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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.