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Making the Best of "Whren": The Problems with Pretextual Traffic Stops and the Need for Restraing

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NOTE

MAKING THE BEST OF "*WHREN*": THE PROBLEMS WITH PRETEXTUAL TRAFFIC STOPS AND THE NEED FOR RESTRAINT

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I. INTRODUCTION

Three decades ago, in the landmark search and seizure case of *Terry v. Ohio*,[1] Chief Justice Warren wrote: "intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches [are] a result this Court has consistently refused to sanction."[2]

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* To my family and friends who know me so well, yet choose to love me anyway.

1. 392 U.S. 1 (1968).

2. *Id.* at 22 (citation omitted). The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

In *Terry*, the Supreme Court first distinguished between different types of intrusions when it decided that probable cause[3] was not necessary for police to stop and investigate an individual suspected of criminal activity.[4] Rather, all that was required was a lower level of certainty, reasonable suspicion.[5]

The main impetus behind *Terry* was law enforcement's need for a more flexible method of investigating criminal activity in the wake of ever increasing urban crime.[6] Although the Court acknowledged that allowing this flexibility arguably interfered with liberty and personal security interests of the individual, it found that "stop and frisks"[7] based on reasonable suspicion were justified because they amounted to a "minor inconvenience and petty indignity."[8]

While Fourth Amendment protections may have been weakened by the *Terry* decision, citizens could nevertheless take comfort in the fact that they could not be stopped on the street based on the mere whims of an officer.[9] To allow law enforcement to act in such a manner would contradict the very purpose of the Fourth Amendment.[10] The Amendment's framers clearly sought to put an end to the use of arbitrary police power which was so commonplace in colonial times.[11]

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3. Probable cause is a rather difficult concept to define.

> According to the Supreme Court, "probable cause" to arrest exists when the facts and circumstances are sufficient to warrant a prudent person in believing that the person to be arrested has committed or is committing a crime, and "probable cause" to search exists when the same prudent person would believe that the evidence or persons to be seized are located at the place to be searched.

CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 121 (1993) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. United States, 388 U.S. 160, 175-76 (1949)).

4. "Probable cause was the sole investigative standard recognized by the Court until 1968." *Id.* Other levels of certainty include reasonable suspicion, and a level essentially similar to relevance which is used in administrative investigations. *See id.* at 121-22.

5. *See id.* at 121. The Supreme Court defined reasonable suspicion as a level of certainty based on "specific and articulable facts," rather than on a hunch, but also made clear that it was meant to represent a lower standard than probable cause. *See id.*

6. *See Terry*, 392 U.S. at 10.

7. "Stop and frisk" should be distinguished from a full arrest because the suspect is only stopped briefly and if there is a suspicion that the suspect is armed, he is frisked for weapons. *See id.*

8. *Id.* (citing People v. Rivera, 201 N.E.2d 32, 36 (1964)).

9. *See* Janet Koven Levit, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L.J. 145, 155 (1996).

10. *See id.* at 167.

11. *See id.* at 168.

Reasonable suspicion provided the necessary safeguard by preventing the use of such arbitrary power.[12] While the Court did not provide a precise definition of reasonable suspicion, it is clear that it must amount to more than an unsubstantiated hunch.[13]

In *Terry*, for example, a police officer, patrolling an area to which he had been assigned for thirty years, developed reasonable suspicion after observing the strange behavior of two men he had never seen before.[14] These men alternately paced back and forth in front of a store window, repeatedly peering into the window more than five times each over a period of about ten minutes.[15] After each time, the men would confer with one another.[16] At one point, a third man joined the two for a conference, and then left.[17] The officer, who at this point had become thoroughly suspicious, followed the two men where they joined up with the third man a couple of blocks away.[18] Fearing that the men may be armed and about to commit a robbery, the officer stopped the men and conducted a frisk of their coats for weapons.[19] This extensive, suspicious behavior, which, according to the Court, clearly amounted to more than simple "window shopping," was enough to justify the temporary seizure of the men.[20]

Thirty years later, *Terry* is still the law of the land. Technically, a police officer cannot constitutionally stop an individual based on a mere hunch. However, due to the Supreme Court's holding in *Whren v. United States*,[21] police officers can now, in effect, do exactly that.[22]

This Note discusses the *Whren* decision and its impact since it was decided more than a year ago. Part II focuses on the *Whren* decision itself, and how *Whren* has made it possible for law enforcement to circumscribe the long-standing reasonable suspicion standard established in *Terry*. Part III discusses how the comprehensive nature of the traffic code has given the police practically unbridled discretion in deciding when they can detain a motorist. Part IV shows how this discretion has

12. *See id.* at 155 (stating "[a] reasonable suspicion requirement prevents the state from stopping individuals based merely upon whims, hunches, suspicions, and prejudices").

13. *See id.*

14. *See Terry*, 392 U.S. at 5.

15. *See id.* at 6.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *See id.* at 23.

21. 116 S. Ct. 1769 (1996).

22. The only limitation is that a person has to be driving; probable cause for any traffic violation will suffice for a reasonable stop regardless of an officer's true intentions. *See generally id.*

had its biggest impact on minorities by increasing the problem of racial discrimination in the use of traffic enforcement activities to search for evidence of criminal activity. Part V examines two primary types of *Whren* stops which have evolved—one of which not only minimizes the problem of discrimination, but also minimizes the likelihood that law enforcement will exceed the limitations of the Fourth Amendment. Finally, Part VI discusses specific practices which should be prohibited by law enforcement under certain circumstances.

