed a "drug courier profile" which is based on characteristics generally associated with narcotics traffickers. Federal and state agents have been trained to identify suspected drug smugglers based on characteristics contained in the profile. *See* Morgan Cloud, *Search and Seizure By The Numbers: The Drug Courier Profile And Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 847 (1985); Yale Kamisar, *The Fourth Amendment*, in *THE SUPREME COURT: TRENDS AND DEVELOPMENTS* 119, 133-43 (Dorothy Opperman ed., 1981).

115. *Sokolow*, 831 F.2d at 1420; *see also* *United States v. Weaver*, 966 F.2d 391, 397 (8th Cir. 1992) (Arnold, C.J., dissenting) (noting the lack of empirical evidence to support the agent's claim that drug courier passengers exhibit a degree of nervousness more pronounced than innocent airline passengers, and that young black males from Los Angeles were more prone to be drug couriers than young white males; "[t]his [empirical evidence], which we never seem to get in [drug profile] cases, would go far towards enabling us to say whether the kind of police tactic we have before us is reasonable, which is, after all, the controlling criteria in applying the Fourth Amendment").

In the Supreme Court, the government argued, *inter alia*, that the Ninth Circuit's ruling placed an impossible evidentiary burden on the government. The government submitted:

Contrary to the court of appeals' assumption, the kinds of factors that are important to experienced agents in deciding whether to stop a person traveling through an airport are *not readily susceptible to empirical or statistical proof*. It is difficult to assign a numerical value to nervousness for statistical purposes. The significance of other incongruities in demeanor, behavior, or dress are equally difficult to quantify. In a case such as this one, how could the government be expected to present statistical evidence regarding the likelihood that a person taking a four-day trip from Honolulu to Miami and back (via an indirect route) would be returning with narcotics? By ordering experienced narcotics agents to justify their investigative decisions with statistical proof, the court of appeals has essentially rejected the use of inference based on *common sense* and the shared experience of agents in the field.<sup>116</sup>

Reversing the Ninth Circuit's decision, the Court agreed with the government's position that empirical proof was unnecessary to satisfy Fourth Amendment standards in this context.<sup>117</sup> When deciding whether there is reasonable suspicion for a specific detention, the Court stated that one "must consider 'the totality of the circumstances—the whole picture.'"<sup>118</sup>

The point here is not to reexamine the soundness of *Sokolow*, but to note that the Court has not imposed high standards on the type of evidence it will consider when deciding whether an investigative detention satisfies the Fourth Amendment's reasonableness requirement. Not only did the government fail to provide empirical proof for its claim that the drug courier profile has reliable predictive value, but there was reason to believe that "most of the drug courier profile characteristics appearing in the caselaw do not accurately describe the behaviors of actual drug couriers and generally are not relied upon by the police."<sup>119</sup>

In terms of empirical quality, the statistical evidence developed in *Pedro Soto* and *Wilkins* is substantially more credible and reliable than the evidence accepted in *Sokolow*. In contrast to the government's evidence in *Sokolow*, the claims of racial impact con-

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116. Brief for the United States at 33-34, *United States v. Sokolow*, 490 U.S. 1 (1989) (No. 87-1295) (emphasis added).

117. The Court, however, did not explicitly endorse the government's "trust the 'common sense' of federal agents" standard for measuring reasonable suspicion.

118. *Sokolow*, 490 U.S. at 8 (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)).

119. *Cloud*, *supra* note 114, at 884.

nected with pretextual traffic stops are “susceptible to empirical and statistical proof.”<sup>120</sup> The statistics showing arbitrary and biased stops in New Jersey and Maryland have been subjected to adversarial challenge, and courts can test and refute future complaints of racial targeting when the government provides neutral explanations for the racial disparities.

Furthermore, if, as explained in *Sokolow*, the reasonableness requirement of the Fourth Amendment dictates an analysis that considers “the totality of the circumstances—the whole picture,” the question arises why empirically sound statistical evidence showing the relevance of race in traffic stops is not part of “the whole picture.” Where such evidence exists, at a minimum, the burden should be on the government to show why this evidence should be omitted from the Court’s analysis when considering the constitutional validity of pretextual traffic stops.

It begs the constitutional question to assert that “[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”<sup>121</sup> The issue is the reasonableness of police officers targeting and stopping black and Hispanic drivers for traffic violations in order to intercept narcotics. That an officer had probable cause of a traffic violation should not end the Fourth Amendment inquiry. It does not require a radical view of the Fourth Amendment to believe that the manner in which a particular intrusion is effectuated—even one authorized by a warrant or valid exception to the warrant requirement—must satisfy the reasonableness test of the Fourth Amendment.<sup>122</sup> A traffic stop, even one supported by probable cause,

120. The government conceded that the criteria of the drug courier profile are “not susceptible to empirical or statistical proof.” Brief for the United States at 33, *Sokolow* (No. 87-1295).

121. *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996); see also *id.* at 1776 (“With rare exceptions not applicable [to pretext stops], the result of [the Fourth Amendment’s] balancing is not in doubt where the search or seizure is based upon probable cause.”).

122. The *Whren* Court intimated that where probable cause exists, judicial scrutiny of the manner in which a search or seizure is effectuated is required only where the challenged intrusion is “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.” *Id.* at 1776-77 (citing cases involving deadly force, forcible entries into private homes, and physical penetration of one’s body). A routine traffic stop by plain clothes officers, according to *Whren*, “does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.” *Id.* at 1777.

It is not surprising that the Court would consider evaluating the reasonableness of pretextual traffic stops a waste of judicial time and resources. The Court sees the step in *Whren*—officers brazenly violating departmental rules to stop a vehicle with two black males on pretextual traffic charges in order to pursue a hunch that the occupants were drug dealers—as “the run-of-the-mine case.” *Id.* From a police perspective the Court is right; stopping black

is unreasonable if it is the product of racial targeting.<sup>123</sup> Imagine, for example, empirical evidence indicating that police are targeting motorists for traffic stops based on the political views expressed in a bumper sticker.<sup>124</sup> Also, in each case, an officer has probable cause that the motorist with the suspect bumper sticker did commit a traffic infraction. These hypothetical seizures not only violate norms embodied in the First Amendment's Free Speech Clause,<sup>125</sup> but they also imperil Fourth Amendment values because they constitute arbitrary and biased seizures.<sup>126</sup>

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drivers for dubious traffic offenses is routine. From the perspective of a black motorist, however, this type of seizure is never routine and always insulting. See Don Jackson, *Police Embody Racism To My People*, N.Y. TIMES, Jan. 23, 1989, at A25, stating:

The black American finds that the most prominent reminder of his second-class citizenship are the police. . . . Operating free of constitutional limitations, the police have long been the greatest nemesis of blacks, irrespective of whether we are complying with the law or not. We have learned that there are cars we are not suppose to drive, streets we are not suppose to walk. We may still be stepped and asked "Where are you going, bey?" Whether we're in a Mercedes or a Volkswagen.

*Id.*

123. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416 (1974) (stating that our Fourth Amendment rights should not depend upon "the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin"); cf. KENNEDY, *supra* note 35, at 162. In his excellent book, Professor Kennedy states that "[e]veryone—ordinary citizens, legislators, police officials, judges, and so on—should demand that race play no routine role in decisionmaking regarding whom to scrutinize for purposes of law enforcement." *Id.* But Professor Kennedy acknowledges, on the other hand, that "[i]f [the] police would be legally justified in detaining an individual in the absence of the race factor, but the police nonetheless used race in their calculation, the detention would be ruled legal—but the police would also be subject to administrative and legal penalties for having utilized a prohibited criterion." *Id.*

124. See Respondent's Brief at App. 9A, *Delaware v. Prouse*, 440 U.S. 648 (1979) (No. 77-1571) (describing a 1969 study where 15 college students with good driving records affixed a Black Panther bumper sticker to their cars; within 17 days, the students had been issued 33 traffic citations, and a researcher found that "it is statistically unlikely that this number of previously "safe" drivers could amass such a collection of tickets without assuming real bias by police against drivers with Black Panther bumper stickers'").

125. Cf. Karst, *supra* note 104, at 29-30, stating:

The equality principle, viewed as a barrier against content censorship, also implicitly underlies the elaborate [F]irst [A]mendment doctrines that prohibit giving officials discretion to decide when speech shall be permitted and when it shall be punished or the speaker denied a license. . . . It is not accidental that these [F]irst [A]mendment doctrines serve equality not only at the level of principle but also at a practical level, defending nonconformists, dissenters, and the disadvantaged. The principle of equal liberty of expression, like the equal protection clause, has special relevance for protecting the downtrodden.

126. *But cf.* *Holland v. City of Portland*, 102 F.3d 6, 10 (1st Cir. 1996) (finding that an arrest motivated by a suspect's refusal to identify himself does not violate the Fourth Amendment if there are other objective grounds for the arrest and "any attempt to untangle the ascribed motive from a skein of others, in prompting an arrest justified by objective probable cause, would invite exactly the inquiry into police motivation condemned by *Whren*").



Ultimately, the *Whren* Court casually sanctioned the "costs" imposed on black motorists by pretextual stops because of its unwillingness to perform a balancing analysis for an "exceedingly important issue regarding a pervasive law enforcement practice"<sup>127</sup> which has caused consternation among large segments of the minority community. Perhaps, if such a balancing analysis had been performed, the Court might have still ruled in favor of the government, albeit under a different rationale. Alternatively, a balancing analysis that actually weighed the costs and benefits associated with race-based pretextual traffic stops might have prompted the Court to conclude that such seizures are "unreasonable," despite the existence of probable cause for a traffic stop.<sup>128</sup> The *Whren* Court, however, found the burden of pretextual stops on black motorists so insignificant that it saw no reason to perform any balancing analysis. The Court's performance and judgment on this point is a perfect illustration of why many blacks feel like second-class citizens in America's judicial system.

### III. THE LINKAGE BETWEEN RACE AND THE FOURTH AMENDMENT

Evidence of police targeting black motorists for pretextual traffic stops reveals a phenomenon that merited the Court's attention in *Whren*, even under conventional Fourth Amendment analysis. Instead of addressing this conduct, however, the Court reaffirmed its view that Fourth Amendment values are not implicated by race-based seizures. The Court cannot justify its failure to scrutinize race-based seizures under the reasonableness standard of the Fourth Amendment by claiming that evidence of racial targeting merely reflects the subjective intent of individual officers, which is without value for Fourth Amendment purposes. On the contrary, evidence of racial targeting provides concrete and objective information on the racial populations of motorists stopped by police officers. Absent a race-neutral explanation, this evidence shows that police officers are targeting black and other minority motorists in an arbitrary and biased fashion, in violation of the Fourth Amendment.<sup>129</sup> But the *Whren* Court's separation of racial concerns from Fourth Amendment norms is wrong for another reason: Earlier cases have demonstrated

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127. LAFAYE, *supra* note 43, § 1.4, at 13.

128. See *infra* notes 177-80, 190-200 and accompanying text.

129. See *supra* Part II for discussion of this data.

that racial factors are relevant when adjudicating Fourth Amendment issues.

