1998

Car Wars: The Fourth Amendment's Death on the Highway

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Essay

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Introduction

The Supreme Court's Fourth Amendment jurisprudence, as tattered and full of holes as a beggar's winter coat, calls into question whether the remaining protection it offers to citizens against government searches and seizures has any value. In no area is this question presented more sharply than in cases involving cars, their drivers, and their passengers. Indeed, it is no exaggeration to say that in cases involving cars, the Fourth Amendment is all but dead.

In its last two Terms alone, the Court has increased police discretion over cars and their drivers in three different cases. In *Whren v. United States*,[1] the Court resolved a split among the federal circuits by ruling that any time a police officer sees a traffic violation, the officer has probable cause and may stop the vehicle.[2] The rule applies even if no reasonable officer would have made the stop to enforce the traffic laws, and even if the stop was only a pretext to enable the officer to investigate a mere hunch or intuition.[3] In *Ohio v. Robinette*,[4] the Court said that when the police stop a driver and have decided to release him, they need not precede a request for consent to

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1 116 S. Ct. 1769 (1996).

2 *See id.* at 1776-77.

3 *See id.* at 1774-75; *see also infra* notes 20-23 and accompanying text.

4 117 S. Ct. 417 (1996).

search the car by telling the driver that he or she has the right to leave and forgo the search.[5] And in *Maryland v. Wilson*,[6] the Justices extended the existing rule[7] by declaring that officers stopping cars may also order passengers out of the vehicles without probable cause or any other type of legal justification.[8]

Taken in isolation, *Whren, Robinette,* and *Wilson* might generate some concern about the power of the police during traffic stops. But these three cases do not stand alone. Rather, they represent only the latest installments in a trend visible for at least two decades: steadily increasing police power and discretion over cars and their occupants. Put simply, the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it.

Given the pervasiveness and even the necessity of cars and driving in modern America, these cases could hardly be more important. If driving and traveling by vehicle is the experience central to daily life in this country, the blunt fact is that the car cases allow police tremendous power over most Americans. It is no exaggeration to say that one of our most basic, traditional rules concerning police power—that police must have probable cause or reasonable suspicion of criminal activity in order to search or seize[9]—has almost no application to citizens driving or riding in cars. Quite literally, it is open season on every car, driver, and passenger.

Some of the Court's decisions involving cars are obviously correct. For instance, the Court long ago decided that if officers have probable cause to search a car they are pursuing, it would make little sense to force them to break off and get a warrant; by the time police returned, the vehicle would almost certainly be gone.[10] But most of the recent cases can be justified only by a sense that police need to have every imaginable advantage in stopping automobiles. The current ad hoc, police-always-win regime makes no attempt to attain an even balance between the competing concerns of law en-

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5 *See id.* at 421; *infra* notes 51-55 and accompanying text.

6 117 S. Ct. 882 (1997).

7 *See* Pennsylvania v. Mimms, 434 U.S. 106, 111 & n.6 (1977) (per curiam) (holding that ordering a lawfully detained driver out of a vehicle is reasonable and permissible under the Fourth Amendment).

8 *See Wilson*, 117 S. Ct. at 885-86; *infra* notes 58-76 and accompanying text.

9 The principle behind this statement might be stated more broadly in terms of Justice Brandeis's characterization of the Fourth Amendment as the right to be left alone:

> [The makers of our Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

As Professor LaFave has put it, "arbitrary action is unreasonable under the Fourth Amendment." WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.4(e), at 122 (3d ed. 1996); *see also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 197 (1993) (stating that at the core of Fourth Amendment lies restraint on government power).

10 *See* Carroll v. United States, 267 U.S. 132, 153-54 (1925).

forcement and officers' safety, on the one hand, and citizens' freedom from unwarranted interference in daily activities on the other.

Of course, there is a benefit to such broad police power: law enforcement will catch more criminals. Police will use the law to stop cars, question drivers, and search vehicles; this will result in a greater number of apprehensions than if they had more limited discretion. But if this is the main benefit of these cases, one must also note an important, and usually disregarded, cost: for each wrongdoer intercepted, some much larger number of absolutely innocent people are also stopped, questioned, and often searched—in short, treated like criminals. Moreover, this cost will not be spread evenly across all citizens. African Americans and people of color will suffer this treatment in numbers far out of proportion to their representation in the driving population.[11]

Treating all citizens like criminals in order to catch the malefactors among us represents an unwise policy choice, an outlook favoring crime prevention over all of our other values. We need to recalibrate this approach; although police discretion is necessary and cannot be eliminated, it must be channeled appropriately to attain a balance between public safety and citizen autonomy. Furthermore, in a society dedicated to the ideal of equal justice under law, forcing one group of citizens to put up with disparate treatment because of the color of their skin is positively abhorrent. With the racial divisions exposed by the O.J. Simpson case still clearly visible in our collective rearview mirror, we ignore these implications of the automobile cases at our peril. A better set of rules would restrict the stops of cars to traffic enforcement, and not allow police officers to use these stops as a detour around traditional Fourth Amendment limitations.

Part I begins the discussion with a description of *Whren*, *Robinette*, and *Wilson*, the three newest Supreme Court cases involving car stops. Part II demonstrates how these cases fit within the longer-term trend toward greater police power and describes how law enforcement employs these cases. Part III explains that the pervasiveness of cars gives the police considerable control over most Americans. Part IV analyzes these problems of expanded police control of cars and their occupants, and Part V makes recommendations.

I. The Most Recent Cases: Whren, Robinette, *and* Wilson

A. Whren v. United States

A discussion of the Supreme Court's newest cases involving cars begins with *Whren v. United States*.[12] *Whren* addressed a circuit split[13] on the issue

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11 *See infra* note 21.

12 116 S. Ct. 1769 (1996).

13 Some federal circuits had ruled that any time an officer *could have* made a traffic stop based on a traffic infraction, it was legitimate for the officer to do so. *See* United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc); United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995); United States v. Whren, 53 F.3d 371, 374-75 (D.C. Cir. 1995), *aff'd*, 116 S. Ct. 1769 (1996); United States v. Scopo, 19 F.3d 777, 782-84 (2d Cir. 1994); United States v. Ferguson, 8 F.3d 385, 389-91 (6th Cir. 1993) (en banc); United States v. Hassan El, 5 F.3d 726, 729-30 (4th Cir. 1993); United States v. Cummins, 920 F.2d 498, 500-01 (8th Cir. 1990); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989); United States v. Causey, 834 F.2d 1179, 1184

of pretextual traffic stops: police use of minor traffic violations as excuses to stop motorists for other purposes.[14] The facts of *Whren* were straightforward. Plainclothes District of Columbia vice officers in an unmarked car observed two young men driving a newly purchased vehicle in an area known for drug activity.[15] The police saw the vehicle make an unusually long stop at a stop sign and became suspicious, even though nothing the men did indicated criminal activity.[16] When the driver turned without signaling and drove away too fast,[17] the police stopped the vehicle and observed a bag of cocaine in plain view.[18]

A unanimous Supreme Court ruled that any time an officer witnesses a traffic offense, this constitutes probable cause for a stop.[19] It does not matter that the actual reason for the stop may not have been traffic enforcement at all, but something entirely different—suspicionless questioning concerning drug trafficking,[20] police intuition that certain racial groups were prone to crime,[21] or even just a whim. The Court said that the officers' subjective intent makes no difference;[22] rather, the issue is whether there was objective evidence of probable cause in the form of a traffic offense.[23]

Whren has two very disturbing implications. The first of these involves state traffic laws. Vehicle codes, which exist in every state, contain an almost mind-numbing amount of detailed regulation. There are, of course, the usual "moving violations," such as speeding, failing to obey stop signs, and changing lanes without signalling. But these violations only begin the catalog of possible offenses. There are traffic infractions for almost every conceivable aspect of vehicle operation, from the distance drivers must signal before turn-

(5th Cir. 1987) (en banc). Two other circuits had ruled that a traffic stop was sufficient to constitute probable cause only when a reasonable officer *would have* made the stop. *See* United States v. Cannon, 29 F.3d 472, 475-76 (9th Cir. 1994), *abrogated by* Whren v. United States, 116 S. Ct. 1769 (1996); United States v. Smith, 799 F.2d 704, 708-09 (11th Cir. 1986), *abrogated by* Whren v. United States, 116 S. Ct. 1769 (1996).

14 *See Whren*, 116 S. Ct. at 1771-72.

15 *See id.*

16 *See id.*

17 *See id.* A contrary conclusion can only come from the men's youth, the nature of their vehicle, "a dark Pathfinder," and that the driver looked toward the passenger's lap. *Id.* The lead officer testified that police stopped the car not to investigate their suspicions, but only to speak to the driver about his driving. *See* Petitioner's Brief at 5-7, *Whren* (No. 95-5841).

18 *See Whren*, 116 S. Ct. at 1772.

19 *See id.* at 1773-77. The defendants in *Whren* proposed that the rule should be "whether a police officer, acting reasonably, would have made the stop for the reason given." *Id.* at 1773.

20 *See infra* note 108 and accompanying text.

21 *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 137 (1997) (arguing that police and others "use race as a proxy for an increased risk of criminality"); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,* 87 J. CRIM. L. & CRIMINOLOGY 544, 572 (1997) (stating that disproportionate use of traffic stops against African Americans indicates that police "are using race as a proxy for the criminality or 'general criminal propensity' of an entire racial group"); Sherri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 220, 236-39 (1983) (stating that police use minority race as a proxy for a greater possibility of criminal involvement, even though it is problematic at best).

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

23 *See id.* at 1776-77.

ing,[24] to the times of day and weather conditions that require drivers to turn on their lights.[25] Some of these offenses are not even clearly defined, giving officers the discretion to stop drivers who are operating vehicles in ways and under conditions that are not "reasonable and prudent."[26] And if regulation of driving is pervasive, legal requirements concerning vehicle equipment may be even more so. For example, state traffic codes mandate the kind of lights each vehicle must have and the distance from which these lights must be visible,[27] the types of license plates and regulatory stickers vehicles must carry,[28] how loud an exhaust system may be,[29] and even how deep the tread on a car's tires must be.[30]

The upshot of all this regulation is that even the most cautious driver would find it virtually impossible to drive for even a short distance without violating some traffic law. A police officer willing to follow any driver for a few blocks would therefore always have probable cause to make a stop under

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24 *See, e.g.*, MD. CODE ANN., TRANSP. II § 21-604(d) (1992) (requiring that a signal must "be given continuously during . . . the last 100 feet . . . before turning"); N.M. STAT. ANN. § 66-7-325B (Michie 1994) (same); OHIO REV. CODE ANN. § 4511.39 (Anderson 1997) (same); S.C. CODE ANN. § 56-5-2150(b) (Law Co-op. 1991) (same).

25 *See, e.g.*, KY. REV. STAT. ANN. § 189.030(1) (Banks-Baldwin 1995) ("Lights . . . shall be illuminated during the period from one-half (1/2) hour after sunset to one-half (1/2) hour before sunrise, and at such other times as atmospheric conditions render visibility as low as or lower than is ordinarily the case during that period."); NEB. REV. STAT. ANN. § 60-6,219(1) (Michie 1995) (requiring that lights be used "from sunset to sunrise and at any other time when there is not sufficient light" for drivers to see persons or vehicles 500 feet away); VA. CODE ANN. § 46.2-1030 (Michie 1996 & Supp. 1997) (requiring that lights be used "from sunset to sunrise [and] during any other time when, because of rain, smoke, fog, snow, sleet, insufficient light, or other unfavorable atmospheric conditions," drivers cannot see to a distance of 500 feet, but not in "instances when windshield wipers are used intermittently in misting rain, snow, or sleet").

26 *See, e.g.*, WASHINGTON, D.C., MUN. REGS. tit. 18, § 2200.3 (1995).

27 *See, e.g.*, MD. CODE ANN., TRANSP. II § 22-204(a), (f) (1992) ("Every motor vehicle . . . shall be equipped with at least 2 tail lamps mounted on the rear [which shall be] visible from a distance of 1,000 feet to the rear" and "a white light" that will illuminate the rear registration plate "and render it clearly legible from a distance of fifty feet"); N.D. CENT. CODE § 39-21-04(1), (3) (1992) (requiring vehicles to have "at least one tail lamp mounted on the rear . . . plainly visible from a distance of one thousand feet" and "a white light" illuminating "the rear registration place[, rendering] it clearly legible from a distance of fifty feet"); S.C. CODE ANN. § 56-5-4510 (Law Co-op. 1991) (requiring at least one tail light to be visible from 500 feet).

28 *See, e.g.*, S.C. CODE ANN. § 56-5-5350(a) (Law Co-op. 1991) ("No person shall drive . . . any vehicle . . . unless there shall be in effect and properly displayed thereon a current certificate of inspection.").

29 *See, e.g.*, KY. REV. STAT. ANN. § 189.140 (Banks-Baldwin 1995) (requiring every vehicle to "be equipped with a suitable and efficient muffler" that cannot be modified to amplify noise and that must comply with applicable muffler regulations); N.J. STAT. ANN. § 39:3-70 (West 1990) (requiring all vehicles with combustion engines to "be equipped with a muffler in good working order . . . to prevent excessive or unusual noise"); VA. CODE ANN. § 46.2-1049 (Michie 1996) (requiring all vehicles to be equipped with an exhaust system of the type used "as standard factory equipment" that will "prevent excessive or unusual noise").

