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**BEYOND PRIVACY, BEYOND PROBABLE
CAUSE, BEYOND THE FOURTH
AMENDMENT: NEW STRATEGIES FOR
FIGHTING PRETEXT ARRESTS**

TIMOTHY P. O'NEILL*

INTRODUCTION

Consider the number of minor traffic violations that the typical driver makes each time he or she gets into a car. After following and observing a motorist for a short distance, a police officer is likely to witness at least a trivial violation by nearly every driver on the road. Failure to signal for the appropriate length of time before turning; failure to signal before every lane change; failure to come to a complete stop at a stop sign; driving too fast, too slowly, or driving too fast for the conditions in the opinion of the officer—all could justify pulling a car over and issuing a citation. Perhaps this is fair; society certainly has an interest in ensuring safety on our roads. But what if such violations would justify not only a minor fine but also the removal of the driver from his or her vehicle and a search of the entire passenger compartment including all of the driver's belongings? What if the police officer was allowed the discretion to engage in such a search based on factors such as the neighborhood in which the driver was traveling, or the driver's clothes, or the color of the driver's skin? Such a practice would be an affront to our sense of justice. One might hope that these types of searches could never

* Professor, The John Marshall Law School. I wish to acknowledge the excellent research provided by Michael J. Summerhill. I wish to thank The John Marshall Law School for supporting this work through its Summer Research Grant Program. Thanks also to my parents for their unflagging support through the years. I finally wish to thank John T. Moran, Jr., whose generous assistance enabled me to enter the field of criminal law and to whom I will always be grateful.

be tolerated under our Bill of Rights. But these practices appear to be precisely in line with the present United States Supreme Court jurisprudence on the subject.

On June 10, 1996, the Supreme Court decided *Whren v. United States*,¹ which dealt with the issue of "pretext arrests."² Whren and Brown were convicted of possession of illegal drugs recovered during a police stop of their automobile.³ They asserted that the ostensible reasons their car was stopped by the District of Columbia Metropolitan Police Department—failure to signal for a turn; not giving full attention to the operation of a vehicle; unreasonable speed—were merely "pretextual."⁴ That is, the police had no actual interest in enforcing these minor traffic code violations, but were merely stopping the car because Whren and Brown were young African-American men driving in a "high drug area"⁵ of Washington, D.C.⁶ This "pretext" enabled the police to engage in a legal "fishing expedition" in which illegal drugs were found. The traffic offense "pretext" thus allowed the police to search for drugs without having probable cause to believe any drugs were present.

During the past decade, the issue of "pretext arrests" has produced a wave of academic writing⁷ as well as disagreement

1. 116 S. Ct. 1769 (1996).

2. See *infra* notes 6-8 and accompanying text for a definition and discussion of pretext arrests; see also *infra* note 10 and accompanying text for the Court's definition of pretext arrests in *Whren*, 116 S. Ct. 1769 (1996).

3. See *Whren*, 116 S. Ct. at 1772. The federal drug laws which Whren and Brown were convicted of violating were 21 U.S.C. §§ 844(a) and 860(a) (1994). *Id.* Section 844(a) criminalizes the possession of controlled substances. 21 U.S.C. § 844(a) (1994). Section 860(a) criminalizes the possession of controlled substances within one thousand feet of a school zone. 21 U.S.C. § 860(a) (1994).

4. Petitioners' Brief at 14-15, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841); see also D.C. Mun. Regs. tit. 18, § 2213.4 (1995) (providing that "an operator shall . . . give full time and attention to the operation of the vehicle"); D.C. Mun. Regs. tit. 18, § 2200.3 (1995) (stating that "no person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions"); D.C. Mun. Regs. tit. 18, § 2204.3 (1995) (providing "no person shall turn any vehicle . . . without giving an appropriate signal").

5. *Whren*, 116 S. Ct. at 1772. The "high drug area" of Washington, D.C., to which the Court referred, is located in the southeast portion of the city. See Petitioners' Brief at 2, *Whren*, 116 S. Ct. 1769 (No. 95-5841).

6. See *Whren*, 116 S. Ct. at 1773; see also Petitioners' Brief at 14, *Whren*, 116 S. Ct. 1769 (No. 95-5841) (arguing that a disproportionate number of minorities will be affected by these "traffic" stops).

7. See generally Guy-Uriel E. Charles, *Fourth Amendment Accommodations: (Un)Compelling Public Needs, Balancing Acts, and the Fiction of Consent*, 2 MICH. J. RACE & L. 461 (1997); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI

among state and federal courts.⁸ Yet the *Whren* decision displayed complete consensus among the Justices of the Supreme Court. In an opinion by Justice Scalia, the Court held that the stop was proper simply because there was probable cause to believe the defendants committed the civil traffic offenses.⁹ The Court went on to hold that any subjective reasons the police had for making the stop—that is, any “pretexts” they may have had—were irrelevant under the Fourth Amendment.¹⁰

The result of *Whren* certainly was no surprise. After all, in cases decided by the Burger and Rehnquist Courts, the government usually has prevailed on key Fourth Amendment issues.¹¹

L. REV. 425 (1997); 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 (1996); Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145 (1996); S. Michael McCulloch, *Criminal Procedure: Arrest, Search, and Confessions*, 42 SW. L.J. 565 (1988); Thomas M. Melsheimer et al., *Criminal Procedure: Confessions, Search and Seizure*, 50 SMU L. REV. 1059 (1997); Brian J. O'Donnell, *Whren v. United States: An Abrupt End to the Debate Over Pretextual Stops*, 49 ME. L. REV. 207 (1997); David M. Silk, *When Bright Lines Break Down: Limiting New York v. Belton*, 136 U. PA. L. REV. 281 (1987); Robert D. Snook, *Criminal Law—Pretextual Arrests and Alternatives to the Objective Test*, 12 W. NEW ENG. L. REV. 105 (1990).

8. Compare *United States v. Scopo*, 19 F.3d 777, 785-86 (2d Cir. 1994) (Newman, C.J., concurring) (agreeing with the majority's adoption of the “could have” test—a search or seizure is constitutional if the arresting officer legally *could have* stopped the individual—but noting that the test gives law enforcement officials sufficient power to harass members of minority groups using minor traffic violations to legitimize the harassment), with *United States v. Laymon*, 730 F. Supp. 332 (D. Colo. 1990) (applying the “would have” test—a search and seizure is constitutional if a reasonable officer *would have* stopped the individual—and finding a traffic stop unconstitutional because the officer used a minor traffic violation to stop the occupants of a car merely because the car had out-of-state license plates). As for state court decisions, compare *State v. Olson*, 482 N.W.2d 212 (Minn. 1992) (adopting the “could have” test), with *Taylor v. State*, 111 Nev. 1253 (1995) (adopting the “would have” test).

9. See *Whren*, 116 S. Ct. at 1772, 1777 (holding that the two police officers, in viewing the totality of the circumstances, had probable cause to believe *Whren* and *Brown* committed the traffic offenses).

10. *Id.* at 1774. Although the Court did note that the Constitution prohibits “selective enforcement” of the laws, the Court held that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Id.*

11. See, e.g., *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989) (stating that Federal Railroad Administration requirements that all employees be tested for drugs and alcohol were reasonable for purposes of the Fourth Amendment); *New York v. Burger*, 482 U.S. 691 (1987) (holding that a New York statute allowing warrantless searches of vehicle-dismantling businesses came within the administrative inspections exception to the warrant requirement of the Fourth Amendment); *United States v. Leon*, 468 U.S. 897 (1984) (holding that evidence

What was surprising, however, was the unanimity in the decision. Not only was there no dissent; there was not even a concurring opinion. Moreover, the unanimous opinion in *Whren* was written by Justice Scalia, whose Fourth Amendment jurisprudence has occasionally placed him at odds with the rest of the Court.¹² How could an issue which had created such controversy throughout academia and the lower courts be resolved through a unanimous opinion?

Perhaps *Whren* is a watershed Fourth Amendment case. The unanimous rejection of the defense position in *Whren* indicates the need to develop a new paradigm for analyzing issues involving law enforcement behavior in the area of searches and seizures. As this article will illustrate, the defense bar, through its emphasis on "privacy" and on defining a "reasonable" search almost exclusively in terms of "warrants" and "probable cause," has deprived itself of the *vocabulary* for expressing what is constitutionally wrong with a pretextual arrest. The defense bar's crabbed view of the Fourth Amendment—which has been the focus of important new scholarship by commentators such as William Stuntz,¹³ Scott Sundby,¹⁴ and Akhil Amar¹⁵—has placed many issues of police behavior outside the scope of the Fourth Amendment.

This article argues that the defense bar needs to be more receptive to recent scholarship which challenges traditional defense views of the meaning of the Fourth Amendment. As *Whren* illustrates, defense attorneys need to think beyond

should not be excluded even though it was seized under an invalid warrant, where the police had no reasonable grounds to believe the warrant was invalid); *Illinois v. Gates*, 462 U.S. 213 (1983) (abandoning the warrant requirement and adopting a "totality of the circumstances" standard for determining the reasonableness of searches and seizures).

12. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (Scalia, J., dissenting) (emphasizing the key role of "reasonableness" in Fourth Amendment interpretation). *Id.* at 59. Also, Justice Scalia joined the judgment of the Court in *California v. Acevedo* only because he felt that its decision to allow a warrantless search of a bag found in a car was "more faithful to the text and tradition of the Fourth Amendment" than the dissent's claim that a warrant was required. 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

13. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

14. See Scott Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen," 94 COLUM. L. REV. 1751 (1994).

15. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

"privacy," "warrants," and "probable cause" in arguing which searches and seizures are "reasonable" under the Fourth Amendment. Indeed, defense lawyers need to go beyond the Fourth Amendment itself.¹⁶ It is time to rethink the traditional defense paradigm in search and seizure situations.

Part I of this article outlines the current paradigm within which Fourth Amendment issues are decided by the Supreme Court and the resulting dilemma faced by defense lawyers. It also discusses important new scholarship which challenges this paradigm. Part II examines how the traditional paradigm defined the way the "pretext" issue was presented to the Supreme Court in *Whren* and how this guaranteed a victory for the government. Part III then uses the new scholarship discussed in Part I to elaborate ways in which the "pretext" issue can be reconfigured and raised again in both state and federal courts.

I. THE CURRENT PARADIGM AND ITS CRITICS

A. *The Two Strands of the Supreme Court's Fourth Amendment Jurisprudence: "Privacy" and "Reasonableness"*

Whren's attorneys had to confront two separate threads of Fourth Amendment jurisprudence. One strand is the emphasis on "privacy" as the crucial value protected by the Fourth Amendment. Prior to 1967, the Supreme Court interpreted the Fourth Amendment's enumeration of "persons, houses, papers, and effects"¹⁷ quite literally. Strict concepts of property often defined the coverage of the Fourth Amendment.¹⁸ This ended with the

16. See *infra* notes 148-93 and accompanying text in Part III for a discussion on how defense attorneys should consider approaching search and seizure issues.