After the civil unrest and urban violence of the 1960s, a Presidential Panel, the Kerner Commission,<sup>130</sup> found that hostility between the police and the black community was a contributing factor, and in some places, *the* factor, precipitating riots in several urban centers. As the Commission remarked, "Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police."<sup>131</sup> Three months after the Commission issued its report, the Supreme Court decided *Terry v. Ohio*.<sup>132</sup> *Terry* concerned a police procedure that was a source of enormous tension between the police and black Americans: stopping and frisking individuals on the street.<sup>133</sup>

At first glance, *Terry v. Ohio* was a simple case, unrelated to police harassment of or brutality against urban blacks.<sup>134</sup> *Terry*

130. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter Kerner Commission].

131. *Id.* at 158. Another Presidential Panel had issued similar findings a year earlier. See UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967). The report stated that:

Misuse of field interrogation . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt "aggressive patrol" in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident. The Michigan State survey found that both minority group leaders and persons sympathetic to minority groups throughout the country were almost unanimous in labeling field interrogation as a principal problem in police community relations.

*Id.*

132. 392 U.S. 1 (1968).

133. Kerner Commission, *supra* note 130, at 159-60 (noting that police departments, reacting to concerns about crime, have begun aggressive patrol practices, including stop and frisk tactics, "without weighing their tension-creating effects [for the Negro community] and the resulting relationship to civil disorder"). The brief filed by the NAACP Legal Defense and Educational Fund, Inc., left no doubt about the tensions caused by stop and frisk tactics in black neighborhoods:

[T]he ill effects of stop and frisk practices, particularly in the ghetto, is as strong at least as any evidence of their good effects "from a purely law enforcement point of view." . . . We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. *Speaking bluntly, we believe that what the ghetto does not need is more stop and frisk.*

Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 60-62, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74 & 67) (quoting Herman Goldstein, *Police Policy Formulation: A Proposal for Improving Police Performance*, 65 MICH. L. REV. 1123, 1140 (1967) (emphasis added)).

134. Cf. Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2245 (1993) (arguing that the opinions of the

concerned the constitutionality of frisking a suspect for weapons where police did not have probable cause for an arrest.<sup>135</sup> Prior to *Terry*, the Court had never upheld a seizure of a person in the absence of probable cause that a crime had occurred. But an overwhelming majority in *Terry* held that a frisk was permissible where an officer had specific and articulable facts—reasonable suspicion—to believe that a person was armed and dangerous.<sup>136</sup> Though the Court acknowledged that the case “thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity,”<sup>137</sup> the result in *Terry* turned on the practical concern that officers be permitted to protect themselves during potentially dangerous street encounters.<sup>138</sup>

While the Court’s ruling and rationale were straightforward, another aspect of *Terry* gave the Court some difficulty. The Court acknowledged that police initiate street confrontations for a host of reasons. It noted that some confrontations “are wholly unrelated to a desire to prosecute for crime” and some undoubtedly violate the Fourth Amendment.<sup>139</sup> The Court also recognized that certain police practices, including stop and frisk tactics, disproportionately impact certain groups within society, particularly urban blacks, and can exacerbate tensions between the police and the minority community.<sup>140</sup> And though the Court ultimately upheld the frisking of individuals on less than probable cause, the racial impact connected with “aggressive patrol” techniques and stop and frisk policies noticeably troubled the Court. In fact, the Court signaled, albeit in an enigmatic footnote, that the judiciary must consider racial impact when determining the constitutional reasonableness of an intrusion. Referring to police practices that generated tensions within the black community, the Court noted:

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Warren Court “proceed in a colorblind frame, implying that race was not central to the decisions because the cases presented universal issues of the relations between the State and individuals” and “the defendants in cases like *Terry v. Ohio* just ‘happened to be black’ ”).

135. *Terry*, 392 U.S. at 15.

136. *Id.* at 21-22.

137. *Id.* at 9.

138. See ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 466-68 (1997) (noting Chief Justice Warren’s concerns that frisking dangerous suspects was essential to protect the lives of police officers); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 686 (1983) (same).

139. *Terry*, 392 U.S. at 13-14 (“Doubtless some police ‘field interrogation’ conduct violates the Fourth Amendment.”).

140. *Id.* at 14-15 n.11. Professor Schwartz’s article discusses in greater detail the scholarly and empirical evidence regarding the impact that stop and frisk practices have on black citizens. See generally Schwartz, *supra* note 35.

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is *clearly [relevant]* to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.<sup>141</sup>

*Terry* was the Court's first Fourth Amendment ruling to acknowledge that a police intrusion may cause adverse racial tensions and to mandate judicial assessment of that negative impact when analyzing the reasonableness of the intrusion. Unfortunately, the modern Court has neglected this component of *Terry's* analysis; however, the Court has not made race a forbidden topic when measuring the reasonableness of seizures. On the contrary, where the govern-

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141. *Terry*, 392 U.S. at 17 n.14 (emphasis added). Professor Schwartz has taken a very different view of this matter. She has argued that while the *Terry* Court recognized the racial impact that stop and frisk policies had on black individuals, the Court explicitly made facts and legal arguments about race irrelevant to Fourth Amendment analysis. See, e.g., Schwartz, *supra* note 35, at 346 ("[T]he *Terry* majority adopted the N.A.A.C.P.'s empirical contentions about the extent and causes of racial disparity in the incidence of stops and frisks only to conclude that such considerations are irrelevant to delineating the proper standard for stops and frisks."). Professor Schwartz correctly points out that racial impact should have played a more prominent role in the *Terry* Court's Fourth Amendment analysis. I disagree, however, with her conclusion that the reasoning of *Terry* made arguments about race irrelevant to search and seizure law. See *id.* at 349 ("Many scholars have failed to recognize that *Terry* argued explicitly for the irrelevance of facts about racial impact.").

Concerns about the racial consequences of stop and frisk practices clearly occupied a subordinate position in comparison with *Terry's* concerns about police safety and violent crime. But the evidence of racial harassment, albeit not decisive to the Court's holding, "was a matter of great concern to the Court." Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 59 (1968).

Regrettably, the Court's recognition of the relevance of racial impact to Fourth Amendment norms was smothered by an extensive commentary on the limits of the exclusionary rule as a judicial device to control certain police tactics. See *Terry*, 392 U.S. at 13-15. The Court seemed to suggest that certain police tactics, including illegitimate harassment of racial minorities, were beyond the control of the judiciary. See, e.g., *id.* ("Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."). Professor Schwartz reads this portion of *Terry* to establish the proposition that the exclusionary rule is helpless to prevent police from stopping and frisking citizens because of their race. See Schwartz, *supra* note 35, at 348. But the Court's comments do not extend that far. Instead, the Court was merely explaining, as it did in the textual passage that precedes this footnote, that the exclusionary rule is not a cure-all for all forms of police misconduct. "The exclusionary rule . . . cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections." *Terry*, 392 U.S. at 13. Put simply, the exclusionary rule cannot be a "blunderbuss" to reach illegitimate police practices. See LaFave, *supra*, at 62. That message did not undercut the Court's declaration that racial impact is clearly relevant to Fourth Amendment analysis.

ment submits that racial factors promote law enforcement interests, the Court freely discusses race and has explicitly allowed race-based seizures in some Fourth Amendment contexts.

In *United States v. Brignoni-Ponce*, federal Border Patrol agents stopped the respondent's car near the Mexican border because the three occupants appeared to be of Mexican ancestry.<sup>142</sup> While the agents found that the vehicle contained illegal aliens, the Court ruled the stop unconstitutional because the occupants' Mexican appearance alone did not give the officers reasonable suspicion of illegal alien smuggling.<sup>143</sup> Although *Brignoni-Ponce* invalidated the specific seizure at issue, much in the Court's opinion weakened Fourth Amendment protections.

First, the Court explained that roving border patrols did not need probable cause to stop vehicles traveling on roads within one hundred miles of the border. Reasonable suspicion would suffice.<sup>144</sup> In deciding whether there is reasonable suspicion to stop a car in the border area,<sup>145</sup> the Court stated that Mexican appearance is a relevant, but not dispositive, factor.<sup>146</sup>

This last point, of course, was the heart of the case. Although the border agents' sole justification for the stop in *Brignoni-Ponce* was the occupants' apparent Mexican ancestry, the Court seemed skeptical about the ability of agents to recognize the ethnicity of individuals traveling along interstate highways at night.<sup>147</sup> Moreover, even if agents could truly recognize the ethnicity of motorists, ethnic appearance alone would "justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country."<sup>148</sup> Many American citizens share "the physical characteristics identified with Mexican ancestry, and even in

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142. 422 U.S. 873, 875 (1975).

143. *See id.* at 885-86.

144. *See id.* at 884. Prior to *Brignoni-Ponce*, probable cause was the constitutional standard for judging the validity of an automobile seizure or search. *See Carroll v. United States*, 267 U.S. 132, 155-56 (1925). While the Court had conceded that there is often a "troublesome line . . . between mere suspicion and probable cause," *Brinegar v. United States*, 338 U.S. 160, 176 (1949), the Court reaffirmed the notion that moving vehicles could not be stepped or searched on less than probable cause of criminal activity. *See id.* at 164-71.

145. *See Brignoni-Ponce*, 422 U.S. at 884. The Court approvingly noted several criteria which might establish reasonable suspicion. The Court repeated, but did not expressly endorse, the government's assertion that "trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut." *Id.* at 885.

146. *See id.* at 887.

147. *See id.* at 886 ("At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights.").

148. *Id.*

the border area a relatively small proportion of them are aliens.”<sup>149</sup> Thus, according to the Court, the probability that “any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”<sup>150</sup>

Within limited circumstances, *Brignoni-Ponce* permitted racial and ethnic traits to be legitimate factors in determining whether an investigative stop was reasonable. Within a year, however, the Court gave the border patrol additional discretionary authority to use race and ethnicity and justified its result with statistical evidence. In *United States v. Martinez-Fuerte*, the Court held that the Fourth Amendment permitted the seizure of vehicles at fixed checkpoints away from the border even in the absence of individualized suspicion that a particular car contained illegal aliens.<sup>151</sup> The Court stated that officers could rely on the appearance of Mexican ancestry as justification for the selective referral of motorists to a “secondary inspection” area for questioning.<sup>152</sup>

In reaching this result, the Court stressed the important national interest in stemming the influx of illegal aliens, the difficulty of detecting smuggling, and the minimal nature of the intrusion involved at fixed checkpoints. The Court resolved the inconsistency between selective seizures on the basis of ethnicity and the Fourth Amendment’s purpose of restraining police discretion and barring arbitrary seizures by noting two details. First, the Court pointed to the government’s submission that agents rely on factors besides ethnicity when making selective referrals and noted the statistical evidence supporting this assertion.<sup>153</sup> Second, the Court suggested that use of ethnicity was a successful law enforcement tool.<sup>154</sup>

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149. *Id.*

150. *Id.* at 886-87.

151. *See* 428 U.S. 543, 562 (1976).

152. *See id.* at 563 (holding that it is permissible to “refer motorists selectively to the secondary inspection area . . . on the basis of criteria that would not sustain a roving-patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation”).

