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Stopping a Moving Target

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INTRODUCTION:

Across the nation, police officers have for decades singled out African-Americans and members of other minority groups as targets for law enforcement excesses.[1] African-Americans have long been all too aware of this phenomenon.[2] The larger society, blissfully unaware in the past, has recently begun to take note of it as well.[3] This widespread awareness has, in turn, lessened the public's faith in our criminal justice system.[4]

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1. *See* Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 53-54; Hope Viner Samborn, *Profiled and Pulled Over: Lawmakers Propose New Remedy to Stop Police*, 85 . A.B.A. J. 18, Oct. 1999, at 18.

2. *See* Goldberg, *supra* note 1, at 55 (quoting young black men who were interviewed, describing the profiling practices). Even a veteran police officer indicated that "[w]hen I go to Jersey for Guard weekends, I take the back roads . . . I won't get on the turnpike. I won't mess with those troopers." *Id. See also* David Kocieniewski, *Minority Drivers Tell of Troopers' Racial Profiling*, N.Y. TIMES, Apr. 14, 1999, at B1 (reporting testimony of witnesses who appeared before the New Jersey Legislature, one of whom testified that he had been stopped fifty times in three years of driving on the New Jersey Turnpike in his BMW).

3. *See* Angie Cannon, *DWB: Driving While Black; Motorists are Fighting Back Against Unfair Stops and Searches*, U.S. NEWS & WORLD REP., Mar. 15, 1999, at 72 (citing separate incidents in which Blair Underwood, Wesley Snipes and Christopher Darden were each victims of racial profiling). *See also* April McClellan-Copeland, *Police Racial Profiling Focus of Panel; Bill Would Require Officers to Gather Data at Traffic Stops,* PLAIN DEALER CLEV., Aug. 12, 1999, at 1B (quoting former police officer saying, "What happens is cops are on a fishing expedition and they stop predominantly young black males and say 'Empty your pockets, show me your ID.'").

4. *See* N.J. Attorney Gen., *Interim Report of the State Police Review*

This Article focuses on a phenomenon that is sometimes called "driving while black" or "DWB."[5] This ironic term describes the widespread police practice of stopping African-American drivers for minimal speeding and other traffic violations that would not lead an officer to stop a white driver under similar circumstances.[6] Until a few years ago, victims of such practices might have sought sanctuary in the Fourth Amendment right against unreasonable seizures.[7] In *Whren v. United States*,[8] however, the United States Supreme Court stated that the Fourth Amendment does not prohibit racially motivated traffic stops.[9] The Court advised aggrieved litigants to attack racial profiling under the Equal Protection Clause of the Fourteenth Amendment.[10]

Though the Court's advice might sound theoretically unobjectionable, the decision to consign the fight against racially motivated routine traffic stops to the Equal Protection Clause has serious and detrimental practical implications. The Su-

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Team Regarding Allegations of Racial Profiling 47 (1999) ("[D]isparate treatment of minorities at the hands of our criminal justice system reinforces a sense of mistrust."); *id.* at 84 (profiling erodes public confidence in police); Vivian S. Toy, *Confidence in Police Has Fallen, a Poll Finds*, N.Y. TIMES, Oct. 3, 1997, at B1 (stating that "New Yorkers' confidence in the Police Department has dropped significantly in the last year and a half."). *See also* David Rohde, *Jurors' Trust in Police Erodes in Light of Diallo and Louima*, N.Y. TIMES, Mar. 9, 2000, at B1 .

5. *See* David A. Harris, *Driving While Black; Racial Profiling on Our Nation's Highways*, An American Civil Liberties Union Special Report, June 1999; Anna Quindlen, *The Problem of the Color Line*, NEWSWEEK, Mar. 13, 2000, at 76 ("On the highways, being stopped because of race is so commonplace that there's even a clever name for it: DWB or 'driving while black").

6. *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 280 (1999) (Noting that Blacks are more likely to be stopped than whites.); *See generally* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

7. Note that this Fourth Amendment litigation could take the form of either a §1983 suit, *see, e.g.,* Washington v. Lambert, 98 F.3d 1181, 1183 (9th Cir. 1996), or a suppression motion under the Fourth Amendment exclusionary rule; United States v. Betemit, 899 F. Supp. 255, 257 (E.D.Va. 1995).

8. 517 U.S. 806 (1996).

9. *Id.* at 812-813.

10. *Id.* at 813.

preme Court ruled in *Washington v. Davis*[11] that to win on a claim of discrimination under the Fourteenth Amendment, a plaintiff must demonstrate the defendant's intent to discriminate on account of race (or other prohibited classification).[12] Demonstrating a disparate impact, even a severely disparate impact, would not suffice.[13]

The holding in *Washington v. Davis* created a substantial obstacle to challenging discriminatory traffic stops as a matter of Equal Protection. A police officer might not realize, for example, that he is stopping a particular driver in part because of her race, because the process might be unconscious.[14] It could be that the discriminatory intent only emerges when we note the racial disparity in stops over a period of time. Under the doctrine, however, statistical evidence of such unconscious racism would not register as "intent" and would therefore fail to meet the requirements of making out a successful Equal Protection claim.

Exemplifying this problem in the death penalty context, the Supreme Court again addressed the issue of discriminatory intent in *McCleskey v. Kemp*.[15] Though the habeas petitioner there demonstrated a statistically significant association between the respective race of defendants and their victims and the odds of the jury imposing a death sentence, the Court held that in the absence of proof that petitioner's specific jurors consciously decided to sentence him to death because of his or

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11. 426 U.S. 229 (1976).

12. *Id.* at *239*.

13. *Id.* at 242 ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.").

14. *See e.g.,* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) ("[R]equiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. It also disregards both the irrationality of racism and the profound effect that the history of American race relations has had on the individual and collective unconscious."); Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

15. *See* 481 U.S. 279 (1987).

his victim's race, there was no Equal Protection violation.[16] It is hard to imagine better evidence of race-driven decision-making than the statistics presented to the Court demonstrating otherwise inexplicable racial disparities in capital sentencing. Yet the Court wanted the smoking gun implicating the specific jurors and accordingly rejected McCleskey's petition. It is with an eye to this very stingy doctrine of Equal Protection that we need to evaluate critically whether the Court was correct to choose Equal Protection over the Fourth Amendment as a tool for putting an end to racial profiling on the highway.

This Article argues that the Court seriously erred when it decided that race-driven, pretextual traffic stops do not violate the Fourth Amendment right against unreasonable seizures. Section I begins by developing and analyzing the distinction between stops of pedestrians, on the one hand, and stops of drivers, on the other. The Section then goes on to explain why driver stops lend themselves more readily to effective Fourth Amendment regulation than pedestrian stops and urges that the doctrine should reflect this reality. Section II articulates and explains a second distinction—between governmental discrimination that violates the Equal Protection Clause alone and governmental discrimination that violates Equal Protection *and* other constitutional provisions. The Section next elaborates on which racially motivated stops violate only Equal Protection and which violate both the right to Equal Protection *and* the Fourth Amendment right against unreasonable seizures. The explanation proceeds by describing and then utilizing the distinction between over and under-enforcement. I contend in this Section that the racially motivated traffic stop represents an instance of over-enforcement and therefore violates both Equal Protection and the Fourth Amendment. As I also illustrate in this Section, the reality of traffic law enforcement violates the spirit of the Supreme

16. *Id.* at 292-93 ("[T]o prevail under the Equal Protection Clause, McClesky must prove that the decisionmakers in *his* case acted with discriminatory purpose. He offers no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence.").

