Confronting Racist Authority: The Vertical Narrowing of *Whren v. United States*

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ABSTRACT

Professor Derrick Bell stated, "At its essence, the willingness to protest represents less a response to a perceived affront than the acting out of a state of mind."[1] This piece honors Professor Bell, his protest, and the state of mind he embodied: confronting authority. It seeks to embolden the everyday, persevering practitioner or judge who is troubled by racist Supreme Court precedent, namely Whren v. United States.[2]

For nearly three decades, practitioners and judges have dutifully applied Whren *to even the most obviously harmful pretextual traffic stops. The* Whren *Court licensed the racial profiling and over-policing of countless Black and Brown people. What Justice Scalia described as the "run-of-the-mine" traffic stop predictably progressed into a colonizing and abusive police practice that is "unusually harmful" to the Fourth Amendment interests of Black and Brown people.*

When the Whren *Court condoned the pretextual traffic stop of two African-American men in 1996, it enabled the seizing and killing of Black and Brown people that has continued until the present day. It also sanctioned arbitrary police invasion of the privacy and security interests of countless Black and Brown people. Justice Scalia's "run-of-the-mine" traffic stop has become at best, a demoralizing form of social control, and at worst, an ever-present death trap.*

For those practitioners and judges ready to confront Whren*, there is a way to do so without overruling it, and thus without risking accusations of anarchy. The language of* Whren*, social facts and developments, adjacent case law, and the roots of our Fourth Amendment support a vertical "narrowing" of this authority. Conceived by Professor Richard M. Re, this "narrowing from below" occurs when lower courts interpret a higher court precedent more narrowly than its conventional reading, adopting a reasonable alternative interpretation of the precedent.[3] Narrowing is not overruling, and even the strictest model of vertical stare decisis supports its legitimacy.[4] The Supreme Court*

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1. DERRICK BELL, CONFRONTING AUTHORITY, ix (1994).

2. 517 U.S. 806 (1996).

3. *See generally* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923-30 (2016).

4. *See id.* at 926.

itself narrows its own precedent and, significantly, has blessed the vertical narrowing of its precedent by lower courts.[5]

Whren *is ripe for vertical narrowing where Justice Scalia juxtaposes the "run-of-the-mine" traffic stop with a seizure "unusually harmful" to an individual's privacy and physical interests.*[6] *Although the* Whren *Court might not have contemplated the pretextual traffic stop as "unusually harmful" in 1996, we know far better today. Practitioners and judges can and should seek to vertically narrow* Whren.

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5. *See* Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1909 (2014); *see also* Re, *supra* note 3, at 926-27.

6. *See Whren*, 517 U.S. at 818-19.

PROLOGUE (AN ALLEGORICAL STORY): HOMAGE TO THE FUTURE ADVOCATE'S ORAL ARGUMENT IN *WHREN V. UNITED STATES*[7]

Today, I am on my way to the HCA ("High Crime Area") Fourth Judicial District Court. Across the country, district courts lie at the center of these HCAs. Seated inside are the predominantly Black and Brown people who await courtroom hearings after their arrests due to the exclusive enforcement of crime in the HCAs.

I am here for my third motions hearing this week, where I am about to deliver the same righteous, albeit losing, argument: that the arrest resulted from a pretextual stop, and therefore, lacked the necessary justification to pass the requirements of the Fourth Amendment. I do these repetitive, spirit-breaking hearings because it is long overdue that the legal system rid the harm it has inflicted through the devastating application of a now two-hundred-year-old case, *Whren v. United State*s.[8] Because of *Whren,* Black and Brown people steadily and increasingly became targets of police harassment and violence, a pattern that continues to this day. This has gone on for far too long. The only change that has occurred between 1996 and now, 2166, is that the violence is no longer at the hands of human officers, but rather a twenty-second-century robotic police force.

I take a slow, deep breath as I pull on the usual courtroom door to enter the chamber of lost causes. Suddenly, a strong wind strikes me in the face, and for a moment, as I am entering the courtroom, there is only a flash of light. Rather than seeing my client waiting in shackles, and instead of seeing one judge looking down, I find myself standing before nine black robes perched high above. I struggle to recover from the blinding light. It looks like I have stepped into a brief pause in this court's proceedings—actually amid some laughter, which abruptly ends as the justices register my unexpected presence.[9]

Chief Justice William Rehnquist, his eyes wide and bewildered, demands: "Who are you?! What is the purpose of your obnoxious interruption to these proceedings?!"

I fight to find my words. All I can come up with is a confused expression, with a weak, "Excuse me?"

Rehnquist repeats, "Who are you?! Why are you here?" I mumble, "Uh, I was on my way to the HCA Fourth Judicial District Court . . ."

"The *what* Fourth Judicial District Court? Obviously, you are lost. You are not a party to *Whren v. United States*, madam. You are a long way from whatever district

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7. Matt Klein co-authored the allegorical story. Matt Klein is the Director of Academic Success at the University of Wyoming, College of Law. He wants to thank Professor Lauren McLane for giving him the opportunity to explore his passions for critiquing the racial inequities of the criminal legal system and seeking to promote community over criminalization.

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

9. GUY PADULA, COLORBLIND RACIAL PROFILING: A HISTORY, 1974 TO THE PRESENT, 173 (2018) (quoting Transcript of Oral Argument, *Whren v. United States* (Apr. 17, 1996), available in Westlaw, 1996 WL 195296, at 40-41) (describing an instance in oral argument for *Whren* where Justice Ginsburg asks the government's attorney what else the stop could be about, other than race, and apparently Justice Scalia interrupts with commentary about how the attorney really doesn't care, causing laughter and no answer to the question).

court you seek. Bailiff, security, please escort this young woman out of our courtroom immediately."

The bailiff, however, does not even so much as flinch at the Chief Justice's request. "Security! Now!" Everyone but the justices and I remain still and quiet, frozen actually. Several of the other nine justices begin to shift uneasily in their seats. Justice Stevens comments, "I do believe security is disposed of at the moment." Justice Scalia points at me and yells, "Get out of here now!" My only solace appears to be Justice Ginsburg who is smirking slightly at the situation, or at me.

"Is this actually 1996?" I quietly ask. Chief Justice Rehnquist rolls his eyes and answers, "Young lady, what kind of joke is this?!" I can feel my face flushing and my palms sweating. I take a few seconds to look around. The lawyers arguing at what must be the oral argument for *Whren v. United States* are also frozen—one awkwardly in mid-sentence. "Uh, your Honors, I am in fact 200 years from where I am supposed to be." I pause to conjure up some courage. "But if this truly is oral argument in *Whren v. United States*, well, then perhaps I am exactly where I am supposed to be." Justice Thomas responds, "As the Chief Justice warned, young lady, you are not a party to these proceedings. You do not belong here." With more courage, I respond, "Respectfully, your Honor, you do not appear to be able to do anything about that for the moment, nor can I." Justice Scalia raises his eyebrows, "Well, she's got you there."

I continue, "Where I come from, robotic police forces roam the streets of so-called high-crime areas, the HCAs, harassing Black and Brown people as a pretext to pursue baseless investigations. Plainly, these criminalized neighborhoods are a result of the bad decision you will make in this case." Chief Justice Rehnquist, now quite angry, opened his mouth to interrupt me. However, as he began to do so, it was as if the source of power that brought me here prevented him from speaking, and the floor was suddenly mine. All nine justices had no choice but to listen, as they sat above, looking down on me, without the ability to interrupt or eject me.

"Your Honors, I stand before you today as an advocate in a future that this Court is destroying. High crime areas are nothing new. In fact, you are not fully aware of it yet, but you will be using a similar phrase in this very opinion, as if it were some lofty legal phrase. When, in fact, it is nothing other than lightly veiled code for 'high concentration of Black and Brown people.' Black and Brown communities are all too familiar with the kind of police persecution that exists in the case before this Court. This harassment is but another tactic in a long battle to control and ultimately remove Black and Brown people from our society.

Based on the precedent set by *Whren*, harassment and violence by police, as well as racial discrimination, will only intensify. We will see the criminalization of daily occurrences in the name of drug enforcement and crime reduction. Many people are going to be demoralized, brutalized, and killed at the hands of police because of this decision. Without true reasonableness balancing under the Fourth Amendment, police are allowed to run rampant through our disenfranchised communities and selectively criminalize, backed by the power of unbridled discretion.

This Court strips away protection against racialized discrimination under the Fourth Amendment, blindly referring the petitioners to the Fourteenth Amendment's Equal Protection Clause, which you all know offers them no recourse. Black and Brown people face the impossible–having to demonstrate to this Court and the country at large that racism continues to embed itself in our legal systems and permeates throughout our society. It is as if the Court believes centuries of slavery on this continent would disappear so easily.

Not only does the practice of pretextual stops and the expansion of police discretion strip away the dignity and constitutional protection of people subject to this violence, it also pushes them further out on the fringes of society. They continue to lose faith in their elected officials and governmental bodies. So rather than filling out their ballots, they tear the meaningless pieces of paper to shreds. They reckon with the truth of what they have always known–that an oath to protect and serve has nothing to do with their own safety and communities and everything to do with maintaining a status quo and social control.

Your authorization of over-policing here also serves to condemn Black and Brown communities to designated neighborhoods. Citizens of predominantly white neighborhoods flood the phones of police tip lines with suspicious activity reports. White people see false images of Black and Brown criminality all around them in large part due to the propaganda of the 'War on Drugs' and a 'law and order' political narrative. This war failed in preventing drug use and crime, which was just as high, if not higher, in white communities. Yet, it succeeded in its primary objective in controlling Black and Brown people, and removing them from white communities. You already know mass incarceration is reaching a new height in this country as you sit here today. It does not get better. Black and Brown people, forced to stay in their own neighborhoods and streets, now the HCAs, are fiercely policed by the racist algorithms of robotic police and are secured away from white society that enjoys no policing whatsoever and, as a result, benefits from plentiful resources.

White America abandoned all forms of empathy for the condition of marginalized people and their communities. The narrative became that crime took over the country and the priority was safety and combating the proliferation of 'street' drugs and 'street' crime. It was easy for the white public to believe this narrative because law enforcement had your decision to point to.

As police came to rely on pretextual encounters and targeted drug enforcement, crime rates hit an all-time high. This is not because there was more crime, but because criminalization became the mechanism for driving crime statistics. These crime rates then inspired an exclusive enforcement policy of targeting specific areas throughout the country. Predictably, the designated areas were predominantly Black and Brown communities. As police departments had time and resources to narrow in on particular areas, boundaries of containment were drawn that became known as 'High Crime Areas.' The designation of the HCAs became the leading government strategy to promote and achieve public safety.

However, regardless of how many officers were committed to fight crime, crime continued to plague the HCAs. Finally, having given up hope that the challenges

facing the HCAs would be solved through the current enforcement strategies, new programs were subsidized by the government with billions of dollars to research and develop new law enforcement strategies.

Ultimately, this research and development produced the initiation of robotic police forces. Artificial intelligence was heralded as a new, objective tool, but developers incorporated existing police manuals, department policies, books, articles, and Supreme Court decisions–including this one–that emphasized the importance of police discretion. These resources authorized and encouraged arbitrary, invasive policing. Thus, robotic police were equipped with all the deadly force available to former human officers, guided by the flawed materials used to develop the AI.

As the new branch of law enforcement began to patrol HCAs around the country, police encounters became more than stops and frisks and pretextual traffic stops. They evolved, or perhaps better put, devolved into general 'street infractions.' This reintroduced much of what happened in our country's earlier periods, including slave patrols, the Black Codes, and Jim Crow policing.

As part of the directive to improve community safety and tranquility, deterrence and preemption of crime were aided by these criminal codes that gave police expansive discretion and the ability to effortlessly establish reasonable suspicion or probable cause. Curfews, the number of people in a group or vehicle, the covering of one's face with a mask, scarf, bandana, or wearing a hooded sweatshirt are just a few of the codes that are now exclusively enforced in the HCAs by robotic police forces. In addition, traffic infractions far more *de minimis* than the alleged ones before you in this case became mainstream in policing.

The opinion you will issue in this case closes the courthouse doors for centuries to Black and Brown people all around the country. Not only will police discretion become more dangerous and arbitrary after this case, but it will also devolve in ways that you must now understand will result in further criminalization and racism."

I paused. I realized that I was sweating and crying, but also out of words. Timely, that same burst of wind and extraordinary light filled the courtroom, and I was returned back to the courtroom doors 200 years into the future.

Meanwhile, that evening back in the hallways of the Supreme Court building of 1996, Justice Ginsburg hailed Justice Scalia, the author of the *Whren* opinion.

"Justice Scalia, can I have a moment of your time?"

"Briefly," Justice Scalia said, somewhat irritated, but also curious, adding, "As you know, I need to complete this draft. I presume you are still on board with the majority?"

Justice Ginsburg responded, "Did you see the Advocate from the future in our courtroom today? It all seemed so quick. You went right back into your mocking commentary with the government's attorney, which, by the way, interfered with my question about pretext," she said, giving Justice Scalia a scolding look, "but I could not have been the only one who saw and heard her." Justice Scalia nodded, "Yes, I did see her and very much heard her."

Justice Ginsburg continued, "You know, she made strong points today. I can't help but think that she will be right. What we do in this case could cause grave harm.

I do not wish to venture too far down this slippery slope, but I saw and heard her sadness, her fear. You and I both know why these vice officers really made this stop. The only solution we've left for this is a Fourteenth Amendment claim, but don't you think it a bit cruel to refer to that knowing full well these petitioners could not have proven the officers purposefully discriminated against them?"

Justice Scalia held his head back momentarily and looked at the ceiling. "My friend, we cannot overconcern ourselves with what is to come. All we decide is the case and how it sits before us, not some alleged 200 years into the future."

Justice Ginsburg responded, "I understand, but our ultimate loyalty is to the Constitution and to its people. The Advocate from the future detailed a horrid police practice that operates in an extraordinary manner and produces intolerable and unusual harm to the concepts we hold so sacred under the Fourth Amendment. We will be discarding reasonableness, the Amendment's core value and measure, in favor of unregulated police discretion."

"What are you asking of me?" Justice Scalia asked abruptly. "Simply that you include language that allows a way to correct this, as you put it, misguided application of the Fourth Amendment should the Advocate be right," responded Justice Ginsburg.

"Fine, I will put something in there about police action causing unusual harm juxtaposed with what we clearly have before us today–a 'run-of-the-mine,' traffic stop," Justice Scalia stated.[10] Justice Ginsburg nodded and walked away, with an air of anxiousness following a few steps behind her. She wondered whether someday, if this harm came to bear, a practitioner or judge would see Justice Scalia's language and know not only what it meant, but also know what to do next? She sighed and quietly closed the door to her chambers.

INTRODUCTION

In 1996, a unanimous Supreme Court ratified the pretextual traffic stop in the case of *Whren v. United States.* In a pretextual stop, police use minor traffic violations as justifications to engage with motorists for suspicion-less reasons, such as to conduct a drug investigation for which there is no reasonable suspicion or probable cause.[11] The facts of *Whren* illustrate this type of stop in action. On June 10, 1993, plain clothed vice-squad officers were patrolling a "high drug area" in Washington, D.C.[12] As Justice Scalia wrote, "[t]heir suspicions were aroused" when two "youthful" Black men, Mr. Brown and Mr. Whren, were sitting in a dark truck with

10. *Whren*, 517 U.S. at 819.

11. *See id.* at 810. Though it is open for debate, probable cause presents a higher burden to police than reasonable suspicion. Probable cause is defined as whether, based on the totality of the circumstances, a reasonable officer believes a crime has been committed. *See* Brinegar v. United States, 338 U.S. 160, 175-76 (1949). Reasonable suspicion is defined as whether the officer has a reasonable belief that criminal activity is afoot based on specific and articulable facts along with reasonable inferences that can be drawn from those facts. *See* Terry v. Ohio, 392 U.S. 1, 21, 28, 30 (1968).

