Race, Cops, and Traffic Stops

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ANGELA J. DAVIS*

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When Wade Henderson, director of the Leadership Conference on Civil Rights, rented a car to drive to the University of Richmond Law School to give a lecture, he chose a bland family car rather than a flashy sports model. Journalist and academic Salim Muwakkil not only rents drab, nondescript cars when he travels on the highway, but he also leaves his favorite black beret at home. Neither man has a passion for dull-looking cars, and both can probably afford the fancier models. However, they make these decisions because they know from experience that the flashy sports car or the jaunty beret would increase their chances of being stopped by the police.

Wade Henderson and Salim Muwakkil are African American men. That fact makes them more likely to be stopped and detained by the police than their white counterparts. Flashy cars and distinctive hats attract the attention of the police even more. Neither the advancing age nor the graying hair of these men offset the problem—a presumptive social offense which Mr. Muwakkil cogently describes as “Driving While Black.”

Although most police officers would deny relying on race as a reason to initiate traffic stops, the practice of stopping motorists for a

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2. See id.
5. But see testimony of defense witness Kathless Bell in trial of O.J. Simpson who stated
minor traffic infraction for the real purpose of searching or investigating them for other offenses is a common practice that the United States Supreme Court recently upheld. In Whren v. United States, the petitioners claimed that these "pretextual stops" violate the Fourth Amendment to the Constitution and are racially discriminatory. The Supreme Court rejected the claim, upholding the constitutionality of pretextual stops based on probable cause and noting that claims of racial discrimination must be challenged under the Equal Protection Clause. The Court effectively sidestepped the subtextual issue of race in pretextual traffic stops, despite the mounting evidence that such stops

that former Los Angeles police officer Mark Fuhrman told her "of his hatred for interracial couples and suggested he would often stop them for no reason—just to harass them." Simpson's Lawyers Shift Gears, CHI. TRIB., Sept. 2, 1995, at 3.

6. If a police officer has probable cause to believe that the motorist has committed a traffic violation, he may forcibly detain him in order to issue a citation or even arrest him. See United States v. Robinson, 414 U.S. 218, 234-35 (1973). If the police officer decides to place the motorist under arrest, he then has the legal authority to conduct a full-blown search incident to the arrest of the motorist and the area around him. See Chimel v. California, 395 U.S. 752, 762-63 (1969). Any evidence or contraband found on the motorist may be used as the basis for probable cause to arrest him for other crimes. See Whren v. United States, 116 S. Ct. 1769, 1774 (1996); Robinson, 414 U.S. at 266. Aside from the opportunity to ticket or arrest a motorist, the pretextual traffic stop gives a police officer the opportunity to request permission to search his car. The police officer may legally request such permission to search, whether or not he decides to issue a traffic ticket. Although the officer must have reasonable suspicion or probable cause to stop or arrest a motorist, once the reason for the stop or arrest is completed, the officer has the right to continue to speak with him. Even if a police officer does not have probable cause or reasonable suspicion to believe that a crime has been or is about to be committed, he nonetheless has the right to approach an individual and speak with him. See Florida v. Bostick, 501 U.S. 429, 434 (1991). The Supreme Court has held that if the individual does not want to talk to the officer, he has the right to decline and walk away, and the exercise of those rights may not be used as the sole basis for probable cause or even reasonable suspicion. See Florida v. Royer, 460 U.S. 491, 497-98 (1983) (citing United States v. Mendenhall, 446 U.S. 544, 556 (1980)). Although many people do not realize they may refuse an officer's request to speak with them or search their car, see Bailey v. United States, 389 F.2d 305, 364 (D.C. Cir. 1967) (stating "people generally do not know and usually do not care whether they have a lawful right to walk away without regard for the presence of the policeman"); cf. Richard Cordray, Drivers Must Yield a Few Rights to Police in War Against Crime, Court Decides, COLUMBUS DISPATCH, July 1, 1996, at 7A (arguing that a motorist may permit a search due to fear that refusal would cause harsher sanctions for an alleged violation), the Supreme Court has held that police are not constitutionally required to inform individuals of this right. See Ohio v. Robinette, 65 U.S.L.W. 4013 (U.S. Nov. 18, 1996) (No. 95-891).


8. Although pretextual stops may be defined as any stop in which a police officer pretends to stop an individual for one reason so that he may investigate them for another, this Essay will only address pretextual stops in the traffic context.

9. See id. at 1774. The Court only briefly mentions the race issue in its reference to the Equal Protection Clause as the proper constitutional basis for challenging selective enforcement of the law based on race.

10. See id. at 1774. The Court only briefly mentions the race issue in its reference to the Equal Protection Clause as the proper constitutional basis for challenging selective enforcement of the law based on race.
are often racially motivated.\textsuperscript{11}

The \textit{Whren} Court left African-Americans and Latinos without an effective remedy for discriminatory pretextual traffic stops when it suggested the Equal Protection Clause as the appropriate constitutional basis for challenging these stops. The motorist who is arrested after a pretextual stop, as well as the motorist who is eventually allowed to go his way, must overcome substantial hurdles to mount a successful challenge to discriminatory police practices under the equal protection clause. These problems may prove insurmountable for the arrested motorist and may ultimately discourage other aggrieved motorists. In this Essay, I will discuss the Supreme Court's failure to provide a clear and effective remedy for discriminatory pretextual traffic stops. In Part I, I discuss the discretionary nature of pretextual stops and their discriminatory effect on African-Americans and Latinos. In Part II, I examine the \textit{Whren} decision and the ineffectiveness of the Court's proposed remedy for both criminal defendants and motorists who are not arrested. In conclusion, I stress the need for creative legal and policy-based solutions.