153. The Court explained that while Mexican-Americans and legal resident aliens of Mexican ancestry represented a significant percentage of the population of California, less than one percent of the cars passing through the checkpoint are stopped for questioning. In addition, the Court opined that if the percentages of persons in California with Spanish-speaking skills or possessing Spanish surnames were applied to the approximately 146,000 cars traveling through the checkpoint, one would expect that almost 23,400 vehicles would contain persons of Spanish or Mexican origin, “yet only 820 were referred to the secondary area. This appears to refute any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area.” *Id.* at 563 n.16.

*Terry*, *Brignoni-Ponce*, and *Martinez-Fuerte* indicate, albeit in different ways, that race matters in the adjudication of Fourth Amendment questions. The *Terry* Court acknowledged the racial impact and tensions caused by stop and frisk practices.<sup>155</sup> *Terry* recognized that police often deploy stop and frisk policies in black neighborhoods or against individual blacks in a disparate manner and that these policies and procedures generate friction between the police and black Americans.

Further, the *Terry* Court made the degree of resentment in the black community provoked by frisking a relevant factor in deciding the reasonableness of frisking under the Fourth Amendment.<sup>156</sup> Thus, where convincing evidence shows that a particular practice adversely affects a segment of the community, this evidence merits judicial attention. The Court does not promote Fourth Amendment values by ignoring evidence of racial impact. True, the Court interprets the Fourth Amendment's command as general reasonableness, which typically involves an analysis of objective factors.<sup>157</sup> But if evidence shows that police use particular search and seizure methods in black

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The statistics cited by the Court do not refute the claim that Border Agents were relying exclusively on ethnicity in deciding which motorists to question. It is true that because Border Agents were looking for Mexicans illegally entering the country, and given the significant percentage of Hispanic persons represented in California's population, one might have expected a larger percentage of motorists to be stopped and questioned by Border Agents. But simply because less than one percent of the cars passing through the checkpoint were stopped does not mean that the Hispanic motorists who were selected for questioning were not targeted because of their ethnic background. Like other governmental actors, Border Agents have limited time and resources to conduct their duties. Given additional time and resources, one would expect that a greater percentage of motorists would have been stopped and questioned.

154. Echoing the motto that "nothing works like success," the Court noted: "Of the 820 vehicles referred to the secondary inspection area . . . roughly 20% contained illegal aliens. Thus, to the extent that the Border Patrol relies on apparent Mexican ancestry at this checkpoint . . . that reliance clearly is relevant to the law enforcement need to be served." *Id.* at 564 n.17.

155. *Cf.* Schwartz, *supra* note 35, at 360-75 (noting empirical studies indicating that blacks are more likely to be stopped and frisked than whites, and urging that racial impact be a factor in Fourth Amendment analysis, but resisting a change in substantive Fourth Amendment standards until further research can identify the causes of racially disparate intrusions); Brief for NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 58-69, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74 & 67).

156. *See Terry*, 392 U.S. at 17 n.14. *Cf. Race and the Criminal Process*, *supra* note 25, at 1518:

[C]ourts should realize that police may often inflict the sorts of injuries classically thought to arise when the government acts discriminatorily, and should apply a [F]ourth [A]mendment balance that takes account of citizens' interest in avoiding such injuries. Rather than inquiring merely into the extent a given police action infringes on a citizen's freedom, courts should also ask to what extent the action discriminatorily injures the individual and the racial group to which the individual belongs.

157. *See, e.g., Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250-51 (1991); *Illinois v. Rodriguez*, 497 U.S. 177, 178 (1990).

neighborhoods or against minorities in a disparate way, that evidence is no less objective than other factors considered by the Court. Indeed, where such evidence exists, as it did in *Terry*, it would be irresponsible not to consider this evidence as part of the "totality of the circumstances" for determining the reasonableness of the intrusion. At a minimum, where evidence of racial impact exists, the burden should be on those who advocate ignoring such evidence to explain why evidence of racial impact should not form part of the "totality" analysis.

Of course, one might respond that this approach would require different Fourth Amendment standards for different groups or individuals depending on race, ethnicity, or cultural makeup of the neighborhood. Consideration of racial impact, however, does not compel a "double standard" or outcome-determinative rule under the Fourth Amendment. Search and seizure law seldom turns on the consideration of a single factor. The modern Court interprets the Fourth Amendment to require reasonableness in official searches and seizures, and reasonableness is, more often than not, determined by balancing the nature and degree of the intrusion on the individual against the public interests served by the intrusion.

For example, the Court applies a totality test to decide whether a police intrusion triggers Fourth Amendment protection. In *Bostick*, the Court considered whether police questioning of a passenger seated on a bus during a stopover of an interstate trip constituted a seizure. The fact that the passenger did not feel free to leave the bus and was accosted by two officers standing in the cramped aisle space were merely factors in considering whether a seizure had occurred.<sup>158</sup> Similarly, valid consent to a police search does not turn on the individual's knowledge that he or she had a right to refuse the search, as one might expect. Rather, the constitutional validity of a consent search depends upon whether the consent was "voluntary," which is a question of fact to be determined from the totality of all the circumstances: "While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent."<sup>159</sup>

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158. See *Florida v. Bostick*, 501 U.S. 429, 435-37 (1991).

159. See *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973); see also *Rodriguez*, 497 U.S. at 177, which involved a third party's authority to consent to the search of a suspect's home. Historically, the home is accorded the highest degree of protection under the Fourth Amendment, and the Court has stated unequivocally that "[a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. 573, 590 (1980). Knowing this, one might have predicted that a warrantless police search of a



Depending on the context, Fourth Amendment reasonableness analysis takes account of several criteria: the text of the amendment;<sup>160</sup> history;<sup>161</sup> threats to police safety;<sup>162</sup> the use of standardized police procedures;<sup>163</sup> subjective and objective expectations of privacy;<sup>164</sup> the presence of police coercion;<sup>165</sup> the fact that privacy interests are only marginally protected;<sup>166</sup> the potential danger to the public at large;<sup>167</sup> the severity of the alleged criminal conduct a suspect has committed;<sup>168</sup> whether a suspect poses a threat to the community or actively resists an officer's seizure;<sup>169</sup> and a whole host of other factors

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home based solely on the consent of someone without authority to consent to the search was a patent violation of the Fourth Amendment. But consistent with its "objective" model of the Fourth Amendment, the modern Court has not opted for this bright-line approach. Instead, *Rodriguez* held that even in cases where a third party *lacks* authority to consent to a search of another's home, the question of consent must be judged under a totality of the circumstances standard—do the facts available to the officer warrant a person of reasonable caution in the belief that the third party had authority to consent to the search? See *Rodriguez*, 497 U.S. at 185-88.

160. See, e.g., *Oliver v. United States*, 466 U.S. 170, 176-77 (1984) (holding that the text of the Fourth Amendment does not extend to the "open fields" of private property).

161. See, e.g., *Wilson v. Arkansas*, 514 U.S. 927, 931-36 (1995) (relying on history of common law to find that the "knock and announce" rule forms part of the reasonableness inquiry of the Fourth Amendment); *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (noting that one of the purposes of the Fourth Amendment is to "preserve that degree of respect for the privacy of persons and the inviolability of their property that existed" in 1791); *Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting) (noting that the judiciary should be reluctant to invalidate "a police practice that was accepted at the time of the adoption of the Bill of Rights and has continued to receive the support of many state legislatures").

162. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (stating that "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties").

163. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (stating that adherence to police procedures was indicative of a reasonable inventory search of the defendant's automobile).

164. See, e.g., *California v. Greenwood*, 486 U.S. 35, 39 (1988) (stating that "[t]he warrantless search of garbage bags . . . would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable"); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (holding that a reasonable expectation of privacy must be subjectively reasonable to the defendant and objectively reasonable to society).

165. See, e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (holding that the presence of coercion should be considered in assessing the validity of a consent search of the suspect during a traffic stop).

166. See, e.g., *California v. Acevedo*, 500 U.S. 565, 596 (1991) (balancing the right to privacy against the need for effective law enforcement); *Gerstein v. Pugh*, 420 U.S. 103, 112-13 (1975) (same).

167. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 620 (1989) (stating that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements").

168. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (stating that "the severity of the crime at issue" goes to the reasonableness of a warrantless step); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that an officer's use of deadly force may be constitutional where the fleeing suspect is believed to have committed a crime involving "serious physical harm").

depending on the circumstances. Under the current regime, any one of these various considerations may influence the ultimate decision of whether a challenged police intrusion is reasonable, but racial impact may not. This is a curious way to formulate Fourth Amendment rules. As Professor Randall Kennedy has perceptively recognized in discussing the connection between race and suspicion of criminality, not only is reasonableness a concept that defies easy description, it can also disguise unspoken assumptions and fears about law enforcement and the people enmeshed in confrontations with the police. Professor Kennedy asserted that:

Reasonableness, then, is not a definite, arithmetic, objective quality that is independent of aims and values. It is a concept that is considerably more subtle, complex, malleable, and mysterious than the simplistic model of decisionmaking relied upon by those who accept at face value the "reasonableness" or "rationality" of conduct that expresses not only controversial moral and political judgments, but also deep-seated, perhaps unconscious, affections, fears, and aversions.<sup>170</sup>

Because reasonableness is a malleable concept, the Court could easily add consideration of racial impact to the current analysis without requiring fundamental change of search and seizure standards. More importantly, however, consideration of racial impact would enable the Court to take account of the realities on the street, which include police methods disproportionately employed against minority groups and individuals.

Concerns about creating a Fourth Amendment "double standard" should not preclude consideration of racial impact. In certain contexts, the police already utilize a *de facto* double standard, relying on race, ethnicity, or socio-economic status of the neighborhood when conducting searches and seizures. Where the police engage in (or are perceived by minorities to have engaged in) such conduct, the ensuing harm and tension within the minority community is palpable, even for the police.<sup>171</sup> Judicial recognition and consideration of the adverse

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169. See, e.g., *Graham*, 490 U.S. at 396 (listing these factors as part of its inquiry into the reasonableness of the investigatory stop).

170. KENNEDY, *supra* note 35, at 144-45.

171. See, e.g., Neil MacFarquhar, *Torture Case Puts Officers on Defensive More Skittish*, N.Y. TIMES, Aug. 27, 1997, at A1 (describing the tension officers feel while on duty in minority communities after alleged police brutality case: "People don't look at cops as someone who helps them," said Joe Gueits, a housing police officer in the Bronx. "They look at us like an occupying force. This kind of thing makes that worse. You can tell by the way they look at you, by their body language, by what they say.").

racial impact that emerges from such police behavior will not harm Fourth Amendment norms.