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

temporary license plates.[13] The officers stated the men were waiting at a stop sign for "an unusually long time—more than 20 seconds."[14] Reportedly, Mr. Brown, the driver, was looking into the lap of his passenger, Mr. Whren.[15] After only these observations, the police decided to perform a U-turn to follow the vehicle. This corroborates what one of the vice officers admitted—that their actual intention was to investigate for drugs, not the minor traffic infractions they observed.[16]

After their U-turn, the vice officers observed the truck make a sudden right turn without signaling and then speed off at an "unreasonable speed."[17] A traffic stop ensued where an officer approached the driver's side of the truck and saw two bags of what appeared to be cocaine in Mr. Whren's hands.[18] Mr. Brown and Mr. Whren were arrested and convicted of various federal drug crimes.[19] At the Supreme Court, the issue was whether the stop was justified even if the vice officers were not interested in the minor traffic infractions but rather, in conducting a suspicionless drug investigation.[20]

First, the Supreme Court held that the subjective motivations of police are irrelevant under the Fourth Amendment.[21] Thus, it did not matter if the vice officers intended to stop Mr. Brown and Mr. Whren for a baseless drug investigation, and not a traffic violation. Justice Scalia wrote, "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[22] While the Court claimed to agree that the Constitution prohibited racial profiling, it referred Mr. Brown and Mr. Whren to the Equal Protection Clause under the Fourteenth Amendment, not the Fourth Amendment, for relief from racial discrimination.[23] The "cruel irony" is that the Equal Protection Clause requires purposeful discrimination for relief, which is next-to impossible to prove.[24]

Next, the Supreme Court decided that there was no need for the Fourth Amendment reasonableness balancing test, where courts look at the totality of the circumstances and balance the people's privacy, security, and physical interests against the relevant government interests.[25] Here, the Court stated that balancing

13. *Id.* Note that the Court informs us that Mr. Brown and Mr. Whren are black, not in the facts, but in describing their argument as to the impermissibility of using race to stop a vehicle. *Id.* at 810.

14. *Id.*

15. *Id.*

16. One of the officers, Officer Littlejohn, testified that they stopped Mr. Brown and Mr. Whren to investigate them for drug activity, not the traffic violations. PADULA, *supra* note 9, at 171 (quoting Brief for Petitioner at *13 n. 7, *Whren*, 517 U.S. 806 (1996) (No. 95-5841), 1996 U.S. S. Ct. Briefs LEXIS 119) (internal citation omitted).

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

18. *Id.*

19. *Id.* at 809.

20. *See id.* at 808.

21. *Id.* at 813.

22. *Id.*

23. *Id.*

24. *Id.*; *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 109 (New Press 2010); Washington v. Davis, 426 U.S. 229 (1976).

25. Whren v. United States, 517 U.S. 806, 816-19 (1996); *see* Camara v. Municipal Court, 387 U.S. 523, 530-39 (1967) (demonstrating a prime example of reasonableness balancing where the individual interests

was not needed because the police had probable cause to investigate the traffic infractions, and therefore, the stop was reasonable.[26] Even in 1996, this conclusion seemed counterintuitive. *Whren* readily allows for unbridled police discretion because police can use any traffic violation to conduct secondary investigations for which they have no reasonable suspicion or probable cause.

However, the founders expressed deep concern of this type of arbitrary and unfettered police discretion.[27] The text of the Fourth Amendment itself plainly states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[28] To provide this security, "[the Amendment] erects a wall between a free society and overzealous police action—a line of defense implemented by the framers to protect individuals from the tyranny of the police state."[29] The foundation of this wall is reasonableness balancing where the government's interests are tempered by the need to secure to the people their privacy, security, and physical interests.[30] The question to be answered is whether the police intrusion is reasonable based on the totality of the circumstances.[31]

The *Whren* Court said the question was sufficiently answered if there was probable cause that even the most minor traffic violation occurred.[32] The Court decided that so long as police had probable cause to stop a motorist for a traffic violation, there was *de facto* reasonableness.[33] This is how the Court distinguished the case from others where a reasonableness balancing was required in the absence of probable cause.[34]

After *Whren*, police were licensed to conduct suspicionless investigations justified by minor traffic violations. The *Police Chief* magazine, produced by the International Association of Chiefs of Police (IACP), "immediately reported that Whren 'preserve[s] officers' ability to use traffic stops to uncover other criminal activities.'"[35] As Professor Devon Carbado has noted, "[t]he short of it is that *Whren* is problematic not only

were balanced against the specific governmental interests at issue); *see also* Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.") (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).

26. *Whren*, 517 U.S. at 816-19.

27. In *Whren*, "[t]he fact that the Fourth Amendment was specifically adopted by the Founding Fathers to prevent arbitrary stops and searches was deemed unpersuasive." ALEXANDER, *supra* note 24, at 86; *see also* David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 BOSTON L. REV. 425, 452 (2016) ("Like many provisions of the Bill of Rights, the Fourth Amendment was motivated by the experiences of colonials and their British brethren with abuses of power.") (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 27-43 (1969)).

28. U.S. CONST. amend. IV.

29. Renee McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 444 (2007).

30. *See id.*

31. *See id.*

32. *Whren*, 517 U.S. at 819.

33. *Id.*

34. *Id.* at 817-18.

35. CHARLES R. EPP, STEVEN MAYNARD-MOODY, & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 35, n.45 (2014).

because it creates an incentive for police officers to continue to perform pretextual stops, but also because it legalizes those stops, which helps make them an institutional practice."[36]

The institutionalization of pretextual traffic stops was, and remains, at the center of the failed "War on Drugs," the primary cause of the onset of mass and over-incarceration of Black and Brown people in the 1980s and 1990s.[37] In addition, lower courts have eliminated *Whren's* probable cause requirement, reducing what little "protection" that may have offered, to mere reasonable suspicion that a traffic violation has occurred.[38] Therefore, it has become even easier since *Whren* for police to engage in the racial profiling and pretextual stops of Black and Brown motorists.

In telling words, one training officer exclaimed, "[a]fter *Whren* the game was over. We won."[39] That win would come at great costs; thousands of motorists, especially Black and Brown people, would suffer demoralizing, suspicionless, (and fruitless) pretextual traffic stops.[40] Much worse, many would lose their lives.[41] When the *Whren* Court condoned the pretextual stop of Mr. Brown and Mr. Whren, the

36. DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT 83 (2022).

37. *See generally infra*, at Part II, section C, subsection 1.

38. *See, e.g.*, Loveless v. State, 789 S.E.2d 244 (Ga. Ct. App. 2016); Marshall v. State, 117 N.E.3d 1254, 1259 (Ind. 2019); City of E. Grand Rapids v. Vanderhart, No. 329259, 2017 WL 1347646, at *6 (Mich. Ct. App. Apr. 11, 2017); State v. McBreairty, 697 A.2d 495, 497 (N.H. 1997); Comm'n v. Chase, 960 A.2d 108, 120 (Pa. 2008); State v. Casas, 900 A.2d 1120 (R.I. 2006); State v. Donaldson, 380 S.W.3d 86 (Tenn. 2012); State v. Richardson, No. 2001-064, 2002 WL 34423170, at *1 (Vt. June Term 2002); Warner v. Comm'n, No. 0871-18-4, 2019 WL 6314821, at *4 (Va. Ct. App. November 26, 2019); State v. Snapp, 275 P.3d 289, 299 (Wash. 2012) (formally adopted reasonable suspicion standard).

39. Gary Webb, *DWB* [*Driving While Black*], ESQUIRE (Jan. 29, 2007), https://esquire.com/news-politics/a1223/driving-while-black-0499/.

40. *See* FRANK R. BAUMGARTNER, DEREK A. EPP, & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018); *see also* EPP ET AL., *supra* note 35; Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STANFORD L. REV. 637-726 (2021).

41. Ray Sanchez, *Who was Sandra Bland?*, CNN (July 23, 2015, 9:17 PM), https://www.cnn.com/2015/07/22/us/sandra-bland/index.html; David A. Graham, *How Many Sandra Blands Are Out There?* THE ATLANTIC (July 22, 2015), https://www.theatlantic.com/national/archive/2015/07/how-many-sandra-blands-are-never-caught-on-video/399173/; Bill Chappell, *Sandra Bland's Phone Video of Her Own Arrest Surfaces, Reviving Calls for New Inquiry*, NPR (May 7, 2019, 3:23 PM), https://www.npr.org/2019/05/07/721086944/sandra-blands-phone-video-of-her-own-arrest-surfaces-reviving-calls-for-new-inqu; Jay Croft, *Philando Castile Shooting: Dashcam Video Shows Rapid Event*, CNN (June 21, 2017, 10:14 AM), https://www.cnn.com/2017/06/20/us/philando-castile-shooting-dashcam; Omar Jimenez & Tiffany Anthony, *Police in Grand Rapids, Michigan, Set to Release Video of the Deadly Shooting During a Traffic Stop*, WLFI 18 (Apr. 13, 2022), https://www.cnn.com/2022/04/13/us/michigan-grand-rapids-police-video-patrick-lyoya/index.html; Deena Winter, *Lawyers Lay Out Opposing Views of Police Shooting That Killed Daunte Wright*, MINNESOTA REFORMER (Dec. 8, 2021, 3:11 PM), https://minnesotareformer.com/2021/12/08/lawyers-lay-out-opposing-views-of-police-shooting-that-killed-daunte-wright/; Sam Levin, *US police have killed nearly 600 people in traffic stops since 2017, data shows: Deaths continue apace this year, with Black victims disproportionately harmed, amid calls to reduce traffic encounters*, THE GUARDIAN (Apr. 21, 2022), https://www.guardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data; *see also* THE WASHINGTON POST POLICE SHOOTINGS DATABASE, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited Nov. 19, 2023); MAPPING POLICE VIOLENCE: THE OFFICIAL MAPPING POLICE VIOLENCE DATABASE, https://mappingpoliceviolence.us/https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last visited Nov. 19, 2023).

Court also authorized the stopping and killing of Sandra Bland, Philando Castile, Patrick Lyoya, Daunte Wright, Giovonn Joseph-McDade, and numerous others.[42] These traffic stops consisted of a failure to signal a lane change, malfunctioning taillights, improper vehicle registration, an air freshener hanging from the rearview mirror, expired tags, and then. . .death.[43] Each was made possible by *Whren*.

What the *Whren* Court once described as the "run-of-the-mine" traffic stop has predictably progressed into a colonizing and abusive police practice that is "unusually harmful" to the privacy, security, and physical interests of the people, especially Black and Brown people. The language of *Whren* itself, the evolution of the pretextual traffic stop, the surrounding facts and circumstances, and the roots of the Fourth Amendment all support a long overdue vertical narrowing of this precedent.

Coined by Professor Richard M. Re, "narrowing from below" (also known as vertical narrowing) occurs when lower courts interpret a higher court precedent more narrowly than its "best" or conventional reading, adopting a reasonable alternative interpretation of the precedent.[44] Lower courts engage in vertical narrowing based on the precedent's language, facts, adjacent case law, foundational constitutional principles, policy arguments, and, sometimes, reasons far outside the precedent.[45] As Professor Re asserts, "[T]here are more ways of honoring precedent than adhering to the best available reading."[46]

While narrowing is frequently utilized, it is an under-recognized form of case interpretation. The Supreme Court itself engages in the narrowing of its own precedent[47] as do lower courts, with no repercussions or substantiated allegations of anarchy.[48] This seems to be the case because narrowing is good for precedent, which, much like tree pruning, supports growth and structure. This is especially true when courts are tasked with applying out-of-date or impractical precedent to a new situation or set of circumstances.[49] Narrowing is particularly fitting for Supreme Court precedent that is racist or preserves the subjugation of minoritized individuals, such as *Whren*. While in practice, it is difficult to rewrite or overrule racist precedent, it can and should be narrowed.

Here, there is an opportunity to do just that, and address the racist legacy of *Whren* through narrowing. Practitioners can narrow *Whren* by arguing that pretextual traffic stops are no longer "run-of-the-mine," and instead something more akin to seizures that are conducted in an "extraordinary manner" and are "unusually

42. *See* discussion *supra* note 41.
43. *Id.*
44. *See* Re, *supra* note 3, at 925.
45. *Id.* at 955.
46. *Id.* at 971.
47. *See generally* Re, *supra* note 5.
48. *See* Re, *supra* note 3, at 926-28.
49. *See, e.g.*, State v. Gant, 162 P.3d 640 (2007) (where Arizona Supreme Court narrowed Supreme Court precedent in the area of vehicular searches incident to arrest due to impracticality); U.S. v. Wurie, 728 F.3d 1 (1st Cir. 2013) (where First Circuit narrowed Supreme Court precedent due to technological advancements); State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (where Missouri Supreme Court narrowed Supreme Court precedent that was based on outdated premises).

harmful" to the privacy, security, and physical interests of the people, especially Black and Brown people.

These harms are not merely perceived but have real impacts and actual consequences. For example, a study of 20 million traffic stops in North Carolina showed that African Americans were 63 percent more likely than white people to be stopped by police.[50] This study, in combination with others, also demonstrates that Black and Brown people are far more likely to be subjected to pretextual traffic stops than white people.[51] Further, as we have witnessed, pretextual traffic stops have become increasingly physically harmful, particularly to Black and Brown people.[52] Traffic stops are among those police encounters where most fatal police shootings occur.[53] These harms, *inter alia*, have propelled commentators to criticize *Whren* vehemently.[54] Professors Carbado and Feingold have rewritten *Whren* as part of a project that challenges racist Supreme Court precedent.[55]

Critically, in denying the need for reasonableness balancing beyond probable cause, the *Whren* Court noted, "the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures **conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests**..."[56] The Court gave examples, including *Wilson v. Arkansas*, which involved police serving a search warrant and announcing their entry only after breaching the home's threshold, and *Welsh v. Wisconsin*, which involved a warrantless entry into a home to arrest Mr. Welsh for a misdemeanor offense.[57] In addition, the Court wrote, "For the run-of-the-mine case, which this surely is, we think there is no realistic alternative to the traditional common-law rule that

50. BAUMGARTNER ET AL., *supra* note 40, at 65-66, tbl. 3.1. Notably, pretextual traffic stops include those stops that are "investigatory" in nature, rather than "traffic-safety" stops. As an example, investigatory stops include malfunctioning equipment or minor traffic infractions, such as failure to signal. Meanwhile, traffic-safety stops include police stops for speeding and reckless driving. *See* EPP ET AL., *supra* note 35, at 53, 59, 100-06.

51. *See infra*, at Part II, section B, subsection 1.

52. For example, Philando Castile, a Black man killed by police in Minneapolis, was pulled over for a broken taillight, but the police conversation on the radio also revealed the police believed he looked like a suspect in a recent armed robbery. Sarah Horner, *Police scanner audio sheds light on Philando Castile traffic stop*, TWIN CITIES PIONEER PRESS (July 12, 2016), https://www.twincities.com/2016/07/11/philando-castile-falcon-heights-shooting-police-scanner-traffic-stop/.

53. MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.us/ (last updated June 16, 2023).

54. ALEXANDER, *supra* note 24, at 136,153; Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032-34 (2002); Tracey Maclin & Maria Savarese, *Martin Luther King Jr. and Pretext Stops (And Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 MEMPHIS L. REV. 43, 54-65 (2018); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(e), at 171, § 1.4(f), at 176 n. 86 (citations to other articles where *Whren* is criticized), 193 (5th ed. 2012); Lauren McLane, *Our Lower Courts Must Get in "Good Trouble, Necessary Trouble," and Desert Two Pillars of Racial Injustice—Whren v. United States and Batson v. Kentucky*, 20 CONN. PUB. INT. L. J. 181 (2021).

55. *See* Devon W. Carbado & Jonathan Feingold, *Rewriting Whren v. United States*, 68 UCLA L. REV. 1678 (2022).

56. Whren v. United States, 517 U.S. 806, 818 (1996) (emphasis added).

57. *Id.*

probable cause justifies a search and seizure."[58] The juxtaposition of the "run-of-the-mine" case against cases involving police action that is unusually harmful to the privacy and physical interests of the people left the door ajar for "narrowing" *Whren*.

This article is intended as a guide for practitioners and lower courts, respectively, to, argue for or enact the vertical narrowing of *Whren*. To that end, Part I focuses on the legitimacy of vertical narrowing, including its definition, its framework, examples of vertical narrowing in practice, and discussion of what remains of precedent after its narrowing. Part II lays out how *Whren* can legitimately be vertically narrowed, including observations that *Whren*'s own language, social facts, social developments, and the first principles of the Fourth Amendment all point toward the need to vertically narrow *Whren*. Finally, Part III proposes a set of viable narrowed rules for *Whren*, anchored in Fourth Amendment reasonableness. It argues courts should presume pretextual traffic stops (apart from traffic-safety stops) unreasonable unless the government presents a compelling safety concern. Where the government does present such evidence, reasonableness balancing requires the stop be evaluated under the totality of circumstances.