II. BLOWING *WHREN* WAY OUT OF PROPORTION

The facts of *Whren* are quite simple. Two plainclothes officers in an unmarked car were patrolling a high drug area in the District of Columbia.[23] The officers drove past a truck waiting at a stop sign, and noticed the driver looking down into the lap of the passenger seated next to him.[24] The truck remained stopped at the intersection for more than twenty seconds.[25] When the officers turned their car around and headed toward the stopped vehicle, the truck made a right turn without signaling, and sped off at an "unreasonable" speed.[26]

Arguably, the officers did not have probable cause, or even reasonable suspicion, to temporarily stop the motorists in order to investigate other criminal activity they suspected.[27] However, the officers did have probable cause to believe that the driver had violated several provisions of the District of Columbia's traffic code.[28] After overtaking the truck, one of the officers approached the vehicle to give the driver a warning concerning the violations observed.[29] At this point the officer immediately observed the passenger holding in plain view what appeared to be two bags of crack cocaine.[30] Both the driver and the passenger were

23. *See id.* at 1772.
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.* The defendants did not argue that the police officers lacked probable cause to believe that the traffic code had been violated. *See id.* One of the violations was simply for "fail[ing] to give full time and attention to the operation of the vehicle." *Id.* In addition, the officers did not think the defendants were speeding, but simply "driving at a speed greater than [was] reasonable and prudent under the conditions." *Id.* at 1772-73.
29. *See id.*
30. *See id.* at 1772. There is a "plain view" exception to the general requirement that a search warrant is necessary to conduct a search. Providing there is a valid reason for the stop, evidence of a crime or contraband that is in plain view can be seized. *See* Coolidge v. New Hampshire, 403 U.S. 443, 484-90 (1971). The plain view sighting of the evidence or contraband, however, need not be inadvertent. *See generally* Horton v. California, 496 U.S. 128 (1990).

arrested, more drugs were subsequently seized from the vehicle, and the two were indicted later for violating federal drug laws.[31]

In an attempt to exclude the drug evidence at trial, the defendants argued that the officers' real reason for making the stop had nothing to do with enforcing the traffic code.[32] In other words, they asserted that the traffic violation was a mere pretext—a false excuse to stop the vehicle.[33] The issue for the Court in *Whren* was whether such pretextual stops were violative of the Fourth Amendment's prohibition against unreasonable seizures.[34] The Court unanimously upheld the constitutionality of pretextual stops, holding that such stops are reasonable so long as probable cause exists to believe a traffic violation has occurred.[35] The actual motivations of the individual officers are irrelevant to the reasonableness of the stop.[36]

At first glance, *Whren* seems to make a great deal of sense. After all, long before *Whren* was decided, automobile stops were reasonable when the police had probable cause to believe a traffic violation had occurred.[37] In holding that such stops could be made regardless of an officer's true intentions, however, the Court enabled the police to do what they clearly could not do prior to *Whren*—stop and investigate criminal activity unrelated to the traffic violation with less than reasonable suspicion.[38] As a matter of fact, virtually any hunch will do for a constitutional stop. Taking a closer look at *Whren*, it appears that motorists across the country have been, in effect, completely stripped of any and all Fourth Amendment protections.

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31. *See Whren*, 116 S. Ct. at 1772. There also were other drugs in the vehicle seized in a search incident to the arrest of the defendants. *Id.*

32. *See id.*

33. *See id.*

34. *See id.* at 1771. Defendants argued that the test should be "whether a police officer, acting reasonably, would have made the stop for the reason given." *Id.* at 1773. The Court believed that the test should be simply whether the officer *could* have made the stop. *See id.* One commentator has noted: "The adoption of the 'could' standard, thereby blindly sanctioning pretextual traffic stops, ignores and circumvents reasonable suspicion and, concomitantly, undermines the purpose behind the Fourth Amendment." Levit, *supra* note 9, at 167.

35. *See Whren*, 116 S. Ct. at 1776.

36. *See id.* at 1774.

37. *See* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

38. *See Whren*, 116 S. Ct. at 1773. The defendants argued that pretextual stops create the temptation to use traffic stops as a means of investigating other law violations, for which only a hunch exists. *See id.*

III. TRAFFIC CODES AND THE PROBLEM OF IMPOSSIBLE COMPLIANCE

Consider the following scenario: a police officer, after observing a young male for just a moment, develops a hunch that he is dealing drugs. The officer cannot articulate anything specific about the man that would justify his hunch, and so he certainly does not have the requisite suspicion to stop and investigate at this point.[39] Fortunately for the officer, the man gets into his car and drives away. Now, the officer has virtually unlimited discretion to stop the driver any time and for any reason.[40]

This result occurs because driving codes are typically so extensive that no driver can travel three blocks without violating the law in at least some small way.[41] In fact, a study of a particular stretch of highway between Baltimore and Delaware revealed that ninety-three percent of all drivers committed at least one traffic violation.[42] These statistics are certainly not surprising considering that the traffic code regulates everything from taillights to tire tread.[43] A motorist can be stopped not only for driving too fast, but also for driving too slow or simply for driving at a speed greater than is reasonable and prudent under the circumstances.[44] Thus, an officer can stop a motorist for actually adhering to the posted speed limit. There is certainly a problem with the comprehensive nature of the traffic code when a motorist can be stopped even when he is doing everything possible to comply with the law.

