

# STATE CONSTITUTIONAL ANALYSIS OF PRETEXT STOPS: RACIAL PROFILING AND PUBLIC POLICY CONCERNS

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## INTRODUCTION

A unanimous United States Supreme Court made itself quite clear in *Whren v. United States*:<sup>1</sup> motor vehicle stops based on pretext are not prohibited by the Fourth Amendment.<sup>2</sup> The primary concern with pretext stops is that they facilitate racial profiling, the process of singling out drivers based on their race. Although the Supreme Court was careful to point out that such a practice is unconstitutional,<sup>3</sup> the Court instructed that an attack on the practice must be made using the Equal Protection Clause, not the Fourth Amendment.<sup>4</sup>

Scholars, journalists, and lawyers promptly and vociferously assailed the *Whren* decision as legally incorrect, technically flawed, and fundamentally unfair.<sup>5</sup> Forgotten in the resulting melee was an assessment of the practical application of *Whren*, that is, the degree of difficulty—throughout the entire criminal justice system—in addressing the issue of racial profiling via an equal protection analysis, rather than under the Fourth Amendment.

In order to examine the Pennsylvania Supreme Court's possible response to the principles established by the *Whren* Court, this Article reviews the Pennsylvania Supreme Court's past reliance on the state constitution to deviate from established Fourth Amendment jurisprudence. To illustrate the point, this Article explores the broad police power the United States Supreme Court endorsed in *New York v. Belton*,<sup>6</sup> as compared to the limits placed on that power by the Pennsylvania Supreme Court relying on the state constitution in

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1. 517 U.S. 806 (1996).

2. See *Whren*, 517 U.S. at 819 (upholding stop where officers had probable cause to believe traffic code violated irrespective of officers' motivation).

3. See *id.* at 813 ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.").

4. *Id.*

5. See *infra* notes 113-30 and accompanying text for a discussion of the public response to *Whren*.

6. 453 U.S. 454 (1981).

*Commonwealth v. White*.<sup>7</sup> There is precedent for the Pennsylvania courts to rely on the state constitution in interpreting *Whren*-like cases.<sup>8</sup> In addition, as part of its public policy consideration, the court should take into account the positive practical consequences of diverging from the rule in *Whren*.

In analyzing Fourth Amendment cases, appellate courts are faced with complex fact patterns where only minute details serve to distinguish cases. This point is particularly true of auto search cases. The task is to decide whether or not those details are significant enough to warrant departure from what one party insists is binding precedent and what another party argues is clearly inapplicable.

In those matters when Fourth Amendment law, as dictated by the United States Supreme Court, is quite clear and an accused cannot prevail regardless of what factual differences exist, the generally greater protection afforded by the state constitution is the only remaining potential avenue of relief. In such cases, the accused must persuade the state court that deviating from the rationale of the United States Supreme Court is not only logical, but also mandatory under the state's most important and overriding body of law, its constitution.

In Pennsylvania, the state supreme court has not hesitated to depart from federal standards on the basis of its state constitution.<sup>9</sup> The reasons for so doing are based on heightened protections inherent in article I, section 8 of the Pennsylvania Constitution, the state's counterpart to the Fourth Amendment.<sup>10</sup> The *Whren* case is certain to provoke additional requests for deviation from Fourth Amendment law in Pennsylvania. If the state supreme court stays the course it has already charted, it will decide this issue under the state constitution, and perhaps provide greater protection than the federal norm.

#### I. THE UNITED STATES SUPREME COURT BROADENS POLICE POWER: *NEW YORK V. BELTON*

In the spring of 1978, Roger Belton was a passenger in a car that was stopped by New York State police officers for speeding.<sup>11</sup> Upon discovering marijuana, the troopers ordered the occupants outside of the car, placed them

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7. 669 A.2d 896 (Pa. 1995).

8. See *infra* notes 42-67 and accompanying text for a discussion of the Pennsylvania Supreme Court state constitutional analysis in *Commonwealth v. White*, 669 A.2d 896 (Pa. 1995), and *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

9. See *infra* notes 91-100 and accompanying text for a discussion of Pennsylvania's willingness to diverge from federal standards.

10. See *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991) (exploring unique history of article I, section 8 and noting prominence of Pennsylvania Declaration of Rights in state's original constitution of 1776). Article I, section 8 provides:

The people shall be secure in their persons, houses, papers, and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8.

11. *New York v. Belton*, 453 U.S. 454, 455 (1981).

under arrest, and conducted a warrantless automobile search.<sup>12</sup> They discovered Belton's jacket in the rear seat; inside the jacket's zippered pocket, they found cocaine.<sup>13</sup> After Belton's conviction on drug charges, the United States Supreme Court framed the issue as the "proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants."<sup>14</sup> Recognizing that it already held, in *Chimel v. California*,<sup>15</sup> that a lawful arrest authorizes police to conduct warrantless searches of the person and "the immediately surrounding area,"<sup>16</sup> the *Belton* Court nonetheless found this standard unworkable and "difficult to apply."<sup>17</sup> It highlighted the need for a "single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."<sup>18</sup>

The *Belton* majority reasoned that the cure for the uncertainty faced by police, as to whether a warrant was necessary, was a straightforward rule defining the "immediately surrounding area" of the arrestee.<sup>19</sup> The Court defined the phrase in general terms.<sup>20</sup> It asked not what area the arrestee had control over *at the time of the search*, but rather, what area the arrestee controlled *prior to his arrest and custody*.<sup>21</sup> Because Belton's jacket was "located inside the passenger compartment of the car in which [he] had been a passenger *just before* he was arrested," the jacket was deemed to be in an area within his immediate control.<sup>22</sup> The term "immediate area of control," *Belton* held, includes the entire passenger compartment and all of its contents, including closed containers and zippered jacket pockets.<sup>23</sup> After *Belton*, only the trunk of

12. *Id.* at 456.

13. *Id.*

14. *Id.* at 459.

15. 395 U.S. 752 (1969).

16. *Belton*, 453 U.S. at 457. In *Chimel*, police officers entered the home of burglary suspect with a warrant for his arrest. *Chimel*, 395 U.S. at 753. The suspect's wife permitted the officers to enter the home and wait for the suspect who was due to arrive from work shortly. *Id.* After the suspect returned home, the officers handed him the arrest warrant and proceeded to search the entire residence of the suspect's three-story home. *Id.* at 754. The Court found that the "search incident to arrest" principle does not include "searching any room other than that in which an arrest occurs." *Id.* at 763.

17. *Belton*, 453 U.S. at 458.

18. *Id.* (quoting *Dunaway v. New York*, 442 U.S. 200 (1979)).

19. *Id.* at 457.

20. *See id.* at 460 ("Our reading of the cases suggests the *generalization* that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact *generally*, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]' . . . . [W]e read *Chimel's* definition . . . in light of that *generalization*." (quoting *Chimel*, 395 U.S. at 763) (emphasis added).

21. The Court fashioned this definition despite its recognition that the rule in *Chimel* was based on "the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." *Belton*, 453 U.S. at 457 (quoting *Chimel*, 395 U.S. at 763).

22. *Id.* at 462.

23. *Id.* at 460 n.4.

the car remained off-limits.<sup>24</sup>

The dissent in *Belton*, led by Justice William Brennan, soundly disagreed. It labeled a fiction the majority's conclusion that the interior of a car is "within the immediate control of an arrestee."<sup>25</sup> Justice Brennan considered the majority's holding an expansion of *Chimel* that was inconsistent with search incident to arrest jurisprudence.<sup>26</sup> *Chimel*, he asserted, properly placed "a temporal and a spatial limitation on searches incident to arrest, excusing compliance with the warrant requirement only when the search 'is substantially contemporaneous with the arrest and is confined to the *immediate* vicinity of the arrest.'"<sup>27</sup>

Justice Brennan also eschewed the majority's underlying rationale: the purported need for a "bright-line rule" to guide the officer in the field.<sup>28</sup> Instead, he reasoned, *Chimel* set forth a clear and effective rule for determining the proper scope of a warrantless search incident to arrest:

Under *Chimel*, searches incident to arrest may be conducted without a warrant only if limited to the person of the arrestee or to the area within the arrestee's "immediate control." While it may be difficult in some cases to measure the exact scope of the arrestee's immediate control, relevant factors would surely include the relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container. Certainly there will be some close cases, but when in doubt the police can always turn to the rationale underlying *Chimel*—the need to prevent the arrestee from reaching weapons or contraband—before exercising their judgment.<sup>29</sup>

Despite Justice Brennan's analysis, the *Belton* majority's view was sustained and the issue consequently fell to the states for resolution on state constitutional grounds.

