

## THE ROAD TO *WHREN* AND BEYOND: DOES THE “WOULD HAVE” TEST WORK?

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### INTRODUCTION

When, more than a decade ago, a unanimous Supreme Court decided *Whren v. United States*,<sup>1</sup> it launched a firestorm of virtually unanimous criticism of its ruling that police officers' subjective intentions have no place in Fourth Amendment probable cause analysis. The *Whren* Court, examining the constitutionality of a traffic stop, held that, when there is objective probable cause to believe that criminal activity is occurring, a reviewing court need not examine the officer's real state of mind and whether an officer was doing the right thing for the “right reason.”<sup>2</sup> Under *Whren*'s “could have” test, objective probable cause justifies the officer's decision to initiate a traffic stop—a Fourth Amendment seizure—regardless of her motives for doing so.<sup>3</sup>

Most scholarly criticism of *Whren* has claimed that it allows unfettered police discretion, permitting the use of pretextual traffic stops based upon racial profiling or other unconstitutional grounds. Many scholars have argued for a return to the “would have” or “reasonable officer” test that some courts used pre-*Whren*. The Fourth Amendment inquiry under the “would have” test was whether “a police officer, acting reasonably, would have made the stop for the reason given”<sup>4</sup>—the objective probable cause—or for an ulterior, unconstitutional reason. Such a test, scholars argue, would protect drivers from arbitrary and unconstitutional police behavior by ensuring that police officers make traffic stops only to enforce the traffic code and not for

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1. 517 U.S. 806.

2. See Daniel B. Yeager, *The Stubbornness of Pretexts*, 40 SAN DIEGO L. REV. 611, 617 (2003) (“[P]retextual police action occurs when police do the right thing for the wrong reasons . . .”).

3. 517 U.S. at 812.

4. *Id.* at 810.

other, unconstitutional reasons.<sup>5</sup> Applying the “would have” test in *Whren* itself, for example, would have led the court to suppress the seized evidence, because, although there was objective probable cause of a traffic infraction, the officers violated a police department regulation prohibiting traffic stops by plainclothes officers. Arguably, a reasonable plainclothes officer would not have made the traffic stop but for unsupported suspicions of drug activity or racial bias.

Remarkably, perhaps, despite criticisms of *Whren*'s “could have” test, the argued “unbridled arbitrariness”<sup>6</sup> afforded police officers by the test, and the urgings of commentators for adoption of the “would have” test,<sup>7</sup> Washington is currently the only state to have determined that its constitution provides broader protection than the U.S. Constitution on this issue. Three years after *Whren*, the Washington Supreme Court ruled that its citizens held “a constitutionally protected interest against warrantless traffic stops or seizures on a mere pretext to dispense with the warrant when the true reason for the seizure is not exempt from the warrant requirement.”<sup>8</sup> In essence, the Washington Supreme Court ruled that the “would have” test applied under its state constitution.

With almost a decade's worth of opinions, Washington provides a legal petri dish for examining how the “would have” test operates. This experience reveals that, although the “would have” test identifies police pretextual behavior in limited circumstances—such as when po-

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5. *State v. Ladson*, 979 P.2d 833, 838 (Wash. 1999) (A pretextual traffic stop is “a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason”); see, e.g., David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 102 (1998) (suggesting that the “would have” test “simply asks whether a reasonable officer would have made the traffic stop absent an infirm ulterior motive” (emphasis omitted)).

6. Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 557 (2002) (noting that, in *Whren*, “[w]ith surprising unanimity, the Court seemed either oblivious to, or unconcerned with, its implicit sanctioning of unbridled arbitrariness or racial profiling” by police officers). But see *State v. Robinson*, 767 N.E.2d 638, 648 (N.Y. 2001) (noting that “the combination of police officer discretion and numerous traffic violations” does not equal arbitrary police conduct and that “probable cause under the Vehicle and Traffic Law and its related regulations” constrains police conduct).

7. See, e.g., Todd Coberly, *State v. Vandenberg: Lowering the Fourth Amendment Bar While Avoiding the Issue of Pretextual Police Conduct*, 35 N.M. L. REV. 467 (2005) (arguing that New Mexico should consider barring pretextual police conduct on state constitutional grounds); Jeffrey M. Kaban, Note, *Alaska, the Last Frontier of Privacy: Using the State Constitution to Eliminate Pretextual Traffic Stops*, 55 HASTINGS L.J. 1309 (2004) (arguing that Alaska should reject *Whren* and bar pretextual police conduct under its own constitution). See also *State v. Heath*, 929 A.2d 390 (Del. Super. Ct. 2006).

8. *Ladson*, 979 P.2d at 842 (holding that while “police may enforce the traffic code . . . [t]hey may not, however, use that authority as a pretext or justification to avoid the warrant requirement for an unrelated criminal investigation”).

lice admit such behavior—it has not done so as much as commentators had predicted. The reason for this is not clear. It could be that there are not as many instances of pretextual police behavior as commentators had thought or that courts have difficulty discerning pretextual behavior without an admission. A third alternative is that courts have been reluctant to find pretextual behavior without direct testimony from officers, because it is difficult to separate out an officer's real motives. If, for example, there is objective probable cause of a traffic violation, as well as evidence that an officer's initial suspicions were not based on the traffic violation, how does a court determine the officer's actual reason for the stop? Does the court run the risk of suppressing evidence “when there were, in fact, good intentions sufficient to justify the action notwithstanding the bad intentions”?<sup>9</sup> Also, by determining when it is reasonable for a police officer to ignore violations of the law, is the court substituting its own judgment for the police officer's—and the legislature's—as to what the officer “should have” done?

While courts have used the “would have” test to suppress evidence in some cases—and, thus, it should have at least a marginal effect on police misconduct—overall, Washington state courts are still doing what courts have always done under the “could have” test: determining the credibility of police officers and relying upon the totality of the circumstances in deciding whether a traffic stop was constitutionally permissible. The Washington experience tends to imply that other means of addressing police use of pretext<sup>10</sup> might be more effective than states' large-scale adoption of the “would have” test.

In Part II, this Article discusses the split in the circuits that led to the *Whren* decision, the decision itself, and the current state of U.S. Supreme Court law regarding traffic stops.<sup>11</sup> Part III surveys scholarly criticism of the *Whren* decision.<sup>12</sup> Part IV details the adoption of the “would have” test by Washington state courts,<sup>13</sup> and Part V reviews subsequent Washington state cases to analyze whether the use of the “would have” test has addressed criticisms of the *Whren* “could have” test.<sup>14</sup> Part VI concludes that the “would have” test, as applied by

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9. Eric F. Citron, Note, *Right and Responsibility in Fourth Amendment Jurisprudence: The Problem with Pretext*, 116 *YALE L.J.* 1072, 1083 (2007). Citron suggested that the answer to this problem is to require that “inappropriate motivations be a *but-for cause* of the seizure or search.” *Id.* (emphasis in original).

10. See *infra* notes 256–285 and accompanying text.

11. See *infra* notes 16–76 and accompanying text.

12. See *infra* notes 77–100 and accompanying text.

13. See *infra* notes 101–129 and accompanying text.

14. See *infra* notes 130–291 and accompanying text.

Washington state courts, has not resulted in the significantly greater protections that scholars predicted.<sup>15</sup> Although it does not ignore the very real issue of racial profiling, this Article suggests that states would be better served by adhering to *Whren's* “could have” test while opening other avenues of relief to address abuses of police discretion.

## II. THE ROAD TO *WHREN*

The Fourth Amendment provides the following:

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.<sup>16</sup>

Although the Fourth Amendment provides protection against unreasonable seizures, whether brief or lengthy in duration,<sup>17</sup> not all encounters between police officers and citizens trigger the amendment's protections.<sup>18</sup> The determination of whether an officer has violated a person's Fourth Amendment rights rests first on considering if the officer seized that person.<sup>19</sup> Courts determine seizure for Fourth Amendment purposes<sup>20</sup> by considering, under the totality of the circumstances, whether a suspect's “freedom of movement is restrained” by the police, either by physical force or a show of authority to which she submits.<sup>21</sup> When a reviewing court determines that there has been

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15. See *infra* notes 292–298 and accompanying text.

16. U.S. CONST. amend. IV.

17. See *United States v. Sharpe*, 470 U.S. 675, 686–87 (1985); *Florida v. Royer*, 460 U.S. 491 (1983). This Article focuses on traffic stops at their inception, not the events after the stop.

18. See, e.g., *Royer*, 460 U.S. at 498 (“If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.”); *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (“The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but ‘to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.’” (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976))).

19. See *Brendlin v. California*, 127 S. Ct. 2400, 2405 (2007) (finding that, without an actual submission to a show of authority and without the use of physical force, “there is at most an attempted seizure, so far as the Fourth Amendment is concerned”).

20. A Fourth Amendment seizure does not necessarily rise to the level of custody necessary for the Fifth Amendment protections afforded by *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (holding that persons who are temporarily detained pursuant to an ordinary traffic stop are not “in custody” for *Miranda* purposes).

21. See *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (“[A]ssuming that [the officer's] pursuit in the present case constituted a ‘show of authority’ enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled.”); see also *Brendlin*, 127 S. Ct. at 2405.

a seizure, the inquiry becomes whether the seizure was a *Terry* stop<sup>22</sup> or an arrest. Once a court has made this determination, it must consider whether the police had sufficient objective evidence to justify the seizure.<sup>23</sup> If the police did not, then they acted unconstitutionally by unreasonably seizing the person, and the court will generally suppress any evidence gained as a result of that seizure pursuant to the exclusionary rule.<sup>24</sup> The exclusionary rule thus acts as a deterrent to police misconduct.

A Fourth Amendment seizure occurs when police order the driver of an automobile to stop, and the driver complies.<sup>25</sup> As with seizures of an individual, police detention of an automobile can be brief or lengthy.<sup>26</sup> Once a reviewing court has determined the type of traffic stop, “[t]he primary (indeed, virtually exclusive) inquiry appropriate to determining the lawfulness of a traffic stop is whether there was a pre-existing sufficient quantum of evidence to justify the stop.”<sup>27</sup> When a police officer has observed a driver commit a traffic violation, the standard of probable cause generally has been met, and a traffic

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22. See *Terry v. Ohio*, 392 U.S. 1 (1968). A *Terry* stop is less intrusive than an arrest.

23. The Court has stated that probable cause is required for an arrest and reasonable suspicion is required for a *Terry* stop. See *Maryland v. Pringle*, 540 U.S. 366, 371 (2003); *Terry*, 392 U.S. at 27.

24. See *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (holding that direct and indirect “fruits” of unlawful police conduct are generally to be excluded from trial).

25. *Whren v. United States*, 517 U.S. 806, 809–10 (1996) (“Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a seizure of persons within the meaning of [the Fourth Amendment].”).

26. See *United States v. Sharpe*, 470 U.S. 675, 685 (“[I]f an investigative stop [of a vehicle] continues indefinitely, at some point it can no longer be justified as an investigative stop.”).

27. Wayne R. LaFare, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1846, 1848 (2004) (explaining that most states assume that reasonable suspicion is sufficient for traffic stops); accord Keith S. Hampton, *Stranded in the Wasteland of Unregulated Roadway Police Powers: Can “Reasonable Officers” Ever Rescue Us?*, 35 ST. MARY’S L.J. 499, 513 (2004) (explaining that, because traffic stops are warrantless encounters, police action is not judicially reviewed until after the police have seized and possibly searched the motorist and his vehicle). Officers may also stop automobiles without an individualized showing of suspicion pursuant to a regulatory program utilizing neutral criteria, such as a drunk driving checkpoint. Compare *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990) (holding that a sobriety checkpoint was constitutional), and *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976) (finding that international border checkpoints were constitutionally reasonable), with *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (holding that discretionary stops of vehicles not based upon individualized reasonable suspicion were constitutionally invalid), and *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–84 (1975) (holding that random stops not based upon individualized reasonable suspicion were constitutionally invalid).

stop based on that violation is constitutionally valid under the Fourth Amendment.<sup>28</sup>

The *Whren* petitioners noted that, because “the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible,”<sup>29</sup> police officers are vested with a large amount of discretion as to whether to stop a vehicle and which vehicles to stop. As many commentators have discussed, and as the *Whren* Court recognized, this level of discretion “creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.”<sup>30</sup> More importantly, this level of discretion could lead to police officers deciding which motorists to stop “based upon decidedly impermissible factors, such as the race of the car’s occupants.”<sup>31</sup>

Prior to *Whren*, most federal circuits followed the rule that, where an officer has objective probable cause to believe that a traffic violation has occurred, a traffic stop is reasonable under the Fourth Amendment.<sup>32</sup> The Ninth and Eleventh Circuits, however, had held that, when a defendant raised a claim of pretext, “the proper inquiry . . . [was] not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose.”<sup>33</sup> Notably, the Tenth Circuit, which had also adopted the reasonable officer test, struck that test down prior to *Whren*, finding that the standard after

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28. *Whren*, 517 U.S. at 810 (“[A]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

29. *Id.*; accord Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 874 (2001) (“So dense is the modern web of motor vehicle regulations that every motorist is likely to get caught in it every time he drives to the grocery store.”); LaFave, *supra* note 27, at 1853 (“[V]ery few drivers can traverse any appreciable distance without violating some traffic regulation.” (internal quotation marks omitted)).

30. *Whren*, 517 U.S. at 810,

31. *Id.*; accord Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 431 (1997) (“Empirical evidence suggests that race is frequently the defining factor in pretextual traffic stops.”); LaFave, *supra* note 27, at 1844–45 (suggesting that, given the “war on drugs,” “police are on the watch for ‘suspicious’ travelers, and when a modicum of supposedly suspicious circumstances are observed . . . it is only a matter of time before some technical or trivial offense produces the necessary excuse for a traffic stop”).

32. See, e.g., *United States v. Johnson*, 63 F.3d 242, 245–47 (3d Cir. 1995); *United States v. Jeffus*, 22 F.3d 554, 556–57 (4th Cir. 1994); *United States v. Scopo*, 19 F.3d 777, 782–84 (2d Cir. 1994); *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993); *United States v. Meyers*, 990 F.2d 1083, 1085 (8th Cir. 1993); *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C. Cir. 1991); *United States v. Trigg*, 925 F.2d 1064, 1065 (7th Cir. 1991); *United States v. Causey*, 834 F.2d 1179, 1184–85 (5th Cir. 1987).

