UNREASONABLE TRAFFIC STOPS

SAM KAMIN*

ABSTRACT

In 1996, the Supreme Court announced in Whren v. United States *that a traffic stop is constitutional if there is probable cause to believe a traffic infraction has occurred. So long as the officers who stop an individual can point—even after the fact—to any violation of the traffic laws, their actual, subjective motivations for initiating a stop are legally irrelevant. Case-by-case determination of reasonableness is unnecessary in the traffic stop context, the Court concluded, because the balancing of interests has already been done. Unlike warrantless entries into homes, the use of deadly force, or unannounced warranted entries, a traffic stop is not an "extreme practice," and therefore the existence of probable cause invariably outweighs an individual's interest in avoiding police contact.*

In this Article, I argue that the Court was half right in Whren*: there is little need for case-by-case adjudication of the reasonableness of traffic stops. Given that the government interest in these stops is relatively low, that such stops can result in harm to both the officer and those stopped, and that other, less intrusive means are nearly always available to serve the government's stated interest in traffic enforcement, courts should presume that the use of sworn officers to conduct traffic stops is unreasonable. While there may be some situations in which the use of armed police officers to make traffic stops is reasonable, the government should bear the burden of demonstrating that fact in each individual case. This straightforward legal*

* Chauncey G. Wilson Memorial Research Chair, University of Denver Sturm College of Law. The author would like to thank G. Jack Chin, Nancy Leong, Laurent Sacharoff, Christopher Slobogin, and the participants at the Southwest Criminal Law and Vanderbilt Works-In-Progress Symposia. All errors and omissions are the responsibility of the author alone.

change would significantly reduce needless police stops, thereby increasing overall safety for both officers and the public.

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INTRODUCTION

On January 7, 2023, six members of the Memphis Police Department stopped Tyre Nichols, 29, on suspicion of reckless driving.[1] Three days later, Nichols was dead, the result of a savage beating at the hands of the officers.[2] While much of the attention that followed this incident rightly focused on the officers' extraordinarily violent conduct—for which they were fired and five later charged with second-degree murder—many also questioned why Nichols was stopped in the first place.[3]

From a legal point of view, however, it does not particularly matter why the officers stopped Nichols. Maybe they wanted to obtain consent to search his car. Maybe they wanted to do a warrants check on him. Maybe they thought someone who looked like him was in the wrong part of town at the wrong time of day. The Supreme Court announced in *Whren v. United States* that the sole criterion for evaluating the commencement of a traffic stop is the existence of probable cause to believe a traffic infraction had occurred.[4] So long as the officers who stopped Tyre Nichols were able to point, even after the fact, to any violation of the traffic laws, their actual, subjective motivations for initiating the stop were legally irrelevant.[5] Case-by-case determination of reasonableness is unnecessary in the traffic stop context, the Court announced, because the balancing of interests has already been done.[6] Unlike warrantless entries into homes, the use of deadly force, or unannounced warranted entries, a traffic stop "does not remotely qualify

1. Rick Rojas, Neelam Bohra, Eliza Fawcett & Emily Cochrane, *What We Know About Tyre Nichols's Lethal Encounter with Memphis Police*, N.Y. TIMES (Sept. 12, 2023), https://www.nytimes.com/article/tyre-nichols-memphis-police-dead.html [https://perma.cc/7EBN-FZ88].

2. *Id.*

3. *See id.*

4. 517 U.S. 806, 819 (1996). The Court has also said that a stop must be valid both at its inception and in its scope. So, while probable cause is the sole test for whether the police may *initiate* a traffic stop, a stop may still violate the Constitution if it continues for too long or is too invasive. *See infra* Part I.B.

5. *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (holding that the announced reason for an arrest is irrelevant so long as probable cause with regard to some crime did in fact support the arrest).

6. *See Whren*, 517 U.S. at 817-19.

as ... an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[7]

In this Article, I will argue that the Court was half right in *Whren*: there *is* little need for case-by-case adjudication of the reasonableness of traffic stops. Given that the government interest in these stops is relatively low, that such stops pose a threat to both the officer and particularly to those stopped, and that other, less-intrusive means are nearly always available to serve the government's stated interest in traffic enforcement, courts should presume that the use of armed, sworn officers to conduct traffic stops is unreasonable.[8] There may in fact be cases where the use of sworn officers to effect stops to enforce the traffic laws is reasonable, but the burden should be on the government to persuade a court of that fact. This straightforward legal change would likely significantly reduce needless police stops, thereby increasing safety for both officers and the public at very little cost in terms of public safety.

This Article proceeds as follows. Part I begins by examining the reality of traffic stops in the United States today and the constitutional law that currently governs those stops. I show that traffic stops are frequent,[9] disproportionately impact communities of color,[10] often arise from a desire to increase revenue,[11] and are perceived by law enforcement as the most dangerous part of their

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7. *Id.* at 818.

8. The Bureau of Justice Statistics defines "sworn officers" as those authorized to arrest. *See* Bureau of Just. Stat., *Glossary*, U.S. DEP'T OF JUST., https://bjs.ojp.gov/glossary?page=9#glossary-terms-block-1-whw1p81svq11v0je [https://perma.cc/A2ES-Y6EL].

9. *See, e.g.*, STANFORD OPEN POLICING PROJECT, *Findings*, STAN. UNIV., https://openpolicing.stanford.edu/findings [https://perma.cc/N69B-2M9S] ("Police pull over more than 50,000 drivers on a typical day, more than 20 million motorists every year."); *see infra* Part I.A.1.

10. STANFORD OPEN POLICING PROJECT, *supra* note 9 (describing the complication of determining whether people of color are stopped a disproportionate amount and concluding "[t]he project has found significant racial disparities in policing. These disparities can occur for many reasons: differences in driving behavior, to name one. But, in some cases, we find evidence that bias also plays a role."); *infra* Part I.A.2.

11. *See, e.g.*, Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), https://nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/YUX6-3MG2] ("A hidden scaffolding of financial incentives underpins the policing of motorists in the United States, encouraging some communities to essentially repurpose armed officers as revenue agents searching for infractions largely unrelated to public safety."); *infra* Part I.A.2.

job.[12] Nonetheless, the Supreme Court has adopted a deferential review of these interactions, manifesting a steadfast unwillingness to scrutinize the decision to initiate such stops. The Court has forgiven law enforcement officials for getting substantive traffic laws wrong,[13] for arresting individuals for non-jailable offenses,[14] and even for arresting for offenses when the underlying statute does not authorize arrest,[15] so long as a reasonable officer would have believed that probable cause existed at the time the arrest was made.

Next, Part II argues that even if judicial deference to the decision to stop an individual could have been justified in the past, it cannot be today. While it may once have been true that the only effective way for a state to enforce its traffic laws was for a police officer to make a seizure of an individual to investigate on the scene, that is no longer the case. First, a number of jurisdictions have de-emphasized traffic enforcement entirely, announcing that some infractions will no longer be an appropriate basis for a traffic stop.[16] This de-emphasizing of traffic enforcement cuts against the argument that police traffic stops are necessary to either ensure traffic safety or reduce crime more generally. Second, much of traffic enforcement can be, and to an extent already has been, automated. Red light cameras and photo radar stations currently issue citations or their equivalent without requiring the presence and participation of a

12. *See, e.g.*, Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 638 (2019) ("Police academies regularly show officer trainees videos of the most extreme cases of violence against officers during routine traffic stops in order to stress that mundane police work can quickly turn into a deadly situation if they become complacent on the scene or hesitate to use force."); *infra* Part I.A.3.

13. *See, e.g.*, Heien v. North Carolina, 574 U.S. 54, 57 (2014) (holding that the stop of defendant's car was reasonable under the Fourth Amendment where the officer reasonably, though wrongfully, believed that state law required two working brake lights).

14. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 354-55 (2001) (holding that a full custodial arrest for violation of a state seat belt ordinance was reasonable, even though conviction for the offense would support no more than a fine).

15. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 176 (2008) (holding that arrest was not a violation of the Fourth Amendment even where state law stated that the relevant infraction could be dealt with only by citation).

16. *See, e.g.*, Jill Cowan, *Berkeley Moves Closer to Ending Police Traffic Stops*, N.Y. TIMES (Oct. 31, 2021, 4:52 PM), https://www.nytimes.com/2021/02/24/us/berkeley-police.html [https://perma.cc/ JHP5-MK2Z]; *Philadelphia Bans Traffic Stops for Minor Infractions*, ASSOC. PRESS (Feb. 25, 2022), https://apnews.com/article/philadelphia-gun-politics-jim-kenney-3303e90208819de3394773c60c2815aa [https://perma.cc/7AHQ-ZC7X].

sworn officer or the indignity, peril, and personal intrusion of a physical stop.[17] Third, a number of jurisdictions are beginning to shift primary responsibility for the enforcement of traffic laws way from their regular police forces.[18] Thus, while it is indisputable that the government has a valid safety interest in enforcing its traffic laws, it does not necessarily follow that that work requires officers who carry guns, are charged with the enforcement of the criminal law, and have the authority to arrest. Increasingly, jurisdictions are demonstrating that effective law enforcement can be carried out without police-effectuated traffic stops.

Putting these pieces together—the dangers inherent in traffic stops, traffic stops' significant intrusion upon individual liberty, and the ready availability of alternatives that are both less intrusive to the public and at least as effective in serving public safety interests—Part III argues that the continued use of sworn officers to enforce traffic laws should be deemed presumptively unreasonable and thus unconstitutional. I do not argue that every stop by a sworn officer for the sole, or stated, purpose of enforcing traffic laws is unconstitutional. There may well be situations— reckless driving, impaired driving, flight, and so on—where an immediate threat to the public justifies a physical seizure by a sworn officer. Similarly, it may be impractical or prohibitively expensive for a particular jurisdiction to adopt the enforcement innovations described above. But the prosecution should bear the burden of justifying such intrusions in each case.

I. THE TRAFFIC STOP IN LAW AND PRACTICE

Spurred on by the Black Lives Matter protests of the last several years and attendant calls to defund the police,[19] attention has

17. *See* Sarah A. Seo, *Police Officers Shouldn't Be the Ones to Enforce Traffic Laws*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/police-daunte-wright-traffic-stops.html [https://perma.cc/Y976-BXK6].

18. *See, e.g.*, Cowan, *supra* note 16; *Philadelphia Bans Traffic Stops*, *supra* note 16; *see also infra* Part II.A.

19. *See, e.g.*, Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/8GQ5-CNKK] ("Enough. We can't reform the police. The only way to diminish police violence is to reduce contact between the public and the police."); Rashawn Ray, *What Does "Defund the Police" Mean and Does It Have Merit?*, BROOKINGS INST. (June

rightly focused of late on the traffic stop as a flashpoint of confrontation between law enforcement and the public.[20] In this Part, I discuss the practical realities of traffic stops in America in the twenty-first century, as well as the way such stops are treated by the courts.

A. The Reality of Traffic Stops

1. Ubiquity and Scope

The traffic stop is ubiquitous in American law and culture. From music,[21] to movies,[22] to television,[23] the image of a carefree drive being changed, possibly forever, when blue lights come on behind the occupants has long been a popular trope.[24] And with good

19, 2020), https://www.brookings.edu/articles/what-does-defund-the-police-mean-and-does-it-have-merit [https://perma.cc/JW9R-DHKH] ("'Defund the police' means reallocating or redirecting funding away from the police department to other government agencies funded by the local municipality. That's it. It's that simple. Defund does not mean abolish policing. And, even some who say abolish, do not necessarily mean to do away with law enforcement altogether. Rather, they want to see the rotten trees of policing chopped down and fresh roots replanted anew."); Amna A. Akbar, *How Defund and Disband Became the Demands*, N.Y. REV. BOOKS (June 15, 2020), https://www.nybooks.com/online/2020/06/15/how-defund-and-disband-became-the-demands [https://perma.cc/TM5Y-9FDN] ("The protesters are saying, loud and clear, that the only solution to the violence of policing is less policing—or maybe, none at all.").

20. *See, e.g.*, David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html [https://perma.cc/7BRS-4H2Q] ("Los Angeles last month became the biggest city to restrict the policing of minor violations. In Philadelphia, a ban on such stops has just taken effect. Pittsburgh; Seattle; Berkeley, Calif.; Lansing, Mich.; Brooklyn Center, Minn.; and the State of Virginia have all taken similar steps. Elsewhere across the country, a half-dozen prosecutors have said they will not bring charges based on evidence collected at these stops.").

21. *See* TOM PETTY AND THE HEARTBREAKERS, *Don't Pull Me Over*, *on* MOJO (Reprise Records 2010); THE PHARCYDE, *Officer*, *on* BIZARRE RIDE II THE PHARCYDE (Delicious Vinyl 1992); JAY Z, *99 Problems*, *on* THE BLACK ALBUM (Rockafella 2003).

22. *See* BRIDESMAIDS (Universal Pictures 2011); QUEEN & SLIM (Universal Pictures 2019); JINGLE ALL THE WAY (20th Century Studios 1996).

23. *See Friends* (NBC television broadcast May 10, 2001); *The Fresh Prince of Bel-Air* (NBC television broadcast Oct. 15, 1990).

24. *See generally* Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 307 (2012) ("Our fables of freedom celebrating the road contrast starkly with accounts of motorists pulled over, questioned, delayed, and ensnared in the minutiae of arcane traffic laws."); SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM 8, 10, 16 (2019) (arguing that, although the automobile is often associated in American mythos with freedom

reason: traffic stops occur in huge numbers throughout the country every day. The Stanford Open Policing Project estimates that 50,000 traffic stops occur *each day* in this country, or more than 20 million such encounters per year.[25] A 2018 Department of Justice survey of police contacts found that, among those who had experienced police-initiated interactions with law enforcement officials—as opposed to those who initiated interactions by contacting law enforcement for assistance—the overwhelming majority occurred through traffic stops: nearly seven times as many people reported being stopped in a car as opposed to on foot, and on average about one in ten adults[26] is involved in a traffic stop in a given year.[27] Traffic stops are, thus, the most common interaction between individuals and law enforcement, often setting the tone for how a person experiences the police.

As we will see in greater detail in the next Part, the Supreme Court has described these traffic stops as brief and relatively non-threatening encounters:

> The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way.[28]

And while it is true that most traffic stops are quite brief and result in either a warning or a citation, law enforcement officials can, and

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and the open road, it has served as a means for the widespread acceptance of police intervention into privacy).

25. Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 736 (2020).

26. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018—STATISTICAL TABLES (2020) (highlighting that 18,666,000 reported being a stopped driver and 5,702,600 reported being stopped as a passenger while only 3,528,100 reported being stopped on the street).

27. *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 271 (1997) ("Most Americans never have been arrested or had their homes searched by the police, but almost everyone has been pulled over.").