17. U.S. CONST. amend IV. The amendment provides in its entirety: 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.

Id. (emphasis added).

18. Compare *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (holding that the use of evidence of telephone conversations between the defendant and others, obtained by means of a wire-tap, did not violate the Fourth Amendment because telephone conversations are not "material things—the person, the house, his papers,

landmark decision in *Katz v. United States*.¹⁹ *Katz* announced that the "premise that property interests control the right of the government to search and seize has been discredited."²⁰ The focus was shifted to protection of "people, not places."²¹ As Justice Harlan expressed in his widely cited concurrence, the issue after *Katz* was whether the expectation of privacy claimed by an individual was one that society was prepared to accept as reasonable.²²

The second strand concerned the interpretation of the Reasonableness Clause of the Fourth Amendment.²³ Rather than viewing "reasonableness" as an amorphous standard to be applied in a case-by-case manner, the Supreme Court has given precise meaning to the concept by looking to the Fourth Amendment's Warrant Clause. As expressed by Professor Morgan Cloud, "[I]n the years following the Second World War, the Court settled upon a rule-based model that defined 'unreasonableness' by referring to the specific requirements for warrants set forth in the amendment's second clause."²⁴ Thus, it could be said that the Reasonableness Clause, in some sense, *incorporated* the Warrant Clause; that is, a search or seizure was *per se* reasonable if it was preceded by a warrant based on probable cause.

This, of course, does not mean that a reasonable search or seizure always has to be based on a warrant.²⁵ Nor does it mean

or his effects"), with *Silverman v. United States*, 365 U.S. 505 (1961) (holding that the use of a listening device contained within the heating duct of the defendant's house by the police violated the Fourth Amendment because of the physical intrusion of the device within the defendant's home).

19. 389 U.S. 347 (1967).

20. *Id.* at 353.

21. *Id.* at 351.

22. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (stating that there is a "twofold requirement" for search and seizure cases: first, there must first be an expectation of privacy; second, that expectation must be reasonable).

23. U.S. CONST. amend IV. The amendment provides:

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.

Id. (emphasis added).

24. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 U.C.L.A. L. REV. 199, 224 (1993).

25. See Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985) (noting that there are over 20 exceptions to the warrant requirement in the Fourth Amendment including: searches incident to arrest; automobile searches; border searches and near-border searches; administrative

that a reasonable search or seizure always has to be based on probable cause.²⁶ What it does mean is that, as a general rule,²⁷ a search or seizure preceded by a warrant based on probable cause is *per se* "reasonable."

Again, this preference for warrants was not absolute. A search or seizure based upon probable cause which fell under an established "warrant exception" did not require a warrant. For example, one long-standing deviation from the warrant requirement is the so-called "automobile exception."²⁸ The Supreme Court has long held that the existence of probable cause alone is sufficient to make an automobile stop "reasonable" despite the lack of a warrant.²⁹

Thus, Whren's lawyers faced a daunting task under this traditional Fourth Amendment paradigm. They could not argue that a warrant was required; they had to concede that the police had "probable cause," albeit on the civil traffic offenses; and since technically there was probable cause to stop the car, Whren could not plausibly complain that the police had violated any reasonable expectation of "privacy."

Indeed, this brief description of Whren's legal dilemma incorporates the basic reasoning embodied in the Supreme Court's unanimous opinion rejecting Whren's claims. Yet there is a growing body of academic writing that challenges this traditional view of the Fourth Amendment and merits serious attention.

searches of regulated businesses; *Terry* stop situations; the plain view exception; search of person in custody; search incident to non-arrest when there is probable cause to make an arrest; fire investigations; warrantless entry following arrest elsewhere; boat boarding for document checks; consensual searches; welfare searches; and inventory searches). Bradley lists six other exceptions to the warrant and probable cause requirements of the Fourth Amendment. *Id.*; see also *California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring) (noting that there are "nearly 20 . . . exceptions" to the warrant requirement).

26. See generally *Terry v. Ohio*, 392 U.S. 1 (1967) (noting that a police officer can search and seize a person in appropriate circumstances, even if the officer does not have probable cause to arrest the person).

27. *But cf. Zurcher v. Stanford Daily*, 436 U.S. 547, 581-82 (1978) (Stevens, J., dissenting) (arguing that the Fourth Amendment prohibits the issuance of warrants unless supported by probable cause, and probable cause does not extend to third-party possession of possible documentary evidence).

28. See *Carroll v. United States*, 267 U.S. 132 (1925).

29. See *California v. Carney*, 471 U.S. 386, 393-95 (1985) (holding that probable cause to believe a vehicle contains contraband is constitutionally sufficient to allow the police to search the vehicle).

B. *The Critique of the Traditional Paradigm*

1. The Limits of "Privacy"

Professor William Stuntz has offered a challenging critique of the primacy of privacy in Fourth Amendment law. Stuntz notes that "[p]rivacy, at least as the word is used in criminal procedure, protects the interest in keeping information out of the government's hands."³⁰ But, although this certainly has relevance to Fourth Amendment values, Stuntz contends it does not go far enough. It fails to sufficiently regulate *police behavior*. Stuntz observes that, although "[a] focus on privacy has led to a great deal of law . . . about what police officers *can see*[,] [t]he doctrine pays a good deal less attention to what police officers *can do*."³¹ As Stuntz views the problem:

The Supreme Court penalizes an officer for turning over a stereo turntable to look at a serial number without sufficient cause, but the same Court ignores unprovoked police violence during the course of an otherwise legal search of a private home. The law requires more of a justification for searching a suspect's pockets than for grabbing him, spinning him around, and shoving him against the wall of a building.³²

Why this inordinate emphasis on privacy? Stuntz traces this theme back to the nineteenth century.³³ For most of the first century of this nation's history, the Supreme Court had very little to say about the Fourth Amendment. The Fourth Amendment at that time had no application to the states,³⁴ and the states

30. Stuntz, *supra* note 13, at 1017.

31. *Id.* at 1068 (emphasis added).

32. *Id.* at 1043 (citations omitted). The case to which Professor Stuntz refers is *Arizona v. Hicks*, 480 U.S. 321 (1987). In *Hicks*, the police entered the defendant's apartment to investigate a report of gunfire. *Id.* at 323. During the course of their search, one of the officers noticed a stereo system which "seemed out of place in the squalid and otherwise ill-appointed . . . apartment." *Id.* The police officer suspected that the stereo equipment was stolen so he read the serial numbers which required him to move some of the components. The officer was advised that the equipment was stolen in an armed robbery so he immediately arrested the defendants and seized the equipment. The court found this search and seizure to be a violation of the Fourth Amendment. *See id.* at 329.

33. Stuntz, *supra* note 13, at 1017 (noting that "privacy protection" dates back to *Boyd v. United States*, 116 U.S. 616 (1886)). For a discussion of *Boyd*, see *infra* notes 36-48 and accompanying text.

34. *See generally* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (holding that

conducted the vast majority of the nation's criminal prosecutions.³⁵

The first famous Fourth Amendment case was, ironically, a civil *in rem* case decided in 1886. *Boyd v. United States*³⁶ concerned the federal government's claim that Boyd had lied about the contents of shipments of glass in order to evade taxes.³⁷ The federal government brought a forfeiture action against thirty-five cases of glass. Pursuant to the federal statute,³⁸ the government served Boyd with a subpoena for the invoices of twenty-nine of the cases that had been shipped.³⁹ Over his objection that the subpoena was unconstitutional, Boyd produced the invoices.⁴⁰ At the trial level, the government prevailed on its forfeiture claim.⁴¹

But the United States Supreme Court reversed, agreeing with Boyd that the subpoena was unconstitutional.⁴² The Court characterized a subpoena which requests papers as the functional equivalent of a search and seizure.⁴³ The Court cited the eighteenth-century English case of *Entick v. Carrington*⁴⁴ for the proposition that government was forbidden to seize personal documents to be used as evidence against their maker.⁴⁵ Thus, *Boyd* found a Fourth Amendment violation.

The Court also characterized the subpoena as, in effect, compelling a person to be a witness against himself. Thus, as

the amendments contained in the Bill of Rights apply only to the federal government).

35. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 146 (1997) (noting that originally, the Supreme Court did not have general appellate jurisdiction over federal criminal cases, and that the Court did not obtain such jurisdiction until 1891).

36. 116 U.S. 616 (1886).

37. See *id.* at 617-18.

38. The action was based on "[t]he 5th section of the act of June 22, 1874, entitled 'An Act to amend the customs revenue laws,' &c., which section authorizes a court of the United States . . . to require the defendant or claimant to produce in court his private books, invoices and papers, or else the allegations of the [government] attorney to be taken as confessed." See *id.* at 616.

39. See *id.* at 618.

40. See *id.*

41. See *id.*

42. See *Boyd v. United States*, 116 U.S. 616, 638 (1886).

43. See *id.* at 622.

44. 19 How. St. Tr. 1029 (1765).

45. See *Boyd*, 116 U.S. at 626. *Entick* involved a trespass for entering the plaintiff's house and searching his desk and papers. See *id.* (discussing *Entick v. Carrington*). The jury returned a verdict for the plaintiff and the English appellate courts upheld the verdict—establishing one of the "landmarks of English liberty," which influenced the creation of the Fourth Amendment. See *id.*

Boyd memorably stated, "the Fourth and Fifth Amendments run almost into each other."⁴⁶

Taken literally, *Boyd* is a breath-taking opinion. If it were true that the government has no constitutional right to ever obtain a person's record keeping, then the modern regulatory state would have been an impossibility. Indeed, Professor Stuntz argues that "it may be fair to say that at about the time of *Lochner v. New York*, Fourth and Fifth Amendment law posed a greater threat to activist government, at least at the federal level, than did substantive due process."⁴⁷ Similarly, Akhil Amar has characterized *Boyd* as "our old friend, *Lochner*-era property fetishism, dressed up as a textual argument."⁴⁸ Just as *Lochner* perversely found bakers' working hours to be immune from governmental control,⁴⁹ so did *Boyd* hold that the Constitution somehow protected the privacy of business receipts.