33. *United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991) (emphasis in original) (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)); accord *United States v. Cannon*, 29 F.3d 472, 474–76 (9th Cir. 1994).

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seven years of application was “unworkable” and led to “inconsistent” results.<sup>34</sup> With this circuit split, the stage was set for *Whren*.

#### A. *The Facts in Whren*

On the evening of June 10, 1993, in Washington, D.C., James Brown was driving a truck with temporary tags in an area known to officers of the District of Columbia Metropolitan Police Department (MPD) as a “high drug area.”<sup>35</sup> Michael Whren was a passenger in the vehicle.<sup>36</sup> Plainclothes vice squad officers, who were patrolling the area in an unmarked car, noticed the truck stopped at a stop sign with Brown looking down into Whren’s lap.<sup>37</sup> In the officers’ estimation, the truck “remained stopped at the intersection for what seemed an unusually long time—more than 20 seconds.”<sup>38</sup> As the police vehicle made a U-turn to head back toward the truck, “the Pathfinder turned suddenly to its right, without signaling, and sped off at an ‘unreasonable’ speed.”<sup>39</sup> The officers followed and pulled alongside the vehicle when it stopped behind traffic at a red light.<sup>40</sup> Officer Ephraim Soto stepped out of the police car and approached the driver’s door.<sup>41</sup> He identified himself as a police officer and directed Brown to put the vehicle in park.<sup>42</sup> When Officer Soto reached the driver’s side window, he “immediately observed two large plastic bags of what appeared to be crack cocaine in petitioner Whren’s hands.”<sup>43</sup> Officer Soto yelled, “C.S.A.,” to alert the other officers that he had observed a Controlled Substances Act violation.<sup>44</sup> As Officer Soto reached for the driver’s side door, Whren yelled, “pull off, pull off,” and pulled the cover off of a power window control panel in the passenger door, putting one of the large bags into the hidden compartment.<sup>45</sup> Officer

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34. *United States v. Botero-Ospina*, 71 F.3d 783, 786 (10th Cir. 1995) (overruling *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988)); *see also* *People v. Robinson*, 767 N.E.2d 638, 648 (N.Y. 2001) (noting that the Tenth Circuit’s experience with the reasonable officer standard supported its decision to adopt *Whren*’s standard).

35. *Whren*, 517 U.S. at 808 (internal quotation marks omitted).

36. *Id.* at 809.

37. *Id.* at 808.

38. *Id.* At the suppression hearing, Officer Soto also testified that there was at least one car stopped behind the Pathfinder and that the Pathfinder was obstructing this vehicle. *See United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff’d*, 517 U.S. 806 (1996).

39. *Whren*, 517 U.S. at 808.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 809.

44. *United States v. Whren*, 53 F.3d 371, 373 (D.C. Cir. 1995) (internal quotation marks omitted).

45. *Id.* (internal quotation marks omitted).

Soto opened the driver's door, "dove across Brown and grabbed the other bag from Whren's left hand."<sup>46</sup> The officers arrested Brown and Whren and recovered several types of illegal drugs from a search of the Pathfinder.<sup>47</sup>

After Brown and Whren were charged in a four-count indictment, they moved to suppress the seizure of the drugs as the product of an illegal stop.<sup>48</sup> They argued that the stop was pretextual: "[T]he police officers used the alleged traffic violations as a pretext for what in actuality was a search for drugs without probable cause; thus, the search was objectively unreasonable under the Fourth Amendment."<sup>49</sup> The district court admitted the evidence, and the men were convicted.<sup>50</sup> Their convictions were affirmed on appeal to the District of Columbia Circuit Court of Appeals.<sup>51</sup>

### B. *The U.S. Supreme Court's Decision*

On appeal to the U.S. Supreme Court, petitioners Whren and Brown accepted that Officer Soto had objective probable cause to believe that Brown had violated several provisions of the District of Columbia traffic code, including that "[a]n operator shall . . . give full time and attention to the operation of the vehicle."<sup>52</sup> They argued, however, that probable cause was insufficient in the "unique context of civil traffic regulations," given the large number of traffic rules and the difficulty of total compliance with these rules.<sup>53</sup> Police officers might use traffic stops as "a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists" and "might decide which motorists to stop based on decidedly impermissible factors, such as the race of the car's occupants."<sup>54</sup> Petitioners urged the Court to adopt a different Fourth Amendment test for traffic stops: "whether a police officer, acting reasonably, *would*

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46. *Id.*

47. *Id.*

48. *Whren*, 517 U.S. at 809.

49. *Whren*, 53 F.3d at 374.

50. In denying Brown and Whren's motions, the district court noted that, while "[t]here may be different ways in which one can interpret it . . . the facts of the stop were not controverted," adding that "[i]t may not be what some of us believe should be done, or when it should be done, or how it should be done, but the facts stand uncontroverted, and the court is going to accept the testimony of Officer Soto." *Id.* at 373 (internal quotation marks omitted).

51. *Id.* at 372.

52. *Whren*, 517 U.S. at 810 (citing D.C. MUN. REGS. §§ 2213.4, 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal."); § 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions.")).

53. *Id.* (internal quotation marks omitted).

54. *Id.* Both Brown and Whren were African American. *Id.*

have made the stop for the reason given.”<sup>55</sup> In applying this test to their case, petitioners argued that a reasonable officer would not have made the traffic stop, in part, because MPD internal regulations permitted plainclothes officers in unmarked vehicles to enforce traffic laws “only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others.”<sup>56</sup>

In addition, petitioners argued that the Court should apply “the balancing inherent in any Fourth Amendment inquiry . . . weigh[ing] the governmental and individual interests implicated in a traffic stop.”<sup>57</sup> According to petitioners, under such a balancing test, the government’s interest in using plainclothes officers in unmarked cars to investigate minor traffic offenses is outweighed by the individual’s Fourth Amendment interests.<sup>58</sup>

In rejecting these arguments, the Court agreed that “in principle every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors.”<sup>59</sup> However, the Court continued, “[w]ith rare exceptions not applicable here . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”<sup>60</sup> The Court also rejected petitioners’ argument that past cases had disapproved of police using lawful means as a pretext for other investigatory agendas: “Not only have we never held, outside the context of inventory search or administrative inspection . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary.”<sup>61</sup> The Court agreed with petitioners that selective enforcement of the law based upon race was constitutionally prohibited but ruled that the Equal Protection Clause, not the Fourth Amendment, was the constitutional basis for objecting to intentional discrimination: “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>62</sup>

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55. *Id.* (emphasis added).

56. *Whren*, 517 U.S. at 815 (emphasis in original) (internal quotation marks omitted).

57. *Id.* at 816.

58. *Id.* at 817.

59. *Id.*

60. *Id.* at 817–18 (“The making of a traffic stop out of uniform does not remotely qualify as such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”).

61. *Id.* at 812.

62. *Whren*, 517 U.S. at 813.

*C. U.S. Supreme Court Decisions Post-Whren*

In the years following *Whren*, the Court has reaffirmed its holding that a police officer's mindset does not have any bearing upon the Fourth Amendment validity of a traffic stop or an arrest based upon objective probable cause.<sup>63</sup> Federal courts and almost all state courts have followed this ruling.<sup>64</sup>

In 2001, the Court, in a per curiam opinion, reversed the Arkansas Supreme Court's ruling in *Arkansas v. Sullivan* that it could interpret the U.S. Constitution "more broadly than the United States Supreme Court, which has the effect of providing more rights."<sup>65</sup> *Sullivan* involved an uncontested traffic stop and a subsequent arrest that was contested as a mere pretext to provide the officer with authority to search the defendant's vehicle.<sup>66</sup> Describing the state court's opinion as "flatly contrary to this Court's controlling precedent,"<sup>67</sup> the Court noted that the officer's authority to arrest for a fine-only traffic violation had correctly never been questioned by the lower courts.<sup>68</sup> In light of this, the Arkansas Supreme Court's finding that the arrest, supported by probable cause, still violated the Fourth Amendment because of the officer's "improper subjective motivation" could not

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63. See *Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

64. See, e.g., *Bolton v. Taylor*, 367 F.3d 5, 8 (1st Cir. 2004) (holding that, because an officer had reasonable suspicion of prostitution, the stop was valid even though the officer's motivation for the stop was a suspicion of drug activity); *United States v. Sanchez-Pena*, 336 F.3d 431, 437 (5th Cir. 2003) (holding that officers "may stop a motorist for a traffic violation even if, subjectively, the officer's true motive is to investigate unrelated criminal offenses"); *United States v. Bailey*, 302 F.3d 652, 656 (6th Cir. 2002) (noting that it is well established that an officer's "actual motivation" for making a traffic stop is irrelevant in determining the Fourth Amendment validity of the stop); *United States v. Clayton*, 210 F.3d 841, 844 (8th Cir. 2000) (determining that whether a Fourth Amendment violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken"); *Simms v. Vill. of Albion*, 115 F.3d 1098, 1108 (2d Cir. 1997) (holding that the test for analyzing a Fourth Amendment challenge is a "wholly objective authorization test" that does not look to an officer's state of mind); *United States v. Hudson*, 100 F.3d 1409, 1414-15 (9th Cir. 1996) (holding that the *Whren* analysis governs both traffic stops and arrests); see also *Doyle v. State*, 995 P.2d 465, 470 (Nev. 2000) (noting that the "could have" test is the proper test to apply where a defendant makes a claim of pretext); *People v. Robinson*, 767 N.E.2d 638, 649-50 (N.Y. 2001) (adopting *Whren* and citing numerous state court cases adopting the *Whren* standard); *State v. Lamont*, 631 N.W.2d 603, 610 (S.D. 2001) (noting that an officer's subjective motivations are irrelevant under Fourth Amendment analysis).

65. *State v. Sullivan (Sullivan II)*, 16 S.W.3d 551, 552 (Ark. 2000).

66. *Sullivan*, 532 U.S. at 770.

67. *Id.* at 771.

68. *Id.* (citing *Atwater*, 532 U.S. at 318).

stand.<sup>69</sup> The Court dismissed as “of no particular moment” that Sullivan’s case involved a custodial arrest rather than a traffic stop, given that the *Whren* Court had relied upon *United States v. Robinson*<sup>70</sup>—where a custodial arrest for a traffic violation was not constitutionally invalid even if it was a “‘mere pretext for a narcotics search.’”<sup>71</sup>

In a concurring opinion joined by Justices Stevens, O’Connor, and Breyer, Justice Ginsburg acknowledged that the Court’s Fourth Amendment cases provide “disturbing discretion”<sup>72</sup> to a police officer who can “‘trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.’”<sup>73</sup>

In a 2007 case concerning whether a passenger in a stopped vehicle is seized for Fourth Amendment purposes, the Court unanimously rejected the state’s contention that a passenger cannot challenge the constitutionality of a traffic stop.<sup>74</sup> It noted that to hold otherwise would “invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal.”<sup>75</sup> Remarkably, without reference to pretextual action in other situations, the Court stated that “[t]he fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of ‘roving patrols’ that would still violate the driver’s Fourth Amendment right.”<sup>76</sup> As

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69. *Id.* The Court also noted that a state could impose, under its own law, greater restrictions on police activity than those found as a matter of federal constitutional law. *Id.* at 772 (citing *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

70. 414 U.S. 218 (1973).

71. *Sullivan*, 532 U.S. at 772 (quoting *Robinson*, 414 U.S. at 221 n.1). On remand, the Arkansas Supreme Court held that under the Arkansas Constitution, as well as its own precedent, “pretextual arrests—arrests that would not have occurred *but for* an ulterior investigative motive—are unreasonable police conduct warranting application of the exclusionary rule.” *State v. Sullivan (Sullivan III)*, 74 S.W.3d 215, 221 (Ark. 2002) (emphasis in original). Interestingly, in another case involving allegations of a pretextual traffic stop, the Arkansas Court of Appeals stated the following: “[W]e do not intend to endorse pretextual police traffic stops. We merely are unable to hold that the pretextual conduct in this case required the trial court to grant appellant’s suppression motion in view of the applicable federal and state authorities.” *Lawson v. Arkansas*, 200 S.W.3d 459, 464 (Ark. Ct. App. 2004).

72. *Sullivan*, 532 U.S. at 772 (Ginsburg, J., concurring).

73. *Id.* at 773 (quoting *State v. Sullivan*, 16 S.W.3d 551, 552 (Ark. 2000)). Writing specifically about possible pretextual arrests, Justice Ginsburg hoped the Court would reconsider its cases should “‘anything like an epidemic of unnecessary minor-offense arrests’” occur. *Id.* (quoting *Atwater*, 532 U.S. at 353).

74. *Brendlin v. California*, 127 S. Ct. 2400, 2408 (2007).

75. *Id.* at 2410.

76. *Id.*

this Article discusses, legal scholars have raised similar concerns about the Court's "traffic stop" jurisprudence.

### III. SCHOLARLY CRITIQUES OF *WHREN*

Most legal scholars have excoriated the *Whren* decision.<sup>77</sup> One title sums up the criticism: *Whren v. United States: A Pretext to Subvert the Fourth Amendment*.<sup>78</sup> The thrust of the criticism has been that the decision—specifically, the holding that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”<sup>79</sup>—permits unfettered police discretion, allowing the use of racial profiling<sup>80</sup> and pretextual traffic stops on unconstitutional grounds, even assum-

77. See, e.g., Hon. Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597 (1999) (“Scholars, journalists, and lawyers promptly and vociferously assailed the *Whren* decision as legally incorrect, technically flawed, and fundamentally unfair.”); Mark M. Dobson, *The Police, Pretextual Investigatory Activity, and the Fourth Amendment: What Hath Whren Wrought?*, 9 ST. THOMAS L. REV. 707, 763 (1997) (“*Whren*, when coupled with already existing and recently extended Fourth Amendment doctrines, means that we can surely expect that more and more officers will use some form of subterfuge stops and arrests to conduct searches they otherwise would not be able to do.”); Diana Roberto Donahoe, “*Could Have*,” “*Would Have*,” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1194 (1997) (“By affirming the ‘could have’ test without inquiry into its true application, the *Whren* Court condoned arbitrary, unconstitutional searches and seizures.”); David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 585 (1998) (“Viewed as part of the larger picture of traffic stops, *Whren* is nothing less than the end of the applicability of the Constitution to every person driving a car.”); David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 547 (1997) (“*Whren* represents a clear step in the other direction—toward authoritarianism, toward racist policing, and toward a view of minorities as criminals, rather than citizens.”); LaFave, *supra* note 27, at 1859 (“The totality of the Court’s analysis in *Whren* is, to put it mildly, quite disappointing. By misstating its own precedents and mischaracterizing the petitioners’ central claim, the Court managed to trivialize what in fact is an exceedingly important issue regarding a pervasive law-enforcement practice.”); Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 451 (2002–2003) (“Clearly the implicit discretionary authority given to law enforcement in *Whren* . . . contradict[s] the premise that we live by a government of laws and embraced by countless courts throughout the history of this nation.”).

