

# “PARKING WHILE BLACK”: PRETEXTUAL STOPS, RACISM, PARKING, AND AN ALTERNATIVE APPROACH

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I. INTRODUCTION .....	109
II. A BRIEF HISTORY ON PRETEXTUAL STOP JURISPRUDENCE PRIOR TO, AND AFTER, THE <i>WHREN</i> DECISION .....	113
A. The Importance of <i>Terry</i> to Pretextual Analysis .....	114
B. The Competing Legal Tests Prior to <i>Whren</i> .....	115
1. The “Could Have” Test .....	115
2. The “Would Have” Test.....	117
C. State and Locality Response to Pretextual Stops Prior To, and After, <i>Whren</i> .....	118
1. <i>Police Department and State Government Approaches to Pretextual Stops and What’s at Stake for Law Enforcement</i> ..	118
2. <i>State Caselaw Prior to Whren</i> .....	119
3. <i>Difficulty in Classifying States’ Pretextual Stop Approach: People v. Burrell</i> .....	121
III. <i>WHREN</i> v. <i>UNITED STATES</i> .....	124
A. Facts.....	124
B. Unanimous Opinion.....	126
1. “ <i>Don’t Ask, Don’t Tell</i> ”: <i>Analyzing the Precedent Regarding a Police Officer’s Subjective Intentions</i> .....	126
2. <i>Deficiencies of the Petitioner’s Proposed Reasonable Officer Test</i> .....	127
C. The <i>Whren</i> Effect.....	128
IV. <i>UNITED STATES</i> v. <i>JOHNSON</i> .....	130
A. Facts and Posture of the Case .....	130
B. Seventh Circuit Court of Appeals’ Majority Opinion .....	132
1. <i>Statutory Exhaustion</i> .....	132
2. <i>Applying Whren to Parking Infractions</i> .....	133

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C. Hamilton's Dissent .....	134
1. <i>The Inherent Unreasonableness of the Seizure</i> .....	134
2. <i>"Parking While Black"</i> .....	135
3. <i>How Johnson is Distinguished From United States v. Shields</i> .....	136
V. ANALYSIS.....	136
A. Proposal For A New Legal Test .....	137
1. <i>Reasonable Investigation of Statutory Exceptions</i> .....	137
2. <i>Would a Reasonable Officer Have Made the Seizure?</i> .....	137
3. <i>More Than Bare Suspicion of a Class of Crimes</i> .....	138
4. <i>Tangential Relation</i> .....	138
5. <i>Aggravating Circumstances</i> .....	139
B. The Test Applied .....	139
1. <i>The Test Applied to Whren</i> .....	139
2. <i>The Test Applied to Johnson</i> .....	140
3. <i>The Test Applied to United States v. Herrera</i> .....	141
C. A Reasonable Expectation of Privacy in Automobiles.....	142
VI. CONCLUSION .....	144

## I. INTRODUCTION

*So I pull over to the side of the road,  
I heard “Son, do you know what I am stopping you for?”  
“Cause I’m young and black and my hat’s real low?  
Or do I look like a mind reader, sir? I don’t know.  
Am I under arrest or should I guess some mo?”  
“Well, you was doing fifty-five in the fifty-four”<sup>1</sup>*

Bill, a 23-year-old African American with a felony record, lives in Milwaukee, Wisconsin. He has been trying to go straight after his last arrest. He’s maintained a job and gotten an apartment. In all aspects, he has turned his life around. His brother, Chris, one night asks Bill to accompany him to Chris’ girlfriend’s place. Chris tells Bill that his girlfriend and a friend of hers are having a small get together—Chris promises Bill it will just be the four of them. Bill agrees. On the way, Chris stops at a liquor store while Bill waits in the car. Suddenly, there are flashing lights behind the car. Police officers, guns drawn, are on both sides of the car. The passenger door is ripped open. Bill is ordered out of the car and handcuffed. A gun is found under the passenger seat. Bill is convicted under a federal statute prohibiting felons from being in possession of a firearm. It is a nightmare scenario that can be a reality for many.<sup>2</sup>

The Fourth Amendment guarantees a right to be free from unreasonable searches and seizures.<sup>3</sup> Traffic stops qualify as a Fourth Amendment seizure when a police officer restricts a person’s freedom by physical force or by showing their authority.<sup>4</sup> Society accepts the power to subject automobiles to reasonable Fourth Amendment search and seizures as necessary to protect the public from an activity commonly understood to be inherently dangerous.<sup>5</sup> While the Supreme Court has held the Fourth Amendment prohibition on unreasonable searches and seizures extends to traffic stops,<sup>6</sup>

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<sup>1</sup> JAY Z, *99 Problems*, on THE BLACK ALBUM (Rock-a-Fella, Def Jam Records, 2004). Others in legal academia have noticed this song’s connections to the Fourth Amendment; see Caleb Mason, *Jay-Z’s 99 Problems, Verse 2: A Close Reading with Fourth Amendment Guidance for Cops and Perps*, 56 ST. LOUIS U. L.J. 567 (2012). The connection has also been recognized outside of legal academia, see also Aisha Harris, *What Can “99 Problems” Teach Us About the Fourth Amendment?*, SLATE (Jul. 11, 2012 4:52 PM), <https://slate.com/culture/2012/07/99-problems-and-the-fourth-amendment-what-the-jay-z-song-can-teach-us-about-the-constitution.html>.

<sup>2</sup> This hypothetical is loosely based on the facts of *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017). While it is not known what defendant Randy Johnson’s personal history is, the purpose of the above hypothetical is to demonstrate what most would consider a clearly unreasonable seizure.

<sup>3</sup> U.S. CONST. amend. IV.

<sup>4</sup> *Brendlin v. California*, 551 U.S. 249, 254 (2007).

<sup>5</sup> See *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) (explaining that while the record lacked statistics showing the dangers of highway safety, the Court was aware of the risk to life involved in motoring).

<sup>6</sup> *Whren v. United States*, 517 U.S. 806, 810 (1996).

automobiles have never quite enjoyed the same robust Fourth Amendment protections stationary dwellings have.<sup>7</sup> Some scholars have even questioned whether the Court offers any Fourth Amendment protections to motorists.<sup>8</sup>

The justifications for the rigid distinction between homes and automobiles for Fourth Amendment purposes seems to originate from the automobile's mobile nature<sup>9</sup> and the American tradition of sanctifying the home.<sup>10</sup> This distinction became a much brighter line when the Court held police officers may use minor traffic violations—even if those violations are not criminal—as a pretense to investigate a suspected underlying crime.<sup>11</sup>

This note argues that through a series of Supreme Court holdings culminating in *Whren v. United States*, the current view on racially based profiling in traffic enforcement amounts to “don’t ask, don’t tell.”<sup>12</sup> Courts should not ask if a police officer racially profiled a driver in determining whether to stop a car,<sup>13</sup> and in order to avoid accusations of racial profiling, the officer need only not tell of any subjective intentions that may show unconstitutional racial profiling.<sup>14</sup> This doctrine is dangerous in light of the already existing racial biases in enforcing drug<sup>15</sup> and traffic laws.<sup>16</sup>

Twenty-two years after *Whren*, instead of reining in a police tactic that furthers feelings of resentment towards police by the African American

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<sup>7</sup> See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1996) (“[W]arrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.”).

<sup>8</sup> See generally Chris K. Visser, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683 (1999) (arguing that through a series of Supreme Court decisions it is easier than ever for a police officer to turn a simple traffic violation into a Fourth Amendment search and seizure).

<sup>9</sup> *United States v. Chadwick*, 433 U.S. 1, 12 (1977).

<sup>10</sup> See *Payton v. New York*, 445 U.S. 573, 601 (1980).

<sup>11</sup> See generally *Whren*, 517 U.S. at 806.

<sup>12</sup> “Don’t ask, don’t tell” was the colloquial name for the policy that regulated homosexuality in the military during the early 1990’s. The policy consisted of a statute passed by Congress and a Department of Defense regulation that stated the government would not ask about an applicant’s sexual orientation, and current members of the military would not disclose if they were gay or bisexual. See Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell”*, 108 YALE L.J. 485, 538 (1998).

<sup>13</sup> See *Whren*, 517 U.S. at 815 (explaining that a police officer’s subjective intentions have no role in determining the reasonableness of a Fourth Amendment seizure).

<sup>14</sup> Proving that an officer stopped a motorist based on that motorist’s race is an extraordinarily hard feat. In order to succeed on a civil claim of racial profiling, the plaintiff must show the defendant had discriminatory intent. See Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 265 (2008); see also TELL ME MORE (May 21, 2013), <https://www.npr.org/templates/story/story.php?storyId=185788184>.

<sup>15</sup> See PAULA S. ROTHENBERG, RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY 197 (St. Martin’s Press, 4th ed. 1998).

<sup>16</sup> JOSEPH PETROCELLI & MATTHEW PETROCELLI, ANATOMY OF A MOTOR VEHICLE STOP 14 (Looseleaf Law Publications, Inc. 2005) (a study of North Carolina traffic stops showed black drivers were more likely to be ticketed and have their vehicles searched than white drivers).

community,<sup>17</sup> the courts are expanding pretextual stop doctrine.<sup>18</sup> The latest evolution of the *carte blanche* approval of pretextual stops has been for courts to hold that *Whren* applies to non-moving, parking violations.<sup>19</sup> This note will question the wisdom of the hardline distinction between the home and the automobile,<sup>20</sup> especially when an automobile is parked. As they are increasingly likely to contain private, personal information that individuals have a reasonable expectation of privacy to,<sup>21</sup> automobiles are now, more than ever, deserving of robust Fourth Amendment protections.

This note proposes a new legal test to determine when a pretextual stop violates the Fourth Amendment. This test is designed with a nonmoving vehicle in mind but could also be applied to moving vehicles. The first step to this test is asking whether an officer has exhausted all statutory exceptions to the alleged traffic violation. For example, if the violation underlying the justification for the seizure is a parking violation, the court should inquire as to whether the officer made a “reasonable investigation” to determine if the car was actually legally parked and only appears to be illegally parked.

The second step of the test asks whether, under similar circumstances, a reasonable officer would have made the traffic stop. This step is essentially adopting the “would have” or “reasonable officer” test that many courts had previously used.<sup>22</sup> Under the reasonable officer test, a court looked to the intentions of the stopping officer, and if it was determined the stop was pretextual, the seizure was found to be unreasonable under the Fourth Amendment.<sup>23</sup> This inquiry alone would signal a return to more robust Fourth Amendment protections for motorists.<sup>24</sup>

The third step is to require the stopping officer to have more than a bare suspicion of a general class of crimes which they wish to investigate. This step would clarify to courts that some standard above bare suspicion is required for police officer to justify a Fourth Amendment seizure. This step also allows courts some flexibility in choosing an appropriate standard for

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<sup>17</sup> See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 268 (1999).

<sup>18</sup> *U.S. v. Johnson*, 874 F.3d 571, 577 (7th Cir. 2017), *cert. denied*, 139 S.Ct. 58 (U.S. Oct. 1, 2018) (No.17-1349) (denying certiorari effectively expanded the *Whren* holding to include non-moving, parking violations).

<sup>19</sup> See *Johnson*, 874 F.3d at 574 (explaining that the Fifth Circuit Court of Appeals, the Sixth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals came to the conclusion that the Court in *Whren* did not distinguish between moving and nonmoving violations).

<sup>20</sup> See generally *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

<sup>21</sup> See generally *United States v. Carpenter*, 138 S. Ct. 2206 (2018) (holding that individuals have a reasonable expectation of privacy as to their physical movements when generated by cell-site location information); see also Lindsey Barrett, *Herbie Fully Downloaded: Data-Driven Vehicles and the Automobile Exception*, 106 GEO. L.J. 181 (2017).

<sup>22</sup> See Robert D. Snook, *Criminal Law-Pretextual Arrests and Alternatives to the Objective Test*, 12 W. NEW ENG. L. REV. 105, 107 (1990).

<sup>23</sup> See *id.*

<sup>24</sup> See generally *id.* (the author notes that the “would have” test appears to be the norm prior to 1978).

when an officer may conduct a traffic stop based on a pretext (or banning pretextual stops completely), so long as the standard requires more than bare suspicion.