I. VERTICAL NARROWING IS A LEGITIMATE PRACTICE

A. What is "Narrowing"?

According to Professor Richard M. Re, "narrowing" is reasonably interpreting a precedent apart from its conventional interpretation.[59] Specifically, "'narrowing' means interpreting a precedent *not* to apply where it is best read *to* apply."[60] For example, narrowing *Whren* would entail interpreting it as inapplicable when police conduct a pretextual stop (i.e., when police stop a vehicle for a traffic violation for which they have probable cause so they can actually perform a suspicion-less investigation).[61] Conventional interpretations of *Whren* would find that this is precisely the stop that it should apply to. Narrowing *Whren* would entail finding another reasonable interpretation.[62]

There is little recognition of narrowing. While scholars have been critical of whether lower courts can overrule vertical precedent, "lower courts' authority to narrow higher court precedent has received little attention."[63] Perhaps narrowing has received such sparse attention because courts fear accusations of "stealth overruling," viewing case interpretation in a very black-or-white manner.[64] As Professor Re notes, "[t]oo often judges and commentators assume a simplistic relationship whereby lower courts either do or don't follow their superiors' instructions."[65]

58. *Id.* at 818.
59. Re, *supra* note 3, at 926-28.
60. *Id.* at 927-28 (emphasis added).
61. *See Whren,* 517 U.S. 806.
62. *See* Re, *supra* note 3, at 925-26.
63. *Id.* at 923-24.
64. *See id.* at 924.
65. *Id.* at 927.

Additionally, narrowing may receive sparse attention because it is often mistaken or referred to as something else, such as distinguishing.[66] Narrowing is not the same task as distinguishing precedent, which is when courts interpret "a precedent *not* to apply where it is best read *not* to apply." [67] In contrast, narrowing is "interpreting a precedent *not* to apply where it *is* best read *to* apply."[68] Narrowing is at its best when a court thinks "that the precedent, when best read, [applies] to the new case at hand[,]"but, nevertheless, believes that application of the precedent is no longer wise.

Examining situations where *Whren* can apply helps to illustrate the difference between narrowing and distinguishing. For instance, *Whren*'s conventional holding would not apply in a case where the police did not have probable cause (or reasonable suspicion) to believe that a traffic violation occurred. What mattered in *Whren* was that the police had probable cause to believe traffic infractions were committed, and probable cause's existence eliminated the need for any further Fourth Amendment reasonableness balancing.[69] In a situation where there is no probable cause (or reasonable suspicion) that a traffic violation occurred, an advocate could distinguish *Whren,* arguing that it does not apply to the case at hand. In contrast, imagine a case where there is probable cause for the traffic violation, but there is evidence that racial profiling has occurred. The court could narrow *Whren* on the basis that its application has become detached from the roots of the Fourth Amendment.[70] In this way, narrowing encourages candor in the courts in a way that distinguishing does not. Narrowing does this by acknowledging that while the conventional interpretation of the precedent may apply, it does not make sense in newly presented circumstances, and another reasonable (and narrowed) interpretation is required. [71]

Courts should also be assured that narrowing is not overruling precedent. Unlike overruling, narrowing does not presume a precedent is wrong; rather, when courts engage in narrowing, "they construe precedential ambiguities in favor of their own first-principles view of the law."[72] In this way, narrowing is similar to the principle of avoidance in the statutory interpretation context, i.e., "[w]hen courts engage in avoidance, they construe legal ambiguities in favor of compliance with a deeper source of law, such as the Constitution."[73] Professor Re further notes that narrowing holds more credibility than avoidance because "there is more reason to think that a prior court intended to get the law correct, where legislatures may ignore lawful bounds."[74] Examining the framework of narrowing, how it works in practice, and its effect on precedent, helps demonstrate its conceptual distinction from overruling.

66. *See, e.g.*, Davis v. United States, 564 U.S. 229 (2011) (where Supreme Court erroneously describes the narrowing of one of its precedents as distinguishing).
67. Re, *supra* note 3, at 928 (emphasis added).
68. *Id.* at 927-28 (emphasis added).
69. *See* Whren v. United States, 517 U.S. 806, 816-19 (1996).
70. *See infra* section B.
71. Re, *supra* note 3, at 927-28.
72. *Id.* at 932.
73. *Id.*
74. *Id.* n.56 (citing Clark v. Martinez, 543 U.S. 371, 381-82 (2005)).

B. The Narrowing Framework

The framework for narrowing suggested by Professor Re's work includes: (1) determining the precedent's best-read interpretation; (2) assessing whether ambiguity exists or another reasonable alternative interpretation is available; and (3) deciding whether such alternative reading better honors the law.[75] If there is ambiguity and the court believes that the alternative interpretation is a better reflection of the law, then narrowing is legitimate.[76] What results is a narrowed rule with the precedent carrying on in a limited form. However, there are instances where precedent may be rendered wholly obsolete.[77]

Determining whether the precedent is ambiguous, and therefore whether there is "uncertainty about which reading deserves the Court's imprimatur," is essential.[78] In making this determination, the narrowing framework both embraces and formalizes the broad sphere that exists in our judicial system for reasonable disagreement on how best to interpret precedent.[79] As demonstrated by the forthcoming examples, courts determine the presence of ambiguity in precedent and narrow it simultaneously based on the same factors: the precedent's facts and language, the facts of the instant case before the court, social facts and developments, adjacent case law, and policy arguments.[80]

At its core, vertical narrowing is rooted in first-principles thinking, which is no stranger to the legal field. Three of the most popular philosophical thinkers—Aristotle, Plato, and Socrates—were students of first-principles thinking.[81] The

75. *See* Re, *supra* note 3, at 923, 926, 928, 936-40.

76. *Id.* at 923.

77. *See infra* section IV.

78. Re, *supra* note 3, at 939.

79. *Id.* at 928, 925, n. 20 ("The conventions of legal practice allow for substantial but limited disagreement among reasonable interpreters.") (citing Richard H. Fallon, Jr., *The Supreme Court 1996 Terms—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 124-25 (1997)); *see also* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 734 (1987) ("Regardless of one's view of precedent, the question of candor turns ultimately on the judge's state of mind. A judge fulfills any requirement of candor when [they] believe what [they are] saying about the force of a particular case. On the other hand, a judge who believes that a particular precedent can fairly be distinguished but who nevertheless describes it as 'controlling,' can properly be accused of lack of candor.").

80. *See* Re, *supra* note 3, at 926-28, 936-45; *see, e.g.*, *id.* at 954-55 (Professor Re notes the First Circuit narrowed Supreme Court precedent based on "facts [(including technological and social facts)], law, arguments, and reasons that lay far outside [the precedent] itself.").

81. Aristotle's teacher was Plato, who was a student of Socrates. *See Who Were Aristotle's Teachers and Students?*, BRITANNICA, https://britannica.com/question/Who-were-Aristotles-teachers-and-students (last visited Oct. 24, 2023); *see also* Stephen Michael Perdue, *The Big Three of Greek Philosophy: Socrates, Plato, and Aristotle.*, PENN. STATE UNIV. ENG. BLOG (Sept. 19, 2014), https://sites.psu.edu/rclperdue/2014/09/19/the-big-three-of-greek-philosophy-socrates-plato-and-aristotle/; Aly Juma, *Aristotle and the Importance of First Principles*, MEDIUM (Jan. 16, 2017), https://medium.com/swlh/aristotle-and-the-importance-of-first-principles-9431aa60a7d1. Significantly, before Aristotle, Plato, and Socrates, there were the original philosophers in Africa. *See* Jacob H. Carruthers, *Reflections on the History of African Education*, 77 ILLINOIS SCH. J. no.2 Spring 1998, at 3, 8-10 ("Aristotle, Plato's critical student, echoed [Plato's acknowledgement of "the impact of African education on ancient Greece"] when he admitted that the Egyptians invented the mathematical arts, one of the three theoretical sciences. . .and the master of technology, political science.") (Isaac Newton stated that the Greek "derived their first, as well as soundest notion of philosophy" from the Egyptians—the "early observers of the heavens."). First-principles thinking therefore should be attributed to

Socratic Method of remains central to current law school pedagogy, often beginning on the first day. The aim of this questioning is to "probe the underlying beliefs upon which each participant's statements, arguments and assumptions are built."[82] This type of first-principles inquiry is also how courts construe ambiguities in precedent.[83]

In addition, the Fourth Amendment context is ripe for first-principles thinking. Nearly three decades ago, Professor Akhil Reed Amar put it succinctly: "There is a better way to think about the Fourth Amendment—by returning to its first principles. We need to read the Amendment's words and take them seriously: they do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable."[84] Although Professor David Gray, another leading Fourth Amendment scholar, disagrees with Professor Amar's position on the Fourth Amendment's exclusionary rule, he too affirms that "the 'touchstone' of the Fourth Amendment is reasonableness . . . ."[85] And the Supreme Court agrees, referring to reasonableness as "the ultimate touchstone of the Fourth Amendment. . . ."[86] Thus, there is a substantive basis to engage in narrowing. The next question becomes how narrowing occurs in practice.

C. A Prime Example: The Vertical Narrowing of Belton v. New York

One striking example of the vertical narrowing framework, its legitimacy, and how it can be used to return to first principles in the Fourth Amendment context, is *State v. Gant.* There, the Arizona Supreme Court narrowed the Supreme Court's opinion in *New York v. Belton.*[87] At issue in *Gant* was whether a warrantless search of Mr. Gant's car incident to his arrest was reasonable, despite the fact he was secured away from his car at the time of the search.[88] *Belton*'s conventional rule (the binding precedent at the time) was understood as follows: "when a police [officer] has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[89] This rule had broad implications. Anytime an occupant of a car was arrested, their car could be searched incident to that arrest. However, based on the language and facts of *Belton*, as well as first-principles thinking about the Fourth Amendment, the

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the original thinkers in Africa, not the great Western philosophers that are the focus of Eurocentric systems, such as the legal academy.

82. Peter Conor, *The Socratic Method: Fostering Critical Thinking*, COLO. ST. U.: THE INST. FOR LEARNING AND TEACHING, https://tilt.colostate.edu/the-socratic-method/#:~:text=The%20Socratic%20Method%20says%20Reich,arguments%20and%20assumptions%20are%20built (last visited Feb. 14, 2023) ("The aim of the questioning is to probe the underlying beliefs upon which each participant's statements, arguments and assumptions are built.").

83. Re, *supra* note 3, at 932.

84. Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (emphasis in original removed); *see also* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820 (1994).

85. Gray, *supra* note 27, at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403).

86. *Stuart,* 547 U.S. at 403.

87. State v. Gant, 162 P.3d 640 (2007); New York v. Belton, 453 U.S. 454 (1981).

88. *Gant*, 162 P.3d at 641.

89. *Belton*, 453 U.S. at 459-60.

Arizona Supreme Court vertically narrowed *Belton*, and did so with the Supreme Court's blessing.[90]

Belton involved a traffic stop that led to a car search. Specifically, it was a case where a lone officer searched a car incident to the arrests of four recent occupants who remained unsecured and near the car after their arrest.[91] Although the holding was based on these specific facts, its best-read interpretation was construed broadly by many lower courts, who interpreted *Belton* to mean that police may search a car incident to a recent occupant's arrest even in instances where the arrestees were unable to access the car.[92] Notably, one of the primary rationales behind the search incident to arrest doctrine was a concern for the destruction of evidence (tethered to Fourth Amendment reasonableness balancing), which cannot happen if arrestees cannot access the car.[93] The *Belton* court appeared to authorize searches of cars incident to arrest even in the absence of that essential concern.[94]

The Arizona Supreme Court returned the Fourth Amendment back to its reasonableness roots, not by distinguishing or overruling *Belton*, but by vertically narrowing it. The Court emphasized the *Belton* Court's language to support an interpretation of *Belton* apart from its conventional reading. Specifically, it cited the Supreme Court's distinguishing of *United States v. Chadwick* from the circumstances in *Belton*.[95] In *Chadwick*, the Supreme Court held that a footlocker could not be searched over an hour after the relevant arrests because neither a concern for the destruction of evidence or officer safety (the key government interests announced in *Chimel*) was present.[96]

The Arizona Supreme Court acknowledged that it was possible to read *Belton* as announcing a bright-line rule eliminating the need to assess the exigencies of the police contact. However, if that were the case, then a search of a car incident to arrest could occur hours after the relevant arrest.[97] In its view of the Fourth Amendment's reasonableness requirement, this did not make sense, especially given the *Belton* Court's comments about *Chadwick*.

In *Belton*, the Supreme Court remarked that the search in *Chadwick* ensued "after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency."[98] The Arizona Supreme Court stated there would be no need to make this distinction if the *Belton* Court intended to

90. *See Gant*, 162 P.3d at 643.

91. *Belton*, 453 U.S. at 460, 455-56.

92. *Davis*, 564 U.S. at 233 (citing Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J., concurring in judgment) (collecting cases).

93. *See* Chimel v. California, 395 U.S. 752, 762-63 (1969) (noting twin rationales for the search incident to arrest doctrine as the prevention of the destruction of evidence and office safety).

94. *See id.*

95. *Gant*, 162 P.3d at 643.

96. *Id.*; United States v. Chadwick, 433 U.S. 1, 15 (1977).

97. *Gant*, 162 P.3d at 643.

98. *Id.* (first quoting *Belton*, 453 U.S. at 462; then quoting *Chadwick*, 433 U.S. at 15) (internal quotations omitted).

authorize any search of a car incident to a recent occupant's arrest regardless of the existence of exigency.[99] Further, in *Belton*, the Court stated in a footnote that its holding "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests."[100] This solidified that the *Belton* Court could not have contemplated its albeit broadly stated rule would apply even in the absence of the search-incident-to-arrest doctrine's rationales announced by *Chimel*: concern for the destruction of evidence or officer safety.

The Arizona Supreme Court engaged in this narrowing of *Belton* with the blessing of the Supreme Court.[101] The author of *Whren* himself, Justice Scalia, concurred with the majority in *Gant v. Arizona*.[102] The *Gant* Court wrote, "Despite the textual and evidentiary support for the Arizona Supreme Court's reading of *Belton*, our opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[103] In approving the Arizona Supreme Court's return to Fourth Amendment reasonableness, the *Gant* Court held when an arrestee is unable to access the passenger compartment of the car or "it is [not] reasonable to believe the vehicle contains evidence of the offense of arrest," the search incident to arrest of a car will be unreasonable unless there exists a warrant or some other exception to the so-called warrant requirement.[104]

Remarkably, several years later, the Supreme Court would refer to what the Arizona Supreme Court did as "distinguishing" *Belton*. In *Davis*, the Supreme Court wrote of *Gant*: "The [Arizona Supreme Court] distinguished *Belton* as a case in which 'four unsecured' arrestees 'presented an immediate risk of loss of evidence and obvious threat to [a] lone officer's safety.'"[105] The *Davis* Court attempted to simplify the Arizona Supreme Court's holding as one where it found that *Belton* did not apply; however, that is not accurate.[106] Rather, in evaluating the language of *Belton*, the Arizona Supreme Court decided that the *Belton* Court could not have meant that searches of cars incident to arrest were authorized even when no exigencies, such as the concern for destruction of evidence, were present.[107] In other words, the Arizona Supreme Court interpreted *Belton* short of its conventional bright-line rule and offered another reasonable, albeit unconventional, interpretation of it. This is further supported by the *Gant* majority's acceptance of the Arizona Supreme Court's narrowing of *Belton* and its return to the reasonableness roots of the Fourth Amendment.

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99. *Id.*
100. *Belton*, 453 U.S. 460, n.3.
101. *See* Gant v. Arizona, 556 U.S. 332, 335, 337, 341, 351 (2009).
102. *See id.* at 351.
103. *Id.* at 341.
104. *Id.* at 351.
105. *Davis*, 564 U.S. at 234 (quoting *Gant*, 162 P.3d at 643 (Scalia, J., concurring)).
106. *See id.*
107. *Gant*, 162 P.3d at 643.

> Under this broad reading of *Belton,* a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.[108]

In addition, Justice Scalia's concurrence in *Gant*, as described by the *Davis* Court, also supports that the Arizona Supreme Court did not distinguish or overrule *Belton*: "Justice Scalia, who provided the fifth vote to affirm in *Gant*, agreed with the dissenters' understanding of *Belton*'s holding. Justice Scalia favored a more explicit and complete overruling of *Belton*, but he joined what became the majority to avoid 'a 4-to-1-to-4' disposition."[109] The *Davis* Court recognized that by joining the *Gant* majority, Justice Scalia understood the majority was doing something short of overruling *Belton*. Indeed, overruling *Belton* would have resulted in *Belton* no longer maintaining any precedential value, but that did not happen as evidenced in the lower courts.[110] Further, *Gant* did not distinguish *Belton* because, in the end, *Belton's* bright-line rule was no more; rather, it continued to exist in its narrowed form where lower courts still referenced it for general search-incident-to-arrest principles as well as the permitted scope, i.e., that the trunk is off limits during the search of a car incident to a recent occupant's arrest.[111]

As tempting as it may be to label the narrowing of *Belton* as "distinguishing," it is incorrect to do so. In their application, distinguishing and narrowing do appear quite similar. For instance, by comparing the facts of *Belton*—four unsecured occupants near the car with a lone officer—with *Gant*—one secured occupant away from the car with multiple officers—it is evident these cases are factually distinguishable.[112] In addition, based on the *Belton* Court's reliance on *Chadwick* and its remarks about *Chimel*, the Court could have believed the situation in *Gant* to be outside the bounds of *Belton.* However, recall that the conventional interpretation of *Belton* was that when police made a lawful arrest of an occupant of a car, contemporaneous to that arrest, they could search the car's passenger compartment. That reading, on its face, applies to the situations in both *Belton* and *Gant*.