78. Markus, *supra* note 5, at 110 (“Instead of reinforcing the protection against arbitrary invasions, the *Whren* Court encourages officers to engage in such behavior.”).

79. *Whren v. United States*, 517 U.S. 806, 813 (1996). Another line of criticism maintains that *Whren* left the lower courts in confusion, because the Court failed to acknowledge what counts as a pretext. See Yeager, *supra* note 2, at 642 (arguing that by confusing intentions with motives and then holding that police “intentions” are irrelevant, the Court has “foil[ed] any attempt to understand what happened in any given case”).

80. The term “racial profiling” is generally used to describe “the police practice of using broad racial descriptions of individuals likely to be involved in a specific crime to suspect one particular individual of that crime based, in part, upon that individual’s race.” Alberto B. Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation’s Roads*, 90 KY. L.J. 75, 75 (2001–2002).

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ing that the officer has probable cause to believe that the driver has committed a traffic violation.<sup>81</sup>

As noted in Part II, lawmakers regulate automobiles so heavily that total compliance is virtually impossible.<sup>82</sup> Given that a large number of drivers are committing traffic infractions at any point in time, police officers have enormous discretion in determining whether to stop a driver and which driver to stop.<sup>83</sup> After the police have exercised this discretion and initiated a traffic stop, they can ask the driver and passenger to step out of the vehicle,<sup>84</sup> ask for consent to search the vehicle without informing the driver that he may refuse,<sup>85</sup> perform a *Terry* frisk of the occupants and the vehicle where facts support this,<sup>86</sup> and detain the vehicle and its occupants to determine whether their suspicions are grounded.<sup>87</sup> If the officers' suspicions rise to the level of

81. Pretextual traffic stops are different from stops where the police have falsified the reason for the stop. "Pretext and perjury are different forms of deception. In the former, a valid legal infraction is used as cover for a covert investigative purpose; in the latter, the police falsely claim that a valid legal infraction ever existed." Hampton, *supra* note 27, at 525, 540 (noting that when police falsify the reason for the stop, the stop is "clearly unconstitutional because the probable cause is fiction"). For other articles discussing the issue of police officers lying while testifying, see Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389 (1999), and Carol A. Chase, *Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767 (2001). This Article does not address whether traffic stops on less than probable cause are constitutionally valid. For a discussion of that concern, see LaFave, *supra* note 27, at 1846-52, and Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1003 (1999) (discussing the requirement that stops be based upon probable cause, not just reasonable suspicion, as a possible judicial remedy).

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82. See *supra* note 29 and accompanying text.

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83. See, e.g., Davis, *supra* note 31, at 427 (arguing that, because most jurisdictions enact hundreds of traffic regulations, police officers must exercise discretion in determining which motorist to stop and for what observed traffic infraction); Lichtenberg, *supra* note 77, at 451 ("If police have the unbridled discretion to stop any motorist . . . while at the same time it is commonly known that virtually every motorist is violating the law, a disparity exists between the law as it is written and the law as it is enforced."); Thompson, *supra* note 81, at 982 n.132 ("An examination of vehicle codes across the country reveals that statutes expressly authorize police officers to use their discretion in deciding whether to stop a driver.")

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84. See *Maryland v. Wilson*, 519 U.S. 408, 410 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

85. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 249 (1973).

86. See *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983) (holding that, where officers have a reasonable suspicion that their safety or the safety of others is in danger, they can perform a protective sweep of the car's interior).

87. See *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (holding that officers should diligently pursue their investigation); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (holding that officers must use investigative tools reasonably available to verify or dispel their suspicion "in a short period of time"); see also Hampton, *supra* note 27, at 506-07 (noting that officers have "broad authority" to detain occupants of a vehicle while investigating).

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probable cause, they can search the vehicle without a warrant.<sup>88</sup> If the officers decide to arrest the driver based upon the traffic infraction, they can take the driver into custody, search the driver and the car incident to that arrest,<sup>89</sup> and even impound the vehicle and perform an inventory search.<sup>90</sup> As one legal commentator noted, “[t]ake any minor traffic or equipment violation, add a pretextual stop and a custodial arrest for the minor traffic violation, and *voilà*, you get a lawful search of the automobile.”<sup>91</sup>

As the Court recognized in *Whren*, and as legal scholars and others have discussed, such a high level of discretion provides the police with the ability to use traffic stops based upon legitimate traffic infractions as pretexts to investigate other, possibly criminal activity for which the police have no probable cause or even reasonable suspicion.<sup>92</sup> In addition, this level of discretion could provide officers who might be prone to racial profiling a means to perform traffic stops on the basis of impermissible factors, such as race.<sup>93</sup> While the petitioners in *Whren* urged the Court to adopt the “reasonable officer” test precisely for these reasons,<sup>94</sup> the Court declined, noting that “the consti-

88. See *Carroll v. United States*, 267 U.S. 132, 155–56 (1925) (establishing the automobile exception).

89. See *United States v. Robinson*, 414 U.S. 218, 224 (1973) (holding that a search incident to a lawful arrest is valid); *New York v. Belton*, 453 U.S. 454, 461 (1981) (holding that a search of the passenger compartment of a vehicle incident to a lawful arrest of a passenger is valid).

90. See *Florida v. Wells*, 495 U.S. 1 (1990); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

91. David A. Moran, *The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time*, 47 VILL. L. REV. 815, 831 (2002) (emphasis in original); accord *Kaban*, *supra* note 7, at 1309–10 (arguing that the effect of *Whren* and *Atwater* is “that officers can follow persons until they violate a traffic law, pull them over, and conduct a search of the vehicle as a search incident to arrest”).

92. *Whren v. United States*, 517 U.S. 809, 810 (1996); see also *Hampton*, *supra* note 27, at 514 (“[T]he ease with which traffic stops can be made, the hope of discovering criminality, [and] the absence of judicial oversight—combine to invite police exploitation.”).

93. *Whren*, 517 U.S. at 810; see also *Davis*, *supra* note 31, at 428 (positing that pretextual traffic stops are examples of police abuse of discretion “when race—either consciously or unconsciously—infuses the decision to stop a motorist”); *Lopez*, *supra* note 80, at 121 (“[T]he legitimacy of the traffic code masks the illegitimate use of race and its alleged link to criminality in search decisions by providing police officers with a justifiable reason to stop vehicles whether or not the officers normally enforce the traffic code provisions.”).

94. *Whren*, 517 U.S. at 810 (noting that to avoid the danger of police officers deciding which motorists to stop based on impermissible factors such as race, petitioners urged the Court to adopt the test of “whether a police officer, acting reasonably, would have made the stop for the reason given”). *But see* *LaFave*, *supra* note 27, at 1854 (arguing that the Court’s characterization of petitioners’ position was false when the Court stated that it had never held that an officer’s motive could invalidate objectively justifiable behavior; instead, “petitioners’ position [was] grounded in the officer’s deviation from usual practice; improper motivation unaccompanied by such deviation is not asserted to be ‘unreasonable’ under the Fourth Amendment”); *Lopez*, *supra* note 80, at 79 (arguing that the *Whren* decision “effectively blunted any efforts to challenge racial profiling under the Fourth Amendment”).

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tutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>95</sup> Instead, the Court held that, where probable cause exists for the traffic stop, “the actual motivations of the individual officers involved”<sup>96</sup> are irrelevant under the Fourth Amendment.

As petitioners did in *Whren*, many legal scholars have argued that use of a “reasonable officer” test, also known as the “would have” test, would combat the tendency to use traffic infractions as a pretext to investigate other possible criminal behavior and would consequently protect drivers. A court reviewing an officer’s decision to perform a traffic stop would not be concerned with “whether the [officer] validly could have made the stop, but rather, whether a reasonable officer, given the same circumstances, would have made the stop absent the invalid purpose.”<sup>97</sup> Under this test, a court would look to the totality of the circumstances, including “whether the officer was investigating the driver before the stop; whether the officer issued a citation; whether the particular violation is commonly enforced in that jurisdiction; and whether this type of stop was within the officer’s normal duties.”<sup>98</sup> Applying this test to the facts in *Whren*, a court would not have to inquire into Officer Soto’s thoughts. Instead, knowing that the officer violated a police department regulation prohibiting plainclothes officers in an unmarked car from stopping motorists except in circumstances not present in the case, the court would find that the stop was pretextual and would suppress the evidence.<sup>99</sup> Over

95. *Whren*, 517 U.S. at 813. *But see* Thompson, *supra* note 81, at 998 (“[T]he Court erred in *Whren v. United States* by declaring that police officers’ ‘intentionally discriminatory application’ of search and seizure powers ‘based on considerations such as race’ are ‘not [the concern of] the Fourth Amendment’ and are solely the province of the Equal Protection Clause.” (alterations in original)); *cf.* Markus, *supra* note 5, at 106 (“*Whren* provides police officers incentive to violate the Equal Protection Clause of the Constitution because the evidence will be admitted . . .”).

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96. *Whren*, 517 U.S. at 813. *But see* LaFave, *supra* note 27, at 1856 (arguing that whether the officer had the proper frame of mind is not the issue; instead, “the petitioners’ test would only identify arbitrariness in the disparate-treatment sense, which can occur with or without bad thoughts, just as bad thoughts might (but do not inevitably) produce disparity”).

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97. Donahoe, *supra* note 77, at 1202–04 (arguing that the “would have” test is “no different from the objective test set forth in *Terry v. Ohio*, 391 U.S. 1 (1968): whether a reasonable officer in that officer’s shoes had a reasonable belief that the action was appropriate”); *see also* Markus, *supra* note 5, at 102 (arguing that the “would have” test asks the same question as the objective test in *Terry*).

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98. Donahoe, *supra* note 77, at 1203 (“Under this totality test, it would not always be reasonable for an officer to stop a motorist for a minor traffic violation.”).

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99. *See Whren*, 517 U.S. at 815; *see also* Loewy, *supra* note 6, at 571 (“If the local police regulations forbid a plainclothes officer to make a traffic stop unless certain specified special circumstances are present, it is hard to construct an argument that the stop, in the absence of such circumstances, was reasonable.”); Markus, *supra* note 5, at 102 (“The ‘would have’ test works exactly as intended in situations like *Whren*.”).

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time, then, with the application of the exclusionary rule, police officers would be deterred from making traffic stops on pretextual grounds, and drivers would be protected from police abuse of discretion.<sup>100</sup>

#### IV. WASHINGTON STATE AND THE “WOULD HAVE” TEST

Starting with *State v. Ladson*, Washington state courts have provided broader protection for drivers under the Washington State Constitution than that found under the Fourth Amendment as interpreted by the U.S. Supreme Court in *Whren*. Washington is the only state to have done so.<sup>101</sup> In essence, the Washington Supreme Court ruled that the “would have” test applies in state cases.

##### A. *State v. Ladson*

The Washington Supreme Court squarely addressed whether pretextual traffic stops violated the Washington State Constitution in *State v. Ladson*.<sup>102</sup> The facts in *Ladson* were undisputed.<sup>103</sup> Two officers on proactive gang patrol noticed Richard Fogle and his passenger, Thomas Ladson, both African American men, as they drove by; the officers recognized Fogle based upon an unsubstantiated street rumor that he was involved with narcotics.<sup>104</sup> The officers followed the two men, waited while the vehicle refueled at a gas station, and pulled the vehicle over several blocks later on the asserted grounds that the license plate tabs had expired five days earlier.<sup>105</sup> After the stop, the officers ordered Fogle out of the vehicle and discovered that his driver’s license was suspended; they arrested him on the scene.<sup>106</sup> They also ordered Ladson out of the car, patted him down, and de-

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100. See *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (noting that the primary purpose of the Fourth Amendment exclusionary rule “is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures” (internal quotation marks omitted)).

101. See *State v. Norman*, No. CR-07293066, 2008 WL 1066917, at \*6 (Conn. Super. Ct. Mar. 20, 2008) (noting that the “vast majority” of jurisdictions that have considered whether their state constitutions provide more protection than *Whren* have rejected that argument and “embraced” *Whren*); *People v. Robinson*, 767 N.E.2d 638, 642 n.1 (N.Y. 2001) (noting that only Arkansas—banning pretextual arrests, not stops—and Washington have rejected *Whren*); Shardul Desai, *Pretextual Searches and Seizures: Alaska’s Failure to Adopt a Standard*, 23 ALASKA L. REV. 235, 245, 263 (2006) (noting that Washington is a “notable exception” to states that have adopted *Whren* and that no other state follows the reasonable officer standard). See also *Kaban*, *supra* note 7 (discussing why pretextual traffic stops and arrests are illegal under the Alaska state constitution).

102. 979 P.2d 833 (Wash. 1999).

103. *Id.* at 836.

104. *Id.*

105. *Id.*

106. *Id.*

tained him while they searched the car's interior.<sup>107</sup> Inside the car, the officers found Ladson's jacket in the passenger's seat, searched it, and recovered a small handgun.<sup>108</sup> Ladson was arrested and, in a search incident to the arrest, the officers found several bags of marijuana and about \$600 in cash on his person and in the jacket.<sup>109</sup> Ladson was charged with possession of a stolen firearm and unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon.<sup>110</sup>

Prior to trial, Ladson filed a motion to suppress the evidence, arguing that it had been obtained during an "unconstitutional pretextual traffic stop."<sup>111</sup> At the suppression hearing, the officers testified that they did not make routine traffic stops while on proactive gang patrol; instead, they "selectively enforce[d] traffic violations depending on whether [they] believe[d] there is the potential for intelligence gathering in such stops."<sup>112</sup> The officers did not deny that the stop was pretextual.<sup>113</sup> However, they did have objective probable cause to believe that a traffic infraction had occurred given that Fogle's license plate tabs had expired. The trial court suppressed the evidence, ruling that "[p]retextual stops by law enforcement officers are violative of the [U.S.] Constitution."<sup>114</sup>

While the state's appeal of the suppression ruling was pending, the Court decided *Whren*. Relying on this decision, the Washington Court of Appeals reversed the trial court's ruling but did not address the state constitutional claim raised by Ladson.<sup>115</sup> On appeal to the Washington Supreme Court, Ladson asserted the state law issue and argued that the Washington State Constitution provides broader protection against pretextual traffic stops than the Fourth Amendment of the U.S. Constitution and "renders pretextual traffic stops unconstitutional."<sup>116</sup>

In reviewing Ladson's claim, the Washington Supreme Court examined its earlier cases and reiterated that article I, section 7, of the

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107. *Id.*

108. *Ladson*, 979 P.2d at 836.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Ladson*, 979 P.2d at 836 (internal quotation marks omitted).