## II. THE PENNSYLVANIA SUPREME COURT CONFRONTS *BELTON*: *COMMONWEALTH V. WHITE*

Over a dozen years later, the Pennsylvania Supreme Court was asked to consider *Belton* in light of the state constitution. In February of 1990, William White, who had been identified to the police as a drug dealer some months earlier, was the subject of an investigation that involved the use of a confidential informant ("CI").<sup>30</sup> White unwittingly sold cocaine to the CI, who later

24. *See id.* ("Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.")

25. *Belton*, 453 U.S. at 466 (Brennan, J., dissenting). Justice Marshall joined in the dissent. *Id.* at 463.

26. *Id.* at 468 (Brennan, J., dissenting).

27. *Id.* at 465 (Brennan, J., dissenting) (citations omitted).

28. *Id.* at 469 (Brennan, J., dissenting).

29. *Id.* at 471-72 (Brennan, J., dissenting) (citations and footnotes omitted). Justice White, joined by Justice Marshall, also filed a dissenting opinion. He characterized the majority's decision as "an extreme extension of *Chimel*" to which he could not subscribe. *Id.* at 472 (White, J., dissenting).

30. *Commonwealth v. White*, 669 A.2d 896, 898 (Pa. 1995).

informed the police that a significant drug deal between White, his partner, and others was scheduled to take place.<sup>31</sup> The CI gave the police the date and location of the deal.<sup>32</sup> He also informed them that a blue car would be involved in the drug transaction.<sup>33</sup>

With all of the information they gathered, the police were able to secure search warrants for White's residence and the residence and automobile of White's partner.<sup>34</sup> The police, however, did not seek a warrant for White's car.<sup>35</sup> At the expected location on the expected date, White appeared in his blue car and was joined in the car by another, unidentified man.<sup>36</sup> White's partner, who was in a second car, drove by a number of times and left the scene.<sup>37</sup> At least six police officers then converged on White's car, ordered the men from the vehicle, and placed them under arrest.<sup>38</sup> The police thereafter searched the empty car and retrieved a brown paper bag between the seats.<sup>39</sup> Inside the bag, they discovered cocaine.<sup>40</sup> Prior to facing trial on drug charges, White argued that the cocaine was seized illegally.<sup>41</sup>

One of the many bases upon which the Commonwealth sought to justify the search of the paper bag, and thereby avoid suppression of the cocaine as evidence at trial, was as a search incident to arrest under *Belton*.<sup>42</sup> Clearly, the rationale in *Belton* authorized admission of the drugs. The Pennsylvania Supreme Court, however, refused to adopt *Belton* and instead relied on the state constitution to find that suppression was proper.<sup>43</sup> In a relatively brief opinion, the state court justices characterized *Belton* as proof that "the United States Supreme Court has de-emphasized the privacy interests inherent in the Fourth Amendment."<sup>44</sup> Without much analysis other than citation to Pennsylvania case law decided prior to *Belton*,<sup>45</sup> the *White* court held that "there is no justifiable search incident to arrest under the Pennsylvania Constitution save for the search of the person and the immediate area which the person occupies during his

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *White*, 669 A.2d at 898.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *White*, 669 A.2d at 898.

41. *Id.*

42. *Id.* at 901. The Pennsylvania Superior Court accepted this argument. *Id.* The other proffered bases for denying suppression were the automobile exception, a finding of exigency under the circumstances, and an inventory search. *Id.* at 898-99. All were rejected by the court. *Id.* at 902-03.

43. *Id.* at 902.

44. *Id.* at 898.

45. See *White*, 669 A.2d at 901-02 (discussing holding in *Commonwealth v. Timko*, 417 A.2d 620 (Pa. 1980), that warrantless search of automobile incident to arrest is limited to individual's clothing and areas within his immediate reach).

custody. . . ."<sup>46</sup> In Pennsylvania, the "immediate area" was more limited than its federal counterpart.<sup>47</sup> It meant only those areas that the arrestee could reach *at the time of the search*.<sup>48</sup> Where an arrestee was secured outside of his vehicle or in the back of a police car, a search of the automobile's interior compartment was beyond the scope of a search incident to arrest.<sup>49</sup>

In a concurring opinion, Justice Montemuro agreed that the Pennsylvania Constitution gave its citizens additional protections against the *Belton* rule.<sup>50</sup> Justice Montemuro, however, faulted the majority's summary treatment of the issue.<sup>51</sup> He believed that an in-depth analysis was warranted whenever the court considered deviation from the federal norm.<sup>52</sup> He urged his colleagues to return to the *Edmunds* test,<sup>53</sup> a legal analysis that the court created in *Commonwealth v. Edmunds*.<sup>54</sup> *Edmunds* set forth what was originally thought to be a mandatory four-prong briefing format that addressed, in detail, the following factors:

- (1) the text of the relevant state constitutional provision; (2) the history of the provision; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.<sup>55</sup>

Although the Pennsylvania Supreme Court had earlier made it clear that an *Edmunds* analysis was merely helpful,<sup>56</sup> Justice Montemuro called for reinstatement of *Edmunds* as a mandatory mode of analysis.<sup>57</sup> He suggested that *Edmunds* was "essential" to all state constitutional cases because it provided "a

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46. *Id.* at 902.

47. Compare *Commonwealth v. White*, 669 A.2d 896, 902 (Pa. 1995) (suppressing evidence found in paper bag found between front seats of car), and *Commonwealth v. Timko*, 417 A.2d 620, 623 (Pa. 1980) (suppressing evidence found in zippered valise seized from automobile), with *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (defining area within arrestee's immediate control to include glove compartments, consoles, luggage, boxes, bags, and all other receptacles found in passenger compartment).

48. *White*, 669 A.2d at 902. The court found that the arrestee's privacy interests remained "intact" and the officer was permitted to search only for the limited purpose of preventing the arrestee from obtaining weapons or destroying evidence. *Id.*

49. *Id.*

50. *Id.* at 903 (Montemuro, J., concurring).

51. *Id.* (Montemuro, J., concurring). Justice Montemuro believed that dealing with the issue in summary fashion "weaken[ed]" the court's prior state constitutional decision in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *White*, 669 A.2d at 903 (Montemuro, J., concurring).

52. *Id.* at 903-04 (Montemuro, J., concurring).

53. *White*, 669 A.2d at 904 (Montemuro, J., concurring).

54. 586 A.2d 887 (Pa. 1991).

55. *Edmunds*, 586 A.2d at 895.

56. In *Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995), the court characterized the *Edmunds* factors as "helpful," but not mandatory. *Id.* at 961 n.6. The majority in *White* reiterated this characterization of *Edmunds* in response to the prosecution's claim that appellant waived his state constitutional claim by failing to set forth an *Edmunds* analysis. *White*, 669 A.2d at 899.

