Social Sciences Report to the Traffic Stop Task Force—Eric Jakobsson, May 20, 2015

Abstract and Summary:

From a legal perspective, the entire discussion of this issue must be in the context that police officers are legally entitled to make traffic stops based not only on traffic safety but also if there is probable cause to believe that the car contains people who have committed a crime, or may do so in the near future. The Supreme Court has repeatedly upheld this view. On the other hand, these stops must not be made on the basis of race.

The fact is that during the time that this legal doctrine has been upheld, throughout the nation and in Urbana, African-Americans are stopped in their cars by police officers out of proportion to their numbers in the population. Further, their cars and persons are subject to search out of proportion to the numbers of stops. It is illuminating to consider the motives for the stops; whether they are purely for traffic safety or whether they have an investigatory component; that is, whether part of the reason for the stop is due to a suspicion by the officer that the stop might yield evidence to solve a non-traffic crime, or whether the stop is solely motivated by dangerous driving or equipment violations. The literature suggests that the racial disparities show up almost entirely in stops with an investigative component, as opposed to purely safety stops. This suggests a further question: To what extent are the suspicions behind the investigatory stops warranted, and to what extent are they based purely on the race of the driver? To the extent they are warranted, they may help to deter or solve crimes that jeopardize the public safety. To the extent they are on the basis of race, they needlessly create animosity between the African-American community and the police, and unfairly impose an economic and psychological cost on members of the African-American community.

We do not expect to finally resolve the above issue in this report, but the literature suggests ways to resolve it. The literature suggests that "hot-spot policing" in which resources are concentrated in areas that have more calls for service does reduce crime, but may also exacerbate community-police tensions in those communities which have more calls for service. Community policing, on the other hand, seems to have little effect on crime rates but does serve to reduce community-police tensions.

Other people than the author may interpret the data differently, but to the author of this section the data suggest that "hot spot policing" is justified to reduce crime, but that it should be accompanied by community policing to reduce community-police tension, plus much greater transparency than we have so far had with respect to the criteria used by officers when making stops with an investigatory component.

No discussion of this topic would be complete without making reference to the Justice Department Report on Ferguson, Missouri, that was issued in the course of our group's deliberatiuons[1]. We do not see evidence that the Urbana Police Department and the Champaign County court system exhibit the systematic and purposeful targeting of African-

[1] http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf

Americans exhibited by their counterparts in Ferguson. On the other hand, given the pervasive racial biases that persist in our society, it would be naïve to assume that our local criminal justice system is completely free of such biases, or that we could not benefit from a thorough examination of our system in that regard.

Literature Review

There is ample evidence that, around the United States, African-American drivers are subject to traffic stops out of proportion to their representation in the population.[2]

One hypothetical reason for the disparity might be driving habits. One might reasonably guess that death rates for drivers would be a good measure of reckless driving. Statistics gathered by the Centers for Disease Control over a several year period show no significant difference in age-adjusted driver deaths between African-Americans, Hispanic-Americans, and European-Americans.[3] African-Americans are not more reckless drivers than European-Americans.

Although Asian-Americans are not the topic of our study, it is notable that traffic stops of Asian drivers in Urbana are only about one-half of their proportion in the population. The national highway death data also show that Asian-Americans are only about half as likely, relative to their proportion in the population, to be drivers in fatal accidents. So it does appear that Asian-Americans, as a group, are safer drivers than other ethnic groups in the United States, and possibly also in Urbana.

Note that the statistics cited above are age-normalized. Younger drivers have more accidents than older drivers (except for drivers over 75 year old).[4] The African-American population in the U.S. is younger than the White population. Thus the fractional population of African-Americans is higher in the "dangerous driving" age range (up to 24) and lower in the "safe driving" age range (35-74).[5] This effect is large enough to account for part, but not nearly all, of the racial discrepancy in traffic stops over the United States.

It is instructive to examine the case of one city with similar demographics to Urbana that, for a number of years, had no racial disparity in traffic stops. This is Iowa City, population approximately 72,000, home of the University of Iowa. A comprehensive study of racial disparity in traffic stops was done by Barnum, et al.[6] The authors found that from 2005 through 2007 there was only a very slight disparity in traffic stops, perhaps small enough to be accounted for by the black population being younger and therefore having a higher fraction of the population violating traffic laws. But in 2008 and 2009 there was a surge in violent crimes in the black neighborhood that was statistically modest but received prominent coverage in local news media. This resulted in increasing patrols in black

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[2] http://www.nij.gov/topics/law-enforcement/legitimacy/pages/traffic-stops.aspx
[3] http://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a10.htm
[4] http://www.census.gov/compendia/statab/2012/tables/12s1114.pdf
[5] http://en.wikipedia.org/wiki/Demographics_of_the_United_States
[6] Barnum, Chris, Robert Perfetti, and Matt Lint. "Iowa City Police Department Traffic Study." (2014).

neighborhoods and a significant increase in statistical racial disparity in stops. The crime incidence soon returned to its previous level, but the traffic stop disparity persisted through 2012, the last year covered by the study. It may persist to the present day.

This study illustrates both the strength and weakness of statistical analysis. The statistics are very good at telling us what happened but fall short in telling us why it happened. To what extent was the end of the surge in violent crime in Iowa City due to the increased patrols and arrests and to what extent did it simply "play itself out" or decline due to other factors? Is the continued increase in patrols and arrests in the black neighborhoods responsible for the sustained reduced crime rate, or is it a practice that has outlived its policy usefulness but is maintained for political reasons?

Weisburd and Eck[7] attempted to deal with the "why" issue by reviewing a broad range of studies on the relationship between police practices and crime rates. They concluded that employing a broad range of strategies in a coordinated focus on "hot spots" of crime is effective in reducing crime rates. Investigative traffic comprised a component in this strategy. They also found that community policing was not effective in reducing crime, at least in the short run, but did improve community-police mutual trust. It is reasonable to hypothesize that this increased trust could lead to a long-term reduction in crime by improving the effectiveness of enforcement, but long term trends are hard to deal with statistically since many factors are changing, for example the composition of neighborhoods, the overall economic climate, etc.

Epp et al[8] published a major study on the causes and effects of racial disparities in traffic stops. They concluded that there was no disparity in stops that were made for purely traffic safety reasons. Essentially all of the disparities were due to stops with an investigative component, where the officer used a minor safety issue as a reason to stop a vehicle that was suspected, for other reasons, to be connected to some illegal activity. They concluded that, due to the fact that in most stops the suspicions are not substantiated, these stops have a corrosive effect on relationships between the police and the black community. This is especially so because blacks are under-represented on police forces across the nation.[9] Thus many black residents have had the experience of being stopped by white officers on the basis of suspicions that proved to be unfounded.

It should be noted that the constitutional right of officers to make such pretextual stops, for minor moving or equipment violations that would not in themselves usually prompt a stop except for some other suspicion of illegal activity, are firmly rooted in settled law. The relevant Supreme Court case is Whren vs. United States, which was a unanimous decision.[10]

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[7] Weisburd, David, and John E. Eck. "What can police do to reduce crime, disorder, and fear?." *The Annals of the American Academy of Political and Social Science* 593.1 (2004): 42-65.

[8] Epp, Charles R., Steven Maynard-Moody, and Donald P. Haider-Markel. *Pulled Over: How Police Stops Define Race and Citizenship*. University of Chicago Press, 2014.

[9] http://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html

[10] http://en.wikipedia.org/wiki/Whren_v._United_States

Some legal scholars have criticized this decision. [11] [12] [13] However because it was unanimous, it is not likely to be overturned any time soon, so it is part of the legal context in which traffic stop disparities must be considered. A recent Supreme Court decision modified the Whren decision to some extent. This was RODRIGUEZ v. UNITED STATES[14], decided on April 21,2015. In this decision, the Court held that even if a stop has an investigative component, its duration couldn't be extended beyond the time needed to process the traffic violation that served as the nominal reason for the stop.

The sum total of the studies cited above presents a policy conundrum. Investigative stops in black neighborhoods with relatively high crime rates are constitutional and may effect an improvement in public safety in solving crimes that might otherwise go unsolved. On the other hand, they exacerbate tensions between the police and the black community because of the common experience of many black residents in being stopped by white officers when they have done nothing wrong. The whole situation is intensified by the racial and ethnic stereotypes that pervade American society.[15]

Because of the role of investigatory traffic stops in the criminal justice system, they unavoidably become entangled with other criminal justice issues, especially with how the criminal justice system deals with drug use and mental illness. While those issues are beyond the scope of the task force, perhaps they merit mention by virtue of how they interact with investigatory stops.

Carl Hart describes racial disparities in both the letter and the enforcement of drug laws in his book, "High Price".[16] Hart has a unique perspective as a black man who dealt drugs in his youth in Miami but ultimately became a respected neuroscientist whose work focuses on the science of addiction. He combines his personal experience with his professional expertise to analyze the problems with how our criminal justice system deals with drugs in the black community.

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[11] Sklansky, David A. "Traffic stops, minority motorists, and the future of the Fourth Amendment." *The Supreme Court Review* (1997): 271-329.

[12] LaFave, Wayne R. "The" Routine Traffic Stop" from Start to Finish: Too Much" Routine," Not Enough Fourth Amendment." *Michigan Law Review* (2004): 1843-1905.

[13] Donahoe, Diana Roberto. "Could Have, Would Have: What the Supreme Court Should Have Decided in Whren v. United States." *Am. Crim. L. Rev.* 34 (1996): 1193.

[14] http://www.supremecourt.gov/opinions/14pdf/13-9972_p8k0.pdf

[15] Smedley, Audrey, and Brian D. Smedley. "Race as biology is fiction, racism as a social problem is real: Anthropological and historical perspectives on the social construction of race." *American Psychologist* 60.1 (2005): 16.

[16] Hart, Carl L. *High Price: A Neuroscientist's Journey of Self-discovery that Challenges Everything You Know about Drugs and Society*. Harper, 2013. A summary of Hart's research and his conclusions can be found at http://www.nytimes.com/2013/09/17/science/the-rational-choices-of-crack-addicts.html?_r=0

In addition to racial disparities in drug issues, mental health problems are under-treated in the African American community.[17] [18]

Reflecting the interplay between all these issues, our jail and prison populations are over-represented in African-Americans and in people suffering from mental health and drug problems. [19]

Fortunately there is currently interest in Champaign County in criminal justice reform, which would improve how the criminal justice system deals with the issues described above. This is exemplified by the visit and presentations from Leon Evans, the CEO of the Center for Health Care Services in San Antonio, Texas.[20] He talked about their very successful jail diversion program.[21] [22]

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[17] Snowden, Lonnie R. "Barriers to effective mental health services for African Americans." *Mental health services research* 3.4 (2001): 181-187.

[18] Lasser, Karen E., David U. Himmelstein, Steffie J. Woolhandler, Danny McCormick, and David H. Bor. "Do minorities in the United States receive fewer mental health services than whites?." *International Journal of Health Services*32, no. 3 (2002): 567-578.

[19] http://en.wikipedia.org/wiki/Incarceration_in_the_United_States
[20] http://www.chcsbc.org/who-we-are/ceo-message/
[21] http://www.chcsbc.org/innovation/jail-diversion-program/
[22] http://www.npr.org/blogs/health/2014/08/19/338895262/mental-health-cops-help-reweave-social-safety-net-in-san-antonio

Iowa City Police Department Traffic Study

2005, 2006, 2007, 2010, 2011 & 2012

Chris Barnum

Robert Perfetti

Matt Lint

St. Ambrose University

Final Revision 5-31-14

CITY OF IOWA CITY

MEMORANDUM

Date: June 20, 2014

To: Mr. Thomas Markus

From: Chief Sam Hargadine

Re: St. Ambrose Study on ICPD Traffic Stops

Background

In response to some community concerns of racial profiling the ICPD started to collect demographic data on traffic stops in July of 1999. The results of the traffic stop data collection were analyzed in a January 2004 report titled "Traffic Stop Practices of the Iowa City Police Department: January 1 – December 31, 2002." The research team was from the University of Louisville and this report was frequently referred to as the Louisville study.

On or about 2006 the Command Staff was approached by Dr. Christopher Barnum, Associate Professor of Sociology and Criminal Justice and Director of Graduate Studies Masters in Criminal Justice at St. Ambrose University. Dr. Barnum was familiar with the Louisville study and became interested in analyzing ICPD traffic stop data utilizing a differing approach. Dr. Barnum initially indicated a desire to study the data for a six month period of time.

After an initial review of the six months period of time, both Dr. Barnum and I determined that a more in-depth analysis was needed in order to better understand operational trends in the department. I maintained the working relationship with Dr. Barnum and provided him data for the years 2005, 2006, 2007, 2010, 2011 and 2012. Unfortunately, a transition to a new data management system resulted in conversion problems that prevent us from analyzing 2008 and 2009 data. Throughout this partnership with Dr. Barnum, our officers were not advised of the study due to the potential of changing behavior patterns.

In June of 2013 the City Council passed Resolution 12-320 establishing an Ad Hoc Diversity Committee to study City transit and law enforcement operations as they relate to minority populations. Over the course of six months the Ad Hoc Diversity Committee held 22 Committee meetings. Several community discussion forums were held with community members from diverse backgrounds to discuss and receive feedback about transit and law enforcement operations. During this time a renewed conversation on disproportionate contact with minority populations was sparked. The ICPD took the Ad Hoc Diversity Committee process very seriously and is working hard to implement each of the recommendations of the committee.

Based on the community conversation generated by the Ad Hoc Diversity Committee, I worked with Dr. Barnum to incorporate more traffic stop data and finalize his analysis. While this study was initially intended for internal and academic purposes, I now believe it is appropriate to have a public discussion on the topic. By participating in the study, I hope it sends a clear message that the ICPD has taken the issue of disproportional minority contact very seriously in the past and will continue to do so in the future.

The Study

Attached is a study of ICPD traffic stop data from the years 2005, 2006, 2007, 2010, 2011 and 2012. It is an in depth analysis supervised by Dr. Chris Barnum of St. Ambrose University. He was assisted by graduate students Robert Perfetti and Matt Lint.

It is important to note that the interpretation of the data is very complex and best explained by Dr. Barnum. The methodology used included observational baseline studies. Over 20 trained observers were stationed at various locations within Iowa City to determine the racial makeup of Iowa City's drivers. These surveys occurred at different times of the day and over multiple years.

Dr. Barnum discusses at length the difference in disproportionality from the data in 2005 – 2007 and 2010 – 2012. Dr. Barnum's report indicates a notable increase in the disproportionate contacts in particular on the South East side between the two time periods. The numbers jump considerably both among a few officers that were assigned to that area and by the department as a whole. As this was occurring the department was responding to a dramatic increase in violent calls that included two riots, multiple shots fired calls and one homicide. To combat the problem ICPD created a new concentrated zone within the existing beat and patrolled that area extensively.

In 2009 reported crime was a significant concern for residents in the Pepperwood, Wetherby, and Grant Wood neighborhoods. A juvenile gang calling themselves the Broadway Goons was believed to be responsible for a significant amount of the reported crime. This area is also well known for its high volume of drug trafficking and weapons offenses.

Incidents, many of which gained a lot of media attention, began in the early spring and lasted until late summer. Information gained from arrestees was that the gang was actively recruiting and trying to grow in size. Increased assertive foot patrol efforts were started and directed to the area in an attempt to thwart problems. In October 2009 landlord John Versypt was murdered while working in the hallway of his rental property located in the 1900 block of Broadway. Numerous neighborhood meetings were held to address the issue which included several members of the City Council at that time. These issues were a major factor that led to the passing of the Juvenile Curfew Ordinance and the establishment of the South East Substation.

There is no doubt that we intensified directed patrols in the south east portion of town during the later time period. We also asked neighboring jurisdictions to drive through that area if they were driving by anyway. The Iowa State Patrol and Johnson County Sheriff's Office assisted us with creating a sense of continuous law enforcement presence. The officers with the highest likelihood of disproportionate contact in Dr. Barnum's study were there because they were assigned there by supervisory staff to solve a significant crime problem. It is important to note that crime in this area of town has dropped dramatically as a result of our intensified patrols over the last several years.

Presently the Pheasant Ridge/Bartelt Road area saw three very violent shots fired incidents one of which has led to significant injury to an innocent person who was hit as a bullet went through the exterior wall inside to where party goers were assembled. The violence seen this spring on the West side and the concern of residents and neighborhood associations is very much like the concerns expressed by the residents of the South East side of town a couple of years ago. The police department remains committed to see that it does not rise to the level that it did a couple of years ago. Our commitment has included similar resource devotion, including extra patrols and overtime details. While we hope to bring stability to this area, we are certainly more cognizant of the tendency for disproportionate minority contact to occur when engaging in hot spot policing. Ideally, we can bring stability without seeing similar jumps in disproportionate contacts.

There are several additional items to keep in mind that are not included in the study but are significant at looking at the entire picture. These include:

- Complete CALEA® assessments in 2007, 2010 and 2013. The 2013 assessment team was provided with Dr. Barnum's report. CALEA® is the Commission on Accreditation for Law Enforcement Agencies. The accreditation process requires compliance with

rigorous standards that meet the best practices for police agencies in the U.S. and Internationally. Proof of compliance is also required and continually monitored over three year periods.

- All traffic stops are videotaped and routine and continued random audits by supervisors have not shown any pattern of biased based policing or unprofessional behavior.
- Complaints that have come in claiming racial bias have been taken seriously and are fully investigated by supervisory staff. Any inappropriate behavior has resulted in personnel action.

Recommendations Going Forward

Going forward the department has reviewed Dr. Barnum's report with the officers and reiterated that biased based policing is illegal, immoral and if discovered can lead to discipline to include termination. Officers receive legal training once per year specifically on race based traffic stops which outlines the legal and civil penalties they could be exposed to if they engage in racial profiling. Officers have also been through diversity training provided by Chad Simmons of Diversity Focus. It is recommended that this relationship with Diversity Focus be ongoing.

Supervisory staff members will continue to randomly review the videos of officers throughout the year for indications of unprofessional, biased based or even unsafe habits. Any violations of policy require documentation and at a minimum corrective counseling. All complaints will continue to be fully investigated.

It is recommended that Dr. Barnum be hired to analyze 2013 traffic stop data and compare the data with previous years. Future studies should be conducted to ensure that measures put in place are effective and the disproportionate statistics lowers. I would recommend that at least for the next few years we publish this data as part of the City's Annual Equity Report. This will help demonstrate to the community our commitment to this issue and hopefully will show meaningful progress in the years to come.

It is imperative that all officers from the newest recruit to the Chief realize that perceptions are viewed differently based on life's experiences. Police have to remain vigilant to find unprofessional behavior and take seriously all complaints that are brought to light.

Lastly, I want to express my full confidence in the officers and staff in the ICPD. I am personally very proud of their dedication, professionalism and high level of performance. The numbers in Dr. Barnum's study do raise concerns, which I am taking with the utmost seriousness. However, I do not for a minute think the numbers indicate ill motivations. I believe the release of the data is an opportunity for the department to grow and outwardly express our commitment to build relationships and protect all persons in the community with the same high standards of professionalism. I look forward to starting this process with the City Council on June 16th and will make myself available to community groups who may wish to further discuss this issue with me in the coming weeks and months.

Acknowledgments

We wish to thank the members of the Iowa City Police Department for their cooperation and invaluable assistance with the transfer of data and the other information they provided. We especially thank Chief of Police Sam Hargadine, Administrative Services Captain Rick Wyss, Field Operations Captain Jim Steffen and Jim Baker from Information and technology. This report would not be possible without their tremendous cooperation and support. We also thank the many St. Ambrose University students who participated in various aspects of data collection and analyses.

Contents

Executive Summary

In response to concerns about the potential for racial bias in the Iowa City Police Department's traffic stop activity, the PD began systematically collecting data on traffic stops in approximately 2001. Recently the City retained our research team to analyze their data. The focus of our investigation was an assessment of racial disproportionality in the ICPD's traffic stop activity for stops made in 2005, 2006, 2007, 2010, 2011 and 2012—more than 60,000 stops. The investigation evaluated two broad categories of police data: *(i)* the demographic information of drivers stopped by the ICPD and *(ii)* the outcome or disposition of a stop.

The methodology used to analyze ICPD's traffic stop demographics employed a driver-population *baseline* fashioned from roadside observations, census data and school enrollment information. A baseline should be thought of as the proportion of minority drivers on the roads in a given location. The analysis process is straight forward. It centers on identifying differences between the percentages of various groups stopped by the ICPD and the baseline information. Any difference between baseline values and police data signifies *disproportionality*.

The results of baseline analyses suggested that roughly 10% of the drivers on Iowa City roads were minority members during the study period. Results also show that between 2005 and 2007 levels of disproportionality in ICPD stop activity were comparatively low. During this time-period, roughly 14% of the Iowa City Police Department's traffic stops involved minority drivers.

However, disproportionality increased in 2010 and then remained stable through 2012. Analyses show that in 2010 the percentage of minority drivers stopped by ICPD officers increased to roughly 19% and remained near this level in 2011 and 2012. The analyses also show that the minority-driver baseline remained essentially constant during this time-frame.

A close examination of ICPD patrol practices suggests that in part, the increase in disproportionality stemmed from an escalation of patrols in a portion of southeast Iowa City. After a review of various sources it seems likely that the Iowa City Police Department modified patrol procedures following an increase in violent crime in the city in 2008 and 2009. These modifications included the establishment of a new patrol beat located in southeast Iowa City in an area with a comparatively high minority resident concentration. This new patrol area called "beat-2-A" is rather small. It consists of an area no larger than few blocks and is geographically much smaller than other ICPD beats. However, the minority baseline in beat 2-A is significantly higher than in other Iowa City beats.

Individual officer analyses indicate that the officers exhibiting the most disproportionality in traffic stops were frequently assigned to patrol areas located on the southeast side of Iowa City, or were "float" officers who were tasked with patrolling high crime areas. Both groups of officers tended to stop higher proportions of minority drivers than did most of their colleagues. Officers assigned to patrol the small 2-A beat also tended to stop higher proportions of minority drivers than did officers in other areas of town. However, this result is expected because the proportion of minority members on the roads in this area is much higher than in other areas of town and much higher than the 10% minority baseline used for analysis. Consequently, higher proportions of minority stops for beat 2-A officers do not necessarily indicate disparity or bias.

The examination of stop *outcomes* assessed disproportionality in citations, arrests, consent searches and *hit-rates* or seizures from consent searches. Univariate odds ratio analyses showed consistent

patterns—Iowa City officers disproportionately arrested and (consent) searched minority drivers. On average across all years of the study the odds were about three times greater that minority drivers would be arrested on a traffic stop in comparison to others. Likewise, the average odds for consent searches were about three and a half times greater that ICPD officers would request a search from minority drivers compared to others, this despite hit rates that were actually *lower* on average for minority drivers. In other words, in comparison to others, ICPD officers were more likely to make a seizure from a nonminority driver as the result of a consent search even though officers were more likely to request a such a search from a minority driver. Findings also suggest that minority drivers and nonminority drivers were ticketed at equivalent rates. Multivariate logistic regression analyses show parallel results. The regression odds ratios were similar in size to those from univariate analyses even after controlling for officer's race, officer's gender, officer's years of service, officer's duty assignment, the time of day, type of traffic violation and the driver's gender. It should be noted that our analyses show that many officers were inconsistent in entering information about voluntary consent search requests with about 50% of officers incorrectly inputting data. This level of inconsistency likely negatively affects the validity of the findings in this area.

Care should be used when evaluating findings for arrest outcomes. Several important control variables were not available for inclusion in logistic regression models. Consequently, it's not possible to evaluate whether disproportionality in arrest rates was a product of other factors like differences in offense types or offending rates between demographic categories. Likewise, it is important to emphasize that the number of cases used for analyses of consent search requests and seizures was much smaller than the number of cases used in analyses of other stop- outcome variables. This small "n" can affect the validity of the findings and should be taken into consideration when evaluating results.

Recommendations in Brief

(1) ICPD should continue collecting traffic stop data and repeat this study in one year's time to assess trends in disproportionality once officers know their behavior is being monitored. This analysis should include department level measures of disproportionality as well as an assessment of individual officers' traffic stop activity across time and location.
(2) The ICPD should closely monitor officer compliance of data collection to reduce the number of unknown and missing cases.
(3) ICPD should increase officer training in regards to the proper collection and inputting of data especially for voluntary search requests
(4) ICPD should modify data collection software so that it becomes practical to collect and analyze the geographical location of individual stops.
(5) ICPD should also modify data collection software so that it becomes practical to track the reason for an arrest on traffic stops.

Chapter One: Levels of Disproportionality

Introduction

In recent years, US citizens have expressed increasing apprehension about racially biased policing (sometimes called profiling) in traffic stop activity. Although, many definitions of racially biased policing exist, most researchers agree that the event occurs when the police use race or ethnicity as a proxy for suspiciousness when deciding whether to stop or sanction potential targets. Of late, some Iowa City constituents have communicated concerns that the Iowa City Police Department may be profiling when interacting with minority members. These concerns generally stem from personal accounts and anecdotal evidence but persist despite a 2001 University of Louisville study that found no systematic bias in ICPD officers' conduct (Edwards, Grossi, Vito & West, 2001). To address this issue the City of Iowa City asked our research team to develop and implement an analysis of Iowa City Police traffic stop conduct.

In what follows, we use a two-prong approach to assess ICPD traffic stop activity by focusing on traffic stop demographics *and* on the outcome of the stop. The ICPD has been collecting data on officers' traffic stop behavior for over a decade and has accumulated a substantial amount of raw data. Interpretation of raw data however can be tricky because the nature of police work is characterized by a complex array of factors that may legitimately account for disproportionality in police-minority contacts. In fact, these factors can present issues that cloud interpretation of analyses. Our approach in dealing with this complexity is straightforward. First, to analyze disproportionality in traffic stops we compare police stop demographic data to a valid and representative baseline. A baseline is best thought of as the proportion of minority drivers present on the roads. Second, to assess disproportionality in the outcome of a stop, we use two statistical techniques, a disparity index predicated on odds-ratios and logistic regression analyses. The outcome of a stop includes things like whether a citation was issued, an arrest was made or a search conducted etc. We also look closely at individual officer's conduct by analyzing how an officer's traffic stop information may be affected by work schedules, duty assignments and neighborhood characteristics.

Background[1]

Racial disparity within the criminal justice system is an enduring feature of the American experience. For most of this country's history, minority members, especially African-Americans have been overrepresented at nearly all stages of the criminal justice process (Drummond, 1999; Kennedy, 1997; for a contrasting opinion, see DiLulio, 1996; Wilbank, 1987). However, studies conducted over the past 20 years suggest change. These studies show that the overt use of race in police decision-making behavior is steadily decreasing (Engel et al., 2002; Sherman, 1980). This trend is likely due in part to community outrage and legislative action but also it's partly the result of efforts by police supervisors. Today most research indicates that police discretionary decision making is predicated more on legal and situational factors than *solely* on race (Engel et al., 2002; Mastrofski, Worden, & Snipes, 1995; Riksheim & Chermak, 1993). Nevertheless, race remains one of the most reliable predictors of attitudes toward

[1] Much of this section is adapted from Barnum and Perfetti 2010.

the police in America today (Weitzer & Tuch, 2005). African Americans are consistently more likely to hold negative opinions of the police than are other groups (Hurst, Frank, & Browning, 2000).

Why then, at a time when overt racism by the police seems to be decreasing, do minority members cling to negative perceptions of the police? In part, the answer may lie in a perception of double disproportionality—an opinion by minority members that the police tend to energetically enforce the law against them but fail to adequately enforce the law for them. Certain police and law enforcement practices may have served to heighten this suspicion. The notable forms of drug courier profiling that began in the last quarter of the 20th century provide an example.

Profiling in various forms has existed for decades in the United States. However, the practice became particularly salient in the 1980s when some of the first federally subsidized drug courier profiling methods were developed and used to train local law enforcement officials. An example of this activity includes tactics developed in a Drug Enforcement Administration sponsored profiling strategy called *Operation Pipeline*. This program was originally designed to stem the flow of drugs that were being transported from Florida to the metropolitan areas of the Northeast along interstate highways. Officers participating in this training were taught guidelines for identifying the typical characteristics of drug couriers. One of these guidelines included race. Using race as an identifier lead to unfortunate consequences including increased levels of fear and resentment among minority members toward police, and ultimately to lawsuits and litigation.

The source of the recent interest in racially biased policing in traffic stops is generally traced to two court cases in the 1990s. Defendants in a New Jersey criminal case, the *State of New Jersey vs. Soto* (1996), and plaintiffs in a Maryland civil case, *Wilkins vs. Maryland State Police* (1993), argued that they were stopped because of their race rather than their driving. This litigation sparked scholarly interest in this subject and a spate of other court cases across the country. As a result of this legal action, many police departments began collecting data on police–citizen contacts. Unfortunately, much of this data remains untouched.

The Baseline Problem

A key reason for this neglect in data analysis is difficulty in identifying and developing the essential characteristics of the data. The question of how to develop an effective baseline is one of these problems. A baseline is a standard for determining the percentage of minority drivers in a given police jurisdiction who are on the roads at a given time. Investigators compare this benchmark to police traffic stop data to determine whether the driver's race was a factor in the officer's decision to make a traffic stop. Some methods of benchmarking include using census or DOT information to establish baselines. These techniques are often ineffective for various reasons, including differences between races in the amount of time spent driving (driving quantity), racial differences in offending rates and thus police attention (driving quality), and the racial composition of neighboring communities whose citizens may travel through the population of interest (driver mobility). More recent innovations, however, use mixed methodological approaches that combine direct observation with census and other data. These

methods have generally established more valid baselines than earlier attempts (e.g., Alpert et al., 2007; Alpert, Smith, & Dunham, 2004; Lamberth, 2006).

Methodology

In what follows we use a combination of methodologies to evaluate officers' traffic stop behavior. First, to establish a baseline we use an applied technique that includes traffic observations and census data. As noted, the baseline should be thought of as the percentage of minority drivers on the road in a given area of town. In plain terms, the baseline is a standard that can be used to judge the percentage of minority drivers that should be stopped by the police when no bias is occurring. Second, we evaluate post stop outcomes using statistical techniques including logistic regression, hierarchical linear modeling and a disparity index that is predicated on odds ratio analyses. Finally, we assess individual officers' conduct using in-depth analyses of stop outcomes specific to a given officer.

Data Sources

This study examines several years of data that has been collected by the ICPD. The data were selected from years falling within a period ranging from 2005 through 2012. The ICPD experienced difficulties with their data collection system in 2008 & 2009. Less than a hundred cases are available for analyses during these years and we consider this information unreliable so they are not included in the examination. Our strategy is as follows: we will first analyze older data from 2005 - 2007 and use this information as a comparison standard when evaluating the more recent data from 2010-2012.

Iowa City street officers record information relevant to self-initiated traffic activity as part of their regular duties. As noted, the Iowa City Police Department has been collecting traffic stop data for over a decade. Officers are very familiar with the data-collection routine. When stopping a vehicle, officers contact the dispatch center who then logs the stop. The officers use their in-car computers to enter pertinent information at the completion of the stop. The data are then transmitted to the station where they are centrally stored. For each stop, officers enter data regarding the driver of the vehicle, the reason for the stop, and demographic information. Officers were unaware that their discretionary traffic stop behavior was being examined by outside researchers. Consequently, it seems unlikely then that officers modified their level of discretionary traffic stop behavior during the analysis period over concerns of increased scrutiny.

Observational Baseline Information.

During the study period, over 20 trained observers monitored traffic in Iowa City. These individuals were stationed at various locations within each of Iowa City's four police beats. Several intersections were designated for observations within each beat. These intersections were chosen at random prior to the beginning of the study, after being screened for traffic volume and visibility (the selected intersections were chosen from a pool of relatively busy intersections). The choice of intersections proved to be less complex than initially thought because the city is comparatively uniform in terms of the racial composition of neighborhoods. In plain terms, there are no *large* predominately minority sections or neighborhoods in town.

In fact, an initial examination of data from the 2000 U.S. census (and a reanalysis using 2010 census data) for the percentage of African Americans by block group reveals the following. Iowa City is made up of roughly 40 block groups. Three of these block groups are populated with the highest concentrations of African Americans. Two of these areas are located on the southeast side of Iowa City and one is located on the southwest side. However, in Iowa City the police beats are much larger geographical areas than are census block groups. Consequently, even in these highest minority concentration areas, the percentage of African Americans residing in areas located on the rest of the beat does not exceed 12%. In all other areas of the community, the percentage of African Americans populating any block group was less than 15.0%. A simultaneous examination of all block groups strongly suggests that with the exception of the three previously mentioned neighborhoods, on the whole, African American homes are more or less evenly distributed throughout the community.

We utilized three waves of observations. The initial cohort monitored traffic in 2007, followed by two more groups that surveyed traffic in 2011 and 2013. For each selected intersection, every traffic observer made between 200 and 400 traffic observations. Depending on traffic volume, this took approximately 45 minutes. For the initial rounds of observations, the observers generally examined traffic in at least one intersection on all four beats in a given session. Consequently, each observation session lasted roughly 3 or 4 hours. The observers surveyed vehicles to discern the race and gender of the drivers and conducted their inspections periodically all hours of the day—mornings, afternoons, evenings, and late nights.

The initial round of observations included data from 14 trained observers. All observers used a systematic sampling strategy that was dependent on traffic volume. For example, when traffic volume was light, the observers would attempt to assess race and gender for each vehicle passing through the intersection. However, when volume was heavier, an assessment was made for a set number of cars (e.g., every third car) passing through the intersection. Generally, traffic volume was much lighter late at night than during daytime or evening hours. Therefore, the length of observation periods tended to be longer at night than during daylight hours. Because the observers worked independently of one another, the correlation coefficient r was used to assess inter-observer reliability. The assessments from each observer were compared across all beats. Accordingly, each observer's observations were compared to all others. For example, the correspondence of assessments of race across all observation points from Observer A were compared to those same observation points for Observer B. Observer B's data were next compared to observer C's and so on. This was done for all possible contrasts, for a total of 91 comparisons. The average correlation of assessments between observers was extremely high ($r \approx .9$). This strongly suggests that the roadside observers were independently seeing very similar percentages of minority and nonminority drivers pass through each observation site.

Table 1* Census and observer information

Observations	Total	Percentage	2010 Census %
White	19,391	88.14	82.5
Black	843	3.83	5.8
Asian	854	3.88	6.9
Other	912	4.15	4.8
Grand total	**22,000**	**100.00**	**100.00**

*$\chi 2$ = 148.68. *p = .999,* r =.989

In the analyses that follow whites and Asians are grouped together and are compared to all other groups called, "minorities." We group whites and Asians because previous research strongly suggests that Asians tend to be disproportionately *underrepresented* in traffic stops (Novak, 2004; Sheldon, 2001; Barnum and Perfetti 2010). In other words, the police tend to stop too few Asians in comparison to their baseline values in the population. And as we shall see shortly, this was indeed the case for Iowa City as well. Grouping Asians with other minority members then would tend to suppress or hide potential disproportionality in minority traffic stops.

In the initial round, the observers made an assessment of race for 22,000 drivers between June and December 2007. Table 1 depicts the findings as well as the parallel 2010 census figures. The correspondence between the percentages witnessed by the roadside observers and the 2010 census population percentages is striking; 92. 02% of observers' assessments were of White or Asian drivers, whereas 7.98% were minority group members. This closely resembles the 2010 census figures, which report that 89.4% of Iowa City residents were white or Asian, and 10.6% were members of other racial groups. In addition, observers found that on each of Iowa City's four police beats, the *average* percentage of whites and Asians was at least 90%, and there was no significant difference in percentages between daytime and nighttime hours. Based on these findings and the high inter-observer reliability, it seems reasonable to conclude that at least for initial analyses a valid baseline for Iowa City driver demographics is 90% white and Asian, and 10 % minority. We will have much more to say about the baseline in the southeast side of town (called beat-two) in subsequent sections of this paper. We will also soon describe how the baseline is used in a disparity index to examine traffic stop data.

Summary

- White & Asian = 90% of the driving population on Iowa City roads
- Minority members = 10% of the driving population on Iowa City roads

ICPD Traffic Stop Demographic Analyses 2005 & 2007

We begin the analyses by looking at demographic information of data resulting ICPD self-initiated traffic stops in 2005 - 2007. Table 2 gives this information for 2005.

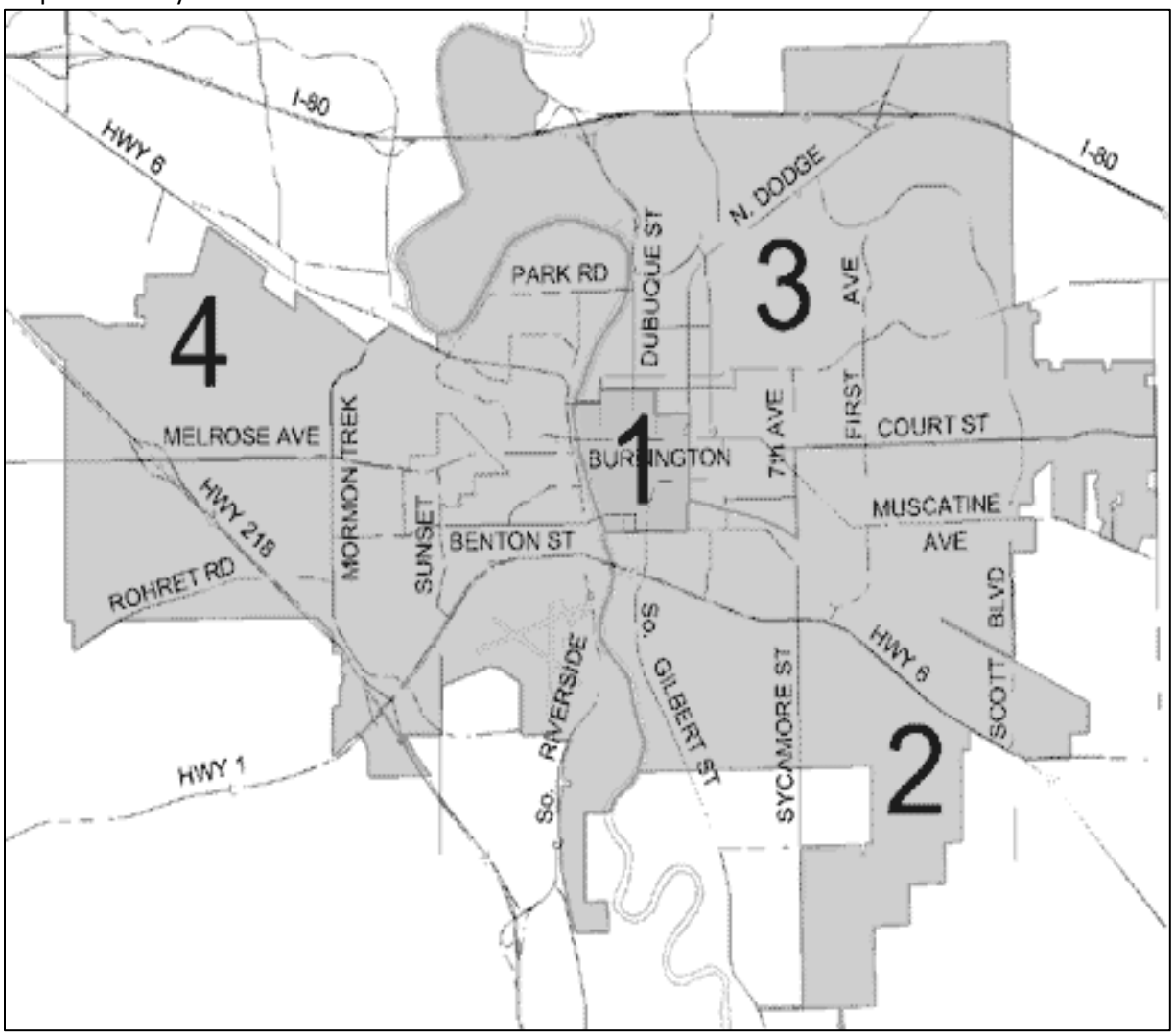
Table 2 Demographic Traffic Stop Information from 2005

Race	Total Stops	Percentage
White	8394	84%
Black	892	9%
Hispanic	320	3%
Asian	242	2%
Other	127	1%
Unknown	19	.1%
Native	7	.1%
Grand Total	**10001**	**100%**

In 2005, the ICPD initiated 10001 traffic stops.[2] Of these, roughly 14% involved minority drivers. This value is moderately higher than the 10% observational/census baseline, meaning that in 2005 the ICPD stopped about 4% "too many" minority drivers in comparison to baseline values. Keep in mind that baseline values are *estimates* of the percentages of drivers on the roads, so 4% over the baseline is not necessarily a meaningful amount. In order to assess this level of disproportionality further, we use a series of steps. First, we analyze stops across police beats. Map 1 gives the locations of the four Iowa City police beats.

[2] Only stops where all information was known about driver and stop location were included in the analyses

Map 1 Iowa City Police Beats



Three of the four Iowa City police beats are similar size. Only beat number one which is located in the downtown area of town is smaller than the others. Table 3 below gives the number and percentage of traffic stops broken out by the race of the driver and the beat where the stop occurred. In the table we have included an additional *beat–five* which is used to represent officers who are not assigned to a specific beat but instead were allowed to "float" city-wide. This designation includes special enforcement street crime action team (SCAT) officers as well as k-9 patrols and regular patrol officers who are not assigned to specific beats or areas of responsibility.

Table 3 Driver Demographic Traffic Stop Percentages by Beat in 2005*

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	1064	2888	2410	1117	693	8394	84%
Black	117	357	142	165	95	892	9%
Hispanic	42	130	56	54	32	320	3%
Asian	45	73	51	40	26	242	2%
Other	20	50	27	18	10	127	1%
Unknown	4	5	3	1	6	19	0%
Native	1	3	2		1	7	0%
Grand Total	1293	3506	2691	1395	863	10001	100%
Min. Percentage	**14%**	**16%**	**9%**	**17%**	**17%**	**14%**	

*Does not include 254 traffic stops made by command staff personnel or data where race is unidentified

The bottom row of the table gives the percentages of minority drivers stopped on each beat. The total percentage for all stops irrespective of beat is highlighted in red. In 2005, disproportionality in traffic stops was greatest among beat-five officers who floated city wide and those who worked on beats four and two (and to a lesser degree on beat one). No disproportionality was found for officers working on beat three. In general levels of disproportionality are relatively modest and more or less evenly dispersed across the beats. We now evaluate traffic stop information from 2006 and 2007 in a similar fashion.

Table 4 Demographic Traffic Stop Information from 2006

Race	Total Stops	Percent
White	9941	82%
Black	1148	9%
Hispanic	463	4%
Asian	289	2%
Native	5	.1%
Other	230	2%
Unknown	27	.1%
Grand Total	**12,103**	**100%**

Table 5 Minority Stop Percentages by Beat in 2006*

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	2177	3745	1960	1008	906	9796	82%
Black	249	499	129	112	148	1137	10%
Hispanic	100	198	53	42	59	452	4%
Asian	54	87	52	53	38	284	2%
Other	56	71	38	37	24	226	1%
Unknown	7	8	8		4	27	<1%
Native		1	1		3	5	<1%
Grand Total	2643	4609	2241	1252	1182	11927	100%
Min. Percentage	**15%**	**17%**	**10%**	**15%**	**20%**	**15%**	

* Does not include 176 traffic stops made by command staff personnel or data where race is unidentified

The information from 2006 is similar to 2005. Disproportionality in stops is generally evenly distributed across beats, although officers on beat-five have higher levels than others.

Table 6 Demographic Traffic Stop Information from 2007

Race	Total Stops	Percent
White	7105	83%
Black	734	9%
Hispanic	341	4%
Asian	227	3%
Native	3	.1%
Other	105	1%
Unknown	11	.1%
Grand Total	**8526**	**100%**

Table 7 Minority Stop Percentages by Beat in 2007*

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	930	2776	1213	1089	745	8394	83%
Black	121	251	131	89	104	892	9%
Hispanic	38	148	43	34	61	320	4%
Asian	425	66	47	50	25	242	3%
Other	13	31	14	23	21	127	1%
Unknown	2	1	5	1	2	19	<1%
Native			1		2	7	<1%
Grand Total	1129	3273	1454	1286	960	8102	100%
Min. Percentage	**15%**	**13%**	**13%**	**11%**	**19%**	**14%**	

*Does not include 424 traffic stops made by command staff personnel or data where race is unidentified

The overall patterns of the 2005 – 2007 data are similar. In each year the levels of disproportionality are relatively low and disproportionality is greatest among beat-five officers who floated city wide. [3]

Two Generalizations from 2005 - 2007

- Overall Levels of disproportionality are low
- Beat-five officers exhibit highest levels of disproportionality

We use these generalizations to evaluate 2010, 2011 & 2012 ICPD traffic stop data.

ICPD Traffic Stop Demographic Analyses 2010

Table 8 Demographic Traffic Stop Information from 2010

Race	Total Stops	Percent
White	9311	77%
Black	1527	13%
Hispanic	593	5%
Asian	372	3%
Native	6	.1%
Other	173	1%
Unknown	66	.1%
Grand Total	**12048**	**100%**

[3] For 2007 data were only available from January 1st – November 12th 2007.

Table 9 Minority Stop Percentages by Beat in 2010

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	1677	1729	1758	1869	1588	8621	77%
Black	183	451	323	190	285	1432	13%
Hispanic	72	181	118	73	121	565	5%
Asian	60	73	85	62	59	339	3%
Other	26	19	29	42	54	170	2%
Unknown	6	33	1	2	7	49	<1%
Native	1	2			2	5	<1%
Grand Total	2025	2488	2314	2238	2116	11181	100%
Beat Percentage	**14%**	**26%**	**20%**	**14%**	**22%**	**19%**	

*Does not include 867 traffic stops made by command staff personnel or data where race is unidentified

The information in the 2010 traffic stop data departs from results seen in earlier years in two important ways. First, overall levels of disparity have increased from roughly 14% to 19%. Second, disproportionality on beat-two has noticeably increased by roughly ten percentage points. These trends continue in the 2011 and 2012 data.

ICPD Demographic Analyses 2011

Table 10 Demographic Traffic Stop Information from 2011

Race	Total Stops	Percent
White	10124	76%
Black	1489	11%
Hispanic	627	5%
Asian	419	3%
Native	25	.1%
Other	165	1%
Unknown	485	4%
Grand Total	**13334**	**100%**

Table 11 Minority Stop Percentages by Beat in 2011*

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	2262	2663	1599	1993	254	8771	76%
Black	232	682	222	159	65	1360	12%
Hispanic	122	242	100	62	21	547	5%
Asian	94	121	74	68	14	371	3%
Other	34	46	29	18	5	132	1%
Unknown	40	77	86	98	4	305	3%
Native	3	5	1	11	1	21	<1%
Grand Total	2787	3836	2111	2409	364	11507	100%
Min. Percentage	**14%**	**25%**	**17%**	**10%**	**25%**	**18%**	

* Does not include 1827 traffic stops made by command staff personnel or data where race is unidentified

ICPD Demographic Analyses 2012

Table 12 Demographic Traffic Stop Information from 2012

Race	Total Stops	Percent
White	9122	74%
Black	1385	11%
Hispanic	579	5%
Asian	528	4%
Native	52	.1%
Other	194	2%
Unknown	507	4%
Grand Total	**12367**	**100%**

Table 13 Minority Stop Percentages by Beat in 2012

Race	Beat Number					Totals	
	1	2	3	4	5	Stops	Percentage
White	2273	1863	2422	1843	181	8771	75%
Black	251	427	272	284	60	1360	11%
Hispanic	88	172	144	126	19	547	5%
Asian	143	89	125	118	15	371	4%
Other	44	50	58	27	4	132	2%
Unknown	141	40	78	47	2	305	2%
Native	13	8	10	17	2	21	<1%
Grand Total	2953	2469	3109	2462	283	11412	100%
Min. Percentage	**13%**	**25%**	**15%**	**18%**	**29%**	**18%**	

* Does not include 955 traffic stops made by command staff personnel or data where race is unidentified

Discussion of 2010 – 2012 ICPD Traffic Stop Demographic Data

The information from the tables for 2010 – 2012 diverges from the demographic data from 2005 - 2007 in at least two important ways. First, the overall percentages of minority drivers stopped by the police were higher in 2010-2012 than the earlier years. For the more recent data, minority stops comprised roughly 18% or 19% of all stops made by the ICPD. In 2005 - 2007 this percentage equaled roughly 14%. Given a 10% minority baseline, this suggests that in 2010 – 2012, overall levels of disproportionality increased from roughly 4% to about 8%. Logistic regression shows this difference is statistically significant. For this analysis, logistic regression is a statistical technique that evaluates whether specific "independent variables" are associated with a driver's race, given that a stop has occurred. Results show that irrespective of the area of town where a stop occurred, the reason for the stop or the age and gender of the driver, the year of the stop was associated with an increase in the odds that the driver was a minority member (given a stop was made). Specifically, results show that a stop made during the 2010 – 2012 timeframe was associated with a roughly 35% increase in the odds that the driver was a minority member in comparison to 2005-2007 ($z = -12.57$ $p < .001$). See appendix B for tables of results.

Second, the percentage of minority drivers stopped dramatically increased in beat-two and to a lesser extent among beat-five and beat-three officers in 2010-2012 when compared to the earlier years. In 2005 - 2007 the average percentage of minority drivers stopped on beat-two equaled roughly 15%. It increased by about 10 percentage points during 2010 -2012. The levels of disproportionality on Beat-five and beat-three increased by about 6% during the same period. Logistic regression shows these changes were significant (see appendix B for details). Results also show that minority driver stops on the other beats did not increase in a similar fashion.

Two Important Generalizations from 2010 – 2012

- The percentage of minority drivers stopped significantly increased from 2005 – 2007 levels
- The increase in the percentage of minority drivers stopped was chiefly driven by significant increases in minority driver stops on beat-two, beat-three and among officers not assigned to a beat (designated as beat-five officers).

Beat-Two

As noted, the largest increase in the percentage of minority drivers stopped occurred on beat-two. This increase may stem from changes in the baseline population—that is, the percentage of minority members living and driving in the area, or the increase may stem from changes in police conduct. In what follows we evaluate the likelihood of each of these potential explanations.

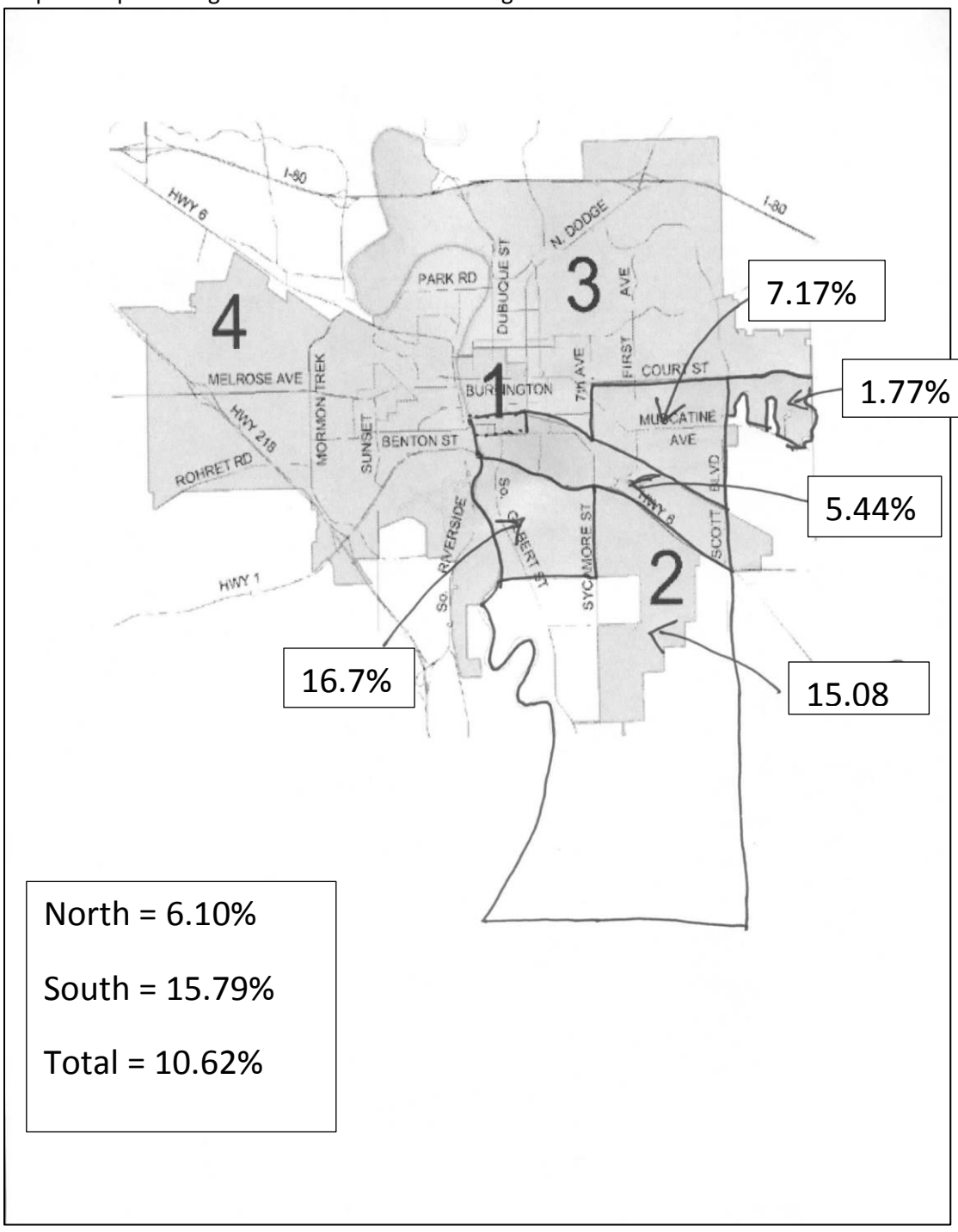
Beat-two Baseline Recalibration

In order to assess minority population change we recalibrated the baseline for beat-two. We began with an examination of the 2010 U. S. Census data for beat-two. Map 2 below gives the percentage of African-Americans living in each of the five census *tracks* located within beat-two. It's clear from map 2

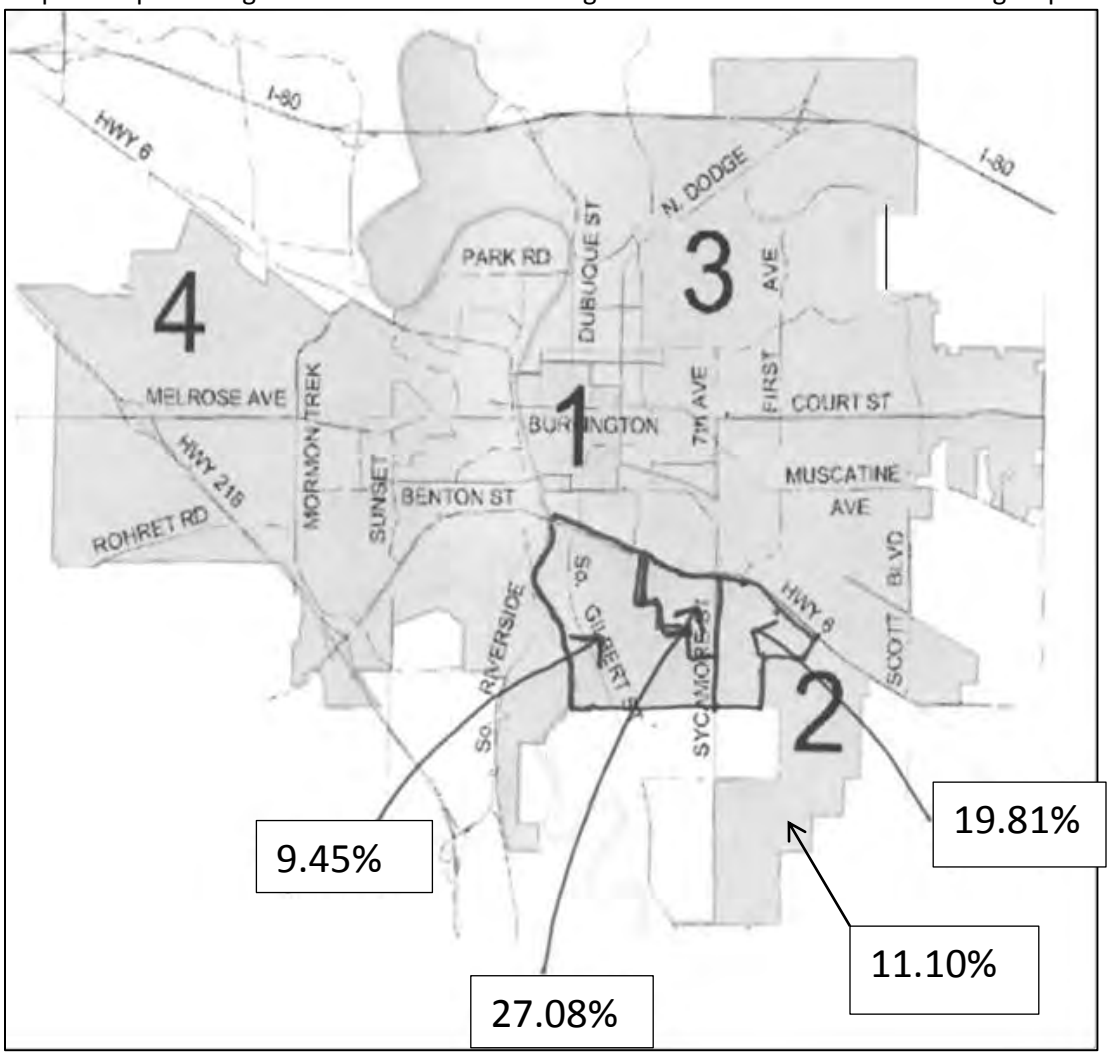
that not all the census tracks match-up with beat-two boundaries. The tracts do however give a good rough estimate of the percentage of African-Americans living on the beat. Map 2 shows that the majority of African-Americans who reside in beat-two live on the south end of the beat. Approximately 15.79% of the residents living south of US Highway 6 on beat-two are African-American. On the north side of this demarcation line roughly 6.10% of residents are African-American. The total percentage of African-Americans living on beat-two equals approximately 10.62%

Given that most of the African-American residents on beat-two live south of Highway 6 we used US Census *block-group* data to examine this area more closely. A block-group is a much smaller area than a census track. Specifically, a block-group consists of clusters of blocks (usually 20 -30) within a given census track. Map 3 below gives the census block-groups for the area of beat-2 south of Highway 6.

Map 2 The percentage of African-Americans living in beat-two 2010 census tracks



Map 3 The percentage of African-Americans living in selected 2010 beat-two block-groups



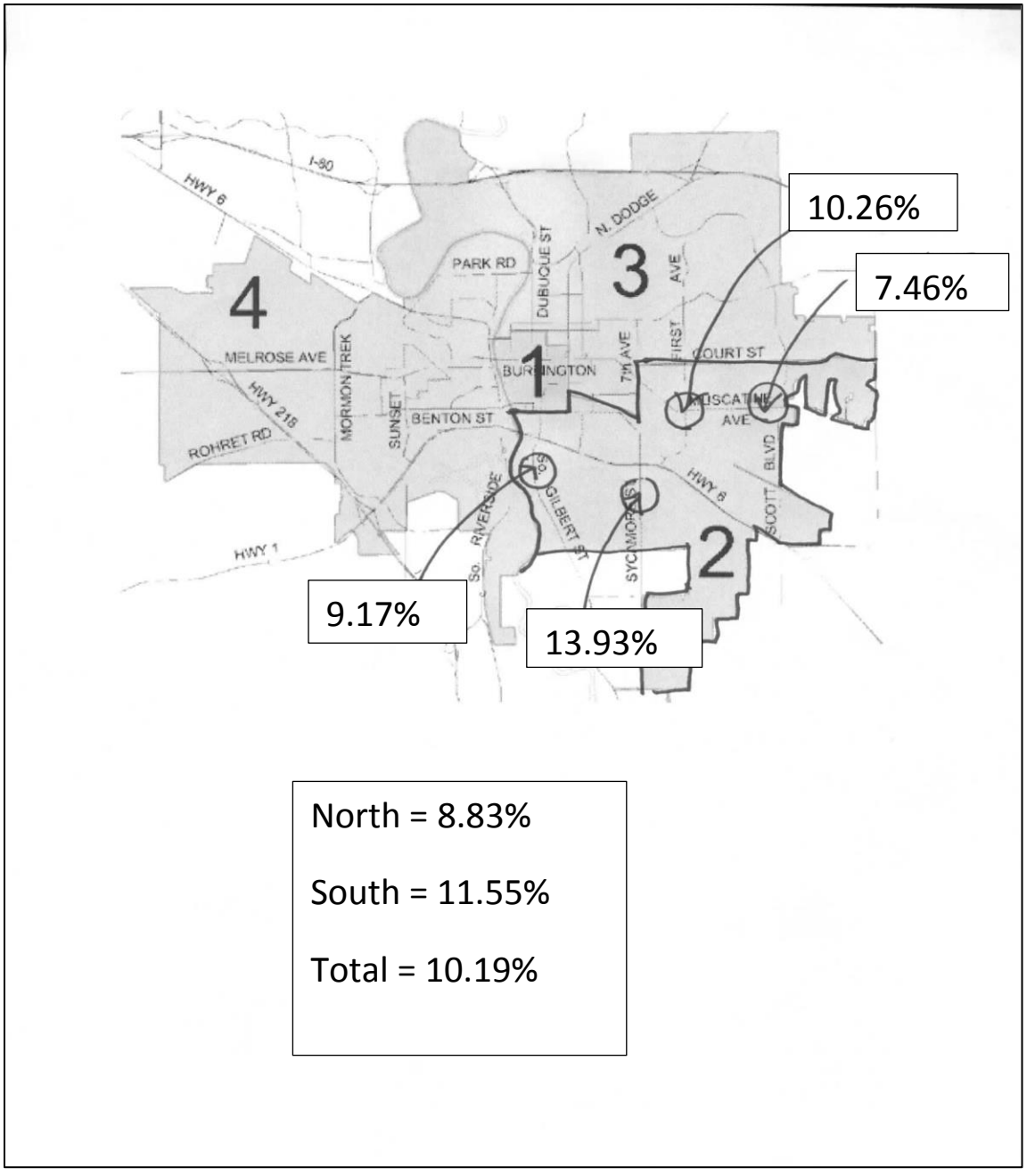
Map 3 shows that the location of the majority of African-American who reside in beat-two generally live in an area that is centered around two block-groups located just south and adjacent to US Highway 6. These two block groups are intersected by Sycamore street. Note the block-group located in the extreme southeast corner of the map is partially located outside city limits.[4]

Observation Recalibration: As mentioned earlier, using census data to establish a baseline can be problematic because the characteristics of the driving population in a given location may not match the demographics of the residents who live in the area. Research suggests that observational techniques

[4] Note: The percentages in maps 2 and 3 are for African-Americans, not all minority members. The percentages for all minority members would be higher. We chose to use African-Americans rather than all minority members because US census data do not completely conform with our definition of a minority. For example, a person who is classified as "two or more races" under the US census and who Asian an white would not be a minority member using our classification.

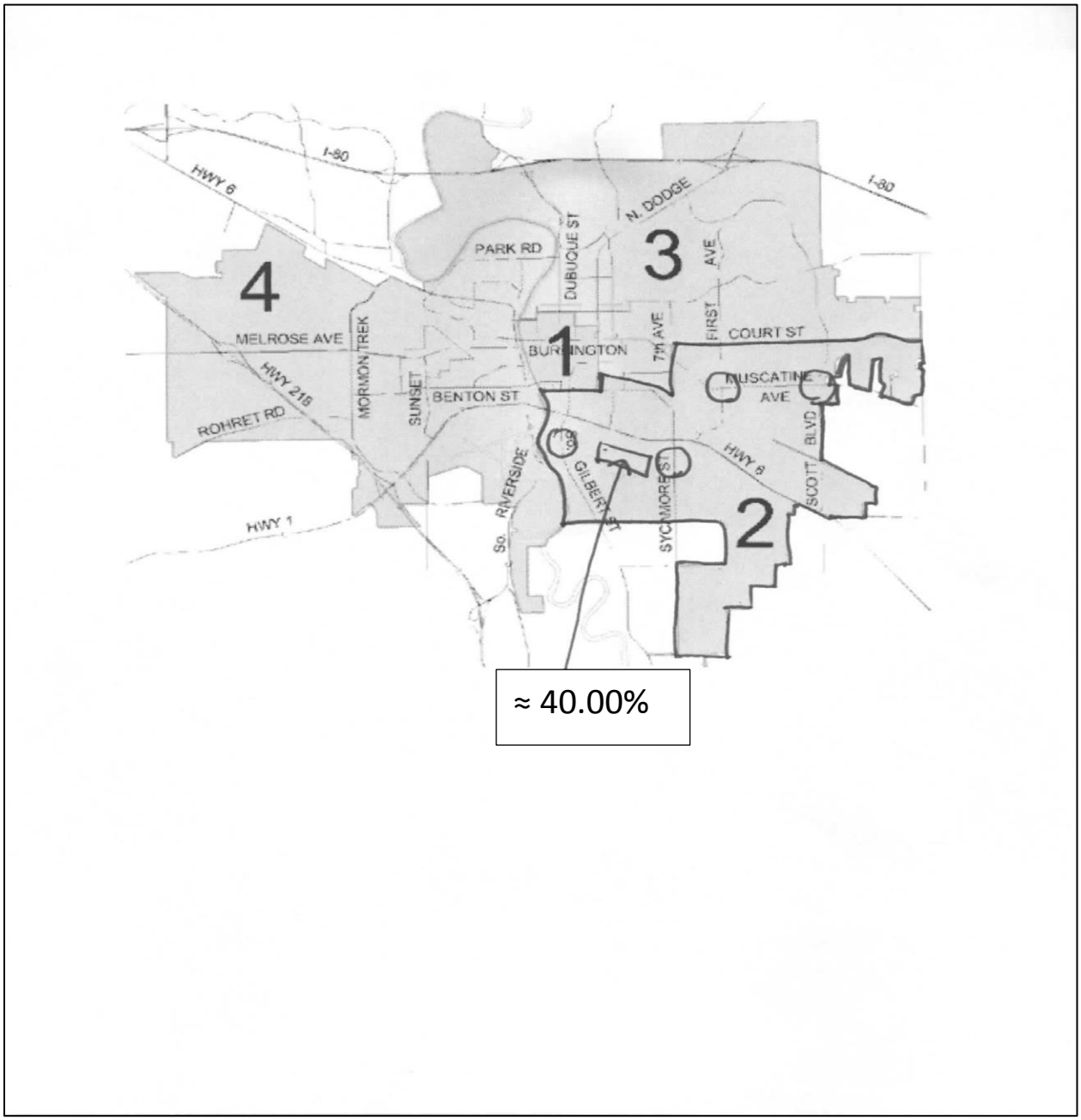
generally provide superior baselines to census data (Alpert et al., 2007; Alpert, Smith, & Dunham, 2004; Lamberth, 2006). Consequently, we developed a supplemental baseline for beat-two. Subsequent the original 2007 observation study we conducted two additional rounds of roadside observations in beat-two. The first of these occurred in April and May 2011 and focused mainly on the north side of the beat (1100 observations) and the second, was conducted in June and July 2013 on the south end of the beat and included oversampling in an area near the Broadway apartments (3200 total observations across the beat). The second study consisted of a total of five observation sites. Maps 4 and 5 give results of these analyses.

Map 4 Percentages of minority drivers identified by roadside observers in 2011 & 2013



The circled areas in map 4 indicate the observation zones. This map shows that about 10% of all roadside observations were minority drivers. This value is consistent with the earlier 2007 observation study. Analyses also show that observers saw more minority drivers on the south side of the beat (11.55%) than on the north side (8.86%). An additional observation area was conducted within the block-group exhibiting the highest minority resident percentage (see map 3). This zone is located near the Broadway area of beat-two. Observations here found roughly 40% of all drivers were minority members, see map 5 below.

Map 5 Percentages of minority drivers identified by roadside observers in 2011 & 2013 including oversampling in Broadway area



Iowa City Public School Data

The information from the supplemental observation studies and census analyses is very consistent with the original baseline and census findings from 2007. The 2011-13 observation information suggests that for beat-two as a whole, about 10 or 11% of the drivers are minority members on average across the entire beat. The census analyses also suggest that the population demographics in beat-two did not change in a significant way between the years 2007 – 2012.

To further investigate whether minority resident percentages changed on beat-two during the study period we analyzed Iowa City Public School Enrollment. Table 14 gives the percentages of African-American students enrolled at Iowa City public schools for beat-two students.[5] The table shows that with the exception of Grant Wood Elementary, African-American enrollment in beat-two generally remained steady or decreased between the school years of 2005/06 and 2010/11. These findings are consistent with information from census and observational analyses. Together, the findings suggest that it's unlikely that population demographics on beat-two changed in a dramatic way during the study period.

Table 14 Percentage of African-America students in Beat-Two schools

Year	SE	NW	NC	Wood	Twain	Lucas	Dist. Total
2005-2006	**16.13**	**14.04**	**16.02**	**28.61**	**45.71**	**17.81**	**13.38%**
2006-2007	14.39	17.26	10.06	31.89	44.21	19.25	14.42%
2007-2008	**19.97**	**17.54**	**10.89**	**36.26**	**50.38**	**15.42**	**16.55%**
2008-2009	18.72	18.97	9.75	31.96	45.02	14.86	15.96%
2009-2010	19.17	18.97	11.84	38.23	41.77	15.35	16.16%
2010-2011	**17.48**	**17.58**	**12.00**	**39.35**	**38.68**	**16.55**	**16.22%**

Map 6 below gives the location of Grant Wood School and summarizes the information from the census, observation and school analyses. Based on the totality of this information it seems reasonable to conclude that for most areas of beat-two the minority population and percentage of drivers on the road equaled roughly 10% during the study period. However, an area located in a southern portion of the beat (and as indicated in map 5) had a much higher percentage of minority residents and drivers. It seems likely that in this area 20% or more of the driers on the roads were minority members.

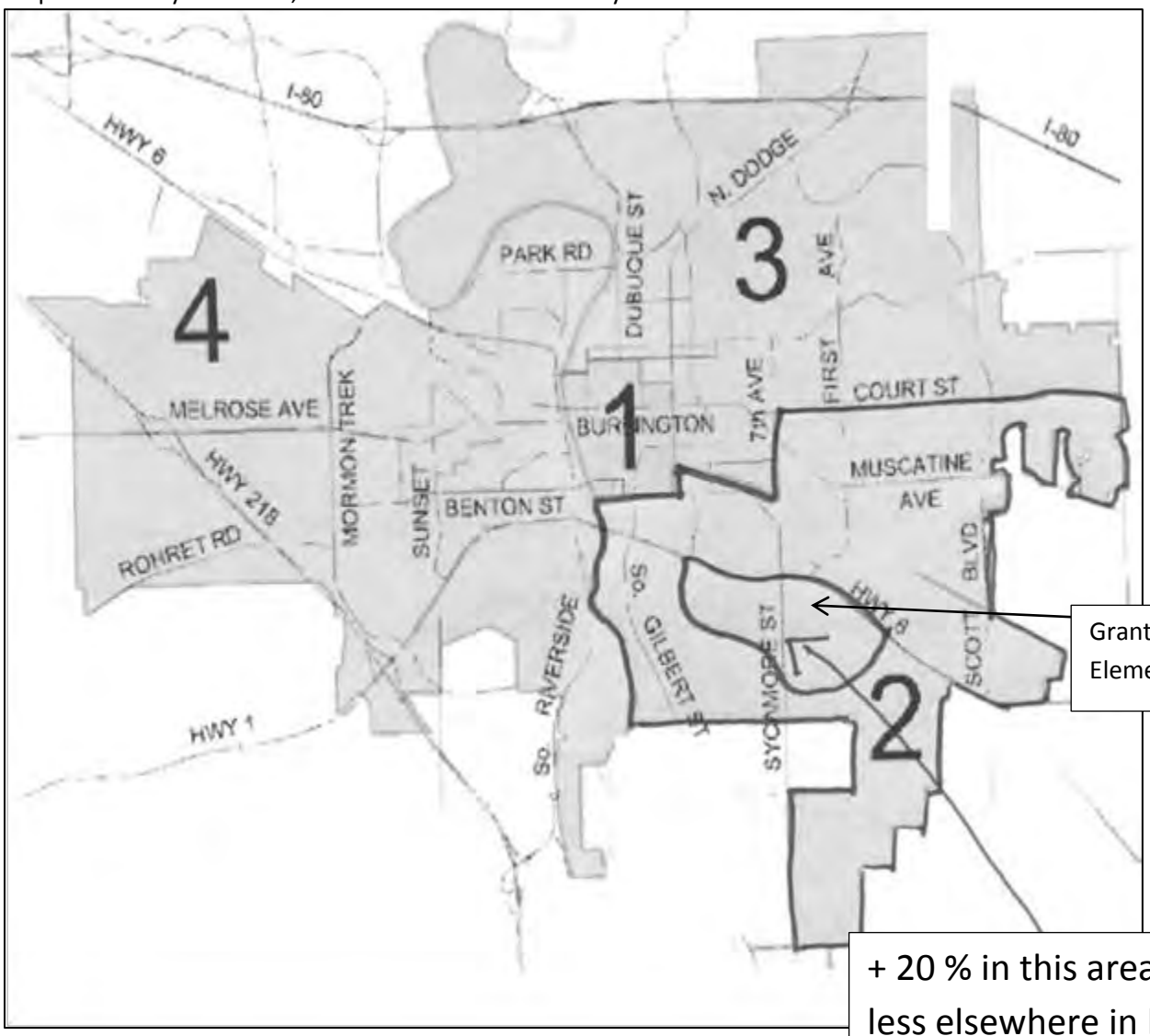
Summary so far

- It's unlikely that the baseline percentage of minority drivers on the road increased in a significant way during the study period in beat-two.
- Consequently, increases in disproportionality for ICPD traffic stops on beat-two likely stem from changes in patrol procedures.

[5] The results from NW Junior High should not be given as much weight as other listed schools because the boundaries for NW Junior High include only a few blocks of beat-two.

As will be outlined below, modifications in patrol procedures likely accounts for changes in the percentage of minority drivers stopped on beat-two during the study period. These changes include increased use of focused patrols in the higher minority concentration areas of beat-two. A key question at this point is, why were ICPD patrol procedures modified? We turn to this question in the next section.

Map 6 Summary of census, observation and school analyses



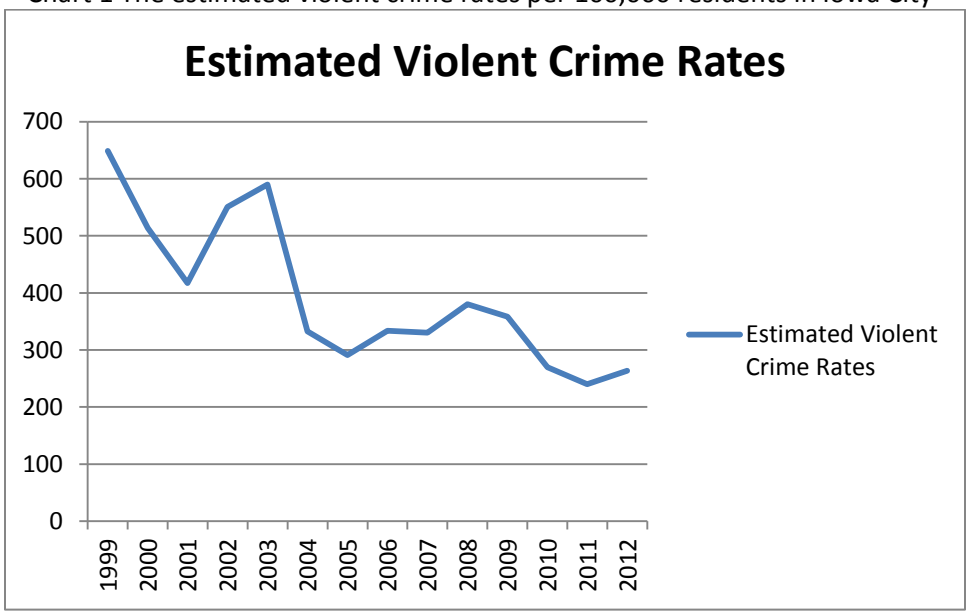
Crime rates and Patrol Procedures

As noted, the analyses thus far suggest that it's unlikely that the observed increase in disproportionality of minority drivers stopped by the ICPD that occurred during the study period resulted from a significant rise in the percentage of minority drivers on the roads. Instead other factors seem more likely to be responsible for the change.