Court's decision in *Delaware v. Prouse*,[17] which prohibited individual stops not based on objectively reasonable suspicion of wrongdoing.[18]

Section III contends that to address the problem of racially motivated traffic stops, the Court's approach to traffic law enforcement must change. Specifically, the Section urges, we ought to limit allowable traffic stops to those occasions on which a driver has created a serious danger that must be addressed immediately. For other kinds of traffic violations, the Section contends, the Fourth Amendment requires a less confrontational enforcement method. Pursuing alternatives to current traffic enforcement practices would cut back on the boundless discretion that police officers currently enjoy in deciding whom to stop. As a direct byproduct of this reduction in discretion, the racial disparity that inevitably accompanies limitless discretion would diminish as well. In addition, a reduction in the absolute number of unnecessary stops would cut down on a practice whose inherent volatility and dangerousness has led the Court to tolerate intrusions on privacy and liberty that are not justified by the seriousness of reasonably suspected violations.[19]

Finally, Section III sketches two alternative enforcement schemes that could take the place of current stopping practices. The Section discusses one approach that some foreign countries have adopted, thus illustrating the feasibility of change. Whether adopted federally, as I argue it should be, as

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17. 440 U.S. 648 (1979).

18. *Id.* at *663*.

19. *See* Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977) (per curiam) (holding that police may order driver out of a lawfully stopped vehicle); Maryland v. Wilson, 519 U.S. 408, 415 (1997) (holding that police may order passengers out of a lawfully stopped vehicle). *Cf.* United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) (explaining, in the context of search incident to arrest, that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest," and citing a study that concludes that approximately 30% of the incidents in which a police officers is shot occurs during a vehicle stop.). Because the Court has viewed a stop and frisk as less intrusive than the typical search and seizure, it defines the requisite "reasonable suspicion" as a less demanding standard than the usual "probable cause" standard contained in the language of the Fourth Amendment. *See id.*

a matter of Fourth Amendment law, or whether adopted by state courts through their own analogous constitutional (or statutory) provisions, such reforms are not only realistic, but they have proved both practical and effective in their implementation elsewhere. Though generally driven by different concerns, implementation in other common-law countries can serve as a useful model for our efforts in the United States to address the seemingly intractable problem of racial profiling on the highway.

I. WALKING vs. DRIVING

A. *Walking*

A person walking down a street in the United States has the right to be free from police stops, as long as she does nothing to arouse legitimate suspicion of criminal activity. She has this right because in 1968, the Supreme Court held that a police stop that falls short of qualifying as an arrest nonetheless triggers the Fourth Amendment's ban on unreasonable searches and seizures. To satisfy the Fourth Amendment, the police must have at least reasonable suspicion before performing a stop.[20] In addition, in order to perform a legal patdown or "frisk" of an individual's outer clothing, police officers must first have reasonable suspicion to believe the individual is armed and dangerous.[21]

The cases define "seizures," which include stops, and spell out some of the necessary elements.[22] What they fail to do is say exactly at what point an interaction between a police officer and a pedestrian changes from a consensual conversation

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20. Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

21. *Id.* at 27.

22. *Id.* at 16 ("[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."); United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("[A] person [is] 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."); California v. Hodari D., 499 U.S. 621, 625-26 (1991) (holding that a show of authority absent physical force becomes a seizure only when the suspect yields).

into a stop.[23] In *Terry* itself, the Court failed to identify the moment at which the police officer had "stopped" the suspects, and the Court did not say definitively that prior to the patdown searches, the officer had stopped the suspects at all.[24] Though this failure might seem basic, it cannot be easily remedied, given the inherent ambiguity of many on-the-street encounters.

Consider the customary nonvehicular police/civilian interaction. An officer might initiate contact with a pedestrian by saying hello or by asking a relatively innocuous question. The civilian would then typically respond, even if he would rather ignore the officer and continue on his way.[25] After an initial exchange, the officer might switch topics to suspicious circumstances that raise questions about the individual. As the dialogue continues, the individual might come to feel less and less able to walk away from the officer without consequences. This unease can persist and escalate throughout the conversation until the officer either tells the individual that she is free to leave or performs a weapons frisk that serves to confirm the individual's subjective perception of coercion.

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23. *See e.g.,* Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 ST. LOUIS U. L.J. 205, 272 (1991).

24. Of course, the suspects were not free to leave once the officer began frisking them for weapons and arresting them. *See* Terry v. Ohio, 392 U.S. at 19 ("In this case there can be no question, then, that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing."). Prior to that point, however, the Court does not resolve the question—either to say that there was no stop or to say that there was, and if so, when that stop occurred.

25. *See, e.g.,* David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 954 (1997) (describing pressure in citizen-police "consensual" encounters); Robert H. Whorf, *"Coercive Ambiguity" in the Routine Traffic Stop Turned Consent Search*, 30 SUFFOLK U. L. REV. 379, 406 (1997) ("'The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred.'"(quoting Ohio v. Robinette, 653 N.E.2d 695, 698 (Ohio 1995), *rev'd*, 519 U.S. 33 (1996))); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 74 (1998) (stating that encounters between police officers and individuals are sometimes coercive and often nonconsensual).

Since police/citizen interactions are fraught with a great deal of anxiety and perceived coercion, some have argued that the Fourth Amendment should be read to require that police interact only with individuals about whom there is an objective basis to suspect wrongdoing.[26] In essence, such an approach would define all police-initiated interactions with private individuals as Fourth Amendment "stops." This paradigm would extend the protections of *Terry v. Ohio* to the people who most distrust and fear the police, those who feel captive to police questioning even under circumstances in which the standard "reasonable person" of the judicial imagination might feel free to leave.[27]

Unfortunately, this remedy for perceived coercion would generate serious problems of its own. For one, limiting police interaction in this way could make the task of law enforcement much more difficult and thereby diminish the deterrent effect of the criminal law on behavior.[28] The police have a much easier time discovering a crime in progress when they are free to talk to people at the scene without having to negotiate procedural obstacles.[29] There is a second and more important problem, from the perspective of those who stand to gain the most from a reduction in hostile interactions with the police. Ide-

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26. For a thorough consideration of one such approach, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974).

27. *Cf.* California v. Hodari D., 499 U.S. 621, 630 n.4 (1991) (Stevens, J., dissenting) (criticizing the majority's suggestion that only the guilty flee from the police, because "it fails to describe the experience of many residents, particularly if they are members of a minority").

28. *But cf.* Jeffrey Fagan and Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, Columbia Law School, Public Law & Legal Theory Working Paper Group, 10 (Mar. 25, 2000), at http://papers.ssrn.com/paper.taf?ABSTRACT_ID=223148. ("The failure of crime rates to decline commensurately with increases in the rate and severity of punishment reveals a paradox of punishment: higher incarceration rates resulted in stable if not higher levels of crime.").

29. *See* Joseph D. Grano, *Crime, Drugs, and the Fourth Amendment: A Reply to Professor Rudovsky*, 1994 U. CHI. LEGAL F. 297, 297-98 (1994) ("I believe that the crisis of crime confronting our country . . . requires that we reexamine some of our 'rights,' particularly those that were created during the Supreme Court's activist period in the 1960s.").

ally, police should cultivate a relationship of trust and collegiality with the people they "serve and protect" in minority neighborhoods. But they can do so only if they are free to interact in a friendly way with innocent individuals against whom they harbor no suspicion, reasonable or otherwise.[30] A community in which police approach and speak only to suspects will necessarily view the police as the community's adversary.[31] For this reason, it is not only impractical but affirmatively undesirable to define the "stop" of a pedestrian in a manner that would effectively shield innocent people from all contact with the police.

