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U.C.L.A. Law Review

Rewriting *Whren v. United States*

Devon W. Carbado & Jonathan Feingold

ABSTRACT

In 1996, the U.S. Supreme Court decided *Whren v. United States*—a unanimous opinion in which the Court effectively constitutionalized racial profiling. Despite its enduring consequences, *Whren* remains good law today. This Article rewrites the opinion. We do so, in part, to demonstrate how one might incorporate racial justice concerns into Fourth Amendment jurisprudence, a body of law that has long elided and marginalized the racialized dimensions of policing. A separate aim is to reveal the "false necessity" of the *Whren* outcome. The fact that *Whren* was unanimous, and that even progressive Justices signed on, might lead one to conclude that the Court's hands were tied. This Article argues otherwise by offering an alternative Supreme Court opinion that could have decided the case. In the context of doing so, the Article limits its archive—the materials on which it formally relies—to sources that were available to the Court when the case was litigated. We do not pretend that this citational practice fully avoids the pitfalls of presentism. To be perfectly transparent, how we view *Whren* is very much informed by the broad literature that has emerged over the past two decades arguing that the case was wrongly decided. Still, that we have limited our archive along the preceding lines strengthens the case that the Court could have reached a different conclusion—within the confines of Fourth Amendment law—that took the dignity and sanctity of Black lives more seriously. We have written the opinion in the voice of the late Justice Thurgood Marshall, whose constitutional jurisprudence routinely centered the experiences of the marginalized, the minoritized, and the forgotten.

AUTHOR

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This essay is part of a broader scholarly project that rewrites central Supreme Court Cases to better attend to racial inequality. *See* Critical Race Judgements: Rewritten U.S. Court Opinions on Race and Law (Bennett Capers, Devon Carbado, Robin Lenhardt & Angela Onwuachi-Willig eds.) (forthcoming 2022). As we indicated in the abstract, in rewriting *Whren*, we did not expressly rely on materials that were published after the original *Whren* opinion was decided. Still, we recognize that our approach to the case was shaped by scholarship and ideas that circulated post-*Whren*.

Indeed, many of the ideas draw from two papers one of us (Devon Carbado) wrote, both of which were published subsequent to the *Whren* decision: *(E)Racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002) and *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125 (2017).

Those pieces, in turn, drew from a robust body of scholarship on race and the Fourth Amendment, including: Paul Butler, *The White Fourth Amendment*, 43 Tex. Tech L. Rev. 245 (2010); Gabriel J. Chin & Charles J. Vernon, *Reasonable But Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 Geo. Wash. L. Rev. 882 (2015); Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. Miami L. Rev. 425 (1997); Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, Pulled Over: How Police Stops Define Race and Citizenship (2014); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651 (2003); Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 Seattle U. L. Rev. 1413 (2013); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. Crim. L. & Criminology 554 (1997); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land*: United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 Geo. L.J. 1005 (2010); Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 Mich. L. Rev. 1843 (2004); Margaret Lawton, *State Responses to the Whren Decision*, 66 Case W. Res. L. Rev. 1039 (2016); Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 Fla. L. Rev. 305 (2012); Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271; Jordan B. Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. Rev. 672 (2015).

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WHREN V. UNITED STATES

OPINION OF THE COURT

Justice Marshall delivered the opinion of the Court.

I.

In this case, we decide whether it is consistent with the Fourth Amendment for a police officer who observed a traffic violation to use that violation to justify a racially selective traffic stop, or as the pretext to investigate a crime for which the officer lacks probable cause. We answer both questions in the negative.

II.

On the evening of June 10, 1993, a team of District of Columbia (D.C.) plainclothes vice officers were patrolling for drug activity in an unmarked car. Investigator Tony Howard drove the vehicle, in which officers Efrain Soto, Jr. and Homer Littlejohn were also present.[1] While driving in Southeast D.C., the officers noticed two Black men sitting in a dark Nissan Pathfinder paused at a stop sign. The Pathfinder had temporary tags. Officer Soto testified that he had observed James Lester Brown, the driver, looking into the lap of Michael Whren, the passenger. As the officers proceeded slowly down the street, Soto continued to watch the Pathfinder. He testified that the Pathfinder remained stopped at the intersection for more than twenty seconds, obstructing traffic behind it.[2]

Investigator Howard had already begun to make a U-turn to tail the Pathfinder when Soto instructed him to follow it. As the officers turned around, the Pathfinder turned without signaling. Officer Soto added that the Pathfinder "sped off quickly" and proceeded at an "unreasonable speed."[3]

The vice officers followed the Pathfinder to a different intersection, where it was surrounded by cars to its front, right, and rear. The officers boxed in the

1. United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd sub nom.* Whren v. United States, 517 U.S. 806 (1996).
2. Officers Soto and Littlejohn disagreed as to whether any cars were stopped behind the Pathfinder. Soto testified that at least one car was stopped behind the Pathfinder, but acknowledged that no car behind the Pathfinder honked or otherwise requested the Pathfinder to move. Officer Littlejohn testified that there were no vehicles waiting behind the Pathfinder. Brief for the Petitioners at *4–5, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841).
3. *Id.* at *5–6 (quoting the District Court transcript).

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Pathfinder by pulling alongside its driver's side. Officer Soto then immediately exited his vehicle and approached the Pathfinder, identifying himself as a police officer. Officer Littlejohn followed a few steps behind.

Because the surrounding vehicles prevented Brown from pulling over, Officer Soto told Brown to place the Pathfinder in park. As he was speaking, Soto noticed that Whren was holding two large, clear plastic bags. Upon seeing the bags, which Soto suspected to contain cocaine, the officer yelled "C.S.A." to notify the other officers that he had observed a Controlled Substances Act violation.[4]

According to Officer Soto, as he reached for the driver's side door, Whren yelled "pull off, pull off."[5] Officer Soto then observed Whren pull the cover off a power window control panel in the passenger door and place one of the large bags into a hidden compartment. Officer Soto opened the driver's side door, dove across Brown, and grabbed the other bag from Whren's left hand. At the same moment, Officer Littlejohn pinned Brown to the driver's seat.

Multiple officers then arrested Brown and Whren and proceeded to search the Pathfinder. The officers recovered two tinfoil packets containing marijuana laced with PCP, a bag of chunky white rocks, a large white rock of crack cocaine, numerous unused Ziplock bags, a portable phone, and personal papers. Petitioners were charged in a four-count indictment for violating various federal drug laws, including 21 U.S.C. §§ 844(a) and 860(a).