As Professor Stuntz has outlined, it did not take long for the Supreme Court to begin cutting back on *Boyd*.⁵⁰ In *Hale v. Henkel*, a secretary-treasurer of a corporation objected to a subpoena issued pursuant to a Sherman Act investigation.⁵¹ The subpoena requested all documents relating to the corporation's dealings with six other firms. The corporation raised several objections including, *inter alia*, that the subpoena constituted an illegal search and seizure and that it violated the privilege against self-incrimination under *Boyd v. United States*.⁵²

A solid victory for the corporation might well have gutted a variety of federal regulatory schemes. That the Court was aware of this fact can be seen in its language rejecting the self-incrimination claim: "[T]he privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?"⁵³ And, although the Court found

46. *Id.* at 630.

47. William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 428 (1995) (referring to *Lochner v. New York*, 198 U.S. 45 (1905)).

48. Amar, *supra* note 15, at 791.

49. See *Lochner v. New York*, 198 U.S. 45 (1905).

50. See Stuntz, *supra* note 47, at 428-30.

51. See *Hale v. Henkel*, 201 U.S. 43 (1906). For additional discussion of the decision, see Stuntz, *supra* note 47, at 428-33.

52. *Hale*, 201 U.S. at 50.

53. *Id.* at 70.

that the subpoena in *Hale* constituted an unreasonable search and seizure, it seriously undermined its seemingly categorical holding in *Boyd* with the following language: "[W]e do not wish to be understood as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment."⁵⁴

Hale, Stuntz argues, marked the beginning of the end for *Boyd*.⁵⁵ It was the first in a series of decisions that, although never formally overruling *Boyd*, succeeded in draining it of most of its vitality.⁵⁶ Although *Boyd* retained an honored place for its language offering a rousing defense of the concept of privacy, its practical effect was quite small. As Stuntz describes the situation, "It is as if . . . instead of repudiating *Lochner*, the court had repeatedly reaffirmed it—but applied it only to laws regulating bakers."⁵⁷

Yet a constitutional development in the mid-twentieth century once again brought *Boyd* and its progeny to the forefront of constitutional law. That event was the Supreme Court's decision to apply the guarantees of the Fourth Amendment to the states through the operation of the Fourteenth Amendment's Due Process Clause.⁵⁸ Suddenly it was imperative for the Court to give shape and substance to Fourth Amendment guarantees now applicable to the criminal justice systems of all fifty states.

Prior to this, the Supreme Court's control over state criminal justice systems—to the extent that it exercised any control—was solely through substantive use of the Fourteenth Amendment's Due Process Clause. Many of the Court's rulings focused spe-

54. *Id.* at 77.

55. See Stuntz, *supra* note 47, at 430 (stating that "[t]he notion of any *Boyd*-type protection . . . whether grounded in the Fourth Amendment or the Fifth, was dead").

56. *Id.* at 432 (discussing how *Marron v. United States*, 275 U.S. 192 (1927), and *Shapiro v. United States*, 335 U.S. 1 (1948), further limited *Boyd*).

57. *Id.* at 433.

58. Compare *Wolf v. Colorado*, 338 U.S. 25 (1949), with *Mapp v. Ohio*, 367 U.S. 643 (1961). Although *Wolf* found that the principles of the Fourth Amendment were included in the concept of Due Process found in the Fourteenth Amendment, *Mapp* made the exclusionary rule of the Fourth Amendment applicable to the states and is thus commonly recognized as the case which "selectively incorporated" the Fourth Amendment and made it completely applicable to the states.

cifically on police behavior, such as violence used against suspects to obtain confessions.⁵⁹

However *Boyd* and its progeny switched the focus from the behavior of the police under the substantive due process standard to the privacy rights of the individual. Even though much of the force of *Boyd* had been dissipated by the Court's civil decisions upholding the regulatory power of government, the privacy vocabulary had survived. Professor Stuntz notes that selective incorporation "changed the *purpose* of constitutional regulation, from the due process cases' focus on police coercion and violence to the Fourth and Fifth Amendments' traditional emphasis on privacy, autonomy, and the ability of individuals to keep information to themselves."⁶⁰ Thus, after the selective incorporation of the Fourth Amendment, police behavior *per se* now took a back seat to considerations of the privacy of citizens.

A jurisprudence focused on police behavior will regularly deal with issues such as the proper use of force in serving warrants and making searches. A jurisprudence based on privacy, on the other hand, will tend to debate what a police officer can and cannot examine.

Professor Stuntz is not alone in his doubts about privacy being the primary Fourth Amendment value. Scott Sundby has also offered a trenchant critique in this area.⁶¹ Sundby argues that privacy—epitomized by Justice Brandeis' formulation of "the

59. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936). In *Brown*, the defendants, all African-Americans, were found guilty of murder and sentenced to death. See *id.* at 279. The only evidence the state presented was a confession by each defendant. Other than these confessions, "there was no evidence sufficient to warrant the submission of the case to the jury." *Id.* The defendants objected to the admissibility of this evidence arguing that the police obtained the confessions through the use of physical violence. See *id.* at 279-80. The police officer in charge had repeatedly hanged one of the defendants from a tree and whipped him in an attempt to obtain a confession. See *id.* at 281. The police used the same tactics on the other defendants. See *id.* at 282. All defendants confessed to committing the crime. In holding that the use of the confessions during the trial was a "clear denial of due process," the Court stated that "[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions." *Id.* at 286. The Court reasoned that the Due Process Clause requires state action to be consistent with "fundamental principles of liberty and justice." *Id.* (quoting *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926)). The Court further reasoned that cases that rest on admissions obtained through the use of physical violence are merely pretenses of a trial, violative of the Due Process Clause. See *id.*

60. Stuntz, *supra* note 47, at 439.

61. See, e.g., Sundby, *supra* note 14.

right to be let alone"⁶²—no longer “fully captures the Fourth Amendment’s role as a meaningful regulator of government-citizen interactions.”⁶³ He notes that the realities of the modern world—including the increase of government regulation and the startling advances in electronic technology—militate against the concept of privacy being an effective measuring stick for Fourth Amendment values. He observes that courts increasingly see privacy not as an aspirational value, but rather as an empirical fact. For example, if, as a matter of fact, a person’s activities *could be* monitored from an airplane⁶⁴ or a helicopter⁶⁵ then, as a matter of law, that person lacks an interest in privacy in those activities cognizable under the Fourth Amendment. Sundby contends that a new metaphor is needed. He suggests that privacy should be replaced with the goal of establishing mutual trust between government and citizens.⁶⁶ This would shift the

62. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

63. Sundby, *supra* note 14, at 1775.

64. See *California v. Ciraolo*, 476 U.S. 207 (1986) (holding that a warrantless observation, from a private airplane, of the defendant’s fenced-in yard did not violate the Fourth Amendment). The police officers, acting on an anonymous tip, observed marijuana plants growing in the defendant’s backyard. See *id.* at 207. The Court concluded that the defendant could not have a reasonable expectation that “his garden is protected from such observation.” *Id.* at 214. The Court based its reasoning on the fact that any member of the public who might fly over the defendant’s house would be able to see the marijuana. See *id.* at 215. The Court further reasoned that such observation is exactly what a judge requires to issue a warrant. See *id.* at 213.

65. See *Florida v. Riley*, 488 U.S. 445 (1989). Similar to *Ciraolo*, the police officers, acting pursuant to an anonymous tip, observed marijuana plants in the defendant’s greenhouse while circling over the defendant’s house in a helicopter. See *id.* at 445. In holding that there was no violation of the Fourth Amendment, the Court reasoned that the defendant could have no expectation of privacy since the greenhouse’s sides and roof were open, thereby allowing anybody who flew over to see its contents. The Court held that the fact the observation was made from the unique vantage of a helicopter was not determinative since the helicopter was not violating the law and it was not shown to be unreasonable to expect that a helicopter might fly over the defendant’s property. See *id.*

66. See Sundby, *supra* note 14, at 1777-78 (arguing that implicit in the Constitution, and thus the Fourth Amendment, is the notion of “reciprocal trust” between the government and its citizens). Professor Sundby maintains that the government needs to trust the citizens to exercise their liberties responsibly, and that this trust implicates the Fourth Amendment. Sundby continues:

Even a rudimentary comparison of democratic to totalitarian and anarchist states demonstrates the central role that government-citizen trust plays in a free society. Totalitarian regimes maintain power not through the consent of the governed but by physical, economic, and psychological control over the populace. Such governments exercise

focus from the privacy expectations of the individual to what *behavior* we, as citizens, demand from our police.

Thus, doubts concerning the role of privacy as the prime value of the Fourth Amendment are being expressed in the academic literature. Yet there is another challenge being made against the traditional paradigm. This one questions the primacy of the Warrant Clause itself.

2. The Limits of the Warrant Clause

The United States Supreme Court has long expressed a preference for warrants. Half a century ago the Court noted that "[i]t is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable."⁶⁷ In the landmark case of *Katz v. United States*,⁶⁸ the Court was even more explicit: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."⁶⁹

This "warrant preference" position has always had its share of critics both on the Court⁷⁰ and off.⁷¹ Professor Telford Taylor

control through a variety of means, but among the most essential is the use of the police power to reinforce the message that the government is superior and in control of the individual. Measures such as identification checkpoints, random searches, the monitoring of communications, and the widespread use of informants not only are means of keeping track of the citizenry, but also act as continuous symbolic reminders that the citizenry is dominated by the government. Far from fostering trust, the government's actions convey a message of distrust in order to perpetuate control of the citizenry.

Id. Sundby further argues that when the citizenry does not trust the government, it will look to other means of redress such as civil unrest. *See id.* at 1778. For Sundby, the Constitution and, more specifically, the Bill of Rights are designed to increase the legitimacy of the government because they serve as a contract between the government and the governed. *See id.* at 1780. The rights contained in the Bill of Rights become "enclaves from government interference" which demonstrate that the government trusts its citizens to exercise those rights properly. *Id.*

67. *Trupiano v. United States*, 334 U.S. 699, 705 (1948), *overruled on other grounds* by *United States v. Rabinowitz*, 339 U.S. 56 (1950).

68. 389 U.S. 347 (1967).

69. *Id.* at 357.