We believe that a modification of ICPD patrol procedures and tactics—especially on beat-two—generated increased levels of disproportionality. This change in policing occurred between 2007 and 2010 and was concurrent with a spike in violent crime that occurred in 2008 and 2009.

Chart 1 below gives the rates of violent crime per 100,000 residents in Iowa City between 1999 and 2011. It's clear that the overall trend in the crime rate during this period is downward. However, in 2008 and 2009 the crime rate sharply increased for a brief period and then resumed its downward trend through the rest of the decade.[6]

Chart 1 The estimated violent crime rates per 100,000 residents in Iowa City*



*Source City-Data.com, estimates calculated using decennial census population values estimates

Although the increase in crime in 2008-09 was not large or long lasting, research suggests the spike was accompanied by a disproportional amount of media coverage (Barnum and Perfetti, 2012; 2013; Perfetti 2013).[7] Much of this media coverage framed the "crime problem" in Iowa City as predominately a

[6] The following crimes were included as violent crimes in the analyses for chart 1: aggravated assault, murder, rape, robbery.

[7] Here are links that provide a sampling of media stories about increases in Iowa City crime on beat-two during 2008-09. See appendix A for a graph of newspaper coverage of crime that occurred during this time.
http://www.kcrg.com/news/local/44973862.html

product of illegal activity occurring on the southeast side of town. Additionally, a substantial amount of anecdotal evidence suggests that the increase in crime and accompanying media coverage affected law enforcement behavior. For instance, the ICPD instituted a new patrol beat during this time period. This new beat (called "beat 2-A'") is formed from a subsection of the original beat-two and is located on the south side of the beat. The area designated as +20% concentration of minority residents on map 6 roughly corresponds to beat "2-A." Secondly, the ICPD opened a police substation in 2010 on beat-two near this same area. The sub stationed opened in part to address crime problems in the area. Further, the City of Iowa City instituted a curfew ordinance in December 2009 which according to many media accounts was enacted in part to deal with the violent crime trend in town especially on the southeast side.[8] Consistent with this, violent crime data for neighborhoods located in beat-two do show higher rates of violent crime for neighborhoods located on the south side of beat-two than the north side (see tables 15 and 16 below).[9]

Table 15* Violent crime rate for neighborhoods located in the south side of beat-two

South Neighborhoods Violent Crime	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Wetherby	35	16	16	8	18	27	25	10	15	13
South Pointe	0	1	0	0	0	0	1	0	0	2
Pepperwood	7	0	0	1	0	0	1	0	0	0
Hilltop	0	0	0	0	0	0	0	0	2	2
Grant Wood	23	11	9	13	25	20	26	19	19	22
South 2 Totals	65	28	25	22	43	47	53	29	36	39
Crime rate for year	**746.27**	**321.47**	**287.03**	**252.58**	**493.69**	**539.61**	**608.50**	**332.95**	**413.32**	**447.76**

* South-side beat-two estimates are based on a population estimate that equals 8,710

Table 16* Violent crime rate for neighborhoods located in the north side of beat-two

North Neighborhoods Violent Crime	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Village Green	1	1	1	4	1	1	2	2	1	1
Lucas farms	15	6	5	10	8	9	8	6	4	6
South East	21	11	5	7	9	7	7	7	12	7
Longfellow	5	3	0	3	1	2	3	2	0	2
Creek Side	5	6	3	5	7	0	7	6	3	4
Friendship	12	4	7	4	8	5	3	6	1	8
Morningside	5	3	0	2	0	1	2	1	2	1
North 2 totals	64	34	21	35	34	25	32	30	23	29
Crime rate for year	**529.23**	**281.15**	**173.65**	**289.42**	**281.15**	**206.73**	**264.62**	**248.08**	**190.19**	**239.81**

* North-side beat-two estimates are based on a population that equals 12,093

http://www.press-citizen.com/article/20090512/NEWS01/90512001/Man-arrested-rioting-assault-during-large-fight
http://coralvillecourier.typepad.com/community/2009/05/five-more-charged-for-mothers-day-brawl---violence-spills-over-to-city-high.html

[8] http://www.kwwl.com/story/11602573/iowa-city-council-to-make-decision-on-curfew-ordinance
http://www.kcrg.com/news/local/59413962.html
http://www.radioiowa.com/2009/09/16/first-reading-of-curfew-ordinance-passed-in-iowa-city/

[9] Source *IC Press Citizen.* The following crimes were included as violent crimes in the analyses for tables 15 & 16: aggravated assault, arson, forcible rape, kidnapping, murder and robbery.

Tables 15 and 16 show that the violent crime rate was notably higher for neighborhoods located on the south side of beat-two than those located on the north side during the study period.

Suppositions

Based on the analyses so far, our supposition is that the ICPD changed its patrol procedures in response to perceived increased levels of violent crime on beat-two. The analyses show that the south side of the beat, especially the Wetherby neighborhood had higher violent crime rates than most other areas of the city, and that the rates of violent crime in this area were higher in 2008 and 2009 than in the other years included in the analysis. Moreover, it was during this time frame when the changes in police tactics occurred. These changes took the form of focused patrols—with more officers patrolling in higher minority concentration areas (beat 2-A) than had been the case prior to 2008. It seems likely that these police tactics account for some of the increased minority disproportionality found ICPD traffic stops. It also seems likely that float officers, including SCAT and k-9 officers concentrated their patrols in these higher minority population neighborhoods. We will investigate these claims more deeply in the next section.

Summary for this Section

- Observation and census analyses show that the baseline of the percentage of minority drivers on the roads of Iowa city equaled roughly 10% during the study period
- In 2005 - 2007 levels of disproportionality in ICPD stops were comparatively low
- Levels of disproportionality significantly increased in 2010 and remained stable though 2012
- The increase was not likely due to changes in the proportions of minority drivers on the roads of Iowa City
- Disproportionality increased more on beat-two than other beats during the study period.
- ICPD modified patrol procedures in 2008-09 in response to perceived increased violent crime in Iowa City. These modifications include the formation of a new sub-beat located within beat-two. This sub-beat is located in an area characterized by a higher percentage of minority residents than other areas of beat-two (or Iowa City).

Chapter 2: Individual Officer Data

In this section we breakout individual officer traffic stop information by beat assignment. A disparity index, odds ratios and graphs are used to identify officers with higher levels of disproportionality than their coworkers. Comparisons are made across time, across the entire department and across beat assignment.

The Odds Ratio

In much of what follows we measure disproportionality using one of two estimators that are predicated on an *odds ratio*. Given this, it's valuable to spend some time becoming acquainted with this estimator. The odds ratio is a measure of effect size and association. It is useful when comparing two distinct groups. We use a measure called a *disparity index* when analyzing traffic stops. This measure compares stops to baseline values. When assessing the outcome of a stop we use a *standard odds ratio* measure which compares the odds of something happening in one group to the odds of it happening in another group.

Before proceeding let's define a few terms. A ***baseline*** is a standard used to judge disproportionality. It should be thought of as the percentage of minority drivers who are on the road in a given area, and consequently as the percentage of minority drivers that should be stopped by the police when no bias is occurring. If the percentage of minority drivers stopped is either higher or lower than the baseline percentage then ***disproportionality*** is said to occur. The term disproportionality does not necessarily imply bias or discrimination. In what follows we analyze two essential types of police data: *(i)* traffic **stop** data and *(ii)* ***outcome*** data. As the name implies, stop data deals with comparing the number of stops made by the police to baseline values. Outcome data gives information about the consequence of a stop. For example, did the driver receive a ticket? Was s/he arrested? How about searched?

The *disparity index* used to analyze traffic stops measures the difference in ratios between two groups and their respective baselines. To illustrate let's focus on a made-up example. Let's say the baseline for a given area of town equals 10%, meaning that we can expect that about 10% of the drivers in this area are minority members. This value represents the proportion of minority drivers who should be stopped by the police. It follows then, that the baseline value for white drivers in this area equals 90%. To make this more concrete, let's say a given officer makes 100 traffic stops in this area. Further, let's say that forty-five of the drivers stopped were minority members while fifty-five were not. Given these values, the disparity index for this officer equals

$$(.45/.10) \div (.55/.90) = 7.36$$

This number suggests that for our fictional officer, the odds were more than seven (7.36) times greater that she would stop a minority driver as a non-minority driver given the baseline values. Please note *that higher odds ratio values signal more minority disproportionality and that a score equal to one suggests no disproportionality*.

Now let's look at the outcome of the stop. Here we'll use the *standard odds ratio* to evaluate disproportionality. To illustrate let's say that our fictional officer wrote a single ticket to 80 of the 100 drivers she stopped. Let's also say that forty of these tickets went to minority drivers while forty were issued nonminority drivers. Given this information, computing the odds ratio for stop outcomes is straightforward.

Citation			
	No	**Yes**	**Total**
Minority	5	40	**45**
W & A	15	40	**55**
Total	**20**	**80**	**100**

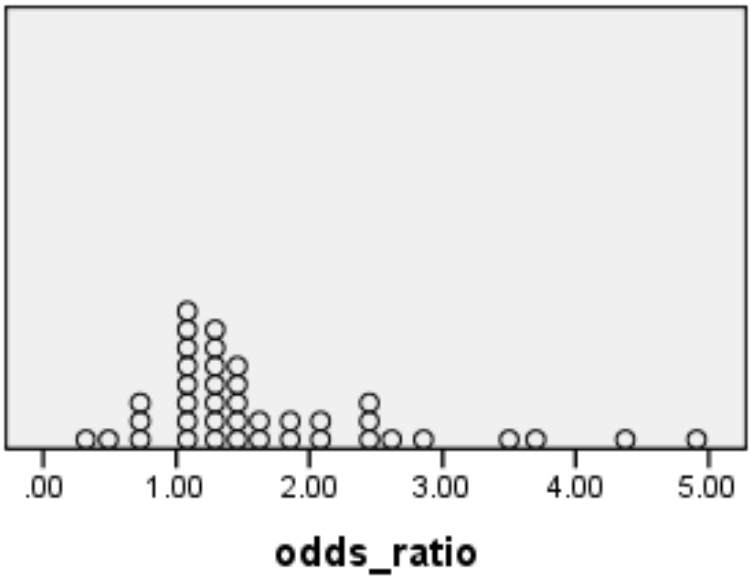
The odds ratios for citations equals (40/5) ÷ (40/15) = 3, meaning that the odds were three times greater that this officer issued a citation to a minority driver as a white driver. This value is meaningfully greater than one and so suggests significant disproportionality.

In the charts that follow each officer is represented as a circle. Disparity index values are located on the horizontal axis. As values move from left to right along this axis levels of disproportionality increase. An effective strategy to use in examining the charts is to identify officers who: *(i)* are located on the right side of the horizontal axis, *(ii)* who stand out from other officers *(iii)* who have higher disparity index values than others and (*iv*) who consistently have comparatively high values across time and on different beats.

An important warning: Please keep in mind is that the disparity index is based on an observational baseline and that the baseline is simply an ***estimate*** of the proportion of minority drivers on the roads of Iowa City. The actual percentages of drivers may be significantly different than the baseline. Consequently, **when evaluating an individual officer's data, it's important to evaluate the officer over time and in comparison to colleagues. This practice is much better than simply focusing on the specific value of a single disparity index score**. **In other words, in isolation of context—in particular other officers' scores, as well as the target officer's scores across time and place—a single disparity index score is not a good indicator of bias.** Also, please note that the index values become more valid and reliable as the number of stops made by the officer increases.

Disparity Index Ratios for Stops

Chart 2, disparity index ratios for officers working in 2005



The chart above shows the value of the disparity index score for each ICPD officer making at least fourteen traffic stops in 2005. This table is useful for identifying officers who stopped disproportionate percentages of minority drivers (given observational zone baseline values). The estimator is calculated as described above. Each circle represents an individual officer. The values for the index are given on the horizontal axis. Higher values suggest more disproportionality and a score equaling one suggests no disproportionality, meaning that the odds of stopping minority and white/Asian drivers are equal. As a general rule of thumb a score equal to or greater than **three** should draw your interest and be examined more closely. Likewise, scores that appear to be dissimilar from others should also be given special scrutiny**. Also it is very important to remember that disparity values that are based on a large number of stops are more valid and reliable than those based on fewer stops.** On the next page we present a table that gives the values for officers with a disparity index value greater than three. Interpretation is direct, for example, the odds are the first officer listed in the table is roughly five times (disparity index = *4.91*) more likely to stop a minority driver than a W & A driver given the observational baselines. These same claims apply for all charts that follow.

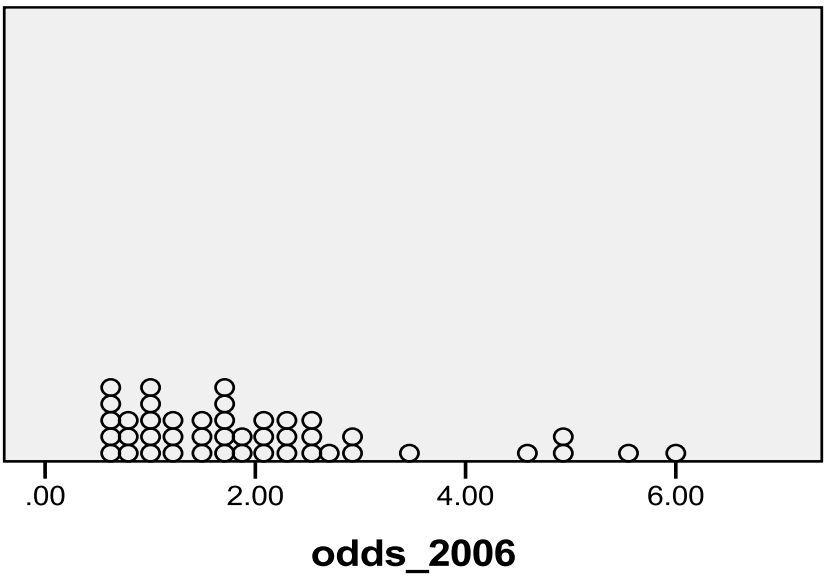
2005 Descriptives	
Mean	1.71
σ	1.03
Skew	1.45

Table 17, officers, disparity index values and beats for 2005

Odds Ratio	Beat	Stops
4.91	5	51
4.37	2	263
3.70	2	508
3.50	2	50
2.86	4	83
2.55	2	181
2.51	2	261

The data for 2005 show relatively modest amounts of disproportionality. In chart 2 the majority of officers' disparity index values cluster around 1.00 (mean = 1.7). Recall that a value equaling one suggests no disproportionality. Additionally, only four officers have disparity odds ratio values larger than three.

Chart 3, disparity index ratios for officers working in 2006



2006 Descriptives	
Mean	2.00
σ	1.44
Skew	1.56

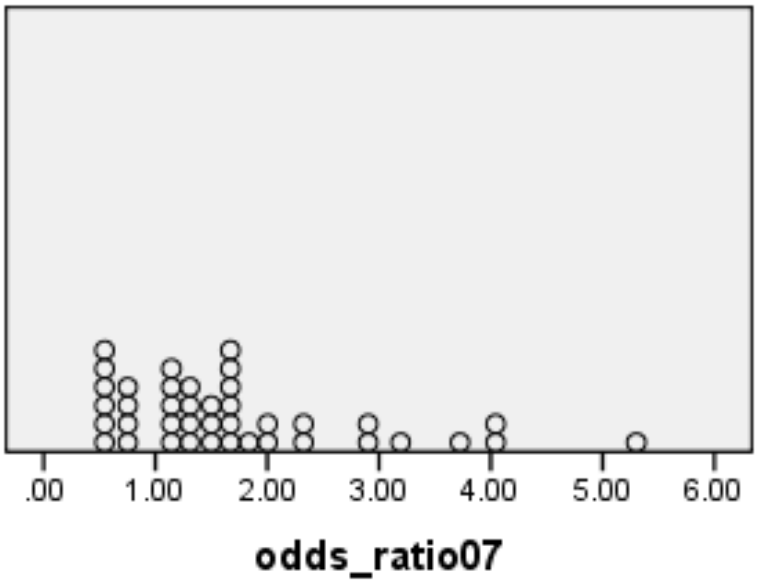
Table 18, officers, disparity index values and beats for 2006

Odds Ratio	Beat	Stops
6.0	5	25
5.5	2	776
4.95	5	31
4.91	1	51
4.6	2	77
3.5	2	223
3.0	4	40
2.8	1	445
2.7	4	144
2.6	2	417

The disparity index values for 2006 are moderately higher than those for 2005 (mean = 2.0). Several officers disparity index scores are above three. However of the officers with high values, only one is based on a large number of stops (n > greater than 100) so caution should be used when interpreting results.

The disparity index information for 2007 is given on the following page.

Chart 4, disparity index for officers working in 2007



2007 Descriptives	
Mean	1.75
σ	1.07
Skew	1.31

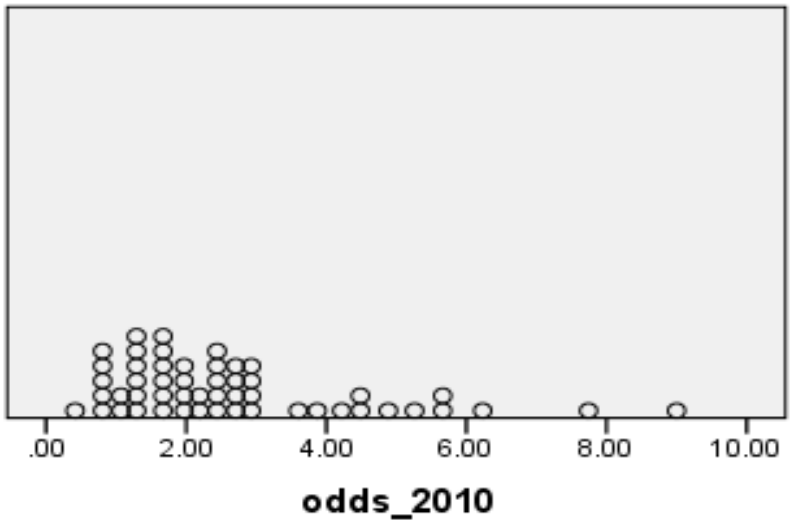
Table 19, officers, disparity index scores and beats for 2007

Odds Ratio	Beat	Stops
5.17	2	359
3.98	1	186
3.78	3	216
3.77	2	159
3.29	4	56
2.94	1	65
2.83	5	380

The data for 2007 are very similar to those for 2005. The 2007 information shows only modest levels of disproportionality with most officers' values clustered around 1.0 (mean = 1.75). Only five officers' disparity odds ratios were larger than three. Incidentally, no officers in 2007 with odds ratio scores above three had similarly high scores (disparity index values over three) in 2005 or visa-versa.

2010-2012 Stop Data

Chart 5, disparity index for officers working in 2010



2010 Descriptives	
Mean	2.56
σ	1.81
Skew	1.52

Table 20, officers, disparity index values and beats for 2010*

Odds Ratio	Beat	Stops
9.00	5	70
7.41	2	186
6.14	2	69
6.03	2	137
5.75	3	231
5.31	4	264
4.91	2	266
4.53	5	233
4.42	2	367
4.22	2	47
3.78	3	493
3.60	2	35

* Officers highlighted in red were assigned to beat 2A; officers highlighted in green worked the beat occasionally

The data from 2010 show a marked increase in disproportionality compared to data from 2005 – 2007. Examination of chart 5 shows twelve officers have disparity index values greater than three. The arithmetic mean of the entire distribution of disparity index values equals 2.56 and is clearly higher than those from 2005 – 2007. Table 20 above lists the officers whose disparity index values are greater than three. Nine of these twelve officers were assigned to beat-two or as beat-five float officers.

These data make apparent that much of the increase in disproportionality in 2010 disparity index is driven by those assigned to beat-two. It is important to note that the officers whose information is highlighted in red were assigned to beat 2-A fulltime. Information highlighted in green is from officers who worked beat-2A at least some of the time. Recall that beat 2-A is a special beat that was developed in 2010 to deal with perceived increases in crime on the southeast side of Iowa City. Six officers listed in table 17 were assigned to this beat at least some of the time in 2010.

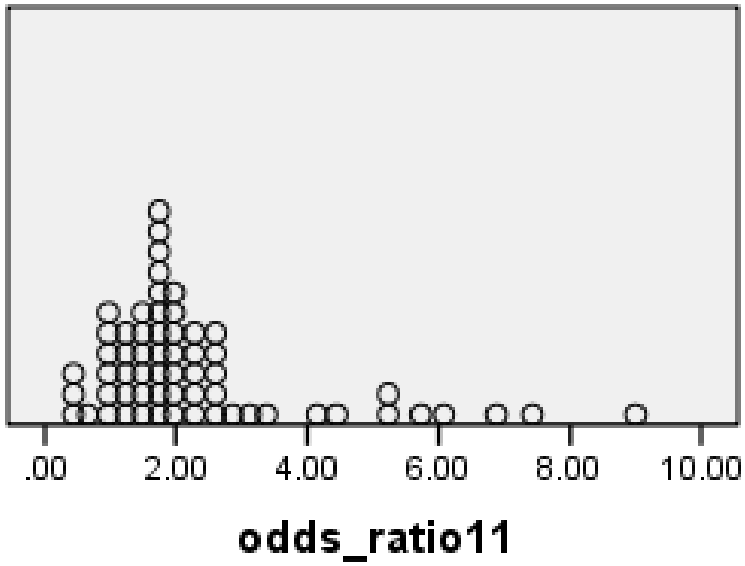
As noted, the census and observational baseline analyses show that the percentage of minority residents and drivers in the area demarcated by beat 2-A were significantly higher than in other areas of beat-two. In fact, observational analyses suggest that minority baseline values for beat 2-A were as high as 40%. **Consequently, the 10% minority driver baseline used for other areas of beat-two is not valid or appropriate for officers making stops solely in beat 2-A.** Simply put, using the 10% baseline for an officer working only in this area would dramatically increase the officer's odds ratio value and give a false impression of levels of disproportionality

Limitations of the Data

There are two important limitations with the ICPD traffic stop data: first, is it is not possible to determine the location of individual traffic stops and second, although we know the beat assignments of officers, it is not possible to know where on the beat an officer spent most of his/her time. Consequently, we cannot know the proportion of stops an officer made in a specific location or area of a beat or know how much time the officer spent in an area looking for a stop. This means that for beat-two officers it is not possible to know the percentage of time a given officer spent patrolling beat 2-A or the number of stops the officer made in this area.

The individual officer data for 2011 and 2012 follow. Summary and interpretation will follow the presentation of results for both years.

Chart 6, disparity index for officers working in 2011



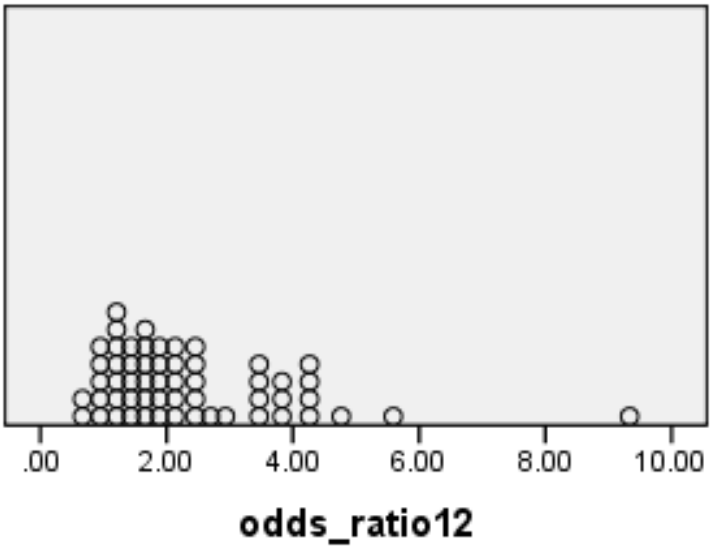
Descriptives 2011	
Mean	2.31
σ	1.74
Skew	2.03

Table 21, officers, disparity index values and beats for 2011

Odds Ratio	Beat	Stops
9.00	5	22
7.43	2	418
6.88	2	337
6.08	3	129
5.73	5	18
5.27	2	203
5.20	3	112
4.45	2	248
4.15	5	171
3.38	1	22
3.13	2	190

* Officers highlighted in red were sometimes assigned to beat 2A

Chart 7, disparity index for officers working in 2012



Descriptives 2012	
Mean	2.32
σ	1.54
Skew	1.99

Table 22, officers, disparity index values and beats for 2012

Odds Ratio	Beat	Stops
9.33	2	55
5.59	2-A	261
4.76	5	52
4.37	2	266
4.29	3	96
4.22	1	144
4.16	2	313
3.90	5	139
3.82	2	218
3.76	†	112
3.61	2	199
3.50	‡	26
3.38	4	461
3.38	2	282

* Officers highlighted in red were sometimes assigned to beat 2A
† investigator, ‡ deidentified

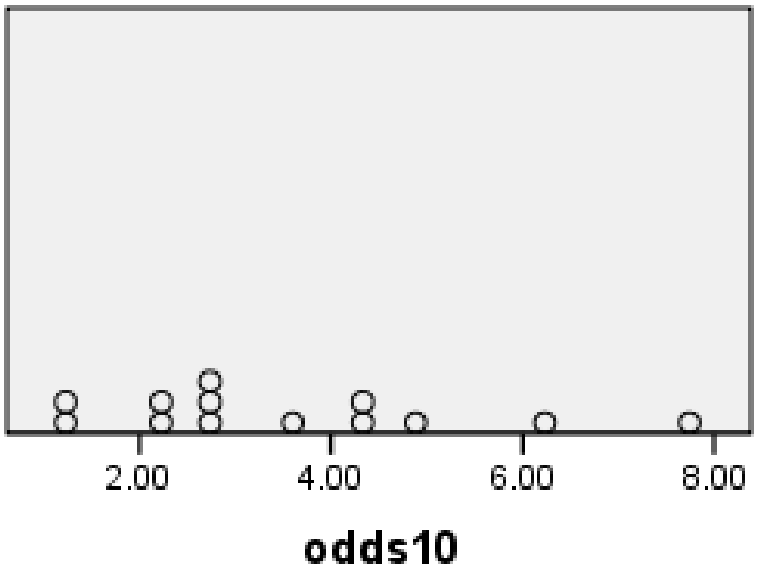
The disparity index data for 2010 – 2012 show a clear pattern. The mean disparity index values for each year are appreciably higher than those from 2005 – 2007 (see Appendix D HMLM section for a statistical analysis of differences). An examination of individual officers with the highest disparity index values (greater than three) shows that the majority of these officers were assigned to beat-two or beat-five.

Summary of 2005 – 2012 Analyses so far:

- Levels of disproportionality among ICPD officers were comparatively low in 2005 – 2007
- Levels of disproportionality significantly increased in 2010 and remained stable in 2011 and 2012 (see appendix D).
- In general, officers assigned to beat-two or beat-five demonstrated the highest levels of disproportionality in 2010 – 2012 traffic stops.

Next, we look more closely at beat-two and beat-five officers' disparity index values for 2010 – 2012.

Chart 8, disparity index for beat 2 officers working in 2010



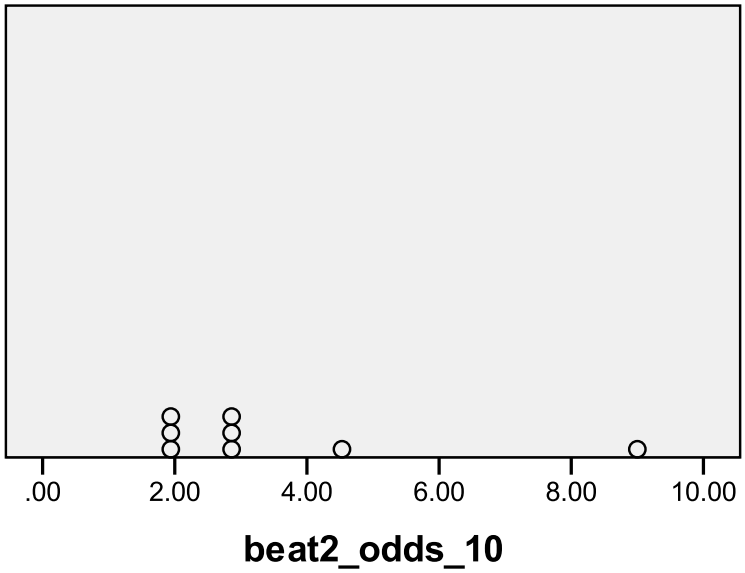
Descriptives 2010 beat 2	
Mean	3.89
σ	1.83
Skew	.48

Table 23, officers, disparity index values for beat 2 in 2010*

Odds Ratio	Beat	Stops
7.41	2-A	186
6.15	2-A	69
6.03	2-A	137
4.91	2-A	266
4.42	2-A	367
4.22	2	47
3.60	2	35
2.76	2	196
2.66	2-A	269
2.33	2	102
2.12	2	291
1.75	2	159
1.29	2	183

* Officers highlighted in red were sometimes assigned to beat 2A

Chart 9, disparity index for beat 5 officers working in 2010



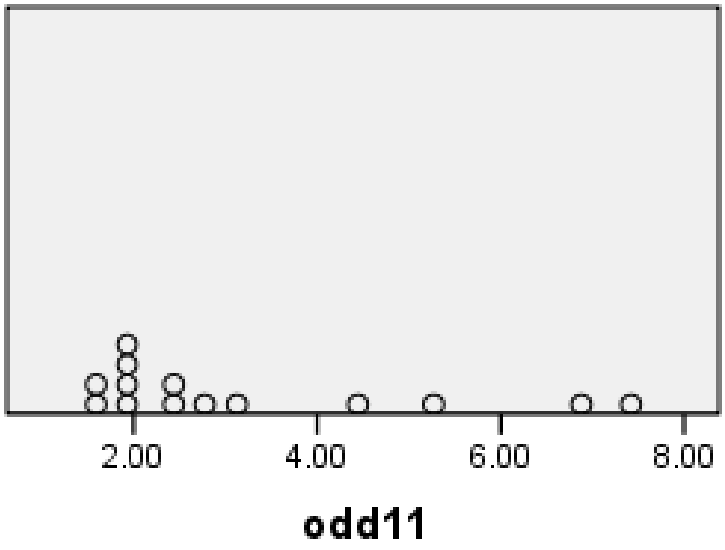
Descriptives 2010 beat 5	
Mean	3.69
σ	2.50
Skew	1.55

Table 24, officers, disparity index values for beat 5 in 2010

Odds Ratio	Beat	Stops
9.00		70
4.53		233
3.06		323
2.79		283
2.66		35
2.2		56
2.12		189
1.68		918

Analyses show that in 2010 the disparity index values for officers assigned to work beat 2-A were higher than other beat-two officers who were not designated to work solely in this area.

Chart 10, disparity index for beat 2 officers working in 2011



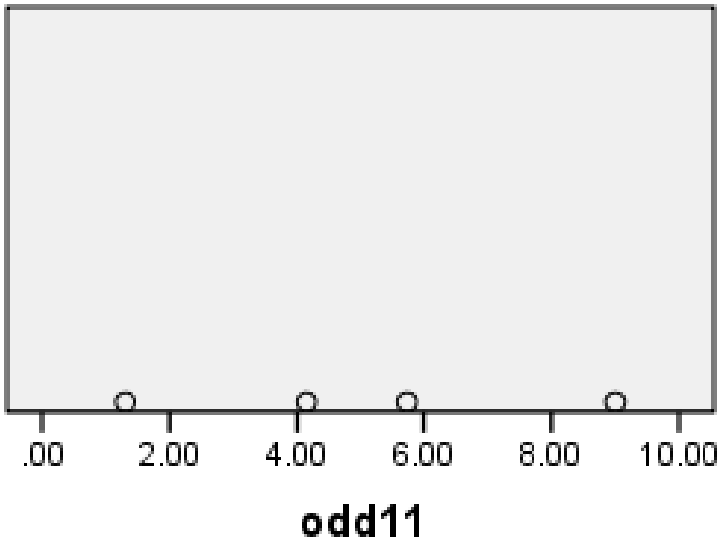
Descriptives 2011 beat 2	
Mean	3.26
σ	1.96
Skew	1.15

Table 25, officers, disparity index values for beat 2 in 2011*

Odds Ratio	Beat	Stops
7.427948	2-A	418
6.879581	2-A	337
5.273438	2	203
4.445783	2	248
3.12766	2	190
2.616279	2	333
2.595092	2	210
2.273684	2	238
2.076923	2	128
2.076923	2	80
1.979253	2	294
1.774038	2	249
1.738636	2	210
1.431818	2	204

* Officers highlighted in red were sometimes assigned to beat 2A

Chart 11, disparity index for beat 5 officers working in 2011



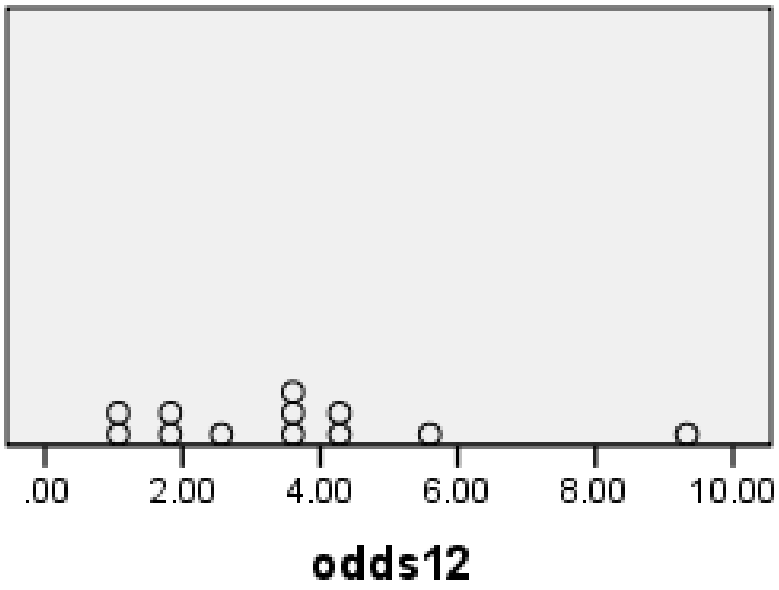
Descriptives 2011 beat 5	
Mean	5.04
σ	3.21
Skew	.107

Table 26, officers, disparity index values for beat 5 in 2011

Odds ratio	Beat	Stops
9.0		22
5.73		18
1.30		142
4.15		171

Again the 2011 data make clear that the disparity index values for beat 2-A officers were higher than the ratios for beat-two officers not designated to work beat 2-A and the values for some beat-five were also higher than other beat-two officers.

Chart 12, disparity index for beat 2 officers working in 2012



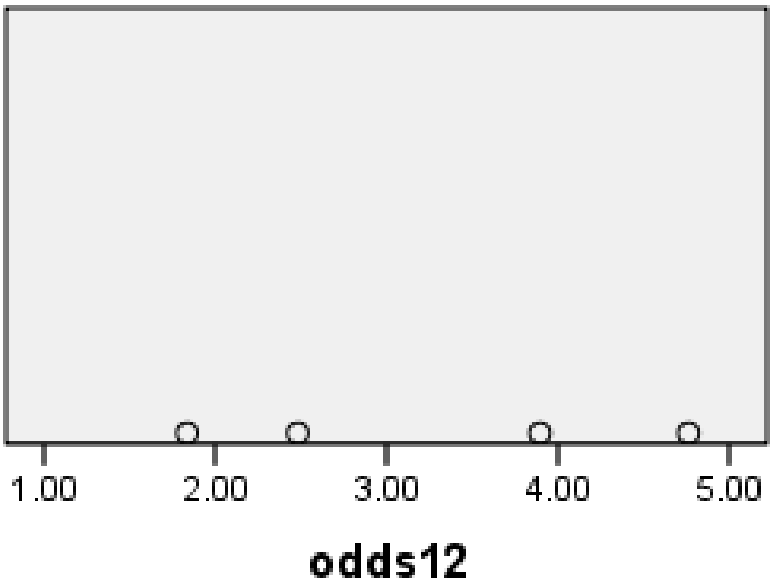
Descriptives 2012 beat 2	
Mean	3.55
σ	2.29
Skew	1.25

Table 27, officers, disparity index values for beat 2 in 2012

Odds Ratio	Beat	Stops
9.33	2	55
5.59	2-A	263
4.37	2	270
4.16	2	315
3.82	2	219
3.61	2	202
3.38	2	284
2.56	2	293
1.94	2	126
1.69	2	171
1.10	2	302
1.02	2	149

* Officers highlighted in red were sometimes assigned to beat 2A

Chart 13, disparity index for beat 5 officers working in 2012



Descriptives 2012 beat 5	
Mean	3.24
σ	1.32
Skew	.089

Table 28, officers, disparity index values for beat 5 in 2012

Odds Ratio	Beat	Stops
4.76		52
3.90		139
2.48		74
1.84		59

Summary of 2010 – 2012

ICPD traffic stop disproportionality for 2010-2012 data increased in comparison with 2005 – 2007 levels. The analyses suggest that much of this increase stemmed from an intensification of focused patrols in an area of southeast Iowa City characterized by higher minority-resident concentrations than other areas of town. This location is known as beat 2-A and was implemented as a patrol area in 2010. Since then, a small number of officers have been assigned to patrol only this beat. Additionally, evidence suggests that beat-five officers (especially street crime action team or SCAT officers) have frequently focused their patrols in this area. SCAT officers are tasked with patrolling high crime areas.

Data for individual officers shows that in general, the disparity index values for officers assigned to beat 2-A and many beat-five SCAT officers are higher than the values for officers not designated to work solely in this area of town. As noted previously, the percent of minority drivers and residents in beat 2-A is considerably higher than in other areas of town. **Consequently, the 10% baseline value used to calculate individual officer disparity index values is not valid for officers whose patrol areas are limited to this beat.** In fact, using the 10% baseline for officers whose patrol areas are circumscribed by beat 2-A would significantly inflate their disparity index values.

However, it's also important to emphasize that several officers not assigned to beat 2-A or SCAT demonstrated high levels of disproportionality in comparison to their colleagues. Although many of these officers were assigned to beat-two, some were assigned to beats located in other areas of the city.

It's also important to mention that not all beat-two or beat-five officers demonstrated high levels of disproportionality in traffic stops in comparison to colleagues. In fact, the disparity index values for roughly one half of all beat-two and beat-five officers were lower than 3.0.

Knowing that some beat-two officers exhibited disparity index values while others did not begs an important question. Why the difference? Two possibilities seem reasonable. First, perhaps beat-two officers with low values tended to avoid the locations on their beat with high minority concentrations (like beat 2-A) and simply focused their attention elsewhere. If so, these officers would be making traffic stops solely in locations where baseline values for minority drivers were lower. Or second, perhaps although not specifically assigned to beat 2-A, the beat-two officers with higher disparity index values may have focused their attention on the small area known as beat-2A which is located within their beat (perhaps because they believed crime was more likely to occur in 2-A). More analysis is needed to adjudicate between these two possibilities. However, in order to effectively evaluate the likelihood of each possibility it is necessary to know the precise location of each traffic stop made by officers working in beat-two. This information is needed to determine if officers with higher disparity index values were stopping cars more frequently in beat 2-A than other officers. As noted above, this type of analyses is not possible with these data because exact locations of stops were not provided.

Chapter 3 Outcome Data Analyses

In this chapter we examine traffic stops outcomes by looking for disproportionality in citations, searches, arrests and seizures. The analyses include both univariate odds ratios and multivariate regression techniques (see appendix A for detailed logistic regression. See Appendix C for detailed univariate odds ratio analyses).

Outcome analysis provides information about the consequence of a stop. In basic terms, it tells us what happened to drivers once they were stopped. Our focus is on whether minority drivers were more likely to receive some sort of sanction (like a ticket) than white/Asian drivers. Assessments include analyses for citations, arrests, search requests and *hit rates*—or the rate that a seizure of contraband or evidence occurred during a consent search.

Unlike the analyses for traffic stops, an investigation of stop outcomes is not dependent on population baseline characteristics. Outcome assessment simply compares two or more groups using the proportion of traffic stops as the comparison benchmark. So as an example, let's say a given officer stopped ten drivers all for the same offense—running a red light. Here the benchmark is the ten stops. Let's also say that five of these drivers were white/Asian and five were minority members. The analysis simply compares the officer's outcomes to the stop baseline. Since in this example five drivers from each demographic violated the law, we'd expect the officer to issue an equal number of tickets to each group. However, if the officer issued only one ticket to white/Asian drivers but five to minority drivers, this disparity may suggest bias.

In nearly all instances however, the situation is not as simple as the example above. Officers do not generally stop drivers for just one type of offense. Instead, officers usually stop drivers for a variety of reasons, including moving violations, equipment violations, reasonable suspicion and so forth. This adds a degree of complexity to the analyses. Multivariate statistical techniques like logistic regression and HMLM are useful in these contexts. These techniques enable researchers to statistically control (or set aside) potential explanatory variables that are not of interest.

The tables below present summary data for the odds ratio analyses, appendix A provides tables from logistic regression analyses for outcomes.

Our presentation strategy is as follows. Immediately below we present an example of a complete odds ratio analyses of data from 2005 to illustrate the process. Following this we present a summary table of the final results for all years followed by a discussion of the findings. A detailed analysis of odds ratios for all years can be found in appendix C.

2005 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	831	530	1361	**14%**
W & A	4592	4044	8636	**86%**
Total	5423	4574	9997	**100%**

* 5 cases missing data

2005 Odds Ratio for citations = .724 (1.38)

Received Citations	No	Yes
Minority Percent Cited	**61%**	**39%**
W & A Percent Cited	**53%**	**47%**

Interpretation: in 2005 given that a citation was issued, the odds were 1.35 times higher that a white/Asian driver would receive a ticket than would a minority driver.

Arrests

Arrests	No	Yes	Total
Minority	1230	131	1361
W & A	8288	348	8636
Grand Total	9518	479	9997

* 5 cases missing data

2005 Odds Ratio for arrests = 2.54

Arrests	No	Yes
Minority Percent Arrested	**90%**	**10%**
W & A Percent Arrested	**96%**	**4%**

Interpretation: given that an arrest was made, the odds were 2.5 times greater that a minority driver would be arrested during a traffic stop than would a W & A driver in 2005.

Searches

Consent Request	No	Yes	Total
Minority	1299	61	1360
W & A	8479	157	8636
Grand Total	9778	218	9996

* 6 cases missing data

2005 Odds Ratio for consent search requests = 2.54

Consent Search Requests	No	Yes
Minority Percent Requested	**96%**	**4%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search request was made, the odds were 2.5 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2005.

2005 Odds Ratio for hit rates = .624 (1.60)

Search Hits	No	Yes	Total
Minority Hits	54	7	61
W & A	130	27	157
Grand Total	184	34	218
Minority Hits	**89%**	**11%**	
W & A Hits	**83%**	**17%**	

Interpretation: given that an item was seized, compared to W & A drivers, the odds were 2.5 times greater that an officer would request a search from a minority driver during a traffic stop in 2005; however in the same year the odds were 1.60 times greater that an officer would seize evidence or contraband as a result of the search requested of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

A summary table for each year of the study follows. See appendix C for individual tables for the data analyzed during 2005 -2012.

Summary Table of Outcomes

Odds ratios for outcomes by year

Citations	**Minority Odds**
2005	0.72
2006	0.67
2007	0.86
2010	1.18
2011	1.38
2012	1.44
Arrests	----
2005	2.54
2006	2.82
2007	2.61
2010	3.08
2011	3.18
2012	2.55
Search Requests	----
2005	2.54
2006	3.42
2007	5.62
2010	2.75
2011	3.89
2012	2.44
Hit Rates	----
2005	0.62
2006	1.20
2007	0.34
2010	0.44
2011	0.78
2012	0.87

Stop Outcome Summary

The purpose of the analyses of stop *outcomes* was to evaluate disproportionality in citations, arrests, consent searches and seizures from consent searches. The univariate odds ratio analyses showed consistent patterns—Iowa City officers disproportionately arrested and asked for consent to search minority drivers across all years of the study. On average the odds were about 2.80 times greater that minority drivers would be arrested on a traffic stop in comparison to others. Likewise, the odds were roughly 3.45 times greater that ICPD officers would request a search from minority drivers compared to others, this despite "hit rates" that were actually higher for non-minority drivers. Results also suggest that white/Asian and minority drivers were ticketed at similar rates. Multivariate logistic regression show similar results. The regression odds ratios are similar in size to those from univariate analyses even after controlling for officer's race, officer's gender, officer's years of service, officer's duty assignment, the time of day, moving violation, equipment violation and the driver's gender.

It's important to emphasize that across most years of the study the hit rates that resulted from consent searches were actually lower for minority drivers than for a white/Asian driver. So although officers were more likely to ask minority drivers for permission to search, they were more successful in seizing contraband and evidence from white/Asian drivers.

A final word about searches: We recently surveyed officers to check compliance and accuracy of the inputting of search request data. The results suggest that ICPD officers were inconsistent in entering information about search requests. Specifically, roughly 50% of officers correctly input each search request made. These officers input data each time they made a search request. However, about 50% of the officers incorrectly entered this information. Instead of entering a request each time an attempt was made, these officers input a search request only after being granted consent for the search by the driver. Moreover, it is not possible to know which type of search requests are present for a given search in this data set. This information should be considered when interpreting search request information.

A final word about arrests: the findings show that across the study period the odds were greater that a minority driver would be arrested on traffic stop than a white/Asian driver. However, caution should be used when interpreting this result because important control variables could not be included in logistic regression models. Most importantly, information was not available for the reason for arrest during a traffic stop. Consequently, it is unknown whether minority drivers were more likely to be arrested for low discretion offenses such as bench warrants, driving while under suspension and operating while intoxicated. Officers have very little discretion when deciding whether to affect an arrest for these types of offenses. It was not possible to test for differences in offending rates between racial groups for these types of offenses—which could theoretically account for some of the observed disproportionality—because the data set does not include this information.

Final Summary

This study looked for disproportionality in traffic stops made by the Iowa City Police Department during 2005, 2006, 2007, 2010, 2011 and 2012—more than 60,000 stops. The investigation analyzed two broad categories of discretionary police conduct: *(i)* a made traffic stop and *(ii)* the outcome or disposition of a stop. The methodology used to analyze ICPD traffic stops employed a driver-population baseline fashioned from roadside observations, census data and school enrollment information. The observational portion of the baseline centered on observations from people who surveyed traffic in Iowa City to determine the race and gender of drivers on the roads. These observers monitored traffic at various times between 2007 and 2013 and made roughly 25,000 total observations. The methodology used in assessing ICPD officers' traffic stop data is straight forward. It centered on identifying differences between the PD's traffic stop information and the baseline. Any difference between baseline values and police data signified disproportionality.

The results of baseline analyses suggested that roughly 10% of the drivers on Iowa City roads were minority members during the study period. Results also show that between 2005 and 2007 levels of disproportionality in ICPD stop data were comparatively low. During this time-period, roughly 15% of the Iowa City Police Department's traffic stops involved minority drivers.

However, disproportionality significantly increased in 2010 and then remained stable through 2012. Analyses show that in 2010 the percentage of minority drivers stopped by ICPD officers increased to roughly 19% and remained near this level in 2011 and 2012. The analyses also show that the minority-driver baseline remained constant during this time-frame.

A close examination of ICPD patrol practices suggests that the increase in disproportionality stemmed from an intensification of directed patrols in a portion of southeast Iowa City. After a review of various sources it seems likely that the Iowa City Police Department modified patrol procedures following an increase in violent crime in the city in 2008 and 2009. These modifications included the establishment of a new patrol beat located in southeast Iowa City in an area with a higher minority resident concentration than other areas of town. This beat—called "2-A" is rather small. It consists of an area no larger than few blocks and is geographically much smaller than other ICPD beats. However, the minority baseline in beat 2-A is significantly higher than in other Iowa City beats.

Individual officer analyses indicate that the officers exhibiting the most disproportionality in traffic stops were frequently assigned to patrol areas located on the southeast side of Iowa City, or were "float" officers who were tasked with patrolling high crime areas. Both groups of officers tended to stop higher proportions of minority drivers than did most of their colleagues. Officers assigned to patrol the small 2-A beat also stopped higher proportions of minority drivers than did other officers. However, for these officers this result should be discounted because of the higher minority baselines in this area. Consequently, higher proportions of minority stops for beat 2-A officers do not necessarily indicate disproportionality or bias.

The examination of stop *outcomes* assessed disproportionality in citations, arrests, consent searches and *hit-rates* or seizures from consent searches. Univariate odds ratio analyses showed consistent patterns—Iowa City officers disproportionately arrested and (consent) searched minority drivers. On average across all years of the study the odds were about 2.80 times greater that minority drivers would be arrested on a traffic stop in comparison to others. Likewise, the odds were roughly 3.45 times greater that ICPD officers would request a search from minority drivers compared to others, this despite hit

rates that were actually on average higher for non-minority drivers. Findings also suggest that minority drivers and others were ticketed at equivalent rates. Multivariate logistic regression analyses show parallel results. The regression odds ratios were similar in size to those from univariate analyses even after controlling for officer's race, officer's gender, officer's years of service, officer's duty assignment, the time of day, moving violation, equipment violation and the driver's gender.

Care should be used when evaluating findings for arrest outcomes. Several important control variables were not available for inclusion in logistic regression models. Consequently, it's not possible to evaluate whether disproportionality in arrest rates was a product of differential offending rates between demographic categories. Likewise, it is important to emphasize that the number of cases used for analyses of consent search requests and seizures was much smaller than the number of cases used in analyses of other stop- outcome variables. This small "n" should be taken into consideration when evaluating results.

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Appendix A
Logistic Regression Analyses of Stop Outcomes

2005 Logistic Regression Analyses (*minority coded as 0***)**

Citations	**B**	**S.E.**	**Exp(B)**
Officer's race*	-0.638	0.172	0.529
Officer's gender*	0.505	0.115	1.657
Years of service*	0.03	0.003	1.031
Assignment*	0.01	0.003	1.011
Daytime stop*	1.605	0.048	4.976
Moving violation	0.025	0.074	1.025
Equip violation*	-0.714	0.077	0.49
Male driver	0.071	0.047	1.073
W & A driver	**-0.028**	**0.067**	**0.972**
Constant	-1.11	0.22	

** p < .01*

Arrests	**B**	**S.E.**	**Wald**	**Exp(B)**
Officer's race **	-0.62	0.246	6.359	0.538
Officer's gender*	0.554	0.281	3.893	1.741
Years of service**	-0.02	0.007	7.455	0.98
assignment	0.007	0.006	1.22	1.007
Daytime stop	-1.687	0.132	163.483	0.185
Moving violation	-0.184	0.155	1.405	0.832
Equip violation**	-0.484	0.162	8.969	0.616
Male driver**	0.49	0.109	20.076	1.632
W & A driver**	**-0.747**	**0.111**	**44.956**	**0.474**
Constant	-1.644	0.406	16.436	

***p < .01, *P < .05*

Consent Request	**B**	**S.E.**	**Wald**	**Exp(B)**
Officer's race	17.241	3.23E+03	0	3.08E+07
Officer's gender**	-0.991	0.211	22.026	0.371
Years of service**	-0.117	0.015	62.443	0.889
Assignment	0.012	0.008	2.02	1.012
Daytime stop**	-0.792	0.159	24.939	0.453
Moving violation*	-0.494	0.221	4.993	0.61
Equip violation	0.138	0.22	0.395	1.148
Male driver**	0.531	0.16	10.943	1.7
W & A driver**	**-0.582**	**0.158**	**13.582**	**0.559**
Constant	-18.613	3.23E+03		

***p < .01, *P < .05*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were essentially equal that minority drivers would receive a ticket. However, the odds were greater minority drivers would l be arrested (2.11) and have an officer ask to search the vehicle (1.78).

2006 Logistic Regression Analyses (*minority coded as 0***)**

Citations	**B**	**S.E.**	**Exp(B)**
Assignment***	-.1299	.0165	.878
Daytime stop***	1.348	.0149	3.851
Moving violation*	.128	.063	1.137
Equip violation***	-.555	.0633	.574
Male driver	-.005	.0408	.994
W & A driver* **	**.221**	**.0555**	**1.246**
Constant	-.6634	.0954	

** p < .05. *** p < .001*

Arrests	**B**	**S.E.**	**Exp(B)**
Assignment	-.031	.0301	.964
Daytime stop***	-1.258	.0996	.248
Moving violation***	-1.308	.1291	.270
Equip violation***	-1.04	.1306	.352
Male driver***	.3724	.0971	1.451
W & A driver* **	**-08583**	**.0971**	**.4238**
Constant	-.8981	.1741	

****p < .001*

Consent Request	**B**	**S.E.**	**Exp(B)**
Assignment**	-.121	.0431	.885
Daytime stop***	-.590	.1093	.554
Moving violation*	.374	.167	1.454
Equip violation***	.838	.167	2.312
Male driver***	.953	.137	2.595
W & A driver* **	**-1.092**	**.111**	**.335**
Constant	-3.28	.249	

****p < .001, **P < .01, *p < .05*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were slightly greater that a white/Asian driver would receive a ticket (1.24) but the odds were greater that a minority driver would be arrested (2.33) and have an officer ask to search the vehicle (2.98).

2007 Logistic Regression (*minority code as 1*)

Citations	**B**	**S.E.**	**Exp(B)**
Officer's race	-0.348	0.225	0.706
Officer's gender**	0.704	0.145	2.021
Years of service**	0.062	0.004	1.064
Assignment*	-0.028	0.012	0.972
Daytime stop**	1.127	0.069	3.087
Moving violation**	0.616	0.107	1.851
Equip violation	0.095	0.108	1.1
Male driver	-0.014	0.063	0.986
W & A driver**	**0.262**	**0.091**	**1.3**
Constant	-2.744	0.199	

** p < .5, ** p < .01*

Arrest	**B**	**S.E.**	**Exp(B)**
Officer's race	-0.634	0.732	0.53
Officer's gender	-0.207	0.26	0.813
Years of service**	-0.049	0.01	0.952
Assignment	-0.047	0.033	0.954
Daytime stop**	-1.069	0.155	0.343
Moving violation**	-0.712	0.224	0.491
Equip violation**	-0.999	0.232	0.368
Male driver**	0.853	0.162	2.346
W & A driver**	**0.747**	**0.153**	**2.111**
Constant	-1.625	0.411	

** p < .5, ** p < .01*

Search Request	**B**	**S.E.**	**Exp(B)**
Officer's race	0.33	0.632	1.391
Officer's gender**	-1.07	0.358	0.343
Years of service**	0.035	0.016	1.036
Assignment*	0.031	0.013	1.032
Daytime stop**	-1.7	0.287	0.183
Moving violation	-0.203	0.368	0.816
Equip violation**	-0.177	0.373	0.838
Male driver**	1.531	0.356	4.623
W & A driver**	**1.501**	**0.228**	**4.484**
Constant	-4.374	0.584	

** p < .5, ** p < .01*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were roughly equal minority driver would receive a ticket (1.3) but the odds were

greater that a minority driver would be arrested (2.11) and have an officer ask to search the vehicle (4.84).

2010 Logistic Regression (*minority coded as 0*)

Citations	**B**	**S.E.**	**Exp(B)**
Officer's race	0.047	0.118	1.048
Officer's gender	-0.066	0.138	0.936
Years of service**	0.033	0.003	1.033
Assignment**	-0.01	0.001	0.99
Daytime stop**	-0.867	0.054	0.42
Moving violation**	0.329	0.087	1.39
Equip violation**	-0.332	0.087	0.718
Male driver	0.047	0.048	1.049
W & A driver**	**-0.423**	**0.059**	**0.655**
Constant	-0.777	0.201	

** p < .05; ** p < .01*

Arrests	**B**	**S.E.**	**Exp(B)**
Officer's race**	-0.63	0.198	0.532
Officer's gender	0.185	0.306	1.203
Years of service**	-0.021	0.008	0.979
Assignment	0	0.003	1
Daytime stop**	0.657	0.118	1.93
Moving violation**	-1.54	0.148	0.214
Equip violation**	-1.72	0.149	0.179
Male driver*	0.276	0.113	1.318
W & A driver**	**-0.951**	**0.109**	**0.386**
Constant	-1.025	0.393	

** p < .05; ** p < .01*

Search Requests	**B**	**S.E.**	**Exp(B)**
Officer's race*	1.775	0.714	5.902
Officer's gender	-0.104	0.319	0.901
Years of service*	-0.021	0.01	0.979
Assignment	-0.001	0.003	0.999
Daytime stop**	0.817	0.15	2.264
Moving violation**	-0.796	0.217	0.451
Equip violation**	-0.636	0.21	0.53
Male driver**	0.721	0.154	2.057
W & A driver**	**-0.856**	**0.135**	**0.425**
Constant	-4.856	0.818	

** p < .05; ** p < .01*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were greater that minority drivers would receive a ticket (1.52) would be arrested (2.6) and would have an officer ask to search the vehicle (2.354).

2011 Logistic regression (*minority coded as 0*)

Citation	**B**	**S.E.**	**Exp(B)**
Officer's race	0.154	0.089	1.166
Officer's gender**	0.677	0.168	1.967
Years of service**	0.031	0.003	1.031
Assignment **	-0.016	0.001	0.984
Daytime stop**	0.454	0.051	1.574
Moving violation**	0.209	0.08	1.232
Equip violation**	-0.782	0.082	0.458
Male driver**	-0.003	0	0.997
W & A driver**	**-0.583**	**0.056**	**0.558**
Constant	-1.597	0.21	

** *p < .01*

Arrests	**B**	**S.E.**	**Exp(B)**
Officer's race	-0.318	0.19	0.728
Officer's gender	0.266	0.346	1.305
Years of service	0.012	0.007	1.012
Assignment	-0.001	0.002	0.999
Daytime stop**	-1.035	0.115	0.355
Moving violation**	-1.149	0.14	0.317
Equip violation**	-1.099	0.139	0.333
Male driver*	0.003	0.001	1.003
W & A driver**	**-0.928**	**0.1**	**0.395**
Constant	-1.334	0.422	

** *p < .01*

Search requests	**B**	**S.E.**	**Exp(B)**
Officer's race*	0.76	0.326	2.139
Officer's gender	0.049	0.346	1.05
Years of service	-0.008	0.008	0.992
Assignment	-0.003	0.003	0.997
Daytime stop**	-0.646	0.127	0.524
Moving violation	-0.012	0.179	0.988
Equip violation	0.016	0.177	1.016
Male driver	0.001	0.001	1.001
W & A driver**	**-1.284**	**0.112**	**0.277**
Constant	-3.134	0.514	

* *p < .05;* ** *p < .01*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were greater that minority drivers would receive a ticket (1.79) be arrested (2.53) and have an officer ask to search the vehicle (3.61).

2012 Logistic Regression (*minority coded as 0*)

Citations	**B**	**S.E.**	**Exp(B)**
Officer's race	0.083	0.108	1.087
Officer's gender**	0.589	0.121	1.803
Years of service	0.005	0.003	1.005
Assignment**	-0.01	0.002	0.99
Daytime stop**	0.649	0.055	1.914
Moving violation**	-0.371	0.087	0.69
Equip violation**	0.363	0.088	1.437
Male driver**	0.181	0.048	1.199
W & A driver**	**-0.49**	**0.056**	**0.613**
Constant	-2.104	0.197	

** *p < .01*

Arrest	**B**	**S.E.**	**Exp(B)**
Officer's race**	-0.506	0.183	0.603
Officer's gender	0.443	0.329	1.557
Years of service	0.003	0.009	1.003
Assignment	0.002	0.003	1.002
Daytime stop**	-1.318	0.137	0.268
Moving violation**	-1.161	0.14	0.313
Equip violation**	-1.367	0.146	0.255
Male driver**	0.425	0.104	1.529
W & A driver**	**-0.764**	**0.1**	**0.466**
Constant	-1.286	0.411	

** *p < .01*

Search Request	**B**	**S.E.**	**Exp(B)**
Officer's race**	1.564	0.583	4.776
Officer's gender	0.413	0.39	1.511
Years of service	0.014	0.011	1.014
Assignment	-0.01	0.007	0.99
Daytime stop**	-1.234	0.18	0.291
Moving violation	-0.345	0.21	0.708
Equip violation	-0.103	0.21	0.902
Male driver**	0.661	0.142	1.937
W & A driver **	**-0.754**	**0.128**	**0.471**
Constant	-4.998	0.744	

** *p < .01*

Interpretation: the results of logistic regression are consistent with odds ratio analyses. Even after controlling for several important alternative explanations, results show that in comparison to W & A drivers, the odds were greater that minority drivers would receive a ticket (1.63) be arrested (2.15) and have an officer ask to search the vehicle (2.12).

Appendix B

Logistic Regression Analyses: Comparing Racial Differences in Traffic Stops 2005-2007 to 2010-2012

Logistic Regression for all Beats Comparing 2005-2007 to 2010-2012

Driver's Race=DV	B	S.E.
Year of Study***	-.3059	.024
Male Driver***	-.195	0..24
Assignment	.003	.0009
Moving violation***	.523	.0398
Equip violation	.098	.0400
Male driver***	0.071	0.047
Daytime Stop***	.277	.0243
Constant	1.413	
n	53100	

*** *p < .001 (DV=minority driver coded as 0) Note: year of study is an indicator variable with 2010-2012 coded as 1*

Logistic Regression for individual beats comparing 2005-2007 to 2010-2012

Driver's Race=DV	B	S.E.	Exp(B)	n
Year of Study Beat-1	0.0841	0.0576	1.087	9821
Year of Study Beat-2***	-0.5121	0.0258	0.599	16314
Year of Study Beat-3***	-0.5791	0.0564	0.560	11592
Year of Study Beat-4	-0.1371	0.0627	0.871	8212
Year of Study Beat-5***	-0.3569	0.0893	0.693	4876

*** *p < .001 (DV=minority driver coded as 0) Note: year of study is an indicator variable with 2010-2012 coded as 1. The control variables used are the same as the analysis above but are not listed in this table*

Appendix C
Detailed Information for Odds Ratio Analyses

2005 Citations

Citations	No	Yes	Total	Percent of Stops
Minority	831	530	1361	**14%**
W & A	4592	4044	8636	**86%**
Total	5423	4574	9997	**100%**

* 5 cases missing data

2005 Odds Ratio for citations = .724 (1.38)

Received Citations	No	Yes
Minority Percent Cited	**61%**	**39%**
W & A Percent Cited	**53%**	**47%**

Interpretation: in 2005 given that a citation was issued, the odds were 1.35 times higher that a white/Asian driver would receive a ticket than would a minority driver.

Arrests

Arrests	No	Yes	Total
Minority	1230	131	1361
W & A	8288	348	8636
Grand Total	9518	479	9997

* 5 cases missing data

2005 Odds Ratio for arrests = 2.54

Arrests	No	Yes
Minority Percent Arrested	**90%**	**10%**
W & A Percent Arrested	**96%**	**4%**

Interpretation: given that an arrest was made, the odds were 2.5 times greater that a minority driver would be arrested during a traffic stop than would a W & A driver in 2005.

Searches

Consent Request	No	Yes	Total
Minority	1299	61	1360
W & A	8479	157	8636
Grand Total	9778	218	9996

* 6 cases missing data

2005 Odds Ratio for consent search requests = 2.54

Consent Search Requests	No	Yes
Minority Percent Requested	**96%**	**4%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search was requested, the odds were 2.5 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2005.

2005 Odds Ratio for hit rates = .624 (1.60)

Search Hits	No	Yes	Total
Minority Hits	54	7	61
W & A	130	27	157
Grand Total	184	34	218
Minority Hits	**89%**	**11%**	
W & A Hits	**83%**	**17%**	

Interpretation: compared to W & A drivers, the odds were 2.5 times greater that an officer would request a search from a minority driver during a traffic stop in 2005; however in the same year the odds were 1.60 times greater that an officer would find evidence or contraband as a result of the search requested of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

2006 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	1137	718	1855	**15%**
W & A	5302	4928	10230	**85%**
Total	6439	5646	12085	**100%**

2006 Odds Ratio for citations = .67 (1.49)

Received Citations	No	Yes
Minority Percent Cited	**62%**	**38%**
W & A Percent Cited	**52%**	**48%**

Interpretation: in 2006 given that a citation was issued, the odds were 1.49 times higher that a white/Asian driver would receive a ticket than would a minority driver.

Arrests

Arrests	No	Yes	Total
Minority	1675	180	1855
W & A	9855	375	10230
Grand Total	11530	555	12085

2006 Odds Ratio for arrests = 2.82

Arrests	No	Yes
Minority Percent Arrested	**90%**	**10%**
W & A Percent Arrested	**96%**	**4%**

Interpretation: given that an arrest was made, the odds were 2.8 times greater that a minority driver would be arrested during a traffic stop than would a W & A driver in 2006.

Searches

Consent Request	No	Yes	Total
Minority	1714	141	1855
W & A	9990	240	10230
Grand Total	11530	381	12085

* 6 cases missing data

2006 Odds Ratio for consent search requests = 3.42

Consent Search Requests	No	Yes
Minority Percent Requested	**92%**	**8%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search request was made, the odds were 3.4 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2006.

2006 Odds Ratio for hit rates = 1.20

Search Hits	No	Yes	Total
Minority Hits	121	20	141
W & A	211	29	240
Grand Total	332	49	381
Minority Hits	**86%**	**14%**	
W & A Hits	**87%**	**13%**	

Interpretation: compared to W & A drivers, the odds were 3.4 times greater that an officer would request a search from a minority driver during a traffic stop in 2006 and in the same year the odds were 1.20 times greater that an officer would find evidence or contraband as a result of the search requested of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests and when voluntary searches were conducted, the hit rates were higher when requested from minority.

2007 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	690	493	1183	**13.8%**
W & A	3949	3383	7332	**86.2%**
Total	4639	3876	8515	**100%**

2007 Odds Ratio for citations = .979 (1.02)

Received Citations	No	Yes
Minority Percent Cited	**58%**	**42%**
W & A Percent Cited	**54%**	**46%**

Interpretation: given that a citation was issued, the odds were 1.02 times greater that W & A drivers would receive a citation during a traffic stop than would a minority driver in 2007.

Arrests

Arrests	No	Yes	Total
Minority	1085	98	1183
W & A	7073	259	7332
Grand Total	8158	357	8515

2007 Odds Ratio for arrests = 2.47

Arrests	No	Yes
Minority Percent Arrested	**92%**	**8%**
W & A Percent Arrested	**96%**	**4%**

Interpretation: given that an arrest was made, the odds were 2.47 times greater that a minority driver would be arrested during a traffic stop than would a W & A driver in 2007.

Searches

Consent Request	No	Yes	Total
Minority	1120	63	1183
W & A	7249	83	7332
Grand Total	8369	146	8515

2007 Odds Ratio for consent search requests = 5.67

Consent Search Requests	No	Yes
Minority Percent Requested	**95%**	**5%**
W & A Percent Requested	**99%**	**1%**

Interpretation: given that a search request was made, the odds were 5.67 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2007.

2007 Odds Ratio for hit rates = .735 (1.37)

Search Hits	No	Yes	Total
Minority Hits	53	10	63
W & A	66	17	83
Grand Total	119	270	146
Minority Hits	**84%**	**16%**	
W & A Hits	**80%**	**20%**	

Interpretation: compared to W & A drivers, the odds were 5.67 times greater that an officer would request a search from a minority driver during a traffic stop in 2007; however in the same year the odds were 1.37 times greater that an officer would find evidence or contraband as a result of the search requested of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

2010 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	1680	619	2299	**19.2%**
W & A	7395	2288	9683	**80.8%**
Total	9075	2907	11982	**100%**

2010 Odds Ratio for citations = 1.19

Received Citations	No	Yes
Minority Percent Cited	**73%**	**27%**
W & A Percent Cited	**76%**	**24%**

Interpretation: given that a citation was issued, the odds were 1.19 times greater that minority drivers would receive a citation during a traffic stop than will a W & A driver in 2010.

Arrests

Arrests	No	Yes	Total
Minority	2124	175	2299
W & A	9435	248	9683
Grand Total	11559	423	11982

2010 Odds Ratio for arrests = 3.13

Arrests	No	Yes
Minority Percent Arrested	**92%**	**8%**
W & A Percent Arrested	**97%**	**3%**

Interpretation: given that an arrest was made, the odds were 3.13 times greater that a minority driver would be arrested during a traffic stop than a W & A driver in 2010.

Searches

Consent Request	No	Yes	Total
Minority	2190	109	2299
W & A	9509	174	9683
Grand Total	11699	283	11982

2010 Odds Ratio for consent search requests = 2.72

Consent Search Requests	No	Yes
Minority Percent Requested	**95%**	**5%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search request was made, the odds were 2.72 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2010.

Search Hits (Requests)	No	Yes	Total
Minority Hits	96	13	109
W & A	137	37	174
Grand Total	233	50	283
Minority Hits	**88%**	**12%**	
W & A Hits	**79%**	**21%**	

2010 Odds Ratio for hit rates = .50 (1.99)

Interpretation: compared to W & A drivers, the odds were 2.72 times greater that an officer would request a search from a minority driver during a traffic stop in 2010; however in the same year the odds were 1.99 times greater that an officer would find evidence or contraband as a result of the search of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

2011 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	1627	679	2306	**18.0%**
W & A	8093	2450	10543	**82.0%**
Total	9720	3129	12849	**100%**

*485 cases missing data

2011 Odds Ratio for citations = 1.38

Received Citations	No	Yes
Minority Percent Cited	**71%**	**29%**
W & A Percent Cited	**77%**	**23%**

Interpretation: given that a citation was issued, the odds were 1.38 times greater that minority drivers would receive a citation during a traffic stop than would a W & A driver in 2011.

Arrests

Arrests	No	Yes	Total
Minority	2111	195	2306
W & A	10245	298	10543
Grand Total	12356	493	12849

* 485 cases missing data

2011 Odds Ratio for arrests = 3.18

Arrests	No	Yes
Minority Percent Arrested	**92%**	**8%**
W & A Percent Arrested	**97%**	**3%**

Interpretation: given that an arrest was made, the odds were 3.18 times greater that a minority driver would be arrested during a traffic stop than a W & A driver in 2011

Searches

Consent Request	No	Yes	Total
Minority	2144	162	2306
W & A	10342	201	10543
Grand Total	12486	363	12849

*485 cases missing data

2011 Odds Ratio for consent search requests = 3.89

Consent Search Requests	No	Yes
Minority Percent Requested	**93%**	**7%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search request was made, the odds were 3.89 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2011.

Search Hits (Requests)	No	Yes	Total
Minority Hits	109	53	162
W & A	124	77	201
Grand Total	233	130	363
Minority Hits	**67%**	**33%**	
W & A Hits	**62%**	**38%**	

2011 Odds Ratio for hit rates = .78 (1.27)

Interpretation: compared to W & A drivers, the odds were 2.89 times greater that an officer would request a search from a minority driver during a traffic stop in 2011; however in the same year the odds were 1.27 times greater that an officer would find evidence or contraband as a result of the search requests of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

2012 Outcomes

Citations

Citations	No	Yes	Total	Percent of Stops
Minority	1681	597	2278	**19.0%**
W & A	7736	1914	9650	**81.0%**
Total	9417	2511	11928	**100%**

*439 cases missing data

2012 Odds Ratio for citations = 1.44

Received Citations	No	Yes
Minority Percent Cited	**74%**	**26%**
W & A Percent Cited	**80%**	**20%**

Interpretation: given that a citation was issued, the odds were 1.44 times greater that minority drivers would receive a citation during a traffic stop than will a W & A driver in 2012.

Arrests

Arrests	No	Yes	Total
Minority	2097	181	2278
W & A	9334	316	9650
Grand Total	11431	497	11928

* 439 cases missing data

2012 Odds Ratio for arrests = 2.55

Arrests	No	Yes
Minority Percent Arrested	**92%**	**8%**
W & A Percent Arrested	**97%**	**3%**

Interpretation: given that an arrest was made, the odds were 2.55 times greater that a minority driver would be arrested during a traffic stop than a W & A driver in 2012.

Searches

Consent Request	No	Yes	Total
Minority	2176	102	2278
W & A	9468	182	9650
Grand Total	11644	284	11928

*439 cases missing data

2012 Odds Ratio for consent search requests = 2.44

Consent Search Requests	No	Yes
Minority Percent Requested	**96%**	**4%**
W & A Percent Requested	**98%**	**2%**

Interpretation: given that a search request was made, the odds were 2.44 times greater that an officer would request to search a car driven by a minority member than a car driven by a W & A driver in 2012.

Search Hits (Requests)	No	Yes	Total
Minority Hits	35	67	102
W & A	57	125	182
Grand Total	92	192	284
Minority Hits	**34%**	**66%**	
W & A Hits	**31%**	**69%**	

2012 Odds Ratio for hit rates = .87 (1.15)

Interpretation: compared to W & A drivers, the odds were 2.44 times greater that an officer would request a search from a minority driver during a traffic stop in 2012; however in the same year the odds were 1.15 times greater that an officer would find evidence or contraband as a result of the search requested of W & A drivers as opposed to minority drivers. In plain terms minority drivers were subjected to more search requests but when voluntary searches were conducted, the hit rates were higher when requested from W & A drivers.

APPENDIX D

HMLM

We use hierarchical multivariate linear modeling (HMLM) to investigate the effects of time on levels of disproportionality in individual officers' disparity indexes. Statistical hierarchies are common in data and usually consist of units grouped at different levels. For the present analysis, this structure came about because the same individuals were measured on more than one occasion during the study period. Consequently, we treat multiple observations on each officer as nested within the officer.

When measurements are repeated on the same participants the measurement repetitions (called occasions) are *level-1* units and the participants are *level-2* units. We model a linear relationship between the year of the study and a given officer's disparity index. This simple model is appropriate for data like ours because there are only a few observations per officer and the time period between observations is short (Bryk & Raudenbush, 1992). The model takes the form of a linear growth model, where the year of the study is treated as an age metric. This variable is grand-mean-centered so it describes the difference in years between a given year of the study period and the midpoint of the study (2009). Both the intercept and the time parameter vary at level-2 as a function of characteristics of the officer.

Equation 1 specifies the level-1 model for this investigation.

$$\boldsymbol{Y_{ij} = \pi_{0j} + \pi_{1j}(time)_{ij} + \pi_{2j}(beat) + r_{ij}} \quad (1)$$

This equation models a linear relationship between time elapsed during the study period, the beat or area of the town and a given officer's disparity index. In equation 1, the symbol Y_{ij} represents the value of officer j's disparity index at time i, π_{0j} is the average level of disparity across occurrences for a given officer, it represents the officer's effect on the disparity index, π_{1j} is the change in levels of disparity across occurrences that is due to time period for a given officer, π_{2j} is the change in levels of disparity across occurrences that are due to the area of town an officer is working, this is a time varying covariate and r_{ij} is the unique effect of a given occurrence for a particular officer. We assume that the errors are independent and normally distributed with a common variance. Equations 2, 3 and 4 model how the stage of an officer's career mediates the effect of time on disparity. The seniority variable is defined as the maximum number of years an officer has worked on the street at the end of the study period.[10]

$$\boldsymbol{\pi_{0j} = \beta_{00} + \beta_{01}(years\ of\ service)_j + u_{0j}} \quad (2)$$

At level-2 the average level of disparity across occurrences of the study for an officer (π_{0j}) is a function of the average level of disparity across all officers (β_{00}); plus the amount of disparity that is a function of the officers' years of service, (β_{01}); and a unique individual component of disparity that is due to a given officer (u_{0i}) this is formulated as the difference between the officer's mean change in disparity and β_{00}.