28. Berkemer v. McCarty, 468 U.S. 420, 437 (1984) (explaining why traffic stops are not custodial for Miranda purposes).

often do, use a traffic stop as an entrée to a more invasive interaction.[29] Officers may use traffic stops to investigate nontraffic related offenses,[30] to check for outstanding warrants,[31] or to seek consent to search individuals and their possessions.[32] So long as they do not unnecessarily prolong the interaction, officers can also walk a trained narcotics dog around a stopped car to look for drugs,[33] or require individuals to exit a car so that it (and they) can be searched for weapons based on reasonable suspicion that they are armed.[34] And, most seriously, while most traffic stops do not lead to dangerous physical altercations, a disturbing number do.[35] One study of police violence calculated that 571 Americans were killed by police officers during traffic stops between 2017 and 2021.[36]

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29. *See* Alex Chohlas-Wood, Sharad Goel, Amy Shoemaker & Ravi Shroff, *An Analysis of the Metropolitan Nashville Police Department's Traffic Stop Practices*, STAN. COMPUTATIONAL POL'Y LAB (Nov. 19, 2018), https://policylab.stanford.edu/media/nashville-traffic-stops.pdf [https://perma.cc/7VWA-3BA5] (finding that arrests were made in 3.7/1,000 traffic stops and that misdemeanor citations were issued in 47.1/1,000 traffic stops, meaning that 95 percent of those stopped were allowed to proceed with either a warning or a citation for a non-criminal offense).

30. Arizona v. Johnson, 555 U.S. 323, 333 (2009) ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").

31. *See* Rodriguez v. United States, 575 U.S. 348, 355 (2015) (explaining that during a traffic stop "[a] 'warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.'" (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(c) 507, 516 (5th ed. 2012))).

32. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973) (explaining that a search conducted pursuant to a valid consent is constitutionally permissible, "[b]ut the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force").

33. Illinois v. Caballes, 543 U.S. 405, 410 (2005) ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

34. Michigan v. Long, 463 U.S. 1032, 1049 (1983) ("[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968))).

35. *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 149-50 (2017) (using the examples of Walter Scott and Sandra Bland to demonstrate "how an ordinary traffic stop can be a gateway to extraordinary police violence").

36. *See, e.g.*, *Mapping Police Violence*, MAPPING POLICE VIOLENCE DATABASE (Sept. 15,

2. Disparate Impact and Limited Utility

Thus, traffic stops, though routine, are both an indignity in themselves[37] and create risks of more serious police involvement and physical threat to those stopped. This is particularly concerning because the evidence increasingly demonstrates that not all Americans bear the same risk of being stopped, or of having a stop turn into a more serious encounter.[38] Recent research has confirmed what many in this country have long suspected: that people of color are more likely to be stopped than are whites, and that stops involving people of color are likely to be more invasive (and dangerous) than those involving whites.[39]

For example, the same Stanford study referenced above found that Black and Hispanic drivers were both stopped more often and searched more often when they were stopped than were white drivers.[40] It is a significant leap, however, from the fact that traffic stops disproportionately impact certain subgroups of the population to a conclusion that such disparities are motivated by bias or are even inappropriate.[41] Part of the difficulty in proving racial animus

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2023), https://airtable.com/appzVzSeINK1S3EVR/shroOenW19l1m3w0H/tblxearKzw8W7ViN8 [https://perma.cc/84JS-MF4K] (finding 571 civilian deaths during traffic stops January 1st, 2017 to December 31st, 2021).

37. *See, e.g.*, CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 1 (2014). Epp and his co-authors tell the story of Joe, an African American male who describes a relatively tame and brief experience with the police. The authors note:

> The stop Joe describes in this brief narrative might appear, at first glance, to be inconsequential. Some might say it was merely a minor inconvenience in the police war on crime. The officer was professionally courteous and, in the end, issued no citation. It was all over in a few minutes. Research tells us stopped drivers are most concerned about police rudeness and sanctions, and on those dimensions, Joe could hardly have fared better. Yet Joe's response was palpable and raw. This African American was not merely annoyed or angry. He felt violated.

Id.

38. *See* Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED SCI. 1193, 1203 (2017).

39. *See id.*

40. *Id.*

41. Under the Supreme Court's test for discrimination, it is not enough to show a racially disparate impact to maintain an Equal Protection Clause violation. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

in the traffic stop context is that it is unclear what equitable policing would look like with regard to such stops.[42] If, for example, certain subgroups of the population drive more often or over greater distances than do other groups, we would expect them to be stopped at higher rates, *even if they were being selected entirely at random or using wholly permissible criteria.*[43] Furthermore, if some groups are more likely than others to commit moving violations or to have unregistered vehicles or vehicles with faulty equipment, equitable enforcement might lead to individuals in those groups being stopped more often than those in other groups even in the absence of bias.[44] This so-called baseline problem[45] is not unique to the traffic stop context: in the same way that those who study racially disparate impact in other contexts—the imposition of the death penalty, say[46]—

42. *See generally* Ravi Shroff, *Statistical Tests to Audit Investigative Stops*, 15 OHIO J. CRIM. L. 565 (2018) (discussing the various tests used to determine bias in police decisions to stop). *See, e.g.*, Jeffery Grogger & Greg Ridgeway, *Testing for Racial Profiling in Traffic Stops from Behind a Veil of Darkness*, 101 J. AM. STAT. ASS'N 878, 878 (2006) ("Many researchers suggest that a difference between the racial distribution of persons stopped by police and the racial distribution of the population at risk of being stopped would constitute evidence of the existence of racial profiling.... This implicit definition reveals the key empirical problem in testing for racial profiling: measuring the risk set, or the 'benchmark,' against which to compare the racial distribution of traffic stops.").

43. *See, e.g.*, Pierson et al., *supra* note 25, at 737 ("These numbers are a starting point for understanding racial disparities in traffic stops, but they do not, per se, provide strong evidence of racially disparate treatment. In particular, per-capita stop rates do not account for possible race-specific differences in driving behaviour, including amount of time spent on the road and adherence to traffic laws. For example, if black drivers, hypothetically, spend more time on the road than white drivers, that could explain the higher stop rates we see for the former, even in the absence of discrimination."); *see also* Grogger & Ridgeway, *supra* note 42, at 878 ("Measuring the risk set explicitly poses a number of problems. First, the race distribution of drivers within a jurisdiction may differ from the race distribution of the residential population, because car ownership and travel patterns may vary by race. They also may differ because part of the driving population originates outside of the jurisdiction. Furthermore, the race distribution of the at-risk population may differ even from that of the driving population if drivers of different races differ in their driving behavior, that is, if they commit traffic offenses at different rates. Finally, the at-risk population may vary due to differences in exposure to police, even when controlling for driving behavior.").

44. *See* Grogger & Ridgeway, *supra* note 42, at 878.

45. *See generally* Ole R. Holsti, *The Baseline Problem in Statistics: Examples from Studies of American Public Policy*, 37 J. POL. 187 (1975).

46. *See, e.g.*, David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-*Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1656 (1998) ("[S]ome occasionally offer evidence that blacks constitute thirteen percent of the national population, but forty-one percent of the nationwide death row population, to

need to eliminate other, permissible, explanations for seemingly inequitable outcomes before concluding that race was a motivating factor in official conduct, so here it is important to consider what a fair distribution of traffic stops would look like.[47]

Although my arguments in this Article do not rely on convincing the reader that disparities in the application of traffic stops are racially motivated,[48] the evidence on that point is now compelling.[49] One widely used test to measure bias in the selection of targets for traffic stops is the "veil of darkness" test attributed to Grogger and Ridgeway. This test posits that, because the race of a driver is easier for an officer to discern during the day than at night, a lower differential between the percentage of whites and nonwhites stopped at night would be evidence of bias.[50] Other methodologies, such as the outcome test associated with Nobel economist Gary Becker[51] or

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prove systemic race-of-defendant discrimination. However, this unadjusted disparity is highly misleading because it fails to control for the disproportionately high percentage of blacks (about fifty-five percent) among citizens arrested for homicide nationally. As a result, the comparison fails to control for the differential rates at which black and nonblack citizens commit death-eligible homicides.") (internal citations omitted); John C. McAdams, *Racial Disparity and the Death Penalty*, 61 L. & CONTEMP. PROBS. 153, 155 (1998). ("To get a solid assessment of bias, however, we need to go beyond eyeballing numbers. We have to control for factors that might legitimately result in more or fewer severe sentences.").

47. *See, e.g.*, Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 660 (2021) ("Identifying the appropriate 'benchmark' for comparison is critical in evaluating whether the resulting statistical disparities in police behavior are the result of racial profiling by law-enforcement officers or the result of genuine differences in underlying behavior."); *see also* Greg Ridgeway & John M. MacDonald, *Doubly Robust Internal Benchmarking and False Discovery Rates for Detecting Racial Bias in Police Stops*, 104 J. AM. STAT. ASS'N 661, 661-62 (2009).

48. Although it is obviously important to detect and remedy instances of bias throughout the criminal justice system (and elsewhere) the disparate impact of traffic stops is problematic *even if it does not result from bias*. If traffic stops are perceived as biased they will negatively affect public perceptions of the police—and public safety—regardless whether they are "fair" as measured by some objective standard. In other words, if traffic stops are problematic and disproportionately impact some communities over others, that is a problem to be remedied regardless of the cause of the disproportionality.

49. For an overview of the literature, see Rob Tillyer & Robin S. Engel, *The Impact of Drivers' Race, Gender, and Age During Traffic Stops: Assessing Interaction Terms and the Social Conditioning Model*, 59 CRIME & DELINQ. 369, 370-72 (2013).

50. Grogger & Ridgeway, *supra* note 42, at 878.

51. *See generally* GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (Univ. Chicago Press 2d ed. 1971) (summarizing the model Becker theorized that was later coined the "outcome test"); Simoiu et al., *supra* note 38, at 1194 ("[W]hen assessing bias in traffic stops, one can compare the rates at which searches of white and minority drivers turn up contraband. If searches of minorities yield contraband less often than searches of whites, it

the newer threshold test, look at the ultimate results of traffic encounters to determine whether a differential standard is being applied to two groups ex ante.[52] Using these various methodologies, researchers have found evidence of bias nationally,[53] in Washington State,[54] in the city of Nashville,[55] and elsewhere.[56] All of this is particularly disconcerting because, as described below, Black and Hispanic people are disproportionately likely to be the victims of police violence and traffic stops lead to a large percentage of police killings.[57]

Importantly, even when racial animus cannot be proven from a pattern of stops, racial disparity in who is stopped can have a negative impact on the relationship between a community and law enforcement. To quote a study finding bias in one city's pattern of police stops: "If ... officers disproportionately patrol black and Hispanic neighbourhoods, the downstream effects can be injurious even if individual stop decisions are not directly affected by the colour of one's skin."[58] The work of psychologist Tom Tyler also demonstrates that perceptions of fairness are crucial to the law's legitimacy in a given community.[59] When people do not perceive that

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suggests that the bar for searching minorities is lower, indicative of discrimination.").

52. *See* Simoiu et al., *supra* note 38, at 1194 (coining the phrase "the threshold test").

53. *See* Pierson et al., *supra* note 25, at 736 ("[P]olice stops and search decisions suffer from persistent racial bias.").

54. *See* Rushin & Edwards, *supra* note 47, at 643-44.

55. *Reevaluating Traffic Stops in Nashville*, POLICING PROJECT, https://www.policingproject.org/nashville [https://perma.cc/24AG-LWR9].

56. STANFORD OPEN POLICING PROJECT, *supra* note 9; *see, e.g.*, Simoiu et al., *supra* note 38, at 1203 (finding in a study of more than 9.5 million North Carolina traffic stops, "the search rate for black drivers (5.4%) and Hispanic drivers (4.1%) is higher than for white drivers (3.1%). Moreover, when searched, the rate of recovering contraband on blacks (29%) and Hispanics (19%) is lower than when searching whites (32%). Thus both the benchmark and outcome tests point to discrimination in search decisions against blacks and Hispanics."); Pierson et al., *supra* note 25, at 739 ("Across jurisdictions, we consistently found that searches of Hispanic drivers were less successful than those of white drivers. However, searches of white and black drivers had more comparable hit rates. The outcome test thus indicates that search decisions may be biased against Hispanic drivers, but the evidence is more ambiguous for black drivers.").

57. *See infra* notes 68-72, 81-83 and accompanying text.

58. Pierson et al., *supra* note 25, at 741.

59. *See, e.g.*, Tom Tyler, *Police Discretion in the 21st Century Surveillance State*, 2016 U. CHI. LEGAL F. 579, 584 (2016) ("[T]he police have a lot to gain from building popular legitimacy. Many of the problems that the police identify as making policing more difficult—such as widespread disregard of police authority and a broad unwillingness to work with the police, are linked to a lack of trust and confidence in the police—so building

the system is just—that fair procedures are applied, for example, or that people are dealt with based on the merits—they are not just less likely to view the system as legitimate. When a community views the police as unjust, members of that community are less likely to report crimes or to otherwise cooperate in the work of solving crimes.[60] In this way, discrimination—or even the perception of discrimination—is not just a moral problem but a public safety concern as well. What is more, being singled out based on the color of one's skin has other, less tangible, but no less pernicious effects on individuals and communities.

> The suspect, sensing that he may have been singled out at least in part because of race, may feel humiliation, even rage, but is unlikely to seek legal recourse. The incident becomes an uncomfortable anecdote shared with other minorities, and stories are exchanged, almost therapeutically, about "being black [or Hispanic, or Asian] in this country" or about the "law as microaggression."[61]

These harms to legitimacy and dignity are magnified by the fact that traffic stops by police officers are hardly necessary to achieve public safety. Although traffic stops are primarily justified as a means of ensuring safety on the roads,[62] they are often held out as well as as an important part of controlling crime more broadly. In Part II, I describe the ways in which municipalities around the country are finding alternative ways to enforce traffic laws and thus ensure road safety, so I focus here on the effect that traditional police traffic stops have on crime suppression generally.

A 2013 publication of the National Highway Transportation Safety Administration neatly summarizes the traditional understanding of the relationship between traffic enforcement and crime:

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legitimacy is a desirable strategy for addressing those problems.").

60. *Id.* at 588.

61. I. Bennett Capers, *Policing, Race, and Plac*e, 44 HARV. C.R.-C.L. L. REV. 43, 68 (2009) (internal citations omitted) (alteration in original).

62. *See* INT'L ASS'N OF CHIEFS OF POLICE, TRAFFIC SAFETY RESOURCE GUIDE 74 (2017), https://www.theiacp.org/sites/default/files/2020-07/242837_TrafficSafety_Report_FINAL_5-28.pdf [https://perma.cc/HE9F-4LRE] ("Studies have shown that highly visible traffic enforcement leads to reductions in traffic crashes and changes in driver behavior.... This, of course, is one of the underlying reasons for conducting enforcement in the first place.").