B. *Driving*

Drivers present a very different set of considerations. On the road, casual conversation between police and drivers (or their passengers) is generally impossible. Unlike pedestrians, drivers travel at speeds that preclude such exchange. If a police officer wants to converse with a driver, she must stop the driver with an unmistakable show of authority (flashing lights, sounding siren). There is no ambiguity about this event and thus no room for the government to argue that a driver spoke with the police voluntarily. Unlike pedestrians responding to police inquiries, drivers who do nothing suspicious thus receive protection under Fourth Amendment doctrine from having to talk with the police and thus endure an intimidating (and potentially lethal) encounter. In theory, the car can therefore

30. *See* Wesley G. Skogan, *Everybody's Business*, *in* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES 58, 59-60 (Joshua Cohen & Joel Rogers eds., 1999) (describing and praising community policing); *see also* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 575-76 (1997).

31. *See* Livingston, *supra* note 30, at 564 ("In community policing, . . . broad authorization, at the neighborhood level, is deemed essential to involving the police significantly in efforts to lessen disorder problems."); Dan M. Kahan and Tracey L. Meares, *Public-Order Policing Can Pass Constitutional Muster*, N.Y. TIMES, June 15, 1999, at A26 (defending community policing in the context of Chicago's anti-loitering ordinance, invalidated by the Supreme Court).

provide African-Americans and other minorities with a refuge from unwanted contact with the police.

On the highways of America, however, theory bears little resemblance to practice. In reality, it would be preposterous to claim that African-Americans can find refuge from unwanted interactions with the police by getting into a car. On the contrary, African-Americans are at least as likely to encounter racial profiling on the highway as in other venues.[32] The reason is no mystery. The traffic law is so extensive as to make absolute compliance virtually impossible for any driver, regardless of race.[33] As a result, though police *must* have reasonable suspicion or probable cause for every vehicular stop, they in fact always *do* have such suspicion about virtually every driver. A ubiquitous probable cause or reasonable suspicion enables police to stop any driver on the road. Instead of finding refuge, the African-American driving a vehicle finds himself a police-magnet.[34]

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32. Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 721-23 (1999) (providing anecdotes detailing the experiences of driving, walking, idling, standing, and shopping while black); *id.* at 721, ("In recent years, there has been mounting evidence that Blackness has become an acceptable 'risk factor' for criminal behavior. . . ."); *id.* at 730 ("Although DWB is among the most well-known crimes of Blackness, it is hardly the only one of its kind.").

33. *See* Harris, *supra* note 6, at 311 ("[N]o one can drive for even a few blocks without committing a minor violation – speeding, failing to signal or make a complete stop, touching a lane or center line, or driving with a defective piece of vehicle equipment"); David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 560 (1998) ("[E]ven the most cautious driver would find it virtually impossible to drive for even a short distance without violating some traffic law"); Janet Koven Levit, *Pretextual Traffic Stops:* United States v. Whren *and the Death of* Terry v. Ohio, 28 LOY. U. CHI. L. J. 145, 168-69 (1996) ("[W]e all violate traffic laws almost every time we enter the car.").

34. *See* Harris, *supra* note 6, at 326. ("It is virtually impossible to find black people who do not feel that they have experienced racial profiling."); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, N.Y.U. L. REV. 956, 957 (1999); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 441 n. 106 (1997) (describing the results of evidence compiled by test drivers who drove exactly 55 mph on a stretch of Interstate 95 while documenting the speed of other drivers. "Preliminary test results indicate that 17% of drivers on this part of the highway were black and that 17% of black drivers committed traffic violations. Ninety-three percent of all drivers committed some traffic violation. Thus,

II. EQUAL PROTECTION vs. THE FOURTH AMENDMENT

The problem is clear: Police officers are stopping minority drivers at a disproportionately high rate relative to their violations on the highway, and this practice is deplorable. The solution, however, is less obvious. We do not have the ambiguity problem we had in the pedestrian stop context. On the highway, a stop is a stop is a stop,[35] and the Fourth Amendment accordingly applies. The Court, however, has been reluctant to examine police officers' subjective motivations in otherwise justifiable searches and seizures.[36] If any doubts remained, moreover, the Court dispelled them when it announced five years ago that racially motivated stops do not violate the Fourth Amendment. The Court offered litigants the Fourteenth Amendment Equal Protection Clause for relief from such practices.[37] A litigant who can prove that the police stopped him because of his race does theoretically have recourse to the Equal Protection Clause. But as I discussed earlier, the subjective standard of *Washington v. Davis* is very difficult to satisfy.[38]

Does the fact that a stop is illegal under Equal Protection necessarily preclude its illegality under the Fourth Amendment? It should not.[39] The Court, however, has preferred to classify government misconduct under one (rather than several

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African-Americans were not found to violate traffic regulations more than members of other racial groups. In fact, the statistics indicate the opposite conclusion.").

35. *Cf.* GERTRUDE STEIN, *Sacred Emily, in* GEOGRAPHY AND PLAYS 178, 187 (1922) ("a rose is a rose is a rose is a rose").

36. *See, e.g.,* Horton v. California, 496 U.S. 128, 142 (1990) (holding that a constitutionally valid plain view seizure need not rest on inadvertent discovery of evidence by the police officer).

37. 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.").

38. *See* 426 U.S. 229 (1976) *supra* notes 11-14, and accompanying text.

39. *See* Brown v. Illinois, 422 U.S. 590, 601 (1975) (indicating by implication that if police violated Miranda to get a confession after an illegal arrest, the acquisition of the confession would raise both Fourth and Fifth Amendment difficulties); Sherry F. Colb, *Freedom From Incarceration: Why is This Right Different From All Other Rights*, 69 N.Y.U. L. REV. 781, 835-36 (1994)

or rotating) constitutional provisions. Often, the Court's preference for staying with one constitutional provision rather than considering another, perhaps more promising, avenue of analysis seems more a matter of sticking with the familiar than of a logically compelling selection. For example, the Court has–with some rigidity–developed most of its death penalty jurisprudence under the Eighth Amendment right against cruel and unusual punishment,[40] in spite of the fact that in some cases, the Due Process Clause might appear to apply more naturally than the Eighth Amendment does.[41]

However one feels generally about the application of multiple constitutional provisions, some government misconduct does fit neatly under the Equal Protection Clause and seems to raise no independent constitutional issues. Other misconduct raises issues that go beyond what Equal Protection by itself is equipped to handle. How do we distinguish these cases from one another? In answering this question, I use "Equal Protection Only" and "Equal Protection Plus" to designate, respectively, each of the two categories.

In the Equal Protection Only case, the government acts unfairly by singling out some people (united by membership in a racial group, for example) for burdens that it spares others, burdens that would be unobjectionable if they applied equally across the board. In one classic example, the Supreme Court

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(suggesting that no one constitutional provision represents the universe of possible bases on which to invalidate a particular governmental action).

40. Furman v. Georgia, 408 U.S. 238, 239 (1972); Gregg v. Georgia, 428 U.S. 153, 231 (1976); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Beck v. Alabama, 447 U.S. 625, 646 (1980); Eddings v. Oklahoma, 455 U.S. 104, 111 (1982).

41. *See, e.g.,* Beth S. Brinkmann, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing,* 94 YALE L.J. 351, 360 (1984) ("Because of its text and history the due process clause provides better authority for establishing the minimal procedures that should underlie all capital sentencing proceedings than does the Eighth Amendment."); Linda E. Cartera, *Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness,* 52 OHIO ST. L.J. 195, 202 (1991) ("The requirements distilled from the 1976 death penalty cases, decided under the eighth amendment, were largely procedural. The due process clause, rather than the cruel and unusual punishment clause, might have been at least an equally logical choice for constitutional procedural guarantees.").

held that to remedy the equal protection violation of having a "whites only" public swimming pool, a city could choose either to integrate the swimming pool or to close it down and thus deny access (equally) to everyone.[42] There is nothing constitutionally flawed, in other words, about failing to provide people with access to public swimming facilities. The government violates the Constitution *only* when it grants such facilities on the basis of a suspect classification such as race.[43]

When would it be fair to say that a stop raised Equal Protection Only problems such as those raised by the segregated public facility? Consider the case of the police officer who stops a driver who has just fired a pistol at a pedestrian, killing her. Assume that the local homicide rate is so high that the police exercise discretion in deciding which homicides to pursue. If the police officer in this example chooses to pull over the shooter in part because of his race, we would be confronting an Equal Protection Only case. No one would seriously argue that stopping a driver who shoots a pedestrian is "unreasonable"—that the shooter, in other words, has a right not to be stopped. The most appropriate corrective for the racially motivated aspect of this homicide stop would accordingly be to end the underinclusiveness. In other words, the police could address the inequity by adopting a policy of stopping white killers too, rather than having to desist from stopping all killers so that black and white killers alike may escape justice.[44]

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42. Palmer v. Thompson, 403 U.S. 217, 227 (1970).