Instead, consideration of racial impact will sharpen judicial review because judges will have to pay attention to the effects of police behavior on all racial groups.<sup>172</sup> In other words, judicial assessment of racial impact need not produce differing Fourth Amendment rules for individuals depending upon their racial or ethnic background. Thus, when white motorists are targeted under the guise of pretextual traffic stops, their Fourth Amendment rights have also been violated. Sensitivity to the harm caused by racial targeting by the police will expand the Fourth Amendment interests of all citizens.<sup>173</sup>

Finally, consideration of racial impact will advance Fourth Amendment values by focusing judicial attention on the arbitrary application of police authority. Despite the connection of arbitrary police conduct to the history of the Amendment, controlling police discretionary power is not the central focus of the modern Court's Fourth Amendment doctrine. Instead, the Court appears to focus on whether a challenged police intrusion is rational from a police

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172. See Robert Tomsho, *Matter of Principle: High School in El Paso Gives the Border Patrol A Civil Rights Lesson*, WALL ST. J., Feb. 23, 1993, at A1 (describing a federal judge's granting of a temporary restraining order after hearing evidence that border patrol was harassing Hispanic high school students with unreasonable searches and seizures). For a more detailed report on alleged law enforcement misconduct against Hispanic individuals in Southwestern border communities, see FEDERAL IMMIGRATION LAW ENFORCEMENT IN THE SOUTHWEST: CIVIL RIGHTS IMPACTS ON BORDER COMMUNITIES 81 (1997) (summarizing allegations of misconduct by the Border Patrol, including "shootings, beatings, and sexual assault; racial and ethnic insults; rude and abusive language; threats and coercion; illegal or inappropriate searches, seizures, and arrests; and confiscation of documents").

173. A few years ago, the Clinton Administration proposed that tenants in the nation's public housing projects be encouraged to sign "consent clauses" that would allow unannounced, random sweeps of their apartments. Although many black public housing residents applauded the Administration's action, a few individuals voiced concern that the proposed "consent clauses" might be a mandatory condition of leases given primarily to poor minority persons with no place else to go for housing choices. See Tracey Maclin, *Public Housing Searches Ignore the Constitution*, CHRISTIAN SCI. MONITOR, May 24, 1994, at 19.

Not surprisingly, white suburban homeowners are just as concerned about open-ended invitations to police entry as are poor black residents who live in public housing units. A few months after the Administration's proposal, a police chief in a predominately white New Jersey suburb learned that homeowners in his town thought little of his plan of asking parents of teenagers to waive their Fourth Amendment rights and allow police to enter their homes to discover alcohol-drinking teenagers. See Robert Hanley, *An Anti-Drinking Campaign, and How It Flopped*, N.Y. TIMES, Sept. 28, 1994, at B1 (describing that after sending out approximately 2,700 consent forms to homes with teenagers, only 20 forms were returned after four months; Police Chief Louis J. Mader stated, "I'd have liked a better response.'").

perspective.<sup>174</sup> Yet, in certain contexts, search and seizure law remains concerned with the discretionary powers of police officers.<sup>175</sup>

Discretionary police authority may generate discriminatory searches and seizures and tension between the police and minority individuals.<sup>176</sup> Even where there is no proof that the police are acting with a specific racial intent, a police intrusion may violate Fourth Amendment norms due to its arbitrary nature. An intrusion can be "arbitrary" even where there is a facial justification for its initiation if it is "conducted at the discretion of [police] officials, who may act despotically and capriciously in the exercise of the power to search and seizure."<sup>177</sup> Under this view, a pretextual traffic stop of a black motorist is a paradigmatic arbitrary seizure. Probable cause of a traffic offense does not negate the arbitrariness of the seizure because the seizure is effectuated for purposes other than traffic enforcement. The officer conducts the seizure because he unreasonably believes that there is a greater chance of finding criminal evidence in the vehicle of a black motorist. While officers may hold these views or are trained to think in this manner, there is no empirical data that supports the claim that police are more likely to find contraband or other criminal evidence in the vehicles of black motorists stopped for traffic violations.<sup>178</sup> Rather, judges are left only with the bald

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174. See Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 236-39 (1993).

175. See, e.g., *Michigan State Police v. Sitz*, 496 U.S. 444, 454-58 (1989); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 323 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 529 (1967).

176. See Respondent's Brief at App. 9A, *Delaware v. Prouse*, 440 U.S. 648 (1979) (No. 77-1571) ("The conclusion reached by all of the relevant literature [discussing discretionary power of police officers], in short, is that police officers' behavior will reflect their biases when the officers are given free rein."); SAMUEL WALKER, *TAMING THE SYSTEM* 32 (1993) (noting the validity of the claim that an unregulated deadly force policy "allows officers to act out their racial stereotypes: that the black man lurking in the shadows is inherently dangerous, whereas the white suspect is not. Restrictive shooting policies, although nominally addressed to race-neutral situations, curb the effect of racial stereotypes, with rather dramatic results." Because of restrictions on officer discretion, "[f]ewer people are being shot and killed, racial disparities in shooting have been reduced, and police officers are in no greater danger."); Schwartz, *supra* note 35, at 351-54 (describing empirical studies indicating that unrestrictive deadly force policies lead to greater numbers of blacks being shot and killed); see also REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS: TO SECURE THESE RIGHTS 25 (1947) ("[W]herever unfettered police lawlessness exists, civil rights may be vulnerable to the prejudices of the region or of dominant local groups, and to the caprice of individual policemen. Unpopular, weak, or defenseless groups are most apt to suffer."), quoted in Brief for the NAACP Legal Defense and Education Fund, Inc., as Amicus Curiae at 4 n.5, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74 & 67).

177. Amsterdam, *supra* note 123, at 411.

178. For example, the data produced by the Maryland State Police reveals no differences in the success rate of troopers when searching black and white motorists stopped for traffic offenses. Cf. Hecker, *supra* note 43, at 569 (noting that the disparate impact on black motorists from traffic stops "may be justified if, in fact, race is probative of drug activity or correlates with

assertions from the police that when blacks are involved, "there is always a greater chance of something wrong."<sup>179</sup>

While *Terry* signaled that the adverse racial impact from police intrusions was a legitimate concern of the Fourth Amendment, *Brignoni-Ponce* and *Martinez-Fuerte* endorsed an officer's reliance on race, in certain contexts, when deciding whether to effectuate a seizure. More specifically, *Martinez-Fuerte* sanctioned discretionary seizures of motorists even where there was reason to believe that race was a motivating, if not determinative, factor for the seizure. Reliance on race was constitutionally acceptable, because "that reliance clearly is relevant to the law enforcement need to be served."<sup>180</sup>

One need not applaud the results in *Brignoni-Ponce* and *Martinez-Fuerte* to recognize that these rulings support the submission of race-based arguments to attack the validity of pretextual traffic stops. Both cases recognize that in certain contexts, race is a crucial component in police decisionmaking. Both cases also recognize the relevance of race in the adjudication of Fourth Amendment issues. Moreover, *Martinez-Fuerte* established the Court's willingness to allow statistical evidence to influence the resolution of Fourth Amendment issues related to race. The Court cited government-supplied statistics to show that border agents were not relying exclusively on ethnicity in making selective referrals, and that the use of ethnicity by border agents to make selective referrals promoted the law enforcement interest at hand.<sup>181</sup>

The Court's Fourth Amendment logic should not be unidirectional. If the Court permits the government to offer statistical evidence to prove that its officers are not exclusively relying on race or ethnicity in exercising their discretionary authority, then the Court should allow black defendants to submit statistical evidence indicating otherwise. Similarly, if the government offers statistical evidence to sustain its assertion that race or ethnic-based decisionmaking "clearly is relevant" to law enforcement interests,<sup>182</sup> then black defendants should be given the opportunity to submit statistical evidence indicating that race-based decisionmaking does not promote the law enforcement goal served by a particular intrusion. In sum,

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race-neutral factors that are probative of drug activity," but finding it "unlikely that the vast disparity found in the [Volusia County] Florida and Maryland studies in particular can be explained in this fashion. It seems more likely that police employ racial stereotypes that too often view black drivers, in particular, with suspicion.")

179. BROWN, *supra* note 46, at 170.

180. *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976).

181. *See id.* at 564 n.16.

182. *See id.* at 564 n.17.

just as *Brignoni-Ponce* ruled that ethnic considerations are relevant in determining the reasonableness of a seizure and *Martinez-Fuerte* allowed statistical data on ethnicity and police decisionmaking to influence its determination of the reasonableness of discretionary race-based seizures, the Court should give black defendants the chance to prove that racial targeting of motorists for traffic seizures is unreasonable.

As a doctrinal matter, the core of the Fourth Amendment is reasonableness, and reasonableness "is measured in objective terms by examining the totality of the circumstances."<sup>183</sup> An objective consideration of any law enforcement program should include accurate information about how the law is enforced. Fourth Amendment "reasonableness" should not be defined in a vacuum, or in a way that ignores the realities visited upon black and other minority citizens.<sup>184</sup> Where accurate information indicates that black motorists are being detained for traffic violations in a disproportionate manner, or in brazen violation of public regulations, and the state provides no neutral explanation other than the fact that a traffic offense has been observed, a judicial rebuke of these police procedures is essential. Otherwise, the value of the Fourth Amendment will be meaningless for a substantial segment of our nation.

#### IV. THE SUBSTANCE OF THE FOURTH AMENDMENT

Putting aside the Court's prior cases acknowledging that race matters in the adjudication of search and seizure law, *Whren* was wrong to segregate racial concerns and Fourth Amendment values for other reasons. The model of the Fourth Amendment envisioned by the *Whren* Court provides only procedural protection for the individual. Under *Whren*, the Amendment protects a motorist from unwarranted discretionary seizures provided there is no probable cause to believe that he has committed a traffic offense. Once probable cause exists, Fourth Amendment protection terminates and the police are free to conduct a seizure at their whim.

This constitutional interpretation is wrong because it overlooks that the Fourth Amendment provides substantive, as well as proce-

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183. *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

184. See *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) (observing that the Fourth Amendment protects "Everyman").

dural, protection. In the context of traffic stops, the substantive protection afforded by the Amendment requires the judiciary to consider the real world of law enforcement and to reconcile that reality with a meaningful right to be free from unreasonable seizures. When viewed this way, the analysis of *Whren* is more than "quite disappointing."<sup>185</sup> The opinion is spurious because it disregards, or at best is indifferent to, police discretion, police perjury, and the mutual distrust between blacks and the police—issues intertwined with the enforcement of traffic stops.

#### A. Police Discretionary Power

The constitutional liberty of motorists to drive the nation's highways cannot be confined to the procedural right announced in *Whren*. Under *Whren*, if the police have probable cause that any motorist has committed a traffic offense, a routine traffic stop is per se permissible under the Fourth Amendment. This interpretation, one could argue, is not only consistent with constitutional text and history, but highly pragmatic because it eases the burden of judges faced with claims of pretextual behavior.<sup>186</sup> This reasoning, however, ignores the substantial discretion officers possess in deciding which vehicles to stop for the myriad of traffic offenses they observe daily.<sup>187</sup>

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185. LAFAYE, *supra* note 43, § 1.4, at 13.

186. See Harris, *supra* note 19, at 553, noting that *Whren's* reasoning is not entirely wrong. There is no question that it will be easier for lower courts to work with the "could have" than the "would have" rule. The "could have" rule requires very little evidence; the officer need only testify that she observed a traffic violation and stopped the car. The court will either believe the testimony or reject it.

*Id.*

187. *Id.* at 559 ("[W]ith the traffic code in hand, any officer can stop any driver any time."); see also Bill Torpy & Diane Loupe, *It's a Stab in the Dark*, ATLANTA J. & CONST., May 9, 1992, at B1 (noting comments of an officer that the more cars you stop and search, the more drugs will be found; another officer testified that he routinely asks for consent to search during traffic stops and searched at least 80% of the cars he stopped, but that he has stopped "hundreds" of vehicles where no drugs were found).