> By 1990 we had strong empirical evidence that traffic enforcement had an effect on crime. This effect worked two ways. First, traffic enforcement made law enforcement activities more visible, and thus it served as a general deterrent to crime. This was in contrast to the modest level of visibility that is derived through routine patrol. Second, traffic enforcement reduced crime by making it more difficult for offenders to use motor vehicles. That is, when officers stop vehicles they are likely to find contraband or other evidence of crime, and thus offenders may be more reluctant to use their vehicle in the commission of a crime.[63]

Similarly, pushback against police reforms—and especially the idea of curtailing traffic stops or removing police officers from the enforcement of traffic laws—often warns of the public safety perils of removing officers from traffic enforcement: "The NYPD has effectively connected its traffic enforcement to crime suppression while pursuing its broader public safety goals. Experience during the pandemic has revealed that removing police from traffic enforcement leads to more dangerous streets, more disorder, and more crime."[64]

But the empirical evidence supporting a crime-suppression effect of traffic stops is uncertain at best. For example, a vast study of the City of Nashville's pattern of traffic stops called into question the effectiveness of traffic enforcement as a general crime-prevention technique: "One might posit that traffic stops deter future crime or lead to apprehending those responsible for past incidents. Though plausible, we find little evidence of such a connection between traffic stops and serious crime levels in Nashville."[65] And the reasons why this would be so are relatively straightforward. For example, in Nashville, only a tiny fraction of traffic stops lead to arrests, and those arrests that do occur are overwhelmingly for relatively minor

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63. NAT'L HIGHWAY TRAFFIC AND SAFETY ADMIN., DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY (DDACTS): AN HISTORICAL OVERVIEW 3 (2013), https://www.ojp.gov/ncjrs/virtual-library/abstracts/data-driven-approaches-crime-and-traffic-safety-ddacts-historical [https://perma.cc/9JZQ-XASC].

64. John Hall, *Why Police Need to Enforce Traffic Laws*, MANHATTAN INST. (Sept. 14, 2021), https:// www.manhattan-institute.org/hall-why-police-need-enforce-traffic-laws#notes [https://perma.cc/3SYN-7UBB].

65. Chohlas-Wood et al., *supra* note 29, at 2.

offenses.[66] While there may be some general deterrent effect associated with increased traffic stops—those considering committing crimes in a particular area may choose not to (or to commit their crimes elsewhere) if they see a police presence in that area—it is far from certain whether that hypothetical deterrent effect outweighs the deleterious effect on community relations that targeted enforcement of traffic laws can engender.[67]

Why are so many stops occurring, then, if the public safety benefits are so unproven? One answer, discussed in more detail below, is pretext. Traffic stops are an easy way for police to initiate a broader investigation that would not otherwise be warranted. Because traffic laws are so extensive, police officers looking for a reason to stop an individual to look for items in plain view, run a warrants check, or otherwise attempt to discover evidence of criminal activity can almost always point to a traffic violation as a valid justification to initiate an encounter.

Increasingly, however, the evidence supports the conclusion that municipalities are turning to traffic enforcement as a means of revenue generation wholly unrelated to concerns about public safety or criminal law enforcement.[68] In the wake of the unrest in Ferguson, Missouri, and around the country following the shooting of Michael Brown in 2015, a federal investigation by the Department of Justice focused on the role that revenue generation played both in driving police practices and in increasing animosity between the Ferguson Police Department (FPD) and city residents:

> The City's emphasis on revenue generation has a profound effect on FPD's approach to law enforcement. Patrol assignments and schedules are geared toward aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether

66. *Id.*

67. There are also constitutional concerns with using traffic enforcement as a means of interdicting crime. While the Supreme Court has approved the use of suspicionless drunk driving checkpoints as a means of controlling road safety, it has rejected the use of similar dragnets for traditional crime prevention purposes. *Compare* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990), *with* City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000).

68. *See, e.g.*, Melissa Tobak Levin, *Driver's License Suspension for Nonpayments: A Discriminatory and Counterproductive Policy*, 48 HASTINGS CONST. L.Q. 73, 80 (2021) ("Pretextual stops are increasingly used for the purpose of generating fines and fees revenue and have little (if anything) to do with traffic safety.").

> enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation. Officer evaluations and promotions depend to an inordinate degree on "productivity," meaning the number of citations issued. Partly as a consequence of City and FPD priorities, many officers appear to see some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue.[69]

Revenue generation through traffic enforcement operates as a regressive, almost Orwellian tax on poor and minority communities.[70] The pressure that politicians impose on police forces to issue citations in order to generate revenue produces a tax that profoundly affects those least able to pay.[71] To quote another study of the Ferguson debacle:

> Expired vehicle registration, outdated inspections, driving without insurance—while non-impoverished people may occasionally be ticketed for such violations, the tickets are generally nothing more than a minor inconvenience or annoyance. For the poor living in North County St. Louis, these issues may exist as a consequence of their lack of money, and all of them can come to a head in a single traffic stop and quickly lead to daunting fines and oftentimes the revocation of driving privileges. What is more, poor minorities are pulled-over more frequently, they are let go without a ticket less frequently, and they are in all likelihood the only group to see the inside of a jail cell for minor ordinance violations.[72]

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69. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/A7BG-YKCL].

70. *See, e.g.*, Tonantzin Carmona, *Inequitable Fines and Fees Hurt Vulnerable Communities. Now, Policymakers Have an Opportunity for Reform*, BROOKINGS INST. (Dec. 17, 2021), https://www.brookings.edu/articles/inequitable-fines-and-fees-hurt-vulnerable-communities-now-policymakers-have-an-opportunity-for-reform/ [https://perma.cc/2SLM-EMZK]; Brett Simpson, *The Other Speed Trap*, ATLANTIC (Feb. 2, 2022), https://www.theatlantic.com/ideas/archive/2022/02/traffic-tickets-income-adjustment-rich/621452/ [https://perma.cc/87QZ-SYHC] ("For poor Americans, a traffic ticket can be a life-altering disaster. For rich Americans, it's a minor inconvenience. The American criminal-justice system goes hard on people who can't afford to pay traffic fines and easy on those who can.").

71. Devon W. Carbado, *Predatory Policing*, 85 UMKC L. REV. 545, 558-60 (2016).

72. *ArchCity Defenders: Leading the Charge to Make St. Louis a Better, More Fair Place*

The problem is obviously not limited to one police department in a single jurisdiction, of course. Scholars have written for years about the various ways that revenue generation drives policing around the country.[73] And it is no surprise that revenue-focused policing is inherently self-defeating. As the Justice Department report makes clear, the conflict between the revenue-generation aim of traffic enforcement and the general mission of police to serve and protect their communities is profound.[74] It is not simply that revenue generation is orthogonal to public safety and community relations; revenue generation makes police officers and those they serve antagonists. The more tickets the officers write, the more they make; the more tickets the officers write, the harder the lives of those they purport to protect and serve. It is almost impossible to imagine a system more perfectly structured to generate animosity between the public and the police and to frustrate broader law enforcement goals.

3. Dangerousness

It is well-documented that police officers are taught that the routine traffic stop is one of the most dangerous interactions they will have during their shifts.[75] The idea that a routine traffic stop can turn deadly is instilled in officers from their first day of training and regularly reinforced thereafter.[76] However, as with so many

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to Live and Work, ARCHCITY DEFENDERS (Mar. 6, 2015), https://www.archcitydefenders.org/archcity-defenders-leading-the-charge-to-make-st-louis-a-better-more-fair-place-to-live-and-work/ [https://perma.cc/5JBE-RN4Q].

73. *See, e.g.*, Allison P. Harris, Elliott Ash & Jeffrey Fagan, *Fiscal Pressures and Discriminatory Policing: Evidence from Traffic Stops in Missouri*, 5 J. RACE, ETHNICITY & POL. 450, 452-53, 455-57 (2020) (collecting studies).

74. *See supra* note 69 and accompanying text.

75. *See, e.g.*, Woods, *supra* note 12, at 638 ("The idea that routine traffic stops pose grave and unpredictable danger to the police also influences how officers are trained to approach and act during these stops.").

76. *See, e.g.*, Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 966-67 (2020) ("The idea that routine encounters between police and civilians can be unpredictable and dangerous to police is a common narrative in policing. Police officers are trained to take command in these encounters by asking penetrating questions and temporarily detaining civilians using restraints or verbal instructions—an authority granted by the courts, which routinely defer to officers' safety priorities. Officers regularly see violent encounters in training and are taught methods of self-protection to use in these encounters.").

other empirical claims law enforcement officials make about traffic stops, the evidence to support the inherent dangerousness of traffic stops is relatively slim. For example, Jordan Blair Woods has demonstrated that any particular traffic stop is extraordinarily unlikely to pose a fatal threat to the officer.[77] In his large empirical study, Woods found the risk of officer death from a traffic stop to be between 1 in 3.6 million and 1 in 15.3 million.[78] Given the study referenced above finding that the police carry out approximately twenty million traffic stops a year, we would expect at most a handful of those stops to lead to officer fatalities each year, even employing the most generous estimate of traffic stops' dangerousness to officers.[79] It is only because so many stops are carried out that the aggregate number of officer deaths during such stops is even measurable.[80] In fact, while policing is a dangerous profession overall, the likelihood of dying on the job is no higher, and in many cases far lower, than in many blue-collar professions such as forestry, mining, and manufacturing.[81]

What is more, there seems to be a self-fulfilling aspect to police training on the dangerousness of traffic encounters. A recent study

77. Woods, *supra* note 12.

78. *Id.* at 679.

79. *See id.*

80. *See id.* at 637.

81. The Bureau of Labor Statistics tracks deaths and injuries by profession, generating rates of fatalities per hour worked and per person employed. *See* BUREAU OF LABOR STATISTICS, CENSUS OF FATAL OCCUPATIONAL INJURIES (2020), https://www.bls.gov/iif/oshcfoi1.htm#rates. Overall, there are approximately 3.4 work related fatalities for each 100,000 people employed full-time in the United States. *Id.* The rate for police officers is approximately four times that rate, or 13.4 deaths for every 100,000 full-time employees. *Id.* While this certainly makes law enforcement more dangerous than the average profession, it is on par with other occupations such as metal ore mining (12.8/100,000); animal production and aquaculture (12.6/100,000); construction and extraction occupations (13.5/100,000) and waste management (15/100,000). *Id.* Law enforcement is significantly less dangerous than iron and steel work (32.5/100,000); roofing (47.0/100,000); logging (91.7/100,000); and hunting and fishing (132.1/100,000). *Id.* The Bureau of Labor Statistics offers a caution, however: "There are many other elements that factor into any definition of a 'dangerous job' such as the likelihood of incurring a nonfatal injury, the potential severity of that nonfatal injury, the safety precautions necessary to perform the job, and the physical and mental rigors the job entails. Since there is no universal definition of 'dangerous' or 'hazardous', the Injuries, Illnesses, and Fatalities (IIF) program goes to great lengths not to frame these occupations as the 'most dangerous' in a particular year." BUREAU OF LABOR STATISTICS, *Dangerous Jobs* (Mar. 28, 2018), https://www.bls.gov/iif/overview/dangerous-jobs. htm [https://perma.cc/UY6R-K7L8].

by the New York Times revealed that emphasizing dangerousness during training and fostering anxiety in officers can lead those officers to take risks during traffic stops that might otherwise seem inexplicable.[82] Because officers are trained to believe traffic stop encounters are inherently life-threatening, they are prone to escalate them, even when doing so actually increases, rather than decreases, the risks to themselves as well as to others.[83] As a number of scholars have noted, so-called "officer-created jeopardy" is a significant contributing factor to the dangerousness of traffic stops; when officers treat traffic stops as life-threatening, they actually increase the likelihood that they will become so.[84]

As the example that begins this Article demonstrates, the consequences of police escalation of traffic stops go beyond the loss of privacy and dignity; traffic stops often turn deadly for those stopped as well as for those making the stops.[85] Although records of civilians killed during traffic stops are not kept on a national basis, press outlets have attempted in recent years to maintain such a tally. One such study showed that more citizens were killed by police in 2021 than in any prior year for which data were available and that 115 of those killed had been stopped for traffic offenses, accounting for more than 10 percent of all killings by police in that year.[86] Coupled with the fact that traffic stops disproportionately

82. David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html [https://perma.cc/6K96-7ZA3].

83. *See id.*

84. Cynthia Lee, *Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer's Use of Deadly Force*, 89 GEO. WASH. L. REV. 1362, 1367 (2021) ("Officer-created jeopardy ... includes the actions of officers who, without sound justification, willingly fail to take advantage of available tactical concepts like distance, cover, and concealment ... willingly abandon tactically advantageous positions by moving into disadvantaged positions without justification, or act precipitously on their own without waiting for available assistance from other officers.") (quoting SETH W. STOUGHTON, JEFFREY J. NOBLE & GEOFFREY P. ALPERT, EVALUATING POLICE USES OF FORCE 158 (2020)); *see also* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 301-02 ("Under our approach, expert reports like those solicited by the prosecutor in the Rice case would be soundly ignored as irrelevant or, at best, incomplete. A tactical Fourth Amendment analysis would focus on whether officers acted contrary to sound police tactics by unreasonably creating a deadly situation, and asking whether a cautious approach could have given them time to take cover, give warnings, and avoid the need to use deadly force.").

85. *See* Rojas et al., *supra* note 1.

86. *2021 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/policeviolencereport2021.pdf?0 [https://perma.cc/GH2J-ZM22].

impact people of color[87] and that people of color are generally more likely to be killed by the police than are whites, traffic stops create something of a perfect storm of violent dangers for at-risk communities.

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I have tried to demonstrate in this Part the contradiction that traffic stops present in contemporary America. They are dangerous (particularly to their targets), at odds with the broader goals of policing, and disproportionately impact communities of color; they are perceived by officers as the most dangerous part of their job, yet police officers engage in tens of millions of them each year. In light of all of this, one might expect that the courts would carefully scrutinize these stops, narrowly cabining their purpose and scope. Instead, as the next Part demonstrates, courts have been largely deferential to police officers' decisions on when and how to stop those they encounter abroad in cars.

B. The Law of Traffic Stops

It is not surprising, given that traffic stops are the most common police-citizen interaction, that they play an important role in the formulation of Fourth Amendment doctrine. The ubiquity of car travel in this country,[88] coupled with alcohol[89] and drug

87. *See supra* Part I.A.2.

88. A survey of American drivers conducted by AAA found that, in the aggregate, American "drivers made a total of approximately 229 billion driving trips, spent 91 billion hours behind the wheel, and drove an estimated 2.92 trillion miles in 2021, compared with an estimated 211 billion trips, 82 billion hours, and 2.54 trillion miles of driving in 2020." AAA FOUNDATION FOR TRAFFIC SAFETY, AMERICAN DRIVING SURVEY 2020-2021 3 (2022).

89. *See, e.g.*, Kenneth M. Murchison, *Prohibition and the Fourth Amendment: A New Look at Some Old Cases*, 73 J. CRIM. L. & CRIMINOLOGY 471, 526 (1982) ("[P]rohibition was the primary cause of that era's fourth amendment developments."); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 116-17 (2006) ("Because prohibition had flooded the federal courts with criminal defendants, because many of these were wealthy enough to afford lawyers, because most prohibition prosecutions required the production of evidence of liquor seized by law enforcement officials, and because the Taft Court was committed to the exclusionary rule as a means of enforcing the Fourth Amendment, prohibition sparked a virtual 'doctrinal explosion' of Fourth Amendment jurisprudence.") (internal citations omitted).

prohibition,[90] made the stopping and searching of automobiles one of the principal contexts in which the relationship between citizens and the police was tested.