43. *Id.* at 226; *see also* New York v. Liberta, 485 N.Y.S. 2d 207, 219 (N.Y. App. Div. 1984) (invalidating the New York marital rape exemption by prospectively extending rape liability to married men rather than by extending the exemption to co-habitants, as the litigant had urged); Randall L. Kennedy, McClesky v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988) (observing that one could remedy the racial disparities in capital punishment by expanding rather than abolishing capital sentencing).

44. Of course, if the police desisted from enforcing the homicide law altogether, this dubious approach to equal justice would appear to conform to the dictates of the Equal Protection Clause. Fortunately, however, it would not be the only way. *Cf.* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996) (explaining that although the guilty person against whom there is no probable

Justice Scalia claimed in *Whren* that the entire universe of discriminatory traffic stops raises what I call "Equal Protection Only" problems – problems to be solved by overcoming underinclusiveness. But is that a plausible claim? Consider the case of Michael Whren and James Brown, in which Justice Scalia, writing for the Court, made this pronouncement. The police there became suspicious about a vehicle driven by petitioner Brown. The suspicion was inarticulable, however, and thus the officers lacked authority to perform a stop. They made a U-turn to drive in the direction of the suspect's vehicle and thereafter observed a civil traffic violation.[45] The Supreme Court ruled that once the officers had witnessed this violation, they could legally stop the vehicle in question. Furthermore, the Court held, this would be true even if the traffic violation were relatively minor so that a reasonable police officer would not have stopped the car on the basis of that violation alone.[46] Finally, the stop would not violate the Fourth Amendment, even if the race of the vehicle's occupants had motivated it.[47]

Justice Scalia, in his opinion for the Court, advised petitioners 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."[48] The Court's reasoning is flawed, as a matter of logic and as a matter of doctrine. Logically, the Fourth Amendment requirement of "reasonableness" properly encompasses a prohibition against seizures of individuals whose driving does not distinguish them from anyone else on the road. Doctrinally, the Court has previously embraced the no-

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cause has the right not to be unfairly targeted, from a standpoint of who is morally deserving, he does not have any greater entitlement to privacy than the guilty person against whom police do have probable cause).

45. *See* Whren v. United States, 517 U.S. 806, 808 (1996).

46. *See id.* at 806.

47. *See id.* at 813.

48. *Id.* at 813. He added that although the petitioner's proffered objective reasonableness test is "framed in empirical terms, this approach is plainly and indisputably driven by subjective considerations." *See id.* at 814.

tion that the Fourth Amendment bars the police from the arbitrary exercise of limitless discretion.

In *Delaware v. Prouse*, the Supreme Court held that a police officer could not legally stop an individual driver without some articulable basis for suspecting that the driver had committed an offense.[49] The case arose after a police officer, who lacked any basis for suspecting the respondent, stopped him to ask for license and registration.[50] The Supreme Court held that absent some particularized reason to single him out, the stop of Mr. Prouse represented an "unreasonable seizure" in violation of the Fourth Amendment.[51] In reaching this result, the Court emphasized that the Fourth Amendment protects against police having limitless discretion to stop any driver. The Court stated: "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. . . .'"[52] The Fourth Amendment, under *Prouse*, thus protects the people against the arbitrary exercise of discretion. Since *Prouse* continues to be good law,[53] arbitrary stops that violate Equal Protection offend two constitutional principles–the Fourth Amendment reasonableness requirement and Equal Protection–and accordingly raise "Equal Protection Plus" concerns.

The State of Delaware in *Prouse* took a position radically at odds with the notion that Fourth Amendment "reasonable-

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49. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) ("stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.").

50. *See id.* at 648.

51. *See id.* at 663.

52. *Id.* at 653-54 (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967))).

53. *See* Illinois v. Rodriguez, 497 U.S. 177, 186 (1990) ("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.") (quoting *Prouse*, 440 U.S. at 653-54).

ness" limits an officer's discretion to stop drivers.[54] As the Supreme Court noted, "the State of Delaware urge[d] that patrol officers be subject to no constraints in deciding which automobiles shall be stopped for a license and registration check, because the State's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion upon the privacy and security of the persons detained."[55] The plea was for absolute discretion, and Delaware proposed that this plea did not run afoul of the Fourth Amendment's "reasonableness" requirement. After "balancing the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case,"[56] the Court rejected Delaware's plea. In doing so, it reaffirmed the position that stops—even those that do not lead to an arrest—are sufficiently intrusive to require a factually based case-specific justification. It declared: "[S]tops generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. [Stops] interfere with freedom of movement, are inconvenient, and consume time. [Stops] may create substantial anxiety."[57]

In a literal sense, this holding might be theoretically consistent with the decision in *Whren*, as the *Whren* majority indeed believed it was.[58] Unlike the officer in *Prouse*, after all, the officers in *Whren* had probable cause to believe that the driver had violated the traffic law at the time of the stop, the very thing that the Supreme Court said distinguished legal from illegal stops.[59] Consider, however, what the police officer in *Prouse* could have done to satisfy reasonableness qua *Whren*.

Assume that the *Prouse* officer had noticed Mr. Prouse and decided that even though there was no evidence of any wrongdoing, stopping him might prove fruitful, particularly if Prouse

54. 440 U.S. at 655.
55. *Id.*
56. *Id.* at 657.
57. *Id.*
58. *See* Whren v. United States, 517 U.S. 806, 818 (1996).
59. *Id.* at 810.

were to consent to a search of the vehicle.[60] Rather than pull him over right away, however, assume that the officer followed the vehicle for a little while, as the officers did in *Whren*, and waited until Prouse violated some traffic law, which we have seen would almost certainly occur soon, no matter how law-abiding the driver.[61] Perhaps Prouse might begin to drive slightly over the speed limit or might change lanes after signaling for a shorter time than is legally required (but no shorter than any other drivers). In other words, suppose his actions neither distinguished him from other drivers nor – in and of themselves – motivated the police to stop him. If such a stop were legal, then *Prouse* would amount to little more than a rule that police must generally follow a racially targeted driver for a few minutes before stopping him.[62] It is hard to believe that the Fourth Amendment validity of a seizure might turn on something so insignificant.

III. PROPOSAL

A. *Are Traffic Stops Reasonable Seizures?*

Police have long had the authority to stop a driver for any traffic violation, however trivial. Unlike the drive-by shooter from our earlier example, however, the driver who commits a minor traffic violation should not be forced to undergo a police stop. As the Supreme Court has acknowledged in a vari-

60. *See* David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,* 87 J. CRIM. L. & CRIMINOLOGY 544, 574-75 (1997) (discussing people's tendency to give consent to the police out of either fear or the mistaken belief that they are not legally entitled to refuse. "As one veteran state trooper told a reporter, in two years of stops, 'I've never had anyone tell me I couldn't search.'"); David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, An American Civil Liberties Union Special Rep., June 1999, *available* at http://www.aclu.org/profiling/report/index.html (last visited Mar. 28, 2001) (describing a motorist's response to a request to search her car on Interstate 70 in Colorado. "I didn't want any hassle," she said. "I didn't feel I had a choice.").