Although the overwhelming majority of these pretextual stops do not yield narcotics or other contraband, some officers are unmoved by criticism of their conduct and believe their seizures of innocent motorists are proper. See Mary Callahan, *CHP Under Fire For Traffic Stops In Drug Fight Officials Deny North Coast Action Violates Rights*, PRESS DEMOCRAT (Santa Rosa, Cal.), Nov. 25, 1996, at A1 (quoting officer who feels that pretextual traffic stops are valid, "I look at it this way, and I tell people, you know, there's a lot of drugs in this country, and I almost look at it as their little part in the war against drugs"); Greg Garland, *I-10 Drug Searches; Seizure Law Critics Point To Sulphur Police Tactics*, THE ADVOCATE (Baton Rouge, Louisiana), Feb. 9, 1997, at 1A (responding to the criticism that his highway drug interdiction team is successful in only one out of every 33 searches, Sulphur Police Captain Keith Andrus stated: "It's just like when you have a war, you're going to have some friendly fire. . . . Is it worth inconveniencing a few people or would you rather have your community ruined by drugs?").

The Court, however, responds that probable cause of a traffic violation sufficiently checks police discretion.<sup>188</sup> This answer is illusory. Probable cause of a traffic offense not only fails to diminish the discretion possessed by officers, but may actually facilitate arbitrary seizures. If 98.1% of the drivers on a section of the New Jersey Turnpike are committing a traffic offense, and 15% percent of those violators are black motorists, but 46% of the stops by state troopers on that section of the Turnpike are of black motorists<sup>189</sup> and there is not a race-neutral explanation for the disparity, then probable cause is not acting as a check on police discretion.

If 93.3% of the drivers on a portion of Interstate 95 in Maryland are violating the traffic laws, and only 17.5% of those violators are black motorists, but 72.9% of the vehicles stopped and searched by state troopers are driven by black motorists<sup>190</sup> and the head of the state police defends this disparity by noting that traffic stops are made on a case-by-case judgment based on "intelligence information" that he will not reveal to the public,<sup>191</sup> then probable cause is not acting as a check on police discretion. Similarly, if black men account for 45% of the traffic citations issued by a special drug patrol in western North Carolina that uses traffic stops as a means to interdict narcotics, but black men received only 24.2% of the traffic citations issued by other officers patrolling the same highways,<sup>192</sup> and the commander of the special drug patrol cannot provide a race-neutral explanation for the disparity of black men stopped by the special patrol,<sup>193</sup> then probable cause is not acting as a check on police discretion. Faced with this evidence, it is easy to see that when police target minority motorists for pretextual traffic stops, probable cause is an insufficient check against unreasonable seizures. Rather than protect motorists, in this context, probable cause acts as a lever to initiate an arbitrary seizure, and then insulates the decision from judicial review.<sup>194</sup>

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188. See *Whren v. United States*, 116 S. Ct. 1769, 1773-74 (1996).

189. See *supra* note 65 and accompanying text.

190. See *supra* notes 80-81 and accompanying text.

191. *All Things Considered: ACLU Says Maryland State Police Stop Too Many Blacks* (National Public Radio, May 7, 1997).

192. See *supra* note 99 and accompanying text.

193. See *Neff & Stith, supra* note 2, at A1.

194. Professor LaFave makes a similar point when he notes that the essential element in *Whren* "is that probable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action." LAFAVE, *supra* note 43, § 1.4, at 6.



*Whren's* "procedural" model of the Fourth Amendment does not curtail the enormous discretion officers possess in deciding which motorists to stop. And the Court's sarcastic response to this logic only adds insult to the constitutional injury suffered by black and Hispanic motorists:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide . . . which particular provisions are sufficiently important to merit enforcement.<sup>195</sup>

As the Court well knows, the complaint of black motorists is not the expansiveness of the traffic code itself, but the arbitrary and discriminatory seizures effectuated under the code by police. Nor is there an absence of legal "principle" to handle this symptom of discretionary and arbitrary power. The principle of preventing discretionary enforcement of the law has been asserted in other constitutional contexts and fits nicely with the purpose of the Fourth Amendment to check police power. Justice Robert Jackson explained why the judiciary must remain alert to official abuses under the guise of discretionary authority:

[N]othing opens the door to arbitrary action so effectively as to allow [government] officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.<sup>196</sup>

Justice Jackson's logic also extends to the power of police officers who enforce the traffic laws. The problem in *Whren* and other pretextual stop cases is not deciding "at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."<sup>197</sup> Rather, the problem is deciding whether officers jeopardize Fourth Amendment norms when they conduct seizures under a traffic code in a manner that brazenly deviates from normal procedures or wildly defies statistical expectations. As Professor Davis has already

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

196. *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

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

noted, the police can execute arbitrary seizures even under an otherwise reasonable and neutral law: "If the police enforce a statute against one out of a hundred known violators, and no one can know in advance which one will be selected or why, does not the system of enforcement encourage arbitrariness and discrimination, and is it not therefore unconstitutional?"<sup>198</sup> Finally, the Court will not have to search in vain to determine which provisions of the traffic code are "sufficiently important to merit enforcement."<sup>199</sup> Where police discretion produces arbitrary seizures under a facially valid provision, the solution is not to invalidate the particular provision of the code, but to nullify the police conduct itself.<sup>200</sup>

### B. Police Perjury

The discretionary power of officers to effectuate arbitrary seizures under the traffic laws is just one tool available to police to deny black and Hispanic motorists their substantive rights under the Fourth Amendment. Police often commit perjury to achieve the same end. While the practice of police perjury may not be as old as police targeting of blacks for disproportionate search and seizure, it often works hand in glove with police intrusions that have a disparate impact on minority persons.<sup>201</sup>

The Mollen Commission, impaneled to study police corruption in New York City, has documented the linkage between police perjury

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198. Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 714 (1974); see also Hecker, *supra* note 43, at 555-57.

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

200. When confronted with evidence that some prosecutors were using their discretionary power via the peremptory challenge to arbitrarily remove black jurors, the Court did not nullify peremptory challenges entirely, but required prosecutors to provide race-neutral explanations where defendants show a prima facie case of discrimination. See *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986). Under the *Batson* framework, a defendant can establish a prima facie case by showing that the totality of the relevant facts raises an inference of purposeful discrimination. Once a prima facie case is shown, the burden shifts to the state to rebut that case. "The State cannot meet this burden on mere general assertions that its officials did not discriminate or that they properly performed their official duties." *Id.* at 94. Rather, the prosecutor must provide race-neutral reasons for his selection criteria. A similar model could be employed where a black motorist can raise an inference of discrimination either through statistical data that indicate race-based traffic stops or the type of brazen violation of internal police regulations that occurred in *Whren*.

201. See PAUL CHEVIGNY, *POLICE POWER* 277 (1969) (finding that police lying or "distortion of fact is the thread [that] runs through all abuses, however different they may seem").

and police misconduct.<sup>202</sup> The Commission did not mince words in describing the extent of police perjury it found:

As with other forms of corruption, it is impossible to gauge the full extent of police falsifications. Our investigation indicated, however, that this is probably the most common form of police corruption facing the criminal justice system, particularly in connection with arrests for possession of narcotics and guns. Several officers also told us that the practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: "testi[l]ying."<sup>203</sup>

The Commission described the typical forms of perjury, the motivations for it, and the failure to stop it by supervisory and prosecutorial officials in blunt terms:

When the stop or search [of a vehicle] was unlawful, officers falsified their statements about the arrest to cover for the unlawful acts. Fabricating a traffic violation or claiming to see contraband in plain view was a commonly used pretext—which was virtually never questioned by supervisory officers. In one score from a car, for example, the records indicate that the officers fabricated a story for the District Attorney's Office about a car running a red light, and that they then observed the butt of a gun in plain view.<sup>204</sup>

The Commission continued:

What breeds this tolerance is a deep-rooted perception among many officers of all ranks within the Department that nothing is really wrong with compromising facts to fight crime in the real world. . . . As one dedicated officer put it, police officers often view falsification as, to use his words, "doing God's work"—doing whatever it takes to get a suspected criminal off the streets. This attitude is so entrenched, especially in high-crime precincts, that when investigators confronted one recently arrested officer with evidence of perjury, he asked in disbelief, "What's wrong with that? They're guilty."

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202. THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT, July 7, 1994 [hereinafter Mollen Commission].

203. *Id.* at 36.

204. *Id.* at 29-30. The Commission further noted:

Officers also commit falsification to serve what they perceive to be "legitimate" law enforcement ends—and for ends that . . . officers alike stubbornly defend as correct. In their view, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested. Officers reported a litany of manufactured tales. . . . We found that such motivations to falsify are often present in narcotics enforcement units, especially to justify unlawful searches and arrests. . . . Regardless of the motives behind police falsifications, what is particularly troublesome about this practice is that it is widely tolerated by corrupt and honest officers alike, as well as their supervisors. Corrupt and honest officers told us that their supervisors knew or should have known about falsified versions of searches and arrests and never questioned them.

*Id.* at 38-40.

[S]everal former and current prosecutors acknowledged—"off the record"—that perjury and falsifications are serious problems in law enforcement that, though not condoned, are ignored. The form this tolerance takes, however, is subtle which makes accountability in this area especially difficult . . . . [A] story that sounds suspicious to the trained ear; patterns of coincidences that are possible, but highly unlikely; inconsistencies that could be explained, but sound doubtful. In short, the tolerance the criminal justice system exhibits takes the form of a lesser level of scrutiny when it comes to police officers' testimony. Fewer questions are asked; weaker explanations are accepted.<sup>205</sup>

One need not accept that perjury is a pervasive problem in every police department to recognize that perjury (or the potential for perjury) may play a central role in how pretextual traffic stops are carried out. When narcotics officers and their supervisors admit to stopping as many cars as possible under the guise of traffic stops to investigate drug trafficking,<sup>206</sup> the possibilities and temptation to lie about a motorist's driving skills are manifest. When patrol officers know that higher-ranking officers tolerate and sometimes encourage targeting minority motorists,<sup>207</sup> but frown upon the practice when publicly disclosed, the incentive for the police to falsely claim that a black motorist was not wearing his seatbelt or failed to signal a turn is substantial. When subjective traffic violations—like driving unreasonably slowly or not paying full attention to driving—can be falsely lodged against a motorist and the officer knows that his testimony is unlikely to be contradicted by a neutral source, the chances for perjury increase. Finally, when actual police perjury is captured on film, showing a Louisiana officer stopping a motorist for "improper lane change," and research shows that this officer has issued hundreds of other traffic tickets for the same violation and minority drivers are the overwhelming targets of these traffic stops,<sup>208</sup> then police perjury is no longer an isolated phenomenon, but part and

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205. *Id.* at 41-42.

206. See Roy & Curtis, *supra* note 91, at A1; Bill Torpy & Diane Loupe, *Cherokee County Drug Searches Called Racially Biased Traffic Stops: Critics Say Minorities Are Unfairly Singled Out, But Deputies Defend The Tactics*, ATLANTA J. & CONST., May 9, 1992, at B1 (quoting Lieutenant Vic West, the commander of the Bartow County, Georgia, Sheriff's Department's drug unit, "Obviously, it's a stab in the dark; if you search enough cars, you'll catch a few.").