The fourth step requires there to be at least some tangential relationship between the suspected underlying class of crimes (for example, narcotic or weapons possession or intoxicated driving) the stopping officer wishes to investigate and the traffic infraction for which there is actual reasonable suspicion. This step can be justified on two fronts. First, there is precedent for a similar inquiry.<sup>25</sup> Second, it would reduce incidents of specialized police task forces being used to accidentally enforce traffic laws.<sup>26</sup>

The fifth and final step is to ask if there were aggravating circumstances that would give the officers more than bare suspicion of an underlying crime they wish to investigate. This step considers temporal, spatial, and other factors related to the suspected crime. For example, consider the following scenario: a car is parked illegally in a handicap space, with the driver's door ajar outside of a liquor store in the early morning hours. The aggravating factors in this scenario would be the driver's door being ajar, the time of the morning, and the location of the violation.

This test is admittedly, on the surface, longwinded and complex. However, it creates a middle ground for proponents of the old "pretext rule" approach, which stated any seizure based on a pretext was unreasonable under the Fourth Amendment, and supporters of the current rule coming out of *Whren*, which allows pretextual Fourth Amendment seizures.<sup>27</sup> This approach also addresses those who have long argued for the need of flexibility in police tactics for enforcing laws, particularly when officers have developed suspicions based on their observations.<sup>28</sup>

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<sup>25</sup> See *State of Hawaii v. Bolosan*, 890 P.2d 673, 681 (1995) ("Therefore, we hold that an investigative stop can be justified based on an objectively reasonable suspicion of any offense, provided that the offense for which reasonable suspicion exists is related to the offense articulated by the officer involved. Offenses are related when the conduct that gave rise to the suspicion that was not objectively reasonable with respect to the articulated offense could, in the eyes of a similarly situated reasonable officer, also have given rise to an objectively reasonable suspicion with respect to the justifiable offense.").

<sup>26</sup> In *Johnson* the police officers were part of the Milwaukee Police Department's Narcotics Task Force. This specialized task force likely receives funding and resources greater than those departments tasked with enforcing traffic laws. If one of these specialized task force officers uses a traffic violation as a pretext to investigate a hunch of a more serious crime, that hunch proves wrong, and a ticket is issued for the violation, arguably the law was enforced accidentally.

<sup>27</sup> See 1 WAYNE R. LAFAVE, §1.4(f) *More on "pretext": the effects of Whren*, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2018).

<sup>28</sup> See *Terry v. Ohio*, 392 U.S. 1, 10 (1968) (establishing the doctrine of "stop and frisk").

## II. A BRIEF HISTORY ON PRETEXTUAL STOP JURISPRUDENCE PRIOR TO, AND AFTER, THE *WHREN* DECISION

The Tenth Circuit Court of Appeals has provided a useful definition of a pretextual stop:

A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example, presented in this case, occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity.<sup>29</sup>

In other words, “pretextual stops” allow officers to legally investigate criminal activity on nothing more than a “hunch.”<sup>30</sup> Allowing police officers to utilize this investigatory tool without any restrictions has had disastrous effects on the Fourth Amendment, as motorists are now subject to legalized capricious seizures.<sup>31</sup> Allowing seizures of an automobile on the pretext of a civil infraction, and not requiring even reasonable suspicion for the underlying crime,<sup>32</sup> is a contradiction of the common law doctrines that inspired the Fourth Amendment.<sup>33</sup>

The Supreme Court settled a long-standing circuit split regarding the constitutionality of pretextual stops in *Whren v. United States*.<sup>34</sup> The influence of *Whren* on state courts is unquestionable<sup>35</sup>—however, at least one state supreme court held, post-*Whren*, pretextual stops violate their state constitution.<sup>36</sup> Legal scholars have come to differing conclusions regarding the effects that *Whren* has had on the Fourth Amendment, but the vast majority of scholars have harshly criticized the decision as being fundamentally unfair.<sup>37</sup>

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<sup>29</sup> United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988).

<sup>30</sup> See United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir. 1995).

<sup>31</sup> 1 WAYNE R. LAFAVE, *supra* note 27.

<sup>32</sup> See Botero-Ospina, 71 F.3d at 786.

<sup>33</sup> See Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and The Fourth Amendment*, 86 IND. L. J. 979, 1010-11, (2011).

<sup>34</sup> Delaware v. Heath, 929 A.2d 390, 398 (Del. Super. Ct. 2006).

<sup>35</sup> See *infra* note 196.

<sup>36</sup> Washington v. Ladson, 979 P.2d 833, 836 (Wash. 1999).

<sup>37</sup> See generally Margaret M. Lawton, *The Road to Whren and Beyond: Does the “Would Have” Test Work?*, 57 DEPAUL L. REV. 917 (arguing that the state of Washington’s prohibition on pretextual stops has little effect on preventing violations of the Fourth Amendment); *but cf.* GUY PADULA, *COLORBLIND RACIAL PROFILING: A HISTORY, 1974 TO THE PRESENT* 167 (Routledge, 1st ed. 2018) (arguing tens of thousands of pages of scholarly work regarding *Whren* can be distilled down to it a single assertion that the holding grants police too much power).

However, the question of whether *Whren* can be applied to nonmoving, parking violations has not been expressly answered by the Court.<sup>38</sup> Circuits which have dealt with this issue hold *Whren* should apply to nonmoving parked automobiles.<sup>39</sup> *Johnson* can be distinguished from other pretextual stop cases involving nonmoving violations by the sheer unreasonableness of the police officer's behavior in that case.<sup>40</sup> Warrantless seizures being reasonable is the very heart of the Fourth Amendment.<sup>41</sup> As such, the effect of the majority opinion in *Johnson* has been to essentially do away with the reasonableness requirement in the context of a parked vehicle.

#### A. The Importance of *Terry* to Pretextual Analysis

In *Terry v. Ohio*, Terry and two other defendants were observed by a veteran police officer repeatedly looking into the window of a jewelry store, causing the officer to believe the men were armed and were "casing a job."<sup>42</sup> After confronting the defendants, the officer frisked Terry and discovered a handgun.<sup>43</sup> Terry challenged the inclusion of the handgun as evidence, arguing Terry's detention was unreasonable under the Fourth Amendment as the officer lacked probable cause to stop Terry.<sup>44</sup> The Court found Terry's seizure to be reasonable and affirmed the conviction.<sup>45</sup>

The Supreme Court's holding in *Terry v. Ohio* established three very important concepts in Fourth Amendment jurisprudence. First, anytime a police officer limits a person's physical mobility in anyway, it constitutes a "seizure" under the Fourth Amendment.<sup>46</sup> Second, and perhaps most central to this note's argument, is that reasonableness is central to the inquiry of a seizure's constitutionality under the Fourth Amendment. Finally, the Court declared that in order for a seizure and search to be constitutionally reasonable under the Fourth Amendment, two factors must be met: first, the initial seizure must be justified; and second, the search must be reasonably related to the circumstances that justified the initial seizure.<sup>47</sup>

The first factor is clearly defined by the Court as requiring the seizing officer to show articulable facts that tip the scale balancing the state's interest in deterring crime against the individual interest of freedom from

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<sup>38</sup> U.S. v. Johnson, 874 F.3d 571, 577 (7th Cir. 2017).

<sup>39</sup> See Flores v. City of Palacios, 381 F.3d 391 (5th Cir. 2004).

<sup>40</sup> See generally discussion *infra* Section III.

<sup>41</sup> See Terry v. Ohio, 392 U.S. 1, 10 (1968).

<sup>42</sup> *Id.* at 7.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 7-8.

<sup>45</sup> *Id.* at 30.

<sup>46</sup> See *id.* at 16.

<sup>47</sup> See *id.* at 19-20.



unreasonable seizures, in the favor of the state.<sup>48</sup> The second factor (or the reasonable relation inquiry) is similar to the inquiry in the fourth step of this note's proposed test. The *Terry* rule relating to seizures can be distilled into requiring an officer to justify a seizure as being reasonable by a showing of articulable facts that demonstrate a reasonable suspicion that the person being seized is engaged in some sort of illicit activity.<sup>49</sup>

A solid understanding of the *Terry* rule is important to understanding the argument against the *carte blanche* allowance of pretextual stops because a traffic stop is a type of *Terry* investigative stop.<sup>50</sup>

## B. The Competing Legal Tests Prior to *Whren*

Prior to *Whren*, the federal circuits were split on the constitutionality of pretextual automobile stops.<sup>51</sup> For example, the Sixth Circuit had previously held pretextual stops were unreasonable under the Fourth Amendment,<sup>52</sup> while the Seventh Circuit held a police officer's subjective state of mind was irrelevant to the Fourth Amendment reasonableness analysis.<sup>53</sup> During this circuit split, two distinct legal tests competed with each other: the "could have" test and the "would have" test.<sup>54</sup>

### 1. The "Could Have" Test

Under the "could have" test or "objective legality" approach,<sup>55</sup> courts do not consider a police officer's subjective state of mind prior to the seizure and only inquire if the police officer could have legally seized the automobile for some violation no matter how trivial.<sup>56</sup> As an example, consider the following scenario. A police officer patrolling a well-known drug area sees a vehicle leave the driveway of a residence suspected to be involved in the drug trade. The officer suspects the house is used to sell drugs because he overheard other officers saying as much, though he was never directly told this particular house was under suspicion. The officer wishes to pull the

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<sup>48</sup> See *id.* at 19-22.

<sup>49</sup> See PADULA, *supra* note 37, 53-54; see also *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986).

<sup>50</sup> *United States v. Green*, 897 F.3d 173, 178 (3d Cir. 2018).

<sup>51</sup> *Delaware v. Heath*, 929 A.2d 390, 398 (Del. Super. Ct. 2006).

<sup>52</sup> Stephen P. Jones, *Criminal Procedure – State v. Williams: Pretextual Vehicle Stops and the Fourth Amendment*, MEM. ST. U. L. REV. 421, 430 (1993).

<sup>53</sup> See *id.*

<sup>54</sup> See *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) (rejecting the government's argument that the inquiry should be if a reasonable officer could have stopped the defendant's car and instead held the proper inquiry is if a reasonable officer would stop the defendant's car).

<sup>55</sup> Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1014 (1996).

<sup>56</sup> *Id.* at 1016.

vehicle over, and gets the opportunity to do so after noticing that the car may have a license plate light that is not lit. In this municipality, cars are required to have two fully lit license plate lights. Not complying with this requirement is an offense for which the municipality authorizes traffic stops. In this example, there is no reasonable suspicion for anything other than a minor equipment violation. Under the “could have” test, this traffic stop would be automatically seen as reasonable.

Most courts found that the “could have” test included two factors: first, the officer must have had probable cause that the alleged traffic violation occurred; and second, the municipality must allow for the officer to pull the vehicle over.<sup>57</sup> As such, no inquiry into the officer’s subjective intentions is made—even supporters of the competing “would have” test, detailed below, admit that such an inquiry into subjective intentions would be an exercise in futility.<sup>58</sup>

The most obvious flaw with the “could have” test is that it reduces Fourth Amendment protections for motorists.<sup>59</sup> But perhaps the real danger in the test is that nearly every motorist is susceptible to a Fourth Amendment seizure at any time they are on a public road. Under the “could have” test, reasonable suspicion for some minor automobile violation, no matter how obscure or technical, can almost certainly be universally found in every moving automobile.<sup>60</sup> Even the most pious<sup>61</sup> and law abiding<sup>62</sup> motorists fail to completely conform their behavior to complex traffic laws.<sup>63</sup> How can we completely conform our behavior when most of us regard traffic laws as subjective?<sup>64</sup> Any motorist traveling any appreciable distance likely has violated some traffic rule.<sup>65</sup> Additionally, the legal objectivity test allows

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<sup>57</sup> Matthew J. Saly, *Whren v. United States: Buckle-Up and Hold on Tight Because the Constitution Won't Protect You*, 28 PAC. L.J. 595, 605 (1997).

<sup>58</sup> See Keith S. Hampton, *Stranded in the Wasteland of Unregulated Roadway Police Powers: Can “Reasonable Officers” Ever Rescue Us?*, 35 ST. MARY’S L.J. 499, 529 (2004) (explaining that Professor Wayne R. LaFave preferred the reasonable officer test); see also 1 WAYNE R. LAFAVE, §1.4(e) “Pretext” Arrests and Searches Before *Whren*, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2018) (Professor LaFave believes it is a sound principle to avoid trying to inquire into subjective minds of police officers).

<sup>59</sup> Saly, *supra* note 57, at 605.

<sup>60</sup> LAFAVE, *supra* note 27.

<sup>61</sup> See *Pida v. City of Bonners Ferry*, 2:17-CV-00195-REB, 2018 WL 2224047, \*1 (D. Idaho May 15, 2018) (speeding motorist was a Catholic hermit).

<sup>62</sup> See 4 WAYNE R. LAFAVE, §9.3(a) *Grounds for Stop*, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (5th ed. 2018) (citing to a New York Times article explaining that Supreme Court Justice William Rehnquist was ticketed for speeding).