70. *See, e.g., California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring) (arguing that the purpose of the Fourth Amendment is not to require the use of warrants, but rather to limit how and when warrants can be issued); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) (stating that the Fourth Amendment only says that warrants which "may issue shall only issue upon

has traditionally been considered the most eloquent authority for the position that there is no warrant preference in the Fourth Amendment.⁷² According to Professor Taylor, the intended purpose of the Warrant Clause was not to make warrants mandatory, but rather to *limit* the ability of the executive to obtain warrants in the first place.⁷³

Akhil Amar has recently echoed Professor Taylor's position. Amar contends that warrants were "friends of the searcher, not the searched."⁷⁴ This is because a valid warrant provided an absolute defense for the executive in any trespass suit brought by the victim of a search against the government. Amar has argued that "juries, not judges, are the heroes of the Founders' Fourth Amendment story."⁷⁵ If a jury found that a warrantless search or seizure was unreasonable, the jury could award damages.⁷⁶ Thus, the purpose of the Warrant Clause was not to make warrants mandatory for all searches and seizures, but rather to make it *difficult* for the executive to obtain a warrant in those cases in which the executive was attempting to immunize itself from possible damages arising out of a questionable search and seizure.⁷⁷

This position stands in bold contrast to the Supreme Court's current approach to Fourth Amendment issues. In a search and seizure situation, the Court looks first to the Warrant Clause to determine if a warrant was properly issued. If there was no warrant, the Court then looks to the other clause of the Fourth Amendment—the Reasonableness Clause⁷⁸—to determine if there was a proper reason for not obtaining a warrant and if the warrantless search and seizure was therefore "reasonable." Amar, on the other hand, argues that the Court has it completely backwards. According to Amar, reasonableness is "[t]he core of

probable cause," and that it does not say that searches may only be conducted with a warrant).

71. See TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

72. See *id.*

73. See *id.* (arguing the purpose of the warrant clause was originally to limit the power of the executive to obtain warrants in the first place).

74. Amar, *supra* note 15, at 774.

75. *Id.* at 771.

76. See *id.* at 774.

77. See *id.* at 774-75.

78. See *supra* note 23 and accompanying text.

the Fourth Amendment.”⁷⁹ The Warrant Clause only exists to govern situations in which the government has actually chosen to obtain a warrant.

Although the Supreme Court continues to officially hew to the “warrant preference” position,⁸⁰ some commentators have questioned the degree of the Court’s commitment. Silas J. Wasserstrom has criticized what he perceives as the Court’s turn towards use of the Reasonableness Clause rather than the Warrant Clause.⁸¹ He, and others, perceive a connection between a “reasonableness” approach and a general weakening of Fourth Amendment protection.⁸²

However the defense community should not always regard the use of the Reasonableness Clause as the weaker, “second-best” part of the Fourth Amendment. Regardless of whether there should be a “warrant preference,” an argument can be made for recognizing the independent vitality of the Reasonableness Clause. Under this view, the Reasonableness Clause works as a “back up” provision which both complements and reinforces the values of the Warrant Clause.

The insufficiency of a warrant and probable cause to effectively protect the relevant individual liberty interests was vividly illustrated in *Zurcher v. Stanford Daily*.⁸³ In that case, the police

79. Amar, *supra* note 15, at 801.

80. See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (“reasonableness generally requires the obtaining of a judicial warrant”). But see *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting); *supra* note 70 (discussing Justice Scalia’s and Rehnquist’s opposition to the Court’s preference for warrants).

81. See generally, Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989).

82. See *id.* at 130 (stating, “the result of this movement [toward a general reasonableness approach] has been, for the most part, a steady weakening of [F]ourth [A]mendment protections”); see also Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 543 (1997) (noting that there are so many exceptions to the warrant requirement that it is virtually non-existent).

83. 436 U.S. 547 (1978). In *Zurcher*, protestors barricaded themselves in the Stanford University Hospital’s administrative offices. *Id.* at 550. The director of the hospital called the police to have them removed. Nine police officers forced their way in and were immediately confronted by numerous protestors wielding sticks and clubs. The protestors attacked the officers, and all of the officers suffered injuries. The following day, the *Stanford Daily* (a student newspaper) published articles and photographs about the confrontation. See *id.* at 551. These photographs became the focal point of a warrant obtained by the police in their effort to identify the

had obtained a warrant after establishing probable cause that the *Stanford Daily* newspaper might possess pictures that would aid in their investigation of criminal activity by campus protesters at Stanford University.⁸⁴ There was no reason to believe that the newspaper itself, however, had anything to do with any criminal activity.⁸⁵ The Ninth Circuit granted the *Daily* declaratory relief holding, *inter alia*,⁸⁶ that the Fourth Amendment forbade the issuance of a warrant against someone not suspected of a crime unless the government could establish that a subpoena would not be effective.⁸⁷

The Supreme Court disagreed by hoisting the defense on its own petard: the Warrant Clause. In an opinion with a distinctly patronizing tone,⁸⁸ the Court held that there was no need to go beyond the fact that the police possessed a warrant supported by probable cause.⁸⁹ The Court curtly noted that "[t]he Fourth Amendment has itself struck the balance between privacy and public need."⁹⁰

Justice Stevens did not agree. He filed a dissent characterized by Amar as a "brilliant opinion that his fellow Justices simply ignored."⁹¹ Stevens argued that the abolition of the "mere evidence" rule in 1967 resulted in a sea change in Fourth Amendment jurisprudence.⁹² Practically speaking, the restrictions of the "mere evidence" rule had thus limited the targets of warrants to those who probably were involved in a criminal enterprise. The old "mere evidence" rule held that only the fruits and instrumen-

protestors. *See id.* at 550-51.

84. *See id.* at 551.

85. *See id.* The warrant itself contained no allegation that anyone associated with the *Daily* participated in the protest or the confrontation with the police. *See id.*

86. *See id.* at 552. The Ninth Circuit affirmed the District Court's finding that First Amendment principles were also implicated. *See id.* at 553.

87. *See id.*

88. *See, e.g., id.* at 560. The court noted that the Ninth Circuit's "remarkable conclusion" did not "withstand analysis." *Id.* The Court also stated that "[i]t is an understatement to say that there is no direct authority in this or any other federal court for the District Court's sweeping revision of the Fourth Amendment." *Id.* at 554.

89. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 554 (1978) (stating that "[u]nder existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found").

90. *Id.* at 559.

91. Amar, *supra* note 15, at 805-06 n.174.

92. *See Zurcher*, 436 U.S. at 577.

talities of a crime and contraband could be seized by the police; according to the rule, the police had no right to seize other items which were "mere evidence." The abolition of the rule in 1967 meant that police could seize *anything* as long as there was probable cause to believe it was connected with a criminal offense.⁹³ Stevens argued that "[i]n the absence of some other showing of reasonableness," a warrant seeking mere evidence and directed at a wholly innocent person was improper.⁹⁴ Thus Justice Stevens portrayed the warrant directed at the *Stanford Daily* as a powerful example of a warrant which, despite being based upon probable cause, was nevertheless "unreasonable" under the Fourth Amendment.

Even Wasserstrom has written of the independent vitality of the "reasonableness" test.⁹⁵ He admitted that he once thought reasonableness was "a one way street to be used only to water down the requirement of probable cause when necessary to authorize governmental intrusions."⁹⁶ Yet he has subsequently conceded that the Supreme Court has on several occasions found a search or seizure to be unreasonable even though it met all the requirements of the Warrant Clause.⁹⁷

For example, in *Winston v. Lee*,⁹⁸ the prosecution moved for a court order to direct the defendant to undergo a surgical opera-

93. See *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 302-09 (1967), (narrowly limiting *Gould v. United States*, 255 U.S. 298 (1921)).

94. *Zurcher*, 436 U.S. at 583.

95. See generally Wasserstrom, *supra* note 81 (noting that the Court's current approach to analyzing police practices is to apply a general standard of reasonableness).

96. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 311-12 (quoting *Gooding v. United States*, 416 U.S. 430, 465 (1974) (Marshall, J., dissenting)).

97. See Wasserstrom, *supra* note 81, at 140 (noting that in *Winston v. Lee*, 470 U.S. 753 (1985), and *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court found the search (*Winston*) or the seizure (*Garner*) to be unreasonable even though, ostensibly, they met the requirements of the Warrant Clause).

98. 470 U.S. 753 (1985). A store owner, who was closing his store for the night, noticed the defendant walking toward him carrying a firearm. See *id.* at 755. The store owner was also carrying a weapon, and when the defendant pointed his weapon at the store owner, the two exchanged fire. When the police arrived at the scene, they found the store owner with a gunshot wound in his leg. Twenty minutes later, the police found the defendant eight blocks away with a gunshot wound in his left chest. See *id.* at 756. He informed the police that he had received the wound from two individuals who had attempted to rob him. While at the hospital, the store owner identified the defendant as the man who had shot him. See *id.*

tion to remove a bullet.⁹⁹ The prosecution wished to show that the bullet lodged in the defendant was the bullet fired by the victim of the attempted armed robbery, thus disproving the defendant's alibi.¹⁰⁰ The requirements of the Warrant Clause were clearly met, since the Court conceded that the prosecution "plainly had probable cause" and since the court order was obtained at an adversarial hearing where the defendant was represented by counsel.¹⁰¹ Yet the Court held that a "compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security."¹⁰² Thus, the Court held that the intrusion could be found unreasonable under the Fourth Amendment despite the presence of a warrant and probable cause.¹⁰³ As Wasserstrom phrased it, the reasonableness analysis caused the court to "slide above" the warrant and probable cause requirements.¹⁰⁴

99. See *id.* at 756. The trial court conducted several pre-trial hearings on the motion in an attempt to determine the type of surgical procedure necessary to remove the bullet. At the second hearing, the state's expert testified that the surgery would not involve general anesthesia, and it would require only a one to one and one-half inch incision because the bullet was "just beneath the skin." *Id.* Just before the surgery, the surgeon ordered X-rays which revealed that the bullet was lodged much deeper. See *id.* at 757. As a result, the surgeon determined that a general anesthetic was necessary. With the addition of the new evidence, the United States District Court for the District of Virginia enjoined the surgery. See *id.*

100. See *id.* at 765.

101. *Id.* at 763.

102. *Id.* at 759.

103. See *id.* at 767. The Court recognized that the constitutional reasonableness of surgical intrusions will depend on a case-by-case analysis. See *id.* at 760. Nevertheless, the Court, following the logic of the lower courts, held that the surgical procedure in this case was unreasonable because:

[T]he [state] proposes to take control of [the defendant's] body, to "drug this citizen—not yet convicted of a criminal offense—with narcotics and barbiturates into a state of unconsciousness," and then to search beneath his skin for evidence of a crime. This kind of surgery involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin.

Id. at 765 (citation omitted).