61. *See Whren*, 517 U.S. at 818.

62. Profiling might, of course, be based on any characteristic that police choose to target, including but not limited to national origin, sex, or appearance. *See* Colb, *supra* note 44, at 1491-93 (citing age discrimination in employment as an example of the targeting harm).

ety of contexts, police stops do not only restrict the target's freedom of movement, but also create serious hazards for the physical safety of both police officers and their targets. These dangers, moreover, often do not correspond to the nature and seriousness of the "crime" that police have probable cause to suspect.[63]

A substantial proportion of police fatalities, for example, occur during highway stops.[64] The genuine fear that such fatalities generate in police officers can, in turn, have fatal consequences for their (sometimes innocent) targets.[65] Mutual awareness of these risks and the resulting tension can

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63. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1651-52 (1998) ("Once an individual is stopped, moreover, much more serious intrusions become permissible largely on the basis of safety risks inherent in the stop situation, risks which therefore do not vary depending on the seriousness of the reasonably suspected offense."); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 111 n.6 (1977) (per curiam) (permitting the police to order driver out of lawfully stopped vehicle); *accord* Maryland v. Wilson, 519 U.S. 408, 413-14 (1997) (same for passengers); *Cf.* United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) (explaining, in the context of search incident to arrest, that "[t]he danger to the police officer [who stops a car to arrest a suspect] flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.").

64. *See* Maryland v. Wilson, 519 U.S. 408, 413 (1997) (noting that "[i]n 1994 alone, there were 5,762 officer assaults and 11 officers killed during traffic pursuits and stops."); *see also* United States v. Robinson, 414 U.S. 218, 234 n.5 (1973) (citing a study which "concludes that approximately 30% of the shootings of police officers occur when an officer stops a person in an automobile"); *see also* Terry v. Ohio, 392 U.S. 1, 23 (1968) ("American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.").

65. *See* Michael James, *Settlement Reached in Fatal Police Shooting: Montgomery Co. Officials to Pay $2 Million to Family of Man Killed in Traffic Stop*, BALT. SUN, Aug. 10, 1999, at 5B (describing the death of an African-American motorist accidentally shot to death by a police officer during a traffic stop); Kevin Flynn, *Police Killing Draws National Notice*, N.Y. TIMES, Feb. 8, 1999, at B5 (referring to the death of Amadou Diallo); Dave Newbart, *Suburb Pays $4 Mil in Traffic-Stop Death*, CHI. SUN TIMES, June 27, 2000, at 1; Don Terry, *Officers' Killing of Woman in Car Leads to Dispute Over Facts and Motives*, N.Y. TIMES, Dec. 30, 1998, at A10 (stating that four police officers in Riverside, California shot and killed a motorist who had been unconscious in her car with a gun on her lap).

cause a simple traffic stop to spin out of control.[66] Because traffic stops are so dangerous, I propose that they ought to be considered "reasonable," within a fair reading of that term, only when there is either reasonable suspicion or probable cause to believe that an occupant has committed a serious crime or that the individual's continued driving poses a real safety hazard. Suspicion of trivial traffic violations, in other words, should not qualify.

B. *Judging the "Dangerous" Driver*

If the Court were to decide to limit car stops to those responding to dangerous driving, two questions would immediately arise: (1) what counts as "dangerous" driving?; and (2) who would decide when a particular driver's conduct qualifies? Determining what counts as dangerous driving would require a judgment about what driving behavior risks serious injury to persons or property. There are cases in which an individual's driving is obviously dangerous. Driving at thirty miles-per-hour over the speed limit under normal traffic conditions falls into this category. Weaving in and out of one's lane in heavy, fast-moving traffic falls into this category as well. Changing lanes on a crowded highway without any signal is yet another example.

There are also violations that, taken in context, are obviously trivial. Driving at four-miles-per-hour over the speed limit under normal weather conditions on a sparsely populated interstate highway is one example. Slowing down to a negligible speed but not actually coming to a complete stop at a stop sign when there are few other vehicles on the road is another.

The borderline cases will be those in which the traffic violation will probably not lead to any immediate harm, but, if not corrected soon, might eventually have serious consequences. Driving with a broken tail light or driving eight miles-per-hour

66. *See, e.g.*, John Kifner & David M. Herszenhorn, *Racial Profiling at Crux of Inquiry Into Shooting by Troopers*, N.Y. TIMES, May 8, 1998, at B1 (describing the shooting of three African-Americans and one Latino who were traveling in a van to basketball camp. Troopers fired at the van after it started reversing and struck the van and its occupants eleven times.).

over the speed limit might fall into this borderline category. As is always true at the border, decision makers could go either way. Even if courts erred on the side of permitting police to make stops in such cases, the approach would still represent a vastly different (and, in my view, better) state of affairs from the current regime of de facto absolute stop authority.

In implementing my proposal for limiting traffic stops, the next question is who will decide whether a driver has created a real safety hazard? The police at the scene and the courts hearing later suppression motions would probably make these determinations. Officers would decide in the first instance whether a driver has posed a hazard sufficient to warrant a stop. In later suppression motions, the officers would have to articulate to the court's satisfaction an objective basis for their judgment, as the law already requires for non-vehicular stops.[67]

Does police discretion to decide at the outset what is hazardous effectively negate any benefit to be gained from narrowing the category of stop-worthy offenses? There is good reason to think that the answer is no. Police already have the discretion to stop a dangerous driver, even if she has not violated a precise statutory rule.[68] Nonetheless, police often defend stops by citing the violation of some enumerated traffic law.[69] This is probably because police have the authority to stop any driver they see violating an existing traffic ordinance. It is accordingly easier to defend a stop under this per se au-

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67. *See* Terry v. Ohio, 392 U.S. 1 (1968).

68. *See, e.g.,* N.J. STAT. ANN. § 39:4-96 (West 1990); N.J. STAT. ANN. § 39:4-97 (West 1999); N.Y. Veh. & Traf. § 1212 (McKinney 1996).

69. *See* David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 567-68 (1998) (discussing how police officers use traffic laws to stop motorists. "Witness these statements by police officers, which date back to the 1960s: "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made. You don't have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway. In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search.").

thority than it is to identify exactly what made the target's driving dangerous enough to justify a stop. This per se authority–in effect–then translates into a general warrant to stop any driver, because – as we saw above—virtually every driver violates some traffic ordinance.

If police instead had to justify a stop by articulating an objective basis for believing a driver posed a serious danger, the discretion previously conveyed by automatic per se stop authority would diminish substantially. An officer who intended to stop a person because of her race (or for some other inappropriate reason) would have either to lie about the driver's behavior or else to limit himself to carrying out such pretextual stops when drivers truly are conducting themselves recklessly (and a stop is therefore objectively reasonable). Though some officers would be willing and able to get away with lying, and minority drivers who posed real dangers might experience disproportionate police stops relative to their white counterparts, the absolute number of race-driven stops would likely decrease dramatically. Furthermore, a regime of this sort would spare most drivers who are truly innocent of any wrongdoing, (i.e., the "Equal Protection Plus" cases), from having to be stopped. This step would represent a major improvement over the current system, which says *both* that racial pretext is irrelevant to the Fourth Amendment *and* that police need not provide any objectively reasonable basis for a car stop.[70]

C. *Can We Still Enforce the Traffic Law?*

For the reader wondering whether I am advocating the repeal of all of specific traffic law provisions, be assured that I am not. What I am instead proposing is that police not be allowed to address routine traffic violations by stopping drivers. There are other ways to enforce traffic rules. In this Section, I provide rough outlines of two such alternatives. As other common-law countries have discovered in the efficacy of one of the alternative methods, moreover, there is an independent

70. They do need to point to some traffic violation, but as described above, see *supra* notes 33-34, and accompanying text, a traffic violation is a foregone conclusion for virtually any driver on the road.

argument that alternatives might be more desirable simply because they are more effective at achieving compliance than roving patrols that stop observed violators.