57. *White*, 669 A.2d at 904 (Montemuro, J., concurring). Justice Montemuro also suggested that the court engraft onto the *Edmunds* test the prerequisite finding of "important and substantial reasons" for departing from decisions of the United States Supreme Court. *Id.* (Montemuro, J., concurring).

maximum amount of guidance to . . . lower courts and to litigants.”<sup>58</sup>

Justice Montemuro applied an *Edmunds* analysis to the facts in *White* and concluded that *Belton* was “seriously flawed and [had] no place in Pennsylvania jurisprudence.”<sup>59</sup> Justice Montemuro began by analyzing the text of article I, section 8 of the state constitution, Pennsylvania’s counterpart to the Fourth Amendment.<sup>60</sup> Justice Montemuro next examined the history of article I, section 8 and relevant Pennsylvania case law, concluding that Pennsylvania had been willing to depart from federal jurisprudence in the past.<sup>61</sup> In addressing the treatment of similar provisions in sister states, the third prong, Justice Montemuro compared the absence of sound state constitutional analysis from states that had adopted the *Belton* rule with the persuasive reasoning from those that had not.<sup>62</sup>

The strength of Justice Montemuro’s reasoning, however, was contained in his analysis of *Edmunds*’s fourth prong, public policy. He carefully considered the current public view of *Belton* and the wide criticism it had received.<sup>63</sup> He weighed the risks and benefits of applying *Belton*’s rule, balancing the privacy rights of Pennsylvania’s citizens against the safety of its police officers.<sup>64</sup> He concluded that rejection of the *Belton* rule would not create “insurmountable law enforcement problems,” while adoption of the rule would “dramatically curtail the privacy rights of motorists.”<sup>65</sup> Contrary to the *Belton* majority’s rationale, Justice Montemuro found no need for a bright-line rule in the wake of *Chimel*.<sup>66</sup> Instead, Justice Montemuro found that public policy interests commanded a state-based rejection of *Belton*.<sup>67</sup>

### III. THE UNITED STATES SUPREME COURT FURTHER BROADENS POLICE POWER: *WHREN V. UNITED STATES*

On a summer evening in 1993, Michael Whren was a passenger in a sport utility vehicle on the streets of Washington, D.C.<sup>68</sup> A number of things prompted plainclothes vice-squad officers to be suspicious of Whren and the driver: the pair’s youthful appearance, the truck’s temporary license plate, and the fact that the vehicle remained at a stop sign in a “high drug area” for “an unusually long time” while the driver looked into the lap of his passenger.<sup>69</sup>

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58. *Id.* (Montemuro, J., concurring).

59. *Id.* at 908 (Montemuro, J., concurring).

60. *Id.* at 904 (Montemuro, J., concurring).

61. *Id.* at 904-05 (Montemuro, J., concurring).

62. *White*, 669 A.2d at 905-07 (Montemuro, J., concurring).

63. *Id.* at 907-08 (Montemuro, J., concurring).

64. *Id.* at 908 (Montemuro, J., concurring).

65. *Id.* (Montemuro, J., concurring).

66. *Id.* (Montemuro, J., concurring). See *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding unconstitutional warrantless search beyond suspect’s person of area not within his immediate reach).

67. *White*, 669 A.2d at 908 (Montemuro, J., concurring).

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

69. *Id.*

When the officers made a U-turn in the direction of the truck, they observed the vehicle turn “suddenly to its right, without signaling, and spe[e]d off at an ‘unreasonable’ speed.”<sup>70</sup> At a traffic light, they approached the vehicle, with the asserted intention of giving the driver a warning about the traffic violation he had just committed.<sup>71</sup> Once at the driver’s side window, the officers saw that Whren was holding two large bags of crack cocaine.<sup>72</sup> Whren was arrested and ultimately charged with several violations of federal drug laws.<sup>73</sup>

In seeking to suppress the drugs as evidence at trial, Whren argued that the officers’ purpose for the traffic stop was pretextual, that is, they were suspicious of Whren and his companion solely because of the men’s race.<sup>74</sup> Whren argued that the officers used the minor traffic violation as a way to stop and investigate the pair.<sup>75</sup> Whren urged the Court to evaluate the officers’ conduct objectively to determine whether, without their legally unsubstantiated suspicions, they would have made a traffic stop for failure to use a turn signal.<sup>76</sup> If they would not have done so, Whren argued, suppression was proper since seizure of the drugs would have been based on pretext, contrary to the Fourth Amendment.<sup>77</sup>

Prior to *Whren*, some circuit courts suggested that pretext stops were unreasonable and, thus, improper under the Fourth Amendment.<sup>78</sup> These courts typically analyzed an officer’s motives in order to uncover pretext.<sup>79</sup> If an officer “would not have” conducted the stop absent her legally unsupportable reason,

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70. *Id.*

71. *Id.* at 809.

72. *Id.*

73. *Whren*, 517 U.S. at 809. Among the charges was one prohibiting distribution of drugs in a school zone or other protected area. *Id.* In such circumstances, the statutory maximum punishment is doubled and there is a mandatory minimum one-year prison term. 21 U.S.C. § 860(a) (1994).

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

75. *Id.*

76. *Id.* Whren argued that civil traffic regulations present a “unique context” that allows police to stop virtually anyone they wish. *Id.* Hence, Whren argued, the Fourth Amendment test in such circumstances should not be probable cause, “but rather, whether a police officer, acting reasonably, would have made the stop for the reason given.” *Id.*

77. *Id.*

78. See, e.g., *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (clarifying test as whether reasonable officer “would have” made stop regardless of other suspicions); *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) (concluding proper inquiry to determine whether traffic stop was pretextual is whether reasonable officer would have made stop absent other motivation).

79. The majority of circuits, including the one from which *Whren* came, followed the rule ultimately set forth in *Whren*, that is, any traffic stop based on an observed traffic violation is permissible. See, e.g., *United States v. Botero-Ospina*, 71 F.3d 783, 787 (10th Cir. 1995) (en banc) (holding traffic stop does not violate Fourth Amendment where police officer had reasonable suspicion traffic violation occurred); *United States v. Ferguson*, 8 F.3d 385, 392-93 (6th Cir. 1993) (en banc) (finding traffic stop does not violate Fourth Amendment where officer had probable cause to believe traffic violation occurred). The Ninth and Eleventh Circuits, however, considered whether the traffic stop “would have” occurred absent the officers’ unrelated suspicions. See, e.g., *Cannon*, 29 F.3d at 476 (finding traffic stop constitutional if reasonable officer “would have” made stop regardless of suspicions of other criminal activity); *Smith*, 799 F.2d at 708 (concluding proper inquiry to determine whether traffic stop was pretextual is whether reasonable officer would have made stop absent other motivation).



the stop was deemed pretextual and, therefore, illegal.<sup>80</sup>

To the surprise of many, the *Whren* Court rejected completely any analysis of the officers' underlying motivations.<sup>81</sup> Instead, the Court reasoned, the only relevant inquiry was whether it appeared that a traffic infraction—even a minor one—had occurred.<sup>82</sup> The unanimous *Whren* Court affirmed the notion that where police officers observe a traffic violation, they may stop the vehicle—even if their actual reason for stopping the car was not the violation they observed.<sup>83</sup> Essentially, *Whren* holds that pretext stops do not violate the Fourth Amendment.<sup>84</sup>

Ignoring those circuit courts that found pretext stops to be an unreasonable course of action by police, the Court reasoned that the Fourth Amendment can never be offended when a traffic stop is made in the face of probable cause to believe a motor vehicle violation has occurred.<sup>85</sup>

In response to defense claims that pretext has long been considered improper, the Court stated that previous cases dealing with law enforcement personnel who harbored ulterior motives did not include the existence of probable cause, unlike the scenario in *Whren*.<sup>86</sup> On the primary argument that permitting pretext stops enables police to engage in selective enforcement of traffic laws based on consideration of race, the Court made little comment. It noted only that while such a practice was wrong, “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”<sup>87</sup>

#### IV. THE PENNSYLVANIA SUPREME COURT'S APPROACH TO THE BREADTH OF POLICE POWER: A RESPONSE TO *WHREN*

While it has yet to happen, the rule in *Whren* certainly will face a state constitutional challenge in Pennsylvania. And, although the state's supreme

80. See *Smith*, 799 F.2d at 711 (excluding evidence obtained from traffic stop where evidence suggested that “reasonable officer would not have” stopped defendants absent illegitimate purpose). *Whren* wanted the United States Supreme Court to adopt the “would have” standard of *Cannon* and *Smith*. *Whren*, 517 U.S. at 810.

