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# Police Discretion and Traffic Enforcement: A Government of Men

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POLICE DISCRETION AND TRAFFIC ENFORCEMENT:  
A GOVERNMENT OF MEN?

ILLYA LICHTENBERG<sup>1</sup>

“If Jefferson were writing the Declaration of Independence today he would undoubtedly be besieged to include an assertion of the inalienable right to the pursuit of happiness’ in an automobile.”<sup>2</sup>

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<sup>2</sup>Arthur Vanderbilt *Traffic Law Enforcement from the Standpoint of the Courts*, 4 RUTGERS L. REV. 555, 561 (1950).

## I. INTRODUCTION

Police across the nation have long been accused of using the broad discretion<sup>3</sup> afforded to them in traffic enforcement as a pretext for criminal investigation.<sup>4</sup> Despite this widely held belief, there is little evidence to suggest that courts have put forth any effort, or have even considered remedying<sup>5</sup> or reducing the wide spread abuse of police discretion<sup>6</sup> in traffic stops,<sup>7</sup> with the exception of racial profiling<sup>8</sup>

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<sup>3</sup>Kathryn Schellenberg, *Policing the Police: Surveillance and Predilection for Leniency*, 27 CRIM. JUST. AND BEHAV. 667 (2000) (“[p]olice conduct is framed by a rigid quasi-military command structure, volumes of regulations, and countless edicts dispensed as law. Paradoxically, however, frontline police officers enjoy a very high level of job discretion and autonomy”).

<sup>4</sup>David Rudovsky, *Law Enforcement by Stereotypes and Seredipity: Racial Profiling and Stops and Searches Without Probable Cause*, 3 U. PA. J. CONST. L. 296, 317-18 (2001) and accompanying footnotes; Kenneth Gavsie, *Making the Best of Whren: The Problems with Pretextual Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 394-401 (1998); *State v. Retherford*, 639 N.E.2d 498, 503 (Ohio Ct. App. 1994), *discretionary appeal denied*, 635 N.E.2d 43 (Ohio 1994) (“Ohio citizens are being routinely delayed in their travels and being asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to ‘practice’ his drug interdiction technique”). The *Retherford* decision was the direct predecessor of *Ohio v. Robinette*, 519 U.S. 33 (1996).

<sup>5</sup>It should be noted that it is unclear whether the courts are capable of effectively reforming police traffic enforcement practices. There appears little in the literature concerning alternative methods of traffic regulation and numerous other factors influence the incentive to not change the status quo as discussed later in the text of this article.

<sup>6</sup>Adero Jernigan, *Driving While Black: Racial Profiling in America*, 24 LAW & PSYCHOL. REV. 127, 132-33 (2000).

The result reached in *Whren* is problematic. First, the Court never addressed the petitioners’ concern that relying on probable cause in the context of pretextual traffic stops leaves motorists without protection against arbitrary law enforcement. This decision leaves too much discretion in the hands of police officers. Because of the lack of resources to fully enforce all the criminal statutes, it follows that police have broad discretion in police investigations, stops, and arrests. This discretion is at its greatest when it comes to enforcing traffic regulations and creates the potential for arbitrary and discriminatory law enforcement.

<sup>7</sup>*Whren v. United States*, 517 U.S. 806, 813 (1996) (subjective motivation for traffic stop not relevant to Fourth Amendment, only whether offense occurred and police had probable cause to justify conduct relevant); H. Laurence Ross, *Folk Crime Revisited*, 11 CRIMINOLOGY 71, 78 (1973) (“[i]f police action in traffic cases often seems arbitrary, the courts cannot be depend upon to rationalize matters at a later stage in the criminal process”). *But see*, *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); *State v. Ladson*, 979 P.2d 833 (Wa. 1999).

<sup>8</sup>Margie Paris, *A Primer in Profiling: The Merger of Civil Rights and Criminal Defense*, 15 FALL CRIM. JUST. 4 (2000) (distinguishing between formal and informal profiling). Formal refers to a departmental policy while informal refers to profiling based on individual police discretion. *Id.* For this Article, since profiling per se is not a central theme to the article, the term “racial profiling” is intended as a general reference to both forms.

litigation under the Equal Protection Clause of the Fourteenth Amendment.<sup>9</sup> The racial profiling litigation, other than being a relatively new concept,<sup>10</sup> has also been limited to using traffic enforcement as a pretext to find more serious criminal wrongdoing,<sup>11</sup> it has not meaningfully addressed the unequal or selective enforcement of traffic laws.<sup>12</sup> This Article addresses the apparent gap in the legal and social science literature concerning the unequal enforcement of traffic laws. How extensive do the police abuse the discretionary powers they are afforded in enforcing traffic offenses? And what, if any, legal remedies exist, or should exist, to address the abuse of police discretion in the traffic enforcement context?

## II. POLICE DISCRETION AND TRAFFIC ENFORCEMENT: THE LAW

The source of police discretion in traffic enforcement and subsequent abuse can be found in its legislation.<sup>13</sup> Traffic laws have been referred to as public welfare offenses,<sup>14</sup> absolute liability offenses,<sup>15</sup> and strict liability offenses.<sup>16</sup> Whichever

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<sup>9</sup>*Whren*, 517 U.S. at 813 (stating relief from discriminatory traffic enforcement practices found in Equal Protection Clause of the Fourteenth Amendment rather than in the Fourth Amendment); Gavsie, *supra* note 4 at 393.

<sup>10</sup>Abraham Abramovsky & Jonathan Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725 (2000) (stating racial profiling came to the forefront in the last two years of the twentieth century).

<sup>11</sup>*Whren*, 517 U.S. 806.

<sup>12</sup>*See, e.g., Soto*, 734 A.2d 350 (challenging drug seizures during motor vehicle stops). It challenged the basis of the stops and the subsequent searches based upon a racial profile but it did not challenge any disparity in the enforcement of traffic laws. *Id.*

<sup>13</sup>The legislated speed limits and actual human driving behavior makes compliance with speed laws virtually impossible, or at minimum, very difficult. *See* MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARDS THE RATIONAL EXERCISE OF DISCRETION* 50 (3d ed. 1989) (“[I] legislatures should redefine the common areas of selective enforcement in such a way that the police are not delegated the discretion not to invoke the criminal law”); Gavsie, *supra* note 4 at 390 ([a] study in Maryland found 93% of motorists had committed at least one traffic violation on a stretch of highway between Baltimore and Delaware); Ross, *supra* note 7 at 83 (when referring to traffic offenses “[w]idespread violation of novel criminal legislation seems to arise when new behavioral opportunities are attractive to large numbers of people and where legislation attempting to control does not integrate with traditional morality”).

<sup>14</sup>Randall S. Bate & Dayna E. Mancuso, *It’s All about What You Know: the Specific Intent Standard Should Govern Knowing Violations of the Clean Water Act*, 9 N.Y.U. ENVTL. L.J. 304, 313 (2001); Beth Frensilli, *Statutory Interpretation of Ambiguous Criminal Statutes: An Analysis of Title 18, Section 207(c) of the United States Code*, 58 GEO. WASH. L. REV. 972, 990 (calling traffic and motor vehicle violations public welfare offense).

<sup>15</sup>Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY’S L.J. 965, 976-979 (1993); Gerhard Mueller, *How to Increase Traffic Fatalities: A Useful Guide for Modern Legislators and Traffic Courts*, 60 COLUM L. REV. 944, 957 (1960); Ross, *supra* note 7 at 84 (referring to traffic violations as absolute liability offenses).

<sup>16</sup>Douglas Husak, *The Nature and Justifiability of Nonconsummate Offenses*, 37 ARIZ. L. REV. 151, 176 (1995) (suggesting that moving violations are generally treated as strict liability

term is utilized there are no real defenses to a traffic ticket;<sup>17</sup> as one commentator noted, a real defense to a traffic ticket is the driver was someone other than the defendant.<sup>18</sup> There are no real defenses to a strict or absolute liability offense as there is no mens rea requirement; the act in itself is grounds for conviction.<sup>19</sup>

Once the police possess probable cause that a traffic violation has occurred they have the unfettered discretion of whether to stop the motorist,<sup>20</sup> to issue a summons or arrest the suspected traffic offender,<sup>21</sup> what ticket or tickets to issue,<sup>22</sup> and will enjoy a virtual guarantee of conviction in court.<sup>23</sup> Because the outcome of the criminal or quasi-criminal process in a traffic case begins and the final outcome of the case is de facto determined during the stop itself, it is clear that the law governing the traffic stop is the only law material to the case. In essence, when the police stop a motorist and issue a summons, any subsequent activity in court is merely a “fiction,” a process that has no meaning other than the process itself, as the actual outcome of the case was decided at the conclusion of the traffic stop.<sup>24</sup>

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offenses); Bonnie McGrath, *Traffic Practice: Just the Ticket*, 9 CHI. BAR ASS'N REC., 25, 26 (1995); Ross, *supra* note 7 at 76; Kenneth Simons, *When is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1082 (1997).