104. See Wasserstrom, *supra* note 81, at 142 (stating, "in *Winston v. Lee* the Court did, in a sense, slide above probable cause because the proposed [F]ourth [A]mendment intrusion was so grave, just as it has, in recent years, increasingly slid below probable cause for lesser, *Terry*-type, [F]ourth [A]mendment intrusions"). It must be noted that the gravity to which Professor Wasserstrom refers does not deal with any threat to the life of the defendant in *Winston*. See, e.g., *Winston*, 470 U.S. at 764 n.7 (noting that the risk of harm or death posed to the defendant was minimal particularly because the defendant "was in the statistical group of persons with the lowest risk of injury from general anesthesia"). Rather, the intrusion was so grave because it was the type of state action that was overly intrusive into an area in which

Similarly, in *Tennessee v. Garner*,¹⁰⁵ the police had probable cause to arrest a fleeing felon; no warrant was needed because of the exigent circumstances surrounding the chase.¹⁰⁶ Nevertheless, the Court found that the use of deadly force in effecting the arrest violated the Fourth Amendment because it was not reasonable to use deadly force on a fleeing non-violent suspect.¹⁰⁷ In *Welsh v. Wisconsin*,¹⁰⁸ the Court refused to uphold an otherwise proper warrantless arrest based on probable cause because it was accomplished through a home entry and the offense was relatively minor.¹⁰⁹ Once again, the Reasonableness Clause "trumped" the Warrant Clause. And most recently in *Wilson v. Arkansas*,¹¹⁰ the Court held that a warrant accompanied by probable cause is not enough to excuse the police officers' failure to "knock and announce" before entering a residence.¹¹¹

the citizenry has a reasonable expectation of privacy. *See id.* at 767.

105. 471 U.S. 1 (1985). In *Garner*, the father of a burglary suspect brought suit under 42 U.S.C. § 1983 (1994), after a Memphis police officer shot and killed his son who was fleeing from the scene of the burglary. *Id.* at 1. The plaintiff alleged violations of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments. *See id.* at 5. The police officer was "reasonably sure" that the plaintiff's son was not armed. *See id.* at 3. The police officer ordered the plaintiff's son to halt, and after the plaintiff's son began climbing a fence to escape the scene, the police officer fired his weapon hitting the plaintiff's son in the back of the head. *See id.* at 4. The police officer was acting under a Tennessee statute that allows an arresting officer to use "all the necessary means to effect the arrest" if a suspect flees or forcibly resists arrest. *Id.* at 4 (citing TENN. CODE ANN. § 40-7-108 (1982)).

106. *See id.* at 3 (giving the facts surrounding the incident that gave rise to probable cause). The police officer arrived on the scene and was immediately informed by a woman that she heard breaking glass in her neighbor's house. The woman told the officer that she thought someone was breaking in next door. When the officer went to the back of the house in question, he heard a door slam and saw someone run to the fence at the edge of the backyard. It was this individual whom the officer shot. *See id.*

107. *See id.* at 12.

108. 466 U.S. 740 (1984). A witness observed a car being driven erratically. *See id.* at 742. The car swerved off the road, coming to a stop in a field. There was no personal or property damage as a result of the incident. The witness instructed the driver, the defendant, to stay at the scene until the police arrived, but the defendant simply walked away from the accident scene. When the police arrived, they checked the license and registration of the car, and, without securing a warrant, went to the defendant's home. *See id.* at 743. The defendant's stepdaughter allowed the police to enter their house. When the police found the defendant, they arrested him for driving under the influence. The offense carried a maximum penalty of a \$200 fine. *See id.* at 746.

109. *See id.* at 754.

110. 514 U.S. 927 (1995).

111. *Id.* at 929. *Wilson* involved the sale of illicit drugs to a police informant. *See id.* The day after a police informant purchased marijuana from the defendant,

There is therefore no reason to necessarily view the Reasonableness Clause and the Warrant Clause as two competing theories. Rather, the Reasonableness Clause can be used to complement—and indeed supplement—the Warrant Clause in certain situations. It is a lesson the defense community should take to heart.

3. The Limits of the Fourth Amendment Itself

After this discussion of privacy, warrants, probable cause, and reasonableness, there is yet another critique which demands our attention. This argument says that courts need to go beyond the Fourth Amendment itself in trying to vindicate citizens' rights against law enforcement. It looks to due process as a vehicle for dealing with issues untouched by the current interpretation of the Fourth Amendment.

Professor Stuntz has recently discussed the Supreme Court's change from an application of the Due Process Clause to selective incorporation of the Fourth Amendment in its criminal procedure jurisprudence.¹¹² He focused on what was lost.

Stuntz argued that the Framers, of course, had no concept of a police force, much less a modern urban police force.¹¹³ Courts slowly responded to the unique new problems posed by the rise of organized police. Yet beginning with *Brown v. Mississippi*¹¹⁴ in 1936, the Supreme Court began to employ the Due Process Clause of the Fourteenth Amendment to construct a body of law governing police behavior.¹¹⁵ During the next few decades, the Court

the police obtained a warrant to search the defendant's home. When the police arrived to carry out the warrant, they found the front door open. They entered the house, identified themselves as police officers, and stated that they had a warrant to search the premises. They subsequently seized marijuana, methamphetamine, valium, drug paraphernalia, a gun, and ammunition. When they found the defendant, she was flushing marijuana down the toilet. At trial, the defendant moved to suppress the evidence seized during the search on the grounds that the officers failed to "knock and announce" before entering the home. *See id.* at 930.

112. *See generally* Stuntz, *supra* note 47, at 433-46 (discussing the Court's selective incorporation of portions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment to protect individual rights from abuses by the state). *See also supra* note 58 for a discussion of the decisions in *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

113. *See* Stuntz, *supra* note 47, at 401.

114. 297 U.S. 278 (1936); *see also supra* note 59.

115. *Brown* held that the use of violence to force confessions, and the later use of these confessions as evidence to convict the defendants, "was a clear denial of *due*

decided a substantial number of cases in the area of police-obtained confessions¹¹⁶ and a smaller number relating to search and seizure.¹¹⁷ Stuntz noted that these cases were not about privacy protection. Instead, they dealt directly with constitutional limitations on police violence and coercion.

What happened after selective incorporation?¹¹⁸ The Supreme Court's Fourth Amendment jurisprudence, as we have seen, was driven by *Boyd*'s¹¹⁹ focus on privacy. The result, according to Stuntz, was that concerns about police violence and coercion now took a back seat to privacy. Stuntz observed that "privacy protection in *Boyd* . . . had no more to do with the problems of police misconduct in the 1960s than *Lochner* or the First Amendment have to do with the Rodney King incident. Nevertheless, after the incorporation cases, *Boyd* defined what the law that governed ordinary police investigation of crime was about."¹²⁰

Stuntz is not alone in this view. Donald Dripps has argued that "[w]hen it comes to constitutional criminal procedure, our first principle should be due process."¹²¹ He argues that "due process could go further than the Fourth Amendment . . . because 'liberty' is a more expansive concept than privacy."¹²² He has offered his own alternative view of constitutional criminal procedure based on procedural due process.¹²³

process." 297 U.S. at 286 (emphasis added).

116. See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (holding that the admission into evidence of a confession, which the defendant did not write or sign and which was only obtained after 36 hours of intensive interrogations without an attorney present, was a violation of the Due Process Clause); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (holding that the use of a confession from a defendant who had a mental capacity of a nine-year-old was a violation of the Due Process Clause where the defendant was not brought before a judge, as was required by state law, and the defendant's confession came after five days in police custody).

117. Compare *Irvine v. California*, 347 U.S. 128 (1954) (holding that evidence obtained by illegally entering the defendant's home to place listening devices violated the defendant's right to Due Process, but following *Wolf v. Colorado*, 338 U.S. 25 (1949), and refusing to apply the exclusionary rule to such evidence), with *Rochin v. California*, 342 U.S. 165 (1952) (holding that a forced "stomach pump" type procedure to obtain evidence that the defendant had swallowed was a violation of the Due Process Clause).

118. See *supra* note 58 and accompanying text.

119. *Boyd v. United States*, 116 U.S. 616 (1886).

120. Stuntz, *supra* note 47, at 440.

121. Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1639 (1996).

122. *Id.* at 1637.

123. See generally Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*,

Not all legal observers share Stuntz's view that the criminal cases decided under the Due Process Clause through the 1950s provided a very workable body of precedent.¹²⁴ However one does not have to question selective incorporation *per se* to see that Fourth Amendment cases during the last four decades have had remarkably little to say about police behavior, especially regarding the use of force. As noted above, it was not until 1985 that the Supreme Court confronted an issue as basic as the use of deadly force to effectuate an arrest.¹²⁵ It was not until 1995 that the Court decided whether the police had to "knock and announce" when executing a search warrant at a residence.¹²⁶ As Stuntz observed, "The vast majority of the many rules that govern how the police deal with suspects do not concern the level of force the police can apply. Rather, those rules govern what the police can see or hear."¹²⁷

Thus, the current state of the law concerning searches and seizures has several broad themes. First, search and seizure problems are dealt with almost exclusively under the Fourth Amendment. Second, among the interests promoted by the Fourth Amendment, personal privacy is the most important. Third, within the structure of the Fourth Amendment itself, the Warrant Clause has primacy. Fourth, the Reasonableness Clause is usually viewed as merely a "back up system" when the Warrant Clause is inapplicable for some reason. With this background, we can now see how the lawyers for Whren and Brown were constrained to frame their arguments before the Supreme Court.

23 U. MICH. J. L. REFORM 591 (1990) (setting out Professor Dripps's theory of criminal procedure based on procedural due process).

124. See Stuntz, *supra* note 47, at 437-38 n.194. But see Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inaba and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963) (arguing that the U.S. Supreme Court's criminal decisions prior to the 1960s did not adequately outline the requirements of the Due Process Clause).

125. See *supra* notes 105-07 and accompanying text for a discussion of *Tennessee v. Garner*, 471 U.S. 1 (1985), which was the first case in which the Supreme Court ruled on the use of deadly force by the police when effectuating an arrest.

126. See *supra* notes 110-11 and accompanying text for a discussion of *Wilson v. Arkansas*, 514 U.S. 927 (1995), and how the Court used that case to establish the "knock and announce" rule.

127. Stuntz, *supra* note 47, at 446.

II. THE STRUCTURE OF WHREN'S ARGUMENTS IN THE SUPREME COURT

The opening of the argument section of the petitioners' brief to the Supreme Court made it clear what the defense thought the *Whren* case was about. Heading "I.A." read: "The Essential Purpose of the Fourth Amendment Is to Safeguard Our Privacy Against Arbitrary Invasions."¹²⁸ The first paragraph is comprised of quotations from two cases. It cites *Wolf v. Colorado*¹²⁹ for the proposition that "security of one's privacy . . . is at the core of the Fourth Amendment."¹³⁰ It then cites *Delaware v. Prouse*¹³¹ which states that the "essential purpose" of the Fourth Amendment's reasonableness requirement is to "safeguard the privacy and security of individuals against arbitrary invasions."¹³² Clearly the petitioners wished to position themselves squarely within the mainstream view of the primary value protected by the Fourth Amendment: privacy.