III.

At a pretrial suppression hearing, petitioners challenged the legality of the stop and the resulting seizure of the drugs. They argued that the officers lacked probable cause, or even reasonable suspicion, to believe that petitioners were engaged in illegal drug-dealing activity. Petitioners further argued that Officer Soto's asserted ground for approaching the vehicle was pretextual.

Petitioners advanced two separate pretext claims. First, petitioners alleged that the stop was racially motivated—that is, the officers stopped petitioners because they were Black, not because they committed a traffic infraction. Second, petitioners alleged that the officers' actual reason for stopping them was investigatory—that is, the officers stopped petitioners to investigate whether they possessed drugs, not to enforce the vehicle code.

To support the foregoing claims, petitioners explained that under normal circumstances, D.C. vice officers do not concern themselves with mundane traffic

4. *Id.* at *8 (quoting the District Court transcript).
5. *Id.*

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violations. According to the D.C. police regulations, plainclothes officers are permitted to make traffic stops "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others."[6] Vice officers, on the other hand, have a mandate to "find narcotics activity going on."[7] Testifying at the District Court, Officer Soto elaborated: "The only circumstances that I would issue tickets . . . is for just reckless, reckless driving, something that in my personal view would somehow endanger the safety of anybody who's walking around the street or even the occupants of a vehicle, maybe children or whoever."[8]

It appears clear that after Brown took a turn without signaling, the officers lacked any objective reason (probable cause or reasonable suspicion) to believe that Brown or Whren had done anything other than commit a minor traffic infraction. Nor is there evidence to suggest that the officers could have believed that the traffic infraction constituted "a violation that is so grave as to pose an immediate threat to the safety of others."[9]

When asked why he stopped the Pathfinder, Officer Soto testified that the driver was "not paying full time and attention to his driving."[10] Officer Soto made clear that he never intended to issue a ticket for any traffic infractions. Rather, he wished to stop the Pathfinder to inquire why it was obstructing traffic and why it sped off without signaling in a school area. When questioned, Officer Soto testified that the decision to stop the Pathfinder was not based upon the "racial profile" of Brown and Whren, but rather on the driver's behavior.[11]

The District Court denied petitioners' suppression motion. It concluded that "the facts of the stop were not controverted" and "[t]here was nothing to really demonstrate that the actions of the officers were contrary to a normal traffic stop."[12] Subsequently, petitioners were convicted of the subject counts.

The Court of Appeals affirmed the convictions. The panel concluded that "regardless of whether a police officer subjectively believes that the occupants of an automobile may be engaging in some other illegal behavior, a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation."[13] We granted certiorari.

6. *Id.* at *4a add. (emphasis added).
7. *Id.* at *4 (quoting the District Court transcript).
8. *Id.* at *7 (quoting the District Court transcript).
9. *Id.* at *4a add.
10. *Id.* at *4–5 (quoting the District Court transcript).
11. *Id.* at *10 n.11 (quoting the District Court transcript).
12. *Id.* at 9 (quoting the District Court opinion).
13. United States v. Whren, 53 F.3d 371, 375 (D.C. Cir. 1995).

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IV.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." When police temporarily detain an individual during an automobile stop, even if brief and for a limited purpose, it constitutes a "seizure" of "persons" under the Fourth Amendment.[14] Accordingly, such stops must be "reasonable" to pass constitutional scrutiny.[15] Under most circumstances, it is reasonable for the police to conduct such a stop if they have probable cause to believe that a traffic violation has occurred.[16] We hold today, however, that certain traffic stops remain unreasonable under the Fourth Amendment even when probable cause of a traffic infraction exists.

The petitioners concede that Officer Soto had probable cause to believe that they had violated various D.C. traffic codes.[17] They argue, however, that our Fourth Amendment jurisprudence does not—and should not—condone a rule that states that all traffic stops conducted with probable cause are *per se* "reasonable." Specifically, the petitioners contend that "in the unique context of civil traffic regulations" probable cause is not always enough.[18]

Because automobile use is so heavily and minutely regulated that it is nearly impossible to comply with all traffic and safety rules all the time, the petitioners contend that a police officer could almost invariably catch a motorist in a technical violation. Accordingly, if evidence of a traffic infraction always satisfies constitutional requirements, police officers would enjoy a level of discretion that invites the sort of governmental abuses that the Fourth Amendment is designed to prevent.

Specifically, the petitioners allege that holding all such stops "reasonable" would provide cover for law enforcement officers to stop drivers for decidedly unreasonable reasons, such as the driver's race. Moreover, they suggest that such a

14. *See, e.g.,* Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556–58 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).
15. *See* Terry v. Ohio, 392 U.S. 1, 19 (1968).
16. *See Prouse*, 440 U.S. at 654 ("[T]he reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." (footnotes omitted)); Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977) (per curiam).
17. D.C. Mun. Regs. tit. 18, §§ 2213.4 ("An operator shall . . . give full time and attention to the operation of the vehicle"), 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal"), 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions") (1995).
18. Reply Brief for the Petitioners at 1, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841).

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rule would embolden police to conduct pretextual stops used to investigate unlawful conduct for which the officers have no reasonable suspicion or probable cause to believe has occurred. To avoid this danger, petitioners argue that the Fourth Amendment test for traffic stops should not simply ask if an officer had probable cause to justify a stop, but whether that stop is indeed reasonable.

We agree.

We first explain why enforcing traffic laws in a racially discriminatory manner is unreasonable under the Fourth Amendment—even if officers have probable cause that a traffic violation occurred. We then discuss why pretextual stops, whereby officers employ traffic stops to investigate unrelated crimes for which they lack probable cause, are also unreasonable under the Fourth Amendment.

A.