One alternative to the current regime is simply to require police to record the license numbers of vehicles in observed violation of the traffic law and issue fines by mail with the opportunity to contest the violations in traffic court.[71] If states and cities adopted this approach, people would probably comply with the traffic law to about the same extent as they do now. Indeed, people who never worried about being pulled over might now have reason to fear having their license numbers recorded, since a fixed number of police officers can record violations at a much faster rate than they could have performed stops of individual drivers. Perhaps more of the drivers who routinely violate the traffic law without event, for example, would think twice about doing so if greater resources were available for catching them.[72] Reducing the number of traffic stops could also have the added benefit of avoiding the inconvenience and even danger of obstructions that result from stops along the highway, stops that can attract attention and cause rubbernecking. Additionally, the driver who nor-

71. The owner of the car caught speeding or running a red light could be considered responsible for the violation unless he or she revealed who was driving the car at the relevant time. Proving another driver could be an affirmative defense.

72. *See generally* David Harris, Law Enforcement's Stake In Coming To Grips With Racial Profiling, 3 Rutgers Race & L. Rev. 9, 13-17 (2001). (finding that when police are not trying to arrest drug-dealers, the degree to which they disproportionately stop minority drivers decreases substantially.). Empirical studies reveal that "the efforts of special drug enforcement units cause vastly disparate targeting of minority motorists." *See* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board,* 28 COLUM. HUM. RTS. L. REV. 551, 569 (1997). To the extent that racial profiling is more prevalent among drug enforcement agents than among actual traffic police, this suggests that if the police were not in a position to obtain consent for the search of a car, their tendency to stop minority drivers for routine traffic violations would decline. Those in fact enforcing traffic laws and not drug laws stop whites and minorities at much more similar rates than do drug enforcement police, and that decline in profiling occurs even though the opportunity to search does arise (though the search is less specifically geared toward finding drugs). Taking away that opportunity by directing police to record license numbers might further diminish the racial profiling effect by eliminating the search opportunity entirely.

mally waits until he is stopped before exercising some caution on the road would now understand that he could be accumulating many citations without any stops to alert him to that fact. The overall consequence could well be a greater attention to safe and careful driving.

This first proposal satisfies what I have articulated as the Fourth Amendment qualitative reasonableness requirement that we forego stops based on mere traffic violations.[73] However, perhaps because the risk of receiving a ticket in the mail and paying a fine is less frightening for many than the risk of being pulled over by the police, even higher rates of apprehension might not compensate entirely for the reduction in the deterrent effect that had been achieved by stops.[74] One response to this concern is that the fear of a police stop, resulting in part as it does from the potential violence that could erupt, is not a legitimate tool of law enforcement. It is not appropriate, in other words, to frighten people into obeying the traffic laws by intimidating them with the threat of a potentially violent confrontation. The question does remain, however, how we might alternatively attain traffic compliance without recourse to stops. For the answer to this question, we can benefit from the experiences of other common-law countries.

Before discussing the technology used by our fellow common-law countries to enforce their traffic rules, it is important to consider an objection that many readers will feel. It is the "Big Brother is Watching" objection.[75] People do not like the

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73. *See* Colb, *supra* note 63, at 1655.

74. *Cf.* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1195 (1985) ("The threat of punishing attempts, as we shall see, makes the completed crime more costly in an expected sense and therefore less likely to be committed. I contend that the main differences between substantive criminal law and substantive tort law can be derived from the differences in (1) the social costs of criminal and tort sanctions and (2) the social benefits of the underlying conduct regulated by these two bodies of law. I contend, in short, that most of the distinctive doctrines of the criminal law can be explained as if the objective of that law were to promote economic efficiency."); Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts*, 145 U. PA. L. REV. 299, 336 (1996).

75. *See* GEORGE ORWELL, 1984, at 4 (1949). For a critique of the new technology (in the U.K., Australia, and New Zealand) from a privacy perspective, see Simon Davies, *Surveillance on the Streets*, 2 PRIV. L. &

idea of having their movements recorded as they go about their daily activities; such surveillance feels like an intrusion. The response to such objections has to be the recognition that the current system is unjust and unacceptable. If traffic laws are important, then the proposed surveillance methods are appropriate, because they are effective. They also do not invade anyone's "reasonable expectation of privacy," because they occupy public streets that anyone can see[76] and because the only "personal" fact revealed by the photographs is the violation of the traffic law, a fact that is – by definition – not entitled to privacy, as long as it was legitimate for the state to prohibit the violating conduct in the first place.[77] If, on the other hand, traffic laws are not important enough to merit surveillance measures to increase compliance, then they are surely not important enough to justify disparate exposure of

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POL'Y REP. 24 (1995). For a critique of the critique, see Wendy Holden, *Big Brother Becomes the Citizen's Best Friend*, DAILY TELEGRAPH, Mar 4, 1993, at 4; Tess Kalinowski, *Big Brother Just Might Help Fight Crime*, LONDON FREE PRESS, Mar. 22, 1999, at A11. For negative reactions to the use of technology to aid in law enforcement within the United States, see Nancy Bartley, *Police, Cities Back Photo Cop Measure: Legislation Would Make Giving Traffic Ticket a Snap*, SEATTLE TIMES, Feb. 7, 1996, at B1 (describing peoples' negative reactions to a proposal to use a camera and radar to issue citations to drivers who violate traffic laws. It was considered by the Washington state legislature in 1995 and 1996 and it died both times.); Michael Taylor, *Photo-Radar to Catch Speeders is Slow to Catch on in U.S.*, S.F. CHRON., Apr. 28, 1997, at A1 ("[I]n the Wild West, [ ] a man and his car and his high-speed highway are seemingly sacrosanct and those who want to use electronic surveillance are accused of being 'Big Brother.'"); Robert J. Farese, *Keep Big Brother off the Highway*, RECORD, Apr. 28, 1992, at B10 (describing a New Jersey resident's dismay at the "'Big Brother' photo speed surveillance system being tested on New Jersey highways."). *Cf.* David Kocieniewski, *Television Cameras May Survey Public Places*, N.Y. TIMES, Oct. 6, 1996, at 42 (describing the New York City Police Department's consideration of a plan to place 24-hour surveillance cameras in Central Park, subway stations and other public places); David M. Halbfinger, *Protestors Assail Rising Use of Police Cameras*, N.Y. TIMES, Feb. 2, 1998, at B3 (describing protests by New York City residents of the Guiliani administration's increased use of surveillance cameras to fight crime.).

76. *See* Oliver v. United States, 466 U.S. 170, 183-84 (1983) (holding that there is no reasonable expectation of privacy in an open field).

77. *See* Colb *supra* note 44, at 1459 (explaining that there is no reasonable expectation of privacy in the information that one is disobeying the law).

racial minorities to the terror and humiliation to which our current practice of traffic stops gives rise.[78]

Let us turn now to the technology of traffic law enforcement. Consider first the English experience. Sir Peter North, former Chairman of Road Traffic Law Review in England described at length the impact of cameras installed to detect vehicles running red lights or exceeding the speed limit, together part of an English reform that North had proposed as Chairman.[79] After these reforms were put into effect, according to North:

> [T]he widespread introduction of fixed speed and red light detection cameras (and of new legal procedures to deal with the photographic evidence from the cameras) . . . made a very significant impact on the reduction in the number of deaths and serious injuries on roads in Britain. A recent survey on the roads going into London, in the north-west quadrant of the city, has shown that the number of accidents involving death or serious injuries has just about halved over a five-year period since speed detection cameras were introduced.[80]

"In west London, the number of fatal accidents and serious injuries [was] cut by 26 per cent over one year, while the number of accidents [ ] dropped by 18 per cent."[81] In Scotland,

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78. *See* Harris, *supra* note 6, at 273 (A social worker who was handcuffed and erroneously arrested for outstanding tickets experienced depression and missed work after being the victim of a pretextual traffic stop. A business executive said, "I do not feel safe around cops."); *see generally* Davis, *supra* note 5, (describing the humiliation and anger felt by a public defender when he and his family were pulled over while driving home from a funeral); David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways*, ACLU Special Report, June 1999, at http://www.aclu.org/profiling/report/index.html.