<sup>17</sup>The terms “traffic ticket,” “ticket,” “summons,” “citation” and “traffic summons” are utilized interchangeably and not intended to convey a different meaning.

<sup>18</sup> McGrath, *supra*, note 16 at 25.

<sup>19</sup> *Id.*

<sup>20</sup> *Whren*, 517 U.S. 813. *But see*, *Soto*, 734 A.2d 350; *Ladson*, 979 P.2d 833.

<sup>21</sup>The Supreme Court has limited the discretion of police officers to conduct searches incident to a lawful arrest. *See Chimel v. California*, 395 U.S. 752 (1969); *Iowa v. Knowles*, 525 U.S. 113 (1998). Yet it has granted extremely broad arrest power. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>22</sup>For example, a police officer could potentially issue a summons for speeding, a seatbelt violation, or perhaps both. In addition, one action may constitute multiple offenses that do not offend the double jeopardy clause of the Sixth Amendment.

<sup>23</sup>As discussed earlier, since traffic violations are strict/absolute liability offenses, there is no defense, thus making acquittal a virtual impossibility. *Mueller*, *supra* note 15 at 960-61, 964; McGrath, *supra* note 16 at 25.

<sup>24</sup>This assertion was largely an analogy drawn from Yale Kamisar “Equal Justice in the Gatehouse and Mansions of American Criminal Procedure: From Powell to Gideon, from Escabedo to . . .”. RICHARD A. LEO & GEORGE C. THOMAS, *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* (1998). Kamisar’s pivotal work published one year prior to *Miranda v. Arizona*, 384 U.S. 436 (1966) critiqued the current jurisprudence on confessions. The critique stemmed from the fact that the law governing interrogations was applied in the sterile setting of the court (the mansion), while the true nature of obtaining the confession was taking place in the gate house (the police station) where far less fashionable practices occurred that would offend the public conscience. As Kamisar eloquently stated:

In the “gatehouse” of American criminal procedure through which most defendants journey and beyond which many never may get the enemy of the state is the depersonalized “subject” to be “sized up” and subjected to interrogation tactics and techniques most appropriate for the occasion; he is “game” to be stalked and cornered. Here ideals are checked at the door, “realities” faced, and the prestige of law enforcement vindicated. Once he leaves the “gatehouse” and enters the “mansion,” if

Since there are roughly fifty to sixty million traffic filings each year in state courts,<sup>25</sup> and not all traffic stops result in the issuance of a summons,<sup>26</sup> it is reasonably estimated that there are over one hundred million traffic stops each year in the United States.<sup>27</sup> If it were presumed that all of these traffic stops were lawfully

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ever he gets there the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement celebrated.

*Id.* at 29-30.

Although Kamisar's description has little direct bearing to the traffic enforcement practices of the police and subsequent court appearances it is easily analogized to the traffic enforcement, traffic court relationship. As noted in the text, *infra*, traffic enforcement involves tremendous police discretion. The police, if they observe a violation, decide whether to stop the motorist, or, if there are multiple motorists, which of the motorists to stop. The police then decide to which motorists to issue a summons and which summonses to issue. This all takes place on the roadway where the traffic stop occurred, not in the courtroom. The suspect certainly has a right to take the ticket to trial and will be afforded at least minimal due process protections, including the right to counsel and compel witnesses. The defendant will be treated in a dignified manner and as Kamisar noted, the protections of liberty will be afforded all of their glory, even if a guilty plea is entered. Yet the fact that the same police officer allowed twenty other motorists to drive past him at identical speeds without stopping them, that the same officer allowed ten other motorists to go free without a ticket, and nine other motorists were issued a summons for the exact same violation will never be an issue addressed by the court. It is immaterial because all that is relevant is whether the offense was committed and the police enforced it. Yes, the defendant can have a trial, but the defendant is convicted before entering the court room—it is a strict liability offense. Thus, most motorists will simply mail their tickets in and those who do try the case will never prevail because the ticket is an absolute liability offense. Thus, everything that takes place in the courthouse is merely a “dressing” for what has already been decided during the stop. Later sections of the Article will address the empirical evidence of the offensive influences on the use and abuse of police discretion and why motorists are rightfully outraged when convicted of a traffic violation.

<sup>25</sup>National Center for State Courts, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1991 at 39, table 116 (1993). The following states did not have data available: Tennessee, Mississippi, Nevada, Rhode Island, Montana. Puerto Rico was also included in the estimate. National Center for State Courts, CASELOAD HIGHLIGHTS: NATIONAL STATE COURT CASELOAD TRENDS, 1984-1993 at 1 (1995).

<sup>26</sup>Ilya Lichtenberg & Lisa Smith, *How Dangerous are Routine Traffic Stops: A Research Note*, 29 JOURNAL OF CRIM. JUST. 419, 423 (2001) (estimating between 33% and 50% of traffic stops result in a summons); PATRICK LANGAN ET AL., CONTACTS BETWEEN THE POLICE AND PUBLIC: FINDINGS FROM THE 1999 NATIONAL SURVEY at 2 (2001), available at [www.ojp.usdoj.gov/bjs/pub/pdf/pp99.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/pp99.pdf) (finding 52.4% of motor vehicle stops resulted in a summons being issued); DAVID BAYLEY, POLICE FOR THE FUTURE 30 (1994) (stating police issue a summons in 43% of stops); BROWN, *infra* note 96, at 227 (finding one in three motorists receive a summons); *State v. Soto*, 734 A.2d 350 (N.J. Super.1996) (finding 60% of motorists receive a summons); Gregory M. Lipper, *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 556 (2001) (finding that only one of every ten motor vehicle stops result in the issuance of a summons in Florida). *See also* note 91, *infra*, citing numerous state police department reports indicating that many motorists are released with a warning or no formal legal action at all.

<sup>27</sup>Lichtenberg & Smith, *supra* note 26, at 422-24 (estimating the number of traffic stops: low = 60,000,000; middle = 120,000,000; high = 180,000,000).

supported by probable cause,<sup>28</sup> why are so many motoring offenders released without a ticket or citation and only certain offenders subjected to the quasi-criminal penalties of traffic enforcement at the discretion of the police?

This Article seeks to explore factors influencing a police officer's decision to issue a traffic summons and the legal restraints, or lack thereof, on the use and abuse of police discretion in traffic enforcement. Because *Atwater*<sup>29</sup> expands the scope of police discretionary authority in traffic enforcement to include the option of arrest, it is inferred that the same use-abuse of discretion in issuing a summons can or will be extended to the arrest,<sup>30</sup> non-arrest discretion. Implications are discussed.

### III. POLICE DISCRETION IN TRAFFIC ENFORCEMENT AND JUDICIAL REVIEW

When the police stop a motorist for a traffic violation, the Fourth Amendment<sup>31</sup> requires that the police have cause sufficient to justify<sup>32</sup> the seizure<sup>33</sup> or any evidence obtained from the resulting stop will be denied admission at trial.<sup>34</sup> Once the police have successfully overcome the hurdle of justifying the initial stop, few obstacles remain to hinder further investigation beyond the traffic infraction or in determining who will and will not be issued, what, if any summons.<sup>35</sup> Jumping this initial hurdle is a rather simple task as virtually every motorist routinely violates a traffic law.<sup>36</sup>

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<sup>28</sup>As required by the Fourth Amendment. *Beck v. Ohio*, 379 U.S. 89 (1964); David Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 560-61 (1998) (noting that probable cause is easy to obtain for traffic offenses because the statutes are so vast and technical).

<sup>29</sup>*Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)

<sup>30</sup>Robert Rigg, *The Objective Mind and Search Incident to Citation*, 8 B.U. PUB. INT. L.J. 281, 297-98 (1990) (“[s]earch incident to citation allows unbridled discretion, encourages already selectively enforced traffic laws to be used as pretexts to search minorities, and uses searches as a device to punish those suspected of criminal activity rather than seize contraband or protect officer safety”).