115. *Id.* at 836–37 (citing *State v. Ladson*, 939 P.2d 223, 224 (Wash. Ct. App. 1997)). The court of appeals stated that Ladson had not adequately briefed the state constitutional issue. *Id.* at 837.

116. *Id.* at 837.

state constitution<sup>117</sup> placed greater emphasis on privacy than the Fourth Amendment:

[W]hile the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, article I, section 7, holds the line by pegging the constitutional standard to “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a *warrant*.”<sup>118</sup>

The court noted that, without a warrant or an exception to the warrant requirement, such as “consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, [or] *Terry* investigative stops,”<sup>119</sup> police action was without the “authority of law” required by the state constitution.<sup>120</sup> In the case of a pretextual traffic stop, police are not enforcing the traffic code, but instead are conducting a criminal investigation unrelated to driving.<sup>121</sup> Thus, the court found that “the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.”<sup>122</sup>

With pretextual traffic stops, the “actual reason for the stop is inherently unreasonable, otherwise the use of pretext would be unnecessary.”<sup>123</sup> While police officers may enforce the traffic code, they “may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception.”<sup>124</sup> Thus, the court held that pretextual

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117. WASH. CONST. art. I, § 7 (“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

118. *Ladson*, 979 P.2d at 837 (emphasis in original) (quoting *State v. Myrick*, 688 P.2d 151 (Wash. 1984)).

119. *Id.* at 838.

120. *Id.* (internal quotation marks omitted).

121. *Id.* at 842.

122. *Id.* at 837–38. The court further noted the following:

[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce the traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.

*Id.* at 838.

123. *Id.*

124. *Ladson*, 979 P.2d at 842. The court, citing *State v. Hehman*, 578 P.2d 527 (Wash. 1978), noted that the Washington State Legislature had decriminalized the traffic code in an effort to protect citizens against pretextual traffic arrests that would allow officers to search for unrelated

traffic stops violate the Washington State Constitution, because they “are seizures absent the ‘authority of law’ which a warrant would bring.”<sup>125</sup>

In determining whether a traffic stop is pretextual, a reviewing court must “look beyond the formal justification for the stop to the actual one”<sup>126</sup> by examining the totality of the circumstances, “including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior.”<sup>127</sup> The court compared this test to the one a reviewing court used to determine whether the emergency exception to the warrant requirement applied: “To satisfy the exception, the State must show that the officer, both subjectively and objectively, ‘is actually motivated by a perceived need to render aid or assistance.’”<sup>128</sup> If the search or seizure is unconstitutional, then all subsequently discovered evidence “becomes fruit of the poisonous tree and must be suppressed.”<sup>129</sup>

#### V. WASHINGTON STATE CASES POST-LADSON

In nearly a decade of applying the subjective *Ladson* “would have” test, Washington courts have built a body of law demonstrating how the test works in practice. Undoubtedly, use of the “would have” test has, in some cases, produced different results than use of *Whren*’s “could have” test, starting with *Ladson* itself. Because the officers in *Ladson* observed that the vehicle had expired license plate tabs, they could have lawfully stopped the vehicle, even though the officers ex-

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criminal activity. *Id.* at 840–41. Thus, assuming no pretext, an officer may stop someone for a decriminalized traffic infraction and issue a citation. However, the officer may not arrest for that decriminalized traffic infraction. *See State v. McCue*, No. 29554-7-II, 2003 WL 22847338, at \*3 (Wash. Ct. App. Dec. 3, 2003).

125. *Ladson*, 979 P.2d at 842 (citing WASH. CONST. art. I, § 7).

126. *Id.* at 839 (“The question, then, becomes whether the fact that someone has committed a traffic offense, such as failing to signal or eating while driving, justifies a warrantless seizure which would not otherwise be permitted absent that ‘authority of law’ represented by a warrant.”).

127. *Id.* at 843.

128. *Id.* (quoting *State v. Angelos*, 936 P.2d 52, 54 (Wash. Ct. App. 1997)).

129. *Id.* In *Ladson*’s case, the supreme court reversed the court of appeals, finding that suppression of the evidence was required given that the initial stop “was without authority of law because the reason for the stop (investigation) was not exempt from the warrant requirement.” *Id.* The majority opinion drew a stinging dissent from Justice Madsen, who pointed out that because the relevant traffic statutes encompass a probable cause standard, “they codify a constitutionally valid standard for warrantless traffic stops.” *Id.* at 844 (Madsen, J., dissenting). Justice Madsen argued that there was no legal authority supporting “the proposition that the motive of the officer making a traffic stop is constitutionally relevant under article I, section 7.” *Id.* at 850. Finally, Justice Madsen agreed with the U.S. Supreme Court that an officer’s motive was relevant under the Equal Protection Clause (and likewise under the Washington State Constitution) if a particular class of people had been targeted for police action. *Id.*

plained that they use traffic infractions as a means to investigate suspicions of narcotics activity.<sup>130</sup> Once lawfully stopped, and without more evidence, the officers could ask the driver and passenger out of the vehicle.<sup>131</sup> Given that the driver had a suspended license, the officers could, and did, lawfully arrest him and search his vehicle incident to that arrest.<sup>132</sup> During the search of the vehicle, the officers could, and did, lawfully search Ladson's jacket, which was on the passenger seat, and find a handgun.<sup>133</sup> Thus, if the court had used the "could have" test, the evidence would not have been suppressed.

Use of the subjective "would have" test in the years since *Ladson* has resulted in the suppression of evidence seized when the court determines that a police officer is using a traffic infraction as a pretext for the basis of the traffic stop. However, determining whether the traffic stop is pretextual—whether a stop that is lawfully sufficient given objective probable cause, but which might not be constitutionally justified for its "true reason"—turns out to be more complicated than it might seem under the "would have" test. It appears that Washington state courts, more often than not, have found disputed traffic stops to be constitutional; that is, courts have found that the subjective intent of the officer, as well as the objective reasonableness of her behavior, satisfies the authority of law requirement. In these decisions,<sup>134</sup> courts often specifically note that *Ladson* depended upon the officers' direct testimony that they were using traffic stops, based on traffic infractions, as a pretext to investigate other activity.<sup>135</sup> This

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130. *Id.* at 836 (majority opinion).

131. *See* *Maryland v. Wilson*, 519 U.S. 408, 410 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

132. *Ladson*, 979 P.2d at 836.

133. *Id.*

134. Most cases are unpublished. *See* WASH. REV. CODE § 2.06.040 (1987) ("Decisions determined not to have precedential value shall not be published.").

135. In *State v. Coronel-Trinidad*, for example, the court rejected Coronel-Trinidad's contention that it should infer pretext because the officer first noticed the car in which Coronel-Trinidad was riding outside a motel in a "high drug area"; he followed the car for several blocks before stopping it; and he did not issue a traffic citation to the driver for turning right into the far lane of traffic instead of the closest lane. No. 25602-9-II, 2001 WL 528242, at \*1, \*3 (Wash. Ct. App. May 18, 2001). The court disagreed, noting that *Ladson* "depended on direct testimony from the arresting officers that they routinely used traffic stops as pretext to investigate gang activity" and, in the instant case, the officer denied that the traffic stop was pretextual. *Id.* at \*3 (finding that the circumstances surrounding the stop "do not give rise to an inference that the stop was a pretext"); *see also* *State v. Freih*, No. 25378-0-II, 2001 WL 88223, at \*2 (Wash. Ct. App. Feb. 2, 2001) (noting that, in *Ladson*, "[b]ecause the officers admitted the actual reason for the stop was not to enforce the traffic code but rather to conduct a criminal investigation, the court concluded that the stop was made under an unconstitutional pretext and the seized evidence had to be suppressed"); *State v. Galer*, No. 50017-1-I, 2002 WL 31518131, at \*1 (Wash. Ct. App. Nov. 12, 2002) ("In *Ladson*, the police officers admitted that although they did not typi-

alone suggests that use of the “would have” test has not addressed concerns about deterring pretextual traffic stops. One could argue that savvy police officers could simply modify their testimony appropriately to avoid having a court find that the stop was pretextual.<sup>136</sup> However, under both tests, courts are determining the officer’s credibility. If an officer has falsified the existence of a traffic infraction, for example, then there was no objective probable cause, and the stop was unlawful under either test.<sup>137</sup>

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cally make traffic stops while on gang patrol, they followed people who seemed suspicious, hoping that these people would commit traffic infractions so that the officers could legally stop them and question them about other criminal activity.”).

136. In an interesting and perhaps prescient case noting this possibility, *State v. Ortiz*, Ortiz argued that the officer had tailored his report to follow the law in *Ladson*. No. 19189-3-III, 2001 WL 27383 (Wash. Ct. App. Jan. 11, 2001). The court rejected this contention, noting that the deputy had written his report six months before the *Ladson* decision. *Id.* at \*3 (“[A]ny claim that Deputy Steadman tailored his report to *Ladson*’s requirements is unsupported.”); see also Desai, *supra* note 101, at 262 (arguing that, with a subjective test, “police, aware of the test, could simply misrepresent their subjective motivation”); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407, 456–57 (2006) (arguing that judicial insistence on “objective” criteria “simply rewards those officers who are able and willing to spin their behavior in a way that satisfies judges,” rewarding “articulate officers and penaliz[ing] those who are less verbally facile or who are transparent about their motivations”). In finding some stops to be proper, courts have also noted that officers have not testified to any underlying motive. See, e.g., *State v. Joe*, No. 17538-3-III, 2000 WL 192788 (Wash. Ct. App. Feb. 17, 2000). In this case, the trial court, applying the *Ladson* criteria, determined that the officer, who was on routine patrol, properly stopped the appellant’s vehicle for a broken turn signal indicator. *Id.* at \*1. The court noted that the officer had “candidly admitted” that he had seen the appellant adjusting his vehicle’s headlights at a convenience store a few minutes before the traffic stop, and he had also run a routine license check at that time. *Id.* at \*2. However, the officer testified that the only reason for the stop was the broken turn signal, because he wanted the driver to know that the signal was not working. The court found that the stop was proper because the officer had not testified as to any underlying motive in stopping the car. *Id.*; see also *State v. Flowers-Roscoe*, No. 30779-1-II, 2005 WL 470424, at \*3 (Wash. Ct. App. Mar. 1, 2005) (noting that there was no evidence in the record to show that the officer stopped the car for any reason other than the traffic infraction); *State v. Twaites*, No. 28985-7-II, 2003 WL 21653086, at \*4 (Wash. Ct. App. July 15, 2003) (noting that the officer “explained that his subjective purpose was to stop Twaites because of his erratic driving”); *State v. Zarate*, No. 18017-4-III, 1999 WL 1249400, at \*2 (Wash. Ct. App. Dec. 23, 1999) (noting that, in addition to being on routine patrol and stopping a number of cars previously for the same infraction, the officer “never gave any indication he stopped [appellant’s] car for anything but the traffic infraction”; thus, the stop was not pretextual). But see *State v. Montes-Malindas*, — P.3d —, No. 25280-9-III, 2008 WL 1869023, at \*4 (Wash. Ct. App. Apr. 29, 2008) (finding that, although the officer testified that the stop was made “only because of the delayed engagement of the headlights,” the stop was pretextual given the officer’s stated suspicions and activities after the stop).

137. See *supra* note 81 and accompanying text (discussing traffic stops based upon falsified reasons); see also *United States v. Williams*, 106 F.3d 1362, 1365 (7th Cir. 1997) (finding that *Whren*’s rule does not apply where a defendant can affirmatively demonstrate the absence of probable cause at the time of the arrest); *State v. Nichols*, 162 P.3d 1122, 1125 (Wash. 2007) (noting that part of the *Ladson* inquiry involves determining whether the officer had probable cause that an infraction occurred).

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While the “would have” test has weeded out those cases of admitted police pretextual behavior, there are arguably either fewer pretextual stops than suspected or it is difficult for courts to identify pretextual behavior without such an admission. Courts may also be reluctant to find pretext, unless the police admit using one,<sup>138</sup> given the potential risk of suppressing validly recovered evidence. Determining whether a reasonable officer would have made the stop, then, remains a challenge, even with the latitude afforded the courts to inquire into officers’ motivations. This challenge has several potential consequences. Any test used by a court must be fact-specific. Apart from cases where a police officer admits to stopping a vehicle on a pretextual basis, however, it is difficult to discern a consistent framework used by the courts in determining whether the “enforcement of the traffic code is the actual reason for the stop.”<sup>139</sup> This lack of consistency provides little guidance to police officers who are not acting under a pretext, but who are nevertheless faced with determining whether they should ignore a violation of the traffic laws. The line between situations where the court finds it is lawful for an officer to act and situations where a court finds that it is not is often very thin.