One case, *Florida v. Corvin*,[45] reveals just how far *Whren* can be stretched to justify a traffic stop which ultimately leads to the discovery of drugs. The governing traffic law prohibited the operation of a vehicle without a validation sticker on the license tag.[46] According to the arresting officer, the motorist's license tag was bent in the corner to the point that the sticker was unreadable.[47] First, the trial court's finding that the officer thought the sticker was unreadable proves that there was,

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39. *See supra* text accompanying notes 2-4.

40. *See* David A. Harris, Whren v. United States: *Pretextual Traffic Stops and "Driving While Black*," 21 CHAMPION 44, 41 (1997) (stating that because the traffic codes are so extensive, police "have virtually unlimited discretion").

41. *See id.*

42. *See* Whitehead v. Maryland, 1997 WL 542954, at *6 n.4 (Md. App.).

43. *See* Harris, *supra* note 40, at 41.

44. *See id.* This was one of the violations that the motorist in *Whren* was suspected of committing. *See Whren*, 116 S. Ct. at 1773.

45. 677 So. 2d 947 (Fla. 2d DCA 1996).

46. *See id.* at 948.

47. *See id.*

in fact, a sticker on the tag.[48] Therefore, there was no true violation in the first place.[49] Also, the stop occurred at 4 a.m.[50]—a time at which, the trial court noted, no tag is readable.[51] If the tag is unreadable, then certainly the sticker is unreadable.[52] Holding that the stop was pretextual, the seized drug evidence was suppressed based on a pre-*Whren* holding.[53]

On appeal, however, the case was overturned in light of *Whren*.[54] The appellate court noted the fallacies described above, in addition to the fact that the officer had no other suspicions about the motorist.[55] Nevertheless, it held that probable cause existed to believe a traffic law had been violated, and therefore, it reversed the trial court.[56]

It is clear that no matter how minor and insignificant the infraction, and regardless of whether such infractions are regularly enforced or ever enforced at all, *Whren* provides the constitutional foundation for the stop.[57] In fact, it almost seems as though the only way one can prevent being stopped by a police officer based on a random hunch is by staying off the roads altogether.

IV. *WHREN*'S STAMP OF APPROVAL ON RACIAL DISCRIMINATION

The law is clear. As long as an officer has the statutory authority under the traffic code to make a stop, the officer's subjective motivations for making the stop are absolutely irrelevant and will not be considered in determining whether the stop was reasonable under the

48. *See id.* The appellate court noted: "We first observe that the trial court's finding that officers stopped the vehicle because the decal was 'unreadable' is contrary to the stipulated fact that the officer originally thought the tag contained 'no decal' at all." *Id.* at 948-49.

49. Section 320.07, Florida Statutes (1993) only makes it a violation to drive "without" a sticker, not with an unreadable one.

50. *See Corvin*, 677 So. 2d at 948.

51. *See id.*

52. *See id.* (stating that the officer's observation that the sticker was illegible was unpersuasive).

53. *See id.* The trial court based its holding on *Kehoe v. State*, 521 So. 2d 1094 (Fla. 1988). *See Corvin*, 677 So. 2d at 948. The *Corvin* court explained that *Kehoe* used the "reasonable officer" test to determine if a traffic stop was reasonable under the Fourth Amendment. *See id.* In other words, a reasonable officer would not have stopped a motorist at 4 a.m. for the alleged registration sticker violation. *See id.*

54. *See Corvin*, 677 So. 2d at 949.

55. *See id.* at 949-50.

56. *See id.*

57. *See Whren*, 116 S. Ct. at 1776. *Whren* applies to all traffic violations and does not require officers to have more than probable cause for those violations that are minor or technical. *See id.*

Fourth Amendment.[58] This result may hold true even in the following situation.

Consider a police officer who has the personal belief that all African-Americans are involved in illegal drug activity in one way or another. Based on this belief, the officer decides to stop only African-Americans who exceed the speed limit, and ignores all other drivers regardless of their excessive speed. According to the Supreme Court, these stops are "reasonable" under the Fourth Amendment.[59]

The hypothetical described above is unfortunately a reality. Discrimination on the nation's roadways is a problem that began long before *Whren*.[60] For example, in 1992 in Volusia County, Florida, a study was conducted of local law enforcement traffic stop procedures.[61] More than 140 hours of videotape were compiled consisting of almost 1110 traffic stops.[62] The results were quite revealing. More than seventy percent of all the traffic stops involved African-American drivers.[63] This statistic is even more startling considering that African-Americans made up less than ten percent of the drivers on the particular highway involved in the study.[64] In addition, African-American drivers were detained twice as long, on average, as were white drivers, and also were twice as likely to have their cars searched subsequent to the stop.[65]

The results of the Volusia County study are only one example of obviously discriminatory stops. A similar study in Maryland revealed almost identical, discriminatory practices by law enforcement using the traffic code.[66] So common is the practice of discriminating against African-Americans in enforcing the traffic code, that a term for a new type of traffic violation has been coined: "Driving While Black."[67]

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58. *See Whitehead*, 1997 WL 542954, at *5 (explaining that the actual motivation of the officer cannot be subject to constitutional inquiry or challenge).