<sup>31</sup>The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath OR affirmation, and particularly describing the place to be searched, and the persons OR things to be seized.

U.S. CONST. amend. IV.

<sup>32</sup>There are numerous methods by which the police may lawfully seize vehicles based on no suspicion. See *Michigan v. Sitz*, 496 U.S. 444 (1990); *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>33</sup>The seizure is the initial stop. See *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>34</sup>*Mapp v. Ohio*, 367 U.S. 644 (1961) (binding the exclusionary rule upon the states to remedy violations of Fourth Amendment rights); *Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that evidence discovered as a result of unlawful police intrusion inadmissible as the fruit of a poisonous tree).

<sup>35</sup>See notes, *infra*

<sup>36</sup>Lipper, *supra* note 26 at 556 (“[g]iven that virtually every driver regularly violates one minor traffic law or another, police officers have nearly unlimited discretion to stop motorists”); New Jersey Department of Transportation, THE 36-MONTH STUDY REPORT ON 65

Once a motorist is lawfully stopped, police, without any suspicion beyond the initial traffic offense, may order a driver<sup>37</sup> and passenger<sup>38</sup> from the vehicle and request consent to search the vehicle.<sup>39</sup> Consent is virtually always given,<sup>40</sup> and the scope of the search justified by the consent is limited only by what the police are looking for,<sup>41</sup> which is almost always drugs.<sup>42</sup> Therefore the police can search anywhere once consent is obtained.<sup>43</sup> In addition, police are not required to inform motorists that they can refuse consent.<sup>44</sup> Furthermore, police may conduct canine “sniff tests” of the exterior of the motor vehicle.<sup>45</sup> They may also issue a summons,<sup>46</sup> arrest the

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MPH SPEED LIMIT IN NEW JERSEY (2001) (finding a large percentage of motorists violate the speed limit and an increase in the speed limit did not cause any substantial change in the average speed of motorists); Gavsie, *supra* note 4 at 390 (finding 93% of motorists on stretch of highway between Baltimore and Delaware committed a traffic infraction).

<sup>37</sup>Pennsylvania v. Mims, 434 U.S. 106 (1977)

<sup>38</sup>Maryland v. Wilson, 519 U.S. 408 (1997); United States v. Di Re, 332 U.S. 581 (1948).

<sup>39</sup>Schneckloth v. Bustamonte, 412 U.S. 218 (1973). It has been demonstrated that verbal warnings do not increase the rate of refusal. Ilya Lichtenberg, *Miranda in Ohio: The Effects of Robinette on the ‘Voluntary’ Waiver of Fourth Amendment Rights*, 44 HOWARD L. J. 349, 366-74 (2001).

<sup>40</sup>ILLYA LICHTENBERG, VOLUNTARY CONSENT OR OBEDIENCE TO AUTHORITY: AN INQUIRY INTO THE CONSENSUAL POLICE-CITIZEN ENCOUNTER, at 165-98 (1999).

<sup>41</sup>Florida v. Jimeno, 500 U.S. 248 (1991)

<sup>42</sup>LICHTENBERG, *supra* note 40, at 200

<sup>43</sup>*Jimeno*, 500 U.S. 248 (1991)

<sup>44</sup>Ohio v. Robinette, 519 U.S. 33 (1996); *Schneckloth*, 412 U.S. at 218.

<sup>45</sup>LICHTENBERG, *supra* note 40, at 280 (motorist who refused consent released only after Ohio state trooper was informed no canine unit was available); Gavsie, *supra* note 4, 395-400; Wilkins v. Maryland State Police, civil action No. CCB-93-468 and MJG-93-468. It has also been argued that “plain smell” is not a protected interest within the meaning of the Fourth Amendment. See Jennifer Bradfield, Comment: *Vernonia School District 47J v. Acton: A Step Towards Upholding Suspicionless Dog Sniff Searches in Public Schools*, 68 U. COLO. L. REV. 475, 491-94 (1997).

<sup>46</sup>Because the lawful discretion of police in determining whether to issue a summons to a motorist is so germane to the entire Article and the authority relied upon is not specific to this conduct, it will be cited at length from where this contention emerges. *Whren v. United States*, 517 U.S. 806 (1996).

As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic offense has occurred . . . Since, they contend, the use of automobiles is heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation.

But only an undiscerning reader would regard these cases as endorsing the principal that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred. Petitioners point to our statement that “[t]here was no evidence whatsoever that the officer’s presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the occupants’ of the car. . . .



motorist,<sup>47</sup> give a written or verbal warning,<sup>48</sup> or do nothing at all.<sup>49</sup> If the arrest

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Not only have we never held, outside the context of inventory search or administrative inspection (discussed above), that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary. [S]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional. . . . [T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action. . . .

We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.

[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent. Moreover, police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. But we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide, as petitioners would have us do, which particular provisions are sufficiently important to merit enforcement.

*Whren v. United States*, 519 U.S. 806, 810-19 (1996) (citations omitted). This footnote articulates that the subjective motivation of the police in making a discretionary arrest for a traffic offense does not offend the Fourth Amendment. As noted at the inception of this footnote, the United States Supreme Court has not addressed the discretionary authority to issue a summons. The issuance of a summons by the police constitutes an arrest in most states, but the accused is effectively released on his or her own recognizance (ROR) if not taken into custody. Thus, the issuance of a ticket can be considered to fall somewhere between a traffic stop and a full custodial arrest. When considered in conjunction with the following footnote, it appears that the discretionary authority explicitly afforded to police in the decision to stop a motorist in *Whren* and arrest in *Atwater* is implicitly if not explicitly extended to the issuance of a ticket or summons. See also *Arkansas v. Sullivan*, 532 U.S. 769 (2001), *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>47</sup>Accordingly, we confirm today what our prior cases have intimated: the standard of probable cause "applie[s] to all arrests without the need to 'balance' the interests and circumstances involved in the particular situations. If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."

*Atwater*, 532 U.S. at 354 (citations omitted).

<sup>48</sup>Giving a warning to motorists concerning the state's traffic laws was the practice of Officer Newsome in *Ohio v. Robinette*, 519 U.S. 33 (1996); *United States v. New Jersey Civil Action No. 99-5970 (MLC) FIRST SEMI-ANNUAL REPORT OF THE AGGREGATE DATA SUBMITTED PURSUANT TO THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE* at summary table (no page numbers). Of 132,047 stops made in the first four months of 2000 48,667 tickets, 31,321 warnings, and 28,411 summonses and warnings were issued.

option is selected the police may impound the vehicle and conduct an inventory search.<sup>50</sup> As noted earlier, it is clear that the police often do much more than traffic enforcement during traffic stops.<sup>51</sup> But what restricts these police powers from being utilized as a pretext for criminal investigation,<sup>52</sup> as a means of retaliating against an uncooperative motorist,<sup>53</sup> or simply selectively enforcing the law?<sup>54</sup> The answer is virtually none.<sup>55</sup> The recent *Atwater* decision has effectively gutted the Fourth Amendment from providing motorists with any protection, and replaced the few protections that had remained with the discretion of over 650,000 police officers<sup>56</sup> making decisions independent of any law<sup>57</sup> or rationally based policy.<sup>58</sup> As the

<sup>49</sup>*Whren*, 517 U.S. at 815 (placing no requirement on the police that enforcement be uniform when it noted that “police enforcement practices . . . vary from place to place and time to time”).

<sup>50</sup>*Colorado v. Bertine*, 479 U.S. 367 (1987), *limited by* *Iowa v. Knowles*, 525 U.S. 999 (1998); *Michigan v. Thomas*, 458 U.S. 259 (1982)

[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court’s assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.

<sup>51</sup>*Whren*, 517 U.S. at 816-17 (detectives with departmental guidelines prohibiting them from engaging in routine traffic enforcement do not offend Fourth Amendment when guidelines not followed).

<sup>52</sup>The issue of racial profiling has been repeatedly analyzed in many law reviews and therefore is addressed only briefly in a later section.

<sup>53</sup>Black, *infra* note 116, at 36 (“[j]ust as an argumentative driver is more likely to receive a traffic ticket, so an uncooperative adult or juvenile in any kind of incident is more likely to be arrested”); LICHTENBERG, *supra* note 40, at 278-82 (discussing the consequences of refusing to consent.).