Racialized policing is one of the most pernicious and enduring forms of state-sanctioned racism and remains a core feature of this nation's history.[19] The formal policing of African Americans stretches back at least as far as the slave codes, which codified into law extreme deprivations of life and liberty, and lay a legal groundwork for slave patrols—themselves a state-sanctioned tool to suppress antislavery resistance.[20] In a 1904 essay on the topic, W. E. B. Du Bois detailed how slave patrols formed a critical part of slavery's overarching framework:

> [T]he private well-ordering and control of slaves called for careful co-operation among masters. The fear of insurrection was ever before the South . . . . [and the] result was a system of rural police . . . whose work it was to stop the nocturnal wandering and meeting of slaves. It was usually an effective organization, which terrorized the slaves, and to

19. Regrettably, this Court has long been complicit in various forms of racial inequality. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 391 (1978) (Marshall, J., dissenting) (describing how soon after Reconstruction, "with the assistance of this Court, the Negro was rapidly stripped of his new civil rights"); *id.* at 402 ("After the Civil War our Government started several 'affirmative action' programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.").

20. As one example, the State of Georgia framed the need for a 1757 law establishing and regulating slave patrols as follows: "Patrols should be established under the proper Regulations in the settled parts thereof, for the better keeping of Negroes and other Slaves in Order and prevention of any Cabals, Insurrections or other Irregularities amongst them." Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7. AM. J. POLICE 51, 56 (1988).

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> which all white men belong, and were liable to active detailed duty at regular intervals.[21]

It should go without saying that racially discriminatory policing has no place in our constitutional democracy. That is precisely why many of the procedural safeguards that undergird our modern constitutional criminal procedure—from *Brown v. Mississippi*, 297 U.S. 278 (1936) to *Miranda v. Arizona*, 384 U.S. 436 (1966)—were a response, at least in part, to racially selective policing.

We also recognize that this Court has, at times, favored police power over individual rights in ways that render communities of color—and the African American community in particular—vulnerable to police surveillance, discipline, and social control. Our decision in *Terry* v. *Ohio*, 392 U.S. 1 (1968), which permitted police officers to stop and frisk people on the thinnest of justification and without probable cause is one relevant example. Even so, concerns about racially discriminatory policing have long informed much of our constitutional criminal procedure. We refuse to jettison those concerns today.

B.

In deciding whether racially selective traffic stops are a permissible law enforcement practice, even in the presence of probable cause of a traffic violation, we must balance the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."[22] Under the facts of this case, we find it quite clear that the individual's interests outweigh those of the government.

Rightfully, the government does not argue that it has an interest in performing race-based traffic stops. Instead, it identifies an interest in promoting public safety through the enforcement of its traffic laws. Although valid, this interest deserves minimal deference when, as here, plainclothes officers contravene departmental policy to enforce a minor traffic infraction that posed a minimal risk to public safety.

In contrast, the individual's Fourth Amendment privacy interests in freedom from unreasonable searches and seizures are significant. The government implies that a traffic stop, even when racially motivated, "poses only

21. W. E. B. Du Bois, *Crime and Slavery*, *in* SOME NOTES ON NEGRO CRIME, PARTICULARLY IN GEORGIA 2, 3 (W. E. B. Du Bois ed., 1904).

22. United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

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a modest intrusion on the motorist's privacy interests."[23] This characterization misunderstands the qualitatively distinct intrusion caused by *racially* selective police conduct—traffic stop or otherwise, probable cause or not.

To begin, racially selective policing compromises privacy and dignity by rendering its targets public spectacles, "something exhibited to view; . . . a remarkable or noteworthy sight; an object of curiosity or contempt."[24] Exposure to this form of racial humiliation undermines one's personal sense of security, rendering them insecure in their own "person."[25] Indeed, widespread accounts of racial profiling often highlight the stigma and humiliation that derive from what people experience as a form of public shaming.[26] The apparent ubiquity of racial profiling has engendered a pithy if demoralizing turn of phrase: "driving while Black."[27]

At its core, racial profiling is pernicious precisely because it legitimizes the idea that one racial group's privacy, dignity, and security may be sacrificed for the "greater good"—a sacrifice that others are never asked, nor expected, to bear. That sacrifice can only be considered the "greater" good if you do not account for those experiencing the harm.

In the present context, the greater good is the so-called "war on drugs"—a now decades-long and bipartisan campaign ostensibly intended to combat illegal drug use in America. Crude stereotypes link drug use, criminality, and violence to African Americans—often fueled by racialized representations in media and public discourse. That, in turn, has fueled the proliferation of "drug courier profiles" that explicitly and implicitly view Blackness as a proxy for suspicion.

23. Brief for the United States at 9, *Whren*, 517 U.S. (No. 95-5841).
24. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2188 (3d ed. 1986).
25. U.S. CONST. amend. IV; *see also* Camara v. Mun. Court, 387 U.S. 523, 528 (1967) (observing that "[t]he basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials").
26. We note that our dissenting colleagues' concern about the stigma and racial resentment sown from racial classifications does not appear to have entered their consideration of the racial profiling concerns at issue here. *See*, *e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").
27. Just last year, prominent scholar and Harvard University professor Henry Louis Gates reflected on this creature of contemporary America by remarking that "[t]here's a moving violation that many African-Americans know as D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 59. Washington Post columnist Michael A. Fletcher also recently documented the great lengths Black men will go to avoid being stopped for what some "sardonically call DWB—driving while black." Michael A. Fletcher, *Driven to Extremes*, WASH. POST, Mar. 29, 1996, at A1.

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Meanwhile, white people effectively enjoy racial immunity from the drug war, despite evidence that all racial groups use drugs in roughly equal proportions.[28] Accordingly, in the name of public safety,[29] law enforcement departments across the country disproportionately stop and search African Americans not because of their conduct nor the content of their character, but because of the color of their skin.[30]

Were we to condone racial profiling as a "rational" and legitimate law enforcement tactic, it would do more than compromise the privacy interests of the individuals profiled. Racial profiling of any sort undermines the egalitarian principles enshrined in our Constitution—principles from which we have too often strayed—and furthers the perception of African Americans as a criminally suspect group. When police use racial stereotypes to guide and justify their investigation practices, they reinforce the stereotypes' perceived descriptive accuracy and moral acceptability: Police are more likely engage African Americans, and in turn, the police and public are more likely to view African Americans as criminally suspect. This reinforcing spiral lends moral credence to using stereotypes as a driver of public policy.