[10] It was unreasonable to include other officer level characteristics such as age or race for this analysis because nearly all the officers were white males. This limited the variance in the data and made estimates unreliable.

$$\pi_{1j} = \beta_{10} + \beta_{11}(\text{years of service})_j + u_{1j} \quad (3)$$

The parameter β_{10} represents the average ***change*** in disparity across all officers that is a function of the time period of the study. This coefficient denotes the effect of time on disparity. The parameter β_{11} is the amount of change in disparity that results from an interaction between an officer's years of service and time period. Finally, u_{1j} is an error term representing the unique portion of the change in disparity that is due to a given officer.

$$\pi_{2j} = \beta_{20} + u_{2j} \quad (4)$$

The parameter β_{20} represents the average ***change*** in disparity across all officers that is a function of area of town. This coefficient denotes the effect of a beat on disparity. The parameter u_{2i} is an error term representing the unique portion of the change in disparity that is due to a given officer.

The table below gives the estimated fixed effects results of HMLM analysis. The table includes results of estimates of three models: *(i)* a control model consisting of the intercept parameter only, *(ii)* a restricted model consisting of the intercept and slope parameters and *(iii)* a full model that includes all the parameters.

Summary for HMLM analysis

Fixed Effects	Model 1	Model 2	Model 3
	Coefficients	Coefficients	Coefficients
Net Effects Officers (intercept)			
β_{00}	0.582 (0.057)***	0.566(0.059)***	0.818(0.099)***
β_{01}	--	--	-0.0229(0.006)***
Net Effects of Time (slope)			
β_{10}	--	0.317(0.080)***	0.579(0.163)***
β_{11}	--	--	-0.0223(0.0104)*
β_{20}	-	0.0421(0.058)	0.0412(0.057)
Deviance	376.8	366.2	349.1
n	76	76	76

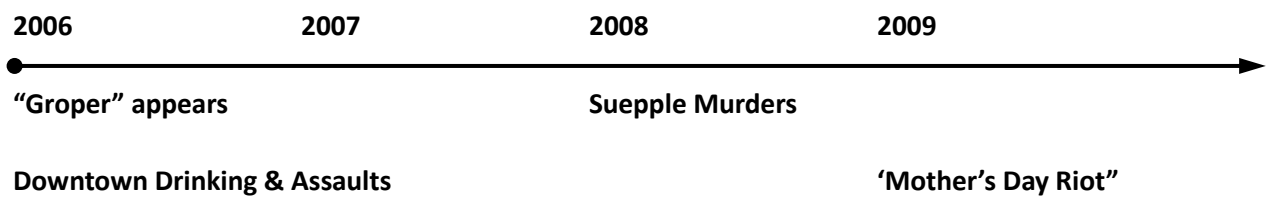
*p < .05, **p <.01, ***p < .001

The results of HMLM suggest the following: changes in time during the study period are associated with significant increases in levels of disproportionality, as reflected by officers' disparity indexes net of area of town. In the control model the estimated mean disparity across all officers (β_{00}) is significantly different from zero at 0.582. This result serves as a rough and ready indicator that can be used to see if there is traffic stop disparity in the data, β_{00}'s value suggests there is. Model 2, the restricted model, is used as a preliminary test of a change in disparity levels across occasions of the study. This model is analogous to independent t-tests, but this test takes into consideration the nested nature of the data. Results show that that the intercept β_{00} equals 0.566 and is significantly different from zero. This value represents the logged average level of disparity across all officers when the difference between the year of the study and the grand mean equals zero (the mid-point of the study). The slope parameter β_{10} is also significant. This implies that the level of disparity increases over the occasions of the analysis, for a unit change in year of the study the logged disparity index increases 0..317 units. The slope

parameter β_{20} which indicates the net effects of a beat or area of town on officers' disparity indexes is not significant. Finally, the full model tests the net effects of time and officer seniority on disparity. The two of the three slope parameters in this model are significant. $\beta_{10,}$ represents the degree to which the average level of disparity changes as a function of time across occasions of the study, a year change in time brings a 0.818 unit increase in the average logged level of disparity units net the other variables. β_{11}, is the coefficient for an interaction effect. It indicates whether the stage of an officer's career mediates the effect of time on disparity. Results show that a one year increase in seniority reduces the effect of time by 0.022 logged units. This implies that the year of the study (before or after 2009) had more impact on less experienced officers than veteran officers. The parameter β_{20} is not significant. This suggests that the area an officer worked did not have a net significant effect on levels of disproportionality. Finally, the analysis for the intercept coefficients, β_{00} and β_{01} show that net baseline levels of disparity across officers are not affected by job seniority. The value of β_{00}, indicates that a significant amount of disparity remains even after the effects of seniority and news stories are taken into account. The significant parameter β_{01}, implies that seniority has a net effect on levels of disparity, meaning that less senior officers have higher disparity indexes than more seasoned officers regardless of the time period of the study.

Appendix E

Adapted Time Line of Some Important Events Affecting ICPD during Study Period



October 2006, increasing September 2007 with an arrest made July 19, 2008 —The "Groper**,"** an assailant who sneaks up behind women, pushes them down, and gropes them before fleeing**.** Almost 40 cases reported. "Law-enforcement authorities have stressed that they're pouring resources into solving these cases."

"Local police deal with open cases, some take years," Daily Iowan, REGINA ZILBERMINTS, MARCH 11, 2009, http://www.dailyiowan.com/2009/03/11/Metro/10537.html

2006-2010—Downtown underage drinking and violence crackdown. "In response to a string of random and seemingly unrelated assaults involving men in the downtown area, Iowa City and UI police are collaborating to assign more officers to the Pedestrian Mall, where many attacks have occurred.

"Violence tests police," BY REGINA ZILBERMINTS | APRIL 15, 2009 7:38 AM, http://www.dailyiowan.com/2009/03/11/Metro/10537.html

2008—Suepple Murders. "Iowa banker facing federal embezzlement and money laundering charges murdered his wife and four young children in their home before killing himself. . . ."

"Indicted Banker's Desperate Murder-Suicide," ABC News, DAVID SCHOETZ
March 26, 2008, http://abcnews.go.com/US/story?id=4521545&page=1

May, 2009—The "Mothers Day Riot." Violent fights that broke out in Southeast Iowa City later dubbed the Mother's Day riot.

A1 Number of crime stories published in IC *Press Citizen* during the study period*

Title: "Could have," "would have": what the Supreme Court should have decided in Whren v. United States
Author(s): Diana Roberto Donahoe
Source: ***American Criminal Law Review.*** 34.3 (Spring 1997): p1193-1209.
Document Type: Article

Abstract:

The US Supreme Court failed to properly apply its own Fourth Amendment balancing test in Whren v. United States in ruling that using a traffic violation stop as a pretext for a drug search was permissible. The Court found that the stop was constitutional under a "could have" standard, but the Court should have employed a "would have" standard based on whether the police would have made the stop if not motivated to use the stop as a pretext. Under the traditional balancing test, the stop in question should have been found to be unconstitutional.

Full Text:

I. Introduction

After the Supreme Court decision in Whren v. United States,(1) I cannot drive my car without feeling paranoid that a police officer will single me out for a legitimate stop based upon his unsupported hunch that I might possess drugs. I forget to signal before changing lanes or I stop at a stop sign for twenty seconds to give my daughter a toy in the back seat, and I wonder if I will be stopped because an officer incorrectly believes I possess drugs. Ironically, I find comfort in my belief that officers only arbitrarily stop individuals who fit their stereotype of a drug courier -- a young black male. As a white female, I am uncomfortably comforted.

The Whren decision is the cause of my paranoia. It held that a police officer may stop a vehicle if there is probable cause that a minor traffic violation has occurred even if that traffic stop is a "pretext" for a suspected crime for which no probable cause exists. In Whren, narcotics officers observed a vehicle stop at a stop sign for more than twenty seconds. That vehicle was a Nissan Pathfinder occupied by two young black males. The Pathfinder turned suddenly without signaling and "sped off quickly."(2) Four or five plainclothes vice officers pursued and stopped the vehicle by cornering it at an intersection, blocking oncoming traffic.(3) As Officer Soto approached the vehicle, he observed what appeared to be crack cocaine in the passenger's hands.(4) Soto opened the driver's door, jumped over the driver, and seized the drugs.(5) Although Officer Soto testified that he did not plan to issue a ticket, his justification for the stop was based upon a District of Columbia traffic infraction for not "paying full time and attention" to driving.(6)

The District of Columbia Circuit Court adopted the "could have" test and held that the stop was valid under the Fourth Amendment because the officer "could have" stopped the car for the traffic violation.(7) The defendant appealed, arguing that the appropriate test was the "would have" test: the stop was invalid unless "under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose."(8) The Supreme Court resolved a split in the Circuit Courts about the proper test to apply in pretext cases and affirmed the use of the "could have" test.(9)

Holding simply that probable cause is probable cause, the Supreme Court found the "could have" test to be facially neutral and thus valid. Had the Supreme Court assessed the reality of the enforcement of minor traffic infractions, however, it would have found that probable cause for traffic violations often is used arbitrarily to stop for a suspected crime where probable cause for the suspected crime does not exist. The Fourth Amendment seeks to prohibit arbitrary intrusions that the "could have" test specifically permits, and therefore the Supreme Court's decision was incorrect.

This Essay criticizes the Court's failure to into the reasonableness of the pretext stop. By affirming the "could have" test without inquiry into its true application, the Whren Court condoned arbitrary, unconstitutional searches and seizures. Part II asserts that Fourth Amendment precedent required the Court to use a balancing test to determine the general reasonableness of pretext cases. It then applies that test to the facts of Whren and concludes that pretext stops are unreasonable. Part III discusses the various tests the lower courts have applied to determine if pretext stops result in arbitrary intrusions. It finds the "would have" test most appropriate and applies that test to the facts of

Whren. Part IV explains the ramifications of the Court's failure to adopt the "would have" test. Finally, Part V suggests proposals the legislative and executive branches can adopt to curb the unbridled police discretion that inevitably will result from the Whren decision.

II. The Fourth Amendment Balancing Test

The Fourth Amendment applies to all seizures, including those that involve only a brief detention.(10) "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a `seizure' of `persons'"(11) and must be reasonable.(12) The Supreme Court fashioned a balancing test to determine standards of reasonableness."(13) Under this test, the Court determines the reasonableness of a particular law enforcement practice by balancing the intrusion on the individual's Fourth Amendment right to be free from arbitrary interference by law enforcement officers against its promotion of legitimate government interests.(14)

Although the Supreme Court has stated that this test is necessary to determine the constitutionality of a seizure(15) and has used it historically in Fourth Amendment automobile cases,(16) it failed to apply this test in Whren.(17) Had it done so, the Court would have found the pretext stop unreasonable.

A. The Historical Use of the Balancing Test in Automobile Cases

Historically, the Supreme Court has applied the balancing test in automobile cases by weighing the individual's right to be free from arbitrary police interference against various legitimate government interests.(18) For example, in Delaware v. Prouse,(19) the Court held that police could not randomly stop cars to spot check for the validity of drivers' licenses because the minimal contribution to highway safety did not justify the arbitrary intrusion. Similarly, random stops of vehicles on the highway to spot check for illegal aliens without any level of suspicion were not reasonable under the balancing test.(20) On the other hand, systematic stops of all vehicles at permanent checkpoints were reasonable to curb entry of illegal aliens(21) and to limit drunk driving.(22) The Court found the significant difference to be the intrusive nature of being singled out by an officer on the highway: in the field, there is a grave danger of unreviewable discretion that would be abused by some officers, while there is no discretion when all vehicles are stopped at a checkpoint.(23) The pretext stop embodies the grave danger of abused, unreviewable discretion because officers can single out an individual for a crime where no probable cause exists and stop him for a minor traffic violation. It follows logically that the same test should have been applied in Whren, a case involving the reasonableness of the pretext stop.

B. Whren Failed to Use the Appropriate Balancing Test

Although the balancing test has been used to determine general reasonableness in automobile cases, the Supreme Court decided that the balancing test was not appropriate in Whren because the stop was based on probable cause and, therefore, the "result of that balancing [was] not in doubt."(24) This reasoning, however, is superficial. The standard of probable cause on its face is reasonable -- if the police have probable cause to believe that a crime has been committed, they should be permitted to stop a suspect. Nevertheless, probable cause of otherwise unenforced, minor traffic violations is used by the police as a vehicle arbitrarily to stop suspects for serious crimes. This abuse of the probable cause standard results in no standard at all for police to follow. Instead, police use the guise of a traffic violation arbitrarily to stop drivers for crimes for which they have no probable cause. Arbitrary intrusions are unreasonable unless they are outweighed by a legitimate government interest. The balancing test was thus necessary in Whren to determine whether the intrusion on the petitioners' Fourth Amendment rights was outweighed by the government interest in traffic safety.

The Supreme Court rationalized that the balancing test was not used in cases where probable cause existed unless the searches or seizures were conducted in such an extraordinary manner to be unusually harmful to an individual's privacy or even physical interests.(25) But this rationalization is unpersuasive for two reasons: first, lack of probable cause is not a prerequisite for the balancing test; and second, even if it is a prerequisite, pretext stops are unusually harmful to an individual's privacy rights because they result in the arbitrary enforcement of laws, which mandates an inquiry into reasonableness.

First, the Supreme Court has repeatedly described the balancing of competing interests as "the key principle of the

Fourth Amendment"(26) and has Stated that "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."(27) Lack of probable cause has not been a prerequisite for applying the balancing test in these cases.(28) Even more significant is the fact that the Court in Whren admits that "in principle every Fourth Amendment case, since it turns upon a `reasonableness' determination involves a balancing."(29) Yet, the Court failed to apply the test in this case. The balancing in every Fourth Amendment case is thus merely a "principle" on paper, and the petitioners are left with the reality of an unreasonable search.

Second, even if probable cause were a prerequisite to the balancing test, the pretext stop falls into one of the exceptions suggested by the Court. The arbitrary stopping of individuals in vehicles for an otherwise unenforced minor traffic violation is unusually harmful to an individual's privacy rights. It allows officers arbitrarily to single out individuals on the road, using probable cause as an excuse rather than a valid standard to stop under other circumstances. This behavior poses exactly the danger the Court held in violation of the Fourth Amendment in the prior automobile cases.(30)

The Supreme Court further attempted to rationalize its failure to use the balancing test by discussing Prouse,(31) the very case that focuses on the importance of the term "arbitrary" and the "grave danger" of abuse of discretion. Although Prouse prohibited random spot checks of automobiles,(32) the Whren Court interpreted dicta to permit stops whenever there is probable cause for a traffic violation, no matter how minor or how arbitrarily enforced.(33) A closer look at Prouse reveals that the Court was concerned with officers, using random stops as a method of investigating violations of other laws(34) and with abuse of police discretion: "were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed."(35) Whren permits this very "unfettered governmental intrusion." Therefore, the balancing test used in Prouse and prior automobile cases also should have been applied in Whren to determine whether the intrusion of pretextual stops is outweighed by the government interest in promoting traffic safety.

C. The Balancing That Should Have Been Done in Whren

Had the Supreme Court correctly applied the balancing test, it would have concluded that the pretext stop in Whren was unreasonable because the intrusive nature of the stop outweighed the government interest in traffic safety. The first inquiry of the balancing test focuses on the intrusive nature of the stop. Today in the United States, many people keep legal personal items in their cars with the assumption that they will be free from intrusion. In fact, the Supreme Court has established that an individual has a legitimate expectation of privacy in his car:(36) "many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel."(37)

Although a person has a legitimate expectation of privacy in her car, an intrusion into an automobile is considered modest, usually consuming no more than a minute, and limited to a brief response to a few questions and the possible production of documents.(38) Nevertheless, before anyone ever discovered drugs in plain view, four or five plainclothes vice officers pulled the Whren petitioners over.(31) Such an intrusion can hardly be labeled "modest" or within the normal practice for a traffic offense, thus demonstrating the potential for abuse of police discretion.

In fact, the Supreme Court has been concerned with do intrusive nature of an automobile stop because of the fear and annoyance of randomly being stopped on the highway by police with broad discretion.(40) A stop is more intrusive if it is based on arbitrary police discretion because the individual feels singled out.(41) Armed with the "full time and attention" regulation, which allows police to stop a vehicle if the driver is distracted from the road, an officer arbitrarily could single out a driver and wait until he changed the radio station, spoke on his car phone, or waited too long at a stop sign.(42) Because almost every driver will be distracted at some time, the full time and attention regulation permits police to single out individuals whom they want to stop. In Whren, the defendants most likely were singled out because they were young black men driving a Nissan Pathfinder. (43) Thus, the intrusive nature of the stop is heightened in Whren because of the very real possibility of unfettered police discretion used to single out minorities.

Next, this level of intrusion is balanced against the government interest furthered by stopping for minor traffic

violations. In Whren, that interest allowed plainclothes narcotics officers to stop a driver for "not paying full time and attention to his driving."(44) As noted in an amicus brief for Whren, "[t]he government's legitimate interest in enforcing minor, frequently arcane motor vehicle laws is hardly a strong one."(45) This interest is described in Prouse as "marginal at best."(46)

Although the government has a traffic safety interest in enforcing these minor violations, the plainclothes officer who made the stop in Whren posed more of traffic risk than the petitioners who simply paused too long at a stop sign. First, in order to make the stop, an unmarked police car pulled up to the left of the Pathfinder, obstructing oncoming traffic.(47) Second, concerns about carjacking and other crimes against motorists create the potential for dangerous misunderstandings when armed nonuniformed officers attempt to stop motorists,(48) as in this case. In fact the District of Columbia expressly forbids plainclothes officers from enforcing most minor traffic regulations except for a violation that is "so grave as to pose an immediate threat to the safety of other."(49) The police conduct cannot be legitimized as enforcing traffic safety when, in fact, the police created more of a safety hazard by stopping the car than the defendants did by stopping too long at a stop sign. Had the Supreme Court applied the balancing test, the petitioners' right to be free from arbitrary intrusion would have outweighed the government interest in promoting traffic safety, especially when traffic safety was compromised by the stop itself.

III. The Appropriate Judicial Remedy

Had the Supreme Court found a Fourth Amendment violation, it would have needed to decide the appropriate test for the lower courts to apply to ensure that police do not use pretext as a means for stopping drivers. Prior to the Whren decision, the lower courts considered three alternative tests: the subjective test, the "could have" test, and the "would have" test.

A. The Subjective Test

Although pretext, by definition, entails an assessment of motive,(50) the Supreme Court has clearly held that an inquiry into the officer's subjective state of mind is inappropriate."(51) This rule makes sense when one considers the difficulty of reading the officer's mind as he makes quick decisions on the street. "Sending state and federal courts on an expedition into the minds of police officers would produce grave and fruitless misallocation of judicial resources."(52) Imagine a defense attorney attempting to impeach an officer regarding his motive; who would she call to prove the officer's thoughts were improper? Because such a task would be impossible, the subjective test would allow police to stop for a serious crime but claim their motive was based on a minor traffic violation. The Supreme Court therefore correctly found this test inappropriate in Whren.

B. The "Could Have " Test

Prior to Whren, most circuits had adopted the "could have" approach, which finds that regardless of the officer's subjective belief about the automobile occupants' other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected traffic violation.(53) Whren adopted this test.

Under the "could have" test, a pretextual traffic stop is reasonable per se whenever a police officer has probable cause that any traffic violation has occurred, no matter how minor the violation. The rationale is simple: probable cause is probable cause. On its face, probable cause for a traffic violation should be enough to stop a car for that violation. But in practice, the test actually permits arbitrary invasions based on a "mere hunch"(54) of a suspected crime as long as there is probable cause for something. For example, under the "could have" test, an officer can legally stop a person he is investigating as a member of organized crime without any reasonable articulable suspicion that she is engaged in such activity by waiting for her to get in her car and turn without signaling.(55) Because nearly everyone eventually will commit a minor traffic violation,(56) the "could have" test enables the police to circumvent the Fourth Amendment by permitting them arbitrarily to single out a motorist, follow her until she makes a minor traffic violation, and stop her. The "could have" test essentially strips an individual of her legitimate expectation of privacy in a vehicle, and the Supreme Court therefore erred in adopting it.

C. The "Would Have" Test

The "would have" test asks not whether the police validly could have made the stop, but rather, whether a

reasonable officer, given the same circumstances, would have made the stop absent the invalid purpose.(57) Although this test is almost identical to the "objective officer test" fashioned in Terry v. Ohio,(58) the Whren Court claimed that this test is "driven by subjective considerations"(59) and difficult to apply.(60)

First, the Court claimed that the test would require the lower courts to speculate about the hypothetical reaction of a hypothetical constable -- an exercise the Court calls "virtual subjectivity."(61) Nevertheless, the Supreme Court already has required lower courts to speculate about police behavior in Fourth Amendment cases.(62) Specifically, in Terry, the Court used a similar "objective" test to determine if an on-the-street stop was justified: "would the facts available to the officer at the moment of the seizure or the search: "warrant a man of reasonable caution in the belief' that the action taken was appropriate?"(63) In other words, what would be the reasonable hypothetical reaction of a reasonable hypothetical constable on the street? Under the Court's rationale, the Terry standard also is unworkable because what constitutes reasonable articulable suspicion would vary in different jurisdictions. For example, standing outside jewelry store at midnight would be considered normal in some jurisdictions, while in others the same actions would constitute suspicious behavior. Case by case analysis is thus performed to determine reasonable articulable suspicion to account for the differences in areas throughout the country. The determination is made by considering the totality of the circumstances.(64)

Under the "would have" test, the lower courts would apply a similar totality of the circumstances test. In asking whether a reasonable officer armed with the information available to the arresting officer would have stopped for the minor traffic violation, the courts would look at the totality of the circumstances, including: whether the officer was investigating the driver before the stop; how long the officer followed the driver; the actions of the officer after the stop; whether the officer issued a citation; whether the particular violation is commonly enforced in that jurisdiction; and whether this type of stop was within the officer's normal duties. Under this totality test, it would not always be reasonable for an officer to stop a motorist for a minor traffic violation.

The Court also expressed concern that the "would have" test is difficult to apply because police practices vary from jurisdiction to jurisdiction.(65) For example, the Court assumed that the District of Columbia regulation prohibiting plainclothes officers in unmarked vehicles from enforcing traffic laws unless the violations posed a grave, immediate threat to safety would result in a violation of the test in the District of Columbia under the facts of Whren, but would not be a violation in other jurisdictions without such regulations.(66) Under the totality of the circumstances test, however, one factor would be whether a minor traffic stop was within the plainclothes narcotics officer's normal duties. Whether or not there is such a regulation, it would be extremely difficult for the government to show that a narcotics officer's normal duties include stopping motorists for minor traffic violations. Regardless of the jurisdiction, a narcotics officer by definition is charged with enforcing drug laws, not traffic laws.

The problem with the Supreme Court's rationale in Whren is that it focuses too much on "standard practice" within varying jurisdictions and not enough on the general reasonableness of an officer's actions under the totality of circumstances test. The question under the "would have" test is whether a reasonable officer in that officer's shoes would have stopped the car absent the invalid purpose. This question is no different from the objective test set forth in Terry: whether a reasonable officer in that officer's shoes had a reasonable belief that the action was appropriate. (61) The differences in standard practice in each jurisdiction do not make the test unworkable; instead, the differences make the test both reasonable and preferable.

D. Applying the "Would Have" Test to Whren

Had the Supreme Court properly adopted the "would have" test and applied it to Whren, it would have held that Officer Soto violated the petitioners' Fourth Amendment rights. Under the totality of the circumstances, a reasonable officer in Officer Soto's position would not have stopped the petitioners for the traffic violation absent his belief that drugs were involved. First, Soto and his partners were plainclothes vice officers patroling for drug activity; it was not their normal activity to make traffic stops." Second, although they did not follow the Nissan Pathfinder for very long before the stop, using four or five officers to stop for a traffic violation was not reasonable. (69) Third, Officer Soto admitted that he did not intend to issue a ticket to the driver.(70) Thus, the Supreme Court would have concluded that a reasonable vice officer who had witnessed the minor traffic infractions would not have made the stop absent a mere unsupported hunch that two young black men in a Nissan Pathfinder possessed drugs. As a result, the evidence would have been suppressed.

IV. Ramifications of the Court's Decision

Unfortunately, the Court did not use the appropriate balancing test, nor did it apply the proper judicial remedy. By holding that police can stop a vehicle as long as there is probable cause for a minor traffic violation, the Court condoned arbitrary intrusions. An officer now can single out an individual for any reason, such as race, wait for that individual to enter his car, follow him until he makes a minor traffic violation, and stop him.

If evidence is seized as a result of the stop,(71) a defense attorney will be unable to suppress it. For example, imagine the following cross examination of a police officer at a hearing on a motion to suppress evidence:

Q: Officer, isn't it true that you singled out the defendant based only on the fact that you did not like the way he looked?

A: Yes. I wanted to arrest him, but I didn't have a good reason.

Q: So at the time you targeted him, you had no reason to believe he had committed a crime?

A: None whatsoever. I wanted to stop him because I didn't like him. So I followed him in his car for an hour. Eventually he changed lanes without signaling so I pulled him over.

Q: Are you a traffic officer?

A: No. I am a plainclothes narcotics officer. My duties are to stop for drug arrests, not for traffic violations.

Q: Were you planning to issue a citation?

A: No. I was planning to find an excuse to stop him so that I could look in his car.

Despite this outrageous testimony, the evidence in this case would not be suppressed under the Whren decision. Even if the defense attorney presented the testimony of every other officer in that precinct that this officer always targeted certain individuals and that he harassed this particular individual every day, the evidence would not be suppressed.(72) Instead, the lower court would be forced to hold that the officer could stop the defendant because he changed lanes without signaling. The traffic infraction would provide the probable cause regardless of the unreasonable police behavior and resulting arbitrary intrusion.

The ramifications of this decision reach far beyond allowing one officer to abuse his discretion. The Whren decision condones arbitrary stops by permitting police officers to single out any one of us, follow us for any length of time, and wait for us to make a minor traffic violation in order to pull us over. No one is free from this abuse of discretion -- not even the innocent.

V. Alternative Remedies

Although the Supreme Court refused to fashion a test to ensure the preservation of our Fourth Amendment rights, alternative remedies lie elsewhere. The executive and legislative branches also are sworn to uphold the Constitution. These branches have the responsibility to curb the unbridled police discretion that the Whren decision permits.

A. The Executive

State and local executive branches are in a good position to limit police discretion by creating strategies for enforcing laws systematically. The checkpoint stop was constitutional because it created a systematic chock without police discretion.(73) Surely an executive branch can devise a similar systematic enforcement plan for minor traffic offenses.

Some local executive branches have done just that. For example, in New York City, Mayor Giuliani has instituted an aggressive police tactic called "zero-tolerance" where arrests are made for minor offenses to change public attitudes and encourage crime control.(74) "Giuliani calls it the 'Broken Window Theory' of crime control: even a

broken window that goes unfixed ... can breed a belief that no one cares. Fix the window and you keep society glued together."(75) As part of the tactic, police arrest for minor offenses, including panhandling, graffiti defacement, and traffic violations.(76) On subways, instead of waiting for rapes or muggings, police arrest turnstile leapers, harassers, and individuals who urinate in public.(77) Often, they find that these offenders are the people with weapons who were likely to commit the more serious crimes.

The results are positive. In four years, serious felonies on New York City subways are down 64%.(78) Crime was down 11% in 1994 and 17% in 1995; arrests were up 20% in 1995, and the police department's budget has been protected from cuts.(79) In addition, New Yorkers perceive the city to be safer, and tourism has increased over the past three years.(80)

In New York City, the zero-tolerance strategy is conduced citywide, by all officers, all the time.(81) Thus, discretion is limited. If a person commits a minor traffic offense, he will be stopped regardless of the officer's predisposition. Every time a violator is caught, a ticket is issued.

Although this strategy might be perceived as inconvenient for the "innocent" minor traffic violator, it is a small price to pay for community-wide crime control. As one clergyman stated, "I was informed that Pastor, if you're speeding, you're going to get a ticket' ... I've been warned. I accept that as a challenge. It's probably good for me." (82)

Although all citizens would be "inconvenienced" by the enforcement of all laws, the zero-tolerance strategy would help reduce arbitrary stops. Traffic regulations would not be enforced at random on individuals suspected of serious crimes; instead, similar to checkpoint stops, such regulations would be enforced systematically on everyone.

In addition to helping curb the constitutional problems highlighted by Whren, a zero-tolerance policy would help fight crime. First, the whole community would be forced to follow every letter of the law. Second, these valid stops could lead to valid arrests and seizures. For example, if a speeding individual had an illegal weapon in her car, she also would be arrested on weapon charges. The evidence would not be suppressed because the stop would not have been an arbitrary intrusion -- it would have been based on a systematic stop of every speeding car. Imagine the number of weapons that would be legally seized!

The most obvious problems with this solution are abuse of the policy and lack of resources. First, a misguided zero-tolerance policy could lead to grand scale Fourth Amendment violations. For example, officials in Houston use a zero-tolerance approach to crime, but unlike New York, which practices the tactic city-wide, Houston targets certain areas.(83) The problem with the Houston strategy is that instead of limiting police discretion, it actually enhances it. The department has no policy concerning what warrants a zero-tolerance crackdown.(84) There have been allegations that sweeps usually are conducted in neighborhoods populated predominantly by minorities.(85) If true, such zero-tolerance sweeps could lead to department-wide discrimination, or worse, a departmental condonation of targeting minorities. In creating a zero-tolerance policy, the executive must be careful to consider not only the fight against crime, but also its duty to protect constitutional rights.

Another obvious problem with zero-tolerance is that it requires an increased budget for more police to enforce the minor violations. Some localities might be willing to pay the price in order to accommodate tourism.(86) Some cities, however, simply will not have the funds. If the New York City experiment proves to be as successful as it initially appears, enforcement of the minor violations should help to keep more serious crimes down as well, decreasing the fiscal burden on police departments. Such a positive result could be a political coup for a state or local executive. While politically feasible, however, we must face the reality that such efforts might not be financially viable.

B. The Legislature

State and local legislatures can avoid financial strain and curb police abuse of discretion by making simple changes in the traffic laws. If laws are no longer enforced or are enforced only as a pretext for arbitrary stops as in Whren, they should be repealed. For example, if an individual is apprehended for stopping too long at a stop sign only when the officer thinks he is dealing drugs, the ability to stop for this minor traffic violation should be limited. Legislatures should either repeal the law or send a ticket for the violation in the mail rather than allow the intrusion

on the street.(87) The mailed ticket would still deter the driver from committing minor infractions; in fact, it might be more of a deterrent than the current system because a driver would not know immediately if he had received a ticket for the infraction and would be less likely to repeat it for fear of receiving yet another ticket. By limiting the officer's ability to stop a vehicle for minor infractions that are not generally enforced, the legislature would eliminate the pretext itself and simultaneously motivate drivers to pay greater attention to traffic regulations.

Unfortunately, some overzealous jurisdictions have done just the opposite. For example, in Texas, an officer can jail a driver for any minor traffic offense except for speeding and drinking.(88) Failure to wear a seatbelt could lead to a night in jail even though a conviction carries no jail penalty.(89) The decision is subject to the officer's "discretion," (90) which often depends on her mood or the driver's attitude. For example, an individual often is jailed for a minor offense because he fails the "contempt of cop" test by refusing to show the officer proper respect.(91) This abuse of discretion is unlimited.

Legislatures should force the police to behave responsibly. To do so, they must overhaul the current statutory systems permitting broad police discretion. They should replace unenforced laws and ordinances with ones that restrict the infractions for which police can stop individuals and that require police explicitly to state the reason for the stop on a police report. Such limits on police discretion would protect individuals against arbitrary stops. In addition, less time and money would be spent on antiquated laws, and more time and money could be used to prevent and investigate more serious crimes.

Each locality should decide the best method to prevent arbitrary intrusions in its jurisdiction. Unfortunately, it seems that most localities only focus on the best method of crime prevention and forget their responsibility to prevent unconstitutional police practices. A New York City-type of zero-tolerance policy could do both. It would be applauded politically as a successful weapon in the fight against crime and constitutionally as a method of limiting arbitrary intrusions. In addition, legislatures could gain political points by repealing antiquated traffic laws and enforcing others by mail. A combination of legislative and executive changes would be a powerful tool to correct the problem created by the Whren decision, as well as to further the fight against crime.

VI. Conclusion

The Supreme Court in Whren incorrectly held that pretext stops are constitutional. As a result, an individual is subject to unfettered police discretion every time she enters a vehicle. In practice, this means that minorities and those who fit an officer's personal "drug courier profile" can be singled out on the highway, followed by a caravan of police cars, and seized.

Had the Supreme Court applied the balancing "principle" it previously has found to be so important, it would have held that the petitioners' right to be free from arbitrary instrusion in the vehicle outweighed the government's interests in enforcing minor traffic violations. If the Court had found a violation, it then should have decided that the "would have" test was the appropriate inquiry for the lower courts to determine reasonable police behavior in each pretext case.

Because the Court failed to apply the appropriate balancing test and direct the lower courts to use the "would have" test in pretext cases, the burden is on the executive and legislative branches to uphold the Constitution by curbing police discretion. The legislative branch must eliminate the pretext, and the executive must systematically enforce those minor traffic laws that remain intact. Until that time, today's driver will not have a legitimate expectation of privacy in his vehicle, especially if he fits an officer's drug profile sterotype -- a young black male driving an expensive vehicle. As a white female, I feel reasonably safe from arbitrary intrusion in my car, but I remain paranoid about the status of our present criminal justice system. (1.) 116 S. Ct. 1769 (1996).

(2.) United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995) (quoting District of Columbia Police Officer Soto's testimony).

(3.) Id.

(4.) Id. at 373.

(5.) Id.

(6.) Id.

(7.) Id. at 376.

(8.) Brief Amicus Curiae of American Civil Liberties Union in Support of petitioners, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841) (quoting United States v. Valdez, 931 F.2d 1448, 1450 (9th Cir. 1991).

(9.) Whren, 116 S. Ct. at 1777.

(10.) Davis v. Mississippi, 394 U.S. 721 (1969). The Fourth Amendment provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches add seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

(11.) Whren v. United States, 116 S. Ct. 1769, 1772 (1996) (citing Delaware v. Prouse, 440 U.S. 648, 653 (1979), United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976), and United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

(12.) See Brignoni-Ponce, 422 U.S. at 878 (stating that the Fourth Amendment requires seizures to be "reasonable").

(13.) Florida v. Jimeno, 500 U.S. 248 (1991); United States v. Place, 462 U.S. 696, 703 (1983); Prouse, 440 U.S. at 654; Martinez-Fuerte, 428 U.S. at 555. For a discussion of the emergence of the balancing test, see William W. Greenhalgh & Mark J. Yost, In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause, 31 Am. Crim. L. Rev. 4 (1994).

(14.) See, e.g., Prouse, 440 U.S. at 654 (using a balancing test in a Fourth Amendment challenge); Brignoni Ponce, 422 U.S. at 878 (same); Terry v. Ohio, 392 U.S. 1, 20-21 (1969) (same).

(15.) Tennessee v. Garner, 471 U.S. 1, 7(1985); Place, 462 U.S. at 703; see also Prouse, 440 U.S. at 654 (judging the permissibility of particular law enforcement Prouse by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests); Martinez-Fuerte, 428 U.S. at 555 (discussing use of balancing test in determining constitutionality of checkpoint stop by Border Patrol).

(16.) See infra notes 19-23 and accompanying text.

(17.) Whren, 116 S. Ct. at 1777.

(18.) United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding that stops at permanent checkpoints of all vehicles without any degree of suspicion is reasonable to check for illegal aliens); United States v. Ortiz, 422 U.S. 891 (1975) (holding that probable cause is necessary to search vehicle at checkpoint to check for illegal aliens); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (holding that reasonable articulable suspicion is necessary for automobile stop by roving-patrols to check for illegal aliens.

(19.) 440 U.S. 648 (1979).

(20.) United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

(21.) United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

(22.) Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

(23.) See Martinez-Fuerte, 428 U.S. at 559 (holding that routine checkpoints do not intrude on motoring public because potential interference with traffic is minimal and checkpoint operations involve less discretionary enforcement).

(24.) 116 S. Ct. at 1776.

(25.) Id. at 1776-77 (citing Wilson v. Arkansas, 115 S. Ct. 1914 (1995) (discussing unannounced entry into home); Tennessee v. Gamer, 471 U.S. 1 (1985) (discussing seizure by deadly force); Winston v. Lee, 470 U.S. 753 (1985) (discussing physical penetration of body); Welsh v. Wisconsin, 466 U.S. 740 (1984) (discussing entry into home without warrant)).

(26.) Garner, 471 U.S. at 8 (quoting Michigan v. Summers 452 U.S. 692, 700 (1981)); see also Camara v. Municipal Court, 387 U.S. 523, 528 (1967) stating that the basic purpose of the Fourth Amendment is to safeguard privacy and security of individuals against arbitrary invasion by government officials).

(27.) Garner, 471 U.S. at 8 (quoting Place, 462 U.S. at 703); see also Martinez-Fuerte, 428 U.S. at 555 (applying balancing test to determine whether checkpoint stop is consistent with Fourth Amendment protections).

(28.) Garner, 471 U.S. at 8-9; Place, 462 U.S. at 703; Martinez-Fuerte, 428 U.S. at 555.

(29.) 116 S. Ct. at 1776.

(30.) See supra notes 19-23 and accompanying text.

(31.) 440 U.S. 648 (1979).

(32.) Id.

(33.) The Court pieces together three separate parts of the Prouse opinion, which, taken out of context and pasted together in Whren, read:

Our opinion in Prouse expressly distinguished the case from a stop based on precisely what is at issue here: `probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations.' 440 U.S. at 661. It noted approvingly that `the foremost method of enforcing traffic and vehicle safety regulations ... is acting upon observed violations,' id., at 659, which afford the "quantum of individualized suspicion" necessary to ensure that police discretion is sufficiently constrained id., at 654-655 (quoting United States v. Martinez-Fuerte, 428 U.S. at 560).

(34.) 440 U.S. at 662-63.

(35.) Id.

(36.) Rakas v. Illinois, 439 U.S. 128 (1978); cf. Carroll v. United States, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."). (37.) Prouse, 440 U.S. at 662.

(38.) Brignoni-Ponce, 422 U.S. at 880.

(39.) See supra note 3 and accompanying text.

(40.) United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

(41.) See Martinez-Fuerte, 428 U.S. at 558-60 (stating that checkpoint stops are less intrusive because they involve less police discretion).

(42.) This type of police activity regularly occurs. The American Bar Foundation's Survey of the Administration of Criminal Justice in the United States reported the following statement by a police officer: "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made." Petitioners' Brief at 21, Whren v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841) (citing L. Tiffany et al., Detection of Crime 131 (1967)).

(43.) Although the officer denied race was a factor, 53 F.3d at 373, the impermissible practice of stopping for race is still with us. See, e.g., United States v. Harvey, 16 F.3d 109, 113-14 (1994) (Keith, J., dissenting) (stating that an officer testified that he stopped defendant's car in part because there were three young black males in an old vehicle); Utah v. Arroyo, 796 P.2d 694,688 n.3 (Utah 1990) (stating that an officer admitted that the training led him to want to stop vehicles driven by Hispanics). Statistics demonstrate that traffic stops are racially disproportionate. Henry P. Curtis, Statistics Show Pattern of Discrimination, Orlando Sentinel, Aug. 23, 1992, at A11 (asserting that although blacks and Hispanics made up only 5% of drivers and only 15% of traffic convictions in Florida, approximately 70% of those stopped were black or Hispanic).

(44.) United States v. Whren, 53 F.3d 371, 373 (D.C. Cir. 1995).

(45.) Brief Amicus Curiae of National Association of Criminal Defense Lawyers in Support of Petitioners at 8, When v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841).

(46.) 440 U.S. at 660. En Prouse, the court concluded that the government has a legitimate interest in traffic safety, 440 U.S. at 658, but "[t]he marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure ... at die unbridled discretion of law enforcement officials." Id. at 661.

(47.) Brief for Petitioners at 7-8, Whreb v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841).

(48.) Id. at 42.

(49.) D.C. Metro. Police Dep't General Order 303.1(I)(A)(2)(a)(4) (emphasis added).

(50.) Pretext is "an ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense." Black's Law Dictionary (5th ed. 1979).

(51.) Whren v. United States, 116 S. Ct 1769, 1774 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"); Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (stating that Fourth Amendment inquiries depend "on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time ... and not on the officer's actual state of mind at the time the challenged action was taken"); Scott v. United States 436 U.S. 128, 136-37 (1978) (stating that any officer's state of mind does not invalidate an action if the circumstances objectively justify that action). But cf. United States v. Smith, 802 F.2d 1119, 1124 (9th Cir. 1986) ("Whether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers").

(52.) Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment [section] 1.4(b) (2d ed. 1978).

(53.) See, eg., United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995) (discussing a defendant stopped after remaining at an intersection for more than 20 seconds and obstructing traffic behind him,, then failing to signal and proceeding at an "unreasonable speed"); United States v. Scopo, 19 F.3d 777 (2d. Cir. 1994) (discussing a member of the Colombo Family who changed lanes without signaling); United States v. Hassan El, 5 F.3d 726 (4th Cir. 1993) (discussing a defendant stopped for failing to stop at intersection); United States v. Ferguson, 8 F.3d 385, 392 (6th Cir. 1993) (en banc) discussing a defendant stopped for violation of license plate ordinance); United States v. Mitchell, 951 F.2d 1291, 1295 (D.C. Cir. 1991) (discussing a defendant moving at "high rate of speed" who then turned without signaling); United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990) (holding that "stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions"); United States v. Hawkins, 811 F.2d 210, 213 (3d Cir. 1987) (stating that the existence of a pretext for a Terry stop "does not render invalid an otherwise constitutional search"); United States v. Causey, 834 F.2d 1179, 1190 (5th Cir. 1987) (en banc) (approving of police use of an unrelated outstanding warrant for a petty offense in order to interrogate on bank robbery).

(54.) The Supreme Court previously has held that "mere hunches" are not sufficient to justify a stop. Terry v. Ohio, 392 U.S. 1 (1969).

(55.) See, eg., United States v. Scopo, 19 F.3d 777 (2d Cir. 1994) (dismissing a member of the Colombo Family

who changed lanes without signaling).

(56.) Examples of minor traffic regulations that are regularly violated include: driving too slowly, D.C. Mun. Regs. tit. 18 [sections] 2200.10 (1995); driving precisely the speed limit if a police officer deems that speed to be "greater than is reasonable and prudent under the conditions," D.C. Mun. Regs. tit. 18 [sections] 2200.3; signaling for less than three seconds before changing lanes, Utah Code Ann. [sections] 41-6-69 (1995). See also United States v. Smith, 799 F.2d 704 (11th Cir. 1986) (driving in accordance with all traffic regulations is so unusual that it is used as a factor in drug courier profile).

(57.) See, e.g., United States v. Guzman, 864 F.2d 1512, 1517 (10th Cir. 1988) (applying "would have" test where defendant was stopped for not wearing seatbelt and charged with possession of cocaine); United States v Smith, 799 F.2d 704 (11th Cir. 1986) (applying "would have" test where defendant was stopped for weaving based on officer's hunch that vehicle was carrying drugs).

(58.) 392 U.S. 1 (1969).

(59.) 116 S. Ct. at 1774.

(60.) Id. at 1775.

(61.) Id.

(62.) See Florida v. Jimeno, 500 U.S. 248, 251 (1991) (asking whether a reasonable officer would think consent to a car search included closed containers); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (asking whether a reasonable officer would have ordered the defendant from the car); Terry v Ohio, 392 U.S. 1 (1969) (asking whether the facts would lead a reasonable officer to think his actions were appropriate).

(63.) Terry, 392 U.S. at 21-22 (citing Carroll v. United States, 267 U.S. 132 (1925)).

(64.) Id. at 9.

(65.) 116 S. Ct. at 1775.

(66.) Id.

(67.) 392 U.S. 1 (1969).

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

(69.) Id.

(70.) Id. at 373.

(71.) Once the car is pulled over, the officer may seize any item in plain view. Horton v. California, 496 U.S. 128 (1990). In addition, if the infraction permits the officer to arrest the individual, the car can be searched as part of an inventory search, South Dakota v. Opperman, 428 U.S. 364 (1976), or as part of a search incident to a valid arrest, New York v. Belton, 453 U.S. 454 (1981). (72.) Although this testimony merely serves as an example of unreasonable conduct that would not result in suppressed evidence, the Author does not suggest that police officers would ever testify in such a manner as it could lead to a possible civil suit.

(73.) See supra notes 21-23.

(74.) Jim Tobin, Can Detroit Bite into Crime Like Big Apple?, Detroit News, Sept. 18, 1995, at A1.

(75.) Id.

(76.) Neal Peirce, Smarter Policing in U.S. Cities May Be Paying Off, New Orleans Times-Picayune, Jan. 15, 1996, at B5.

(77.) Id.

(78.) Id.

(79.) Ruben Castaneda, As D.C. Police Struggle On, Change Pays Off in New York, Wash. Post, Mar. 30, 1996, at A1.

(80.) Next Leap for Police, New Orleans Two-Picayune, May 24, 1996, at B6. In contrast, in the District of Columbia where no similar strategy has been adopted, crime was up 11% in 1995, arrests in the first two months of 1996 were down 17%, and the department lacks money for tires, gas, and typewriters. Castaneda, supra note 79, at A1.

(81.) Brian McGrory, 0-Tolerance Policing Pays, Crime Rates Falling in High-Enforcement Cities, Com. Appeal (Memphis), Jan. 3, 1996, at 5A.

(82.) John M. Hubbell, Policing with `Zero-Tolerance' Will Start Saturday, Com. Appeal (Memphis), Feb. 15, 1996, at 1A (quoting Reverend James Netters).

(83.) Chet Fuller, Police Find Less Tolerance Lowers Crime, Atlanta J. & Const., Jan. 8, 1996.

(84.) T.J. Milling & Lisa Teachey, Lee [sic] than Zero?; Black Pastors Claim Zero Tolerance Crackdowns are Racist, Houston Chron., Sept. 15, 1993, at A14. Patrol commanders decide on what constitutes zero-tolerance crackdowns with the knowledge of the chief. Id.

(85.) McGrory, supra note 80, at 5A.

(86.) For example, New Orleans has hired two of the consultants who helped develop New York City's zero-tolerance program in an effort to reduce crime and encourage tourism in their own city. Adam Nossiter, 2 Crime Busters for New Orleans, N.Y. Times, Dec. 5, 1996, at A20.

(87.) In England, speeding tickets are sent in the mail. "Speed Cameras" are installed on the motorways and pictures taken of speeding cars. The picture and ticket are sent to the owner of the car; these pictures show the driver add any passengers. Apparently, many people pay the tickets in order to avoid publication of the pictures of the passengers. Tim Jones, Roadside Cameras Reduce Death and Injury by a Third, Times (London), Aug. 23, 1994.

(88.) Tom Moran, High Time to Change State Law, Get Rid of These `Contempt of Cop' Arrests, Houston Chron., Nov. 6, 1994, at 4.

(89.) Id.

(90.) Id.

(91.) Id. A former prosecutor explains: "You can beat the rap, but you can't

THE "ROUTINE TRAFFIC STOP" FROM START TO FINISH: TOO MUCH "ROUTINE," NOT ENOUGH FOURTH AMENDMENT

*Wayne R. LaFave**

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Yale Kamisar, about which I have said too much elsewhere in this issue of the *Review*,[1] could rightly be called "Mr. Confessions," for he has not only authored books and a host of articles on the subject of police interrogation, but for years has been printing *Miranda* cards in his basement and selling them to police departments all across the nation.[2] Moreover, he may be the only law professor in the country

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Professor LaFave has advised us that his personal experience with traffic stops is limited, as he has been stopped but once, about thirty-five years ago. He was stopped *and* ticketed for speeding by a Madison, Wisconsin, officer while driving to the University of Wisconsin law school to give a lecture entitled "Discretionary Enforcement by the Police"! — Ed.

1. *See* Wayne R. LaFave, *"What is a Kamisar?"*, 102 MICH. L. REV. 1732 (2004) [hereinafter LaFave, *What is a Kamisar?*].

2. Some skeptics out there might not believe this, so I will cite a reliable source. *See* Wayne R. LaFave, *Random Thoughts by a Distant Collaborator*, 94 MICH. L. REV. 2431, 2435 n.11 (1996).

who has both personally coerced a confession and had a confession coerced out of him.[3]

As Kamisar has himself noted,[4] my own "intellectual sandbox" has been the field of search and seizure, which has occupied much of my attention for virtually all of my professional life. Among my endeavors in that regard is a treatise on the subject, now in its five-volume third edition,[5] in which I have "created" (in the Frankensteinian sense) a 1,687,149-word exceptionally execrable excrescence[6] upon the 54-word Fourth Amendment. Such efforts notwithstanding, I have understandably not had this "sandbox" to myself; there is no way I could claim exclusive rights to an *entire* amendment to the Constitution. Indeed, there were footprints in the sandbox upon my very first visit, most prominently those of Yale Kamisar, and he has often revisited since my arrival, all to my benefit. I have read and re-read Yale's many contributions to this area, and have profited greatly from the insights I have gained from them. That being the case, when the *Review* asked if I would do a Fourth Amendment piece for this issue honoring Yale Kamisar, I accepted immediately.

The subject of this Article is an exceedingly important one, as is reflected by the fact that in recent years more Fourth Amendment battles have been fought about police activities incident to what the courts call a "routine traffic stop"[7] than in any other context. There is a reason why this is so, and it is *not* that police have taken an intense interest in such matters as burned-out taillights and unsignaled lane changes per se. Rather, as anyone not on a trip to Mars over the past decade or so is surely aware, the renewed interest of the police in traffic enforcement is attributable to a federally sponsored initiative related to the "war on drugs."[8] Both in urban areas and on the

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3. Simultaneously at that. *See* LaFave, *What is a Kamisar?*, *supra* note 1, at 1736.

4. Jerold H. Israel & Yale Kamisar, *Wayne R. LaFave: Search and Seizure Commentator at Work and Play*, 1993 U. ILL. L. REV. 187, 188 (1993).

5. 1-5 WAYNE R. LAFAVE, SEARCH AND SEIZURE (3d ed. 1996) [hereinafter LAFAVE, SEARCH AND SEIZURE (1996)].

6. To the astonishment of some. *See* Israel & Kamisar, *supra* note 4, at 188-89.

7. *See* Knowles v. Iowa, 525 U.S. 113, 117 (1998); United States v. Lofton, 333 F.3d 874 (8th Cir. 2003); State v. Green, 826 A.2d 486, 489 (Md. 2003); Fender v. State, 74 P.3d 1220, 1225 (Wyo. 2003).

8. Albert Alschuler has written that:

> The federal government has strongly encouraged state and local law enforcement officers to view the highway as a battleground in the war on drugs. It has trained patrol officers to use traffic stops to investigate suspected drug offenses. See the Drug Enforcement Administration's description of "Operation Pipeline," available online at http://www.usdoj.gov/dea/programs/pipecon.htm, and see also the Department of Transportation's description of the training courses offered by the Drug Interdiction Assistance Program of the Federal Motor Carrier Safety Administration, available online at http://www.fmcsa.dot.gov/ntc/pages/set.html. The federal government also has provided financial incentives for state and local drug interdiction. See 21 U.S.C.A. §§ 881(e)(1)(A) & (e)(3) (West 2002). States have established programs like "Operation Valkyrie," a program designed to "enhance [the]

interstates, police are on the watch for "suspicious" travelers, and when a modicum of supposedly suspicious circumstances are observed — or, perhaps, even on a hunch or pursuant to such arbitrary considerations as the color of the driver's skin[9] — it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop.[10] Perhaps because the offenses are often so insignificant,[11] the driver may be told at the outset that he will merely be given a warning. But then things get ugly. As a part of the "routine," a criminal-history and outstanding-warrants records check is run on the driver and passengers; they are closely questioned about their identities, the reason for their travels, their intended destinations, and the like, and may be quizzed as to whether they have drugs on their persons or in the vehicle. The driver may be induced to submit to a full search of the vehicle, or a drug-sniffing dog may appear on the scene and "do his thing."

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capability [of the Illinois State Police] to detect and apprehend drug couriers . . . while focusing on the enforcement of highway safety regulations." *Operation Valkyrie: An Officer's Guide to Drug Interdiction Techniques*, quoted in *Chavez v Illinois State Police*, 251 F.3d 612, 62[1] (7th Cir. 2001) (first and second alterations in original).

Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 170 n.25 (some citations omitted).

9. As one distinguished black educator has wryly noted, "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59. There is now a significant body of literature on the subject of racial profiling, most of which occurs in the context of traffic stops. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4 n.77.36 (Supp. 2004) [hereinafter LAFAVE, SEARCH AND SEIZURE (Supp.)].

10. As Markus Dubber writes:

> Every day, millions of cars are stopped for one of the myriad of regulations governing our use of public streets. As soon as you get into your car, even before you turn the ignition key, you have subjected yourself to intense police scrutiny. So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.

Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001).

11. Indeed, sometimes bordering on the nonexistent. *See* United States v. Akram, 165 F.3d 452, 455 (6th Cir. 1999) (characterizing case as "an example of the very questionable police conduct that is permitted by *Whren*," *see infra* text accompanying note 48); *id.* at 457 (Guy, J., dissenting) (explaining police conduct was questionable because police ordinarily "do not stop vehicles on interstate highways for speeding when they are only exceeding the speed limit by two miles per hour"); United States v. Lee, 73 F.3d 1034 (10th Cir. 1996) (holding that when Utah deputy patrolling Interstate 70 saw an automobile driven by a black man straddle the center line for about one second before proceeding to the other lane of traffic, officer had sufficient suspicion the operator was driving while impaired to support stop); United States v. Roberson, 6 F.3d 1088 (5th Cir. 1993), (discussed in the text accompanying note 12 *infra*); State v. Waters, 780 So. 2d 1053, 1056 (La. 2001) (finding driver's one-time "contact" with fog line without crossing it sufficient basis for stop for improper lane use; dismissing defendant's claim "that this 'almost violation' marks the *de minimis* point at which *Whren*'s objective approach no longer provides a workable rule for determining the reasonableness of vehicular stops").

My favorite illustration of this tactic is *United States v. Roberson*.[12] A Texas state trooper on patrol at night passed a van and noted it had out-of-state plates and four black occupants, so he pulled off onto the shoulder after cresting a hill, turned his lights off, and then observed the van change lanes to provide more distance between it and the vehicle parked on the shoulder. The lane change was unaccompanied by a signal, which hardly seems remarkable in view of the fact that the van was "the only moving vehicle on that stretch of road," but the trooper "obviously regarded this as a serious traffic offense," for he pulled the van over.[13] He then questioned the van's occupants on unrelated matters and finally exacted consent to search the vehicle, which resulted in the discovery of drugs. Despite the court's familiarity with this trooper's "propensity for patroling the fourth amendment's outer frontier" and his "remarkable record" of turning traffic stops into drug arrests on 250 prior occasions, the defendants in *Roberson* were deemed to be without any basis to challenge the stop because, after all, the trooper had "observed a traffic infraction before stopping the vehicle"![14]

Cases of this genre raise a number of important issues concerning the Fourth Amendment legalities of the "routine traffic stop" from start to finish. As to the start, there are various questions concerning the limitations upon when such a stop may be initiated. As to the finish, there are questions concerning what is necessary to constitute a termination of custody and what official actions thereafter will or will not constitute a new seizure. And then there is the in-between, that critical period between start and finish; as to it, there is another set of questions concerning how long the seizure may continue and what investigative techniques and tactics are permissible during that interval.

I. THE START: LAWFULNESS OF THE TRAFFIC STOP

A. *Quantum of Evidence*

The primary (indeed, virtually exclusive) inquiry appropriate to determining the lawfulness of a traffic stop is whether there was a pre-existing sufficient quantum of evidence to justify the stop. In the run-of-the-mill case, this presents no significant problem, for most traffic stops are made based upon the direct observations of unambiguous conduct or circumstances by the stopping officer. That is, in most of the cases the stopping will have been made on full probable cause.

12. 6 F.3d 1088 (5th Cir. 1993).

13. *Id.* at 1089.

14. *Id.* at 1092.

Because the Supreme Court has recently told us, in the roundly criticized[15] case of *Atwater v. City of Lago Vista*,[16] that probable cause alone suffices to justify a *custodial* arrest for the slightest traffic offense, it is apparent that the same is true for the lesser intrusion of a traffic stop.[17]

Probable cause, of course, is the well-established constitutional standard for arrest where more serious criminal conduct has apparently occurred, and in such a context has worked rather well as a basis for determining which suspected offenders should and should not be apprehended. With respect to traffic offenses, however, even though "the establishment of probable cause based on the word of the officer is practically a given,"[18] there is good reason to be less sanguine. At least since the police have co-opted our traffic codes as a weapon to be used in the "war on drugs," police make stops for the most insignificant conduct lying at (or perhaps just beyond) the outer boundaries of the defined prohibited conduct, and courts uphold those tactics by broad interpretation of the definitions of the traffic offenses involved.[19] Although the matter is seldom put this way, it is as if the courts were saying that at the probable-cause level (as compared to the beyond-a-reasonable-doubt level), a reasonable but perhaps erroneous interpretation of the substantive statute relied upon by the officer is good enough. But that simply is not the case, for it is well-established Fourth Amendment doctrine that the sufficiency of the claimed probable cause must be determined by considering the conduct and circumstances deemed relevant within the context of the

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15. I have taken a dim view of *Atwater*, *see* 3 LAFAVE, SEARCH AND SEIZURE (Supp.), *supra* note 9, § 5.1 (citing text at notes 314.3 ff.), as has Ross Perot, *see* Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 267-71 (2001), and the Court's reasoning in that case has been effectively demolished by such distinguished commentators as Thomas Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002), and Richard Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329 (2002).

16. 532 U.S. 318 (2001).

17. If the offense is only a parking violation, however, then it may be that probable cause alone will not suffice, or at least a few courts have so held. *See* United States v. Copeland, 321 F.3d 582, 594 (6th Cir. 2003) (parking violation was a violation of the traffic laws and thus justified a stop on probable cause, but "[b]ecause a parking violation necessarily takes place only when a vehicle is stopped or standing, the time in which a moving vehicle can reasonably be stopped for a parking violation is relatively limited"); State v. Holmes, 569 N.W.2d 181, 185 (Minn. 1997) ("A police officer who has probable cause to believe that a person has committed a parking violation can stop the person only if the stop is necessary to enforce the violation, for example, if a person is attempting to drive off with an illegally parked car before the officer can issue the ticket.").

18. Robert H. Whorf, *Consent Searches Following Routine Traffic Stops — The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 4 (2001) [hereinafter Whorf, *Consent Searches*].

19. *See* cases cited *supra* note 11.

actual meaning of the applicable substantive provision, rather than the officer's claimed interpretation of that statute.[20]

But if, as is clear, probable cause is *a* permissible basis for a traffic stop, is it the only basis, or will some lesser standard also suffice, such as the reasonable-suspicion standard approved in *Terry v. Ohio*[21] for certain investigative stops? Most courts have assumed the latter, i.e., that traffic stops as a class are permissible without probable cause if there exists reasonable suspicion, that is, merely equivocal evidence. Such an assumption is to be found in the federal-court decisions of the various circuits,[22] as well as in the decisions of most states.[23] In most of these cases the matter has not even been put into issue by the defendant (often because it appears the stop would pass muster even under the probable-cause test), but on the rare occasions when the defendant has made a contrary claim it is often rather summarily dismissed.[24] A few state decisions are to be found *not* permitting stopping for all traffic violations; some are grounded in a state statutory provision so limiting the police authority to make stops,[25] but on other occasions courts, whether or not mentioning the Fourth Amendment, have engaged in analyses one would expect to be employed in determining the issue under the Fourth Amendment.[26]

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20. *See, e.g.*, United States v. Granado, 302 F.3d 421 (5th Cir. 2002); United States v. Freeman, 209 F.3d 464, 466 (6th Cir. 2000); United States v. Ozbirn, 189 F.3d 1194, 1198 (10th Cir. 1999). The same rule applies even if a "reasonable-suspicion" standard is applicable. *See infra* note 28.

On the other hand, if the officer's interpretation of the statute is unduly broad but the perceived conduct or circumstances fit within the statute as properly construed, then probable cause is not defeated. *See* United States v. Wallace, 213 F.3d 1216, 1220 (9th Cir. 2000).

21. 392 U.S. 1 (1968).

22. *E.g.*, United States v. Chanthasouxat, 342 F.3d 1271 (11th Cir. 2003); Haynie v. County of Los Angeles, 339 F.3d 1071 (9th Cir. 2003); United States v. Sanchez-Pena, 336 F.3d 431 (5th Cir. 2003).

23. *E.g.*, State v. Bohannon, 74 P.3d 980 (Haw. 2003); State v. Crawford, 67 P.3d 115 (Kan. 2003); State v. Chavez, 668 N.W.2d 89 (S.D. 2003).

24. *E.g.*, United States v. Callarman, 273 F.3d 1284 (10th Cir. 2001); United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000).

25. *E.g.*, State v. Painter, 676 P.2d 309, 313 (Or. 1984) ("Traffic infractions are not among the category of offenses to which the stop and frisk statute applies.").

26. *See, e.g.*, Ebona v. State, 577 P.2d 698, 700 (Alaska 1978) (holding police suspicion was sufficient here only because suspicion was of driving under the influence, since court previously required that for a *Terry* stop the officer must have "a reasonable suspicion that imminent public danger exists, or serious harm to persons or property has recently occurred"); State v. Holmes, 569 N.W.2d 181, 185 (Minn. 1997) (stating that, because in *Terry* "the Supreme Court necessarily has limited such seizures to those situations where the suspected violation is serious," "we hold that a police officer who merely has reasonable suspicion that a *parking* violation has occurred cannot seize an individual for the purpose of investigation"); Commonwealth v. Gleason, 785 A.2d 983, 989 (Pa. 2001) (following a prior ruling that took an interest-balancing approach, court held that notwithstanding statute purporting to authorize stops upon " ' "articulable and reasonable grounds to suspect a violation" ' " of the vehicle code, the officer must have facts "*which would provide probable*

Illustrative of the few cases expressly rejecting a defendant's claim that probable cause is required for some traffic violations is *United States v. Callarman*, where the district court had upheld the stop on the ground that the officer either had probable cause or reasonable suspicion (without specifying which) of violation of the statute making it a traffic infraction to drive with windshield damage so severe that it "substantially obstructs the driver's clear view" of the road, where the officer saw a twelve-inch crack just above where the windshield met the hood.[27] The court of appeals affirmed, but failed to address the defendant's contention that under *Terry* a seizure on reasonable suspicion requires a higher public interest than the enforcement of minor traffic offenses. As one commentator has cogently elaborated:

> The *Callarman* court's analysis did not consider the seriousness of the suspected offense in determining whether the reasonable suspicion standard was applicable, thus rendering its analysis contrary to Supreme Court precedent. Two aspects of the *Callarman* opinion suggest this lack of consideration. First, the court heavily relied on cases in which the suspected offenses were distinguishable from that in *Callarman*. In both *Botero-Ospina* and *Ozbirn* the police officers suspected that the defendants were driving drunk; in *Brignoni-Ponce* the Court held that stopping an automobile would be constitutional where the police officer has reasonable suspicion that the car is transporting illegal aliens. The hazard created by a windshield crack infraction does not appear to be nearly as grave as drunk driving, and transporting illegal aliens is an offense different in both degree and kind from the one in *Callarman*. That the Tenth Circuit did not even attempt to explain away these distinctions indicates that the court either overlooked them or viewed them as irrelevant. The precedential value of the cited cases for the court's purposes thus appears to have rested on the one factual similarity between them and *Callarman*: they all involved stops of vehicles. Second, the court's failure to engage directly Callarman's serious offense argument suggests that the court did not accept it. Had the court accepted the argument, it could have at least reasoned — perhaps somewhat tenuously — that the windshield crack infraction created a substantial risk of immediate danger to the public and warranted a departure from the probable cause requirement. That the court did not go this route suggests that it justified its application of the reasonable suspicion standard solely on the basis of the less intrusive nature of a temporary seizure. The court's reasoning would seem to allow a

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cause to believe" there was such a violation (quoting Commonwealth v. Whitmyer, 668 A.2d 1113, 1116-17 (quoting 75 PA. CONS. STAT. § 6308(b) (1996)))). For more on the Alaska and Pennsylvania positions, respectively, see David A. Greene, *Investigative Stops in Alaska: Can* Coleman *Survive a Multifactored Balance?*, 7 ALASKA L. REV. 381 (1990), and Joseph E. Vogrin, *DUI Traffic Stops in Pennsylvania*, 3 No. 5 LAW. J., at 6 (2003).

27. 273 F.3d 1284, 1287 (10th Cir. 2001) (quoting KAN. STAT. ANN. § 8-1741(b) (1991)).

> temporary seizure upon reasonable suspicion of, for example, curfew violation or littering.[28]

The issue that *Callarman* and other cases of that genre fail to meet head-on — whether under *Terry* a stop is permissible upon less than probable cause merely because of the lesser intrusion or because of both a lesser intrusion and a strong government-enforcement interest — has never been specifically decided by the Supreme Court, although language in some of the Court's decisions might lead one to conclude otherwise. On the one hand, there is the statement in *Whren v. United States* 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,"[29] which has been echoed in subsequent decisions.[30] But it may quite properly be said of these decisions that while they "indicate that probable cause is a *sufficient* ground for a stop, none of them indicates that it is *necessary* for a stop."[31] On the other hand, there is the statement in *Berkemer v. McCarty*,[32] later relied upon in *Knowles v. Iowa*,[33] that a routine traffic stop "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest."[34] But in neither case was the quantum of evidence needed for a traffic stop at issue, and the context of the above-quoted language from *Berkemer* makes it apparent that the Court was *only* saying that a traffic stop, like a *Terry* stop, is temporary and brief in nature.

Somewhat more on point than any of those cases is *Delaware v. Prouse*, for the actual holding of the case is:

> except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and

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28. Recent Cases, *Tenth Circuit Applies Reasonable Suspicion Standard to Stops for Minor Traffic Infractions:* United States v. Callarman, 116 HARV. L. REV. 697, 700-01 (2002) (citations omitted).

Similar criticisms could be made of the Ninth Circuit's earlier holding to the same effect in *United States v. Lopez-Soto*, 205 F.3d 1101 (9th Cir. 2000). The defendant, however, prevailed in *Lopez-Soto* because the police did not have a reasonable suspicion. Applying the same rule that obtains when the test is probable cause, *see* cases cited *supra* note 20, the court concluded that the officer's suspicion based on the absence of a vehicle-registration sticker visible from the rear could not constitute reasonable suspicion because it reflected a mistake of law by the officer, i.e., failure to understand that the applicable law called for the sticker to be affixed to the windshield.

29. 517 U.S. 806, 810 (1996).

30. *E.g.*, Arkansas v. Sullivan, 532 U.S. 769, 770 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000).

31. United States v. Callarman, 273 F.3d 1284, 1286 (10th Cir. 2001).

32. 468 U.S. 420 (1984).

33. 525 U.S. 113, 117 (1998).

34. *Berkemer*, 468 U.S. at 439.

> detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[35]

But it is to be doubted whether even *Prouse* settles the matter here at issue, for (i) the case involved traffic stops made purely at random, so that the emphasis was upon the impropriety of such stops rather than the relative merits of the probable-cause and reasonable-suspicion tests in traffic-law enforcement; (ii) the Court actually *accepted* the notion that under a balancing approach (such as was used in *Terry*) "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,"[36] so that the nature of the offense *would* be relevant; and (iii) the particular purpose of the stopping addressed in *Prouse* may involve an interest much stronger than is true of traffic enforcement generally, i.e., "the danger to life and property posed by" an unlicensed driver not "physically qualified to operate a motor vehicle."[37]

If the Supreme Court were to address the issue here under discussion, it might well be that the Court would conclude that *Terry* stops upon less than probable cause cannot be made with respect to all offenses, so that a goodly number of traffic offenses would not be encompassed within the *Terry* reasonable-suspicion standard. Such a holding certainly would be faithful to the *Terry* decision, for there the Court emphasized the nature of the crime there suspected, stating it "would have been poor police work indeed" for the officer "to have failed to investigate" behavior suggesting the defendant was casing a store in preparation for an armed robbery.[38] Later, the Court characterized the *Terry* rationale as "warrant[ing] temporary detention for questioning on less than probable cause where the public interest involved is the suppression of . . . serious crime,"[39] and has said that under *Terry*, seizures made "on less than probable cause" draw their justification from both the "limited intrusions on the personal security of those detained" and the "substantial law enforcement

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35. 440 U.S. 648, 663 (1979).

36. *Prouse*, 440 U.S. at 654.

37. *Id.* at 658 (citations omitted); *see also* cases cited *supra* note 26. In *Smith v. State* the court held that where

> there are grounds to believe that the license of a driver has been suspended, and there is no information to rule out the possibility that the suspension was directly related to the driver's actual inability to drive safely, there is, at a minimum, reasonable suspicion to believe that imminent public danger exists.

756 P.2d 913, 916 (Alaska Ct. App. 1988).

38. Terry v. Ohio, 392 U.S. 1, 23 (1968).

39. Florida v. Royer, 460 U.S. 491, 498-99 (1983) (plurality opinion).

interests" being served.[40] As several of the Court's other Fourth Amendment decisions illustrate, the seriousness of the offense thought to be involved bears directly upon the substantiality of the law-enforcement interest[41]; as one member of the Court put it, the Supreme Court has "never suggested that all law enforcement objectives . . . outweigh the individual interests infringed upon" so as to support a stop on reasonable suspicion.[42]

An express prohibition upon *Terry* stops on reasonable suspicion when the suspected offense does not involve "danger of forcible injury to persons or of appropriation of or damage to property,"[43] so that probable cause would be required for most traffic stops,[44] would be one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators — especially in light of the now well-established police practice of using traffic stops to seek out drugs. The point is simply this: any extraordinary grant of police authority ought to be circumscribed in such a way as to "remove the temptation for the police to go on fishing expeditions for contraband."[45]

B. *Protection Against Arbitrariness and Pretext*

When it comes to such common criminal offenses as burglary, theft, and assault, the quantum-of-evidence requirement for making a seizure itself serves as a reasonably effective means of ensuring that only those who should be apprehended are seized. But this is not the case when it comes to traffic violations, considering (i) that stops purportedly for such violations are often made for purposes of drug interdiction; (ii) that this can result in stops for extremely minor and

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40. Michigan v. Summers, 452 U.S. 692, 698-99 (1981).

41. Graham v. Connor, 490 U.S. 386, 396 (1989) (explaining that for the use of force to be consistent with the Fourth Amendment, an important consideration is "the severity of the crime at issue"); United States v. Hensley, 469 U.S. 221, 228-29 (1985) (noting that factors in the balancing test when *Terry* applied to "stops to investigate past crimes . . . may be somewhat different," such that the Court limits its approval to such stops for "felonies or crimes involving a threat to public safety"); Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (an important factor to be considered when determining whether any exigency exists for making a warrantless arrest within premises is the gravity of the underlying offense for which the arrest is being made).

Atwater v. City of Lago Vista, 532 U.S. 318 (2001), is not to the contrary, although the Court there refused to create an exception to the custodial-arrest power for minor traffic offenses, for the Court reasoned that because such arrests may be made only upon probable cause there would be no necessity for any balancing of interests.

42. United States v. Sharpe, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring).

43. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(1)(a)(i) (1975).

44. Except, e.g., driving under the influence. *See* Ebona v. State, 577 P.2d 698, 700 (Alaska 1978).

45. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 39, 65 (1968).

technical violations; and (iii) that, in any event, "[v]ery few drivers can traverse any appreciable distance without violating some traffic regulation."[46] This means that virtually anyone (even a Supreme Court Justice[47]) can readily be stopped, suggesting a need for some additional limitation upon the authority to stop that might help prevent pretextual or arbitrary seizures. But the Supreme Court slammed the door on such an avenue of reform in *Whren*, where, upon the petitioner's claim of a pretextual stop (resulting in a plain view of drugs) by plainclothes vice-squad officers patrolling a "high drug area" in an unmarked car, the Court answered in the negative the question

> whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws.[48]

Much of the Court's analysis in *Whren* is expended in attempting to show that the Court's prior decisions do not lend support to a pretext-type argument in the instant case. For example, the Court begins by attempting to distinguish away statements in *Florida v. Wells*,[49] *Colorado v. Bertine*,[50] and *New York v. Burger*[51] seemingly recognizing that pretextual activity sometimes violates the Fourth Amendment. In these cases, the *Whren* Court now says,

> we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.[52]

But that hardly explains why it is essential that the purported purpose be the real purpose only in the case of inventories and administrative searches, given that well-established Fourth Amendment doctrine requires a "substitute," if you will, for traditional probable cause in

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46. B. JAMES GEORGE, JR., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 65 (1969).

47. *Rehnquist Is Given Ticket for Speeding*, N.Y. TIMES, Sept. 13, 1986, § 1, at 10.

48. 517 U.S. 806, 808 (1996).

49. 495 U.S. 1 (1990). In *Wells*, the Court states that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Id.* at 4.

50. 479 U.S. 367 (1987). In *Bertine*, the Court thought it significant that there had been "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation." *Id.* at 372.

51. 482 U.S. 691 (1987). In *Burger*, the Court noted that the warrantless administrative inspection upheld did not appear to be "a 'pretext' for obtaining evidence of . . . violation of . . . penal laws." *Id.* at 717 n.27.

52. *Whren*, 517 U.S. at 811-12.

both of those situations. Significantly, this substitute is stated in terms of regularity and not motive in both instances; vehicle inventories require "standardized procedures,"[53] while administrative searches of buildings must conform to "reasonable legislative or administrative standards."[54]

Indeed, the Court's basis for distinguishing *Wells*, *Bertine*, and *Burger* virtually overlooks the very core of the petitioner's argument in *Whren*, earlier stated quite accurately by the Court as being that

> "in the unique context of civil traffic regulations" probable cause is not enough. Since . . . the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. . . . To avoid this danger . . . the Fourth Amendment test for traffic stops should be, not the normal one . . . of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.[55]

The fundamental point in that argument, of course, 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. Because that is so, the situation addressed by the petitioners in *Whren* is more like that in *Wells*, *Bertine*, and *Burger* than it is like seizures and searches on probable cause for more substantial criminal conduct. Indeed, it is likely true that the probable-cause requirement in the context of minor traffic offenses provides considerably less protection against arbitrariness than do the "standardized procedures" and "reasonable legislative or administrative standards" requirements for inventories and administrative inspections, respectively.

The Court in *Whren* then goes on to say that it has "repeatedly held and asserted the contrary" of the petitioners' "position," said to be that "an officer's motive invalidates objectively justifiable behavior."[56] But that characterization is false, for the petitioners' position is grounded in the officer's deviation from usual practice; improper motivation unaccompanied by such deviation is not asserted to be "unreasonable" under the Fourth Amendment. Once that is understood, it is apparent that the four cases the *Whren* Court relies upon to show that "we have repeatedly held and asserted the contrary" are readily distinguishable. In *United States v. Villamonte-*

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53. *Bertine*, 479 U.S. at 377.

54. Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

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

56. *Id.* at 812.