59. *See* Harris, *supra* note 40, at 42 (explaining that law enforcement's use of the vast discretionary power granted to it under *Whren* to stop more African-Americans does not, by itself, violate the Fourth Amendment).

60. *See id.*

61. *See* David A. Harris, *Traffic Stops of Minorities: Unequal Justice Under Law*, ORLANDO SENTINEL, Mar. 30, 1997, at G3.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See* Harris, *supra* note 40, at 42. In the Maryland study, 18 months worth of data revealed that of all motorists stopped and then searched, either through consent or with the use of a drug-sniffing dog, almost 80% were African-Americans. *See id.*

67. Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 425 (1997).

The Supreme Court could have seized the opportunity in *Whren* to remedy discriminatory pretextual traffic stops.[68] However, it avoided the issue almost entirely. Devoting only two sentences of the entire decision to the issue of discrimination, the Court stated that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[69] The Court cannot technically be accused of condoning discriminatory practices.[70] However, designating the Equal Protection Clause as the sole remedy for a discriminatory claim is tantamount to doing just that.

Bringing an equal protection claim requires an individual to prove that the officer, or other agent of the State, acted intentionally to discriminate against him based on his race.[71] Meeting this burden is no easy task, despite the statistical evidence available which would tend to support such a claim.[72] For example, an African-American living in Volusia County would not be able to successfully prove his claim simply by submitting the available study which clearly shows that members of his race are stopped in that county at a much higher rate than members of other races.[73]

The Supreme Court requires an individual to prove that similarly situated individuals could have been stopped for the same traffic offense, but were not.[74] In other words, an African-American motorist would have to show that a white motorist was observed by an officer committing the same violation under similar circumstances, yet was not stopped. Proving this absence of action is most definitely easier said than done. After all, police officers keep records of only the motorists they stopped, not of those whom they could have stopped, but did not.[75] It is therefore apparent that short of an officer admitting he stopped a driver

68. The African-American defendants in *Whren* argued that police officers might decide which motorists to stop based on decidedly impermissible factors, such as race. *See Whren*, 116 S. Ct. at 1773.

69. *Id.* at 1774.

70. The Supreme Court did not condone discrimination. It merely stated that discrimination was an equal protection issue, not a Fourth Amendment issue. *See id.*

71. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

72. Showing a discriminatory effect by statistical evidence is not, in itself, enough. Discriminatory intent also must be proven. *See id.* at 240-41.

73. *See id.*

74. *See* United States v. Armstrong, 116 S. Ct. 1480, 1488 (1996).

75. *See* Davis, *supra* note 67, at 437.

because of race, raising a successful equal protection challenge will be a near impossibility.[76]

Minorities have made accusations of discriminatory practices by law enforcement in the use of traffic stops for a long time.[77] In fact, the Volusia County study was conducted four years before the *Whren* decision.[78] *Whren* is simply responsible for making the situation worse by providing law enforcement with the constitutional foundation for engaging in such discriminatory practices.[79] As will be discussed later, pretextual stops can be conducted in a manner that will at least minimize the risk of discrimination.

V. TWO TYPES OF PRETEXTUAL STOPS

It seems as though law enforcement has taken full advantage of the Court's liberal interpretation of the Fourth Amendment in *Whren*. By all indications, pretextual traffic stops have significantly increased all over the country since *Whren*.[80] To make matters worse, the Supreme Court provided no guidance as to how far the police may go in detaining and interrogating someone who has been stopped under the pretext of traffic code enforcement.[81] As a result, the traffic code has suddenly become one of law enforcement's most effective weapons in fighting the war on drugs.

It is important to keep in mind that the stop in *Whren* was extremely brief.[82] Regardless of why the officer stopped the vehicle, the fact remains that as soon as he approached the vehicle, drugs were seen in plain view in the passenger's hands.[83] It was on these facts that the Supreme Court gave its stamp of approval for pretextual stops.[84]

However, not all traffic stops which lead to arrests run as smoothly or quickly as did the one in *Whren*. Obviously, most drug dealers do not

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76. *See id.* at 435. "It would be quite difficult for a black motorist to prove that a police officer stopped or detained him because of his race." *Id.*

77. *See* Harris, *supra* note 61, at G3. "[African-Americans] had been saying for years that police regularly stopped and searched them, but few people listened." *Id.*

78. The Volusia County study was conducted in 1992. *See* Harris, *supra* note 61, at G3.

79. *See* Harris, *supra* note 40, at 42 (stating with regard to using traffic stops to discriminate against African-Americans, "we can predict what *Whren* will lead to because it was happening already"). Additionally, Harris states that the Supreme Court has given its "stamp of approval" to discrimination in pretextual traffic stops. *See id.*

80. *See* Whitehead v. Maryland, 1997 WL 542954, at *2.

81. *See id.* at *5 (emphasizing that *Whren* was a unanimous decision without concurring opinions).

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

83. *See id.*

84. *See* Harris, *supra* note 40, at 42.

hold their contraband in their hands when a police officer approaches the vehicle. The methods available to law enforcement once they stop the vehicle to further detain the motorist and search the vehicle are so numerous that every traffic stop can easily be turned into a search for other criminal activity.[85]

While every traffic stop tends to be unique, stops which are admittedly pretextual have emerged in two basic forms. After considering these two types separately, it is clear that one is preferable because it limits the potential for abuse under *Whren*. The other demonstrates how law enforcement typically violates the Fourth Amendment by exercising authority that it lacks even after *Whren*'s liberal holding.