In addition, racially selective policing has resulted in racially-disparate collateral damage across all dimensions of our criminal justice system—from stops and arrests, to incarceration and sentencing.[31] This does not even begin to describe the collateral consequences—from potential disenfranchisement to exclusion from housing and employment—that follow individuals post-arrest and incarceration. Dispiritingly, the "logic" of racial profiling often goes

28. See Nanette Graham, The Influence of Predictors on Adolescent Drug Use: An Examination of Individual Effects, 28 YOUTH & SOC'Y 215, 217, 227 (1996) (noting that "Blacks report less drug use than do Whites" and finding that "Whites were found to be significantly higher than Blacks on cigarette, alcohol, and marijuana use . . . . On the other hand, Blacks, although not significantly different, were found to be higher than Whites on cocaine and heroin use"); Alison M. Trinkoff, Christian Ritter & James C. Anthony, The Prevalence and Self-Reported Consequences of Cocaine Use: An Exploratory and Descriptive Analysis, 26 DRUG AND ALCOHOL DEPENDENCE 217, 219–20 (1990) (concluding that cocaine use is more prevalent among white people than Black people); Dan Weikel, War on Crack Targets Minorities Over Whites, L.A. TIMES, May 21, 1995, at A1, A26.

29. Rarely do we question whose "public safety" we intend to protect.

30. Two years before the Los Angeles Uprisings that followed the Rodney King beating, *Los Angeles Times* reporter Ron Harris remarked that "[m]aybe no one planned it, maybe no one wanted it and certainly few saw it coming, but around the country, politicians, public officials and even many police officers and judges say, the nation's war on drugs has in effect become a war on black people." Ron Harris, *Blacks Feel Brunt of Drug War*, L.A. TIMES, Apr. 22, 1990, at A1.

31. *See* MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA, 3–4 (1995).

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unquestioned, despite evidence that the growing disparities in our criminal justice system are not caused by actual behavioral differences across racial groups.[32]

Though we have focused our attention on Black Americans, they are far from the only racialized group to face state-sanctioned profiling in the name of public safety and national security. In the 1940s, drawing upon wartime "hysteria,"[33] the United States Government—including this Court—took us into "the ugly abyss of racism" when it incarcerated Japanese Americans on the racial assumption that they were, or were likely to be, disloyal.[34] Americans of German and Italian ancestry, in contrast, remained free from such unindividuated treatment, notwithstanding that Germany and Italy also constituted wartime adversaries.

Under the guise of "strictly scrutinizing" Japanese internment, this Court did not simply acquiesce, but affirmatively defended anti-Japanese racism. Forty years later in *Brignoni-Ponce*, we revived this ignoble tradition by holding that the government may employ a person's "apparent Mexican ancestry" as one factor among many in determining whether that person is, to use the dehumanizing term, an "*illegal* alien."[35] Without even applying strict scrutiny, our decision expressly incorporated racial discrimination into Fourth Amendment law. We see no compelling reason—indeed, not even a rational one—to compound those errors here.

The dissent, for its part, describes the underlying traffic stop as "run-of-the-mine"—a phrase apparently intended to capture its supposed reasonableness and banal character. Yet if true, this only proves our point: Racial profiling has become so ingrained in the fabric of American policing that it is rendered ordinary, and therefore constitutionally reasonable, in the eyes of Supreme Court Justices. Tragically, this is not the first time members of this Court have cited racism's ordinary and everyday nature to justify its constitutionalization. Whether

32. Justice Stevens recently made this point, gesturing to a 1995 Special Report to Congress that contained the following noteworthy facts. In 1993, although 65 percent of persons who had used crack are white, whites represented only 4 percent of federal offenders convicted of trafficking crack; 88 percent of those convicted were Black. Justice Stevens's observations find additional support in a Bureau of Justice Statistics study that suggests that sentencing disparities grew dramatically after the implementation of the Sentencing Guidelines. These "presumably reliable," as Chief Justice Rehnquist put it, statistics belie any suggestion that disparities in arrest, conviction, or sentencing naturally and reasonably reflect disparities in criminality. To the contrary, they reflect "troubling racial patterns of enforcement." United States v. Armstrong, 517 U.S. 456, 479–80 (1996) (Stevens, J., dissenting).

33. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS 5 (1983) ("The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership.").

34. *See* Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

35. United States v. Brignoni-Ponce, 422 U.S. 873, 877, 886–87 (1975) (emphasis added).

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ordinary or not, racial profiling constitutes the antithesis of "evenhanded law enforcement."[36]

It seems plain wrong that the Fourth Amendment, which is intended to ensure that police conduct is *reasonable*, would invite, let alone permit a rule that inoculates racially discriminatory policing—including discrimination rooted in racial animus—from constitutional scrutiny. At least since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), we would not have thought it necessary nor controversial to assert that racism is, by definition, unreasonable.[37] Racial discrimination does not become reasonable just because the officer possesses probable cause of a traffic infraction. Indeed, we have repeatedly struck down laws or policies as unreasonable because they discriminated based on race.[38] Accordingly, we find it untenable to adopt a rule that would make racial discrimination constitutionally reasonable.

The dissent disagrees, apparently. It insists that it is not asking us to ignore our constitutional commitment to racial equality. Rather, it argues that the proper constitutional provision to contest racially discriminatory policing is the Fourteenth Amendment—not the Fourth.[39]

We agree that a claim of racial discrimination is colorable under the Fourteenth Amendment's Equal Protection Clause. But conduct impermissible under one Amendment is not therefore permissible under another. Any instance of police misconduct could potentially give rise to multiple constitutional claims, arising under distinct constitutional provisions. This is particularly true in the realm of constitutional criminal procedure, which rests on multiple constitutional anchors. Consider a criminal defendant, who could appropriately seek to suppress the same

36. Brief for the United States at 14, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

37. But, apparently, we must make this point explicit, particularly given the array of law enforcement officials, politicians, and academics who profess that racially discriminatory policies and practices are both rational and constitutionally reasonable.

38. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 190 (1964) ("Classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis.'") (quoting Gulf, Colo. & Santa Fé Ry. v. Ellis, 165 U.S. 150, 155 (1897)).

39. As a preliminary matter, it is not clear to us how the Fourteenth Amendment applies to this case, since the Government conduct in question does not implicate a state, but rather the Metropolitan Police Department. The relevant constitutional provision would be the Fifth Amendment's Due Process Clause, which itself incorporates the equal protection guarantees contained in the Fourteenth Amendment. Nonetheless, for purposes of this opinion we assume that the Equal Protection Clause applies, as it does to most criminal procedure cases before this Court.