30 *See, e.g.*, MD. CODE ANN., TRANSP. II § 22-405.5(b) (1992) (stating that a tire is "considered unsafe if . . . tread wear indicators are flush with the tread at any place on the tire" or, in the absence of tread wear indicators, if the tire does not meet precise measurements at three locations on the tire); S.C. CODE ANN. § 56-5-5040 (Law Co-op. 1991) (requiring that tires "be in a safe operating condition").

Whren.[31] Although a traffic stop alone would not constitute legal justification for a further intrusion,[32] such as searching the car or driver, the stop often begins a chain of events that leads in that direction.[33]

The second implication of *Whren* is even more disturbing than the first. Even though *Whren* allows police to stop virtually every driver at any time by simply following a car for a few blocks, police will not stop every driver.[34] Rather, available evidence indicates that the discretionary power of police to make traffic stops will be used against African American and Hispanic drivers in numbers far out of proportion to their presence among drivers.[35] In almost every instance in which statistics have been collected, people of color were far more likely than whites to be stopped for traffic offenses.[36] Nevertheless, the Court brushed aside the argument that racially biased law enforcement violated the Fourth Amendment.[37] The correct constitutional basis for such an assertion, the Court said, was the Equal Protection Clause.[38] The defendants in *Whren* were out of luck; they could perhaps bring a federal civil suit for redress, but the District Court had been correct when it refused to suppress the evidence in their case.[39]

With hardly a backward glance, the Court's decision in *Whren* validated a practice long anathema to African Americans and other people of color. At the same time, it also gave police virtually unlimited discretion to stop drivers. In a country in which police generally need to have a reason to interfere with a person's movements, possessions, or place of residence, *Whren* stands out for the virtual carte blanche it gives law enforcement.

B. Ohio v. Robinette

Less than six months after *Whren*, the Supreme Court decided *Ohio v. Robinette*,[40] another case involving police power over drivers. In *Robinette*, a police officer stopped the defendant for a traffic violation and ran a computer

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31 *See supra* notes 22-23 and accompanying text.

32 Even *Terry v. Ohio*, 392 U.S. 1 (1968), which allows certain types of limited intrusions based on the less-than-probable-cause reasonable suspicion standard, requires more than an officer's "inchoate and unparticularized suspicion or 'hunch,' [instead, it requires] the specific, reasonable inferences which [the officer] is entitled to draw from the facts in light of his experience" that criminal activity is afoot. *Id.* at 27.

33 *See infra* notes 99-121 and accompanying text.

34 *See Harris*, *supra* note 21, at 560.

35 *See* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431 (1997) ("Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops."); Harris, *supra* note 21, at 560-73 (finding evidence that traffic stops are used disproportionately against minority group members); *see also* Carol M. Bast, *The Plight of the Minority Motorist*, 39 N.Y.L. SCH. L. REV. 49, 50-51 & n.7 (1994) (giving examples of "abusive application of civil asset forfeiture" against "minority motorists"); *infra* notes 182-210 and accompanying text.

36 *See* Harris, *supra* note 21, at 561-66 (finding that statistics covering hundreds of drivers in Florida and Maryland showed that African Americans and Hispanics made up more than 70% of those stopped).

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

38 *See id.* at 1774.

39 *See id.* at 1777.

40 117 S. Ct. 417 (1996).

check of his license.[41] Finding no previous violations, the officer gave the defendant a verbal warning and then asked him whether he had any contraband on his person or in his car.[42] When the defendant said no, the officer asked for permission to search the car.[43] The defendant consented, and the search revealed a small amount of marijuana and a single pill of methylenedioxymethamphetamine ("MDMA"), a controlled substance.[44] The State prosecuted the defendant for possession of the MDMA; after an unsuccessful effort to suppress the evidence, the defendant was convicted in trial court.[45] The Ohio Court of Appeals reversed,[46] and on appeal the Supreme Court of Ohio affirmed, ruling that when the police make a traffic stop, "['a]ny attempt at consensual interrogation must be preceded by the phrase "[a]t this time you are free to go" or words of similar import.'"[47] In other words, under the Ohio Supreme Court's ruling, when the police ask for consent to search a vehicle after they have decided to let the driver go, they must first tell the driver that he or she has the right to refuse. Otherwise, the consent to search would not be valid.[48]

The U.S. Supreme Court reversed.[49] Citing *Schneckloth v. Bustamonte,*[50] the Court rejected the argument that consent to search was not valid unless the driver knew he had the right to refuse.[51] Requiring police to inform citizens that they are free to leave before getting consent would be "unrealistic."[52] Consent need only be voluntary, and voluntariness "'is a question of fact to be determined from all the circumstances.'"[53] The officer's failure to tell the defendant that he could refuse consent was just one factor to be considered.[54] The Court reiterated *Schneckloth*'s determination of the issue and found no reason to change the law now.[55]

The Court devoted the great bulk of the *Robinette* opinion to jurisdictional issues; the portion of the opinion dealing with consent is remarkably

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41 *See id.* at 419.

42 *See id.* The officer asked, "'One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?'" *Id.* (alteration in original) (quoting Appendix to Respondent's Brief at 2, *Robinette* (No.95-891)).

43 *See id.*

44 *See id.*

45 *See id.*

46 *See id.* The Ohio Court of Appeals reversed the trial court's finding of guilt, because the evidence was found during a search that resulted from an unlawful detention. *See* State v. Robinette, No. 14074, 1994 WL 147806, at *2 (Ohio Ct. App. Apr. 15, 1994), *aff'd*, 653 N.E.2d 695 (Ohio 1995), *rev'd*, 117 S. Ct. 417 (1996).

47 *Robinette*, 117 S. Ct. at 419-20 (quoting State v. Robinette, 653 N.E.2d 695, 696 (Ohio 1995), *rev'd*, 117 S. Ct. 417 (1996)).

48 *See id.* at 419 (characterizing the issue as "whether the Fourth Amendment requires that a lawfully seized defendant must be advised that he is 'free to go' before his consent to search will be recognized as voluntary").

49 *See id.*

50 412 U.S. 218 (1973).

51 *See Robinette*, 117 S. Ct. at 421 (citing *Schneckloth*, 412 U.S. at 227).

52 *Id.*

53 *Id.* (quoting *Schneckloth,* 412 U.S. at 248-49).

54 *See id.*

55 *See id.*

brief—just four paragraphs.[56] When the Court said that it would be "unrealistic" for police officers to tell citizens that they can go before asking for consent, it made this statement as an obvious, unadorned truism—something no reasonable person would dispute. No explanation or analysis accompanied it. This makes it hard to escape the suspicion that the Justices decided on their conclusion first—we don't want any rules that might hamper law enforcement in even the slightest way—and then said as little as possible to justify it. Indeed, it recalls nothing so much as the Court's offhanded dismissal of the racial consequences of the decision in *Whren*.[57]

C. Maryland v. Wilson

Maryland v. Wilson[58] rounds out this group of the three newest cases. In *Wilson*, a state trooper pursuing a car traveling nine miles over the speed limit noticed that the two passengers in the car ducked their heads repeatedly.[59] When he stopped the car, the trooper observed that the front-seat passenger seemed nervous and ordered him out of the car.[60] When the passenger complied, some cocaine fell to the ground.[61] The passenger moved to suppress the cocaine, arguing that being ordered out of the car constituted an unreasonable seizure of his person.[62] The trial court granted the motion,[63] and the Maryland Court of Special Appeals affirmed.[64]

According to the U.S. Supreme Court, the question was whether to extend the rule of *Pennsylvania v. Mimms*.[65] *Mimms* allowed officers to order drivers to exit lawfully stopped vehicles as a matter of course, without either probable cause or reasonable suspicion of wrongdoing.[66] The Court based *Mimms* on a balancing of factors: on the one hand, the interest of the police and the public in safety, and on the other, the individual driver's right to freedom from arbitrary interference by police.[67] In *Wilson*, the Court found that ordering the passengers out of vehicles, without any probable cause or reasonable suspicion to believe they had committed a crime, implicated the same factors balanced in *Mimms*.[68] On the side of police and public security, the Court said, "the same weighty interest [found in *Mimms*] is present regardless of whether the occupant of the stopped car is a driver or passen-

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56 *See id.*

57 *See supra* notes 35-38 and accompanying text.

58 117 S. Ct. 882 (1997).

59 *See id.* at 884.

60 *See id.*

61 *See id.*

62 *See id.*

63 *See id.*

64 Maryland v. Wilson, 664 A.2d 1, 15 (Md. Ct. Spec. App. 1995), *rev'd*, 117 S. Ct. 882 (1997). The state's highest court, the Court of Appeals of Maryland, denied certiorari. *See* State v. Wilson, 667 A.2d 342 (Md. 1995).

65 434 U.S. 106 (1977).

66 *See id.* at 111; *see also Wilson*, 117 S. Ct. at 884, 885 (characterizing *Mimms* as saying that a police officer may "'as a matter of course order'" the driver of a lawfully stopped car to exit the vehicle even though, there has been "nothing unusual or suspicious to justify ordering [the driver] out of the car" (quoting *Mimms*, 434 U.S. at 109-10)).

67 *See Wilson*, 117 S. Ct. at 885 (citing *Mimms*, 434 U.S. at 109).

68 *See id.*

ger."[69] On the other side, the Court said that the liberty interest of the passenger in *Wilson* exceeded that of the driver in *Mimms*.[70] When drivers of cars are stopped for traffic violations, police do, at least, have probable cause to believe that the driver has committed some violation of the law—a traffic offense.[71] By contrast, the passenger in a car has done nothing, and therefore has a correspondingly greater interest in freedom from police interference.[72]

These competing considerations seem evenly balanced. Nevertheless, the Court chose to tip the scales the same way it did in *Robinette,* by assuming the existence of overarching practical considerations without any real discussion. Offering some statistics concerning assaults on officers,[73] the Court simply stated that giving police the power to order passengers out of vehicles would increase officers' safety by assuring that a passenger could not reach any weapons inside the vehicle.[74] Yet, as the Court had to concede, the statistics it cited actually failed to indicate that passengers posed any danger.[75]

The Court also minimized the burden of the police conduct, saying that "as a practical matter, the passengers are already stopped by virtue of the stop of the vehicle."[76] As with *Robinette,* the *Wilson* opinion makes it difficult to escape the feeling that the Court decided the outcome first and reasoned (if that term truly applies) later. The operative parts of the opinion are nothing but policy judgments dressed up as principled judicial decisions.

II. The Long-Term Trend

Neither *Whren, Robinette,* nor *Wilson* represents a substantial change in the law as it existed before each was decided. For example, in refusing to require that drivers be told they are free to leave before giving consent, *Robinette* purports only to be applying *Schneckloth*.[77] Similarly, the majority in *Wilson* viewed the case only as a minor extension of *Mimms*.[78] Additionally, most of the federal circuits already had adopted *Whren*'s rule.[79]

This may be true, but it is a mistake to view these three cases without reference to the many decisions involving cars that came before them. In the

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69 *See id.*

70 *See id.* at 886.

71 *See id.*

72 *See id.*

73 *See id.* at 885 ("In 1994 alone, there were 5762 officer assaults and 11 officers killed during traffic pursuits and stops.") (citation omitted).

74 *See id.*

75 *See id.* at 885 n.2. The Court conceded the dissent's point that the statistics were "not further broken down as to assaults by passengers and assaults by drivers," but nevertheless said that "we need not ignore the data which do exist simply because further refinement would be even more helpful." *Id.* This, of course, assumes that statistics that do not support the Court's assertion are, in some way, "helpful." In the last phrase of the note, the Court makes it obvious that it is doing nothing more than making a result-oriented policy decision: "[W]e believe that our holding today is more likely to accomplish [a reduction in assaults on officers] than would be the case if [the dissent's] views were to prevail." *Id.* at 886 n.2.

76 *Id.* at 886. The only difference for the passengers, the Court said, was that they would now be detained outside the car, rather than inside it. *See id.*

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

78 *See Wilson*, 117 S. Ct. at 885-86.

79 *See supra* note 13.

last fifteen to twenty years, searches or seizures of vehicles or people traveling in them have become the central focus in a whole host of cases.[80] These cases are not concerned so much with mobility—the central idea in the first "car" cases[81]—but with two other factors: the reduced expectations of privacy drivers are said to have as compared to those not using vehicles and the dangers police officers face whenever they have an encounter with a citizen riding in a car.[82] The thrust of these decisions has all been in one direction: allowing greater police discretion to enforce the law and to ensure their own safety.[83] Thus *Whren, Robinette,* and *Wilson* must be seen not as cases that make some slight changes in the law, but as just the latest examples of a long-term trend that has increased police power and discretion over cars and their occupants. Viewed this way, it becomes apparent that, for all practical purposes, the venerable Fourth Amendment principle that the police need a reason—call it probable cause, reasonable suspicion, or whatever—to interfere with a citizen in his or her daily activity has all but vanished for anyone who drives or rides in a car. Traffic stops have become both the occasion and the legal justification for a new kind of criminal investigation: one that features suspicionless investigation on an individual level, without any special governmental need beyond ordinary law enforcement.[84]

A. The Beginnings: The Automobile Exception

Fourth Amendment law regarding automobiles begins with the automobile exception to the warrant requirement. In 1925, the Court ruled that when police have probable cause to believe that a vehicle contains contraband or evidence of criminal activity, they may search the vehicle without obtaining a warrant.[85] The Court's rationale centered on the difficulties of obtaining a warrant in such a situation; given the vehicle's "ready mobility,"[86] a warrant requirement would allow criminals in automobiles to escape.[87]

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80 *See infra* Part II.B.

81 *See* Carroll v. United States, 267 U.S. 132, 153 (1925) (holding that the mobility of vehicles justifies an exception to the warrant requirement if there is probable cause).