A. *"Cookie-Cutter"* Whren

An example of the first type of stop to be discussed occurred as part of an effort to stop the flow of drugs into Pinellas County, Florida.[86] The local police department set up a highway taskforce which used the traffic code as a means to stop cars to search for drugs.[87] The taskforce operated as follows: police officers would stop each motorist observed to be in violation of Florida's traffic code on a particular stretch of road.[88] Following the stop, a detective would approach the vehicle and ask the driver to accompany him to the police car.[89] The driver would then be asked for his consent to search the vehicle.[90] If the driver consented, one officer would run a computer check on the driver and vehicle, while another officer searched the vehicle.[91] If the driver refused, the officers would use a narcotics detection dog to sniff the vehicle, as dog sniffs do not qualify as a "search" under the Fourth Amendment.[92]

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85. *See* Levit, *supra* note 9, at 145-46. The officer may: (1) conduct a protective search of the driver, passengers, and vehicle for weapons if suspicion of danger exists; (2) seize contraband in plain view provided the stop itself is valid; (3) conduct a search incident to arrest; (4) use the time necessary to check the vehicle and registration to develop reasonable suspicion necessary to further detain the driver; or (5) ask the driver for voluntary consent to search the vehicle. *See id.*

86. *See* United States v. Holloman, 113 F.3d 192, 193 (11th Cir. 1997).

87. *See id.* The constitutionality of this practice recently was upheld in light of *Whren*. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.* The Supreme Court, in dictum, in *United States v. Place*, 462 U.S. 696 (1983), said that a drug sniff is not a search because it "discloses only the presence or absence of narcotics, a contraband item." SLOBOGIN, *supra* note 3, at 194 (citing *Place*, 462 U.S. at 707). The defendant in *Holloman* tried to distinguish his stop from the one in *Whren* by arguing that

It is important to take note of the cookie-cutter fashion in which the stops of this operation are conducted. First, each motorist observed violating the traffic code is stopped, regardless of any individualized suspicion of drug activity.[93] Therefore, this operation is less susceptible to claims of discrimination. Second, each motorist is subjected to an identical post-stop procedure.[94] A motorist cannot complain that he was subjected to a more aggressive attempt by the officers to search the vehicle than any other motorist.[95]

Also noteworthy is the efficiency of the operation. Multiple officers are involved in each stop and an on-site narcotics detection dog is readily available if consent is refused by the motorist.[96] At all times, therefore, the pretextual purpose of the traffic stop is being carried out.[97] While the search of the car is being conducted by one officer, the computer check of the motorist is being conducted by another.[98] Such checks are routine practice for a traffic stop even when the officer has no intention of searching for drugs.[99] Additionally, once the radio report is received which indicates that there are no problems with the motorist or the vehicle, the detention is concluded by either issuing a citation or an oral warning.[100]

The benefit in this cookie-cutter operation is such that every stop is conducted quickly and efficiently. This is important because the Supreme Court has held that an intrusion must last no longer than is necessary to effectuate the purpose of the stop.[101] If reasonable suspi-

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the drugs in *Whren* were in plain view and that there was no required detention or search. *See Holloman*, 113 F.3d at 194. In *Holloman*, the defendant argued, there was a detention and a search. *See id.* This argument failed because a dog sniff is not a search for Fourth Amendment purposes. *See id.* The *Holloman* court reasoned that this case was therefore analytically indistinguishable from *Whren*. *See id.* Additionally, the defendant argued that the case was similar to an unlawful roving patrol rather than a constitutionally permissible roadblock stop. *Id.* The court said that the roadblock and roving stop cases "concerned whether, consistent with the Fourth Amendment, the Government may temporarily detain motorists in the absence of probable cause or reasonable articulable suspicion." *Id.* Since the seizure in this case was based on probable cause, the court dismissed the argument. *See id.*

93. *See supra* text accompanying note 88.

94. *See supra* text accompanying notes 89-92.

95. This approach also makes the post-detention period less susceptible to claims of discrimination.

96. *See supra* text accompanying notes 88-92.

97. The pretext is the violation of the traffic code for which the motorist is stopped. The true purpose of the task force is to stop the flow of drugs.

98. *See supra* text accompanying note 91.

99. A computer check is part of the "legitimate investigative detention in the wake of a traffic stop." Levit, *supra* note 9, at 154.

100. *See Holloman*, 113 F.3d at 193.

101. *See* Florida v. Royer, 460 U.S. 491, 500 (1983).

cion to continue the detention of the motorist does not develop during the time necessary to issue a warning or citation for the observed violation, then the stop must end.[102] Any detention beyond the time necessary to issue the citation is deemed a second stop.[103] Therefore, if reasonable suspicion is lacking, any evidence discovered during the second stop will be excluded as the fruit of an unconstitutional search.[104]

B. *Random Stops Under* Whren

Whren does not restrict pretextual traffic stops to the cookie-cutter type described in the above Pinellas County operation. In a random stop, the second type to be described, the decision to stop a vehicle occurs in an arbitrary manner. In addition, law enforcement may use other techniques following the traffic stop other than simply asking for the driver's consent.[105] The efficiency of these random stops also suffers when the stops are not part of an organized operation. Obviously, if a

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102. *See* Snow v. State, 84 Md. App. 243, 248 (1990).