Yet perhaps an analogy would illustrate what is wrong with this picture. Let us assume that we have just told a friend about the police decision to pump the stomach of the suspect in *Rochin v. California*.¹³³ Our friend responds: "That's terrible! The police have no right to know the contents of a person's stomach! That is highly personal information!" Most of us might be a bit puzzled by this response and would probably respond, "Well, yes. But the real problem is the outrageousness of the police behavior in pumping his stomach."

128. Petitioners' Brief at 15, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

129. 338 U.S. 25 (1949).

130. Petitioners' Brief at 15, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

131. 440 U.S. 648 (1979).

132. *Id.* at 654 (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (quoting *Camara v. Municipal Ct.*, 387 U.S. 523, 528 (1967))); *see also* Petitioners' Brief at 15-16, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841).

133. 342 U.S. 165 (1952). The "stomach pump" procedure was a result of police officers witnessing the defendant swallowing two capsules. *See id.* at 166. After a struggle, the officers took the defendant to a hospital and instructed a doctor to empty the defendant's stomach. The doctor forced an emetic solution into the defendant's stomach through a tube that the doctor forced down the defendant's throat. The solution induced the defendant to regurgitate the contents of his stomach. In these contents, the police found the two capsules containing morphine. The entire procedure was performed against the defendant's will, and was found to violate the Due Process Clause. *See id.*

This difference in focus—between the privacy of the suspect and the behavior of the police—is subtle, but crucial. For when the counsel for Whren and Brown began the argument using the traditional Fourth Amendment privacy paradigm, the case was essentially over. The petitioners conceded that the stop here was not “arbitrary” in the *Delaware v. Prouse* sense because the officers were acting pursuant to three duly enacted traffic laws; they conceded that these laws were valid; they conceded that the police had probable cause to believe that Whren and Brown had violated these laws; and they conceded that the “automobile exception” excused the need for a warrant. Under the traditional “privacy primacy” view of the Fourth Amendment, this meant “game, set, and match” to the government.

And this is exactly what the Court’s unanimous opinion held. In response to the petitioners’ contention that the Court’s inventory cases¹³⁴ and administrative search cases¹³⁵ warned against pretextual motivations, the Court distinguished *Whren* by noting that those two situations were searches “conducted in the absence of probable cause.”¹³⁶ Here, there was probable cause.

The Court emphasized that under a Fourth Amendment analysis, the subjective motivations of the police officer are irrelevant. In response to the petitioners’ claim that they wanted the Court to evaluate how a reasonable officer would have acted under the same set of circumstances—by examining, for example, departmental manuals and guidelines—the Court brusquely dismissed this as “virtual subjectivity.”¹³⁷ Thus, under the existing paradigm the Court unanimously found no Fourth Amendment violation.

None of this is meant to be critical of the performance of the petitioners’ attorneys. Within the confines of the current paradigm, they did an excellent job. The problem is that the Court’s

134. See, e.g., *Florida v. Wells*, 495 U.S. 1 (1990) (holding that an inventory search involving the unlocking of a suitcase violated the Fourth Amendment); see also *Colorado v. Bertine*, 479 U.S. 367 (1987) (holding that, in the absence of bad faith on the part of the police, evidence obtained in an inventory search of a vehicle after the driver was arrested for driving under the influence was admissible).

135. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987) (holding that a state statute that authorized warrantless searches of a vehicle dismantling business fell within the exception to the Fourth Amendment’s warrant requirement for administrative inspections of closely regulated businesses).

136. *Whren v. United States*, 116 S. Ct. 1769, 1773 (1996).

137. *Id.* at 1775.

current approach to the Fourth Amendment—with its dual emphasis on privacy and the Warrant Clause—simply does not provide a *vocabulary* for attacking the kind of police behavior manifested in this case.

Moreover, in one aspect Whren's attorneys did in fact make an argument similar to one of the critiques discussed above. Overcoming the usual defense distaste for "reasonableness" arguments, the petitioners argued that, in addition to Warrant Clause considerations, the Court should engage in a separate "reasonableness" balancing and find the officers' activity violative of the Fourth Amendment. Thus, similar to the critique discussed above, petitioners contended that the Reasonableness Clause should have a vitality separate and distinct from the Warrant Clause.¹³⁸ The petitioners' brief cited all the cases listed above which required something in addition to probable cause.¹³⁹ However, the unanimous Court responded that:

It is of course true that in principle every Fourth Amendment case, since it turns upon a "reasonableness" determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause.¹⁴⁰

The Court then distinguished those cases where the Court had found that probable cause was not sufficient—cases such as *Welsh v. Wisconsin*,¹⁴¹ *Tennessee v. Garner*,¹⁴² *Winston v. Lee*,¹⁴³ and *Wilson v. Arkansas*¹⁴⁴—by characterizing the searches and seizures in those cases as having been conducted in an "extraordi-

138. Petitioners' Brief at 16-17, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841).

139. See *id.* (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Welsh v. Wisconsin*, 466 U.S. 740 (1984)); see also *supra* notes 105-11 and accompanying text for a discussion of *Garner*, *Welsh*, and *Wilson*.

140. *Whren*, 116 S. Ct. at 1776.

141. 466 U.S. 740 (1984); see also *supra* notes 108-09 and accompanying text for a discussion of *Welsh*.

142. 471 U.S. 1 (1985); see also *supra* notes 105-07 and accompanying text for a discussion of *Garner*.

143. 470 U.S. 753 (1985); see also *supra* notes 98-103 and accompanying text for a discussion of *Winston*.

144. 514 U.S. 927 (1995); see also *supra* notes 110-11 and accompanying text for a discussion of *Wilson*.

nary manner.”¹⁴⁵ It found no such “extraordinary manner” in *Whren* and thus fell back on the “usual rule” that “probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”¹⁴⁶

The Court thus unanimously found that the current conception of the Fourth Amendment provides no relief for pretextual arrests. The next logical question is, for those still disturbed by the injustice and unfairness of pretextual police activity, “Where do we go from here?”

III. THAT WAS *WHREN*, THIS IS NOW: TWO APPROACHES FOR CONTINUING THE FIGHT AGAINST PRETEXT ARRESTS

Whren has undoubtedly delivered a serious blow to the drive to eliminate pretext arrests in America. Yet the blow may not be fatal. This section will suggest two ways of continuing the fight despite the *Whren* decision.

It should be noted that these two suggestions are in addition to the obvious point that individual states are free to ignore *Whren* and find that pretext arrests are improper under their own state constitutional search and seizure protections.¹⁴⁷ The following suggestions, however, are based on the Federal Constitution and can be raised in both federal and state courts.

A. *Violation of a Law Does Not Necessarily Justify Police Seizure*

The petitioners in *Whren* argued that the issue was whether a reasonable officer in the same circumstances would have made

145. *Whren*, 116 S. Ct. at 1776.

146. *Id.* at 1777.

147. See *Michigan v. Long*, 463 U.S. 1032, 1032 (1983) (providing a general explanation of “independent and adequate” grounds). For specific examples of state courts using their own constitutions to find unreasonable searches and seizures, see *New Jersey v. Novembrino*, 519 A.2d 820, 857 (N.J. 1987) (rejecting *United States v. Leon*, 468 U.S. 897 (1984), by refusing to subject state rules that safeguard fundamental rights “to the uncertain effects that . . . will inevitably accompany the good faith exception [established by *Leon*] to the exclusionary rule”); *North Carolina v. Carter*, 370 S.E.2d 553, 559 (N.C. 1988) (reasoning that a state rule justified the rejection of *Leon* because it “maintains the integrity of the judicial branch”); *Oregon v. Tanner*, 745 P.2d 757, 758 (Or. 1987) (holding that *Leon* is not applicable because Oregon’s exclusionary rule is based on defendants’ rights not on deterring police conduct).

a stop for the reasons given.¹⁴⁸ Yet the petitioners never made the argument that there might be some laws which, although concededly valid, may nevertheless fail to justify a seizure of a person under the Fourth Amendment. The offenses in *Whren* were three civil ordinances, each of which was punishable by a fine of \$25.¹⁴⁹ Can something be a valid, legal offense and yet not important enough to justify a seizure of a person under the Fourth Amendment?

The genesis of such an argument can be found in Justice Stewart's provocative concurrence in *Gustafson v. Florida*.¹⁵⁰ Gustafson, the driver of a car, was arrested for failure to have an operator's license after a police officer observed the car weaving across the center line several times.¹⁵¹ The offense for which he was arrested carried no mandatory minimum sentence and was characterized as "benign or trivial in nature."¹⁵² Gustafson argued that the search incident to his custodial arrest was improper because there were no police department policies mandating the custodial arrest of traffic offenders.¹⁵³ The Court found the search proper despite this police discretion.¹⁵⁴

Justice Stewart noted that Gustafson confined his argument to the proposition that the *search* was improper following a custodial arrest performed pursuant to police discretion. However, nowhere did Gustafson challenge the constitutionality *per se* of a *custodial arrest* for a minor traffic offense. Thus, although that issue was not before the Court, Stewart wrote "that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense

148. See *Whren*, 116 S. Ct. at 1773; see also Petitioners' Brief at 32, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841) (arguing that "this court's precedent supports the rule that a seizure based on a minor traffic infraction is 'unreasonable' if a reasonable officer in the same circumstances would not have made it").

149. See Petitioners' Brief at 40-41, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841).

150. 414 U.S. 260, 266 (1973).

151. See *id.* at 262.

152. See *id.* at 263.

153. See *id.*

154. See *id.* at 265-66 (relying on *United States v. Robinson*, 414 U.S. 218 (1973), which was decided the same day as *Gustafson*, and held that a search incident to arrest was proper where the offense for which Robinson was charged required a custodial arrest under local law).

violated his rights under the Fourth and Fourteenth Amendments."¹⁵⁵

It is surprising that such an intriguing idea has attracted relatively little attention over the past quarter century. The Fourth Circuit referred to it in the course of rejecting an argument that a violation of a county ordinance punishable only by a fine would not constitutionally support a custodial arrest.¹⁵⁶ The Ninth Circuit likewise alluded to Justice Stewart's concurrence in rejecting a contention that the Fourth Amendment forbade custodial arrests for municipal ordinance violations.¹⁵⁷ A decision from the Northern District of Illinois referred to Justice Stewart's comment in the course of holding that a custodial arrest for violation of a business license ordinance was constitutional.¹⁵⁸ Academic literature includes two excellent articles discussing

155. *Id.* at 266-67.