I. THE DISCRIMINATORY NATURE OF PRETEXTUAL TRAFFIC STOPS

Police officers exercise a tremendous amount of discretion in the exercise of their official law enforcement duties.\textsuperscript{12} The decisions to stop,\textsuperscript{13} detain or arrest\textsuperscript{14} an individual are all left to the discretion of police officers.\textsuperscript{15} No scenario better exemplifies both the benefits and drawbacks of this discretionary arrest power than the traffic stop. Because most jurisdictions enact hundreds of traffic regulations,\textsuperscript{16} it

\begin{itemize}
\item \textsuperscript{11}See Brief for Petitioners at 21-29, \textit{Whren} v. United States, 116 S. Ct. 1769 (1996) (No. 95-5841).
\item \textsuperscript{12}See generally \textit{United States v. Robinson}, 414 U.S. 218 (1973).
\item \textsuperscript{13}Police officers may stop and frisk suspects without probable cause if they have reasonable and articulable suspicion that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous." \textit{Terry v. Ohio}, 392 U.S. 1, 30 (1968). The Court has defined reasonable suspicion as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." \textit{Id.} at 21.
\item \textsuperscript{14}Police officers may arrest a suspect without a warrant for a felony or misdemeanor committed in his presence or for a felony not committed in his presence if there are reasonable grounds for making the arrest. See \textit{United States v. Watson}, 423 U.S. 411, 418 (1976) (citations omitted). Probable cause is defined as "a fair probability that contraband or evidence of a crime will be found." \textit{Illinois v. Gates}, 462 U.S. 213, 238 (1983).
\item \textsuperscript{15}The police conduct investigations of criminal activities and make arrests. Practically speaking, a decision not to stop, detain, or arrest is unreviewable. See \textit{Stephen A. Saltzburg & Daniel J. Capra}, \textit{American Criminal Procedure} 681 (5th ed. 1996).
\item \textsuperscript{16}Barbara C. Salken, \textit{The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses}, 62 \textit{Temp. L. Rev.} 221, 223 (1989)(stating "[t]he innumerable rules and regulations governing vehicular travel make it difficult not to violate one of them at one time or another.").
\end{itemize}
would be impossible for a police officer to issue a citation or make an arrest for every traffic violation he observed, nor would motorists desire such a result. It is doubtful that motorists would support legislation requiring mandatory citations or arrests for all traffic violations. Even if motorists wanted such legislation, the administrative costs of implementing a system of mandatory citations or arrests for all traffic offenses would be staggering. These practical considerations justify the exercise of discretion, and police officers are arguably best situated to make the necessary judgements based on factors such as the seriousness of the offense and the actual or potential harm in a particular case. The obvious drawback of police discretion is that it inherently involves treating similarly-situated motorists differently. A police officer may stop and ticket only one driver, even when he observes several motorists exceed the speed limit. This accepted exercise of police discretion may seem unfair to some motorists, but it is both unavoidable and legal. The more serious disadvantage of discretionary police power lies in its potential for abuse. Pretextual traffic stops exemplify this abuse when race—either consciously or unconsciously—infuses the decision to stop a motorist.

The legal standard governing a police officer’s decision to stop a suspect has become so flexible and loosely-defined, that it is difficult to know whether, and to what extent, race influences the decision. In Terry v. Ohio, the Supreme Court adopted reasonable suspicion as the standard governing a police officer’s decision to stop and possibly frisk a suspect. The Terry Court held that the officer must have “specific and

17. Driving over the speed limit, crossing the divider line, and changing lanes without signalling are all examples of traffic violations that are committed with such frequency that their volume prohibits the enforcement of the law in every case. It is probably fair to say that every single driver in America has committed a traffic violation at some point in their lives, and most probably commit them on a daily basis.

18. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Professor Lawrence defines unconscious racism as the ideas, attitudes, and beliefs developed in American historical and cultural heritage that cause Americans unconsciously to attach significance to an individual’s race and that induce negative feelings and opinions about nonwhites. See id. at 322. He argues that although America’s historical experience has made racism an integral part of our culture, because racism is rejected as immoral, most people exclude it from their conscious minds. See id. at 322-23; see also Sheri Lynn Johnson, Unconscious Racism and the Criminal Law, 73 CORNELL L. REV. 1016 (1988) (discussing unconscious racism in criminal law and procedure).


20. In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court first held that a police officer may stop and search an individual on less than probable cause. The Court established that the decisions to stop and frisk a suspect are two distinct determinations. A police officer may stop an individual if he has reasonable suspicion to believe that crime is afoot, but he may frisk the suspect only if he has reasonable suspicion to believe the suspect is armed and dangerous. See id. at 30.
articulable facts . . . taken together with rational inferences from those facts," before stopping an individual. The Court held that mere suspicion and inarticulable hunches would not suffice. However, in cases decided after Terry, the Court has exhibited increasing deference to the judgments of police officers in its interpretation of the reasonable suspicion standard.