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108. *Gant*, 556 U.S. at 343 (quoting *Belton*, 453 U.S. at 460, n. 3).

109. *Davis*, 564 U.S. at 234 (quoting *Gant*, 556 U.S. at 351-52, 354) (internal citation omitted). Justice Scalia has both rejected and condoned horizontal narrowing, indicating his desired limits (and not total end) to the practice. *See* Re *supra* note 5, at 1892-94.

110. *See infra,* note 115.

111. *Belton*, 435 U.S. at 460-61.

112. *Id.* at 455-56.

Significantly, while on its surface, narrowing may appear to be distinguishing a precedent, the resulting impact between the two drastically differs. Narrowing comprises of "deliberately interpreting a precedent in a way that is more limited in scope than the best available reading."[113] Professor Re further notes, "[w]hen compared with the best reading of a particular precedent, only narrowing leaves the precedent with a reduced ambit."[114] That is, a narrower interpretation of the precedent survives. This was the case after *Belton* was narrowed: a search incident to arrest of a car must still be limited to the passenger compartment, and the conventional, broader interpretation fell away.[115] On the other hand, distinguishing a precedent "preserves [it] as it was."[116] If *Belton* was distinguished rather than narrowed, then its broad authorization of virtually all searches of cars incident to arrest would still stand today, but it does not.

Finally, *Davis* itself may actually be an example of the Supreme Court encouraging lower courts to narrow its precedent. Professor Re wrote of *Davis*, "the defendant argued that withholding the exclusionary rule would effectively preclude requests to overrule settled Fourth Amendment precedent because any request to overrule would necessarily imply that the officers' search should be protected by the good-faith exception." The Court's solution was, in effect, to point out the possibility that lower courts might narrow from below: "[A]s a practical matter, defense counsel in many cases will test this Court's Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable." The author of this remark was Justice Alito, who was among the five Justices in *Gant* that emphatically believed that the Arizona Supreme Court had "effectively overrule[d]" *Belton*.[117]

The Arizona Supreme Court did not overrule or distinguish *Belton*; it narrowed it using *Belton*'s own language as well as the basic tenet of reasonableness under the Fourth Amendment.[118] And the Supreme Court approved. This *Belton*-to-*Gant* analysis exemplifies two important points about narrowing. First, lower courts can narrow Supreme Court precedent with the High Court's approval. Second, narrowing is likely under-appreciated and often mislabeled as distinguishing or attempted overruling, which is one reason why it has drawn such little attention. Whether courts begin to formalistically apply narrowing or continue to do so "under the

113. Re, *supra* note 5, at 1868.

114. *Id.* at 1870.

115. *See, e.g.*, Com. v. Wooten, 2017 WL 11572143, at *2 (Va. Cir. Ct.) (Trial Order) (quoting *Belton* for basic principles of search incident to arrest doctrine); State v. Newton, 2013 WL 9990316, at *5 (Ohio Com. Pl.) (Trial Order) (comparing *Belton* to instant case and noting that *Belton* was refined by *Gant*); Maryland v. Spence, 2011 WL 10959584, at *3 (Md. Cir. Ct.) (Trial Order) (citing *Belton* for proposition that "police may search containers, whether open or closed, located within the arrestee's reach"); State v. Morgan, 2016 WL 11605065, at *7 (Fla. Cir. Ct.) (Trial Order) (discussing the Supreme Court's later reliance on *Belton* in defining a container); State v. Cooper, 2014 WL 7008426, at *12 (Idaho Dist.) (Trial Order) (quoting *Belton* that "the relatively narrow compass of the passenger compartment" of a vehicle may inevitably be within the arrestee's area of immediate control).

116. Re, *supra* note 5, at 1870.

117. Re, *supra* note 3, at 958 (quoting *Gant*, 556 U.S. at 355 (Alito, J. dissenting)).

118. *See id.*

radar," narrowing is a powerful tool. As noted by Professor Re, "lower courts have a substantial interpretive gray zone available to them—and, in taking advantage of that discretion, lower courts sometimes engage in a precedential dialogue with the Supreme Court."[119] Narrowing has the capacity to honor vertical precedent, including its correctness, proficiency, practicality, and transparency.[120] As Professor Re stated, "[T]here are more ways of honoring precedent than adhering to the best available reading."[121]

D. When Narrowing Renders Precedent Obsolete

What becomes of precedent after it is narrowed? Not to be redundant, but it is narrowed. Generally, broad conventional readings of precedent, as in *Belton*, are ripe for narrowing and continue in some reduced form.[122] For instance, after *Gant*, lower courts still relied on *Belton* for a variety of rules, including the basic tenets of the search incident to arrest doctrine and its scope.[123] The narrowing of a once broadly interpreted precedent also occurred in *People v. Harris*, where the New York Court of Appeals narrowed *Miranda v. Arizona*; this decision was later affirmed by the Supreme Court in *Harris v. New York*.[124] After *Harris*, the majority of *Miranda v. Arizona* remained intact, except that defendants could be impeached with their un-Mirandized, voluntary statements if they testified contrary to those statements.[125]

There are also some instances where narrowing renders a precedent obsolete in all respects.[126] This is especially the case where it is argued that a precedent created a contingent, rather than conventional rule.[127] For example, in the 1989 case *Stanford v. Kentucky*, a Supreme Court plurality decided that it was not cruel and unusual punishment to subject juveniles to the death penalty.[128] "On its face, *Stanford* established a fairly conventional, rule-like holding that rested in part on then-extant state sentencing laws and practices."[129] In 2003, in the case of *State ex rel. Simmons v.*

119. *Id.* at 927.

120. *See id.* at 936-50.

121. *Id.* at 971.

122. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (narrowing Miranda v. Arizona, 384 U.S. 436 (1966), where most of *Miranda*'s conventional interpretation carried on); Boumediene v. Bush, 553 U.S. 723 (2008) (narrowing Johnson v. Eisentrager, 339 U.S. 763 (1950), where most of *Johnson*'s conventional interpretation remained intact); *cf.* State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003) (narrowing Stanford v. Kentucky, 492 U.S. 361 (1989) where *Stanford*'s conventional interpretation was rendered obsolete).

123. *See, supra* note 115.

124. *See* People v. Harris, 25 N.Y.2d 175 (1969); *see also* People v. Kulis, 18 N.Y.2d 318 (1966) (the decision the New York Court of Appeals relied on in narrowing *Miranda*); Miranda, 384 U.S. 436; Harris, 401 U.S. 222.

125. *Harris*, 401 U.S. at 222-26.

126. Sometimes narrowing may render precedent obsolete in certain contexts but not entirely. For example, Professor Re has noted that the Fourth Amendment's application in the sphere of technology is an example of a doctrinal area of obsolescence. *See* Re, *Narrowing Supreme Court Precedent from Below*, *supra* note 3, at 953.

127. *See generally*, Re, *supra* note 3, at 951-53.

128. Stanford v. Kentucky, 492 U.S. 361 361 (1989).

129. Re, *supra* note 3, at 951.

Roper, the Missouri Supreme Court concluded that *Stanford* provided a contingent, not conventional rule, i.e., it was decided based on then existing state law and policies (and facts) that were outdated.[130] As a result, the lower court held that it was cruel and unusual punishment to subject juveniles to the death penalty.[131] The Supreme Court affirmed the Missouri Supreme Court's *Stanford* interpretation in *Roper v. Simmons*.[132]

As Professor Re notes, at first blush, it appears the Missouri Supreme Court engaged in anticipatory overruling when its holding was framed in terms that suggested the Supreme Court would rule similarly:[133] "Indeed, Justice O'Connor and other *Roper* dissenters emphatically criticized the Missouri Supreme Court on precisely that ground."[134] However, careful analysis shows that the lower court narrowed, not overruled, *Stanford*. Professor Re explains,

> *Stanford* was ambiguous as to whether its announced rule should outlast its factual premises. In other words, *Stanford* could be read as establishing either of two precedential rules: (i) the Eighth Amendment permits execution of juvenile[s] [], full stop, or (ii) the Eighth Amendment permits the execution of juvenile[s] [] *if* state sentencing practices remain relevantly unchanged.[135]

The Missouri Supreme Court chose the latter of the two reasonable interpretations even if it was not the best-read interpretation, believing *Stanford* to have established a contingent, not conventional, rule.[136] The court did not believe it was overruling *Stanford*.[137] Instead, it emphasized the need to consider changing state laws and conditions.[138] Professor Re describes how narrowing differs from overruling:

> Embellishing the state court's reasoning, one could imagine a lower court positing that the old rule established in *Stanford* actually remained in force. What had changed was simply that the old rule no longer applied to the case at hand, or to any other foreseeable case, given a relevant series of factual developments—namely, changes in state law. On this view, the old rule could very well find application once again. For example, the states might change their capital-punishment laws back to what they had been, thereby providing a factual context in which *Stanford* might once again apply. Or *Stanford* might apply when courts consider other punitive practices that have support among states comparable to the level of support at issue in *Stanford* itself.[139]

130. *Id.* (citing *State ex rel. Simmons*, 112 S.W.3d at 397).
131. *Id.* at 413.
132. Roper v. Simmons, 543 U.S. 551, 575 (2005).
133. Re, *supra* note 3, at 952; *see also, State ex rel. Simmons*, 112 S.W.3d at 413.
134. Re, *supra* note 3, at 952.
135. *Id.* (emphasis in original).
136. *Id.* at 951 (citing *State ex. rel. Simmons*, 112 S.W.3d at 406).
137. *Id.* at 952.
138. *See* State ex. rel. Simmons, 112 S.W.3d at 407 ("[t]o say that this [Eighth Amendment] determination must be made based on the state of the law and standards that existed when Stanford was decided in 1989, and that to do otherwise is to overrule Stanford, is simply incorrect.").
139. Re, *supra* note 3, at 952.

In her dissent, Justice O'Connor clearly believed that the Missouri Supreme Court had overruled *Stanford*, demonstrating that she adhered to the belief that a holding's reasoning could not be a source of ambiguity in its interpretation.[140] She proclaimed that *Stanford* established a conventional, not contingent rule.[141] For the Missouri Supreme Court, the reasoning was central to *Stanford*'s holding, which involved the Eighth Amendment standard of "evolving decency" and conditioned *Stanford*'s holding on the existence of certain circumstances.[142] When the circumstances that motivated the holding–state sentencing laws and practices–were no longer prevalent, the Missouri Supreme Court had space to "narrow from below, without asserting authority to anticipatorily overrule."[143] What remains of *Stanford* after *Roper* in practice? Not much. But, as Professor Re suggests, inevitable tides may come to bear when one day it is relevant again, perhaps in related, though not exact, circumstances.[144]

II. THE VERTICAL NARROWING OF *WHREN*

Whren is ripe for vertical narrowing. First, when applying *Whren* to the modern-day pretextual traffic stop, there is ambiguity as to the interpretation that best honors the first principles of the Fourth Amendment. The conventional interpretation of *Whren* is that a traffic stop is justified when police have probable cause a traffic violation occurred, even if the police are actually motivated by their interest to carry out a separate, suspicionless investigation. In these circumstances, the conventional interpretation holds that there is no need to engage in reasonableness balancing. However, this interpretation violates the intended boundaries of the Fourth Amendment. As noted, unbridled police discretion, in the form of agents of the Crown, is precisely what the framers were concerned about when they drafted the Amendment.[145]

Next, applying *Whren*'s conventional interpretation to today's pretextual traffic stop is also at odds with the language of *Whren* itself. Justice Scalia crafted the "unusually harmful" seizure doctrine in *Whren* when he contrasted Mr. Brown and Mr. Whren's traffic stop with "unusually harmful" seizures.[146] The stop of Mr. Brown and Mr. Whren was termed "run-of-the-mine," and therefore, probable cause that a traffic violation occurred was sufficient to conduct the stop.[147] However, the Court recognized that the category of "unusually harmful" seizures required not only probable cause for the traffic violation, but also the application of a reasonableness balancing test under the Fourth Amendment. Comparing today's pretextual

140. *Id.* at 953 (citing Roper v Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting)).

141. *Id.*

142. *Id.; see also id.* at n.141 ("The Missouri Supreme Court's view finds some support in a traditional conception of stare decisis, which views as precedential all judicial reasoning essential to the judgment."); *see, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67 (1996).

143. Re *supra* note 3, at 953.

144. *See id.* at 952.

145. *See* Hutchins *supra* note 29, at 444.

146. Whren v. United States, 517 U.S. 806, 818 (1996).

147. *Id.*

traffic stops to "unusually harmful" seizures that affect the people's physical and privacy interests demonstrates that the pretextual traffic stop is no longer "run-of-the-mine."

Today's social facts and developments support that pretextual traffic stops have become unusually harmful to the privacy, security, and physical interests of Black and Brown people. The rationale for pretextual traffic stops is not impressive; it has very little to do with actual safety and more to do with using the initial stop to engage with a driver in a suspicionless investigation.[148] Meanwhile, the level of intrusion that occurs during a pretextual stop is disproportionate to the necessity of the stop — motorists are subjected to invasive questioning, requests to exit their cars, and pressure to consent to searches.[149] It is not uncommon for these interactions to escalate, and police have shot and killed motorists after engaging in a suspicionless stop.[150]

In addition to the high degree of intrusion involved in pretextual traffic stops, the harm of these stops extends far beyond privacy concerns. There is evidence that motorists subjected to pretextual police stops develop insecurities about the police, suffer a serious loss of dignity, including feeling like second-class citizens, and may even be less likely to vote.[151]

Finally, our understanding of the evolution of pretextual traffic stops reveals such stops are rooted in racism and contribute to the institutionalization of racism in policing. This police practice reflects yet another way in which Black and Brown people have been subjugated and colonized over the course of our nation's history.[152] The unfettered police discretion enjoyed in the pretextual traffic stop represents a fear comparable to the fear that led our founders to protect the threshold of homes and businesses from arbitrary executive (Crown) invasion.[153]

A. Whren *Satisfies the Narrowing Framework*

Recall that the framework for narrowing includes: (1) determining the precedent's best-read interpretation; (2) assessing whether ambiguity exists or another reasonable alternative interpretation is available; and (3) deciding whether such alternative reading better honors the law.[154] A precedent is ambiguous if there is "uncertainty about which [interpretation] deserves the Court's imprimatur."[155] Here, the query is whether *Whren*'s conventional interpretation (i.e., that probable cause a traffic violation occurred is sufficient for a traffic stop even if the police are motivated by a suspicionless investigation) is the only reasonable interpretation of *Whren*. If there is a reasonable alternative interpretation, then courts must decide whether that reading better honors the first principles of the Fourth Amendment. In addition, as courts

148. *See* EPP ET AL., *supra* note 35, at 59.
149. *See* CARBADO *supra* note 36, at 85-89.
150. *See infra* Part II, section A, subsection 2.
151. *Id.*
152. *See generally infra* Part II, Section 3.
153. *See* Hutchins, *supra* note 29; *see also infra* note 244 (collecting discussion about the framers' intentions in creating the Fourth Amendment).
154. Hutchins, *supra* note 29, at 923, 926, 928, 936-40.
155. Re, *supra* note 3, at 939.

decide whether such ambiguity exists in *Whren*, they can also consider narrowing it based on the same factors: the precedent's facts and language, the facts of the instant case before the court, social facts and developments, adjacent case law, and policy arguments.[156]

Based on *Whren*'s own language, social facts and development, public policy, and the first principles of the Fourth Amendment, there is a reasonable alternative to its conventional interpretation that better honors the law. Because pretextual traffic stops have become "unusually harmful" to the privacy, security, and physical interests of Black and Brown people, probable cause that a traffic violation occurred is no longer sufficient. Rather, courts must conduct a reasonableness balancing test where the people's interests are balanced against the government's desire to enforce its wide-ranging traffic code.[157]

1. *Whren*'s Own Language Supports Its Vertical Narrowing: The "Unusually Harmful" Seizure Doctrine and Its Prophylactic Protection

First, *Whren*'s own language juxtaposing the "run-of-the-mine" pretextual traffic stop with the "unusually harmful" seizure supports the existence of a reasonable alternative to *Whren*'s conventional interpretation and the argument that *Whren* should be narrowed. In *Whren*, the Supreme Court first articulated the concept of "unusually harmful" searches or seizures that require more than a probable cause justification, i.e., reasonableness balancing. Consciously or not, in doing so, the Court created a fail-safe for when the pretextual stop would no longer be the "run of-the-mine" traffic stop. Specifically, Justice Scalia wrote, "Where probable cause existed, the only cases in which we have found it necessary to actually perform the 'balancing' analysis involved **searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests** . . ."[158] Although this phrase has been nominally recognized, the Supreme Court has referenced it since *Whren*, including as recently as 2021 by Chief Justice Roberts.[159] Based on what we know and what we have witnessed about pretextual traffic stops since *Whren*, the relevant inquiry is whether such stops are still "run-of-the-mine" or have become seizures conducted in an extraordinary manner such that they are unusually harmful to the privacy, security, and physical interests of the people, especially Black and Brown people.