156. *See Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (noting that the defendant argues that because the offense she committed is punishable only with a fine, "any custodial arrest is per se unconstitutional"). The court further noted that although "there have been some intimations from some members of the Supreme Court that perhaps for some minor offenses no custodial arrest should be considered constitutionally permissible . . . the Court has never held so." *Id.*

157. *See Higbee v. City of San Diego*, 911 F.2d 377 (9th Cir. 1990). Plaintiffs challenged the constitutionality of a state statute that allowed police officers to deny individuals, who have committed a misdemeanor, a field release based on possible future conduct. *See id.* at 379. The court alluded to Justice Stewart's concurrence when it stated:

The state is constitutionally permitted to detain all misdemeanor arrestees for the usual post-arrest procedures. California has excepted some alleged misdemeanants [sic] from this procedure—that is California's right. It has also provided that some misdemeanants will be subject to the custodial post-arrest procedures—that too is California's right. To require that those likely to continue to break the law be processed in a custodial manner certainly seems rational.

Id. at 379. The court also noted that the right of police officers to arrest an individual who commits an offense—felony or misdemeanor—in the officer's presence "has never been successfully challenged and stands as the law of the land." *Id.*

158. *See Ricci v. Village of Arlington Heights*, 904 F. Supp. 828, 832 (N.D. Ill. 1995) (noting Justice Stewart's position on custodial arrests for violations of traffic laws, and further noting that no federal court has adopted this position), *aff'd*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 679 (Jan. 9, 1998) (No. 97-501); *see also New Jersey v. Pierce*, 642 A.2d 947, 950 (N.J. 1994) (discussing and refusing to adopt Justice Stewart's concurrence); *New Jersey v. Pierce*, 608 A.2d 952, 955 (N.J. Super. Ct. App. Div. 1992) (Pressler, J., dissenting) (agreeing with Justice Stewart that allowing police officers to make arrests for traffic violations presents Fourth Amendment problems).

Justice Stewart's idea.¹⁵⁹ But, on the whole, Justice Stewart's argument has not received the attention it deserves.

Can the police have "probable cause" to take certain action and yet this action would nevertheless be considered unreasonable under the Fourth Amendment? This was suggested by Judge Frank Easterbrook of the Seventh Circuit in *Gramenos v. Jewel Co.*¹⁶⁰ Judge Easterbrook noted that under common law, an arrest for a misdemeanor could be made only if the misdemeanor was committed in the presence of the arresting officer.¹⁶¹ He noted that the Supreme Court had "bypassed opportunities" to decide if this aspect of the common law was part of the Fourth Amendment.¹⁶² Although the issue did not have to be resolved in *Gramenos*, Judge Easterbrook noted that "[i]t is important to understand that 'probable cause' is not always the same thing as 'reasonable' conduct by the police."¹⁶³

The concept of an offense which would not justify an arrest by the police may appear paradoxical. But there currently is a striking example of this found in the law of many states. Forty-nine states have laws requiring the use of seat belts in automo-

159. See Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 253 (1989) (noting that at least one justice, Justice Stewart, believes custodial arrests for minor traffic offenses are unconstitutional). See generally Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127 (agreeing with Justice Stewart and condemning a blanket authority of police to make custodial arrests for minor offenses).

160. 797 F.2d 432 (7th Cir. 1986). *Gramenos*, like *Tennessee v. Garner*, 471 U.S. 1 (1985), involved a suit under 42 U.S.C. § 1983 (1994). The plaintiff, an attorney, was arrested for shoplifting. See *id.* at 434. A security guard for Jewel supermarkets stopped the plaintiff near the store's exit. See *id.* at 433. The two exchanged words, and then the plaintiff ran through the store. The security guard caught up with the plaintiff, and held him in an office until police officers arrived at the scene. When the police arrived, the security guard showed them items that he accused the plaintiff of attempting to take from the store. The plaintiff denied taking the items and stated that he first thought the security guard was attempting to assault him. See *id.* at 434. The plaintiff said that when he learned that the person was actually a security guard, he went through the store looking for a manager to complain about the security guard's behavior. The plaintiff was acquitted on the charge of shoplifting and then brought the § 1983 suit against the supermarket, the security guard, the arresting officers, and the desk officer in the police station at which the plaintiff was booked and held. See *id.*

161. See *id.* at 441.

162. See *id.* (citing *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring)).

163. *Id.*

biles; yet *thirty-six* of these states forbid the police from stopping an automobile for commission of this offense.¹⁶⁴ In other words, if the seat belt offense is discovered by the police pursuant to an otherwise proper stop, the defendant may be charged, but observation of the offense alone will not justify a stop.¹⁶⁵ Thus, applying the language of Judge Easterbrook's observation, merely having "probable cause" for an action might not—at least under these state laws—make an action "reasonable."¹⁶⁶

Whren does not foreclose an argument that it may be constitutionally unreasonable under the Fourth Amendment—or at least under an individual state's version of the Fourth Amendment—to initially make a stop based on trivial traffic offenses. Analogizing to the seat belt rules in many states, an argument could be made that while there is nothing constitutionally improper with punishing people for a variety of trivial mistakes, it is a separate constitutional issue whether it is reasonable to seize and detain a person solely on the basis of such behavior.

While this argument may be made to the judiciary, an appeal to the *legislature* may be even more successful. Since the legislatures of thirty-six states have already recognized the possibility of creating an offense which will not justify a police stop, there is precedent for asking state legislatures to recognize even more exceptions for similar violations. Empirical evidence could be used to identify those particular laws which law enforcement appear to be using to satisfy "hunches."¹⁶⁷ The fact that this is constitutional under *Whren's* view of the Fourth Amendment,

164. See Matthew L. Wald, *Freewheeling Freedom: Appalled by Risk, Except in the Car*, N.Y. TIMES, June 15, 1997, § 4, at 4 (noting that of the 49 states that have laws requiring drivers and front seat passengers to use seat belts, 36 states prevent police officers from stopping a vehicle for violating these laws).

165. See, e.g., *People v. Edwards*, 673 N.E.2d 752 (Ill. App. Ct. 1996); *People v. Hunt*, 225 Cal. App. 3d 498 (Cal. Ct. App. 1990).

166. See *Gramenos*, 797 F.2d 432, 439 (7th Cir. 1986) (noting that "it may be possible to have an understandable definition of probable cause even though 'reasonableness' remains as a separate issue").

167. See Petitioners' Brief at 19-22, *Whren v. United States*, 116 S. Ct. 1769 (1996) (No. 95-5841) (The brief quotes police officers as saying, "In the event that we see a suspicious automobile or occupant and wish to search the person or the car, or both, we will usually follow the vehicle until the driver makes a technical violation of a traffic law. Then we have a means of making a legitimate search."). Some of the "technical" violations include driving too fast, driving too slowly, driving precisely the speed limit if deemed by the officer to be unreasonably fast for the conditions, and failure to signal for at least three seconds. See *id.* at 19-20.

of course, has no bearing on a state legislature's decision of a wise course for its own state. Moreover, the empirical evidence could help identify possible discriminatory use of particular trivial traffic offenses against certain minority groups—something *Whren* held was completely irrelevant under the Fourth Amendment.¹⁶⁸

Thus, despite *Whren*, pressure can be maintained on both courts and the legislatures to continue examining when our society will countenance police interference with drivers based on trivial offenses—especially when this interference is predicated on racial stereotypes.

B. Limiting Pretexts by Applying the "Void-for-Vagueness" Doctrine

As discussed above, one criticism of current Fourth Amendment jurisprudence is that it has superseded the use of other constitutional provisions which may also impact on search and seizure issues. One example is the Due Process Clause. In the wake of *Whren*, one theory which merits careful consideration is the "void-for-vagueness" doctrine derived from the Due Process Clause. It may provide an effective vehicle for challenging pretext arrests on both the state and federal level.

The basic concept behind the "void-for-vagueness" doctrine is that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."¹⁶⁹ Or, in the words of another Supreme Court decision, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."¹⁷⁰

168. See *Whren*, 116 S. Ct. at 1774. The Court stated:

We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Id. Cf. Amar, *supra* note 15, at 790, 808-09 (arguing that equal protection principles should be included as a part of the Fourth Amendment).

169. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

170. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Although the traditional black-letter interpretation of “void-for-vagueness” stressed lack of notice to the public as the basic due process value being vindicated, the Supreme Court has held that this is no longer true. In *Kolender v. Lawson*, the Court noted:

Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine “is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.”¹⁷¹

When such guidelines are not provided, the result is a statute which provides a “standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.”¹⁷² Such a statute furnishes “a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure.’”¹⁷³ The doctrine seeks to prevent law enforcement officers from exercising a “virtually unrestrained power to arrest and charge persons with a violation.”¹⁷⁴

How does this apply to *Whren*? Certainly the offense of failure to signal for a turn is precise enough to cabin the discretion of police officers. Also the offense of driving at an unreasonable speed is one a society might want the police to exercise according to their discretion. But consider the offense of not giving “full attention to the operation of a vehicle.” This type of an offense is ripe for a “void-for-vagueness” attack.

The advantages of the void-for-vagueness doctrine over the Fourth Amendment should be obvious. One of the reasons for the stop was the existence of the \$25 civil violation for failing to “give full time and attention” to the operation of the vehicle.¹⁷⁵ Con-

171. 461 U.S. 352, 357-58 (1983) (emphasis added) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

172. *Id.* at 358 (alteration in original) (quoting *Smith v. Goguen*, 415 U.S. at 575).

173. *Id.* at 360 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940))).

174. *Id.* (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring)).

175. See *Whren*, 116 S. Ct. at 1772-73.

sequently, the *Whren* Court refused to look at the racial realities of the case, saying only that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."¹⁷⁶

Yet the void-for-vagueness doctrine meets the realities of discrimination head-on. The quotations from the *Kolender* case discussed above show the doctrine's focus on fighting arbitrary, discriminatory enforcement of laws. The California statute in *Kolender* punished any person wandering about the streets who refused to identify himself to a peace officer;¹⁷⁷ the California Supreme Court interpreted the statute to mean that an individual must provide "credible and reliable" identification.¹⁷⁸ The Court was well aware that the defendant in *Kolender* was an African-American man.¹⁷⁹ The Court's opinion prominently notes that Mr. Lawson—who otherwise had no trouble with law enforcement authorities¹⁸⁰—had been stopped for this offense fifteen times during a two-year period.¹⁸¹ It was clear that Mr. Lawson's race, habits, and appearance made him a frequent

176. *Id.* at 1774.

177. See CAL. PENAL CODE § 647(e) (1978) (repealed 1983). The statute provided:

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Id., quoted in *Kolender*, 461 U.S. at 354.

178. See *Kolender*, 461 U.S. at 358.

179. See Brief for the Appellee, at 7, *Kolender v. Lawson*, 461 U.S. 352 (1983) (No. 81-1320) (describing the appellee as a "black, thirty-six year old business consultant . . .").