81. *Whren*, 517 U.S. at 814-16. The Court reasoned that such an approach would be impermissibly “driven by subjective considerations.” *Id.* at 814. The Fourth Amendment, instructed the Court, is concerned with reasonableness—a wholly objective principle that clearly is satisfied whenever there exists probable cause to believe a traffic law has been violated. *Id.*

82. *Id.* at 819. The Court concluded that there was no “realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.” *Id.*

83. *Id.* at 810.

84. *Id.* at 819.

85. *Id.* at 818.

86. *Whren*, 517 U.S. at 811. The *Whren* Court distinguished *Florida v. Wells*, 495 U.S. 1 (1990) (involving inventory search), and *New York v. Burger*, 482 U.S. 691 (1987) (discussing administrative searches), as cases “addressing the validity of a search conducted in the absence of probable cause.” *Id.*

87. *Id.* at 813. Apparently, the only legal issue before the Court was suppression under the Fourth Amendment. See *id.* at 808 (framing issue as validity of temporary detention given Fourth Amendment prohibition against unreasonable seizures).

court no longer requires it, a full *Edmunds* analysis<sup>88</sup> may yield the very same result that it yielded in *White*, namely, a divergence from the established precedent of the United States Supreme Court based on the greater protections of the Pennsylvania Constitution. When the Pennsylvania Supreme Court is faced with a state constitutional challenge to *Whren*, it may find the *Edmunds* test a suitable mode of analysis from which to decide whether or not to diverge from federal law.

*Edmunds*'s first prong, a textual analysis of the Fourth Amendment and its state counterpart,<sup>89</sup> militates neither in favor of nor against adherence to the *Whren* standard. In nearly every case in which the Pennsylvania Supreme Court has departed from the federal rule, it has recognized that article I, section 8 of the state constitution is "similar in language" to the Fourth Amendment but does not bind the courts to "interpret the two provisions as if they were mirror images" of one another.<sup>90</sup> Hence, prong one is not a barrier to divergence.

*Edmunds*'s second prong, an analysis of the state constitutional provision and its history, results in a decided victory for departure from the federal norm. The protections afforded in article I, section 8 not only exceed, but precede, those set out in the Fourth Amendment.<sup>91</sup> The state provision has been interpreted as one "designed to protect [citizens] . . . from unwarranted and even vindictive incursions upon [their] . . . privacy,"<sup>92</sup> a definition that aptly describes pretext stops.

Two decades ago, the state supreme court diverged from established federal law to rule that bank depositors have a legitimate expectation of privacy in their records held by the bank.<sup>93</sup> Characterizing the federal rule as "dangerous precedent," the court used the state constitution to afford state citizens greater privacy rights.<sup>94</sup>

The court continued in this vein by rejecting the United States Supreme Court's reasoning and granting automatic standing to all criminal defendants accused of possessory offenses.<sup>95</sup> The state supreme court concluded that article I, section 8 "mandates greater recognition of the need for protection from illegal government conduct offensive to the right of privacy."<sup>96</sup>

In yet other areas, Pennsylvania has refused to follow federal law, thereby granting an accused greater protection. Evidence gained from the use of a pen

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88. See *supra* notes 53-55 and accompanying text for a discussion of *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

89. See *supra* note 10 for the relevant text of the Pennsylvania Constitution.

90. *Commonwealth v. White*, 669 A.2d 896, 904 (Pa. 1995) (Montemuro, J., concurring) (relying on *Commonwealth v. Edmunds*, 586 A.2d 887, 895-96 (Pa. 1991)).

91. *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991).

92. *Commonwealth v. Miller*, 518 A.2d 1187, 1191-92 (Pa. 1986).

93. See *Commonwealth v. DeJohn*, 403 A.2d 1283, 1291 (Pa. 1979) (rejecting *United States v. Miller*, 425 U.S. 435 (1976)).

94. *Id.* at 1289.

95. See *Commonwealth v. Sell*, 470 A.2d 457, 468 (Pa. 1983) (rejecting *United States v. Salvucci*, 448 U.S. 83 (1980)).

96. *Id.*

register was suppressed where the device was utilized without a prior court order.<sup>97</sup> The good faith exception to the exclusionary rule has been wholly rejected in the Commonwealth, based on state constitutional protections.<sup>98</sup> Other departures from Fourth Amendment jurisprudence have occurred,<sup>99</sup> establishing Pennsylvania as a state that “guard[s] individual privacy rights more zealously than the federal government.”<sup>100</sup> Clearly, the historical treatment of article I, section 8 militates in favor of divergence.

The third prong of analysis under *Edmunds*, consideration of related case law from other states, provides little direction to date. Due to the long road to appellate review, very few state courts have yet considered *Whren*.<sup>101</sup> Only New Hampshire has explicitly adopted *Whren* and held that its own state protections are equivalent to those granted by the federal constitution.<sup>102</sup> Only Washington has explicitly rejected *Whren* on a state constitutional basis.<sup>103</sup> In doing so, the Supreme Court of Washington relied on a state constitutional provision that permitted an invasion of private affairs only under “authority of law.”<sup>104</sup> That provision, reasoned the court, required one to look beyond the formal justification for a stop and to inquire into the actual reason.<sup>105</sup> Where the reason is pretextual, it is “inherently unreasonable” and violates the state constitution.<sup>106</sup> While the Washington case lends some support for rejecting *Whren*, the New Hampshire case does the contrary. Further, Pennsylvania’s constitution does not contain a provision like the one relied on by the Washington court.<sup>107</sup>

The final *Edmunds* prong, policy considerations, provides the most food for

97. See *Commonwealth v. Melilli*, 555 A.2d 1254, 1260-61 (Pa. 1989) (rejecting *Smith v. Maryland*, 442 U.S. 735 (1979)).

98. See *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (rejecting *United States v. Leon*, 468 U.S. 897 (1984)).

99. See, e.g., *Commonwealth v. Matos*, 672 A.2d 769, 776 (Pa. 1996) (departing from *California v. Hodari D.*, 499 U.S. 621 (1991), in holding police officers’ pursuit of individual approached without reasonable suspicion or probable cause constitutes seizure under Pennsylvania Constitution); *Commonwealth v. Smith*, 615 A.2d 321, 325 (Pa. 1992) (diverging from *Oregon v. Kennedy*, 456 U.S. 667 (1982), in finding Pennsylvania’s double jeopardy clause prevents retrial of defendant where prosecutor intentionally sought to deny defendant fair trial).

100. *Melilli*, 555 A.2d at 1258.

101. In one instance, the state court did not reach the state constitutional issue. In *Whitehead v. Maryland*, 698 A.2d 1115 (Md. Ct. Spec. App. 1997), the Maryland appellate court found that where a police officer stops a vehicle and ultimately determines that no traffic laws have been violated, the officer’s continued detention of the motorist cannot be rationalized as falling within *Whren*. *Id.* at 1120.

102. See *State v. McBreairty*, 697 A.2d 495, 496 (N.H. 1997) (using federal and state case law to reject defendant’s claim that stop was illegal).

103. See *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999) (noting state court’s prior rejection of precedents relied on by *Whren*).

104. See *id.* at 837 (quoting WASH. CONST. art. 1, § 7).

105. *Id.* at 839.

106. *Id.*

107. See *supra* note 10 for the relevant text of the Pennsylvania Constitution.

thought on this issue.<sup>108</sup> The primary public concern about constitutional validation of pretextual traffic stops is that the stops will be made disproportionately against an identifiable group, such as a racial minority. This practice of singling out a specific racial group for traffic stops, commonly known as racial profiling, causes persons of one race to be stopped repeatedly, while members of other racial groups avoid repeated police contact.