82 *See infra* note 93.

83 *See infra* note 94.

84 Of course, the Court has allowed some types of investigation without individual suspicion in past cases, as long as there is a "special governmental need" beyond ordinary law enforcement. *See, e.g.,* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (holding that brief intrusions at sobriety checkpoints were justified by a special governmental need to address the drunk driving problem). My argument here is that individuals are being investigated, sometimes in very intrusive ways, without any such special governmental need. This, of course, implies that the requirements of probable cause and reasonable suspicion, thin though they might be, no longer apply in these situations.

85 *See Carroll,* 267 U.S. at 153, 160, 162 (stating that the search of a vehicle without a warrant was valid because the defendants' previous offer to sell illegal liquor to federal agents gave officers probable cause to believe that the vehicle contained contraband).

86 California v. Carney, 471 U.S. 386, 390 (1985) ("[O]ur cases have consistently recognized ready mobility as one of the principal bases of the automobile exception.").

87 *See Carroll,* 267 U.S. at 153 (holding that a warrantless search of a vehicle is justified "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the . . . jurisdiction"). Note, however, that probable cause was still required. *See id.* at 149.

Over time, a number of cases have reaffirmed the automobile exception to the warrant requirement[88] and added a second justification beyond mobility: the "configuration, use and regulation of automobiles" means that drivers and their cars have a reduced expectation of privacy.[89] By the time the Court decided *California v. Carney*[90] in 1985, both of these rationales—mobility and a reduced expectation of privacy—applied.[91] Indeed, the dissenting opinion in *Carney* stated that the Court's cases had by this point decided that "inherent mobility is not a sufficient justification for the fashioning of an exception to the warrant requirement" if there were heightened expectations of privacy in the location searched.[92]

This automobile exception to the warrant requirement seems correct. It would make little sense to require police to get warrants for vehicles that could simply leave during this process. And surely it is true that vehicles are "subject to a range of police regulation inapplicable to a fixed dwelling."[93] But the cases involving automobiles and the techniques and strategies police use to stop and search them only begin with the automobile exception to the warrant requirement.

B. *Beyond the Automobile Exception: Traffic Stops and Searches of Cars, Drivers, and Passengers*

Over the last twenty years, the Supreme Court has decided a considerable number of cases involving automobiles that extend beyond the idea of an exception to the warrant requirement. In most of these cases, searches, seizures, or other elements of police investigation took place at, near, or in automobiles. Generally speaking, it is not mobility that concerns the Court in these cases. Rather, it is a combination of two other factors: the desire that the police have wide latitude to investigate and the safety of the officers

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88 *See* Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996) (holding that ready mobility and probable cause to believe that a vehicle contains contraband permit a warrantless search); *Carney*, 471 U.S. at 392-94 (extending inherent mobility to a mobile home, as long as "the vehicle [is] so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle"); United States v. Ross, 456 U.S. 798, 804-09 (1982) (holding that the police may conduct a warrantless search of a vehicle if they have probable cause to believe that contraband is concealed in it); Chambers v. Maroney, 399 U.S. 42, 44, 52 (1970) (finding the warrantless search of a vehicle valid because police had probable cause to believe that the car contained evidence of robbery).

89 Arkansas v. Sanders, 442 U.S. 753, 761 (1979), *abrogated on other grounds by* California v. Acevado, 500 U.S. 565 (1991) ; *see* New York v. Class, 475 U.S. 106, 112-13 (1986) (holding that the warrantless search of a vehicle is justified by the reduced expectation of privacy found in the physical characteristics and pervasive regulation of automobiles); United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (holding that a warrantless search is justified by lower expectations of privacy because a vehicle seldom becomes a residence or a repository of personal effects, occupants and contents are generally in plain view, and all aspects of vehicles and their operation are strictly regulated), *abrogated on other grounds by* California v. Acevado, 500 U.S. 565 (1991). Note that all of these cases also were based on the inherent mobility justification.

90 471 U.S. 386 (1985).

91 *See id.* at 393 (stating that a mobile home has "a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling").

92 *Id.* at 402 (Stevens, J., dissenting).

93 *Id.* at 393.

while they carry out these duties.[94] The reduced expectation of privacy inherent in vehicles often plays a justifying role, but only in support of the other two reasons.[95] Given these cases, how do police conduct traffic stops, investigations, and searches of cars, drivers, and passengers? Do they, in fact, use the techniques the Court's cases suggest?

Police understand that the traffic code can be a strong ally. Under *Whren,* these codes enable police to accomplish their first objective whenever they want: legally stopping and detaining the driver whether or not probable cause or reasonable suspicion to suspect crimes other than traffic offenses exists.[96] *Whren* may represent recent and final judicial approval of this police practice, but it is nothing new. Officers have used traffic stops this way for years.[97] Witness these statements by police officers, which date back to the 1960s:

> You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made.

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94 *See, e.g.,* Maryland v. Wilson, 117 S. Ct. 882, 885-86 (1997) (stating that the "weighty interest" in officer safety during traffic stops outweighs the personal liberty interests of passengers); Michigan v. Long, 463 U.S. 1032, 1046-50 (1983) (stating that a *Terry*-type search of a vehicle is permissible if police have reasonable suspicion that a suspect in a roadside stop poses a danger); New York v. Belton, 453 U.S. 454, 460 (1981) (finding that the ease with which vehicle occupants can grab hidden weapons justifies a bright line rule allowing the search of the entire passenger compartment and all containers when an arrest takes place); Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977) (finding that dangers inherent in traffic stops are great and outweigh the liberty interests of drivers).

95 *See, e.g., Long,* 463 U.S. at 1046-50 (stating that the chief reason for allowing a search is the danger to officers, not reducing privacy interests).

96 *See* Whren v. United States, 116 S. Ct. 1769, 1776-77 (1996). In order to forcibly stop someone—that is, order the person to stop, as opposed to simply asking if they would mind doing so—police need probable cause to believe that a crime has been committed and that the suspect is involved. *See* Illinois v. Gates, 462 U.S. 213, 227 (1983). In *Gates,* the Court stated that probable cause is not "reduc[ible] to a neat set of legal rules," *id.* at 232, and is more correctly defined as relying on "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Id.* at 231 (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)). *Gates* also defined the concept as "a fair probability that contraband or evidence of a crime will be found," based on "the totality-of-the-circumstances." *Id.* at 238. The police may also stop someone based on reasonable suspicion. *See* Terry v. Ohio, 392 U.S. 1, 27 (1967) (requiring something more than an officer's "inchoate and unparticularized suspicion or 'hunch'"); Alabama v. White, 496 U.S. 325, 330 (1990) ("Reasonable suspicion is a less demanding standard than probable cause . . . ."). This generally means that a police officer must witness some activity that is indicative of crime. The *Whren* case changes this for anyone in a car. To be sure, probable cause is still required in the form of an observed traffic violation. But because virtually no driver can avoid breaking *some* traffic law in any short journey, there is quite simply no need for officers to think in terms of observing criminal conduct other than the ever-present traffic violation before a citizen driving a car can be stopped. *See supra* notes 24-30 and accompanying text. The upshot is that anyone in a car can always be stopped, with just a little effort by the police. Some may contend that these violations are easy to make up, and that police could fabricate probable cause without much effort. While this may be so, the point lurking within *Whren* is that, as long as police are willing to follow drivers for a short time, there is *no need* to fabricate probable cause. The ever-present traffic offense is enough. Thus there need be no causal nexus of any kind between the stop and the eventual prosecution; the stop will rarely have anything to do with the crime charged, and the passenger has no control over whether the driver violates traffic rules.

97 *See* LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 131-33 (1967).

> You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway.
>
> In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.[98]
>
> Although these officers make a fundamental error—the traffic stop does not, *alone*, give them the power to make any further search—they do understand correctly that the law allows them to stop any driver, almost at will, and that probable cause or reasonable suspicion of anything else is not necessary.

With the car stopped, the plain-view exception may come into play.[99] The traffic stop gives the officer the opportunity to walk to the driver's side window and while requesting license and registration, observe everything inside the car.[100] This procedure applies not only to the car and its contents, but to the driver and passengers.[101] Does the driver appear nervous or unusual in any way? Does the driver seem intoxicated? If it is dark, the officer can shine a flashlight into any area he or she could otherwise observe.[102] Thus, if the police observe an object in plain view and it is immediately apparent without further searching that it is contraband, they can make an arrest on the spot.

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98 *Id.* at 131.

99 The plain view exception is so widely used that it sometimes goes unmentioned and is often misunderstood. Briefly stated, an officer has probable cause for an immediate seizure of an item in "plain view" without a warrant if: (a) the officer sees the object from a lawful vantage point; (b) the officer has a right of physical access to it, and (c) the item's contraband nature is immediately apparent, without any further searching. *See generally* Horton v. California, 496 U.S. 128, 136-37 (1990) (enumerating the three requirements); Coolidge v. New Hampshire, 403 U.S. 443, 464-67 (1971) (discussing the plain view doctrine).

100 Thus the officer can look into the car from a lawful vantage point, fulfilling the first criterion for the exception. This means more than simply being in a place from which the officer can see the evidence; in the words of Justice Stewart: "[I]n the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure." *Coolidge*, 403 U.S. at 465 (emphasis in original). Rather, the officer must not have violated the Fourth Amendment in coming to the spot from which the evidence is seen. *See id.* at 465-66.

101 *See, e.g.*, Maryland v. Wilson, 117 S. Ct. 882, 885-85 (1997) (finding that an officer permissibly ordered a passenger out of the car after observing that the passenger seemed nervous).

102 *See* Texas v. Brown, 460 U.S. 730, 739-40 (1983) (plurality opinion) (finding that an officer's use of a flashlight to illuminate a car's interior does not constitute a search); United States v. Lee, 274 U.S. 559, 563 (1927) (stating that the use of artificial illumination is not a search for Fourth Amendment purposes).

The arrest allows the police to go further: a thorough search of the passenger compartment[103] and all closed containers inside.[104] They can also "frisk" the car if they observe anything resembling a weapon.[105]

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103 *See* New York v. Belton, 453 U.S. 454, 460-61 (1981). In *Belton*, the Court announced a bright line rule: an officer may conduct a warrantless search of the passenger compartment of a vehicle including any closed containers found inside, contemporaneous with a lawful arrest of any of the vehicle's occupants. *See id.* Note that the Court did not limit the *Belton* rule to cases involving arrests of the car's drivers. Rather, it used the words "occupant of an automobile," *id.* at 460; thus, arrests of passengers would seem to trigger the rule. This rule applies in every case, not just when there appears to be a danger either to the officer or the integrity of the evidence; if the defendant is taken from a car and arrested, the officer may search the car, even though it is physically impossible for the defendant to get to the car to reach a weapon, destroy evidence, or escape. *See id.*

104 *See* California v. Acevedo, 500 U.S. 565, 580 (1991). Prior to 1991, the law's treatment of closed containers found during searches of vehicles depended upon the facts of each case. If police happened to find a closed container in a vehicle when they had probable cause to search the entire vehicle, they did not need a warrant to open and search the container. *See* United States v. Ross, 456 U.S. 798, 821-23 (1982) (stating that a warrantless search, based on probable cause, of the vehicle and any containers that may contain the contraband sought is reasonable). If, on the other hand, they had probable cause to search a particular container and happened to find it in a vehicle, they *did* need a warrant. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 11-13 (1976) (stating that the search of a locked footlocker placed in automobile and later seized by police required a warrant), *abrogated by* California v. Acevado, 500 U.S. 565 (1991); Arkansas v. Sanders, 442 U.S. 753, 765-66 (1979) (finding that *Carroll*'s "automobile exception" did not extend to the warrantless search of luggage just because it was located in a lawfully stopped vehicle), *abrogated by* California v. Acevado, 500 U.S. 565 (1991). The Court clarified this situation in *Acevedo*, in which the police had probable cause to believe that contraband would be found in a particular kind of bag which happened to be deposited in a car trunk. *See Acevado*, 500 U.S. at 567, 580. The Court wiped away the dual set of rules which previously governed; instead, one rule would determine the outcome in both types of situations. *See id.* at 580. Speaking for the Court, Justice Blackmun said that "[t]he protections of the Fourth Amendment must not turn on . . . coincidences." *Id.* Instead, the Court stated that "police may now search without a warrant if their search is supported by probable cause." Thus, *Acevedo* held that the police may search any areas of an automobile and can open and search any closed containers found there, as long as they have probable cause to believe that evidence or contraband will be found. *See id.* at 580.