<sup>63</sup> See Gary Richards, *Complexity of Road Rules Can Confuse Even Cops*, EAST BAY TIMES, (Mar. 4, 2008, 3:44 AM), <https://www.eastbaytimes.com/2008/03/04/complexity-of-road-rules-can-confuse-even-cops/> (explaining that the California Vehicle Code is about 1,500 pages).

<sup>64</sup> See DONALD J. BASHAM, TRAFFIC LAW ENFORCEMENT 82 (Charles C. Thomas, 1978) (explaining that people perceive the term “stop” to mean different things).

<sup>65</sup> See Richards, *supra* note 63.

police officers, who already have almost complete discretion in enforcing laws,<sup>66</sup> or courts, to fabricate probable cause in hindsight.<sup>67</sup>

## 2. The “Would Have” Test

In contrast, the “would have” test, or the “reasonable officer” test, asks whether under similar circumstances if a reasonable police officer would have made the stop, absent reasonable suspicion of another more serious crime.<sup>68</sup> The “reasonable officer” test likely developed gradually in the federal courts,<sup>69</sup> but its fully developed incarnation can be traced to the 1986 Eleventh Circuit Court of Appeals.<sup>70</sup>

However, the “reasonable officer” test is not without criticism.<sup>71</sup> Perhaps the most worthy and legitimate criticism comes from Professor Margaret L. Lawton, who notes the “reasonable officer” test rarely, if ever, results in a finding that the police officer acted contrary to how a reasonable officer would have acted.<sup>72</sup> Interestingly, Professor Lawton admits in the very same article that the “reasonable officer” test has had the effect of courts suppressing evidence stemming from pretextual stops in certain circumstances.<sup>73</sup> It appears the best tool available to determine when unconstitutional selective enforcement is being practiced may be the reasonable officer test.<sup>74</sup> Part IV of this note proposes a new legal test which attempts to address some of the criticism of the “reasonable officer” test, while adhering to the purpose and spirit of the test.

Perhaps the least convincing criticism of the reasonable officer test comes from the United States Supreme Court, discussed in detail later in this note. Indeed, the unanimous majority opinion’s rejection of the “reasonable officer” test is so confusing and steeped in irony that this note dedicates a separate section to it.<sup>75</sup>

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<sup>66</sup> Andrew J. Pulliam, *Developing a Meaningful Fourth Amendment Approach to Automobile Investigatory Stops*, 47 VAND. L. REV. 477, 491 (1994).

<sup>67</sup> *United States v. Hawkins*, 811 F.2d 210, 220-21 (3d Cir. 1987) (Rosenn, J., dissenting).

<sup>68</sup> Diana Roberto Donahoe, “*Could Have*,” “*Would Have*,” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1202 (1997).

<sup>69</sup> See Snook, *supra* note 22, at 107.

<sup>70</sup> See PADULA *supra* note 37, at 147; see also *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986).

<sup>71</sup> See Lawton, *supra* note 37, at 957.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 956.

<sup>74</sup> See PADULA, *supra* note 37, at 176.

<sup>75</sup> See discussion *infra* Section II.

C. State and Locality Response to Pretextual Stops Prior To, and After, *Whren*

1. *Police Department and State Government Approaches to Pretextual Stops and What's at Stake for Law Enforcement*

Prior to *Whren*, various police department regulations dealt with pretextual stops.<sup>76</sup> Washington D.C. Metropolitan Police Department issued an order preventing plain-clothes police officers from enforcing traffic violations absent exigent circumstances.<sup>77</sup> The legislature of Ohio deemed plain-clothes police officers who enforced traffic laws to be incompetent to testify at the accused's trial.<sup>78</sup> In 2001, the Texas legislature attempted to reign in police power by proscribing pretextual stops in certain circumstances, though the bill was ultimately defeated.<sup>79</sup>

Regulations that touch upon and effect pretextual stops, such as limiting when plain-clothes police officers can enforce traffic violations, are typically done in an attempt to reduce violent confrontations between police officers and motorists.<sup>80</sup> Such justifications seem reasonable in light of the long history of police officers believing that the routine traffic stop is the most threatening aspect of their job.<sup>81</sup> Additional social benefits from police regulations like the above likely accrue, as a certain class of police officers are essentially instructed to turn off their "predatorial instincts" in enforcing traffic violations.<sup>82</sup>

Police officers understand using traffic violations to investigate serious crimes on bare suspicion can be seen as unconstitutional selective enforcement.<sup>83</sup> Unofficial police manuals give police officers advice on how to avoid accusations of racial profiling.<sup>84</sup> Police unions have lobbied extensively to prevent Congress from commissioning studies on traffic stops that would survey the race of those stopped and the legal justification of traffic stops nationwide.<sup>85</sup> Lobbying against a bill which would reveal

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<sup>76</sup> EDWARD LOUIS FIANDACH, §7:23 *Abandonment of the Pretextual Analysis— United States v. Whren; People v. Robinson*, NEW YORK DRIVING WHILE INTOXICATED (3d ed. 2018).

<sup>77</sup> General Order 303.1(I)(A)(2)(a)(4) (1992), [https://go.mpdconline.com/GO/GO\\_303\\_01.pdf](https://go.mpdconline.com/GO/GO_303_01.pdf).

<sup>78</sup> OHIO REV. CODE ANN. § 4549.16 (West, Westlaw through 2019-2020).

<sup>79</sup> See Hampton, *supra* note 58, at 550.

<sup>80</sup> See PADULA, *supra* note 37, at 177.

<sup>81</sup> See BASHAM, *supra* note 64, at 36.

<sup>82</sup> See *id.* at 80.

<sup>83</sup> See PADULA, *supra* note 37, at 177.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.* (explaining that police trade groups lobbied heavily against the Traffic Statistics Act).

statistics of pretextual traffic stops is likely an instinctual survival response as pretextual stops are a cash cow for local police departments.<sup>86</sup>

For individual police officers, pretextual stops are a win-win situation. If a traffic stop fails to prove their suspicion of a serious crime, their department may still reward them for issuing the ticket.<sup>87</sup> One must wonder how the state's legitimate interest in enforcing traffic laws (particularly in enforcing parking violations) outweighs the damage to the reputation of the local police departments caused by using this tactic.<sup>88</sup>

## 2. State Caselaw Prior to *Whren*

Prior to *Whren*, state courts were split on whether to adopt the “would have” test or the “could have” test.<sup>89</sup> Some state courts passed on the pretextual stop question all together.<sup>90</sup> At least one state likely had a district/appellate court split on the issue of pretextual stops<sup>91</sup> prior to that state's supreme court adopting the holding in *Whren*.<sup>92</sup>

To study state responses to pretextual stops, this note analyzes state supreme court cases in which the defendant challenged a conviction based on a legal pretext. These challenges can be either that the traffic stop was based on a pretext or their arrest was based on pretext. The dates used to analyze cases in this note are from the June 10, 1968<sup>93</sup> to June 10, 1996.<sup>94</sup> There was a clear majority in favor of the “could have” test in the federal circuit courts prior to *Whren*.<sup>95</sup>

Not every state can fit neatly into either the “could have” test or the “would have” test—rather than attempt to pigeonhole states, this note creates a third category for “other.” This category includes states that for some reason could not logically be placed in either of the other two. For example,

<sup>86</sup> Eric Blemenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 83 (1998) (noting police departments use pretextual stops to intercept drug money that is ultimately used to fund department operations).

<sup>87</sup> See Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men*, CLEV. ST. L. REV. 443 (2003).

<sup>88</sup> David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 268 (1999).

<sup>89</sup> *Jones v. Alaska*, WL 16196649 \*1 (Alaska Ct. App 1994) (“Courts around the country are split on the wisdom of adopting the ‘pretext arrest’ rule.”).

<sup>90</sup> See *Connecticut v. Winfrey*, No. CR10-204867, WL 389930 \*3 (Dec. 11, 1992) (explaining that it didn't matter which test the court used as stop was not pretextual).

<sup>91</sup> *State v. Roaden*, 98 Ohio App. 3d 500, 503, 648 N.E.2d 916 (12th Dist. Clermont County 1994).

<sup>92</sup> *City of Dayton v. Erickson*, 665 N.E.2d 1091, 1097 (Ohio 1996) (the Supreme Court of Ohio adopted the objective legality test in a case decided on July 3, 1996). The court, rather than citing to *United States v. Whren*, cited to *United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993).

<sup>93</sup> This was the day the Supreme Court decided *Terry v. Ohio*.

<sup>94</sup> This was the day the Supreme Court decided *United States v. Whren*.

<sup>95</sup> Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 162 (1996).

a state supreme court that did not hear a pretextual challenge prior to *Whren* would fit in the third category.<sup>96</sup> Some state supreme courts expressly adopted one of the tests.<sup>97</sup> Other states are not so easily classified as having adopted one test or the other—or even perfectly fit into the third category.<sup>98</sup> At least one state held that a stop may be justified even if the police officer does not witness any violations.<sup>99</sup>

This analysis of state supreme court cases assumes if a state supreme court adopted a test similar to the “objective legality” test or the “reasonable officer” test for other pretextual criminal concepts (such as a pretextual arrest or pretextual search), the state supreme court would adopt that same test for pretextual stops.<sup>100</sup> This is a reasonable inference as at least one state has expressly adopted the “legal objectivity” test to all legal pretexts.<sup>101</sup> If a state supreme court held that a stop was not pretextual, this note groups that state in with “reasonable officer” test states.<sup>102</sup> Finally, if a state supreme court skirts the defendant’s express pretextual challenge, but finds cases that adopt one of the tests to be persuasive, the state would be grouped with whatever test the persuasive cases cited to use.<sup>103</sup>

As an example of the difficulty in classification, this section discusses a state supreme court case from Michigan that holds the defendant failed to show the stop was pretextual while effectively adopting the “could have” test.<sup>104</sup> For states that adopt the pretextual stop rule—that is, banning

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<sup>96</sup> This category also includes states that did not adopt either standard or had a standard that did not conform to either the “could have” test or the “would have” test.

<sup>97</sup> *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991); *State v. Daniel*, 665 So. 2d 1040, 1043 (Fla. 1995) (“The reasonable officer test is better suited for an individualized inquiry because it also asks whether the usual police practice would be to effect a stop when confronted with a particular kind of minor infraction.”).

<sup>98</sup> Some state supreme courts won’t even address the merits of the defendant’s pretextual argument. It seems a reasonable inference could be made that if a traffic stop or arrest was not based on a pretext, then that state supreme court views pretextual stops or arrests as unreasonable. *See People v. Burrell*, 339 N.W.2d 403, 408 (Mich. 1983) (explaining that the defendant merely failed to show that the traffic stop originating from a noisy exhaust system was pretextual).

<sup>99</sup> *See State v. Kissner*, 390 N.W.2d 58, 60 (S.D. 1986).

<sup>100</sup> *See Ex parte Scarbrough*, 621 So. 2d 1006, 1009 (Ala. 1993) (citing *United States v. Smith*, 799 F.2d 704, 708 (11th Cir.1986), which was a pretextual stop challenge, for a definition of the reasonable officer test, but ultimately adopted the objective legality test); *see State v. Towne*, 615 A.2d 484, 496-497 (Vt. 1992) (citing *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *United States v. Hernandez* 901 F.2d 1217, 1219 (5th Cir. 1990) and *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir. 1987), which all are express challenges of pretextual stops, for applying the legal objectivity to test to pretextual arrests).

<sup>101</sup> *Everett*, 472 N.W.2d at 867.

<sup>102</sup> California is one such state. *See People v. Marquez*, 822 P.2d 418, 431 (Cal. 1992) (ruling that the stop of the defendant was not pretextual).

<sup>103</sup> *See People v. Redinger*, 906 P.2d 81, 85-86 (Colo. 1995). The court did not expressly address the defendant’s assertion that the stop was pretextual, rather it used an investigatory stop analysis. However, the court cited cases that expressly dealt with pretextual stop challenges and held them to be persuasive.

<sup>104</sup> *See People v. Burrell*, 339 N.W.2d 403, 408 (Mich. 1983).

pretextual stops altogether<sup>105</sup>—they are placed with the states that adopted the “would have” test.