Marquez,[57] where, the Court says in *Whren*, "[w]e flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification,"[58] the facts did not present the kind of issue raised by the *Whren* petitioners: the point of the Court's discussion in *Villamonte-Marquez* was that the Coast Guard's power to stop vessels without *any* suspicion to check the manifest and other documents certainly may be used against a vessel even more likely to have insufficient documents because it is suspected of involvement in smuggling. In the second case, *United States v. Robinson*,[59] where, as the Court put it in *Whren*, "we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,' "[60] that in fact was not the holding of the Court but only a paraphrasing of the respondent's argument in the lower court. Rather, what *Robinson* says on this subject is that respondent has no complaint because the custodial arrest "was not a departure from established police department practice,"[61] which is in no sense inconsistent with the petitioners' claim in *Whren* that they should prevail because the arrest was such a departure. The third case cited in *Whren* as "contrary" to the petitioner's argument is the companion case to *Robinson*, *Gustafson v. Florida*.[62] However, the truth of the matter is that the majority opinion in *Gustafson* never discusses the significance of either ulterior motive or departure from usual practice, which is hardly surprising in light of the fact (as noted by Justice Stewart in his concurrence) that "the petitioner ha[d] fully conceded the constitutional validity of his custodial arrest."[63] The fourth case, of course, is *Scott v. United States*,[64] where, the Court reminds us in *Whren*, it was said that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[65] But that language too is hardly contrary to the stance of the *Whren* petitioners, who grounded their claim not in bad thoughts but in disparate treatment. And the quoted language in *Scott* would appear

57. 462 U.S. 579 (1983).

58. *Whren*, 517 U.S. at 812.

59. 414 U.S. 218 (1973).

60. *Whren*, 517 U.S. at 812-13.

61. *Robinson*, 414 U.S. at 221 n.1. The *Whren* Court later acknowledged that this is what the Court said earlier in *Robinson*. It is interesting to note that while the Court's misstatement about what *Robinson* has to say on the subject of pretext is called a holding, what the Court actually said there is characterized as "not even a dictum that purports to provide an answer, but merely one that leaves the question open." *Whren*, 517 U.S. at 816.

62. 414 U.S. 260 (1973).

63. *Id.* at 267 (Stewart, J., concurring).

64. 436 U.S. 128 (1978).

65. *Scott*, 436 U.S. at 136.

not even to settle the issue whether bad motive is at all relevant in a pretext context, for *Scott* itself was not a pretext case.[66]

By this reckless use of its own precedents, the Court in *Whren* makes it appear that the issue raised by the petitioners was already settled, while in fact it was very much an open question. The fact that the Court created this false appearance perhaps explains why the Court in *Whren* had so little to say about the merits of the petitioners' claim. And what is said is less than satisfying. For example, while the petitioners reasoned that their test was an "objective" one and thus did not conflict with the *Scott* rule, the *Whren* Court answers that the test "is plainly and indisputably driven by subjective considerations" because it asks "whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind."[67] But surely this is not the case, as the petitioners' test would only identify arbitrariness in the disparate-treatment sense, which can occur with or without bad thoughts, just as bad thoughts might (but do not inevitably) produce disparity.

The Court in *Whren* next asserts that the petitioners' reliance upon material deviation from usual police practices instead of actual police motivation "might make sense" if *Scott* et al. "were based only upon the evidentiary difficulty of establishing subjective intent."[68] But, says the Court, those cases "were not based only upon that, or indeed even principally upon that," for their "principal basis" is "simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[69] In other words, the reason we ordinarily bar inquiry into subjective intent is not because it is too difficult to ascertain,[70] but rather because it is simply irrelevant. But why is it irrelevant? All the Court has to offer on that point is the following quotation from *Robinson*: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not

66. The question in *Scott* was whether the agents had made reasonable efforts at minimizing the calls they intercepted, but significantly the agents did not exceed the statutory minimization constraints even though they apparently intended to do so. *Scott*, therefore, "merely held that improper intent that is not acted upon does not render unconstitutional an otherwise constitutional search." John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 83-84 (1982).

67. *Whren*, 517 U.S. at 814.

68. *Id.*

69. *Id.*

70. And thus *Whren* applies even in those cases where no such difficulty exists because the officers "frankly stated" that they did not rely on the traffic violation now used as a justification for the stop. *See* United States v. Harrell, 268 F.3d 141 (2d Cir. 2001); United States v. Dhinsa, 171 F.3d 721 (2d Cir. 1998).

indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed."[71]

But this is mixing apples and oranges. The context of the just-quoted excerpt from *Robinson* makes it apparent that the question there was not whether subjective intent should be taken into account, but rather whether the right to search incident to arrest depends upon "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."[72] The Court in *Robinson* answered that in the negative, and thus opted for the pragmatic, bright-line rule that "a lawful custodial arrest" carries with it a right to make "a full search of the person."[73] That is a different matter entirely! The fact that "a lawful custodial arrest" permits such a full search without a case-by-case showing of need or the officer's thoughts about that need says nothing about whether the taking of custody should itself be deemed lawful even when it is pretextual (a matter not even at issue in *Robinson*). To put it another way, the search in *Robinson* is like the plain view in *Whren*: neither requires any justification apart from the custodial arrest (in *Robinson*) or detention (in *Whren*) that made them possible. But that fact hardly dictates the result as to the quite different question of whether the seizure in each case is itself conclusively reasonable if grounded in probable cause.

The Court in *Whren* next asserts that even if the concern underlying the *Scott* rule "had been only an evidentiary one," it would exist in spades under the approach of the petitioners, for "it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."[74] But, while it cannot be denied that the *Whren* petitioners' approach does present some difficulties of this kind, the Court makes the situation appear much worse than it actually is. The Court acknowledges that "police manuals and standard procedures may sometimes provide objective assistance,"[75] but then appears to dismiss these manuals and procedures because they "vary from place to place and from time to time."[76] Specifically, the Court declares that it could not "accept that

71. *Whren*, 517 U.S. at 814 (quoting *United States v. Robinson*, 414 U.S. 218, 236 (1973)).

72. *Robinson*, 414 U.S. at 235.

73. *Id.*

74. *Whren*, 517 U.S. at 814-15.

75. *Id.* I have elsewhere argued that greater reliance upon police regulations is desirable in Fourth Amendment adjudication. *See* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990).

76. *Whren*, 517 U.S. at 815.

the search and seizure protections of the Fourth Amendment are so variable" that the "basis of invalidation [in one jurisdiction] would not apply in jurisdictions that had a different practice."[77] But because pretext claims are grounded in a concern about arbitrariness — the lack of substantial consistency within a particular law-enforcement agency — it would seem that it is this consistency, rather than complete consistency from jurisdiction to jurisdiction, which counts the most. Nor can it be said that the Fourth Amendment means exactly the same thing in all jurisdictions; for example, an inventory search or administrative search which violates the Fourth Amendment because it does not conform to "standard procedures" or existing "reasonable legislative or administrative standards" in one jurisdiction may readily pass muster in another jurisdiction precisely because those procedures or standards exist or are different there.

In the concluding portion of its opinion in *Whren*, the Court takes on the petitioners' argument "that the balancing inherent in any Fourth Amendment inquiry requires us to weigh the governmental and individual interests implicated in a traffic stop such as we have here."[78] The Court responds that while it is "true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors," it is nonetheless the case that with "rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause."[79] As for those exceptions, the Court elaborated:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests — such as, for example, seizure by means of deadly force,[80] unannounced entry into a home,[81] entry into a home without a warrant,[82] or physical penetration of the body.[83] The making of a traffic stop out of uniform 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.[84]

Such characterization substantially misrepresents the essence of the problem presented to the Court in *Whren*. True, making an arrest

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77. *Id.*

78. *Id.* at 816.

79. *Id.* at 817.

80. *Id.* at 818 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

81. *Id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

82. *Id.* (citing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)).

83. *Id.* (citing *Winston v. Lee*, 470 U.S. 753 (1985)).

84. *Id.*

while out of uniform is not an "extreme practice" per se, and thus that fact standing alone hardly can make a traffic stop unreasonable. But that is not what was at issue. The fact the traffic stop was by plainclothes officers in an unmarked car is relevant because a police-department regulation prohibited such stops except in circumstances apparently not present in *Whren*,[85] so that the petitioners' real complaint was about the arbitrariness in subjecting them to a traffic stop contrary to general practice. And surely arbitrary intrusions upon liberty are just as "extreme" as those actions mentioned by the Court in *Whren*; indeed, it would seem ludicrous to contend otherwise given the Court's frequent assertions that the "core,"[86] "basic purpose,"[87] and "central concern"[88] of the Fourth Amendment has to do with protecting liberty and privacy against arbitrary governmental interference.

The totality of 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. I am not suggesting that the issue raised by petitioners is an easy one, but it certainly deserved a much more honest and forthright treatment than it received.

Two final comments about *Whren* are in order. The first, related to the earlier discussion of the common assumption that stops for all traffic violations need only be based on reasonable suspicion, involves the intriguing question whether *Whren* would have come out differently if the traffic stop in that case had merely been on reasonable suspicion, so that *Terry v. Ohio*[89] provides would have provided the sole justification for the stop. Taking literally the distinction drawn in *Whren* — police action "based upon probable cause" versus such action "without the probable cause that is its traditional justification"[90] — the case would then appear to fall on the other side of the line drawn by the Court. The analysis in *Terry* also

85. Metropolitan Police Dep't — Washington, D.C., General Order 303, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992), permits plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others."

86. Wolf v. Colorado, 338 U.S. 25, 27 (1949).

87. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

88. United States v. Ortiz, 422 U.S. 891, 895 (1975).

89. 392 U.S. 1 (1968).

90. *Whren*, 517 U.S. at 817 (emphasis omitted).

lends support to this view, for while the Court in *Whren* says the stop was on probable cause and thus there is no occasion for balancing, *Terry* asserts that stops when probable cause is lacking are to be "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures"[91] and that consequently a balancing of interests is necessary. It is nonetheless to be doubted that the boundaries of the *Whren* decision will ultimately be drawn short of *Terry* stops and other Fourth Amendment activities permitted on individualized suspicion. Rather, the Court can be counted upon to say that arbitrariness inquiries are likewise foreclosed in those instances as well because (as intimated at one point in *Whren*) the existence of reasonable suspicion likewise "ensure[s] that police discretion is sufficiently constrained."[92] The Court quietly asserted the contrary in *Atwater v. City of Lago Vista*,[93] but seems to have moved at least partly in the other direction in *United States v. Knights*.[94]

Lastly, there is the matter of an equal-protection challenge in this context. The petitioners in *Whren* were black, and they put before the Court the fact that selective traffic enforcement of the type described above not infrequently is influenced by the race of the vehicle's occupants. To this, the Court responded that it "agree[d] with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race," though "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[95] But it is difficult to believe that an equal-protection challenge would be effective in this context,[96] especially if existing law regarding selective-

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91. *Terry*, 392 U.S. at 20.

92. *Whren*, 517 U.S. at 817-18.

93. 532 U.S. 318 (2001). The Court appeared to say that *Whren* does not extend to stops on reasonable suspicion, asserting:

> *Terry v. Ohio* . . . upon which the dissent relies . . . is not to the contrary. *Terry* certainly supports a more finely tuned approach to the Fourth Amendment when police act without the traditional justification that either a warrant (in the case of a search) or probable cause (in the case of arrest) provides; but at least in the absence of "extraordinary" circumstances, *Whren v. United States* . . . there is no comparable cause for finicking when police act with such justification.

Atwater, 532 U.S. at 347 n.16.

94. 534 U.S. 112 (2001). The Court in *Knights* held that a probation search could be justified not merely on a "special needs" analysis, as in the past, but also through a balancing process "under our general Fourth Amendment approach." *Id.* at 118. The Court thus upheld a search of a probationer's premises grounded in reasonable suspicion, though made by a police officer as part of a regular criminal investigation, adding that because "our holding rests on ordinary Fourth Amendment analysis that considers all the circumstances of a search," *id.* at 122, the motivation of the officer was, per *Whren*, not relevant. Justice Souter, concurring, would have "reserve[d] the question whether *Whren*'s holding . . . should extend to searches based only upon reasonable suspicion." *Id.* at 123 (Souter, J., concurring).

95. *Whren*, 517 U.S. at 813.

96. As one commentator has put it:

prosecution challenges is followed here.[97] Police agencies take considerable pains to keep secret all training materials, directives, and instructions that might reflect the basis upon which selective traffic stops for drug-enforcement purposes are undertaken.[98] And under the requirements announced by the Supreme Court just weeks before *Whren* was decided, the defendant's chances of even obtaining discovery are slight, for it is necessary that he first "produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not."[99] Moreover, "[o]nly in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation."[100] Even if a defendant were to clear those hurdles, it is still less than certain that meaningful relief would be forthcoming, for absent recognition of an equal protection exclusionary rule,[101] the defendant's only relief is likely to be dismissal of the traffic charge.

> In theory there is no problem with relying on the Equal Protection Clause to protect against racial unfairness in law enforcement. The problem is that equal protection doctrine, precisely because it attempts to address all constitutional claims of inequity, has developed in ways that poorly equip it to address the problems of discriminatory police conduct. Equal protection doctrine treats claims of inequitable policing the same as any other claim of inequity; it gives no recognition to the special reasons to insist on evenhanded law enforcement, or to the distinctive concerns with arbitrariness underlying the Fourth Amendment. As a result, challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police. For reasons discussed earlier, this amounts to saying that they will almost always fail.

David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326.

97. Thus it has been suggested that *Whren* makes necessary a different approach as to equal protection claims, at least in this context. *See* Christopher Hall, Note, *Challenging Selective Enforcement of Traffic Regulations After the Disharmonic Convergence:* Whren v. United States, United States v. Armstrong, *and the Evolution of Police Discretion*, 76 TEX. L. REV. 1083, 1086-87 (1998); Jennifer A. Larrabee, Note, *"DWB (Driving While Black)" and Equal Protection: The Realities of an Unconstitutional Police Practice*, 6 J.L. & POL'Y 291, 295-96 (1997); Lisa Walter, Comment, *Eradicating Racial Stereotyping from* Terry *Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 289 (2000).

98. *See, e.g.*, People v. Perez, 631 N.E.2d 240 (Ill. App. Ct. 1994).

99. United States v. Armstrong, 517 U.S. 456, 469 (1996); *see also, e.g.*, United States v. Bullock, 94 F.3d 896, 899 (4th Cir. 1996) (finding against black defendant who claimed his traffic stop "was motivated by a race-based drug courier profile" because he "has failed to meet the rigorous standard for proving such a violation" imposed by *Armstrong*); United States v. Bell, 86 F.3d 820, 823 (8th Cir. 1996) (finding that black bicyclist stopped for lack of headlamp who "showed the only people arrested for violating the statute during a certain month were black" and that "there are no lights on 98% of all bicycles in the Des Moines area, which is populated predominantly by white people" did not meet his *Armstrong* burden, as he "presented no evidence about the number of white bicyclists who ride their bicycles between sunset and sunrise," though police admitted they had "targeted" a high-crime area "populated primarily by minorities").

100. United States v. Avery, 137 F.3d 343, 356 (6th Cir. 1997).

101. As noted by Alschuler:

> Police violations of the Equal Protection Clause warrant an effective remedy no less than police violations of the Fourth Amendment. To say that the Supreme Court would have no

II. THE IN-BETWEEN: DIMENSIONS OF A LAWFUL TRAFFIC STOP

Given that police can easily come by a factual basis for a traffic stop, that such stops are often motivated by drug-enforcement purposes, and that there exists virtually no basis for questioning the initiation of such a stop because of its pretextual or arbitrary nature, it is apparent that the permissible dimensions of a lawful traffic stop are matters of some importance. How long may the traffic violator be detained, and exactly what activities of an investigative nature not strictly related to the infraction serving as the basis of the stop are permissible? To explore this question, it is necessary initially to determine what standards do or should govern such cases — in particular, to assess the extent to which limits on *Terry* investigative stops are appropriate in a traffic stop context. Then a closer look can be taken at the various investigative techniques now "routinely" employed during a "routine traffic stop."

A. *The Applicability of the Terry Limitations*

In *Berkemer v. McCarty*, holding that "the roadside questioning of a motorist detained pursuant to a routine traffic stop" does not amount to " 'custodial interrogation' " for purposes of *Miranda*,[102] the Court placed considerable reliance upon its judgment that "the usual traffic stop is more analogous to a so-called '*Terry* stop' than to a formal arrest."[103] In lower-court cases involving instead the Fourth Amendment question of what temporal and scope limitations apply during a traffic stop, that characterization from *Berkemer* has often been quoted with apparent approval.[104] This would lead one to believe that the limitations imposed in the *Terry* case itself and in its progeny would apply with equal force to the so-called "routine traffic stop."

What are the *Terry* limitations? *Terry* itself recognized that "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one — whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[105] The first *Terry* prong, of course, has to do with whether the stop was made on reasonable suspicion (or, as earlier discussed, perhaps on probable

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principled basis for refusing to exclude evidence obtained in violation of the Equal Protection Clause, however, is not to predict that the Court would exclude it.

Alschuler, *supra* note 8, at 254.

102. Berkemer *v.* McCarty, 468 U.S. 420, 435 (1984).

103. *Id.* at 439 (citation omitted).

104. *E.g.*, United States v. Rodriguez-Arreola, 270 F.3d 611, 617 (8th Cir. 2001); People v. Gonzalez, 789 N.E.2d 260, 265 (Ill. 2003) (collecting cases from other jurisdictions).

105. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

cause in the case of minor traffic infractions); but it is less than immediately apparent what is encompassed within the second prong. The Court in *Terry* did remind us that the matter of "scope" requires that the Fourth Amendment activity "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"[106] as to which it nonetheless might be asked: "Does scope concern only the length of the detention . . . or does scope mean the type of questioning and investigating that occurs during the stop . . . ?"[107]

The answer given in *Florida v. Royer* is "both," for the Court there deemed it "clear" (i) that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," and also (ii) that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[108] That is, as *Royer* goes on to conclude, the prosecution bears the burden of establishing that the stop was "sufficiently limited in scope *and* duration."[109] And thus, when called upon to apply *Terry* directly rather than by analogy (that is, in cases where the stop was on reasonable suspicion of serious criminality rather than on probable cause of a traffic offense), the courts have enforced both the temporal and intensity limits by, for example, insisting that any consent to search be obtained before the time has run out[110] and that, even before the time expires, any interrogation concern an offense for which there was then reasonable suspicion.[111]

When one turns to the traffic-stop cases, certainly many decisions can be found that are faithful to the *Terry* limits described above by

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106. *Id.* at 19 (quoting Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)).

107. Amy L. Vazquez, Comment, *"Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car?" What Questions Can a Police Officer Ask During a Traffic Stop?*, 76 TUL. L. REV. 211, 226 (2001).

108. 460 U.S. 491, 500 (1983).

109. *Royer*, 460 U.S. at 500 (emphasis added); *see* Vazquez, *supra* note 107, at 226 ("By separating scope and duration, the Court here clearly suggested that scope is something more than the length of the detention. A reasonable inference can be made that the 'something more' should be, and is, the type of questioning and investigating."); *see also* United States v. Hensley, 469 U.S. 221, 235 (1985) (stating the question as being whether the circumstances "justified the length and intrusiveness of the stop and detention that actually occurred").

110. *E.g.*, Commonwealth v. Helm, 690 A.2d 739 (Pa. Super. Ct. 1997) (holding that where time ran out on lawful detention on reasonable suspicion of possessing stolen property because investigation alleviated the suspicion, consent to search thereafter was a suppressible fruit of illegal detention).

111. *E.g.*, Medrano v. State, 914 P.2d 804 (Wyo. 1996) (holding that officer did not exceed the scope of the stop by inquiring if defendant had drugs or weapons in his possession because, although the reasonable suspicion leading to the stop concerned a robbery, there then developed reasonable suspicion of drug possession).

adhering strictly to the time limits appropriate for a stop serving only traffic-enforcement purposes[112] and by proscribing investigative techniques unrelated to the traffic violation even when they are undertaken within the applicable time limit.[113] But when it comes to traffic stops, as will be elaborated below in the discussion of specific investigative techniques,[114] the *Terry* limitations are honored more often in the breach than in the observance. For one thing, the temporal limits are loosely observed, and courts even go so far as to state that such limits may be extended somewhat in the interest of permitting procedures only relevant to drug-law enforcement.[115] For another, the intensity limitation is treated as if it did not exist at all, so that nonsearch investigative procedures undertaken to uncover drugs are deemed permissible so long as they actually or approximately occurred within whatever temporal limits are being observed.[116]

Many of the appellate decisions applying only a watered-down version of *Terry* say little or nothing by way of justifying such a departure, but recently there has been some attempt to construct a rationale in support of this deviation. There are two central points. One, principally directed at explaining why a range of drug-law-enforcement activities (especially interrogation) are unobjectionable so long as they do not significantly extend the time of the traffic stop, is essentially that those activities do not actually increase the intensity of the encounter in a significant way and thus need not be taken into account in determining whether the police have exceeded traffic-law-stop limitations. The other, directed mainly at showing why the notion of temporal limitations need not be seriously considered if at all, is that the *Terry* limitations reflect an effort to minimize the intrusion when a stop is grounded only upon reasonable suspicion and hence are not applicable (at least in the same way) to stops made on probable cause, as most traffic stops are. These contentions are developed most extensively in the recent en banc case of *United States v. Childs*,[117] and

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112. *E.g.*, United States v. Luckett, 484 F.2d 89 (9th Cir. 1973); State v. Gutierrez, 51 P.3d 461 (Idaho Ct. App. 2002); People v. Cox, 782 N.E.2d 275 (Ill. 2002).

113. *E.g.*, United States v. Holt, 264 F.3d 1215 (10th Cir. 2001); People v. Caballes, 802 N.E.2d 202 (Ill. 2003), *cert. granted*, 124 S. Ct. 1875 (2004); State v. Wiegand, 645 N.W.2d 125 (Minn. 2002).

114. *See infra* Section II.B.

115. *E.g.*, State v. DeLaRosa, 657 N.W.2d 683 (S.D. 2003); State v. Lopez, 831 P.2d 1040 (Utah Ct. App. 1992).

116. *E.g.*, United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001); United States v. Shabazz, 993 F.2d 431 (5th Cir. 1993); Lecorn v. State, 832 So. 2d 818 (Fla. 2002); Henderson v. State, 551 S.E.2d 400 (Ga. Ct. App. 2002).

117. 277 F.3d 947 (7th Cir. 2002) (en banc). Also worth noting is an earlier case along the same lines, *United States v. $404,905.00 in U.S. Currency*, 182 F.3d 643 (8th Cir. 1999), curiously never mentioned in *Childs*. *Childs* itself has been embraced by some other courts.

thus it is useful to focus upon that case in undertaking an assessment of these arguments.

The issue in *Childs* was whether the panel was correct in concluding that questioning during a traffic stop must be related to the reason for the custody,[118] to which a majority of the full court responded with a resounding "no." In doing so, the court began with the Supreme Court's declaration in *Florida v. Bostick* that "mere police questioning does not constitute a seizure,"[119] then noted that while most of the Court's decisions to that effect "concern questions asked of persons not under arrest," certainly it must be equally true that "a question asked of someone already in custody causes no delay and thus can't be a seizure."[120] Warming to the task, the *Childs* court thus declared:

> If the police may ask (without suspicion) questions of persons who are in no custody (e.g., walking down the street), people who are in practical but not legal custody (e.g., passengers on busses and airplanes), and people who are in formal custody pending trial or following conviction (e.g., prisoners . . . a pretrial detainee), then why would the police need probable cause or reasonable suspicion to direct questions to persons such as Childs who are in legal custody but likely to be released soon? To say that questions asked of free persons and questions asked of prisoners are not "seizures" but that questions asked of suspects under arrest *are* seizures would have neither the text of the Constitution behind it nor any logical basis under it.[121]

If the point of *Childs* were *only* that the panel had been wrong in characterizing the questioning itself as a seizure, I would respond with nothing more than a hearty "Amen." But the court immediately inflated that sensible conclusion into a much broader proposition by stating that "the idea that the police could violate a prisoner's *fourth* amendment rights by asking questions in search of information about other offenses has no basis in the language of that amendment or the Supreme Court's cases."[122] This assertion was apparently offered in support of the court's opening broadside:

> The full court holds that, because questions are neither searches nor seizures, police need not demonstrate justification for each inquiry. Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong custody, but

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See United States v. Burton, 334 F.3d 514 (6th Cir. 2003); Edmond v. State, 116 S.W.3d 110 (Tex. Ct. App. 2002).

118. United States v. Childs, 256 F.3d 559 (7th Cir. 2001), *rev'd en banc*, 277 F.3d 947 (7th Cir. 2002).

119. *Childs*, 277 F.3d at 950 (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)).

120. *Id.*

121. *Id.* at 951.

122. *Id.*

> questions that do not increase the length of detention (or that extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers.[123]

This is a much broader proposition — in effect, that because interrogation is not a seizure it can have no bearing upon the reasonableness of a seizure unless it significantly adds to its length. As one court rejecting the *Childs* approach aptly put it, that conclusion is hardly supported by the *Bostick* quote, for the Court in that case "did not address the issue" of "whether, in the context of a nonconsensual police-citizen encounter, police questioning on matters unrelated to the purposes of the initial stop can be so intrusive" as to affect the Fourth Amendment legality of the traffic stop.[124] As to that issue, the answer most certainly is yes, for a traffic stop that has been turned into a drug investigation via the techniques elaborated further below (questioning about drugs, grilling about the minute details of travel plans, seeking consent for a full roadside exploration of the motorist's car, or parading a drug dog around the vehicle) is a far cry from a straightforward and unadorned traffic stop in which the officer merely checks the motorist's license and registration and writes out the citation or warning for the observed infraction (which thus requires no investigation of *any* kind). Thus, as yet another court put it, "[a]llowing police to pose any question to the occupants of a stopped vehicle, even if such question is totally divorced from the purpose of the stop, effectively does away with any balancing of the competing interests involved."[125] Such a consequence is not tolerable, at least so long as the teaching of *Delaware v. Prouse* that "the nature of the intrusion" must be weighed in judging Fourth Amendment activity remains extant.[126] Moreover, this conclusion does not depend upon how one comes out regarding the question discussed later herein of whether *Terry* itself applies to stops on probable cause, for the Court's *Royer* decision makes it clear that "the Fourth Amendment constrains the scope of *all* searches and seizures."[127]

For all these reasons, it is the concurring opinion[128] in the *Childs* case that better understands the dynamics of a so-called "routine

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123. *Id.* at 949.

124. United States v. Holt, 264 F.3d 1215, 1229 (10th Cir. 2001).

125. People v. Gonzalez, 789 N.E.2d 260, 269 (Ill. 2003).

126. Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002), *so characterizing* Delaware v. Prouse, 440 U.S. 648 (1979).

127. *Holt*, 264 F.3d at 1230 (emphasis added) (referring to the analysis in *Florida v. Royer*, 460 U.S. 491, 499-500 (1983)).

128. *Childs*, 277 F.3d at 954 (Cudahy, J., concurring) (concurring rather than dissenting only because of the view that there was reasonable suspicion of marijuana possession justifying the questioning).

traffic stop" and what this means in terms of Fourth Amendment doctrine:

> In attempting to equate questioning without detention with questioning in the course of detention, the majority conveniently ignores the fact that detention involves official coercion and therefore concerns quite a different relationship of the police officer to the person questioned. Anyone who has been pulled over for a traffic offense faces the police officer as one currently exercising authority over the motorist to keep him or her in place. This exercise of official coercion is the reason the Supreme Court has limited questioning to matters within the scope of the stop. The majority does not explain why exceeding the scope of the stop is somehow less burdensome to the detainee's Fourth Amendment rights than exceeding a reasonable duration for the stop. To explore bank robberies or polygamy, as to which there is no reasonable suspicion, with Childs would be to abuse the rationale for the stop based on other matters and would be just as abusive as extending a ten-minute stop to an hour.
>
> The majority comments blithely that the detainee can refuse to answer the questions posed by the police officer. How many times have you refused to answer questions asked by a police officer who has pulled your car over for a traffic offense?[129]

In short, Fourth Amendment limitations upon "routine traffic stops" would be grossly inadequate if expressed solely in terms of the permissible duration of the stop.[130]

The en banc opinion in *Childs* then turns to the duration limitation of *Terry*, invoked by passenger Childs because, after the vehicle was stopped because of a broken windshield and Childs was then seen to be violating the seat-belt law, Childs was questioned after what he claimed was delay in running the license and warrant checks. Noting the oft-quoted assertion that a typical traffic arrest resembles a *Terry* investigative stop more than a custodial arrest, the *Childs* court then reasoned:

> We grant this as a factual matter, but it does not follow that the Constitution *requires* all traffic stops to be treated as if they were unsupported by probable cause. What is "typical" often differs from the constitutional minimum. *Atwater*[131] makes this clear. A person arrested for an offense punishable only by a fine typically is given a citation (a "ticket") and released, but *Atwater* holds that the Constitution allows the police to place the person in custody and take him to be booked. Thus

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129. *Id.* at 960 (Cudahy, J., concurring).

130. Especially considering that courts have upheld traffic stops lasting a half hour or more, *see, e.g.*, United States v. Shareef, 100 F.3d 1491 (10th Cir. 1996), or even approaching a full hour, *see, e.g.*, United States v. Hardy, 855 F.2d 753 (11th Cir. 1998).

131. The reference is to *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which held that police have absolute and total discretion in deciding whether to make a custodial arrest of a minor traffic violator in lieu of issuing a citation.

> although traffic stops usually proceed like *Terry* stops, the Constitution does not require this equation. Probable cause makes all the difference — and as *Whren v. United States*[132] shows, traffic stops supported by probable cause are arrests, with all the implications that follow from probable cause to believe that an offense has been committed. . . .
>
> Because probable cause supported this stop, neither the driver nor Childs had a right to be released the instant the steps to check license, registration, and outstanding warrants, and to write a ticket, had been completed. It is therefore not necessary to determine whether the officers' conduct added a minute or so to the minimum time in which these steps could have been accomplished. . . . The extra time, if any, was short — not nearly enough to make the seizure "unreasonable."
>
> Our point is not that, because Chiola could have taken Childs to a police station for booking, any less time-consuming steps are proper. The reasonableness of a seizure depends on what the police *do*, not on what they might have done. The point, rather, is that cases such as *Atwater* and *McLaughlin*[133] show that the fourth amendment does not require the release of a person arrested on probable cause at the earliest moment that step can be accomplished. What the Constitution requires is that the entire process remain reasonable. Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention.[134]

While at first reading this all seems very logical, upon closer evaluation of this reasoning it is apparent that it is so seriously flawed that other courts would be well advised to reject it and hold instead that the *Terry* limitations apply without modification even to those traffic stops made upon probable cause.[135] The position taken in the above-quoted excerpt from *Childs* is objectionable for these reasons:

(1) The court asserts at one point that the "reasonableness of a seizure depends on what the police do, not on what they might have done," but obviously doesn't mean it. Looking at "what the police do" means that *Childs* involved only a traffic stop, for passenger Childs was guilty of nothing more than a failure to wear a seat belt, and the police had given no indication whatsoever that in dealing with this insignificant traffic infraction they were intending to make a custodial arrest or to take any step beyond that of possibly writing a citation. (Indeed, it is to be doubted whether the officer *could* have made a custodial arrest, for while *Atwater* tells us the Fourth Amendment

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132. 517 U.S. 806 (1996).

133. The reference is to *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), which held that when an arrest is made without a warrant, a subsequent judicial determination of probable cause will usually be timely if made within forty-eight hours of the arrest.

134. *Childs*, 277 F.3d at 953-54 (citations omitted).

135. *See, e.g.*, United States v. Holt, 264 F.3d 1215 (10th Cir. 2001); People v. Gonzalez, 789 N.E.2d 260 (Ill. 2003).

would not be violated by such a step, the events of *Childs* occurred in Illinois, where a driver's license — which apparently Childs had[136] — may be posted in lieu of bail for such an offense,[137] in which case the "officer should issue a warning ticket or a citation, as appropriate, and allow the driver to leave."[138]) Since under the "what-the-police-do" approach this was only a traffic stop, the court's reliance on *Atwater* and *McLaughlin* makes absolutely no sense, for those decisions only indicate the more substantial intrusions that could have followed under a "might-have-done" scenario.[139] Significantly, the Supreme Court declined to take any such might-have-done approach in *Knowles v. Iowa*,[140] which involved a full search of Knowles's car incident to a traffic-stop/citation situation relating to his driving at an excessive speed. After noting that the state supreme court had upheld the search by "reasoning that so long as the arresting officer had probable cause to make a custodial arrest, there need not in fact have been a custodial arrest"[141] (a straightforward "might-have-done" argument), a unanimous Supreme Court rejected that contention out of hand. Rather, the Court focused upon the stop/citation character of the events as they actually occurred, and then quite correctly noted that the need for search in such a setting is not at all equivalent to that existing when a custodial arrest is made: there is no need to search for evidence of the speeding violation, and the "threat to officer safety from issuing a traffic citation . . . is a good deal less than in the case of a custodial arrest,"[142] so that the bright-line search rule of *United States v. Robinson*[143] makes no sense in a traffic-stop context. So what search power for his own protection does the officer need during a traffic stop? Precisely that permitted under *Terry*, the Court answered, thus providing yet another example of the wisdom of the *Terry*-stop/traffic-

136. The court noted that Childs had been stopped while driving the same vehicle three days earlier and then was arrested when a records check disclosed an outstanding warrant; there is no mention that the check revealed a lack of a driver's license. *Childs*, 277 F.3d at 949.

137. ILL. SUP. CT. R. 526(e).

138. People v. Cox, 782 N.E.2d 275, 279 (Ill. 2002).

139. As noted in a concurring opinion in *Childs*: "What the majority seems to be saying is that, because Officer Chiola *could* have gone on to a custodial arrest, he may instead (and without subjecting Childs to custodial arrest) elect to inquire into crimes for which there is neither probable cause nor reasonable suspicion." *Childs*, 277 F.3d at 959 (Cudahy, J., concurring).

140. 525 U.S. 113 (1998).

141. *Knowles*, 525 U.S. at 115-16.

142. *Id.* at 117.

143. 414 U.S. 218 (1973).

stop analogy rejected in *Childs*. *Childs* simply cannot be squared with the Supreme Court's *Knowles* decision.[144]

(2) The court in *Childs* never gave the slightest suggestion that its watering down of the Fourth Amendment's application during "routine traffic stops" had anything at all to do with some public interest relating to the enforcement of states' traffic codes. While this is understandable, in that no plausible claim could be made that traffic-law enforcement is attended with unique difficulties necessitating a reduction in personal security and privacy beyond that tolerated in investigating honest-to-goodness criminal behavior, it is thus apparent that underlying the *Childs* decision is nothing more than a desire to assist the police in their efforts to use traffic stops as a means of seeking drugs. That is, *Childs* constitutes a positive encouragement to the police to engage in pretextual activity — making stops whose sole legal justification is traffic regulation in order to seek out drugs when grounds are lacking to detain for a narcotics investigation. If the Supreme Court previously had actually endorsed pretextual conduct by the police, then *Childs* might be at least understandable, but the Court did not, as can be seen by recalling the Court's reasoning in *Whren v. United States*.[145] *Whren* never says at any point that such pretextual activities by the police are desirable, but only that case-by-case litigation of the pretext issue is not permissible when the police action was grounded in probable cause. In part, that conclusion was based upon the fact that were the law otherwise courts would regularly be "reduced to speculating about the hypothetical reaction of a hypothetical constable."[146] Moreover, when the *Whren* Court got to the petitioner's claim that the usual probable-cause-is-sufficient rule should not obtain in the instant case because "the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop,"[147] the Court responded *solely* on pragmatic grounds. The difficulty, says the Court, is that no principled basis exists for deciding in which areas of law enforcement that problem has reached the point where "infraction itself can no longer be the ordinary measure of the lawfulness of enforcement," or — even assuming such specification was possible — of then deciding "which particular provisions are sufficiently important to merit enforcement."[148] The fact

144. *See, e.g.*, Ochana v. Flores, 199 F. Supp. 2d 817 (N.D. Ill. 2002) (discussed *infra* note 153).

145. 517 U.S. 806 (1996) (discussed *supra* text accompanying note 48).

146. *Whren*, 517 U.S. at 815.

147. *Id.* at 818.

148. *Id.* at 818-19.

that *Whren* came out this way is hardly supportive of *Childs*; indeed, *Whren* actually shows rather clearly why *Childs* is so wrong-headed! Since the Court concluded that detecting pretext on a case-by-case basis was not worth the candle, this is all the more reason for ensuring that the procedures permitted incident to traffic stops are limited to those needed for traffic enforcement so as to diminish as much as possible any police incentive to go the subterfuge route. As one court put it, if the pretext issue cannot be raised under the first prong of *Terry*, then surely the second prong must be fully applied in order to protect "the traveling public" from arbitrary police action.[149]

(3) With the *Terry* limits not applicable to traffic stops, there would nonetheless be a need for some sort of limits on traffic stops, as the *Childs* court admits, for it feels compelled to make a judgment that the amount of delay in that case beyond that needed to deal with the traffic infractions was "not nearly enough to make the seizure 'unreasonable.' "[150] But if "a minute or so"[151] is not even close to the point of unreasonableness, what would be? Not even a clue to the answer to that question is to be found in *Childs*, which is hardly surprising. Once the rather clear *Terry* limit, tied to those activities defensible in terms of responding to the traffic infraction, is abandoned, there remains no other basis for making a judgment about the legal parameters of a "routine traffic stop" — unless it is simply a matter of applying the "horseshoes rule," i.e., that just being close counts. But any court believing that Fourth Amendment adjudication requires something a bit more principled than that is left in a sea of uncertainty by *Childs*. As one judge aptly put it, abandonment of the *Terry* limits "leaves courts speculating on the length of time after a

149. United States v. Botero-Ospina, 71 F.3d 783, 788 (10th Cir. 1995). The pre-*Whren* *Botero-Ospina* case clearly reflects this relationship between *Whren* and the present problem: in *Botero-Ospina*, the court abandoned its prior rule that a traffic stop is unconstitutionally pretextual if it would not have been made but for an ulterior purpose (e.g., drug-law investigation). While the court, essentially anticipating the *Whren* position, did so on the ground that experience had shown its earlier approach was "unworkable," the court felt compelled to add that by such rejection of an opportunity for drivers to make pretext claims:

> we do not abandon the traveling public to "the arbitrary exercise of discretionary police power." Our holding in this case properly focuses on the very narrow question of whether the initial stop of the vehicle is objectively justified. We leave intact the vast body of law which addresses the second prong of the *Terry* analysis — whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place. Our well-developed case law clearly circumscribes the permissible scope of an investigative detention. Therefore, if an officer's initial traffic stop, though objectively justified by the officer's observation of a minor traffic violation, is motivated by a desire to engage in an investigation of more serious criminal activity, his investigation nevertheless will be circumscribed by *Terry*'s scope requirement.

Id. (citations omitted).

150. United States v. Childs, 277 F.3d 947, 953 (7th Cir. 2002).

151. *Id.*

stop is over that an officer would be justified in detaining the motorist anew," which is "a can of worms best left unopened."[152]

(4) The *Childs* analysis is nothing more than the beginning of a descent down the slippery slope. True, the court protests that it is not adopting some sort of greater-includes-the-lesser principle to the effect that because under *Atwater* Childs could have been arrested and detained a much longer time, any lesser imposition is unobjectionable. But as a practical matter the only difference between the result in *Childs* and such a greater-includes-the-lesser rule is that, on the facts presented, it was only necessary to recognize a small departure from the duration standard of *Terry* — just "a minute or so." But the mere fact that the court on this particular occasion only had to take a small bite out of the Fourth Amendment is hardly reassuring (especially in light of the fact that the *Childs* decision has since been relied upon to justify a further slide down the slope so far as to effectively nullify *Knowles*[153]). Indeed, the Supreme Court has cautioned against such incremental intrusions, warning that because "unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure," it "is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[154]

(5) The only justification offered by the *Childs* court for abandoning *Terry* in traffic-stop situations is the rather cynical observation that the "potential for detecting crime" would be

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152. State v. DeLaRosa, 657 N.W.2d 683, 691 (S.D. 2003) (Sabers, J., dissenting).

153. In *Ochana v. Flores*, 199 F. Supp. 2d 817 (N.D. Ill. 2002), police responding to a honking of horns at a stoplight found a car blocking traffic with the driver slumped over the wheel. An officer put the car into park and assisted the driver out of the vehicle. While one officer was examining the driver's credentials at the rear of the vehicle, a second officer searched a backpack inside the vehicle and found drugs. The driver (the plaintiff in this section 1983 action) moved to bar any reference to the search as being incident to arrest on the ground that he was not under arrest at the time. The court ruled that "a reasonable person in Ochana's position would have thought he was under arrest," *id.* at 828, citing in support the facts that "Ochana consented to talk to the investigating officers . . . that Ochana did not depart the area without hindrance . . . [that] there is no evidence that the officers informed Ochana that he was not under arrest or that he was free to leave, that the officers physically touched Ochana other than to assist him from his car, or that the officers displayed weapons or otherwise threatened Ochana," *id.* at 827. Perhaps appreciating that just such facts would, in an exclusionary-rule context, merely create some doubt as to whether there was a temporary stop or no seizure at all, the district court then went on to declare that "Ochana was under arrest when his car was searched," *id.* at 828, for the officers "had probable cause to believe that Ochana had committed the traffic offense of obstruction of traffic," *id.*, which it deemed sufficient in light of *Childs*' declaration that "traffic stops supported by probable cause are arrests, with all the implications that follow from probable cause to believe that an offense has been committed," *id.* (quoting *Childs*, 277 F.3d at 953).

On appeal, however, the court of appeals cited *Knowles* but not *Childs* in holding that the search could not be deemed a valid search incident to arrest because there was insufficient evidence of a custodial arrest. Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003).

154. Boyd v. United States, 116 U.S. 616, 635 (1886).

enhanced if those committing traffic infractions were given less constitutional protection than those persons stopped because suspected of burglary, robbery, and other serious criminal offenses. But if ever there was a bad reason for manipulating constitutional rights, this is it. Any other court contemplating a similar move would be well advised to reflect upon the oft-quoted words of Justice Frankfurter:

> Violators should be detected, tried, convicted, and punished — but not at the cost of needlessly bringing into question constitutional rights and privileges. While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice.[155]

Lastly, note should be taken of two other straws grasped by the *Childs* majority. One is that the earlier-quoted[156] statement from *Berkemer* has appended to it a cautionary footnote reading: "We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop."[157] However, as the *Childs* concurrence[158] notes, this footnote, "besides being dictum, sheds little light on the present problem because the footnote appears in the context of a discussion whether *Miranda* warnings need to be administered to a detainee at a traffic stop."[159] Even more significant, as another court pointed out, is the fact that courts

> have not read this cautionary statement . . . to imply that the existence of probable cause to believe that only a minor traffic violation was committed is sufficient to sanction a substantially more intrusive stop than would be justified under *Terry*, at least where the police officer is not undertaking to make an arrest based on the traffic violation.[160]

Indeed, the Supreme Court itself, in *Knowles v. Iowa*, quoted the language from *Berkemer* to which that footnote was appended but ignored the footnote in holding, as to a traffic violator who had been stopped on probable cause but had not in fact been subjected to custodial arrest, that the search authority of the police did not exceed that granted in *Terry*.[161]

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155. Shapiro v. United States, 335 U.S. 1, 69-70 (1948) (Frankfurter, J., dissenting).

156. *See supra* text accompanying note 102.

157. Berkemer v. McCarty, 468 U.S. 420, 439 n.29 (1984).

158. Based upon the conclusion that there was reasonable suspicion of a drug offense.

159. United States v. Childs, 277 F.3d 947, 959 (7th Cir. 2002) (Cudahy, J., concurring).

160. Mitchell v. United States, 746 A.2d 877, 887 (D.C. Cir. 2000).

161. Knowles v. Iowa, 525 U.S. 113, 117 (1998).

The other straw is *Ohio v. Robinette*.[162] The *Childs* majority asserts that the Supreme Court, by deciding in *Robinette* that a valid consent to search, in the context of a traffic stop, does not require prior warnings that the violator was free to leave, "necessarily rejected the broader contention that unrelated questions may not be asked at all."[163] Putting aside the doubts as to whether *Robinette* should be relied upon for much of anything given the Court's inability to even understand the basis of the state court's decision,[164] the fact of the matter is that the Court in that case "never addressed, let alone approved, questions asked *during* a routine traffic stop that do not concern the purpose of the stop or were not based upon reasonable suspicion."[165]

B. *Specific Investigative Techniques*

The bare essentials of a "routine traffic stop" consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning. But these days, manifesting the war-on-drugs motivation so often underlying these stops, there are various investigative activities unrelated to the infraction justifying the stop that themselves are so common as to now be a part of the routine. These activities, considered seriatim below, are: (1) a records check via radio or computer regarding the criminal history of those stopped and any outstanding arrest warrants for those individuals; (2) interrogation of those stopped directly on the subject of drugs or about the nature and purpose of their travels; (3) seeking (and often obtaining) consent to conduct a full search of the stopped vehicle; and (4) using a drug-sniffing dog to detect the presence of any drugs in the stopped vehicle.

1. *Records Check*

As one court has aptly put it, the "primary law enforcement purposes" for making a traffic stop are: "(1) to verify that a violation of the traffic laws has occurred or is occurring and, (2) to provide for the issuance of an appropriate ticket or citation charging such traffic violation or make an arrest of the driver based upon such violation."[166] This being the case, it might be thought that a close application of the

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162. 519 U.S. 33 (1996).

163. *Childs*, 277 F.3d at 954.

164. *See infra* text following note 333.

165. *Childs*, 277 F.3d at 960 (Cudahay, J., concurring).

166. United States v. Brigham, 343 F.3d 490, 498 (5th Cir. 2003).

Terry doctrine to traffic stops would mean that the police could not use the occasion to check, via radio or computer, various government records concerning the status of the driver and the vehicle; rather, the officer should merely investigate sufficiently to verify (where necessary) that his pre-stop suppositions about the violation are correct (sometimes they are not[167]) and then simply proceed with citation or arrest. But the court responsible for the above-quoted pronouncement followed it with this postscript: "In furtherance of these purposes, the police officer is authorized to require the driver of the vehicle to produce a valid driver's license and documentation establishing the ownership of the vehicle and that required public liability insurance coverages are in effect on such vehicle," after which "the officer may run a computer check on the driver's license and registration."[168] This kind of checking of government records incident to a "routine traffic stop," which usually takes a matter of minutes,[169] is well established as a part of the "routine,"[170] and has consistently been approved and upheld by both federal[171] and state[172] courts.

There is certainly no basis to question that conclusion, which is not really inconsistent with rather strict application of the *Terry* standard to traffic stops. For one thing, as a constitutional matter, thanks to the Supreme Court's *Atwater* decision, the officer making the traffic stop has, even in the most insignificant cases, the power to choose between making a custodial arrest and giving a citation. Citation will be the choice in most instances, but computer verification of the credentials produced by the driver "is crucial to the successful operation of any citation system."[173] Moreover, whenever a stop is made of a person who has violated the traffic laws, it is appropriate in those circumstances to "run such computer verifications" because they are "necessary to determine that the driver has a valid license and is

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167. *See, e.g.*, United States v. Valadez, 267 F.3d 395 (5th Cir. 2001) (concerning vehicle stopped on suspicion of an expired vehicle sticker and illegal windshield tinting where immediately following the initial stop, the officer determined that the sticker was valid and that the tinting was not too dark).

168. United States v. Brigham, 343 F.3d 490, 498-99 (5th Cir. 2003).

169. The time is generally brief, but can vary some from case to case. *See, e.g.*, United States v. Shabazz, 993 F.2d 431, 438 (5th Cir. 1993) (noting officer testified that a "check can take anywhere from two to three to ten to fifteen minutes").

170. People v. Grove, 792 N.E.2d 819, 821 (Ill. 2003) (holding that "an officer may properly run a computer check on a motorist's license as a routine part of a traffic stop" even when, as here, it was already determined that the vehicle registration was valid).

171. *E.g.*, United States v. Caro, 248 F.3d 1240 (10th Cir. 2001).

172. *E.g.*, State v. Lee, 658 N.W.2d 669 (Neb. 2003); Fender v. State, 74 P.3d 1220 (Wyo. 2003).

173. Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 268 (1989).

entitled to operate the vehicle."[174] As the Supreme Court concluded in *Delaware v. Prouse*, "the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed," so that police, "acting upon observed violations"[175] of the traffic laws,[176] may "stop[] an automobile and detain[] the driver in order to check his driver's license and the registration of the automobile."[177]

However, the checking of government records via radio or computer is not limited to merely verifying the driver's license and the vehicle's registration. For one thing, is it common for the officer also to run a check for any outstanding arrest warrants on the driver. Indeed, it may fairly be said that such a warrant check has itself become a "routine" part of the so-called "routine traffic stop"[178] that is undertaken without regard to whether there is any reason to believe that such a warrant exists or that the driver is engaged in other criminality.[179] Warrant checks are run even when the traffic violation is nothing more than an unsignaled lane change[180] or failure to maintain proper distance[181] (and pedestrians are not immune, as warrant checks are likewise run incident to stops for jaywalking[182]). There is

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174. United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997).

175. Delaware v. Prouse, 440 U.S. 648, 658-59 (1979).

176. The importance of the violation of law to the authority to run a check on a license and registration is illustrated by those cases holding that if there is a stopping on either reasonable suspicion or probable cause of a traffic violation that is determined immediately after the stop not to have been a violation at all, the officer may not continue the detention for a license/registration check. *See, e.g.*, United States v. McSwain, 29 F.3d 558 (10th Cir. 1994); People v. Redinger, 906 P.2d 81 (Colo. 1995).

The principle is also illustrated by the holding that if a vehicle is stopped because of a traffic violation by the passenger for which the driver is not also legally accountable, then there may be no checking of the driver's license incident to that stop. City of Fairborn v. Orrick, 550 N.E.2d 488 (Ohio Ct. App. 1988). There exists some questionable authority, however, to the effect that if an officer makes a nonseizure encounter with a parked car, e.g., to see if the motorist needs assistance, then this may be followed by a brief seizure to check the validity of the defendant's driver's license. State v. Godwin, 826 P.2d 452 (Idaho 1992).

177. *Prouse*, 440 U.S. at 663.

178. *See, e.g.*, State v. Johnson, 645 N.W.2d 505 (Minn. Ct. App. 2002) (characterizing encounter as "routine traffic stop"); State v. Mogen, 52 P.3d 462 (Utah Ct. App. 2002) (same); Wilson v. State, 874 P.2d 215 (Wyo. 1994) (same).

179. Occasionally, however, when such suspicion has been present, courts have emphasized it as justification for the warrant check. *See, e.g.*, United States v. Spencer, 1 F.3d 742 (9th Cir. 1992).

180. State v. DeMarco, 952 P.2d 1276 (Kan. 1998).

181. United States v. Lopez-Guzman, 246 F. Supp. 2d 1155 (D. Kan. 2003).

182. United States v. Luckett, 484 F.2d 89 (9th Cir. 1973); State v. Barros, 48 P.3d 584 (Haw. 2002). Under the aggressive patrol tactics utilized in some high-crime locales, pedestrians are stopped for minor violations such as jaywalking and then detained as long as

considerable variation in the reports as to the time that a warrant check takes. For those police having computers in their patrol cars, as is increasingly common,[183] it is said that access to the data is "almost instantaneous,"[184] but other reports of the time actually consumed waiting for a response to a warrants query range from a few minutes[185] to ten minutes[186] to thirty minutes.[187] Of course, it sometimes will be uncertain whether the driver is actually the same person as is named in the warrant, in which case still more time will be taken resolving that question.[188]

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thirty minutes while a warrant check is conducted. *See* Adrienne L. Meiring, Note, *Walking the Constitutional Beat: Fourth Amendment Implications of Police Use of Saturation Patrols and Roadblocks*, 54 OHIO ST. L.J. 497, 528-30 (1993).

183. "Police officers throughout the United States increasingly use computer consoles in their patrol cars to request immediate information about outstanding arrest warrants, traffic records, and other matters relevant to their discretionary decisions about whether to investigate, cite, or arrest the citizens with whom they interact." Christopher E. Smith & Madhavi McCall, *Constitutional Rights and Technological Innovation in Criminal Justice*, 27 S. ILL. U. L.J. 103, 114 n.63 (2002).

184. People v. McGaughran, 601 P.2d 207, 216 n.2 (Cal. 1979) (Bird, C.J., concurring and dissenting); *see also infra* note 186.

Even if the response is very quick, dealing with the data received may take some time as well. Files that are called up on the patrol-car computer contain "a significant amount of information, including: name, age, sex, race, driving record, traffic violations, warrants, insurance information, et cetera," but "the information is presented in an extremely hard-to-read format and is normally provided in separate files that force the officer to scan through several records." Lisa Napoli, *Speeding Up Police Traffic Stops*, MSNBC, *at* http://www.aps.us/news/Speeding.htm (last visited Sept. 1, 2004).

185. Piggott v. Commonwealth, 537 S.E.2d 618 (Va. Ct. App. 2000).

186. People v. McGaughran, 601 P.2d 207 n.6 (Cal. 1979). This was the time actually taken in this particular case. The Attorney General claimed that "because of modern communications systems and advances in computer technology the usual response time to a warrant check is now from a few seconds to less than four minutes, depending on the method used and the number of inquiries being processed," while the defendant claimed the ten minutes taken in his case was more typical; the court concluded "that reality lies somewhere between these two extremes: i.e., that under ideal conditions warrant checks can now be swiftly completed, but that in a still significant number of places in the state — presumably diminishing with the spread of the new technology — the ideal is not yet attained." *Id.* at 211.

187. Meiring, *supra* note 182, at 528-30.

188. U.S. v. Simmons, 172 F.3d 775, 775-76 (11th Cir. 1999) (holding that additional seventeen to twenty-six minutes consumed by a police officer's attempts to verify whether the defendant was the subject of an outstanding arrest warrant did not render the duration of the initially valid traffic stop unconstitutional, although the warrant was from a county on other side of the state, date of birth on the warrant did not match the defendant's, police had run the defendant's name two and one-half months earlier, but had not detected any outstanding warrants, and warrant was for a worthless check, as opposed to a more "serious" crime, officer had specific and articulable suspicion that person named in the warrant was the defendant, method of investigation, a computer check and follow-up teletype was likely to confirm or dispel their suspicions quickly, and with a minimum of interference, and scope and intrusiveness of the detention was relatively minor).

With rare exception,[189] the courts have approved of the general practice of conducting warrant checks incident to a traffic stop. Sometimes the expression of approval appears unrestrained, in that it is made to appear that such a check is simply another proper procedure, along with the license and registration check, that may accompany any traffic stop.[190] Other courts have been somewhat more restrained, holding that a warrant check is permissible if it does not "significantly extend" the period of detention.[191] While one case has been found in which the court actually held that this latter limitation had not been met,[192] it has been cogently questioned whether as a practical matter this limitation can be enforced.[193]

Earlier in this Article I have argued, as a general proposition, that courts should rather strictly adhere to the *Terry* standard for judging the lawful dimensions of a traffic stop, so as to remove the incentive for pretextual arrest and to minimize the intrusion upon the very substantial numbers of persons who find themselves by the side of the road after being signaled to stop by a traffic/drug-enforcement officer. Does this mean that the practice of making warrant checks incident to traffic stops ought to be abolished, at least absent "specific and articulable facts causing [the officer] to reasonably suspect that there may be an outstanding warrant for the driver's arrest"?[194] Certainly a

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189. In *State v. Rife*, 943 P.2d 266, 268 (Wash. 1997), the court ruled the warrant check there was illegal because "[n]either the [applicable] statute nor the Seattle Municipal Code grants authority for a police officer to run a warrant check after stopping a person for a routine traffic infraction."

190. *E.g.*, United States v. Jones, 269 F.3d 919 (8th Cir. 2001); United States v. Garcia, 205 F.3d 1182 (9th Cir. 2000); State v. Lee, 658 N.W.2d 669 (Neb. 2003); Walter v. State, 28 S.W.3d 538 (Tex. Crim. App. 2000).

191. *E.g.*, United States v. Contreras-Diaz, 575 F.2d 740 (9th Cir. 1978); State v. Barros, 48 P.3d 584 (Haw. 2002); Storm v. State, 736 P.2d 1000 (Okla. Crim. App. 1987).

192. United States v. Luckett, 484 F.2d 89 (9th Cir. 1973).

193. As stated in *People v. McGaughran*, 601 P.2d 207, 216-17 (Cal. 1979) (Bird, C.J., concurring and dissenting):

> This rule is unworkably vague. How is it possible to determine what amount of time would have been "reasonably necessary" for an officer to discharge the duties he or she had with respect to the traffic infraction itself? I submit, it is not possible. Further, the rule requires the officer and the judge to determine the duration of a past event *which never occurred*, i. e., the length of time the traffic detention *would* reasonably *have required* if the officer had not run the warrant check. Not only must past history be thus reorganized, but a determination must be made as to how many of the officer's actions that never occurred would have been reasonably "necessary" to perform duties that may have been only partly performed.

In the court's first opinion in *McGaughran*, a majority of the court expressed similar reservations: "For a court to decree at a later date precisely how much time 'would have been' necessary to perform the officer's duties in any given case would be at best hindsight and at worst sheer speculation." People v. McGaughran, 585 P.2d 206, 215 (Cal. 1978), *rev'd*, 601 P.2d 207 (Cal. 1979).

194. This was the test very, very briefly in California by virtue of *McGaughran*, 585 P.2d 206, 208 (1978), until rejected in the court's second opinion in that case, 601 P.2d 207 (1979).

rather compelling argument can be made in favor of such a change. For one thing, the point has been made that "[i]nitiating a warrant check and awaiting the return are not activities that are directed at resolving the traffic offenses which authorized the stop in the first place," meaning that this is an obvious case for applying the limitations of *Terry* in order that the "scope of a lawful, routine traffic detention [may] be limited to what is necessary to investigate the traffic infraction itself" rather than "expanded to permit using a portion of the detention solely to investigate the separate question of whether there are unrelated arrest warrants in the name of the driver."[195]

So the argument goes, if police are deprived of the windfall of the serendipitous discovery of persons wanted on outstanding warrants for a variety of crimes, then they may be less likely to make traffic stops for marginal conduct. Moreover, such a change would obviate another problem:

> Since a warrant check during a traffic detention does not have to be justified on any factual basis, the decision as to whether or not to run a warrant check will turn not upon the driver's apparent involvement in crime but upon the unconstrained and standardless discretion of the officer.[196]

While there is much to these arguments, I would not press as hard for a change in the warrant-check practice, as I would for the changes later recommended herein. This is because there are at least some rational arguments for retaining the warrant-check routine as to a person who apparently has committed a traffic offense.[197] For one thing, to the extent that the warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses, as happens in a small but perhaps significant number of cases,[198] it can be said that the warrant check

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195. People v. McGaughran, 601 P.2d 207, 216 (Cal. 1979) (Bird, C.J., concurring and dissenting).

196. *Id.* at 217.

197. Here, as with the license/registration check, *see* cases cited *supra* note 176, there is the question of whether the warrant check may proceed even after it is determined that no violation occurred. The answer would seem to be no in this context as well. *But cf.* People v. Safunwa, 701 N.E.2d 1202 (Ill. App. Ct. 1998) (reasoning, curiously, that the fact that a number of jurisdictions have held that where the initial traffic stop is valid, police may request a driver's license and run a warrant check without any further probable cause supports the court's holding in this case of first impression that where the police were justified in stopping the defendant's car because they believed he was a fugitive wanted on a federal warrant, they could detain him to conduct a warrant check even after they realized that he was not the fugitive).

198. In *People v. McGaughran*, 585 P.2d 206, 213-14 (Cal. 1978), *rev'd*, 601 P.2d 207 (Cal. 1979), the court concluded that "2 percent of California drivers — at the very most — may be operating with suspended or revoked licenses" and "less than 2 percent" of the licensed drivers have traffic warrants outstanding. In the second opinion in that case, the concurring/dissenting opinion noted that "statistics based on all warrant checks run by the

serves objectives sufficiently related to the initial reason for the stop, in much the same way as does the license/registration check. For another, my main argument is that those stopped for traffic infractions should not receive less Fourth Amendment protection than is afforded to those subjected to *Terry* stops because they are suspected of burglary, robbery, and other typical crimes. At least as to warrant checks, it can be said that this is likewise a standard practice as to those in the latter group, where again the check is not limited to a search for warrants regarding conduct similar to that suspected in the instant case.[199]

Yet another type of information regularly acquired by a records check following a traffic stop is the driver's criminal history, that is, information regarding his prior convictions, prior arrests, and the like. This has likewise become a "part of [a] routine computer check" performed incident to a traffic stop,[200] just one of the "routine . . . tasks related to the traffic violation."[201] Criminal-history information is readily available to law-enforcement agencies and officers through the National Crime Information Center,[202] and is said to be "instantly available nationally."[203] The cases reflect, however, that obtaining a criminal-history check is one of several "somewhat time-consuming tasks related to the traffic violation"[204]; delays of five minutes in getting a response back to the officer in the field are not uncommon.[205] The check can easily add to the total length of the stop, for "often criminal history checks take longer to process than the usual license and warrant requests."[206] Moreover, the criminal-history inquiry may itself produce a substantial extension of the traffic violator's seizure without reasonable grounds to suspect more serious criminal activity. A criminal record, even if previously denied by the violator, counts for

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Los Angeles County Sheriff suggest the figures may be somewhat higher. In addition to disclosing traffic warrants, a warrant check may also reveal felony and misdemeanor warrants. The information supplied by the Los Angeles Sheriff suggests that felony warrants are discovered in 1 percent of all warrant checks and nontraffic misdemeanor warrants in 5 percent." 601 P.2d 207, 217-18 n.6 (Cal. 1979) (Bird, C.J., concurring and dissenting).

199. *See, e.g.*, State v. Holman, 380 N.W.2d 304 (Neb. 1986); State v. McFarland, 446 N.E.2d 1168 (Ohio Ct. App. 1982); State v. DeMasi, 448 A.2d 1210 (R.I. 1982), *order confirmed*, 452 A.2d 1150; State v. Chapman, 921 P.2d 446 (Utah 1996).

200. United States v. Purcell, 236 F.3d 1274, 1278 (11th Cir. 2001).

201. United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 647 (8th Cir. 1999); *see also* Laime v. State, 60 S.W.3d 464, 474-75 (Ark. 2001).

202. United States v. McManus, 70 F.3d 990, 991 n.2 (8th Cir. 1995).

203. Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 373 (1998) (Souter, J., dissenting).

204. United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 647 (8th Cir. 1999).

205. *See, e.g.*, United States v. Gregory, 302 F.3d 805 (8th Cir. 2002); United States v. Finke, 85 F.3d 1275 (7th Cir. 1996).

206. *Finke*, 85 F.3d at 1280.

very little,[207] but yet may lead to interrogation that is "intense, very invasive and extremely protracted."[208]

Most courts confronted with the issue have concluded that a criminal-history check is a valid part of a traffic stop. Sometimes it is stated flat-out that "a police officer, incident to investigating a lawful traffic stop, may... conduct computer searches to investigate the driver's criminal history."[209] To the same effect are those cases that "demonstrate an implied acceptance of criminal history checks as generally reasonable, by beginning their unconstitutional detention analysis only after the point at which a criminal history report has been obtained."[210] Other cases are a bit more cautious, indicating that a criminal-history check is proper provided it is "almost simultaneous" with the license/registration check,[211] or if it does not unduly prolong the length of the traffic-stop seizure,[212] although here (just as with warrant checks[213]) it is to be doubted whether in practice this is a meaningful limitation. Criminal-history checks are run even in the case of traffic offenses as innocuous as an unsignaled lane change,[214] and courts forthrightly acknowledge that they are approving such checks or even added detention to facilitate such checks "even though the purpose of the stop had nothing to do with such prior criminal

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207. As stated in *United States v. Jones*, 269 F.3d 919, 928 (8th Cir. 2001):

> There are numerous reasons why an innocent traveler initially would be reluctant to reveal to law enforcement authorities his criminal history; primarily for fear that it would have the exact effect that it had here, i.e., casting unwarranted suspicion upon that person. Also, an inconsistent answer regarding past conduct is less suspicious than an inconsistent answer regarding present destination or purpose. An inconsistent answer as to the former might cast a shadow of dishonesty upon the character of the motorist, but an inconsistent answer regarding the latter casts suspicion and doubt on the nature and legitimacy of the activity being investigated.

208. Based upon data accumulated under a 1995 Maryland court order from January 1995 through June 2000 (including a total of 8027 searches, and focusing upon a subset of 2146 searches that occurred on the northern portion of I-95, from Baltimore to the Delaware border), it is reported in Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 685 (2002) (alterations in original) (quoting CAL. STATE ASSEMBLY DEMOCRATIC CAUCUS TASK FORCE ON GOV'T OVERSIGHT, OPERATION PIPELINE: CALIFORNIA JOINT LEGISLATIVE TASK FORCE REPORT, *at* 13-15, *available at* http://www.aclunc.org/discrimination/webb-report.html (Sept. 29, 1999) [hereinafter OPERATION PIPELINE]), that in " 'approximately 30 hours of [actual] videotaped stops.... [t]he questioning that was done was intense, very invasive and extremely protracted. It was not uncommon to see travelers spending 30 minutes or more standing on the side of the road, fielding repeated questions about... their criminal histories' " and other matters.

209. *E.g.*, United States v. Jones, 269 F.3d 919, 924 (8th Cir. 2001).

210. *Finke*, 85 F.3d at 1279 (7th Cir. 1996) (citing illustrations).

211. United States v. McRae, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996).

212. *E.g.*, United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001).

213. *See supra* note 193.

214. State v. DeMarco, 952 P.2d 1276 (Kan. 1998).

history"[215] and even though there had not yet developed any reasonable suspicion of more serious criminal activity.[216]

Especially in light of that, it would appear, consistent with the thesis developed earlier in this Article, that there should be a total prohibition (without regard to whether the check increases the time of detention significantly or at all) on use of criminal-history checks incident to traffic stops except when there also exists a reasonable suspicion of more serious criminal conduct.[217] Because in this "war on drugs" via traffic stops the criminal-history check serves to identify drivers who deserve (at least in the officer's mind) more intense scrutiny,[218] a prohibition on such checks could contribute in a meaningful way to reducing the number of pretextual stops as well as the number of stops in which the motorist is subjected to excessive scrutiny and detention.

But there is one wrinkle here that makes this issue a bit more complex: while most courts approving of these criminal-history checks deem it unnecessary to say even a word by way of justification for such a conclusion, occasionally a claim is made that criminal-history checks are legitimate in connection with traffic stops in order to aid in ensuring the officer's safety.[219] This claim can hardly be dismissed out of hand, for certainly legitimate concerns about officer safety may warrant some action that would be inappropriate if it were simply a matter of acquiring evidence of criminal activity.[220] But, while it is doubtless true that "[b]y determining whether a detained motorist has a criminal record or outstanding warrants, an officer will be better appri[s]ed of whether the detained motorist might engage in violent activity during the stop,"[221] it is at least debatable whether routinely obtaining this information is necessary in light of the various other

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215. United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001).

216. United States v. Gregory, 302 F.3d 805 (8th Cir. 2002).

217. In some cases the court has approved the criminal-history check at issue because there did exist a reasonable suspicion of more serious criminality, *e.g.*, United States v. Finke, 85 F.3d 1275 (7th Cir. 1996); People v. Easley, 680 N.E.2d 776 (Ill. App. Ct. 1997), an unobjectionable result.

218. Even though the existence of the criminal history may be attributable to prior arbitrary traffic stops of the driver! *Cf.* United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998) (holding that Criminal History Category V over-represented defendant's criminal record because defendant's driving convictions were the result of pretextual traffic stops or racial profiling).

219. *E.g.*, United States v. Holt, 264 F.3d 1215 (10th Cir. 2001); United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001).

220. Perhaps the best illustration of this point is that it quite properly takes less to justify a frisk of a person already lawfully stopped by the police than it would to justify a stop in the first instance on suspicion of carrying a concealed weapon. *See* 4 LAFAVE, SEARCH AND SEIZURE (1996), *supra* note 5, § 9.5(a).

221. *Holt*, 264 F.3d at 1221-22.

rules that exist with respect to what an officer may do in the interest of his own protection during a stop.[222] Given these many other avenues of self-protection, it would seem that they suffice to ensure the officer's protection during what should be a brief face-to-face encounter,[223] so that the added authority to run a criminal-history check (which has no conceivable other legitimate basis during a traffic stop) need not be granted. If there is doubt on that point, however, this would *not* mean that a bright-line rule allowing a criminal-history check incident to *all* traffic stops would be necessary;[224] rather, this otherwise undesirable step would be permitted only upon a showing of reasonable apprehension approaching that needed for a frisk.

Before leaving this general subject of records checking as an incident of a traffic stop, something should be said about such checks regarding a passenger in the stopped vehicle. Although it is sometimes suggested that both the driver and any passengers might be required to display their driver's licenses incident to a traffic stop,[225] this would not seem to be the case, for applicable statutes do not require "a passenger in a vehicle to carry his driver's license or any other type of identification" and do not "attribute liability to a passenger for a traffic violation committed by the driver, such as 'following too close.' "[226] Of course, if the driver's offense makes him unable to continue driving and the passenger agrees to take over, then it is

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222. These rules permit frisking the driver on reasonable suspicion he has a weapon, *e.g.*, Knowles v. Iowa, 525 U.S. 113 (1998), searching the vehicle on reasonable suspicion there is a weapon within (even if the driver is not himself in the car!), *e.g.*, Michigan v. Long, 463 U.S. 1032 (1983), and even absent reasonable suspicion of a weapon ordering the driver, *e.g.*, Pennsylvania v. Mimms, 434 U.S. 106 (1977), or passengers, *e.g.*, Maryland v. Wilson, 519 U.S. 408 (1997), out of the vehicle, ordering the occupants to remain within the vehicle, *e.g.*, Rogala v. District of Columbia, 161 F.3d 44 (D.C. Cir. 1998); United States v. Moorefield, 111 F.3d 10 (3d Cir. 1997); State v. Roberts, 943 P.2d 1249 (Mont. 1997); State v. Hodges, 631 N.W.2d 206 (S.D. 2001), ordering the occupants within to show their hands, *e.g.*, United States v. Enslin, 327 F.3d 788 (9th Cir. 2003); Cousart v. United States, 618 A.2d 96 (D.C. App. 1992), or directing the driver to be seated with the police officer in the patrol car during the stop, *e.g.*, United States v. Barlow, 308 F.3d 895 (8th Cir. 2002); State v. England, 92 S.W.3d 335 (Mo. Ct. App. 2002); State v. Lee, 658 N.W.2d 669 (Neb. 2003); State v. Lozado, 748 N.E.2d 520 (Ohio 2001).

223. It is interesting to note that in *United States v. McRae*, the danger prompting a frisk in light of what was learned by the criminal-history check came into being only because the officer had obtained the driver's consent to a full search of the vehicle; the court emphasized that "a search of the car might compel Officer Colyar to turn his back on Mr. McRae," and that because the driver needed to exit the car to facilitate the search "Officer Colyar permitted Mr. McRae to put on his jacket before getting out of the car, and a jacket is a likely place in which to store a weapon." 81 F.3d 1528, 1536 (10th Cir. 1996). If consent to search a vehicle gives rise to a need for a frisk of the person that otherwise would not exist, one wonders why the frisk should not be expressly included in the requested consent.

224. *See* United States v. Finke, 85 F.3d 1275, 1280 (7th Cir. 1996) (finding "such a bright line rule troubling" after noting the officer-safety argument in other decisions).

225. State v. Gutierrez, 611 N.W.2d 853 (Neb. Ct. App. 2000).

226. United States v. Brigham, 343 F.3d 490, 503 n.7 (5th Cir. 2003).

proper for the officer to require the passenger to display his license,[227] but otherwise requiring display of a driver's license by the passenger may not be required and, indeed, may in some circumstances amount to an illegal seizure.[228] While an officer making a traffic stop, "[i]n order to do his or her job correctly," should attempt to "determine the identity of the witnesses to the incident," meaning that "the securing of names of witnesses" thereto, i.e., passengers, "is part of the scope of a traffic stop,"[229] "[p]assengers are free to refuse to provide identifying information,"[230] and thus the officer should request rather than demand such information and should not insist upon a driver's license to the exclusion of other forms of identification.

It is not uncommon for appellate courts to declare that incident to a traffic stop it is permissible for the officer to run a warrant check on the passengers specifically[231] or on all occupants of the vehicle,[232] although it is sometimes said that detention for this purpose after the traffic stop is otherwise over is not permissible.[233] Putting aside those cases where the warrant check was upheld because connected with a driver's license check on a passenger who was to assume the driving duties,[234] it is to be doubted whether there is any valid reason for automatic warrant checks on mere passengers. If, as suggested earlier, the best that can be said for requiring a warrant check on the driver is

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227. Duncan v. State, 686 So. 2d 1279 (Ala. Crim. App.1996); State v. Higgins, 884 P.2d 1242 (Utah 1994); State v. Mennegar, 787 P.2d 1347 (Wash. 1990).

228. This is certainly the case when, as in *Piggott v. Commonwealth*, 537 S.E.2d 618 (Va. Ct. App. 2000), the traffic stop of the driver was completed by citation or warning after which the passenger is required to surrender his credentials. It is less apparent that this is the case when, in the course of the traffic stop, the officer stands at the passenger door and asks the passenger for his license, though such was the holding in *People v. Spicer*, 203 Cal.Rptr. 599 (Cal. Ct. App. 1984).

229. State v. Jones, 5 P.3d 1012, 1018 (Kan. Ct. App. 2000). As stated in *State v. Griffith*:

> [T]here is a general public interest in attempting to obtain identifying information from witnesses to police-citizen encounters. If witnesses are willing to identify themselves, they may later be able to assist police in locating the person who violated the law. If questions later arise about police conduct during the stop, passengers may be able to provide information about what occurred during the stop.

613 N.W.2d 72, 81-82 (Wis. 2000).

230. *Griffith*, 613 N.W.2d at 82.

231. State v. Ybarra, 751 P.2d 591 (Ariz. Ct. App. 1988); United States v. Morris, 910 F. Supp. 1428 (N.D. Iowa 1995); State v. DeMarco, 952 P.2d 1276 (Kan. 1998).

232. United States v. White, 81 F.3d 775 (8th Cir. 1996); State v. Anderson, 605 N.W.2d 124 (Neb. 2000).

233. State v. Damm, 787 P.2d 1185 (Kan. 1990); State v. Johnson, 805 P.2d 761 (Utah 1991); Piggott v. Commonwealth, 537 S.E.2d 618 (Va. Ct. App. 2000).

234. State v. Higgins, 884 P.2d 1242 (Utah 1994); State v. Mennegar, 787 P.2d 1347 (Wash. 1990). The state relied upon this exception in *People v. Harris*, but without success, as at "no time during the traffic stop" did the officer ask the passenger whether he "was able to drive the car." 802 N.E.2d 219, 222 (Ill. 2003).

that this is an appropriate step for all those seized, even temporarily, for violating the law, it hardly follows that companions of the offender (especially when the offense is only a traffic violation) should be treated in the same fashion. And thus the correct result as to this issue is that reached in *People v. Harris*:[235] except when (1) the police "have a reasonable, articulable suspicion that the passenger has committed a crime," (2) "the passenger has violated a traffic law," or (3) "the driver and passenger, knowing that the driver is being arrested or is otherwise incapable of driving, agree that the passenger should drive the vehicle," a warrant check on a passenger is impermissible because it would change "the fundamental nature of the traffic stop" by "convert[ing] the stop from a routine traffic stop into an investigation of past wrongdoing by" the passenger.[236] As for the intimation in some of the cases that a criminal-history check of a passenger is proper,[237] here again a contrary conclusion is supported by the need to obviate the possibility of a "windfall" that would make a pretextual stop worthwhile to the police, especially since any police-safety claim is relatively weak vis-à-vis a passenger.