<sup>54</sup>*See Whren*, 517 U.S. at 806; *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>55</sup>Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107 (2001) (“[i]n perhaps no setting does law enforcement possess greater discretion than in the decision to conduct a traffic stop . . .”); Gavsie, *supra* note 4, at 390; Jernigan, *supra* note 6, at 132-33; Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1416 (2000) (“[c]urrently law effectively permits officers to search the car of any person they observe committing a traffic offense”); Peter Shakow, *Let He Who has Never Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 AM. J. CRIM. L. 627, 633 (1997) (“[a]lmost everyone in the country with a driver’s license could be stopped at almost anytime, were the police inclined to vigorously enforce every violation”).

<sup>56</sup>CRIME IN THE UNITED STATES 2000 (2002) at 322, table 74. There were 637,551 sworn police officers and 261,567 civilian police employees in the United States, not including federal law enforcement officers. Sworn police personnel are generally distinguished from civilian personnel by the power to arrest and/or carry a firearm.

<sup>57</sup>David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the ‘New Federalism’ in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 375 (2001)

remainder of this Article will argue, *Whren* and *Atwater* essentially expanded police discretion beyond all notions of decency,<sup>59</sup> not for the purpose of discretionary enforcement, but to discretionarily impose punishment.<sup>60</sup> The only questions remaining are how and when this discretion is abused and against whom?<sup>61</sup>

A. *Whren and Atwater*<sup>62</sup>

At first glance, *Atwater* may seem to be nothing more than a continuation of a conservative Supreme Court's narrowing of the Fourth Amendment protections afforded to citizens.<sup>63</sup> When examined closely, it becomes clear that the *Atwater* decision makes the Fourth Amendment obsolete in motor vehicle stops absent some protection afforded by a particular state through statute or interpretation of its own constitution.<sup>64</sup> *Atwater* also effectively reverses the impact of recent efforts to reform questionable police practices in conducting searches based upon consent which has been inextricably tied into the controversy of racial profiling.<sup>65</sup> The

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(*Whren* held that "any time the officer observed a traffic offense this constituted probable cause, and the actual motivation for the stop not traffic enforcement, but something else entirely did not matter").

<sup>58</sup>*Whren*, 517 U.S. at 814-15 (holding that departmental guidelines prohibiting specific police assignment from working traffic detail is legally unenforceable).

<sup>59</sup>Prior law reviews have claimed, rightfully so, that the police were using traffic stops as a pretext for criminal investigation prior to *Whren*. *Whren* merely institutionalized or legally authorized a practice that law enforcement was already openly using. Craig Glantz, *Could This be the End of Fourth Amendment Protections for Motorists?*, 87 J. CRIM. L. & CRIMINOLOGY 864, 883 (1997).

<sup>60</sup>See text *supra* notes 13-30, discussing the implications of strict-absolute liability in the discretionary enforcement of traffic offenses.

<sup>61</sup>*Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J concurring) ("in *Atwater*, which recognized no constitutional limitation on arrest for a fine-only misdemeanor offense, this Court relied in part on a perceived 'dearth of horrors demanding redress . . . I hope the Court's perception proves correct. But if it does not, if experience demonstrates anything like an epidemic of unnecessary arrest,' I hope the Court will reconsider its recent precedent" (citations omitted)).

<sup>62</sup>Justice Ginsburg, in a concurring opinion shortly after *Atwater*, indicated that the *Atwater* decision was based upon the presumption that police would not abuse the arrest discretion they were afforded. *Sullivan*, 532 U.S. at 773.

<sup>63</sup>Harris, *supra* note 57, at 367.

Little wonder, then, that when the Court shifted toward a more conservative view of criminal defendants' rights, it is not surprising that a least one commentator criticized this a 'revolution to the right.' . . . While we can debate the magnitude of this conservative shift, the direction was unquestionably away from the protection of the criminal defendants' rights and toward a more expansive view of police and prosecutorial power.

*Id.*

<sup>64</sup>See *Michigan v. Long*, 436 U.S. 1032 (1983); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Sullivan*, 532 U.S. at 771.

<sup>65</sup>Rudovsky, *supra* note 4, at 297-304.

following briefly discusses the major holding of the *Atwater* and *Whren* decisions and then focuses upon its practical impact on motor vehicle searches.

The *Atwater* Court held that police had the discretionary authority to arrest or not arrest a suspect for a minor traffic violation,<sup>66</sup> such as failing to wear a seatbelt,<sup>67</sup> if they possessed probable cause to believe that such an offense had in fact been committed.<sup>68</sup> Essentially, the *Whren* decision permitted police to selectively stop motorists unabatedly, providing there was independent evidence amounting to probable cause that a traffic violation had occurred.<sup>69</sup> The subjective motivation for the stop was irrelevant;<sup>70</sup> only some objective justification need be present.<sup>71</sup> The abuse of police discretion in deciding whether or not to issue a summons is also unreviewable by the courts.<sup>72</sup> *Atwater*, in effect, permits police officers to not just utilize their unreviewable discretion to issue a traffic summons but also provides the police with the discretionary authority to make an arrest or not, a far more intrusive seizure<sup>73</sup> than a motor vehicle stop.<sup>74</sup> A lawful arrest creates a situation where police have virtually no restraints on their search power during motor vehicle stops.<sup>75</sup> The police can conduct a search of the person arrested<sup>76</sup> and the motor vehicle, provided the actual arrest takes place.<sup>77</sup> Since the operator of the vehicle was arrested, the police may also seize the vehicle.<sup>78</sup> A lawfully impounded vehicle is then subject to a discretionary inventory search,<sup>79</sup> thus permitting the police to search the entire

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<sup>66</sup>*Atwater v. City of Lago Vista*, 532 U.S. 318, 323 (2001) (“[t]he question is whether the Fourth Amendment forbids a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by fine. We hold that it does not”).

<sup>67</sup>*Id.* at 1553.

<sup>68</sup>*Id.* at 1557.

<sup>69</sup>*Whren v. United States*, 517 U.S. 806, 813 (1996) (“[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved”).

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>Slobogin & Schumacer, *Rating the Intrusiveness of Police Search and Seizure Practices*, 17 LAW & HUM. BEHAV. 151 (1993) (finding judicial perceptions of the intrusiveness of searches and seizures varies from perceptions of students and law enforcement).

<sup>74</sup>*Iowa v. Knowles*, 525 U.S. 113 (1998).

<sup>75</sup>There does not appear to be a willingness on the part of the courts to extend the wing-span restrictions of *Chimel* to motor vehicle stops. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *Michigan v. Long*, 436 U.S. 1032 (1983).

<sup>76</sup>*Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Chimel v. California*, 395 U.S. 752 (1969); *Harris v. United States*, 331 U.S. 145 (1947); *Terry v. Ohio*, 301 U.S. 1 (1968).

<sup>77</sup>*Chimel*, 395 U.S. at 752; *Knowles*, 525 U.S. at 113.

<sup>78</sup>The only limitation placed upon the police by the Court is *Iowa v. Knowles*, 525 U.S. 113 (1998) (restricting the discretion of the police in conducting a search incident to a lawful arrest when no arrest has occurred).

contents of the vehicle.<sup>80</sup> Essentially the police could simply search the entire person and their vehicle as a search-incident-to-a-lawful-arrest<sup>81</sup> and conduct an inventory search<sup>82</sup> rendering the need to obtain consent or a warrant to search unnecessary.<sup>83</sup> The remainder of the Article is devoted to analyzing what police have done with the expansive discretion afforded to them in traffic enforcement and what *Whren* and *Atwater* can be predicted to bring in the future.

#### IV. POLICE DISCRETION AND TRAFFIC ENFORCEMENT: PRACTICE

The review of the policing literature on traffic enforcement is broken into three areas: 1) The scope of the police discretion in traffic enforcement; 2) how motorist conduct during the traffic stop may influence the use-abuse of police discretion; and 3) factors influencing the use of police discretion that are unrelated to the conduct of the motorist during the stop, highway safety,<sup>84</sup> or the legislative intent of traffic related statutes.<sup>85</sup>

##### A. *The Scope of Police Discretion in Traffic Stops*

“What is the law? Is it what the police enforce and what the people probably think is the law, or is it the command of the legislature?”<sup>86</sup>

The majority of traffic tickets are issued by police officers.<sup>87</sup> Law enforcement being the primary means in which traffic enforcement is undertaken, it should first be noted that most traffic violations do not come to the attention of the police.<sup>88</sup>

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<sup>79</sup>*Bertine*, 479 U.S. at 367.