3. *Difficulty in Classifying States’ Pretextual Stop Approach: People v. Burrell*

As an illustration, the last express challenge of a traffic stop being pretextual to the Supreme Court of Michigan came in 1983.<sup>106</sup> The defendants in *People v. Burrell* were two black males driving an older car through a predominately white neighborhood.<sup>107</sup> The stopping police officer had said he became suspicious of the defendants because they were driving at a slow speed and the Grand Rapids area had a recent string of armed robberies reported to have been committed by two black males.<sup>108</sup>

After a game of “cat and mouse,”<sup>109</sup> the arresting officer was finally able to establish probable cause to stop the defendant’s vehicle after having his patrol car’s window rolled down enough to hear a defective exhaust system.<sup>110</sup> The defendant-passenger had given the stopping officer a false name and thus extended the seizure of the defendants for over an hour while police verified their identity.<sup>111</sup> The defendants were eventually charged with burglary and sentenced to prison terms of ten to fifteen years.<sup>112</sup>

In challenging the stop as a pretext for suspicion based upon race, the defendants noted the arresting officer did not cite either defendant for an equipment violation.<sup>113</sup> The court merely held the defendants failed to show the stop was pretextual.<sup>114</sup> Though this holding is prefaced by the court stating that while the defective equipment violation justified the initial stop, the underlying suspicion of two black males driving slowly through a predominantly white neighborhood and recalling a recent string of armed robberies would not have not have justified the stop.<sup>115</sup>

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<sup>105</sup> Celia Guzaldo Gamrath & Iain D. Johnston, *The Law of Pretext Stops Since Whren v. United States*, 85 ILL. B.J. 488, 489 (1997).

<sup>106</sup> *Burrell*, 339 N.W.2d at 407.

<sup>107</sup> *See id.*

<sup>108</sup> *Id.* at 404.

<sup>109</sup> *See id.* at 404-07 (detailing events, the opinion notes that the officer lost sight of the slow-moving automobile, initiated a search for the defendants eventually stopping them for an equipment violation).

<sup>110</sup> *Id.* at 404.

<sup>111</sup> *Id.* at 404-07.

<sup>112</sup> *Id.* at 404-06.

<sup>113</sup> *Id.* at 404, 407.

<sup>114</sup> *Id.* at 404, 408.

<sup>115</sup> *Id.* at 404, 410.

*Burrell* is of interest to this note for three reasons. First, it perfectly illustrates a pretextual stop.<sup>116</sup> Second, the opinion in *Burrell* shows an example of a court not expressly naming one of the tests,<sup>117</sup> but the court's ruling effectively endorses one of them.<sup>118</sup> It is reasonable to infer that since the court held the stopping officer in *Burrell* was justified in stopping the defendants, a reasonable officer could have stopped them—thus effectively adopting the objective legality test.<sup>119</sup>

Finally, it should be noted that the *Burrell* court never defines pretextual stops—though it can be inferred that the court's understanding of pretextual stop means an unconstitutional seizure based on a motorist's race.<sup>120</sup> This lack of definition of a pretextual stop in *Burrell* may stem from either the overall confusion as to what actually constitutes a pretextual stop,<sup>121</sup> the relative earliness of the opinion in relation to pretextual stop jurisprudence,<sup>122</sup> or both. In either case, it is unlikely the seizure in *Burrell* would be seen as reasonable today, even under *Whren* standards.<sup>123</sup>

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<sup>116</sup> See generally *id.* The police officer initially lacked probable cause for any offense. The stopping officer testified that he suspected they were connected to a recent string of robberies based solely on the defendant's race and type of automobile. However, the police officer only stopped the vehicle after losing sight of them for 22 minutes and then noticing an equipment violation.

<sup>117</sup> Nowhere in the opinion does the court mention either the "could have" test or the "would have test."

<sup>118</sup> See *Burrell*, 339 N.W.2d at 403.

<sup>119</sup> See *id.* at 408.

<sup>120</sup> See *id.* at 408 ("[W]e conclude that defendants' argument that the stop was pretextual is without merit") (it can be inferred from this quote that race-based pretextual stops are generally unconstitutional).

<sup>121</sup> Some courts have seen the reasonable officer test as unworkable because it is too demanding and impractical to get inside the officer's subjective mindset and because an officer could simply lie about having improper pretext based on race or other factors. See Hampton, *supra* note 58, at 538.

<sup>122</sup> It is difficult to pinpoint the exact year in which a defendant argued that a stop was unreasonable because it was based on a pretext, but an early case appears in the Eighth Circuit in 1976. See generally *United States v. Hollman*, 541 F.2d 196 (8th Cir. 1976) (a defendant challenged the inclusion of evidence by alleging that it was obtained by a pretextual stop).

<sup>123</sup> Under *Whren* selective enforcement based on race is still unconstitutional. Additionally, the *Burrell* court hints that the traffic stop was unreasonably extended beyond the scope of the equipment violation. See *Burrell*, 339 N.W.2d at 409 ("[I]t took Deputy Blackport a somewhat incredible 33 minutes to issue a citation to Brown for failure to have a valid driver's license in his possession."); see also *Rodriguez v. United States*, 135 S. Ct. 1609, 1611 (2015) (holding that a traffic stop is unconstitutional if it is unreasonably prolonged beyond the scope of the original purpose).



“Could Have” Test <sup>124</sup>	“Would Have” Test <sup>125</sup>	Other
Alabama, Iowa, Massachusetts, Michigan, Minnesota, Missouri, North Dakota, Oregon, South Dakota, Vermont	California, Colorado, Florida, Georgia, Hawaii, Maine, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Rhode Island, Utah, West Virginia, Wyoming	Alaska, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, New Hampshire, New Mexico, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, Wisconsin

<sup>124</sup> See *Ex parte* Scarbrough, 621 So. 2d 1006, 1010 (Ala. 1993) (hearing challenge to defendant’s arrest as pretextual, the court adopted the legal objectivity test); *State v. Aderholdt*, 545 N.W.2d 559, 563 (Iowa 1996) (challenging stop as pretextual, court expressly adopted the objective legality test); *Commonwealth v. Santana*, 649 N.E.2d 717, 720 (Mass. 1995) (challenging stop as pretextual, the court adopted the objective legality test, though referred to the test as the “authorization test”); *People v. Burrell*, 339 N.W.2d 403, 407 (Mich. 1983) (challenging the stop as pretextual, the court held the stopping officer could have made the stop because of the equipment violation); *State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991) (challenging arrest as pretextual, the court adopted objective legality test for all legal pretext challenges); *State v. Mease*, 842 S.W.2d 98, 105 (Mo. 1992) (holding that legal objectivity test applied to pretextual arrests); *Zimmerman v. N. Dakota Dept. of Transp. Dir.*, 543 N.W.2d 479, 483 (N.D. 1996) (“The validity of [a] stop is not vitiated merely because [an officer] subjectively stopped the vehicle for another reason[.]”); *State v. Tucker*, 595 P.2d 1364, 1368 (Or. 1979) (“We see no reason to hold that such a stop is improper or invalid simply because, in addition to probable cause to arrest for a specific offense (or to stop for purposes of issuing a citation), the officer also has a suspicion which contributes to the decision to make the stop.”); *State v. Kissner*, 390 N.W.2d 58, 60 (S.D. 1986) (holding a stop can be justified even the stopping officer witness no violation); *State v. Towne*, 615 A.2d 484, 496 (Vt. 1992) (challenging arrest as pretextual, court adopted the objective legality tests and finds pretextual stop cases that used this test as persuasive).

<sup>125</sup> See *People v. Marquez*, 822 P.2d 418, 431 (Cal. 1992) (rejecting defendant’s argument that traffic stop was a pretext, the court’s language tends to indicate a pretextual stop would have been impermissible); *People v. Redinger*, 906 P.2d 81, 85 (Colo. 1995) (finding cases that adopted reasonable officer test persuasive); *State v. Daniel*, 665 So. 2d 1040, 1043 (Fla. 1995) (adopting reasonable officer test); *Tate v. State*, 440 S.E.2d 646, 650 (Ga. 1994) (holding defendant’s stop was pretextual and adopting reasonable officer test); *State v. Bolosan*, 890 P.2d 673, 681 (Haw. 1995) (adopting reasonable officer test); *State v. Haskell*, 645 A.2d 619, 621 (Me. 1994) (adopting reasonable officer test); *Alejandre v. State*, 903 P.2d 794, 797 (Nev. 1995), overruled by *Gama v. State*, 920 P.2d 1010 (Nev. 1996) (adopting reasonable officer test); *State v. Prahin*, 455 N.W.2d 554, 559 (Neb. 1990) (challenging stop as a pretext for vehicle search, court held arrests may not be used as a pretext for a search.); *State v. Pierce*, 642 A.2d 947, 961–62 (N.J. 1994) (citing to a number of both state and federal courts that suppressed evidence under the reasonable officer test); *People v. Spencer*, 646 N.E.2d 785, 787 (N.Y. 1995) (“[P]olice stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations[.]”); *State v. Watkins*, 446 S.E.2d 67, 70 (N.C. 1994) (“The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.”); *State v. Kinley*, 651 N.E.2d 419, 426 (Ohio 1995), reh’g granted, opinion recalled, 663 N.E.2d 324 (Ohio 1996) (holding that evidence obtained through a pretextual arrest must be excluded from trial); *State v. Scurry*, 636 A.2d 719, 723 (R.I. 1994) (challenging arrest as pretextual, court held the inquiry must focus on the

Perhaps more difficult than classifying each state's pre-*Whren* pretextual stop jurisprudence into one of these three columns is deciphering whether 16 state supreme courts considered subjective intentions. If the "would have" test is a purely subjective test cloaked in empirical terms, then 16 state supreme courts considered an inquiry into subjective intentions appropriate. It is clear that more state courts were likely to find pretextual stops as unreasonable under the Fourth Amendment prior to *Whren* than not.<sup>126</sup> Though the objective legality test was the clear winner in the Federal Circuit courts, there was still a sufficient enough split to set the stage for the Supreme Court to hear *Whren*.<sup>127</sup>

### III. *WHREN* v. *UNITED STATES*

In *Whren v. United States* the Court considered the question of whether a plain-clothes police officer patrolling an area of Washington, D.C. known for drug activity could use actual reasonable suspicion of a traffic violation as pretext to investigate more serious offenses for which they only had bare suspicion.<sup>128</sup> In other words, the Court was deciding whether federal courts should use the "could have" test or the "would have" test.<sup>129</sup> The *Whren* court expressly rejected the "reasonable officer" test,<sup>130</sup> holding that an officer's subjective intentions do not matter so long as there is sufficient probable cause.<sup>131</sup>

#### A. Facts

On June 10, 1993, narcotics officers Tony Howard, Efrain Soto Jr., and Homer Littlejohn were patrolling the Southeastern quadrant of Washington, D.C. in an unmarked car.<sup>132</sup> The officers were patrolling an area known for drug activity and violent crimes<sup>133</sup> for the purpose of enforcing narcotics violations.<sup>134</sup> The officers noticed defendants Michael Whren and Lester

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arresting officers intent and motivation); *State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990) (affirming lower court's use of the reasonable officer test in pretextual stop challenge); *State v. Hefner*, 376 S.E.2d 647, 651 (W. Va. 1988) (holding pretextual arrests are unlawful); *State v. Welch*, 873 P.2d 601, 604 (Wyo. 1994) (holding that officer's stop of defendant was not pretextual but lawful) It is reasonable to infer that this court would consider pretextual stops unreasonable.

<sup>126</sup> See Table 1.

<sup>127</sup> Levit, *supra* note 95, at 162.

<sup>128</sup> See *Whren*, 517 U.S. at 806.

<sup>129</sup> See *id.* at 808.

<sup>130</sup> *Id.* at 806.

<sup>131</sup> *Id.* at 806.

<sup>132</sup> *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996).

<sup>133</sup> See *Whren*, 517 U.S. at 806.

<sup>134</sup> See *Whren*, 53 F.3d at 372.