In United States v. Cortez, the Court held that reasonable suspicion should be based on the "totality of the circumstances" and that "[b]ased upon the whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped." The Court held that the particularized suspicion must be based on all the circumstances, including inferences and deductions by a trained officer. Given this flexible standard that not only acknowledges but credits the mental inferences of the police officer, it would be difficult to discern whether, and to what extent, racial considerations may be camouflaged in the midst of limitless inferences and deductions.

Police officers need not always conceal the fact that race has influenced their decision to detain a suspect, because some courts have ruled that race may be used as a detention factor in certain circumstances. The Supreme Court has twice upheld the use of race in immigration detention decisions.

22. 392 U.S. at 22.
26. Id.
27. See 449 U.S. at 418.
28. See United States v. Weaver, 966 F.2d 391, 394-96 (8th Cir. 1992) (finding race coupled with other factors is a basis for reasonable, articulable suspicion justifying detention of young black male in airport); State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) (deciding ethnic background of defendant properly considered where person appears out of place in neighborhood); State v. Ruiz, 504 P.2d 1307, 1307-09 (Ariz. Ct. App. 1967) (holding that police properly considered race of defendant when they stopped a Mexican in an all-black area). But see State v. Barber, 823 P.2d 1068, 1074-75 (Wash. 1992) (holding that a person of a specific race being allegedly "out of place" in a particular geographic area, can never constitute finding of reasonable suspicion of criminal behavior); City of St. Paul v. Uber, 450 N.W.2d 623, 628-29 (Minn. Ct. App. 1990) (holding that presence of white person from suburban town in mixed, high-crime neighborhood does not constitute basis for detention).
29. See United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976) (holding that there was no constitutional violation when border patrol detained motorists even if such referrals were made largely on basis of apparent Mexican ancestry); United States v. Brignoni-Ponce, 422 U.S. 873, 885-87 (1975) (holding that border patrol officers may consider race of suspect as a factor in decision to stop).
be one of a number of factors in the detention calculus. Drug courier profiles also permit the infusion of race in the detention decision. Law enforcement agents compile a lot of characteristics that have been found through experience to be common characteristics of those engaged in a certain type of criminal activity in order to form a criminal profile. Drug courier profiles have included a broad range of behaviors which often contradict. For example, some drug courier profiles list individuals travelling alone by plane who exit last while others target those who leave first. Travellers who carry certain types of luggage appear on some profiles while individuals who travel without luggage are on others. Most if not all of the conduct and characteristics listed in the profile constitute innocent, noncriminal behavior. But in United States v. Sokolow, the Supreme Court held that the fact that individual behaviors and characteristics were consistent with innocent behavior did not exclude them from consideration in the overall determination of whether the totality of the circumstances constituted reasonable suspicion or probable cause. Race or ethnicity are two of the “innocent” characteristics specifically included in some drug courier profiles.

The use of drug courier profiles may be discriminatory even when they do not list race as a characteristic because officers do not stop whites who exhibit the other innocent behaviors or characteristics as


31. See United States v. Harvey, 16 F.3d 109, 113 (6th Cir. 1994) (Keith, J., dissenting) (police officer involved in pretextual traffic stop testified that the defendants fit a drug courier profile because they were “three young black male occupants in an old vehicle”).


37. 490 U.S. at 10 ("'[I]nnocent behavior will frequently provide the basis for a showing of probable cause,' and '[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry." (citing Illinois v. Gates, 462 U.S. 213, 243-44 n.13 (1983)).

38. See United States v. Rosales, 60 F.3d 835 (9th Cir. 1994) (unpublished opinion) (Hispanic men driving American-made luxury or performance automobiles); United States v. Weaver, 966 F.2d 391, 392-93 (8th Cir. 1992) (young black male, roughly dressed, walking rapidly towards taxi stand, deplaned in Kansas City from L.A.).
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quently as African-Americans. A white man dressed in a business suit who buys a round trip plane ticket with a quick turnaround time, travels with no luggage, and deplanes last may not be detained. But a young black man or woman casually dressed who acts and travels the same way may raise the suspicions of law enforcement agents. If a police officer who uses a profile treats similarly situated blacks and whites differently, then race becomes the defining factor which elevates a suspicion or hunch to reasonable suspicion or even probable cause.

Police who do not use drug courier profiles may believe that black men and women are more likely to engage in certain types of criminal behavior than whites because of statistical studies which purport to prove disproportionate criminality among African-Americans. Police officers who harbor these beliefs may either consciously or unconsciously consider an African-American's race as a factor in the nebulous reasonable suspicion calculus. The idea that one's race may be used in the detention decision in any way other than as an identifying factor troubles some scholars and jurists. But even if one accepts the argument that race may be used in some circumstances as one of many factors, it would be virtually impossible to determine precisely what role race played in a particular detention decision. Did it play a minimal role or was it in fact the officer's primary or even sole reason for stopping a suspect?

Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops. Statistics gathered in connection with lawsuits filed by black motorists in New Jersey and Maryland reveal that 71

39. For a discussion of the use of race in drug courier profiles see Johnson, supra note 30, at 233-34.
40. See generally Johnson, supra note 30.
41. See Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 56-68 (1995) (analyzing studies which compare arrests and victim reports with incarceration rates and concluding that blacks disproportionately commit certain types of crimes). But see Angela J. Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660, 1681 (1996) (criticizing Tonry's analysis and arguing that the use of arrest statistics as a measure of criminal behavior is inherently flawed due to the discretionary and often discriminatory detention and arrest decisions of police officers. Davis also argues that despite the problems inherent in relying on arrest statistics, Tonry's analysis indicates the existence of substantial racial bias in the criminal process).
42. Witnesses of crime may include the race of the suspect in their descriptions. See United States v. Collins, 532 F.2d 79, 83 (8th Cir. 1976) (holding stop of African-American driving brown Cadillac within miles of bank proper where description of bank robbery suspects indicated three black men escaped in brown Cadillac).
43. See United States v. Collins, 532 F.2d 79, 85 (8th Cir. 1976) (Heaney, J., dissenting) (arguing factor of race eliminates persons of another race from suspicion, but police should not suspect persons of identified race, especially in our society where "race is often an integral part of police suspicion") (citing President's Comm'n on Law Enforcement and the Admin. of Justice, Task Force Report: Police 184 (1967)); Johnson, supra note 30.
percent of the 437 motorists stopped and searched along a northeastern stretch of Interstate 95 in the first nine months of 1995 were black.\footnote{See Michael A. Fletcher, Driven to Extremes, WASH. POST, Mar. 29, 1996, at A1.} One hundred and forty-eight hours of videotaped traffic stops in Florida revealed that seventy percent of the 1,048 motorists stopped along Interstate 95 were black or Hispanic,\footnote{See Jeff Brazil & Steve Berry, Color of Driver is Key to Stops in I-95 Videos, ORLANDO SENTINEL, Aug. 23, 1992, at A1.} even though Blacks and Hispanics made up only five percent of the drivers on that stretch of the highway.\footnote{See Henry Pierson Curtis, Statistics Show Pattern of Discrimination, ORLANDO SENTINEL, Aug. 23, 1992, at A11.} Less than one percent of the drivers received traffic citations and only five percent of the stops resulted in an arrest.\footnote{See Brazil and Berry, supra note 45.}

In 1993, an African-American man in the city of Reynoldsburg, Ohio, sued the city after an informal group of police officers who called themselves the “Special Nigger Arrest Team” targeted him for arrest.\footnote{See Fletcher, supra note 44.} Several officers confirmed the existence of the group and admitted that its members singled out African-Americans for traffic stops and arrests.\footnote{See id.} The city eventually settled the lawsuit.\footnote{See id.} Since police departments across the country have varying policies on the collection and release of information about the race of motorists who are stopped, detained, or searched, national statistics are not available.\footnote{See id.}

\section*{II. \textit{Whren v. United States}}

The Supreme Court was presented with the opportunity to remedy discriminatory pretextual traffic stops in the case of \textit{Whren v. United States}. Despite the evidence that police officers used these stops to discriminate against people of color,\footnote{See Brief for the Petitioners at 21-29, Whren v. United States, 116 S. Ct. 1769 (1996) (No.95-5841).} the Court dismissed the issue in a
single sentence, noting that the Equal Protection Clause was the appropriate constitutional basis for a claim of racial discrimination.\textsuperscript{3} This cryptic reference to the Equal Protection Clause constituted the Court’s entire response to the petitioners’ argument that pretextual stops discriminate against blacks and Latinos.

The facts of the \textit{Whren} case reveal that the traffic stop was pretextual. Two young African-American men were sitting in a Nissan Pathfinder at a stop sign when they were first spotted by two plain-clothes police officers. The officers asserted that they were suspicious because the occupants were youthful, the driver appeared to be looking into the lap of the passenger, and the car had temporary license plates.\textsuperscript{4} In addition, the young men were driving in a “high drug area” of Washington, D.C. and the car remained at the stop sign for about twenty seconds, which the officers considered to be an unusually long period of time.\textsuperscript{5} According to the officers, as the officers made a U-turn and drove towards the Pathfinder, its driver made a sharp right turn without signalling and sped off at a high rate of speed.\textsuperscript{6} The police officers followed the Pathfinder until it stopped at a traffic light.\textsuperscript{7} One of the officers got out of the unmarked car and approached the driver’s side of the window.\textsuperscript{8} The passenger was holding plastic bags containing what appeared to be crack cocaine.\textsuperscript{9} The officers placed the two young men under arrest and charged them with various narcotics offenses.\textsuperscript{10}

The defendants moved to suppress the drugs, alleging that the stop was illegal because the officers had neither probable cause nor reasonable suspicion to believe the defendants had drugs.\textsuperscript{11} The defendants further claimed that the traffic stop was pretextual. The trial court denied the motion and the Court of Appeals affirmed, holding that “regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances could have stopped the car for the suspected