<sup>80</sup>*Id.*

<sup>81</sup>Subject, of course, to the nominal restrictions of *Iowa v. Knowles*, 525 U.S. 113 (1999).

<sup>82</sup>*Bertine*, 479 U.S. at 367.

<sup>83</sup>LICHTENBERG, *supra* note 40, at 280 (finding 95% of motorists give consent); WAYNE LAFAYE, TREATISE ON THE FOURTH AMENDMENT 596 (3d ed. 1996). LaFave sarcastically notes the so-called consent search. *Id.* The dubious nature in which police obtain consent to search a vehicle seems to suggest the collateral search powers incident to *Atwater* may have pre-existed *Atwater* in practice, but only de facto in legal application.

<sup>84</sup>Ross, *supra*, note 7, at 77 (finding the average driver commits nine driving errors every five minutes in urban settings).

<sup>85</sup>AUGUST VOLLMER, THE POLICE AND MODERN SOCIETY 143 (1992). “However zealous the police may be in their attempts to perform traffic duties adequately, they are universally handicapped by the prevailing and unfortunate misconception that rigid enforcement will bring about the greatest returns in public safety on the streets and highways.” *Id.*

<sup>86</sup>Elder, *infra* note 209, at 850.

<sup>87</sup>Some traffic tickets are initiated by citizens filing complaints. The specific number is unknown, but it is assumed that this practice does not account for more than a small percentage of all traffic violations processed in state courts.

<sup>88</sup>Ross, *supra* note 7, at 83-84 (“[r]elatively few offenders are apprehended”); Gavisie, (“because driving codes are typically so extensive that no driver can travel three blocks without violating the law in at least some small way”); Smith, *infra* note 89; Schellenberg, *supra* note 3, at 668 (“[d]iscretion is also inherent due to the sheer impossibility of enforcing every law to the extent allowed”).

Even if traffic violations are witnessed by the police, they are often either overlooked<sup>89</sup> or unenforced.<sup>90</sup> When traffic offenses are observed and the motorist stopped there is little to suggest that enforcement is uniform,<sup>91</sup> fair,<sup>92</sup> or done to serve some public interest,<sup>93</sup> if there is any enforcement at all.<sup>94</sup> “For the big-city police have always done more than just enforce laws, keep the peace, and serve the public.

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<sup>89</sup>BRUCE SMITH, *POLICE SYSTEMS IN THE UNITED STATES* at 65 (1949) (“[m]ost violations are not observed by enforcement officers and most of those that do come to the attention of the police are ignored, tolerated or condoned for various reasons”).

<sup>90</sup>Rudovsky, *supra* note 4, at 318; Elder, *infra* note 209, at 842-43; Shakow, *supra* note 55, at 633 (“[a]lmost everyone in the country with a driver’s license could be stopped at almost anytime, were the police inclined to rigorously enforce every violation”); MICHAEL PIKE, *THE PRINCIPLES OF POLICING* 66 (1985) (“there is considerable scope for individual discretion since some officers may choose to ignore the offence or to deal with it informally”).

<sup>91</sup>*See* United States v. New Jersey Civil Action No. 99-5970 (MLC) FIRST SEMI-ANNUAL REPORT OF THE AGGREGATE DATA SUBMITTED PURSUANT TO THE CONSENT DECREE ENTERED INTO BY THE UNITED STATES OF AMERICA AND THE STATE OF NEW JERSEY REGARDING THE NEW JERSEY DIVISION OF STATE POLICE at summary table (no page numbers). Of 132,047 stops made in the first four months of 2000, 48,667 tickets, 31,321 warnings, and 28,411 summonses and warnings were issued. *Id.* In 1998 the Colorado State Patrol issued 143,702 traffic citations, 38,560 seat belt citations, and 30,020 warning tickets, this data does not include traffic stops where the Colorado State Patrol issued no summons or warning. COLORADO STATE PATROL: 1998 ANNUAL REPORT (see 1998 Statistical Overview: Colorado State Patrol Activities, 1998). The Pennsylvania State Police, although not offering information on total stops or warnings does provide information on actions of some specialized divisions. Troop C’s Centipede and TAG-D enforcement division issued 3,998 traffic citations and 1,727 warnings in 2,686 man hours (at 42). The Troop E bicycle patrol issued nineteen written warnings and issued two traffic citations (at 45). I-78 Coalition Enforcement Efforts included 4,643 traffic citations and 5,687 warnings (at 49). PENNSYLVANIA STATE POLICE: 2000 ANNUAL REPORT; The Michigan State Police reported for the year 2000 that 255,954 tickets were issued and 308,718 verbal warnings were given totaling 564,672 stops. MICHIGAN STATE POLICE: YEAR 2000 -STATEWIDE REPORT TOTALS - TRAFFIC ENFORCEMENT ACTIVITY at 6. The Ohio Highway Patrol reports similar figures. In 2000 they made 436,477 speeding arrests, 194,321 seat belt arrests, and issued 413,195 traffic warnings. OHIO STATE HIGHWAY PATROL ACTIVITY SUMMARY 1994-2000; Gregory M. Lipper *Racial Profiling*, 38 HARV. J. ON LEGIS. 551, 556. “[P]olice spend a great deal of time pulling over drivers even when there are no charges filed against them. In Florida, for instance, only ten percent of the thirty-two to thirty-five million traffic stops each year result in tickets.”; Matthew T. Zingraff, et al., *EVALUATING NORTH CAROLINA STATE HIGHWAY PATROL DATA: CITATIONS, WARNINGS, AND SEARCHES IN 1998* REPORT SUBMITTED TO: NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY AND NORTH CAROLINA STATE HIGHWAY PATROL at table 1 (2000). North Carolina reported 651,576 total citations issued and 325,331 total warnings issued in 1998.

<sup>92</sup>Holland, *supra* note 55, at 1107.

<sup>93</sup>MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13 (1980) (“[s]treet level bureaucrats [such as the police] make policy in two related aspects. They exercise wide discretion in decisions about citizens with whom they interact. Then, when taken in concert, their individual actions add up to agency behavior”).

<sup>94</sup>SMITH, *supra* note 89, at 87.

They have also decided, or at least helped to decide, which laws to enforce, whose peace to keep, and which public to serve.”<sup>95</sup>

Aside from deciding *when*, *where* and *which* laws to enforce, many police officers question whether traffic regulation should even be part of their job.<sup>96</sup> As one study noted, in small police departments the majority of police supervisors felt traffic enforcement was not part of a patrolman’s duties,<sup>97</sup> while in a large city all of the supervisors felt traffic was not part of a patrolman’s duties.<sup>98</sup> Thus, organizational influences can have a large impact on traffic enforcement practices of departments. These organizational influences manifest themselves in the individual enforcement behavior of police officers.

Many persons who are stopped by police for a traffic violation do not even receive a ticket because the police choose to deal with the offense informally<sup>99</sup> or ignore<sup>100</sup> it altogether. Other studies on police traffic enforcement have found similar results.<sup>101</sup> One study found the police issued a summons in thirty-three percent of traffic stops,<sup>102</sup> another found that forty-three percent of stops resulted in a ticket,<sup>103</sup> while another national study estimated that 54.2% of stops result in a summons.<sup>104</sup> “Many more drivers who violate the rules of the road are stopped and warned than are cited or arrested.”<sup>105</sup> Based on this finding, it is reasonable to assume that police officers are selective in traffic enforcement decisions not just in making stops and conducting searches, but also in issuing summonses. This raises concerns of what criteria police officers employ when deciding to issue tickets for traffic violations.<sup>106</sup>

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<sup>95</sup>ROBERT FOGELSON, *BIG-CITY POLICE* 12 (1977).

<sup>96</sup>MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 261 (1981) (“[w]hen asked if patrolmen should enforce traffic laws, at least a third and as many as two-fifths of the field supervisors in small departments took the position that patrolmen should not work traffic. By comparison, none of the field supervisors in the LAPD took this position”).

<sup>97</sup>*Id.*

<sup>98</sup>*Id.*

<sup>99</sup>PIKE, *supra* note 90, at 66.

<sup>100</sup>ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 89 (1977). “[T]o control traffic often entails ignoring moving violations . . .”.