180. See *id.* at 354 n.2. Other than being stopped under this particular statute, Mr. Lawson maintained that he had never been stopped by the police for any reason whatsoever. See *id.*

181. See *id.* at 354. The two-year period was from March of 1975 to January 1977. One police officer testified that on one of the occasions he questioned Mr. Lawson because he was walking late at night on a vacant street near a high crime area. See *id.* at n.2. Another police officer testified that he stopped Mr. Lawson because he was walking in a business district in which burglaries had recently been reported. Of the 15 times Mr. Lawson was stopped by the police, he was prosecuted only twice. See *id.* at 354. With respect to these two prosecutions, Mr. Lawson was convicted on one of the charges, and the second charge was dismissed. The Court also noted the definite possibility that Mr. Lawson could be stopped and questioned under this statute at some point in the future. See *id.* at 355 n.3.

target of police attention. In striking the statute down on void-for-vagueness grounds, the Court focused on the apparent fact that this statute allowed for arbitrary, discriminatory enforcement.¹⁸² It placed enormous discretion in the hands of the individual police officer to determine who came under the ambit of the statute. *Kolender*—unlike *Whren*—looked at the realities of law enforcement.

This same quality can be found in another case where the Supreme Court applied void-for-vagueness to strike down a statute. *Papachristou v. City of Jacksonville*¹⁸³ concerned the constitutionality of a vagrancy statute.¹⁸⁴ A large portion of the

182. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 218 (1985) (“[I]t seems quite clear that the Court focused on the right problem—namely, the susceptibility of the law in question to arbitrary and discriminatory enforcement. That is the only rationale that plausibly supports this decision, and . . . it is the most persuasive justification for vagueness review generally.”). Professor Jeffries is emphatic in his assertion that arbitrariness in the enforcement of laws, particularly laws similar to the one in *Kolender*, necessarily implicates racial discrimination. *Cf. id.* at 197. Professor Jeffries classifies laws such as the one at issue in *Kolender* as “street-cleaning” statutes. *See id.* at 216. He argues that a “rule of law perspective” with respect to the void-for-vagueness doctrine explains why this doctrine is frequently used against these forms of statutes. *Id.* at 215. *Kolender* is the best example of the rule of law in action with respect to street-cleaning statutes. *See id.* at 217. The rule of law to which he refers “signifies the constraint of arbitrariness in the exercise of government power.” *Id.* at 212. The rule of law seeks to advance “regularity and evenhandedness in the administration of justice and accountability in the use of government power.” *Id.* Professor Jeffries maintains, and I agree, that in modern American society, the rule of law and notions of equality are closely linked. *See id.* at 213. With respect to equality, the single most important concern is racial and ethnic equality. *See id.* at 213-14. As Professor Jeffries states, “inhibiting racial discrimination is very much a part of what the rule of law is all about.” *Id.* at 214. In fact, the Constitution, and thus the rule of law, are committed to “the equal protection of the laws.” *Id.* at 213. The Court in *Kolender* also noted this commitment. 461 U.S. at 357 (stating “[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty”). Finally, Professor Jeffries maintains that the rule of law “also reveals the common ground between ‘normal’ vagueness cases and the use of the vagueness doctrine to assure ‘breathing space’ for [F]irst [A]mendment freedoms.” *See Jeffries, supra*, at 216. First Amendment freedoms are also something the Court was concerned with in *Kolender*. 461 U.S. at 358 (remarking that “[o]ur concern here is based upon the ‘potential for arbitrarily suppressing First Amendment liberties’” (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965))).

183. 405 U.S. 156 (1972).

184. At the time of the arrest and conviction, the ordinance in question provided as follows:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers,

court's opinion describes in detail just who the defendants were who had been arrested under this statute.¹⁸⁵ A picture emerges of men being stopped because they were black, and white women being stopped because they were with black men.

persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

JACKSONVILLE, FLA., CODE § 26-57 (1965), quoted in *Papachristou*, 405 U.S. at 156-57 n.1.

185. See *Papachristou*, 405 U.S. at 158-60. *Papachristou* involved five consolidated cases concerning the following defendants: Papachristou, Calloway, Melton, and Johnson were charged with prowling by auto; Smith and Henry were charged with being vagabonds; Heath and a codefendant were charged with loitering and being common thieves; Campbell was charged with being a common thief; and Brown was charged with disorderly loitering on the street. See *id.* at 158.

Papachristou and Calloway were white females accompanied by Melton and Johnson who were African-American males. See *id.* All were employed or enrolled in a college. The four were riding in Calloway's automobile on their way to a nightclub. See *id.* at 158-59. They were arrested because they stopped near a used-car lot which had been recently burglarized several times. See *id.* at 159. The arresting officer stated that the "racial mixture" of the four individuals was not a reason for the arrest. See *id.*

Smith and Henry, both African-Americans, were arrested in the morning as they waited for a friend to pick them up so they could go apply for work. See *id.* They were walking back and forth over a two-block area looking for their friend when a police officer stopped, questioned, and searched the two. The police questioned them because a local business owner thought the two were suspicious looking. The police officer stated that he arrested Smith and Henry because he did not believe their story that they were waiting for a friend. See *id.*

Heath and his codefendant were arrested when they arrived at Heath's girlfriend's home. See *id.* at 160. Police officers were already at the scene effectuating the arrest of another man when they told Heath and his codefendant to get out of their car. The police searched the vehicle, and although they found no illegal items, they arrested Heath for being a common thief because they heard that he was a thief. They arrested Heath's codefendant for loitering in the driveway even though he was standing in the driveway at the insistence of the police officers. See *id.*

Campbell was arrested just as he arrived home. See *id.* The police stopped him because he was speeding. Although Campbell was not charged with speeding, he was arrested for being a common thief. See *id.*

Finally, Brown was arrested after a police officer saw him leave a hotel. See *id.* The police officer stated that he knew Brown to be "a thief, narcotics pusher, and generally obnoxious character." *Id.* The officer called Brown over to the police cruiser where the officer was seated, and Brown complied with the command. The officer testified that he intended to arrest Brown unless he had an explanation as to why he was out on the street. When Brown got to the police cruiser, the officer searched him. See *id.* In the process of the search, the officer found two small packets of heroin, at which time Brown resisted the search. See *id.*

Some of the items in the statute—for example, “rogues and vagabonds”—provide textbook examples of items which provide no real notice to the public.¹⁸⁶ Yet other categories are painfully specific. For example, Justice Douglas focused on the statute’s mention of “[p]ersons able to work but habitually living upon the earnings of their wives or minor children.”¹⁸⁷ This provides a good deal of notice to the public. Justice Douglas notes that this “might implicate unemployed pillars of the community who have married rich wives.”¹⁸⁸ Yet from Justice Douglas’ thorough descriptions of the defendants in this case, it was clear, of course, that the Jacksonville police were not applying it to “pillars of the community.”¹⁸⁹ Justice Douglas concluded by reminding us that “the rule of law implies equality and justice in its application The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”¹⁹⁰

Again, compare this to Fourth Amendment analysis. There the “rule” of probable cause takes precedence over the “standard” of reasonableness.¹⁹¹ Messy details of discrimination are irrelevant under a regime of supposed objectivity. Racial bias on the part of police officers is considered an Equal Protection issue, rather than a Fourth Amendment problem.

Under a “void-for-vagueness” review, however, the Court would be very interested in just who seems to be stopped over and over in the District of Columbia for not giving “full time and attention to the operation of the vehicle.”¹⁹² Under “void-for-

186. See JACKSONVILLE, FLA., CODE § 26-57 (stating “rogues and vagabonds . . . shall be deemed vagrants”), quoted in *Papachristou*, 405 U.S. at 156-57 n.1.

187. JACKSONVILLE, FLA., CODE § 26-57, quoted in *Papachristou*, 405 U.S. at 163.

188. *Papachristou*, 405 U.S. at 163. Justice Douglas also noted that this provision “may also embrace unemployed people out of the labor market, by reason of a recession or disemployed by reason of technological or so-called structural displacements.” *Id.*

189. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 158-61 (1972) (giving a thorough description of each of the defendants); see also *supra* note 185 for an abbreviated description of the defendants.

190. *Id.* at 171.

191. On the concept of rules and standards, see generally Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

192. *Whren v. United States*, 116 S. Ct. 1769, 1772 (1996) (quoting D.C. MUN. REGS. tit. 18, § 2213.4 (1995) which provides that “[a]n operator shall . . . give full time and attention to the operation of the vehicle”).

vagueness" review, the Court is much more receptive to the kind of empirical information on police behavior carefully presented in the petitioners' brief in *Whren*,¹⁹³ and never once alluded to under *Whren*'s Fourth Amendment analysis.

The "void-for-vagueness" cases should remind defense attorneys that just because a case involves a search and seizure, that does not mean that it can only be analyzed under the Fourth Amendment. Especially after *Whren*, it is time to examine other constitutional alternatives.

CONCLUSION

The decision in *Whren* is a serious set back for those interested in the civil liberties of Americans. Yet *Whren* may have a positive effect if it forces the defense bar to recognize the limitations in its traditional approach to Fourth Amendment issues. As this Article has shown, focusing exclusively on warrants, probable cause, and privacy unduly restricts the potential power of the Fourth Amendment. The Reasonableness Clause of the Fourth Amendment should be viewed as a separate source for evaluating both police motivations and police activity.

Moreover, civil libertarians need to look beyond the Fourth Amendment itself. Due process analysis may also be used to help redefine the proper relationship between citizens and government as we approach the millennium.

The United States Supreme Court's decision to grant the petition for certiorari in the *Ricci* case¹⁹⁴ may be the signal that even the very Court which decided *Whren* is uncomfortable with the power of the police to stop, arrest, and search our citizens. Regardless, the struggle to protect civil liberties must continue.

193. Petitioners' Brief, at 28 n.24, *Whren*, 116 S. Ct. 1769 (1996) (No. 95-5841) (providing statistical evidence showing that at least 60% of all individuals stopped by the police as a result of a pretextual traffic stop belonged to racial minorities).

194. See *Ricci v. Village of Arlington Heights*, 904 F. Supp. 828 (N.D. Ill. 1995) *aff'd*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 118 S. Ct. 679 (Jan. 9, 1998) (No. 97-501). The Supreme Court has also very recently granted certiorari to hear an appeal to a decision of the Iowa Supreme Court holding that officers may search a vehicle pulled over for speeding despite the lack of probable cause to believe that any evidence of a crime might be found. See *State v. Knowles*, 569 N.W.2d 601 (Iowa 1997), *cert. granted*, 1998 WL 38084 (U.S. Iowa, Mar. 23, 1998) (No. 97-7597).