\textsuperscript{4} See id. at 1772.
\textsuperscript{5} Id.
\textsuperscript{6} See id.
\textsuperscript{7} See id.
\textsuperscript{8} See id.
\textsuperscript{9} See id.
\textsuperscript{10} See id.
\textsuperscript{11} The petitioners concede that the officers had probable cause to believe that they had violated various traffic regulations (failing to give full time and attention to the operation of their vehicle, turning without signalling, and speeding). \textit{See Whren}, 116 S. Ct. 1769 at 1772-73.
traffic violation."62 The Supreme Court granted certiorari.63

Although the Court had not previously ruled on the constitutionality of pretextual traffic stops, it had addressed pretextual behavior in previous cases and seemed to express a general disapproval of the practice.64 The Court acknowledged its discussion of pretextual stops and searches in previous cases65 but noted, "not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."66

The Supreme Court affirmed the Court of Appeals, finding the stop legal because the police officers had probable cause to believe that the driver had committed several traffic violations.67 The Court declined to question the motivations of the police officers and rejected the notion that the constitutional reasonableness of traffic stops depended on the actual motivations of the individual officers involved.68 The Court noted that "the fact that the officer does not have the state of mind which is hypothesized 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."69

The Court rejected the petitioners' argument that the standard for traffic stops should be "whether a police officer, acting reasonably, would have made the stop for the reason given."70 The petitioners urged this standard because they claimed that a police officer could easily use

64. See Florida v. Wells, 495 U.S. 1, 4 (1990) (stating use of inventory search as front for general search for incriminating evidence improper); New York v. Burger, 482 U.S. 691, 716-17 n.27 (1987) (noting proper administrative inspection valid and not illegal); Colorado v. Bertine, 479 U.S. 367, 372 (1987) (approving inventory search where there was no showing police acted in bad faith or for sole purpose of investigation); Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam) (noting officer's issuance of traffic citation not pretext for confirming unrelated suspicions). But see United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983) (holding customs officials with valid legal justification may board vessel regardless of alleged ulterior motive); Scott v. United States, 436 U.S. 128, 138 (1978) (deciding subjective intent of agents' wiretapping not relevant to legality of conduct); Gustafson v. Florida, 414 U.S. 260, 265-66 (1973) (following Robinson, Court upheld full search of person incident to arrest regardless of officers' subjective fear that suspect might be armed); United States v. Robinson, 414 U.S. 218, 221 n.1, 236 (1973) (rejecting petitioner's argument that search was invalid because traffic violation based arrest was pretext for drug search).
66. Id. at 1774.
67. See id. at 1777.
68. See id. at 1774.
69. Id. at 1774 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).
70. Id. at 1773.
a traffic stop as a pretext for investigating a motorist for some other crime for which he had neither probable cause nor reasonable suspicion. The petitioners further claimed that police officers might use these traffic stops to detain motorists based on impermissible factors such as race. The Court noted that the constitutional basis for challenging racially discriminatory enforcement of the law is the Equal Protection Clause, not the Fourth Amendment. According to the Court, any legal challenge which requires questioning the subjective motivations of a police officer is not suitable for Fourth Amendment analysis.

A. The Arrested Motorist

The Whren Court did not provide a clear, meaningful remedy for the criminal defendant who is arrested based on drugs or other contraband found during a race-based pretextual traffic stop. Although criminal defendants alleging a violation of their Fourth Amendment rights traditionally seek suppression of the illegally seized evidence under the exclusionary rule, the Whren Court identified the Equal Protection Clause rather than the Fourth Amendment as the appropriate constitutional basis for claims based on race discrimination. However, the Court did not address the appropriate forum for raising such claims nor the appropriate remedy if the defendant prevails.

A criminal defendant could file a civil rights action under 42 U.S.C. § 1983 alleging that the police officer had denied him equal protection.

71. See id. at 1772-74.
72. See id. at 1772-73.
73. See id. at 1774.
74. See id. Although the Court eschews questioning the motivations of police officers under the Fourth Amendment, it requires proof of such motivations in Equal Protection analysis. See generally Washington v. Davis, 426 U.S. 229 (1976); see also McCleskey v. Kemp, 481 U.S. 279 (1987) (defendant alleging discrimination in the administration of Georgia’s death penalty statute in violation of the equal protection clause must prove that decision makers in his case acted with discriminatory purpose).
75. Courts exclude evidence from the Government’s case-in-chief on the merits of guilt or innocence where the court determines that the evidence was the product of an unconstitutional search or seizure. The Court first introduced the doctrine in federal courts in Weeks v. United States, 232 U.S. 383 (1914), and subsequently applied the rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961). The Court has explicitly stated that the “exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.” Stone v. Powell, 428 U.S. 465, 482-93 (1976) (emphasis added).
76. 42 U.S.C. § 1983 (1994) provides:

Every person, who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
of the laws. If he prevailed, he would be entitled to damages or injunc-
tive relief. But would these remedies really compensate an incarcer-
ated criminal defendant? Given the social hostility to citizens convicted
of criminal offenses, would an individual found guilty of a criminal
offense have any meaningful chance of securing a settlement or recoup-
ing monetary damages from a jury? What type of injunctive relief
would a court order? A judgment requiring police officers to refrain
from searching a defendant or his car without probable cause to believe
that criminal activity other than the traffic violation has occurred would
not compensate the defendant who has already suffered harmed.