1. Legally Categorizing the Traffic Stop

An enormous amount has been written recently about the constitutional regulation of traffic stops, spurred in part by the reexamination of race and policing that followed the tragic killings of George Floyd and others.[91] Tellingly, however, there remains significant ambiguity, even at the most basic level, regarding how the law treats traffic stops.[92]

The Supreme Court has, though never quite explicitly, created three increasingly scrutinized constitutional categories of police-citizen interactions: consensual encounters, brief investigative

90. *See, e.g.*, Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 921 (1987) ("The historic dynamic of the American drug control movement has been expansionary. Pretrial detention, longer and mandatory prison sentences, enhanced fines and property forfeitures, good faith exceptions to the exclusionary rule, roadblocks, drug-detector dogs, wiretaps, informants, undercover agents, extradition treaties, tax investigations, computers, currency controls—the list grows and grows."); Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1, 4 (1986) ("[C]ourts throughout the United States have been 'cheating.' They have been turning their backs on fundamental constitutional principles, particularly fourth amendment principles, in order to aid the war against illicit drugs."). *But see* Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 MCGEORGE L. REV. 23, 23-24 (2012) (surveying the Supreme Court's marijuana related Fourth Amendment cases and concluding that "the Court could have developed virtually all of the same rules and standards through cases involving other types of evidence. Marijuana, in other words, was not so unique as to have a direct effect on Fourth Amendment doctrine.").

91. *See, e.g.*, Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, 116 NW. U. L. REV. 1481 (2022); Devon W. Carbado & Jonathan Feingold, *Rewriting* Whren v. United States, 68 UCLA L. REV. 1678 (2022); Jordan Blair Woods, *Conventional Traffic Policing in the Age of Automated Driving*, 100 N.C. L. REV. 327 (2022); Jordan Blair Woods, *Metanarratives of Traffic Policing*, 53 CONN. L. REV. 645 (2021); Tracey Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law*, 99 B.U. L. REV. 2317 (2019); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violenc*e, 105 CALIF. L. REV. 125 (2017); Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413 (2013); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551 (1997); Sklansky, *supra* note 27.

92. *See, e.g.*, Wayne R. LaFave, *The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1846-51 (2004).

stops, and custodial arrests.[93] An arrest is the quintessential seizure under the Fourth Amendment.[94] The consequences of a custodial arrest are profound: an arrestee can be searched[95] (including invasively at the stationhouse)[96] and held for up to forty-eight hours before being taken before a magistrate.[97] Beyond that significant indignity, an arrest can have long-term aftereffects for the subject, even if a prosecution is never initiated against her.[98] In light of this intrusiveness, the Supreme Court has required the same level of suspicion for an arrest that the Constitution mandates for all searches and seizures carried out pursuant to a warrant:[99] probable cause to believe that a crime has been committed.[100]

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93. *See, e.g.*, David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1150 (2000) ("Although the Supreme Court created and developed the doctrine that led most lower federal courts to conclude that there are exactly three categories of police-citizen encounters, the Court itself has never actually stated that there are only three categories. To the contrary, the Court has several times come close to recognizing that traffic violation stops are non-custodial arrests.").

94. *See, e.g.*, California v. Hodari D., 499 U.S. 621, 624 (1991) (describing an arrest as "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence").

95. United States v. Robinson, 414 U.S. 218, 224 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.").

96. Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318, 328 (2012) ("In many jails officials seek to improve security by requiring some kind of strip search of everyone who is to be detained.").

97. Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991) ("A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.").

98. *See, e.g.*, Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 546 (2005) ("Even an arrest that is not followed by conviction can have a lifelong impact. Whether the offense is a non-violent crime or a low-level drug or property offense—and even most felonies do not involve violence against persons—a criminal record can be a barrier to employment, education, the right to vote, and certain public benefits, including public housing.").

99. Though ambiguous on many important points, the Constitution is clear that warrants may only issue based upon probable cause: "[N]o Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV.

100. *See, e.g.*, Draper v. United States, 358 U.S. 307, 313 (1959) ("Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." (quoting Carroll v. United States, 267 U.S. 132, 162 (1925) (alterations in original))). An officer may make an arrest in public without a warrant. United States v. Watson, 423 U.S. 411, 418 (1976) ("The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or

At the other extreme of police-citizen interactions, a consensual encounter between police officers and an individual is not an interaction that triggers Fourth Amendment scrutiny at all; so long as a reasonable person would feel free to ignore police attention and go about her business, police conduct is neither a search nor a seizure.[101] As a result, the police may, without any suspicion whatsoever, approach an individual to talk with her, gather information, or even seek consent to conduct a search. Such interactions may be unconstitutional, but the means of scrutinizing them lies outside the Fourth Amendment.[102]

A traffic stop obviously falls somewhere between these two extremes; neither is the target of a traffic stop free to leave nor is her freedom generally impinged upon in a manner akin to arrest.[103] It is not surprising, therefore, that the Supreme Court has often stated that a traffic stop closely resembles a so-called *Terry* stop.[104] In *Terry v. Ohio*, the Supreme Court considered investigative stops, brief police-citizen interactions that neither depend on the consent of the person under investigation nor rise to the level of an arrest.[105] The Court acknowledged that such brief detentions are indeed seizures[106]—and therefore are governed by the Fourth Amendment's reasonableness requirement—but also concluded that they may be conducted on the lesser standard of reasonable suspicion rather than probable cause.[107] The individual is not required to answer

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felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.").

101. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 200 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen.").

102. *See, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

103. Knowles v. Iowa, 525 U.S. 113, 117 (1998) (contrasting the "relatively brief encounter" of a traffic stop with the more invasive seizure of formal arrest). While a traffic stop may lead to an arrest, courts generally acknowledge that it begins as something far short of one.

104. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 439-40 (1984) (finding that a traffic stop is far less "police dominated" than a custodial interrogation and "is more analogous to a so-called '*Terry* stop' than to a formal arrest").

105. 392 U.S. 1, 4 (1968).

106. *Id.* at 16 ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

107. *Id.* at 27 ("The officer need not be absolutely certain that the individual is armed; the

police questions during a *Terry* stop, however,[108] and the officers must release her if a brief investigation does not reveal further evidence of criminal wrongdoing.[109]

If the Supreme Court has been cagey about these three levels of interaction between citizens and the police—refusing to define, for example, such basic terms as reasonable suspicion[110] and probable cause[111]—it has been even less clear about where routine traffic stops fit along this continuum.[112] While the Court has often hinted that traffic stops are analogous to investigative stops,[113] it has stopped short of either declaring them to actually be *Terry* stops or

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issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

108. *Id.* at 34 (White, J., concurring) ("[C]oncerning the matter of interrogation during an investigative stop[,] [t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.... Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."); *see also* Sam Kamin & Zachary Shiffler, *Obvious But Not Clear: The Right to Refuse to Cooperate with the Police During a* Terry *Stop*, 69 AM. U. L. REV. 915, 925 (2020) (basing in Justice White's concurrence the principle that the police may not arrest an individual for refusing to answer their questions during a *Terry* stop).

109. *See* United States v. Sharpe, 470 U.S. 675, 686 (1985) ("In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly."); *see also* United States v. Place, 462 U.S. 696, 709 (1983) ("[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion.").

110. *See Terry*, 392 U.S. at 27 ("And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.").

111. Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.").

112. One author has argued that the reason the Court has not placed traffic stops into one of its three categories is because it does not fall neatly within any of them. He would characterize traffic stops as a new category of seizure: "Because these traffic violation stops are not investigative stops, custodial arrests, or consensual encounters, the Court should recognize that there is a fourth type of police-citizen encounter, the non-custodial arrest." Moran, *supra* note 93, at 1146.

113. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (distinguishing "the usual" traffic stop from custodial arrest and finding that it is "more analogous to a so-called '*Terry* stop' than to a formal arrest") (internal citation omitted).

consistently treating them as such.[114] Paradoxically, it has often held that probable cause to stop is the requirement for conducting a traffic stop—treating stops more like arrests than like investigative stops.[115] But in this, as well, the Court has been far from consistent.

Most often, the Court has avoided the question entirely, holding simply that an officer's observation of traffic infractions provides that "quantum of individualized suspicion" the Fourth Amendment requires before a seizure can be initiated.[116] And that should not be very surprising; the distinction between reasonable suspicion and probable cause—itself hardly a model of clarity—rarely comes into play during routine traffic stops.[117] Given both the capaciousness of

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114. Moran, *supra* note 93, at 1153 ("Since *Knowles* [*v. Iowa*] unambiguously recognized that a routine traffic violation stop is not a custodial arrest, the case should have been the perfect vehicle for the Court to hold that such a stop is a non-custodial arrest or, at the very least, to specify exactly what kind of encounter it is. This, regrettably, the Court declined to do. Instead, the Court's analysis of the type of encounter at issue consisted of exactly one sentence: 'A routine traffic stop, on the other hand, is a relatively brief encounter and "is more analogous to a so-called '*Terry* stop' ... than to a formal arrest."'" (alteration in original) (quoting *Berkmer*, 468 U.S. at 117)).

115. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 149 (1925) ("[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."); Almeida-Sanchez v. United States, 413 U.S. 266, 274-75 (1973) ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." (quoting *Carroll*, 267 U.S. at 154)).

116. United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) ("The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure.").

117. *See, e.g.*, LaFave, *supra* note 92, at 1848: ("[I]f, as is clear, probable cause is *a* permissible basis for a traffic stop, is it the only basis, or will some lesser standard also suffice, such as the reasonable-suspicion standard approved in *Terry v. Ohio* for certain investigative stops? Most courts have assumed the latter, i.e., that traffic stops as a class are permissible without probable cause if there exists reasonable suspicion, that is, merely equivocal evidence. Such an assumption is to be found in the federal-court decisions of the various circuits, as well as in the decisions of most states. In most of these cases the matter has not even been put into issue by the defendant (often because it appears the stop would pass muster even under the probable-cause test), but on the rare occasions when the defendant has made a contrary claim it is often rather summarily dismissed.") (internal citations omitted); *see also* Gran McKerlie, *The Diminishment of the 4th Amendment While Driving: Stops and Seizures Based on Criminal Activity, Noncriminal Civil Traffic Violations Also Included*, 31 DC BAR ASS'N BRIEF 16, 16 (2019) ("As recent as 2007, the Sixth Circuit Court of Appeals in *United States v. Sanford* conceded: 'There is a degree of confusion in this

most traffic codes and the fact that many traffic infractions—failing to signal before turning, say, or failing to make a full stop at a posted stop sign—are easy enough to discern from a distance, few cases actually turn on whether there is sufficient suspicion to justify the initiation of a traffic stop.[118]

While the Supreme Court has been less than consistent with regard to some aspects of a traffic stop—whether it is a *Terry* stop, an arrest, or some new category somewhere in between; whether it must be supported by probable cause or reasonable suspicion; and so on—what *is* clear is that the Court has refused to closely scrutinize the decision to commence a traffic stop beyond satisfying itself that there was sufficient evidence that a traffic infraction occurred.

2. Judicial Deference to the Decision to Stop

The most important opinion in this regard is *Whren v. United States*, decided in 1996. In *Whren*, two officers in an unmarked police car conducted a stop of the petitioner's vehicle late at night for turning right without signaling and for accelerating at an "unreasonable" speed.[119] Upon stopping the vehicle, the officers observed evidence of narcotics trafficking in plain view and discovered additional evidence in a subsequent search of the car incident to the occupants' arrest.[120] The officers directly observed the traffic infractions, so that mysterious quantum of individualized

circuit over the legal standard governing traffic stops.' The confusion stems from whether a traffic stop is permissible under the Fourth Amendment's probable cause standard, the well known constitutional standard for arrest, or the reasonable suspicion standard as articulated in *Terry v. Ohio*, or a combination of both." (citing United States v. Sanford, 476 F.3d 391, 394 (6th Cir. 2007)) (internal citations omitted)).

118. There are cases, admittedly, where the question arises whether the police even have reasonable suspicion to initiate an investigative stop. *See, e.g.*, Prado Navarette v. California, 572 U.S. 393, 395 (2014) (holding that reasonable suspicion to initiate an investigation was present even though officers following the defendant for five minutes were unable to verify any of the suspicious behavior reported by an anonymous tipster). Often, however, those cases involve information relayed to the police from members of the public rather than directly observed by the officers themselves.

119. 517 U.S. 806, 808 (1996). The latter conduct was a violation of a D.C. ordinance mandating that "No person shall drive a vehicle ... at a speed greater than is reasonable and prudent under the conditions" while the former ran afoul of a rule requiring that "An operator shall ... give full time and attention to the operation of the vehicle." *Id.* at 810 (alterations in original) (internal citations omitted).

120. *Id.* at 808-09.

suspicion was clearly satisfied whether that quantum is described as probable cause or reasonable suspicion.[121] Instead of contesting the suspicion necessary to commence the stop, Whren argued that the stop of him and his companion was pretextual and therefore invalid.[122] He maintained that the plain clothed vice squad officers who pulled his Toyota Pathfinder over did so for reasons unrelated to the stated interest in traffic enforcement and public safety.[123] The petitioners, two young, African American men, argued that they had aroused officer suspicion with their presence in a car with temporary plates late at night, and the officers initiated the stop in order to do exactly what they did in fact—peer into the car window looking for evidence of drug trafficking.[124] The petitioners' argument before the Court on this point was straightforward but ultimately unpersuasive.[125]

> Since, [petitioners] contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. Petitioners, who are both black, further contend that police officers might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants. To avoid this danger, they say, the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.[126]

Although the test proposed by *Whren* was an objective one—whether a reasonable officer would have made the stop that the arresting officer did—the Court described it as requiring inquiry into the

121. *See id.* at 808.
122. *Id.* at 809.
123. *See id.* at 810.
124. *See id.* at 809-10.
125. *See id.* at 813.
126. *Id.* at 810.

subjective motivation of the officers, an inquiry it was loath to make.[127] Despite the fact that there was a General Order in effect in Washington, D.C., that plainclothes officers were to make traffic stops "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others,"[128] the Court was unwilling to analyze what a reasonable police officer would have done in the arresting officer's shoes.[129]

Invoking the Court's oft-repeated statement that the ultimate test under the Fourth Amendment is reasonableness,[130] Whren next argued that even if the officers' pretext did not invariably doom the stop in his case, the Court should nonetheless engage in balancing to determine whether the specific details of the stop—that it was made by plainclothes officers in an unmarked car, late at night, for a relatively minor offense—rendered it unreasonable on its facts.[131] This, the Court also refused to do.[132] While acknowledging that reasonableness *is* the ultimate test for the constitutionality of a stop, the Court nonetheless held that it was unnecessary to determine the reasonableness of any particular stop by balancing "the governmental and individual interests implicated in a traffic stop such as we have here."[133] It distinguished the routine traffic stop from those Fourth Amendment encounters—the use of deadly force, warrantless entry to a home, or physical penetration of the body—where it had found case-by-case determination of reasonableness

127. *Id.* at 810, 813-14; *see*, *e.g.*, Brigham City v. Stuart, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.' The officer's subjective motivation is irrelevant." (alteration in original) (emphasis in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978))).

128. *Whren*, 517 U.S. at 815 (emphasis omitted) (citing WASH., D.C., METRO. POLICE DEP'T, GEN. ORD. 303.1(A)(2)(4) (Apr. 30, 1992)).