As always, there are two sides to the issue. Consider the balance of public policy interests. It is argued that most pretextual stops are race-based, and inherent in them is racial profiling. Where shown to be race-based, such stops are unreasonable, and therefore contrary to article I, section 8 of the Pennsylvania Constitution.<sup>109</sup> The unreasonableness of the stop stems from the fact that it is based on the officer's personal belief that people of certain races are more likely perpetrators of crime than are people of other races. The officer's beliefs are not based on anything the suspect has done. The officer's beliefs necessarily subject law-abiding citizens to unwarranted stops simply because of their race. Further, the officer does not seek to address and punish the minor traffic violation that serves as the legal basis for the stop, but is instead looking for other crimes, for which he has no legal basis.<sup>110</sup> Finding this conduct unreasonable allows the court to exclude the evidence seized in the pretext stop and, according to logic, deter future stops based on racial profiling.

On the other hand, characterizing pretextual stops as reasonable, and therefore not violative of article I, section 8, allows police officers to discover and apprehend criminals even when they do not commit significant crimes in the presence of police. This, according to logic, prevents more crime.<sup>111</sup> It is argued that pretextual stops do not necessarily involve racial profiling. To the extent that they do, the constitutional violation of such a race-based stop can be addressed effectively via alternative remedies, such as the Equal Protection Clause.<sup>112</sup> Whether that is true remains uncertain.

#### V. PUBLIC POLICY RESPONSE: THE STATE OF AFFAIRS IN THE AFTERMATH OF *WHREN*

Scholarly support for the practice of racial profiling is predictably slim. Few people find it acceptable, but one person who does is author and former police officer, Joseph Wambaugh. In an article addressing the public outcry that occurred after New Jersey state troopers fired on a van of minority youths

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108. See *infra* notes 113-37 and accompanying text for additional discussion of the public policy response to pretext stops and racial profiling.

109. See *supra* note 10 for the relevant text of the Pennsylvania Constitution.

110. See, e.g., Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, at 51, 53 (describing traffic stop with hope of criminal interdiction).

111. See Jackson Toby, *'Racial Profiling' Doesn't Prove Cops Are Racist*, WALL ST. J., Mar. 11, 1999, at A22 (describing crackdown on minor offenses to prevent serious felonies as "one of the most important ideas in modern criminology").

112. See *supra* note 87 and accompanying text for a discussion of the Supreme Court's suggestion in *Whren* that the basis for objecting to race-based state action is the Equal Protection Clause.

stopped for a traffic violation on the turnpike, Wambaugh argued that a police officer's consideration of race is not necessarily a bad thing.<sup>113</sup> Like the Supreme Court in *Whren*, Wambaugh concedes that race as the sole reason for a stop is improper.<sup>114</sup> He argues, however, that inclusion of race as part of the probable cause mix has always been and continues to be appropriate.<sup>115</sup>

Another approach adopted by commentators unopposed to pretext stops is the claim that even if practiced, the conduct known as racial profiling is not as "evil" as perceived. A recent editorial in the *Wall Street Journal* urged readers to have "a little perspective" and consider whether statistical information on traffic stops was evidence of racism or, simply, "efficien[cy]" in the "targeting [of] potential drug traffickers."<sup>116</sup>

On the other hand, *Whren* has prompted a flood of law review articles, legal reports, and editorials condemning the opinion. Authors have criticized the reasoning and logic of the opinion on legal grounds, citing the Court's failure to follow applicable precedent and its error in applying case law that is inapposite.<sup>117</sup> Further, the debate taking place in our public forum, and the current events fueling that debate, offer additional opposition to *Whren*.

The practice of racial profiling is widely reported—and criticized—in the media.<sup>118</sup> Accusations and confirmations of the practice are everywhere. Recently, New Jersey's Office of the Attorney General released a report in which it admitted the existence of racial profiling in the state's law enforcement organizations.<sup>119</sup> This admission triggered the resignation of the state police chief,<sup>120</sup> a concession in a lawsuit successfully brought against the state by the

113. Joseph Wambaugh, *Trust Cops' Intuition*, WALL ST. J., May 19, 1998, at A22.

114. *Id.*

115. *Id.*

116. Toby, *supra* note 111, A22.

117. See, e.g., David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 561 (1998) (asserting *Whren* gives law enforcement carte blanche to engage in racial profiling); Patricia Leary & Stephanie Rae Williams, *Toward a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1025 (1996) (describing *Whren* as "a rickety piece of judicial scholarship"); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 96-97 (1998) (arguing *Whren* encourages police officers to engage in arbitrary invasions of privacy).

118. See *infra* notes 119-26 and accompanying text for examples of media coverage on the issue of racial profiling.

119. See Tom Avril, et al., *N.J. Admits that Race Played Role in Some Police Stops on Turnpike*, PHILA. INQUIRER, Apr. 21, 1999, at A1 (reporting on news conference in which New Jersey governor and attorney general acknowledged racial profiling by state troopers). Governor Christine Todd Whitman reportedly said that "the broader problem is the result of well-intentioned troopers who simply thought they were engaging in good police work." *Id.* The report issued by the state attorney general's office revealed that 53 percent of persons searched during turnpike stops were black and 24 percent were Latino, despite the fact that "blacks make up about 14.5 percent of New Jersey's overall population, and . . . those 'of Hispanic origin' make up 11.9 percent." *Id.*

120. Actually, Governor Whitman requested that the superintendent of the state police tender his resignation prior to the release of the Attorney General's report on racial profiling. Diane Mastrull, et al., *New Jersey's Top Trooper Is Forced Out*, PHILA. INQUIRER, Mar. 1, 1999, at A1. Some

American Civil Liberties Union,<sup>121</sup> and the probable release of nineteen criminal defendants whose cases originated with a traffic stop.<sup>122</sup> Legislation aimed at preventing systemic racial profiling is being proposed on both federal and state levels.<sup>123</sup> White police officers stand indicted for falsifying official records to cover up a practice of racial profiling,<sup>124</sup> while officers of African-American descent are rallying together to end the racist practices of their colleagues.<sup>125</sup> Print media nationwide report the news of those directly affected.<sup>126</sup>

“DWB” or “Driving While Black” is no longer a novel term; instead, its

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thought Williams was asked to leave because the report was soon to be released and Williams had refused to admit his agency's racial profiling tactics; others believed his ouster was the direct result of public comments he made regarding the types of crimes committed and the types of people who commit them. *Id.* While insisting that racial profiling was something the state police would not tolerate, Williams also told reporters that the methamphetamine market was controlled by whites, while the heroin market was primarily controlled by Jamaicans. *Id.*

121. See Howard Goodman, *Gloucester County Turnpike Arrests in Doubt*, PHILA. INQUIRER (South Jersey edition), Apr. 21, 1999, at B1 (describing class action suit and effect of state concession of racial profiling). In 1996, a Gloucester County judge suppressed evidence seized in the arrests of nineteen people on the New Jersey Turnpike when those individuals asserted that they were targeted for traffic stops on account of their race. *Id.* The Attorney General's Office promptly appealed the decision, but dropped the appeal after issuing its report on racial profiling practices within the state police force. *Id.*

122. See *id.* It was expected that most, if not all, of the drug charges against the 19 African Americans stopped on the turnpike in Gloucester County would be withdrawn by the prosecution, since the suppression order would preclude it from offering evidence seized during the improper stop. *Id.* Cases in other New Jersey counties, wherein similar accusations against police were made, were put on hold. *Id.*

123. See Robert Cohen, *Racial Profiling Allegations Spur Lawmakers to Call for U.S. Study*, STAR-LEDGER (NEWARK, N.J.), Apr. 14, 1999, at 7, available in 1999 WL 2970986 (reporting New Jersey State Police revelations prompted legislation on racial profiling); *North Carolina Legislation Mandates Statistics to Prove/Disprove Profiling*, 1 CRIM. JUST. WKLY. 1, June 1, 1999, at 20 (noting North Carolina became first state to sign criminal statistics bill into law); Sonya Ross, *Clinton Orders Officers to Collect Racial Data on Stops, Arrests*, PHILA. INQUIRER, June 10, 1999, at A22 (reporting President ordered federal law enforcement agencies to collect race and gender data from all stops or arrests).