103. *See id.* In *Snow,* the driver was stopped by an officer for speeding, and appeared to the officer to be somewhat nervous. *See id.* at 247. The officer was on the lookout for drugs, considering the particular stretch of road involved. *See id.* After noticing three air fresheners hanging from the rear view mirror, the officer believed that the driver may have been attempting to conceal the odor of narcotics. *See id.* At some point, both the driver and passenger were asked to exit the vehicle. *See id.* After the officer issued a traffic warning for speeding, he requested permission to search the car. *See id.* at 248. The driver refused, and the officer then used a K-9 dog to sniff the car for narcotics. *See id.* The dog alerted to the presence of drugs, and a subsequent search turned up heroin. *See id.* The court in *Snow* held that the purpose of the stop was fulfilled as soon as the officer issued the warning for speeding. *See id.* Additionally, the court found that the State did not demonstrate a reasonable, articulable suspicion to continue the detention beyond the warning. *See id.* at 265. The fact that the driver was nervous and avoided eye contact with the officer did not justify a detention because this is common of most motorists during a confrontational traffic stop. *See id.* at 260. The driver's use of a stretch of highway on which drug trafficking was common did not distinguish him from any other driver on the road. *See id.* Furthermore, air fresheners in a car are common for both their functional and ornamental capacity. *See id.* at 261. The court reasoned that the three air fresheners could merely indicate that the driver added one at a time, still considering the old one to be useful. *See id.* Finally, exercising the constitutional right to refuse consent is no indicator that one is involved in carrying drugs. *See id.* at 262. While the officer's "hunch" of drug activity in this case turned out to be correct, it did not justify the continued seizure of the driver, which was an additional intrusion on his Fourth Amendment rights. *See id.* at 267.

104. *See* Mapp v. Ohio, 367 U.S. 643 (1961). The reasoning behind viewing a detention beyond the time it takes to issue a traffic warning or citation as a separate, distinct detention is derived from a main tenet of the landmark *Terry* case discussed earlier: "the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry,* 392 U.S. at 19 (citing Warden v. Hayden, 387 U.S. 294, 310 (1967)).

105. *See supra* text accompanying note 81.

single officer is making the stop, he cannot effectively do two things at the same time. Therefore, if the requisite reasonable suspicion does not develop, the likelihood increases that the detention will continue for a longer period than is constitutionally permissible.[106]

The very recent case of *Whitehead v. Maryland*,[107] decided by the Court of Special Appeals of Maryland, provides a perfect example of a random stop which at first glance appears no more intrusive than a uniform stop. However, a closer look reveals several key differences which ultimately make the stop unconstitutional.[108] It also demonstrates the need for limiting an officer's conduct subsequent to a pretextual stop.

The police officer in this case was part of a special highway taskforce, similar to the Pinellas County taskforce, organized to enforce the controlled dangerous substance laws.[109] Accompanied by a K-9 narcotics dog, the officer pulled over a motorist who was exceeding the speed limit.[110] Unlike the systematic operation described above, the officer did not stop all drivers he observed speeding.[111] In fact, testimony showed that the officer only selected particular vehicles which exceeded the speed limit and ignored others.[112] As a result, there was little doubt that the officer's decision to stop the driver for speeding was a pretext for further investigating his suspicion that the vehicle and its occupants were connected with narcotics activity.[113]

Subsequent to the stop, the officer asked the driver to produce his license and registration, but the driver could only produce the latter.[114] Therefore, the officer ordered the driver out of the car, but told the passenger to remain seated.[115] The officer in this case, unlike the officers involved in the Pinellas County stops, did not have a standard

106. *See supra* notes 98-99 and accompanying text.

107. 1997 WL 542954 (Md. App.).

108. The stop itself was not unconstitutional. *See id.* at *5. However, the portion of the detention subsequent to the stop, which exceeded the time necessary to issue a warning or citation, was unconstitutional. *See id.*

109. *See id.* at *2.

110. *See id.* at *1.

111. *See id.* The court stated, "We, consequently, can and do properly infer that [the officer's] selection of particular vehicles violating the speed limits, while ignoring others, is influenced by his suspicion that the occupants may, in addition to speeding, also be in violation of the criminal laws that he has been detailed to enforce." *Id.* at *2.

112. *See id.*

113. *See id.*

114. *See id.* at *1.

115. *See id.*

operating procedure which was adhered to in attempting to investigate narcotics activity subsequent to the stop.[116]

After separating the driver and passenger, the officer asked the driver where he had been on his travels.[117] Shortly thereafter, the officer posed the same question to the passenger and received a slightly different response.[118] At this point, the officer claimed he became suspicious of the men.[119] Meanwhile, the officer contacted the station via radio to check if the driver had any outstanding warrants, if he had a valid driver's license, and also to verify that the car had not been reported stolen.[120]

The driver then was asked to sit in the police cruiser, where the officer requested the driver's consent to search the vehicle.[121] The driver subsequently became nervous and began to stutter.[122] In addition, he refused to sign the consent form.[123]

Meanwhile, the officer received a report which indicated that the driver had a valid driver's license, that he was not wanted on any outstanding warrants, and that the car he was driving was not stolen.[124] Nevertheless, the officer continued the detention while he conducted a scan of the car for narcotics with his K-9 police dog.[125] The dog

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116. Nothing in *Whitehead* indicates that the officer used the same procedure following a traffic stop for a violation of the traffic code to look for signs of other criminal activity. The only reference to any standard technique was the officer asking for consent to search the vehicle to observe the motorist's reaction to the request. *See id.* Nothing indicates that the officer asked all stopped motorists for consent.