129. The Court grounded this reticence in what it described as the general principle that inquiry into the subjective nature of police work was ill-advised. After citing a number of cases for the proposition that subjective inquiry into the state of mind of the officer is unwarranted, Justice Scalia concluded categorically for the Court: "[T]hese cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at 813.

130. *See, e.g.*, *Brigham City*, 547 U.S. at 403 ("[B]ecause the Fourth Amendment's ultimate touchstone is 'reasonableness,' the warrant requirement is subject to certain exceptions.").

131. *Whren*, 517 U.S. at 816-17.

132. *Id.* at 817, 819.

133. *Id.* at 816.

to be appropriate.[134] "The making of a traffic stop ... does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken 'outbalances' private interest in avoiding police contact."[135] The balance, in other words, had already been struck. No matter how picayune the infraction, how senseless the use of manpower might be under the circumstances, or how unrealistic the pretext for a broader criminal investigation might seem, so long as the officer has probable cause to believe that an infraction has occurred, her decision to stop the defendant's car will always be upheld, at least at its inception.

Of course, there is much to recommend bright-line rules in constitutional criminal procedure.[136] The Supreme Court's interpretation of the Constitution is enforced by lay officers in the field, and the simpler the instructions to those officials can be, the more likely they are to be complied with (or at least enforced after the fact by courts reviewing such conduct).[137] As appealing as such rules can be, however, the Court did not actually create one in *Whren*. In the first place, the existence of probable cause or reasonable suspicion is not always clear—particularly where the officers' suspicion comes from others rather than from their own observations.[138] Furthermore,

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134. *Id.* at 818.

135. *Id.*

136. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 321 (1982) ("[I]f our aim, as stated in the [F]ourth [A]mendment, is to ensure that 'the people' are 'secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' then it may well be that the rules governing search and seizure are more in need of greater clarity than greater sophistication. And thus, as between a complicated rule which in a theoretical sense produces the desired result 100% of the time, but which well-intentioned police could be expected to apply correctly in only 75% of the cases, and a readily understood and easily applied rule which would bring about the theoretically correct conclusion 90% of the time, the latter is to be preferred over the former.").

137. *See Atwater*, 532 U.S. at 347 ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.").

138. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 231 (1983) ("Perhaps the central teaching of

even when sufficient suspicion is present, all that *Whren* tells us is that a traffic stop conducted by a sworn officer is valid *at its inception* if it is supported by probable cause or reasonable suspicion.[139] The Court did not hold that any traffic stop that begins with probable cause is reasonable under the Fourth Amendment. If the officers coerce the occupants into granting consent to search,[140] detain them for too long,[141] use excessive force,[142] or otherwise unreasonably carry out the stop, the officers have violated the Fourth Amendment even if the stop was valid at its inception. As the Court has told us *ad nauseum*, a search or seizure under the Fourth Amendment must be valid both at its inception and in its scope.[143] Each of these inquiries—into the appropriate length of a stop, the reasonableness of force under the totality of the circumstances, or the voluntariness of consent—is an inherently fact-intensive, case-by-case determination not amenable to bright-line rules. All that is gained, in other words, from the bright-line rule created in *Whren* is an easier answer to the first of these two questions. The reasonableness of each stop will still need to be adjudicated in every case in which a criminal defendant objects to the introduction of evidence seized during a traffic stop.

And if the Court had stopped at refusing to examine the reasonableness of an officer's decision to make a particular stop, that would have been bad enough. But the Court did not stop there. Later cases—both involving traffic stops and other seizures—make

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our decisions bearing on the probable-cause standard is that it is a 'practical, nontechnical conception.' 'In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (alteration in original) (quoting Brinegar v. United States, 388 U.S. 160, 175-76 (1949))).

139. *See Whren*, 517 U.S. at 810.

140. *See, e.g.*, United States v. Watson, 423 U.S. 411, 424-25 (1976) (recognizing that even if a seizure of a driver comports with the Fourth Amendment, a subsequent search will be deemed invalid if the consent was not voluntarily given).

141. *See, e.g.*, Rodriguez v. United States, 575 U.S. 348, 357 (2015) (finding that a traffic stop "prolonged beyond" the "time reasonably required to complete [the stop's] mission" is unreasonable) (alteration in original) (citing Illinois v. Caballes, 543 U.S. 405, 407 (2005)).

142. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396 (1989) (finding that excessive force in the course of an otherwise reasonable traffic stop constitutes a Fourth Amendment violation).

143. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 19-20 (1968) ("And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

clear that the probable cause standard that is the only measure of whether the police may initiate a seizure would be applied in a flexible and extremely deferential manner. For example, in *Heien v. North Carolina*, the investigating officer reasonably, though ultimately incorrectly, believed that North Carolina law required two operational taillights when in fact only one was required.[144] The officer conducted a traffic stop of Heien based on this belief, received consent to search the stopped car, and discovered cocaine.[145] On appeal from Heien's drug conviction, the Court acknowledged the officer's mistake regarding North Carolina law but nonetheless found the stop to be a reasonable one because the officer had reasonably believed that he was lawfully entitled to stop the car.[146] In the same way that a reasonable factual mistake does not invalidate an arrest otherwise supported by probable cause,[147] the Court reasoned, a traffic stop is not invalidated when an officer reasonably, though incorrectly, misreads a statute; the law does not require the officer to be right, merely to be reasonable.

Similarly, in *Devenpeck v. Alford*, the Court afforded officers an even higher level of deference.[148] Alford was arrested during a traffic stop for taping a conversation with officers during their investigation of whether he had been impersonating an officer himself.[149] The recording charge was dismissed (because it was not illegal under state law to record a conversation with a police officer), and Alford filed suit against one of the arresting officers, alleging that his arrest had been unreasonable under the Fourth Amendment

144. 574 U.S. 54, 57 (2014). North Carolina law on this point was admittedly ambiguous. *Compare* N.C. GEN. STAT. ANN. § 20-129(g) (requiring "a stop lamp on the rear of the vehicle"), *with* N.C. GEN. STAT. ANN. § 20-129(d) (requiring vehicles "have all originally equipped rear lamps or the equivalent in good working order"). While the North Carolina Court of Appeals concluded that the statute required that only one stop lamp is required, it must be conceded that an officer could reasonably read the statute as requiring that all rear lamps be in working order.

145. *Heien*, 574 U.S. at 57-58.

146. *Id.* at 57.

147. *Id.* ("The Fourth Amendment prohibits 'unreasonable searches and seizures.' Under this standard, a search or seizure may be permissible even though the justification for the action includes a reasonable factual mistake. An officer might, for example, stop a motorist for traveling alone in a high-occupancy vehicle lane, only to discover upon approaching the car that two children are slumped over asleep in the back seat. The driver has not violated the law, but neither has the officer violated the Fourth Amendment.").

148. 543 U.S. 146 (2004).

149. *Id.* at 148-49.

because it had been made without probable cause.[150] Although conceding that he had in fact originally arrested Alford for an offense that does not exist under Washington law (surreptitiously taping an officer), the officer maintained in response to Alford's suit that the arrest was nonetheless reasonable because there *was* probable cause to believe that Alford was impersonating an officer.[151] Writing for a unanimous Court, Justice Scalia repeatedly invoked *Whren* for the proposition that the focus should remain narrowly on whether probable cause was present and that considerations of subjective factors—why the officer *actually* made the arrest—are irrelevant.[152] If probable cause was actually present, the fact that the officer could not name the crime for which the defendant was being arrested at the time of that arrest was beside the point.[153] Finally, in *Virginia v. Moore*, the Court held that probable cause would support an arrest for driving on a suspended license even though the relevant state statute provided that violations should lead only to a citation and not to a formal arrest.[154] Justice Scalia, again writing for the Court, cited *Whren* for the proposition that "the Fourth Amendment's meaning [does] not change with local law enforcement practices—even practices set by rule."[155]

These cases work together to convert the traffic stop into what some commentators have called a general warrant for cars.[156] In the

150. *Id.* at 151.

151. *Id.* at 152.

152. *Id.* at 153 ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause." (internal citations omitted)). Here the Court echoed its § 1983 jurisprudence where it has held that an otherwise reasonable stop is not invalidated by a demonstration that the officer had in fact acted in bad faith. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989) (finding that "the subjective motivations of the individual officers ... [have] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment").

153. *Devenpeck*, 543 U.S. at 153.

154. 553 U.S. 164 (2008).

155. *Id.* at 172. Scalia went on to note that were the case to come out otherwise, the meaning of the Fourth Amendment would vary from place to place. "Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'" *Id.* (quoting *Whren*, 517 U.S. at 815).

156. *See, e.g.*, Aaron R. Megar, Note, *Road to Reform: The Case for Removing Police from Traffic Regulation*, VAND. L. REV. EN BANC 13, 19-20 (2022) (citing Jay Schweikert, *Pretextual Stops and the General Warrant: Stopping the March of the* Whren *Doctrine*, CATO INST.: CATO LIBERTY (Apr. 25, 2018), https://www.cato.org/blog/pretextual-stops-general-warrant-stopping-

same way that colonial-era general warrants permitted agents of the crown to search anywhere seditious or untaxed items might be found,[157] the ability to stop a car any time an officer perceives a traffic infraction amounts to a blank check to law enforcement. Given the broad scope of most states' vehicular codes, officers can likely stop any car at any time if they have sufficient patience to wait for the driver to commit an infraction.[158] And even if the officers are not patient, even if they only believe they have probable cause but are wrong about the facts or wrong about the law, the Court will forgive their mistakes after the fact.[159] Moreover, once a car has been lawfully stopped, officers may arrest its driver,[160] search the car incident to the arrest,[161] impound the car, and

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march-whren-doctrine [https://perma.cc/287F-8KPR]); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 257 (1989) ("As with general warrants and writs of assistance, both unjustified and arbitrary intrusions are presented when a police officer has the power to arrest for a minor traffic offense.").

157. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999) (arguing that "the need to ban house searches under general warrants" was the primary goal motivating the Framers of the Fourth Amendment); Hon. M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 912 (2010) ("The immediate aim of the Fourth Amendment was to ban general warrants and writs of assistance. To this end, the Amendment's Warrant Clause requires that a warrant 'particularly describ[e] the place to be searched, and the persons or things to be seized.'" (alteration in original)).

158. *See* LaFave, *supra* note 92, at 1844-45 ("Both in urban areas and on the interstates, police are on the watch for 'suspicious' travelers, and when a modicum of supposedly suspicious circumstances are observed—or, perhaps, even on a hunch or pursuant to such arbitrary considerations as the color of the driver's skin—it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop." (internal citation omitted)); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 565 (1998) ("[F]or all practical purposes, the venerable Fourth Amendment principle that the police need a reason—call it probable cause, reasonable suspicion, or whatever—to interfere with a citizen in his or her daily activity has all but vanished for anyone who drives or rides in a car. Traffic stops have become both the occasion and the legal justification for a new kind of criminal investigation: one that features suspicionless investigation on an individual level, without any special governmental need beyond ordinary law enforcement.").

159. *See supra* notes 143-54.

160. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 323, 353 (2001) (upholding the "foolish" warrantless arrest of a mother for failing to secure her children in seatbelts because probable cause existed to support the arrest).

161. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 335 (2009) (holding that police may search a car incident to arrest if the defendant has not yet been restrained and removed from the scene or where there are reasonable grounds to believe that evidence of the crime of arrest will be found therein).

conduct an inventory search at the stationhouse even if they wrongfully, but reasonably, believe they have probable cause to make an arrest.[162]

How has this state of affairs come to be? Why has the Court been so deferential to the making of traffic stops when, as we have seen, the consequences of such stops can be so negative and so profound? A number of authors have noted that a motivating factor seems to be that courts presume, reflexively, that traffic stops are inherently dangerous and that as a result, officers in the field must have wide latitude to conduct those stops in ways that they allege will mitigate those risks.[163] The narrative of dangerousness, described in the previous Part, in other words, has largely been accepted by reviewing courts. For example, in *Pennsylvania v. Mimm*s, the Court permitted police officers to remove passengers from a car during a traffic stop, in light of the "inordinate risk confronting an officer as he approaches a person seated in an automobile."[164] Although Justice Stevens dissented in that case, questioning the empirical support for the majority's assumptions of danger,[165] such blanket statements continue to find their way into the Court's traffic stop opinions. For example, in *Michigan v. Long*, the Court once again

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162. South Dakota v. Opperman, 428 U.S. 364, 375-76 (1976) (finding that police do not violate the Fourth Amendment when they conduct an inventory search of an impounded car, at least where there is no suggestion that the search "was a pretext concealing an investigatory police motive").

163. *See* Woods, *supra* note 12, at 638 ("The idea that routine traffic stops are fraught with grave and unpredictable danger to the police has animated this expansion. For instance, in several Fourth Amendment cases involving traffic stops, the U.S. Supreme Court has deferred to law enforcement based on officer safety concerns, stressing that officers must be empowered during these stops to take 'unquestioned command of the situation.'").

164. 434 U.S. 106, 110 (1977).

165. Justice Stevens critiqued the majority for relying on a single study to justify its conclusion that traffic stops are inherently dangerous to the officers involved:

> These figures tell us very little about the risk associated with the routine traffic stop, and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this area of human behavior strongly recommend that the police officer "never allow the violator to get out of the car."

Id. at 119 (Stevens, J., dissenting) (quoting V. FOLLEY, POLICE PATROL TECHNIQUES AND TACTICS 95 (1973)).

validated an officer's decision to remove passengers from a car to search it for weapons on the basis of past decisions (including *Mimms*) which had established "that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect."[166] More recently, the Court in *Arizona v. Johnson* cited *Long*, *Mimms*, and *Maryland v. Wilson*[167] for the proposition that traffic stops are inherently dangerous and that as a result, officers must have the ability to remove passengers from a car in order to "exercise unquestioned command of the situation."[168]

I noted above that such presumptions of the inherent dangers of traffic stops are in fact not well supported by empirical evidence and that, while policing is unquestionably dangerous work, policing is not more dangerous than many other professions. The risk of death associated with any single traffic stop is almost vanishingly small, and officers' perception of the danger, reinforced by the courts, likely makes matters worse rather than better.[169] Furthermore, as we shall see in the following section, events on the ground give lie to the notion that traffic enforcement is so dangerous that it requires stops to be made by sworn, uniformed officers. Many local governments are increasingly moving away from using uniformed officers to carry out mundane aspects of traffic enforcement, raising the question whether continued deference to the dangerousness of such stops is warranted.[170]

II. THE CHANGING REALITIES OF POLICING

The previous Part demonstrated the myriad ways that courts defer to the decision of a police officer to stop a car. Unwilling or unable to evaluate the wisdom of such stops on a case-by-case basis, courts have broadly permitted them, taking as a given that the government has a compelling interest in the enforcement of traffic laws and that the intrusion on the individual associated with such

166. 463 U.S. 1032, 1049 (1983).

167. Maryland v. Wilson, 519 U.S. 408, 413 (1997) ("Regrettably, traffic stops may be dangerous encounters.").

168. Arizona v. Johnson, 555 U.S. 323, 330-31 (2009) (quoting *Wilson*, 519 U.S. at 414).

169. *See supra* note 162 and accompanying text.