124. See Tom Avril & Douglas A. Campbell, *N.J. Troopers Indicted in Racial Profiling Probe*, PHILA. INQUIRER, Apr. 20, 1999, at A1 (describing charges). The indictment alleges that the troopers falsified their stop and arrest records to make it appear that the minorities they stopped were instead white. *Id.* The two troopers, John Hogan and James Kenna, are the same officers involved in a 1998 incident on the New Jersey Turnpike. *Id.* Hogan and Kenna allegedly fired on four unarmed men, three black and one Hispanic, during a traffic stop. *Id.* See also Mastrull, et al., *supra* note 120, at A7 (describing shooting incident as bringing issue of racial profiling to forefront, eventually leading to resignation of superintendent of state police).

125. See George Berkin, *Black Cops Vow to Follow, Tape Troopers*, STAR-LEDGER (NEWARK, N.J.), May 22, 1998, at 30, available in 1998 WL 3417389 (describing response to turnpike shooting). Three African-American police officer groups organized a 1998 Memorial Day weekend outing that involved off-duty police officers patrolling the New Jersey Turnpike and videotaping traffic stops. *Id.*

126. See, e.g., *Justice Department to Probe Accusations of 'Racial Profiling'*, CHI. TRIB., Mar. 10, 1999, at 8 (reporting meeting between deputy attorney general and New Jersey black and hispanic leaders); John Kifner, *N.J. Traffic Shootings Follow Racism Allegations Police 'Targeting Blacks' on Turnpike*, ARIZ. REP., May 10, 1998, at A20, available in 1998 WL 7770245 (describing shooting incident and racial profiling controversy).

definition is widely known—and used—in the public forum.<sup>127</sup> In an effort to combat racial profiling, the ACLU maintains a website that offers users the opportunity to file an electronic Driver Profiling Complaint Form.<sup>128</sup> Users also are invited to download the ACLU “Bustcard,” a “pocket guideline on encounters with the police” that advises citizens on their rights when stopped by law enforcement personnel.<sup>129</sup> Even organizations beyond the police department are being accused of and investigated for engaging in racial profiling.<sup>130</sup>

In weighing the public policy risks and benefits pursuant to an *Edmunds* analysis, one must consider the value pretext stops have in our society, as well as the dangers they present. As Mr. Wambaugh so aptly instructs, a police officer’s instinct and intuition is often right on the mark.<sup>131</sup> Clearly, society benefits from the officer who is skilled enough to recognize criminal conduct even absent the standard indicators accepted in our legal system.

Those supporting pretext stops argue that eliminating them is unwise, even though they are based on a fundamentally unfair factor like race.<sup>132</sup> Precluding the use of pretext altogether prevents police officers from using their knowledge of the street to interrupt criminal conduct even when their suspicions are not based on impermissible factors.<sup>133</sup> While the actual number of officers who operate on intuition without reliance on race would likely prompt an endless

127. See David Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, An ACLU Special Report (visited June 2, 1999) <<http://www.aclu.org/profiling/report>> (stating practice of police looking for drug criminals by stopping drivers based on color is so common “that the minority community has given it the derisive term, ‘driving while black or brown’—a play on the real offense of ‘driving while intoxicated’”). See also David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 & n.10 (1997) (relating “driving while black” was “standard way” black clients in Washington, D.C. area described “common experience of constant stops and harassment” by police).

128. ACLU, *Driver Profiling Complaint Form* (visited June 2, 1999) <[http://www.aclu.org/profiling/report\\_incident](http://www.aclu.org/profiling/report_incident)>.

129. ACLU, *ACLU ‘Bustcard’: Pocket Guidelines on Encounters With the Police* (visited June 2, 1999) <<http://www.aclu.org/profiling/bustcard>>. The “Bustcard” instructs users on what to do when stopped by police. In addition to warning drivers to be polite, respectful, and calm, the ACLU advises them to “write down everything you remember ASAP,” “make [no] . . . statements regarding the incident,” and “[a]sk for a lawyer immediately upon your arrest.” *Id.*

130. See Al Frank, *P.A. Looking into Claims of Profiling on the PATH*, STAR-LEDGER (NEWARK, N.J.), Mar. 13, 1999, at 11, available in 1999 WL 2962478 (reporting investigation of Port Authority PATH police alleged to have engaged in racial profiling); Howard Goodman, *Profiling Allegations Expanded*, PHILA. INQUIRER, Apr. 30, 1999, at B1 (reporting New Jersey Attorney General’s Office investigation of state police program that trains hotel employees to spot possible drug dealers near turnpike).

131. Wambaugh, *supra* note 113, at A22. The suspicions of the officers in *Whren* certainly were founded. See *Whren v. United States*, 517 U.S. 806, 806-07 (1996) (noting officers’ “suspicions were aroused,” causing them to pull over vehicle found to contain illegal drugs).

132. See Wambaugh, *supra* note 113, at A22 (suggesting certain criminals, including white lawbreakers in black neighborhoods, would “cruise . . . unmolested” if police could not use profiling).

133. See *id.* (“As police attempt to cull potential lawbreakers from honest citizens, sex, age, race, clothing and lots of subtleties go into the process.”).

debate,<sup>134</sup> supporters of pretext stops urge that these police officers are invaluable assets to the communities they serve.<sup>135</sup> Preserving their ability to act for the greater public good is a desirable goal. The supporters assert that society can continue to permit officers of this type to root out crime by using pretext stops, since evils like racial profiling can be attacked under the Equal Protection Clause. Intuitive police officers can zealously conduct their business without fear that they are transgressing the Fourth Amendment.

Justice Scalia made it clear in his opinion in *Whren* that race-based stops are wrong and, indeed, unconstitutional.<sup>136</sup> According to the Justice and his colleagues, such stops do not offend the Fourth Amendment prohibition against unreasonable searches; instead, they are prohibited by the Equal Protection Clause,<sup>137</sup> an avenue of relief apparently not pursued by Michael Whren.

#### VI. REMEDIES: GETTING THE PROOF AND MAKING A CLAIM UNDER THE EQUAL PROTECTION CLAUSE

While racial profiling is widely condemned, the supporters of pretext stops claim that the problem can be addressed via the Equal Protection Clause, while giving police greater latitude to operate legally within the Fourth Amendment. Closer analysis of this proposition shows that a racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove. In assessing whether and to what extent the Equal Protection Clause is a viable avenue of relief, one must consider, in practical terms, what actions an accused would have to take to establish that her constitutional rights have been violated.

The Equal Protection Clause prohibits the discriminatory application of laws and precludes law enforcement agencies, exercising discretion, to go forward with a case based on “an unjustifiable standard such as race, religion or other arbitrary classification.”<sup>138</sup> It is easy for an accused to allege that she was subjected to police interference based on race, but it is difficult to support the allegation.

In such cases, the accused will make a pre-trial attempt to prove that the officer in her case used race as a guide, thus violating the Equal Protection Clause, i.e., the officer stopped her because she was black and would not have stopped a white person under similar circumstances. It is safe to assume that there will be few admissions by police officers that a driver’s race was the basis

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134. While researching an article for the *New York Times Magazine*, author Jeffrey Goldberg rode with police officers from various cities, including Philadelphia. Some officers denied relying on race in deciding whom to stop; others admitted the practice. The officers alternatively decried and defended the practice. The wide use of racial profiling, however, was unmistakably clear throughout the fascinating piece. See generally Goldberg, *supra* note 110.

135. See Toby, *supra* note 111, A22 (asserting stopping people who violate minor laws helps prevent major crimes such as drug trafficking).