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156. *See id.* at 926-28, 936-45; *see, e.g.*, *id.* at 954-55 (Professor Re notes the First Circuit narrowed Supreme Court precedent based on "facts [(including technological and social facts)], law, arguments, and reasons that lay far outside [the precedent] itself.").

157. *See, e.g.*, Code of Virginia, Title 46.2, Ch. 8, Regulation of Traffic, https://law.lis.virginia.gov/vacode/title46.2/chapter8/.

158. Whren v. United States, 517 U.S. 806, 819 (1996) (emphasis added).

159. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001); Lange v. California, 141 S. Ct. 2011, 2033-34 (2021) (Roberts, C.J., concurring); *see also* Ric Simmons, *Lange, Caniglia, and The Myth of Home Exceptionalism*, 54 ARIZ. SR. L.J. 145, 170 n. 153 ("Chief Justice Roberts believed that a categorical rule should exist [in cases involving feeling suspects]," noting "six exceptions to the rule" in his concurrence, including whether "the arrest was 'unusually harmful to [the individual's] privacy or even physical interests.'") (quoting *Lange*, 141 S. Ct. at 2033-34).

The phrase "unusually harmful" is informed by its preceding language "conducted in an extraordinary manner." Thus, the phrase has been interpreted as describing how the search or seizure ensued.[160] Five years after *Whren*, the Supreme Court stated, "[a]s our citations in *Whren* make clear, the question whether a search or seizure is 'extraordinary' turns, above all else, on the manner in which the search or seizure is executed."[161] In *Whren*, the Court cited four examples of situations where an "unusually harmful" search or seizure required reasonableness balancing beyond probable cause.[162] Two of the cited cases, *Wilson v. Arkansas* (unannounced entry of a home while serving a search warrant) and *Welsh v. Wisconsin* (warrantless arrest inside a home for a misdemeanor), focused primarily on the privacy and security interests of the people.[163] The other two, *Tennessee v. Garner* (excessive use of force and police shooting death of 15-year old suspect) and *Winston v. Lee* (proposed surgical procedure to remove evidentiary bullet), focused on the physical interests of the people.[164]

The cited cases make it clear that a practice itself can be deemed as unusually harmful, even if there is no material harm. For example, *Wilson* focused on unannounced home searches, finding that this practice violated the Fourth Amendment.[165] In *Wilson*, police had probable cause to search Ms. Wilson's home and obtained a valid search warrant.[166] Police entered Ms. Wilson's home through an unlocked screen door.[167] They did not announce their presence until after their entry.[168] Ms. Wilson was located in the bathroom flushing marijuana down the toilet.[169] The events were relatively nominal in that Ms. Wilson was not physically harmed and her home was not damaged by police.[170] Even Ms. Wilson's brief stated, "the officers peaceably entered without prior announcement of their identity and purpose; they had no weapons drawn, there was no confrontation, and it was a simple arrest."[171] Although any police intrusion into a person's home is invasive, the police interference with Ms. Wilson's privacy and sense of security was not, on its face, "unusually harmful." Nevertheless, the Supreme Court had the foresight to understand that future unannounced entries into homes may not be as mundane—they may cause substantial inconvenience and danger as was recognized at common law.[172]

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160. *Atwater*, 532 U.S. at 325.

161. *Id.*; *see also* Tennessee v. Garner, 471 U.S. 1, 7 (1985) (noting how a seizure is conducted was important to reasonableness balancing).

162. *Whren*, 517 U.S. at 818.

163. Wilson v. Arkansas, 514 U.S. 927 (1995); Welsh v. Wisconsin, 466 U.S. 740 (1984)

164. Tennessee v. Garner, 471 U.S. 1 (1985); Winston v. Lee, 470 U.S. 753 (1985).

165. *Wilson*, 514 U.S. 927.

166. *See id.* at 929.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. Brief for Petitioner, Wilson v. Arkansas, 514 U.S. 927 (1995) (No. 94-5707), 1995 WL 39036, *18 (1995).

172. *Wilson*, 514 U.S. at 936 (quoting Semayne's Case, 5 Co. Rep. 91b, 77 Eng. Rep. 194, 196 (K.B. 1603); *see also* Brief for Petitioners, Whren v. United States, 1996 WL 75758, *45 (1996) (discussing the perils of unannounced entry into one's home, including the use of defense measures by the individual that would

This foresight–that unannounced entries can cause substantial danger–was unfortunately prescient, as shown by the police killing of Breonna Taylor. In the service of a warrant on Ms. Taylor's home by police in Louisville, Kentucky, there was a dispute as to whether or not the police announced themselves before their forced entry.[173] That forced entry led to Ms. Taylor's boyfriend, Kenneth Walker III, firing his gun towards who he believed to be intruders but turned out to be police.[174] When police returned fire, Ms. Taylor was killed.[175] In *Wilson*, in taking the opportunity to provide further guidance in a case quite unlike that of Ms. Taylor—where even Ms. Wilson's counsel admitted the entry was peaceable—the Court honored the prophylactic protection that the Fourth Amendment offers to the people.[176]

There need not be actual danger present in a specific case before a court for it to engage the Fourth Amendment and its prophylactic protection. Specifically, the *Wilson* case is an example of a search or seizure that was not itself instantly "unusually harmful," but instead presented a situation where future "unusually harmful" searches or seizures could occur, necessitating reasonableness balancing. Similarly, although a pretextual traffic stop presented to a court may not portray actual danger, a court can still decide that the circumstances of such a stop present a scenario that is susceptible to danger in the same way that the *Wilson* Court considered the dangers of unannounced police entries into homes.

Courts do not even need to engage in these hypothetical scenarios, however. All pretextual stops generate danger and harm, even if there is no physical manifestation of that harm. As detailed below, there is substantial evidence that pretextual traffic stops subject Black and Brown people to great harm not only related to their physical well-being, but also their privacy, dignity, and sense of security.

2. Today's Social Facts and Developments Demonstrate That Pretextual Traffic Stops Are Unusually Harmful to the Privacy, Security, and Physical Interests of Black and Brown People

Recall that the Missouri Supreme Court narrowed *Stanford* because of a decade-long evolution of social facts and developments represented in changes to state sentencing practices and policies that informed the court that it was no longer lawful to

not have otherwise been taken had it been known that it was the police entering) (citing LAFAVE, *supra* note 54, § 4.8(a) at 599) (quoting State v. Carufel, 314 A.2d 144 (1974)).

173. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, NY TIMES (Mar. 9, 2023), https://www.nytimes.com/article/breonna-taylor-police.html.

174. *Id.*; see also Theresa Waldrop et al., *Breonna Taylor Killing: A Timeline of the Police Raid and Its Aftermath*, CNN, Aug. 4, 2022, https://www.cnn.com/2022/08/04/us/no-knock-raid-breonna-taylor-timeline/index.html.

175. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, What to Know About Breonna Taylor's Death, NY TIMES (Mar. 9, 2023), https://www.nytimes.com/article/breonna-taylor-police.html.

176. The author uses "the people" to emphasize that, as Professor Gray states, "[A]ny right of the people is also a right of each person. All of us, and each of us, therefore have a right to be free from unreasonable search and seizure. Consequently, whenever a member of 'the people' challenges a governmental search or seizure, she stands not only for herself, but also for 'the people' as a whole." Gray, *supra* note 27, at 456.

execute juveniles.[177] The *Stanford*-to-*Roper* narrowing represents the narrowing of a contingent rule, where *Stanford*'s holding was contingent on the existence of certain circumstances, i.e., state sentencing practices and policies that authorized the execution of juveniles.[178] *Whren*'s holding, that probable cause alone, without resort to further reasonableness balancing, is sufficient for a traffic stop, is a contingent rule. It is predicated on the pretextual traffic stop remaining, in Justice Scalia's words, "run-of-the-mine."[179] The premises that led to such a conclusion are outdated just as the state sentencing policies and practices that authorized the execution of juveniles were outdated in the Missouri Supreme Court's narrowing of *Stanford*. The contingency of *Whren*—that pretextual traffic stops are just "run-of-the-mine"—is no more; these stops are "unusually harmful" to the privacy, security, and physical interests of Black and Brown people.

In the twenty-first century, studies and empirical data overwhelmingly demonstrate that Black and Brown people are subjected to pretextual traffic stops far more than white people.[180] As Epp and his colleagues have noted, an "investigatory stop" differs significantly from a "traffic-safety stop." First, when police make an investigatory stop, they have usually already decided to conduct a suspicionless investigation before they make the stop; "they then identify, or create, a pretext to justify the stop."[181] In short, investigatory-type stops are routinely used as pretexts, rendering investigatory stops synonymous with pretextual stops.[182]

Next, while traffic-safety stops consist of speeding, failing to yield to traffic signals and signs, negligent and reckless driving, and driving under the influence, investigatory stops include failing to signal a lane change, equipment problems (such as broken tail, head, and license plate lights), and expired tags.[183] Frequently, the latter type of stops involve minor infractions that pose little-to-no danger to public safety.[184] Although there are outlying situations, the majority of failures to yield to traffic signals create more risk to public safety than failures to use signals. Blowing

177. *See* Re, *supra* note 3, at 951 (citing *State ex rel. Simmons*, 112 S.W.3d 397).

178. *Id.*

179. Whren v. United States, 517 U.S. 806, 819 (1996).

180. There are a substantial number of studies that with and without regard to type of stop (investigatory or traffic-safety) demonstrate Black and Brown people are disproportionately subjected to traffic stops as well as car and person searches resulting from traffic stops. See e.g., VIRGINIA DEPARTMENT OF CRIMINAL JUSTICE SERVICES, REPORT ON ANALYSIS OF TRAFFIC STOP DATA COLLECTED UNDER VIRGINIA'S COMMUNITY POLICING ACT 8-9 (Sept. 2022,) https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/research/report-analysis-traffic-stop-data-fiscal-year-2022.pdf.; *Minneapolis Police Department Stop Information*, TABLEAU (last visited Oct. 24, 2023), https://tableau.minneapolismn.gov/views/MPDStopDataOpenData/MPDStopInformation?%3Aembed=y&%3B%3AshowAppBanner=false&%3B%3AshowShareOptions=true&%3B%3Adisplay_count=no&%3B%3AshowVizHome=no; see also Rigel Robinson & Ben Gerhardstein, *How Berkeley is De-Policing Traffic Enforcement*, MEDIUM (Oct. 19, 2021), https://medium.com/vision-zero-cities-journal/how-berkeley-is-de-policing-traffic-enforcement-ab218f6ee80d; *Report Analyzes Racial Profiling in California Traffic Stops*, CBS NEWS SACRAMENTO (Jan. 3, 2023, 12:00 PM), https://www.cbsnews.com/sacramento/news/report-analyzes-racial-profiling-in-california-traffic-stops/; RACIAL AND IDENTITY PROFILING ADVISORY BOARD, ANNUAL REPORT 2023 7-10 (Jan. 1, 2023), https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf.

181. EPP ET AL., *supra* note 35, at 59.

182. BAUMGARTNER ET AL., *supra* note 40, at 9.

183. EPP ET AL., *supra* note 35, at 53, 59.

184. *See id.*

through a red light presents substantially more risk to safety than failing to signal a lane change. Of course, failing to provide enough room for the lane change would be negligent or, in some cases, reckless driving, and would fall into the traffic-safety category.[185]

Further, traffic-safety stops are dictated by how people drive while investigatory stops are dictated by how people *look*: "The distinction between traffic-safety and investigatory stops is the key to sorting out how and when race matters in police stops."[186] As seen with the results of Epp et al.'s and other studies, race matters most when the stop is pretextual or investigatory in nature; meanwhile, it is essentially irrelevant during a traffic-safety stop. When making an investigatory stop, police justify it with a *de minimis* traffic violation, such as failing to signal a lane change to reach a separate, unjustified investigation. Whereas when police make a traffic safety stop, they provide a traffic-safety reason for the stop, such as excessive speed, and address the safety issue.[187]

Epp et al.'s scholarship confirms that Black and Brown people were far more likely to be stopped for *de minimis* traffic violations through investigatory stops.[188] Specifically, Epp et al. found that Black motorists were "2.7 times more likely than whites to be stopped in investigatory stops."[189] Strikingly, fifty-two percent of Black people reported being stopped for *de minimis* reasons while thirty-four percent of whites reported being stopped for similar minor reasons.[190]

Smacking of a tactic of social control, Epp et al. also found that Black people in Kansas City's white suburbs were especially targeted with investigatory stops: "Disproportionate investigatory stops of African American drivers in these wealthy suburbs looks less like crime control and more like a deliberate effort to keep blacks out."[191] In addition, eighteen percent of Black drivers were given no reason for their stops versus only eight percent of white drivers.[192] This coincides with a significant difference between a traffic-safety stop and an investigatory stop – during a traffic-safety stop, the driver knows why they are being stopped and is left with that "they

185. *See id.*

186. *Id.* at 59.

187. State v. Carney, 2023-Ohio-1801, ¶¶ 26-27 (Ct. App.); City of Dayton v. Erickson, 665 N.E.2d 1091, 1096 (Ohio 1996); State v. Williams, 554 N.E.2d 108, 110 (Ohio 1990).

188. EPP ET AL., *supra* note 35, at 53-54 ("Our analysis of who is targeted builds on research by Robin Shepard Engle and Jennifer Calnon, who found, [in a national study examining central-city and non-central city areas], that racial disparities in police stops are greater in stops made for low level violations, like failure to signal a turn, than in speeding violations. Likewise, Albert Meehan and Michael Ponder found that officers in a larger West Coast city were significantly more likely to run computerized license-place checks and make stops of African Americans drivers in 'white' neighborhoods. . .") (citing Robin Shepard Engel and Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics during Traffic Stops with Police: Results From a National Survey*, JUSTICE QUARTERLY 21 (2004): 49-90; Albert J. Meehan and Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, JUSTICE QUARTERLY 19 (2002): 399-430)).

189. *Id.* at 64.

190. *Id.* at 61.

191. *Id.* at 61, 71; *id.* at 106. ("Suburban officers are especially likely to carry out investigative intrusions of African American drivers and are much more likely than their urban and exurban counterparts to pursue these investigations in *both* investigatory and traffic-safety stops.") (emphasis in original); *id.* at 108.

192. *Id.* at 60.

got me" feeling whereas those subjected to investigatory stops are left wondering, "why did this happen?"[193]

Another profound study on traffic stops, which included data on investigatory stops, was conducted by Frank Baumgartner and his colleagues from 2002–2016 where they reviewed data from over twenty million traffic stops in North Carolina.[194] One year's worth of data showed that African Americans were 63 percent more likely than white drivers to be stopped by police.[195] In a broader assessment of the data, investigatory stops made up 46.27 percent of the stops.[196] Revealingly, 51.85 percent of those stops were of Black drivers, while 46.98 percent were of white drivers.[197] Bear in mind that African Americans made up far less of the state's total population than whites; and the researchers used this statistic, rather than considering the Black driver population, which was very likely to be lower than the total Black population.[198]

Further, Stephen Rushin and Griffin Edwards collected data from over eight million traffic stops conducted in 2008 through 2015 in Washington state.[199] They did this during a pivotal time, when the state transitioned from pretextual traffic stops being forbidden to so-called "mixed-motive stops" being permitted. This meant officers were allowed to stop cars if they articulated they would have stopped them for the traffic violation alone.[200] Rushin and Edwards found that after the Washington Supreme Court's licensing of "mixed-motive stops," there was "a statistically significant increase in traffic stops of drivers of color relative to white drivers."[201] They also found that this occurred most frequently during the daylight hours where it was easier for officers to see the driver's race.[202] Rushin and Edwards note that their findings "suggest that judicial decisions like *Whren* and *Arreola* [the "mixed-motive stops" case in Washington] increase the probability of racial profiling by police officers."[203]

What sets Epp et al.'s survey apart from others is that it collected information about the actual experiences of Black and Brown drivers subjected to investigatory stops. While no one enjoys a traffic-safety stop, investigatory stops are far more "intrusive, interpersonally tense, and sometimes genuinely scary, as when the officer handcuffs the driver; but, in the end, most drivers. . .are let go with no ticket or warning whatsoever."[204] Black drivers are far more aware of the dangers of a traffic stop

193. *Id.* at 62-63.
194. *See* BAUMGARTNER ET AL., *supra* note 40.
195. *Id.* at 68-69, tbl.3.1.
196. *Id.* at 53-54, tbl. 2.1.
197. *See id.* at 53-54, tbl. 2.1, 68-69, tbl. 3.1; *see also* McLane *supra* note 54, at 197-204.
198. *See* BAUMGARTNER ET AL., *supra* note 40; *see also* McLane *supra* note 54, at 197-204.
199. Rushin & Griffin, *supra* note 40, at 637-726.
200. *See id.* at 637; *see also* State v. Ladson, 979 P.2d 833 (Wash. 1999); State v. Arreola, 290 P.3d 983 (Wash. 2012).
201. Rushin & Griffin, *supra* note 40, at 637, 644, 669, 686, tbl. 2, 687-689, tbl. 3.
202. *Id.* at 637-38, 690-693.
203. *Id.* at 638 (context added).
204. EPP ET AL., *supra* note 35, at 83.

escalating, often seeking to be as compliant as possible to safely end the encounter.[205] As stated by Epp et al., "rather than striking out against this disrespect, [B]lack drivers follow a script prescribing quiet acquiescence to police officers' commands and requests in investigatory stops."[206] Many Black drivers told Epp et al. that during a traffic stop they would do everything they could to externally remain compliant with the officer even if internally they felt violated and wanted to be defiant.[207] If they do not put on this external face and image, they risk further aggression, verbal and physical, by police.[208] Black and Brown people, for good reason, are afraid of the police.[209] In essence, "a stop is never just a stop. If anything a stop is 'normal,' it is the constant possibility of intrusive questions and searches, and the implication that the driver looks like a criminal."[210] All of this results in a substantial loss of not only privacy, but also loss of security and dignity.