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138. See Thompson, *supra* note 81, at 1002 (noting that, when facing the prospect of finding that an officer is lying about her motivations, “[m]ost judges would find such a situation extremely disturbing”); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 383 (1998) (“When the difficulty of proving police falsehoods in a particular case is combined with the strong incentives influencing a trial judge to accept the police versions of the facts, the chances of a trial judge dismissing a case or suppressing evidence because of police perjury are remote.”). It is also possible that prosecutors are exercising their discretion and not bringing cases where the police engaged in pretextual behavior. Washington courts do take charges of pretext seriously. For example, the Washington Court of Appeals has found that defense counsel’s failure to challenge the officer’s subjective reasons for making the traffic stop constitutes ineffective assistance of counsel. See *State v. Meckelson*, 135 P.3d 991, 993–94 (Wash. Ct. App. 2006) (holding that defense counsel was ineffective for failing to challenge the officer’s reasons for making the stop; given that this is a “factually nuanced question,” the trial court needed to consider any evidence of this as part of the totality of the circumstances under *Ladson*); see also *State v. Rainey*, 28 P.3d 10, 14 (Wash. Ct. App. 2001) (finding that defense counsel’s failure to bring a plausible motion to suppress based on allegations of a pretextual stop is evidence of constitutionally ineffective assistance of counsel; the officer ostensibly stopped the car because there was no front license plate). But see *State v. Faulkner*, No. 20115-5-III, 2002 WL 339422 (Wash. Ct. App. 2002) (holding that raising a claim of a pretextual traffic stop for the first time on appeal did not demonstrate manifest error affecting a constitutional right). Faulkner did not challenge the trial court’s finding that the traffic stop was justified by the observed traffic infractions. *Id.* at \*2. Because the officer was never questioned at all about “non-driving suspicions such as drug activity,” and nothing elsewhere in his testimony suggested pretext, the court found that Faulkner could not make a showing of manifest error. *Id.*; see also *State v. McFadden*, No. 52758-4-I, 2004 WL 1559783 (Wash. Ct. App. July 12, 2004) (finding defense counsel effective despite its failing to offer evidence of what officers learned after stopping the appellant; the relevant inquiry before the trial court was what officers knew before the stop and the reasons for the stop).

139. *State v. Hoang*, 6 P.3d 602, 607 (Wash. Ct. App. 2000).

In addition to not providing guidance to officers, this lack of consistency might lead a court to substitute its own judgment for the police officer's—and the legislature's—when determining whether the stop was the product of “good police work” or something less laudatory but still legal: in essence, determining whether the officer “should have” made the stop. Given these types of issues, use of the “would have” test does not appear to constrain police discretion to the extent suggested by critics of *Whren* and the “could have” test. A review of Washington cases illustrates these issues.

#### A. *Lack of a Consistent Framework*

In determining whether a stop was pretextual, courts look at affirmative versus passive conduct by the police in considering the totality of the circumstances, although what is considered affirmative conduct and how much it should matter is not always clear. For example, although “the officer’s subjective motivation for the initial decision to follow a vehicle is not the focus of the inquiry,”<sup>140</sup> courts try to distinguish whether the officer was following someone because she was waiting for the driver to commit a traffic violation—presumably leading to a pretextual traffic stop—or because the officer was engaging in “routine” police work—which presumably is not pretextual. Whether the officer was on routine patrol or narcotics investigation, regardless of what initially alerted the officer, is also part of the totality of the circumstances considered by courts. On the other hand, if a traffic violation occurred while an officer happened to be present, such as a driver making an illegal turn in front of an officer who is parked, courts have found that an officer did not engage in pretextual behavior even though the officer had suspicions about the occupants of the vehicle *before* the traffic violation occurred and even though the officer did not give a citation for the infraction.

#### 1. *Cases*

*State v. DeSantiago*, decided shortly after *Ladson*, is a pretext case that is frequently cited as an example of an officer following someone because she is waiting for a traffic infraction so that she can investigate other suspicions for which she has no probable cause.<sup>141</sup> In *DeSantiago*, Patrol Officer Miller was watching an apartment complex known for illegal narcotics activity.<sup>142</sup> Officer Miller observed DeSan-

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140. *State v. Gonzales*, No. 50924-1-I, 2003 WL 21326866, at \*3 (Wash. Ct. App. June 9, 2003) (“The decisive factor is the officer’s subjective motivation for making the traffic stop itself.”).

141. 983 P.2d 1173 (Wash. Ct. App. 1999).

142. *Id.* at 1174.

tiago arrive at the complex, enter and leave an apartment, and drive away.<sup>143</sup> Officer Miller suspected that DeSantiago had bought drugs, but did not have probable cause to stop him.<sup>144</sup> Officer Miller followed DeSantiago, because he wanted to identify his license plate and “was looking for a basis to stop the vehicle.”<sup>145</sup> After following DeSantiago for about ten blocks, Officer Miller saw DeSantiago make an illegal left turn and pulled him over.<sup>146</sup> Officer Miller arrested DeSantiago after learning that he had a suspended license, as well as an outstanding warrant.<sup>147</sup> Pursuant to the arrest, Officer Miller found methamphetamine and a handgun in the car.<sup>148</sup> After DeSantiago’s motion to suppress was denied, he was convicted of possession of methamphetamine and unlawful possession of a firearm.<sup>149</sup> In reversing DeSantiago’s conviction, the appellate court determined that Officer Miller was not on routine traffic patrol but, instead, like the officers in *Ladson*, was investigating narcotics.<sup>150</sup> Although the court found that Officer Miller properly stopped DeSantiago for the traffic infraction, the court determined that the stop was pretextual: “Officer Miller was clearly looking for a basis to stop the vehicle and subjectively intended to engage in a pretextual stop.”<sup>151</sup>

In other cases without such evidence, courts have placed particular emphasis on the fact that the stopping officer was on routine patrol and not on a narcotics or other type of investigation, even if what alerted the officer initially was not a traffic infraction. For example, in *State v. Freih*, a deputy sheriff was on routine patrol when he passed a vehicle in which Freih was a passenger.<sup>152</sup> Because the deputy considered it suspicious that one of the passengers hid his face after looking at him, the deputy turned around and followed the vehicle in an attempt to determine who was in the car.<sup>153</sup> The deputy did not know any of the occupants, nor did he have any suspicions that they were

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143. *Id.*

144. *Id.*

145. *Id.* at 1176 (internal quotation marks omitted). It is not clear if Officer Miller testified directly to “looking for a basis to stop the vehicle” or if the trial court inferred that from the evidence. *Id.*

146. *Id.* at 1174.

147. *DeSantiago*, 983 P.2d at 1174.

148. *Id.* at 1175.

149. *Id.*

150. *Id.* at 1176. When the state tried to distinguish *Ladson* on the grounds that Officer Miller, in the instant case, was a patrol officer and not a narcotics detective, the court noted that “[t]his is a distinction, but not a material one.” *Id.*

151. *Id.* (internal quotation marks omitted).

152. No. 25378-0-II, 2001 WL 88223, at \*1 (Wash. Ct. App. Feb. 2, 2001).

153. *Id.*

involved in illegal drug activity.<sup>154</sup> When the driver made an illegal lane change before the deputy reached the car, he stopped the car for this traffic infraction.<sup>155</sup> After the deputy found drugs and drug paraphernalia,<sup>156</sup> Freih was charged and later convicted of unlawful possession of heroin. Freih argued that the traffic stop was pretextual.<sup>157</sup> The court, however, applying the *Ladson* analysis, determined that the traffic stop was lawful because of the traffic infraction and the circumstances; the deputy, who was on routine patrol, was not conducting any investigation regarding the car's occupants.<sup>158</sup> Although the deputy initially followed the vehicle based on his suspicions, the court found that these suspicions, without more, did not render the traffic stop pretextual; the officer was not required to ignore violations of the traffic laws.<sup>159</sup>

In other cases in which a traffic violation occurred in front of an officer, courts have found that the officer did not use the traffic infraction as a pretext, even if the officer had suspicions about the car and its occupants *before* observing the infraction. Courts cite *State v.*

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154. *Id.*

155. *Id.*

156. *Id.* As the deputy approached the car, he saw Freih reaching under his seat. The deputy then ordered Freih out of the vehicle and saw what appeared to be, and was, heroin and drug paraphernalia. *Id.*

157. *Id.*

158. *Freih*, 2001 WL 88223, at \*2. In *State v. Ortiz*, 2001 WL 27383, at \*2 (Wash. Ct. App. 2001), *Ortiz* argued that the deputy had an improper subjective intent in stopping him because the deputy saw his face before the stop. The deputy, however, testified that he neither recognized *Ortiz* or his vehicle, nor had reason to suspect that there were drugs in the vehicle. The court distinguished *Ladson* by pointing out that the deputy in the instant case was on routine patrol where his primary duties were to enforce the traffic laws; apparently, it was this deputy's "common practice" to make these types of stops. *Id.*; see also *State v. St. Ours*, No. 33528-0-II, 2006 WL 1829382, at \*1 (Wash. Ct. App. July 5, 2006) (finding no record evidence of pretext although the officer made a U-turn to follow *St. Ours's* truck; the officer testified that his attention "was focused on pedestrian activity, not on the truck's occupants"); *State v. Galer*, No. 50017-1-I, 2002 WL 31518131, at \*2 (Wash. Ct. App. Nov. 12, 2002) (noting that, even though the officer testified that his primary assignment was deterring crime as well as narcotics enforcement and that the area of the stop was a "known drug area," the court emphasized the officer's additional testimony that he was on a roving patrol at the time of the stop and not a drug operation; the stop was not pretextual given the three traffic violations); *State v. Johnson*, No. 27743-3-II, 2002 WL 31341654, at \*1 (Wash. Ct. App. Oct. 18, 2002) (noting that the officer was part of a "proact unit" that patrols problem areas of the city; however, unlike officers in *Ladson* and *DeSantiago*, the officer testified that traffic enforcement was a part of regular duties, and he pulled *Johnson* over because of the noise his truck was making as well as its speed).

159. *Freih*, 2001 WL 88223, at \*2; see also *State v. Gonzales*, No. 50924-1-I, 2003 WL 21326866, at \*3 (Wash. Ct. App. June 9, 2003) (finding that, although the officer's initial suspicions were not based on a traffic violation, the traffic stop was not pretextual because of the traffic infraction; the officer's contact with *Gonzales* was limited to that necessary to process the traffic infraction).

*Hoang*<sup>160</sup> as an example of an officer engaging in “routine” duties when stopping someone who has committed a traffic infraction in front of her and, thus, making traffic stops that are not for pretextual reasons.<sup>161</sup> In *Hoang*, Officer Kamalu was on routine patrol early one morning, parked in a neighborhood known for illegal narcotics activity.<sup>162</sup> He saw Hoang in his vehicle stop twice to converse with two groups of people.<sup>163</sup> Based upon these observations and his experiences in the neighborhood, the officer suspected that Hoang might be involved in narcotics transactions.<sup>164</sup> When Hoang made a turn without signaling, Officer Kamalu pulled him over and learned that his driver’s license had been suspended.<sup>165</sup> After arresting Hoang for this offense, Officer Kamalu discovered what turned out to be cocaine in his car.<sup>166</sup> Hoang was charged and later convicted of possession of cocaine after his motion to suppress was denied.<sup>167</sup>

In rejecting Hoang’s argument that the traffic stop was pretextual, the court found the officer was acting within the scope of his normal traffic control duties and would have made the stop even without suspicions of drug transactions.<sup>168</sup> The court noted that, unlike the officers in *Ladson* and *DeSantiago*, Officer Kamalu did not follow Hoang waiting for a reason to stop him; Hoang made his turn right in front of the officer, and the officer immediately pulled him over, “just as he would have for any other routine stop for a traffic infraction committed in his presence.”<sup>169</sup> The fact that Officer Kamalu did not

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160. 6 P.3d 602 (Wash. Ct. App. 2000).

161. *See, e.g.*, State v. Cole, No. 34668-1-II, 2007 WL 1748093, at \*3 (Wash. Ct. App. June 19, 2007); State v. Freih, No. 25378-0-II, 2001 WL 88223, at \*2 (Wash. Ct. App. Feb. 2, 2001).

162. *Hoang*, 6 P.3d at 603.

163. *Id.*

164. *Id.* Officer Kamalu saw Hoang approach several groups of people in his car and engage in conversations, but he saw no exchanges take place that would add to his suspicions and possibly raise them to the level of probable cause. *Id.*

165. *Id.*

166. *Id.* at 604.

167. *Id.*

168. *Hoang*, 6 P.3d at 606–07 (“Under *Ladson*, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop.”); *see also* State v. Flowers-Roscoe, No. 30779-1-II, 2005 WL 470424, at \*3 (Wash. Ct. App. Mar. 1, 2005) (finding that a stop was not pretextual where an officer was “performing routine traffic enforcement, not a narcotics investigation”).

169. *Hoang*, 6 P.3d at 606; *see also* State v. Martin, No. 57078-1-I, 2007 WL 1113989, at \*4 (Wash. Ct. App. Apr. 16, 2007) (finding that, although an officer’s suspicions may have been aroused by having seen Martin’s car earlier, the officer did not look for a traffic violation to justify a stop for an unrelated criminal investigation); State v. Acosta, No. 20907-5-III, 2003 WL 1091029, at \*1, \*3 (Wash. Ct. App. Mar. 13, 2003) (noting that the officer was on routine patrol and did not follow Acosta’s vehicle looking for a pretext to pull him over, even though he had previously run a license check on the car while it was unoccupied and outside a house known for drug activity); State v. Alexander, No. 19185-1-III, 2001 WL 564216, at \*3 (Wash. Ct. App. May

issue Hoang a citation was not dispositive. The court held that “nothing in *Ladson* . . . limits prosecutorial discretion with respect to charging decisions, or . . . requires police to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of the traffic stop allegedly based on pretext.”<sup>170</sup>

## 2. *The Officer's Dilemma*

The court's ruling in *DeSantiago* rested on evidence that the officer followed the defendant “looking for a basis to stop the vehicle” and, in that sense, is closer to cases in which officers admit to using traffic infractions as a pretext than to those without such testimony. The officer was also on narcotics patrol, similar to the officers in *Ladson*. In *Hoang* and *Freih*, although the officers were on routine patrol, their attention was drawn to the defendants for reasons other than traffic violations. In *Freih*, the officer turned around to follow the vehicle so that he could see who was in the car.<sup>171</sup> The court's holding in *Freih* suggests that, if the deputy had known who was in the car prior to the stop or was not on routine patrol, the stop would have been pretextual as in *DeSantiago*, even with a violation of the traffic law. The officer in *Hoang* did not need to follow the vehicle because the traffic infraction occurred right in front of his parked vehicle. Would the officer have stopped the vehicle without his suspicions of drug activity? The court found that he would have.<sup>172</sup> These cases raise the issue of whether it is better for an officer to have fewer, rather than more, concerns about a car and its occupants before deciding to make a traffic stop. This dilemma provides little guidance to police officers who,

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24, 2001) (finding that a traffic stop was not pretextual where the detective stated that he stopped the vehicle for two traffic infractions and he did not follow the vehicle waiting for an infraction); *State v. Reynolds*, No. 22480-1-II, 2000 WL 1208353, at \*3 (Wash. Ct. App. Aug. 25, 2000) (noting that, unlike *Ladson*, there was no evidence of any preconceived knowledge the officer could have had from surrounding circumstances, such as seeing the vehicle in a known drug area, which would provide a reason to disbelieve the officer's stated motivation to stop the car for a cracked windshield).