117. *See id.*

118. *See id.* The driver revealed that he had come from New Jersey where he had visited his grandmother the previous Saturday, and was returning to Baltimore. *See id.* The passenger responded similarly. His response, however, differed in that he said they had visited friends, and also that they had visited New Jersey on the previous Sunday (not Saturday). *See id.*

119. *See id.*

120. *See id.*

121. *See id.*; *supra* text accompanying note 99.

122. *See Whitehead*, 1997 WL 542954, at *1.

123. *See id.* The officer testified that he typically did this to observe the motorist's reaction. *Id.* at *4. The Supreme Court has held that the validity of a purported consent to a search is determined by a "voluntariness" test. *See* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2 (3d ed. 1996). Whether a consent to a search was "voluntary" is a question of fact determined from the totality of all the circumstances. *See id.* Also noteworthy is the Supreme Court's recent holding that the Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go" before his consent to search will be recognized as voluntary. *See* Ohio v. Robinette 117 S. Ct. 417, 421 (1996). The Court found that it would be unrealistic to require law enforcement to always inform detainees that they may leave. *See id.*

124. *See Whitehead*, 1997 WL 542954, at *1.

125. *See id.*

alerted to the presence of drugs near the driver's door, and a subsequent search by the officer turned up crack cocaine in a bag behind the driver's seat.[126] At trial, a motion to suppress the evidence found during the traffic stop was denied, and the driver was convicted of violating narcotics laws.[127]

The outcome of this random *Whren* stop was indeed desirable. After all, a drug dealer was convicted and sent to jail. It must not be forgotten, however, that even drug dealers are protected by the Fourth Amendment, which still exists, despite the *Whren* decision. On appeal, the conviction was overturned, and the court held that the officer exceeded the limits which govern a search subsequent to a stop for violation of the traffic laws.[128]

In deciding that the detention in *Whitehead* was unconstitutional, the court strictly adhered to the Supreme Court's holding that a detention must be no longer than is necessary to carry out the purpose of the stop.[129] Considering that the entire detention lasted only five minutes,[130] it is clear that a brief stop will not automatically qualify as constitutional. The *Whitehead* court found that nothing occurred during the time it took to complete the purpose of the stop to justify further detaining the motorist to conduct the K-9 search.[131]

Even though this stop is precisely the type which *Whren* unanimously upheld,[132] it differs dramatically from the type of stop described earlier which was part of a more organized, systematic operation. Immediately,

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126. *See id.*

127. *See id.*

128. *See id.* at *5. After the Supreme Court agreed to hear the *Whren* case, but before its decision, the *Washington Post* printed an editorial which stated, "It is difficult for many people to accept that a drug conviction can be overturned simply because it was not reasonable for the police to have stopped the car in the first place." *Drugs and Car Searches: An Editorial*, WASH. POST, Jan. 6, 1996, at A20. *Whren*'s holding made the stop itself reasonable. *See Whren*, 116 S. Ct. at 1777. It is no doubt equally difficult for people to accept that a five minute detention like the one in *Whitehead* which ultimately turned up drugs was unconstitutional. *See Whitehead*, 1997 WL 542954.

129. *See Whitehead*, 1997 WL 542954, at *2 (citing Florida v. Royer, 460 U.S. 491, 500 (1983)).

130. *See id.* at *1. The Supreme Court has said that the brevity of the intrusion on an individual's Fourth Amendment interests is an important factor in determining if the seizure is so minimally intrusive as to be justified by reasonable suspicion. *See* United States v. Place, 462 U.S. 696, 709 (1983).

131. *See Whitehead*, 1997 WL 542954, at *5. The *Whitehead* court stated: "There is nothing that [the officer] observed that even remotely indicates an involvement in the transportation of drugs." *Id.*

132. *See id.* "We are mindful of the Supreme Court's opinion in *Whren* that put an officer's motivation for stopping a motor vehicle beyond attack for purposes of suppressing the fruits of a search." *Id.*

the random type of stop is more susceptible to claims of discrimination because the race of the driver may be what motivates the officer to decide which speeders to stop. Such an accusation cannot easily be made when all traffic offenders are stopped. Additionally, since the officer only stops those motorists whom he has a hunch may be involved in narcotics, it is more likely that he will detain the motorist longer than necessary in order to investigate his hunch.[133]

VI. RESTRICTING PRETEXTUAL STOPS

One way to prevent the *Whren* decision from turning every temporary traffic stop into an extended, and therefore, unconstitutional stop,[134] is to strictly limit an officer's conduct during a stop when reasonable suspicion is absent.[135] *Whitehead* serves as a perfect example of certain practices that should be restricted if a stop is conducted in the random manner just described. As the court stated:

> We think it would be a mistake to read *Whren* as allowing law enforcement officers to detain on the pretext of issuing a traffic citation or warning, and then deliberately to engage in activities not related to the enforcement of the traffic code in order to determine whether there are sufficient indicia of some illegal activity.[136]

A. *Questioning Occupants During a* Whren *Stop*

One activity which occurred in *Whitehead*, common to many investigations following a traffic stop, was the questioning of the vehicle occupants to further a hunch of suspicious behavior.[137] As noted earlier, the driver and passenger gave slightly conflicting responses regarding where they had been.[138] However, there is nothing about a driver and passenger not having identical stories as to exactly where they

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133. It logically follows that if an officer stops a speeding vehicle because he has a hunch the vehicle contains drugs, he will attempt to prove his hunch correct. It also follows that such a stop will tend to run longer than a stop for speeding where no such suspicion exists.