Criminal defendants typically raise equal protection claims in their
criminal cases based on alleged racially discriminatory behavior by
prosecutors. In United States v. Armstrong, the defendants alleged
race-based selective prosecution and sought dismissal of the indictment
as the appropriate remedy. In Batson v. Kentucky, the defendant
alleged discriminatory use of peremptory strikes during jury selection,
and at the trial stage, sought dismissal of the selected jury. Although
criminal defendants traditionally have not sought exclusion of evidence
as a remedy for an equal protection violation, exclusion would seem
the most appropriate remedy for unconstitutional police behavior since it
precisely meets the force of the violation. Likewise, criminal defendants
typically have not sought dismissal of the indictment as a remedy for
unconstitutional police behavior. However, since defendants would
allege race-based selective enforcement of the law as the constitutional
error, the violation is closely analogous to selective prosecution, and dis-
missal of the indictment might be the more appropriate remedy. The
Whren Court provides no guidance on these issues.

Whether the criminal defendant raises the equal protection claim in
the criminal or civil context, traditional Equal Protection analysis
requires that the defendant prove that a police officer intentionally dis-
criminated against him based on his race. Specifically, the defendant

78. Criminal defendants experience difficulty securing legal representation for these claims.
See infra note 108.
80. See id. at 1483; see also infra notes 89-93 and accompanying text.
82. Id. at 83.
83. But see State v. Pedro Soto, Superior Court of New Jersey (unpublished opinion, March 4,
1996) (suppressing evidence seized as result of discriminatory enforcement of the traffic laws by
the New Jersey State Police under the equal protection and due process clauses of the Fourteenth
must show that the law enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose. A number of scholars have criticized the traditional equal protection standard as being an inadequate remedy for race discrimination because of the difficulty of proving invidious intent on the part of the state actor. Motorists challenging pretextual stops would certainly face this obstacle. It would be quite difficult for a black motorist to prove that a police officer stopped or detained him because of his race. Even if the officer relied on a drug courier profile which included race as a factor, short of an admission by the police officer or similarly incriminating physical evidence, a motorist could not prove that race served as the only reason or the primary reason for the stop.

The Supreme Court's recent decision in United States v. Armstrong illustrates the obstacles a criminal defendant must overcome when he alleges a denial of equal protection. In Armstrong, the Court established the standard for discovery in criminal cases in which the defendant alleges race-based selective prosecution. The Court held that in order to obtain discovery, the defendant would have to present some evidence that similarly situated defendants of another race could have been prosecuted, but were not. The standard for prevailing on the merits is almost identical. The Court reaffirmed that a defendant attempting to prove selective prosecution based on race in violation of the Equal Protection Clause must prove that similarly situated defendants of another race could have been prosecuted, but were not. Presumably, more proof would be required to prevail on the merits than to obtain discovery, but the Armstrong Court does not provide much guidance on this issue.

An African-American motorist alleging that a police officer's use

85. A plaintiff can establish a prima facie case of an equal protection violation by showing that the application of the statute or regulation at issue has had a discriminatory effect. See id. at 241.
86. See id. at 239.
87. See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 319-23 (1987) (arguing that most behavior that produces racial discrimination results from "unconscious racial motivation"); Paul Brest, In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1, 4-5 (1976) (setting forth a disproportionate impact doctrine as an alternative to the Washington v. Davis discriminatory purpose standard, arguing that the Davis standard ignores the fact that "race-dependent decisions are so often concealed").
88. See supra notes 24-51 and accompanying text.
90. Id. at 1487.
91. See id. at 1488-89.
92. See id. at 1487. The Court does not explain the difference between the discovery standard and the standard for prevailing on the merits. Presumably more proof would be necessary to prevail on the merits.
of a pretextual traffic stop constituted a denial of equal protection would need to show that similarly situated white motorists could have been stopped, detained or arrested, but were not. Armstrong suggests that they would need to provide some evidence of such failures to stop to obtain discovery and presumably more of such evidence to prevail on the merits. How could a motorist obtain such evidence? Even if he did not have to cross the Armstrong hurdle to get discovery, such information would not be readily available. Police officers do not keep records of instances in which they could have stopped a motorist for a traffic violation, but did not.

B. The Motorist Who is Not Arrested

Pretextual traffic stops may have a discriminatory effect on an individual whether or not the police discover evidence of criminal activity. When the police detain and search a motorist, they intrude on his privacy and possessory rights, his right to be left alone. While one might be tempted to conclude that when the police detain an individual and ultimately release him, he suffers little or no harm, when the detention is based on race, the harm is felt long past the duration of the stop.