Brown stopped at stop sign with at least one car behind them.<sup>135</sup> Soto testified he noticed defendant Brown, the driver of the vehicle, look down into the lap of defendant Whren and that the defendants remained stopped at the stop sign for more than twenty seconds.<sup>136</sup> Deciding to tail the defendants, the officers observed the defendants driving off at an “unreasonable” speed and failing to use a turn signal.<sup>137</sup> Eventually pulling the defendants’ vehicle over,<sup>138</sup> Soto approached the driver side of the vehicle, noticing a large clear plastic bag of white powder in each of defendant Whren’s hands.<sup>139</sup> Believing the bags to contain cocaine, Soto yelled out “CSA”—shorthand for “Controlled Substances Act violation.”<sup>140</sup> The defendants were then arrested for various narcotics violations.<sup>141</sup>

The defendants moved to have the evidence suppressed, arguing the traffic stop was pretextual and unreasonable under the Fourth Amendment.<sup>142</sup> At the suppression hearing, Soto testified that he did not intend to issue a traffic ticket. Rather, he wanted to investigate why the defendants’ vehicle was impeding traffic at the stop sign—denying the decision to stop the defendants was based on a racial profile.<sup>143</sup> The District Court concluded that the actions of the officers were routine for a traffic stop.<sup>144</sup> Although the District Court admitted the execution and timing of the stop may have been contrary to how most people would have preferred, it was still appropriate, and the court denied the defendant’s motion to suppress the physical evidence.<sup>145</sup>

The defendants appealed, arguing the “would have” line of federal cases from the Tenth and Eleventh Circuits should be considered persuasive and that the “could have” test failed to put any real limitation on police discretion.<sup>146</sup> The defendants noted the stop would not have occurred if the police officer lacked an ulterior motive.<sup>147</sup> The court rejected this argument, citing another District of Columbia Circuit Court of Appeals case that held traffic stops as a mere pretext for the officer to search the vehicle are not unreasonable seizures under the Fourth Amendment.<sup>148</sup> The defendants

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *See id.*

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *Id.*

petitioned the Supreme Court and were granted certiorari on January 5, 1996.<sup>149</sup>

## B. Unanimous Opinion

A unanimous Court rejected all of the petitioners' arguments and held the police officer's underlying motivations or subjective intentions (so long as they are not based upon race)<sup>150</sup> are not relevant to a Fourth Amendment challenge.<sup>151</sup> The Court noted that, generally, reasonable suspicion of an actual traffic violation is needed for a police officer to stop a vehicle and that even the briefest traffic stop qualifies as a seizure under the Fourth Amendment.<sup>152</sup> As such, the Court noted, the stop must be "reasonable."<sup>153</sup>

### *1. "Don't Ask, Don't Tell": Analyzing the Precedent Regarding a Police Officer's Subjective Intentions*

The petitioners argued that civil traffic violations are a unique area of law, and since operating a vehicle is such a heavily regulated aspect of daily life, the standard should be something higher than reasonable suspicion.<sup>154</sup> The petitioners also argued that the objective legality test effectively allows, and perhaps even encourages, police officers to be able to find reasonable suspicion on all vehicles on the road.<sup>155</sup> To support this proposition, the petitioners pointed out that the Court had previously held that inventory searches (a lawful search of an arrestee's personal effects for which probable cause is not required)<sup>156</sup> could not be a sham for a general search for incriminating evidence.<sup>157</sup> The petitioners noted that the Court held warrantless administrative searches could not be a pretext to discover evidence that could lead to criminal charges.<sup>158</sup>

The Court rejected this precedent as applicable to the petitioners' situation because the cases cited both involved searches (not seizures) that lacked, and did not require, probable cause.<sup>159</sup> Additionally, the Court noted

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<sup>149</sup> *Whren*, 517 U.S. 806 (1996).

<sup>150</sup> *See id.* at 813.

<sup>151</sup> *See id.* at 806.

<sup>152</sup> *Id.* at 810.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 810 (petitioners note that driving an automobile is such a heavily regulated activity that is it next to impossible to be in full compliance with all rules and regulations at any given moment).

<sup>156</sup> 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 5.5(B) (5th ed. 2018).

<sup>157</sup> *See Whren*, 517 U.S. 806, 811 (1996).

<sup>158</sup> *See id.* at 811 (upholding the constitutionality of warrantless administrative inspections in *New York v. Burger*, 482 U.S. 691, 716-17 (1987), the Court held these inspections could not be a pretext to find evidence of violation of penal laws).

<sup>159</sup> *Id.*

that outside of those two narrow circumstances of inventory searches and warrantless administrative inspections, the Court has never given an officer's subjective intentions or underlying motives any weight in determining if a seizure was reasonable.<sup>160</sup>

While avoiding a subjective inquiry appears to be an agreeable, sound legal doctrine,<sup>161</sup> the effect of such a hardline stance is the tacit acceptance of using traffic violations to justify searches and seizures of minority motorists based on the color of their skin.<sup>162</sup> Under the Holmsonian "bad man" theory of the law,<sup>163</sup> *Whren* may encourage police officers to racially profile motorists and justify the seizure using a minor traffic violation, knowing that they only have to deny any accusation of racial profiling.<sup>164</sup> Absent the police officer being caught on tape explicitly admitting to using a traffic violation as a pretext to investigate an unreasonable suspicion based upon the motorist's race, it is nearly impossible for a defendant to show the seizure was unreasonable.<sup>165</sup>

The *Whren* opinion essentially amounts to a policy of "don't ask, don't tell" in terms of racial profiling. The Court "won't ask" of the officer's motivations,<sup>166</sup> and the officer, in the interest of self-preservation, likely "won't tell."<sup>167</sup> The Court's refusal to inquire into a police officer's subjective intentions provides yet another road block to proving civil rights violations that occurred via pretextual stops.<sup>168</sup>

## 2. Deficiencies of the Petitioners' Proposed Reasonable Officer Test

The Court also rejected the petitioners' contention that the reasonable officer test is an objective standard.<sup>169</sup> Rather, the Court thought the

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<sup>160</sup> See *id.* at 812.

<sup>161</sup> See WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.4(E) (5th ed. 2018) (Professor LaFave, a proponent of the reasonable officer test, believes it is a sound principle to avoid trying to inquire into subjective minds of police officers).

<sup>162</sup> See David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 291 (1999).

<sup>163</sup> See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (arguing the "bad man" wished to conform his behavior and avoid incarceration as much as the "good man" not because of morality, rather because of self-interest and a cost-benefit analysis of the law).

<sup>164</sup> See Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039, 1040 (1997) (explaining that his understanding of the "bad man" theory is that statutes and judicial opinions serve as materials for the bad man to predict a potential outcome in court).

<sup>165</sup> See Harris, *supra* note 162, at 291.

<sup>166</sup> See *Whren*, 517 U.S. 806, 812 (1996).

<sup>167</sup> See generally Holmes, *supra* note 163, at 459.

<sup>168</sup> See Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 265 (2008); see generally *The Difficulties of Proving Racial Profiling*, NPR NEWS: TELL ME MORE (May 21, 2013), <https://www.npr.org/templates/story/story.php?storyId=185788184>.

<sup>169</sup> *Whren*, 517 U.S. at 814.

petitioners dressed up a purely subjective test in empirical terminology.<sup>170</sup> The Court decided that the petitioners asked the Court not to determine whether a police officer's subjective intentions are appropriate, but rather, whether it is plausible to believe the police officer had appropriate intentions in conducting the seizure.<sup>171</sup> To the Court, this seemed illogical as it seems it would be a less onerous task to figure out what an individual police officer's subjective intentions are than to try to understand what collective police practices would be deemed "reasonable."<sup>172</sup>

The Court's suggestion that the "would have" test is a subjective standard masquerading as an objective standard<sup>173</sup> is contrary to what some of the most respected Fourth Amendment scholars have concluded.<sup>174</sup> In the end, the Court's opinion can be distilled into the following doctrine: (1) if a stopping officer has reasonable suspicion of a traffic violation,<sup>175</sup> then pretextual stop challenge cases don't fit within the narrow exceptions of the Fourth Amendment jurisprudence that do not require reasonable suspicion or probable cause and do require an inquiry into subjective intentions;<sup>176</sup> and (2) that a police officer's subjective intent or underlying motivations in conducting a traffic stop are always irrelevant<sup>177</sup> in a Fourth Amendment analysis, unless those intentions are selective enforcement based upon race or some other prohibited consideration.<sup>178</sup>

### C. The *Whren* Effect

One must wonder if the relatively new problem of "racial profiling"<sup>179</sup> was exacerbated by the rejection of the reasonable officer test in *Whren*. As argued by the defendants in the District of Columbia Circuit Court of Appeals, the "could have" test fails to place any meaningful or reasonable checks on the discretionary power of police officers.<sup>180</sup> Limiting police discretionary power and pretextual stops in general is important for two reasons. First, the law enforcement profession encourages officers to hone and use predatory instincts.<sup>181</sup> Second, law enforcement as a profession does not doubt the reality of racial profiling and instructs officers to be

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<sup>170</sup> See *id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> See *id.*

<sup>174</sup> See *Hampton*, *supra* note 58.

<sup>175</sup> *Whren*, 517 U.S. at 817.

<sup>176</sup> See *id.* at 812.

<sup>177</sup> See *id.* at 806.

<sup>178</sup> *Id.* at 813.

<sup>179</sup> PADULA, *supra* note 37, at 12 (noting that the appearance of the term "racial profiling" did not surface until the 1990's).

<sup>180</sup> See *Whren*, 53 F.3d at 374 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996).

<sup>181</sup> See BASHAM, *supra* note 64, at 80.

concerned about it.<sup>182</sup> While it may be argued they are instructed “to worry about” racial profiling in a moral sense,<sup>183</sup> not long ago police were instructed to use racial profiling to enforce a national policy against narcotics.<sup>184</sup> Even today, in some circumstances, police officers are encouraged to consider socio-economic factors in their enforcement of traffic violations.<sup>185</sup>

The “could have” test suits the law enforcement profession’s general hostility towards any legal doctrine that diminishes or questions their officers’ discretionary authority in any way. In one unofficial police manual on conducting traffic stops, the authors reproduce a traffic court transcript in which a defense attorney asks the officer to define the term “discretion.”<sup>186</sup> The officer can only give examples of discretion and not a definition.<sup>187</sup> The authors of this traffic enforcement manual seem to be so offended by a defense attorney questioning police discretionary power, they refer to this line of questioning as “childish” and “grasping for straws.”<sup>188</sup> When an officer lacks either a “be on the lookout” advisory for a certain vehicle, knowledge of an active warrant, or only has a bare suspicion of a crime,<sup>189</sup> an officer can easily find probable cause for any number of the numerous municipal vehicle violations.<sup>190</sup> As noted above, pretextual stops also present opportunities for local police departments to fill in budget gaps.<sup>191</sup>

Perhaps the most important consequence after *Whren* was the states’ wholesale abandonment of the “would have” test.<sup>192</sup> In the twenty-eight years between *Terry* and *Whren*,<sup>193</sup> at least seventeen states offered some

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<sup>182</sup> PETROCELLI & PETROCELLI, *supra* note 16, at 11-15 (citing various statistics that tend show selective enforcement against racial minorities and police officers should be concerned with racial profiling).

<sup>183</sup> *Id.* at 11 (explaining that racial profiling is “unprofessional and unacceptable”).

<sup>184</sup> See PADULA, *supra* note 37, at 51-52 (explaining that police training videos showed and portrayed drug dealers as almost exclusively either Latino or black); see also PETROCELLI & PETROCELLI, *supra* note 16, at 11-15 (noting that racial profiling was a tool that was taught to police officers as recently as the 1980’s).

<sup>185</sup> PETROCELLI & PETROCELLI, *supra* note 16, at 11 (listing areas that are not police friendly and thus not good for vehicle stops include “some housing projects, motorcycle club meeting places, certain bars and known gang hangouts.”).

<sup>186</sup> See *id.* at 7-8.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See generally *id.* at 17-18 (explaining that *Delaware v. Prouse*, 440 U.S. 648 (1979), requires that police officers have a lawful reason to stop a vehicle).

<sup>190</sup> See Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1846 (2004) (explaining that most traffic stops stem from direct observation of some vehicle violation); see also Visser, *supra* note 8, at 1683 (explaining that driving has become an intrinsic part of American life).

<sup>191</sup> See Lichtenberg, *supra* note 87.

<sup>192</sup> See Lawton, *supra* note 37, at 918 (explaining that currently Washington is the only state whose supreme court has said the “reasonable officer” test is required under Washington’s state constitution).

<sup>193</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (decided on June 10); *Whren v. United States*, 517 U.S. 806 (1996) (decided on June 10).

protection to motorists against pretextual stops—either through expressly adopting the “reasonable officer” test or some variant.<sup>194</sup> This note refers to this dramatic transformation of how state supreme courts viewed the Fourth Amendment as the “*Whren* effect.” In light of the fact that Supreme Court decisions set the floor and not the ceiling in terms of Fourth Amendment protections,<sup>195</sup> why are state courts so enamored and influenced by Supreme Court decisions that they would rollback constitutional protections they previously thought necessary?<sup>196</sup> With the near nationwide abandonment of the “would have” test,<sup>197</sup> very little protections against unreasonable Fourth Amendment seizures are available to motorists traveling any appreciable amount of distance on American roads.<sup>198</sup> This begs the question if the pretextual stop doctrine should apply to every scenario involving a defendant in a vehicle—even if the reasonable suspicion is for a nonmoving violation?