79. *See* Sir Peter North, CBE QC, *Law Reform: Problems and Pitfalls*, 33 U.B.C. L. REV. 37 (1999).

80. *Id.* at 41.

81. Julie Kirkbride, *MP calls for more traffic cameras*, DAILY TELEGRAPH, Nov. 24, 1995, at 19 ("Studies show that the cameras have been effective in reducing casualties."). *See also Cameras halve tally of drivers jumping lights*, EVENING STANDARD (London), Dec. 13, 1993, at 19 (noting that "[d]eaths have been cut from 15 to two on the roads covered and there have been nearly 200 fewer accidents. Serious injuries are down by 43, nearly one-third. The Department of Transport estimates the cameras have saved £18 million in police, medical, administrative and other costs."); *see*

"automated cameras . . . made a major contribution to reducing the accident total. . . ."[82] Though the purpose of these reforms was to enhance traffic safety, North explained that they also enhanced both the apparent and the actual fairness of traffic law enforcement. As North aptly observed, fairness in traffic law enforcement is critical to the public perception of criminal law enforcement generally. He stated:

> It [road traffic criminal law] is the area of the law contravention of which is most likely to lead normally self-respecting citizens to be classed as criminals. It is the area of the law most likely to bring a member of the public into contact with the police. It is, therefore, the area of the law most likely to condition the average member of the public's perception of, and attitude towards, the police.[83]

Speed-detection cameras and light-violation-detection cameras have similarly made the roads safer in countries outside of England. "Speed cameras were introduced in New Zealand in

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also Robin Young, *Police Unveil Laser in War On Speeding*, TIMES - LONDON, Mar. 22, 1994, (Home News), (quoting head of Kent traffic department as saying: "'[t]he equipment costs Pounds 14,000, but on average an accident costs Pounds 45,000 and a fatal accident Pounds 750,000, so this must be seen as being extremely cost-effective.'").

82. Andrew Collier, *Positive Development*, HERALD (Glasgow), May 13, 1997, at 24. This reporter describes the surveillance system in detail: roadside speeding cameras contain a doppler radar system that triggers the taking of two photographs (to demonstrate speeding) of speeding vehicles, and red-light cameras that record registration number, time and speed of vehicle traveling through the red light. Computer-printed notices of intended prosecution are issued to the registered owner who must then inform the police of who was driving the car. *See id.* A fine is then offered (as a sort of plea bargain, if the driver does not go to a hearing). *See id.* Because our Fifth Amendment would in many circumstances preclude our demanding incriminating information from apprehended drivers, we could design legislation that would hold owners responsible for violations committed with their car and provide an affirmative defense for those owners who could prove that someone else was driving the vehicle.

83. North, *Law Reform: Problems and Pitfalls*, *supra* note 79, at 41. *See also* Department of Environment, Transport, and the Regions, *The Effects of Speed Cameras: How Drivers Respond*, at http://www.detr.gov.uk/roads/roadsafety/research11/sc01htm ([R]esearch results based on aggregate data on the effectiveness of cameras are generally positive. Among the benefits it was calculated that accidents fell by an average of 28% at the 174 speed sites covered, which translated into a reduction of 1.25 accidents sites per year, and that speeds fell by an average of 2.3 mph per site.).

1993. Within the first 12 months of operation, speed-related crashes fell by 5.5%."[84] In the late 1990's, Canada – perhaps impressed with the English success[85] – instituted similar traffic reforms. Although some remain skeptical of the technology and believe that more police are the answer, there is reason for optimism. In Victoria, British Columbia, for example, "a 1993 surveillance camera trial reduced red light violations by 74 per cent at one intersection."[86] Similarly in Scotland, in 1993, in a poll of drivers asked how they would behave if speed-detection cameras were installed, "89% of the 500 motorists questioned said that they would regulate speed if they knew cameras were in operation. . . ."[87]

Australia appears to have been another pioneer in this area. One reporter in 1998 observed that "[a] radical self-funding Australian road safety scheme that has halved the number of people killed on the roads in Victoria[, Australia,] could soon be saving lives in the UK too."[88] Included in the Victoria approach were traffic cameras and other means of streamlining prosecutions for traffic offenses.[89] "Collisions fell by 22 per cent while the proportion of vehicles breaking the speed limit fell from 23 per cent in 1989 to 3.5 per cent in 1994 and 2.7 per cent in 1996."[90]

Though these law reforms were aimed at increasing highway safety, they also have the potential to provide a substitute for

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84. http://www.ltsa.govt.nz/factsheets/33.html.

85. *See* Betty Howard, *Surveillance Cameras Good Tool*, LONDON FREE PRESS, Sept. 15, 1998, Letters to the Editor, at A10 ("While visiting the United Kingdom a few years back, I couldn't help but notice that some of the main streets in the town had cameras set atop their traffic lights. . . . The police monitored situations where cameras were throughout the town. This allowed speedy response and crime prevention, something which we here in Ontario are looking to address").

86. Mohammed Adam, *Insurers Skeptical of Traffic Cameras: 'The Effectiveness Needs to be Reviewed' More Police the Answer, Insurance Bureau Says.*, THE OTTAWA CITIZEN, May 3, 2000, at C1.

87. Hugh Hunston, *Speed Trap Cameras Find Favour*, HERALD (Glasgow), Feb. 10, 1993, at 2.

88. David Williams, *Driving Death Off Roads*, EVENING STANDARD (London), Aug. 12, 1998, at 61.

89. *See id.*

90. *Id.*

traffic stops in this country. These strategies would likely prove to be very effective. Perhaps equally important, surveillance cameras provide preventative (as well as curative) traffic enforcement with the promise of race-neutrality. The mounted camera system is a color-blind deterrent to traffic violations. Underlining such deterrent value is the effect of the occasional traffic camera lookalike.[91] Unlike the occasional appearance of a visible police car in the United States, leading perhaps to momentary and rushed compliance by nearby drivers, the presence of cameras conveys a credible threat that violators will be fined. Lord Mackay of Clashfern, delivering an address in Edinburgh, "spoke of the growth of surveillance cameras . . . for traffic light infringements and speeding. Equipment of that kind was in his view essential if the law was to be fairly and effectively enforced."[92]

In the United States, some people expect to be routinely stopped for minor traffic violations,[93] while others know equally well that *they* will generally get away with similar infractions. The latter group might accordingly feel free to violate the traffic law with impunity.[94] These individuals' noncompliance raises the average speed on the highway and the average rate of traffic violations generally. Noncompliance thus has a domino effect on other, initially law-abiding, drivers, because it makes compliance more dangerous and

91. *See, e.g.*, Matthew Knowles, *Nesting Box That Put The Brake On Speeding*, DAILY MAIL (London), Mar. 16, 1999, at 29 (discussing the successful reduction in speeding accomplished by David Pullin, who, "[f]ed up with cars racing through the village of Lower-Hey-ford, near Bicester, Oxfordshire," built a box that "looks exactly like a speed camera," and suggested that "'[a]bout 50 per cent of cars are slowing down now. I can hear their tires squealing as they spot it.'"); *see also* Jim Dunn, *Increased Road Safety at a Snap,* SCOTSMAN, Sept. 20, 1996, at 29 ("Also of significant benefit in road safety terms, according to traffic police, is the use of dummy, or partially active cameras. These were introduced following early observations after the cameras were introduced that, while there was a significant number of motorists caught on film, the average traffic speed slowed down.").