One would surmise that the motorist who is not arrested and therefore does not carry the stigma or bear the practical difficulties of an incarcerated criminal defendant should be able to challenge a racially discriminatory pretextual traffic stop successfully. The case of Robert Wilkins v. Maryland State Troopers, illustrates that the Whren Court’s proposed remedy for these stops may fail even in the best case scenario. Mr. Wilkins does not come close to fitting a drug courier profile. With the exception of his African heritage, he displays none of the characteristics or behavior listed in the typical drug courier profile. Mr. Wilkins is 33 years old, married, and drives a 1989 Nissan Sentra. He wears horn-rimmed glasses and dresses conservatively. A graduate of the Harvard Law School and a staff attorney at the Public Defender Service for the District of Columbia, Mr. Wilkins is an active member of the Union Temple Baptist church where he serves as a trustee and mentor in the Rites of Passage Manhood program, a mentoring program for young men eleven to seventeen years old. Despite his quiet and modest man-

93. See infra note 106 for discussion of how such information was compiled in a pending lawsuit.

94. Although Mr. Wilkins’ case was brought and resolved one year before the Whren decision, his claim alleged a violation of his right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, as well as violations of the Fourth Amendment, Maryland common law, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. Sec. 1983 (1994).
ner, Mr. Wilkins’ physical appearance is almost regal, primarily because of his carriage—proud, upright, and most dignified. His speech is precise, clear, always proper and never profane. Its content reveals his intelligence and thoughtfulness.

On May 8, 1992, Mr. Wilkins was driving from Chicago to Washington, D.C. with his aunt, uncle and cousin. They had attended the funeral of Mr. Wilkins’ grandfather, Rev. G.R. Wilkins, Sr. The family was driving a Cadillac they had rented for the trip. They had decided to drive all night so that Mr. Wilkins could arrive on time for a client’s 9:30 a.m. court appearance.

At about 5:55 a.m., Maryland state police officer V.W. Hughes stopped the car on I-68 in Cumberland, Maryland. Mr. Wilkins’ cousin, Scott El-Amin, was driving at the time. Officer Hughes stated that Mr. El-Amin had been driving sixty miles per hour in a forty mile per hour zone. Before issuing either a ticket or a warning, Hughes produced a form requesting consent to search the car. The family declined consent and refused to sign the form. Hughes stated that the searches were routine and further stated “if you have nothing to hide, then what is the problem?” Mr. Wilkins’ uncle stated that he would not consent to the officer searching through all of their belongings on the highway in the rain. Mr. Wilkins asked Hughes why he wanted to search the car. Hughes refused to provide an explanation and merely repeated his request. He then mumbled something about “problems with rental cars coming up and down the highway with drugs.” Mr. Wilkins then informed Hughes that they were returning from his grandfather’s funeral in Chicago and offered to show him a copy of the obituary. Hughes declined the offer and informed the family that if they did not consent to the search, they would have to wait while he called for a narcotics dog to come and sniff the car.

Mr. Wilkins, drawing on his experience as a criminal defense appellate and trial lawyer, informed Hughes that there was a Supreme Court case entitled United States v. Sharpe95 that prevented him from detaining them without a reasonable, articulable suspicion that they were carrying drugs.96 Mr. Wilkins further noted that the officer had no such reasonable suspicion. No doubt irritated rather than enlightened by Mr. Wilkins’ impromptu lesson in criminal procedure, the officer told Mr. Wilkins and his family that they would just have to wait.

At approximately 6:25, Sergeant Brown arrived with a narcotics dog and ordered them out of the car. The family asked if they could remain in the car during the dog sniff so they could stay out of the rain

96. See id. at 683; id. at 689 (Marshall, J., concurring).
and away from the dog. The police officers refused their request and insisted that they stand in the rain. The German shepherd sniffed slowly and thoroughly around the car while curious motorists passed on the highway. The dog detected nothing. Hughes issued a $105 speeding ticket and at about 6:35, the Wilkins family continued on their way. Mr. Wilkins was late for his court appearance.

Mr. Wilkins and his family felt humiliated and angry. Unlike most motorists who endure this experience, Mr. Wilkins decided to pursue legal action. He wrote to the local office of the American Civil Liberties Union ("ACLU"). After meeting with Mr. Wilkins, the ACLU lawyers decided to represent him. Lawyers from the firm of Hogan and Hartson agreed to join as counsel. They filed a lawsuit against the Maryland State Police, alleging that Mr. Wilkins and his family had been falsely imprisoned and intentionally treated differently on account of their race in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Maryland common law, Title VI of the Civil Rights Act of 1964 and 42 U.S. C. Sec. 1983.97 In addition to violations of their Fourth Amendment right to be free from unreasonable searches and seizures, the plaintiffs claimed deprivation of "their right to equal protection of the laws as enjoyed by similarly situated Caucasian citizens of the United States secured to them by the Fourteenth Amendment."98

On June 5, 1995, the Maryland State Police agreed to a settlement involving monetary damages and injunctive relief.99 The Maryland State Police consented to adopt a policy prohibiting the use of race-based drug courier profiles as a law enforcement tool.100 They further agreed that the policy would direct all Maryland State Police not to use a race-based profile as a cause for stopping, detaining, or searching motorists traveling on Maryland roadways.101 The policy would be enforced through appropriate investigation and disciplinary action.102 Additional terms of the agreement included the implementation of a mandatory training program incorporating the policy and a requirement that computer records of all stops involving consent to search or dog sniffs be maintained.103 Such records would document the date, time, and location of the consent, search, or dog sniff, the name of the officer, the race

97. See Robert L. Wilkins v. Maryland State Police, Complaint filed in U.S District Court for the District of Maryland, p. 3.
98. Id. at p. 12.
99. See Settlement Agreement, United States District Court for the District of Maryland, Civil Action No. MJG-93-468.
100. See id. at p. 3.
101. See id.
102. See id. at p. 4.
103. See id.
of the person(s) stopped, detained or searched, the year, make, and model of the car and the grounds for requesting the search or dog sniff.104