170. *See infra* notes 188-92 and accompanying text.

stops is slight.[171] Yet for all the proof that traffic enforcement is more about revenue generation, pretext to search, or sometimes simple harassment than about ensuring safer streets and communities,[172] there is also no denying that at least some traffic enforcement is motivated by concerns for public safety; the impaired or careless driver does significant harm in this country. Notwithstanding recent technological improvements in auto safety, the number of traffic deaths skyrocketed during the COVID pandemic.[173]

Thus, rather than arguing against the state's interest in traffic enforcement, I argue that courts' review of traffic stops made by sworn police officers should nonetheless be markedly less deferential than it is at present. To reach this conclusion, I focus here on three related, on-the-ground policy initiatives that are changing the nature of traffic stops in this country and merit a constitutional reexamination of the practice: deemphasizing the enforcement of trivial traffic violations, increasing automation of traffic enforcement, and shifting away from using sworn officers to enforce traffic laws. These developments demonstrate that, even where the government's interest in traffic enforcement is sincere, its goals can quite often be served by means far less intrusive and threatening to the safety and autonomy of motorists.

A. De-Emphasizing Routine Traffic Enforcement

If traffic stops carried out by police officers are dangerous, humiliating, and pregnant with discrimination, one of the most logical solutions to the problem they pose is to simply do fewer of them. Some states and municipalities have begun doing just this by limiting the authority of police officers to conduct stops for minor infractions such as driving with a suspended license or with expired

171. *See supra* notes 155-61 and accompanying text.

172. *See supra* Part I.A.2.

173. *See, e.g.*, *Newly Released Estimates Show Traffic Fatalities Reached a 16-Year High in 2021*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (May 17, 2022), https://www.nhtsa.gov/press-releases/early-estimate-2021-traffic-fatalities [https://perma.cc/LN99-2KX4] ("NHTSA projects that an estimated 42,915 people died in motor vehicle traffic crashes last year, a 10.5% increase from the 38,824 fatalities in 2020. The projection is the highest number of fatalities since 2005 and the largest annual percentage increase in the Fatality Analysis Reporting System's history.").

registration. A number of cities—Philadelphia,[174] Pittsburgh,[175] and Seattle,[176] among them—have officially de-emphasized the enforcement of traffic violations that do not present an immediate threat to public safety, instructing officers in the field not to make stops based solely on those violations.[177] More recently, the City of Los Angeles, the largest police department in the country, announced that it, too, would be curtailing the enforcement of minor traffic offenses.[178] The City's Chief of Police explained the decision by saying "We want to fish with a hook, not a net."[179] One of the most prominent examples of this approach is the experience in Philadelphia. The city was, for many years, governed by a consent decree as

174. *See, e.g.*, PHILA., PA CODE § 12-1703(3) (2020) ("To the full extent of Council's legislative authority, a police officer or other law enforcement officer may initiate a motor vehicle stop for a secondary violation observed within the City of Philadelphia only where there is a simultaneously-observed primary violation for which an officer, at their discretion, could issue a citation.").

175. *See, e.g.*, PITTSBURGH, PA CODE § 503.17(c)(3) (2001) ("Notwithstanding the provisions of any contrary ordinance, resolution, regulation, procedure or order of the City or any of its departments or agencies, a police officer or other law enforcement officer may initiate a motor vehicle stop for a secondary violation, enumerated in Section 503.17(b)(2), observed within the City of Pittsburgh only where there is a simultaneously-observed primary violation for which an officer, at their discretion, could issue a citation.").

176. *See, e.g.*, Letter from Adrian Z. Diaz, Chief of Police, Seattle Police Dep't, to Lisa Judge, Inspector Gen., City of Seattle (Jan. 14, 2022), https://www.seattle.gov/documents/Departments/OIG/Other/Letter%20to%20Inspector%20General%20Lisa%20Judge%20-%20Traffic.pdf [https://perma.cc/2PK6-VHM5].

> While discussions will continue as we work through the traffic code, the Seattle Police Department will no longer treat the following violations as primary reasons to engage in a traffic stop:
>
> - Expired or missing vehicle registration. *License tabs expired.* (Title: License and plates required) - SMC 11.22.070
> - Issues with the display of registration plates. *No front license plate, a vehicle must have a rear license plate.* (Title: Vehicle license plates displayed) - SMC 11.22.080
> - Technical violations of SMC 11.84.140, such as items hanging from the rear-view mirror and cracks in the windshield. *Actual visual obstruction, such as snow, fog, non-transparent material, or shattered windshields, will be enforced.* (Title: Windshield obstruction) SMC 11.84.140
> - Bicycle helmet violations (KCHC 9.10)
>
> These violations do not have a direct connection to the safety of other individuals on the roads, paths, or sidewalks.

177. *See* Kirkpatrick et al., *supra* note 20 ("Los Angeles is overhauling its traffic policing, aiming to stop pulling over cars—frequently with Black drivers—for trivial infractions like broken taillights or expired tags as a pretext to search for drugs or guns.").

178. *Id.*

179. *Id.*

a result of its pattern of racially discriminatory stop and frisks.[180] In the aftermath of the order, the City Council passed the Driving Equality Law,[181] stating that officers could no longer pull over motorists when their sole reason was a violation of one of eight minor traffic violations unrelated to the immediate safety of fellow motorists or pedestrians.[182]

There is obviously much to recommend an approach that de-emphasizes the enforcement of minor traffic offenses. Given the harms associated with traffic stops described above and the minimal public benefits associated with police enforcement of traffic laws,[183] any policy that reduces the number of those stops is likely to have a positive impact on both public relations and public safety.[184] While reasonable minds can disagree about which traffic provisions should be left underenforced—do dice dangling from the rearview mirror impact public safety in a way that merits immediate intervention, say? Or driving on an expired license?—reducing the number of bases on which the police may initiate a traffic stop might produce significant benefits at a relatively low price.

However, there is good reason to be skeptical that any such approach will actually have a dramatic impact on the number of traffic stops being made in a particular jurisdiction. First, no jurisdiction has suggested the nonenforcement of more serious moving violations such as speeding, or distracted driving.[185] And with good reason. Such infractions pose an immediate threat to public safety, and the political costs of ignoring them would likely

180. Order and Consent Decree, Bailey v. City of Philadelphia, No. 10-5952 (E.D. Pa. June 21, 2011).

181. PHILA., PA., CODE § 12-1700 (2021).

182. The eight violations which are no longer to be enforced under the new law include:

- Driving an unregistered vehicle (with a 60-day grace period);
- Relocation of Temporary Registration Permits (must still be visible);
- Driving with an unfastened Registration Plate (must still be visible);
- Driving with one missing brake light, head light, or running light;
- Items hanging from the rear view mirror;
- Minor Bumper issues;
- Driving with an expired inspection sticker;
- Driving with an expired emission sticker.

See id. § 12-1702(2) to -03.

183. *See supra* Part I.A.2.

184. *See supra* Part I.A.3.

185. *See, e.g.*, PHILA., PA., CODE § 12-1703(2) (permitting police officers to initiate motor vehicle stops for "primary" violations).

be profound for policymakers.[186] Furthermore, given the comprehensiveness of most traffic codes, any limit on the bases on which a stop can be made will likely just shift enforcement to other offenses, which remain valid reasons for a stop.[187] In short, an officer dedicated to finding a reason to make a traffic stop will likely be able to do so whenever she wishes, even in a jurisdiction that has limited the reasons that can permissibly support such a stop.[188] By contrast, the next two changes in policing—automation and the use of civilians to enforce traffic codes—attempt to remedy the problem of traffic stops not by forbidding the issuing of certain citations, but by moving enforcement of those provisions away from those who carry badges and guns.

B. Automated Traffic Enforcement

While calls to defund or abolish the police often focus on moving resources from police departments to other parts of state and local government, some jurisdictions, for both equity and other reasons, have begun moving some of the tasks traditionally done by law enforcement officials to automated systems instead.[189] Such automation has the ability to serve governments' stated goal of ensuring public safety through the enforcement of traffic laws while

186. *See* Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1547 (2021) ("Perhaps the strongest potential objections of police unions to removing the police from traffic enforcement involve protecting the jobs of police officers who conduct traffic enforcement.... For these officers, removing the police from traffic enforcement would result in the disbandment of police traffic units and require officers to be transferred to other police units or nontraffic positions.").

187. *See* Whren v. United States, 517 U.S. 806, 810 (1996) ("As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.... [A] police officer will almost invariably be able to catch any given motorist in a technical violation.").

188. Furthermore, under the Court's current doctrine, it is likely not even a Fourth Amendment violation when an officer makes a stop that is contrary to a jurisdiction's enforcement policy. *See, e.g.*, Virginia v. Moore, 553 U.S. 164, 176 (2007) ("[W]arrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and ... while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.").

189. Maya Fegan, *Speeding into the Future: The Pitfalls of Automated Traffic Enforcement*, BERKELEY J. CRIM. L. BLOG, (Apr. 15, 2021), https://www.bjcl.org/blog/speeding-into-the-future-the-pitfalls-of-automated-traffic-enforcement [https://perma.cc/W6WS-8N9D] ("As local governments respond to increasing public demand to 'defund the police,' automated traffic enforcement presents an appealing and financially profitable alternative.").

at the same time minimizing the number of dangerous and invasive interactions between sworn officers and the public.[190] Although the technology exists to automate many aspects of traffic enforcement,[191] two technologies have thus far received the lion's share of attention from policy makers: photo radar and red light cameras.[192] These technologies allow public safety agencies to both punish and deter traffic infractions by recording traffic infractions and issuing citations without subjecting either members of the public or patrol officers to the risks associated with traditional stops.[193]

190. When talking about automation in policing it is important to distinguish two kinds of automation—what Vincent M. Southerland calls predictive and surveillance tools. *See* Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, 80 MD. L. REV. 487, 497 (2021). Predictive tools, of the kind used both by law enforcement and by courts, use group-level data to help determine the appropriate distribution of criminal justice resources. *Id.* When I talk here about automation in the criminal justice system, however, I am talking primarily about surveillance—the use of technologies to do what the police could do if they were in more places at once.

191. *See* Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 221 (2007) (demonstrating that many of the most cited reasons for traffic stops could be accomplished through the use of RFID technology replacing human-initiated traffic stops).

192. *See, e.g.*, Robin Miller, Annotation, *Automated Traffic Enforcement Systems*, 26 A.L.R. 6th. 179 § 2 (2007) ("The two principal [automated enforcement] systems in use in the United States are photo-radar, which detects vehicles that are exceeding the speed limit, and red light cameras, which capture images of vehicles crossing an intersection against a red light."); Sarah A. Seo, *Police Officers Shouldn't Be the Ones to Enforce Traffic Laws*, N.Y. TIMES (Apr. 15, 2021), https://www.nytimes.com/2021/04/15/opinion/police-daunte-wright-traffic-stops.html [https://perma.cc/Y976-BXK6] ("Automated speed cameras and red-light cameras, for example, have proved to be effective in decreasing traffic accidents, injuries and fatalities, precisely because they're more consistent than human oversight. They also don't selectively—or discriminatorily—choose to pull over violators. Automating citations for speeding, a major cause of accidents, could significantly reduce police encounters.").

193. While these technologies can detect, and ultimately punish, speeding and red light running, they do not react in real time to remove dangers from the road. *See, e.g.*, Matthew Yglesias, *Automate as Much Traffic Enforcement as Possible*, SLOW BORING (Nov. 4, 2021), https://www.slowboring.com/p/traffic-enforcement [https://perma.cc/B6LN-EQJP] ("The best solution is to largely automate this function. We have the technology to detect vehicle speed, take images of cars breaking the rules, read license plate numbers from those photos, and fine the responsible drivers."); *Automated Enforcement*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS, https://nacto.org/publication/city-limits/the-right-speed-limits/corridor-speed-limits/determine-best-option-for-speed-management/automated-enforcement/ [https://perma.cc/3MH6-CJ8M] ("Automated speed enforcement (ASE) can be an effective tool for reducing operating speeds, especially in locations where data shows that there are frequent speed-related fatal and serious injury crashes. Studies find that cameras reduce the percentage of speeding vehicles by 14-65% percent [sic], and serious injury and fatal crashes by 11-44% [sic]. Results from NYC's speed camera program found that, in the zones where cameras were installed, total crashes declined by 15%, total injuries by 17%, fatalities by 55%, and excessive speeding

Despite the intuitive promise of automation, one principal problem with the use of surveillance technologies to detect traffic infractions is that, without careful implementation, these technologies have the capacity to recapitulate many of the problems associated with in-person enforcement.[194] For example, if cameras are located in overpoliced and minority communities or treated as a source of revenue generation rather than a means of increasing public safety, they will perpetuate, or perhaps even exacerbate, many of the problems discussed in the last Part.[195] While the use of these technologies will not put citizens (or officers) in harm's way in the same way that traditional traffic enforcement does—a not insignificant benefit—they have the potential to expand the reach of the criminal justice system in deleterious ways.[196]

Perhaps for this reason, resistance to technology like red-light cameras and radar ticketing has often been profound.[197] There

violations by 60%."); *Investing in Evidence-Based Alternatives to Policing: Non-Police Responses to Traffic Safety*, VERA INST., 1, 2-3 (Aug. 2021), https://www.vera.org/downloads/publications/alternatives-to-policing-traffic-enforcement-fact-sheet.pdf [https://perma.cc/BC4F-9STK]. ("Automated cameras (which are commonly used for tolls) significantly reduce speeding, crash-related injuries, and property damage, while yielding significant cost savings. They also reduce racial- and gender-based disparities in stops and fine amounts—which police discretion exacerbates—and are popular where implemented, especially among Black drivers.").

194. Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 14 (2019) ("Camera-driven enforcement can be less likely to be racially biased than traffic stops by police officers. But there is also ample evidence that algorithmic processes of sentencing and risk assessment can be racially biased.").

195. *See, e.g.*, Woods, *supra* note 186, at 1507-08 ("Automated traffic enforcement has similar shortcomings. Studies have found that communities of color bear the brunt of current automated traffic-enforcement programs. Potential factors driving these unequal outcomes include the disproportionate placement of red-light and speed cameras in neighborhoods of color as well as the possibility that camera operators are disproportionately targeting the driving behaviors of people of color for closer scrutiny."); William Farrell, *Predominately Black Neighborhoods in D.C. Bear the Brunt of Automated Traffic Enforcement*, D.C. POL'Y CTR. (June 28, 2018), https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement [https://perma.cc/KFX5-RYXU].

196. *See, e.g.*, I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1244-45 (2017) (arguing that increased use of surveillance technologies has the potential to level the surveillance playing field: "In exchange for a reduction of hard surveillance of people of color, it will require an increase in soft surveillance of everyone.").