134. *See supra* notes 102-03 and accompanying text.

135. If reasonable suspicion of criminal activity develops during the normal course of the traffic stop, then the detention may be constitutionally continued. *See supra* text accompanying note 85. The *Whitehead* court indicated that such suspicion could arise from noticing the presence of scales, bongs, glassine bags, or other instruments which may have a lawful use, but also are commonly used to conduct narcotics activity. *See Whitehead*, 1997 WL 542954, at *5.

136. *Whitehead*, 1997 WL 542954, at *5.

137. *See id.* at *1; *supra* notes 117-18 and accompanying text.

138. *See Whitehead*, 1997 WL 542954, at *1; *supra* text accompanying note 118.

were, why they were there, and when they left, that would justifiably lead a police officer to conclude that they were involved in narcotics activity.[139]

Furthermore, such an inquiry is in no way related to the enforcement of the traffic code. The officer was not asking these questions to determine why the driver was speeding or to try to prevent the driver from speeding in the future.[140] He was merely doing this to obtain justification for searching the vehicle.[141]

Although the court in *Whitehead* did not in any way prohibit the use of such questions during a stop for a violation of the traffic code, these inquiries ought to be prohibited. After all, the most that could arise is an inconsistent response from the driver and passenger. Since the court correctly points out that inconsistent responses do not create an inference of narcotics activity,[142] such inquiries have no utility. In fact, these inquiries have the undesirable effect of increasing the length of the detention.[143] If the officer should at all times be doing whatever is necessary to effectuate the purpose of the stop, then asking irrelevant questions is improper.

B. *K-9 Searches by a Single Officer*

Another activity which should be prohibited under certain circumstances is the use of a K-9 dog to sniff for narcotics when a driver refuses to give consent to search the vehicle. As is demonstrated in *Whitehead*, when a traffic stop is made by a single officer,[144] it is likely that using a K-9 will result in an extended, unconstitutional detention.

This result is the case because a police officer conducting a traffic stop is required to issue the citation or warning efficiently and expeditiously.[145] If an officer asks for consent and the motorist refuses, as he is entitled to do, then an officer can resort to using a K-9 dog. Again, even though the use of a dog is not considered a search,[146] it still

139. *See Whitehead*, 1997 WL 542954, at *3 (suggesting that asking a motorist where he has been does not further the enforcement of the posted speed limit).

140. *See id.* at *4.

141. *See id.*

142. *See id.* at *3.

143. An officer should not be asking irrelevant questions when he could be using the time necessary to ask those questions to issue the citation and to discontinue the detention of the motorist.

144. *See Whitehead*, 1997 WL 542954, at *1.

145. *See id.* at *4 (stating that this duty arose after the officer received the results of the computer check which indicated that everything was in order).

146. *See supra* text accompanying note 92.

requires a further detention of the motorist.[147] Since the stop in *Whitehead* was only five minutes in duration,[148] including the time it took to use the K-9, it is clear that even a short stop can violate an officer's duty to quickly complete the stop.

Unless a second officer is available to conduct the K-9 scan while the other officer is conducting the computer check of the motorist, it seems that the use of a dog will result in an illegal detention in most instances, absent reasonable suspicion. Additionally, a driver's exercise of his constitutional right to refuse consent cannot ever be used to justify this further detention.[149] Therefore, unless the stop is conducted by a multiple officer taskforce, like the one described in the Pinellas County operation,[150] K-9 scans will be an unnecessary intrusion exceeding an officer's constitutional limitations.

VII. CONCLUSION

It seems as though the unanimous *Whren* decision is here to stay despite its obvious defects. American motorists are thus forewarned that as soon as they venture out onto any street or highway, they will instantly be subjected to the whims of a law enforcement officer. Some may consider the liberal holding of *Whren* to be a necessary evil in fighting the war on drugs. Others may view it as an unnecessary intrusion on personal privacy, as well as a means whereby law enforcement can easily discriminate against minorities in deciding who to stop. Debating the issue, however, does not change the law.

It is true that an officer's subjective motivations for making a traffic stop are constitutionally irrelevant after *Whren*. However, there are still limitations following a traffic stop for a violation of the traffic code that must be strictly enforced if *Whren* is to be kept from spiraling out of control. Therefore, a traffic stop should always be conducted in an expeditious manner that at all times furthers the purpose of the stop, regardless of the officer's true intention. While Fourth Amendment protections have been weakened by *Whren*, limiting pretextual stops in this manner will ensure that these protections do not completely disappear.

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147. This is true unless, of course, there is more than one officer involved to conduct the K-9 drug-sniff while the other officer checks the computer for outstanding warrants. *See supra* notes 96-99 and accompanying text.

148. *See Whitehead*, 1997 WL 542954, at *1 (referring to the officer's testimony).

149. *See id.* at *4.

150. *See supra* text accompanying notes 88-92.