170. *Hoang*, 6 P.3d at 607. Apparently the prosecutor was still considering the possibility of charging Hoang with driving with a suspended license in the second degree up until the date of the suppression hearing but chose not to proceed on that charge. See also *State v. St. Ours*, No. 33528-0-II, 2006 WL 1829382, at \*3 (Wash. Ct. App. July 5, 2006) (noting that, unlike officers in *Ladson* and *DeSantiago*, the officer did not state that he intended to use a traffic violation as an excuse; the officer was on routine patrol at the time of the stop and the fact that no tickets were given was not dispositive); *State v. Coronel-Trinidad*, No. 25602-9-II, 2001 WL 528242, at \*4 (Wash. Ct. App. May 18, 2001) (noting that it was not dispositive that the officer decided not to issue a traffic citation).

171. *State v. Freih*, No. 25378-0-II, 2001 WL 88223, at \*1 (Wash. Ct. App. Feb. 2, 2001).

172. *Hoang*, 6 P.3d at 606.

while not acting under a pretext, are determining whether to initiate a traffic stop based upon a violation of the traffic laws.

### B. “Should Have” Issues

The *Hoang* and *Freih* cases found that officers *in certain situations* are not required to ignore violations of the traffic law. Two cases involving claims of ineffective assistance of counsel illustrate how thin the line is between situations where the court finds it is lawful for an officer to act and situations where a court finds that it is not. *State v. Meckelson* and *State v. Nichols* have very similar facts, but very different holdings that illustrate this issue.

#### 1. Cases

In *State v. Meckelson*, the court of appeals held that defense counsel had been ineffective for failing to challenge the officer’s subjective reason for making the stop that led to appellant’s arrest and subsequent conviction.<sup>173</sup> The undisputed facts were that Sergeant Thoma was on patrol duty at about 6:00 p.m. when he pulled next to a car that was “being driven normally.”<sup>174</sup> The sergeant stated that he was not pursuing the car, but, as part of his duties, he “observed other drivers and their reactions.”<sup>175</sup> As the sergeant pulled up, he noticed the driver turn and look at him; the sergeant thought the driver “looked alarmed, with a ‘deer-in-the-headlight’ look,”<sup>176</sup> leading him to wonder if the car was stolen. As the sergeant dropped behind the vehicle to check its registration, the driver suddenly turned right without signaling.<sup>177</sup> The sergeant pulled the car over for this failure to signal.<sup>178</sup> Meckelson, who was a passenger in the car, was subsequently arrested for possession of methamphetamine, but the driver was never cited for the traffic offense.<sup>179</sup> In reversing Meckelson’s conviction, the appellate court found that, while Sergeant Thoma had a right to stop the car for a minor traffic infraction, the critical inquiry was whether the sergeant would have made the stop “but for the legally insufficient rea-

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173. 135 P.3d 991, 994 (Wash. Ct. App. 2006).

174. *Id.* at 992.

175. *Id.* (internal quotation marks omitted).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Meckelson*, 135 P.3d at 992, 994. During a search of the vehicle, Sergeant Thoma discovered items associated with a methamphetamine lab, as well as bags of a white crystalline substance. *Id.* at 992. Meckelson was charged with possession of methamphetamine, delivery of methamphetamine, and manufacture of methamphetamine. *Id.* At the subsequent trial, he was convicted of possession of methamphetamine and acquitted of the other two charges. *Id.*

son that he thought the driver looked at him funny when he pulled alongside the car.”<sup>180</sup> Meckelson’s counsel, however, “walked away” from any inquiry into whether the sergeant stopped the vehicle to look for evidence of another crime, even though the officer “candidly suggest[ed]” that that was his purpose.<sup>181</sup> Meckelson’s counsel was, thus, ineffective for failing to challenge the sergeant’s subjective reason for the stop.<sup>182</sup>

In contrast, in *State v. Nichols*, the court found that counsel was *not* ineffective for failing to move to suppress evidence on the grounds that the traffic stop was pretextual.<sup>183</sup> In *Nichols*, the stipulated facts established that Deputy Sheriff Hause was in a parking lot shortly after midnight when he observed a car drive into a nearby lot.<sup>184</sup> The car slowly drove around the lot and left the same way that it had entered.<sup>185</sup> Deputy Hause wrote in his report<sup>186</sup> that, as the car exited the lot, it crossed a double yellow line and pulled immediately into the far right lane, explaining that “[i]t appeared to me that the vehicle (driver) was trying to avoid driving in front of me.”<sup>187</sup> When the deputy pulled out of the parking lot, the vehicle turned onto another street.<sup>188</sup> After following the car for about four blocks, Deputy Hause activated his lights but the car did not immediately stop.<sup>189</sup> Instead, it kept moving for another few blocks and then turned left into a car wash parking lot.<sup>190</sup> While the deputy was following, he noticed a large “For Sale” sign in the rear window blocking his view of the driver. At some point, the driver started waving his hand in the rear window; Deputy Hause said that “it appeared the driver was delaying the stop.”<sup>191</sup> Once the car stopped, Deputy Hause learned that the driver had a suspended license.<sup>192</sup> The passenger, Nichols, was not wearing a seatbelt.<sup>193</sup> A subsequent search of Nichols revealed a bag

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180. *Id.* at 993.

181. *Id.*

182. *See id.*

183. 162 P.3d 1122 (Wash. 2007) (en banc).

184. *Id.* at 1123.

185. *Id.*

186. The parties stipulated to the facts set out in the police reports. *Id.*

187. *Id.* (internal quotation marks omitted).

188. *Id.*

189. *Nichols*, 162 P.3d at 1124 n.1.

190. *Id.* at 1123.

191. *Id.* at 1123–24.

192. *Id.* at 1124.

193. *Id.*

of what tested as methamphetamine,<sup>194</sup> and Nichols was later convicted of possession of methamphetamine.<sup>195</sup>

On appeal, Nichols argued that his case was indistinguishable from *Meckelson*: in both cases, the officers were alerted to the vehicles by something other than a traffic violation.<sup>196</sup> In rejecting Nichols's claim, the supreme court noted that, unlike the officer in *Meckelson* who "admitted" that he had dropped behind the vehicle to investigate the driver,<sup>197</sup> the deputy here "never said he began investigating the vehicle or its driver, or even that he thought of doing so, prior to seeing . . . several traffic infractions. There is no evidence in the record that [the officer] followed the vehicle *because* he suspected the driver was trying to avoid him."<sup>198</sup> The deputy's observation that the driver seemed to be avoiding him occurred "nearly concurrently" with the traffic infractions, and he immediately pursued the vehicle.<sup>199</sup> The court also found it significant that Deputy Hause was on routine patrol, but found that the lack of citations given was insignificant.<sup>200</sup> Given the "paucity of evidence supporting any subjective intent to stop the vehicle for speculative investigative purposes,"<sup>201</sup> counsel was not ineffective for failing to move to suppress on the grounds that Deputy Hause used a pretext as the basis of the traffic stop.

## 2. *A Thin Line*

The testimony of Sergeant Thoma in *Meckelson* that "he was dropping back to start investigating the driver of the vehicle . . . because his suspicions were aroused"<sup>202</sup> appears to be key to the courts' holdings in the two cases.<sup>203</sup> If Sergeant Thoma's testimony is considered an

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194. *Id.*

195. *Nichols*, 162 P.3d at 1125.

196. *Id.* at 1126. Nichols argued that the officer was alerted because the vehicle seemed to be avoiding him, while in *Meckelson* the officer was alerted because the driver "looked alarmed to see him." *Id.*

197. *Id.*

198. *Id.* (emphasis in original).

199. *Id.*

200. *Id.* at 1126, 1128.

201. *Nichols*, 162 P.3d at 1129 (finding that Nichols could not overcome the "strong presumption that counsel's performance was not deficient"). Counsel also moved to suppress the evidence on other grounds.

202. *Id.* at 1126.

203. As part of evaluating whether trial counsel was ineffective, the court considers whether there was a plausible motion to suppress that "would likely have been successful if brought." *State v. Meckelson*, 135 P.3d 991, 993 (2006) (quoting *State v. Rainey*, 28 P.3d 10, 14 (Wash. Ct. App. 2001)).

admission to using a pretext,<sup>204</sup> it places *Meckelson* in the category of cases where the court has found a pretext because the officer admitted to acting under one. If not, then the cases are more difficult to reconcile. It is possible that the court reversed Meckelson's conviction in part because his lawyer and the trial court misunderstood the *Ladson* test.<sup>205</sup>

In *Nichols*, the court distinguished the two cases based upon the arguably slight differences in the officers' testimonies.<sup>206</sup> In *Nichols*, the court found nothing in the record that suggested pretext other than the officer's observation that the driver might be trying to avoid him.<sup>207</sup> Given that this observation occurred "nearly concurrently" with the officer's observation of the traffic infractions, there was no evidence to support a claim of pretext. In *Meckelson*, why was the officer's observation of the sudden turn without a signal not also considered "nearly concurrent" with his suspicions that the car might be stolen? The different holdings suggest that the court was not only applying a "should have" test instead of a "would have" test, but was also affirming one police officer's "instincts" over another, drawing a thin line that is difficult for officers to follow.

### C. Other "Should Have" Cases

Similar to *Nichols* and *Meckelson*, three cases involving license checks also illustrate contrasting results that courts may reach in factually similar cases when applying the "would have" test. In each case, the driver had committed a traffic infraction. In *State v. McCue*, the court upheld a traffic stop, even though the officer had run a license check and determined that the tags were on the proper vehicle prior to the stop.<sup>208</sup> In *State v. Cole*, the court found that the stop was proper even though the officer had suspicions about the car's occupants before the stop.<sup>209</sup> In contrast, in *State v. Myers*, the court found that the stop was pretextual even with two traffic infractions when the

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204. *Id.* (noting that the officer's testimony "candidly suggest[ed]" that his purpose was to look for evidence of another crime).

205. *See id.* Meckelson's lawyer told the trial court that he knew Sergeant Thoma and, thus, was not asking the court to find that the officer lied about his reasons for the stop. The court of appeals noted that these comments "suggest a misapprehension of . . . *Ladson*." *Id.* Also, the trial court apparently misunderstood the role of pretext in a suppression hearing. The trial judge suggested that Meckelson could "address the pretext issue at trial" when, in fact, it is the court's duty to determine before trial whether the evidence should be suppressed. *Id.* at 993-94.

206. *Nichols*, 162 P.3d at 1126 (noting that "this case is not like *Meckelson*").

207. *Id.* at 1126, 1129.

208. No. 29554-7-II, 2003 WL 22847338 (Wash. Ct. App. Dec. 2, 2003).

209. No. 34668-1-II, 2007 WL 1748093 (Wash. Ct. App. June 19, 2007).

officer stopped the vehicle before the results of the license check were known.<sup>210</sup>

### 1. Cases

In *McCue*, Officer Deatherage was on routine patrol with a drug detection dog when she saw a pickup truck with an obstructed rear license plate in violation of a traffic regulation requiring that license plates be attached so “that they can be plainly seen and read at all times.”<sup>211</sup> She followed the truck for a short distance and, when it turned, the officer was then able to read all of the numbers and enter them into her patrol car computer.<sup>212</sup> Even though Officer Deatherage learned that the license plate properly belonged to the truck, she decided to stop it for the plate infraction.<sup>213</sup> After the stop, Officer Deatherage learned that McCue’s license had been suspended, and she arrested him; narcotics and narcotics paraphernalia were found in the truck and on McCue.<sup>214</sup> The trial court credited the officer’s testimony that she asked McCue for his license, registration, and insurance, all standard questions following a traffic stop, in contrast to McCue’s testimony that her first question was, “where are the drugs?”<sup>215</sup> McCue was convicted of narcotics possession after a bench trial.<sup>216</sup> On appeal, McCue argued that there was no traffic violation and, thus, Officer Deatherage stopped him based on a pretext.<sup>217</sup> The appellate court found that Officer Deatherage properly stopped McCue, because “[a] partially obscured license plate that is fully visible only at certain angles is not plainly seen and read at all times.”<sup>218</sup> Defering to the trial court’s finding that Officer Deatherage was more credible than McCue, the court found that the officer was acting “in accordance with her regular duties” and that there was no indication that the officer was acting under a pretext.<sup>219</sup>

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210. 69 P.3d 367 (Wash. Ct. App. 2003).

211. 2003 WL 22847338, at \*3 (internal quotation marks omitted).

212. *Id.* at \*1. The patrol car computer is connected with databases containing information on vehicle registrations.

213. *Id.*

214. *Id.*

215. *Id.* (internal quotation marks omitted).

216. *Id.* at \*2.

217. *McCue*, 2003 WL 22847338, at \*4.

218. *Id.* at \*3 (internal quotation marks omitted).

219. *Id.* at \*4 & n.5; *see also* State v. Wolfe, No. 22953-0-III, 2006 WL 1000411, at \*4 (Wash. Ct. App. Apr. 18, 2006) (noting that there was no indication that an officer had any intent other than to investigate the erratic driving he had witnessed); State v. Twaites, No. 28985-7-II, 2003 WL 21653086, at \*4 (Wash. Ct. App. July 15, 2003) (noting that an officer “would have been remiss in his duties had he not investigated” and performed a traffic stop).