Indeed, research suggests that racialized policing causes lasting harm, serving to further subjugate Black and Brown people.[211] Racially-biased stops convey a message to the driver that they "look like a criminal," and that "they are not an equal member of society."[212] These stops also lead to mass incarceration of Black and Brown people and further their criminalization.[213] In addition, police stops cause psychological harm.[214] And, of course, disparate police stops reduce what trust there is in our legal

205. *See id.* at 88.

206. *Id.* EPP ET AL. further notes, "As Rod Brunson and Ronald Weitzer observed in their rich ethnographic study, deferring to the officers' instructions in investigatory stops is African American drivers' rational, self-preserving response to the ever-present risk of violent escalation." *Id.* (citing Ronald Weitzer and Rod Brunson, *Strategic Responses to the Police Among Inner-City Youth*, 50 SOCIO. Q. 235, 235-56 (2009); Rod K. Brunson and Ronald Weitzer, *Negotiating Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, 40 J. CONTEMP. ETHNOGRAPHY 425 (2011)).

207. *Id.* at 88.

208. *See, e.g.*, Ayana Archie, *Army lieutenant pepper-sprayed in Virginia traffic stop receives $3,685 in damages*, NPR (Jan. 19, 2023), https://www.npr.org/2023/01/19/1149924822/army-lieutenant-virginia-police-traffic-stop.

209. *See, e.g.*, Tracey Maclin, *"Black and Blue Encounters" Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U.L. REV. 243, 250-262 (1991). There are websites and guides dedicated to helping Black and Brown people survive a police encounter. *Know Your Rights: Police Interactions for Black and Brown People*, ACLU NORTHERN CALIFORNIA, (Sept. 30, 2020), https://www.aclunc.org/our-work/know-your-rights/know-your-rights-police-interactions-black-and-brown-people. In addition, numerous other "studies show that African Americans and Latinos have developed and share with each other an extensive body of knowledge about police behavior and police stops." EPP ET AL., *supra* note 35, at 117 (citing Rod K. Brunson & Ronald Weitzer, *Negotiation Unwelcome Police Encounters: The Intergenerational Transmission of Conduct Norms*, J. OF CONTEMP. ETHNOGRAPHY, 40(4), 425-56 (2011); Ronald Weitzer & Rod Brunson, *Strategic Responses to the Police Among Inner-City Youth*, SOCIO. Q. 50, 235-56 (2009).

210. EPP ET AL., *supra* note 35, at 118.

211. *Id.* at 135, 139 ("The drivers interviewed, black and white, suggested how targeting African Americans for investigatory stops sends unmistakable messages about their lower status.").

212. *Id.* at 135-36.

213. *See id.* at 135.

214. *See id.* at 135 (citing Amber J. Landers, et al., *Police Contacts and Stress among African American College Students*, AM. J. OF ORTHOPSYCHIATRY 81(1), 72-81) (2011).

system, including policing.[215] Unsurprisingly, some studies show that "people stopped by police are less likely to vote."[216]

All of this, for what? Not much. It turns out that pretextual traffic stops based on a 1980s "drug courier profile" and further laced with implicit bias and racial framing, are not that successful.[217] In fact, most of them are fruitless. For example, in Epp et al.'s 2003-2004 survey of Kansas City Metropolitan area drivers, during investigatory stops, "26.5 percent of [B]lack drivers [] were searched, but only 8.5 percent of white drivers in these stops were searched."[218] However, "[t]he hit rate—the rate at which officers discover[ed] contraband in a vehicle search—for African American drivers [was] less than half that for white drivers (11 percent versus 27 percent)."[219] In addition, in the Baumgartner study in North Carolina that spanned from 2002–2016, in the 700,000 total searches that were conducted, "police [were] equally likely to find contraband on [B]lacks as compared to whites."[220]

When the type of search is adjusted for, separating discretionary searches from procedural searches, i.e., discretionary ones involving police using discretion to decide whether to search (such as a search based on consent) and not because of a matter of procedure (such as a search incident to arrest), white people were more likely to be in possession of contraband.[221] Specifically, "[o]fficers [were] 22 percent less likely to find contraband on [B]lack drivers following consent searches and 12 percent less likely after probable cause searches."[222] These results are not unique, other studies support that traffic stops do not reduce crime.[223]

Although these violations of privacy, dignity, and sense of security occur at the driver's or passenger's side window of a car, they present the same dangerous and harmful situation as the threshold of Ms. Wilson's home. Sure, in most cases, a car is not a home; however, individuals do not discard their privacy and security interests when they leave their homes and travel in their cars. For example, when the *Gant* Court accepted the Arizona Supreme Court's vertical narrowing of *Belton*, it

215. *Id.* at 135, 143 ("Experiencing a traffic-safety stop has no effect on either whites' or African Americans' trust in the police. By contrast, experiencing an investigatory stop directly and substantially erodes African Americans' trust in the police. . .Experiencing an investigatory stop also erodes whites' trust in the police, but the impact is less than half that for African Americans."). *See generally* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (where several current justices weighed in on the racial discriminatory effects of the continued practice of non-unanimous jury).

216. *Id.* (citing Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, AM. POL. SCI. R. 104, no. 4 (Nov. 2010: 817-33).

217. *See generally* PADULA, *supra* note 9, at 60-62 (describing the origins of the "drug courier profile").

218. *Id.* at 105.

219. *Id.*

220. BAUMGARTNER et al., *supra* note 40, at 112-13.

221. *Id.* at 113.

222. *Id.*

223. *See e.g.*, Andrew Wolfson, *Traffic stops don't reduce crime, study says. But Louisville police insist they work*, COURIER J. (Apr. 4, 2019), https://www.courier-journal.com/story/news/crime/2019/04/04/nyu-study-more-traffic-stops-nashville-didnt-reduce-crime/3227748002/; *see also An Assessment of Traffic Stops and Policing Strategies in Nashville,* NYU SCHOOL OF LAW: POLICING PROJECT, https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5bf2d18d562fa747a554f6b0/1542640014294/Policing±Project±Nashville±Report.pdf.

recognized that permitting invasive searches in cars whenever a person is subjected to a traffic stop "creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."[224]

Even if, at the end of the stop, the Black or Brown motorist is permitted to leave without even so much as a traffic ticket, the invasion to their privacy and sense of security was arbitrary and extreme. In a traffic stop, police need only reasonable suspicion that a traffic infraction has occurred; they may order the driver (and passengers) out of the car; they can frisk the driver and search the car if there is reasonable suspicion to believe the driver is armed and dangerous; they can engage in intrusive questioning, including asking why the driver is in the area; they can visually inspect the car (including with a flashlight or spotlight); they can subject the car to K-9 sniffs; they can seek consent to search the car; they can arrest the driver with probable cause; and, potentially, they can subject the driver's property and assets to civil forfeiture.[225]

None of this was considered by the *Whren* Court in 1996 and, unfortunately, the Court did not engage in the critical foresight demonstrated in *Wilson*, where it considered the potential dangers that could be lurking at the threshold of one's home when police enter unannounced.[226] A narrowed *Whren* would preserve the privacy and security interests as well as the dignity of Black and Brown people who disproportionately suffer these highly invasive, suspicionless, and fruitless pretextual traffic stops.

Further, pretextual and *de minimis* traffic stops are downright deadly for Black and Brown people. To name only a few who have been shot and killed by police following such a stop: Philando Castile, Patrick Lyoya, Daunte Wright, Nathaniel

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224. *Gant*, 556 U.S. at 345 (citing *Maryland v. Garrison*, 480 U.S. 79, 94 (1987); Chimel v. California, 395 U.S. 752, 760-61 (1969); *Stanford v. Texas*, 379 U.S. 476, 480-84 (1965); *Weeks v. United States*, 232 U.S. 383, 389-92 (1914); *Boyd v. United States*, 116 U.S. 616, 624-25 (1886); 10 C. Adams, The Works of John Adams 247-48 (1856); *see also id.* at 348 ("Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated. . ."). In addition, there is evidence that cars are becoming "roving computers" that require more modern-day Fourth Amendment protections. Nathan Freed Wessler, Jennifer Stisa Granick, & Daniela del Rosario Wertheimer, *Our Cars Are Now Roving Computers. Is The Fourth Amendment Ready?*, ACLU, May 21, 2019, https://www.aclu.org/news/privacy-technology/our-cars-are-now-roving-computers-fourth-amendment.

225. *See* CARBADO, *supra* note 36, at 85-89; *see also* PADULA, *supra* note 9, at 158; *see, e.g.*, Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL (July 21, 2015), https://www.orlandosentinel.com/1992/08/23/color-of-driver-is-key-to-stops-in-i-95-videos/ (updated article originally published in 1992 detailing the racial profiling and civil forfeiture that Sheriff Vogel encouraged in Volusia County, Florida). There was other evidence that Vogel's profile was racist, including one of his officers testifying under oath that "[Vogel's] profile target[ed] Black men between 20 and 50." PADULA, *supra* note 9, at 144 (citing Al Truesdell, *Prosecutor: Drug Profile Ruling Won't Affect Volusia*, ORLANDO SENTINEL (June 29, 1985), http://articles.orlandosentinel.com/1985/-06-29/news/0310150230_1_volusia-county-drug-courier-profile-palm-beach). In addition, two of Vogel's men, under deposition, admitted that during a 1989 meeting Vogel told them to "look for Blacks and Hispanics," and then allegedly stated, "'There goes one now,' when he saw a Black motorist drive past." *Id.* at 159 (quoting Steve Berry, *Witnesses Call Vogel's Drug Policy Racist*, ORLANDO SENTINEL (Jan. 11, 1995), http://articles.orlandosentinel.com/1995-01-11/news/9501110114_1_drug_squad_vogel_selena).

226. Whren v. United States, 517 U.S. 806, 806, 808 (1996); *see also supra* note 172.

Edwards, and James Hartsfield.[227] Before he was shot and killed by police, Philando Castile, a school cafeteria employee in the Minneapolis-Saint Paul area, was pulled over at least fifty-two times in thirteen years, racking up substantial fines.[228] He received seventy-nine different traffic citations, forty-eight of which were ultimately dismissed. Most of the citations were for violations that were discoverable only after he was pulled over, such as failing to provide proof of car insurance.[229]

During the pretextual traffic stop that led to his death, Mr. Castile was allegedly pulled over for a broken taillight, though recorded police radio indicated that officers thought he looked like the suspect in a recent armed robbery.[230] Video filmed by Mr. Castile's girlfriend showed that he was shot and killed after telling the officer he had a legally possessed firearm in his car.[231] The police in-car video captured Mr. Castile's final words: "I'm not pulling it out," and then, after the sound of seven gunshots, "I wasn't reaching . . ."[232]As Guy Padula aptly states, "[h]is death also symbolizes the dangers innocent motorists are subjected to by efforts to use roving patrol stops based on trivial traffic violations to enforce narcotic laws."[233] Philando Castile's death and the harassing police stops he experienced leading up to it represent the awful, intrusive nature of pretextual traffic stops and their ultimate toll on the privacy, dignity, security, and physical interests of Black and Brown people.

Each year, the police kill an average of over 1,000 people–a number that is steadily rising.[234] In 2022, the highest number of people per year were killed by police, and within the last twelve months of drafting this article, 1,031 people have been shot and killed by police.[235] Although African Americans account for approximately thirteen percent of the U.S. population, they are killed by police at a rate more than two times than that of white people.[236] Tellingly, counties with historically high rates of

227. *See infra* Introduction; *see also* David D. Kirkpatrick, et al., *Why Many Police Stops Turn Deadly*, NY TIMES (Oct. 31, 2021), https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html.

228. PADULA, *supra* note 9, at 211 (citing Sharon La Franiere & Mitch Smith, *Driver Killed by Officer Had Trail of Tickets*, NY TIMES, July 17, 2016, at A1; Mitch Smith, *Family of Minnesota Man Killed by Police Calls for Inquiry by a Special Prosecutor*, NY TIMES, July 13, 2016, at A10; A.J. Lagoe & Steven Eckert, *KARE 11 Investigates: Racial Profiling in Minnesota*, KARE11.COM (Aug. 29, 2016), www.kare11.com/news/investigations/kare-11-investigates-racial-profiling-in-minnesota/266814958.

229. PADULA, supra note 9, at 211.

230. Horner, *supra* note 52.

231. Croft, *supra* note 41.

232. *Id. Philando Castile family reaches $3M settlement in death*, ABC 13 EYEWITNESS NEWS, (June 26, 2017), https://abc13.com/police-shooting-philando-castile-minneapolis-settlement/2149683/; *see also* CBS Evening News, *Squad car video of Philando Castile shooting released*, YOUTUBE (June 20, 2017) https://www.youtube.com/watch?v=V94Lphx6z6Y (readers should be mindful of the upsetting and traumatic nature of the content before viewing).

233. PADULA, *supra* note 9, at 212.

234. *918 People have been shot and killed by police in the past 12 months,* WASH. POST, (updated June 27, 2023), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/.

235. *Id.*; *see also 2022 Police Violence Report*, MAPPING POLICE VIOLENCE, https://policeviolencereport.org/ (last visited Nov. 19, 2023) [herein referred to as *2022 Police Violence Report*].

236. *Id.*; *see also* Wesley Lowery, *Aren't more white people than black people killed by police? Yes, but no*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/; *see also* MAPPING POLICE VIOLENCE (June 16, 2023), https://mappingpoliceviolence.us/; *2022 Police Violence Report*, *supra* note 239.

racial terror lynchings are also those that had the most police shootings of Black people from 2015 to 2020.[237] Traffic stops are among the leading police contacts that result in police shootings.[238] From 2017 to 2022, roughly 600 people were killed by police during traffic stops.[239] Black drivers, making up twenty-eight percent of these deaths, are highly overrepresented compared to their population.[240] Pretextual traffic stops are unusually harmful to the physical interests of the people; for Black and Brown people especially, they are deadly. We can save lives by vertically narrowing *Whren*.

3. *Whren*'s Conventional Interpretation is Antithetical to the First Principles of the Fourth Amendment

It is undisputed that our founders designed the Fourth Amendment to protect the people against arbitrary, unfettered police discretion.[241] The Supreme Court has said, "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."[242] The fear of arbitrary, unfettered police discretion was at the forefront of the founders' minds when they crafted the Fourth Amendment.[243] Significantly, the so-called "Reasonableness Clause" of the Amendment dictates a reasonableness balancing to protect against such overly intrusive police action.[244] Courts and commentators alike highlight "the central meaning of the Fourth Amendment is 'reasonableness.'"[245]

In *Whren*, the Court concluded that probable cause a traffic violation occurred was sufficient to ward off police arbitrariness and honor reasonableness balancing.[246] The Court wrote, "[w]ith rare exceptions not applicable here, [] the result of [reasonableness] balancing is not in doubt where the search or seizure is based upon probable

237. Jhacova Williams & Carl Romer, *Black deaths at the hands of law enforcement are linked to historical lynchings: U.S. counties where lynchings were more prevalent from 1877 to 1950 have more officer-involved killings*, ECONOMIC POLICY INSTITUTE (June 5, 2020), https://www.epi.org/blog/black-deaths-at-the-hands-of-law-enforcement-are-linked-to-historical-lynchings-u-s-counties-where-lynchings-were-more-prevalent-from-1877-to-1950-have-more-officer-involved-killings/.