105 *Terry v. Ohio*, 392 U.S. 1 (1968), and the cases that have followed it, for example, *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (reiterating the *Terry* standard), and *Adams v. Williams*, 407 U.S. 143, 145-46 (1972) (same), permit a brief detention when there is reason to believe that crime is afoot and that a particular person is involved. *See Dickerson*, 508 U.S. at 373; *Adams*, 407 U.S. at 145-46; *Terry*, 392 U.S. at 30. If outward appearances indicate that the suspect is armed and dangerous, or if the crime suspected is one that by its nature requires weapons, *Terry* allows a frisk—a pat-down of the outer clothing of the suspect—for the purpose of finding weapons. *See Dickerson*, 508 U.S. at 373; *Adams*, 407 U.S. at 146; *Terry*, 392 U.S. at 24, 30; *see also* Ybarra v. Illinois, 444 U.S. 85, 93-94 (1979). *Michigan v. Long*, 463 U.S. 1032 (1983), extended the idea of a frisk to automobiles. *See id.* at 1049. Police in *Long* stopped to investigate a car that had swerved into a ditch; the defendant, who appeared intoxicated, met them at the rear of his car. *See id.* at 1035. When the defendant moved toward his car at the request of the officers to get his registration, one of the officers observed a hunting knife on the floorboard near the driver's seat. *See id.* at 1036. The defendant was outside the car and could not reach the weapon, but the officer did a cursory search of the car's interior anyway—a "frisk" of the car—and found a pouch of marijuana. *See id.* After the defendant was arrested for possession of this pouch of marijuana, a further search of the car's trunk revealed 75 pounds of marijuana. *See id.* According to the Court, this search comported with the Constitution. *See id.* at 1049-50. Although the weapon did not pose any current danger because the defendant was outside the vehicle, the Court found that it was reasonable to search areas in the car from which

If nothing is seen in plain view (and perhaps even if something is), questioning begins. Police need not give *Miranda* warnings[106] in these situations,[107] and the tone of the questions is probably amicable. But this questioning is more than friendly patter. It is a purposeful, directed effort to get the driver talking.[108] The answers may disclose something that seems suspicious.[109] But even if every question is answered satisfactorily, that will not end the matter. The officer's real goal is to obtain consent for a search.[110] A

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the defendant could get a weapon. *See id.* The circumstances of the case, the Court said, justified a reasonable belief that the defendant posed a danger if he returned to his car. *See id.* at 1050. It is difficult to understand the Court's conclusion. Among the circumstances the Court relies on are the lateness of the hour, the rural location, and the defendant's careless driving and apparent intoxication. *See id.* The Court also felt that the restricted nature of the search also made it reasonable. *See id.* But the fact remains that the defendant was outside his car and under the control of more than one police officer. He only moved toward the car in response to the officers' request for his license and registration. *See id.* at 1036. Thus, simply maintaining the status quo would have protected the officers fully. There was no need to search the car, and no need for a new rule of law.

106 *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) (requiring that an individual taken into custody must be given warnings before questioning begins, informing him of his "right to remain silent, that anything he says can be used against him in a court of law, that he has the right to . . . an attorney, and that if he cannot afford an attorney one will be appointed for him").

107 *See* Berkemer v. McCarty, 468 U.S. 420, 437 (1984). Once the car is stopped, can police question the driver? To be sure, officers can do more than request license and registration. They may question the driver and attempt to get substantive answers. If this sounds like it might be custodial interrogation that would trigger the requirements of the *Miranda*, think again. In *Berkemer*, the Court found that the typical roadside encounter does not bring *Miranda* into play. *See id.* at 437. According to the majority, the concerns that drive *Miranda* do not apply to the questioning of motorists by officers. *See id.* First, these encounters take place in public, and usually involve only one or two officers. Traffic stops do not include the secretive police controlled atmosphere of the station house, and the driver is therefore unlikely to feel completely within the power of the police. *See id.* at 438-39. Indeed, he can even refuse to answer questions. *See id.* at 439. Second, these encounters are "presumptively temporary and brief," and would not create the same feeling of fear and loss of control that one might feel upon a full custodial arrest or a trip to police headquarters. *See id.* at 437-38. *Miranda* does not, of course, say that those in custody cannot be interrogated. Rather, it says only that *if* custodial interrogation takes place, the resulting statements can be used in the prosecution's case in chief only if they were preceded by the *Miranda* warnings or some equivalent. *See Miranda*, 384 U.S. at 478-79. *Berkemer* says this requirement does not apply automatically to traffic stops. *See* 468 U.S. at 441. Officers may freely question motorists without giving them warnings, and any incriminating statements that result can come into evidence. In short, *Miranda* is just not a factor in a typical traffic stop. Justice Marshall did, however, attempt to leave some room for future cases with more egregious facts, when he said for the majority in *Berkemer* that a traffic stop could under some circumstances become a custodial interrogation situation requiring warnings. *See id.* at 440 ("If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.").

108 *See* Joe Hallinan, *Highway Dragnets Seek Drug Couriers: Police Stop Many Cars for Searches*, SEATTLE TIMES, Sept. 3, 1992, at B6.

109 *See* J. Andrew Curliss, *A Nose for Dope: Trooper Has Knack for Drug Busts That Stand Up in Court*, DALLAS MORNING NEWS, July 18, 1996, at 1A (describing how an officer experienced at making highway drug arrests looks for suspicious answers to his questions); Joseph Neff & Pat Stith, *Highway Drug Unit Focuses on Blacks*, RALEIGH NEWS & OBSERVER, July 28, 1996, at A1 (describing how officers question those stopped, looking for suspicious answers).

110 Consent searches remain an important part of law enforcement's arsenal. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court resolved the issue of whether a con-

great number of the searches of vehicles stopped for traffic offenses begin with a request for consent.[111] The initial friendly chat helps put the driver in the frame of mind of responding to the trooper on a friendly basis, making cooperation and the giving of consent more likely.[112] And it usually works. Whether out of a desire to help, fear, intimidation, or a belief that they cannot refuse, most people consent. As one veteran state trooper told a reporter, in two years of stops, "'I've never had anybody tell me I couldn't search.'"[113] And although a driver could surely limit consent with words like "you can look through my car, but not my luggage," most of the searches are in fact quite thorough and include personal effects.[114]

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sent search required only a voluntary giving of consent or whether the state would have to show "'an intentional relinquishment or abandonment of a known right'" because consent involved the waiver of a constitutional right. *See id.* at 235 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In *Schneckloth*, police obtained consent and performed a search without giving either Fourth Amendment "warnings" or advice. *See id.* at 219-20. The Court resolved the issue by relying on the voluntariness standard traditionally used in the police interrogation area, noting that "two competing concerns must be accommodated . . . —the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." *Id.* at 227. Requiring the state to show that the defendant knew he had a right to refuse consent and nevertheless waived it, would "create serious doubt whether consent searches could continue to be conducted," because the prosecution would find it quite difficult to prove the defendant's awareness of his right to refuse. *Id.* at 229-30. The Court was unwilling to promulgate such a rule and was candid about its reasons, stating: "In situations where the police have *some* evidence of illicit activity but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important or reliable evidence." *Id.* at 227 (emphasis added). The Court overlooked the possibility that in some cases, this "insufficient evidence" would not be indicative of criminality at all. The Court rejected the obvious answer—having officers advise the defendant of his right to refuse before asking for consent—as impractical, because consent searches, as a "standard" part of law enforcement's investigatory arsenal, are typically used in a less "structured" atmosphere than a trial, or even the custodial interrogation situation of *Miranda*. *See id.* at 231-32. The Court assumed, rather than explained, that this made the alternative of a warning impractical. The reason seems obvious: the Justices fear that citizens who would otherwise consent to a search might actually listen to a brief warning ("You don't have to let us, but we'd like to search your car") and refuse, thus depriving the police of the use of this "standard investigatory technique][," *id.* at 231, that allows searches in the absence of any other legal justification. *Robinette*, the most recent case in this line, arose under different factual circumstances, but arrived at the same conclusion. *See* Ohio v. Robinette, 117 S. Ct. 417, 421 (1996); *supra* notes 48-55 and accompanying text. Unlike the officer engaged in ongoing questioning and investigation in *Schneckloth*, the officer in *Robinette* had actually completed any investigation he was going to do and had resolved to let the defendant go with a verbal warning. *See Robinette*, 117 S. Ct. at 419. The officer's questioning of the defendant before the request for consent shows this. *See id.* ("One question before you *get gone* [sic] . . . .") (emphasis added) (internal quotations omitted). Nevertheless, the Court refused to see *Robinette* as any different than *Schneckloth*, and gave exactly the same kind of answer in *Robinette* in almost the same words: *Schneckloth*'s "it would be thoroughly impractical" to tell defendants of their right to refuse, 412 U.S. at 231, became *Robinette*'s "it [would] be unrealistic," 117 S. Ct. at 421. Both cases are almost nakedly result oriented; *Robinette* is different only because it lacks even the small amount of analysis present in *Schneckloth*.

111 *See* Hallinan, *supra* note 108, at B6.

112 *See id.*

113 *Id.* (quoting Indiana Trooper Terry Dellarosa).

114 *See* Harris, *supra* note 21, at 566-68 (describing the thorough search of a named plaintiff by Illinois State Police); Curliss, *supra* note 109, at 1A (attesting to thoroughness of trooper's searches); Neff & Stith, *supra* note 109, at A1 (describing searches that were so thorough that cars were permanently damaged).

But in the rare event that the officer sees no contraband and the driver refuses consent, at least one other avenue of investigation remains open: the use of a drug-sniffing dog. Because the Supreme Court declared that the use of these dogs does not constitute a search, police may use them without probable cause or reasonable suspicion of any kind.[115] This rule makes them ideal tools for the "no consent" situation; no consent—in fact, no justification at all—is needed.[116] Any jurisdiction that can afford it would want to have "K-9 teams" in the field at all times, available to assist with drug interdiction on an immediate basis.[117] Police officers can use the dogs either to handle searches when there is a refusal, or to short circuit the whole process by using the dog as soon as the car is stopped, without even seeking consent.[118] Once the dog indicates the presence of narcotics by characteristic barking or scratching, that information itself constitutes probable cause for a full-scale search.[119]

This activity[120] constitutes a picture not of traffic enforcement but of drug interdiction. That is obviously what all of this is about; police use traffic

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115 *See* United States v. Place, 462 U.S. 696, 707 (1983). In *Place*, the Court assessed the constitutionality of allowing a dog trained to find drugs to sniff the luggage of an airline passenger. *See id.* at 697-98. Because the Court found the detention of the defendant's luggage that preceded the sniff unreasonable, *id.* at 705-06, 709, a decision on the constitutional validity of dog sniffs was unnecessary to the resolution of the case. Despite the fact that the constitutionality of the sniff had been neither briefed nor argued, *id.* at 723 (Blackmun, J., concurring), the Court decided the issue anyway. The Justices declared that having a trained dog sniff a defendant's luggage located in a public place (a significant limitation, making it not at all clear that *Place* should apply to dog sniffs of people, or to the public exteriors of homes) was not a search. *See id.* at 707. The Court offered two reasons. First, the dog was unintrusive. Using the dog did not even entail the opening of the luggage and the exposure of personal effects to public view, as a search by hand at an airport security checkpoint does. *See id.* Second, the dog only gave the authorities limited information: drugs are, or are not, present. *See id.* "[T]he canine sniff," the Court observed, "is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Id.* Canine sniffs did not prove to be sui generis for very long. Just the next term, the Court put the use of drug field testing kits in the same category. *See* United States v. Jacobsen, 466 U.S. 109, 122-23 (1984).

116 *Place* is critically important to understanding how police conduct traffic stops and searches of cars. Because the Court has said that using a drug-sniffing dog is not a search for Fourth Amendment purposes, these dogs can be used without a warrant, without probable cause or reasonable suspicion—without *any evidence at all*—to provide individualized suspicion. This makes these dogs an indispensable part of the modern day police department's arsenal, because like consent searches they allow officers to search when the law would not otherwise allow it.

117 The word "immediate" does put the focus on a wrinkle worth mentioning: drivers can only be detained for a reasonable amount of time in order to bring a dog to the scene. *See* Harris, *supra* note 21, at 575-76. In fact, the constitutional violation in *Place* occurred because the detention of the luggage was longer than reasonable to obtain the dog. *See Place*, 462 U.S. at 707-10.

118 *See, e.g.*, State v. Montoya, No. CR97-1072, slip op. at 2, 10 (Ohio Ct. C.P., Lucas County, June 17, 1997) (describing a videotape showing that an officer signaled for dogs to be brought to the car before any reason to be suspicious came to light).

119 *See* United States v. Ludwig, 10 F.3d 1523, 1527-28 (10th Cir. 1993) (holding that a dog alert constituted probable cause to search the defendant's trunk).

120 To be sure, the techniques described in this section do not exhaust law enforcement's repertoire. There are other ways that police can exercise their power over cars, their drivers and passengers, and their contents. For example, standardized departmental procedures often allow police to conduct inventory searches of automobiles and their contents after impoundment. *See*

infractions as excuses to initiate these encounters, and the Court's cases concerning automobiles and their drivers provide the legal underpinnings for wide-ranging searches of vehicles and all of their occupants, drivers, and passengers. Indeed, it will be a rare driver who can avoid this treatment if the officer is at all inclined to use any or all of these techniques. The police have almost all the discretion they could hope for, and the concepts designed to limit police discretion—warrants, probable cause, and reasonable suspicion—are never an obstacle when cars are the target. Viewed together, the cases and techniques described here effectively amount to a new exception to the Fourth Amendment's usual requirements: the "vehicular drug interdiction" exception, under which the commission of a traffic violation means that, for all practical purposes, the usual constitutional safeguards do not apply.[121]

The story of a state trooper in Texas supplies a real world example of how these practices work in the 1990s. Renowned as one of the state's most effective drug interdiction officers, Trooper Barry Washington uses traffic stops to enforce drug laws.[122] His efforts have netted more than 1000 pounds of marijuana and 20,000 grams of cocaine yearly, almost four percent of his entire agency's state-wide total.[123] He sometimes stops more than forty motorists *per day*—one stop for every eleven minutes of his shift.[124] A devoted student of search and seizure law, Trooper Washington knows how to use the traffic laws; most of his stops result from minor traffic infractions, such as illegal lane changes, speeding, and driving with broken lights and other defective equipment.[125] After stopping a vehicle, Trooper Washington really goes to work. He questions those stopped about their travel and activities, look-

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Colorado v. Bertine, 479 U.S. 367, 375-76 (1987); South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976). It is also constitutional to use vehicle checkpoints to briefly detain drivers who are not suspected of any crime. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990); United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976).