<sup>101</sup>DANIEL B. KENNEDY & ROBERT J. HOMANT, *POLICE AND LAW ENFORCEMENT* 86 (1985) (“the data show that [the police] had many more occasions for issuing a ticket than they used”); Lichtenberg & Smith, *supra* note 26, at 423 (estimating that 33% to 50% of motorists stopped receive a summons).

<sup>102</sup>BROWN, *supra* note 96, at 227 (“[o]f all those individuals they stopped for a minor violation, only one-third were cited or arrested”).

<sup>103</sup>DAVID H. BAYLEY, *POLICE FOR THE FUTURE* 30 (1994) (“[i]n traffic stops it was found that ‘43% of the time they issue a citation’”).

<sup>104</sup>LANGAN, *supra* note 26; *see also* BAYLEY, *supra* note 103.

<sup>105</sup>HERMAN GOLDSTEIN, *PROBLEM ORIENTED POLICING* 136 (1990).

<sup>106</sup>The following sections address this issue in detail.

The research on the exercise of discretion in issuing citations does not support the view that most traffic summonses are based on public safety criteria.<sup>107</sup> Rather, the literature indicates that police officers' decisions to issue traffic tickets to motorists are strongly related to other factors remotely related or unrelated to the issue of public safety. The following sections provide explanations for police behavior in citation decision making that do not include public safety<sup>108</sup> and several reasons why officers do not issue citations when in fact public safety may be important.<sup>109</sup>

### B. Conduct of the Motorist During the Traffic Stop

It is well established in the policing literature that the use of police discretion, especially for minor offenses, is influenced, if not dictated, by the conduct of the offender-suspect during the encounter.<sup>110</sup> In the *Whren-Atwater* context this section offers the most compelling empirical evidence that the potential for police to abuse the discretionary authority in traffic stops is extreme and far more than the "dearth of horrors" suggested by the *Atwater* Court.<sup>111</sup>

### C. Demeanor

The policing literature confirms that a citizen's demeanor is a contributing if not the primary causal factor in the police officer's decision to issue a citation for a moving violation.<sup>112</sup> "The existing answer is that when offenders are impolite, police get angry and then they get even. . . . From this perspective, the manifest purpose of an arrest or ticket is to punish an impolite offender for being in 'contempt of cop'."<sup>113</sup>

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<sup>107</sup>In a review of the literature, there was no evidence that training of police officers involved any attempt at teaching police to make independent determinations of a particular act's threat to public safety. Therefore, it is questionable whether police are capable of performing the traffic enforcement function and actually accomplishing a public safety objective.

<sup>108</sup>The literature review is not intended to convey the perception that police do not enforce traffic laws when there is an egregious violation of the traffic laws that poses an immediate and clear threat to public safety, it is intended to address the routine traffic stop. It should also be noted that the section on those who are largely immune from the law suggests that even for egregious violations of the traffic laws, certain citizens are exempted from enforcement.

<sup>109</sup>*Id.*

<sup>110</sup>LAPINSKY, *supra* note 93, at 31-32

[The police] tend to be lenient with offenders whose attitudes and demeanor denote penitence but harsh and punitive to those offenders who show signs of disrespect. Indeed policemen often appear to test the extent to which an offender respects police authority in order to determine whether he or she is likely to have an improper attitude and therefore more likely to resist authority.

*Id.*

<sup>111</sup>532 U.S. 318 at 353.

<sup>112</sup>Black, *infra* note 116, at 36 ("[i]n a study of police patrol work in three cities, only 11% of 'antagonistic' drivers were released without being ticketed or arrested, whereas the proportion rose to 35% of drivers who were 'civil' and to 49% of those who were 'very deferential'").

<sup>113</sup>Richard J. Lundman, *Demeanor or Crime? The Midwest City Police-Citizen Encounters Study* 32 CRIMINOLOGY 631, 647 (1994).



As one police officer stated “[p]eople write their own tickets. They really do. Your conduct to me will predict how I’ll act to you. The ultimate outcome of that traffic stop is always in your hands. Your attitude writes your ticket.”<sup>114</sup> Behavior triggering the use of police discretion is not limited to how the citizen responds<sup>115</sup> to the police officer; the citizen is expected to cooperate.<sup>116</sup> Being abusive<sup>117</sup> or disrespectful to the police increases the likelihood of receiving a summons. Police have been known to conduct “attitude tests” of motorists that help them decide whether or not to issue a summons.<sup>118</sup> In the 1950s investigators found that the most frequent reason cited why police officers used force against a citizen was because they had shown disrespect for the police.<sup>119</sup> It has also been suggested that being in “contempt of cop” elicits a form of “blue justice,” which includes a traffic citation.<sup>120</sup> Thus, the personal contact between the police officer and the motorist is perhaps the single most influential factor triggering enforcement<sup>121</sup> or leniency.<sup>122</sup> “[I]f the driver makes the officer angry, what might have been a simple infraction can become costly.”<sup>123</sup> The driver’s character may influence leniency by police.<sup>124</sup> Protesting innocence has been noted to increase the probability of a summons.<sup>125</sup> It has also

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<sup>114</sup>Connie Fletcher, *PURE COP: COP TALK FROM THE STREET TO THE SPECIALIZED UNITS* at 249 (1991).

<sup>115</sup>PIKE, *supra* note 90, at 67 (“the interaction between the police officer and the offender or suspected offender will affect the manner in which the officer exercises his discretion”).

<sup>116</sup>DONALD J. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* 35-36 (1980) (“[w]hen the police stop an automobile, whether they give a ticket may depend on not only upon who the driver is but also upon how he or she behaves: All else constant, the likelihood of a ticket varies inversely with the degree to which the driver cooperates”).

<sup>117</sup>JOHN A. GARDINER, *TRAFFIC AND THE POLICE: VARIATIONS IN LAW ENFORCEMENT POLICY* 151 (1969) (“[p]ersons who have been abusive to officers, as we have noted, are more likely than others to receive a ticket. . .”); BLACK, *supra* note 116, at 36; *see also* Schellenberg, *supra* note 3, at 671.

<sup>118</sup>MICHAEL P. BANTON, *THE POLICEMAN IN THE COMMUNITY* 13 (1964).

<sup>119</sup>William A. Westley, *Violence and the Police*, 59 *AM. J. SOC.* 38, table 1 (1953).

<sup>120</sup>MIKE ROTHMILLER & IVAN G. GOLDMAN, *L.A. SECRET POLICE: INSIDE THE LAPD ELITE SPY NETWORK* 37 (1992).

<sup>121</sup>GEORGE T. PAYTON, *PATROL PROCEDURE AND ENFORCEMENT CONCEPTS* 60 (6th ed. 1982). “Traffic enforcement is strongly dependent upon personal contact between the patrol officer and the violator . . . any failure to show respect toward an officer increases the likelihood of a ticket.” BLACK, *supra* note 116, at 36.

<sup>122</sup>BAYLEY, *supra* note 103, at 29 “Ever since God investigated Adam, policemen have performed ‘attitude tests.’” “The action policeman take after stopping a motoring offender is often influenced by the demeanor of the driver.” “Leniency [in traffic situations] is also affected by their reading of the character of the drivers.”

<sup>123</sup>*Id.* at 30.

<sup>124</sup>*Id.* at 29. “Leniency is also affected by their reading of the character of the drivers.” *Id.*

<sup>125</sup>BLACK, *supra* note 116, at 36.

been found that irregular movements in a car, without relevance to public safety, increase the probability of being stopped.<sup>126</sup>

Political affiliation or sponsorship of an unpopular group may instigate a ticket if publicly displayed.<sup>127</sup> One insightful study<sup>128</sup> involved fifteen people who had not received a traffic citation in the past twelve months and who promised to drive safely during the study period and obey all traffic laws.<sup>129</sup> They placed bumper stickers on their cars stating “BLACK PANTHERS.”<sup>130</sup> Within seventeen days there were thirty-three citations issued to the participants. Some of the stories were exceptional.<sup>131</sup>

The influence of a motorist’s demeanor in the police officer’s decision to issue a summons is well supported by the literature. When expanded to include references to questioning a police officer’s authority in general,<sup>132</sup> the amount of supporting literature becomes astronomical.<sup>133</sup>

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<sup>126</sup>BAYLEY, *supra* note 116, at 30 (“drivers who speed are more likely to be stopped if they appear furtive, avert their faces from the police car, or are arrogant and sassy”).