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incriminating statement under the Fourth, Fifth, Sixth, or Fourteenth Amendments.

Petitioners need not cede their Fourth Amendment protections simply because they may find recourse under the Fourteenth Amendment. Indeed, we find it hard to understand how police conduct that would violate the Fourteenth Amendment would be considered reasonable under the Fourth. If anything, the fact that racially discriminatory policing raises a cognizable Fourteenth Amendment claim suggests the opposite.

First, we have historically interpreted the Constitution as a unified document, rather than as a series of disaggregated provisions.[40] On this view, by rendering racially discriminatory stops reasonable, notwithstanding the clear Fourteenth Amendment violation, we would untether the Fourth Amendment from the rest of the constitutional fabric. Such a conclusion would signal that the Fourth Amendment is neither concerned with, nor informed by, other constitutional safeguards.

Second, the Fourteenth Amendment's equal protection concerns are particularly applicable to our interpretation of the Fourth Amendment—perhaps far more than other constitutional provisions.[41] Whatever the Fourth Amendment's initial scope, the Fourteenth Amendment infused it with an equality dimension—one acutely attentive to America's disgraceful treatment of Black Americans—that informs our contemporary reasonableness inquiry.[42] A holistic reading of these two amendments suggests that, at minimum, one subset

40. *See, e.g.*, United States v. U.S. District Court (*Keith*), 407 U.S. 297, 313 (1972) ("National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime."); Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring) ("Reflection on the problem . . . has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.").

41. It is worth noting that a reasonableness inquiry commonly guides our equal protection analysis. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 47 (1973) (rejecting the District Court's conclusion that Texas "had failed . . . 'to establish a reasonable basis for a system that results in different levels of per-pupil expenditure"). And across bodies of law that transcend the Constitution, reasonableness has historically been understood in terms of whether conduct is otherwise lawful or constitutional. *See, e.g.*, Kansas City S. Ry. Co. v. Carl, 227 U.S. 639, 650 (1913) (employing reasonableness analysis to assess the lawfulness of a shipping contract).

42. John Ely has remarked that "the Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment." JOHN HART ELY, DEMOCRACY AND DISTRUST 97 (1980). This is not to suggest that racial discrimination was not previously a concern of the Fourth Amendment. Rather, it is to mark that the Fourteenth Amendment's passage reinvigorated the Fourth Amendment with a normative commitment that compels our rejection of a jurisprudence that views racial discrimination as constitutionally reasonable.

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of unreasonable searches and seizures are those conducted in a racially discriminatory manner.

Third, the Fourth Amendment is applicable to the states through the Fourteenth Amendment's Due Process Clause, which—similar to the Fifth Amendment's Due Process Clause—contains an antidiscrimination dimension.[43] Time and again, we have reiterated that racial discrimination violates due process. For example, in *Cooper* v. *Aaron*, 358 U.S. 1 (1958), which principally concerned the Fourteenth Amendment's equal protection guarantee, we remarked that "[t]he right of a student not to be segregated on racial grounds . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law."[44] *Cooper* is but one example of our well-established understanding that due process and equal protection are distinct yet overlapping and intertwined principles rooted in "our American ideal of fairness."[45]

The dissent's approach, however, would effectively "incorporate" racism into the Due Process Clause and put the Fourteenth Amendment at war with itself, pitting its Equal Protection Clause against its Due Process Clause.[46] Perhaps this explains why our dissenting colleagues never state explicitly that racially targeted stops are constitutionally reasonable if conducted under the guise of enforcing traffic laws. Not once does the dissent utter the words "racial discrimination," "racialized policing," "racism," or "white supremacy." Instead, the dissent sanitizes its approach and obscures how it would constitutionally internalize racial discrimination by speaking in terms of "actual motivations," "ulterior motives," "subjective intentions," and "probable cause."

Consider the dissent's own reasoning:

> "Here the District Court found that the officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment, the evidence thereby discovered admissible, and the upholding of the convictions by the Court of Appeals for the District of Columbia Circuit correct."

On its face, race is absent from the dissent's proposed rule. But make no mistake, this approach would endorse racial profiling: If a police officer observes A and B committing the same traffic infraction (and therefore has probable cause

43. *See* Gibson v. Mississippi, 162 U.S. 565, 591 (1896) ("The guarantees of life, liberty, and property are for all persons, within the jurisdiction of the United States, or of any state, without discrimination against any because of their race.").
44. Cooper v. Aaron, 358 U.S. 1, 19 (1958).
45. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
46. We see no good reason nor need to generate such tension. Doing so would uplift a vision of the Fourth Amendment inconsistent with our Constitution's unambiguous mandate that its rights and protections flow equally to all, irrespective of one's race.

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to enforce the infraction), and the officer decides to target B *because* B is Black, the dissent would find the stop reasonable under the Fourth Amendment. Furthermore, so long as there was probable cause of a traffic infraction, the dissent would approve of the stop—even if the officer had no intention of enforcing the traffic infraction, and was solely motivated by overt racism or an intent to harass B. This approach transforms probable cause from a shield that protects the public from arbitrary police intrusions into a sword police officers can wield to racially discriminate.[47]

That this sword is not colorblind raises broader constitutional concerns. This Court has long embraced the notion that "[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens."[48] When Justice Harlan offered that rebuke in *Plessy*, he did not add a proviso: "except with respect to the Fourth Amendment."[49]

We recognize that our distinguished colleagues vary in how precisely they might adhere to our constitutional commitment to colorblindness. Competing positions, for instance, are reflected in the *Bakke* opinions authored by Justices Powell and Brennan.[50] Justice Powell, writing alone for the Court, invoked colorblindness to insist both that affirmative action must satisfy strict scrutiny, the highest level of judicial review, and that remedying societal discrimination was not a compelling interest sufficient to justify such a policy.

In contrast, Justice Brennan argued that affirmative action should receive intermediate scrutiny because it was a benign use of race to further remedial ends. From his perspective: "[W]e cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[51]

47. We worry as well that were the dissent to have its day, we would open the door to arguments that the government may formally use race as a basis for the existence of probable cause. Our concern is not far-fetched. Two decades ago, in *United States v. Brignoni-Ponce*, this Court held that the government may take "apparent Mexican ancestry" into account in determining whether there is reasonable suspicion that a person has formal legal status in the United States. 422 U.S. 873, 885–87 (1975). The Court did so without even subjecting its reasoning to a strict scrutiny analysis—the very analysis we apply to remedial uses of race. It is bad enough that racially inflected presumptions about who is, and is not, American have been folded into our reasonable suspicion framework. We will not facilitate the incorporation of racist lay theories into determinations of probable cause as well.

48. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

49. As we have noted throughout, there is no reason to restrict racial discrimination claims to one constitutional provision. Just as multiple constitutional vehicles regulate when and how police officers can question us, so does the Constitution provide multiple checks against racial discrimination.

50. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

51. *Id.* at 327 (Brennan, J., dissenting).

Electronic copy available at: https://ssrn.com/abstract=4081289

We are sympathetic to Justice Brennan's descriptive and normative accounts. Nevertheless, as the law currently stands, any express use of race is constitutionally suspect—even for benign or remedial purposes—and triggers the most exacting judicial scrutiny.[52] Indeed, Justice Scalia, who authors the dissent, has been one of the most forceful proponents of this hardline approach. Yet, here, he abandons such colorblind sensibilities in the face of racially discriminatory policing, instead relegating them to equal protection doctrine alone. If ever there were a context to uphold the line that our Constitution is colorblind, we think racially selective law enforcement is it.

Accordingly, we hold that it is unreasonable for an officer to make a traffic stop because of a motorist's race. This is true even if the officer has probable cause of a traffic violation.

In articulating this "because of race" standard, Fourth Amendment litigants need not prove conscious racial motivation, the intent standard that applies in the Fourteenth Amendment context.[53] Scholars have roundly criticized that standard for reasons with which we largely agree.[54] While evidence of conscious intent to discriminate or explicit racial animus would certainly meet the "because of race" test we set forth here, the absence of that showing should not preclude the finding of a Fourth Amendment violation.

In this sense, our holding is narrow: We do not decide whether the petitioners were stopped because of their race. The District Court did not make a factual finding on this issue, and the record is insufficient for us to do so here. Accordingly, we remand to the District Court so that it may take up petitioners' racial profiling claim in the first instance. In doing so, we urge the District Court to press the parties on the following counterfactual inquiry: Would the officers have stopped petitioners had they been white? In

52. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

53. *See* Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

54. *See, e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 324–25 (1987) ("By insisting that a blameworthy perpetrator be found before the existence of racial discrimination can be acknowledged, the Court creates an imaginary world where discrimination does not exist unless it was consciously intended."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1053 (1978) (contrasting antidiscrimination law's prevailing "perpetrator" conception of racial discrimination—which requires litigants to identify a "blameworthy" individual who has engaged in "intentional" discrimination—with a "victim" conception that which suggests that the problem of racial discrimination "will not be solved until the conditions associated with it have been eliminated").

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answering that question, the District Court should consider, among other factors (1) whether the officers' conduct violated departmental policy, (2) whether civilians have registered any complaints of racial bias or discrimination against the officers, (3) whether the officers employed racially inflected language during the interaction, and (4) whether there is evidence of racial disparities in the rate at which officers in the department stop people for traffic infractions. We express no view as to how courts should weigh these factors, nor do we present them as exhaustive. We simply note that each is relevant to the "because of race" test we have described.

C.

We now turn to petitioners' pretext argument.

In recent years, this Court has examined several cases involving officers searching an impounded vehicle while taking inventory of the vehicle's contents. Just six years ago, in *Florida v. Wells*,[55] we stated that "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence," and that "[t]he individual police officer must not be allowed so much latitude that inventory searches are turned into a 'purposeful and general means of discovering evidence of crime.'" That passage quoted Justice Blackman's concurrence in *Colorado v. Bertine*,[56] which we decided just three years earlier. In approving the inventory search in *Bertine*, we thought it significant that there was "no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."[57]

That same year we upheld the constitutionality of a warrantless administrative inspection in *New York v. Burger*.[58] We observed that New York was not employing the underlying administrative scheme "as a 'pretext' to enable law enforcement . . . [to investigate] penal violations."[59] And there was "no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws."[60]

55. 495 U.S. 1, 4 (1990).
56. 479 U.S. 367 (1987).
57. *Id.* at 372.
58. 482 U.S. 691, 716–18 (1987).
59. *Id.* at 716 n.27.
60. *Id. See also* South Dakota v. Opperman, 428 U.S. 364, 376 (1976) (upholding an inventory search of an impounded car because "there is no suggestion whatever that this . . . was a pretext concealing an investigatory police motive").

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In each of the preceding cases we either explicitly or implicitly recognized that pretextual searches could violate the Fourth Amendment. Our dissenting colleagues do not quarrel with that conclusion. Instead, they perceive what they believe is an important distinction: In those cases, unlike here, the government lacked any probable cause. According to the dissent, this distinction makes all the difference:

> [O]nly an undiscerning reader would regard [the inventory] cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. In each case we were addressing the validity of a search conducted in the *absence* of probable cause. Our quoted statements simply explain that the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.[61]

Formally, the dissent is entirely right. Unlike the inventory or administrative search cases in which the government typically lacks probable cause, the D.C. vice officers undisputedly had probable cause to believe that petitioners committed multiple traffic infractions. Substantively, however, the dissent identifies a distinction without a difference.

Given the catalogue of traffic code regulations in any given city, it is virtually impossible to drive a car without committing some infraction.[62] The D.C. traffic code, as the following regulations reflect, is no exception:

> The driver of a vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the roadway; both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge or the roadway; no person shall start a vehicle which is stopped, standing, or parked unless and until the movement can be made with reasonable safety; an operator shall, when operating a vehicle, give full time and attention to the operation of the vehicle; a signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred feet (100 ft.) traveled by the vehicle before turning; no vehicle

61. Whren v. United States, 517 U.S. 806, 811–12 (1996).

62. Justice Scalia has previously acknowledged the breath of common traffic laws, having noted that "[w]e know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning." Morrison v. Olson, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting).