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

137. The *Whren* Court agreed that race-based stops are wrong, but noted that it was necessary to present such claims under the Equal Protection Clause, not the Fourth Amendment. *Id.*

138. *Oyler v. Boles*, 368 U.S. 448, 456 (1962).



for a stop that ultimately yields contraband or evidence of criminal activity.<sup>139</sup> If the defendant is “fortunate” enough to have been stopped by someone like the two New Jersey state troopers who recently were indicted for falsifying their official paperwork, she might prevail.<sup>140</sup> In such a case, the officer’s past transgressions based on race would be on the record.<sup>141</sup>

The more likely scenario, however, is that the accused will request an enormous amount of documents from the prosecution, including a demand for the officer’s prior arrest records and personnel records. She may also request documents from the law enforcement agency’s files, items like department-wide arrest and investigation statistics, formal policies and procedures, and training manuals and techniques used by the agency.

Making the requests for these documents, however, is quite different from actually getting them. In the few cases deciding this issue, a rather stringent standard has developed. In general, discovery is permitted only when the accused has established that the “police agency has an officially sanctioned or ‘de facto’ policy of selective enforcement against minorities.”<sup>142</sup> Of course, even if the requests are granted, the documents may not provide the answers sought. The kind of information necessary for a pretext analysis simply has not been gathered on a regular basis.<sup>143</sup> While great strides have been made on both state and federal levels, it is only very recently that local governments and agencies have begun generating data regarding traffic stops and race.<sup>144</sup>

139. See generally Goldberg, *supra* note 110. Despite their description of conduct that arguably constitutes racial profiling, most of the officers in Goldberg’s article denied that race was the sole factor in a stop. *Id.* Similarly, two New Jersey state troopers indicted for falsifying records, who also denied that race was the sole factor, have been characterized by their lawyers as conducting “good police work.” Avril & Campbell, *supra* note 124, at A6.

140. In this context, “prevail” is a strong word. Actually, a driver stopped by one of these officers may simply have a very strong case for a race-based traffic stop. Whether there exists a viable remedy for such a claim, however, is the central issue in this Article. See *supra* notes 138-39 and *infra* notes 141-60 and accompanying text for a discussion of the difficulty in fashioning a legal remedy for race-based traffic stops.

141. Of course, the accused would still be faced with establishing that a race-based pretext occurred in her case.

142. *State v. Smith*, 703 A.2d 954, 958 (N.J. Super. Ct. App. Div. 1997) (relying on *United States v. Armstrong*, 517 U.S. 456 (1996)). The use of a selective enforcement defense was approved by the United States Supreme Court in 1962, when in *Oyler v. Boles*, 368 U.S. 448 (1962), the Court held that prosecution based on race, religion, or another arbitrary classification violates the Equal Protection Clause. *Id.* at 456. See *infra* note 145 and accompanying text for a discussion of selective enforcement claims.

143. Even if compelling evidence were gathered, its positive effect in the courts is questionable. For years, opponents of the death penalty have offered statistical studies and analyses in an effort to prove that the harsh sentence is imposed in a discriminatory manner, but the death penalty remains a constitutional form of punishment. See, e.g., *Developments in the Law: Race and the Criminal Process, Part VIII: Race and Capital Sentencing*, 101 HARV. L. REV. 1603, 1614-22 (1988) (describing Supreme Court’s rejection of death penalty as violative of Equal Protection Clause despite strong statistical evidence); Douglas W. Vick, *Poorhouse Justice: Underfunded, Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 332-36, 410-12 (1995) (analyzing relation of race and socioeconomic status with imposition of death penalty).

144. In Philadelphia, Police Commissioner John Timoney is not waiting for the enactment of

When it comes to the breadth of a discovery request of this type, the scope of such an inquiry may be limitless. Is the accused entitled to look into the personal life of the officer? After all, there may be relevant and probative evidence from the officer's conduct outside of the police department from which one could conclude that she might target individuals of a certain race. If personal conduct is fair game, how far back can an accused go? Simply because an officer has not been involved in questionable conduct recently does not mean that she does not harbor racist tendencies. Are interviews of and subpoenas for the officer's friends, colleagues, neighbors, and supervisors off limits? Certainly, if an accused has a good faith basis to believe that testimony from these or other people will establish an officer's tendency to engage in racial profiling, how could a court preclude her from presenting it?

Of course, all of these inquiries make the pre-trial process more burdensome for all parties. Defense attorneys would have a much more complex task. Their burden will no longer be simply to establish that the reasonable officer would not have made the stop. Instead, they will be expected to probe any and all aspects of an officer's conduct, training, and habits, as well as those of his colleagues and supervisors. Failure to conduct a complete inquiry may give rise to an ineffective assistance of counsel claim.

The prosecution also will be burdened with additional tasks. Enormous discovery requests will mean not only more work culling documents, but also will likely prompt protracted litigation on the relevance and probative value of the items sought. Further, participation by the police department, state police, or other agency will be necessary, since much of the information requested will not be in the hands of the district attorney. Legal representation on behalf of those agencies or the officer himself may be appropriate, particularly if evidence of prior conduct in other cases is being sought or assessed. The introduction of additional parties and interests, of course, invites further delay.

These changes in turn burden the court system and hamper the judicial process. The sealing or sharing of evidence may become an issue. Proceedings may be further delayed by the need for an extended briefing schedule, further discovery, or oral argument. The court will be forced to allot a significant amount of court time to pre-trial matters. It must decide what is and is not discoverable, what is and is not admissible, and ultimately, what effect all of the evidence has in the context of the case.

Throughout these lengthy proceedings, an accused's right to a speedy trial will invariably be put on hold. Admittedly, an in-depth analysis of a police

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mandatory legislation before confronting racial profiling among his staff. Instead, he has formed a ten member "Integrity Control Unit" that will conduct "random, unscheduled audits of all bureaus, divisions and units for any signs of trouble, including in the area of police compliance with departmental policies . . . such as racial profiling." Robert Moran, *New Team to Monitor Police Conduct*, PHILA. INQUIRER, June 11, 1999, at B2. Commissioner Timoney is also not naive about the daunting task he faces: "We cannot always detect, let alone change, the mindset or prejudices of certain people, but we can put systems in place to prevent those biases from affecting their performance as police officers." Telephone interview with the Offices of the Philadelphia Police Commissioner (June 30, 1999).

officer's race-based conduct is the proper focus of a legislative committee hearing or a class action civil suit aimed at effecting a major change in a law enforcement agency's tactics and techniques. Making such an analysis part of any one criminal proceeding, however, is burdensome.

Further, even if an accused establishes that she was the victim of racial profiling and thereby proves that her constitutional rights under the Equal Protection Clause were violated, to what remedy is she entitled? While a violation of the Fourth Amendment has as its sanction the suppression of all evidence seized as a result of the violation, identical relief is not necessarily granted to the individual who has suffered a violation of her equal protection rights.

It seems fair to accord the victim of improper police conduct deemed a violation of the Equal Protection Clause the very same remedies accorded those who have sustained a Fourth Amendment violation via improper police conduct, namely, suppression of the evidence procured by unlawful means. There is no Supreme Court precedent, however, for such relief.<sup>145</sup> Instead, the Court has declined to state just what remedy, if any, a criminal defendant is entitled to if he establishes that he is the victim of racial profiling.<sup>146</sup>

New Jersey courts have made compelling arguments that the purposes of the exclusionary rule in the Fourth Amendment context apply with equal force in a pretextual stop scenario, and in fact, have imposed such sanctions.<sup>147</sup> Both

145. Selective enforcement claims have been raised many times over the past several decades. See *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (denying selective enforcement claim where no unjustifiable standard alleged); *United States v. Schoolcraft*, 879 F.2d 64, 68-69 (3d Cir. 1989) (rejecting equal protection claim where no evidence was offered supporting contended prosecution based on unjustifiable standard); *Commonwealth v. Wells*, 657 A.2d 507, 510 (Pa. Super. Ct. 1995) (denying alleged equal protection claim for selective prosecution where both prosecuted and non-prosecuted occupants of stopped vehicle were of same race). As the United States Supreme Court has explained:

A selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. . . . A selective prosecution claim asks a court to exercise jurisdictional power over a "special province" of the Executive.