2. *Questioning Vehicle Occupants*

Once a lawful traffic stop has been made, it is certainly proper for the officer then to engage in "questioning the driver about the traffic violation,"[238] although often the officer's prior observations will have obviated the need for any interrogation to establish the existence of the traffic infraction. Given the frequent use of traffic stops for the purpose of uncovering drugs, it may be just as likely that the officer will question the driver about the presence of any drugs on his person or in the vehicle. Such questioning is often "intense, very invasive and extremely protracted,"[239] and the driver may be confronted with a virtual barrage of questions about drugs and related matters.[240] The

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235. 802 N.E.2d 219 (Ill. 2003)

236. *Id.* at 228-230.

237. United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001) (finding stop to be proper if not thereby unreasonably prolonged); State v. DeMarco, 952 P.2d 1276 (Kan. 1998).

238. United States v. Simmons, 172 F.3d 775, 778 (11th Cir. 1999).

239. Gross & Barnes, *supra* note 208, at 685 (quoting OPERATION PIPELINE).

240. *E.g.*, Maxwell v. State, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001). In *Maxwell*, during what the court termed "a fishing expedition," officer King

> asked Maxwell about matters which had nothing to do with the citation.... Deputy King asked over 50 questions during this traffic stop. Many of the questions involved drugs or weapons: Do you have any drugs in the car? When was the last time you used marijuana? Have you ever been arrested for drugs? Has anyone been in your car recently with drugs? Do you object to a search of your car? Is there any reason a drug dog would alert to drugs if it walked around your car? Do you have any objection to the drug dog walking around your car? Do you have any guns in your car? Have you had any firearms violations?

questioning is sometimes profitable; the interrogatee may actually admit to the possession of drugs,[241] or his staunch denial may produce what is deemed consent to a search when the officer responds that then the driver will not mind if the officer looks in the vehicle.[242]

Such questioning has been upheld where a reasonable suspicion of drug transportation had already been lawfully developed,[243] which is hardly objectionable, and where the questioning occurred in a post-stop "consensual encounter,"[244] which would be likewise unobjectionable but for the unrealistic fashion in which courts typically go about determining that a traffic-stop seizure has ended (discussed in Part III below). As for those cases where the questioning about drugs was during the stop and without a reasonable suspicion about drugs, one view is that such questioning is permissible provided that it occurs before the valid purposes of the traffic stop (license/registration check, ticketing, or warning) have been concluded.[245] That is, under those cases the single issue is whether the seizure had become unlawful in a temporal sense. This may be easy to determine if the questioning comes after all the above-mentioned steps have been taken but before release from custody,[246] but if the questioning comes earlier it may be a matter of some uncertainty. This is because it is often difficult to determine whether the officer was "stalling" the completion of these other steps in order to facilitate the questioning.[247]

Because of the "slippage" possible under this approach, it probably does not vary from that taken by some other courts, namely, that the questioning about drugs is permissible so long as it does not "unreasonably prolong" the detention.[248] In the cases taking this view, typically no explanation is offered as to why it is proper to hold someone longer than would otherwise be required because some of the time was taken up questioning the driver about matters totally unrelated to the traffic stop. But one court, with uncharacteristic

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Id. at 1279 (citation omitted).

241. *E.g.*, State v. Toevs, 964 P.2d 1007 (Or. 1998).

242. *E.g.*, United States v. Erwin, 71 F.3d 218 (6th Cir. 1995).

243. *E.g.*, United States v. Hunnicutt, 135 F.3d 1345 (10th Cir. 1998); United States v. Jones, 44 F.3d 860 (10th Cir. 1995); United States v. Perez, 37 F.3d 510 (9th Cir. 1994).

244. *E.g.*, United States v. Sanchez-Pena, 336 F.3d 431 (5th Cir. 2003); People v. Thomas, 839 P.2d 1174 (Colo. 1992); State v. Ready, 565 N.W.2d 728 (Neb. 1997).

245. *E.g.*, United States v. Mesa, 62 F.3d 159 (6th Cir. 1995); United States v. Fernandez, 18 F.3d 874 (10th Cir. 1994); State v. Gutierrez, 51 P.3d 461 (Idaho Ct. App. 2002); State v. Hight, 781 A.2d 11 (N.H. 2001); State v. Hansen, 63 P.3d 650 (Utah 2002).

246. As in, for example, *State v. Gutierrez*, 51 P.3d 461 (Idaho Ct. App. 2002).

247. When the stalling is quite apparent, it may be taken into account by the court, as in *Maxwell v. State*, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001).

248. *E.g.*, Henderson v. State, 551 S.E.2d 400 (Ga. Ct. App. 2001); State v. Parkinson, 17 P.3d 301 (Idaho Ct. App. 2000); State v. Wallace, 642 N.W.2d 549 (Wis. Ct. App. 2002).

honesty, stated flat out that the explanation was that a policy of regularly making such traffic-stop extensions "promotes the public interest in quelling the drug trade."[249]

These positions are dead wrong! They are totally at odds with the *Terry* line of Supreme Court decisions on the limits applicable to temporary detentions, and amount to nothing more than an encouragement to police to engage in pretextual traffic stops so that they may engage in interrogation about drugs in a custodial setting (albeit not custodial enough to bring even the protections of *Miranda* into play[250]). The correct rule is that followed by some other courts: that in strict accordance with *Terry* and its progeny, questioning during a traffic stop must be limited to the purpose of the traffic stop and thus may not be extended to the subject of drugs.[251]

Nor is a different result called for on this issue merely because a different rule might obtain were the questioning about weapons, a matter deserving brief exploration here. What the rule should be about such questioning is a close call, as is reflected by the fact that in the en banc case of *United States v. Holt*,[252] the court split 5-4 on the issue. The majority's bright-line rule to allow such an inquiry because of "the dangers inherent in all traffic stops"[253] is grounded in the notion that ensuring the safety of the police and bystanders is a more compelling interest than acquiring information of criminality and thus justifies a variety of minimal intrusions in service of that particular interest:

> In addition to information about loaded weapons that the officer may obtain from visually looking in the car, shining a light around the interior of the car, or asking the motorist and occupants to step out of the car or to keep their hands raised — all procedures authorized by the courts in the name of officer safety — an officer may also obtain information about the existence of a loaded weapon by simply asking the motorist if there is a loaded weapon in the vehicle. Indeed, straightforwardly asking

249. State v. Robinette, 685 N.E.2d 762, 768 (Ohio 1997), *rev'd*, Ohio v. Robinette, 519 U.S. 33 (1996). The court's legal analysis in support of the lawfulness of such a position is truly astounding, as by some curious merger of the holdings in *Florida v. Royer*, 460 U.S. 491 (1983), and *Brown v. Texas*, 443 U.S. 47 (1979), the court concluded that these two decisions "set out a standard whereby police officers, under certain circumstances, may briefly detain an individual without reasonably articulable facts giving rise to suspicion of criminal activity, if the detention promotes a legitimate public concern, *e.g.*, removing drunk drivers from public roadways or reducing drug trade." *Robinette*, 685 N.E.2d at 768.

250. Berkemer v. McCarty, 468 U.S. 420 (1984).

251. *E.g.*, United States v. Jones, 44 F.3d 860 (10th Cir. 1995); State v. Syhavong, 661 N.W.2d 278 (Minn. Ct. App. 2003); *see also* Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 164-88 (2001) [hereinafter Maclin, *Freeway*].

252. 264 F.3d 1215 (10th Cir. 2001).

253. *Holt*, 264 F.3d at 1226.

> this question is often less intrusive than many of the procedures authorized by our sister circuits.[254]

The majority went on to emphasize the utility of such inquiry: if the suspect answers in the affirmative, or even if the suspect either answers in the negative or refuses to answer in a certain way, the officer would be provided with "an important piece of information causing [him] to proceed with greater caution."[255] But, as the dissenters pointed out in objecting to allowing such questioning "in all future cases,"[256] it is precisely because there are many other means available for ensuring officer safety, including requiring the traffic violator to exit his vehicle and remain outside during the entire period of the detention, that such questioning is unnecessary. In an apparent effort to counter that contention, the majority declares that once the traffic stop is over and the detainee is free to leave, he will at that point of necessity be allowed to reenter his vehicle and might at that point choose to attack the officer. That claim seems just as fanciful here as it did when made by the Supreme Court in *Michigan v. Long*.[257]

Nor is a different result called for regarding questioning about drugs simply because many courts have allowed police to inquire into the driver's travel plans during a stop, for, as one court aptly put it,

> even assuming for purposes of argument that these cases allow an officer conducting a *Terry* stop to ask a detainee a limited number of questions unrelated to the purpose of the stop, we are not convinced they allow for questions . . . which would require the detainee to give[] an incriminatory answer or which would directly lead to a search of the detainee's vehicle.[258]

But these travel-plans cases themselves also require a closer look. What they say is that inquiry into the driver's travel plans (or, as it is often put, into the driver's destination and purpose, which, however, can include quite detailed questioning about precisely where the driver has been, where he is going, and whom he has seen or will be

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254. *Id.* at 1223.

255. *Id.* at 1224.

256. *Id.* at 1239 (Lucero, C.J., concurring and dissenting) (noting also that the "average American citizen stopped for speeding while hurrying to drop children off at school will not only find it bizarre, but more than minimally intrusive, to be confronted with questions about loaded weapons").

257. 463 U.S. 1032 (1983). For criticism of that position in *Long*, see 4 LAFAVE, SEARCH AND SEIZURE (1996), *supra* note 5, § 9.5(e), at 291 n.233.

258. United States v. Holt, 229 F.3d 931, 937 (10th Cir. 2000), *vacated en banc*, 264 F.3d 1215 (10th Cir. 2001) (reaching majority agreement on the rule regarding interrogation about drugs).

seeing, etc.) is "routine"[259] and that such questions may be asked "as a matter of course"[260] because they are "reasonably related"[261] to the circumstances justifying the traffic stop. The essence of these cases is that calling upon the driver to fully explain the past and forthcoming aspects of his travels is a regular part of the officers' duties whenever they make a traffic stop.[262]

Only occasionally do the cases attempt to spell out why under the "reasonably related" test the questioning about travel plans is permissible. In *State v. Chapman*, for example, where the concern was with "the trooper's initial questions . . . concerning where the defendants had been and where they were going," the court explained that "[t]hese inquiries had a substantial nexus to ascertaining the reasons for Chapman's erratic driving," especially (since intoxication had been already eliminated) "the possibility of fatigue."[263] But that won't wash, as all the officer needed to know on the fatigue issue, at best, was how long Chapman had been driving. And even if there is doubt about that, a case like *Chapman* hardly supports the broadside that "[t]ravel plans *typically* are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop."[264] For example, *Chapman* hardly explains why the supposed police right of inquiry into travel plans has been upheld even when the stop was made for a loud muffler[265] or a just-ended parking violation.[266]

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259. United States v. Long, 320 F.3d 795, 799 (8th Cir. 2003); United States v. West, 219 F.3d 1171, 1176 (10th Cir. 2000); Miller v. State, 102 S.W.3d 896, 902 (Ark. Ct. App. 2003) (quoting Laime v. State, 60 S.W.3d 464, 474 (Ark. 2000)).

260. *West*, 219 F.3d at 1176 (quoting United States v. Hernandez, 93 F.3d 1493, 1499 (10th Cir. 1996)).

261. United States v. Lyton, 161 F.3d 1168, 1170 (8th Cir. 1998); State v. Lee, 658 N.W.2d 669, 676 (Neb. 2003) (quoting State v. Anderson, 605 N.W.2d 124, 131 (Neb. 2000) (quoting U.S. v. Bloomfield, 40 F.3d 910 (8th Cir. 1994))).

262. *See also* United States v. Gregory, 302 F.3d 805 (8th Cir. 2002); State v. Fields, 662 N.W.2d 242 (N.D. 2003); *cf.* United States v. Givan, 320 F.3d 452, 459 (3d Cir. 2003) (stating that "questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop," thus suggesting something short of a bright-line rule).

Of course, in this area as well it is sometimes said that questions about travel plans may not be asked if they extend the time of detention beyond that otherwise permissible. United States v. Brigham, 343 F.3d 490 (5th Cir. 2003); Mitchell v. United States, 746 A.2d 877 (D.C. 2000). While, as previously discussed, such a test is not easy to administer where the questioning did not actually follow completion of all the lawful tasks pursuant to the traffic stop, *Brigham* emphasized that in the instant case the officer's "methodology, questioning unrelated to the traffic violation for eight minutes *before* commencing the computer check, is merely an impermissible variation" from the post-completion questioning scenario. *Brigham*, 343 F.3d at 501.

263. State v. Chapman, 753 A.2d 1179, 1185 (N.J. Super. Ct. App. Div. 2000); *see also* United States v. Holt, 264 F.3d 1215 (10th Cir. 2001); United States v. Bloomfield, 40 F.3d 910 (8th Cir. 1994).

264. *Holt*, 264 F.3d at 1221 (emphasis added).

265. *See* United States v. Hephner, 260 F. Supp. 2d 763 (N.D. Iowa 2003).

266. *See* Caldwell v. State, 780 A.2d 1037 (Del. 2001).

Permitting travel-plans inquiries across the board has been defended on the ground that the "scope doctrine does not . . . prevent officers from engaging in facially innocuous dialog which a detained motorist would not reasonably perceive as altering the fundamental nature of the stop."[267] But this is a gross misrepresentation of the situation at issue. The interrogations challenged without success in the cases have not been social one-liners like "hey, where you headed?" or "so, where you from?"; rather, they are multi-question extended inquiries of vehicle occupants into the most minute details regarding the parts of the journey completed and lying ahead.[268] The officers are "trained to subtly ask questions about . . . their destination, their itinerary, the purpose of their visit, the names and addresses of whomever they are going to see," "to make this conversation appear as natural and routine a part of the collection of information incident to a citation or warning," and "to interrogate the passengers separately, so their stories can be compared."[269] The objective is not to gain some insight into the traffic infraction that provided the legal basis for the stop, but to uncover inconsistent, evasive, or false assertions that could contribute to reasonable suspicion or probable cause regarding drugs. Thus, "[n]ot only are questions about travel plans investigatory rather than merely conversational, the ordinary traveler cannot reasonably be expected to decline to answer such questions, particularly if they are posed while an officer is holding the driver's license and other essential documents."[270]

As an impressionable lad growing up in the '40s in a sleepy Wisconsin burg where the local cinema was the principal source of amusement, I consumed a steady diet of World War II movies, where I saw essentially the same scene time and again: in some area under the Nazi thumb, some hapless traveler would be stopped by the authorities, at which point the man in charge would inevitably say, "Ve vant to zee your papers." The traveler would produce his credentials and then would be subjected to a thorough grilling about

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267. *Holt*, 264 F.3d at 1240 (Murphy, C.J., concurring and dissenting).

268. For a striking illustration, see the facts in *United States v. Brigham*, 343 F.3d 490, 494-96 (5th Cir. 2003), where, after Trooper Conklin stopped Brigham for not maintaining sufficient distance from the car preceding him, the officer subjected all the occupants of the vehicle to an intense grilling about all aspects of their travels.

269. Gross & Barnes, *supra* note 208, at 685 (quoting OPERATION PIPELINE, *supra* note 208, at 13).

Passengers are no more immune from interrogation than they are from the other investigative techniques previously discussed. Passengers may merely be asked their name, *e.g.*, People v. Gonzalez, 789 N.E.2d 260 (Ill. 2003), may be asked about travel, *e.g.*, People v. Bunch, 796 N.E.2d 1024 (Ill. 2003), or may be directly questioned about drug possession, *e.g.*, United States v. Childs, 277 F.3d 947 (7th Cir. 2002).

270. Petition for Writ of Certiorari at 8, Williams v. United States, 535 U.S. 1019 (2002) (No. 01-1422).

where he was going, where he had been, why he was about, etc. Each time I watched such a scene, shivers went down my spine, and it was then that I concluded that one of the most striking differences between a free and a totalitarian society was that in the former scenes like that could not happen. We certainly have come a long way, unfortunately in the wrong direction!

3. *Obtaining Consent to Search*

Yet another technique commonly employed in connection with drug stops disguised as traffic stops is seeking consent to make a search. Usually the officer attempts to get the driver to consent to a search of the vehicle, but sometimes the requested consent will be for search of the person.[271] Requesting consent has apparently become yet another part of the "routine" of "routine traffic stops,"[272] and it is thus not surprising that the cases contain acknowledgments by police about the frequency of this tactic.[273] These requests result in affirmative responses in the overwhelming majority of cases.[274] Guilty or innocent, "most motorists stopped and asked by police for consent to search their vehicles will expressly give *permission* to search their vehicles," resulting in "thousands upon thousands of motor vehicle searches of innocent travelers each year."[275] This is apparently attributable to the training police have received in the art of acquiring what will pass for consent,[276] plus the fact that many factors often present in this setting produce an affirmative response.[277]

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271. A request for search of the person may also be directed at a passenger. *See, e.g.*, State v. Hardyway, 958 P.2d 618 (Kan. 1998).

272. *See* State v. Ready, 565 N.W.2d 728, 731 (Neb. 1997) (quoting an officer's testimony that he "routinely" seeks consent to search following traffic stops).

273. *See, e.g.*, United States v. Lattimore, 87 F.3d 647, 649 (4th Cir. 1996) (discussing officer's recorded statement that he searches "97 percent of the cars I stop"); State v. Retherford, 639 N.E.2d 498, 503 n.3 (Ohio Ct. App. 1994) (noting 786 requests to search vehicles made by testifying officer in one year and expressing concern over the "staggering" numbers of Ohio citizens affected).

274. One study showed that consent was given in about ninety percent of the cases. *See* Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 533-35 (2001) (discussing Illya D. Lichtenberg, Voluntary Consent or Obedience to Authority: An Inquiry Into the "Consensual" Police-Citizen Encounter (1999) (unpublished Ph.D. dissertation, Rutgers University)).

275. Whorf, *Consent Searches*, *supra* note 18, at 2. This article and its companion piece, Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379 (1997), examine in detail the traffic stop/consent search phenomenon.

276. In the words of Professor Whorf:

> The "right" technique is by now well-established and is likely a frequent subject of law enforcement training in "drug interdiction." It goes like this: A police officer stops a vehicle for a routine traffic violation such as speeding; the police officer asks the driver to get out of the vehicle; the police officer chats in a friendly way with the driver and, sometimes, with

When the resulting search turns up drugs, the courts deal with the validity of the police action in seeking the consent in much the same way as they do with the other techniques previously discussed. Consent requests made during the course of the traffic stop are generally deemed proper,[278] at least if the request itself did not unjustifiably delay the conclusion of the stop[279] and was not preceded by "stalling"[280] or earlier investigative efforts (e.g., interrogation about drugs) that caused improper delay.[281] On the other hand, any consent obtained will not be valid if the request came after the traffic stop had or should have run its course,[282] unless by the time of the request there was reasonable suspicion of drug activity[283] or circumstances changing the situation to that of a "consensual encounter."[284] Because it typically takes little time to obtain consent, courts are inclined to validate consent requests that immediately follow completion of all other traffic-stop activities.[285] If the officer legitimately sought the

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passengers as well; the police officer issues a warning rather than a citation for the traffic offense; the police officer asks if the vehicle contains anything illegal; and then, right on the heels of the inevitable denial, the police officer asks for permission to search the vehicle.

Whorf, *Consent Searches*, *supra* note 18, at 2-3 (citations omitted).

277. Again, as Whorf puts it:

There are plausible explanations for the ready acquiescence to search by the "guilty": 1) the overall coercive nature of the routine traffic stop turned consent search; 2) the technique of catching the motorist off-guard by the quick transition from traffic stop to contraband investigation; 3) the possible belief by consentors that well-concealed contraband will not be found; 4) the possible belief by consentors that if they readily acquiesce, police suspicion will be dispelled resulting in a cursory search or in no search at all; and 5) the likely belief by consentors that, if they refuse consent, police suspicion will be heightened resulting in a forcible search.

Id. at 22 n.121.

278. *E.g.*, United States v. Purcell, 236 F.3d 1274 (11th Cir. 2001); People v. Reddersen, 992 P.2d 1176 (Colo. 2000).

279. *See* State v. Johnson, 51 P.3d 1112, 1116-17 (Idaho App. 2002).

280. *See, e.g.*, United States v. Jones, 234 F.3d 234, 241 (5th Cir. 2000) (finding search illegal and consent invalid where officer employed "dilatory tactic" of delaying handing over of warning ticket).

281. *See, e.g.*, United States v. Brigham, 343 F.3d 490, 501 (5th Cir. 2003) (finding search illegal earlier where officer engaged in "questioning unrelated to the traffic violation for eight minutes *before* commencing the computer check"). This panel decision, however, has been set for rehearing en banc. United States v. Brigham, 350 F.3d 1297 (5th Cir. 2003).

282. United States v. Santiago, 310 F.3d 336 (5th Cir. 2002); Harris v. Commonwealth, 581 S.E.2d 206 (Va. 2003).

283. *See, e.g.*, United States v. Carrate, 122 F.3d 666 (8th Cir. 1997); Heincelman v. State, 56 S.W.3d 799 (Tex. App. 2001).

284. *See, e.g.*, United States v. West, 219 F.3d 1171 (10th Cir. 2000); United States v. Chan, 136 F.3d 1158 (7th Cir. 1998); State v. Hardyway, 958 P.2d 618 (Kan. 1998); State v. Williams, 646 N.W.2d 834 (Wis. 2002).

285. *See, e.g.*, United States v. Carrazco, 91 F.3d 65, 66 (8th Cir. 1996) (validating request that came three seconds after delivering warning ticket); State v. Kremen, 754 A.2d

consent, chances are the consent itself will be upheld as being voluntary.[286]

Here again, the failure of most courts, when dealing with traffic-stop consent searches, to adhere to the *Terry* limits on what constitutes a reasonable temporary detention has produced very distressing results. Consent searches are no longer an occasional event by which a crime suspect may "advise the police of his or her wishes and for the police to act in reliance on that understanding,"[287] but are now a wholesale activity accompanying a great many traffic stops, submitted to by most drivers, guilty or innocent, and resulting in continued interruption of their travels for a substantial period of time[288] while they wait by the roadside as their vehicles are ransacked, a process which beyond question "is highly invasive of the dignitary interests of individuals."[289] Certainly the best way to deal with this problem is as in *State v. Fort*,[290] which involved a traffic stop for speeding and a cracked windshield. The court quite correctly held that the officer's "consent inquiry . . . went beyond the scope of the traffic stop and was unsupported by any reasonable articulable suspicion,"[291] meaning the evidence obtained via the consent must be suppressed, without regard to whether the inquiry and subsequent search "may also have extended the duration of the traffic stop."[292]

964, 968 (Me. 2000) (holding that officer, after writing ticket, may still pursue "a simple request for permission to search a vehicle").

286. Courts holding these consents valid are sometimes inclined to overlook rather convincing evidence of coercion, such as that the defendant was threatened that if he did not consent, a drug dog would be summoned to sniff the vehicle. *See, e.g.*, United States v. Lattimore, 87 F.3d 647 (4th Cir. 1996); Cole v. State, 562 S.E.2d 720 (Ga. Ct. App. 2002). This would suggest that *State v. George*, 557 N.W.2d 575, 580 (Minn. 1997), is correct in concluding that the nature of traffic-stop consents is such that appellate courts should give those consents more "careful review." Indeed, it may be that the concept of voluntariness should be looked at differently in this context. One commentator has asserted that in the common case of a police-citizen encounter followed by a purported consent to search upon a police "request," the "question should be whether the officer's behavior was too coercive given the reason for the encounter," e.g., "the reasonableness of treating [the citizen] like he was a probable drug courier." William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064-65 (1995). Another has argued that this wholesale seeking of consents that are almost always given and then almost always upheld by the courts means it is time for the "drastic solution" of eliminating consent searches entirely. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 271 (2001).

287. United States v. Drayton, 536 U.S. 194, 207 (2002).

288. "A typical vehicle search for drugs is likely to last twenty to forty minutes or more." Whorf, *Consent Searches*, *supra* note 18, at 19.

289. *Id.*

290. 660 N.W.2d 415 (Minn. 2003).

291. *Fort*, 660 N.W.2d at 419.

292. *Id.* at 419 n.1. A slightly different approach, with essentially the same benefits, is that taken in *State v. Carty*, 790 A.2d 903, 905 (N.J. 2002), namely, "that, in order for a consent to search a motor vehicle and its occupants to be valid, law enforcement personnel

4. *Sniffing by Drug Dogs*

Especially in recent years, it seems that a good many of the officers making a traffic stop either have a drug dog with them initially[293] or else are able to summon one to the scene in short order.[294] That being the case, a not uncommon tactic these days in police efforts to use traffic stops as a means of drug interdiction is to lead a drug dog around the detained vehicle to see if the dog will "alert."[295] This process can be carried out rather quickly — in "no more than two minutes,"[296] and in some instances in "20, 30 seconds at the most."[297] If the dog should alert, this is deemed to establish probable cause that the vehicle contains drugs, justifying an immediate full search of it.[298]

The courts have responded to the use of drug-sniffing dogs in connection with traffic stops much as courts have responded to the other investigative techniques previously discussed. First of all, if the detention was continuing[299] or had been resumed[300] when the sniff occurred but the time had run out on the traffic-stop detention either

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must have a reasonable and articulable suspicion of criminal wrongdoing prior to seeking consent to search a lawfully stopped motor vehicle."

293. *See, e.g.*, State v. Box, 73 P.3d 623 (Ariz. Ct. App. 2003); State v. DeLaRosa, 657 N.W.2d 683 (S.D. 2003).

294. *See, e.g.*, Lecorn v. State, 832 So. 2d 818 (Fla. Ct. App. 2002). The mere act of summoning a drug dog to the scene is within the total discretion of the officer, and this step is not subject to a reasonable-suspicion limitation or any other such requirement. State v. Carlson, 657 N.E.2d 591, 594 (Ohio Ct. App. 1995).

295. Ordinarily the drug dog remains outside the vehicle, though occasionally the dog enters it. *Compare* United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989) ("[T]he dog's instinctive actions did not violate the Fourth Amendment" as there was "no evidence . . . that the police asked Stone to open the hatchback so the dog could jump in. Nor is there any evidence the police handler encouraged the dog to jump in the car."), *with* United States v. Winningham, 140 F.3d 1328, 1330-31 (10th Cir. 1998) (finding a search where a drug dog jumped through an open door and alerted to a vent inside the car and deeming *Stone* "inapposite" because here, unlike in *Stone*, "the officers themselves opened the door," making apparent a "desire to *facilitate* a dog sniff of the van's interior").

296. *Box*, 73 P.3d at 629.

297. Bradshaw v. State, 759 N.E.2d 271, 274 (Ind. Ct. App. 2001) (quoting an officer's testimony).

298. United States v. $404,905.00 in U.S. Currency, 182 F.3d 643 (8th Cir. 1999); State v. Tucker, 979 P.2d 1199, 1201 (Idaho 1999).

299. *Cf. Box*, 73 P.3d at 629 (holding that a traffic-stop detention had ended, and a post-detention consensual encounter had begun, when the officer "returned appellant's documents to him and handed him the written warning, [and] appellant was free to leave").

300. Even if the events otherwise clearly indicate a termination of custody (e.g., the officer tells the driver he is "free to go"), if the officer then announces that a drug dog has been summoned to do a sniff of the vehicle, this amounts to a new and illegal seizure, for anyone who was "present when a canine unit had been summoned to the scene and was then told by [the officer] that he was going to have a canine unit conduct a drug sniff of [the] car" would not "reasonably have felt free to leave." United States v. Beck, 140 F.3d 1129, 1135-36 (8th Cir. 1998).

because its immediate lawful objectives had been accomplished[301] or because they had not been accomplished only because of stalling (a likely tactic when a drug dog has been summoned from some distance and has not yet arrived[302]), then the dog sniff and its fruits are all suppressible consequences of the illegal detention,[303] unless of course the continuation of the detention beyond its otherwise lawful limits was justified by the existence of reasonable suspicion of drug possession.[304] But precisely because the dog sniff itself takes so little time, courts in this context have been especially willing to employ a "fudge factor" regarding the temporal limits of the traffic stop; if the dog sniff is conducted immediately after completion of those tasks actually connected with the traffic violation, the resulting additional custody is deemed so de minimis as to be of no consequence.[305] Such cases are thus treated like those in which the use of a dog on the vehicle is upheld because it occurs within the proper time of the traffic stop, that is, before the citation has been issued[306] or before a return has been received on the radio or computer check regarding the license, registration, and outstanding warrants.[307]

Here as well, it may be concluded that the appellate courts have, for the most part, missed the mark completely on the matter of drug-sniffing dogs used in connection with traffic stops. There should be no need for the complex and often nearly impossible task of calculating just when the time should be deemed to have expired in the case of a particular traffic stop and, often, the equally bedeviling task of heading down the slippery slope to determine just how much extra time after the proper ending of the traffic stop should be excused on some de minimis theory. Rather, the central point is that use of a drug-sniffing dog has *absolutely nothing* to do with the traffic infraction that served as the sole justification for the stop in the first place,[308] and for

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301. *See, e.g.*, Dukes v. State, 753 So. 2d 780 (Fla. Dist. Ct. App. 2000); Damato v. State, 64 P.3d 700 (Wyo. 2003).

302. Maxwell v. State, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001); People v. Cox, 782 N.E.2d 275, 280 (Ill. 2002).

303. United States v. Wood, 106 F.3d 942 (10th Cir. 1997); State v. Fields, 662 N.W.2d 242 (N.D. 2003).

304. United States v. Bailey, 302 F.3d 652 (6th Cir. 2002); Wilson v. State, 822 A.2d 1247 (Md. Ct. Spec. App. 2003).

305. *See, e.g.*, United States v. Gregory, 302 F.3d 805 (8th Cir. 2002); State v. Box, 73 P.3d 623 (Ariz. 2003).

306. Lecorn v. State, 832 So. 2d 818 (Fla. 2002); State v. Parkinson, 17 P.3d 301 (Idaho Ct. App. 2000).

307. Rogers v. State, 560 S.E.2d 742 (Ga. Ct. App. 2002); Wilkes v. State, 774 A.2d 420 (Md. 2001).

308. With the arguable exception of those instances in which the stop is grounded in a reasonable suspicion that the driver is operating the vehicle under the influence of some controlled substance.

that reason alone should not be permitted at all. Allowing the dogs to be used serves only as a positive encouragement for police to engage in pretext and subterfuge, hardly a defensible move given the common knowledge that traffic-law enforcement has been diverted from its justified objectives to serve as a means for seeking out drugs.[309] Allowing use of the drug dogs at all in conjunction with traffic stops can only encourage the making of stops for insignificant and technical violations on the basis of unarticulated suspicions and mere hunches or, at worst, on totally arbitrary and discriminatory bases. Moreover, allowing use of the dogs at all adds to the process another decision, whether to summon a drug dog, that the cases indicate requires no reasonable suspicion nor, for that matter, any justification whatsoever,[310] but that the practice indicates is also likely to be made on an arbitrary basis.[311]

In justification for the status quo, it is stated that these drug-dog sniffs of vehicles do not constitute Fourth Amendment searches[312] and that "the presence of a single drug detection dog does not necessarily intensify the level of detention."[313] It is true that such use of a drug dog is no search; the Supreme Court so held in *City of Indianapolis v. Edmond*,[314] but that did not stop the Court from concluding that use of drug dogs in a checkpoint context violated the Fourth Amendment when incident to a stopping of vehicles having the sole lawful basis of enforcing the traffic laws.[315] In the case of individualized traffic stops,

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309. By like reasoning, it has been cogently argued that "the only way to assure that a [traffic-law-enforcement] roadblock is adopted for permissible reasons is to deny the use of drug sniffing dogs or any similar devices whose only purpose is to search for drugs." Stephen Saltzburg, *The Supreme Court, Criminal Procedure and Judicial Integrity*, 40 AM. CRIM. L. REV. 133, 154 (2003).

310. *See supra* note 294. *But see* People v. Cox, 782 N.E.2d 275, 280 (Ill. 2002) (indicating that one court was greatly troubled by the summoning of a drug dog in the absence of any suspicion whatsoever).

311. When the *Orlando Sentinel* studied the operations of the Criminal Patrol Unit of the Orange County Sheriff's Office, "a special patrol squad that uses routine traffic stops to search for narcotics," it found upon reviewing the "records of more than 3,800 stops by the Unit" that "black drivers represented 16.3% of the drivers stopped," but accounted for "more than 70% of the canine searches." Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 352-53 (1998) (discussing 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).

312. United States v. Gregory, 302 F.3d 805, 810 (8th Cir. 2002); State v. Box, 73 P.3d 623 (Ariz. 2003).

313. State v. Parkinson, 17 P.3d 301, 307 (Idaho Ct. App. 2000).

314. 531 U.S. 32 (2000).

315. The only difference between *Edmond* and the situation here under discussion is that there the stoppings were without probable cause or reasonable suspicion of any traffic-law offense, albeit pursuant to the operation of a checkpoint assuring against any of the arbitrariness that is possible in case-by-case traffic stops. Given that distinction, it might well be argued that the use of drug dogs incident to individualized stops is worse than incident to

the question again is not whether any of the drug-seeking tactics are themselves Fourth Amendment searches, for the point is that they taint the stop purportedly made only for a traffic violation because they have absolutely no relationship to traffic-law enforcement. Moreover, even if it is true that the use of drug dogs in this context is not a search, surely such conduct is close to the line, considering that it is quite different from "the sniffing of inanimate and unattended objects"[316] that courts have typically approved, as in the Supreme Court's initial embrace of dog sniffing in *United States v. Place*, where the absence of "embarrassment" was emphasized.[317] In short, the presence of the dog at a traffic stop does intensify the level of the detention.[318] Yet another relevant consideration is that drug dogs are not infallible, so that their employment in instances where there is not a prior reasonable suspicion that drugs are present will result in a much higher number of false positives and, in turn, total ransacking of vehicles containing no contraband.[319]

For all these reasons, the correct result is that reached in *State v. Wiegand*,[320] where, after a defendant's vehicle was stopped for a burned-out headlight, one officer walked a drug dog around the vehicle while another officer was writing out the ticket. The court concluded that this did not constitute a search under either the federal or state constitution, and also noted that the defendant did not argue that the stop in this case lasted too long, but nonetheless ruled in the defendant's favor. Proceeding step by step, the court reasoned (1) that "the *Terry* principles are appropriately applied in this case"; (2) that "*Terry* authorizes us to balance the nature and quality of the intrusion into the individual's Fourth Amendment interests against the importance of the governmental interests as stake"; (3) that "there is some intrusion into privacy interests by a dog sniff"; and (4) that consequently the Fourth Amendment requires "a reasonable,

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a checkpoint operation, especially since targeting a particular vehicle for a publicly conducted sniff on the roadside is accusatory in nature.

316. Doe v. Renfrow, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from denial of certiorari).

317. 462 U.S. 696, 707 (1983).

318. Which explains why a state court might conclude that a drug dog's sniffing of an automobile stopped for a traffic infraction constitutes a search under the state constitution, as in *People v. Haley*, 41 P.3d 666 (Colo. 2001). Also noteworthy is that other states have found sniffing by drug dogs to be a search under their state constitutions in a broader set of circumstances. *See, e.g.*, State v. Pellicci, 580 A.2d 710 (N.H. 1990); People v. Dunn, 564 N.E.2d 1054 (N.Y. 1990).

319. "The judiciary should be most skeptical of sniffs conducted in a random, unfocused manner. All but the most carefully planned random sniffs using highly-trained dog teams will likely result in many false detections." Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L. J. 405, 432-33 (1997).

320. 645 N.W.2d 125 (Minn. 2002).

articulable suspicion of drug-related criminal activity before law enforcement may conduct a dog sniff around a motor vehicle stopped for a routine equipment violation in an attempt to detect the presence of narcotics."[321]

III. THE FINISH: FROM SEIZURE TO "CONSENSUAL ENCOUNTER"

Whether or not limitations of the kind proposed in Part II are in place, it sometimes happens that the police are unable to complete their drug investigation by the time that the traffic stop has reached the point where all the steps properly taken into account in determining how long it may go on have been completed. This running of the time often does not represent a substantial obstacle to continuing the investigation because of the availability of yet another "routine" (used this time to mean *both* "a regular course of procedure" and "a carefully rehearsed act"[322]). All the officer has to do to obviate any and all time and scope limitations is to perform in such a manner that courts are likely to treat as manifesting a termination of the seizure even though any person who has been detained for a traffic violation is unlikely to so perceive the situation. In many jurisdictions, this is rather easy to bring off; all it calls for is the well-known Lt. Columbo gambit ("one more thing . . .").[323]

Illustrative is *United States v. Lattimore*,[324] where a trooper stopped Lattimore for speeding and then had him sit with the officer in the patrol car during ticketing. After issuing citations and returning Lattimore's driver's license, and while Lattimore was still in the patrol vehicle, the trooper began questioning Lattimore about the presence of narcotics or any contraband in his vehicle, which Lattimore denied. The officer then requested and obtained Lattimore's oral consent to search the vehicle. In rejecting Lattimore's claim that his consent was obtained during an illegal extension of the traffic stop, the appellate court stated:

> Trooper Frock did not question Lattimore concerning the presence of narcotics or contraband in his automobile, or request permission to search it, until after the officer had issued the citations and returned Lattimore's driver's license, indicating that all business with Lattimore was completed and that he was free to leave. During the subsequent conversation between Trooper Frock and Lattimore, "a reasonable

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321. *Id.* at 133-35. A more recent decision in accord with *Weigand*, People v. Caballes, 802 N.E.2d 202 (Ill. 2003), is headed for the Supreme Court. Illinois v. Caballes, 124 S. Ct. 1875 (2004) (granting cert.).

322. 14 OXFORD ENGLISH DICTIONARY 172 (2d ed. 1989).

323. *See* Columbo, Nostalgia Central.com, *at* http://www.nostalgiacentral.com/tv/cops/columbo.htm (last visited June 2, 2004).

324. 87 F.3d 647 (4th Cir. 1996).

> person would have felt free to decline the officer['s] requests or otherwise terminate the encounter."[325]

Various other federal and state courts have taken essentially the same approach,[326] grounded in the common assumption that there is a "clear line . . . between police-citizen encounters which occur before and after an officer returns a person's driver's license, car registration, or other documentation."[327] But, while it is true that mere interrogation does not bring about a seizure that otherwise did not exist,[328] it is hard to swallow the conclusion in *Lattimore* that returning one's credentials with a citation or warning ticket sufficiently manifests a change in status when immediately followed by interrogation.[329]

Rather, the realities of the situation were appreciated much more clearly in *State v. Robinette*,[330] a case that involved quite similar facts. Robinette was stopped for speeding, after which the deputy asked for his driver's license and took it back to the squad car to check it; the deputy then had Robinette exit his car and stand between the two vehicles, where his reactions could be taped by the video camera in the squad car, which the deputy then activated. The deputy then returned Robinette's license and gave him a verbal warning, following which he delivered an ungrammatical version of the Lt. Columbo gambit, saying: "One question before you get gone [*sic*]: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[331] When Robinette denied having any such items, the deputy then sought and obtained Robinette's consent to a search of his car, which uncovered drugs. In concluding that the consent had been obtained during an illegal seizure rather than during a post-seizure consensual encounter, the Ohio Supreme Court reasoned:

> The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow. . . .
>
> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer

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325. *Id.* at 653 (quoting the test in *Florida v. Bostick*, 501 U.S. 429, 438 (1991)).

326. *E.g.*, United States v. West, 219 F.3d 1171 (10th Cir. 2000); State v. Williams, 646 N.W.2d 834 (Wis. 2002).

327. United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir. 1993).

328. Florida v. Bostick, 501 U.S. 429, 434 (1991); Florida v. Royer, 460 U.S. 491, 497 (1983).

329. For a more detailed criticism of that conclusion, see Maclin, *Freeway*, *supra* note 251, at 131-64.

330. 653 N.E.2d 695 (Ohio 1995), *rev'd*, Ohio v. Robinette, 519 U.S. 33 (1996).

331. State v. Robinette, 653 N.E.2d at 696 (alteration in original).

> retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him. . . .
>
> Therefore, we are convinced that the right, guaranteed by the federal and Ohio Constitutions, to be secure in one's person and property requires that citizens stopped for traffic offenses be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "At this time you legally are free to go" or by words of similar import.[332]

While the Ohio court's judgment was thereafter reversed in *Ohio v. Robinette*,[333] this should not be taken to mean that the United States Supreme Court has embraced the *Lattimore* approach, as compared to that in the middle paragraph in the above quotation, on what it takes to transform what was admittedly a seizure into nothing more than a consensual encounter. This is because the Court was snookered by the state of Ohio into considering only the issue set out in the state's certiorari petition — as the Court phrased it, "whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary."[334] That is, the Supreme Court remarkably proceeded to decide a question which was really not in the *Robinette* case at all and had not even been mentioned by the state court,[335] and in the process managed to avoid entirely the important issue the state court had taken on: whether a traffic offender somehow becomes "unseized" upon return of his license notwithstanding a continuation (albeit on a different subject) of police discussion with the stopped driver.[336]

On the voluntary-search issue, all members of the Court in *Robinette* expressed agreement that the Fourth Amendment does not require that a lawfully seized person be advised he is "free to go"

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332. *Id.* at 698-99.

333. 519 U.S. 33 (1996).

334. *Ohio v. Robinette*, 519 U.S. at 35.

335. Actually, the lower court did assert at one point that "[t]he burden is on the state to prove that the consent to search was voluntarily given," *State v. Robinette*, 653 N.E.2d at 698 (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)), but it is readily apparent that this was not intended as a characterization of the matter at issue, for in both the preceding and following sentences the court makes clear that the matter under consideration in the instant case was not whether the consent was voluntary or not but rather whether, even if voluntary, it was the fruit of an illegal seizure.

336. As aptly stated by Dery, "[t]he crucial issue missed in *Robinette* dealt not with the resulting consent, but with the continuing seizure. By failing to target the correct question, the Court missed the opportunity to clarify an area of the law suffering from uncertainty." George M. Dery III, *"When Will This Traffic Stop End": The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern* — Ohio v. Robinette, 25 FLA. ST. U. L. REV. 519, 565 (1998).

before his consent to search will be recognized as voluntary. This is hardly surprising. As the majority in *Robinette* pointed out, the state court had adopted a per se rule, an approach generally disfavored by the Supreme Court, which has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry" (except, of course, when the bright line favors the prosecution rather than the defendant[337]). Moreover, in the seminal case on the consent-search voluntariness test, *Schneckloth v. Bustamonte*, the Court had rejected as "impractical" a proposal of another kind of warning as a prerequisite to a voluntary consent, namely, a caution that defendant had a right to refuse the request.[338] This made it easy for the Court to say in *Robinette* that it would likewise be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[339]

The most perverse aspect of the misdirection in *Robinette* is that lower courts have tended to read the case as embracing the *Lattimore* approach,[340] when in fact the analysis summarized above speaks only to the voluntariness issue and says nothing whatsoever about the more significant issue presented by the *Lattimore* genre of cases: whether the prior, lawfully commenced seizure did not end when it should have, so that the consent to search, albeit voluntary, is an inadmissible fruit of an illegal seizure. Only Justice Stevens thought it appropriate to talk about the latter issue, and his analysis deserves careful attention, for he correctly states how the *Lattimore* line of cases ought to be handled. As Stevens notes in his dissent, under the Court's decisions the seizure issue is to be resolved by asking whether "a reasonable person would have believed that he was not free to leave."[341] A reasonable motorist in the defendant's shoes in *Robinette* would have so believed, Stevens points out, considering the fact that the officer never told defendant he was free to leave, the additional

337. *Ohio v. Robinette*, 519 U.S. at 39. For example, just two months after *Robinette* the Court endorsed a pro-prosecution bright-line rule on requiring passengers to exit stopped vehicles in *Maryland v. Wilson*, 519 U.S. 408, 415 (1997).

338. Schneckloth v. Bustamonte, 412 U.S. 218, 231 (1973).

339. *Ohio v. Robinette*, 519 U.S. at 40.

340. *See, e.g.*, United States v. Chan, 136 F.3d 1158, 1159 (7th Cir. 1998) (contending that under *Robinette*, whether the "lack of a clear break in the process . . . made the consent involuntary" or "converted the traffic stop, initially lawful, into an unlawful arrest . . . are just two ways of making the same argument, and should not affect either analysis or outcome"); State v. Ready, 565 N.W.2d 728, 732-33 (Neb. 1997).

Some courts have been more perceptive, as in *People v. Brownlee*, 713 N.E.2d 556, 563 (Ill. 1999) (observing correctly that the "continued-detention issue" in the instant case "requires consideration independent from *Robinette*," which "does not speak to the issue of taint").

341. *Ohio v. Robinette*, 519 U.S. at 46 (Stevens, J., dissenting) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

questioning and request for consent was sought, in the officer's language, "before you get gone," and defendant was at that time standing in front of a video camera in response to an official command. Indeed, it would take less than that to give rise to such a reasonable belief; as the Supreme Court put it earlier in *Berkemer v. McCarty*, "few motorists would feel free . . . to leave the scene of a traffic stop without being told they might do so."[342] Indeed, one of the facts that emerged in *Robinette* strongly reinforces that conclusion, as Stevens explained:

> The fact that this particular officer successfully used a similar method of obtaining consent to search roughly 786 times in one year . . . indicates that motorists generally respond in a manner that is contrary to their self-interest. Repeated decisions by ordinary citizens to surrender that interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.[343]

It is thus nonsensical for courts to continue their embrace of the *Lattimore* position that a reasonable motorist, having been seized, would conclude he was free to leave (even though not told so) in the face of ongoing police interrogation. The police know this is not so, which is why materials prepared by the police for public consumption[344] and for use nationally in driver's education training[345] state unequivocally that a motorist subjected to a traffic stop is not free to leave until expressly told so by the officer. And thus, as some courts have learned, judges should instead ask when not even a notice from the officer that the motorist is free to leave can carry the day because circumstances suggesting otherwise are also present.[346]

IV. SOME FINAL REFLECTIONS

What we have seen in this look at "routine traffic stops" from start to finish is that in terms of what may start the process, what is deemed

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342. 468 U.S. 420, 436 (1984).

343. *Ohio v. Robinette*, 519 U.S. at 48 (citations omitted).

344. For example, on one website a police department maintains to inform the public about traffic stops, the question, "when is the stop over?" is answered as follows: "The traffic stop is over, when the Officer tells you that you are free to go." WEST UNION POLICE DEP'T, TRAFFIC STOPS, *at* http://www.wupd.com/traffic_stops.htm (Dec. 9, 2002).

345. For example, a police-prepared lesson plan for driver's education students, distributed nationally by the National Association of School Resource Officers, includes this point under the heading: "During the Stop/Contact with the officer": "Can not leave until officer tells you that you are free to go." Officer Ken Teppel, Bolingbrook Police Dep't, Lesson Plan for Conducting a Unit of Instruction in "What is Going to Happen If You Are Stopped for a Traffic Violation" 4-5, *at* http://www.nasro.org/members/lessons/stoppedforatrafficviolation.doc (June 23, 2000).

346. *See, e.g.*, State v. Robinette, 685 N.E.2d 762 (Ohio 1997); Commonwealth v. Freeman, A.2d 903 (Pa. 2000); State v. Ballard, 617 N.W.2d 837 (S.D. 2000).

to end the process, and virtually everything in between, most state and federal courts have applied Fourth Amendment principles in a loose and illogical fashion, thus facilitating use of the traffic stop by law enforcement as a readily available mechanism for at least appearing to win[347] some battles in the war on drugs. Stops are permitted across the board on nothing more than reasonable suspicion and without regard to the pretextual or arbitrary nature of the process by which traffic violators are selected for "the treatment." That treatment is one that permits police to engage in many investigative activities incident to the stop that serve no purpose other than as an attempt to uncover drugs, contrary to the *Terry* limits on stops that obtain in other areas of law enforcement. And then there is the end of the stops, the fact that a traffic stop is deemed to have morphed into a mere "consensual encounter" in circumstances where any reasonable traveler would believe he was still under the control of the police. And all this has been allowed to occur notwithstanding the common knowledge that law enforcement has co-opted the traffic stop and transmogrified it into a mechanism for random and often overbearing quests for drugs, a fact that would seem to call for strict rather than loose application of Fourth Amendment standards.

In a recent lecture to federal judges, Professor Stephen Saltzburg commented upon "a combination of disturbing trends" he saw in the Supreme Court's Fourth Amendment decisions:

> First, there is the tendency of the Supreme Court to pretend that the world we all know is not the world in which law enforcement operates. To be blunt, I contend that the Supreme Court has offered opinions that strain to describe human nature and typical behavior and rely upon beliefs and reactions of ordinary people to fit the world that law enforcement wishes the Court to believe is real. Whether the Court is out of touch with the world in which most people live or is blinking and winking to aid law enforcement probably does not matter. Decisions that do not correspond to the world in which most people live threaten to undermine the integrity of the judicial system.

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347. It is open to serious discussion, however, whether drug enforcement via traffic stops is having any real effect:

> The entire war on drugs is fraught with ambiguity and ambivalence, and many commentators have concluded that the effort to reduce drug consumption by limiting supply is doomed to failure. We need not reach this question, however, because the specific program at issue is ineffective by any standard. Fishing for drug couriers in the immense stream of cars on interstate highways is a hopeless strategy for eliminating drug trafficking; it probably has no impact whatsoever on drug markets.

Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1431 (2002) (citations omitted).

Moreover, whatever impact it does have is probably offset by the costs in terms of damaged police-citizen relations, considering that "[f]or many law-abiding citizens their only contact with the criminal justice system is via interaction with the police, predominantly during traffic stops." Martinez v. Village of Mount Prospect, 92 F. Supp. 2d 780, 783 (N.D. Ill. 2000).

> Second, the Court has been too quick to adopt "bright line" rules in an effort, supposedly, to provide more guidance to law enforcement. There are two principal problems with these rules. One is that bright line rules that are divorced from the rationale for action never provide as good guidance as the rationale itself. The other problem is that the Fourth Amendment's place in the Bill of Rights strongly suggests that, if bright line rules are to be adopted, they should protect the constitutional rights of citizens rather than promote police efficiency.
>
> Third, there are recent signs that the Court is hinting to law enforcement that it can escape the Fourth Amendment's restrictions if it offers phony explanations for actions. In other words, if law enforcement is honest about its intentions, the Fourth Amendment may inhibit actions; but, if law enforcement is willing to offer a false defense of its actions, it may escape the limitations of the Fourth Amendment. These signs are troubling because the Court ought never to be encouraging governmental subterfuge.
>
> Fourth, the Supreme Court's tolerance of pretext searches and seizures may well provide more deference to law enforcement than any civilized system should. The result may be to provide too much discretion to law enforcement and to intrude unnecessarily upon the privacy of less powerful members of society.
>
> These four trends are related to one another. They suggest a judicial straining to aid law enforcement and an undervaluing of the Fourth Amendment protection of privacy and freedom from government intrusion.[348]

I not only share that view, but would say in addition that this is also a fair description of the actions of most of the state and federal judiciary with respect to the so-called "routine traffic stop." The courts' views of how little it takes to produce a post-stop consensual encounter are grounded in nothing else than a very distorted view of the "reactions of ordinary people" caught up in a traffic stop. The rules on traffic stops as laid down (or at least as enforced) by the courts are nothing more than a series of "bright lines" giving police authority to do certain things in connection with all traffic stops that, at best, might be reasonable under very unique circumstances. Moreover, allowing prohibited drug stops to be sanitized by calling them traffic stops is a prime example of the judiciary assuring police that "phony explanations" are the way around the Fourth Amendment. And certainly the "tolerance of pretext searches and seizures" that lies at the heart of the traffic-stop-for-drugs phenomenon "does provide more deference to law enforcement than any civilized system should."

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348. Saltzburg, *supra* note 309, at 133-34 (citations omitted) (originally presented as a lecture to the National Symposium for United States Court of Appeals Judges, in Washington, D.C. on October 21, 2002,).

While police are sworn to uphold the Constitution, they are, after all, "engaged in the often competitive enterprise of ferreting out crime."[349] It is thus perhaps not too surprising that, in the course of their attempts to stem the drug traffic, the police have been so relentless in pushing their claimed authority relating to traffic stops to the absolute limits.[350] But it is sad, to say the least, that so many judges have served as ready and willing accomplices in these excesses, thereby treating the Fourth Amendment as largely an irrelevancy in the context of "routine traffic stops." Surely the one hundred ninety million licensed drivers in this country,[351] subjected to the millions upon millions of traffic stops made annually,[352] are entitled to more than this.

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

350. As Justice Jackson noted in his dissent in *Brinegar v. United States*, "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

351. "There were 190,625,023 licensed drivers in the United States in 2000." OFFICE OF HIGHWAY POLICY INFORMATION, U.S. DEP'T OF TRANSP., LICENSED DRIVERS, *at* http://www.fhwa.dot.gov/ohim/onh00/onh2p4.htm (last modified Feb. 14, 2003).

352. There are apparently no national figures on the number of traffic stops. In *Maryland v. Wilson*, Justice Stevens noted that over one million traffic stops were made in Maryland alone in a single year. 519 U.S. 408, 419 (1997) (Stevens, J., dissenting).

Race and Health

DO MINORITIES IN THE UNITED STATES RECEIVE FEWER MENTAL HEALTH SERVICES THAN WHITES?

Karen E. Lasser, David U. Himmelstein, Steffie J. Woolhandler, Danny McCormick, and David H. Bor

Older studies have found that minorities in the United States receive fewer mental health services than whites. This analysis compares rates of outpatient mental health treatment according to race and ethnicity using more recent, population-based data, from the 1997 National Ambulatory Medical Care Survey and National Hospital Ambulatory Medical Care Survey. The authors calculated visit rates per 1,000 population to either primary care or psychiatric providers for mental health counseling, psychotherapy, and psychiatric drug therapy. In the primary care setting, Hispanics and blacks had lower visit rates (per 1,000 population) for drug therapy than whites (48.3 and 73.7 vs. 109.0; $P < .0001$ and $P < .01$, respectively). Blacks also had a lower visit rate for talk therapy (mental health counseling or psychotherapy) than whites (23.6 vs. 42.5; $P < .01$). In the psychiatric setting, Hispanics and blacks had lower visit rates than whites for talk therapy (38.4 and 33.6 vs. 85.1; $P < .0001$ for both comparisons) and drug therapy (38.3 and 29.1 vs. 71.8; $P < .0001$ for both comparisons). These results indicate that minorities receive about half as much outpatient mental health care as whites.

According to the Surgeon General, the U.S. mental health system "is not well equipped to meet the needs of racial and ethnic minority populations" (1). Several older studies found that blacks and Hispanics receive less mental health care than whites (2–5). Recent studies of selected populations have shown that minorities continue to receive inadequate treatment for mental health problems (6, 7). While a recent study found that minorities receive fewer antidepressant medications than do whites (8), another found that African Americans and whites now receive equivalent amounts of mental health care (9). No recent, nationally representative

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data on use of a broad range of outpatient mental health services are available. We sought to determine whether the racial inequalities in outpatient mental health care identified in the 1980s persisted into the late 1990s.

METHODS

Data Sources

We analyzed data from the 1997 National Ambulatory Medical Care Survey (NAMCS) and the 1997 National Hospital Ambulatory Medical Care Survey (NHAMCS), national probability sample surveys conducted by the National Center for Health Statistics. The probability sample design of the NAMCS and NHAMCS allows the sample data to be weighted to produce national estimates of the utilization of ambulatory medical services (10). In conjunction with these data, we used the Census Bureau's 1997 population estimates (11) to calculate yearly visit rates per 1,000 residents of the United States.

The NAMCS is a survey of office-based practitioners who provided data on 24,715 patient visits. The NHAMCS is a survey of ambulatory care provided in hospital emergency and outpatient departments. From the NHAMCS, we used data only on the 30,107 outpatient department visits. Hospital-based providers (NHAMCS) collected data over a four-week period, while office-based providers collected data over a one-week period (NAMCS). The data forms used in both surveys asked for information on patient demographics (with patients' race and ethnicity determined by the provider), reason for visit (as identified by the provider), services ordered or provided, and medications prescribed. The physician response rate in the NAMCS was 69.2 percent and the hospital response rate in the NHAMCS was 96 percent.

Definitions

For the NAMCS, we defined primary care providers as those physicians (n = 6,593), nurse practitioners (n = 67), and physicians' assistants (n = 139) who listed their specialty as general practice, family practice, internal medicine, geriatric medicine, adolescent medicine, or general pediatrics. We defined visits to a psychiatrist as those to either a general psychiatrist or a psychiatric subspecialist. In the NHAMCS, we defined primary care providers as those who worked in general medicine clinics or pediatric clinics. Outpatient psychiatric clinics were not specifically identified in the NHAMCS.

Both the NAMCS and NHAMCS defined mental health counseling as "general advice or counseling about mental health issues" and defined psychotherapy as "all treatments involving the intentional use of verbal techniques to explore or alter the patients' emotional life" (12). We defined "talk therapy" as receipt of either mental health counseling or psychotherapy, or both. We defined "drug therapy" as

the prescription of antidepressant, antianxiety, antipsychotic, or sedative-hypnotic medications as classified by the *National Drug Code Directory* (13). We defined non-Hispanic white patients as "white," non-Hispanic black patients as "black," and Hispanic patients of any race as "Hispanic." We excluded patients of other races (Asians, Pacific Islanders, Native Americans, Eskimos, and Aleutians); members of these racial groups comprised less than 5 percent of the total sample, precluding reliable estimation of their visit rates.

Statistical Analysis

The primary outcomes were the receipt of talk therapy and drug therapy, analyzed according to patients' race and ethnicity. We compared the number of visits for talk therapy and drug therapy made to psychiatrists and primary care providers. We also analyzed the number of visits made to both psychiatrists (regardless of the stated reason for the visit) and primary care providers in which the provider identified psychiatric symptoms as a reason for the visit. We calculated the number of visits per 1,000 population for each group by dividing the number of visits (weighted to be representative of the national utilization of ambulatory medical care) by the 1997 Census Bureau population estimate for that racial/ethnic group.

We compared visit rates between Hispanics and whites, and between blacks and whites, using *z*-tests. The numerator of the *z*-test was the difference in the respective rates, where we assumed that the number of visits per physician followed a Poisson distribution. The denominator of the *z*-test was the square root of the sum of the Poisson variances, adjusted for the weighting factors described above.

RESULTS

The majority of visits to primary care providers and to psychiatrists were made by women. Hispanic patients were younger than their white and black counterparts. Visits made by minority patients had higher rates of Medicaid coverage than did visits by whites, while the latter had higher rates of private insurance coverage (Table 1).

Visits to Primary Care

Blacks had only slightly lower visit rates to primary care providers (for all reasons) than did whites (1,250 vs. 1,350; $P < .05$); visit rates for Hispanics (1,340) were similar to those for whites (Table 2). However, minorities received markedly fewer mental health services. Both Hispanics and blacks had substantially lower rates of receipt of mental health counseling, antidepressant prescriptions, and antianxiety prescriptions than did whites (Table 3). Blacks also made significantly fewer visits for talk therapy than whites ($P < .01$). Hispanics and blacks had

Table 1

Demographic characteristics of all patient visits to U.S. primary care providers and psychiatrists, as percentages

Variable	White (non-Hispanic)	Hispanic (black and white)	Black (non-Hispanic)
Sex			
Women	55.8%	54.3%	61.5%
Patient age, in years			
0–17	27.7	47.7	29.0
18–39	21.1	19.5	18.1
40-64	29.7	18.7	32.5
≥65	21.4	14.1	20.4
Insurance			
Private	55.1	42.9	36.8
Medicare	19.4	9.7	15.6
Medicaid	7.5	29.1	26.6
Workers' compensation	1.2	2.4	1.5
Self-pay	9.4	10.2	6.5
Other[a]	7.4	5.7	13.0
Type of visit			
HMO	27.7	31.8	30.2
Capitated	13.8	20.4	15.2

[a] "Other" includes other types of insurance, no charge for visit, or unknown insurance status.

substantially lower rates of receipt of drug therapy (48.3 and 73.7, respectively) than did whites (109.0; $P < .0001$ and $P < .01$, respectively).

Visits to Psychiatrists

Hispanics and blacks visited psychiatric providers less than half as often as did whites (48.2, 37.8, and 106.0, respectively; $P < .0001$ for each comparison; see Table 2). Blacks and Hispanics received significantly less talk therapy from psychiatrists than did whites, with visit rates per 1,000 population of 33.6, 38.4, and 85.1, respectively ($P < .0001$; see Table 4). The largest difference observed was in visits for psychotherapy, with whites making three times as many visits (per 1,000 population) for psychotherapy as nonwhites. On a per capita basis, nonwhite patients also had significantly fewer visits for psychoactive drug therapy than did whites.

Table 2

Visit rates (per 1,000 population per year) and proportion of all visits by physician specialty, presence of a psychiatric complaint, and race/ethnicity of patient

Variable	White (non-Hispanic)	Hispanic (black and white)	Black (non-Hispanic)
All office visits			
Rate/1,000 population	2,530	2,240****	2,070****
Percent of all visits	100	100	100
Visits to primary care			
Rate/1,000 population	1,350	1,340	1,250*
Percent of all visits	51.7	58.0	57.9
Visits to psychiatry			
Rate/1,000 population	106.0	48.2****	37.8****
Percent of all visits	4.1	2.1	1.7
Visits to primary care, with psychiatric complaint as reason for visit			
Rate/1,000 population	58.4	30.1***	39.7*
Percent of all visits	2.3	1.3	1.9
Visits to psychiatry plus visits to primary care with psychiatric complaint as reason for visit			
Rate/1,000 population	164.0	78.3****	77.5****
Percent of all visits	6.5	3.5	3.7

Significance determined by *z*-test: *$P < .05$; **$P < .01$; ***$P < .001$; ****$P < .0001$.

Visits to Psychiatry and Visits to Primary Care with a Psychiatric Complaint

Primary care providers rarely identified a psychiatric complaint as a reason for the patient's visit (Table 2). When we combined data for visits to psychiatry and visits to primary care in which the provider identified a psychiatric complaint as a reason for the visit, blacks and Hispanics had significantly lower rates of talk therapy and drug therapy than whites (Table 5). Whites had about twice as many visits for talk therapy and for drug therapy as blacks and Hispanics.

Table 3

Visit rates (per 1,000 population per year and as proportion of all visits) to primary care providers for mental health services, by race/ethnicity

Variable	White (non-Hispanic)	Hispanic (black and white)	Black (non-Hispanic)
All primary care visits			
Rate/1,000 population	1,350	1,340	1,250*
Percent of all primary care visits	100	100	100
Psychotherapy			
Rate/1,000 population	10.3	9.1	5.4
Percent of all primary care visits	0.8	0.7	0.4
Mental health counseling			
Rate/1,000 population	34.8	19.2*	19.7**
Percent of all primary care visits	2.6	1.4	1.6
Any talk therapy[a]			
Rate/1,000 population	42.5	27.6	23.6**
Percent of all primary care visits	3.1	2.1	1.9
Antidepressant Rx			
Rate/1,000 population	72.3	25.8***	42.3**
Percent of all primary care visits	5.4	1.9	3.4
Antipsychotic Rx			
Rate/1,000 population	6.1	2.0	5.1
Percent of all primary care visits	0.4	0.1	0.4
Sedative-hypnotic Rx			
Rate/1,000 population	9.0	6.6	16.2
Percent of all primary care visits	0.7	0.5	1.3
Antianxiety Rx			
Rate/1,000 population	40.0	15.2***	19.0**
Percent of all primary care visits	3.0	1.1	1.7
Any drug therapy[b]			
Rate/1,000 population	109.0	48.3***	73.7**
Percent of all primary care visits	8.1	3.6	5.9

[a] Mental health counseling, psychotherapy, or both.
[b] Prescription of antidepressant, antianxiety, antipsychotic, or sedative-hypnotic medication.
Significance determined by *z*-test: *$P < .05$; **$P < .01$; ***$P < .001$; ****$P < .0001$.

Table 4

Visit rates (per 1,000 population per year and as proportion of all visits) to psychiatrists for mental health services, by race/ethnicity

Variable	White (non-Hispanic)	Hispanic (black and white)	Black (non-Hispanic)
All psychiatry visits			
Rate/1,000 population	106.0	48.2****	37.8****
Percent of all psychiatry visits	100.0	100.0	100.0
Psychotherapy			
Rate/1,000 population	67.7	20.9****	21.0****
Percent of all psychiatry visits	63.8	43.5	55.6
Mental health counseling			
Rate/1,000 population	44.1	24.8****	23.6****
Percent of all psychiatry visits	41.6	51.4	62.5
Any talk therapy[a]			
Rate/1,000 population	85.1	38.4****	33.6****
Percent of all psychiatry visits	80.3	79.7	88.9
Antidepressant Rx			
Rate/1,000 population	56.9	30.5****	20.1****
Percent of all psychiatry visits	53.7	63.3	53.2
Antipsychotic Rx			
Rate/1,000 population	19.7	15.9	12.0*
Percent of all psychiatry visits	18.6	32.9	31.7
Sedative-hypnotic Rx			
Rate/1,000 population	4.6	2.7	2.5
Percent of all psychiatry visits	4.4	5.5	6.6
Antianxiety Rx			
Rate/1,000 population	20.1	9.6***	5.2****
Percent of all psychiatry visits	18.9	20.0	13.9
Any drug therapy[b]			
Rate/1,000 population	71.8	38.3****	29.1****
Percent of all psychiatry visits	67.7	79.5	77.0

[a] Mental health counseling, psychotherapy, or both.
[b] Prescription of antidepressant, antianxiety, antipsychotic, or sedative-hypnotic medication.
Significance determined by *z*-test: *$P < .05$; **$P < .01$; ***$P < .001$; ****$P < .0001$.

Table 5

Visit rates to psychiatry or to primary care with psychiatric complaint (per 1,000 population per year and as proportion of all such visits) for mental health services, by race/ethnicity

Variable	White (non-Hispanic)	Hispanic (black and white)	Black (non-Hispanic)
Visits to psychiatry or primary care, with psychiatric complaint as reason for visit			
Rate/1,000 population	164.0	78.3****	77.5****
Percent of visits	100.0	100.0	100.0
Psychotherapy			
Rate/1,000 population	71.1	21.5****	23.8****
Percent of visits	43.3	27.4	30.7
Mental health counseling			
Rate/1,000 population	53.9	30.6****	32.0****
Percent of visits	32.9	39.1	41.2
Any talk therapy[a]			
Rate/1,000 population	97.1	44.3****	43.5****
Percent of visits	59.2	56.6	56.1
Antidepressant Rx			
Rate/1,000 population	74.2	37.9****	25.5****
Percent of visits	45.2	48.4	32.9
Antipsychotic Rx			
Rate/1,000 population	20.6	16.0	13.3*
Percent of visits	12.6	20.5	17.2
Sedative-hypnotic Rx			
Rate/1,000 population	7.6	2.9**	4.5*
Percent of visits	4.6	3.7	5.8
Antianxiety Rx			
Rate/1,000 population	30.7	19.0***	7.7****
Percent of visits	18.7	24.3	9.9
Any drug therapy[b]			
Rate/1,000 population	96.8	55.1****	39.7****
Percent of visits	59.0	70.4	51.2

[a] Mental health counseling, psychotherapy, or both.
[b] Prescription of antidepressant, antianxiety, antipsychotic, or sedative-hypnotic medication.
Significance determined by *z*-test: *$P < .05$; **$P < .01$; ***$P < .001$; ****$P < .0001$.

DISCUSSION

Our findings suggest that the lower rates of mental health care for blacks and Hispanics observed in the 1980s (2, 3, 14) have persisted. We found that minority patients receive much less mental health care in the primary care setting than do whites, and have 50 percent fewer psychiatric visits. We also confirmed that lower rates of antidepressant prescriptions for nonwhites (4, 8) have persisted. Moreover, we identified a striking racial difference in the receipt of psychotherapy during psychiatry visits: whites had more than three times as many visits for this service as did blacks and Hispanics.

Our study is limited by the fact that the unit of measurement was the patient visit, and not the individual patient. We were unable to distinguish multiple visits made by a single patient from single visits made by multiple patients. The NAMCS and NHAMCS did not provide data on psychological distress; therefore we have no denominator of need. Hence, we were unable to assess whether differences in treatment between groups reflect undertreatment in one group versus overtreatment in another group. We suspect that the observed racial difference reflects underreceipt of care by minorities rather than overreceipt by whites, as previous studies have shown that all U.S. populations are undertreated for mental illness (15, 16).

This study is also limited by its reliance on provider-identified diagnoses and reports of treatment. The NAMCS and NHAMCS did not interview patients or validate provider diagnoses. The percentage of primary care visits in which a psychiatric complaint was identified by the provider as the patient's reason for the visit was surprisingly low across all three groups. Primary care providers may not be accustomed to coding for psychiatric symptoms, which are often poorly reimbursed by insurance companies. We suspect that the true number of patient visits to primary care with a recognized psychiatric complaint is substantially higher.

While our data give little clue as to why minorities receive fewer mental health services than whites, we hypothesize that it is a consequence of institutional racism, "differential access to the goods, services and opportunities of society by race" (17). For example, patchy insurance coverage, lack of providers in minority neighborhoods, lack of transportation, inadequate interpreter services, and the inability of low-status workers to take time off work may combine to undermine the care of minorities. Some (2, 18, 19) but not all (20, 21) studies have found that the desire for formal mental health treatment varies by race and culture. Although the NAMCS and NHAMCS did not provide data about sources of mental health care outside the medical model, a recent study found that minorities with psychiatric difficulties may turn to extended family, clergy, psychologists, and social workers more often than do whites (9).

Some minorities with mental health problems may visit primary care providers, but may not be offered adequate treatment or referral to psychiatrists. Previous

studies have documented that providers underdiagnose (22) and misdiagnose (23) mental illness in minority patients, and often prescribe treatments that are not consistent with evidence-based recommendations (24). It has also been shown that clinicians who are culturally and racially discordant with patients deliver fewer mental health services (25). While our data sources do not disclose provider ethnicity, we hypothesize that racial discordance between provider and patients sometimes creates communication barriers that interfere with appropriate mental health care.

Adult prison populations, not included in the NAMCS and NHAMCS surveys, have high rates of mental illness and are disproportionately nonwhite (25–28). Prison health services may be a significant unmeasured source of mental health service use by blacks and Hispanics. In addition, the overrepresentation of the mentally ill in prisons suggests that an excessively punitive attitude toward substance abuse and psychiatric problems in minority populations may be yet another form of institutionalized racism. We wonder whether inadequate mental health care, as found in our study, may be an underestimated (and remediable) factor in causing criminality and homelessness.

Whatever the social implications, the clinical implications of our findings are clear. Medical providers must heighten their awareness of the mental health needs of minority patients, and redouble their efforts to ensure appropriate care.

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Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment

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TRAFFIC STOPS, MINORITY MOTORISTS, AND THE FUTURE OF THE FOURTH AMENDMENT

Most Americans never have been arrested or had their homes searched by the police, but almost everyone has been pulled over. Traffic enforcement is so common it can seem humdrum. Notwithstanding the occasional murder suspect caught following a fortuitous vehicle code violation,[1] even the police tend to view traffic enforcement as "peripheral to 'crime fighting.'"[2]

Fourth Amendment decisions about traffic enforcement can seem peripheral, too. Every criminal lawyer knows that the Supreme Court treats the highway as a special case. Motorists receive reduced protection against searches and seizures, in part because

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[1] See, for example, Stephen Braun, *Trooper's Vigilance Led to Arrest of Blast Suspect*, LA Times A1 (Apr 22, 1995) (describing arrest of Oklahoma City bomber Timothy McVeigh following traffic stop); Richard Simon, *Traffic Stops—Tickets to Surprises*, LA Times B1 (May 15, 1995) (noting that serial killers Ted Bundy and Randy Kraft were caught during traffic stops).

[2] David H. Bayley, *Police for the Future* 29 (Oxford, 1994). Not surprisingly, traffic officers take a different view. See id; Simon, *Traffic Stops*, LA Times at B1 (quoting California Highway Patrol Sgt. Mike Teixiera's assertion that "[w]e probably get more murderers stopping them for speeding than we do by looking for them").

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of law enforcement necessities,[3] and in part because the Supreme Court simply finds it unrealistic in this day and age for people to expect much privacy in their cars.[4] Doctrinally as well as practically, constitutional restrictions on traffic enforcement thus can appear of marginal consequence.

This is deceptive. Despite its unglamorous reputation, traffic enforcement is perilous work, and law enforcement administrators increasingly view it as integral to effective crime control. For many motorists, particularly those who are not white, traffic stops can be not just inconvenient, but frightening, humiliating, and dangerous. And for the scholar, the Supreme Court's application of the Fourth Amendment to traffic stops can offer important clues to the overall status and future of search and seizure law. It is not just that doctrines crafted for the highway can later turn up elsewhere, although this certainly happens.[5] More important is that the way the Court handles controversies over vehicle stops—what it says and what it does not say—has a good deal to tell us about its broader understandings of the role of the Fourth Amendment.

This is particularly true today, because in the past two terms the Court has given vehicle stops an unusual amount of attention. In the ten-month period from May 1996 to February 1997, the

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[3] See, for example, *Chambers v Maroney*, 399 US 42, 51 (1970) (explaining that "a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway," because "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained"); *Michigan Dep't of State Police v Sitz*, 496 US 444, 451 (1990) (upholding sobriety checkpoint in part because of "the magnitude of the drunken driving problem").

[4] See *South Dakota v Opperman*, 428 US 364, 367–68 (1976) (reasoning that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office," because cars "are subjected to pervasive and continuing governmental regulation" and "periodic inspection," police stop and examine cars for vehicle code violations "[a]s an everyday occurrence," highway travel is "obviously public" because it subjects the occupants and contents of cars to "plain view," and cars "are frequently taken into police custody" as part of "community caretaking"). To similar effect is *United States v Chadwick*, 433 US 1, 12–13 (1977).

[5] Warrantless inventory searches, initially predicated on the reduced expectation of privacy in a motor vehicle, see *South Dakota v Opperman*, 428 US 364 (1976), in time were extended to booking searches of arrestees, see *Illinois v Lafayette*, 462 US 640 (1983). Similarly, "protective sweeps" were approved first for cars, see *Michigan v Long*, 463 US 1032 (1983), then for houses, see *Maryland v Buie*, 494 US 325 (1990); and the Court's lenient approach to sobriety checkpoints, see *Michigan Dep't of State Police v Sitz*, 496 US 444 (1990), ultimately formed part of the basis for its approval of drug testing for student athletes, see *Vernonia School District 47J v Acton*, 115 S Ct 2386, 2391 (1995).

Court held that the legality of a traffic stop based on probable cause does not depend on the officer's intent,[6] used a case involving a vehicle stop to decide the standard of review for findings regarding the existence of probable cause or reasonable suspicion,[7] authorized an officer conducting a traffic stop to ask permission to search the car without first making clear the driver is free to leave,[8] and ruled that passengers as well as the driver can be ordered out of the car.[9]

Since virtually everyone violates traffic laws at least occasionally, the upshot of these decisions is that police officers, if they are patient, can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over. For reasons I hope to make clear, this is a discomforting state of affairs. My principal focus here, however, is less on the wisdom of the Court's recent decisions than on the lessons these decisions teach about the general state of Fourth Amendment law. I argue that the four cases reveal a strong degree of consensus on the Court about the proper application of the Fourth Amendment, and that the consensus results not from a settled body of doctrine but rather from shared, largely unspoken understandings. These understandings strongly favor law enforcement and, more troublingly, disregard the distinctive grievances and concerns of minority motorists stopped by the police. In ways the vehicle stop cases help to illustrate, this disregard is deeply embedded in the structure of current Fourth Amendment law, and over the long term it limits the protection the Amendment provides to all of us.

In Part I of this essay I briefly describe the four cases, after first reviewing even more summarily the doctrinal background against which they were decided. Part II discusses the striking degree of unanimity the Court has displayed in the vehicle stop decisions and in recent Fourth Amendment cases generally. Part III inquires whether this lack of discord is the product of a stable body of doctrine and determines that it is not. I argue in Part IV that the

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

[7] *Ornelas v United States*, 116 S Ct 1657 (1996).