121 Professor LaFave put it this way:

> But given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone . . . there exists "a power that places the liberty of every man in the hands of the petty officer," precisely the kind of arbitrary authority which gave rise to the Fourth Amendment.

LAFAVE, *supra* note 9, § 1.4(e), at 123 (quoting John Adams, Petition of Lechmere, *in* 2 LEGAL PAPERS OF JOHN ADAMS 106, 141-42 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)). Another commentator put it this way:

> [I]f vice squad officers stop a car to search an individual for narcotics without the requisite probable cause or *Terry v. Ohio* reasonable suspicion, the fact that the search was unlawfully motivated is irrelevant to the question of the existence of a remediable fourth amendment violation as long as a court can point to other "objectively reasonable" grounds for stopping the car, such as a minor traffic violation.

John M. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 189 (1979) (footnotes omitted) (discussing Scott v. United States, 436 U.S. 128, 137 (1978) (making the subjective intent of the police irrelevant in determining whether police action is constitutional)).

122 *See* Curliss, *supra* note 109, at 1A.

123 *See id.*

124 *See id.*

125 *See id.*

ing for clues, contradictions, or just plain nervousness.[126] If, after this questioning, Trooper Washington remains interested, he asks to search the car, and if he gets permission he does an extremely thorough search.[127]

As successful as Trooper Washington is, it is not evidence of wrongdoing by these drivers that guides him. One of Trooper Washington's colleagues put it this way: "'Call it instinct, a sixth sense, a gut hunch . . . . Call it what you will. Barry has something that is very hard to describe.'"[128] This statement illustrates perfectly the legal contradiction created by the Court's current cases on traffic stops. Forcible stops of suspects are to be based on probable cause or reasonable suspicion, which the Court has described, clearly and frequently, as something more than a hunch.[129] And yet the Court's view of traffic codes in *Whren* free Trooper Washington and every other police officer to do exactly what is otherwise forbidden: act on nothing more than a hunch. And these cases "stand up in court."[130]

Perhaps we can best understand the current situation through a description in the words of a pragmatic police officer. Such an officer would be concerned, first and only, with the consequences of his or her actions vis-a-vis the law.[131] The officer will base his or her conduct on whether he or she believes courts will condone it, in which case the prosecution can use evidence to convict the defendant, or condemn it and grant a motion to suppress.[132] Here is how such an officer might describe what the current law allows police to do:

> If I see someone who interests me walking down the street, I watch. I look for something that tells me criminal activity is going on and that this person is involved. When I see this, I know I can make them stop and talk to me. If I see something that indicates they might be armed—say, the tell tale bulge under the coat—I can pat

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126 *See id.*

127 *See id.*

128 *Id.* (quoting Captain Fred Little, Department of Public Safety).

129 *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 22, 27 (1967) (requiring something more than "inchoate and unparticularized suspicion or 'hunch'").

130 *See* Curliss, *supra* note 109, at 1A.

131 *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Holmes invites the reader to imagine how a "bad man," who would behave according to what "material consequences" the law would impose upon him, would act. *See id.* The hypothetical officer I have imagined here has this same mindset. The officer does the job of policing by anticipating the response to his or her actions from courts. The officer is practical, motivated by what will happen and not some higher notion of right or wrong. I hesitate to use Holmes's label for this character, however, because I do not mean to imply that the officer is in any sense evil or venal. For further insight into Holmes's speech, see generally *The Path of the Law After One Hundred Years*, 110 HARV. L. REV. 989, 989 (1997) (referring to the speech as "one of Holmes's most influential works").

132 I owe the idea of casting Holmes's "bad man" (or the view of the "bad man") in a law enforcement role to Professor Alschuler, who illustrated a point concerning the Supreme Court's *Miranda* jurisprudence by imagining "the bad man of the law" as the author of a police training manual. *See* Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987) (stating that in failing to overrule *Miranda*, the Burger Court "create[d] a situation in which a police training manual authored by Justice Holmes' 'bad man of the law' might" advise officers on ways to get around the law).

them down. If I think the guy's into something violent, a crime that would involve a weapon, I go right to the frisk. I don't actually have to see any bulge.

But if I just have a sense about the guy, I can't do anything. I just have to wait until I see something more, because I can't act on a gut instinct. Unless, of course, the guy gets into a car.

See, if he gets into a car—or if the person I'm interested in is in a car in the first place when I see him—I'm home free. All I have to do is follow the car for a bit, until it crosses the lane lines or goes a little too fast, or until I notice that the light above the license plate is burned out. As soon as I have that, I just pull the car over. Simple as that. That's when I can really get started. If I feel at all funny about the guy, the first thing I do is order him—the driver—out of the car. Passengers, too—they can be just as dangerous. I watch them carefully as they get out; even if they're not carrying weapons, I sometimes notice things being dropped or stuffed under or between seats. Once they're out, or even if they're still in their cars, I give the vehicles a quick but thorough eyeball. Anything I see is potential evidence, because it's in plain view. If I see contraband, I arrest immediately. Even if I don't arrest, if I see anything resembling a weapon, even a legal one, I do an immediate weapons search of the car.

If I don't come up with anything in plain view, I start talking to the guy. I don't have to give him *Miranda* warnings or any of that, and I just go to town, as friendly as can be. I look for any suspicious answers—"I'm going to Kansas to see the mountains" or stuff like that—and any answers that don't add up. If it's enough to create probable cause or raise a reasonable suspicion, I go ahead and do the appropriate kind of search. But if that doesn't happen, I slowly work the guy right to the end, when I ask him if I can search his car. I don't have to tell him he doesn't have to let me, and if I've done my job right that never comes up. Most just say o.k. As quickly as I can without sacrificing thoroughness, I go ahead and search the entire car, top to bottom, and everything in it.

Once in a while, somebody says no. I can usually spot these guys a mile away, and as soon as I do I call for the dog squad. As soon as the officer with the dog arrives, I tell him to run the dog around the car. I don't need anybody's permission for that, or even any reason, as long as I don't hold the car and driver for an unreasonable period of time waiting for the dog. If the doggie alerts, all bets are off, and I can search the car, or at least the part the dog is scratching at. If the dog reacts I almost always hit the jackpot.

But even if the dog doesn't do anything, the game isn't always over. Remember I said that I might have arrested the guy for something I saw in plain view. I also can arrest the guy for certain traffic offenses and for any warrants I find on him when I call his license in. If I haven't found the dope yet and I still think the guy's dirty, I bust him for the traffic offense or whatever I have and take him into

> custody. Whenever I arrest anyone from a car, I can get everybody out of it and search the entire passenger compartment, including any closed areas or containers. You'd be surprised at how often I find stuff this way. And then we have the car towed and impounded, and our guys at the lot do an inventory. You better believe that if I missed anything, they will find it. They go over cars with a fine tooth comb.
>
> So if you're out there in a car and we think you're dirty, forget it. If we want you, we'll get you, and we'll find whatever you've got, one way or another. It's like they used to say about the Mounties—we always get our man. And the best part is, we always follow the law while we do it. That's no problem at all.

The point, of course, is not that every officer always uses this whole set of techniques, thinks this way, or treats every car this way. But they can if they want, and the law clearly, unequivocally, allows it.

III. Driving: The Universal—and Necessary—American Experience

With *Whren, Robinette,* and *Wilson* as only the most recent examples, the car stop cases convey to police a huge amount of discretionary power. Nevertheless, it is not the law itself in this area that makes this discretionary power so important. Rather, it is the ubiquity of driving itself—the almost universal nature of traveling by vehicle in late twentieth century America—that makes the car stop cases perhaps the most important source of police power in the law.

Put simply, no activity is common to more Americans than driving or riding in a car. America is virtually saturated with vehicles, roads, and licensed drivers. Americans use their cars every day in a thousand different ways.[133] Our vehicles often become something more to us than the transportation machines that they are. They are rolling offices, living rooms, and eating areas. They serve as both occasions for self-expression and as reflections of our self-images. We as a nation remain absolutely wedded to our cars as a kind of personal statement or cultural idea.[134]

On average, most working Americans spend almost one hour a day driving to and from work in a car.[135] This figure, however, represents only twenty-six percent of all personal trips, leaving the remaining seventy-four percent to other driving activity, such as personal or family business or shopping.[136] Thus, Americans spend a significant amount of time in their cars. Despite the congestion, expense, and environmental damage caused by cars, most Americans go to work in private vehicles.[137] In the United States, more than eighty-four million drive to work alone; another fifteen million travel in

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133 *See* Steven Stark, *America's Long-Term Love Affair with the Automobile* (National Public Radio broadcast, Aug. 18, 1996) ("It is virtually impossible to overstate the importance of the car in American life.").

134 *See id.*

135 *See* ALAN E. PISARSKI, COMMUTING IN AMERICA II 103 (1996).

136 *See id.* at 3.

137 *See id.* at 39-42, 50, 60-61.

car pools.[138] Only 5.3% use public transportation.[139] For every 1000 Americans of driving age, 873 are licensed drivers.[140] In some states and demographic groups, the number is well past 900 per 1000.[141] In 1993, there were more than 194 million registered vehicles on the road,[142] an increase from roughly 156 million in 1980,[143] and more than 173 million licensed drivers.[144] During the 1980s, Americans added more vehicles to our national stock[145] than people to our population.[146] In addition, the increase in the number of commuters in single-occupant vehicles exceeded the total increase in commuters.[147] By 1990, only 11.5% of American households did not own at least one vehicle.[148]

But just as important, the suburbanization of both population and job growth continues to increase. Fifty percent of all commuters live in suburbs, and suburbs now contain over forty-one percent of all jobs.[149] Of the nineteen million new jobs created between 1980 and 1990, thirteen million, or almost seventy percent, were created in the suburbs.[150] Even in metropolitan areas with relatively well-developed public transportation systems, suburbs have notoriously insubstantial options for those who do not drive. People have great difficulty reaching these new suburban jobs without driving. And with continued trends toward suburban centralization of shopping in malls and other clusters, there are relatively few areas anymore in which one can live without driving.

It is the shape of American society, as it has been and continues to be physically configured around private automobile transportation, that gives the car stop cases their real force. It is not just that the law allows police to stop cars and gives officers great power to gather evidence when they make these stops; it is that virtually every American of driving age is subject to this authority almost every day in the most common and necessary activities of daily life. For many, driving is the way they get to work, obtain food, conduct personal business, and find opportunities for recreation. With automobiles serving as the common denominator in our society, probable cause, reasonable suspicion, and other Fourth Amendment-type safeguards have, for all practical purposes, disappeared from large parts of our public and private lives. Thus no matter how incremental the legal changes brought about by each car case has been, the big picture has been altered, and dramatically so.

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138 *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 635, No. 1030 (1995).

139 *See id.*

140 *See* U.S. DEP'T. OF TRANSP., HIGHWAY STATISTICS 31 (1990).

141 *See id.* at 30-35.

142 *See* U.S. DEP'T OF COMMERCE, *supra* note 138, at 632, No. 1023.

143 *See id.* at 634, No. 1026.

144 *See id.* at 632, No. 1023.

145 *See id.* at 634, No. 1026.

146 *See id.* at 8, No. 2.

147 *See* PISARSKI, *supra* note 135, at xii.

148 *See id.* at 34.

149 *See id.* at xiii.

150 *See id.*

And this affects the lives of all Americans—not just those who are stopped frequently, but every person who could be.

IV. Analysis

The car cases pose an important question for our society: what are reasonable limits on searches and seizures in the context of a stop of automobiles? We know that the central question under the Fourth Amendment is whether a particular search or seizure is reasonable.[151] We also know that the Fourth Amendment is supposed to limit police discretion; after all, a major impetus for including the Amendment in the Bill of Rights was to address the use of general warrants and writs of assistance by the Crown's representatives, devices that allowed the authorities to enter and search "persons, houses, papers, and effects"[152] without limits.[153] Police need discretion to do their work;[154] indeed, it is impossible to imagine eliminating it. The questions are how much discretion comports with the Fourth Amendment, and how this discretion might be channeled most wisely.

A. "What's The Problem?": Calculating The Cost

Many will not agree with the position that the cases and police techniques discussed in this essay pose a problem. Indeed, decisions such as *Whren, Robinette*, and *Wilson* have received widespread applause, and not just from police officers themselves.[155] Political leaders have voiced strong support for these decisions, and it is telling that the reasons they give have nothing to do with traffic safety or enforcement of the motor vehicle laws.[156] Almost uniformly, they have recognized these cases for what they are: weapons in the "war on drugs."[157]

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151 *See, e.g.*, Wilson v. Maryland, 117 S. Ct. 882, 884-85 (1997) (explaining that the reasonableness of the government's invasion of a citizen's personal security is the Fourth Amendment's central concern) (citing Pennsylvania v. Mimms, 434 U.S. 106, 108-09 (1977)); Ohio v. Robinette, 117 S. Ct. 417, 421 (1996) ("[T]he 'touchstone of the Fourth Amendment is reasonableness.'") (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).

152 U.S. CONST. amend. IV.

153 *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 7-8 (1977), *abrogated on other grounds by* California v. Acevado, 500 U.S. 565 (1991). The Court in *Chadwick* stated:

> [T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance and their memories of the general warrants formerly in use in England. These writs, which were issued on executive rather than judicial authority, granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods.

Id.; *see also* Miller v. United States, 357 U.S. 301, 307 (1958). The Court in *Miller* stated:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement!"

Id. (quoting remarks attributed to William Pitt).

154 *See* KENNETH C. DAVIS, DISCRETIONARY JUSTICE 51 (1969).

155 *See infra* note 164.

156 *See infra* notes 159-164 and accompanying text.