<sup>127</sup>The influence of being disrespectful to the police and posting unpopular signs or bumper stickers on a motor vehicle triggering a police officer to issue a summons raises serious issues surrounding the First Amendment that are not addressed in this article.

<sup>128</sup>F. K. Heussenstamm, *Bumper Stickers and the Cops*, 8 TRANS-ACTION 32, at 33.

<sup>129</sup>*Id.*

<sup>130</sup>*Id.* “Bumper stickers in lurid day-glow orange and black, depicting a menacing panther with large BLACK PANTHER lettering were attached to the rear bumper of each subject car and the study began.” *Id.*

<sup>131</sup>*Id.*

The first student received a ticket for making an ‘incorrect lane change’ on the freeway less than two hours after heading home in the rush hour traffic. Five more tickets were received by others on the second day for ‘following too closely,’ ‘failing to yield the right of way,’ ‘driving too slowly in the high-speed lane of the freeway,’ ‘failure to make proper signal before turning right at an intersection,’ and ‘failure to observe proper safety of pedestrians using a crosswalk.’ On day three, students were cited for ‘excessive speed,’ ‘making unsafe lane changes,’ and ‘driving erratically.’ And so it went on every day. One student was forced to drop out of the study by day four, because he had already received three citations. Three others reached what we had agreed was the maximum limit-three citations- within the first week. Altogether, the participants received 33 citations in 17 days, and the violations fund was exhausted.

This research had some additional findings that were exceptional. For example, one student received his second traffic ticket while on his way to pay the first. *Id.* Another pertinent finding was that race, sex, ethnicity nor personal appearance seemed to have an impact. *Id.*

<sup>132</sup>Personal communication with several New Jersey State Troopers in 2001 revealed there is an informal policy to ticket motorists who refuse to confess to violating the speeding laws, while motorists who confess are usually let go without a ticket.

<sup>133</sup>Deborah Sontag & Dan Barry, *Disrespect as Catalyst for Brutality*, N.Y. TIMES Nov. 19, 1997, at A1. Compare this to the circumstances in *Brown v. Texas*, 443 U.S. 47, 49 (1979) where Brown “refused to identify himself and angrily asserted that the officers had no right to stop him.” Brown was frisked and ultimately arrested for failing to produce identification; *Graham v. Connor*, 490 U.S. 386, 389-390 (1989) (plaintiff, seeking relief for

*D. Factors Unrelated to the Motorist's Conduct Influencing Police Discretion*

In this section, factors that may influence the use of police discretion that are unrelated to the conduct of the motorist during the stop are reviewed. There are varying factors that may influence police decision making that have nothing to do with the motorist or his or her conduct. Many of these factors are related to organizational expectations of the police and the ease at which certain geographical or architectural short-comings make meeting organizational expectations easier. Other factors examined include certain immutable personal characteristics<sup>134</sup> such as race and age.<sup>135</sup> Finally, the privileged and those not subject to traffic law enforcement are examined.

*E. Quotas, Shifts, and Dates*

Often the police enforce the traffic laws because of formal departmental expectations, quotas, or informal means such as an "unstated" quota or minimum number of violations written if promotion is expected.<sup>136</sup> Viewed in this way, the police administrator creating the quota is the complaining party while the patrolman

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police abuses through a 42 U.S.C.A. § 1983 action, had his face slammed against a the hood of his vehicle for requesting sugar for his diabetes after being told to shut up); PETER K. MANNING, *THE SOCIAL ORGANIZATION OF POLICING* 231 (1977); JAMES WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 33 (1969); JAMES RICHARDSON, *URBAN POLICE IN THE UNITED STATES* 196 (1974); JOSEPH FINK & LLOYD SEALY, *THE COMMUNITY AND THE POLICE--CONFLICT OR COOPERATION* 5, 16-17 (1974); Ralph Juhnke & Julia Bermann, *Police Discretion: Relations of Experience to Officers' Beliefs and Arrest Decision*, 12 AM. J. CRIM. JUST. 243, 248 (1998)(finding experienced officers felt strongly that persons who challenge their authority should be arrested); STEVEN M. COX & JACK D. FITZGERALD, *POLICE IN COMMUNITY RELATIONS: CRITICAL ISSUES* 17 (1983); Stephen Mastrofski, et al., *Compliance on Demand: The Publics Response to Specific Police Requests*, 33 J. OF RESEARCH IN CRIME AND DELIQUENCY (1996); PETER SCHARF & ARNOLD BINDER, *THE BADGE AND THE BULLET: POLICE USE OF DEADLY FORCE* 46 (1983). ROTHMILLER & GOLDMAN, *supra* note 120, at 47 (1992); Richard Lundman, *Demeanor and Arrest: Additional Evidence From Previously Unpublished Data* 33 J. RES. CRIM. & DELINQ. 306, 308-309 (1996); JEROME SKOLNICK & JAMES FYFE, *ABOVE THE LAW* (1993) at 103; PIKE, *supra* note 90, at 67; Albert J. Reiss, *Police Brutality--Answers to Key Questions*, 8 TRANS-ACTION 10, 18 (1968); EGON BITTNER, *FUNCTIONS OF THE POLICE IN MODERN SOCIETY* 74 (1976); SIDNEY HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICA 1865-1915* 189 (1983). "'Your name'. Raymond gave his name. 'Take the cigarette out of your mouth when your talking to me,' the policeman said gruffly. Raymond hesitated, glanced at me, and kept the cigarette in his mouth. The policeman promptly swung his arm and gave him a good smack of the left cheek.'" (Camus is a fictional account). ALBERT CAMUS, *THE STRANGER* 45 (Stuart Gilbert trans., New York, A.A. Knopf 1946) (1942).

<sup>134</sup>Immutable characteristics cannot be changed.

<sup>135</sup>It should be noted that age is generally not considered an immutable characteristic because it changes with time. Thus, a child cannot challenge a lack of voting rights because he or she will be relieved of the burden upon reaching a certain age. Yet in this article, it is argued that if age influences the level of traffic enforcement it has a far graver consequence, namely that the young person is subject to differential levels of enforcement which offend the Equal Protection Clause.

<sup>136</sup>Lundman, *supra* note 113, at 164 (noting that the decision to issue a summons varied depending upon high or low quota saliency).

simply selects the defendant.<sup>137</sup> When analyzed in this form a quota becomes the starting point for the abuse of police discretion.<sup>138</sup> If the police are organizationally required to write a certain number of tickets to fill a quota the number of motorists to be subject to legally scrutiny is fixed; however, the selection of the motorists is left to the officer's individual discretion.<sup>139</sup> Although it might be suspected that many police officers, if faced with a quota, might only enforce the most egregious violations of the traffic code, such has not always been the case.<sup>140</sup> There are often individual rewards available to police officers for writing traffic tickets.<sup>141</sup> In addition, ticket writing is an easy-to-measure method of tracking an officer's performance,<sup>142</sup> compared to often difficult-to-measure police functions such as the prevention of crime. During the enforcement of minor violations such as traffic enforcement, departmental policy will have the greatest influence on the degree of enforcement.<sup>143</sup> A study of eight communities' traffic enforcement practices found that departmental policy or practices of an individual administrator determined the level of enforcement.<sup>144</sup> Other research has found micro management going as far as to expect two tickets per hour from patrolmen.<sup>145</sup>

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<sup>137</sup>BLACK, *supra* note 116, at 33. "Their usual policy is to ticket only as many drivers as their supervisors demand, and to relax after this so-called quota has been filled . . . . In effect, then, police supervisors act as complainants in most traffic work, but, within limits, they leave to the officers the selection of cases to be treated as offenses." *Id.*

<sup>138</sup>Lundman, *supra* note 113, at 644. "[B]ut the interaction of Quota and Class is significant in all models. . . ." (thus noting that how police discretion is exercised when responding to a quota can be a significant source of class discrimination).

<sup>139</sup>Lundman, *The Traffic Violator: Organizational Norms* THE AMBIVALENT FORCE: PERSPECTIVES ON THE POLICE (Arthur Niederhoffer et al. ed. 1976) at 117. "Most generalists [patrolman] either do the minimum enforcement required by their supervisors or pay attention only to egregious violations of traffic rules. . . ." Citation quotas, however, only direct patrol officers to issue a certain number of traffic tickets. They do not determine the types of individuals to whom will be issued in order to meet organizational expectations. *Id.*

<sup>140</sup>DAVID H. BAYLEY, MODERN POLICING: CRIME AND JUSTICE A REVIEW OF RESEARCH VOL. 15 at 524. (Michael Tonry et al. eds, 1992)

<sup>141</sup>HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 168 (1977). "Police units are rewarded for the number of traffic citations issued." *Id.*

<sup>142</sup>REISS, *supra* note 100, at 7 ("on the other hand, higher priority was given to other police business, such as writing a traffic ticket (usually to fill one's ticket quota)").