[8] *Ohio v Robinette*, 117 S Ct 417 (1996).

[9] *Maryland v Wilson*, 117 S Ct 882 (1997).

unanimity instead results from shared understandings that are decidedly pro-government, and in Part V that these understandings systematically ignore the ways in which roadside stops of minority motorists tend to differ from those of whites. Part VI explores the implications of this disregard for searches and seizures generally and suggests that the vehicle stop cases illustrate several ways in which a systematic disregard for the distinctive concerns of racial minorities has become embedded in the structure of Fourth Amendment doctrine and constrains the doctrine's growth. Finally, in Part VII, I ask whether the minority concerns ignored by search and seizure law are adequately addressed elsewhere, I conclude that they are not, and I offer some tentative thoughts about how the problems I have identified can best be addressed.

I. The Cases

The basic Fourth Amendment rules regarding vehicle stops can be stated simply. When the police pull a car over, they take hold, temporarily, of both the car and the driver. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," so vehicle stops, like other "seizures," must be "reasonable."[10] Although a full-scale arrest is reasonable only if based on probable cause to believe the suspect has committed a crime,[11] a car stop or other detention falling short of an arrest need only be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference."[12] Such a detention is "justified at its inception" if it is supported by probable cause that the driver has violated traffic laws, or by "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."[13]

[10] See, for example, *Delaware v Prouse*, 440 US 648, 653 (1979).

[11] See, for example, *United States v Watson*, 423 US 411 (1976). Probable cause consists of "facts and circumstances" sufficient to lead a reasonable officer to believe that the suspect is committing or bas committed an offense. *Draper v United States*, 358 US 307 (1959). Tbe Court has resolutely refused to define the term with any further precision. See, for example, *Illinois v Gates*, 462 US 213, 232 (1983) (stressing that "probable cause is a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules").

[12] *Terry v Ohio*, 392 US 1, 20 (1968).

[13] *Brown v Texas*, 443 US 47, 51 (1979). The Court has never made clear whether a traffic stop may be justified by reasonable suspicion, falling short of probable cause, that the driver

An officer who has pulled a car over may order the driver out.[14] If the officer reasonably suspects that the driver is armed and dangerous, a patdown is allowed,[15] and the passenger compartment may be searched for weapons if the officer reasonably believes the driver "is dangerous and . . . may gain immediate control of weapons."[16] In either case, the officer's concern must be objectively reasonable, based on "specific and articulable facts."[17] Beyond this, there are few sharp rules restricting the "scope" of roadside stops and other investigatory detentions; the duration of such a detention, for example, is limited only by the general requirement of reasonableness.[18]

If before or during the detention the officer develops probable cause to believe the car contains contraband or evidence of a crime, the car may be searched without a warrant.[19] The car also may be searched if the officer receives consent that appears "voluntary" in view of "all the circumstances"[20] from someone the officer reasonably believes has sole or shared authority over the vehicle.[21]

All these rules were in place five years ago; most of them have been settled for more than two decades. They provided the backdrop for the four car stop cases the Court decided in the past two terms. *Ornelas v United States*[22] and *Whren v United States*[23] were handed down during the 1995 Term, *Ohio v Robinette*[24] and *Maryland v Wilson*[25] during the 1996 Term. Before discussing what these

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has committed a noncriminal traffic offense. See Wayne R. LaFave, 4 *Search and Seizure* § 9.2(c) (West, 3d ed 1996). In practice the question rarely arises, because most stops for traffic violations follow the officer's direct observation of the violation.

[14] See *Pennsylvania v Mimms*, 434 US 106 (1977).

[15] See *Terry*, 392 US at 27.

[16] *Michigan v Long*, 463 US 1032, 1049–50 (1983).

[17] Id at 1049; *Terry*, 392 US at 21.

[18] See *United States v Sharpe*, 470 US 675 (1985).

[19] See *Pennsylvania v Labron*, 116 S Ct 2485, 2487 (1996); *California v Acevedo*, 500 US 565, 569–70 (1991); *Chambers v Maroney*, 399 US 42 (1970).

[20] *Schneckloth v Bustamonte*, 412 US 218, 233 (1973).

[21] See *Illinois v Rodriguez*, 497 US 177 (1990).

[22] 116 S Ct 1657 (1996).

[23] Id at 1769.

[24] 117 S Ct 417 (1996).

[25] Id at 882.

cases mean collectively, it will help to examine each individually.

A. ORNELAS V UNITED STATES

Unlike the other three cases, *Ornelas*, although it arose from the detention of a motorist and his passenger, did not involve the substantive limits on traffic stops. Rather, it focused on the standard of appellate review for findings of probable cause or reasonable suspicion. The decision merits our attention, however, because it illuminates the significance of the other three cases.

Saul Ornelas and Ismael Ornelas-Ledesma were stopped by officers of the Milwaukee County Sheriff's Department as they were about to drive out of a motel parking lot in downtown Milwaukee. The officers suspected the men were trafficking in narcotics.[26] After speaking briefly with the defendants, the officers searched the car and found two kilograms of cocaine hidden behind a door panel. The district court found that facts known to the officers gave them reasonable suspicion for the initial stop and probable cause for the search.[27] The court of appeals affirmed, concluding that the district court's findings did not constitute "clear error."[28]

The question addressed by the Supreme Court was whether the trial court's findings of reasonable suspicion and probable cause were properly reviewed de novo or for "abuse of discretion"—the

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[26] One of the officers later explained that his suspicions initially were aroused by the car itself: an older model, two-door General Motors vehicle, "a favorite with drug couriers because it is easy to hide things in them," bearing license plates from California, "a 'source State' for drugs." *Ornelas*, 116 S Ct at 1659. The officers determined from a check of registration records that the car was owned by "either Miguel Ledesma Ornelas or Miguel Ornelas Ledesma from San Jose, California," and the motel registry revealed "Ismael Ornelas," accompanied by another man, had checked in at 4:00 in the morning without a reservation. Id. The officers then had the Drug Enforcement Administration check the Narcotics and Dangerous Drugs Information System (NADDIS)—"a federal database of known and suspected drug dealers"—for the names Miguel Ledesma Ornelas and Ismael Ornelas; both names turned up, one as a heroin dealer and one as a cocaine dealer. Id.

[27] The district court also found that the defendants had consented to a search of the car. Under Seventh Circuit precedent, however, the consent search could not include removing the door panel, without probable cause to believe it concealed contraband or evidence. See *United States v Garcia*, 897 F2d 1413, 1419–20 (7th Cir 1990). The Supreme Court in *Ornelas* "assume[d] correct the Circuit's limitation on the scope of consent only for purposes of this decision." 116 S Ct at 1660 n 1.

[28] *United States v Ornelas-Ledesma*, 16 F3d 714, 719 (7th Cir 1994), rev'd, 116 S Ct 1657 (1996).

Court's preferred term for the deferential standard of review applied by the court of appeals.[29] The justices voted 8–1 for de novo review and remanded the case to the court of appeals.

Chief Justice Rehnquist wrote for the majority. Assessments of probable cause and reasonable suspicion, he explained, should be reviewed searchingly, in order to promote consistency of results, to give appellate courts control of the legal principles they propound, and to allow progressive clarification of the law.[30] The Court "hasten[ed] to point out," however, "that a reviewing court should take care both to review findings of historical fact for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers."[31] Such inferences, the Court explained, included those drawn by an officer "through the lens of his police experience and expertise."[32] More particularly, they included both the officer's inference in the case before the Court that a loose door panel he discovered might conceal illegal narcotics, and "the trial court's finding that the officer was credible and the inference was reasonable."[33]

Justice Scalia, the sole dissenter, argued for deference to the expertise of district judges, and suggested that determinations of probable cause and reasonable suspicion were so fact-intensive that appellate review in particular cases would do little to clarify the law.[34] He also accused the majority of lacking "the courage of its conclusions," because "in *de novo* review, the 'weight due' to a trial court's finding is zero."[35]

B. WHREN V UNITED STATES

The three roadside detention cases decided after *Ornelas* all involved what the police described as routine traffic stops. Each of

[29] The Court explained that " '[c]lear error' is a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and applies when reviewing questions of fact." 116 S Ct at 1661 n 3.

[30] See id at 1662.

[31] Id at 1663.

[32] Id.

[33] Id. Given these broad hints, it should come as no surprise that on remand the court of appeals, applying the nominally more demanding standard of review prescribed by the Supreme Court, once again reaffirmed the district court's finding of reasonable suspicion. See *United States v Ornelas*, 96 F3d 1450, 1996 WL 508569 (7th Cir 1996).

[34] Id at 1663–65 (Scalia dissenting).

[35] Id at 1666.

these concerned, in a sense, what counts as "routine" for purposes of the Fourth Amendment.

Whren v United States[36] arose when police in Washington, D.C., pulled over a Nissan Pathfinder and saw two bags of crack cocaine in the hands of Michael Whren, the front-seat passenger. This evidence was used to convict Whren and the driver of federal narcotics offenses. Both defendants challenged their convictions on the ground that the stop leading to the discovery of the cocaine violated the Fourth Amendment. The police claimed they had stopped the car because the driver had broken several traffic laws; specifically, he had paused at a stop sign "for what seemed an unusually long time—more than 20 seconds," he had turned without signaling, and he had "sped off at an 'unreasonable' speed."[37] The defendants contended they had been stopped "because the sight of two young black men in a Nissan Pathfinder with temporary tags, pausing at stop sign in Southeast Washington," had struck the police as suspicious.[38]

There was some circumstantial evidence for the defendants' version. They had been pulled over and ultimately arrested not by traffic officers but by plainclothes vice-squad officers patrolling a "high drug area" of the city in an unmarked car—officers who were actually prohibited, as a matter of departmental policy, from making routine traffic stops.[39] But the Supreme Court sided with the police. In a unanimous opinion authored by Justice Scalia, the Court held that "the constitutional reasonableness of traffic stops"

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[36] 116 S Ct 1769 (1996).

[37] Id at 1772. District of Columbia traffic laws prohibited turning without signaling, driving at "a speed greater than is reasonable and prudent under the conditions," and failing to "give full time and attention to the operation of the vehicle." Id at 1772–73 (quoting 18 DC Mun Regs §§ 2204.3, 2200.3, 2213.4 (1995)).

[38] Brief for the Petitioners at 2. Lower courts generally have held that "racial incongruity" may provide part but not all of the basis for reasonable suspicion. LaFave, 4 *Search and Seizure* § 9.4(f) at 183 n 220 (cited in note 13). See also *United States v Brignoni-Ponce*, 422 US 873, 885–87 (1975) (holding that "Mexican appearance" is a "relevant factor" but on its own cannot justify car stops by roving border patrol agents). For thoughtful criticism of permitting even this limited use of race, see Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L J 214 (1983); *Developments in the Law—Race and the Criminal Process*, 101 Harv L Rev 1472, 1500–20 (1988). The officers in *Whren* claimed that race had played no role in their decision to stop the Pathfinder. See *United States v Whren*, 53 F3d 371, 373 (DC Cir 1995), aff'd, 116 S Ct 1769 (1996).

[39] 116 S Ct at 1772, 1775.

does not depend "on the actual motivations of the individual officers involved."[40] Because the police had probable cause to believe the driver of the Pathfinder had violated traffic laws—they saw the violations themselves—the stop was lawful, regardless of their actual motivation. "Subjective intentions," Justice Scalia explained, "play no role in ordinary, probable-cause Fourth Amendment analysis."[41]

C. OHIO V ROBINETTE

The controversy in *Ohio v Robinette*[42] had to do not with the initiation of a traffic stop, but with its aftermath. Robert Robinetre was stopped for speeding and received a warning. Deputy Sheriff Roger Newsome then asked him "[o]ne question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"[43] When Robinette said he was not, Newsome, apparently as a matter of routine, asked for permission to search the car.[44] Robinette agreed. The search turned up a small amount of marijuana and a methamphetamine pill. Robinette was convicted of possession of a controlled substance, but the Ohio Supreme Court threw the conviction out.

The Ohio court reasoned that, once the basis for the stop had terminated, Newsome was required to tell Robinette that he was free to leave. Otherwise, the subsequent interactions between Robinette and Newsome could not be deemed consensual:

> Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouter-

[40] Id at 1774.

[41] Id.

[42] 117 S Ct 417 (1986).

[43] Id at 419.

[44] Like the officers in *Whren*, Newsome "was on drug interdiction patrol at the time." *State v Robinette*, 653 NE2d 695, 696 (Ohio 1995), rev'd, 117 S Ct 417 (1996). He testified that he routinely asked permission to search cars that he stopped for traffic violations. See id. As Justice Ginshurg noted in her concurring opinion, Newsome testified in another case that "he requested consent to search in 786 traffic stops in 1992, the year of Robinette's arrest." 117 S Ct at 422 (citing *State v Rutherford*, 639 NE2d 498, 503 n 3 (Ohio Ct App), dism'd, 635 NE2d 43 (Ohio 1994)).

> ments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.[45]

By a vote of 8–1, however, the Supreme Court of the United States rejected the Ohio court's "bright-line" rule, reasoning that the only "Fourth Amendment test for a valid consent to search is that the consent be voluntary,"[46] and reaffirming that voluntariness must be determined "from all the circumstances."[47] Writing for the majority, Chief Justice Rehnquist added that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[48]

Concurring in the judgment, Justice Ginsburg agreed that the requirement imposed by the Ohio court could not be found in the Fourth Amendment, but she strongly suggested that the Ohio Supreme Court might appropriately ground such a requirement in state constitutional law.[49] Justice Stevens, the lone dissenter, also agreed that "[t]he Federal Constitution does not require that a lawfully seized person be advised that he is 'free to go' before his consent to search will be recognized as voluntary," but he argued that "the prophylactic rule announced [by the Ohio Supreme Court] . . . was intended as a guide to the decision of future cases rather than as an explanation of the decision in this case."[50]

D. MARYLAND V WILSON

Whereas *Whren* involved the justification for a routine traffic stop, and *Robinette* addressed its aftermath, *Maryland v Wilson*[51] fo-

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[45] 653 NE2d 695, 698.

[46] 117 S Ct at 421.

[47] Id (quoting *Schneckloth v Bustamonte*, 412 US 218, 248–49 (1973)).

[48] 117 S Ct at 421.

[49] Id at 421–24. Justice Ginsburg agreed with the majority that "[t]he Ohio Supreme Court invoked both the Federal Constitution and the Ohio Constitution without clearly indicating whether state law, standing alone, independently justified the court's rule," and that this ambiguity rendered appropriate the Court's exercise of jurisdiction under *Michigan v Long*, 463 US 1032 (1983). Id at 422.

[50] Id at 424.

[51] 117 S Ct 882 (1997).

cused on what may happen *during* the stop. Specifically, the case concerned whether a police officer carrying out a lawful traffic stop has blanket authority to order passengers out of the car. Jerry Wilson, the front-seat passenger in a car pulled over for speeding, dropped some crack cocaine when he was directed to leave the vehicle. The Maryland courts ruled the cocaine inadmissible against Wilson, on the ground that ordering Wilson out of the car was unreasonable and therefore in violation of the Fourth Amendment. Although the Supreme Court had earlier held that the *driver* may be ordered out of the car during a lawful traffic stop,[52] the Maryland courts reasoned that passengers were different.

By a vote of 7–2, the Supreme Court disagreed. Writing once again for the majority, Chief Justice Rehnquist acknowledged that "there is not the same basis for ordering the passengers out of the car as there is for ordering the driver out," because "[t]here is probable cause to believe that the driver has committed a minor vehicular offense, but there is no such reason to stop or detain the passengers."[53] Nonetheless, "the additional intrusion on the passenger is minimal," and "the same weighty interest in officer safety is present regardless whether the occupant of the stopped car is a driver or passenger."[54] Indeed, the Chief Justice noted, "the fact that there is more than one occupant of the vehicle increases the possible sources of harm to the officer."[55]

Justices Stevens and Kennedy dissented. Justice Stevens argued that a police officer carrying out a traffic stop should be authorized to order passengers out only if the officer "has an articulable suspicion of possible danger."[56] Justice Kennedy called for a more open-ended approach, permitting such a command whenever "there are

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[52] See *Pennsylvania v Mimms*, 434 US 106 (1977).

[53] 117 S Ct at 886.

[54] Id. "In 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops." Id at 885 (citing Federal Bureau of Investigation, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (1994)). See also Lisa A. Regini, *Extending the Mimms Rule to Include Passengers*, FBI Law Enforcement Bull 27 (June 1997) (suggesting these dangers may make "routine traffic stops" the "most misnamed activity in law enforcement").

[55] 117 S Ct at 885.

[56] Id at 887 (Stevens dissenting).

objective circumstances making it reasonable for the officer to issue the order."[57]

II. The New Consensus

To anyone familiar with the Supreme Court's writings on the Fourth Amendment over the past several decades, probably the most striking thing about *Ornelas*, *Whren*, *Robinette*, and *Wilson* was not the results reached—none of which, taken individually, came as a great surprise—but the lack of discord within the Court. In the four decisions combined, there was a total of only four dissenting votes, and only one separate concurring opinion.

Even these numbers overstate the degree of disagreement. Justice Scalia, the lone dissenter in *Ornelas*, agreed with the majority that trial courts deserve deference on questions of probable cause and reasonable suspicion; what he wanted was less a different rule than a rule worded more clearly. Justice Stevens, the only dissenting vote in *Robinette*, explicitly approved the Court's substantive holding, and disagreed only about whether the lower court had applied a contrary rule in the case under review. Justice Ginsburg, who concurred separately in *Robinette*, expressly embraced the Court's holding, and wrote separately only because it seemed to her "improbable that the Ohio Supreme Court understood its first-tell-then-ask rule to be the Federal Constitution's mandate for the Nation as a whole."[58] Similarly, although Justices Stevens and Kennedy dissented in *Wilson*, the rules they proposed differed only modestly from the one adopted by the Court.[59]

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[57] Id at 890 (Kennedy dissenting). Justice Kennedy ascribed this conclusion to Justice Stevens, whose dissent he also joined. Justice Stevens apparently recognized that Justice Kennedy's approach was less circumscribed than his own; he did not join Justice Kennedy's dissent.

[58] Id at 422 (Ginsburg concurring).

[59] The rule proposed by Justice Stevens—requiring an officer to have "an articulable suspicion of possible danger" before ordering a passenger out of a car, 117 S Ct at 887 (Stevens dissenting)—may even have been satisfied in the case before the Court. The officer who ordered Wilson out of the car testified that he did so because "movement in the vehicle" suggested to him that "there could be a handgun in the vehicle," and gave him concern for his safety. *State v Wilson*, 664 A2d 1, 2 (Md 1995), rev'd, 117 S Ct 882 (1997). For reasons the record does not disclose, the Maryland Court of Special Appeals nonetheless upheld the trial judge's finding that the officer did not act out of any "sense of heightened caution or apprehensiveness." Id at 15.

Justice Kennedy joined Justice Stevens's opinion and also wrote a separate opinion sug-

The institutional harmony displayed in these cases is typical of the Court's recent Fourth Amendment decisions. This is a new phenomenon. As recently as five or ten years ago, an important search or seizure commonly produced four or more sharply divergent opinions. Often no single opinion spoke for the Court.[60]

Although the Court still splinters today on some other subjects—voting rights[61] and freedom of speech[62] are two good examples—it increasingly speaks with a clear and united voice when it

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gesting that "the command to exit ought not to be given unless there are objective circumstances making it reasonable for the officer to issue the order." Id at 890 (Kennedy dissenting). Although Justice Kennedy apparently saw no divergence between his standard and the rule advocated by Justice Stevens, the difference could in fact prove significant. By tying the legality of an exit command to what is "reasonable" under the circumstances, the test proposed by Justice Kennedy might disallow the command in some situations in which the per se rule endorsed by Justice Stevens would allow it: situations involving a small amount of possible danger, outweighed perhaps by the burden that leaving the car would impose on the passenger. Of greater importance, Justice Kennedy's open-ended test might allow passengers to be ordered out of cars in some situations lacking any indications of danger to the officer: "objective circumstances" making the order reasonable, Justice Kennedy suggested, could include not only indications of possible danger, but also "any circumstance justifying the order . . . to facilitate a lawful search or investigation." Id.

"Since a myriad of circumstances will give a cautious officer reasonable grounds for commanding passengers to leave the vehicle," Justice Kennedy acknowledged that "it might be thought the rule the Court adopts today will be little different in its operation than the rule offered in dissent." Id at 890–91. He did not quarrel with that conclusion, suggesting only that "[i]t does no disservice to police officers . . . to insist upon exercise of reasoned judgment." Id at 891.

[60] See, for example, *California v Acevedo*, 500 US 565 (1991) (four opinions); *Michigan Dep't of State Police v Sitz*, 496 US 444 (1990) (four opinions); *Minnesota v Olsen*, 495 US 91 (1990) (four opinions); *Florida v Wells*, 495 US 1 (1990) (four opinions); *Maryland v Buie*, 494 US 325 (1990) (four opinions); *United States v Verdugo-Urquidez*, 494 US 259 (1990) (five opinions); *Florida v Riley*, 488 US 445 (1989) (four opinions, no majority opinion); *Arizona v Hicks*, 480 US 321 (1987) (four opinions); *Illinois v Gates*, 462 US 213 (1983) (four opinions); *Florida v Royer*, 460 US 491 (1983) (five opinions, no majority opinion); *Schneckloth v Bustamonte*, 412 US 218 (1973) (six opinions); *Coolidge v New Hampshire*, 403 US 443 (1971) (five opinions, partial majority opinion); *United States v White*, 401 US 745 (1971) (five opinions and a "statement," no majority opinion); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind L J 329 (1973) (observing that "the Supreme Court can seldom muster a majority on any important fourth amendment issue"); Wayne R. LaFave, *"Case-by-Case Adjudication" versus "Standardized Procedures": The Robinson Dilemma*, 1974 Supreme Court Review 127, 127–28 & n 2 (noting multiple opinions and closely divided votes in Fourth Amendment cases decided in 1972 and 1973 Terms).

[61] See, for example, *Bush v Vera*, 116 S Ct 1941 (1996) (six opinions, no majority); *Miller v Johnson*, 115 S Ct 2475 (1995) (four opinions).

[62] See, for example, *Turner Broadcasting System, Inc v FCC*, 117 S Ct 1174 (1997) (four opinions, partial majority); *Denver Area Educ Telecom Consortium v FCC*, 116 S Ct 2374 (1996) (six opinions, partial majority); *Colorado Republican Campaign Comm v FEC*, 116 S Ct 2309 (1996) (four opinions, no majority).

addresses constitutional restrictions on searches and seizures by the police.[63] Usually the opinion is authored by Chief Justice Rehnquist or a more conservative member of the Court.[64]

Nothing illustrates this new consensus on the Fourth Amendment more clearly than Justice Scalia's unanimous opinion for the

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[63] In addition to the cases discussed in the text, see *Richards v Wisconsin*, 117 S Ct 1416 (1997) (unanimous ruling that "no knock" searches may he "unreasonahle" even in a drug case, although not in the case before the Court); *Pennsylvania v Labron*, 116 S Ct 2485 (1996) (per curiam holding that "automobile exception" to the warrant requirement does not require exigency); *Wilson v Arkansas*, 115 S Ct 1914, 1915 (1995) (unanimous ruling that the "common-law 'knock and announce' principle forms part of the reasonableness inquiry under the Fourth Amendment"); *United States v Padilla*, 508 US 77 (1993) (per curiam holding that criminal defendants lack standing to ohject to violations of the Fourth Amendment rights of their coconspirators).

The Court can still divide noticeahly when asked how the Fourth Amendment applies to government agencies other than the police. See *Vernonia School District 47J v Acton*, 115 S Ct 2386 (1995); *Arizona v Evans*, 115 S Ct 1185 (1995). The majority in *Acton*, led by Justice Scalia, upheld a school district's program of mass, suspicionless drug testing of student athletes. Justice O'Connor, joined by Justices Stevens and Souter, dissented vehemently from the decision, and Justice Ginsburg, who joined the majority opinion, also wrote separately in an effort to limit the ruling. In *Evans*, the Court held that the Fourth Amendment does not require suppression of evidence seized during an illegal arrest resulting from a clerical mistake by court personnel. Chief Justice Rehnquist wrote for the majority, Justice O'Connor and Justice Souter each filed concurring opinions seeking to limit the scope of the ruling, and Justice Stevens and Justice Ginsburg each wrote dissents. The Court was less divided in *Chandler v Miller*, 117 S Ct 1295 (1977), when it struck down, over Chief Justice Rehnquist's lone dissent, a Georgia statute requiring candidates for certain elected positions to take urinalysis drug tests. As I discuss later, this may have had to do with the fact that among those Georgians subjected to drug testing were candidates for seats on the state supreme court, court of appeals, and superior courts. See note 151 and accompanying text.

[64] In addition to the cases discussed in text, see *Vernonia School District 47J v Acton*, 115 S Ct 2386 (1995) (Scalia); *Arizona v Evans*, 115 S Ct 1185 (1995) (Relnquist); *Wilson v Arkansas*, 115 S Ct 1914 (1995) (Thomas). An exception is *Richards v Wisconsin*, 117 S Ct 1416 (1997) (Stevens).

Justice Thomas and Chief Justice Rehnquist have been in the majority of all hut three of the Fourth Amendment cases the Court has decided since Thomas joined the Court in 1993. The exceptions are *Minnesota v Dickerson*, 508 US 366 (1993), *Powell v Nevada*, 511 US 79 (1994), and *Chandler v Miller*, 117 S Ct 1295 (1997). The holding in *Powell* was relatively technical: the Court ruled that *County of Riverside v McLaughlin*, 500 US 44 (1991), which found the Fourth Amendment to require that suspects arrested without warrant ordinarily receive a judicial determination of prohable cause within 48 hours, applied retroactively. The Chief Justice joined Justice Thomas's dissent. In *Dickerson*, the Chief Justice wrote the dissent, joined hy Justice Thomas and Justice Blackmun. The principle holding in that case, with which all nine justice agreed, was that the Minnesota Supreme Court had erred in ruling that officers may not seize nonthreatening contraband detected during a protective patdown search. The majority, led by Justice White, nonetheless affirmed the Minnesota court's reversal of Dickerson's conviction, reasoning that the patdown exceeded permissihle limits; the dissenters would have remanded that issue. In *Chandler*, a majority of eight, led by Justice Ginsburg, struck down a Georgia statute requiring candidates for a wide range of executive and judicial positions to take drug tests; Chief Justice Rehnquist was the lone dissenter.

Court rejecting the pretext claim in *Whren*. *Whren* touched on an issue of persistent ambiguity in constitutional criminal procedure—the relevance of a police officer's motivations. On the one hand, the Court has long expressed a strong preference, at least in theory, for tying the legality of law enforcement measures to objective circumstances, rather than to officers' intentions.[65] On the other hand, some doctrines of criminal procedure hinge explicitly on police intent,[66] and even when applying doctrines that do not, the Court often has seemed influenced, sometimes heavily, by suppositions about why the police acted as they did.[67]

Had the Supreme Court decided *Whren* twenty-five years ago, it is difficult to say what the result would have been. Ten years ago, the government probably would have won, but one suspects there would have been a strong dissent, and perhaps one or two opinions concurring only in the result. Very possibly no opinion would have spoken for a majority of the Court; if one did, it likely would have emphasized the particular facts before the Court and left "for another day" the question whether, in different circum-

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[65] See, for example, *Stansbury v California*, 114 S Ct 1526, 1529–30 (1994); *Illinois v Rodriguez*, 497 US 177, 185–86 (1990); *New York v Quarles*, 467 US 649, 656 & n 6 (1984). At times the Court has even said things like "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Scott v United States*, 436 US 128, 138 (1978) (Rehnquist).

[66] See, for example, *South Dakota v Opperman*, 428 US 364, 375–76 (1976) (upholding warrantless inventory searches of impounded automobiles for "caretaking" purposes) (followed in *Colorado v Bertine*, 479 US 367, 372 (1987) and *Florida v Wells*, 495 US 1, 4 (1990)); *United States v Massiah*, 377 US 201 (1964) (holding that Sixth Amendment barred use against defendant of statements "deliberately elicited from him after he had been indicted and in the absence of his counsel") (followed in *Brewer v Williams*, 430 US 387 (1977), and *United States v Henry*, 447 US 264 (1980)); *United States v Lefkowitz*, 285 US 452, 467 (1932) (holding that "[a]n arrest may not be used as a pretext to search for evidence").

[67] See, for example, *New York v Burger*, 482 US 691, 716 n 27 (1987) (upholding warrantless administrative inspection in part because neither legislature nor officers appeared to have used the inspection as a "pretext" to search for evidence of crime); *Arizona v Mauro*, 481 US 520, 528 (1987) (finding *Miranda* warnings unnecessary in part because police did not appear to have acted "for the purpose of eliciting incriminating statements"); *Jones v United States*, 357 US 493, 500 (1958) (invalidating search in part because "[t]he testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, not to arrest petitioner").

Justice Scalia correctly pointed out that both *Burger* and *Opperman* involved searches made without probable cause. See *Whren*, 116 S Ct at 1773. The same could be said of *Jones*. What he did not explain was why this distinction should make all the difference.

stances, an officer's subjective intent could ever invalidate an otherwise lawful traffic stop.[68] The dissent would have stressed that to allow pretextual stops for traffic violations is to license arbitrary exercises of official discretion similar to those notoriously authorized in the eighteenth century by general warrants and writs of assistance,[69] and that a "paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures."[70] The principal opinion presumably would have disclaimed giving police the broad authority

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[68] See, for example, *Skinner v Railway Labor Executives' Ass'n*, 489 US 602, 621 n 25 (1989) ("leav[ing] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the [Federal Railway Administration's drug testing program] would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program"); *O'Connor v Ortega*, 480 US 709, 723 (1987) ("leav[ing] for another day" application of the Fourth Amendment to workplace searches by government employers for purposes unrelated to work); *United States v Robinson*, 414 US 218 (1973) ("leav[ing] for another day questions which would arise" if the arrest giving rise to a search was "a departure from established police department practices").

[69] See, for example, LaFave, 1974 Supreme Court Review at 152–53 (cited in note 60); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L Rev 221, 254–58 (1989).

For concise accounts of the resentments provoked by general warrants and writs of assistance, and the key role these resentments played in the drafting and adoption of the Fourth Amendment, the classic sources are Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 43–78 (Johns Hopkins, 1937), and Telford Taylor, *Search, Seizure, and Surveillance*, in *Two Studies in Constitutional Interpretation* 19, 24–38 (Ohio State, 1969). Essentially, general warrants were broad grants of authority from the executive to crown officers to search for and to arrest certain offenders, generally printers and publishers of seditious libel, and to search for and seize their papers. In the 1760s, Lord Camden and Lord Mansfield struck down these warrants in a series of decisions well known and widely applauded in the colonies. Writs of assistance were legislative acts empowering colonial revenue agents to search for smuggled goods. In 1761, James Otis argued famously but unsuccessfully against renewal of the writs in Massachusetts. General warrants were disfavored partly because they authorized broadscale seizure of all the offenders' papers, and partly because they gave crown officers wide discretion in determining who the offenders were. Writs of assistance were resented because of the virtually unlimited discretion they gave revenue agents to decide when, where, and how to search for contraband. This history recently has been placed in wider context by William Cuddihy's unpublished 1990 Ph.D. thesis, *The Fourth Amendment: Origins and Original Meaning, 1602–1791*. For a useful summary of that "exhaustive" and "exhausting" work, see Morgan Cloud, *Searching through History; Searching for History*, 63 U Chi L Rev 1707, 1713 (1996).

[70] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn L Rev 349, 417 (1974). See also, for example, *Camara v Municipal Court*, 387 US 523, 528 (1967) (noting that "the basic purpose" of the Fourth Amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials"); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm & Mary L Rev 197, 201 (1993) (arguing that "the central meaning of the Fourth Amendment is distrust of police power and discretion").

decried by the dissent. Law professors and lower courts would have been left to speculate how broad the holding really was.[71]

No such speculation is necessary now. All nine justices joined Justice Scalia's opinion in *Whren*, and whatever else may be said about that opinion, it is not equivocal. Not only did Justice Scalia refuse to inquire why the District of Columbia police had pulled over the Pathfinder, he declared flatly that the Court's prior cases "foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved"—or even on whether "the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[72]

Although the latter inquiry had been favored by a leading scholar of the Fourth Amendment and by a growing minority of lower courts,[73] Justice Scalia made short work of it. This nominally

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[71] Debate continued for two decades, for example, about what sense to make of the Supreme Court's statement in *United States v Scott*, 436 US 128, 138 (1978), that "the fact that the officer does not have the state of mind which is bypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"—and, in particular, about whether the Supreme Court adopted the government's broad claim in that case that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." See, for example, LaFave, 1 *Search and Seizure* § 1.4(e) at 105 (cited in note 13) (arguing that *Scott* "can hardly be read as a definitive analysis settling that in *all* circumstances Fourth Amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved,' " but that "this is precisely what the rule ought to be"); id at 102–25 & nn 61, 62, & 70 (summarizing and citing cases); John M. Burkoff, *The Pretext Search Doctrine Returns after Never Leaving*, 66 U Detroit L Rev 363, 372 (1989) (contending that "Supreme Court decisions handed down both before and after the *Scott* decision have neither uniformly adopted nor applied an objective fourth amendment test as was seemingly dictated by *Scott*"); John M. Burkoff, *Bad Faith Searches*, 57 NYU L Rev 70, 74–75 (1982) (calling the broad language of *Scott* "mere dicta," and arguing that "[r]easons of policy as well as doctrinal consistency require that the case be read more narrowly"); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U Mich J L Ref 639, 674 (1989) (noting that "*Scott* did not involve a pretext claim," but arguing that the Supreme Court, properly, has never invalidated an otherwise valid search or seizure on the ground that the officers lacked the proper motive).

[72] 116 S Ct at 1774.

[73] See, for example, *United States v Cannon*, 29 F3d 472 (9th Cir 1994); *United States v Smith*, 799 F2d 704 (11th Cir 1986); *State v Daniel*, 665 So2d 1040 (Fla 1995); *State v Haskell*, 645 A2d 619 (Me 1994); *Alejandre v State*, 903 P2d 794 (Nev 1995); *State v French*, 663 NE2d 367 (Ohio Ct App 1995); *State v Blumenthal*, 895 P2d 430 (Wash Ct App 1995); LaFave, 1 *Search and Seizure* § 1.4(e) at 119–20 & nn 55–59 (cited in note 13) (citing cases). None of the scholarly and judicial support for the defendants' position was noted in the Court's opinion.

objective test, he explained, actually was "driven by subjective considerations," because "[i]ts whole purpose is to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons."[74] In addition, Justice Scalia stressed the difficulty of "plumb[ing] the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation."[75] He conceded that "police manuals and standard procedures may sometimes provide objective assistance," but suggested that "ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity."[76] Finally, even if the test could be applied, Justice Scalia pointed out that it would make the protections of the Fourth Amendment turn on police practices that "vary from place to place and from time to time," a prospect the Court found simply unacceptable.[77]

These arguments were all of the cavalier sort one tends to encounter in opinions not tested by a dissent. No competent criminal lawyer could be expected to believe that past cases flatly "foreclose[d]" a direct inquiry into the purpose of a traffic stop; anyone familiar with the cases knew they were far murkier.[78] And Justice

[74] 116 S Ct at 1774.

[75] Id at 1775.

[76] Id.

[77] Id.

[78] For example, in a footnote to its per curiam affirmance of the conviction in *Colorado v Bannister*, 449 US 1 (1980), the Court had noted "[t]here was no evidence whatsoever that the officer's presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants." Id at 4 n 4. Justice Scalia quite properly treated the footnote as inconclusive: the most it demonstrated was "that the Court in *Bannister* found no need to inquire into the question now under discussion." *Whren*, 116 S Ct at 1773.

With other cases, though, Justice Scalia was less careful. For example, he described *United States v Robinson*, 414 US 218 (1973), as having "held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search,'" and *Scott v United States*, 436 US 128 (1978), as having "said that '[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.'" 116 S Ct 1774. The actual import of those cases was less clear. After noting in a footnote in *Robinson* that the defendant claimed his arrest for a traffic offense was pretextual and that the officer denied it, the Court said only this: "We think it is sufficient for purposes of our decision that respondent was lawfully arrested for an offense, and that [his placement] in custody following that arrest was not a departure from established police department practice. We leave for another day questions which would arise on facts different from these." 414 US at 221 n 1. In *Scott*, the Court recounted the *government's* position that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional," endorsed this position for purposes of assessing compliance with the statutory re-

Scalia's objections to the "reasonable officer" test were unlikely to sway any careful reader. To begin with, it is not at all clear that the purpose of the test must be "to prevent the police from doing under the guise of enforcing the traffic code what they would like to do for different reasons." Professor LaFave, for one, had argued that "it is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation."[79] More fundamentally, it is hard to see why even someone opposed to probing for pretext in particular cases should object to objective rules simply on the ground that they are "driven by subjective considerations"; indeed, a strong case can be made that much of Fourth Amendment law is "driven" by concerns about improperly motivated searches and seizures.[80]

At the level of application, police manuals and standard procedures surely could provide—and had provided—far more assistance than Justice Scalia acknowledged in assessing the objective reasonableness of traffic stops; the suggestion that the "reasonable officer" test could not be applied was belied by the experience of the lower courts that had in fact applied it.[81] (Indeed, one of the

quirement that wiretaps minimize the interception of conversations not the focus of the surveillance, and then opined more broadly that "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action." 436 US at 138. Given the context of the broad language in *Scott*, even scholars unsympathetic to pretext claims have treated the case as questionable authority for their position. See note 71.

Justice Scalia also cited *United States v Villamonte-Marquez*, 462 US 579 (1983), which upheld the warrantless boarding of a sailboat by customs officers to inspect documents; in a footnote, the Court rejected an argument that the action was unlawful because it was prompted by a tip that a vessel in the vicinity was carrying marijuana. See id at 584 n 3. The rejected claim, however, appeared to be statutory rather than constitutional, see id, and, as in *Scott*, was not truly an allegation of pretext: as the Court pointed out, among the "vital" purposes of shipboard document inspections was "the need to deter or apprehend smugglers" in order to "preven[t] the entry into this country of controlled substances" and other contraband. See id at 591, 593.

[79] LaFave, 1 *Search & Seizure* § 1.4(e) at 120–21 (cited in note 13).

[80] This is precisely the case made by Professor Haddad. See Haddad, 18 U Mich J L Ref at 653–73 (cited in note 71).

[81] See Janet Koven Levit, *Pretextual Traffic Stops: United States v Whren and the Death of Terry v Ohio*, 28 Loyola U Chi L J 145, 178–80 (1996). Despite the gradual spread of the "reasonable officer" test in the lower courts (see note 73), the Tenth Circuit, which had adopted the test in 1988, see *United States v Guzman*, 864 F2d 1512 (10th Cir 1988), abandoned it as "unworkable" in 1995, see *United States v Botero-Ospina*, 71 F3d 783, 786 (10th Cir 1995). The court reached that conclusion largely because it found its own application of the rule "inconsistent" and because the rule had rarely caused the court to "reverse an order denying suppression." Id. As I discuss later (see notes 184–89 and accompanying text), the inconsistencies identified by the Tenth Circuit were the normal, transitional results of

side benefits of the test may have been the encouragement it provided police departments to spell out their standard procedures more clearly, thereby minimizing litigation over the reasonableness of particular traffic stops, and in the bargain protecting against improper exercises of discretion.[82]) The business in *Whren* about "virtual subjectivity" was hard to take seriously: criminal procedure is chock full of rules that call precisely for "speculating about the hypothetical reaction of a hypothetical constable."[83] And although police practices certainly do vary, why this made them improper predicates for Fourth Amendment restrictions (Justice Scalia called them "trivialities"[84]) was largely unexplained.[85]

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refining a new rule case by case; in any event, as the dissent pointed out, the obvious remedy for inconsistent application was to "clarify the standard rather than abandon it altogether." Id at 792 n 2 (Seymour dissenting). As for the fact that the test rarely resulted in appellate reversal of an order denying suppression, this showed the rule was "unworkable" only if law enforcement officers, prosecutors, and trial judges all were assumed incapable of following it, and if weak protection was thought worse than none.

[82] See, for example, Amsterdam, 58 Minn L Rev at 423–28 (cited in note 70) (discussing the advantages of constraining police discretion through departmental rules).

[83] See, for example, *Florida v Jimeno*, 500 US 248, 252 (1991) (authorizing police to open a closed container found while searching a car pursuant to consent if the "consent would reasonably be understood" to extend to the container); *Illinois v Rodriguez*, 497 US 177, 188–89 (1990) (holding that valid consent may be given by anyone a reasonable officer would believe exercised "common authority over tbe premises"); *United States v Sharpe*, 470 US 675 (1985) (holding that an investigative stop may last as long as is reasonable under all the circumstances); *United States v Leon*, 468 US 897, 919 & n 20 (1984) (holding that the exclusionary rule does not apply where an officer relies in "objective good faith" on a search warrant issued by a judge or magistrate); *New York v Quarles*, 467 US 649, 656 (1984) (holding that *Miranda* warnings need not be given before police questioning that, regardless of its actual motivation, could have been "reasonably prompted by a concern for the public safety"); *Rhode Island v Innis*, 446 US 291, 301–02 (1980) (holding that "the definition of interrogation" for purposes of triggering the *Miranda* rule "can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response"); *Terry v Ohio*, 392 US 1, 21–22 (1968) (noting generally that application of Fourth Amendment requires asking whether "the facts available to the officer at the moment of the seizure or the search" would " 'warrant a man of reasonable caution in the belief' that the action taken was appropriate") (quoting *Carroll v United States*, 267 US 132, 162 (1925)).

[84] *Whren*, 116 S Ct at 1775.

[85] The Court supported this point with "cf" citations to *Gustafson v Florida*, 414 US 260 (1973) and *United States v Caceres*, 440 US 741 (1979). *Gustafson* was a search-incident-to-arrest case in which the Court noted, in passing, that although local regulations neither required the defendant's arrest nor set conditions for bis body search, these facts were not "determinative of the constitutional issue." 414 US at 265. *Caceres* "decline[d] to adopt any rigid rule" requiring the suppression of evidence obtained in violation of IRS regulations concerning electronic surveillance. 440 US at 755. Neither case suggested that the variable nature of local police regulations rendered them entirely irrelevant to the reasonableness of a search or seizure under the Fourth Amendment. On the other hand, *Gustafson* certainly did provide a particularly striking illustration of the Supreme Court's general lack of interest

None of this is to say that the result in *Whren* was plainly wrong. The "reasonable officer" rule has much to recommend it, but Justice Scalia was probably right to suggest that it would give rise to difficult problems of application. Whether those problems justified the holding in *Whren* is a question I will take up later. The important point for now is not the answer the Supreme Court gave, but how unanimous and unqualified the answer was. The justices were able in *Whren* to resolve a difficult and persistent ambiguity of criminal procedure in a decisive manner that ten or twenty years ago would have been impossible.[86] The Supreme Court's Fourth Amendment jurisprudence has begun to settle down. It is worth asking how this has been accomplished.

III. The New Consensus and the Old "Mess"

Complaints about the disarray of Fourth Amendment law have long been a staple of legal scholarship. It now has been thirty-five years since Roger Dworkin first called Fourth Amendment cases "a mess"[87] and Anthony Amsterdam said this was an understatement.[88] Nearly two decades ago, Silas Wasserstrom and Louis Michael Seidman found "virtual unanimity" that "the Court simply has made a mess of search and seizure law."[89] More recently Akhil Amar has described Fourth Amendment law as "jumble[d]," "contradictory," and—of course—a "mess."[90] As Morgan Cloud

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in constraining police discretion by compelling, or even encouraging, departmental rulemaking. See Amsterdam, 58 Minn L Rev at 416 (cited in note 70).

[86] The only potential limit to the sweep of the holding in *Whren* is the weight the Court placed on the fact that the Fourth Amendment action there was supported by probable cause; possibly a different result might be reached for stops based only on reasonable suspicion. The Court acknowledged that "in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors," but it concluded that "[w]ith rare exceptions not applicable here . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause." 116 S Ct at 1776; see also note 67. This of course includes almost all lawful stops for traffic violations. See note 13.

[87] Dworkin, 48 Ind L J at 329 (cited in note 60).

[88] See Amsterdam, 58 Minn L Rev at 349 (cited in note 70). Even earlier, Professor LaFave had noted that "[n]o area of the law has more bedeviled the judiciary, from the Justices of the Supreme Court down to the magistrate." Wayne LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U Ill L F 255.

[89] Silas J. Wasserstrom and Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Georgetown L J 19, 20 (1988).

[90] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv L Rev 757, 758, 761 (1994).

has noted, "[c]ritics of the Supreme Court's contemporary Fourth Amendment jurisprudence regularly complain that the Court's decisions are," among other things, "illogical, inconsistent, . . . and theoretically incoherent."[91]

The harmony the Court displayed in the recent vehicle stop cases may at first suggest that these criticisms are now obsolete. On closer inspection, though, the recent cases show all the inconsistency for which Fourth Amendment law has become famous. Whatever accounts for the Court's broad consensus in these cases, it is not newfound doctrinal coherence.

Start with *Ornelas*, in which the Court held that "as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."[92] Despite this holding, the Court instructed the appellate court on remand to give "due weight" to the trial court's finding that the officers' determinations had been reasonable. I will argue later that these two directives can be reconciled in spirit, but as a matter of simple logic it is hard to argue with Justice Scalia's characterization of the Court's opinion as "contradictory."[93]

It is not much easier to square the concluding remarks of *Ornelas* with the Court's reasoning two weeks later in *Whren*. In explaining the "due weight" that reviewing courts should give to the inferences of law enforcement officers and trial judges, the Court in *Ornelas* emphasized that determinations of probable cause and reasonable suspicion must be made "in the light of the distinctive features and events of the community."[94] For example, the Court explained, "what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee."[95] In *Whren*, however, the Court rejected not only an examination of the actual motivations underlying a roadside stop, but also any inquiry whether reasonable police practices called for the stop. It did so in part because "police enforcement practices,

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[91] Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L Rev 199, 204 (1993).

[92] 116 S Ct at 1663.

[93] Id at 1666 (Scalia dissenting).

[94] 116 US at 1663.

[95] Id.

even if they could be practicably assessed by a judge, vary from place to place and from time to time," and the Court could not "accept that the search and seizure protections of the Fourth Amendment are so variable."[96]

Particularly given that *Ornelas* and *Whren* were decided only days apart, it seems fair to ask why it is "more problematic to determine whether a police officer acted according to local practices in making a traffic stop than to determine whether an investigative stop is rooted in reasonable suspicion."[97] This question may well have answers. The local circumstances deemed significant by the Court in *Ornelas* were factual; they concerned matters such as geography, climate, and population patterns.[98] It is at least arguable that ignoring *this* sort of local variation in assessing reasonableness would press the limits of logic, whereas variations in local *laws* can more sensibly be ignored, and indeed *should* be ignored, in determining whether the Fourth Amendment prohibits a particular search or seizure as "unreasonable."[99]

But this is by no means obvious. If "the basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials,"[100] a great deal can be said, and has been said, in favor of the view that

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[96] 116 S Ct at 1775.

[97] Levit, 28 Loyola U Chi L J at 180 (cited in note 81).

[98] By way of illustration, the majority opinion in *Ornelas* noted that Milwaukee:

> is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping Milwaukee in December is either there to transact business or to visit family or friends.

Ornelas, 116 US at 1663.

[99] See *California v Greenwood*, 486 US 35, 43 (1988) ("We have never intimated . . . that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs."). There is a sense, of course, in which "the meaning of the Fourth Amendment" inevitably does depend on local laws—not local laws explicitly addressing police procedure, but local laws defining what conduct is criminal, and thereby determining, albeit indirectly, what sets of circumstances constitute "probable cause" and "reasonable suspicion." See William J. Stuntz, *Substance, Procedure, and the Civil-Criminal Line*, 7 J Contemp L Issues 1 (1996). This point received no attention in *Whren*.

[100] *Camara v Municipal Court*, 387 US 523, 528 (1967). See also notes 69–70 and accompanying text.

"reasonable" searches and seizures must be carried out pursuant to standardized procedures—and that searches and seizures that affirmatively violate established procedures are a fortiori unconstitutional.[101] The Supreme Court has never shown great enthusiasm for this view,[102] but neither has the Court rejected it across the board.[103] My point at present is not that local laws must play as large a role as other local circumstances in Fourth Amendment doctrine. It is rather that the case for drawing a sharp distinction here is far from plain, and that, without further explanation, the Court's instructions at the conclusion of *Ornelas* sit uncomfortably with the Court's insistence in *Whren* that Fourth Amendment protections should not "vary from place to place and from time to time."

Nor were these the only incongruities created by *Ornelas*. Three days after deciding *Whren*, the Court held unanimously in *Koon v United States*[104]—the federal criminal case arising out of the infamous beating of Rodney King—that a trial court's decision to depart from the federal sentencing guidelines should be reviewed not de novo but merely for "abuse of discretion."[105] Part of the reason was that trial courts need "flexibility to resolve questions involving 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" that departure decisions involve "'the consideration of unique factors that are "little susceptible . . . of useful generalization,"'" and that, "as a consequence, *de novo* review is 'unlikely to establish clear guidelines for lower courts.'"[106] All of this, of course, could be said equally well of determinations of probable

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[101] See, for example, Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 80–96 (Louisiana State, 1969); LaFave, 1 *Search and Seizure* § 1.4(e) at 124–25 (cited in note 13); Amsterdam, 58 Minn L Rev at 409–39 (cited in note 70); LaFave, 1974 S Ct Rev at 161 (cited in note 60); Carl McGowan, *Rule-Making and the Police*, 70 Mich L Rev 659 (1972).

[102] See note 85.

[103] See, for example, *Illinois v Lafayette*, 462 US 640, 647 (1983) (upholding searches of arrested suspect pursuant to "standardized inventory procedures" before incarceration); *South Dakota v Opperman*, 428 US 364, 372 (1976) (approving inventory searches of lawfully seized automobiles "pursuant to standard police procedures").

[104] 116 S Ct 2035 (1996).

[105] Id at 2047. Although all nine justices agreed on the proper standard of review, the Court split on the proper application of that standard to the facts before it. Steven Clymer pointed out to me the tension between *Koon* and *Ornelas*.

[106] Id (quoting *Cooter & Gell v Hartmarx Corp.*, 496 US 384, 404–05 (1990) (in turn quoting *Pierce v Underwood*, 487 US 552, 561–62 (1988))).

cause and reasonable suspicion. Justice Scalia had pointed out as much in his *Ornelas* dissent, and the majority in that case had all but conceded the point. But none of the opinions in *Koon* so much as mentioned *Ornelas*.[107]

Now consider *Robinette*. The crux of the Court's reasons for rejecting a "first-tell-then-ask rule"[108] was its disavowal of "*per se* rule[s]" in applying the Fourth Amendment.[109] No member of the Court found fault with the Ohio Supreme Court's premise that "[m]ost people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them."[110] The majority left that claim unchallenged; Justice Ginsburg, concurring separately, quoted it with evident approval;[111] and Justice Stevens, in dissent, called it "surely correct."[112] The basis for the holding in *Robinette*—a holding that even Justices Ginsburg and Stevens expressly endorsed—was the Court's wholesale rejection of any fixed, categorical approach to determining whether a search or seizure is "unreasonable" within the meaning of the Fourth Amendment.

"Reasonableness," Chief Justice Rehnquist explained for the majority, depends upon "the totality of the circumstances," and "[i]n applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry."[113] Eschewing bright-line rules is indeed a well established principle of Fourth Amendment jurisprudence, and the Chief Justice had no difficulty collecting examples of its application.[114] Repetition, though, is not the same thing as constancy, par-

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[107] In other contexts, the Supreme Court sometimes has reasoned that a more probing standard of review should be applied to the application of rules that protect important constitutional values. See, for example, *Bose Corp. v Consumers Union*, 466 US 485, 501–02 (1984). This might seem a promising basis for distinguishing *Ornelas*, which involved constitutional determinations, from *Koon*, which did not. But the opinions in *Ornelas* and *Koon* paid no attention to this factor, and the "due weight" that *Ornelas* instructed reviewing courts to give to the inferences of trial judges and law enforcement officers is difficult to reconcile with the exercise of "independent judgment" required by decisions like *Bose Corp.*

[108] *Robinette*, 117 S Ct at 422 (Ginsburg concurring).

[109] Id at 421.

[110] 653 NE2d at 698.

[111] 117 S Ct at 422 (Ginsburg concurring).

[112] Id at 425 (Stevens dissenting).

[113] Id at 421.

[114] See id (citing *Florida v Bostick*, 501 US 429 (1991) (rejecting flat prohibition of suspicionless questioning of passengers on board intercity buses); *Michigan v Chestnut*, 486 US

ticularly in Fourth Amendment law, and the suggestion that the Court has "consistently" avoided bright-line rules for searches and seizures borders on the comic.

Anyone with the vaguest awareness of Fourth Amendment law knows it is full of bright-line rules. Homes may not be entered without a warrant except in an emergency,[115] cars may be searched without a warrant if there is probable cause,[116] warrantless arrests for felonies are permissible in public based on probable cause,[117] an arrested suspect may be searched without a warrant,[118] if a suspect is arrested in a car the interior of the car is automatically subject to search[119]—this hardly begins to exhaust the list. And it does not include two bright-line rules the Court invoked in *Robinette* itself—only a paragraph before proclaiming that reasonableness is simply a matter of "the totality of the circumstances."

The first of these rules led the Court to conclude there was "no question that, in light of the admitted probable cause to stop Robinette for speeding, [the officer] was objectively justified in asking Robinette to get out of the car."[120] The basis for this judgment was *Pennsylvania v Mimms*,[121] in which the Court had held "that once a motor vehicle has been lawfully detained for a ttaffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment's prohibition of unreasonable searches and seizures."[122] *Mimms*, of course, was the ruling the Court extended in *Maryland v Wilson* to apply to passen-

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567 (1988) (rejecting "bright-line" rule that any investigatory pursuit amounts to a seizure); *Florida v Royer*, 460 US 491 (1983) (declining to rule that "drug courier profile" alone cannot provide basis for investigatory stop); *Schneckloth v Bustamonte*, 412 US 218 (1973) (rejecting rule that valid consent to search can be given only by a suspect who knows that he or she has the right to refuse consent).

The Chief Justice could also have cited, for example, *United States v Sharpe*, 470 US 675 (1985) (refusing to create *per se* rule regarding how long an investigative detention justified only by reasonable suspicion may last). Were *Robinette* decided today, he could add *Richards v Wisconsin*, 117 S Ct 1416 (1997). See note 148.

[115] *Payton v New York*, 445 US 573 (1980).

[116] See, for example, *Pennsylvania v Labron*, 116 S Ct 2485 (1996); *California v Acevedo*, 500 US 565 (1991).

[117] See *United States v Watson*, 423 US 411 (1976).

[118] See *United States v Robinson*, 414 US 218 (1973).

[119] See *New York v Belton*, 453 US 454 (1981).

[120] 117 S Ct at 421.

[121] 434 US 106 (1977).

[122] Id at 111 n 6.

gers as well as the driver. Writing for the Court in *Wilson*, how did Chief Justice Rehnquist reconcile *Robinette* with the reaffirmation and expansion of *Mimms*? By sheer fiat. Certainly, the Chief Justice acknowledged, "we typically avoid *per se* rules concerning searches and seizures," but that "does not mean that we have always done so; *Mimms* itself drew a bright line, and we believe the principles that underlay that decision apply to passengers as well."[123] So much for consistent eschewal.

The second bright-line rule invoked by the Court in *Robinette* was less blatant than the *Mimms* rule, but it ultimately was no more consistent with the Court's purported commitment to open-ended assessments of reasonableness. Despite strong reason to believe that Robinette was not actually stopped to enforce the speed limit,[124] the Court had no trouble concluding that the fact that Robinette was speeding made his initial stop lawful. The Court reached that conclusion, of course, based on its ruling five months earlier in *Whren* that the subjective intentions of an officer making an objectively justifiable traffic stop are irrelevant. Even granting the wisdom of *Whren*, the decision on its face affirmatively *prohibits* an analysis of reasonableness of a search or seizure based on "all the circumstances surrounding the encounter."[125] It does so by cordoning off an entire category of "circumstances" that might ordinarily be thought pertinent to the reasonableness of an officer's actions, and making them irrelevant as a matter of law.[126]

One can try to put a good face on this by recasting "the totality of the circumstances" as "the totality of objective circumstances." The Court in *Robinette* did essentially that, explaining that "[r]easonableness . . . is measured in *objective* terms by examining the totality of the circumstances."[127] But this does not wash. Once we allow bright lines to circumscribe the factors that can be taken into account in determining reasonableness, it becomes harder to

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[123] 117 S Ct at 885 n 1. There was no sign in *Maryland v Wilson* that the Court was simply bowing to precedent, no sign that the Court felt bound by or in any way disagreed with its earlier decision in *Mimms*.

[124] See note 44.

[125] *Florida v Bostick*, 501 US 429, 439 (1991).

[126] Actually, the decision went further than that, declaring that "as 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." 116 S Ct at 1772. See also note 86.

[127] 117 S Ct at 421.

explain why we should not allow bright lines to mark off certain prohibited police behavior. It will no longer do to say simply that per se rules are "consistently eschewed," in "recognition of the 'endless variations in the facts and circumstances' implicating the Fourth Amendment."[128] Certain per se rules, including the major one set forth in *Whren* and the more minor one extended in *Wilson*, are found desirable; certain facts and circumstances are addressed in advance. There may be good grounds for distinguishing between the bright-line rules embraced in *Whren* and *Wilson* and the one rejected in *Robinette*, but the Court in *Robinette* did not even acknowledge the need to draw the distinction.

IV. Behind the New Consensus

What made the recent vehicle stop cases straightforward for the Court plainly was not the doctrinal inevitability of the results. What then explains the striking lack of discord? Can any common theme explain the Court's ease in deciding these cases? Setting *Ornelas* aside for the moment, what unites the other three cases is obvious. *Whren*, *Robinette*, and *Wilson* all gave significant latitude to law enforcement. In *Robinette* and *Wilson* this was the Court's stated intent: the Court explained in *Robinette* that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary,"[129] and, in *Wilson*, the Court focused heavily on the "weighty interest in officer safety."[130] And although there was no similar reference to law enforcement exigencies in *Whren*,[131] the Court's decision in that case obviously gave a large boost to law enforcement by allowing officers to use traffic violations to justify investigatory stops for any purpose whatsoever. Because almost everyone violates traffic rules sometimes, this means that the police, if they are patient, can eventually pull over anyone they are inter-

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[128] Id (quoting *Florida v Royer*, 460 US 491, 506 (1983)).

[129] 117 S Ct at 421.

[130] 117 S Ct at 885. See also id at 886.

[131] The practical concerns articulated in *Whren* had to do with justiciability, not policing. See *Whren*, 116 S Ct at 1775–77. See also *Wilson*, 117 S Ct at 890 (Kennedy dissenting) (justifying *Whren* on the ground that "[w]e could discern no other, workable rule").

ested in questioning; this is why traffic enforcement has been called "the general warrant of the twentieth century."[132] After *Robinette* and *Wilson* they can also order all the occupants out and question them without ever telling them they are free to leave.[133]

The consequences for everyday police practices are substantial. Even before *Robinette* and *Wilson*, "savvy police administrators" were "rediscover[ing] the value of traffic enforcement" as "an integral part of both criminal interdiction and community policing."[134] In Grand Prairie, Texas, for example, "traffic enforcement personnel" made 37% of all arrests in 1994, and only "slightly more than half the arrests made by the traffic officers were made for traffic-related offenses."[135] Nationwide, the Drug Enforcement Administration estimates that 40% of all drug arrests begin with a traffic stop.[136]

The Court in *Whren* plainly was not blind to the practical implications of the case for law enforcement. Part of the defendants' argument in *Whren* was precisely that driving today "is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible," and that "a police officer will almost invariably be able to catch any given motorist in a technical viola-

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[132] Salken, 62 Temple L Rev at 221 (cited in note 69). The trial judge in *Maryland v Wilson*, for example, noted that in his opinion "no one goes 55 m.p.h" on the stretch of Interstate 95 where the car in that case was pulled over for traveling 64 m.p.h. in a 55 m.p.h. zone. *State v Wilson*, No. 94 CR 01201 (Md Cir Ct Jan 10, 1995), aff'd, 664 A2d 1 (Md Ct Spec App 1995), rev'd, 117 S Ct 882 (1997). Similarly, statisticians observing cars on the New Jersey Turnpike in 1993 concluded that "virtually everyone on the Turnpike was driving faster than the speed limit." Joseph B. Kadane and Norma Terrin, *Missing Data in the Forensic Context* 3 (on file with author).

[133] Justice Kennedy drew attention to the combined effects of *Whren* and *Wilson* in his dissent from the latter ruling: "The practical effect of our ruling in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police." *Wilson*, 117 S Ct at 890 (Kennedy dissenting).

[134] Earl M. Sweeney, *Traffic Enforcement: New Uses for an Old Tool*, Police Chief 45 (July 1996). Sweeney directs the New Hampshire Police Standards and Training Council. His article stressed that "an alert police officer who 'looks beyond the traffic ticket' and uses the motor vehicle stop to 'sniff out' possible criminal behavior may be our most effective tool for interdicting criminals," and pointed out that "[in]any cities that are plagued by gang activity, illegal guns, open-air drug markets and drive-by shootings have discovered that saturating an area with traffic patrol shuts down these illegal operations." Id.

[135] Garrett Morford, J. Michael Sheeban, Jr., and Jack Stuster, *Traffic Enforcement's Role in the War on Crime*, Police Chief 48 (July 1996).

[136] Highway Safety Comm., Int'l Ass'n of Chiefs of Police, *Top 10 Lies in Traffic Enforcement*, Police Chief 30 (July 1997).

tion."[137] After describing this contention, Justice Scalia made no effort to dispute it, or even to cast it into doubt. Much as in *Robinette*, the Court appeared to concede the defendants' empirical claim, at least for the sake of argument, but treated the claim as irrelevant in applying the Fourth Amendment.

At first glance, *Ornelas* may appear to break this pattern of pro-government decisions. Ornelas and his co-defendant won in the Supreme Court, and the case was widely reported as a victory for criminal defendants.[138] But the matter is not so simple. It is revealing that the government in *Ornelas* joined the defendants in requesting reversal.[139] Moreover, the opinion on remand consisted of a single paragraph reaffirming the district court's findings and upholding the search.[140] The fact is, of course, that de novo review helps whichever side lost below, and government appeals of suppression orders are far from uncommon. And although rulings on suppression motions are challenged in appellate courts more often by the defense than by the prosecution, there are reasons to believe that *Ornelas* will wind up helping the government more than criminal defendants.

The first of these is the contradiction pointed out in dissent by Justice Scalia. Immediately after holding that determinations of probable cause and reasonable suspicion should generally receive de novo review, the Court in *Ornelas* "hasten[ed] to point out" that appellate courts "should take care . . . to give due weight to the inferences drawn . . . by resident judges and local law enforcement officers." This instruction is not simply inconsistent with true de novo review; it is inconsistent in a way that gives the prosecution a leg up. A deferential standard of review like "clear error,"

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[137] 116 S Ct at 1773.

[138] See, for example, Joan Biskupic, *Greater 4th Amendment Scrutiny Ordered*, Wash Post A12 (May 29, 1996) (noting the case "enhances the ability of defendants to challenge a conviction before an appeals court"); David G. Savage, *Supreme Court Orders Review of Police Search*, LA Times A16 (May 29, 1996) (describing the decision as "a rare victory for convicted drug dealers and other criminals"). But see Linda Greenhouse, *Supreme Court Roundup*, NY Times A14 (May 29, 1996) (pointing out that "the standard of appellate review is an issue that can cut in either direction").

[139] Because the United States agreed with the petitioners that determinations of probable cause and reasonable suspicion should be reviewed de novo, the Supreme Court was forced to appoint an amicus curiae to defend the judgment below. See *Ornelas*, 116 S Ct at 1661 n 4.

[140] *United States v Ornelas*, 93 F3d 1450, 1996 WL 508569 (7th Cir 1996).

the standard initially applied by the court of appeals in *Ornelas*, gives weight to the judgments of the trial court, but not to those of the officers involved in the case. By rejecting a "clear error" standard in favor of a "de novo with due weight" standard, the Court in effect declared that police officers should receive as much deference as trial judges. Taken as a whole, then, *Ornelas* may make appellate review of suppression rulings appreciably more hospitable to law enforcement.

Given the practicalities of criminal adjudication, moreover, *Ornelas* would likely help the prosecution more than the defense even without the language at the end about giving "due weight." For a range of familiar reasons, federal judges on average are more apt to sympathize with and to believe law enforcement witnesses than criminal defendants.[141] Far more often than not, federal judges find the inferences drawn and actions taken by law enforcement officers reasonable, and deny suppression motions challenging those inferences and actions. Decisions in the other direction are departures from the norm. Strictly as a statistical matter, therefore, one might expect it to be less likely for two out of three appellate judges to find a Fourth Amendment violation than for a single trial judge to do so.

None of this is spelled out in *Ornelas*, and there is no reason to believe it was the principal focus of the Court's concern. But it cannot entirely have escaped the Court's awareness that a "clear error" standard threatened to protect aberrational rulings suppressing key evidence in criminal cases. This is particularly so given the timing of the decision. Two months before *Ornelas* was argued, District Judge Harold Baer drew nationwide criticism for finding that police in Washington Heights lacked reasonable suspicion to stop a car that turned out to carry eighty pounds of cocaine and heroin.[142] Judge Baer reversed himself the week after the Court

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[141] See, for example, Paul Brest, *Who Decides?* 88 S Cal L Rev 661 (1985) (discussing the "demography of the judiciary"); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va L Rev 881, 912–13 (1991) (suggesting that "the character of the claimant in an exclusionary rule proceeding tends to exacerbate the bias that is naturally present in all after-the-fact proceedings").

[142] See *United States v Bayless*, 913 F Supp 232, vacated, 921 F Supp 211 (SDNY 1996); Don Van Natta, Jr., *Judge Finds Wit Tested by Criticism*, NY Times B1 (Feb 7, 1996). The police claimed their suspicions had been aroused when, among other things, four men threw a duffel bag in the trunk of the car and then, after noticing police officers watching them, ran away. 913 F Supp at 234–35. Judge Baer called the police testimony "at best suspect," id at 239, and commented, in the most controversial part of his ruling, that given the well-

heard argument in *Ornelas*[143]—but not before 150 members of the House of Representatives had petitioned President Clinton to request the judge's resignation,[144] and the White House had signaled receptivity.[145] The Court's consideration of *Ornelas* thus was vividly informed by the prospect of errant district judges sabotaging both the drug war and judicial independence by finding that the police lacked probable cause or reasonable suspicion.

For all these reasons, *Ornelas* is consistent with the pro-government pattern evident in *Whren*, *Robinette*, and *Wilson*.[146] Together, these decisions suggest that Fourth Amendment cases may have become easier for the Court because the justices now share a set of underlying understandings that are markedly more favorable to law enforcement than to criminal suspects, particularly those suspected of trafficking in narcotics.[147] The traffic stop cases are not

publicized police corruption in the neighborhood, "had the men not run when the cops began to stare at them, it would have been unusual," id at 242.

[143] See *United States v Bayless*, 921 F Supp 211 (SDNY 1996). Judge Baer based his second ruling on new evidence bolstering the credibility of the police officers involved in the stop and undermining the credibility of the defendant. Id at 213–16. He also lamented that "the hyperbole (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast majority of the dedicated men and women in blue who patrol the streets of our great City." Id at 217. The following month Judge Baer denied a defense motion for his recusal, but recused himself anyway to avoid "several unnecessary and otherwise avoidable problems and attendant delay." See *United States v Bayless*, 926 F Supp 405 (SDNY 1996).

[144] See John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, Wash Post A3 (Mar 1, 1996). Nor was the Senate silent. See, for example, 142 Cong Rec S539 (daily ed Jan 26, 1996) (remarks of Sen. Dole); id at S1162 (daily ed Feb 9, 1996) (remarks of Sen. Hatch); Van Natta, NY Times at B1 (reporting that Senator Moynihan, who had recommended Baer's appointment to the federal bench, now expressed regret for the endorsement).

[145] See Alison Mitchell, *Clinton Pressing Judge to Relent*, Wash Post A1 (Mar 22, 1996).

[146] *Ornelas* is also consistent with Carol Steiker's recent argument that the Burger and Rehnquist Courts have retreated from the Warren Court's approach to constitutional criminal procedure less by explicitly loosening the restrictions on police conduct than by limiting the extent to which violations of those restrictions result in the exclusion of evidence or reversals of convictions. See Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich L Rev 2466 (1996). *Whren*, *Robinette*, and *Wilson* fit Professor Steiker's thesis less well, but then she acknowledges that "the Court's Fourth Amendment police-conduct norms . . . have changed much more over the past twenty-five years than have its Fifth or Sixth Amendment norms." Id at 2503.

[147] Of course, the defendants in *Ornelas*, *Whren*, and *Robinette* were not just suspects: they had been convicted of narcotics offenses. Jerry Wilson had not been convicted, but that was only because the trial court suppressed the crack cocaine he dropped when stepping out of the car. The fact that the defendants in these cases were for all practical purposes proven criminals obviously undercut the visceral appeal of their Fourth Amendment claims; this is a familiar consequence of enforcing the Fourth Amendment through the exclusion of evidence in criminal prosecutions. See, for example, Amar, 107 Harv L Rev at 796, 799

the only evidence of this phenomenon. In seven of the ten Fourth Amendment cases decided in the last three terms, the Court ruled for the government.[148] The only exceptions were *Ornelas*, *Chandler v Miller*,[149] and *Wilson v Arkansas*.[150] *Chandler* was not a criminal case; it concerned the constitutionality of a Georgia statute imposing drug tests on candidates for a wide range of executive, legislative, and judicial offices[151]—a class of people with whom the Court could be expected to empathize. *Wilson v Arkansas was* a criminal case, but even more clearly than *Ornelas*, it was a government victory in all but name. The reasons for this are worth a brief detour, because *Wilson v Arkansas* both presaged the recent traffic stop cases and helps to explain them.

Sharlene Wilson challenged her narcotics convictions in part on the ground that much of the evidence against her had been found in a search of her home, and that the officers conducting the search, although armed with a warrant, had failed to knock and to announce their presence before entering. The Arkansas Supreme Court affirmed, finding "no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment."[152] In a unanimous opinion by Justice

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(cited in note 90); Stuntz, 77 Va L Rev at 912–13 (cited in note 141); John Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan L Rev 1027, 1036–39 (1974). But the exclusionary rule was not the entire explanation for the Court's pronounced sympathy for law enforcement in the traffic stop cases. The opinions in those cases make clear that the justices did not simply have more sympathy for law enforcement than for the particular defendants before the Court; they had more sympathy for law enforcement than for criminal suspects in general.

[148] In addition to *Whren*, *Robinette*, and *Wilson*, see *Richards v Wisconsin*, 117 S Ct 1416 (1997); *Pennsylvania v Labron*, 116 S Ct 2485 (1996); *Vernonia School District 47J v Acton*, 115 S Ct 2386 (1995); *Arizona v Evans*, 115 S Ct 1185 (1995). *Richards* rejected a "blanket" exception in felony drug cases to the "knock and announce" principle set forth in *Wilson v Arkansas*, 115 S Ct 1914 (1995), but held that under the circumstances before the Court the failure to knock and announce was reasonable. *Labron* reaffirmed the per se rule that automobiles may be searched without a warrant whenever there is probable cause to believe that contraband, criminal proceeds, or evidence will be found. For brief descriptions of *Acton* and *Evans*, see note 63.

[149] 117 S Ct 1295 (1997).

[150] 115 S Ct 1914 (1995).

[151] The state offices covered by the law were "the Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission." Ga Code Ann § 21-2-140(a)(4) (1987), quoted in *Chandler*, 117 S Ct at 1299.

[152] *Wilson v Arkansas*, 878 SW2d 755, 758 (1994), rev'd, 115 S Ct 1914 (1995).

Thomas, the Supreme Court reversed and remanded, holding that the traditional common law rule requiring officers to knock and announce "forms part of the reasonableness inquiry."[153]

But not too stringent a part: the Court held only that "*in some circumstances* an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."[154] Justice Thomas explained that "[t]he Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule," and that "although a search or seizure of a dwelling *might* be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry."[155] In particular, Justice Thomas noted with approval that English and American courts had upheld unannounced entry where there was "a threat of physical violence," where an arrested suspect escaped and fled into his house, or where officers had "reason to believe that evidence would likely be destroyed if advance warning were given."[156] The Court remanded for a determination whether such considerations provided "the necessary justification for the unannounced entry in this case."[157]

That amounted to little more than a formality. Affidavits and testimony presented to the trial court indicated that Wilson's housemate had convictions for arson and firebombing, and that Wilson herself had waved a semiautomatic pistol in the face of an informant, "threatening to kill her if she turned out to be working for the police."[158] In addition, the police argued plausibly that announcing their presence would have given Wilson and her housemate an opportunity to dispose of some or all of the narcotics evidence the police had hoped to find.[159] "These considerations," Justice Thomas noted, "may well" have justified the decision by the police to refrain from knocking.[160] No one who read the

[153] 115 US at 1915.

[154] Id at 1918 (emphasis added).

[155] Id at 1918–19 (emphasis added).

[156] Id.

[157] Id at 1919.

[158] Id at 1915.

[159] See id at 1919.

[160] Id.

Court's decision could seriously expect it to benefit Sharlene Wilson.[161]

Whom then did it benefit? What did *Wilson v Arkansas* accomplish? Not a meaningful expansion of Fourth Amendment protections. As in *Ornelas*, it is worth noticing the position taken by the United States. Arguing as *amicus curiae* in support of Arkansas, the Solicitor General's office asked the Court to hold "that the manner of entry in executing a search warrant is a component of the reasonableness analysis under the Fourth Amendment and that knock and announce is a component of that analysis"—precisely what the Court later held.[162] What the Court held, essentially, is that a "no knock" search is "unreasonable" under the Fourth Amendment when it is unreasonable not to knock. This is hardly a resounding blow for civil liberties.[163]

The greatest significance of *Wilson v Arkansas*, however, may lie not in its holding but in its reasoning. To support the Court's

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[161] In fact, the justification for failing to knock was never even litigated on remand, because the one-year sentence Wilson received on the count of conviction vacated by the Supreme Court ran concurrent with longer sentences imposed on counts unaffected by the legality of the search. Telephone Interview with John Wesley Hall, counsel for Sharlene Wilson (Sept 12, 1996); Telephone Interview with Kent Holt, Assistant Attorney General, State of Arkansas (Apr 18, 1997).

[162] Official Transcript, 1995 WL 243487, at *43 (argument of Michael R. Dreeben, Assistant to the Solicitor General). The United States suggested that a remand was unnecessary because the evidence before the trial court clearly established that dispensing with knock and announce was reasonable in this case. See id at *44.