*United States v. Armstrong*, 517 U.S. 456, 463-64 (1996). However, as recently as 1996, in the same term the Court decided *Whren*, the Court explicitly stated in a footnote that it has "never determined whether dismissal . . . or some other sanction is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race." *Id.* at 461 n.2.

146. *Id.* In *Armstrong*, the defendants sought discovery of police documents to establish their claim of selective enforcement and the district court entered an order granting the defendants' request. *Id.* at 459. The police challenged the defendants' right to the documents and refused to comply with the discovery order. *Id.* at 461. *Armstrong* involved racial profiling of a type, although not in the context of a traffic stop. Instead, the *Armstrong* defendants argued that they had been singled out for federal prosecution, in lieu of prosecution in the state court system, simply because they were black. *Id.* at 458.

147. See, e.g., *State v. Kennedy*, 588 A.2d 834, 838 (N.J. Super. Ct. App. Div. 1991) (discussing racial profiling and propriety of suppression as sanction). In a landmark 1996 case in the New Jersey Superior Court, *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996), Judge Robert Francis

before and after *Whren*, those courts opined that improper police conduct must be met with the sanction of evidence exclusion “to deter future insolence . . . by those charged with enforcement of the law.”<sup>148</sup> As one court explained, “[t]he objective is to compel respect for the constitutional guaranty in the most effective way—by removing the incentive to disregard it.”<sup>149</sup> Despite New Jersey’s enlightened approach, which has now been joined by Washington,<sup>150</sup> other state courts simply are not bound to suppress the evidence seized in a pretext stop.<sup>151</sup>

Alternative remedies are likewise uncertain. The dismissal of criminal charges is a possible, but not assured, remedy for a violation of this type.<sup>152</sup> In most selective prosecution claims brought under the Equal Protection Clause, the petitioner requests dismissal of the indictment against him based on the unconstitutional conduct of the prosecutor.<sup>153</sup> A pretext case, however, does not necessarily fit neatly within the selective prosecution model.<sup>154</sup>

The bulk of selective enforcement claims is made against the prosecuting attorney’s office.<sup>155</sup> The claims typically focus on the office’s policy, not on the conduct of the individuals on staff. Racial profiling, on the other hand, often focuses on the conduct of a single officer who may or may not have been encouraged by de facto or de jure policy of the police department.<sup>156</sup> An individual rogue officer, acting without departmental approval, may engage in racial profiling outside the knowledge of fellow officers or supervisors. The standards set forth in selective enforcement claim cases, which consider the

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combined the suppression requests of nineteen criminal defendants, all of whom claimed that they were the victims of racial profiling by New Jersey troopers. *Id.* at 359. After hearing evidence of the agency’s widespread racial profiling policy and practice, Judge Francis suppressed the evidence seized in the cases. *Id.* at 361. Thereafter, the Attorney General appealed the suppression order. Recently, in the wake of its admission that racial profiling indeed exists within the agency, the Attorney General’s Office abandoned its appeal. Goodman, *supra* note 121, at B1.

148. *Kennedy*, 588 A.2d at 838. See also Goodman, *supra* note 121, at B1 (reporting order of suppression in 19 consolidated cases asserting racial profiling on New Jersey Turnpike).

149. *Kennedy*, 588 A.2d at 838-39.

150. See *supra* notes 103-06 and accompanying text for a discussion of *State v. Ladson*, 979 P.2d 833 (Wash. 1999), and that state’s rejection of *Whren*.

151. See *Armstrong*, 517 U.S. at 461 n.2 (acknowledging that United States Supreme Court has not determined appropriate remedy for pretext stop).

152. See *id.* (stressing Court has not determined whether dismissal is proper remedy). In *Armstrong*, the trial court dismissed the indictment not because it was bound to do so, but because the parties agreed that dismissal was the most efficient way to get the issue of discovery limitations before the appellate court. *Id.*

153. See *supra* note 145 for a description of cases raising selective prosecution claims.

154. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 587-89 (1997) (examining difficulties of bringing Fourteenth Amendment claim for pretextual stop).

155. See, e.g., *Commonwealth v. Mulholland*, 702 A.2d 1027, 1034-35 (Pa. 1997) (involving claim against prosecution and police officers’ effort to bar their retrial where Commonwealth prosecuted only three of five officers involved in death of arrestee).

156. See *supra* notes 119-24 and accompanying text for a discussion of racial profiling as an action of individual officers or department policy.

policy of the prosecuting office, may be inadequate in dealing with racial profiling by a single officer. For instance, even though the New Jersey trial court has been willing to grant suppression as a sanction for selective enforcement, its appellate court continues to disregard the actions of single officers in the field and instead directs that only cases addressing agency-wide violations are actionable.<sup>157</sup> While statistical analyses of police department policy are indeed important evidence, such data cannot establish whether an individual officer conducting a pretext stop violated the driver's equal protection rights. Absent broad, new interpretations of the exclusionary rule, or specific sanctions for racial profiling on both an individual and agency-wide basis, there may be no direct consequence for the violation of equal protection rights in this context.<sup>158</sup>

In sum, neither Pennsylvania nor any other state court can rely on the United States Supreme Court's equal protection safety net to rescue victims of racial profiling. Indeed, that net has a gaping hole. In the unlikely chance that documentary proof of racial profiling is acquired by the victim, admitted by the court, and accepted by a judge or jury, a forceful and effective remedy for the underlying constitutional violation simply is not in place.

The impracticalities of the equal protection alternative militate against adopting *Whren* in the state constitutional context. While racial profiling may be confronted under the rubric of the Equal Protection Clause, it is not necessarily resolved.

The fourth prong in *Edmunds*, consequently, appears to support divergence from the rule in *Whren*.<sup>159</sup> A bright-line rule finding pretext stops unreasonable and, therefore, unconstitutional, will no doubt impinge upon an officer's ability to detect crime through intuition and a keen sense of the street. That same rule, however, arguably serves the public interest in a significant manner in that it avoids extensive, protracted, and perhaps futile litigation, while reassuring a leery public that racial profiling is constitutionally intolerable.<sup>160</sup>

## CONCLUSION

Whether the impact of racial profiling is real or perceived, damaging or

157. See *State v. Smith*, 703 A.2d 954, 957-58 (N.J. Super. Ct. App. Div. 1997) ("At best, the evidence proffered relates . . . Trooper Long had a hidden agenda and profiled Afro-American citizens . . . . The alleged motives of an individual police officer are not enough.").

158. This conclusion is true even in Pennsylvania where the state supreme court has interpreted the exclusionary rule broadly. See *Commonwealth v. Glass*, 718 A.2d 804, 808-09 (Pa. Super. Ct. 1998) (describing purpose behind Pennsylvania's exclusionary rule as not just deterrence of police misconduct, but also as fundamental safeguard of privacy), *appeal granted in part*, 726 A.2d 1041 (Pa. 1999).

159. See *supra* notes 53-55 and accompanying text for a discussion of *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

160. Admittedly, analysis of pretext under search and seizure reasonableness principles would not eliminate pre-trial litigation altogether. Courts still would be required to sift through what a police officer "would have done" absent her legally insupportable suspicions. The reasonableness test, however, sharply limits the inquiry by making it a narrower one. The issue is simply whether the stop would have occurred on the basis of the proffered reason, i.e., the minor traffic violation.

benign, underreported or overblown, it remains a public policy concern that must be confronted, both in the federal and state courts. A state constitutional evaluation of *Whren* is essential in responding to this very important social issue. Not only does racial profiling harm the individual, it also undermines the integrity of the state by making it a tool for discriminatory behavior against a group. This practice is unacceptable. In addressing *Whren*, state courts must recognize that resolution of the problem in the context of equal protection may only be theoretical. Furthermore, even if the matter can be addressed under the Equal Protection Clause, a resolution may be neither swift nor effective.