The agreement also provided that after July 1, 1995, if the plaintiffs made a reasonable showing that a pattern and practice of race-based stops existed, plaintiffs might seek to require the defendants to provide additional identifying information in the computer records and the Court's jurisdiction would be extended to June 30, 1998.105 The information received thus far indicates a continued pattern and practice of stopping African-Americans.106 The plaintiffs have filed pleadings requesting that the defendants be held in contempt of court.107

In one sense, Robert Wilkins' story is a hopeful one. Despite continuing litigation, the outcome of his case was successful. He secured a settlement agreement which compels the Maryland State Police to refrain from considering race as a factor in the decision to stop, detain, and search motorists on Maryland highways. His family received monetary compensation for the harm they experienced.

On the other hand, Mr. Wilkins' case engenders pessimism about the interaction of police forces with African-American citizens on streets and highways. Despite the settlement agreement, preliminary findings indicate a continued pattern of discriminatory stops and searches by the Maryland state police. As a result, Mr. Wilkins' lawyers continue to seek judicial relief. Moreover, the ramifications of this case for most other African-American motorists are, at best, uncertain. Unfortunately, Mr. Wilkins' case cannot be used as an example of what every similarly aggrieved African-American can achieve. First, Mr. Wilkins is far more educated than most motorists—black or white—particularly in the area of Fourth Amendment law, and was able confidently to assert his rights. Second, he was not arrested and charged with a criminal offense, and thus had access to more legal options. Third, Mr. Wilkins' persona—

104. See id. at p. 5.
105. See id.
106. In preparation for further litigation, the plaintiffs and their lawyers commissioned testers to compile additional evidence. These testers drove on a stretch of I-95 between Baltimore and Delaware at exactly 55 mph (the speed limit for this portion of the highway) and documented the number of drivers who drove over the speed limit and committed other obvious traffic violations. Preliminary test results indicate that 17% of drivers on this part of the highway were black and that 17% of black drivers committed traffic violations. Ninety-three percent of all drivers committed some traffic violation. Thus, African-Americans were not found to violate traffic regulations more than members of other racial groups. In fact, the statistics indicate the opposite conclusion. Interview with Robert Wilkins, October 27, 1996.
107. See Paul W. Valentine, Maryland State Police Still Target Black Motorists, ACLU Says, WASH. POST, Nov. 15, 1996, at A1. Seventy-three percent of the cars stopped and searched by troopers on I-95 between Baltimore and Delaware since January 1995 were driven by African-Americans. The police found nothing in seventy percent of the drug searches. See id.
intelligent, articulate, well-educated, church-going and charismatic—had much to do with the ACLU's decision to handle his case. No doubt, these factors also influenced the decision of the Maryland State Police to settle the case. Finally, his case has no legal precedential value for other aggrieved motorists.

IV. CONCLUSION

The race-based pretextual traffic stop tears a hole in the fabric of our constitution by allowing discriminatory behavior to invade the criminal justice system. Faced with the opportunity to repair the hole, the Supreme Court chose to ignore it, leaving African-Americans and other people of color without a clear and effective remedy for this discriminatory treatment. In a certain sense, discriminatory police stops are the first in a chain of racially lopsided decisions by officials in the criminal justice process. With the exception of its decision in *Batson v. Kentucky*, the Supreme Court has consistently dodged the resolution of these issues, leaving people of color without relief.

When people of color experience injustices that are tolerated and even sanctioned by courts and other criminal justice officials, they develop distrust and disrespect for the justice system. That lack of faith translates into hopelessness, frustration, and even violence. The 1992 Los Angeles riots following the acquittal of the police officers charged with the beating of Rodney King and the 1996 riots in St. Petersburg occasioned by the shooting of a black motorist by a police officer offer examples of what may happen when that frustration is ignored.

108. The motorist who decides to seek legal assistance must find a lawyer or organization to accept his case. Most lawyers, aware of the difficult legal standards, will only take the case if the facts and circumstances suggest a winning case. The ACLU gets hundreds of telephone calls and letters from African-Americans alleging illegal and/or unconstitutional behavior by police officers. They decline the vast majority of the cases for a variety of reasons, including the unavailability of resources. One factor they consider is whether the potential plaintiff will appeal to a jury if a lawsuit is brought. Individuals with criminal records are not considered attractive plaintiffs. Telephone Interview with Debbie Jeon, attorney for the Maryland Eastern Shore branch of the ACLU (Nov. 8, 1996).

109. Because the case was settled, one can only speculate as to the difficulties Mr. Wilkins and his family may have faced in establishing invidious intent on the part of the police officer as required by *Washington v. Davis*, 426 U.S. 229, 239 (1976). See supra notes 84-87 and accompanying text.


111. 476 U.S. 79 (1986).


114. See *St. Petersburg's Message*, CHR. SCI. MONITOR, Nov. 18, 1996, at 20 (discussing
“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.”

Disparate enforcement of criminal sanctions ‘destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process.’

Nondiscriminatory law enforcement policies and effective legal remedies accessible to all aggrieved citizens must be developed to restore the integrity of the legal process and the trust of all citizens.

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116. Id.