197. *See, e.g.*, Corey Dade, *What's Driving the Backlash Against Traffic Cameras*, NPR (Feb. 22, 2012, 1:48 PM), https://www.npr.org/2012/02/22/147213437/whats-driving-the-backlash-against-traffic-cameras [https://perma.cc/ENU7-M85V] ("Opponents say red-light cameras actually increase the number of accidents, making the devices little more than cash

seems to be a sense among Americans that, despite the fact that thousands of people are killed in traffic accidents each year,[198] there is something unjust about a technology that makes possible the universal enforcement of the traffic laws. Drivers have come, it appears, to anticipate and expect underenforcement of traffic laws.[199] As a result, the use of remote enforcement technologies is often unpopular, and many jurisdictions have forbidden it entirely.[200] On the other hand, underenforcement of the law carries with it its own potential for abuse and engendering distrust. When a law is infrequently enforced, it can make enforcement in any particular instance seem arbitrary or capricious even when it is not.[201] The person pulled over on the freeway knows that she was not the only one speeding, for example, and is left to wonder why she, rather than some other, equally culpable driver, was singled out for punishment. A system of regularized, automated enforcement could eliminate some of these concerns by removing a measure of discretion from the enforcement of traffic laws.[202] Assuming that the system is set up in a nondiscriminatory way, and that is a big if,[203] the regularization of enforcement through automation has the potential to make the justice system not just appear to be more just but to actually be so.

This complexity is part of the reason why this Article stops short of calling for the mandating of automated enforcement where it can be utilized.[204] Furthermore, there is genuine concern that the use of

machines for camera manufacturers and financially strapped governments. And they question the motives of some pro-camera safety groups that receive funding from camera companies.").

198. *See supra* note 172 ("42,915 people died in motor vehicle crashes last year, a 10.5% increase from the 38,824 fatalities in 2020.").

199. Miller, *supra* note 192, at § 2 ("Automated traffic enforcement systems ... have been described as methods of traffic enforcement so fundamentally different from traditional methods of enforcement that they have significantly altered citizens' basic expectations.").

200. *Id.* (collecting state policies that limit the use of remote enforcement technology).

201. One author went even further: "[T]he central meaning of the Fourth Amendment is distrust of police power and discretion." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993).

202. Joh, *supra* note 191, at 233-34.

203. *See* Farrell, *supra* note 195 ("This initial investigation suggests that absent an affirmative effort to equitably site automated traffic cameras, a disproportionate burden of enforcement could be borne within the District's predominantly black neighborhoods.").

204. *But see* Marco Conner, *Traffic Justice: Achieving Effective and Equitable Traffic Enforcement in the Age of Vision Zero*, 44 FORDHAM URB. L. J. 969, 994 (2017) ("Automated enforcement technology, like speed cameras ... may be the most effective tool to achieve

photo radar and red-light cameras is a slippery slope to far greater intrusions upon privacy and autonomy. More than 15 years ago, Elizabeth Joh wrote about an emerging technology—Dedicated Short Range Communications Service (DSRC)[205]—that has the potential to revolutionize surveillance, traffic enforcement, and privacy in a free society. DSRC is a system that allows cars to communicate with one another and with fixed transponders in real time.[206] This technology, then in its infancy but today quite prevalent, makes remote traffic enforcement possible to a far greater extent than with photo radar and redlight cameras. For example, it permits a remote observer—an insurance company, a private security system like OnStar, or a law enforcement agency—to know, either instantaneously or retrospectively, whether a driver fails to come to a complete stop where required, follows too closely, or otherwise fails to comply with a vast array of traffic laws.[207] Although the Supreme Court has been increasingly attuned to the privacy concerns posed by emerging technologies over the last several years,[208] there is reason to be concerned about automation from a civil liberties perspective. Thus, while there are situations in which the use of automation can be a net benefit from a privacy and

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widespread and consistent traffic enforcement and should be applied broadly.").

205. *See* Joh, *supra* note 191, at 200. The FCC defines DSRC as follows:

> The DSRC Service involves vehicle-to-vehicle and vehicle-to-infrastructure communications, helping to protect the safety of the traveling public. It can save lives by warning drivers of an impending dangerous condition or event in time to take corrective or evasive actions. The band is also eligible for use by non-public safety entities for commercial or private DSRC operations.

Dedicated Short Range Communications (DSRC) Service, FCC (Sept. 30, 2022), https://www.fcc.gov/wireless/bureau-divisions/mobility-division/dedicated-short-range-communications-dsrc-service [https://perma.cc/3934-NPT9].

206. FCC, *supra* note 205.

207. *See id.*

208. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2222-23 (2018) (refusing to extend the so-called third-party doctrine and holding that the use of cell phone tower data to track a suspect's movements retroactively is a search for Fourth Amendment purposes); Riley v. California, 573 U.S. 373, 386-87, 403 (2014) (holding that, unlike other personal effects on an individual's person, a cell phone could not be searched incident to a lawful arrest); United States v. Jones, 565 U.S. 400, 404 (2012) (finding that the attaching of a GPS tracker to defendant's vehicle in order to track his movements was a Fourth Amendment search); Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the use of sense-enhancing technology to discover details about the interior of a home was a search, at least where the technology was not in general public use).

individual autonomy perspective, it cannot be said that automation of traffic enforcement is likely to be an unalloyed good.

C. Enforcement by Non-Police Actors

A final solution proposed by commentators and increasingly adopted by jurisdictions around the country is the use of nonpolice officers to carry out most routine traffic stops. Both Aaron Megar and Jordan Blair Woods have recently proposed exactly this.[209] In separate articles, they argued that the work of traffic enforcement should be removed from police departments.[210] Woods imagines a new traffic enforcement paradigm:

> [O]ne in which police-initiated traffic enforcement is replaced by nonpolice alternatives. To summarize the framework, jurisdictions would redelegate the bulk of traffic enforcement to newly created traffic agencies. Traffic agencies would operate wholly independently of the police and would hire their own traffic monitors to conduct and oversee traffic enforcement. Traffic monitors would enforce traffic laws through in-person traffic stops and handle aspects of traffic enforcement that jurisdictions decided to automate from start to finish. To the extent that exceptions must be made, police would be allowed to conduct traffic stops only for a narrow set of serious traffic violations that clearly involve criminality or an actual or imminent threat of harm to others (for instance, driving a stolen vehicle, hit-and-run, or vehicle racing).[211]

Megar describes his similar proposal thusly:

> [P]olice should be largely removed from the traffic-law enforcement context. This is not to say that traffic laws should not be enforced, but rather they should generally be enforced by a

209. Megar, *supra* note 156, at 16; Woods, *supra* note 186.

210. *See* Woods, *supra* note 186, at 1477; Megar, *supra* note 156, at 16; *see also* Barry Friedman, *Disaggregating the Police Function*, 169 U. PA. L. REV. 925, 930 (2021) (arguing that one-size-fits-all policing has a number of detrimental impacts on public safety and that as a society, "we need to look beyond minimizing the harms of policing and focus on what it is exactly the police do daily, asking whether the police are the institution best suited to the panoply of societal needs they confront regularly").

211. Woods, *supra* note 186, at 1488-89 (footnotes omitted).

> separate government entity that functions similarly to the nonpolice authorities who administer parking tickets in many U.S. jurisdictions.[212]

As Woods allows, moving traffic enforcement to another branch of government necessarily requires line-drawing; the lines between traffic enforcement, public safety, and criminal law enforcement are not always bright.[213] But just because lines may be difficult to draw does not mean that the drawing of any lines is impossible. As he acknowledges, different jurisdictions may draw that line in different places.[214]

Using a civilian department to enforce traffic laws reduces the risk of escalation, particularly if traffic enforcement is completely decoupled from the rest of criminal law enforcement. That is, if the official making the stop is not authorized to look for evidence of other crimes, to run a warrants check, or to arrest, the risk that a traffic stop will escalate into a violent confrontation diminishes significantly.[215] Particularly if the motorist knows that the situation will not be escalated, there is little incentive for her to attempt to avoid traffic enforcement by flight or violence. For that reason, it is important that a wall be erected between the civilian enforcement of traffic laws and law enforcement more broadly defined.

A number of cities either have moved, or are considering a move, to a civilian-enforced traffic model. Berkeley, California, was the first to do so.[216] The Berkeley City Council, explicitly referencing

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212. Megar, *supra* note 156, at 42 (footnote omitted).

213. *See* Woods, *supra* note 186, at 1471-72, 1477. Megar, too, would retain police authority for those cases in which officers stop a car on suspicion of criminal activity:

> [P]olice officers would retain the ability to pull over drivers whom they have a "reasonable suspicion" to believe committed nontraffic criminal felonies. These stops would be most prevalent where officers are stopping drivers who are fleeing the scene of a crime or are believed to have committed criminal traffic offenses like driving a stolen vehicle or street racing.

Megar, *supra* note 156, at 44 (footnote omitted).

214. *See* Woods, *supra* note 186, at 1488.

215. *See* Woods, *supra* note 12, at 640-41.

216. *See* Rachel Sandler, *Berkeley Will Become 1st U.S. City to Remove Police from Traffic Stops*, FORBES (July 15, 2020, 8:22 PM), https://www.forbes.com/sites/rachelsandler/2020/07/14/berkeley-may-become-1st-us-city-to-remove-police-from-traffic-stops [https://perma.cc/E8LG-LQ86] ("Officials in Berkeley, California, voted in favor of a proposal Wednesday morning to shift traffic enforcement away from the police department, a first-in-nation idea that comes as lawmakers across the country begin to rethink public safety after the death of

Whren,[217] moved traffic enforcement and other public-safety-related tasks away from the police department as a means of promoting racial justice:

> Berkeley can lead the nation in refocusing its traffic enforcement efforts on equitable enforcement, focusing on a cooperative compliance model rather than a punitive model. A Department of Transportation in the City of Berkeley could shift traffic enforcement, parking enforcement, crossing guards, and collision response & reporting away from police officers—reducing the need for police interaction with civilians—and ensure a racial justice lens in the way we approach transportation policies, programs, and infrastructure.[218]

Other jurisdictions, including Brooklyn Center, Minnesota; Cambridge, Massachusetts; and Montgomery County, Maryland, have begun work on similar proposals.[219]

* * *

No one is arguing that the solution to the problems posed by traffic stops is to simply stop enforcing traffic laws. Even those who call for the elimination of the police entirely are presumably concerned with public safety and decreasing traffic injuries and fatalities. Rather, the question is how that safety can best be achieved. Increasingly, jurisdictions are developing ways to achieve traffic safety with less reliance on sworn officers to enforce traffic laws. The three solutions I discuss here obviously work together: some minor offenses can go unenforced, some can be enforced through automation, and some through the use of a civilian traffic force.

Taken together, however, these trends away from the use of police officers to make traffic stops demonstrate that it is time for a

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George Floyd and calls from activists to defund police departments.").

217. Berkeley City Council Agenda Material, July 14, 2020, at 1 ("Traffic stops have a history of racial bias that has been continually backed up by the courts—*Whren vs. United States* enabled police officers to conduct pretextual stops, in which minor traffic violations are used as pretext to stop and search drivers suspected of more serious criminal activity.").

218. *Id.* at 4.

219. *See, e.g.*, Megar, *supra* note 156, at 45.

reexamination of the deference that has been given to police-enforced traffic stops for decades. For too long, courts have assumed that the important task of enforcing traffic safety can only be achieved by allowing police officers wide discretion in determining whom to stop. Yet enforcement practices increasingly show that such deference is unwarranted: much of traditional traffic enforcement is not necessary to serve the government's interest in public safety, and what is necessary can usually be done more effectively either remotely or by civilians.

The next Part takes what we have learned thus far about the dangers and practice of police-initiated traffic stops, as well as the increasing number of alternatives, to make the case that courts should presume that such stops are unreasonable and place the burden on the government to justify them on the facts of a given case.

III. THE SOLUTION: A PRESUMPTION OF UNREASONABLENESS

The Supreme Court has stated that the Fourth Amendment exists primarily to protect Americans from the arbitrary exercise of police power.[220] One of the primary ways it does so is by requiring the government to justify its intrusion on individual liberty by demonstrating that a substantial government interest outweighs the intrusion.[221] The *Whren* Court decided that this balancing was not necessary in the context of traffic stops because the intrusion was

220. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'" (footnote omitted) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978))).

221. *See* Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989) ("The Court's turn away from the specific commands of the warrant clause and toward a balancing test of general reasonableness is now evident.").

generally minimal and the government interest always compelling.[222] In light of the foregoing, I argue that this is exactly backward. Given the limited utility of traffic stops conducted by police officers, the ready alternatives to such stops, and the costs those stops impose unequally on society, traffic stops conducted by sworn officers should be deemed presumptively unreasonable under the Fourth Amendment. The burden should be on the government to demonstrate, on the particular facts of a given stop, that its interest in public safety outweighs the motorist's interest in privacy and liberty. The point is not, as Justice Scalia scolded Whren for implying, that the officers' subjective motivations might render unreasonable that which is otherwise reasonable—a stop based on probable cause or reasonable suspicion that a moving violation or other traffic infraction has occurred.[223] Rather, the focus is where it should be under the text of the Fourth Amendment—on the reasonableness of the officers' *actions* without inquiry into subjective motivations.

This solution is likely to frustrate many. On the one hand, it stops far short of the police abolition that many academics and advocates call for.[224] In fact, it falls significantly short of what has already occurred in a number of jurisdictions, detailed in the last Part, that have mandated that some traffic laws either not be enforced, or at least that they not be enforced by sworn officers.[225] The reasons I do not call for the constitutional mandating of one of the policing solutions described in the last Part are largely practical. I am personally convinced that removing most routine traffic enforcement from the province of uniformed officers is the best solution to the problems posed by police-initiated traffic stops and that, at a bare minimum, many of the tasks currently done by uniformed officers could be done more efficiently and fairly through automation or the employment of a civilian traffic corps. But not every jurisdiction will

222. Whren v. United States, 517 U.S. 806, 817 (1996) ("It is of course true that in principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.").

223. *See supra* Part I.B.

224. *See supra* Part I.A.2.

225. *See supra* Part II.

have the financial wherewithal to implement either a technological- or personnel-based solution to the problems of police-conducted traffic stops. And more than that, I do not believe that the Supreme Court is likely to mandate such policy changes any time soon.

But it is not far-fetched to imagine the Court—perhaps with a slightly different makeup—adopting the solution I propose herein. The Supreme Court is by no means averse to reasonableness inquiries, employing them in determining the existence of probable cause, excessive force, the constitutionality of administrative searches, and many other Fourth Amendment inquiries.[226] In other words, while the Court often chooses to apply the kind of bright line rule it announced in *Whren*, applying a balancing test would hardly be a revolutionary development in the Court's search and seizure jurisprudence.

Moreover, I believe that moving away from using sworn officers to enforce traffic laws is better suited to such balancing than it is to the application of bright-line rules. Thus, I do not argue that any stop by a police officer with the ostensible purpose of enforcing the traffic laws is irrebuttably unreasonable.[227] Rather, I put the burden where I think it best belongs—on the government—to demonstrate that the use of sworn officers to make a particular traffic stop was reasonable in light of the dangers posed by a particular defendant and the ready alternatives to such enforcement.[228] As even those who have called for the replacement of police officers as default traffic enforcers acknowledge, there will be certain kinds of stops— for

226. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" (footnote omitted) (quoting Skinner v. Ry. Labor Execs' Ass'n, 489 U.S. 602, 619 (1989))).