157 *See infra* notes 159-162 and accompanying text.

An excellent real-world example came in the wake of *Robinette*. In that case, the state of Ohio appealed the ruling of its own supreme court that officers must tell drivers that they are free to leave before requesting consent to search if that consent is to be considered voluntary.[158] When the U.S. Supreme Court ruled for the State and overturned the Ohio Supreme Court, Ohio's Attorney General, who had filed an amicus brief supporting the State's position, issued a press release that praised the decision in strong and direct terms.[159] "'Today's decision by the U.S. Supreme Court is a victory for law enforcement in Ohio,'" the Attorney General said.[160] "'In Ohio during the past two years, there were more than 400 criminal narcotics cases that arose from searches such as this. Today's decision allows Ohio's peace officers to continue using this valuable weapon in their war against drugs.'"[161] Upon my request, the Attorney General's office gave me a Memorandum that, I was told, supported these assertions. It detailed twenty "significant drug or currency seizures over the past 3 years . . . utilizing consent to search authority [sic]."[162] The memorandum added that statewide, police "had initiated 408 criminal narcotics cases [during 1994 and 1995] in which consent to search was utilized to locate narcotics."[163]

The Ohio Attorney General's view is not unique.[164] To many people, the discretion given to police by the traffic stop cases is nothing to worry about; it's a good thing, a clearly positive development. Were it not for the ability to stop cars for traffic offenses and make consent and other types of searches, 408 cars transporting drugs—occasionally in large quantities—would have gone undetected in Ohio in the past two years.[165] Removing police discretion to make these stops, or limiting it significantly, would entail a cost: some number of people carrying drugs in their cars will go undetected.

There is no escaping this point. The car stop cases clearly help highway drug interdiction efforts. Indeed, there is little question that drug interdiction is their main purpose. Fewer stops will undoubtedly mean fewer

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158 *See supra* notes 46-51 and accompanying text.

159 Press Release, *Attorney General Betty Montgomery Hails U.S. Supreme Court Decision As a Victory for Ohio Law Enforcement*, Nov. 18, 1996.

160 *Id.* (quoting Ohio Attorney General Betty D. Montgomery).

161 *Id.* (quoting Ohio Attorney General Betty D. Montgomery).

162 Memorandum from St. Lt. W.D. Healy, TDIT Unit Coordinator, to Major R.N. Rucker A-3 (Dec. 11, 1995) (on file with author) [hereinafter Healy Memorandum].

163 *Id.* at A-4.

164 *See, e.g., A Victory for Law Enforcement*, PHOENIX GAZETTE, Nov. 22, 1996, at B18 (hailing the *Robinette* decision because "nationwide routine traffic stops do garner massive quantities of . . . drugs"); Lyle Denniston, *Police Given Expanded Traffic Stop Authority*, BALT. SUN, Feb. 20, 1997, at 1A (reporting Maryland Attorney General Joseph Curran's statement that the *Wilson* decision "'should make every officer in the nation feel a little safer tonight'"); *Know Your Rights*, LAS VEGAS REV.-J., Nov. 19, 1996, at 6B (stating that the decision in *Robinette* is "not unreasonable," and that citizens should know and be prepared to their assert right to refuse consent); David G. Savage, *Officers Can Order Passengers Out of Car, Justices Decide*, L.A. TIMES, Feb. 20, 1997, at A21 (stating that Los Angeles Police Commander Tim McBride praised the Wilson decision because "[i]t improves officer safety and improves our ability to investigate multiple suspects").

165 *See* Healy Memorandum, *supra* note 162, at A-4, A-5 to A-7.

seizures of illegal drugs.[166] But this is only one facet of the costs and benefits of the car stop cases and the drug interdiction efforts they support.

B. The Full Cost

When advocates for increased police discretion applaud the car stop cases, they implicitly adopt the argument that moving in the other direction would be unacceptable because it would decrease the number of arrests and hamper drug interdiction efforts by taking successful techniques away from police.[167] They will view my proposal for change in the law as a drag on law enforcement, a cost that will slow down efforts to detect illegal drugs. I concede the point for purposes of this discussion; if much drug interdiction work currently depends on the use of pretextual traffic stops and other such techniques, as I believe it does, reigning these in will slow those efforts down, even if we do not know by how much.

But this conception of "cost" is too narrow. What the Attorney General of Ohio and those who share her beliefs on this question fail to recognize is the full costs of these traffic stops. *Any accounting of costs must include the impact on all the people innocent of any wrongdoing who are stopped, questioned and perhaps searched, and treated in many ways like suspected criminals in the effort to arrest the guilty.*[168] Surely their treatment represents a cost of the drug interdiction effort. Any fair discussion of the effort to interdict drugs through traffic stops must take into account the bother, fear, embarrassment, and even humiliation that law-abiding people must tolerate in order that this "war" be waged.[169] The experience may be fleeting, but it is

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166 Note, however, that it is also easy to overstate the significance of the point. Of the 400 plus cases described in the Memorandum I received, eleven were seizures of marijuana of ten pounds or more, and just two were large seizures of cocaine. *See id.* at A-5 to A-7. The rest were, presumably, smaller. When I requested information on the size of these other seizures, I was told that the information was not tabulated in a form that would make the answer accessible. Telephone Interview with Todd Boyer, Office of the Attorney General (Dec. 13, 1995). It was also unclear whether all 400 seizures involved consent searches after highway stops or some combination of other techniques. *See* Healy Memorandum, *supra* note 162, at A-4 to A-7.

167 *See supra* Part IV.A.

168 Although the usual Fourth Amendment litigants are persons found guilty who have disputed the admissibility of probative evidence used against them on constitutional grounds, there have been at least two cases that have focused on the rights of those innocent of any wrongdoing. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that the customs service may conduct drug tests on employees who apply for positions where they will carry firearms or will be directly involved in drug interdiction); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 609, 611, 634 (1989) (upholding Federal Railway Administration regulations requiring employees involved in major train accidents or suspected of using drugs to submit breath or urine tests). As Professor Schulhofer noted, in these cases "the Court had one of its rare opportunities to hear face-to-face, as Fourth Amendment claimants, those law-abiding citizens for whose ultimate benefit the constitutional restraints on public power were primarily intended." Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 88.

169 *See* Delaware v. Prouse, 440 U.S. 648, 657 (1979) (stating that "stopping or detaining a vehicle on an ordinary city street" involves a "physical and psychological intrusion" due to "a possibly unsettling show of authority" and "may create substantial anxiety"); *cf.* Terry v. Ohio, 392 U.S. 1, 14, 16-17, 24-25 (1968) (noting that it is "simply fantastic" to claim that a stop and frisk is a "'petty indignity'"; rather "[i]t is a serious intrusion . . . which may inflict great indignity

not insignificant to the individuals involved. If cost-benefit analysis is the right way to think about such an issue on a policy level, as the Supreme Court says that it is,[170] surely we must consider all of the costs involved.

In an effort to gather information on the stops of innocent drivers in the wake of *Robinette*, I asked the Ohio Attorney General's office about its claim that 408 arrests resulting from *Robinette*-type searches.[171] How many *total* searches were carried out in order to find the right 408 cars? How many innocent drivers and passengers did police stop in order to find those who were guilty? The official answer was unsatisfying: We don't know, and as far as we know, no one keeps statistics like that.[172] Thus there is no way to know the full costs of these cases.

The point can be illustrated further by returning to the example of Trooper Washington, the successful Texas state trooper discussed above.[173] Trooper Washington sometimes makes as many as forty traffic stops in a single day.[174] If we assume that forty is an unusually high number, on a more average day, Trooper Washington may stop less than half that many, perhaps fifteen drivers. Typically, Trooper Washington "sends two drug-trafficking suspects through the local court system" each week.[175] If we assume a five day work week for Trooper Washington, at fifteen stops per day, he stops seventy-five cars per week, and nets two cars with drugs. Consider: for those two cases, seventy-three other people are stopped, questioned, and probably searched. And this goes on week after week, year after year. In short, the cost of the drug war in terms of the searching and seizing of innocent parties is not at all trivial. Yet courts have left the cost out of the equation. At what point do we ask whether highway drug interdiction is worth what law abiding citizens are giving up in freedom from arbitrary police interference?

A similar example comes from North Carolina. Records indicated that in 1995, Highway Patrol officers detailed to the agency's drug interdiction team searched 3501 vehicles and found drugs in 210—about one in every seventeen cars searched.[176] For every one car found with drugs, sixteen others were searched. Asked for a reaction, an officer found a one in seventeen ratio quite acceptable.[177] In fact, he didn't stop there; he doubted that

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and arouse strong resentment" and may be "an annoying, frightening and perhaps humiliating experience") (footnote omitted)); Louis M. Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1089 (1995) ("[S]earches on the street . . . amount to a species of violence. . . . Even if the search is less intrusive [than a typical stop and frisk]—for example, opening a paper bag or requiring a defendant to get out of his car—it may well be a terrifying experience.").

170 *See* United States v. Leon, 468 U.S. 897, 913-14, 922 (1984) (stating that in order to justify application of the exclusionary rule, the rule's benefit in deterrence must outweigh its costs in lost prosecutions).

171 *See* Memorandum, *supra* note 162 at A-4.

172 Telephone Interview with Todd Boyer, *supra* note 166.

173 *See* Curliss, *supra* note 109, at 1A.

174 *See id.*

175 *Id.*

176 *See* Neff & Stith, *supra* note 109, at A1. The number of cars stopped may be even higher because probably not every car stopped is searched. This would make the ratio even smaller than one in seventeen, and would make for an even larger burden on the innocent.

177 *See id.*

there were actually *any* innocent drivers *at all*: "'You may have had 17 cars searched where drugs are only found one time,' he said. 'But that's not to say that that person who didn't have it wasn't involved.'"[178] In other words, the price of searching sixteen cars to catch one is not only worth paying; the other sixteen searches may not constitute a cost at all, because police don't make mistakes. Everyone whom police stop is involved, whether drugs are found or not.

Justice Kennedy appears to appreciate the gravity of this situation. Like all of his colleagues, Justice Kennedy joined the 9-0 majority opinion in *Whren*.[179] But he dissented when the Court decided *Wilson*.[180] His dissenting opinion in *Wilson* shows that he does, indeed, understand that stoping innocent people constitutes a cost:

> The practical effect of our holding 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.[181]

Justice Kennedy's statement actually underestimates the risk; he could have added tens of millions of drivers too.

C. *Allocation of Costs*

If the stopping and searching of innocent people constitutes a cost that we must consider in assessing the desirability of the current rules concerning car stops, we must also consider the allocation of this cost. In the starkest possible terms, just because police can stop virtually anyone at any time does not mean that they will stop *just anyone*. In fact, evidence that we have indicates that these techniques will be used against African Americans and Hispanics in numbers greatly disproportionate to their presence in the driving population. That is, the cost I have identified here—the stopping of innocent people—will be borne mostly by people of color because police have used and likely will continue to use color as a proxy for possible criminal behavior.

Although there has been no systematic or scientific study of this problem,[182] there is a great deal more than just scattered anecdotal evidence. Consider a few examples. In Maryland, the state police settled a lawsuit claiming that they were making stops on the basis of race.[183] In the settlement, the parties agreed that the law prohibited this practice, and the state police pledged not to engage in it.[184] They also agreed to submit statistics to

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178 *Id.*

179 *See* Whren v. United States, 116 S. Ct. 1768, 1771 (1996).

180 *See* Maryland v. Wilson, 117 U.S. 882, 890 (1997) (Kennedy, J., dissenting).

181 *Id.* at 890 (Kennedy, J., dissenting).

182 *See* Harris, *supra* note 21, at 560 (stating that existing data on police stops have not been gathered with statistical and scientific principles in mind). The Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997), currently pending in the House of Representatives, seeks to remedy this situation by requiring systematic record keeping in traffic stops in order to enable a full and accurate assessment of the practices that take place. *See id.* § 2.

183 Settlement Agreement, Wilkins v. Maryland State Police, Civ. No. MJG-93-468 (D. Md. Jan. 5, 1995); Davis, *supra* note 35, at 438-42; Harris, *supra* note 21, at 563-66.

184 *See* Settlement Agreement ¶ 6, *Wilkens* (Civ. No. MJG-93-468).

the court that would track all stops that resulted in searches by consent or with dogs.[185] Even after agreeing to the conditions in the settlement, with statistical monitoring in place, more than seventy percent of those stopped by the state police drug interdiction teams were African Americans.[186] This occurred in an area in which only seventeen percent of the drivers were African American, and in which African Americans were no more likely than other drivers to violate traffic laws.[187]

In Florida, drug interdiction efforts along I-95 were videotaped by cameras mounted on police cars.[188] A newspaper used the state's public records law to obtain some of those tapes.[189] In 148 hours of tape that documented almost eleven hundred stops, almost seventy percent of the drivers stopped were African American or Hispanic,[190] on a stretch of road on which about five percent of the drivers "were dark-skinned."[191] African Americans and Hispanics were more likely to be searched after stops than whites were,[192] and their stops lasted more than twice as long.[193] Of the motorists not arrested, police were also more likely to seize cash from African Americans and Hispanics than from whites.[194]

In Illinois, an attorney hired private investigator Peso Chavez to drive across certain counties to see if police were, in fact, harassing Hispanic drivers, as the attorney's client had claimed.[195] The state police stopped the investigator after following him for twenty miles and over his objections searched his car with a dog.[196] After telling the investigator that the dog had detected drugs,[197] the police went through every inch of his car and all of his

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185 *See id.* ¶ 9. Note that such records might tend to underestimate the total number of racially based stops because they only include stops that are followed by searches, and only searches of two kinds: those with consent and those using drug-sniffing dogs. *See id.*

186 *See* Summaries of Records of Maryland State Police Searches, Jan. 1995-June 1996 (on file with author). These data were produced in raw form to the court and plaintiffs' counsel; the summaries were produced by plaintiffs' counsel.