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> operated on the highways of the District shall have any object attached to or suspended from the rearview mirror or rearview mirror bracket.[63]

Considering the sprawling traffic codes in D.C. and elsewhere, only in the most formalistic sense does a probable cause requirement constrain a police officer's power to stop a motorist. Thus, while inventory searches are suspicion-less police intrusions in a *de jure* sense (police officers need no objective suspicion to conduct inventory searches), traffic stops are suspicion-less police intrusions in a *de facto* sense (the formal probable cause requirement does not, in practice, constrain an officer's authority to conduct a traffic stop).[64] For this reason, the inventory cases and their pretext analyses are more relevant to the present case than the dissent suggests. Critically, not a single one of the foregoing decisions confined our concerns about pretextual police intrusions only to those instances where officers lacked probable cause, or only to the inventory and administrative search context.[65]

Accordingly, we find that our inventory and investigatory precedents are relevant to the question at hand. We do not suggest, however, that our decision is underpinned by these cases alone. In addition to this body of law, the Fourth Amendment's requirement that we balance parties' interests—the government's law enforcement interests against people's interest in privacy and security—weighs against pretextual stops.

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63. D.C. Mun. Regs. tit. 18 §§ 2201.9, 2203.3, 2206.1, 2213.4, 2204.4, 2213.7 (1995).

64. Nearly 25 years ago, Justice Marshall articulated similar concerns about pretextual stops. *See* United States v. Robinson, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting) ("There is always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search. I suggest this possibility not to impugn the integrity of our police, but merely to point out that case-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee. 'An arrest may not be used as a pretext to search for evidence.'" (citations omitted)).

65. Steagald v. United States, 451 U.S. 204, 215 (1981) (noting that an arrest warrant for one party is not a surrogate to search a third party's home and that a warrant may not serve as a "pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place"); United States v. Lefkowitz, 285 U.S. 452, 467 (1932) (holding that an arrest warrant "may not be used as a pretext to search for evidence"); Jones v. United States, 357 U.S. 493, 500 (1958) (suppressing evidence where "testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search . . . not to arrest"); New York v. Class, 475 U.S. 106, 122 n. (1986) (Powell, J., concurring) (police officer may enter car to obtain VIN, but "an officer may not use VIN inspection as a pretext for searching a vehicle for contraband or weapons"); Texas v. Brown, 460 U.S. 730, 743 (1983) (upholding evidence obtained at a roadblock where "[t]he circumstances of this meeting . . . give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered").

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As we noted above, probable cause is *often* sufficient to establish that a stop or search is reasonable. The government proposes that probable cause is *always* sufficient. As attractive as this proposed rule may be to the government, it contravenes our Fourth Amendment precedent and principles. Specifically, it conflicts with our prior command that, in determining whether a search or seizure is reasonable, we consider "all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."[66] Even when probable cause exists, we must balance the "intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."[67]

As with racially selective stops, the government does not claim to possess an affirmative interest in pretextual stops. Instead, it again describes its interest as promoting public safety through the enforcement of its traffic laws. This interest is legitimate.

We think it beyond dispute, however, that the public safety interest is only minimally advanced by having plainclothes officers in unmarked vehicles investigate minor traffic infractions. Indeed, the Metropolitan Police Department's own regulations prohibit such a practice except when the underlying conduct is "so grave that it poses and [*sic*] immediate threat" to the safety of others.[68] It may in fact hinder the underlying public safety goals by producing motorist confusion and alarm.

In contrast to the government's legitimate but limited interest, the individual burden is significant. The Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."[69] Even ordinary traffic stops entail "a possibly unsettling show of authority."[70] At best, traffic stops "interfere with freedom of movement, are inconvenient, and consume time."[71] At worst, they "create substantial anxiety" and can, in the most unfortunate circumstances, lead to injury or even death.[72] Such anxieties are no doubt more pronounced when a stop is conducted by plainclothes officers in unmarked cars. Under such circumstances,

66. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (citation omitted); *see also* Cooper v. California, 386 U.S. 58, 59 (1967) ("[W]hether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case").
67. *Montoya de Hernandez*, 473 U.S. at 537 (quoting United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983)).
68. METRO. POLICE DEP'T, WASH., D.C., GENERAL ORDER 303.1, at pt.1(A)(2)(a)(4) (1992).
69. Skinner v. Ry. Lab. Execs. Ass'n, 489 U.S. 602, 613–14 (1989) (citations omitted).
70. Delaware v. Prouse, 440 U. S. 648, 657 (1979).
71. *Id.*
72. *Id.*

Electronic copy available at: https://ssrn.com/abstract=4081289

we find it reasonable for a driver—let alone a jury—to suspect that a stop was motivated by something other than a simple traffic infraction.

Our dissenting colleagues would have us refrain from balancing the parties' interests altogether. They contend that "[w]ith rare exceptions not applicable here . . . the result of [Fourth Amendment] balancing is not in doubt where the search or seizure is based upon probable cause." Those "rare exceptions," they say, concern searches or seizures conducted in an "extraordinary manner." Specifically, the dissent reads our case law as follows:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests—such as, for example, seizure by means of deadly force, see *Tennessee* v. *Garner,* 471 U.S. 1 (1985), unannounced entry into a home, see *Wilson* v. *Arkansas,* 514 U.S. 927 (1995), entry into a home without a warrant, see *Welsh* v. *Wisconsin,* 466 U.S. 740 (1984), or physical penetration of the body, see *Winston* v. *Lee,* 470 U.S. 753 (1985). The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken "outbalances" private interest in avoiding police contact.[73]

We do not read our precedent so narrowly. To begin, we have never suggested that balancing is relevant only in the absence of probable cause, and we decline to do so here. Nor have we ever articulated, much less adopted, the dissent's "extraordinary manner" standard as a basis for determining when balancing is necessary or appropriate. It is true that we have not previously performed balancing in a case quite like this. But that simply reflects that in several relevant respects, this case presents a matter of first impression. And as such, we see no reason to retreat from the view that "the balancing of competing interests" is a "key principle of the Fourth Amendment."[74]

Even if we apply the dissent's newly devised standard, we find that this case is "extraordinary." The question presented implicates critical issues of police power and discretion: Is it reasonable under the Fourth Amendment for officers to stop a person to investigate a crime for which they lack probable cause (or, as discussed above, to engage in racial profiling), so long as they have probable cause that the person committed a traffic violation? Answering this question by balancing the

73. Whren v. United States, 517 U.S. 806, 818 (1996).
74. Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (quoting Dunaway v. New York, 442 U.S. 200, 219 (1979)).