#### IV. *UNITED STATES v. JOHNSON*

In *United States v. Johnson*, the Seventh Circuit Court of Appeals considered the question of whether a pretextual stop is reasonable under the Fourth Amendment when the only underlying probable cause that exists is for a civil parking infraction.<sup>199</sup> The court held that police officers need not exhaust every possible statutory exception before approaching a stopped vehicle and that the *Whren* pretextual stop rule applies to moving and nonmoving traffic violations alike.<sup>200</sup>

##### A. Facts and Posture of the Case

In January of 2014, three Neighborhood Task Force (NTF) officers with the Milwaukee Police Department were patrolling a violent crime “hotspot” of Milwaukee.<sup>201</sup> At an evidentiary hearing, the officers testified they were

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<sup>194</sup> See discussion *infra* Table 1.

<sup>195</sup> See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”); see generally Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010) (explaining that state constitutions can offer individual liberties in areas where the United States Constitution fails).

<sup>196</sup> See Sara C. Benesh & Wendy L. Martinek, *Context and Compliance: A Comparison of State Supreme Courts and the Circuits*, 93 MARQ. L. REV. 795, 797 (2009) (explaining that state supreme courts tend to be more influenced by Supreme Court policy than the federal circuit courts, particularly with regard to Fourth Amendment search and seizure policy).

<sup>197</sup> See generally Lawton, *supra* note 37, at 918.

<sup>198</sup> See generally Visser, *supra* note 8.

<sup>199</sup> *United States v. Johnson*, 874 F.3d 571 (7th Cir. 2017), *cert. denied*, 17-1349, 2018 WL 1470947 (U.S. Oct. 1, 2018).

<sup>200</sup> *Id.*

<sup>201</sup> *United States v. Johnson*, No. 14-CR-25, 2014 WL 12656901, at \*1 (E.D. Wis. Aug. 7, 2014).



part of the Street Crimes division of NTF and were trained to look for laws being violated, including traffic laws.<sup>202</sup> At 7:41 p.m., the NTF officers spotted an idling black SUV parked within fifteen feet of a crosswalk, in violation of a Wisconsin state statute.<sup>203</sup>

The driver of the NTF squad car, Officer Navarette, pulled up parallel with the SUV.<sup>204</sup> With bright lights shining on the vehicles, the officers approached.<sup>205</sup> One of the arresting officers, Officer Conway, testified at the evidentiary hearing that he saw a large handgun in defendant Johnson's left hand, who was sitting in the back of the SUV, and that Johnson was making movements consistent with concealing and then attempting to hide a weapon under the driver's seat.<sup>206</sup> The officers pulled all of the passengers out of the SUV and handcuffed the defendant.<sup>207</sup> Officer Conway spotted a firearm on the floor of the car underneath the driver's seat, and the officers arrested all of the passengers.<sup>208</sup> Defendant Johnson was charged under a federal law that prohibits felons from being in possession of a weapon.<sup>209</sup>

Supporting his motion for suppressing the firearm found in the SUV, Johnson argued the seizure of the vehicle was illegal, that the seizure of a vehicle and its passengers justified by a civil parking infraction is unreasonable and that the officers exceeded the scope of the traffic stop.<sup>210</sup> Finding that seizure of the SUV was lawful, the District Court noted that a police officer may conduct a traffic stop for even the most minor of infractions.<sup>211</sup> Johnson argued the seizure was unlawful because a reasonable person could not have formulated a reasonable suspicion of a parking violation in such a brief time span.<sup>212</sup> The District Court rejected this assertion holding that a reasonable suspicion can be formulated almost instantaneously.<sup>213</sup>

Johnson also argued the officers did not have reasonable suspicion of a parking violation, as the driver was not in the SUV when Johnson was

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Officer Conway testified at the evidence suppression hearing that Johnson's furtive behavior caused him to believe Johnson was concealing a weapon. Interestingly, in the majority opinion for the en banc rehearing the court states Officer Conway believed he was hiding either alcohol, drugs, or a weapon. *See id.* at \*1.

<sup>207</sup> *United States v. Johnson*, 874 F.3d 571, 575 (7th Cir. 2017).

<sup>208</sup> *Johnson*, 2014 WL 12656901, at \*1.

<sup>209</sup> *See id.* at \*1; *see also* 18 U.S.C. §§ 922(g)(1) ("It shall be unlawful for any person—who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition . . .").

<sup>210</sup> *See Johnson*, 2014 WL 12656901, at \*2.

<sup>211</sup> *See id.* at \*2.

<sup>212</sup> *See id.*

<sup>213</sup> *See id.*

detained.<sup>214</sup> The court rejected this argument, noting it was not the officer's reasonable suspicion of the parking violation that allowed the seizure, rather Johnson's furtive behavior was consistent with attempting to hide or conceal a weapon, justifying the detainment.<sup>215</sup> Additionally, the District Court expressed its opinion that Johnson's furtive gestures justified the detainment under *Terry*.<sup>216</sup> Finally, the court rejected Johnson's argument that the NTF officers went beyond the scope of what is allowable under *Terry* by acting with excessive force in relation to a parking infraction.<sup>217</sup> Johnson was sentenced to a prison term of forty-six months.<sup>218</sup>

## B. Seventh Circuit Court of Appeals' Majority Opinion

Johnson appealed the District Court's denial of his motion to suppress the evidence resulting from the NTF officer's stop.<sup>219</sup> Johnson argued that a "loading and unloading" statutory exception to the parking within fifteen feet of a crosswalk ordinance could not have been exhausted within the short amount of time between spotting the SUV the defendant was a passenger in and seizing that SUV.<sup>220</sup> This appeal was heard before a three-judge panel.<sup>221</sup> Indicative of the important nature of the question of whether a police officer may use a civil parking infraction as a pretext to seize a vehicle,<sup>222</sup> the Seventh Circuit Court of Appeals vacated the three-judge panel decision and granted a rehearing *en banc*.<sup>223</sup>

### 1. Statutory Exhaustion

Johnson argued in both the evidentiary hearing and on appeal that Wisconsin's statutory exception to the parking ordinance, which allows a driver to park within fifteen feet of the crosswalk if they are "loading or unloading or . . . receiving or discharging passengers," should have been

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<sup>214</sup> *Id.* at \*3.

<sup>215</sup> *Id.*

<sup>216</sup> *See id.* at \*3-4 (explaining that observation of Johnson's furtive gestures was sufficient for Officer Conway to develop reasonable suspicion of criminal activity).

<sup>217</sup> *See id.* at \*5.

<sup>218</sup> *Johnson*, 874 F.3d 571, 572 (7th Cir. 2017).

<sup>219</sup> *See United States v. Johnson*, 823 F.3d 408, 409 (7th Cir. 2016), *reh'g en banc granted, opinion vacated* (Aug. 8, 2016), *on reh'g en banc*, 874 F.3d 571 (7th Cir. 2017), *cert. denied*, 17-1349, 2018 WL 1470947 (U.S. Oct. 1, 2018).

<sup>220</sup> *See id.*

<sup>221</sup> *See generally Johnson*, 823 F.3d 408 (7th Cir. 2016).

<sup>222</sup> *See Indraneel Sur, How Far Do Voices Carry: Dissents from Denial of Rehearing En Banc*, 2006 Wis. L. REV. 1315, 1323-25 (2006) (explaining that Federal Rule of Appellate Procedure 35 deems an en banc rehearing appropriate only when it would "secure or maintain uniformity of the court's decisions," or when there is a legal question of "exceptional circumstance," and, as such, en banc rehearsals are exceedingly rare).

<sup>223</sup> *See Johnson*, 874 F.3d at 572.

exhausted by the officer.<sup>224</sup> Johnson further argued that Wisconsin state courts would hold that a driver parking a car to run into a store to buy something would fall within that exception.<sup>225</sup>

The court chose not to address the issue of state law statutory interpretation as to whether the exception would apply to a driver inside of a store.<sup>226</sup> Instead, the court held that an officer with reasonable suspicion of parking violation was allowed to approach that vehicle and did not need to resolve any possible statutory exceptions.<sup>227</sup> The court explained that police officers with probable cause can issue parking tickets and make arrests, and that it is the job of the judiciary to decide the merits of any affirmative defenses or exceptions.<sup>228</sup> The court noted that traffic enforcement officers routinely exercise discretion in deciding whether to approach parked vehicles.<sup>229</sup> The court held that the Fourth Amendment only requires that a seizure of a vehicle be reasonable—not that the seizing officer make determinations as to whether statutory exceptions exist.<sup>230</sup>

## 2. Applying *Whren* to Parking Infractions

The District Court, in denying Johnson’s motion to suppress the firearm as evidence, held that *Whren* made any ulterior motives by the NTF officers irrelevant to a Fourth Amendment analysis of the reasonability of a seizure.<sup>231</sup> Johnson argued that there is an inherent legal distinction between a “moving” and “nonmoving” violation and that the holding in *Whren* should not apply to nonmoving violations such as parking violations.<sup>232</sup> Johnson also asserted the NTF officers had very little interest in actually enforcing a parking violation, but rather were using it as pretext to investigate an underlying ulterior motive.<sup>233</sup>

Noting that under *Whren*, reasonable suspicion of even minor traffic violations can justify a Fourth Amendment seizure and the reasonability standard of a Fourth Amendment seizure is a purely objective one, the court held the *Whren* standard was generally applicable to all traffic violations.<sup>234</sup> The court also noted that the Seventh Circuit had already decided that *Whren*

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<sup>224</sup> *Id.* at 573.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.* (finding, presumably, that it would be inappropriate to give construction to a state statute in a case involving a violation of a federal firearm statute).

<sup>227</sup> *Id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

<sup>230</sup> *See id.*

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.* at 573–74.

applied to nonmoving traffic violations and that the Circuits are in agreement on this issue.<sup>235</sup> The court noted that if they were to accept Johnson's moving-nonmoving distinction, it would be easier to deem the NTF's seizure in Johnson's case reasonable as the seizure of a moving vehicle is more intrusive.<sup>236</sup>

### C. Hamilton's Dissent

Judge Hamilton noted the seizure of the vehicle Johnson was a passenger in, and of Johnson's person, was conducted using what seems to be inherently unreasonable methods.<sup>237</sup> Five NTF officers split between two squad cars, with bright lights shining into the vehicle, suddenly pulled up behind the parked SUV before any observation of Johnson's furtive physical movements<sup>238</sup>—this Fourth Amendment seizure of two passengers of an idling vehicle outside of store was inherently unreasonable for several reasons.<sup>239</sup>

#### 1. *The Inherent Unreasonableness of the Seizure*

First, the court failed to balance the State's interest in enforcing parking violations against the character of the Fourth Amendment seizure.<sup>240</sup> A comparable balance between the right to privacy and effective police enforcement was used in *Terry*.<sup>241</sup> However, investigative *Terry* stops should only be applied when the suspected offense is a serious one.<sup>242</sup> The state interest in enforcing a rule that prevents vehicles from parking too close to a crosswalk would have far less weight when balanced against the seizure of Johnson in this case.<sup>243</sup>

Judge Hamilton pointed to the circumstances that contributed to the seizure's inherently unreasonable nature.<sup>244</sup> The NTF officers testified they were essentially on a fishing trip for small infractions to establish probable cause to perform investigatory searches in a crime stricken, low-income

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<sup>235</sup> See *id.* at 574 (“We assumed in *United States v. Shields*, 789 F.3d 733, 744–46 (7th Cir. 2015), that *Whren* applies to parked as well as moving vehicles, and to parking violations as well as moving violations. Every other circuit that has addressed the issue expressly has so held.”).

<sup>236</sup> See *id.*

<sup>237</sup> See *Johnson*, 874 F.3d 571, 575 (7th Cir. 2017) (Hamilton, J., dissenting).

<sup>238</sup> See *id.*

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* at 576 (Hamilton, J., dissenting).

<sup>241</sup> See *id.*

<sup>242</sup> See *id.* (citing Wayne R. LaFare's seminal “Search and Seizure”).

<sup>243</sup> See *id.* (explaining that the enforcement of parking violations pales in comparison to the intrusive nature of the seizure in question).