238. *2022 Police Violence Report, supra* note 235.

239. Levin, *supra* note 41.

240. *Id.*

241. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 339-401, 432-33 (1974); TAYLOR, *supra* note 27, *at* 27-43 (discussing the founder's concerns with overreaching warrants); *see, e.g.*, Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (the offensiveness of the use of general warrants and writs of assistance and their granting of sweeping executive or Crown power); *see also Chadwick*, 433 U.S. at 7-8; Boyd v. United States, 116 U.S. 616, 625-27 (1886).

242. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

243. *See id; see also* infra, note 244.

244. *See id.* at 534-39; *see also* Whren v. United States, 517 U.S. 806, 817 (1996) ("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.").

245. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197 (1993); Flippo v. West Virginia, 528 U.S. 11, 13 (1999) *(per curiam);* Katz v. United States, 389 U.S. 347, 357 (1967).

246. *See Whren*, 517 U.S. at 817-19.

cause."[247] However, the Court exclusively focused on the traffic violation rather than what generally comes after the initial pretextual traffic stop, including, *inter alia*, intrusive questioning and alleged consent-based searches.

Notably, the facts of *Whren* as told by the Court did not constitute a highly invasive stop.[248] Although one of the officers did admit the stop was to conduct a suspicionless drug investigation rather than enforce the traffic code—leading the Court to find that the subjective motives of police are irrelevant—how the police contact ensued after the initial stop was remarkably harmless.[249] Mr. Whren is alleged to have been sitting in the passenger seat with obvious narcotics in his hands, leaving little police work for the officers to do thereafter.[250] That is not the way most pretextual traffic stops unfold.[251]

The *Whren* Court's licensing of pretextual traffic stops authorized widespread arbitrary, unfettered police discretion. Police can investigate whomever they want, whenever they want, for whatever reason they want, with no justification whatsoever by simply articulating they had reasonable suspicion that a minor traffic infraction occurred. As the oft-cited William LaFave has stated, "The apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."[252] Co-signer to *Whren*, Justice Ginsburg, signaled she was ready to revisit *Whren*'s flawed and outdated premises in 2018 for this very reason.[253] In *District of Columbia v. Wesby*, Justice Ginsburg stated in her concurrence: "This case [] leads me to question whether this Court, in assessing probable cause, should continue to ignore why police in fact acted."[254] She pointedly continued: "The Court's jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of the Fourth

247. *Id.* at 817.

248. Padula wondered as many of us have: why didn't Mr. Whren hide the drugs? Padula writes,

> [I]t was not entirely surprising to discover that several years after *Whren*, the arresting officers Littlejohn and Soto were the subject of a scathing newspaper expose reporting how they had engaged in excessive use of force; planted evidence; perjured themselves to secure drug convictions; and exacted retribution against a witness who testified he had seen the officers plant evidence on a suspect.

PADULA, *supra* note 9, at 179 (citing Jason Cherkis, *Rough Justice: How Four Vice Officers Served as Judge and Jury on the Streets of MPD's 6th District*, WASH. CITY PAPER (Oct. 29, 2007), www.washingtoncitypaper.com/news/article/13019154/rough-justice).

249. *Id.* at 171 (quoting Brief for Petitioner at *13 n. 7, *Whren*, 517 U.S. 806 (1996) (No. 95-5841), 1996 U.S. S. Ct. Briefs LEXIS 119) (internal citation omitted)).

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

251. See CARBADO, *supra* note 36, at 85-89.

252. LAFAVE, *supra* note 54, at § 1.4(f), 186.

253. Professor Re has discussed vertical narrowing based on "signaled provocation" where lower courts vertically narrow Supreme Court precedent "in response to [the High Court's] signal and thereby provoke the Court to reconsider its own precedent." Re, *supra* note 3, at 956-57. Re identifies the *Belton*-to-*Gant* narrowing as one such example. *Id.* at 956-58.

254. District of Columbia v. Wesby, 583 U.S. 48, 593 (2018) (Ginsburg, J., concurring).

Amendment protection. A number of commentators have criticized the path we charged in [*Whren v. United States* and its progeny]."[255]

Justice Ginsburg and the esteemed commentators and scholars who have questioned or criticized *Whren* have had every reason to do so. *Whren*'s conventional interpretation runs wholly counter to the first principles of the Fourth Amendment. *Whren* authorized an unreasonable and arbitrary practice that mirrors the actions of the Crown and its officials, which the people of the founding era feared most: the *ex officio* search and the issuance of general warrants and writs of assistance.[256] The *ex officio* search entailed Crown officials forcibly entering homes and businesses without a warrant or cause to seek smuggled goods.[257] The officials claimed unbridled discretion based on their deputization or position alone.[258] On the heels of the *ex officio* search was the issuance of general warrants; officials were commanded to search suspected places without cause and to use writs of assistance where agents of the Crown could "search at large for smuggled goods."[259] The root evil of these historical practices was the arbitrary, unfettered use of police (or Crown) discretion.

Similarly, *Whren* authorizes police, based on their deputization, to enforce even the most *de minimis* traffic violations to conduct arbitrary, suspicionless investigations. Under *Whren,* because an officer is deputized to enforce the vast traffic code, including traffic violations having little-to-nothing to do with public safety, they are given carte blanche to investigate whoever they want, whenever they want, for whatever reason they want, like the Crown's officials.

The leading police manual, *Tactics for Criminal Patrol: Vehicle Stops, Drug Discovery & Officer Survival*, written by Charles Remsberg in 1995, is a prime example of police using their deputization to enforce minor traffic violations to arbitrarily conduct suspicionless investigations.[260] This manual shows how racist and arbitrary the pretextual traffic stop had become by the mid-1990s.[261] The manual is considered a "classic" in policing and, despite its latest printing in 1996, is still widely used by agencies and officers across the nation.[262] It lays out how to conduct routine

255. *Id.* (citing LAFAVE, *supra* note 54, at § 1.4(f), 186).

256. *See* Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 WM. & MARY L. REV. 197, 219-22 (1993); *see also* Amsterdam, *supra* note 245, at 432-33; Marshall v. Barlow's, Inc., 436 U.S, 307, 311-312 (1978).

257. Maclin, *supra* note 256, at 219-22.

258. *Id.*

259. Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978); Maclin, *supra* note 256, at 219-22.

260. CHARLES REMSBERG, TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY, & OFFICER SURVIVAL (1995).

261. *See generally* REMSBERG, *supra* note 260.

262. PADULA, *supra* note 9, at 177 (citing *Preliminary Expert Witness Report of Robert C. Willis*, 6, J.G. v. Lingle, No. 13-cv-414-slc (W.D. Wis. Jan. 6, 2014), 2014 WL 7234260); *see also* EPP ET AL., *supra* note 35, at 36. Padula notes: "Although the manual was first published in 1995, if testimonials published on Amazon.com and written by self-described police officers at to be believed, the manual is still quite popular." *Id.* at 177 n. 66. Indeed, one self-described police officer at the end of his career writes in May 2021, "While the book is old and much of this job has changed, there will always be basics that never do—this book covers those bases." Erik Aronson, *Old publication, but still worthwhile!* AMAZON, (May 28, 2021), https://www.amazon.com/Tactics-Criminal-Patrol-Discovery-Survival/dp/0935878122/ref=sr_1_4?crid=

pretextual traffic stops at the officer's leisure and unbridled discretion without being accused of racial profiling.[263]

Remsberg's manual is chock-full of pictures of minorities being seized by police, depicting Black and Brown people as the dominant perpetrators of drug crimes.[264] One chapter, entitled "Looking for Mr. Wrong," acknowledges racial profiling but does very little (if anything) to dissuade it.[265] Remsberg states: "Today, officers rarely utter the 'P word' except among themselves. For good reason, profiling has sparked controversy, lawsuits, and condemnation and is now officially prohibited by most agencies."[266] Based on this statement, Remsberg does not demonstrate a clear, genuine understanding of the problematic nature of racially profiling Black and Brown people; instead, he appears concerned that profiling has caused potential liability on the part of the police. In addition, Remsberg acknowledges that despite the "controversy" of profiling, the "old 'traditional profile pattern' continues frequently to be used."[267]

In his manual, Remsberg shares a list of what officers who adhere to the "traditional profile pattern" look for, including "male Hispanics, Blacks, or 'any swarthy, dark-haired outlander,' sometimes accompanied by a white female or white male. . ."[268] Remsberg adds, "There's no doubt that targeting vehicles and occupants who match the profile has yielded countless caches of hidden drugs and cash and has resulted in numerous spectacular arrests. Traditional profile characteristics still *do* correlate closely with a sizable portion of drug couriers."[269] While Remsberg admits that the use of the traditional profile has been discredited, he dedicates a section of his manual to teaching police how to avoid being accused of racial profiling.[270] In particular, he encourages police to keep track of all their stops, including trivial stops, in order to prove that an officer accused of racial profiling would have stopped the relevant vehicle for the traffic violation regardless.[271]

As illustrated in Remsberg's manual, police are trained to play an arbitrary numbers game in traffic enforcement or what Remsberg terms "the 5%er Mind-Set," where officers are encouraged to engage in traffic stops aggressively.[272] Remsberg claims that "Criminal Patrol in large part is a numbers game; you have to stop a lot

1ARMEAJ8B9QG1keywords=charles+remsberg&qi-d=1687963572&sprefix=charles+remsberg%2Caps%2C90&sr=8-4#customerReviews (book review of REMSBERG, *supra* note 264).

263. *See* REMSBERG, *supra* note 260, at 45-83.
264. *See generally id.*
265. *Id.* at 45.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 45-46 (emphasis in original).
270. *Id.* at 69-70.
271. *Id.*
272. *See generally id.* at 25-44.

of vehicles to get the law of averages working in your favor."[273] At every turn, Remsberg encourages the use of arbitrary decision-making:

> Fishing for "trouble" productively takes planning: You plan where you're going to work . . . you may set a mental goal of how many vehicles you'd like to stop on your shift . . . you decide how tactically you're going to make contact with the driver and how you're going to position yourself to look inside the vehicle . . . you know certain key words, phrases, or questions you're going to try to catch people in lies . . . you have a strategy in mind for getting inside the vehicles you decide you want to search and the search pattern you're going to use . . . you anticipate the role that a K-9 may play. . .you understand how you need to document and handle any physical evidence that you uncover . . .[274]

Remsberg also encourages officers to specifically police areas they believe to be high drug areas.[275]

Remsberg notes:

> Even though you're not profiling in the traditional sense, you want to habitually perform a 'visual pat down' of the exterior and what you can see of the drivers and passengers in the vehicles around you as you watch traffic. Although couriers today blend in better than ever, some will rouse your suspicion on sight, if you understand what to look for.[276]

He also offers a laundry list of "curiosity ticklers" encouraging trivial and arbitrary traffic code enforcement, including team-driving (such as a sleeping passenger or visible bedding that exhibits split driving), rental vehicles, temporary registrations, tinted windows, "lifestyle statements" (such as Grateful Dead decals), "glitzy" trucks, vehicle modifications, "abnormal" tires, dirt, nervous drivers, and "repeat" vehicles (indicating that officers will be able to tell which cars "belong" and which do not on their routine beats).[277] As the Remsberg manual illustrates, police officers are instructed to exercise a tremendous amount of unfettered discretion.

The police officer enabled by *Whren* is the twenty-first-century Crown official conducting the *ex officio* search or indiscriminately searching and seizing pursuant to a general warrant or writ of assistance. *Whren* can therefore be narrowed, not only because of its own language, social facts, and development, as discussed above, but also because its conventional interpretation does not serve the first principles of the Fourth Amendment. A conventional application of *Whren* condones the very

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273. *Id.* at 27 (emphasis omitted). One example Remsberg references is an Ohio officer who states:

> It's a lot like fishing[.] You go to the steam with positive expectations. You catch a lot of little fish for every big one you catch, and some days you don't catch anything. But the law of averages says if you fish enough, you'll hit something eventually. What keeps you coming back is knowing that there *are* big ones out there and they *can* be caught. But you'll *never* catch anything if you don't put your line in the water.

Id. at 37 (emphasis in original).

274. *Id.* at 37-38.

275. *Id.* at 37.

276. *Id.* at 50.

277. *See id.* at 50-63.

practices and policies that inspired our founders to draft the Fourth Amendment. An interpretation of *Whren* that embraces the "unusually harmful" seizure doctrine and factors in reasonableness balancing when analyzing pretextual traffic stops better honors the law.

III. A NARROWED *WHREN*

Although some communities are not waiting for the courts to fix *Whren*, [278] for pretextual traffic stops to die a legitimate death, courts need to narrow it. As Padula writes, "since the Supreme Court exercises the power of constitutional interpretation, it bears the unique responsibility of having made racial profiling legally permissible."[279] A judicial response is necessary. Lower courts must vertically narrow *Whren*, and the Supreme Court has a responsibility to uphold this narrowing, just as it did in *Gant* and other cases.[280]

Whether Justice Scalia had a premonition or not, his juxtaposition of the "run-of-the-mine" pretextual traffic stop with the "unusually harmful" search or seizure presents a long overdue, viable remedy. This juxtaposition generates ambiguity: how should courts determine what constitutes an "unusually harmful" stop in the context of pretextual traffic stops? The conventional interpretation posits that such traffic stops necessarily fall outside this category because they are "run-of-the-mine." This categorical approach enables police to conduct traffic stops for the sole purpose of initiating suspicionless searches based on racial profiling. But there is a reasonable alternative interpretation: traffic stops that are unusually harmful require more than probable cause (or reasonable suspicion) that a traffic violation has occurred, and pretextual traffic stops have become "unusually harmful" to the privacy, security, and physical interests of the people, especially Black and Brown people.

Thus, the preconditions for vertical narrowing are present: the holding is ambiguous, and there is a reasonable alternative interpretation. This provides a roadmap to narrow *Whren*: first, practitioners should argue (and courts should articulate) that this alternative is a reasonable interpretation of *Whren* that better accommodates *Whren*'s language, social facts and developments, and the first principles of the Fourth Amendment. Next, practitioners can argue that the pretextual traffic stop is

278. *See e.g.*, Katie Krzaczek, *8 common traffic violations no longer warrant a police stop in Philly*, PHILADELPHIA INQUIRER (Mar. 3, 2022, 1:00 PM), https://www.inquirer.com/news/philadelphia/philadelphia-police-wont-stop-drivers-minor-offenses-20220303.html; Libor Jany and Ben Poston, *Minor police encounters plummet after LAPD put limits on stopping drivers and pedestrians*, LOS ANGELES TIMES (Nov. 14, 2022, 5:00 PM), https://www.latimes.com/california/story/2022-11-14/minor-traffic-stops-plummet-in-months-after-lapd-policy-change. Some communities have seen some success, but racial disparities remain. *See, e.g.*, Tom Gantert, *Berkeley, California's police reform made national news but still a work in progress*, THE CENTER SQUARE (Dec. 19, 2022), https://www.thecentersquare.com/california/article_aa66377a-7d5d-11ed-980c-17ec1e625fce.html; Devin Anderson-Torrez, *Lansing implements new traffic stop guidelines in direct response to community concern*, THE STATE NEWS (July 1, 2020), https://statenews.com/article/2020/07/lansing-mayor-schor-implements-new-traffic-stop-guidelines-for-lansing-police-department?ct=content_open&cv=cbox_featured; Levin, *supra* note 41.

279. PADULA, *supra* note 9, at 272.

280. *See generally Gant*, 556 U.S. at 332; *see also* Riley v. California, 573 U.S. 373 (2014) (where Supreme Court approves the First Circuit's narrowing of the search incident to arrest doctrine involving a cell phone).

no longer "run-of-the-mine," but "unusually harmful" to the privacy, security, and physical interests of the people, especially Black and Brown people. Thus, probable cause alone is no longer sufficient, and courts must engage in reasonableness balancing. This balancing would require a more individualized, case-by-case approach, similar to what was recently implemented in the exigent circumstances context by the Supreme Court in *Lange v. California*.