207. See German, *supra* note 47, at A1 (discussing report written by township attorney which states that a supervising sergeant in the Avon, Connecticut, Police Department conceded that he directed his officers to find reasons to stop vehicles driven by minority motorists); Gorman, *supra* note 51, at A1 (reporting that two Avon officers and two former officers support claim that high-ranking officers have encouraged patrol officers to target minority drivers; these officers say that "as many as 10 of the department's 30 members are known to follow that practice").

208. See *Dateline*, *supra* note 55.

parcel of the process used to deny black motorists their substantive rights under the Fourth Amendment.<sup>209</sup>

Despite these realities, the Court rarely, if ever, considers police perjury when resolving Fourth Amendment cases.<sup>210</sup> Evidently, the Court believes that police perjury (or the potential for perjury) is not a problem and has no bearing on the meaning of the Fourth Amendment.

This type of thinking is misplaced for several reasons.<sup>211</sup> To begin with, officers do routinely lie about searches and seizures.<sup>212</sup>

209. The Christopher Commission, which undertook a massive study of the Los Angeles Police Department after the Rodney King beating, found that black and Hispanic drivers in Los Angeles were targeted for unjustified traffic stops:

Many witnesses complained of the apparent practice by the police of stopping individuals because they resemble a generalized description of a suspect or because they appear not to belong in a particular neighborhood. The Commission repeatedly heard accounts of African-American and Latino males, often in expensive or late model cars, or in parts of the City where they might be considered out of place, being stopped for no apparent reason or for one that appears on the surface to be a pretext. The existence of this practice among some LAPD officers was acknowledged by an LAPD senior command officer in testimony before the Commission. . . .

Routine stops of young African-American and Latino males, seemingly without "probable cause" or "reasonable suspicion," may be part and parcel of the LAPD's aggressive style of policing. . . . Incidents were reported of African-American [off-duty] officers being stopped by white officers in circumstances not resulting in an arrest or otherwise involving any apparent infraction or illegal activity by the African-American officers.

REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, July 9, 1991, 76-77 [hereinafter Christopher Commission].

210. *But see* James v. Illinois, 493 U.S. 307, 321 (1990) (Stevens, J., concurring) (recognizing the potential for police perjury); Franks v. Delaware, 438 U.S. 154, 165 (1978) (recognizing the potential for false statements).

211. Professor Cloud has explained why judges have erroneously relied upon the Court's objective Fourth Amendment analysis to reject incorporating concerns about police perjury into their Fourth Amendment decision-making processes:

First, it fails to recognize that an officer's perjury about some aspect of an investigation may raise questions concerning the veracity of his testimony about the facts creating reasonable suspicion or probable cause. Second, it abandons the educational functions of constitutional law. . . . One appropriate function of judicial review in Fourth Amendment cases is to teach police officers what the Constitution permits and what it forbids, and how to conform their conduct to these requirements.

Cloud, *supra* note 43, at 1367 n.127.

212. Many scholars and observers of the criminal justice system have acknowledged the widespread problem of police perjury connected with Fourth Amendment cases. *See* ALAN M. DERSHOWITZ, REASONABLE DOUBTS 49-64 (1996) (describing police perjury as common); H. RICHARD UVILLER, TEMPERED ZEAL 115-116 (1988) (asserting that police regard perjury "as the natural and inevitable outgrowth of artificial and unrealistic *post facto* judgments that release criminals"); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1315 (1994) ("Police perjury occurs most frequently when officers are testifying about searches and seizures and witness interrogations. Police perjury about these topics is often the product of rules imposing penalties for illegal police practices, and the most important rules are those requiring the exclusion of evidence discovered by unconstitutional means."); Dripps, *supra* note 39, at 698-703 (noting that police perjury is common and that perjury in Fourth Amendment cases "can function as a shock-absorber, making sure that the exclusionary rule does not cost the

The Court's refusal to acknowledge police perjury (or the potential for perjury) in a case like *Whren* is particularly unfortunate since "motivations to falsify are often present in narcotics enforcement units, especially to justify unlawful searches or arrests."<sup>213</sup> Second, successful police perjury "can defeat any constitutional rule."<sup>214</sup> By deciding Fourth Amendment cases without accounting for the potential for police perjury, judges appear naive and Fourth Amendment rules take on a "make-believe" quality to the police and the public. In the end, because police can lie without fear of the consequences and the public is aware of this fact, nobody will take the Fourth Amendment seriously.

Furthermore, police perjury is often difficult to detect at first glance. Trial judges must "decide cases one at a time, so the police almost always win the swearing contest"<sup>215</sup> between officer and defendant. Police perjury becomes evident when "one stands back from the particular case and looks at a series of cases. It then becomes apparent that policemen are committing perjury at least in some of them, and perhaps in nearly all of them."<sup>216</sup> When the difficulty of proving police falsehoods in a particular case is combined with the strong incentives influencing a trial judge to accept the police version of the facts,<sup>217</sup> the chances of a trial judge dismissing a case or suppressing evidence because of police perjury are remote. Because of these problems and incentives confronting trial judges, appellate courts are more likely to discern police perjury and are better positioned to construct Fourth Amendment standards that account for the possibility or likelihood of police perjury in the future. Nevertheless, appellate courts rarely discuss police perjury when adjudicating Fourth Amendment cases.<sup>218</sup>

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convictions of especially heinous criminals"); Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 94-114 (1992) (discussing the existence and the types of police perjury); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044-45 (1996) (arguing that police commit perjury in search and seizure cases because, among other reasons, they think they can get away with it); Irving Younger, *The Perjury Routine*, NATION, May 8, 1967, 596, 596-97; Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1049-51 (1987) (describing officers conceding the existence of police perjury).

213. Mollen Commission, *supra* note 202, at 38.

214. Dripps, *supra* note 39, at 693.

215. *Id.*

216. Younger, *supra* note 212, at 596; *see also* Cloud, *supra* note 212, at 1318 ("It is the repetition of th[e] suspicious story in case after case that suggests fabrication.")

217. *See* Cloud, *supra* note 212, at 1321-24; Slobogin, *supra* note 212, at 1047.

218. *Cf.* Cloud, *supra* note 43, at 1367 n.127 (citing *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir. 1987), where the court stated that the exclusionary rule was intended to "deter

These realities suggest that police perjury is a legitimate (but neglected) concern of judges in the adjudication of Fourth Amendment cases. But there is an additional reason why police perjury should be a factor in a case like *Whren*. When officers target minority motorists for traffic stops to initiate unwarranted narcotics investigations, falsification is more easily committed by the police and accepted by judges. When the discovery of narcotics is the goal, the catalysts for police perjury increase:

[F]alsifications are most prevalent in high-crime precincts [in New York City] where opportunities for narcotics and gun arrests abound. In such precincts, the prevalence of open criminal activity is high and the utility of an illegal search or arrest is perceived as great. Officers - often correctly - believe that if they search a particular person, or enter an apartment without a warrant, they will find drugs or guns. Frustrated by what they perceive to be unrealistic rules of law and by their own inability to stem the crime in their precincts through legal means, officers take the law into their own hands. And police falsification is the result.<sup>219</sup>

New York City is not the only place where police perjury and falsehoods facilitated illegal searches and seizures. In Philadelphia, operating under the pretense of a war on drugs, individual police officers flagrantly violated the rights of black residents and hid about their actions without fear of retribution.<sup>220</sup> "[A] handful of officers conducted a virtual reign of terror in poor black neighborhoods for years, stopping suspects at will, stealing money, searching homes with phony warrants, and sometimes even planting drugs" on innocent persons.<sup>221</sup> As one elderly resident of North Philadelphia put it:

"Man, this stuff has been going on for years in North Philadelphia. . . . I can remember it all the way into the Sixties. Cops stop anybody they want, do

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unconstitutional conduct, not perjury. In the absence of a constitutional violation, there is no basis upon which to exclude relevant evidence."). Professor Cloud properly notes that the reasoning of cases like *Hawkins* is misplaced because it "erroneously consider[s] the questions of police perjury and the reasons for a search and seizure to be unrelated." Cloud, *supra* note 43, at 1367 n.127.

219. Mollen Commission, *supra* note 202, at 38.

220. See Mark Bowden & Mark Fazlollah, *Lying Officer Never Counted on FBI; Officer John Baird Had Beaten 22 Complaints. Then Came 23. And The Federal Agents, Who Had Been Waiting and Watching His Scheming Ways*, PHILADELPHIA INQUIRER, Sept. 12, 1995, at A1; Mark Bowden & Mark Fazlollah, *Officer Rode Roughshod, Got Away With It*, PHILADELPHIA INQUIRER, Sept. 11, 1995, at A1; Mark Bowden & Mark Fazlollah, *With '91 Case, Scandal Unfolded The Student Told of Torment at the Hands of The Two 39th District Police Officers. Investigators: Findings Were the Tip of a Corruption Iceberg*, PHILADELPHIA INQUIRER, Sept. 10, 1995, at A1 [hereinafter *Corruption Iceberg*].

221. Thomas J. Gibbons, Jr., et al., *Police Corruption Inquiry Widens Up to 9 Officers in Elite Unit Implicated*, PHILADELPHIA INQUIRER, Aug. 13, 1995, at A1.

whatever they want, whenever they want. They beat people up and lock people up. It they don't have evidence, they make up evidence. And when you go to court, who the judge and jury going to believe? Some nigger or the policeman?"<sup>222</sup>

The same police perspectives and law enforcement interests that induce police perjury in the high-crime neighborhoods of New York and Philadelphia also exist on the highways patrolled by officers responsible for interdicting illegal drugs. Many officers see nothing wrong with targeting innocent minority drivers for traffic stops to intercept narcotics because they believe (or are told) that blacks and Hispanics dominate narcotics trafficking and other criminal conduct.<sup>223</sup> Officers also believe that if they stop and search enough cars they will eventually find drugs. Finally, from a police perspective, the benefit of catching a guilty person justifies the perjury. An officer may falsely assert that she saw drugs in plain view, or add a fact to create probable cause or to validate a consent search—particularly where she perceives that the judiciary has imposed unrealistic barriers to the efforts to snare drug traffickers.<sup>224</sup>

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222. *Corruption Iceberg*, *supra* note 220, at A1.

223. *See, e.g.*, Harris, *supra* note 19, at 565 (quoting a Criminal Intelligence Report of the Maryland State Police that instructed troopers to watch for "dealers and couriers (traffickers) [who] are predominately black males and females . . . utilizing Interstate 68"); Rey & Curtis, *supra* note 91, at A1 (quoting Captain Ernie Scott, the commander of Orange County's narcotics unit on why narcotics officers are more likely to search black motorists: "We don't control drug routes and demographics. I think black mules (hired drug carriers) and black smugglers are represented higher (on the turnpike) than they would be on other highways in the nation."); Tracie Reddick, *Routine Stops Called Stereotyping*, TAMPA TRIBUNE, Aug. 18, 1997, at Florida/Metro 1 (describing a black officer admitting that he has allowed stereotypes that black males are criminals to affect his police work); Louise Taylor, *Video Shows Police How to Profile*, SUN HERALD (Biloxi), Dec. 3, 1989, at A1 (describing a videotape of the Louisiana State Police that teaches officers how to catch drug couriers on highways where "video describes the [courier] as a Latin American man between 20 and 36 years old."); Torpy & Loupe, *supra* note 206, at B1 (quoting Deputy Sheriff Jeff Shields: "They say we pull over and arrest more blacks. . . . Well, studies show black people traffic more drugs."). Stereotypes of blacks and Hispanics are not confined to police officers. In discussing highway drug couriers, Mississippi Justice Court Judge Vernon Ladner, was quoted as saying: "If I was a policeman and I saw a Hispanic on the interstate, I'd think they were hauling dope." Taylor, *supra* note 18, at A15.