<sup>244</sup> See *id.*

Milwaukee neighborhood.<sup>245</sup> The scene was a dreary winter night in the predominately African-American Arlington Heights neighborhood.<sup>246</sup> The temperature was subfreezing, eight inches of snow on the ground, the streets were desolate.<sup>247</sup> The five officers made a split-second decision to seize a car that may or may not have been illegally parked.<sup>248</sup> In Judge Hamilton’s opinion, these facts show that the seizure was unreasonable.<sup>249</sup>

## 2. “*Parking While Black*”

Judge Hamilton argued there are two grounds for reversal of the District Court’s denial of Johnson’s motion to suppress the firearm as evidence.<sup>250</sup> The narrower ground is that the seizure in question was inherently unreasonable.<sup>251</sup> The broader doctrinal ground is that the combination of *Terry* and *Whren* should not be applied to parking violations as it undermines the core of Fourth Amendment seizures—reasonableness.<sup>252</sup>

Citing a string of Supreme Court cases, Judge Hamilton argued precedent has facilitated the introduction of aggressive police tactics.<sup>253</sup> This precedential string has reduced the Fourth Amendment to offer virtually no protection to drivers on public roadways.<sup>254</sup> Police officers may pull drivers over if they have probable cause for even the most minor of traffic violations.<sup>255</sup> After the officer has made the stop, they can order everyone out of the vehicle,<sup>256</sup> many times find justification to frisk them,<sup>257</sup> ask intimidating questions, look into the vehicles interior,<sup>258</sup> rifle through certain parts of the vehicle’s interior,<sup>259</sup> and finally detain the driver and passengers while a narcotics sniffing dog searches the vehicle.<sup>260</sup>

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<sup>245</sup> *See id.*

<sup>246</sup> *See id.*; *see also Johnson*, 874 F.3d 571, 575 (7th Cir. 2017), *petition for cert. filed*, 2018 WL 1505539 (U.S. Mar. 23, 2018) (No. 17-1349) (noting the population of the Milwaukee neighborhood of Arlington Heights is 94.1% African-American).

<sup>247</sup> *See id.*

<sup>248</sup> In light of the fact that there was eight inches of snow on the ground and that it was past 7:30 p.m. in January, one must wonder how a police officer could determine with such speed that a vehicle was parked within fifteen feet of a crosswalk that was painted on the street corner in white paint.

*See id.*

<sup>249</sup> *See id.* at 577.

<sup>250</sup> *See id.*

<sup>251</sup> *See id.*

<sup>252</sup> *See id.*

<sup>253</sup> *Id.*

<sup>254</sup> *See id.* at 577-78.

<sup>255</sup> *Id.* (citing *Whren*, 517 U.S. 806 (1996)).

<sup>256</sup> *Id.* (citing *Maryland v. Wilson*, 519 U.S. 408 (1997)).

<sup>257</sup> *Id.* (citing *Arizona v. Johnson*, 555 U.S. 323 (2009)).

<sup>258</sup> *Id.* (citing *Colorado v. Bannister*, 449 U.S. 1 (1983)).

<sup>259</sup> *Id.* (citing *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983)).

<sup>260</sup> *Id.* (citing *Illinois v. Caballes*, 543 U.S. 405, 406-08 (2005)).

According to Judge Hamilton, the tactics employed in this case would not be seen as reasonable in a more affluent part of Milwaukee.<sup>261</sup> This string of constitutional precedent has been combined to expand the concept of “driving while black” to include “parking while black.”<sup>262</sup> Finally, extending *Whren* to parking violations has the effect of it being next to impossible to limit seizures based on racial profiling justified by reasonable suspicion of a parking violation.<sup>263</sup>

### 3. *How Johnson is Distinguished From United States v. Shields*

The majority opinion declared their decision to extend *Whren* to parking violations had already been decided in *United States v. Shields*.<sup>264</sup> In *Shields*, the defendant was illegally parked and ended up running away on foot from the stopping officer.<sup>265</sup> As Judge Hamilton pointed out, the panel opinion held in that case a parking violation is sufficient for an investigatory stop, but “the real action” in *Shields* was the defendant’s giving chase on foot.<sup>266</sup> *Shields* cited to cases that held *Terry* investigative stops were allowable for parking violations, not pretextual stops under *Whren*.<sup>267</sup> Finally, at least two state supreme courts have held that investigative stops are not applicable to parking violations.<sup>268</sup>

## V. ANALYSIS

The majority’s opinion in *Johnson* produces a result in which the Fourth Amendment offers very little protection against an unreasonable search or seizure in situations when citizens are most likely to have an encounter with a suspicious police officer.<sup>269</sup> The most common criticisms of the “would have” test are that it is purely subjective or it is not effective at preventing racial profiling. This note proposes a new legal test that attempts to remedy these deficiencies and offer a more robust Fourth Amendment protection to motorists than the objective legality test offers. It would have the additional

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<sup>261</sup> *Id.* at 576.

<sup>262</sup> *Id.* at 575.

<sup>263</sup> *See id.* (explaining that it is rare to be able to prove an officer’s racial motivation).

<sup>264</sup> *Id.* at 574.

<sup>265</sup> *United States v. Shields*, 789 F.3d 733, 738 (7th Cir. 2015).

<sup>266</sup> *Johnson*, 874 F.3d 571, 579 (Hamilton, J., dissenting).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *See* PETROCELLI & PETROCELLI, *supra* note 16 (explaining that traffic violations are the most common type of law enforcement).

effect of offering the poor, who tend to share vehicles,<sup>270</sup> greater Fourth Amendment protections.

#### A. Proposal For A New Legal Test

This note proposes a new legal test to determine if a pretextual stop was unreasonable in relation to a parking violation. This test recognizes there are times when a police officer must investigate a suspiciously parked vehicle with only bare suspicion.<sup>271</sup> In some ways, this test is an amalgamation of the various state approaches to determining the reasonability of pretextual stops used prior to *Whren*. These state approaches arguably all have a common ancestor in the “reasonable officer” test. This test has five parts, explained below.

##### 1. Reasonable Investigation of Statutory Exceptions

The first step is an inquiry into whether the stopping officer made a reasonable inquiry into possible statutory exceptions. It does not require that an officer exhaust all possible exceptions to a parking violation or consider possible affirmative defenses. Rather, it requires an officer to spend more than a split-second to determine that a parking violation has occurred. For example, if an officer sees a vehicle parked in a handicap parking space but cannot see if there is a valid permit hanging from the vehicles rear view mirror, the court would inquire whether the officer made a reasonable effort to see if there was a permit. Under the holding in *Johnson*, an officer could pull up behind a car in a handicap parking space and seize the vehicle’s occupants, even if the vehicle was legally parked in the handicap space. As Judge Hamilton points out in his dissent, an investigative stop can be justified by an officer’s mistake of fact or law.<sup>272</sup>

##### 2. Would a Reasonable Officer Have Made the Seizure?

This step of the test essentially adopts the “reasonable officer” test. The “reasonable officer” tests inclusion in this proposed test offers the benefit of what its proponents always claimed: it’s a reasonable limit on discretionary

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<sup>270</sup> See Federal Highway Administration, *Mobility Challenges for Households in Poverty*, <https://nhts.ornl.gov/briefs/PovertyBrief.pdf> (those stricken with poverty tend to have less vehicles per household and high vehicle occupancy rates).

<sup>271</sup> In Judge Hamilton’s dissent in *United States v. Johnson*, he offers the scenario of a suspicious van parked in front of a federal building. This example is likely drawn upon past attempts of domestic terrorism. This note’s proposed legal tests seeks to allow police a certain amount of discretion when a exigent threat to public safety exists.

<sup>272</sup> *Johnson*, 874 F.3d at 578 (Hamilton, J., dissenting).

power of police officers.<sup>273</sup> This step is limited and addresses criticism of the “reasonable officer” test. This note does not intend for any of the factors of the proposed test to be dispositive. The other factors in this test limit this inquiry and do not give the “reasonable officer” inquiry as much weight as when it was the sole inquiry used by some courts. The best critique of this step of the test is that courts refuse to look into a police officer’s subjective intention.<sup>274</sup> This criticism is easily rebutted by pointing out that there are circumstances when courts look to an officer’s subjective intent: administrative inspections,<sup>275</sup> checkpoints,<sup>276</sup> and in the case of an unlawful search and seizure.<sup>277</sup> This would be another limited exception when considering the officer’s subjective intentions.

### 3. *More Than Bare Suspicion of a Class of Crimes*

This step seeks to ask whether the officer had something more than bare suspicion of a general class of criminal behavior, such as intoxicated driving or narcotics possession. Of course, the stopping officer would still need reasonable suspicion of a parking violation. This step allows the court leeway to develop a standard that is somewhere between probable cause and bare suspicion. Perhaps most courts would adopt the reasonable suspicion standard.

### 4. *Tangential Relation*

The fourth step seeks to inquire whether the officer’s suspicion of the underlying crime is at least tangentially related to the parking violation. This inquiry is similar to the test found in *State of Hawaii v. Bolosan*.<sup>278</sup> This step serves the twin purposes of insuring necessary and important divisions of police departments, such as the NTF in *Johnson*, are not using parking

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<sup>273</sup> PADULA, *supra* note 37, at 167.

<sup>274</sup> See generally *Whren*, 517 U.S. 806 (1996).

<sup>275</sup> See *New York v. Burger*, 482 U.S. 691, 725 (1987) (holding administrative searches cannot be a pretext for a general search for incriminating evidence).

<sup>276</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding motorist checkpoints cannot be for the purpose of general crime investigation).

<sup>277</sup> When determining if evidence connected to an unlawful search or seizure should be inadmissible, courts look to the officer’s purpose in effectuating the unlawful conduct. See *Utah v. Strieff*, 136 S. Ct. 2056, 2062 (2016).

<sup>278</sup> *State v. Bolosan*, 890 P.2d 673, 681 (Ha. 1995) (“Therefore, we hold that an investigative stop can be justified based on an objectively reasonable suspicion of any offense, provided that the offense for which reasonable suspicion exists is related to the offense articulated by the officer involved. Offenses are related when the conduct that gave rise to the suspicion that was not objectively reasonable with respect to the articulated offense could, in the eyes of a similarly situated reasonable officer, also have given rise to an objectively reasonable suspicion with respect to the justifiable offense.”).



violations as pretexts to investigate mere hunches that prove to be inaccurate and offering more Fourth Amendment protection to persons in a parked vehicle.

### 5. *Aggravating Circumstances*

This step of the test asks if there were aggravating circumstances that would give the officer more than bare suspicion of a crime. As an example of an aggravating circumstance: a vehicle is double parked outside of liquor store late at night, with the driver door ajar. These circumstances would give the officer more than bare suspicion that the driver committed the crime of driving intoxicated.

### B. The Test Applied

This test was designed with cases like *Johnson* in mind—that is, a parking violation that triggers a pretextual investigative stop. However, each inquiry is not intended to be dispositive, nor do all factors need to be proved or disproved. Rather, the inquiries serve as factors to consider in determining if a pretextual stop is unreasonable. Perhaps some courts would give more weight to one of the test’s inquiries, while other courts would take a more holistic approach.

To better understand how the test this note proposes would work, it will be applied to a factual scenario from a recent federal criminal case involving a pretextual stop. This note concludes that the investigative stops from both *Whren* and *Johnson* would be seen as unreasonable.

#### 1. *The Test Applied to Whren*

In *Whren* there was no reasonable investigation of possible statutory exceptions; what caught the officer’s attention in the first place was the defendant’s sitting at a stop sign for more than twenty seconds.<sup>279</sup> It is hard to argue there is no legitimate reason for stopping at a stop sign for more than twenty seconds. Perhaps an officer could reasonably exhaust all statutory exceptions for failure to signal (as the defendant in *Whren* had failed to do)<sup>280</sup> in a split second, but what drew the defendants to their attention in the first place appears to be two black youths stopped at an intersection for what they felt was an unreasonable amount of time.<sup>281</sup> It appears the officers only had a bare suspicion of some drug related activity due to the fact they were in an

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<sup>279</sup> *Whren*, 517 U.S. 806, 808 (1996).

<sup>280</sup> *Id.* at 808-10.

<sup>281</sup> *Id.* at 808.

area known for drug crimes.<sup>282</sup> The easiest step of the proposed test to satisfy is the tangential relationship—in *Whren* the officers could have said they believed the suspect was under the influence of narcotics, causing him to stop for an extended length of time at the intersection. With a lack of any aggravating circumstances,<sup>283</sup> and several other factors met, the facts in *Whren* would lead the court to determine that the seizure was unreasonable.