In *Lange v. California*, Arthur Lange committed several minor traffic violations and failed to yield to an officer pursuing him.[281] Mr. Lange made it home and into his attached garage.[282] The officer followed him into the garage to contact him for the traffic violations and a driving under the influence investigation ensued.[283] The Supreme Court had to decide whether a categorical or case-by-case approach to the exigent circumstances exception to the so-called warrant requirement was appropriate.[284] It decided the latter.[285]

In its discussion of the exigent circumstances exception, the Court reminded, "it applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'"[286] The Court further highlighted that the exigent circumstances exception is generally applied on a "case-by-case basis," noting "[t]hat approach reflects the nature of emergencies."[287] Ultimately, the inquiry is whether the police action in the name of exigency is reasonable under the totality of the circumstances.[288]

In *Lange*, the Court conducted reasonableness balancing by considering the people's privacy and security interests against the government's desire to capture misdemeanor suspects.[289] It is axiomatic that the home is provided the most protection under the Fourth Amendment.[290] Moreover, the Court acknowledged that although misdemeanors vary, "they may be (in a word) 'minor.'"[291] Relying on *Welsh,* where a warrantless police entry into Mr. Welsh's home to arrest him for driving under the influence was determined improper under the exigent circumstances exception, the *Lange* Court stressed that the minor nature of an offense plays a key role in determining the application of the exigent circumstances doctrine.[292] Significantly, the Court held:

> [T]he need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. When the nature of the crime, the nature of the flight, and surrounding facts present no exigency, officers

281. Lange v. California, 141 S. Ct. 2011, 2016 (2021).
282. *Id.*
283. *Id.*
284. *Id.* at 2017-18.
285. *Id.* at 2021-25.
286. *Id.* at 2017 (quoting Kentucky v. King, 563 U.S. 452, 460 (2011)).
287. *Id.*
288. *Id.* at 2021.
289. *Id.* at 2022-24.
290. *See id.*
291. *Id.* at 2020.
292. *See id.*

> must respect the sanctity of the home—which means that they must get a warrant.[293]

In arguing for or formulating a set of narrowed *Whren* rules, practitioners and courts should heed our current Supreme Court's advice when it comes to minor offenses. Most traffic offenses are minor; many investigatory traffic stops are *de minimis*. Therefore, once a court has decided to vertically narrow *Whren*, it should separate investigatory stops (minor) from traffic-safety stops (less minor). As Epp et al., Baumgartner et al., and other studies have shown, investigatory stops are the category of stops that police use most to conduct pretextual traffic stops.[294] Reasons provided for these investigatory stops include "the failure to signal a turn or lane change, a malfunctioning light (including license-plate light), driving too slowly, stopping too long, expired license tag, and to check for a valid driver's license or to conduct a warrant check."[295] Other infractions include minor cracks on windshields, following too closely, minor lane deviations, and speeding three miles per hour or less over the speed limit.[296] These types of pretextual traffic stops are responsible for highly intrusive police stops, which have resulted in the deaths of Black and Brown people at the hands of the police.[297] They are the cause of racial disparities in traffic stops.[298]

As we have seen, the privacy, security, and physical interests of the people, even in their cars, are substantial. In particular, Black and Brown people experience highly intrusive and arbitrary traffic stops. [299] On the other side of the balancing, there is minimal return to the government (the "hit rate" demonstrating how useless these stops are in crime control).[300] Given the seriousness of the people's interests and the government's minimal interests in conducting investigatory (non-safety) traffic stops, these stops should be presumed unreasonable subject to rebuttal by the government, much like the exigent circumstances doctrine discussed in *Lange*.[301]

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293. *Id.* at 2021-22. Notably, in his concurrence, Chief Justice Roberts cites to the "unusually harmful" search or seizure doctrine from *Whren* as he expresses some of his concerns with the majority's approach. *See id.* at 2033-34 (Roberts, C.J., concurring).

294. *See supra* Part II, sections A & B.

295. EPP ET AL., *supra* note 35, at 59.

296. Epp and his colleagues draw the line for traffic-safety speed stops at 7 miles per hour over the speed limit based on interviews with police and self-reports from drivers. EPP ET AL., *supra* note 35, at 59, 60. Further, in Washington, minor lane deviations are insufficient cause for a traffic stop. *See* State v. Prado, 145 Wash. App. 646, 647 (Wash. Ct. App. 2008). Finally, many police departments use arbitrary measures to determine whether a car is following too closely. *Levenson v. State*, 508 P.3d 229, 237 (Wyo. 2022) ("While we have approved the use of the two-second rule to determine if there is a traffic violation for following too closely, we must reiterate that this is not a bright-line rule that can always objectively justify a traffic stop.").

297. *See generally* EPP ET AL., *supra* note 35, at 100-06.

298. *See generally id.*

299. See *supra* Part II, section A, subsection 2.

300. *See supra* notes 222-24.

301. This is similar to the Berkeley Death Penalty Clinic's proposal to address racism in the use of peremptory challenges during jury selection. In a substantial report, the Clinic recommended a list of reasons that if proffered as "race-neutral" reasons for peremptory strikes should be presumptively invalid. *See* Berkeley Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Juror*s, BERKELEY LAW (June 2020), x-xi, 14, 75, 80, https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf; *see also* Wash. Gen. R. 37 (a general court rule in Washington that lists "presumptively invalid" reasons for the use of peremptory challenges).

To carry its burden, the government must demonstrate that there is a compelling safety concern when conducting an investigatory stop. Should the government present sufficient evidence that the investigatory stop was necessary for safety reasons, or the relevant stop was related to a concern about traffic-safety (i.e., alleged excessive speeding, failing to yield to traffic signals or signs, negligent or reckless driving, and driving under the influence), then courts should engage in case-specific reasonableness balancing of the interests, deciding whether a particular traffic stop is reasonable under all the circumstances.[302] Under this test, "all the circumstances," really includes *all* the circumstances. For example, if the stop involved any of the so-called "curiosity ticklers" which Remsberg discusses in his manual (such as "glitzy" cars, certain decals, rental cars, or tinted windows), the court ought to consider them to determine whether the stop was reasonable.[303]

Critically, this is an objective standard that does not require ascertaining the subjective intent of police. As a result, this leaves intact the portion of *Whren*'s conventional interpretation that the subjective motivations of police are irrelevant under the Fourth Amendment—that part of *Whren* will live on.[304] However, this does not insulate racial profiling from review so long as "all the circumstances" of the stop are considered in the reasonableness balancing. Today, it would be virtually impossible to elicit testimony, like Officer Littlejohn's admission in *Whren*, that an officer effected a traffic stop for purely pretextual reasons.[305] An objective test and one that presumes most *de minimis* traffic stops (investigatory stops) are unreasonable recognizes this as well as that many pretextual traffic stops (as Baumgartner et al. noted) are likely the result of implicit, not overt, racial bias.[306] By presuming most investigatory stops, which studies have identified as the excuses for pretextual traffic stops, are unreasonable, the proposed test illuminates its central purpose—the elimination of pretextual traffic stops. Further, where the government attempts to rebut the presumptive unreasonableness of investigatory traffic stops, such stops will still have to be reasonable under all the circumstances, including where objective evidence illustrates that police were actually conducting a pretextual stop, such as the police radio conversation captured in the stop of Philando Castile.[307]

There is a relevant example in Wyoming where its supreme court, despite abiding by *Whren* in its Fourth Amendment jurisprudence, has employed this kind of objective reasonableness balancing. "In Wyoming for the initial traffic stop to be constitutional, it must be reasonable under all the circumstances."[308] The Wyoming Supreme Court has made clear that it still follows *Whren*, accepting that the

302. EPP ET AL., *supra* note 35, at 53, 59.

303. *See* REMSBERG, *supra* note 260, at 50-63.

304. *See* Whren v. United States, 517 U.S. 806, 813 (1996).

305. *See* PADULA, *supra* note 9, at 171 (quoting Brief for Petitioner at *13 n.7, *Whren*, 517 U.S. 806 (1996) (No. 95-5841), 1996 U.S. S. Ct. Briefs LEXIS 119) (internal citation omitted).

306. BAUMGARTNER ET AL., *supra* note 40, at 88.

307. *See* Horner, *supra* note 52.

308. Levenson v. State, 508 P.3d 229, 235-36 (Wyo. 2022) (citing Klomliam v. State, 315 P.3d 665, 669 (Wyo. 2014); O'Boyle v. State, 117 P.3d 401, 409-10 (Wyo. 2005)).

subjective motivations of an officer do not taint an otherwise valid traffic stop.[309] Significantly, however, the court emphasizes that an officer's conduct is relevant to reasonableness balancing.[310] The court noted, "[A]n officer's conduct, no matter his subjective intent, is one of the surrounding facts and circumstances that should be considered when analyzing whether an initial traffic stop is reasonable under all the circumstances."[311]

In addition to an officer's conduct, whether the stop occurred because of race ought to be one of the circumstances considered by the court in this narrowed *Whren* rule. This "because of" test is articulated by Carbado and Feingold in their instructive rewrite of *Whren*, which they write through the well-reasoned perspective of Justice Thurgood Marshall.[312] This rewrite provides a scathing analysis of racial discrimination in policing and why it must be critiqued under the Fourth Amendment:

> It seems plain wrong that the Fourth Amendment, which is intended to ensure that police conduct is reasonable, would invite, let alone permit a rule that inoculates racially discriminatory policing—including discrimination rooted in racial animus—from constitutional scrutiny. At least since *Brown v. Board of Education*, 347 U.S. 483 (1954), we would not have thought it necessary nor controversial to assert that racism is, by definition, unreasonable. Racial discrimination does not become reasonable just because the officer possesses probable cause of a traffic infraction. Indeed, we have repeatedly struck down laws or policies as unreasonable because they discriminated based on race. Accordingly, we find it untenable to adopt a rule that would make racial discrimination constitutionally reasonable.[313]

Carbado and Feingold (as Justice Marshall) craft a "because of race" test, concluding that it is unreasonable for police to stop a motorist based on race. Under this test "it is unreasonable for an officer to make a traffic stop because of a motorist's race. This is true even if the officer has probable cause of a traffic violation."[314] Use of this test is merited, they write, because proof of purposeful discrimination is not required to establish that a search or seizure is unreasonable under the Fourth Amendment.[315] Carbado and Feingold discuss ways to uncover whether race informed a police decision to conduct a particular traffic stop without demonstrating purposeful discrimination:

> Would the officers have stopped petitioners had they been white? In answering that question, the [court] should consider, among other factors (1) whether the officers' conduct violated departmental policy, (2) whether civilians have registered any complaints of racial bias or discrimination against the officers, (3)

309. *Id.* at 236.

310. *Id.*

311. *Id.* For example, in *Levenson*, the trooper's conduct created the circumstances that led to the driver's alleged traffic violation. Ultimately, the Wyoming Supreme Court held that "under all the circumstances of [the] case, [] the trooper's objective justification for a traffic violation was negated, and the initial traffic stop was unreasonable . . . ." *Id.* at 239.

312. Carbado & Feingold, *supra* note 55, at 1689.

313. *Id.*

314. *Id.* at 1693.

315. *Id.*

> whether the officers employed racially inflected language during the interaction, and (4) whether there is evidence of racial disparities in the rate at which officers in the department stop people for traffic infractions.[316]

This "because of race" test makes sense, though practitioners will likely experience great difficulty in obtaining the information suggested by Carbado and Feingold.[317] I suggest that this "because of race" test not become a stand-alone test, but rather another factor that courts may consider when applying the proposed "reasonable under all the circumstances" rule. Further, I recommend that this test should not be based on what a "reasonable officer" would do under the circumstances.[318] Such a rule is deeply problematic when we query who the "reasonable officer" is—what do they look like, how do they think, and whose interests do they serve?

The use of a "reasonable officer standard" would also suffer the same problems that the "reasonable person" standard has generated in the seizure context.[319] Three seminal cases that define what a seizure is under the Fourth Amendment, *United States v. Mendenhall, INS v. Delgado*, and *Florida v. Bostick*—all involving the seizure of Black and Brown people—laid out a "reasonable person" test for determining whether a seizure has occurred. These tests have all been rightfully criticized for whitewashing the "reasonable person."[320] Professor Tracey Maclin argues that the test should be race conscious: "[w]hen assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person's race might have influenced his attitude toward the encounter."[321] Embracing this kind of race consciousness, instead of limiting the inquiry to whether

316. *Id.* at 1694.

317. As a practitioner arguing these motions, the author had difficulty obtaining personnel files and other internal police department documents to demonstrate racial profiling in her own practice. She also wants to acknowledge the many overburdened public defenders who struggle to do the same without enough time or proper resources. Further, the practice of pretextual traffic stops is secretive and it is even difficult to obtain training manuals from departments. PADULA, *supra* note 9, at 5.

318. After enunciating this "because of race" test, Carbado and Feingold move on to broadly addressing pretextual traffic stops. Specifically, after their critique of such stops, they announce (as Justice Marshall) this rule: "We think that the appropriate inquiry asks whether, under the totality of the circumstances, a reasonable police officer would have conducted the traffic stop. This is consistent both with our preceding race discrimination analysis and this Court's Fourth Amendment jurisprudence more broadly." Carbado & Feingold *supra* note 55, at 1700. In *Whren*, this was the test proposed by Mr. Whren and Mr. Brown, rejected by the Court. Whren v. United States, 517 U.S. 806, 813-14 (1996).

319. *See generally* Carbado, *supra* note 54, at 974-1004. Three seminal cases that define what a seizure is under the Fourth Amendment are *United States v. Mendenhall, INS v. Delgado*, and *Florida v. Bostick*—all involving the seizure of Black and Brown people—which laid out a "reasonable person" test for determining whether a seizure has occurred. *See* United States v. Mendenhall, 446 U.S. 544 (1980); Florida v. Bostick, 501 U.S. 429 (1991); INS v. Delgado, 466 U.S. 210 (1984). Under this precedent, the "reasonable person" standard appears to reflect a cisgender, straight, white, male. Yet, the average, hypothetical white person does not even feel comfortable terminating a police interaction, much less a Black or Brown person. *See generally* Maclin, *supra* note 209, at 248-279. Professor Tracey Maclin has stated, "When assessing the coercive nature of an encounter, the Court should consider the race of the person confronted by the police, and how that person's race might have influenced his attitude toward the encounter." *Id.* at 250.

320. *See* United States v. Mendenhall, 446 U.S. 544 (1980); Florida v. Bostick, 501 U.S. 429 (1991); INS v. Delgado, 466 U.S. 210 (1984); *see also* Carbado, *supra* note 54, at 974-1004; *see generally* Maclin, *supra* note 209, at 248-279.

321. Maclin, *supra* note 209, at 250.

a "reasonable officer" would have conducted a particular traffic stop, will generate a more robust balancing test under a narrowed *Whren*.

Finally, practitioners should not shy away from arguing for the vertical narrowing of *Whren* in cases where drugs or other contraband is located by police following a pretextual traffic stop. Most victims of a pretextual traffic stop never see the inside of a courtroom, unless they file a civil action or they are criminally prosecuted. It is very likely the case that will set the vertical narrowing of *Whren* into motion will be like *Gant* (which led to the *Belton*-to-*Gant* narrowing), involving a person being prosecuted for a crime. The prophylactic nature of the Fourth Amendment is intended to protect not just the instant individual's privacy, security, and physical interests at stake, but also the people's: their Fourth Amendment rights "shall not be violated."[322] The fruitfulness of a litigated pretextual traffic stop has nothing to do with whether the decision to make the stop was reasonable under all the circumstances.[323]

Taking these factors into account, courts should adopt the following standard when assessing whether traffic stops violate the Fourth Amendment under a narrowed *Whren.* First, certain *de minimis* traffic violations alone should be presumptively unreasonable police stops. This presumption may be rebutted by evidence submitted by the prosecution, but it bears a heavy burden of demonstrating a compelling safety need. Next, if the prosecution meets this burden or the stop is explicitly focused on traffic safety, then the court must conduct reasonableness balancing with the ultimate query being whether the traffic stop was reasonable under all the circumstances. This should include a discussion of an officer's conduct as well as Carbado and Feingold's "because of race" test. This balancing approach protects all people and honors the Fourth Amendment's purpose to prohibit arbitrary police discretion, far more than *Whren*'s conventional interpretation. Therefore, vertically narrowing *Whren* will allow courts to return to the reasonableness analysis that is foundational to the Fourth Amendment.

IV. CONCLUSION

Lower courts can and should vertically narrow racist precedent, such as *Whren*. It is not necessary to overrule *Whren*. Narrowing has been embraced by the Supreme Court itself as it has horizontally narrowed its own precedent and accepted lower courts' narrowing of its precedent. There is readily available and useful language in *Whren* itself—the "unusually harmful" search or seizure doctrine. Purposeful or not, Justice Scalia inserted that language. The facts, including social facts, and circumstances surrounding pretextual stops today further legitimize its narrowing. Pretextual traffic stops, steeped in racism from their outset and soaked still in racial discrimination today (albeit more implicitly), are unusually harmful to the privacy, security, and physical interests of the people— Black, Brown, or white. Vertically narrowing *Whren* yields a workable and just rule that can better protect our Fourth Amendment rights.

322. *See generally* Gray, *supra* note 27, at 444-57.
323. *See, e.g.*, *Levenson*, 508 P.3d 229.