187 *See* Memorandum in Support of Plaintiff's Motion for Enforcement of Settlement Agreement and for Further Relief at 7-8, Wilkins v. Maryland State Police, Civ. No. CCB-93-468 (D. Md. Nov. 4, 1996). The court denied the defendant's motion for summary judgment, and found that the plaintiffs had made a reasonable showing of a pattern and practice of discrimination. As of March 1998, further relief, in the form of an extension of the obligation to collect data, installation of video cameras on patrol cars, clarification of departmental policy on traffic stops, and attorney's fees, was being put into the form of a new settlement agreement. Telephone interview with Deborah A. Jeon, Counsel for Plaintiffs (March 17, 1998).

188 Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug. 23, 1992, at A1.

189 *See id.*

190 *See id.*

191 *See* Henry P. Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, Aug. 23, 1992, at A11. The five percent figure was based on a five-day sampling. *See id.*

192 *See id.*

193 *See* Brazil & Berry, *supra* note 188, at A1.

194 *See id.*

195 *See Illegal Searches Used in Illinois, Suit Alleges*, N.Y. TIMES, Sept. 4, 1994, at A24 [hereinafter *"Illegal Searches"*].

196 Fourth Amended Complaint ¶¶ 23, 24, 29, 30, Chavez v. Illinois State Police, No. 94 C 5307 (N.D. Ill. filed Aug. 30, 1994). The investigator was also asked to consent to a search, but refused. *See id.* ¶ 29.

197 *See id.* ¶ 31.

personal belongings.[198] While the police performed the search, he was kept in a squad car with another officer who asked him very personal questions.[199] Of course, nothing was found.[200] The investigator is now the lead plaintiff in a class action lawsuit.[201]

North Carolina drug interdiction teams have made thousands of stops in the last several years.[202] All stops were made for minor traffic violations with the clear objective of finding drug traffickers.[203] A considerable number of these drivers' cars were searched, sometimes resulting in damage to vehicles.[204] Many of the drivers were ticketed or given warnings.[205] Although forty-five percent of the drivers ticketed by the drug interdiction team were African American, less than twenty-five percent of the drivers ticketed by all other state police units were African American,[206] a statistical disparity that is almost impossible to explain without acknowledging that African Americans were deliberately targeted.

These cases are not the only examples.[207] And because it is difficult to bring a successful lawsuit alleging discriminatory enforcement of the law,[208] there must be many thousands of other incidents in which no suit is ever filed. The available data confirm what African Americans, Hispanics, and other minority groups have said for years: Police have consistently selected them for this treatment, and there is no race- or ethnicity-neutral explanation for it.[209]

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198 *See id.* ¶¶ 32, 33.

199 *See id.* ¶¶ 31, 32.

200 *See id.* ¶ 33.

201 *See Illegal Searches*, *supra* note 195, at A24.

202 *See* Neff & Stith, *supra* note 109, at A1 (noting that the drug interdiction team searched 3501 vehicles in 1995 alone).

203 *See id.* (reporting that officers are taught "'to legitimately stop vehicles for traffic violations . . .[and then] look for indicators [of drug trafficking]'" (quoting Sergeant Timmy Lee Cardwell)).

204 *See id.* (recounting instances in which searches damaged vehicles).

205 *See id.*

206 *See id.*

207 *See, e.g.*, Amended Complaint ¶¶ 3, 5, 15, 16, Indianapolis Chapter, NAACP, v. City of Carmel, No. IP 97-104 C M/S (S.D. Ind. filed Mar. 17, 1997) (alleging, in a class action suit against a suburban town, biased use of traffic stops against minorities); State v. Soto, No. 88-07-00492i, slip op. at 1 (N.J. Sup. Ct. Mar. 4, 1996) (granting a motion to suppress evidence based on violations of the Equal Protection and Due Process Clauses involving racially biased traffic enforcement); Patrick O'Driscoll, *"Drug Profile" Lawsuit Settled*, DENV. POST, Nov. 10, 1995, at 1A (detailing settlement of lawsuit growing out of racially biased drug interdiction in Eagle County, Colorado); *see also* United States v. Laymon, 730 F. Supp. 332, 339-40 (D. Colo. 1990) (holding that an alleged traffic violation was a pretext for an invalid stop); Barbara W. Stack, *The Color of Justice*, PITTSBURGH POST-GAZETTE, May 5, 1996, at A1 (describing the common experience of police harassment that led some African Americans to file suit).

208 *See, e.g.*, Mark Pazniokas, *Discrimination by Police Often Hard to Prove*, HARTFORD COURANT, May 2, 1994, at A1 (finding that "victims [of racially biased police practices] are reluctant to sue" and "tend to shrug off the [racially biased] stops as an annoying fact of life").

209 *See* KENNEDY, *supra* note 21, at 154-63 (arguing that even though African Americans are statistically more likely to commit street crime, treating race as a proxy for criminality is nevertheless wrong); Harris, *supra* note 21, at 571-73 (finding that although law enforcement calls racially disproportionate stops good police work or "'an unfortunate byproduct of sound

By almost any reckoning, this seems unfair in the rawest possible way. How can it be right to allocate significant government-imposed burdens—the burden of being treated as a criminal suspect—on the basis of skin color? And yet the Supreme Court has said that this does not violate the Fourth Amendment and that the proper way to address these violations is through lawsuits alleging violations of the Equal Protection Clause.[210]

V. Proposals

Given the enormous unaccounted-for costs that the current rules impose upon innocent people and the difficulty of obtaining redress for racially biased law enforcement practices under the Equal Protection Clause,[211] the law must change. Unbounded police discretion is dangerous enough to provoke concern in any case, but coupled with the distribution of the costs involved on the basis of skin color, the need for a different approach is urgent.

A. Traffic Stops Must Be Used Only for Reasonable Efforts to Enforce Traffic Laws

Traffic stops must again become just that—traffic stops. They should not be used to circumvent the Constitution, i.e., blatant excuses to stop and search drivers when the law would not otherwise allow this. Thus this essay proposes to reverse *Whren*: a stop should be found constitutionally valid only if a reasonable officer would have made it for purposes of enforcing the traffic laws. Of course, this is exactly the rule that the Supreme Court rejected in *Whren* as both practically unworkable[212] and inconsistent with its prior decisions concerning the subjective state of mind of the individual officer as it bears upon Fourth Amendment activity.[213] Viewed as part of the larger picture of traffic stops, *Whren* is nothing less than the end of the applicability of the Constitution to every person driving a car. If the Court wants to change Fourth Amendment jurisprudence so drastically, the least it owes society is to say so, instead of hiding behind continued pronouncements that probable cause and reasonable suspicion remain the law. If the requirements of probable cause and reasonable suspicion are the law, *Whren* is clearly wrong. To correct the situation, a traffic stop must be aimed at traffic enforcement and nothing more.

Of course, if the officer making a legitimate traffic stop sees contraband in plain view, he or she need not ignore it. There is no reason that police should blind themselves to what anyone standing next to the car could ob-

police policies,'" it is nothing more than the improper use of race "as a proxy for the criminality or 'general criminal propensity' of an entire racial group" (footnotes omitted)).

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

211 To prove a violation of the Equal Protection Clause, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." Washington v. Davis, 426 U.S. 229, 240 (1976); *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65, 271 (1977) (holding that proof of a racially discriminatory aim is required to show a violation of the Equal Protection Clause and finding that a discriminatory "ultimate effect" did not make out a constitutional claim).

212 *See Whren*, 116 S. Ct. at 1775.

213 *See id.* at 1774.

serve, as long as the officer has a right to be in the place from which he or she observes the contraband. But traffic stops should not be an easy and ever-present way to be in the right place at the right time.

B. Limit Questioning

Questioning of drivers must be limited to matters that bear on the traffic offense itself, unless police observe some other evidence in plain view that prompts suspicion of criminal activity. Officers often use car-side questioning as a way to begin the journey toward a consensual search.[214] One should recognize this questioning for what it is: a fishing expedition, designed to generate the factual and legal circumstances necessary for a search, whether by consent or other grounds, in every single stop. Under any fair reading of Fourth Amendment law, suspicion must exist ex ante, before any Fourth Amendment action takes place. Currently, this concept simply disappears, replaced by prying questions that human nature impels one to want to answer as a way to avoid a ticket, appear cooperative, or appease authority.

C. Advise Drivers That They Need Not Consent and Can Limit the Scope of Consent

Consent searches must require that officers tell those searched that they have both the right to refuse and to limit the scope of the search. Like my suggestion concerning *Whren*, this proposal would require more than the Court has been willing to do. Indeed, the Court has rejected similar approaches that are more modest that this one, not once but twice before.[215] But without this change, motorists will remain at the mercy of police. The Court's failure to adopt such rules and instead to fall back on voluntariness that may be either misinformed or uninformed is simply a way of avoiding the real issue.

Simply put, the typical encounter between a police officer and a motorist does not involve two people with equal power. Rather, the officer has a high degree of leverage over the driver. First, in many instances the law may obligate citizens to obey the orders of police officers.[216] Even if the law did allow citizens to drive away from an officer during questioning in certain circumstances, few people would do this.[217] Second, the officer has a number of alternatives in any traffic stop, and the driver knows this. The officer can just

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214 *See* Neff & Stith, *supra* note 109, at A1; *see also supra* notes 107-114 and accompanying text.

215 *See* Ohio v. Robinette, 117 S. Ct. 417, 421 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

216 *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 28-622, 28-622.01 (West 1989); CAL. VEH. CODE §§ 2800, 2800.1 (West Supp. 1997); DEL. CODE ANN. tit. 21, § 4103 (1995); FLA. STAT. ANN. § 316.1935 (West Supp. 1998); 625 ILL. COMP. STAT. 5/11-204 (West 1997); NEV. REV. STAT. ANN. §§ 484.348, 484.3595 (Michie Supp. 1995); N.Y. VEH. & TRAF. LAW § 1102 (McKinney Supp. 1997); PA. STAT. ANN. tit. 75, § 3733(a) (West Supp. 1996); WASH. REV. CODE ANN. § 46.61.020 (West Supp. 1997).

217 *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.").

talk to the driver, issue a written warning, or issue a citation which carries penalties. In some situations, the officer can even arrest the driver.[218] This power gives the driver a strong incentive to cooperate in hopes of avoiding a citation, whether that cooperation takes the form of answering questions or allowing a search. Third, the police officer embodies authority for many people, and most will do what an authority figure suggests, whether legally obligated to or not.[219] In fact, one study found many people willing to go to extremes to remain obedient to an authority figure.[220] Along with the authority of his or her office, police also wear a uniform, always a potent symbol of legitimacy and authority,[221] and most carry weapons. Fourth, a citizen is likely to assume that police will respond to any refusal to cooperate. Although police cannot use this refusal as the basis for reasonable suspicion,[222] this is a counterintuitive rule. Most people are likely to think that "only a guilty person would refuse to cooperate, so if I refuse, the officer will think I'm guilty and arrest me." Fifth, the form of a question and the circum-

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218 *See, e.g.,* KY. REV. STAT. ANN. §§ 189.290, 189.393, 189.520, 189.580, 189A.010, 431.005(e) (Banks-Baldwin 1995) (giving an officer the discretion to arrest a driver if the officer observes a failure to drive "in a careful manner," if the driver fails to comply with the officer's signal to pull over, if the officer observes the driver operating the vehicle while intoxicated, or if a driver involved in an accident with injuries fails to stop and render aid or locate the owner if property is damaged); MASS. ANN. LAWS, ch. 90, § 21 (Law Co-op. 1994) (giving an officer the discretion to arrest without a warrant persons driving with suspended or revoked licenses, persons driving while intoxicated, and drivers who leave the scene of an accident that caused injuries to any person); OHIO REV. CODE ANN. §§ 2935.03(C), 4506.15(A)-(C), 4511.19 (Anderson 1996) (allowing police to arrest individuals for driving while under the influence of alcohol or other intoxicants).

219 *See* JONATHAN RUBINSTEIN, CITY POLICE (1973), *reprinted in* POLICE BEHAVIOR: A SOCIOLOGICAL PERSPECTIVE 68, 68-71 (Richard J. Lundman ed., 1980); Wayland Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 465, 490 (1967) (finding that in a study conducted, "an overwhelming majority of the individuals stopped cooperated willingly with the police officer, if not out if a sense of civic duty at least with the attitude that this temporary delay be ended as quickly as possible").

220 *See* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 3-6 (1974). In this classic study, Milgram's subjects were commanded by an authority figure to give electric shocks to victims (who were part of the experimenter's team and not actually shocked) when the victims gave the "wrong response." *See id.* at 20. With each subsequent mistake, the subjects were told to turn up the voltage, to the point that the victims were allegedly in pain and expressed it loudly. *See id.* at 20-21, 23. Subjects who hesitated to inflict more pain with higher voltages were told they had to, and over sixty-five percent continued to administer shocks to the highest possible level. *See id.* at 21-23, 33.

221 *See* RUBINSTEIN, *supra* note 219, at 68-69; Leonard Bickman, *The Social Power of a Uniform,* 4 J. APPLIED SOC. PSYCHOLOGY 47, 49-51 (1974) (reporting from a study that when passersby were asked to perform a task by a nonuniformed citizen, a milkman, and a guard in a uniform resembling a police officer, more than 89% obeyed the guard, while only 33% obeyed the civilian, and 57% percent obeyed the milkman).