## 2. *The Test Applied to Johnson*

*Johnson* seems to be a much easier case to resolve under this note's proposed test. The officers seized a parked vehicle on first sight,<sup>284</sup> leaving no time to reasonably exhaust any statutory exceptions. It's hard to see how anyone could even notice that a vehicle is parked too close to a crosswalk given the amount of snow that was on the ground.<sup>285</sup> The officers' actions arguably fail the reasonable officer inquiry as well. A reasonable officer would not seize a car parked outside of a store on a cold and dreary winter night. It would be reasonable to assume the occupants were waiting in the car while the driver was in the store. The officers only had bare suspicion of some criminal activity. No facts can be reasonably articulated that show a reasonable suspicion that the defendant was in possession of a weapon or drugs before the initial seizure was made. Nor can it be said that possession of a weapon or drugs is even remotely related to a minor parking violation. Even if the defendant was in an illegally parked vehicle, that is not enough of an aggravating circumstance that would show a reasonable suspicion of criminal activity. Under the proposed test, it seems clear that the seizure in *Johnson* was unreasonable.

Critics of this note's proposed test would likely argue that the test would allow "soft on crime judges" to find more Fourth Amendment violations by police officers against obviously guilty defendants.<sup>286</sup> There are three responses to this argument. First, politicians would not allow such judicial

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<sup>282</sup> *Id.*

<sup>283</sup> One could argue that the driver looking down into the lap of the other passenger could qualify as an aggravating circumstance under the proposed test, but it seems there could be many more legitimate reasons for looking down into the lap of a passenger than there are nefarious reasons. *See Whren*, 517 U.S. 806, 808 (1996).

<sup>284</sup> *Johnson*, 874 F.3d at 576 (Hamilton, J., dissenting).

<sup>285</sup> *See id.*

<sup>286</sup> In 1996 Federal District Judge Harold Baer, Jr. held a defendant's Fourth Amendment rights were violated and excluded thirty-six kilograms of narcotics as evidence. The political backlash was so strong and from such high authorities as the President, that Judge Baer reopened the case and reversed his ruling on the motion to suppress the evidence. *See* John B. Owens, *Judge Baer and the Politics of the Fourth Amendment: An Alternative to Bad Man Jurisprudence*, 8 Stan. L. & POLICY REV. 189 (1997).

activism.<sup>287</sup> Second, it has been argued that the second prong of the proposed test, the reasonable officer inquiry, likely does not lead to courts finding more Fourth Amendment violations.<sup>288</sup> And finally, as cases like *United States v. Herrera* show, careful police work and avoidance of split-second decisions can lead to convictions of major drug distributors, even under the proposed test.

### 3. *The Test Applied to United States v. Herrera*

The Drug Enforcement Agency (“the investigators”) had been investigating a suspected drug distribution ring in the greater Boston area.<sup>289</sup> The investigators observed the defendant leave a residence they had been surveying as part of the overall investigation.<sup>290</sup> The investigators then radioed Massachusetts State Police Sergeant James Bazzinotti (“Sgt. Bazzinotti”), instructing Sgt. Bazzinotti to conduct a traffic stop of the vehicle. Sgt. Bazzinotti tailed the vehicle until witnessing the vehicle strike a curb, giving Sgt. Bazzinotti reasonable suspicion to conduct a traffic stop.<sup>291</sup> The defendant was ultimately arrested for possession of heroin that was discovered in the vehicle and was issued a written warning for the traffic violation.<sup>292</sup>

The first step of this note’s proposed test is to inquire whether there was a reasonable investigation of statutory exceptions. While this step is mostly designed to be applied to parking violation scenarios, it could easily be applied to moving violations as well. For example, if a car that is part of a funeral procession ignores a traffic signal but is statutorily allowed to do so. In the *Herrera* case, it is unlikely any statutory exception exists for striking a curb. As such, Sgt. Bazzinotti could have exhausted all possible statutory exceptions rather quickly.

The second, and perhaps most interesting, step is to ask if Sgt. Bazzinotti’s traffic stop would have been conducted by a reasonable officer in similar circumstances. It is unknown if Sgt. Bazzinotti is part of a drug interdiction task force or if his regular duties are to enforce the state’s traffic laws. This scenario presents an interesting question: would a reasonable officer, on a routine traffic patrol, follow instructions handed down from a federal agent via radio? It is safe to assume, however, because of the close

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<sup>287</sup> Judge Baer’s decision to exclude 36 kilograms of narcotics because of an unreasonable stop was derided by members of both political parties and the President. See generally John B. Owens, *Judge Baer and the Politics of the Fourth Amendment: An Alternative to Bad Man Jurisprudence*, 8 STAN. L. & POL’Y REV. 189 (1997).

<sup>288</sup> See Lawton, *supra* note 37, at 957.

<sup>289</sup> *United States v. Herrera*, 17-CR-10112-ADB, 2018 WL 1020112, at \*1 (D. Mass. Feb. 22, 2018).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at \*2.

proximity of Sgt. Bizzanotti to the house being surveilled, that he was working with the investigators.<sup>293</sup> As such, a reasonable officer in Sgt. Bizzanotti's position would have conducted the stop.

The third step requires Sgt. Bizzanotti to have more than bare suspicion that the defendant in the vehicle is involved in drug distribution. This third step is easily satisfied, as Sgt. Bizzanotti could have easily met the first prong of the *Terry* test by pointing to the fact that the investigators were surveilling the house and gave him detailed instructions of which car to pull over.<sup>294</sup>

The fourth step could be easily satisfied by Sgt. Bizzanotti explaining that the investigators told him to conduct a traffic stop of a person believed to be involved in a dangerous drug ring. Once Sgt. Bizzanotti saw the defendant strike the curb, it is reasonable to believe the driver either realized he was being followed by Sgt. Bizzanotti or was attempting to conceal narcotics or weapons, and then struck a curb as a result. The tangential relationship inquiry would be satisfied.

Sgt. Bizzanotti could articulate that the defendant left a house which federal agents suspected of being involved in a major drug distribution ring as an aggravating circumstance, which would allow him to formulate a reasonable suspicion of criminal activity.

*United States v. Herrera* proves that these factors are flexible enough to provide sufficient Fourth Amendment protections to motorists from clearly unreasonable seizures and allow police officers to perform their duties.

### C. A Reasonable Expectation of Privacy in Automobiles

Vehicles have never quite received the same protections against unreasonable search and seizures as homes and domiciles have.<sup>295</sup> This distinction is partly attributable to the early republic viewing the domicile as sacrosanct<sup>296</sup> and partly because of the legitimate state interest in regulating an inherently dangerous activity. Considering the continuous growth of the automobile as the dominant form of transportation in the United States,<sup>297</sup> and the fact that motorists can get arrested for even the most minor of traffic

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<sup>293</sup> See *id.* at \*1.

<sup>294</sup> See *Terry*, 392 U.S. at 19-22 (1967) (noting that for a seizure to be reasonable, the officer must point to articulable facts that demonstrates a reasonable suspicion).

<sup>295</sup> See *Opperman*, 428 U.S. at 367 (“[W]arrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not.”).

<sup>296</sup> See *Payton v. New York*, 445 U.S. 573, 601 (1980).

<sup>297</sup> See Federal Highway Administration, *Summary of Travel Trends, 2017 National Household Travel Survey*, 11 [https://nhts.ornl.gov/assets/2017\\_nhts\\_summary\\_travel\\_trends.pdf](https://nhts.ornl.gov/assets/2017_nhts_summary_travel_trends.pdf) (showing a continuous growth in not only the number of vehicles but also drivers).

violations,<sup>298</sup> robust Fourth Amendment protections when behind the wheel only seem logical.

The expanding prevalence of automobiles and the growth of aggressive traffic enforcement tactics<sup>299</sup> is starting to chip away at the justifications for the hardline distinction between homes and automobiles—particularly when the vehicle is parked. A result of the vehicle-domicile distinction is that the poor spend more time in a circumstance in which the right to be free from unreasonable searches and seizures is reduced.<sup>300</sup> This also begs the question of whether the vehicle-domicile distinction creates an Equal Protection violation.<sup>301</sup> As noted in Judge Hamilton’s *Johnson* dissent, the legitimate state interest in enforcing parking violations seems to lose its importance when weighed against the privacy invasions, the circumstances, and police tactics exemplified in *Johnson*.<sup>302</sup>

The Supreme Court has recognized the common-sense notion that we have a reasonable expectation of privacy in smart phones.<sup>303</sup> Smart phones can reveal so much about the most personal and intimate details of our lives.<sup>304</sup> With the number of connected cars (cars which are connected to the internet and have built-in interfaces similar to smartphones) expected to explode in the future,<sup>305</sup> a level of privacy in our cars equal to the level of

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<sup>298</sup> See Lewis R. Katz, “Lonesome Road”: *Driving Without the Fourth Amendment*, 36 SEATTLE U.L. REV. 1413, 1414 (2013); see also *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (petitioner was arrested and booked for a seatbelt violation).

<sup>299</sup> See Katz, *supra* note 298, at 1433 (“Thirty years ago, I laughed when young police officers attending police training programs offered at our law school boasted to me that they could stop every car legally for at least ten traffic violations. I am not laughing any longer.”).

<sup>300</sup> In at least one American city, New York City, the poor have a larger radius of travel than highest income earners. It is reasonable to infer that the poor spend more time in a situation in which the Fourth Amendment offers less protections. See Federal Highway Administration, *Mobility Challenges for Households in Poverty*, <https://nhts.ornl.gov/briefs/PovertyBrief.pdf>; see also *supra* note 16 and accompanying text.

<sup>301</sup> Courts have largely denied motions to suppress evidence when the defendant’s argument is based on a violation of the Fourteenth Amendment’s Equal Protection Clause. See Katz, *supra* note 298, at 1423–32.

<sup>302</sup> This note concedes the enforcement of parking violations is a legitimate state interest. However, the realization of the interest should come from police officers who have a mission to enforce more serious crimes such as narcotics, weapon violations, and violent crime. As noted in an amicus brief from Howard University School of Law, Civil and Human Rights Clinic, relatively little public danger, if any, ever results from a parking violation. See Brief for Howard University School of Law as Amici Curiae Supporting Petitioner, *Johnson v. United States*, 2018 WL 1910945 (Apr. 23, 2018) (No. 17-1349).

<sup>303</sup> See generally *Riley v. California*, 573 U.S. 373 (2014).

<sup>304</sup> See *id.* at 394.

<sup>305</sup> See Niall McCarthy, *Connected Cars By The Numbers*, FORBES (Jan. 27, 2015, 9:43 AM), <https://www.forbes.com/sites/niallmccarthy/2015/01/27/connected-cars-by-the-numbers-info-graphic/#771e906d1028>.

privacy in smartphones would be more consistent with Fourth Amendment jurisprudence.<sup>306</sup>

The majority in *Johnson* argued that if they accepted Johnson's argument that there is a distinction between moving and nonmoving vehicles, it would have been easier to deem the NTF officer's seizure reasonable.<sup>307</sup> This argument is confusing at best. Because of the inherent danger involved to public safety, there is a greater state interest in regulating moving vehicles than regulating parked vehicles. Since parking enforcement is a lesser state interest than moving traffic enforcement, the Fourth Amendment should offer more robust protections against unreasonable search and seizures to situations involving occupants of parked vehicles.

## VI. CONCLUSION

The majority opinion in *Johnson* is yet another nail in the coffin of protections against unreasonable search and seizures of vehicles. The holding in *Johnson* has the effect of allowing police officers to seize any person sitting in a parked car—whether the car is parked legally or not. As noted by Judge Hamilton in his *Johnson* dissent, the Supreme Court has not held the *Whren* rule applies to parked cars. On October 1, 2018, in perhaps the one of the most devastating blows to Fourth Amendment protections for motorists, the Supreme Court declined to grant Johnson's certiorari petition.<sup>308</sup>

Under *Johnson*, a motorist can pull into a metered parking space, begin searching in their car for change to put into the meter, and end up being seized by the police because the meter was expired and the act of looking for meter change could be interpreted by the officer as furtive behavior.<sup>309</sup> It is hard to argue that this example (and the seizure in *Johnson*) would be seen as reasonable under the Fourth Amendment if it happened regularly in more affluent neighborhoods.

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<sup>306</sup> Even complex digital data only accessible by a third party has been held to have a higher expectation of privacy than cars. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding police generally need a warrant backed by probable cause to access cell-site location information held by cell phone carriers).

<sup>307</sup> See *Johnson*, 874 F.3d at 574.

<sup>308</sup> *Johnson*, 874 F.3d 571 (7th Cir. 2017), cert. denied, 139 S. Ct. 58 (mem.) (U.S. Oct. 1, 2018) (No. 17-1349).

<sup>309</sup> This example was argued by an amicus curiae brief submitted to the Court by a group of Fourth Amendment scholars. See Brief for Howard University School of Law as Amici Curiae Supporting Petitioner, *Johnson v. United States*, 2018 WL 1910945 (Apr. 23, 2018) (No. 17-1349).