[163] It could of course assist criminal defendants and constitutional tort plaintiffs in jurisdictions that previously thought that even an unreasonable failure to knock before entering could not violate the Fourth Amendment, but Arkansas itself may not have been such a jurisdiction. The Arkansas Supreme Court described Wilson's argument as asserting, based solely on *Miller v United States*, 357 US 301 (1958), "that the Fourth Amendment requires officers to knock and announce prior to entering the residence." The court noted, correctly, that *Miller* was a statutory case, involving 18 USC § 3109, which specifies when federal officers are allowed to break open doors, but has no application to state officers. The court further opined that there was "no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment," but it did not explain what it meant by "the knock and announce principle." Perhaps the Arkansas court meant to say what Justice Thomas took it to say: that a failure to knock, no matter how unreasonable, could never render a search unconstitutional. Just as likely, however, the court meant simply to reject a flat rule requiring prior announcement in all circumstances. Compare *Dodson v State*, 626 SW2d 624, 628 (Ark App) (holding that "[a]lthough the mere failure of police to announce their authority and purpose does not per se violate the constitution, it may influence whether the subsequent entry to arrest or search is constitutionally reasonable"); *United States v Nolan*, 718 F2d 589, 601–02 (3d Cir 1983) (suggesting that the Fourth Amendment does not impose "a knock and announce requirement with precise and narrowly defined exceptions," but that "a failure by police to knock and announce could, depending on the circumstances, violate the more general Fourth Amendment reasonableness requirement").

judgment that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering,"[164] Justice Thomas reviewed common law decisions dating from the early seventeenth century.[165] The purpose of this inquiry, he explained, was to determine whether "the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure";[166] he concluded that they did. Perhaps the most noteworthy fact about *Wilson v Arkansas* is that no justice objected to the suggestion that in assessing whether a search or seizure is "unreasonable," the Court should focus exclusively, or at least principally, on those factors deemed important at the time of the adoption of the Fourth Amendment.

This has broad consequence. Although the constitutional prohibition of "unreasonable" searches and seizures may be understood merely as shorthand for a bar against specific practices feared by the drafters,[167] the Fourth Amendment can also be viewed, and has more often been viewed, as banning searches and seizures that are "unreasonable" in light of "all the circumstances"—including circumstances that have changed since the adoption of the Bill of Rights.[168] The difference is important, because many things have

[164] 115 S Ct at 1916.

[165] See id at 1916–19.

[166] Id at 1918.

[167] See, for example, *Minnesota v Dickerson*, 508 US 366, 380 (1993) (suggesting that the Fourth Amendment aims "to preserve that degree of respect for privacy of persons and the inviolability of their property that existed when the provision was adopted").

[168] Indeed, as Peter Arenella has observed, the Supreme Court has seldom turned to the "Framers' intent" to resolve any of the central questions of Fourth Amendment jurisprudence: "Instead, the Court's fundamental interpretative strategy is to identify and balance the competing values implicated by this restraint on governmental power." Peter Arenella, *Fourth Amendment*, in Leonard Levy, Kenneth Karst, and Dennis Mahoney, eds, 2 *Encyclopedia of the American Constitution* 223 (Prentice-Hall, 1987). See also, for example, *Tennessee v Garner*, 471 US 1 (1985) (concluding that "sweeping change in the legal and technological context" renders the common law rule allowing deadly force against all fleeing felons no longer consistent with the Fourth Amendment); *Katz v United States*, 389 US 347, 352 (1967) (reasoning that the Fourth Amendment must be read in light of "the vital role that the public telephone has come to play in private communication"); Amsterdam, 58 Minn L Rev at 399 (cited in note 70) (calling implausible the supposition that the framers of the Fourth Amendment "meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evil suffered at the hands of a monarch beyond the seas").

Even those who have urged paying more attention to the intent underlying the Fourth Amendment generally have not suggested that "reasonableness" should depend only on

changed radically. In particular, we now have urban police forces that are professional and quasi-military, and inner cities that typically are impoverished and racially segregated.[169] These developments have suggested to some that the reasonableness of a search or seizure today may depend heavily on factors not widely thought important in the eighteenth century, such as any indications that the action was motivated by the suspect's race, or the extent to which, regardless of motivation, the action unnecessarily widens social divides.[170]

Wilson v Arkansas suggested that all this may be irrelevant under the Fourth Amendment. And much of what *Wilson v Arkansas* suggested, *Whren* made explicit. Part of the defendants' argument in *Whren* was that pretextual traffic stops are used disproportionately against black suspects; Whren and his co-defendant had themselves aroused suspicion, they suggested, largely because they were two young black men in a new sports utility vehicle.[171] Justice Scalia's answer for the Court was short and simple: "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[172]

I will suggest later that requiring all claims of racial unfairness to be brought under the Equal Protection Clause is in fact unwise,[173] but for now the important point is that this requirement heavily burdens those who raise such claims. The Supreme Court has construed the Equal Protection Clause to permit almost any government action that avoids explicit discrimination, unless it can

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those factors thought important in the eighteenth century. See, for example, Amar, 107 Harv L Rev at 800–11, 818 (cited in note 90) (arguing that the history and text of the Fourth Amendment call for a "broad and powerful" inquiry into the reasonableness of searches and seizures, including consideration of issues of race, class, and gender). In the terms made familiar by Ronald Dworkin, the Fourth Amendment has commonly been understood to embody a "concept," not a "conception." Ronald Dworkin, *Taking Rights Seriously* 134–37 (Harvard, 1977). Compare Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv L Rev 1, 63 (1955) (arguing that "an awareness on the part of [the] framers [of the Fourteenth Amendment] that it was *a constitution* they were writing . . . led to a choice of language open to growth").

[169] See Carol S. Steiker, *Second Thoughts about First Principles*, 107 Harv L Rev 820, 830–44 (1994); Amsterdam, 58 Minn L Rev at 401, 416 (cited in note 70).

[170] See, for example, Amar, 107 Harv L Rev at 808 (cited in note 90); Amsterdam, 58 Minn L Rev at 405–06 (cited in note 70).

[171] See note 38 and accompanying text.

[172] *Whren*, 116 S Ct at 1774.

[173] See notes 250–55 and accompanying text.

be shown to be based on outright hostility to a racial or ethnic group.[174] As a consequence, the Clause provides no protection against what is probably the most widespread cause today of discriminatory policing: unconscious bias on the part of generally well-intentioned officers.[175] And even when a police officer *does* act out of racial animus—pulling over a black motorist, for example, simply because the officer does not like blacks—*demonstrating* that typically proves impossible. Even the least imaginative officers almost always can find, or invent, racially neutral grounds for their suspicions.[176]

The Court's recent decisions on vehicle stops thus share three characteristics with the Court's recent Fourth Amendment cases more broadly: a lack of institutional discord, continued doctrinal inconsistency, and a pronounced pattern of ruling in favor of the government. The last of these offers an explanation for the first: the reason Fourth Amendment cases tend not to generate much conflict within the Court is not that Fourth Amendment law has become more coherent, but because the justices now share a set of underlying understandings that heavily favor law enforcement.

V. Minority Motorists and the Court

For judicial decisions to be guided by half-articulated understandings is hardly alarming, nor is it necessarily improper for

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[174] See, for example, *United States v Armstrong*, 116 S Ct 1480, 1486–87 (1996); *McCleskey v Kemp*, 481 US 279, 298 (1987).

[175] See, for example, Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 Cornell L Rev 1016 (1988); Kenneth L. Karst, *Foreword: Equal Citizenship Under the 14th Amendment*, 91 Harv L Rev 1, 51 (1977); Randall L. Kennedy, *McClesky v Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv L Rev 1388, 1419 (1988); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317 (1987).

[176] Sheri Johnson, among others, has noted the "amazing variety of behavior" that law enforcement agents have reported finding suspicious:

> Police have inferred an attempt to conceal both from a traffic violator's reach toward the dashboard or floor of a car, and from his alighting from his car and walking toward the police. [Narcotics] officers have inferred a desire to avoid detection both from a traveler's being the last passenger to get off a plane, and from his being the first. Immigration and Naturalization Service agents have argued both that it was suspicious that the occupants of a vehicle reacted nervously when a patrol car passed, and that it was suspicious that the occupants failed to look at the patrol car. Finally, the government has argued in a customs case that "excessive" calmness is suspicious.

Johnson, 93 Yale L J at 219–20 (cited in note 38).

the Court to give more weight to the interests of police officers than to the interests of criminal suspects and detained motorists. What makes the recent vehicle stop decisions troubling is not what is there but what is missing: a recognition that car stops and similar police actions may raise special concerns for Americans who are not white.

Once more it helps to return to *Whren*. The defendants in *Whren* argued that traffic stops, because of their great potential for abuse, require a kind of review that might not be necessary for other kinds of searches and seizures. Specifically, they argued that traffic stops should be deemed unreasonable if they deviate "materially from the usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given."[177] Writing for a unanimous Court, Justice Scalia found this proposal not only at odds with precedent, but also unworkable, for two separate reasons. First, as discussed earlier, he suggested that the requested inquiry simply could not be carried out; it amounted to a futile effort to "plumb the collective unconscious of law enforcement."[178] Second, Justice Scalia thought the limitation to traffic offenses arbitrary and ultimately unstable. He took no issue with the defendants' claim that vehicle codes were "so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop."[179] But what principle, he asked, would allow the Court "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"?[180] And even if such codes could be identified, "by what standard (or what right)" could the Court determine "which particular provisions are sufficiently important to merit enforcement"?[181]

There was a good deal of hyperbole here. Inquiring into the objective reasonableness of a traffic stop is not nearly so daunting as Justice Scalia suggested,[182] and a line between vehicle code en-

[177] *Whren*, 116 S Ct at 1774.

[178] Id at 1775. See text accompanying notes 75–76.

[179] Id at 1777.

[180] Id.

[181] Id.

[182] See notes 79–83 and accompanying text.

forcement and ordinary criminal enforcement would hardly be the fuzziest distinction drawn in criminal procedure—nor would it be entirely novel.[183] Still, Justice Scalia had grounds to fear that prohibiting pretextual traffic stops, either by inquiring into the actual motivations of the officers involved or by asking whether a reasonable officer would have made the stop, inevitably would embroil the Court in a potentially interminable job of line drawing. This has happened with the rule allowing warrantless searches incident to arrest,[184] with the rule allowing the warrantless search of automobiles,[185] and, more broadly, with the rule prohibiting warrantless searches except in "exceptional circumstances."[186] It has happened with the *Miranda* rule.[187] It has happened with the application of the Fourth Amendment to all intrusions into "reasonable expectations of privacy."[188] It has happened, in short, whenever the Court has determined that the Constitution requires judges to conduct an inquiry they previously had bypassed. It could hardly be avoided were the Court to announce that cars may be stopped for "vehicle code violations" only when "reasonable" in light of local circumstances and procedures. Doubtless there would be later cases, some of them difficult, about what counts as "vehicle code violations," and what should be taken into consideration for purposes of determining "reasonableness."[189]

[183] See *Berkemer v McCarty*, 468 US 420, 435 (1984) (holding that *Miranda* warnings are unnecessary before "roadside questioning of a motorist detained pursuant to a routine traffic stop").

[184] See, for example, *Maryland v Buie*, 494 US 325 (1990); *New York v Belton*, 453 US 454 (1981); *United States v Edwards*, 415 US 800 (1974); *Cupp v Murphy*, 412 US 291 (1973); *Chimel v California*, 395 US 752, 755–68 (1969) (reviewing cases).

[185] See, for example, *California v Acevedo*, 500 US 565, 569–79 (1991) (reviewing cases); *California v Carney*, 471 US 386 (1985).

[186] *Johnson v United States*, 333 US 10, 14 (1948). As Justice Scalia himself recently pointed out, the "exceptions to the warrant requirement are innumerable." Official Transcript, *Richards v Wisconsin*, 1997 WL 143822, at *8 (US Mar 24, 1997).

[187] *Miranda v Arizona*, 384 US 436 (1966). See, for example, *Davis v United States*, 512 US 452 (1994); *Minnick v Mississippi*, 498 US 146 (1990); *Illinois v Perkins*, 496 US 292 (1990); *Arizona v Roberson*, 486 US 675 (1988); *New York v Quarles*, 467 US 649 (1984); *Rhode Island v Innis*, 446 US 291 (1980); *Edwards v Arizona*, 451 US 477 (1981); *Michigan v Mosley*, 423 US 96 (1975).

[188] See, for example, *Minnesota v Olson*, 495 US 91 (1990); *Florida v Riley*, 488 US 445 (1989); *California v Greenwood*, 486 US 35, 41 (1988) (reviewing cases); id at 46–49 (Brennan dissenting) (same).

[189] Some of this had already happened in lower court decisions applying the "reasonable officer" test for pretextual traffic stops. There was confusion regarding the proper reference group for determining "reasonable" police conduct—the entire police force or the officer's unit?—and there was uncertainty regarding the relevance of the officer's own general prac-

The question, always, should be whether the costs of elaborating and applying a new rule are worth the benefits. This in turn requires an assessment of the need for the rule, and it is here that the *Whren* opinion is most strikingly deficient. Other than a dismissive reference to "the perceived 'danger' of the pretextual stop,"[190] and a suggestion that complaints about racial unfairness be left for the Equal Protection Clause, Justice Scalia has nothing to say about the concerns that have led many to conclude that, notwithstanding the jurisprudential difficulties, some sort of Fourth Amendment protection must be provided against pretextual traffic stops.

One reason the Court felt comfortable dismissing these concerns may have been that it viewed the burdens imposed by traffic stops as trifling.[191] *Maryland v Wilson*, for example, described ordering passengers out of the car as only a "minimal" additional intrusion.[192] "As a practical matter," Chief Justice Rehnquist explained for the majority, "the passengers are already stopped," and "[t]he only change in their circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car."[193] As Justice Stevens suggested in

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tices. See Levit, 28 Loyola U Chi L J at 178–80 (cited in note 81). Six months before *Whren*, the Tenth Circuit bad pointed to its own inconsistent answers to these questions as evidence that the test was "unworkable." *United States v Botero-Ospino*, 71 F3d 783, 786 (10th Cir 1995). See note 81. Of course, courts bave faced similar questions, and similar confusion, in applying the "reasonable person" standard in other contexts. How the new test could best be clarified is open to dispute. Professor Levit argues that the test should turn on "local practices" rather than "a particular officer's past history." Levit, 28 Loyola U Chi L J at 180. My own preference would be to allow consideration of any evidence bearing on the question whether a reasonable person in the officer's position, lacking any other purpose, would have stopped the motorist because of traffic violations; in some cases this would include the officer's own conduct, because what a reasonable person would do can be illuminated by what the officer in fact has done. The important point, though, is that the inconsistency and uncertainty created by the new test for pretext—the test the Supreme Court unanimously rejected out of hand in *Whren*—are the kind of inconsistency and uncertainty widely thought acceptable if not inevitable in the application of new legal rules. See generally S. F. C. Milsom, *Reason in the Development of the Common Law*, 81 Law Q Rev 496, 513 (1965) (concluding that case-by-case adjudication typically produces "great logical strength in detail and great overall disorder").

[190] 116 S Ct at 1774.

[191] Compare *United States v Martinez-Fuerte*, 428 US 543, 563 (1976) (approving selective referrals of motorists to secondary inspection at Border Patrol checkpoint away from the border, "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry," because "the intrusion here is sufficiently minimal that no particularized reason need to exist to justify it").

[192] 117 S Ct at 886.

[193] Id.

dissent, these remarks were consistent with the earlier suggestion of then-Justice Rehnquist that even random vehicle stops infringed on "only the most diaphanous of citizen interests."[194]

For many Americans, though, traffic stops are much more than occasional inconveniences. Blacks, in particular, tend to see such stops as a systematic, humiliating, and often frightening form of police harassment. What the *Whren* Court termed "the perceived 'danger' of the pretextual stop"[195] is almost universally described by African Americans as an everyday reality—the familiar roadside detention for "Driving While Black."[196] Although precise numbers

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[194] Id at 890 n 12 (Stevens dissenting) (quoting *Delaware v Prouse*, 440 US 648, 666 (Rehnquist dissenting)). Justice Stevens noted that although the burden imposed on passengers by ordering them out of cars "may well be 'minimal' in individual cases," it could be considered significant by "countless citizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands." 117 S Ct at 888 (Stevens dissenting). But even Justice Stevens wound up making the burden seem of only middling consequence. "Wholly innocent passengers," he argued, "have a constitutionally protected right to decide whether to remain comfortably seated within the vehicle rather than exposing themselves to the elements and to the observation of curious bystanders." Id at 889. Discomfort, inclement weather, and nosy onlookers are surely unpleasant, but a casual reader of the opinions in *Maryland v Wilson* could be excused for wondering what the fuss was about.

[195] 116 US at 1774.

[196] See, for example, 143 Cong Rec E 10 (daily ed Jan 7, 1997) (remarks of Rep. Conyers) (asserting "[t]here 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"); Michael A. Fletcher, *Driven to Extremes: Black Men Take Steps to Avoid Police Stops*, Wash Post A1 (Mar 29, 1996) (noting that "[m]any African American men suspect that police single them out for stops and searches" and that "many law-abiding black motorists . . . find themselves scheming to avoid the police"); Andrea Ford, *United by Anger*, LA Times B1 (Nov 6, 1996) (reporting that "black men ranging from everyday workers to prosperous professionals and celebrities agree . . . that police indiscriminately detain them because of . . . an unwritten traffic offense—DWB, Driving While Black"); Henry L. Gates, Jr., *Thirteen Ways of Looking at a Black Man*, New Yorker 59 (Oct 23, 1995) (explaining that "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black"); David A. Harris, *Driving While Black: Unequal Protection Under the Law*, Chi Tribune 19 (Mar 11, 1997) (noting that, when pulled over by police, "African-Americans in Illinois and around the country ask . . . 'Is this driving while black again?' "); Pat Schneider, *"A Lot Deeper Than a Ticket": Cop Stops Burn Black Drivers*, Capital Times (Madison, Wis) 1A (Oct 23, 1996) (describing reports of "common wisdom" among African Americans: "Don't get caught 'DWB'—Driving While Black").

Echoing the reports of many black male professionals, former Assistant Attorney General Deval Patrick has explained, "I still get stopped if I'm driving a nice car in the 'wrong' neighborhood." Deval Patrick, *Have Americans Forgotten Who They Are?* LA Times B5 (Sept 2, 1996). See also, for example, Christopher Darden, *In Contempt* 110 (Harper Collins, 1996) ("I always seem to get pulled over by some cop who is suspicious of a black man driving a Mercedes"); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 Ford U L J 621, 625 (1993) ("Most black professionals can recount at least one incident of being stopped, roughed up, questioned, or degraded by white police officers"); *Washington v Lambert*, 98 F3d 1181, 1182 (9th Cir 1996) (describing

are hard to come by, the few available empirical studies confirm what anecdotal evidence has long suggested: minority motorists are pulled over far more frequently than whites.[197]

And the experience of being pulled over is often distinctly different for minority motorists. Of course there is a "distinctive sense in which police discrimination injures citizens" all by itself, by sending a message of official hostility and suspicion.[198] But the difference goes beyond that. Los Angeles police, for example, "do not use the chokehold on middle-class white people, nor make them lie down on their faces in the pavement," but a "police officer told the Christopher Commission that the use of the prone-out technique in minority communities was 'pretty routine,' that police had been taught 'that aggression and force are the only things these people respond to.'"[199] Most incidents of police abuse go unreported, but the Los Angeles police repeatedly have been embarrassed by their treatment of black motorists who turn out to have ready access to the media. Last year the Court of Appeals for the Ninth Circuit summarized several of these incidents:

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detentions of innocent persons based largely on race as "all too familiar"). For additional accounts, see Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U Miami L Rev 425, 425, 438–40 (1997); David Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind L J 659, 679–81 (1994); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?* 26 Valp U L Rev 243, 251–53 (1991).

[197] In 1992, for example, reporters in Florida reviewed videotapes of more than 1,000 vehicle stops on Interstate 95. They found "almost 70 percent of the motorists stopped were black or Hispanic," and that "[m]ore than 80% of the cars that were searched were driven by blacks and Hispanics," despite the fact that "the vast majority of interstate drivers are white." Jeff Brazil and Steve Berry, *Color of Driver Is Key to Stops in I-95 Videos*, Orlando Sentinel Tribune A1 (Aug 23, 1992). Less than 1% of the drivers stopped received traffic tickets. See id. Similarly, a 1993 study concluded that 13.5% of cars on the New Jersey Turnpike had black occupants, but police records indicated that 46% of motorists stopped on the turnpike between April 1988 and May 1991 were black. See Robert D. McFadden, *Police Singled Out Black Drivers in Drug Crackdown, Judge Says*, NY Times A33 (Mar 10, 1996). An ACLU study in 1996 concluded that 17% of motorists on Interstate 95 in Maryland were black, although state police reported that blacks were 73% of the motorists stopped. See Kris Antonelli, *State Police Deny Searches Are Race-Based*, Baltimore Sun 18B (Nov 16, 1996); Davis, 51 U Miami L Rev at 441.

[198] *Developments*, 101 Harv L Rev at 1515 (cited in note 38). See also *United States v Martinez-Fuerte*, 428 US 543, 573 (1976) (Brennan dissenting) (warning that selective referral of Mexican American motorists for secondary inspection at immigration checkpoints inside the United States is likely to stir "deep resentment" because of "a sense of unfair discrimination"); *Memphis v Greene*, 451 US 100, 147 (1981) (Marshall dissenting) (noting that closing street in white neighborhood to principally black through-traffic injured black motorists in part by sending them "a clear, though sophisticated, message that because of their race, they are to stay out of the all-white enclave").

[199] Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* 45 (New Press, 1995).

> The police . . . erroneously stopped businessman and former Los Angeles Laker star Jamaal Wilkes in his car and handcuffed him, and stopped 1984 Olympic gold medalist Al Joyner twice in the space of twenty minutes, once forcing him out of his car, handcuffing him and making him lie spread-eagled on the ground at gunpoint. Similarly, actor Wesley Snipes was taken from his car at gunpoint, handcuffed, and forced to lie on the ground while a policeman kneeled on his neck and held a gun to his head. Actor Blair Underwood was also stopped in his car and detained at gunpoint. We do not know exactly how often this happens to African-American men and women who are not celebrities and whose brushes with the police are not deemed newsworthy.[200]

The problem is not confined to Los Angeles. Based on hearings held in six cities across the country, a 1995 study by the National Association for the Advancement of Colored People concluded that "[p]olice officers have increasingly come to rely on race as the primary indicator of both suspicious conduct and dangerousness,"[201] and that "[v]erbal abuse and harassment seem to occur almost every time a minority citizen is stopped by a police officer."[202] Understandably, blacks at all income levels feel differently than whites about encounters with the police. The NAACP found that law-abiding black parents "war[n] their children about the police," and that "[a]verage African-American families do not know whether they should call the police, stop for the police, or help the police—all for fear of becoming a target of police misconduct themselves."[203]

This should ring familiar. Police practices, including investigatory stops, topped the list of grievances the Kerner Commission

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[200] *Washington v Lambert*, 98 F3d 1181, 1182 n 1 (9th Cir 1996).

[201] Charles J. Ogletree et al, *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities* 23 (Northeastern, 1995).

[202] Id at 40. Representative Conyers has suggested that "this kind of harassment is even more serious than police brutality," because "no one hears about this, no one does anything about it." 143 Cong Rec E 10 (daily ed Jan 7, 1997).

[203] Ogletree et al, *Beyond the Rodney King Story* at 103. Survey data confirm the broad gulf between views of the police among whites and those among blacks and other minorities. When asked how much confidence they have in the police, 26% of blacks and 23% of racial minorities more broadly say "very little" or "none," compared to only 9% of whites. See US Dep't of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1995* 133 (GPO, 1996). Thirty-two percent of blacks and 30% of all nonwhites rate the honesty and ethical standards of police officers as "low" or "very low," compared to only 11% of whites. See id at 140.

concluded had led to the urban riots of 1967.[204] Three months after the Kerner Commission Report, when the Supreme Court laid down rules for brief investigatory detentions in *Terry v Ohio*,[205] the majority referred explicitly to "[t]he wholesale harassment by certain elements of the police community of which minority groups, particularly Negroes, frequently complain,"[206] and stressed that patdown searches "may inflict great indignity and arouse strong resentment."[207] The Court's awareness of those resentments doubtless contributed to its refusal to treat investigatory stops as negligible intrusions outside the scope of the Fourth Amendment. Writing for the majority, Chief Justice Warren labeled "simply fantastic" the suggestion that stopping and frisking a suspect—"while the citizen stands helpless, perhaps facing a wall with his hands raised"—amounts only to a "petty indignity."[208] The very term "stop and frisk," he wrote, was a "euphemis[m]"[209] for "a serious intrusion upon the sanctity of the person," which was "not to be undertaken lightly."[210]

How effectively *Terry* protected against this intrusion, and others like it, is a matter of dispute.[211] But at least the decision ex-

[204] *Report of the National Advisory Commission on Civil Disorders* 143–44, 302–04 (Dutton, 1968).

[205] 392 US 1 (1968).

[206] Id at 14.

[207] Id at 17.

[208] Id at 16–17. Few readers in 1968 needed to be told the race of the "citizen stand[ing] helpless, perhaps facing a wall with his hands raised," any more than pop music listeners in 1971 needed to be told the color of "frightened faces to the wall." Sly and the Family Stone, *Brave & Strong*, on *There's a Riot Goin' On* (Epic Records, 1971). See also Greil Marcus, *Mystery Train: Images of America in Rock 'n' Roll Music* 79 (Penguin, 3d ed 1990).

[209] 392 US at 10.

[210] Id at 11.

[211] The decision was a conscious compromise, refusing either to exempt investigatory stops from Fourth Amendment scrutiny or to subject them to the traditional requirement of a warrant issued by a judge or magistrate based on a showing of probable cause. Chief Justice Warren seemed aware that the intermediate requirements he imposed—reasonable suspicion of criminality for a stop, reasonable suspicion of danger for a frisk—left room for a large amount of abuse. Presumably that is why he prefaced his analysis by pointing out the limited usefulness of the exclusionary rule "where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Id at 14.

It was in this context that the Chief Justice mentioned the "wholesale harassment" of minority groups; such harassment, he pointed out, "will not be stopped by the exclusion of any evidence from any criminal trial." Id at 14–15. For a thoughtful argument that "the Warren Court's world-weary realism . . . was, in fact, highly unrealistic," see Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of Terry v Ohio*, 23 Fordham Urban L J 317, 325, 347–59 (1996). Schwartz also contends that the pessimism in *Terry*

pressly recognized the problem of police harassment, took note that the problem appeared particularly acute from the vantage point of black Americans, acknowledged the role that investigatory stops can play in patterns of police abuse—and kept these "difficult and troublesome" realities in mind when interpreting and applying the Fourth Amendment.[212] There is no sign of similar awareness in the recent vehicle stop decisions. That is a major reason these cases seemed easier than they should have to the Court.

VI. The Lost Subtext

Thus far I have argued that the Supreme Court's recent decisions regarding vehicle stops show a striking degree of consensus, that this consensus can be seen in the Court's recent Fourth Amendment cases more generally, that the consensus results less from doctrinal coherence than from a shared set of understandings, and that these understandings include not only a firm appreciation for the difficulties of law enforcement but also a sense that brief roadside detentions are relatively unintrusive and unproblematic. I also have suggested that car stops seem unintrusive and unproblematic to the Court in part because it tends to neglect the ways in which everyday life in America, including the experience of being pulled over by the police, remains strongly affected by race.

It is almost commonplace by now that much of the Court's criminal procedure jurisprudence during the middle part of this century was a form of race jurisprudence, prompted largely by the treatment of black suspects and black defendants in the South.[213] The Court's concern with race relations served as the unspoken subtext of many of its significant criminal procedure decisions; oc-

about the effectiveness of the exclusionary rule amounted to a determination that "facts about racial impact provide no reason for legal limits on police discretion to stop and frisk." See id at 346. I think this misreads the decision. The *Terry* Court made clear that where "overbearing or harassing" conduct by the police is identified, "it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." 392 US at 15. Moreover, as I have argued in the text, the view the majority took of investigatory stops seems to have been strongly influenced by its awareness of how these stops were experienced in minority neighborhoods.

[212] 392 US at 9.

[213] See, for example, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 Yale L J 1287, 1305–06 (1982); Steiker, 107 Harv L Rev at 841–44 (cited in note 169); A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich L Rev 249, 256 (1968).

casionally, as in *Terry*, the concern was made more explicit. The recent vehicle stop cases serve as a reminder that this theme has largely disappeared from Fourth Amendment law. Not only do these cases show little concern for the intangible, insidious damage done when minority motorists know, or suspect with good reason, that they are routinely stopped and hassled because of their race; they also display scant awareness of the evidence that more tangible forms of abuse are experienced far more commonly by minority motorists than by whites.

The disregard of racial problems in the Court's recent vehicle stop decisions obviously has implications for all of Fourth Amendment law, not just for the rules governing roadside detentions. I have already suggested one of those implications: the Court's willingness, signaled in *Wilson v Arkansas* and made explicit in *Whren*, to treat racial issues as essentially irrelevant to the determination of "reasonableness" under the Fourth Amendment. The broader ways in which insensitivity to minority and particularly black experience has stunted the development of Fourth Amendment law is beyond the scope of this essay and the subject of a growing body of scholarship.[214] Two aspects of the problem need mention, however, because both are illustrated by the recent vehicle stop cases.

The first is the almost exclusive emphasis modern Fourth Amendment law has placed on protecting a certain kind of privacy. For three decades now, the Court has understood the chief mission of the Fourth Amendment to be to guard against violations of "reasonable expectations of privacy."[215] By "privacy," the Court means, in essence, freedom from prying eyes and ears.[216] This understanding of the Amendment replaced, at least as a matter of form, an earlier view that had focussed more on the protection of property.[217] The change was understandable and on the whole beneficial, given advances in technology and the concerns raised

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[214] See, for example, Johnson, 73 Cornell L Rev at 1016 (cited in note 175); Maclin, 26 Valp U L Rev at 243 (cited in note 196); Schwartz, 23 Fordham Urban L J at 317 (cited in note 211); *Developments*, 101 Harv L Rev at 1500–20 (cited in note 38).

[215] *Alderman v United States*, 394 US 165, 179 n 11 (1969); *Terry v Ohio*, 392 US 1, 8 (1968); *Katz v United States*, 389 US 347, 360 (1967) (Harlan concurring).

[216] See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich L Rev 1016, 1020–24 (1995); *Robinette*, 117 S Ct at 425 (Stevens dissenting) (noting that even innocent motorists "have an interest in preserving the privacy of their vehicles and possessions from the prying eyes of a curious stranger").

[217] See, for example, Stuntz, 93 Mich L Rev at 1049–54.

in the 1960s and 1970s about widespread government snooping.[218]

As William Stuntz has recently reminded us, however, a focus on "informational privacy" tends to obscure the degree to which investigative procedures inflict injuries other than the disclosure of facts an individual wishes to keep secret.[219] As a consequence, the Court has underestimated the objections that might reasonably be made, for example, to a dog sniff search, finding this intrusion too slight to trigger Fourth Amendment protections.[220] As another consequence, decisions since 1968 have rarely paid as much attention as *Terry* to the humiliation and subjugation that can accompany investigatory detentions. This in turn makes it harder to see why roadside stops deserve much concern. As Professor Stuntz has noted, "car stops involve much less private disclosure" than house searches and electronic surveillance, but "they also involve other sorts of harm that may not be captured by the law's focus on informational privacy."[221]

Decisions such as *Whren*, *Robinette*, and *Maryland v Wilson* thus can be understood in part as the product of the Court's relative disregard of the ways in which searches and seizures can cause grievances unrelated to assaults on confidentiality. Because these other grievances by and large are the ones disproportionately suffered by blacks and members of other racial minorities, the focus on informational privacy can take some of the blame for the Court's insensitivity to race matters in the vehicle stop cases. But it works the other way, too. By failing to consider the special objections raised by nonwhites against traffic stops and other police actions, the Court has blinded itself to the most egregious shortcomings of a Fourth Amendment jurisprudence overwhelmingly focussed on the protection of confidentiality.

Insensitivity to the racial aspects of policing probably has contributed to another serious weakness of modern Fourth Amendment law: the Court's reliance on the fiction of consensual encounters with the police. Like the law of interrogations and confessions,

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[218] See, for example, Amsterdam, 58 Minn L Rev at 407–08 (cited in note 70).

[219] Stuntz, 93 Mich L Rev at 1021.

[220] See *United States v Place*, 462 US 696 (1983).

[221] Stuntz, 93 Mich L Rev at 1062.

Fourth Amendment law places considerable weight on the notion that there is such a thing as a wholly noncoercive encounter with a police officer, and that such encounters are the norm rather than the exception. Anyone who has ever been stopped by the police knows this is nonsense: every encounter with a uniformed officer necessarily involves some amount of apprehension, and hence some amount of psychological if not physical coercion. Nor is this state of affairs entirely regrettable; few of us would want to deprive the police of the ability to get people to do things they would prefer not to do. The key questions are how much and what kinds of coercion are appropriate, and under what circumstances.[222]

These are precisely the questions *not* asked in *Robinette*—or in the two earlier decisions on which it relied, *Schneckloth v Bustamonte*[223] and *Florida v Bostick*.[224] Analogizing to confession law, *Bustamonte* announced the Court's willingness to deem a search of a suspect's property "consensual," and hence automatically constitutional, as long as the suspect's agreement to the procedure was not "coerced, by explicit or implicit means, by implied threat or covert force."[225] As in the interrogation context, the Court made clear in *Bustamonte* that separating valid consent from invalid consent would, in practice, require balancing "competing concerns."[226] Also as in the interrogation context, the Court chose to clothe that balance in the fiction that some requests from police officers—the ones it would deem acceptable—are wholly free from any "implied threat" or "subtl[e] . . . coercion."[227] The Court made clear in

[222] Professor Stuntz has made much the same point: "The question should not be whether the officer had the suspect's permission to look at something. Permission will always be more fictive than real anyway. Rather, the question should be whether the officer's behavior was too coercive given the reason for the encounter." Stuntz, 93 Mich L Rev at 1064.

[223] 412 US 218 (1973).

[224] 501 US 429 (1991). Carol Steiker has plausibly characterized *Schneckloth* and *Bostick* as the modern Fourth Amendment decisions "that are most out of sync with the spirit (if not the letter) of the Warren Court's criminal procedure." See Steiker, 94 Mich L Rev at 2491 (cited in note 146).

[225] 412 US at 228.

[226] Id at 227. Compare *Moran v Burbine*, 475 US 412, 424 (1986) (explaining that the rules set forth in *Miranda v Arizona*, 384 US 436 (1966), strike "the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights").

[227] *Bustamonte*, 412 US at 228. Much of Chief Justice Warren's majority opinion in *Miranda v Arizona*, 384 US 436 (1966), was taken up with a detailed explication of how a suspect questioned in custody is "subjugate[d] . . . to the will of his examiner." Id at 457. Ultimately, however, *Miranda* suggested that "adequate protective devices"—notably the famous series of warnings—could entirely "dispel the compulsion inherent in custodial

Bustamonte just how seriously it was willing to treat this fiction by twice reciting the arresting officer's "uncontradicted testimony" that the roadside encounter leading to the search was "very congenial."[228]

What *Bustamonte* said for searches, *Bostick* said for investigatory questioning. Whether the police need justification for such questioning, the Court explained, depends on whether the encounter is "voluntary" and "consensual," and that depends on whether "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."[229] But as in *Bustamonte*, the very facts of the case before the Court made clear that the standard it announced was not to be taken too literally. Terrance Bostick was approached on board an intercity bus by two raid-jacketed narcotics officers, one carrying a pistol in a zipper pouch. This quite plainly is not a setting in which people can sensibly be expected to feel unpressured. By selectively invoking its principle against per se rules and rejecting the Florida Supreme Court's suggestion that bus interrogations of this kind are necessarily nonconsensual, the Court again served notice that prohibitions against police coercion should be applied with an eye toward practicality rather than linguistic precision.[230] It made clear, that is to say, that "consent"

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surroundings." Id at 458. Two decades later the Court made this explicit: "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Moran v Burbine*, 475 US 412, 427 (1986). The utter falsity of this assumption is readily apparent to anyone who has ever practiced criminal law—or for that matter watched an episode of *NYPD Blue*. The Court has also held that *Miranda* warnings need not be given before questioning at a routine traffic stop, because that setting does not impose pressures on a suspect "that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." *Berkemer v McCarty*, 468 US 420, 437 (1984).

[228] 412 US at 220–21.

[229] 501 US at 436.

[230] The point was underscored by the Court's response to the argument that the situation must have been coercive, because otherwise Bostick would never have agreed, as he ultimately did, to the search of his luggage, which turned out to contain cocaine. Writing for the majority, Justice O'Connor instructed the Florida Supreme Court to reject this argument on remand, "because the 'reasonable person' test presupposes an *innocent* person." 501 US at 438.

As a matter of logic, this made no sense; Bostick's argument was that his own behavior suggested most people in his situation, regardless whether they had anything hide, would feel pressure to cooperate. The real reason the Court could not accept Bostick's argument was that it proved too much: treat consenting against one's interest as evidence of coercion, and the whole fiction of "consent" becomes impossible to sustain.

and "voluntariness" are, in the context of constitutional criminal procedure, legal fictions.[231]

Robinette made this even clearer. The Court in that case dealt with motorists who have been pulled over by police officers and have not been told they are free to leave. It is fanciful to suppose that reasonable people in such circumstances will feel free from any implied threat or subtle coercion; as Justice Stevens suggested, these predictable effects are precisely why officers like Deputy Newsome bother to ask so often for consent.[232] Chief Justice Rehnquist's opinion for the Court disputed none of this, but nonetheless insisted that the voluntariness of any consent in such settings would have to be determined case by case, "from all the circumstances."[233] The Court explained that a more rigid rule, requiring police officers "to always inform detainees that they are free to go before a consent to search may be deemed voluntary," would be "unrealistic."[234]

Why unrealistic? Not, obviously, because it would be impossible or even difficult to administer. "Tell them they're free to go before you ask to search their cars" is not a complicated instruction. The rule is "unrealistic" only because it can be expected to reduce the number of drivers who consent to searches, by dispelling some, although certainly not all, of the coercion attendant to roadside detentions. Once again, the Court made clear that "consent" is to be defined practically rather than literally—in other words, that it is a fiction.

Fictions have their uses, and not all those uses are to be deplored. This is one of the central lessons of Lon Fuller's classic work on legal fictions.[235] It is well enough to say that the legality of police coercion must ultimately be a question of how much,

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[231] The Florida Supreme Court took the hint on remand and found the encounter in *Bostick* "consensual" and hence fully constitutional. See *Bostick v State*, 593 So2d 494 (Fla 1992).

[232] See 117 S Ct at 425 (Stevens dissenting). In *Ornelas* the supposition proved too fanciful even for the government, which "conceded . . . that when the officers approached petitioners in the parking lot, a reasonable person would not have felt free to leave." 116 S Ct at 1660. The concession seems sensible, although it is unclear what if anything made the encounter more coercive than a typical traffic stop.

[233] 117 S Ct at 421.

[234] Id.

[235] Lon Fuller, *Legal Fictions* (Stanford, 1967).

what type, and under what circumstances. But how should we begin to answer that question? One way is to proceed by use of a legal fiction: some sorts of coercion, we will say, are legally uncognizable; we will call decisions made under those kinds of coercion "uncoerced" and "voluntary." We know that these decisions really are not "uncoerced" and "voluntary" in the ordinary sense in which those words are used, but we will give the words a new meaning, in order to use them as a kind of shorthand. And not just any, arbitrary shorthand, but a shorthand with a useful resonance; for part of what we want to guide our determination whether to call a decision "uncoerced" and "voluntary" in the fictional, legal sense is how far the decision is from being *truly* uncoerced and voluntary.

This is fine so long as no one is fooled. But even Fuller stressed that "[a] fiction taken seriously, i.e., 'believed,' becomes dangerous and loses its utility."[236] A fiction is "wholly safe," he noted, only "when it is used with a complete consciousness of its falsity."[237] Unfortunately, the fiction of consent in criminal procedure is used by the Supreme Court with something far short of "a complete consciousness of its falsity." One consequence is that the fiction has made it easier for the Court to disregard the special fears and forms of intimidation that can lead nonwhites—like the defendants in *Bustamonte* and *Bostick*[238]—to agree to cooperate with the police. The pressures placed on these suspects, after all, are in a sense simply extreme variants of pressures felt by virtually everyone pulled over by the police, precisely the pressures that the fiction of consent instructs us to ignore.

Here, too, the causation likely runs both ways. While the fiction of consent may have made it easier for the Court to disregard the special circumstances of minority suspects, that disregard, in turn, probably has helped to sustain the fiction. Were the Court more attentive to the pressures routinely experienced by minority sus-

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[236] Id at 9–10.

[237] Id.

[238] Bustamonte and his companions appear to have been hispanic. See *Schneckloth v Bustamonte*, 412 US 218, 220 (1973). Terrance Bostick was black. Telephone interview with Kenneth P. Speiller, counsel for Terrance Bostick (Aug 19, 1994). For a provocative discussion of the significance of Bostick's race, see Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v Florida*, 67 Tulane L Rev 1979, 2022–43 (1993).

pects stopped by the police, it might find it more difficult to overlook the similar but less extreme pressures routinely experienced by all suspects.[239] It surely is no accident that when the Court invalidated consent granted after an assertion of authority to search, and proclaimed that "where there is coercion there cannot be consent," it did so in a case with racial aspects the Court expressly recognized.[240] In contrast, the Court took no notice of race in *Bustamonte* or *Bostick*, and this made the fiction of consent at least somewhat less fanciful and easier to defend in those cases—and consequently also in *Robinette*.[241]

VII. The Future of the Fourth Amendment

The Court's recent decisions about vehicle stops thus are part of a general pattern in Fourth Amendment cases of overlooking the special grievances of blacks and other racial minorities. Ignoring those grievances makes it easier for the Court to define "reasonableness" in a manner that largely excludes considerations of racial equity, to keep Fourth Amendment law focused principally on the protection of informational privacy, and to sustain the fiction that encounters with the police can be, and typically are, free of coercion. These features of Fourth Amendment law in turn make it easier for the Court to disregard the aspects of police conduct that most frequently give rise to minority complaints.

None of this might matter greatly if those complaints were addressed elsewhere. If, as the Court suggested in *Whren*, complaints about racial unfairness in police practices could safely be left to equal protection law, it might not be important to take them into account under the Fourth Amendment. Similarly, concerns about police harassment might properly be disregarded in formulating rules for vehicle stops if police abuse could adequately be con-

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[239] This is not to say that without the fiction of consent all such pressure would be deemed unlawful. Some investigative procedures currently sustained as "consensual" would doubtless still be allowed on the ground that they involve ouly "reasonable" coercion, or coercion so slight as to render the Fourth Amendment inapplicable—but probably not procedures the whole point of which is to take advantage of those ignorant of their rights.

[240] *Bumper v North Carolina*, 391 US 543, 550 (1968).

[241] Unlike Bustamonte and Bostick, Robert Robinette was white. Telephone interview with Carley J. Ingram, Assistant Prosecuting Attorney, Montgomery County, Ohio (Apr 16, 1997).

trolled through prohibitions of unjustified force and intentional humiliation. In both cases, Fourth Amendment restrictions on roadside detentions would seem a clumsy, roundabout way of addressing conduct—racial discrimination or police abuse—more sensibly controlled through direct prohibitions. Unfortunately, neither sort of direct prohibition is likely to prove effective.

Consider first the problem of harassment. A plausible argument can be made that if one is concerned with police abuse, and in particular with police violence and threats of police violence, one should address those concerns head-on, either through rnles regulating, for example, the use of force by law enforcement officers, or through a case-by-case application of the general Fourth Amendment prohibition of "unreasonable" searches and seizures. The Court has recognized that excessive force can make a search or seizure "unreasonable";[242] this reasoning could perhaps be extended to things like verbal harassment.

For several reasons, however, the problem of police abuse is unlikely to be solved by rules prohibiting specific forms of abuse. Part of the difficulty is administrative: it is too easy for officers who engage in harassment or unnecessary violence simply to deny it.[243] An equally important set of difficulties is institutional. Elected officials tend not to champion significant restrictions on law enforcement, because the victims of police abuse typically belong to groups with minimal political clout.[244] The judiciary, moreover, has shied away from detailed regulation of police officers' use of force, partly because it fears hampering law enforcement, and partly because rules of this kind inevitably involve the drawing of

[242] See *Graham v Connor*, 490 US 386 (1989); *Tennessee v Garner*, 471 US 1 (1985).

[243] It has grown more difficult in recent years because of the spread of video cameras—both those in the hands of bystanders, and those that a growing number of police departments install in their patrol cars. But cameras in patrol cars need to be turned on, and bystanders with video cameras are not always present.

[244] See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatnres Give a Damn About the Rights of the Accused?* 44 Syracuse L Rev 1079 (1993). The isolated exceptions tend to prove the rule. For example, when debating the Exclusionary Rule Reform Act of 1995, HR 666, 104th Cong, 1st Sess (1995), which purported to bar the exclusion in federal criminal case of any evidence obtained by a search or seizure "carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment," the House of Representatives approved amendments exempting searches and seizures carried out by the Internal Revenue Service and by the Bureau of Alcohol, Tobacco, and Firearms, but quickly and overwhelmingly rejected a similar amendment exempting searches and seizures carried out by the Immigration and Naturalization Service. See 141 Cong Rec H 1386–98 (daily ed Feb 8, 1995).

more or less arbitrary lines.[245] A final set of problems is procedural. The exclusionary rule works awkwardly to enforce rules against police harassment, because harassment typically does not lead to the discovery of evidence and is not intended to do so.[246] Victims of police harassment can file civil suits or administrative or criminal complaints, but these face a range of familiar obstacles,[247] and are particularly ineffective as a remedy for the kind of low-level harassment unlikely to result in large damage awards even when the plaintiffs prevail.[248]

It therefore remains important for courts to impose sensible restrictions on when officers may pull over a car, what they may require occupants to do once the car is pulled over, and when and

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[245] These concerns led Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, to dissent even from the Court's ruling in *Tennessee v Garner*, 471 US 1 (1985), imposing Fourth Amendment restrictions on the use of deadly force against fleeing felons. See id at 22–33 (1985) (O'Connor dissenting).

[246] See Stuntz, 93 Mich L Rev at 1072 (cited in note 216). While acknowledging that suppression is better suited "to rules about evidence gathering" than to "regulating police violence," Professor Stuntz suggests that "the causal connection between the police misconduct and finding the evidence is convenient, but it need not be crucial." See id. But given the controversy already generated by the suppression of evidence that would not have been discovered but for police illegality, it seems unlikely that courts or legislatures will expand the rule to exclude evidence that would have been discovered in any event. Indeed, the trend in the caselaw is in the other direction. See *Nix v Williams*, 467 US 431, 444 (1984) (holding that even illegally obtained evidence is admissible if it "ultimately or inevitably would have been discovered by lawful means"); *New York v Harris*, 495 US 14, 21 (1990) (holding that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of [*Payton v New York*, 445 US 573 (1980)]").

[247] See, for example, Amsterdam, 58 Minn L Rev at 429–30 (cited in note 70); *Developments*, 101 Harv L Rev at 1497 n 19 (cited in note 38). The "obvious futility of relegating the Fourth Amendment to the protection of other remedies" was at the heart of the Supreme Court's decision to extend the exclusionary rule to state criminal cases. *Mapp v Ohio*, 367 US 643, 653 (1961). Despite perennial calls for "refurbishing the traditional civil-enforcement model," Amar, 107 Harv L Rev at 811 (cited in note 90), the futility remains obvious. The central difficulty is that truly effective civil remedies overdeter if levied against individual officers, see Peter H. Schuck, *Suing Government* 71–73 (Yale, 1983); Stuntz, 93 Mich L Rev at 1073 n 203 (cited in note 216), and have proven too expensive either for the public to assume voluntarily, or for the courts to impose on the public, see, for example, *Monell v Dep't of Social Servs*, 436 US 658 (1978) (holding that municipalities are liable under USC § 1983 only for civil rights violations resulting from official policy), followed in *Board of County Comm'rs v Brown*, 117 S Ct 1382 (1997) (holding municipality not liable for excessive force employed by officer hired in negligent disregard of his history of violence).

[248] This last problem would be less important, obviously, had the Court's standing decisions not put injunctions beyond the reach of most plaintiffs alleging police misconduct. See *City of Los Angeles v Lyons*, 461 US 95 (1983); *Rizzo v Goode*, 423 US 362 (1976); *O'Shea v Littleton*, 414 US 488 (1974).

how the detention must terminate. Much as restricting the opportunities for crime is a critical component of any meaningful effort to control crime, so restricting the opportunities for police harassment is a critical component of any meaningful effort to minimize harassment. And, of course, if the judiciary chooses *not* to restrict these opportunities, it should at the very least avoid "whitewashing" reality in a way that tells some Americans their experiences do not count, and that "conveys the wrong message to other officials who could potentially provide alternative remedial responses."[249]

A related point can be made about equal protection. In theory there is no problem with relying on the Equal Protection Clause to protect against racial unfairness in law enforcement. The problem is that equal protection doctrine, precisely because it attempts to address all constitutional claims of inequity, has developed in ways that poorly equip it to address the problems of discriminatory police conduct. Equal protection doctrine treats claims of inequitable policing the same as any other claim of inequity; it gives no recognition to the special reasons to insist on evenhanded law enforcement,[250] or to the distinctive concerns with arbitrariness underlying the Fourth Amendment.[251] As a result, challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of the police. For reasons discussed earlier, this amounts to saying that they will almost always fail.[252]

Unless and until equal protection law become more attentive to the factual contexts giving rise to claims of unfairness, it thus will remain of limited help to the victims of police discrimination. In the meantime, the "reasonableness" requirement of the Fourth Amendment, particularly when coupled with the aim of the Amendment's framers to protect against the arbitrary exercise of

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[249] Kennedy, 101 Harv L Rev at 1416 (cited in note 175).

[250] See, for example, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan L Rev 1283, 1309–11, 1316 (1995). As the Supreme Court itself has recognized, apparent inequity within the criminal justice system does more than deny the victim, in the most basic sense, equal protection of the law, it also powerfully undermines "public confidence in the fairness of our system of justice," and can seriously exacerbate racial divisions. *Batson v Kentucky*, 476 US 79, 87–88 (1986). See also *Rose v Mitchell*, 443 US 545, 555 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice"); notes 203–07 and accompanying text.

[251] See notes 69–70 and accompanying text.

[252] See notes 175–76 and accompanying text.

power by officers in the field, could and should provide a strong alternative basis for addressing a particular form of inequality: discretionary law enforcement practices that "unreasonably" burden blacks and members of other racial minorities.

To be sure, Fourth Amendment inquiries of this kind would theoretically duplicate those under the Equal Protection Clause, and might generate results inconsistent with those reached under equal protection analysis. But there is nothing new in the suggestion that equality is the proper concern of more than one provision of the Constitution,[253] and for reasons I have addressed at greater length elsewhere,[254] a little messiness in legal doctrines aimed at securing equitable treatment can be a good thing. Because the Fourth Amendment is narrowly focused on searches and seizures, it could provide an opportunity to develop specialized doctrines of equality that, if they proved workable and successful, could later be considered for wider application under the Equal Protection Clause. And regardless of whether this kind of cross-fertilization would ultimately prove beneficial for equal protection law, it certainly would allow the courts to confront the problem of discriminatory policing without the need to devise doctrines that could also be applied to utility rates and bus fares.[255]

I am not suggesting that the Constitution should restrict searches and seizures of minority suspects more stringently than those of whites. There may be something to be said for bringing affirmative action of this kind to Fourth Amendment doctrine, particularly as a way to combat conscious or unconscious bias on the part of police, prosecutors, and judges. But separate Fourth Amendment rules for minority suspects probably would offend most Americans' sense of justice, far more than affirmative action

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[253] See generally Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (Yale, 1989). Regarding, for example, the role of equality in freedom of speech, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U Chi L Rev 20 (1975); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 201–07, 247–48 (1983).

[254] See Sklansky, 47 Stan L Rev at 1312–15, 1320–22 (cited in note 250).

[255] The Eighth Amendment ban on "cruel and unusual punishments" offers a similar opportunity for a context-specific exploration of equitable treatment. To date, unfortunately, the Supreme Court has largely passed up this opportunity as well. See *Harmelin v Michigan*, 501 US 957 (1991) (finding proportionality of prison sentences largely irrelevant under the Eighth Amendment); *McCleskey v Kemp*, 481 US 279, 312–21 (1987) (concluding that racial disparities in the application of the death penalty do not violate the Eighth Amendment).

in employment decisions and academic admissions, because of the widespread feeling, which I share, that individualized fairness is especially important in the criminal justice system.[256] Then, too, the administrative difficulties of an affirmative-action Fourth Amendment, both for the police and for the courts, could easily make the rules rejected as unworkable in *Whren* and *Robinette* seem like child's play by comparison.

Nor am I arguing that the Fourth Amendment should automatically impose some form of heightened scrutiny on any practices shown disproportionately to disadvantage blacks or other members of other racial minorities. This approach has some attraction, for the same reason it has some appeal as a proposed rule of equal protection: democratic processes tend to provide less reliable protection against unfair burdens when those burdens fall disproportionately on members of a traditionally disempowered minority.[257] But the principal drawback to disparate impact as a trigger for heightened equal protection review—overinclusiveness—weighs even more heavily against its categorical use in search and seizure law. Because minority neighborhoods tend to be poorer and more crime-ridden, *most* police practices disproportionately burden minority suspects. For the same reason, however, minorities as a whole are disproportionately burdened by crime itself, and therefore might not benefit from an across-the-board tightening of Fourth Amendment rules.

What the recent vehicle stop cases suggest that Fourth Amendment law needs is not a special rule to protect minority groups, but more attention to the special concerns of minority groups in the formulation and application of all Fourth Amendment rules. Precisely what rules such attention would generate is uncertain, but with regard to traffic stops, we can make some reasonable conjectures.

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[256] There obviously are limits to this sentiment. In different ways, both the exclusionary rule and the recent trend toward fixed, mandatory sentences may reflect a willingness to sacrifice some degree of individualized fairness in the interest of improving criminal justice overall. Significantly, though, both these compromises have been supported in part by appeals to individualized justice, and neither has been promoted as means for redressing inequalities between groups.

[257] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 135–79 (Harvard, 1980); Sklansky, 47 Stan L Rev at 1298–99, 1307–08 (cited in note 250). Regarding the implications of this phenomenon for free speech law, see Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U Chi L Rev 46, 72–77 (1987).

To begin with, a Fourth Amendment jurisprudence more alert to minority interests and experiences probably would find room for a rule disallowing pretextual detentions for traffic violations: the burdens the rule placed on the judiciary would be outweighed by the need to minimize the opportunities for arbitrary and discriminatory police harassment. It might also accommodate a "first-tell-then-ask" rule, because it likely would *not* indulge the fiction of consensual encounters with the police: the benefit the fiction provides to the judiciary would be outweighed by the abuses it helps to mask. In the interest of officer safety and judicial economy, a more minority-sensitive law of search and seizure might still declare flatly that the police may order passengers out of any lawfully stopped car. But it would do so only after full consideration and frank acknowledgement of the fear and humiliation that orders of this kind can cause, particnlarly when made selectively on the basis of race.

The "touchstone" of the Fourth Amendment, the Court keeps repeating, "is reasonableness,"[258] and reasonableness must be assessed under "all the circumstances."[259] Like many cliches, this one is worth heeding. What is most troubling about the recent vehicle stop decisions are "all the circumstances"—including the continuing and destructive role of race in American policing, the injuries other than forced disclosures suffered at roadside detentions, and the shortcomings of direct restrictions on police abuse and generalized guarantees of equality—that the Supreme Court overlooked.

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[258] *Ohio v Robinette*, 117 S Ct at 421; *Florida v Jimeno*, 500 US 248, 250 (1991); *Pennsylvania v Mimms*, 434 US 106, 108–09 (1977); *Terry v Ohio*, 392 US 1, 19 (1968).

[259] *Maryland v Wilson*, 117 S Ct at 884. See also *Robinette*, 117 S Ct at 421; *Whren*, 116 S Ct at 1776; *Ornelas v United States*, 116 S Ct at 1661.

Race as Biology Is Fiction, Racism as a Social Problem Is Real

Anthropological and Historical Perspectives on the Social Construction of Race

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Racialized science seeks to explain human population differences in health, intelligence, education, and wealth as the consequence of immutable, biologically based differences between "racial" groups. Recent advances in the sequencing of the human genome and in an understanding of biological correlates of behavior have fueled racialized science, despite evidence that racial groups are not genetically discrete, reliably measured, or scientifically meaningful. Yet even these counterarguments often fail to take into account the origin and history of the idea of race. This article reviews the origins of the concept of race, placing the contemporary discussion of racial differences in an anthropological and historical context.

Psychological science has a long and controversial history of involvement in efforts to measure and explain human variation and population differences. Psychologists such as Jensen (1974), Herrnstein (Herrnstein & Murray, 1996), and more recently, Rushton (1995) and Rowe (Rowe, 2002; Rowe & Cleveland, 1996) have advanced the argument that racial group variation on measures such as intelligence tests reflects genetically determined differences in group ability that cannot be explained by differences in environmental living conditions or socioeconomic differences. These psychologists have generally concluded that Africans and African descendants are intellectually inferior to Europeans and European descendants, who in turn are assigned (in more recent work) to a lower intellectual status than Asian populations and their descendants (Rushton, 1995). Although these arguments have been vigorously debated and the influence of "racial" science has been stronger at some times than at others, some scholars interested in racial distinctions have found new grist for the racial differences mill, as geneticists have made important advances in sequencing the human genome (Crow, 2002).

Less prominent in this debate has been a discussion of what is meant by racial groups and whether such groups are, in fact, discrete, measurable, and scientifically meaningful. The consensus among most scholars in fields such as evolutionary biology, anthropology, and other disciplines is that racial distinctions fail on all three counts—that is, they are not genetically discrete, are not reliably measured, and are not scientifically meaningful.[1] Yet even these counterarguments often fail to take into account the origin and history of the idea of "race." This history is significant because it demonstrates that race is a fairly recent construct, one that emerged well after population groups from different continents came into contact with one another. In this article we examine the origins of the concept of race, placing the contemporary discussion of racial differences in an anthropological and historical context. Our aim is not to review the psychological literature regarding the construction of race but to bring anthropological and historical perspectives to the study of race.

In many multiracial nations such as the United States, there are profound and stubbornly persistent racial and ethnic differences in socioeconomic status, educational and occupational status, wealth, political power, and the like. Whether and how governments respond to these disparities should rest on the best available interdisciplinary scientific information. Racialized science—with its conclusion that immutable differences between racial groups underlie social and economic racial hegemony—requires a very different response from government than scientific perspec-

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[1] See the statements of the American Anthropological Association (1998) and the American Association of Physical Anthropologists (1996). Among the many anthropologists who have written on this topic, see Brace, 2003; Cartmill, 1998; Cavalli-Sforza, 1995; Graves, 2001, 2004; Harrison, 1995; Lewontin, 1995; Littlefield et al., 1982; Marks, 1995; Shanklin, 1994; A. Smedley, 1999b, 2002b; and Templeton, 2002.

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tives that place race in a social and historical context. We therefore conclude this article with a discussion of the public policy implications of racialized science.

Anthropological and Historical Perspectives on Ethnicity, Culture, and Race

Ethnicity and Culture

Anthropologists have an understanding of the term *culture* that differs from popular and other scholarly usage of the term (see Harris, 1968; Rapport & Overing, 2000). Every introductory textbook today contains the definition of culture first proposed by E. B. Tylor in 1871 or some variation of it. "Culture," he wrote, "is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capability and habits acquired by man as a member of society" (Tylor, 1871/1958, p. 1). Today, authors substitute *humankind* for *man* and often add a significant phrase, "and based upon the human ability to symbol," that is, the human ability to invent meanings and to act as if they are real or true (Carneiro, 2003; Harris, 1979; White, 1949; White & Dillingham, 1973). Anthropologists concur with cognitive psychologists that "symbolic representation is the principal cognitive signature of humans" (Donald, 1997, p. 737) that makes possible the enormous creativity of cultural phenomena (for exploration of the culture concept, see Harris, 1968, 1999; Stocking, 1968).

What is common to most anthropological conceptions of culture is the contention that culture is external, acquired, and transmissible to others.[2] They do not treat culture as a part of the innate biological equipment of humans (Harris, 1999). It is studied as extrasomatic, socially acquired traditions of thought and behavior and includes patterned, repetitive ways of thinking, acting, and feeling, as well as all arenas of creativity and invention (Harris, 1999). Humans, as individuals or groups, are not born with propensities for any particular culture, culture traits, or language, only with the *capacity* to acquire and to create culture (Harris, 1999; Marks, 1995). It is largely the human capacity for language that enables individuals to transmit culture traits from one person or group to another (see, e.g., Boas, 1940; Harris, 1999; Lewontin, 1995). But as both psychologists and anthropologist understand, language is not the only way by which an individual acquires or achieves cultural information.[3]

Thus, for heuristic purposes, anthropologists do not operate with the assumption of innate biological causes for any social (or economic, religious, political, etc.) behavior. They argue that culture traits—that is, human behavior—can best be understood in terms of other culture phenomena, not as products of some variable biogenetic reality as yet unproved (for a contemporary view of culture, see Harris, 1999, Pt. 2, or Peoples & Garrick, 2000). The evidence from history and the study of thousands of diverse cultures around the world are testament to the overwhelming and coercive power of culture to mold who we are and what we believe (Harris, 1999; Kaplan & Manners, 1972; Rapport & Overing, 2000).

Ethnicity and culture are related phenomena and bear no intrinsic connection to human biological variations or race. Ethnicity refers to clusters of people who have common culture traits that they distinguish from those of other people. People who share a common language, geographic locale or place of origin, religion, sense of history, traditions, values, beliefs, food habits, and so forth, are perceived, and view themselves as constituting, an ethnic group (see, e.g., Jones, 1997; Parrillo, 1997; A. Smedley, 1999b; Steinberg, 1989; Takaki, 1993). But ethnic groups and ethnicity are not fixed, bounded entities; they are open, flexible, and subject to change, and they are usually self-defined (Barth, 1998). Because culture traits are learned, ethnicity or ethnic traits are transmissible to other people—sometimes easily so, such as the widespread adoption of western dress (jeans and tee shirts) found all over the world, and the contemporary manifestation of industrial

[2] The anthropologist most associated with the theory of culture as separate from human biology, occupying a realm of its own, and capable of being studied independently of human physical characteristics was Leslie White (White, 1949). A large body of literature today deals with one of the major issues of cultural studies, the evolution of cultures, and the mechanisms by which cultures change (see Carneiro, 2003; Harris, 1999).

[3] This perspective appears to contradict the work of those in developmental psychology who argue for a complex process by which a child construes cultural meanings, so that culture is not totally identified as a learned phenomenon (Harkness, Raeff, & Super, 2000). A perspective that looks at individuals and cognitive processes may well see considerable variation. Social and cultural anthropologists are concerned with continuity and the replication of cultural features, values, beliefs, institutions, and so forth, over time. Such different approaches may not be as incompatible as they appear at first.

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culture globally. History shows that people can and do learn another language and/or move into another ethnic group and become participants in that ethnicity (A. Smedley, 1999a; Takaki, 1993).

Ethnic differences also constitute an arena of diverse interests that can lead to conflict, but this should not be confused with what in contemporary times is referred to as "racial" conflict. Ethnocentrism (belief in the superiority of one's own culture and lifestyle) and ethnic conflict are widespread and often have deep historical roots, but this is not to say that they are universal or inevitable. Ethnocentric beliefs and attitudes, because they are cultural phenomena, can and do change, sometimes rapidly (Omi & Winant, 1994; A. Smedley, 1999a). Some of the ethnocentrism seen today is mild, such as the enmity between the French and the English, or Canadians and the United States, or even sports teams from different nations.[4] However, the kind of ethnocentrism that most attracts attention, and which scholars have long studied, has often been vehement and malignant, leading to enduring conflicts. In circumstances of extreme conflict, such as warfare, ethnic groups have demonized one another, creating hate-filled images of "the Other," even to the point of posing the argument that the other ethnic group is less than human (Fredrickson, 2002; Jones, 1997; Omi & Winant, 1994; A. Smedley 1999a, 1999b).

The most significant thing about interethnic conflict is that the vast majority of such conflicts have been, and still are, with neighboring groups—people who inhabit the same general environment and who virtually always share physical similarities, as, for example, the English and the Irish, Serbians and Croatians, Indians and Pakistanis, Armenians and Turks, Japanese and Koreans. Until recently such conflict has not been perceived as being racial. Numerous wars, historical and contemporary, around the globe, including both world wars, attest to the reality of ethnic conflict as primarily a local phenomenon (Barth, 1998; A. Smedley, 1999b). Thus, most human conflicts have not been racial, and there is no reason for antagonism to exist or persist simply because protagonists are identified as racially different.

Historical Perspectives on Human Variation

With the rise of empires, language and other cultural features were expanded territorially to encompass populations in more remote geographical areas. With the addition of distance, conquering armies encountered peoples who were physically as well as culturally different. Ancient empires tended to incorporate these peoples into their polities, regardless of their physical variations.[5] The empires of the ancient world—the Egyptian, Greek, and Roman empires, and later the Muslim empire, with its center at Baghdad—encompassed peoples whose skin colors, hair textures, and facial features were highly varied, representing the same range of physical diversity that is seen in the "Old World" today—Africans, Europeans, Middle Easterners, and Asians (see Blakely, 1993; Boardman, Griffin, & Murray, 1986; Cavalli-Sforza, 1995; Fryer, 1984; Godolphin, 1942; Hitti, 1953; Hourani, 1991; Snowden, 1983). History shows that Africans in Europe were assimilated into those societies wherever they were found, and no significant social meanings were attached to their physical differences.[6] Throughout the Middle Ages and up until the 17th century, religion and language were the most important criteria of identity (Hannaford, 1996).

It follows from this brief account of historical facts that physical characteristics should never be included in a *definition* of ethnic identity. It is inaccurate to associate physical features with any specific cultural identity. This is particularly true in modern times, when individuals may have physical traits associated with one region of the world but may manifest very different cultures or ethnic identities. Immigration, intermating, intermarriage, and reproduction have led to increasing physical heterogeneity of peoples in many areas of the world. Africans and East Indians in England learn the English of the British Broadcasing Company and participate fully in English culture. Five hundred years ago, Africans, natives of South and Central America, and Spanish or Portuguese people in the New World began to merge or assimilate (both biologically

[4] International soccer and baseball come to mind. More recently, the rivalries of Olympic teams are good examples of the milder forms of ethnocentrism.

[5] Geneticists have pointed out that continual intermating among human groups has been a primary reason why all humans today are members of a common species (Cavalli-Sforza, 1995).

[6] See Blakey, 1993; Fryer, 1984; A. Smedley 1999a; Snowden, 1983. Among many well-known Europeans of African ancestry, Alessandro de Medici, appointed by his father as the first duke of Florence, Italy, was the son of the man who became Pope Clement VII and his African mistress (see http://members.aol.com/eurostamm/medici.html)

and culturally) and create new ethnic identities. Their descendants today, whether they are called Latinos or Hispanics, represent intricate and complex new mixtures of biogenetic or physical features, but they also have many cultural similarities in language and religion (Degler, 1971; Morner, 1967). As we discuss later, the concept of race that characterizes North American society carries with it the notion that each race has its own forms of social or cultural behavior. This is not borne out by anthropological and historical studies but is part of the myths connected to the ideology of race (see below).

Many historians and sociologists have recognized that race and racism are not "mere ethnocentric dislike and distrust of the Other" (Fredrickson, 2002, p. 5). Steinberg (1989) made a clear distinction between racism and ethnocentrism. In speaking of the differences in America between European immigrant minorities early in the 20th century and racial groups, he pointed out that immigrants were "disparaged for their cultural peculiarities," and they were discriminated against, but the message conveyed by the nation to them was, "You will become like us whether you want to or not." Assimilation was necessary and expected. With the low-status racial groups, the message was, "No matter how much like us you are, you will remain apart" (Steinberg, 1989, p. 42). Ethnicity was recognized as plastic and transmissible, but race conveyed the notion of differences that could not be transcended.

Scientific Conceptions of Race

From the 19th century on, races have been seen in science as subdivisions of the human species that differ from one another phenotypically, on the basis of ancestral geographic origins, or that differ in the frequency of certain genes (Lewontin, 1995; Marks, 1995; A. Smedley, 1999b). The genetic conception of race appeared in the mid-20th century and remains today as a definition or working hypothesis for many scholars (A. Smedley, 1999b; Spencer, 1982). However, other scholars have recognized that there are no neutral conceptualizations of race in science, nor have any of the definitions ever satisfactorily fully explained the phenomenon of race (Brace, 1969; A. Smedley, 1999a, 1999b). When geneticists appeared who emphasized the similarities among races (humans are 99.9% alike), the small amount of real genetic differences among them (0.01%), and the difficulties of recognizing the racial identity of individuals through their genes, doubts about the biological reality of race appeared (see Littlefield, Lieberman, & Reynolds, 1982).

Thus, in the 20th century two conceptions of race existed: one that focused on human biogenetic variation exclusively and was the province of science, and a popular one that dominated all thinking about human differences and fused together both physical features and behavior. This popular conception, essentially a cultural invention, was and still is the original meaning of *race* that scholars in many fields turned their attention to in the latter part of the 20th century and the early 21st century (A. Smedley, 1999a, 1999b, 2002a, 2002b). It is important to explore its origins, examine how it has evolved, and analyze its meaning and significance in those cultures where race became important.

A History of Race and the Ideology of Race

Historians have now shown that between the 16th and the 18th centuries, *race* was a folk idea in the English language; it was a general categorizing term, similar to and interchangeable with such terms as *type, kind, sort, breed,* and even *species* (Allen, 1994, 1997; Hannaford, 1996; A. Smedley, 1999a, 1999b). Toward the end of the 17th century, *race* gradually emerged as a term referring to those populations then interacting in North America—Europeans, Africans, and Native Americans (Indians).[7]

In the early 18th century, usage of the term increased in the written record, and it began to become standardized and uniform (Poliakov, 1982). By the Revolutionary era, *race* was widely used, and its meaning had solidified as a reference for *social* categories of Indians, Blacks, and Whites (Allen, 1994, 1997; A. Smedley, 1999b). More than that, *race* signified a new ideology about human differences and a new way of structuring society that had not existed before in human history. The fabrication of a new type of categorization for humanity was needed because the leaders of the American colonies at the turn of the 18th century had deliberately selected Africans to be permanent slaves (Allen, 1994, 1997; Fredrickson, 1988, 2002; Morgan, 1975; A. Smedley, 1999b).[8] In an era when the dominant political philosophy was equality, civil rights, democracy, justice, and freedom for all human beings, the only way Christians could justify slavery was to demote Africans to nonhuman status (Haller, 1971; A. Smedley, 1999b). The humanity of the Africans was debated throughout the 19th century, with many holding the view that Africans were created separately from other, more human, beings.[9]

The Components of Racial Ideology in United States Society

Eighteenth- and 19th-century beliefs about human races have endured into the 20th and 21st centuries. Those societies in which racial categories are critical to the social structure have certain ideological features—that is, beliefs

[7] This history has been well documented (see Allen, 1994, 1997; Banton & Harwood, 1975; Barzun, 1937/1965; Brace, 1982; Fredrickson, 1988, 2002; Hannaford, 1996; A. Smedley 1999a, 2002a, 2002b). For an in-depth understanding of the processes by which slavery and race were created, see Morgan, 1975. Morgan is the dean of American historians of the colonial period. His classic work is cited by many scholars; it has not been superceded by later historical reconstructions of this era.

[8] There are hundreds of books and articles on slavery and antislavery and on the relationship of race and slavery; it is impossible to cite many of them. We have synthesized the well-known history and refer any reader with questions to the historical literature.

[9] For the 19th-century debates on the questionable humanity of Africans, see Chase, 1980; Fredrickson, 1987; and Haller, 1971, which is now seen as a classic. See also the debates between monogenists and polygenists in Hannaford, 1996, and A. Smedley 1999a. See also Brace, 1982.

about human differences—in common. Race therefore can be seen as an ideology or worldview, and its components have often been spelled out explicitly in social policy.[10] The ideological ingredients can be analytically derived from ethnographic reality (i.e., from descriptions of racist behavior, and especially from the hundreds of historical publications that document the existence of race and racism in North America). This material has been analyzed and these ingredients identified as diagnostic social characteristics of race in North America (see A. Smedley, 1999b, chap. 1). There is widespread agreement in historical and sociological studies about the following characteristics:

1. Race-based societies perceive designated racial groups as biologically discrete and exclusive groups, and certain physical characteristics (e.g., skin color, hair texture, eye shape, and other facial features) become markers of race status.

2. They hold that races are naturally unequal and therefore must be ranked hierarchically (inequality is fundamental to all racial systems). In the United States and South Africa, Africans and their descendants occupy the lowest level of the hierarchy.

3. They assume that each race has distinctive cultural behaviors linked to their biology. The idea of inherited forms of behavior is fundamental to the concept of race and is one basis for the belief in the separation of races (as, e.g., Black music, Black theater, Black literature, Black dance, Black forms of dress, Black language, etc.).

4. They assume that both physical features and behavior are innate and inherited.

5. They assume that the differences among races are therefore profound and unalterable. This justifies segregation of the races in schools, neighborhoods, churches, recreational centers, health centers, and so forth, and proscriptions against intermarriage or intermating.

6. They have racial classifications stipulated in the legal and social system (racial identity by law). (This obtained until recently in the United States and South Africa.)

Skin color, hair texture, nose width, and lip thickness have remained major markers of racial identity in the United States (A. Smedley, 2002a), although the use of these criteria continues to be arbitrary, given the ranges of physical variations in U.S. racial populations. However, physical features and differences connoted by them are not the effective or direct causes of racism and discrimination (see, e.g., Barnes, 2000; Correspondents of the New York Times, 2001; Mathis, 2002). It is the culturally invented ideas and beliefs about these differences that constitute the meaning of race (A. Smedley, 1999b).

The History of Race Ideology

In the United States, race ideology began developing during the late 17th century, in conjunction with the legal establishment of slavery for Africans, and in the 18th century it eventuated in three major groups that were roughly defined and ranked (European Whites, Native Americans [Indians], and "Negroes" from Africa; Allen, 1994; A. Smedley, 1999b). In the mid-19th century, Asian people-first the Chinese and later the Japanese—began to arrive in the United States, and they were fitted into the racial ranking system, somewhere between Whites and Blacks (A. Smedley, 1999b; Takaki, 1993). Also in the mid-19th century, the Irish began to immigrate, followed toward the end of the century by peoples from southern and eastern Europe who were both physically and culturally different from the original English and northern Europeans (Ignatiev, 1995; Takaki, 1993). They, too, were initially seen as separate races and were ranked lower than other Europeans (Chase, 1980; Steinberg, 1989; Takaki, 1993). However, they were eventually assimilated into the "White" category (for an excellent exploration of these processes, see Chase, 1980). The single most important criterion of status was, and remains, the racial distinction between Black and White (Massey, 2001; A. Smedley, 1999b).

Despite legal and social attempts to prohibit intermarriage or intermating, some genetic mixture still occurred. In response, the United States had to resort to a fiction to help preserve the distinctiveness of the White/Black racial (and social) dichotomy. North Americans define as Black anyone who has known African ancestors, a phenomenon known and introduced by historians over half a century ago as the "one drop rule" (see, e.g., Degler, 1971). There is no socially sanctioned in-between classification, even though the last census of 2000 permitted individuals to identify two or more racial ancestries. In South Africa in the 1940s, for historical reasons a large middle category was created, the Colored, so that essentially three more or less exclusive races were established in law (Fredrickson, 1981). And each year, a government board functioned to review racial identities and reassign individuals according to certain subjective appraisals. In none of the states in the United States has there developed a legal mechanism for changing one's race (Fredrickson, 1981).

There is mounting historical evidence that this modern ideology of race took on a life of its own in the latter half of the 19th century (Hannaford, 1996; A. Smedley, 1999b). As a paradigm for portraying the social reality of permanent inequality as something that was natural, this ideology, often but not necessarily connected to human biophysical differences, has been perceived as useful by many other societies. It has led to the exacerbation of already existing interethnic animosities. In Europe, Nazi Germany took the ideology to its greatest extreme, ultimately resulting in the Holocaust of World War II. In Asia, elements of the Western ideology of race were imported to Japan, China, India, and Malaysia (Channa, 2002, 2003; Dikotter, 1997; Katayama, 2002; Kurokawa, 2003; Robb, 1997; Sakamoto, 2002; Tomiyama, 2002).[11]

The contemporary conflicts between the Tutsi and Hutu ethnic groups in East Africa have no basis in tradi-

[10] Legal development of the policies of segregation in the United States and apartheid in South Africa has been well documented in Fredrickson, 1981.