227. Such a test would create perverse incentives. If officers could permissibly stop a car for a criminal investigative purpose but not a traffic-based purpose, officers would be encouraged to create probable cause in situations where it was lacking.

228. Even this overstates the risk to the government. Given the Court's consistent movements away from the application of the exclusionary rule, it is increasingly unlikely that a sworn officer making a traffic stop in good faith would lead to the suppression of the evidence subsequently discovered, even if a court were later to conclude that that stop was unreasonable. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence ... has always been our last resort, not our first impulse.").

reckless or impaired driving, for those engaging in evasive maneuvers, and so on—where the use of uniformed officers is a reasonable response to an imminent threat to public safety.[229]

To the criticism that this test provides insufficient guidance to the officer in the field, I would answer that this claim could be leveled at any balancing test. But what I propose is not what some Justices and commentators have pejoratively described as "free-form" balancing.[230] Rather, I suggest that traffic stops by uniformed officers be treated the way warrantless entries to homes or seizures without probable cause are: prohibited except when the government can demonstrate their reasonableness under the circumstances. Rather than starting from scratch in each case and balancing the intrusiveness of police conduct against the autonomy interests of the individual without standards or guideposts, under the test I propose, a police-initiated traffic stop begins with a presumption of unconstitutionality against it. If the government can demonstrate that circumstances beyond the ordinary are present—immediate threat to the public, for example, or knowledge that the driver has a history of violent assaults—or that extrinsic factors—such as where and when the stop occurred, the nature of the jurisdiction, or the like—are sufficient to overcome the presumption of unconstitutionality, then the stop should be deemed reasonable. In the absence of such a showing, the stop will fail constitutional muster (and evidence derived therefrom will be subject to exclusion). To the criticism that this uncertainty will deter officers from making stops that they currently make for fear that any evidence thus acquired would be suppressed as the fruit of an unconstitutional seizure, I see that pressure as a feature rather than a bug. Given the harms, outlined in Part I, that attend the use of sworn officers to make traffic stops, a rule that requires officers to think twice before stopping a car for a minor traffic offense is a laudable goal in itself.[231]

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229. *See* Part II.C.

230. *See, e.g.*, Maryland v. King, 569 U.S. 435, 468 (2013) (Scalia, J., dissenting) ("It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form 'reasonableness' inquiry that the Court indulges at length today."); *see also* David H. Kaye, *Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases After* Maryland v. King, 104 J. CRIM. L. & CRIMINOLOGY 535, 549-50 (2014).

231. *See supra* Part I.

What would all of this mean in specific cases? To illustrate, I apply this test to some of the Supreme Court's better-known traffic stop cases. The question I ask in each is this: if this stop were to take place today—when the use of paraprofessionals or technology to augment uniformed officers is available—could the government meet its burden of proving the reasonableness of the stops as conducted?

First, consider the facts of *Whren* itself.[232] As discussed above, this was the case that officially authorized pretextual stops and has driven much of the explosion in traffic stops in the United States over the last 30 years.[233] Given the facts of the case, it is hard to see how the government would be able to justify this stop under the presumption of unreasonableness that I advocate for in this Article. The stop the officers executed was against written city policy and seemed calculated to lead to a dangerous confrontation: it was conducted at night by plainclothes officers in an unmarked car.[234] The officers testified that they suspected Whren and his companion of narcotics dealing, increasing, at least from their perspective, the likelihood of an armed confrontation resulting from the stop.[235] What is more, the stated reasons for the stop, driving at an "unreasonable" speed and turning without signaling, are hardly the kinds of immediate threats to public safety that would justify a departure from the presumption of unreasonableness.[236] That the stop occurred in Washington, D.C., a city large enough to maintain a civilian traffic enforcement corps, only further counsels against a finding of reasonableness.[237]

Similarly, the stop at issue in *Illinois v. Caballes* is one that would have difficulty passing constitutional muster.[238] A highway patrol officer stopped Caballes for driving 71 miles per hour in a 65

232. Whren v. United States, 517 U.S. 806, 813 (1996).

233. *See supra* notes 4-6 and accompanying text.

234. *See Whren*, 517 U.S. at 808, 815.

235. *See id.* at 809. Courts often take for granted that drug dealing and gun possession are inextricably connected. *See, e.g.*, United States v. Arnott, 758 F.3d 40, 45 (1st Cir. 2014) ("[T]he police had strong reasons to believe that the occupants of the [car] (one of whom carried no identification) had just concluded a drug-related transaction. The connection between drugs and violence is, of course, legendary.").

236. *See Whren*, 517 U.S. at 808.

237. *See id.*

238. *See* 543 U.S. 405, 406 (2005).

miles per hour zone.[239] A drug interdiction officer, hearing of the stop over the radio, proceeded to the scene and walked a trained narcotics dog around Caballes's car while the first officer wrote up a warning ticket.[240] The dog alerted on the car, indicating the presence of drugs, and a subsequent search of the trunk of the car revealed marijuana.[241] The Court ultimately found the stop to be supported by probable cause and concluded that the use of the trained narcotics dog intruded on no reasonable expectation of privacy, upholding the search and Caballes's conviction.[242]

Although there was clearly probable cause to stop Caballes for speeding, the officer quickly made clear that he suspected Caballes of other criminal activity. He noted the fact that there was "an atlas on the front seat, an open ashtray, the smell of air freshener, and two suits hanging in the back seat without any other visible luggage."[243] He instructed Caballes to sit in the squad car while he wrote the warning ticket.[244] He questioned him about his criminal background and why he was wearing a suit.[245] He asked for consent to search the car.[246] It was in this context that the drug interdiction officer arrived and discovered marijuana in Caballes's trunk.

This incident took place on Interstate 80, a major cross-country artery.[247] If the state were sincerely interested in controlling the speed of those passing through Illinois, it would have a number of options available to it today, including the use of a civilian traffic corps or traffic cameras. Instead, a sworn police officer chose to seize, detain, and interrogate Caballes for driving six miles an hour over the posted speed limit.[248] It is hard to see how the government could meet its burden under the test that I propose. The Supreme

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239. *Id.* at 417-18 (Ginsburg, J., dissenting). Tellingly, this fact is omitted from the majority opinion.

240. *Id.* at 406.

241. *Id.*

242. *Id.* at 407-10.

243. People v. Caballes, 802 N.E.2d 202, 203 (2003).

244. *Id.*

245. *Id.*

246. The Illinois Supreme Court provided all these details in its opinion invalidating the stop. *Id.* The Supreme Court of the United States, by contrast, focused on the use of the narcotics dog and omitted much of this detail when it held the stop constitutional. *Compare id.*, *with Caballes*, 543 U.S. at 406.

247. *Caballes*, 802 N.E.2d at 203.

248. *See id.*

Court has made clear that the ability to move about freely cannot be abridged simply because some crime is conducted through the use of cars. In *City of Indianapolis v. Edmond*, the Court rejected the use of suspicionless drug interdiction checkpoints, stating that the fact that drugs are often carried in cars is an insufficient reason to deviate from traditional Fourth Amendment principles such as individualized suspicion of criminal wrongdoing: "We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."[249] Yet this is exactly what the Court actually sanctioned in *Caballes*.[250] Separating traffic enforcement from the broader task of criminal investigation, where possible, is the only way to truly secure the principle the Court announced in *Edmond*.[251]

Arizona v. Johnson presents another example of a traffic stop that the government would have difficulty justifying under my test.[252] In *Johnson*, decided by the Court in 2009, three officers of an antigang task force working in an area of Tucson "associated with the Crips gang" ran a license plates check on the car in which Johnson was travelling and discovered that the car's registration had been suspended for an insurance-related infraction.[253] The officers approached the car, discussed the passengers' gang status, and, after ordering Johnson from the car, discovered a pistol in his waistband and arrested him for illegal possession of a firearm (Johnson had admitted to the officers that he was a convicted felon).[254] The Court unanimously upheld the discovery of the weapon, finding it to have

249. 531 U.S. 32, 43-44 (2000).

250. The roving stop approved by the Court in *Caballes*, 802 N.E.2d at 203, is actually more problematic than the fixed stop the court rejected in *Edmond*, 531 U.S. at 34-35. At a fixed stop, either every car is stopped or cars are selected based on a set pattern. By contrast, Caballes would have no way of knowing why he was singled out among the many motorists presumably driving a few miles an hour over the posted limit.

251. For further analysis of the *Caballes* case, see Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L. J. 719, 765-68 (2007). Bascuas describes the Illinois stop as part of Operation Pipeline, a DEA program that "trains state and local law enforcement officers to use traffic stops as pretexts for drug interdiction." *Id.* at 761.

252. *See* 555 U.S. 323, 327 (2009).

253. *Id.*

254. *Id.* at 327-29.

been discovered during a reasonable protective frisk of a suspect conducted during a valid traffic stop.[255]

In reaching this conclusion, the Court presumed the correctness of the initial stop under *Whren*, moving quickly to whether the officers exceeded their authority during an otherwise lawful stop.[256] Citing *Maryland v. Wilson*, the Court emphasized the importance, for the safety of both the officers and those detained, of allowing the officers to "exercise unquestioned command of the situation."[257] Under the test I propose, the case would likely come out quite differently. The insurance infraction for which the vehicle was stopped was even less serious than the ones in *Whren* and *Caballes*, which at least involved moving violations. Under Arizona law, the violation was a civil infraction meriting only a citation.[258] Furthermore, the means used to enforce the ordinance were probably at least as likely to lead to a confrontation as those employed in *Whren*. The officers were working in an area known for Crip activity, and three of them pulled over a car that contained three individuals believed to be associated with that gang.[259] Given that the infraction posed no immediate danger to the public,[260] that it was conducted by a gang unit, and that ready alternatives would be available today, it would be difficult for the government to carry its burden of showing that the use of three sworn officers to issue a citation was reasonable under the circumstances.[261]

In contrast to *Whren*, *Caballes*, and *Johnson*, the facts underlying the Supreme Court's decision in *Prado Navarette v. California* provide an example of the sort of case likely to be upheld even under the less deferential standard that I argue for in this piece. In *Prado Navarette*, law enforcement officials received a call that the defendant's truck had forced a driver off the road in a rural area along the

255. *Id.* at 329, 333-34 ("An officer's inquiries into matters unrelated to the justification for the traffic stop, this Court has made plain, do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.").

256. *Id.* at 332-33.

257. *Id.* at 330 (quoting Maryland v. Wilson, 519 U.S. 408, 414 (1997)).

258. *Id.* at 327.

259. *Id.* at 327-28.

260. Of course, uninsured or unregistered drivers pose a danger to the public, but that danger lacks the immediacy of an allegedly impaired or reckless driver. *See* Prado Navarette v. California, 572 U.S. 393, 403 (2014).

261. *See* Arizona v. Johnson, 555 U.S. 323, 327-28 (2009).

California coast.[262] A patrol car was dispatched, which located and followed the suspect's vehicle for five minutes without detecting any erratic driving.[263] Nonetheless, the officer decided to pull the truck over.[264] When the officer, and another who responded to the same 911 call, approached the truck, they smelled marijuana, searched the vehicle, discovered four large bags of marijuana, and arrested the truck's two occupants.[265]

The purpose of the stop in *Prado Navarette* was to check reports that the defendant had run another driver off the road and might be continuing to drive in a dangerous manner.[266] The officers were thus responding to an immediate threat to public safety, in stark contrast to *Whren*, *Caballes*, and *Johnson*, in which the officers' interest in traffic safety seemed tangential at best. Furthermore, the incident took place at the junctions of Mendocino and Humboldt Counties in far Northern California, a remote part of the state far from large population centers.[267] With long stretches of highway to monitor and limited resources, the government might well argue that it did not have the resources to employ either a dedicated traffic enforcement unit or a technological solution to dangerous driving. Furthermore, aggressive driving of the kind alleged by the tipster is not a hazard particularly amenable to automated enforcement—it requires subjective assessment rather than a simple determination of the driver's speed, for example. Thus, the government's interest in using an officer to make a traffic stop was far higher than in the three cases cited above, and the manner in which the stop was conducted—by uniformed officers rather than plain clothed ones, and during the day rather than at night—was inherently less threatening than

262. 572 U.S. at 395.

263. *See id.* at 411-12 (Scalia, J., dissenting) ("[T]he pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a *long* time), Lorenzo's driving was irreproachable. Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck, Whren v. United States, 517 U.S. 806, 810 (1996), and this case would not be before us. And not only was the driving *irreproachable*, but the State offers no evidence to suggest that the petitioners even did anything *suspicious*, such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed.").

264. *Id.* at 395 (Thomas, J.).

265. *Id.* at 395-96.

266. *Id.* at 398-99.

267. *See id.* at 395. A Google Streetview search of the mile markers described in the opinion shows scenic vistas of forest and coastline, but very little else (images on file with the author).

were the stops in *Whren* and *Johnson*.[268] For these reasons, the government would likely be able to meet its burden on these facts, and the marijuana would be admissible in *Prado Navarette*'s trial.[269]

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What these examples demonstrate is that where there is little in the record beyond a routine traffic or vehicular infraction to justify the officers' conduct—where there is no immediate public threat, for example—and where no good reason appears in the record to justify the use of a uniformed officer (rather than a civilian), the presumption of unreasonableness will be difficult to overcome. While there is much to critique in a rule that calls for case-by-case reasonableness adjudication, it should not be overlooked that my rule would also create a safe harbor. Traffic stops carried out by civilians or the enforcement of traffic laws through automated means would be presumptively reasonable under the Fourth Amendment under my test just as they would be under current law.

CONCLUSION

I have written this Article as a plea to the Supreme Court of the United States to reverse *Whren v. United States* and to declare that traffic stops conducted by sworn police officers are presumptively unconstitutional. But we need not wait, likely in vain, for the current Supreme Court to do so. Rather, legislatures and local governments can take up these proposals as well. They can, as many already have, shift the enforcement of traffic offenses away from sworn officers, either through automation[270] or the use of unarmed, civilian traffic enforcement divisions.[271] But legislatures may also, through the rules of evidence and their supervisory powers over the state courts, require prosecutors to justify in court the use of sworn officers to make a stop when evidence seized during

268. *See Prado Navarette*, 572 U.S. at 395.

269. Moreover, even if the Court ultimately found that the use of a sworn officer to make this stop is unconstitutional, the evidence would likely be admitted all the same. *See supra* note 227 and accompanying text.

270. *See supra* notes 190-92 and accompanying text.

271. *See supra* Part II.C.

such a stop is sought to be introduced at trial. And of course, state supreme courts can extend the coverage of their states' Fourth Amendment analogues beyond the current scope of the federal constitution by adopting the suggested presumption against stops made by sworn officers.

No one likes traffic enforcement, and automated or civilian enforcement will do nothing to change that. But as the Tyre Nichols case reminds us, traffic enforcement is currently a matter of life or death for too many Americans.[272] To reduce the threat that traffic stops pose, as well as to foster equity and to improve both policing and public safety more generally, traffic stops conducted by sworn officers should be presumed unconstitutional.

272. *See supra* note 1 and accompanying text.