224. *See* UVILLER, *supra* note 212, at 115-16 (concluding that after spending a sabbatical riding around with New York City officers, that the most common form of police perjury is "the *instrumental adjustment*. A slight alteration in the facts to accommodate an unwieldy constitutional constraint and obtain a just result.").

Interestingly, even when a traffic stop and police search reveals no narcotics, officers are sometimes reluctant to accept the motorist's innocence. *See* Michael Janofsky, *In Drug Fight, Police Now Take to the Highway*, N.Y. TIMES, Mar. 5, 1995, at 1.12 (describing how after 30 minute search of a black motorist's vehicle for drugs disclosed no narcotics, motorist left without a hint of anger which struck officer as unusual; "[i]t would hardly surprise him, [the officer] said as the couple pulled away, that whatever [the second officer] was looking for would be somewhere inside the Pathfinder on its trip back to New Jersey"); Neff & Stith, *supra* note 2, at A1 (quoting Sgt. Timmy Lee Cardwell, who issued more than 60% of his traffic citations to black



All of this suggests that perjury (or the potential for perjury) is a real problem with pretextual traffic stops, particularly when minority motorists are involved.<sup>225</sup> At a minimum, judges should incorporate the likelihood of perjury into their deliberations when adjudicating Fourth Amendment claims in this context. Otherwise, pretextual traffic stops will continue, immunized by an "objective" analysis that leaves unnoticed and unaccountable the realities of the street. This state of affairs is unfortunate because the "Fourth Amendment operates most of the time not in the rarefied world of legal theory, but in the gritty reality of the thousands of encounters each day between citizens and the armed representatives of government."<sup>226</sup>

### C. Distrust and Pretextual Traffic Stops

A final aspect of police targeting minority motorists for pretextual traffic stops merits judicial attention: the distrust and loathing of the police engendered among some blacks by this practice. Blacks correctly see pretextual traffic stops as another sign that police officers view blacks, particularly black males, as criminals who deserve singular scrutiny and treatment as second-class citizens.<sup>227</sup>

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men while on drug patrol, "You may have had 17 cars searched where drugs are only found one time. But that's not to say that the person who didn't have it wasn't involved."). This police contempt and suspicion of blacks mirrors the attitudes of some officers who harassed blacks a generation ago. See ED CRAY, *THE BIG BLUE LINE* 185 (1967), quoting a retired Detroit police officer's testimony to the United States Commission on Civil Rights:

I would estimate - and this I have heard in the station also - that if you would stop and search 50 Negroes and you get one good arrest out of it that's a good percentage; it's a good day's work. So, in my opinion, there are 49 Negroes whose rights have been misused, and that goes on every day. That's just about the entire population of Detroit over a period of time.

225. See Younger, *supra* note 212, at 597 (commenting that the Court in *McCray v. Illinois*, 386 U.S. 300 (1967), "should not so casually have rejected the idea of a constitutional presumption that policemen commit perjury."); *but cf.* *McCray v. Illinois*, 386 U.S. 300, 313 (1967) ("Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every [suppression hearing] to assume the arresting officers are committing perjury."). Ironically, the *McCray* Court justified its decision to uphold the "informer's privilege," which permits the prosecution to withhold at a suppression hearing the identity of an informant who has provided the only evidence establishing probable cause to arrest a person, by noting that at a suppression hearing "the accused seeks to avoid the truth." *Id.* at 307. The Court apparently was not worried that police perjury also "avoid[s] the truth."

226. Cloud, *supra* note 43, at 1345.

227. See, e.g., *United States v. Harvey*, 16 F.3d 109, 114 (6th Cir. 1994) (Keith, J., dissenting) stating:

The majority's willful disregard of the flagrant discriminatory treatment [by a police officer who testified that the motorists' race was a factor in his decision to make a traffic stop] in this case endorses a system where one set of traffic regulations exist for African-Americans. . . . For the same traffic infraction, a white motorist remains an unimpeded

Selecting minority motorists for pretextual traffic stops is a predictable phenomenon in American culture. When police officers either believe or are taught that black and Hispanic motorists are the “mules” who transport illegal narcotics across the nation’s highways, one naturally expects disproportionate stops of minority motorists. This anticipation, however, does not remove the resulting insult and harm. Indeed, these seizures provoke an attitude of distrust of the police that was prevalent among blacks thirty years ago when the Court sanctioned the practice of stop and frisk notwithstanding the ill effects that the intrusion engendered among blacks.

In *Terry*, the amicus brief of the NAACP Legal Defense and Educational Fund provided the Court with an argument which depicted the realities that blacks confront during police encounters and expressed a different perspective on stop and frisk tactics.<sup>228</sup> Emphasizing that the Court should not determine the issue of stop and frisk in a manner oblivious to race, the brief pointed to “the obvious, unhappy fact that the policeman today is the object of widespread and intense hatred in our inner cities” because of aggressive patrol practices used against blacks.<sup>229</sup> The brief also called attention to the different ways that blacks and the police perceive each other. Blacks, more so than whites, had negative opinions about police courtesy, performance, and honesty. Inner city black males viewed officers as brutal and sadistic individuals.<sup>230</sup> Similarly, according to the brief:

[P]olice attitudes toward working class Negro youths and young adults are often based on the concept of the Negro as a savage, or animal, or some being outside of the human species. Therefore, the police expect behavior from Negroes in accordance with this concept. . . . Because of the police officer’s conception of the Negro male, he frequently feels that most Negroes are dangerous and need to be dealt with as an enemy even in the absence of visible criminal behavior.<sup>231</sup>

These “complementary attitudes result in a vicious circle of behavior which serves to confirm the image which Negro males and

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violator, whereas an African-American motorist automatically becomes a suspected felon and menace to society. Such disparate treatment alienates and ostracizes African-Americans, fortifying their badge of second-class citizenship.

228. Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 1, *Terry v. Ohio*, 392 U.S. 1 (1968) (Nos. 63, 74 & 67).

229. *Id.* at 60-61.

230. *See id.* at 64.

231. *Id.* (quoting Letter of the Director of the Lemberg Center for the Study of Violence).

police officers hold of each other."<sup>232</sup> Finally, the brief cautioned the Court not to be swayed by "the familiar inflated claims for stop and frisk as tools of law and order,"<sup>233</sup> without also considering the consequences engendered by the intrusion:

Whatever its conveniences and benefits to a narrow view of law-enforcement, stop and frisk carries with it an intense danger of inciting destructive community conflict. To arm the police with an inherently vague and standardless power to detain and search, especially where that power cannot effectively be regulated, contributes to the belief which many Negroes undeniably have that police suspicion is mainly suspicion of them, and police oppression their main lot in life.<sup>234</sup>

Today, there are troubling parallels to the atmosphere that existed when *Terry* was decided. Despite impressive reductions in the crime rate in many urban areas, "[m]any blacks have come to see the police as just another gang."<sup>235</sup> From Los Angeles to Philadelphia, blue-ribbon commissions, the press, and scholars continue to document the immense distrust that minority groups feel towards the police.<sup>236</sup> In many places, minorities have good reason for their misgivings.<sup>237</sup> For example, New York City officials like to brag that they have the nation's most professional and well-trained police force. The force has been run by two black police commissioners in the last

232. *Id.*

233. *Id.* at 68.

234. *Id.* at 68-69. The arguments of the NAACP brief were bolstered by the findings and recommendations of the Kerner Commission. The Commission urged that police administrators pay closer attention to the attitudes of blacks toward police behavior. It noted:

The recommendations we have proposed are designed to insure proper police conduct in minority areas. Yet there is another facet of the problem: Negro perceptions of police misconduct. Even if those perceptions are exaggerated, they do exist. . . . Many police officials believe strongly that there are law enforcement gains from [aggressive patrol] techniques [like stop and frisk]. However, these techniques also have law enforcement liabilities. Their employment therefore should not be merely automatic but the product of a deliberate balancing of pluses and minuses by command personnel. . . . If the aggressive patrol clearly relates to the control of crime, the residents of the ghetto are likely to endorse the practice. What may arouse hostility is not the fact of aggressive patrol but its indiscriminate use so that it comes to be regarded not as crime control but as a new method of racial harassment.

Kerner Commission, *supra* note 130, at 160-61.

235. David K. Shipler, *Living Under Suspicion*, N.Y. TIMES, Feb. 7, 1997, at A33; *see also* MacFarquhar, *supra* note 171, at A1.

236. *See generally* CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995) [hereinafter NAACP Investigation of Police Conduct].

237. *See* Bruce Shapiro, *When Justice Kills*, NATION, June 9, 1997, at 21; Buffy Spencer, *Camcorder Catches Police Incident*, SUNDAY HAMPSHIRE REPUBLICAN (Springfield, Mass.), Apr. 13, 1997, at A1 (describing how a videotape captured police officer kicking a black man in the head while being held on the ground by other officers). *See generally* NAACP Investigation of Police Conduct, *supra* note 236.

fifteen years, but deadly force, brutality, and abuse of power by officers remains a problem in minority communities.<sup>238</sup> The human

238. See, e.g., Dan Barry, *Officer Charged With Brutalizing Man in Brooklyn Police Station*, N.Y. TIMES, Aug. 14, 1997, at A1 (describing how a police officer was charged with shouting racial slurs at black man and shoving the wooden handle of a toilet plunger into his rectum and then into his mouth); David N. Dinkins, *Giuliani Time: What the Mayor Must Do About Police Brutality*, VILLAGE VOICE, Aug. 26, 1997, at 34; David M. Herszenhorn, *Judge Assails but Acquits Officer in Man's Choking Death in Bronx*, N.Y. TIMES, Oct. 8, 1996, at A1; Clifford Krauss, *Case Casts Wide Light On Abuse By Police*, N.Y. TIMES, Apr. 15, 1995, at 1.21; Clifford Krauss & Adam Nossiter, *Bronx Abuse Complaints Stir Crackdown on Police*, N.Y. TIMES, May 2, 1995, at A1; Selwyn Raab, *City's Police Brutality Report Card: Complaints Down, Needs Improving*, N.Y. TIMES, Aug. 17, 1997, at 1.41 (quoting city attorney who defends officers in brutality suits who says many officers feel invulnerable to punishment: "What makes them feel they are above the law is the fact that so little has been done against rogue cops in so many cases in the past. They feel the odds of getting caught are extremely small."); Joe Sexton, *Bronx Police Inquiry Depicts A Night Shift Out of Control*, N.Y. TIMES, May 7, 1995, at 1.1; Deborah Sontag & Dan Barry, *Police Complaints Settled, Rarely Resolved*, N.Y. TIMES, Sept. 17, 1997, at A1 (stating that New York City "routinely pays out tens of thousands of dollars to people who say the police abused them, but the Police Department rarely formally investigates their allegations, and the officers named in their lawsuits almost always continue working without scrutiny or punishment.").