In *State v. Cole*, Officer Murray saw Cole and a woman come out of a wooded area and walk toward a truck parked in a church's parking lot early one morning.<sup>220</sup> Officer Murray thought he recognized the woman as someone who was involved in criminal activity and with whom he had had many prior dealings.<sup>221</sup> He testified that he suspected that the vehicle was stolen, "because he recognized the woman and thought this particular truck was a little bit too nice for her to own."<sup>222</sup> Officer Murray was also aware of recent church burglaries in the area, which led him to suspect that "they were up to no good."<sup>223</sup> Cole and the woman got into the truck; as it pulled out of the parking lot, Officer Murray followed to try to run the license plate but could not because it was obstructed by the trailer hitch.<sup>224</sup> Testifying as to why he stopped the car, Officer Murray explained as follows: "They were pulling out—leaving—and it was just like, Fine, I am going to contact them. I can't run the plate. I am going to stop them. I'm going to find out why they are back here behind the church."<sup>225</sup> Cole tried to argue that the stop was pretextual, because Officer Murray planned to stop the truck as soon as he had seen Cole and the woman and before noticing the obstructed plate.<sup>226</sup> The court distinguished the case from *Ladson*, noting that Officer Murray did not follow the vehicle waiting for a traffic infraction.<sup>227</sup> As with any other routine traffic stop committed in his presence, the court found that the officer pulled the vehicle over as soon as he realized that he could not check the license plate; his "heightened suspicions about the driver" did not preclude him from enforcing the traffic code.<sup>228</sup>

In contrast, in *State v. Myers*, a case with facts very similar to *Cole*, the court found that the traffic stop was a pretext.<sup>229</sup> In *Myers*, Dep-

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220. No. 34668-1-II, 2007 WL 1748093, at \*1 (Wash. Ct. App. June 19, 2007).

221. *Id.*

222. *Id.* (internal quotation marks omitted).

223. *Id.* (internal quotation marks omitted).

224. *Id.*

225. *Id.* (internal quotation marks omitted).

226. *Cole*, 2007 WL 1748093, at \*2.

227. *Id.* at \*3.

228. *Id.* Cole was the passenger in the truck. Officer Murray cited the driver for having an obstructed license plate, and Cole was arrested on an outstanding warrant. He was convicted for violating a no contact order. On appeal from his conviction, the appellate court found that Cole was not seized until Officer Murray asked him his name. *Id.* at \*4. However, the court did consider whether the traffic stop was pretextual and found that it was not. *Id.* at \*3. After *Brendlin v. California*, 127 S. Ct. 2400, 2410 (2007), Cole would be considered seized as soon as the car in which he was riding was stopped.

229. 69 P.3d 367, 368 (Wash. Ct. App. 2003).

uty Debois noticed Myers when he drove by the officer.<sup>230</sup> The deputy decided to run a license check on Myers, because he recognized him as someone who had had a suspended license approximately a year previously.<sup>231</sup> The deputy began to follow Myers while he was waiting for a reply to his license check. He stopped the vehicle after he saw Myers make two lane changes while signaling simultaneously, but before he received the results of the license check.<sup>232</sup> Deputy Debois testified that, because Myers had committed two infractions, “I just went ahead and stopped them [sic] and thought I would just go and contact them [sic] and verify [the driver’s status] that way.”<sup>233</sup> As it turned out, Myers had a valid license, but his passenger had an outstanding warrant.<sup>234</sup> During a search of the car, the deputy found methamphetamine and arrested Myers.<sup>235</sup> On appeal, the court found that, although the deputy had stopped cars in the past for lane change violations,<sup>236</sup> he had followed Myers because of his suspicions of a suspended license and stopped Myers on the basis of the traffic infractions to investigate those suspicions.<sup>237</sup> In response to the state’s argument that an officer can both stop and arrest a person if the officer has probable cause to believe that the person is driving with a suspended license, the court noted that Deputy Debois’s information was approximately one year old and, “not surprisingly, the suspension had ended.”<sup>238</sup> In addition, the court found that the deputy’s stop of Myers was not justified “by the mere fact that he was investigating Mr. Myers’[s] driving with a suspended license, a ‘driving’ offense.”<sup>239</sup> The court noted that *Ladson*’s reference to an investigation of suspicions “unrelated to the driving” refers “to a driving infraction, not the

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230. *Id.* It is not clear if the deputy was on routine patrol. The majority stated that the deputy “did not testify that he was on a traffic patrol . . . [b]ut he was in the area on some other business,” while the dissenting judge noted that the deputy was “on routine patrol.” *Id.* at 369–70 (Brown, J., dissenting).

231. *Id.* at 368 (majority opinion).

232. *Id.*

233. *Id.* (internal quotation marks omitted).

234. *Id.*

235. *Myers*, 69 F.3d at 369.

236. *Id.* (noting that “legally the response to that assertion is: so what?”).

237. *Id.*

238. *Id.* at 370. *But see* *State v. Deleon*, No. 25141-1-III, 2007 WL 1314468, at \*2 (Wash. Ct. App. May 3, 2007) (finding that counsel was not ineffective for failing to raise the issue of pretext; no information in the record gave rise to an inference that an officer’s knowledge of appellant’s suspended license was stale); *State v. Stiffler*, No. 18866-3-III, 2001 WL 175536, at \*1–2 (Wash. Ct. App. Feb. 20, 2001) (finding that a traffic stop was not pretextual where the officer had a reasonable suspicion that Stiffler, the driver, was driving with a suspended license; the fact that the officer was also looking for a neighborhood prowler did “not vitiate this suspicion or this stop”).

239. *Myers*, 69 P.3d at 369.

criminal investigation of driving with a suspended license.”<sup>240</sup> Myers’s conviction was reversed.<sup>241</sup>

2. *To Stop or Not (or, Less is More)*

There are differences among these three cases. The question, however, is whether these differences indicated the use of a pretext in *Myers* but not in the other cases, or whether the court was determining what the reasonable officer “should have” done in each situation. The most obvious differences are between *McCue* and *Myers*. In *McCue*, Officer Deatherage was on routine patrol, but there was a disagreement in court as to whether Deputy Debois was as well. In any event, the *Myers* court found that this was not dispositive.<sup>242</sup> Officer Deatherage apparently had no prior experience with *McCue*, while Deputy Debois knew that Myers had a suspended license a year previously. Although Officer Deatherage knew that the license plate properly belonged to *McCue*’s truck, she decided to stop him anyway for the obstructed plate infraction; she then learned that he had a suspended license. Deputy Debois was in the process of checking Myers’s license when he saw the traffic infractions and decided to stop Myers based on those infractions. Granted, if the deputy only had the year-old information about the suspended license and nothing else, this information would not rise to the level of probable cause for a stop. He had more, however. Why did the court not consider that the stop for the driving infractions was “for objectively independent proper reasons [and] not improper ulterior reasons?”<sup>243</sup> Moreover, why did the court not consider that the deputy’s information was “merely cumulative, not improper?”<sup>244</sup>

If Deputy Debois had learned that Myers’s license was no longer suspended prior to the stop but had stopped him for the traffic infractions anyway, would the court have found that this was a pretextual stop? The *McCue* court found that Officer Deatherage acted without pretext by stopping *McCue* for an obstructed plate even though her license plate check showed no irregularities prior to the stop. Officer Deatherage, then, “should have” made the traffic stop for the obstructed plate. Deputy Debois, however, “should not have” made his traffic stop for the lane change infractions, even though the trial court had found that the deputy “had every right to pull the vehicle

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240. *Id.* at 370 (internal quotation marks omitted).

241. *Id.*

242. *Id.*

243. *Id.* at 370 (Brown, J., dissenting).

244. *Id.*

over.”<sup>245</sup> What this seems to suggest is that Deputy Debois would have been better off with fewer concerns about Myers, rather than more.

Although there are obvious differences between *McCue* and *Myers*, the differences between *Myers* and *Cole* are slightly less clear. In each case the officer had suspicions about the drivers *before* observing the traffic infractions, and in each case the officer either knew, or thought he knew, the driver. Deputy Debois’s information about Myers’s suspended license was approximately a year old—too old or “stale” to support a traffic stop absent any other evidence.<sup>246</sup> In *Cole*, Officer Murray thought he recognized the driver as someone with whom he had had many dealings.<sup>247</sup> His suspicions that the truck was “a little bit too nice” for the driver to own<sup>248</sup> or his information about recent church burglaries would probably not support a traffic stop either, without any other evidence. The officers’ testimonies are also remarkably similar. Each officer basically said that, because he could not get information about the license plates—either because the plate was obstructed, as in *Cole*, or the information did not come back quickly enough, as in *Myers*, and given the traffic infractions, he decided to stop the driver to find out the information during a traffic stop. Why, then, was one stop pretextual, but not the other? In *Cole*, Officer Murray went even further by testifying that “[I was] going to find out why they are back here behind the church.”<sup>249</sup> While not suggesting that Officer Murray was using the obstructed license plate as a pretext to investigate suspicious activity, other than the age or “freshness” of the officers’ suspicions, suspicions which alone would not justify a stop, it is not clear why the court found a pretext in one case but not in the other. Again, what these cases suggest is that the court is applying a “should have” test in reaching its conclusion and, in effect, substituting its own judgment for the officer’s judgment.

#### D. “True Reason” Stops

Not surprisingly, courts have found stops not to be pretextual where the police stopped a vehicle based upon a reasonable suspicion that the driver had an outstanding warrant or was driving a stolen car.<sup>250</sup>

245. *Myers*, 69 F.3d at 370 (Brown, J., dissenting) (internal quotation marks omitted).

246. *Id.* (majority opinion).

247. *State v. Cole*, No. 34668-1-II, 2007 WL 1748093, at \*1 (Wash. Ct. App. June 19, 2007). In *Cole*, it turned out that the driver was not the person whom the officer thought she was. *Id.*

248. *Id.* (internal quotation marks omitted).

249. *Id.* (internal quotation marks omitted).

250. *See, e.g., State v. Vanderpol*, No. 30572-1-II, 2005 WL 536103 (Wash. Ct. App. Mar. 8, 2005) (finding that a traffic stop was not pretextual where officers had a reasonable suspicion

Stops have also been found not to be pretextual when the court determined that it was justified for its “true reason.” In *State v. Kunst*, for example, officers were in a neighborhood investigating a complaint of suspicious activity involving a car.<sup>251</sup> As they spoke with witnesses, the car in which Kunst was a passenger drove by and the witnesses identified it as the suspicious car.<sup>252</sup> The officers pulled the car over, in part because it did not have a front license plate.<sup>253</sup> Kunst claimed the stop was pretextual.<sup>254</sup> The court, however, determined that *Ladson* did not apply because the stop was justified for its true reason: a reasonable suspicion of trespass or other criminal activity.<sup>255</sup>

### E. Pretextual Stops

In contrast to the number of cases where courts have found the officer did not engage in pretextual behavior, courts have found fewer traffic stops to be based upon a pretext. In most of these cases, the officer has either admitted acting under a pretext or the court has considered the officer’s testimony to be incredible. Significantly, most cases in which officers admitted to acting under a pretext were decided shortly after the *Ladson* decision.<sup>256</sup> In at least two of those cases, the motions hearings were held before *Ladson* was decided and the trial courts denied defendants’ motions to suppress because there was evidence of traffic violations. For example, in *State v. Moore*, the

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that the driver had an outstanding arrest warrant); *State v. Gerou*, No. 28178-3-II, 2003 WL 22293622 (Wash. Ct. App. Oct. 7, 2003) (finding that a traffic stop was not pretextual where police had probable cause to believe the driver had an outstanding warrant and was driving while his license was suspended); *State v. Crabbs*, No. 49654-9-I, 2003 WL 1193766 (Wash. Ct. App. Mar. 17, 2003) (finding that, although an officer waited fifteen to twenty minutes before approaching the defendant, the stop was not pretextual where the officer had probable cause to believe the defendant had failed to properly transfer ownership and registration of vehicle); *State v. Sledge*, No. 19790-5-III, 2001 WL 1497213 (Wash. Ct. App. Nov. 27, 2001) (finding that a traffic stop was not pretextual even though the defendant’s car was initially parked outside a known “drug house”; the officer had an objectively reasonable suspicion that the defendant was driving a stolen vehicle). *Cf.* *State v. Lansden*, 30 P.3d 483, 487 (Wash. 2003) (“Where a valid warrant is issued, the result reached in *Ladson* is not applicable, as the search in *Ladson* was warrantless.”); *State v. Busig*, 81 P.3d 143, 147 (Wash. Ct. App. 2003) (noting that *Ladson*’s pretext analysis does not apply when there is a warrant). *But see* *State v. Vaughn*, No. 20446-4-III, 2002 WL 524449, at \*2 (Wash. Ct. App. Apr. 9, 2002) (finding that a traffic stop was pretextual where an officer “candidly admitted” that he did not have reasonable suspicion to stop the car, nor did he know with certainty that the person for whom there was an outstanding warrant was in the car).

251. No. 28077-9-II, 2003 WL 21653093 (Wash. Ct. App. July 15, 2003).

252. *Id.* at \*1.

253. *Id.*

254. *Id.* After his motion to suppress was denied, Kunst was convicted at trial on the charge of forgery. *Id.* at \*1–2.

255. *Id.* at \*3.

256. *See infra* notes 257–261 and accompanying text.

officer testified at the suppression hearing that the only reason he had stopped Moore for speeding was to investigate possible drug activity.<sup>257</sup> The trial court denied the motion, ruling that, because there was probable cause to stop the vehicle, “any subjective interest of the officers in contacting Moore was irrelevant.”<sup>258</sup> The court of appeals reversed based upon *Ladson*.<sup>259</sup> Similarly, in *State v. Cramer*, the deputy admitted that he followed Cramer’s vehicle waiting for her to commit a traffic violation so that he could justify a traffic stop.<sup>260</sup> The trial court denied the motion, and the court of appeals reversed based upon *Ladson*.<sup>261</sup>

As with the “could have” test, courts using the “would have” test determine whether an officer is credible. However, there seem to be few cases in which the court has found that the officer was not credible regarding the circumstances of the stop. In one case, the court took into consideration whether the officer’s testimony conflicted with the defendant’s testimony. In *State v. Capshaw*, Officer Trevino testified that he was on routine patrol in a high-crime area at about 10:53 p.m. when he observed a vehicle with its rear license plate leaning away from the car; he stopped the car and arrested Capshaw after learning that he had a suspended driver’s license.<sup>262</sup> Although it was uncontested that the officer regularly enforced traffic laws, the court took judicial notice that these types of equipment citations are not common.<sup>263</sup> Capshaw also testified that the officer made a U-turn to follow him and immediately stopped his vehicle.<sup>264</sup> While Officer Trevino agreed that this was possible, this and other differences in the testimony led the court to find that the officer stopped the car for

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257. No. 43692-9-I, 1999 WL 1138575, at \*2 (Wash. Ct. App. Dec. 13, 1999). The officer testified that he had seen other vehicles speeding that night, but that he did not stop those vehicles because he did not suspect the occupants of any drug activity.