222 *See, e.g.,* Florida v. Bostick, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); Brown v. Texas, 443 U.S. 47, 52-53 (1979) (holding that the police cannot, under the Fourth Amendment, demand that an individual answer questions without reasonable suspicion of criminal activity). Otherwise, the law allowing citizens to refuse police requests to stop and talk without probable cause does not make any sense. Police could simply ask any question of anyone, and refusal to answer would create the probable cause not otherwise present.

stances under which it is asked often imply as much as the actual words used. Psychologists and poll takers have understood this for years,[223] and police do, too. As the United States Court of Appeals for the Ninth Circuit stated in *Bustamonte*: "Under many circumstances a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by the force of law."[224] Indeed, it was no accident that the officer in *Robinette* asked: "'One question before you get gone: [A]re you carrying any illegal contraband in your car?'"[225] Although the defendant was not legally obligated to answer that question, a reasonable person uneducated in legal niceties likely would understand that the question had to be answered before he or she could go.

D. Limit the Use of "Detection Devices" Like Drug-Sniffing Canines

The use of drug-sniffing canines or other such methods to detect contraband should be limited to situations in which there is at least reasonable suspicion to think contraband is present. As it now stands, the law allows far more. According to *Place,* the use of any device that can only detect the presence or absence of contraband and does so with very limited intrusiveness does not constitute a search for constitutional purposes.[226] Dogs may be the most well-known example of such devices,[227] but they are not the only ones.[228] *Place* is one of the Court's more shortsighted cases; in an effort to allow police to use drug-sniffing dogs, the Court failed to grasp that evolving police techniques, especially those involving technological capabilities only dreamed of a short time ago, have "significant implications for traditional notions of rights of privacy in a democratic society and may need to be sub-

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223 *See, e.g.,* ELIZABETH LOFTUS, EYEWITNESS TESTIMONY 175-76 (1979) (reporting that most people, when asked, knew that even a very subtle difference in the wording of a question could elicit remarkably different answers); Sam H. Verhovek, *Referendum in Houston Shows Complexity of Preference Issue*, N.Y. TIMES, Nov. 6, 1997, at A1 (stating that the failure of a ballot measure to end Houston's affirmative action policies was attributed to the precise wording as it appeared on the ballot).

224 Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971), *rev'd*, 412 U.S. 218 (1973); *see* Schneckloth v. Bustamonte, 412 U.S. 218, 275-76 (1973) (Douglas, J., dissenting); *id.* at 289 (Marshall, J., dissenting).

225 Ohio v. Robinette, 117 S. Ct. 417, 419 (1996) (alteration in original) (quoting Appendix to Respondent's Brief at 2, *Robinette* (No. 95-891)).

226 *See* United States v. Place, 462 U.S. 696, 707 (1983).

227 It should be noted that the Court assumed in *Place* that dogs only detected contraband and did so accurately, so that there would be no intrusion unless contraband was found. *See id.* In fact, these dogs are not always accurate. *See, e.g.*, Commonwealth v. Cass, No. 12 W.D. 1996, 1998 WL 3264, at *1 (Pa. Jan. 7, 1998) (describing a dog sniff that alerted to the presence of contraband in 18 lockers, but only one contained drugs); Doe v. Renfrow, 475 F. Supp. 1012, 1016-17 (N.D. Ind. 1979) (describing a school canine search in which a dog's affirmative alert forced a twelve year old girl, who was found to have played with a dog in heat earlier in the day, to be body searched, resulting in no contraband to be found, and of 50 other students dogs alerted to, only 17 had drugs), *aff'd in part*, 631 F.2d 91 (7th Cir. 1980).

228 *See* David A. Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMPLE L. REV. 1, 7-14, 17-55 (1996) (surveying the capabilities and legal implications of new high technology weapons detection devices); *Sniffing for Drugs by Testing Vapors*, N.Y. TIMES, Oct. 9, 1991, at D6 (describing a new drug detection system that can identify vapors from minuscule particles of illegal drugs).

ject to regulation and accountability to protect those rights."[229] Indeed, these devices have the potential to have an impact not only on constitutional values, but also on the openness of society in general. The current law, which allows police to use dogs whenever and wherever they want, is so broad that this activity is completely unregulated. In order to maintain traditional Fourth Amendment concepts, at a minimum, the use of detection devices, including dogs, should be limited to situations in which there is already at least enough evidence for reasonable suspicion. Otherwise, the law essentially leaves no sphere of privacy other than what technology allows. And as technology evolves, becoming both less intrusive and more sensitive, the capabilities of these devices will determine what the rights to privacy and security from intrusion by law enforcement are, rather than the other way around. Citizens simply cannot accept this if they are to control their government, instead of the government controlling citizens through the police.

If the police officers who stop a car have an articulable suspicion of danger, the law should allow them to ask all occupants to get out. It is true that police face danger when they make traffic stops. But this is not always so. Allowing officers to ask every driver and passenger to exit the car in every case, no matter what the facts are, goes further than necessary.[230]

E. The Result of These Proposals

Under these proposals, there is no question that police will not find some of the drugs transported by vehicle that they find now. They will almost certainly not make some of those four hundred arrests in Ohio about which the Attorney General bragged.[231] This is a cost of the law as I think it should be, and I acknowledge it.[232]

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229 AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS ON ELECTRONIC SURVEILLANCE RELATING TO TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE ii (draft 3d ed., 1997).

230 Of course, states could take other actions to make officers safer in encounters with drivers. For example, some states have outlawed darkly tinted glass for passenger vehicles, making it easier for officers to observe any dangerous activity. *See, e.g.,* NEB. REV. STAT. ANN. § 60-6,257 (Michie 1995) (outlawing tints in rear or back side windows that have "a luminous reflectance of more than thirty-five percent or has light transmission of less than twenty percent"); *cf.* United States *v.* Stanfield, 109 F.3d 976, 988-89 (4th Cir.) (holding that because tinted windows prevented an officer making a traffic stop from seeing inside the vehicle, he reasonably opened the vehicle's doors to protect his safety), *cert. denied*, 118 S. Ct. 156 (1997). And technological approaches may help. *See Intelligent Vehicle Highway Systems: Oversight Hearing on Firearms Technology: Using Innovation to Stop Gun Violence Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 104th Cong. (1994) (illustrating technologies that would "limit a firearm's use to its owner and/or authorized individual") (statement of Douglas R. Weiss, Project Manager, Smart Gun Technology Project, Sandia National Laboratories); Harris, *supra* note 228, at 9-10 (describing devices that conduct electronic frisks while an officer stays in the relative safety of the patrol car); Vincent Pennacchini, *What's So Smart About the Smart Gun?*, BUS. TIMES, Dec. 1, 1996, at 1 (stating that smart guns can be fired only by owners with proper transmitting equipment, like rings or bracelets); Jim Ritter, *"Smart Gun" Takes Aim for Safety,* CHI. SUN-TIMES, Oct 20, 1996, at 34 (reporting that the smart gun will not fire unless in the hand of a person wearing a ring that transmits a signal to the gun).

231 *See supra* note 159-161 and accompanying text.

232 Of course, there are ways to deal with narcotics in society other than making their use and possession illegal, which creates the black market that makes it worthwhile to risk high

But the cost on the other side of the equation must be acknowledged, too: the huge number of innocent individuals that are stopped, interrogated, and treated like criminals so that the police may catch the guilty. We must add to this cost the fact that many of these individuals seem to be singled out for this treatment because of the color of their skin. These police practices can profoundly alienate even the truest, most law-abiding citizen, and it is not hard to understand why. Race, so often the issue that divides us, stands in this context to become a factor so corrosive of our faith in the integrity of our judicial system that citizens of color simply refuse to accept the legitimacy of our courts.[233] In the long run, this will prove too great a price for our society to pay. And any country that aspires to "equal justice under law" ignores this problem at its peril.

The approach described in this Essay obviously requires a reversal of *Whren, Robinette, Wilson,* and *Place.* On any practical level, this may seem unlikely,[234] even if it is the right thing to do. But this does not mean that my approach should not be taken. If the Supreme Court does not seem a promising venue for successful reform in this area, legislative efforts, at either the state or federal[235] level, may prove more fruitful. After all, the Constitution forms the floor for what governments must do to protect the constitutional rights of their citizens; they are free to do more. Defendants with such argu-

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penalties to transport and sell these substances. We could consider some form of legalization or decriminalization, and any number of thoughtful people have recommended this. *See, e.g.,* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR 231-49 (1993) (discussing the legalization of drugs); William F. Buckley et al., *The War on Drugs Is Lost,* NAT'L REV., Feb. 12, 1996, at 34, 34-48 (reporting the opinions of numerous commentators on how drug prohibition has failed and what to do about it). And there are many examples of ways to deal with street crime without creating the difficulties highlighted here. For instance, if we think youth violence or violent crime in general are a problem worth focussing our energy on, we can use approaches successfully pioneered by Boston, New York and other cities in the past few years that have little impact on innocent people. *See Fewer Youths Arrested for Violent Crime,* ST. LOUIS POST-DISPATCH, Aug. 9, 1996, at 1A (attributing the decrease of the juvenile murder rate in New York to strict enforcement of quality of life offenses); Alison Mitchell, *Clinton Likes Boston's Gains Against Youth Crime,* SEATTLE POST-INTELLIGENCER, Feb. 20, 1997, at A3 (noting that Boston's dramatic reduction in juvenile homicides is attributed to intensive probation, aggressive law enforcement against truancy, graffiti, and various quality of life crimes); Richard Moran, *New York Story: More Luck Than Policing,* WASH. POST, Feb. 9, 1997, at C3 (stating that inroads have been made against crime by attacking low-level quality of life problems or the so-called "broken windows" theory); Christina Nifong, *How Boston Brought Down Youth Crime,* CHRISTIAN SCI. MONITOR, Feb. 20, 1997, at 14 (highlighting the Boston program's aggressive targeting of those youths most likely to commit crimes and a focus on gun selling); Mark Puls, *New York's Approach Cuts City's Murder Rate,* DETROIT NEWS, Jan. 3, 1997, at A3 (reporting that New York attacked crime with aggressive enforcement against quality of life offenses, "such as loitering, panhandling, prostitution, [and] loud music").

233 *See, e.g.,* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System,* 105 YALE L.J. 677, 679 (1995) (advocating the use of jury nullification by African American jurors on behalf of African American defendants as a way of addressing injustices and racism in the system).

234 *Whren* was a unanimous decision. *See* Whren v. United States, 116 S. Ct. 1769, 1771 (1996). *Robinette* was an eight to one decision. *See* Ohio v. Robinette, 117 S. Ct. 417, 417 (1996). *Wilson* was a seven to two decision. *See* Maryland v. Wilson, 117 S. Ct. 882, 883 (1997).

235 For example, the Traffic Stops Statistics Act of 1997, H.R. 118, 105th Cong. (1997), takes the first step by calling for a rigorous statistical study of traffic stops. *See id.* § 2.

ments may find a more receptive audience in state courts, which have frequently shown themselves ready to make decisions under their own constitutions that reject what the U.S. Supreme Court has done.[236]

Conclusion

Whren, Robinette, and *Wilson* are only the latest in a long string of decisions that have increased police power over cars and drivers significantly. In the wake of these cases, it is no exaggeration to say that, on the road, the traditional rules of probable cause and reasonable suspicion, the familiar if threadbare Fourth Amendment protections, simply do not apply. Where cars are concerned, the police are in control and will likely get their way.

This approach is often applauded for the power it gives law enforcement, but we should not blind ourselves to its costs. Those costs are real, they are significant, and perhaps worst of all they are often imposed based on skin color. This is simply too corrosive of the sometimes tenuous strands of common interests that hold us together as citizens. If some individuals are treated as criminals just because that is easiest for law enforcement, what value could people so treated find in being members of society?

Significant change is needed in this area of the law. Otherwise, in the pursuit of the worst among us, we may lose what is best about us. And no matter how safe we are, no matter how many drug traffickers police catch, we will never be able to get back the freedom we have sacrificed.

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236 For example, the suspicionless stops at sobriety checkpoints held constitutional in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 454-55 (1990), were found on remand to violate Michigan's constitutional search and seizure provision. *See* Sitz v. Dep't of State Police, 506 N.W.2d 209, 224-25 (Mich. 1993). In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court found that the use of a pen register was not a search under the Fourth Amendment. *See id.* at 745-46. The use of pen registers, however, have not been upheld under some state constitutions. *See* People v. Sporleder, 666 P.2d 135, 143-44 (Colo. 1983); State v. Rothman, 779 P.2d 1, 8 (Haw. 1989); State v. Thompson, 760 P.2d 1162, 1165-67 (Idaho 1988). Also, in *United States v. Place*, 462 U.S. 696 (1983), the Court found that dog sniffs of luggage located in a public place was not a search. *See id.* at 707. State courts, however, have made differing interpretations regarding the intrusiveness of dog sniffs based on their own constitutions. *See, e.g.*, McGahan v. State, 807 P.2d 506, 511 (Alaska Ct. App. 1991) (stating that a dog sniff of the exterior of a building accessible to the public is a search and requires reasonable suspicion); Pooley v. State, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985) (finding that a dog sniff of luggage is a search); People v. Boylan, 854 P.2d 807, 810-11 (Colo. 1993) (en banc) (stating that a dog sniff of a private express courier package is a search); People v. Dunn, 564 N.E.2d 1054, 1057-58 (N.Y. 1990) (finding that a dog sniff outside front door of residence, alerting police to contraband within, is a search).