92. James Freeman, *Lord Mackay Praises Police Technology*, HERALD (Glasgow), July 4, 1997, at 13.

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

94. *Id.*

more costly for everyone.[95] Foreign success in increasing highway safety bears out this prediction, as do limited experiments with such technology within the United States.[96]

CONCLUSION:

There is no longer any question that police officers carry out racial profiling to an alarming extent. We must do more than root out a few proverbial "bad apples" in the bunch to remedy the problem.[97] One distinct and important site of racial profil-

95. For some of the same reasons, driving well below the speed limit is unsafe and illegal. *See* N.Y. VEH. & TRAF. § 1181 (McKinney 1996); N.J. STAT. ANN. § 39:4-97.1 (West 1990); New Jersey v. Washington, 687 A.2d 343, 344 (N.J. Super. Ct. App. Div. 1997) (holding that police officer had objectively reasonable basis to stop driver who was weaving and driving under the speed limit); *see also* Quentin Hardy, *Pedal to the Metal Time Out West*, CHI. TRIB., Dec. 10, 1995, at 5 ("[S]peed proponents say the 55-m.p.h. law also means that people obeying speed-limit laws become a highway danger, causing unexpected slowdowns in the flow of traffic.").

96. *See* http://www.atstraffic.com/safety/default.htm (Table of results showing reduction in accidents in Scottsdale, AZ, Paradise Valley, AZ, and Fort Collins, CO. "Red light cameras reduced intersection violations by 62% within the first 12 months of operation. In addition, mobile speed cameras and red light cameras reduced collisions by 20% where deployed."); *see also* U.S. Department of Transportation Federal Highway Administration: *Red Light Cameras: Effectiveness*, at http://www.safety.fhwa.dot.gov/stoprlr/camr/camrset.htm (Explains results of studies that show a reduction in accidents and violations after installation of red light cameras in several areas in both the United States and internationally); Insurance Institute for Highway Safety and Highway Loss Data Institute, at http://www.hwysafety.org/news_releases/200/pr071300.htm (Describes the impact of traffic cameras in the United States: "Such programs [red light camera programs] reduce red light running by about 40 percent").

97. *See* David Cole, *The Color of Justice: Courts are Protecting, Rather than Helping to End, Racial Profiling by Police*, NATION, Oct. 11, 1999, at 12 ("Profiling is not the work of a few 'bad apples' but a wide spread, everyday phenomenon that will require systematic reform."); Patrick Cole, *NYC Shooting Renews Outcry on Police Brutality*, CHI. TRIB., Feb. 15, 1999, at 1 (quoting an African-American saying the "Diallo shooting reflects a rogue police department whose power has gone unchecked"); *see also* Alan Attwood, *NYPD Blues*, THE AGE, Aug. 29, 1997, at 23 (critiquing misconduct by the NYPD). *But see* Elaine D'Aurizio, *From the Front Line: He Bridges Gulf Between Police, Public*, RECORD, Apr. 9, 2000, at N1 (quoting a psychotherapist who counsels police officers, saying, "It's a few bad apples compared to so many good cops who perform an incredibly dangerous and difficult job every day."); Tom Morganthau, Gregory Beals and Andrew Murr, *Justice for Louima*, NEWSWEEK, June 7, 1999 at 42 (stating that the

ing is on the road, a place where virtually every law-abiding citizen at the wheel becomes an outlaw, subject to traffic stops at will. Given this absolute discretion, it is African-American drivers who suffer the most from pretextual "traffic" stops that are in fact motivated by unwarranted suspicion that black people are likely to be criminals.[98] Such suspicion accordingly leads to lengthier and more intrusive encounters when an African-American's vehicle is stopped.[99]

In its most recent pronouncement regarding racial profiling, the Supreme Court declared that although a racially motivated stop may violate Equal Protection, if it is accompanied by probable cause, it is a "reasonable" stop under the Fourth Amendment. There is theoretically some wisdom in this pronouncement. It might indeed be difficult to administer a system in which an apparently reasonable stop might be "unreasonable" because of an officer's subjective motivations.[100] The problem, under the Supreme Court's analysis, however, lies in the preliminary assumption that a stop for a trivial traffic violation is otherwise reasonable. It is not. Objectively measured, it is unreasonable to subject individuals to

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police officer who beat and sexually abused Abner Louima with a broken-off broom handle was a "rogue cop").

98. *See* Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations,* 27 CAP. U.L. REV. 79, 118 (1998). ("Last year, The Orlando Sentinel reviewed 3800 recorded traffic stops by the Florida State Police drug squad along the Florida Turnpike from January 1996 through April 1997 and found the drug squad searched blacks six times more frequently than white motorists stopped for minor traffic stops.").

99. *See* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS L. REV. 551, 560 (1997) (stating the results of a study by the Orlando Sentinel of more than 1000 vehicles stopped by a special police drug squad in 1989. Almost 70% of the cars stopped were driven by African-American or Hispanic drivers. "[T]he average length of the stop for minority drivers was 12.1 minutes, more than twice as long as the average 5.1 minutes for white drivers. And, of the 507 cars searched, 414—or 82%—were driven by African-Americans or Hispanics."); *see also* Harris, *supra* note 69, at 583 (describing the same study by the Orlando Sentinel: "African Americans and Hispanics were more likely to be searched after stops than whites were, and their stops lasted more than twice as long. Of the motorists not arrested, police were also more likely to seize cash from African Americans and Hispanics than from whites.").

100. *See* Colb, *supra* note 44, at 1490-91.

the anxiety, humiliation, intrusion and danger that are the reality of highway stops, absent a more compelling justification than a mere traffic violation. Because they are unreasonable, such stops violate the Fourth Amendment. That their present "legality" permits and virtually invites racial profiling is a predictable consequence of unlimited discretion in a society in which racism remains a significant social fact. This consequence of unbridled discretion, in turn, represents an additional reason for its illegitimacy. I have here described this dual illegitimacy as "Equal Protection Plus" and have proposed that limiting reasonable stop authority to occurrences of dangerous driving would go a long way toward curbing the abuse. As Justice Jackson said 60 years ago of prosecutors, but is equally true of police on the highways today:

> With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, *or selects some group of unpopular persons and then looks for an offense*, that the greatest danger of abuse of prosecuting power lies.[101]

Unlike casual exchanges on the sidewalk, when a person drives her car, a stop is a stop and therefore unambiguously does and should trigger the Fourth Amendment protection against unreasonable seizures. So that this command is not an empty letter, we must replace traffic stops with alternative means of enforcing much of the traffic law. As experiences in England, Scotland, Canada, New Zealand, and Australia demonstrate, alternative means can be extremely effective in promoting highway safety, in addition to enhancing fairness. The Court ought to hold, as it did vis-a-vis arbitrary stops in *Delaware v. Prouse*, "Given the alternative mechanisms avail-

101. Robert Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 18-19 (1940) (emphasis added).

able, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the [stop based on a mere traffic violation] . . . justifies the practice under the Fourth Amendment."[102] Before first exploring available alternatives, it is premature to require – as the Court did in *Whren* – that victims of racial profiling on the highway meet the difficult burden of demonstrating subjective bias in violation of the Equal Protection Clause of the Fourteenth Amendment.[103]

102. Delaware v. Prouse, 440 U.S. 648, 659 (1979).
103. *See* Whren v. United States, 517 U.S. 806, 818 (1996).