Electronic copy available at: https://ssrn.com/abstract=4081289

parties' interests is not only appropriate, but necessary to address the intersecting privacy, dignitary, and security harms present in pretextual and racially predicated stops.

We find ourselves compelled to remind our colleagues that concerns about abuse of discretion and police authority are not throwaway lines in our Fourth Amendment jurisprudence. To the contrary, they anchor this body of law. Specifically, we have stated that "persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers."[75] This statement echoes our historic understanding that the Fourth Amendment is skeptical of unbridled law enforcement discretion.[76]

We are unable to see how a regime that permits pretextual traffic stops under the veil of probable cause aligns with these basic principles. Given the ubiquity of traffic infractions, the government's proposed rule would afford officers discretion to single out and stop whomever they wish, whenever they wish, wherever they wish.[77] If unchecked, such discretion would invite arbitrary and capricious decisions, including racially selective ones, about whom to stop—affording officers the very "unconstrained discretion" that the Fourth Amendment is designed to prevent.[78] We decline to adopt a standard that would doctrinally sanction such an abuse of police power.

Reaching the contrary conclusion would come dangerously close to legitimizing the precise kind of suspicion-less traffic stop that we declared unconstitutional in *Prouse*. There, we cautioned that "[w]ere the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be

75. *Prouse*, 440 U.S. at 663.

76. *See id.* at 661 ("This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.").

77. The dissent contends that "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement." *Whren*, 517 U.S. at 818–19. The dissent would make this case harder than it is. Nothing in our opinion alters the authority of police to enforce the full breath of the traffic and vehicle regulations within their jurisdiction. We merely hold that in so doing, the Fourth Amendment prohibits police officers from weaponizing probable cause of a traffic infraction into pretext to investigate a crime for which probable cause is lacking.

78. *Prouse*, 440 U.S. at 661.

Electronic copy available at: https://ssrn.com/abstract=4081289

seriously circumscribed."[79] To put it finely, permitting law enforcement to perform pretextual stops risks subjecting every driver to "unfettered governmental intrusion every time" they drive.[80]

What, then, is our standard for determining whether an officer has employed a traffic stop pretextually? We think that the appropriate inquiry asks whether, under the totality of the circumstances, a reasonable police officer would have conducted the traffic stop. This is consistent both with our preceding race discrimination analysis and this Court's Fourth Amendment jurisprudence more broadly.

The dissent contends that this reasonableness inquiry is unmanageable because it would require us "to plumb the collective consciousness of law enforcement."[81] To the extent that is true, our test is no less manageable than the numerous totality of the circumstances frameworks scattered across our jurisprudence, including earlier Fourth Amendment decisions.[82] For example, to determine whether a person was seized, courts must ask whether, under the

79. *Id.* at 662–63. Of course, there are distinctions between *Prouse* and the case before us. Unlike in *Prouse*, we assume that the officers here possessed probable cause to stop petitioners. But as we have explained, police officers will almost always possess probable cause in the traffic stop context. For this reason, *Prouse*'s core logic extends to this case.

80. We parenthetically note one additional reason to conclude that pretextual stops are unreasonable under Fourth Amendment law. Pretextual stops contravene our Fourth Amendment concerns about scope. Consider the following. Whereas reasonable suspicion that a person is armed and dangerous would permit an officer to frisk that person for weapons, reasonable suspicion does not permit that same officer to conduct an exploratory search into that person's pocket for drugs. *See* Terry v. Ohio, 392 U.S. 1 (1968); Coolidge v. New Hampshire, 403 U.S. 443 (1971). Similarly, while probable cause of criminal activity is generally sufficient to justify an arrest, probable cause does not justify seizing a person by shooting them dead. *See* Tennessee v. Garner, 471 U.S. 1 (1985). *See also* Graham v. Connor, 490 U.S. 386, 394 (1989); City of Oklahoma City v. Tuttle, 471 U.S. 808, 816–17 (1985). And while a warrant might afford an officer the right to search every room in a house for a stolen television, that same warrant may not justify an exploratory search of cabinets for drugs. *See Coolidge*, 403 U.S. at 466–67. In this case, the government is effectively asking this Court to permit police officers to broaden the scope of the *purpose* for a particular seizure—a traffic stop—without broadening the underlying *justification*. Under the government's rule, probable cause of a traffic infraction would permit an officer to stop a motorist to investigate a wholly unrelated reason for which no objective suspicion exists. Probable cause that a driver violated traffic laws authorizes the police to conduct a stop for that—but not some other—purpose. Stopping the person for an unrelated reason, and one that lacks the predicate level of objective suspicion, shares material traits with an officer who looks through medicine cabinets when the warrant authorizes a search for a television, or conducts a full search of a person when that officer has only reasonable suspicion that the person is armed and dangerous. In each instance, the officer has exceeded the scope justified by the objective evidence.

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

82. The search inquiry is also, effectively, a totality of the circumstances analysis in which we ask whether the government intrudes upon an expectation of privacy that society deems legitimate. *See* Katz v. United States, 389 U.S. 347 (1967).

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totality of the circumstances, a reasonable person would feel free to leave or otherwise terminate the encounter.[83] We have applied variations of this standard for more than a decade, and not once has any Justice on this Court criticized the "free to leave" framework for requiring us "to plumb the collective consciousness" of lay people. Moreover, it is worth noting that several lower courts have already applied our proposed standard—seemingly without issue.[84]

The facts of this case—including Officer Soto's admission that he never intended to issue a traffic ticket to the petitioners—leave significant doubt that a reasonable officer would have stopped petitioners for the identified traffic violations except as a pretext for investigating drugs. We have seen no evidence that plainclothes vice officers would have stopped the vehicle; the violations were minor; there was no identified threat to public safety; and the stop itself contravened departmental policy.

Nevertheless, we refrain from deciding whether a pretextual stop occurred in this case. The District Court made no finding on this issue and the Court of Appeals rested its decision on the view that petitioners' pretext claim is not cognizable under the Fourth Amendment. On remand, the District Court should evaluate the pretext question, along with the question of racially selective stops, consistent with the standard articulated herein.

83. *See* Immigr. & Naturalization Servs. v. Delgado, 466 U.S. 210 (1984); Florida v. Bostick, 501 U.S. 429 (1991).

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

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