New York Times columnist Bob Herbert has written several articles outlining the impact of police shootings and misconduct in New York's minority neighborhoods. See Bob Herbert, *A Brutal Epidemic*, N.Y. TIMES, Apr. 28, 1997, at A15 ("In many neighborhoods, ethnic minorities are treated with the kind of routine disrespect and brutality that was the hallmark of the Old South. Very few people in high places are concerned about this problem. Crime is going down and that is all that seems to matter."); Bob Herbert, *Crossing the Abyss*, N.Y. TIMES, June 17, 1996, at A15, stating:

According to one view, here were three cops who had to make a split-second decision in a tense and dangerous encounter with a potentially violent criminal. Two of the officers fired because they felt their lives were in jeopardy. According to the other view, here were three white cops on duty in a neighborhood full of people for whom they have only disdain. Two of the officers fired—and kept firing—not because they were provoked or in any real danger, but because that is what white cops do to black men.

*Id.*; Bob Herbert, *One More Police Victim*, N.Y. TIMES, Aug. 14, 1997, at A31 (describing attack of black man by officers with toilet plunger and wondering whether public officials will stop rampant police brutality); Bob Herbert, *Out of Control*, N.Y. TIMES, Mar. 3, 1997, at A17 ("City residents who are endangered by criminal behavior, like the illegal firing of weapons, should not also have to worry about being shot by trigger-happy police officers, or falsely arrested simply because they were in the vicinity of criminal activity."); Bob Herbert, *Police Overkill*, N.Y. TIMES, Apr. 11, 1997, at A29 (reporting that slow investigations of police shootings by the Manhattan District Attorney "inevitably will contribute to the disheartening feeling among many law-abiding New Yorkers, especially in black and Latino neighborhoods, that the guardians of the law are reluctant to move against possible police misconduct."); Bob Herbert, *Savagery Beyond Sense*, N.Y. TIMES, Oct. 18, 1996, at A37 (finding that police beating of a black man arrested for driving with a suspended license resulted in permanent paralysis from the chest down; "the charge was driving with a suspended license. This was not John Gotti the cops had in custody. But then, Gotti would never have been treated like that."); Bob Herbert, *Sickness In the N.Y.P.D.*, N.Y. TIMES, Oct. 11, 1996, at A39, stating:

The killings [by police officers] continue because no one has stepped forward to make it clear to the sadists and the sociopaths and the raging, howling racists in the Police Department that their murderous behavior will not be tolerated. Instead, the entire political and criminal justice establishment has gone out of its way to send the opposite message: Once you button up that uniform and strap on that sidearm you can brutalize certain types of people with impunity.

rights group Amnesty International recently released a report noting that:

the most serious complaints [of police misconduct and brutality in New York City] tended to be concentrated in high crime precincts and in precincts with large minority populations. More than two-thirds of the victims in the cases examined were African-American or Latino and most, though not all, of the officers involved were white. Nearly all of the victims in the cases of deaths in custody (including shootings) reviewed by Amnesty International were members of racial minorities.<sup>239</sup>

Police contempt for minority citizens and its nexus to police abuse, although hard to quantify empirically, remains a problem. Six years ago, the Christopher Commission found, in the wake of the Rodney King beating, significant evidence of police bias against minority citizens. This conclusion was bolstered, in part, by a Los Angeles Police Department survey of 960 officers noting "that approximately one-quarter (24.5%) of 650 officers responding agreed that 'racial bias (prejudice) on the part of officers toward minority citizens currently exists and contributes to a negative interaction between police and the community.'"<sup>240</sup> More recently, criminologist Robert E. Worden, after surveying the scholarship on the causes of police brutality, noted that a suspect's race "has significant effects on the use of force" by police officers.<sup>241</sup> According to Worden, the fact that "officers are more likely to use even reasonable force against blacks might suggest that officers are, on average, more likely to adopt a punitive or coercive approach to black suspects than they are to white suspects."<sup>242</sup>

Adopting a more cautious stance than Professor Worden, Dean Hubert G. Locke finds that many empirical studies are ambiguous on the connection between race and police misconduct.<sup>243</sup> "[R]esearchers do not know or cannot assert much, with empirical reliability, about whether there are racial reasons for police behavior because other

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*Id.*; Bob Herbert, *Why Were They Shot?*, N.Y. TIMES, Feb. 28, 1997, at A35.

239. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT §2.7 (1996).

240. Christopher Commission, *supra* note 209, at 69. The Commission also noted that 27.6% of the LAPD survey's respondents agreed that "an officer's prejudice toward the suspect's race may lead to the use of excessive force. (15% expressed no opinion; 57.3% disagreed.)" *Id.*

241. Robert E. Worden, *The Causes of Police Brutality: Theory and Evidence on Police Use of Force*, in POLICE VIOLENCE, *supra* note 36, at 37.

242. *Id.*

243. See Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in POLICE VIOLENCE, *supra* note 36, at 133.

possible explanations cannot be ruled out."<sup>244</sup> Dean Locke concedes, however, that the "evidence is indisputable that, compared to general population distributions, persons of color are disproportionately represented among those subjected to police use of force where the discharge of a firearm is involved."<sup>245</sup> These findings confirm the anecdotal testimony that has filled the nation's newspapers and radio and television news programs for the last decade. Blacks from all walks of society perceive the police as their antagonist.<sup>246</sup>

To this list of grievances, blacks can now add pretextual traffic stops which, according to the Court, raise no Fourth Amendment concerns. Of course, some may doubt the legitimacy of blacks' protest against pretextual stops. After all, if a black motorist commits a traffic offense, what's wrong with a police stop? And if the police can use the stop to piggyback a drug investigation, all the better.

This type of thinking is wrong. Police do not target minority motorists for traffic stops because they are poor drivers. Nor does police scrutiny occur by chance. Police target blacks and Hispanics because the officers believe that blacks and Hispanics are involved

244. *Id.* at 133.

245. *Id.* at 135. Furthermore, he observes:

The disproportionately high number of complaints filed by citizens of color which allege police misconduct . . . the disproportionately high number of persons of color who are shot at, injured, or killed by police, the significant number of civil damage suits involving excessive force claims in which plaintiffs of color receive significant monetary awards all point to a police-minority community problem of considerable proportions.

*Id.* at 146.

246. Some of the public is confused by this attitude. After all, blacks, especially poor, inner-city blacks, are more likely to be the victims of violent crime committed by black criminals than are whites from the suburbs. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) ("The most lethal danger facing African-Americans in their day-to-day lives is not white, racist officials of the state, but private, violent criminals (typically black) who attack those most vulnerable to them without regard to racial identity."). The irony, then, is that blacks perceive police officers as the enemy. The explanation for this racial disconnect, however, is clear:

Take a few minutes to sit down with an African-American, preferably a male, and ask whether he has ever been hassled by the police. Chances are you'll get an education. . . . He may have been pulled over for the offense of driving after dark through a white neighborhood, for the misdemeanor of driving with a white woman or for the felony of driving too fancy a car. He may have been questioned for making a suspicious late-night call from a public phone at a suburban mall or, as a boy, for flagrantly riding his new bike on his own street. He may have been a student or a lawyer—even an off-duty policeman, threatened with drawn guns before he could pull out his badge. Some black parents warn their children never to run out of a store or a bank: Better to be late than shot dead.

Shipler, *supra* note 235, at A33. As one scholar noted:

If the police may properly view race as an indicia of suspicion, thereby making people of color more vulnerable to stops and questioning and all that stems from unwanted attention from the police, then it follows that people of color will have more reason than white persons to fear the police, regardless of their compliance with law.

with narcotics. Large percentages of blacks and Hispanics are stopped, interrogated, and searched because the police do not respect their Fourth Amendment rights. Put simply, the police are encouraged to do all of this because minority persons, particularly black men, are deemed second-class citizens in the eyes of law enforcement.<sup>247</sup>

## V. CONCLUSION

Three hundred years ago colonial officials ordered the arbitrary seizure of both slave and free blacks for "gadding abroad" the streets. Before the Constitution recognized blacks as citizens of the United States, protest against arbitrary intrusions was futile because blacks "had no rights which the white man was bound to respect."<sup>248</sup> For black motorists, things have not changed significantly.<sup>249</sup> Police are free to target blacks for traffic seizures and use those intrusions to initiate unwarranted criminal investigations.

If the Supreme Court is serious about protecting the Fourth Amendment interests of minority motorists, it should reverse *Whren v. United States* forthwith. Realistically, of course, this will not happen. State judges, however, need not tolerate the status quo on the nation's highways and roads. Ideally, state judges should rule that pretextual stops violate the search and seizure provisions of their state constitutions.<sup>250</sup>

At a minimum, state courts should allow a criminal defendant the opportunity to show that the facts surrounding his traffic stop raise an inference of a race-based seizure. This would then require

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KENNEDY, *supra* note 35, at 153.

247. See Jackson, *supra* note 122, at A25 ("The black American finds that the most prominent reminder of his second-class citizenship [is] the police.").

248. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 407 (1857).

249. If white motorists were subjected to the same percentages of seizures and searches experienced by blacks and Hispanics, things would most likely change. See Harris, *supra* note 19, at 582 ("African-Americans and Hispanics will suffer the bulk of [pretext stops]. Whites will not have to endure it very often; if they did, it probably would not happen.").

250. See LAFAYE, *supra* note 43, § 1.4, at 13 (criticizing the analysis of *Whren*; "the Court managed to trivialize what in fact is an exceedingly important [Fourth Amendment] issue regarding a pervasive law enforcement practice."); cf. 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, 6-7 (1990-91) (arguing that the real evil of a pretext case is the "virtually unlimited authority of police officers to arrest and search based on minor offenses."); Andrew J. Pulliam, Note, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 492 (1994) (asserting that constitutional evil of pretext traffic stops "is that the government can do indirectly through the use of a combination of Fourth Amendment exceptions what it cannot do directly").

the prosecution to provide a race-neutral explanation other than the fact that a traffic offense was observed.

Until this is done, it will be “reasonable,” according to the Supreme Court, for the police to target minority motorists for pretextual stops. *Whren* assures that black and Hispanic motorists will continue to be treated as second-class citizens on the nation’s roads—subject to seizure, interrogation, and search at the whim of a police officer. If *Whren* is a positive result for some because it adds another weapon to the police arsenal in the war on drugs,<sup>251</sup> it only confirms what blacks have always known about police power. “With reason, African-Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way.”<sup>252</sup>

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251. See Frank J. Murray, *Court Rules Traffic Stops Netting Drug Arrests Constitutional*, WASHINGTON TIMES, June 11, 1996, at A3 (quoting Bill Johnson, a former police officer and general counsel for the National Association of Police Organizations, that *Whren* “formalizes decisions and practices that are ‘good solid police work that’s not unconstitutional’”); *id.* (quoting Charles Hobson, a lawyer for the Criminal Justice Foundation, applauding *Whren* because “[w]e certainly don’t want courts to second-guess officers who take action to protect the public from criminals”).

252. Brent Staples, *Editorial Notebook: Growing Up to Fear the Law*, N.Y. TIMES, Mar. 28, 1991, at A24.