258. *Id.* at \*1; see also *State v. Jones*, No. 43035-1-I, 1999 WL 693956, at \*1-3 (Wash. Ct. App. Sept. 7, 1999) (remanding case for reconsideration in light of *Ladson*; although the officer had testified that he stopped the car because of a cracked windshield, it was dark, the car’s windows were tinted, and the officer knew the owner of the car was affiliated with a narcotics trafficker).

259. *Moore*, 1999 WL 1138575, at \*2 (noting that the officer’s testimony did not establish that he had any purpose in stopping Moore other than pursuing a criminal investigation).

260. No. 17953-2-III, 2000 WL 1663641, at \*1 (Wash. Ct. App. Nov. 2, 2000). The deputy had set up surveillance of Cramer’s vehicle after another deputy reported suspicious activity. When Cramer crossed over the dividing line a few times and failed to signal a turn, she was stopped. At the suppression hearing, heard before *Ladson*, the deputy agreed that he was “just looking for that violation to stop the vehicle.” *Id.* at \*3.

261. *Id.* at \*3 (noting that *Ladson* was not decided until after the suppression hearing).

262. No. 29204-1-II, 2003 WL 21964788, at \*1 (Wash. Ct. App. Aug. 19, 2003). Subsequent to the arrest, the officer discovered methamphetamine in a film canister located in the car. Capshaw was charged with a narcotics offense and driving with a suspended license.

263. *Id.*

264. *Id.*

something other than the asserted reason; thus, the stop was pretextual.<sup>265</sup> On appeal, the state argued that, because Officer Trevino was enforcing the traffic code, the stop was proper; however, the appellate court disagreed.<sup>266</sup> Given that the trial court had implicitly found that the officer was not credible, the express reasons for the stop were void.<sup>267</sup> Under the totality of the circumstances, then, the court found that the stop was pretextual.<sup>268</sup>

In one case, the appellate court did find a stop to be pretextual without a specific admission from the officer and without explicitly finding that the officer was not credible. In *State v. Montes-Malindas*, Sergeant Kevin Dresker was talking in a store parking lot with a man whose daughter had run away.<sup>269</sup> He noticed three people in a van “acting nervously.”<sup>270</sup> Sergeant Dresker decided to watch the van and drove to a car dealership across the street where he would be hidden.<sup>271</sup> The occupants of the van, including Montes-Malindas, went inside the store and left moments later with a woman.<sup>272</sup> Once everyone returned to the van, it pulled out of the parking lot and drove past where Sergeant Dresker was parked.<sup>273</sup> Even though it was dark, the driver did not turn on the headlights until the van had driven about one hundred yards down the street.<sup>274</sup> Sergeant Dresker radioed that he was going to stop the van and did so.<sup>275</sup> Sergeant Dresker approached the van on the passenger side “for safety reasons;” once another officer arrived, the sergeant moved to the driver’s side.<sup>276</sup> After learning that Montes-Malindas, the driver, had no driver’s license or any identification, the sergeant placed him under arrest and discovered a bag filled with crystal methamphetamine resi-

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265. *Id.* Among other differences, Capshaw testified that the officer mentioned the leaning license plate after he was in custody. *Id.* In contrast, in *State v. Goodwin*, while the testimony of Goodwin and the officer also conflicted, the court found the officer’s testimony more credible and determined that the stop was proper. No. 43263-0-I, 2001 WL 410673, at \*2 (Wash. Ct. App. Apr. 23, 2001).

266. *Id.* at \*4.

267. *Id.*

268. *Capshaw*, 2003 WL 21964788, at \*4; *see also* *State v. Vaughn*, No. 20446-4-III, 2002 WL 524449, at \*2 (Wash. Ct. App. Apr. 9, 2002) (finding that a traffic stop was pretextual where the officer’s testimony as to the reason for the stop was not credible).

269. — P.3d —, No. 25280-9-II, 2008 WL 1869023 (Wash. Ct. App. Apr. 29, 2008).

270. *Id.* at \*1.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Montes-Malindas*, 2008 WL 1869023, at \*1.

276. *Id.*

due in his hand.<sup>277</sup> Montes-Malindas was charged with possession of methamphetamine, among other things.<sup>278</sup>

The trial court denied Montes-Malindas' motion to suppress, finding that Sergeant Dresker was credible when he testified that "he did not follow the van hoping to find a legal reason to stop it and his subjective intent was to stop the van and cite the driver for not having his headlights on."<sup>279</sup> Rejecting the state's argument that this testimony should be dispositive, however, the appellate court noted that the *Ladson* test "did not *eliminate* the objective considerations;" rather, *Ladson* enhanced the test with "a subjective feature."<sup>280</sup> Thus, in spite of the sergeant's testimony, including that he stopped a "majority of the drivers he sees driving without their headlights on,"<sup>281</sup> the court held that "it is not reasonable to stop a car only after its lights had been turned on."<sup>282</sup> The court found that all of the circumstances—the sergeant's suspicions about the van's occupants, his testimony that these suspicions "probably were on his mind when he decided to pull over the van,"<sup>283</sup> that he spoke to the passengers before the driver, and his radio call reporting the stop—"suggest[], as does his decision to proceed with caution, that Sergeant Dresker was preparing for something more than a traffic stop."<sup>284</sup> Thus, the court found, the stop was pretextual, and Montes-Malindas's conviction was reversed.<sup>285</sup>

But cases such as *Capshaw*, in which courts have been willing to discredit officers' testimony, and *Montes-Malindas*, in which courts implicitly find that the officer is not entirely credible, are rare. Courts seem to be hesitant to exclude what may have been lawfully seized evidence unless the officer admits to using a pretext or the court finds the officer's testimony about the circumstances of the stop to be inherently incredible.

#### F. Summary

As these cases demonstrate, the "would have" test identifies police pretextual behavior in certain circumstances, and courts use it to sup-

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277. *Id.*

278. *Id.* at \*2. A firearm was also found in the vehicle in the search incident to arrest.

279. *Id.* at \*3.

280. *Id.* at \*3 (emphasis in original).

281. *Montes-Malindas*, 2008 WL 1869023, at \*4 (echoing the court in *Myers* that the response to this is "so what?").

282. *Id.*

283. *Id.*

284. *Id.* at \*4.

285. *Id.* at \*5.

press evidence when the police, although acting with objective probable cause, are motivated by a pretext. However, this test appears to have limited value; specifically, Washington courts rarely seem to find that an officer acted for pretextual reasons unless the officer either testifies to her use of pretext or the court finds that the officer is lying about the reasons for the stop, both of which are relatively uncommon. While, on the one hand, this might suggest that the use of pretext by the police is less prevalent than thought, it could also suggest that courts are reluctant to pick apart an officer's motivations for making a stop, with the possible accompanying risk of elevating a pretextual motive over a valid, constitutional one, and suppressing validly recovered evidence.<sup>286</sup> Putting aside situations in which a police officer admits that she stopped a vehicle because of a racial profile or some other unconstitutional ground, how does an officer explain, or even understand, which of her motives is the primary basis or the "sufficiently primary" reason<sup>287</sup> for the stop?

Illustrating this point is an example suggested by Professor Yeager. Two drivers are speeding down a street. An officer has a suspicion, but not objective probable cause, that one of the drivers is a drug dealer.<sup>288</sup> In Washington, which car can an officer lawfully stop? To take it out of the *Whren* context, assume that part of the officer's duties include traffic enforcement. If the officer stops the car driven by the suspected drug dealer, should a court find that stop unconstitutional? Does this dilemma suggest that, for an officer, the lesson is that "the more suspicions you have, the less justification you have to act on them"?<sup>289</sup> While the court is guided by the principle that a stop is valid "so long as enforcement of the traffic code is the actual reason for the stop,"<sup>290</sup> how would the court in this situation decide what the actual reason for the stop was? At what point are the officer's suspicions "merely cumulative [and] not improper"?<sup>291</sup> Under the "could

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286. See Lerner, *supra* note 136, at 467 (suggesting that "judges show a little humility when called upon to second-guess police officers, who do not have the luxury of evaluating the data before them as an appellate judge does").

287. *State v. Capshaw*, No. 29204-1-II, 2003 WL 21964788, at \*3 (Wash. Ct. App. Aug. 19, 2003) (noting that the trial court properly framed the relevant issue as whether the facially valid reason given by the officer for the stop was "'sufficiently primary among the various possible reasons" (internal quotation marks omitted)).

288. Daniel Yeager, *Overcoming Hiddenness: The Role of Intentions in Fourth Amendment Analysis*, 74 *Miss. L.J.* 553, 593 (2004).

289. *Id.*; see also *United States v. Ferguson*, 8 F.3d 385, 392 (1993) (noting that, with the "could have" test, the court can ensure that "officers who see actual violations of the law, even minor ones, are not left to ponder whether their actions in enforcing the law are appropriate").

290. *State v. Hoang*, 6 P.3d 602, 607 (Wash. Ct. App. 2000).

291. *State v. Myers*, 69 P.3d 367, 370 (2003) (Brown, J., dissenting) (arguing that, even though the officer wanted to check appellant's driving status, "the stop for the driving infractions was

have” test, the answer would be clear: either stop would be constitutionally valid, because there was objective probable cause—speeding—to warrant a traffic stop. Neither the court nor the officer would have to engage in a subjective analysis of the officer’s reasons for the stop.

VI. CONCLUSION

The body of Washington case law tends to imply that the “would have” test does not add significantly greater protection for drivers than the “could have” test. On the other hand, while the “could have” test provides clear guidelines for police, prosecutors, and courts as to what is considered reasonable under the Fourth Amendment, it also has real limitations for constraining police discretion and the potential for abuse of that discretion, such as racial profiling. Given that the U.S. Supreme Court is unlikely to overrule *Whren*, however, these factors suggest that states should find other ways to constrain police discretion and should open other avenues of relief for abuses of this discretion.

While outside the scope of this Article, various proposals about alternative means to address the use of pretext are worth noting. Many of these proposals build on the Court’s statement in *Whren* that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>292</sup> The import of these proposals is that the Court should find that an exclusionary rule is implicit in the Equal Protection Clause.<sup>293</sup>

for objectively independent proper reasons, not improper ulterior reason”; the officer’s concerns about driving status “were merely cumulative, not improper”).

292. *Whren v. United States*, 517 U.S. 806, 813 (1996). Of course, many scholars advocate reversing *Whren* and using the “would have” test. See, e.g., Donohoe, *supra* note 77, at 1194 (“The Fourth Amendment seeks to prohibit arbitrary intrusions that the ‘could have’ test specifically permits, and therefore the Supreme Court’s decision was incorrect.”); Maclin, *supra* note 138, at 392 (“[I]f the Supreme Court is serious about protecting the Fourth Amendment interests of minority motorists, it should reverse *Whren v. United States* forthwith.”). Others suggest using state constitutions, much like the Washington Supreme Court did in *Ladson*, to find more protection for drivers than those found under the Fourth Amendment in *Whren*. See Coberly, *supra* note 7, at 497 (“*Ladson*’s reasoning is persuasive and New Mexico should hold pretextual traffic stops illegal as well.”); Kaban, *supra* note 7, at 1310 (arguing that the Alaska state constitution provides more protection against pretextual traffic stops than those found under the Fourth Amendment).

293. See, e.g., Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1119 (2000) (“An equal protection exclusionary rule . . . would ensure, equally with the Fourth Amendment, that no [person] is to be convicted on unconstitutional evidence.” (internal quotation marks omitted) (alterations in original)); Lisa Walter, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 286 (2000) (arguing that one alternative for translating the “lip service given by courts to an equal protection

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Other approaches suggest creating strategies for uniform enforcement of traffic laws;<sup>294</sup> restricting, or strictly construing, the violations for which police can initiate traffic stops;<sup>295</sup> placing limits on the law governing what the police may lawfully do *after* a traffic stop occurs;<sup>296</sup> requiring that stops be based upon probable cause instead of the *Terry* standard of reasonable suspicion;<sup>297</sup> and educating police, prosecutors, and judges about racially biased policing.<sup>298</sup>

The debate over what justifies a police officer’s decision to perform a traffic stop is not likely to end in the foreseeable future. If states can combine knowledge gained from Washington’s application of the “would have” test with an understanding of the limitations of the *Whren* “could have” test, perhaps they can fashion a more comprehensive method of resolving the debate than either of the two tests can provide alone.

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right to be free from racially discriminatory investigation” would be to “create an equal protection exclusionary rule analogous to the existing Fourth Amendment suppression remedy”); Lawrence W. Williamson, Jr., *Profiling, Pretext, and Equal Protection: Protecting Citizens from Pretextual Stops through the Fourteenth Amendment*, 42 WASHBURN L.J. 657, 673 (2003) (arguing that because the goal of “the Fourteenth Amendment is to prevent official conduct that discriminates on the basis of race,” “the Court must develop a framework similar to that established in *Batson* [*v. Kentucky*, 476 U.S. 79 (1986).] to address pretextual stops, which will attempt to determine the officer’s ultimate motive”). An exclusionary rule under the Equal Protection Clause, however, would perhaps have similar limitations to those under the “would have” test.

294. Donahoe, *supra* note 77, at 1205–06.

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295. *Id.* at 1208; *see also* United States v. Botero-Ospina, 71 F.3d 783, 788 (1995) (noting that, by using the objective “could have” test, the court is “rightly leav[ing] to the state legislatures the task of determining what the traffic laws ought to be, and how those laws ought to be enforced”).

296. *See* Loewy, *supra* note 6, at 571 (noting that, so long as officers may ask for consent without telling a driver she may refuse, can arrest for traffic offenses, and can search or inventory the car, “subterfuge stops should not be allowed”).

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297. *See* Thompson, *supra* note 81, at 1003 (noting that some scholars have argued that a return to the standard of probable cause would “reduce the discretion that officers could permissibly exercise in street encounters”); LaFave, *supra* note 27, at 1852 (requiring probable cause for most traffic stops would be “one significant step toward enhancing the Fourth Amendment rights of suspected traffic violators”).

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298. *See, e.g.*, Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 598 (1998) (suggesting that, by compiling data on racially discriminatory actions, some prosecutors and officers might acknowledge unconscious assumptions and hesitate before taking such action); Thompson, *supra* note 81, at 1009–12 (suggesting ways to reform police culture in communities of color so as to combat police action that is racially motivated); *cf.* Maclin, *supra* note 138, at 386 (arguing that, because perjury or the potential for perjury “is a real problem with pretextual traffic stops, particularly when minority motorists are involved,” judges should consider this issue when adjudicating Fourth Amendment claims).

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