[11] There is some debate in the literature on whether the race concept might have been present in other non-Western societies before the 17th or

tional history but were generated by the policies of European explorers and colonists, who imposed racial identities on these peoples to suit their own purposes (A. Smedley, 1999a; Graves, 2004, has a brief description).

Because of the extensive mixtures of peoples in the first two to three centuries of colonization, it was more difficult to racialize the peoples of Central America, the Caribbean, and South America. None of these societies was able to establish exclusive race categories, but they did develop terminologies that reflected the many variations in phenotype. Most developed color preferences so that individuals with phenotypic traits (e.g., light skin) approximating their European ancestors (conquerors) had higher status (Degler, 1971; Morner, 1967). These societies became increasingly more biased against darker-skinned people during the late 19th and 20th centuries, when there was increasing contact with North Americans, and particularly with the immigration of German Nazi sympathizers after World War II (A. Smedley, 1999b).

The Beginnings of Scientific Classifications of Human Groups

While colonists were creating the folk idea of race, naturalists in Europe were engaged in efforts to establish classifications of human groups in the 18th century. They had to rely on colonists' descriptions of indigenous peoples for the most part, and their categories were replete with subjective comments about their appearances and behaviors. Ethnic chauvinism and a well-developed notion of the "savage" or "primitives" dictated that they classify native peoples as inferior forms of humans.[12] Although there were earlier attempts to categorize all human groups then known, Linnaeus and Blumenbach introduced classifications of the varieties of humankind that later became the established names for the races of the world (Slotkin, 1965).

But it was the influence of Thomas Jefferson that may have had greater impact in bringing science to the support of race ideology. Jefferson was the first American to speculate and write publicly about the character of the "Negro," whom he knew only in the role of slaves on his plantations. He was the first to suggest the natural inferiority of the Negro as a new rationalization for slavery in the only book he wrote, *Notes on the State of Virginia* (Jefferson, 1785/1955), published first in Paris and later in the United States. More than that, he revealed his uncertainty about the position he was taking and called on science to ultimately prove the truth of this speculation (see Jefferson, 1785/1955; for a discussion, see also A. Smedley, 1999b). Since the 1790s and well into the 20th century, the role of science has been to confirm and authenticate the folk beliefs about human differences expressed in the idea of race by examining the bodies of the different peoples in each racial category.

The rise of scientific and scholarly input into the character of races began during the latter part of the 18th century with the writings of the philosopher Voltaire, the planter and jurist Edward Long, and a physician, Dr. Charles White of Manchester, England, among others (A. Smedley, 1999b). In the 19th century, some scholarly men initiated attempts to quantify the differences among races by measuring heads, and later other parts of the human body, with the stated purpose of documenting race inequality (A. Smedley, 1999b; Haller, 1971; Marks, 1995). By the end of the 19th century, more refinements in measuring heads and greater attention to the size and contents of the brain case led scientists to the final critical criterion by which they thought race differences could be measured: the development of tests to measure the functions of the brain. In the early 20th century, intelligence tests became the dominant interest of scientists who were seeking ways of documenting significant differences, especially between Blacks and Whites.[13] As Haller (1971) has pointed out, no one doubted that the races were unequal or that each race had distinctive behaviors that were unique: "The subject of race inferiority was beyond critical reach in the late 19th century" (p. 132).

Recent developments in the fields of genetics and evolutionary biology have prompted a renewed focus on identifying the biological basis of human behavior as well as ascertaining the historical relationships among different populations (Graves, 2004; Olson, 2002). With studies of the human genome and discoveries of the role of DNA in disease, it has become possible to speculate on specific genes as sources of human behavior. Population variations in the genes linked to the making of serotonin, testosterone, and dopamine have already led some race scientists to speculate about race differences in behavior (Oubre, 2004; Rushton, 1995). Some anticipate that they will eventually be able to actually prove race differences in violence, temperament, sexuality, intelligence, and many other mental characteristics.[14] More important, developments in the structuring of an International HapMap, which maps clusters of genes, have revealed variations in strings of DNA that correlate with geographic differences in phenotypes among humans around the world (Olson, 2002). Such findings may well be used by race scientists to argue that

18th centuries (see the discussion in Robb, 1997). However, many instances that some scholars have suggested are indicative of race should more accurately be identified as examples of extreme ethnocentrism (see A. Smedley, 1999a, 1999b).

[12] Historian Margaret Hodgen (Hodgen, 1964) has the best exploration of the concept of savagery in European life and history during the 16th-18th centuries. A discussion of the English image of savagery and its role in the construction of race is found in A. Smedley, 1999b.

[13] The history of intelligence testing has been covered by a number of scholars in the last three or four decades (see Chase, 1980; Kevles, 1985; Marks, 1995; Mensh & Mensh, 1991; A. Smedley, 1999a, 1999b; see especially the articles in Fish, 2002).

[14] Psychologist J. Philippe Rushton (Rushton, 1995) has claimed that he can identify at least 60 social/behavioral variables that distinguish the three major racial groups. He believes that these variables are innate and are directly determined by genes.

geographic variations in DNA confirm the existence of biological human races.

The components of the idea of social race fail to find congruence with the reality of culture as sui generis. And those categories of people that constitute social races bear little relationship to the reality of human biological diversity. From its inception, race was a folk idea, a culturally invented conception about human differences. It became an important mechanism for limiting and restricting access to privilege, power, and wealth. The ideology arose as a rationalization and justification for human slavery at a time when Western European societies were embracing philosophies promoting individual and human rights, liberty, democracy, justice, brotherhood, and equality.[15] The idea of race distorts, exaggerates, and maximizes human differences; it is the most extreme form of difference that humans can assert about another human being or group, as one of its components is the belief that differences are permanent and cannot be overcome (see earlier discussion).

Race essentializes and stereotypes people, their social statuses, their social behaviors, and their social ranking. In the United States and South Africa, one cannot escape the process of racialization; it is a basic element of the social system and customs of the United States and is deeply embedded in the consciousness of its people. Physical traits have been transformed into markers or signifiers of social race identity. But the flexibility of racial ideology is such that distinctive physical traits need no longer be present for humans to racialize others (Katayama, 2002; Saitou, 2002).

Racialized Science and Public Policy

Given that racialized science is based on an imprecise and distorted understanding of human differences, should the term *race* be abandoned as a matter of social policy? Stated differently, if race is not a biological or anthropological reality, should race play a role in policy discussions? From a policy perspective, although the term *race* is not useful as a biological construct, policymakers cannot avoid the fact that social race remains a significant predictor of which groups have greater access to societal goods and resources and which groups face barriers—both historically and in the contemporary context—to full inclusion. The fact of inequality renders race an important social policy concern. At its core, the concept of race depends fundamentally on the existence of social hegemony. As Michael Omi noted, "the idea of race and its persistence as a social category is only given meaning in a social order structured by forms of inequality—economic, political, and cultural—that are organized, to a significant degree, by race" (Omi, 2001, p. 254).

How are resources allocated differentially on the basis of race? The sources of racial inequality remain controversial. Discrimination, the differential and negative treatment of individuals on the basis of their race, ethnicity, gender, or other group membership, has been the source of significant policy debate over the past several decades. Federal and state laws adapted since the landmark 1964 Civil Rights Act outlaw most forms of discrimination in public accommodations, access to resources and services, and other areas. Although this legislation appears to have spurred significant change in some segments of American society, such as in the overt behavior of lenders and real estate agents, debate continues regarding whether and how discrimination persists today. Conservative legal scholars and social scientists argue that discrimination has largely been eliminated from the American landscape (D'Souza, 1996; Thernstrom & Thernstrom, 1999), whereas others argue that discrimination has simply taken on subtler forms that make it difficult to define and identify. Complicating this assessment is the fact that whereas individual discrimination is often easier to identify, *institutional discrimination*—the uneven access by group membership to resources, status, and power that stems from facially neutral policies and practices of organizations and institutions—is harder to identify. Further, it is difficult to distinguish the extent to which many racial and ethnic disparities are the result of discrimination or other social and economic forces.

There is little doubt among researchers who study discrimination, however, that the history of racial discrimination in the United States has left a lasting residue, even in a society that overtly abhors discrimination. "Deliberate discrimination by many institutions in American society in the past has left a legacy of [social and] economic inequality between Whites and minorities that exists today" (Turner & Skidmore, 1999, p. 5), preserving the economic and educational gap between population groups. But discrimination persists today. Racial and ethnic discrimination and disadvantage have been consistently documented in studies of home mortgage lending (U.S. Department of Housing and Urban Development, 1999), housing discrimination and residential segregation (Massey, 2001), and employment and housing practices (Fix, Galster, & Struyk, 1993). More recently, two major reports authored by respected, nonpartisan advisory groups (the Institute of Medicine [B. D. Smedley, Stith, & Nelson, 2003]; Physicians for Human Rights, 2003) have documented persistent patterns of racial and ethnic disparities in health care. Because disparities in health care may reflect a complex mix of social, economic, biologic, and genetic factors and therefore provide a test of the validity of racialized science, in the next section we review relevant literature on health care disparities and assess the implications of racialized science for public policies to address these disparities.

[15] Robert Moore of the University of Liverpool observed that in the mid-1800s, a consensus emerged that human cultural differences were of a permanent kind, expressing underlying natural differences. He quoted an observer of American life, Alexis de Tocqueville, who was among the first to recognize this aspect of the idea of race and who wrote that "the existence of innate and immutable racial characteristics is to be regarded with skepticism and theories founded upon such doctrine are mere rationalizations for slavery and other forms of racial oppression" (Tocqueville, as cited in Stone, 1977, p. 63).

Race, Ethnicity, and Health Care

Over the past three decades, several hundred studies have been published that examine the quality of health care for racial and ethnic minorities relative to nonminorities (Physicians for Human Rights, 2003). Evidence of racial and ethnic disparities in health care is, with few exceptions, remarkably consistent across a range of health care services, including mental health (B. D. Smedley et al., 2003; U.S. Department of Health and Human Services [U.S. DHHS], 2001). These disparities are associated with socioeconomic differences and tend to diminish significantly and, in a few cases, to disappear altogether when socioeconomic factors are controlled. The majority of studies, however, find that racial and ethnic disparities in health care remain even after adjustment for socioeconomic differences and other factors related to health care access (Kressin & Petersen, 2001; Mayberry, Mili, & Ofili, 2000; Physicians for Human Rights, 2003; B. D. Smedley et al., 2003). This research is clear and consistent when comparing African American and White patients, and it is becoming stronger in demonstrating the same disparities between Hispanic and White patients (more research must be done to determine whether American Indians/Alaska Natives, Asian Americans, and Pacific Islander Americans face the same disparities). In general, this research shows the following:

- African Americans and Hispanics tend to receive lower quality health care across a range of disease areas (including cancer, cardiovascular disease, HIV/AIDS, diabetes, mental health, and other chronic and infectious diseases) and clinical services (B. D. Smedley et al., 2003);
- African Americans are *more likely* than Whites to receive less desirable services, such as amputation of all or part of a limb (Gornick et al., 1996);
- Disparities are found even when clinical factors, such as stage of disease presentation, comorbidities, age, and severity of disease are taken into account (B. D. Smedley et al., 2003);
- Disparities are found across a range of clinical settings, including public and private hospitals, teaching and nonteaching hospitals, and so forth (B. D. Smedley et al., 2003);
- Disparities in care are associated with higher mortality among minorities who do not receive the same services as Whites (e.g., surgical treatment for small-cell lung cancer; Bach, Cramer, Warren, & Begg, 1999).

Some of the most rigorous studies in this area assess whether patients are appropriate for the treatment studied by controlling for disease severity using well-established clinical and diagnostic criteria (e.g., Allison, Kiefe, Centor, Box, & Farmer, 1996; Ayanian, Udvarhelyi, Gatsonis, Pasho, & Epstein, 1993; Schneider et al., 2001; Weitzman et al., 1997) or by using matched patient controls (Giles, Anda, Casper, Escobedo, & Taylor, 1995). Several studies, for example, have assessed differences in treatment regimen following coronary angiography, a key diagnostic procedure. These studies have demonstrated that differences in treatment are not due to clinical factors such as racial differences in the severity of coronary disease or overuse of services by Whites (e.g., Canto et al., 2000; Laouri et al., 1997; Peterson et al., 1997; Schneider et al., 2001).

Health care disparities are also found in other disease areas. Several studies demonstrate significant racial differences in the receipt of appropriate cancer diagnostic tests (e.g., McMahon et al., 1999), treatments (e.g., Imperato, Nenner, & Will, 1996), and analgesics (e.g., Bernabei et al., 1998), while controlling for stage of cancer at diagnosis and other clinical factors. Similarly, African Americans with HIV infection are less likely than nonminorities to receive antiretroviral therapy (Moore, Stanton, Gopalan, & Chaisson, 1994), prophylaxis for pneumocystis pneumonia, and protease inhibitors (Shapiro et al., 1999). These disparities remain even after adjusting for age, gender, education, CD4 cell count, and insurance coverage (e.g., Shapiro et al., 1999). In addition, differences in the quality of HIV care are associated with poorer survival rates among minorities, even at equivalent levels of access to care (Bennett et al., 1995; Cunningham, Mosen, & Morales, 2000).

As with other health care services, racial and ethnic disparities also plague mental health care. The U.S. Surgeon General recently completed a major report (U.S. DHHS, 2001) assessing racial and ethnic disparities in mental health and mental health care and found that, more so than in other areas of health and medicine, mental health services are "plagued by disparities in the availability of and access to its services," and that "these disparities are viewed readily through the lenses of racial and cultural diversity, age, and gender" (U.S. DHHS, 2001, p. vi). The Surgeon General also concluded that striking disparities in mental health care exist for racial and ethnic minorities and that these disparities impose a greater disability burden on racial and ethnic minorities. In addition to universal barriers to quality care (e.g., cost, fragmentation of services), the report notes that other barriers, such as mistrust, fear, discrimination, and language differences carry special significance for minorities in mental health treatment, as these concerns affect patients' thoughts, moods, and behavior (U.S. DHHS, 2001).

Public Policy Cannot Ignore Race

As the literature in health care disparities attests, contrary to the optimistic assessments of conservative thinkers (D'Souza, 1996; Thernstrom & Thernstrom, 1999) and, more generally, the American public, race continues to play an important role in determining how individuals are treated, where they live, their employment opportunities, the quality of their health care, and whether individuals can fully participate in the social, political, and economic mainstream of American life. The studies cited previously demonstrate that race continues to matter in important ways.

Race is a means of creating and enforcing social order, a lens through which differential opportunity and inequality are structured. Racialized science, with its emphasis on identifying immutable differences between racial groups, can be expected only to maintain and reinforce existing racial inequality, in that its adherents indirectly argue that no degree of government intervention or social change will alter the skills and abilities of different racial groups. The disproportionate representation of some "racial" groups (e.g., African Americans, American Indians) among lower socioeconomic tiers can therefore be explained as an unavoidable byproduct of human evolution. Yet reinforcing this widely held social stereotype of racial inferiority risks limiting individual human potential, in that individuals' abilities and opportunities would likely be assessed in relation to their racial group.

California businessman Ward Connerly and his allies have proposed that government should not be involved in the collection or analysis of information related to the race or ethnicity of its citizens. They argued (unsuccessfully in California's recent voter referendum, Proposition 54) that data disaggregated by race or ethnicity merely serves to create more social divisions and schisms and that the racial and ethnic disparities observed are generally the product of socioeconomic differences between the racial and ethnic groups. Implicit in this argument is that socioeconomic differences are acceptable-that is, race is increasingly irrelevant in determining one's life opportunities and barriers, but the poor will always be among us. An abundance of evidence, however, demonstrates that race continues to matter in meaningful ways. As long as governments fail to assess racial and ethnic inequality, racialized science will likely attempt to find explanations for racial hegemony in the biology and genetics of the "racial" group rather than in the social attitudes and institutions that perpetuate the idea of race.

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Barriers to Effective Mental Health Services for African Americans

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Many African Americans—especially the most marginal—suffer from mental health problems and would benefit from timely access to appropriate forms of care. However, few seek treatment from outpatient providers in the specialty mental health sector and those who do are at risk of dropping out. African Americans visit providers in the general medical sector, although they use another hypothesized alternative to specialty care, voluntary support networks, less than other groups. These help-seeking tendencies may reflect characteristic coping styles and stigma, as well as a lack of resources and opportunities for treatment. More should be learned about differences in need according to location, social standing, and cultural orientation so as to identify treatments and programs that are especially beneficial to African Americans.

KEY WORDS: African Americans; mental illness; treatment; coping; help seeking.

The African American population is large—about 12.5% of the U.S. population, not counting a substantial census undercount (Statistical Abstract of the United States, 1999). It is socially and historically unique, because of enslavement and long-term residence in the rural south, followed by migration to industrial centers of the north.

When considered in aggregate, African Americans are relatively poor: In 1998 about 24% of African American families, but only 8% of White families, had incomes below the Federally established poverty line (Statistical Abstract of the United States, 1999). The official poverty rate, however, understates the economic plight of many African Americans. African Americans are more likely than Whites to live in deep poverty—about 14% of Black families, but only 3.5% of White families, reported incomes of less than $5,000 per year (Statistical Abstract of the United States, 1999).

Apart from income, African American families have considerably less total wealth than White families. Considering the value of home ownership and other assets, the median net worth of African American families is only about one tenth that of White families (O'Hare, Pollard, Mann, & Kent, 1991).

While many African Americans continue to live in deep poverty, the African American poverty rate appears to have shrunk: although high, the African American poverty rate has declined in recent years. By the late 1990s, 32% of African American men and 59% of African American women held white collar jobs; the median income of African Americans living in married couple families was 87% that of comparable Whites, and almost 32% of African Americans lived in the suburbs (Thernstrom & Thernstrom, 1997). Thus, in socioeconomic terms, the African American population is polarized.

For many years a dominant African American experience with mental illness and treatment was periodic confinement in psychiatric hospitals (cf. Snowden & Cheung, 1990). Against this backdrop, the effort of the past three decades to bring about equity in mental health care represents beneficial strides. More African Americans who need mental health care are in treatment than ever before, and the Black–White gap in utilization appears to have shrunk. As will be shown, however, many barriers remain.

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The present paper will analyze barriers to receiving appropriate and timely mental health care facing African American populations. From Rogler's five-phase model of help seeking (Rogler, 1989), the paper addresses three major topics: patterns of help seeking, assessment and diagnosis, and assignment to care. The purpose is to identify distinctive features of the African American stance toward mental illness and help seeking, and African American patterns of participation in treatment, in order to increase inclusion and promote a higher quality of care.

EPIDEMIOLOGY

It is useful at the outset to consider issues of need and the possibility of greater mental illness among African Americans than among other groups. Yet studies accepted as providing our best estimates of community need give inconsistent answers. On the Epidemiologic Catchment Area (ECA) surveys, African Americans and Whites proved no different in lifetime and current disorders after adjusting for socioeconomic and demographic differences between the groups (Robins & Regier, 1991). With respect to individual disorders, the data indicated that African Americans were more likely than Whites to suffer from phobic disorder (Zhang & Snowden, 1999) and possibly from panic and sleep disorder (Bell, Dixie-Bell, & Thompson, 1986; Neal & Turner, 1991). Somatization disorder and somatization syndrome also are found more in African American communities than elsewhere (Robins & Regier, 1991; Zhang & Snowden, 1999).

The National Comorbidity Survey, on the other hand, painted a different picture. It indicated that African Americans had *lower* lifetime prevalence of mental illness than Whites (Kessler et al., 1994). Also, African Americans were found less likely than Whites to suffer from a comorbid substance abuse disorder.

Major epidemiological surveys cited above appear to agree that African Americans rates of mental illness are *no greater* than those of Whites. On the other hand, this conclusion ignores differences in the downward drift of African Americans burdened with mental illness away from the general population.

African Americans are overrepresented in high need populations. Because a high proportion of African Americans are incarcerated and confined to mental hospitals, are homeless, and live among the inner-city and rural poor, African Americans with significant mental health needs will be underrepresented in household surveys. By counting members of these high need groups, we might arrive at higher rates of mental illness among African Americans than are revealed in current estimates.

A concentration of mentally ill African Americans among persons confined to mental hospitals and among the homeless is consistent with evidence of an interaction between African American status and socioeconomic status (e.g., Kessler & Neighbors, 1986). Whether because of greater exposure to stress or greater downward social mobility, it appears that poor African Americans suffer from mental disorders at higher rates than poor Whites.

Coping: Activism; prayer; turning to family, friends, and religious figures. Studies of coping methods employed by African Americans indicate a spectrum of strategies, but point to certain marked preferences (Broman, 1996). Respondents to the National Survey of Black Americans (Neighbors & Jackson, 1996) heavily endorsed three strategies that are worthy of note (Broman, 1996).

"Face the problem/do something" was affirmed by more than 87% of the sample. Accompanied by a tendency to minimize any perception of threat (Johnson & Crowley, 1996) this stance has been characterized as "John Henryism," a belief that obstacles can be overcome through heroic striving (Adams, Aubert, & Clark, 1999). John Henryism was formulated to understand the behavior of certain African American males and has been associated empirically with increased diastolic blood pressure.

Other coping strategies arise from the religious orientation of African Americans (on one survey almost 85% of African Americans described themselves either as "fairly religious" or "very religious"; Taylor & Chatters, 1991). Prayer has been found among the most frequent African American coping responses (Broman, 1996); about 78% of African Americans reported that they prayed "nearly every day" (Taylor & Chatters).

Another coping preference frequently attributed to African Americans is a turning to significant others in the community, especially family, friends, neighbors, voluntary associations, and religious figures. According to conventional wisdom, such tendencies express mutual commitment and reflect a helping tradition found in African American communities. With respect to material assistance, the empirical literature supports this view: there is evidence of greater pooling of resources, for example, in African American households and among neighbors (e.g., Saegart, 1989).

On the other hand, African Americans do not appear to be especially likely to receive face-to-face help

from informal community helpers (voluntary support networks) when their concerns are labeled as problems of emotions and mental health. From a study of help seeking from informal helpers, Snowden (1998) reported that African Americans were less likely than Whites—not more likely—to have turned for assistance to family and friends and religious figures. Nor did Snowden's data support an expectation that informal help was sought as a substitute for mental health treatment. Informal help instead was complement.

Snowden's findings were consistent with those from the few studies reported in the literature comparing African American and White informal help seeking. Rather than direct assistance from informal helpers—acknowledgment and discussion of problems framed in psychological and psychiatric terms—African Americans may prefer indirect assistance, including general encouragement, companionship, and social and spiritual advice (Taylor & Chatters, 1991).

GENERAL HEALTH AND SPECIALTY MENTAL HEALTH SERVICES

Critics have pointed not only to family and friends as sources of assistance preferred by African Americans but also to the general medical sector. Thus, physicians and hospitals have been viewed as alternatives to mental health specialists.

Evidence bears out these contentions. Data from the National Ambulatory Medical Care Survey reveal that among persons with a mental-health-related complaint as the reason for their visit, about 53% of African American visits were made to a primary care physician and 32% to a psychiatrist, compared to 44% of visits by Whites made to a primary care physician and 42% to a psychiatrist (Snowden & Pingitore, in press). The disproportionate use of emergency care by African Americans will be discussed later.

Turning to the specialty mental health sector, data from the ECA and other household surveys (Freiman, Cunningham, & Cornelius, 1994) indicate that African Americans in the community are less likely than Whites to seek outpatient treatment for mental health problems. After controlling for sociodemographic differences and differences in the need for treatment, the odds of African Americans receiving treatment from any source in the community were only .54 those of Whites. If treated, African Americans were far more likely to have been treated in the public sector (Schwartz et al., 1998).

Poverty does affect African Americans' chances of receiving specialty outpatient treatment, but not in a straightforward manner. Many of the poor are eligible for Medicaid, which finances considerable mental health care. Data from a representative national sample revealed that African Americans on Medicaid were no less likely than Whites to receive outpatient treatment whereas insured African Americans were considerably less likely (Snowden & Thomas, 2000). More serious disorders found among the poor appear to compel treatment, which is often provided in the public sector where providers are unwilling or unable to avoid African Americans.

Differences also exist after initial barriers have been overcome and treatment has begun. African Americans are more likely than others to leave mental health programs prematurely (Sue, Zane, & Young, 1994) and to receive emergency care (Hu, Snowden, Jerrell, & Nguyen, 1991). These differences might come about because, to a greater extent than among other groups, African Americans participate in treatment through legal involvement and coercion (Akutsu, Snowden, & Organista, 1996; Takeuchi & Cheung, 1998).

Voluntary help seeking has been linked to an African American idiom of distress. Snowden (1999a) correlated the number of African American folk symptoms identified from a previous study as occurring on the Diagnostic Interview Schedule (Heurtin-Roberts, Snowden, & Miller, 1997) with the likelihood of having received mental health care. For anxiety-like and somatization-like symptoms, the association among African Americans was especially strong between symptom distress and having received treatment, whether from a mental health specialist either in private or public practice, from a physician, or in an emergency room.

At the same time, there is evidence of a greater willingness by African Americans to seek mental health care. In a follow-up at the Baltimore site of the ECA, Cooper-Patrick, Crum, Powe, Pratt, and Ford (1999) found an increase by all groups in rates of mental health help seeking. They also found that African Americans were no longer less likely than Whites to seek treatment.

ASSESSMENT AND DIAGNOSIS

Lopez (1989) conducted a comprehensive review of literature on the issue of bias in clinical judgment. He examined judgments of the presence or absence

of psychopathology and of severity, as well as of tendencies to attribute psychopathology where none was present and to overlook psychopathology, which was in fact present.

With respect to African Americans, the evidence considered by Lopez proved equivocal, as some investigators reported the existence of bias but others reported its absence. The most consistent pattern of findings concerned the possibility of bias in rendering certain particular diagnoses: schizophrenia and the affective disorders.

Schizophrenia and the affective disorders. Over the past two decades, reports in the literature have pointed to racial imbalances in treated samples in diagnosed schizophrenia and in the affective disorders. The pattern is persistent and clear: African Americans prove more likely than Whites to be categorized as schizophrenic and less likely as having an affective disorder.

Several studies illustrate this point. From national data on psychiatric hospital admissions, Snowden and Cheung (1990) reported that African Americans were about 1.8 times as likely as Whites to be diagnosed with schizophrenia and about half as likely to be diagnosed with an affective disorder. Lawson, Hepler, Holladay, and Cuffel (1994) found that African American inpatients were about 1.5 times as likely as Whites to be diagnosed as schizophrenic and only about 0.60 times as likely to be diagnosed with an affective disorder; among outpatients with affective disorders, racial discrepancy was less but for schizophrenia it was greater. Similarly, Hu et al. (1991) found that African Americans were about 1.5 times more likely than Whites to have a diagnosis of schizophrenia and only 0.75 times as likely to have a diagnosis of affective disorder. The latter finding was considered routine and passed without comment.

As they diagnosis patients in clinical practice, do clinicians routinely overdiagnose schizophrenia among African Americans and underdiagnose affective disorders? Several widely cited studies support this conclusion. For example, Loring and Powell (1988) presented 290 psychiatrists with standard case descriptions, varying only the race and gender of the case. When labeled African American, the case was more frequently diagnosed paranoid schizophrenic by both African American and White respondents. From a body of such evidence, reviewers (Lu, Lim, & Mezzich, 1995; Neighbors, Jackson, Campbell, & Williams, 1989; Worthington, 1992) have judged the case for bias to be a strong one.

PROGRAM AND TREATMENT ASSIGNMENT

African American overrepresentation in psychiatric hospitals is well established (Snowden, 1999b; Snowden & Cheung, 1990), and has long been considered to raise the specter of cultural misunderstanding and social control more than clinical necessity as factors promoting African American confinement to mental hospitals. Other considerations have come to light, however, implicating more strongly than ever individual and community-level poverty as considerations to bear in mind.

African Americans who are hospitalized tend to experience recidivism; the pattern of repeat use itself helps to explain Black–White differences in hospitalization rates (Leginski, Manderscheid, & Henderson, 1990). The cycling in and out of the hospital often reflects the precarious social position of African Americans suffering from severe mental illness as indicated in high rates of homelessness and incarceration, and as exacerbated by living in stress-enhancing communities (Snowden, 1999a, 1990b).

Financing also plays an important role. Because of poverty African Americans are more likely than Whites to be insured by the Medicaid program. Medicaid coverage is strongly related to the possibility of inpatient treatment: Medicaid recipients were almost three times more likely to be hospitalized as persons covered by private insurance (Freiman et al., 1994). As state Medicaid programs increasingly adopt managed care and psychiatric hospitalization becomes a scarcity, concern with overhospitalization may be transformed into a concern with underhospitalization.

Guideline-Based Treatment in Primary Care

When treated in primary care for mental health problems, the quality of care provided to African Americans may be lower than that provided to Whites. Wang, Berglund, and Kessler (2000) reported that African Americans suffering from depression or anxiety were less likely than Whites to receive care adhering to official practice guidelines. Other investigators found that elderly African Americans were considerably less likely than elderly Whites to receive antidepressant medications (Blazer, Hybels, Simonsick, & Hanlon, 2000).

On the other hand, differences between African Americans and Whites may justify differences in use of medication. Evidence from the growing field of ethnopsychopharmacology indicates that African

Americans may metabolize antidepressants such that they are more sensitive than others to their effects (Branford, Gaedigk, & Leeder, 1998). The possibility cannot be ruled out that differential prescription practices result from clinical necessity.

Outpatient Psychotherapy

The possibility of racial differences in assignment to individual outpatient psychotherapy has been a source of concern to researchers and activists, owing to a fear that African Americans were considered lacking in sufficient maturity and intelligence to profit from this form of treatment. Updating a number of studies conducted in public mental health systems over the years, Hu et al. (1991) found that African Americans were indeed less likely than Whites to receive individual outpatient therapy, and that those who participated attended 20% fewer sessions. The finding was remarkable for Asian American and Latino clients, who proved *more* likely than Whites to have received individual outpatient therapy.

Assignment to Other Forms of Care

The emphasis on individual psychotherapy has skewed the research base; few studies have sought to understand racial differences in other services and programs. The use of medication with African Americans may give particular cause for concern. Segal, Bola, and Watson (1996) investigated racial differences in the use of antipsychotic medications in four emergency rooms. They reported that African Americans received a far higher dosage than Whites, and that the race-based discrepancy was lower when clinicians were rated to have made a greater effort to engage the client in treatment. Racial barriers appeared to undermine the capacity to establish a successful treatment process and to deliver a high quality of care.

Segal, Bola, and Watson's study was one of the few to examine the process by which decisions about treatment are made. Their assessment of clinical engagement proved valuable in illuminating the underlying process by which race appeared to promote differential treatment.

Hospitals and Emergency Rooms as Usual Sources of Care

The manner by which African Americans enter and participate in mental health services may be determined less by clinical and administrative decision making and more by social structures and community traditions. African Americans make frequent use of psychiatric emergency care. The pattern distinguishes African Americans not only from Whites but also from Asian Americans and Latinos (e.g., Hu et al., 1991).

African American emergency psychiatric care can be viewed from a broader perspective of African American involvement in general medical care. African Americans visit the emergency room more than others for problems in health care (e.g., Snowden, Libby, & Thomas, 1997) and for some, because of a lack of insurance and a lack of health care providers in the community willing to provide routine treatment, the emergency room becomes a usual source of health care (Lewin-Epstein, 1991). Reliance on emergency care might help to explain other features of African American utilization: repeated, crisis-oriented treatment might preclude participation in regular outpatient treatment and facilitate entry into the psychiatric hospital. A tendency toward emergency psychiatric care might represent continuation of an approach taken toward treatment received in the general medical sector.

IMPROVING AFRICAN AMERICAN ACCESS

Perhaps because of a history of self-reliance and mistrust of mental health providers, many African Americans appear to deny mental health problems. When symptoms appear they may be acknowledged more readily if understood as traditional, folk based disorders, and if self-reliance and prayer are considered in response. Thus among African Americans and Whites surveyed in primary care settings, African Americans more often rated spirituality as a determinant of help seeking and a desirable component of treatment (Cooper-Patrick et al., 1998).

Mental illness retains considerable stigma and seeking treatment is not always encouraged. One study (Cooper-Patrick et al., 1995) found that a feeling of embarrassment about seeking treatment was a more significant barrier for African Americans than for Whites. Support from significant others and fellow community members may be sought but only indirectly, in the form of reassurance, companionship, and advice defined in other than mental health terms.

Structural factors also must be considered. Low rates of insurance coverage and lack of a usual source

of health care limit the options of African Americans seeking treatment.

In thinking about the African American population, it is important to avoid overgeneralization. Age and gender are important to consider along with socioeconomic differences because their strong association with help seeking. Diverging sociohistorical experiences and circumstances of living separate African American women and men (e.g., Snowden, in press), as well as African Americans elders and young adults. These differences suggest that gender-based and age-based interactions should be considered by researchers and possibly gender- and age-sensitive outreach strategies formulated. There is reason to believe also that differences in acculturation (Snowden & Hines, 1998) as well as regional and urban–rural differences (Snowden & Thomas, 2000) should be taken into account.

To improve African American access there appears to be a need for more and better public education, emphasizing that services and programs are available and that recipients are better off than those who abstain. Active outreach into African American communities, engaging opinion leaders and gatekeepers of the community, is also necessary.

Another response to improve African American access focuses on increasing the awareness of personnel providing mental health care. When presenting themselves for treatment, African Americans may express their complaints in terms of physical complaints and of symptoms associated with anxiety. Such complaints may or may not be properly taken at face value; they sometimes reflect a more general language of distress. Special caution should be exercised to guard against error in prescribing psychotropic medications and in making the diagnosis of schizophrenia and affective disorders, whether attributable to misunderstanding or bias. Clinical assessors should remember, in general, the dual nature of potential bias: he or she may attribute mental illness where it does not exist, or may fail to detect it where is does exist.

A number of problems in access appear to be associated with extreme poverty and adverse conditions affecting African American individuals and communities in distress. The repeated use of emergency care, perhaps serving as a usual source of care for problems in health and mental health, may require both structural interventions to create more appropriate points of contact, as well as change in community norms to promote their use.

There is much we do not yet know that is necessary for a comprehensive and effective response. The socioeconomic polarization of African Americans has received insufficient attention among researchers and advocates concerned with access. Many needs of the poorest African Americans are likely to be defined by the problems of severe and persistent mental illness. Long-term disability associated with these conditions may be exacerbated by the a lack of family resources and by a social environment in the poorest black areas that accentuates various forms of distress. High rates of homelessness and incarceration partly attest to high levels of unmet need among poor African Americans.

Finally, it is important to bear in mind the purpose of promoting improved access: to suffer less from troubling symptoms and to have restored one's capacity for successful day-to-day living. It is important to promote participation in mental health treatments and programs insofar as they achieve these objectives.

At present we know disconcertingly little about effectiveness and cost-effectiveness of programs and treatments as they are routinely practiced in the community. We have even fewer answers to questions about the possibility of differential impact on the basis of race (Snowden, 1996). About these issues and others, more research is needed toward a comprehensive understanding of delivery of mental health services to African American populations.

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What Can Police Do to Reduce Crime, Disorder, and Fear?

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and
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The authors review research on police effectiveness in reducing crime, disorder, and fear in the context of a typology of innovation in police practices. That typology emphasizes two dimensions: one concerning the *diversity of approaches*, and the other, the *level of focus*. The authors find that little evidence supports the standard model of policing—low on both of these dimensions. In contrast, research evidence does support continued investment in police innovations that call for greater focus and tailoring of police efforts, combined with an expansion of the tool box of policing beyond simple law enforcement. The strongest evidence of police effectiveness in reducing crime and disorder is found in the case of geographically focused police practices, such as hot-spots policing. Community policing practices are found to reduce fear of crime, but the authors do not find consistent evidence that community policing (when it is implemented without models of problem-oriented policing) affects either crime or disorder. A developing body of evidence points to the effectiveness of problem-oriented policing in reducing crime, disorder, and fear. More generally, the authors find that many policing practices applied broadly throughout the United States either have not been the subject of systematic research or have been examined in the context of research designs that do not allow practitioners or policy makers to draw very strong conclusions.

Keywords: police; evaluations; crime; disorder; hot spots; problem-oriented policing; community policing

The past decade has been the most innovative period in American policing. Such approaches as community policing, problem-oriented policing, hot-spots policing, and broken-windows policing either emerged in the 1990s or came to be widely adopted by police agencies at that time. The changes in American

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policing were dramatic. From an institution known for its conservatism and resistance to change, policing suddenly stood out as a leader in criminal justice innovation. This new openness to innovation and widespread experimentation in new practices were part of a renewed confidence in American policing that could be found among not only police professionals but also scholars and the general public. While there is much debate over what caused the crime drop of the 1990s, many police executives, police scholars, and lay people looked to new policing practices as a primary explanation (Bratton 1998; Eck and Maguire 2000; Kelling and Sousa 2001).

At the same time that many in the United States touted the new policing as an explanation for improvements in community safety, many scholars and police professionals identified the dominant policing practices of earlier decades as wasteful and ineffective. This criticism of the "standard model" of policing was part of a more general critique of the criminal justice system that emerged as early as the mid-1970s (e.g., see Martinson 1974). As in other parts of the criminal justice system, a series of studies seemed to suggest that such standard practices as random preventive patrol or rapid response to police calls for service had little impact on crime or on fear of crime in American communities (e.g., see Kelling et al. 1974; Spelman and Brown 1981). By the 1990s, the assumption that police practices were ineffective in combating crime was widespread (Bayley 1994; Gottfredson and Hirschi 1990), a factor that certainly helped to spawn rapid police innovation at that time.

In this article, we revisit the central assumptions that have underlain recent American police innovation. Does the research evidence support the view that standard models of policing are ineffective in combating crime and disorder? Do elements of the standard model deserve more careful study before they are abandoned as methods of reducing crime or disorder? Do recent police innovations hold greater promise of increasing community safety, or does the research evidence suggest that they are popular but actually ineffective? What lessons can we draw from research about police innovation in reducing crime, disorder, and fear over the last two decades? Does such research lead to a more general set of recommendations for American policing or for police researchers?

Our article examines these questions in the context of a review of the research evidence about what works in policing. Our focus is on specific elements of community safety: crime, fear, and disorder. We begin by developing a typology of police practices that is used in our article to organize and assess the evidence about

NOTE: Our review of police practices in this paper derives from a subcommittee report on police effectiveness that was part of a larger examination of police research and practices undertaken by the National Academy of Sciences and chaired by Wesley G. Skogan. We cochaired the subcommittee charged with police effectiveness which also included David Bayley, Ruth Peterson, and Lawrence Sherman. While we draw heavily from that review, our analysis also extends the critique and represents our interpretation of the findings. Our review has benefited much from the thoughtful comments of Carol Petrie and Kathleen Frydl of the National Academy of Sciences. We also want to thank Nancy Morris and Sue-Ming Yang for their help in preparation of this paper.

police effectiveness. We then turn to a discussion of how that evidence was evaluated and assessed. What criteria did we use for distinguishing the value of studies for coming to conclusions about the effectiveness of police practices? How did we decide when the evidence was persuasive enough to draw more general statements about specific programs or strategies? Our review of the evidence follows. Our approach is to identify what existing studies say about the effects of core police practices. Having summarized the research literature in this way, we conclude with a more general synthesis of the evidence reviewed and a discussion of its implications for police practice and research on policing.

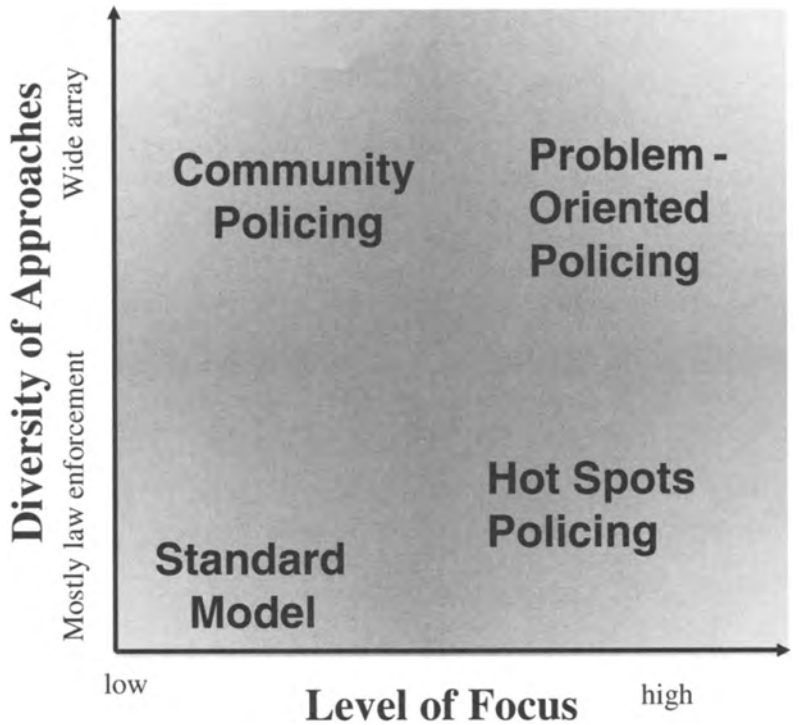
The Standard Model of Policing and Recent Police Innovation: A Typology of Police Practices

Over the past three decades, scholars have increasingly criticized what has come to be considered the standard model of police practices (Bayley 1994; Goldstein 1990; Visher and Weisburd 1998). This model relies generally on a "one-size-fits-all" application of reactive strategies to suppress crime and continues to be the dominant form of police practices in the United States. The standard model is based on the assumption that generic strategies for crime reduction can be applied throughout a jurisdiction regardless of the level of crime, the nature of crime, or other variations. Such strategies as increasing the size of police agencies, random patrol across all parts of the community, rapid response to calls for service, generally applied follow-up investigations, and generally applied intensive enforcement and arrest policies are all examples of this standard model of policing.

Because the standard model seeks to provide a generalized level of police service, it has often been criticized as focused more on the means of policing or the resources that police bring to bear than on the effectiveness of policing in reducing crime, disorder, or fear (Goldstein 1979). Accordingly, in the application of preventive patrol in a city, police agencies following the standard model will often measure success in terms of whether a certain number of patrol cars are on the street at certain times. In agencies that seek to reduce police response times to citizen calls for service, improvements in the average time of response often become a primary measure of police agency success. In this sense, using the standard model can lead police agencies to become more concerned with how police services are allocated than whether they have an impact on public safety.

This model has also been criticized because of its reliance on the traditional law enforcement powers of police in preventing crime (Goldstein 1987). Police agencies relying upon the standard model generally employ a limited range of approaches, overwhelmingly oriented toward enforcement, and make relatively little use of institutions outside of policing (with the notable exception of other parts of the criminal justice system). "Enforcing the law" is a central element of the standard model of policing, suggesting that the main tools available to the police, or legitimate for their use, are found in their law enforcement powers. It is no coinci-

FIGURE 1
DIMENSIONS OF POLICING STRATEGIES



dence that police departments are commonly referred to as "law enforcement agencies." In the standard model of policing, the threat of arrest and punishment forms the core of police practices in preventing and controlling crime.

Recent innovations in policing have tended to expand beyond the standard model of policing along two dimensions. Figure 1 depicts this relationship. The vertical axis of the figure, *diversity of approaches*, represents the content of the practices employed. Strategies that rely primarily on traditional law enforcement are low on this dimension. The horizontal axis, *level of focus*, represents the extent of focus or targeting of police activities. Strategies that are generalized and applied uniformly across places or offenders score low on this dimension. Innovations in policing over the last decade have moved outward along one or both of these dimensions. This point can be illustrated in terms of three of the dominant trends in innovation over the last two decades: community policing, hot-spots policing, and problem-oriented policing. We note at the outset that in emphasizing specific components of these innovations, we are trying to illustrate our typology, although in practice, the boundaries between approaches are seldom clear and often overlap

in their applications in real police settings. We will discuss this point in fuller detail in our examination of specific strategies later in our article.

Community policing, perhaps the most widely adopted police innovation of the last decade, is extremely difficult to define: Its definition has varied over time and among police agencies (Eck and Rosenbaum 1994; Greene and Mastrofski 1988). One of the principal assumptions of community policing, however, is that the police can draw from a much broader array of resources in carrying out the police function than is found in the traditional law enforcement powers of the police. For example, most scholars agree that community policing should entail greater community involvement in the definition of crime problems and in police activities to prevent and control crime (Goldstein 1990; Skolnick and Bayley 1986; Weisburd, McElroy, and Hardyman 1988). Community policing suggests a reliance on a more community-based crime control that draws on the resources of the public as well as the police. Thus, it is placed high on the dimension of diversity of approaches in our typology. It lies to the left on the dimension of level of focus because when community policing is employed without problem solving (see later), it provides a common set of services throughout a jurisdiction.

Hot-spots policing (Braga 2001; Sherman and Weisburd 1995; Weisburd and Braga 2003) represents an important new approach to crime control that illustrates innovation on our second dimension, level of focus. It demands that the police identify specific places in their jurisdictions where crime is concentrated and then focus resources at those locations. When only traditional law enforcement approaches such as directed patrol are used in bringing attention to such hot spots, hot-spots policing is high on the dimension of level of focus but low on that of diversity of approaches.

Problem-oriented policing (Goldstein 1990) expands beyond the standard model in terms of both focus and the tools that are used. Problem-oriented policing, as its name suggests, calls for the police to focus on specific problems and to fit their strategies to the problems identified. It thus departs from the generalized one-size-fits-all approach of the standard model and calls for tailor-made and focused police practices. But in defining those practices, problem-oriented policing also demands that the police look beyond their traditional law enforcement powers and draw upon a host of other possible methods for addressing the problems they define. In problem-oriented policing, the tool box of policing might include community resources or the powers of other government agencies.

Evaluating the Evidence

Before we turn to what our review tells us about the standard model of policing and recent police innovation, it is important to lay out the criteria we used in assessing the evidence we reviewed. There is no hard rule for determining when studies provide more reliable or valid results, or any clear line to indicate when there is enough evidence to come to an unambiguous conclusion. Nonetheless, social sci-

entists generally agree on some basic guidelines for assessing the strength of the evidence available. Perhaps the most widely agreed-upon criterion relates to what is often referred to as internal validity (Sherman et al. 2002; Weisburd, Lum, and Petrosino 2001). Research designs that allow the researcher to make a stronger link between the interventions or programs examined and the outcomes observed are generally considered to provide more valid evidence than are designs that provide for a more ambiguous connection between cause and effect. In formal terms, the former designs are considered to have higher internal validity. In reviewing studies, we used internal validity as a primary criterion for assessing the strength of the evidence provided.

Using the standard model can lead police agencies to become more concerned with how police services are allocated than whether they have an impact on public safety.

Researchers generally agree that randomized experiments provide a higher level of internal validity than do nonexperimental studies (see, e.g., Boruch, Victor, and Cecil 2000; Campbell and Boruch 1975; Cook and Campbell 1979; Farrington 1983; Feder and Boruch 2000; Shadish, Cook, and Campbell 2002; Weisburd 2003). In randomized experiments, people or places are randomly assigned to treatment and control or comparison groups. This means that all causes, except treatment itself, can be assumed to be equally distributed among the groups. Accordingly, if an effect for an intervention is found, the researcher can conclude with confidence that the cause was the intervention itself and not some other confounding factor.

Another class of studies, referred to here as quasi-experiments, typically allow for less confidence in making a link between the programs or strategies examined and the outcomes observed (Cook and Campbell 1979). Quasi-experiments generally fall into three classes. In the first class, the study compares an "experimental" group with a control or comparison group, but the subjects of the study are not randomly assigned to the categories. In the second class of quasi-experiments, a long series of observations is made before the treatment, and another long series of observations is made after the treatment. The third class of quasi-experiments combines the use of a control group with time-series data. This latter approach is generally seen to provide the strongest conclusions in quasi-experiment research.

Quasi-experimental designs are assumed to have a lower level of internal validity than are randomized experimental studies, however, because the researcher can never be certain that the comparison conditions are truly equivalent.

Finally, studies that rely only on statistical controls—generally termed *nonexperimental* or *correlational* designs—are often seen to lead to the weakest level of internal validity (Cook and Campbell 1979; Sherman et al. 1997). In nonexperimental research, neither researchers nor policy makers intentionally vary treatments to test for outcomes. Rather, researchers observe natural variation in outcomes and examine the relationships between that variation and police practices. For example, when trying to determine if police staffing levels influence crime, researchers might examine the relationship between staffing levels and crime rates across cities. The difficulty with this approach is apparent: other factors may influence crime and may also be confounded with staffing levels. To address this concern, researchers attempt to control for these other factors statistically. It is generally agreed, however, that causes unknown or unmeasured by the researcher are likely to be a serious threat to the internal validity of these correlational studies (Feder and Boruch 2000; Kunz and Oxman 1998; Pedhazer 1982).

In our review, we rely strongly on these general assessments of the ability of research to make statements of high internal validity regarding the practices evaluated. However, we also recognize that other criteria are important in assessing the strength of research. While academics generally recognize that randomized experiments have higher internal validity than nonrandomized studies, a number of scholars have suggested the results of randomized field experiments can be compromised by the difficulty of implementing such designs (Cornish and Clarke 1972; Eck 2002; Pawson and Tilley 1997). Accordingly, in assessing the evidence, we also took into account the integrity of the implementation of the research design.

Even if a researcher can make a very strong link between the practices examined in a specific study and their influence on crime, disorder, or fear, if one cannot make inferences from that study to other jurisdictions or police practices more generally, then the findings will not be very useful. Moreover, most social scientists agree that caution should be used in drawing strong policy conclusions from a single study, no matter how well designed (Manski 2003; Weisburd and Taxman 2000). For these reasons, we took into account such additional factors related to our ability to generalize from study findings in drawing our conclusions.

What Works in Policing Crime, Disorder, and Fear of Crime

Below, we review the evidence on what works in policing using the criteria outlined above. In organizing our review, we rely on our typology of police practices and thus divide our discussion into four sections, representing the four broad types of police approaches suggested in our discussion of Figure 1. For each type, we

begin with a general proposition that summarizes what the research literature tells us about the effectiveness of that approach in reducing crime, disorder, and fear of crime.

Proposition 1: The standard model of policing has relied on the uniform provision of police resources and the law enforcement powers of the police to prevent crime and disorder across a wide array of crimes and across all parts of the jurisdictions that police serve. Despite the continued reliance of many police agencies on these standard practices, little evidence exists that such approaches are effective in controlling crime and disorder or in reducing fear of crime.

In our review of the standard model of policing, we identified five broad strategies that have been the focus of systematic research over the last three decades: (1) increasing the size of police agencies; (2) random patrol across all parts of the community; (3) rapid response to calls for service; (4) generalized investigations of crime; and (5) generally applied intensive enforcement and arrest policies.

Increasing the size of police agencies

Evidence from case studies in which police have suddenly left duty (e.g., police strikes) shows that the absence of police is likely to lead to an increase in crime (Sherman and Eck 2002). While these studies are generally not very strong in their design, their conclusions are consistent. But the finding that removing all police will lead to more crime does not answer the primary question that most scholars and policy makers are concerned with—that is, whether marginal increases in the number of police officers will lead to reductions in crime, disorder, or fear. The evidence in this case is contradictory and the study designs generally cannot distinguish between the effects of police strength and the factors that ordinarily are associated with police hiring such as changes in tactics or organizational structures. Most studies have concluded that variations in police strength over time do not affect crime rates (Chamlin and Langworthy 1996; Eck and Maguire 2000; Niskanen 1994; van Tulder 1992). However, two recent studies using more sophisticated statistical designs suggest that marginal increases in the number of police are related to decreases in crime rates (Levitt 1997; Marvell and Moody 1996).

Random patrol across all parts of the community

Random preventive patrol across police jurisdictions has continued to be one of the most enduring of standard police practices. Despite the continued use of random preventive patrol by many police agencies, the evidence supporting this practice is very weak, and the studies reviewed are more than a quarter century old. Two studies, both using weaker quasi-experimental designs, suggest that random preventive patrol can have an impact on crime (Dahmann 1975; Press 1971). A much larger scale and more persuasive evaluation of preventive patrol in Kansas City found that the standard practice of preventive patrol does not reduce crime,

disorder, or fear of crime (Kelling et al. 1974). However, while this is a landmark study, the validity of its conclusions has also been criticized because of methodological flaws (Larson and Cahn 1985; Minneapolis Medical Research Foundation 1976; Sherman and Weisburd 1995).

Rapid response to calls for service

A third component of the standard model of policing, rapid response to calls for service, has also not been shown to reduce crime or even to lead to increased chances of arrest in most situations. The crime-reduction assumption behind rapid response is that if the police get to crime scenes rapidly, they will apprehend offenders, thus providing a general deterrent against crime. No studies have been done of the direct effects of this strategy on disorder or fear of crime. The best evidence concerning the effectiveness of rapid response comes from two studies conducted in the late 1970s (Kansas City Police Department 1977; Spelman and Brown 1981). Evidence from five cities examined in these two studies consistently shows that most crimes (about 75 percent at the time of the studies) are discovered some time after they have been committed. Accordingly, offenders in such cases have had plenty of time to escape. For the minority of crimes in which the offender and the victim have some type of contact, citizen delay in calling the police blunts whatever effect a marginal improvement in response time might provide.

Generally applied follow-up investigations of crimes

No studies to date examine the direct impact of generalized improvements in police investigation techniques on crime, disorder, or fear of crime. Nonetheless, it has been assumed that an increase in the likelihood of a crime's being solved through arrest would lead to a deterrence or incapacitation effect. Research suggests, however, that the single most important factor leading to arrest is the presence of witnesses or physical evidence (Greenwood, Chaiken, and Petersilia 1977; Eck 1983)—factors that are not under the control of the police and are difficult to manipulate through improvements in investigative approaches.

Generally applied intensive enforcement and arrests

Tough law enforcement strategies have long been a staple of police crime-fighting. We reviewed three broad areas of intensive enforcement within the standard model: disorder policing, generalized field interrogations and traffic enforcement, and mandatory and preferred arrest policies in domestic violence.

Disorder policing. The model of intensive enforcement applied broadly to incivilities and other types of disorder has been described recently as "broken windows policing" (Kelling and Coles 1996; Kelling and Sousa 2001) or "zero tolerance policing" (Bowling 1999; Cordner 1998; Dennis and Mallon 1998; Manning 2001). While the common perception is that enforcement strategies (primarily arrest)

applied broadly against offenders committing minor offenses lead to reductions in serious crime, research does not provide strong support for this proposition. For example, studies in seven cities that were summarized by Skogan (1990, 1992) found no evidence that intensive enforcement reduced disorder, which went up despite the special projects that were being evaluated. More recent claims of the effects of disorder policing based on crime declines in New York City have also been strongly challenged because they are confounded with either other organizational changes in New York (notably Compstat; see Eck and Maguire 2000), other changes such as the crack epidemic (see Bowling 1999; Blumstein 1995), or more general crime trends (Eck and Maguire 2000). One correlational study by Kelling and Sousa (2001) found a direct link between misdemeanor arrests and more serious crime in New York, although limitations in the data available raise questions about the validity of these conclusions.

Generalized field interrogations and traffic enforcement. Limited evidence supports the effectiveness of field interrogations in reducing specific types of crime, though the number of studies available is small and the findings are mixed. One strong quasi-experimental study (Boydstun 1975) found that disorder crime decreased when field interrogations were introduced in a police district. Whitaker et al. (1985) report similar findings in a correlational study of crime and the police in sixty neighborhoods in Tampa, Florida; St. Louis, Missouri; and Rochester, New York. Researchers have also investigated the effects of field interrogations by examining variations in the intensity of traffic enforcement. Two correlational studies suggest that such interventions do reduce specific types of crime (Sampson and Cohen 1988; J. Q. Wilson and Boland 1979). However, the causal link between enforcement and crime in these studies is uncertain. In a more direct investigation of the relationship between traffic stops and crime, Weiss and Freels (1996) compared a treatment area in which traffic stops were increased with a matched control area. They found no significant differences in reported crime for the two areas.

Mandatory arrest policies for domestic violence. Mandatory arrest in misdemeanor cases of domestic violence is now required by law in many states. Consistent with the standard model of policing, these laws apply to all cities in a state, in all areas of the cities, for all kinds of offenders and situations. Research and public interest in mandatory arrest policies for domestic violence was encouraged by an important experimental study in Minneapolis, Minnesota (Sherman and Berk 1984a, 1984b), which found reductions in repeat offending among offenders who were arrested as opposed to those who were counseled or separated from their partners. This study led to a series of replications supported by the National Institute of Justice. These experiments found deterrent effects of arrest in two cities and no effect of arrest in three other cities (Berk et al. 1992; Dunford 1990; Dunford, Huizinga, and Elliot 1990; Hirschel and Hutchinson 1992; Pate and Hamilton 1992; Sherman et al. 1991), suggesting that the effects of arrest will vary by city, neighborhood, and offender characteristics (see also Sherman 1992; Maxwell, Garner, and Fagan 2001, 2002).

Proposition 2: Over the past two decades, there has been a major investment on the part of the police and the public in community policing. Because community policing involves so many different tactics, its effect as a general strategy cannot be evaluated. Overall, the evidence does not provide strong support for the position that community policing approaches impact strongly on crime or disorder. Stronger support is found for the ability of community policing tactics to reduce fear of crime.

Police practices associated with community policing have been particularly broad, and the strategies associated with community policing have sometimes changed over time. Foot patrol, for example, was considered an important element of community policing in the 1980s but has not been a core component of more recent community policing programs. Consequently, it is often difficult to determine if researchers studying community policing in different agencies at different times are studying the same phenomena. One recent correlational study that

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The research available suggests that when the police partner more generally with the public, levels of citizen fear will decline.

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attempts to assess the overall impact of federal government investment for community policing found a positive crime control effect of "hiring and innovative grant programs" (Zhao, Scheider, and Thurman 2002); however, a recent review of this work by the General Accounting Office (2003) has raised strong questions regarding the validity of the findings.

Studies do not support the view that community meetings (Wycoff and Skogan 1993), neighborhood watch (Rosenbaum 1989), storefront offices (Skogan 1990; Uchida, Forst, and Annan 1992), or newsletters (Pate and Annan 1989) reduce crime, although Skogan and Hartnett (1995) found that such tactics reduce community perceptions of disorder. Door-to-door visits have been found to reduce both crime (see Sherman 1997) and disorder (Skogan 1992). Simply providing information about crime to the public, however, does not have crime prevention benefits (Sherman 1997).

As noted above, foot patrol was an important component of early community policing efforts. An early uncontrolled evaluation of foot patrol in Flint, Michigan, concluded that foot patrol reduced reported crime (Trojanowicz 1986). However, Bowers and Hirsch (1987) found no discernable reduction in crime or disorder due

to foot patrols in Boston. A more rigorous evaluation of foot patrol in Newark also found that it did not reduce criminal victimizations (Police Foundation 1981). Nonetheless, the same study found that foot patrol reduced residents' fear of crime.

Additional evidence shows that community policing lowers the community's level of fear when programs are focused on increasing community-police interaction. A series of quasi-experimental studies demonstrate that policing strategies characterized by more direct involvement of police and citizens, such as citizen contract patrol, police community stations, and coordinated community policing, have a negative effect on fear of crime among individuals and on individual level of concern about crime in the neighborhood (Brown and Wycoff 1987; Pate and Skogan 1985; Wycoff and Skogan 1986).

An aspect of community policing that has only recently received systematic research attention concerns the influences of police officer behavior toward citizens. Citizen noncompliance with requests from police officers can be considered a form of disorder. Does officer demeanor influence citizen compliance? Based on systematic observations of police-citizen encounters in three cities, researchers found that when officers were disrespectful toward citizens, citizens were less likely to comply with their requests (Mastrofski, Snipes, and Supina 1996; McCluskey, Mastrofski, and Parks 1999).

Proposition 3: There has been increasing interest over the past two decades in police practices that target very specific types of criminals and crime places. In particular, policing crime hot spots has become a common police strategy for addressing public safety problems. While only weak evidence suggests the effectiveness of targeting specific types of offenders, a strong body of evidence suggests that taking a focused geographic approach to crime problems can increase policing effectiveness in reducing crime and disorder.

While the standard model of policing suggests that police activities should be spread in a highly uniform pattern across urban communities and applied uniformly across the individuals subject to police attention, a growing number of police practices focus on allocating police resources in a focused way. We reviewed research in three specific areas: (1) police crackdowns, (2) hot-spots policing, and (3) focus on repeat offenders.

Police crackdowns

There is a long history of police crackdowns that target particularly troublesome locations or problems. Such tactics can be distinguished from more recent hot-spots policing approaches (described below) in that they are temporary concentrations of police resources that are not widely applied. Reviewing eighteen case studies, Sherman (1990) found strong evidence that crackdowns produce short-term deterrent effects, though research is not uniformly in support of this proposition (see, e.g., Annan and Skogan 1993; Barber 1969; Kleiman 1988). Sherman (1990)

also reports that crackdowns did not lead to spatial displacement of crime to nearby areas in the majority of studies he reviewed.

Hot-spots policing

Although there is a long history of efforts to focus police patrols (Gay, Schell, and Schack 1977; O. W. Wilson 1967), the emergence of what is often termed *hot-spots policing* is generally traced to theoretical, empirical, and technological innovations in the 1980s and 1990s (Weisburd and Braga 2003; Braga 2001; Sherman and Weisburd 1995). A series of randomized field trials shows that policing that is focused on hot spots can result in meaningful reductions in crime and disorder (see Braga 2001).

The first of these, the Minneapolis Hot Spots Patrol Experiment (Sherman and Weisburd 1995), used computerized mapping of crime calls to identify 110 hot spots of roughly street-block length. Police patrol was doubled on average for the experimental sites over a ten-month period. The study found that the experimental as compared with the control hot spots experienced statistically significant reductions in crime calls and observed disorder. In another randomized experiment, the Kansas City Crack House Raids Experiment (Sherman and Rogan 1995a), crackdowns on drug locations were also found to lead to significant relative improvements in the experimental sites, although the effects (measured by citizen calls and offense reports) were modest and decayed in a short period. In yet another randomized trial, however, Eck and Wartell (1996) found that if the raids were immediately followed by police contacts with landlords, crime prevention benefits could be reinforced and would be sustained for long periods. More general crime and disorder effects are also reported in two randomized experiments that take a more tailored, problem-oriented approach to hot-spots policing (Braga et al. 1999; Weisburd and Green 1995a, because of their use of problem-solving approaches, we discuss them in more detail in the next section). Nonexperimental studies provide similar findings (see Hope 1994; Sherman and Rogan 1995b).

The effectiveness of the hot-spots policing approach has strong empirical support. Such approaches would be much less useful, however, if they simply displaced crime to other nearby places. While measurement of crime displacement is complex and a matter of debate (see, e.g., Weisburd and Green 1995b), a number of the studies reported above examined immediate geographic displacement. In the Jersey City Drug Market Analysis Experiment (Weisburd and Green 1995a), for example, displacement within two block areas around each hot spot was measured. No significant displacement of crime or disorder calls was found. Importantly, however, the investigators found that drug-related and public-morals calls actually declined in the displacement areas. This "diffusion of crime control benefits" (Clarke and Weisburd 1994) was also reported in the New Jersey Violent Crime Places experiment (Braga et al. 1999), the Beat Health study (Green Mazerolle and Roehl 1998), and the Kansas City Gun Project (Sherman and Rogan 1995b). In each of these studies, no displacement of crime was reported, and some improvement in the surrounding areas was found. Only Hope (1994) reports direct

displacement of crime, although this occurred only in the area immediate to the treated locations and the displacement effect was much smaller overall than the crime prevention effect.

Focusing on repeat offenders

Two randomized trials suggest that covert investigation of high-risk, previously convicted offenders has a high yield in arrests and incarceration per officer per hour, relative to other investments of police resources (Abrahamse and Ebener 1991; Martin and Sherman 1986). It is important to note, however, that these evaluations examined the apprehension effectiveness of repeat-offender programs not the direct effects of such policies on crime. However, a recent study—The Boston Ceasefire Project (Kennedy, Braga, and Piehl 1996)—which used a multiagency and problem-oriented approach (referred to as a "pulling levers" strategy), found a reduction in gang-related killings as well as declines in other gun-related events when focusing on youth gangs (Kennedy et al. 2001).

Another method for identifying and apprehending repeat offenders is "antifencing," or property sting, operations, where police pose as receivers of stolen property and then arrest offenders who sell them stolen items (see Weiner, Chelst, and Hart 1984; Pennell 1979; Criminal Conspiracies Division 1979). Although a number of evaluations were conducted of this practice, most employed weak research designs, thus making it difficult to determine if such sting operations reduce crime. There seems to be a consensus that older and criminally active offenders are more likely to be apprehended using these tactics as compared with more traditional law enforcement practices, but they have not been shown to have an impact on crime (Langworthy 1989; Raub 1984; Weiner, Stephens, and Besachuk 1983).

Proposition 4: Problem-oriented policing emerged in the 1990s as a central police strategy for solving crime and disorder problems. There is a growing body of research evidence that problem-oriented policing is an effective approach for reducing crime, disorder, and fear.

Research is consistently supportive of the capability of problem solving to reduce crime and disorder. A number of quasi-experiments going back to the mid-1980s consistently demonstrates that problem solving can reduce fear of crime (Cordner 1986), violent and property crime (Eck and Spelman 1987), firearm-related youth homicide (Kennedy et al. 2001), and various forms of disorder, including prostitution and drug dealing (Capowich and Roehl 1994; Eck and Spelman 1987; Hope 1994). For example, a quasi-experiment in Jersey City, New Jersey, public housing complexes (Green Mazerolle et al. 2000) found that police problem-solving activities caused measurable declines in reported violent and property crime, although the results varied across the six housing complexes studied. In another example, Clarke and Goldstein (2002) report a reduction in thefts of appliances from new home construction sites following careful analysis of this

problem by the Charlotte-Mecklenburg Police Department and the implementation of changes in building practices by construction firms.

Two experimental evaluations of applications of problem solving in hot spots suggest its effectiveness in reducing crime and disorder.[1] In a randomized trial with Jersey City violent crime hot spots, Braga et al. (1999) report reductions in property and violent crime in the treatment locations. While this study tested problem-solving approaches, it is important to note that focused police attention was brought only to the experimental locations. Accordingly, it is difficult to distinguish between the effects of bringing focused attention to hot spots and that of such focused efforts being developed using a problem-oriented approach. The Jersey City Drug Market Analysis Experiment (Weisburd and Green 1995a) provides more direct support for the added benefit of the application of problem-solving approaches in hot-spots policing. In that study, a similar number of narcotics

The effectiveness of the hot-spots policing approach has strong empirical support.

detectives were assigned to treatment and control hot spots. Weisburd and Green (1995a) compared the effectiveness of unsystematic, arrest-oriented enforcement based on ad hoc target selection (the control group) with a treatment strategy involving analysis of assigned drug hot spots, followed by site-specific enforcement and collaboration with landlords and local government regulatory agencies, and concluding with monitoring and maintenance for up to a week following the intervention. Compared with the control drug hot spots, the treatment drug hot spots fared better with regard to disorder and disorder-related crimes.

Evidence of the effectiveness of situational and opportunity-blocking strategies, while not necessarily police based, provides indirect support for the effectiveness of problem solving in reducing crime and disorder. Problem-oriented policing has been linked to routine activity theory, rational choice perspectives, and situational crime prevention (Clarke 1992a, 1992b; Eck and Spelman 1987). Recent reviews of prevention programs designed to block crime and disorder opportunities in small places find that most of the studies report reductions in target crime and disorder events (Eck 2002; Poyner 1981; Weisburd 1997). Furthermore, many of these efforts were the result of police problem-solving strategies. We note that many of the studies reviewed employed relatively weak designs (Clarke 1997; Weisburd 1997; Eck 2002).

TABLE 1
SYNTHESIS OF FINDINGS ON POLICE EFFECTIVENESS RESEARCH

Police Strategies That . . .	Are Unfocused	Are Focused
Apply a diverse array of approaches, including law enforcement sanctions.	**Inconsistent or weak evidence of effectiveness** Impersonal community policing, for example, newsletters **Weak to moderate evidence of effectiveness** Personal contacts in community policing Respectful police-citizen contacts Improving legitimacy of police Foot patrols (fear reduction)	**Moderate evidence of effectiveness** Problem-oriented policing **Strong evidence of effectiveness** Problem solving in hot spots
Rely almost exclusively on law enforcement sanctions	**Inconsistent or weak evidence of effectiveness** Adding more police General patrol Rapid response Follow-up investigations Undifferentiated arrest for domestic violence	**Inconsistent or weak evidence of effectiveness** Repeat offender investigations **Moderate to strong evidence of effectiveness** Focused intensive enforcement Hot-spots patrols

Discussion

We began our article with a series of questions about what we have learned from research on police effectiveness over the last three decades. In Table 1, we summarize our overall findings using the typology of police practices that we presented earlier. One of the most striking observations in our review is the relatively weak evidence there is in support of the standard model of policing—defined as low on both of our dimensions of innovation. While this approach remains in many police agencies the dominant model for combating crime and disorder, we find little empirical evidence for the position that generally applied tactics that are based primarily on the law enforcement powers of the police are effective. Whether the strategy examined was generalized preventive patrol, efforts to reduce response time to citizen calls, increases in numbers of police officers, or the introduction of generalized follow-up investigations or undifferentiated intensive enforcement activities, studies fail to show consistent or meaningful crime or disorder prevention benefits or evidence of reductions in citizen fear of crime.

Of course, a conclusion that there is not sufficient research evidence to support a policy does not necessarily mean that the policy is not effective. Given the continued importance of the standard model in American policing, it is surprising that so little substantive research has been conducted on many of its key components. Pre-

ventive patrol, for example, remains a staple of American police tactics. Yet our knowledge about preventive patrol is based on just a few studies that are more than two decades old and that have been the subject of substantial criticism. Even in cases where a larger number of studies are available, like that of the effects of adding more police, the nonexperimental designs used for evaluating outcomes generally make it difficult to draw strong conclusions.

This raises a more general question about our ability to come to strong conclusions regarding central components of the standard model of policing. With the exception of mandatory arrest for domestic violence, the evidence we review is drawn from nonexperimental evaluations. These studies are generally confounded in one way or another by threats to the validity of the findings presented. Indeed, many of the studies in such areas as the effects of police hiring are correlational studies using existing data from official sources. Some economists have argued that the use of econometric statistical designs can provide a level of confidence that is almost as high as randomized experiments (Heckman and Smith 1995). We think that this confidence is not warranted in police studies primarily because of the lack of very strong theoretical models for understanding policing outcomes and the questions of validity and reliability that can be raised about official police data. But what does this mean for our ability to come to strong conclusions about police practices that are difficult to evaluate using randomized designs, such as increasing the numbers of police or decreasing response time?

A simple answer to this question is to argue that our task is to improve our methods and data over time with the goal of improving the validity of our findings. In this regard, some recent research on police strength has tried to advance methods in ways likely to improve on prior conclusions (e.g., see Levitt 1997). We think this approach is important for coming to strong conclusions not only about the effectiveness of the standard model of policing but also about recent police innovation. But, more generally, we think experimental methods can be applied much more broadly in this area, as in other areas of policing. For example, we see no reason why the addition of police officers in federal government programs that offer financial assistance to local police agencies could not be implemented experimentally. While the use of experimental methods might be controversial in such cases, the fact that we do not know whether marginal increases in police strength are effective at reducing crime, disorder, or fear suggests the importance and legitimacy of such methods.

While we have little evidence indicating the effectiveness of standard models of policing in reducing, crime, disorder, or fear of crime, the strongest evidence of police effectiveness in our review is found in the cell of our table that represents focused policing efforts. Studies that focused police resources on crime hot spots provide the strongest collective evidence of police effectiveness that is now available. A series of randomized experimental studies suggests that hot-spots policing is effective in reducing crime and disorder and can achieve these reductions without significant displacement of crime control benefits. Indeed, the research evidence suggests that the diffusion of crime control benefits to areas surrounding treated hot spots is stronger than any displacement outcome.

The two remaining cells of the table indicate the promise of new directions for policing in the United States; however, they also illustrate once more the tendency for widely adopted police practices to escape systematic or high-quality investigation. Community policing has become one of the most widely implemented approaches in American policing and has received unprecedented federal government support in the creation of the Office of Community Oriented Policing Services and its grant program for police agencies. Yet in reviewing existing studies, we could find no consistent research agenda that would allow us to assess with strong confidence the effectiveness of community policing. Given the importance of community policing, we were surprised that more systematic study was not available. As in the case of many components of the standard model, research designs of the studies we examined were often weak, and we found no randomized experiments evaluating community policing approaches.

While the evidence available does not allow for definitive conclusions regarding community policing strategies, we do not find consistent evidence that community policing (when it is implemented without problem-oriented policing) affects either crime or disorder. However, the research available suggests that when the police partner more generally with the public, levels of citizen fear will decline. Moreover, growing evidence demonstrates that when the police are able to gain wider legitimacy among citizens and offenders, the likelihood of offending will be reduced.

There is greater and more consistent evidence that focused strategies drawing on a wide array of non–law-enforcement tactics can be effective in reducing crime and disorder. These strategies, found in the upper right of the table, may be classed more generally within the model of problem-oriented policing. While many problem-oriented policing programs employ traditional law enforcement practices, many also draw on a wider group of strategies and approaches. The research available suggests that such tools can be effective when they are combined with a tactical philosophy that emphasizes the tailoring of policing practices to the specific characteristics of the problems or places that are the focus of intervention. While the primary evidence in support of the effectiveness of problem-oriented policing is nonexperimental, initial experimental studies in this area confirm the effectiveness of problem-solving approaches and suggest that the expansion of the toolbox of policing practices in combination with greater focus can increase effectiveness overall.

Conclusions

Reviewing the broad array of research on police effectiveness in reducing crime, disorder, and fear rather than focusing in on any particular approach or tactic provides an opportunity to consider policing research in context and to assess what the cumulative body of knowledge we have suggests for policing practices in the coming decades. Perhaps the most disturbing conclusion of our review is that knowledge of many of the core practices of American policing remains uncertain.

Many tactics that are applied broadly throughout the United States have not been the subject of systematic police research nor have they been examined in the context of research designs that allow practitioners or policy makers to draw very strong conclusions. We think this fact is particularly troubling when considering the vast public expenditures on such strategies and the implications of their effectiveness for public safety. American police research must become more systematic and more experimental if it is to provide solid answers to important questions of practice and policy.

But what should the police do given existing knowledge about police effectiveness? Police practice has been centered on standard strategies that rely primarily on the coercive powers of the police. There is little evidence to suggest that this standard model of policing will lead to communities that feel and are safer. While police agencies may support such approaches for other reasons, there is not consistent scientific evidence that such tactics lead to crime or disorder control or to reductions in fear. In contrast, research evidence does support continued investment in police innovations that call for greater focus and tailoring of police efforts and for the expansion of the toolbox of policing beyond simple law enforcement. The strongest evidence is in regard to focus and surrounds such tactics as hot-spots policing. Police agencies now routinely rely on such approaches (Weisburd et al. 2001; Weisburd and Lum 2001), and the research suggests that such reliance is warranted. Should police agencies continue to encourage community- and problem-oriented policing? Our review suggests that community policing (when it is not combined with problem-oriented approaches) will make citizens feel safer but will not necessarily impact upon crime and disorder. In contrast, what is known about the effects of problem-oriented policing suggests its promise for reducing crime, disorder, and fear.

Note

1. An early experimental hot-spots study that tested problem solving at high crime-call addresses did not show a significant crime or disorder reduction impact (Buerger 1994; Sherman 1990). However, Buerger, Cohn, and Petrosino (1995) argue that there was insufficient dosage across study sites to produce any meaningful treatment impact.

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