<sup>143</sup>James Q. Wilson, VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES 49 (1968). "The level of enforcement on minor police-invoked rules- traffic rules, for example- will depend on departmental policy almost entirely. . . ."

<sup>144</sup>*Id.* at 95. ("The rate at which traffic tickets are issued varies enormously among the eight police departments and this variation is primarily the result of policies of the administrator, not the characteristics of the community.")

<sup>145</sup>*Id.* at 97. "In Oakland, the members of the traffic division are expected to write 2 tickets per man hour." PENNSYLVANIA STATE POLICE: 2000 ANNUAL REPORT at 42. Troop C's Centipede and TAG-D enforcement division issued 3,998 traffic citations and 1,727 warnings in 2,686 man hours an average of 2.13 tickets or warnings per hour.

In addition to the existence of traffic quotas fueling traffic enforcement within police departments is the fact that many police administrators deny their existence.<sup>146</sup> Among patrolmen in large urban police departments it is well known there is no quota, but if they wish to keep a seat in a radio car they will empty one ticket book each month.<sup>147</sup> Some police traffic ticket writing practices have been described as norms,<sup>148</sup> while others simply state that the police write as many tickets as the administrators encourage them to write.<sup>149</sup>

Income that municipalities derive from tickets<sup>150</sup> has also shown to be a major bargaining tool for police unions.<sup>151</sup> The “blue flu”<sup>152</sup> can not just slow down vital police services, but can also slow down income derived from the use of the criminal justice system in the form of ticket writing.<sup>153</sup> For example, during a two month period in Detroit, police used the “blue flu” combined with a slow down in ticket writing, ultimately resulting in pay increases and enhanced fringe benefit packages for patrolmen.<sup>154</sup> New York had an experience similar to that of Detroit; patrolmen

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<sup>146</sup>*Id.* at 96-97. (“Almost no police administrator will admit he sets a traffic ticket quota the one who came closest insisted on calling it a ‘norm’.”)

<sup>147</sup>PAUL RAGONESE & BERRY STAINBACH, *THE SOUL OF A COP* 33 (1991). Pushing police to enforce traffic in this manner is very Orwellian. GEORGE ORWELL, *ANIMAL FARM* 63 (1946). “Throughout the Spring and Summer they worked a sixty-hour week, and in August Napoleon announced that there would be work on Sunday afternoons as well. This work was strictly voluntary, but any animal who absented himself from it would have his rations reduced by half.” *Id.*

<sup>148</sup>John R. Taylor, *Traffic Citation Quotas: Fact or Fiction*, 40 *POLICE CHIEF* 34 (Feb. 1993). (“Yes, officers are required to write citations. But this requirement is not an ironclad ‘quota’ or absolute number . . . rather there is a norm.”)

<sup>149</sup>GARDINER, *supra* note 117, at 90. “The policemen write as many tickets as you encourage them to write.”

<sup>150</sup>The income derived by municipalities from traffic and parking tickets is frequently factored into their budgets. See Beth Kormanik, *1 Million Parking Tickets Expected; 2001 total would be record for City*, MILWAUKEE JOURNAL SENTINEL Aug. 17, 2001, at P 01B; Kevin Flynn, *Turning the Meters; Webb Budget in ‘02 Calls for Parking to Generate Additional \$12.1 Million*, ROCKY MOUNTAIN NEWS, Feb. 11, 2002 at 4A; Michael Saul, *Mike Unveils Budget Full of Painful Cuts: Hikes cig tax, nicks cops*, DAILY NEWS, Feb. 14, 2002, at 3; Eric Weiss & Tom Puleo, *Audit Faults Parking Enforcement*, THE HARTFORD COURANT, Apr. 4, 2001, at A3; Mueller, *supra* note 15, at 946; Ross Netherton, *Fair Trial in Traffic Court*, 41 *MINN. L. REV.* 577, 588 (1957) (citing that most violations bureaus seem to exist for the purpose of generating revenue).

<sup>151</sup>Harvey Juris & Peter Feville, *POLICE UNIONISM: POWER AND IMPACT IN PUBLIC-SECTOR BARGAINING* 86-87 (1973).

<sup>152</sup>The “blue flu” is a general reference to abnormally high rates of absenteeism. Usually used in place of a strike since it is unlawful for the police to strike.

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* (“In May and June 1967 Detroit patrolmen conducted a traffic ticket slowdown and ‘blue flu’ to put pressure on the city in contract negotiations and as a response to what patrolmen perceived as undue pressure to increase city revenues by writing large numbers of tickets.”)

issued no parking or traffic tickets and had a high absentee rate resulting in beneficial contract negotiations.<sup>155</sup> The goal of promoting public safety can be subverted by the goal of merely writing tickets to achieve some end other than public safety.<sup>156</sup> As the prior two examples have illustrated, this practice can be far more than the conduct of individual officers, it can be institutionalized by collective bargaining units.

Officers who must meet a quota, informal or formal, have been known to reject the required number of citations that must be issued and meet the required number of tickets by issuing all the summonses at one point in their shift<sup>157</sup> or at a certain point in the month.<sup>158</sup> Thus, motorists who are subjected to discretionary enforcement may simply have just been in the wrong place at the wrong time, literally.

#### *F. Easy Targets and "Duck Ponds"*

Police officers are also known to select easy targets for finding traffic violations regardless of an officer's opinion of the seriousness of an offense or public safety implications. A tricky intersection<sup>159</sup> or a location where signs are hard to read<sup>160</sup> have been noted as popular locations for police to wait and find traffic offenders.<sup>161</sup> Similar instances have been observed concerning artificially low speed limits.<sup>162</sup>

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<sup>155</sup>*Id.* at 87. "Patrolmen issued no traffic or parking tickets" together with a much higher than average absentee rate, this practice resulted in an agreement more beneficial to the patrolmen.

<sup>156</sup>This commonly referred to as "goal displacement" in management.

<sup>157</sup>BLACK, *supra* note 116, at 33 ("[a] common practice was to write a ticket at the beginning of their shifts so they could forget about traffic violations for the next 7 hours").

<sup>158</sup>Lundman, *supra* note 113, at 118. "In practice, many patrol officers resisted quotas by postponing 'working traffic' until the later portions of each month. They then worked aggressively to meet their quotas."

<sup>159</sup>JEROME SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 55 (2nd ed. 1975).

The traffic cyclist waits in hiding for moving violators near a tricky intersection, and is reasonably sure that such violations will occur with regularity. . . . You learn to sniff out places where you can catch violators when your running behind [on writing tickets]. Of course the department gets to know that you hang around one place, and they sometimes try to repair the situation there. But a lot of the time it would be too expensive to fix up the engineering fault, so we keep making our norm.

<sup>160</sup>BLACK, *supra* note 116, at 33 ("[i]n one precinct in Detroit, for example, a number of officers favored an intersection where it was unusually difficult for drivers to read the sign "reading 'no left turn'. A good duck pond such as this will yield a ticket within a few minutes").

<sup>161</sup>Whether such practices amount to entrapment may be an interesting topic for a law review.

<sup>162</sup>H. Laurence Ross, *Folk Crime Revisited* 11 *CRIMINOLOGY* at 78.

[The police] looked for speeding -in their words, the bread and butter of traffic law enforcement- they drove their patrol cars, not in central London where congestion meant that it was virtually impossible to speed nor on roads with adequate speed limits, but rather on multi-lane limited-access highways, especially on those parts with

Police know where to find minor violators, especially traffic, whenever they desire to discover such offenses.<sup>163</sup>

When roadway engineering, artificially low speed limits, or laws that cannot be complied with regardless of how much care is used by the motorist<sup>164</sup> are the cause of a traffic violation it inevitably leads to outrage from the common motorists.<sup>165</sup> For many Americans it may serve as a challenge to defy, conspire against, or perhaps impede enforcement.<sup>166</sup>

## V. IMMUTABLE CHARACTERISTICS AND PLACE OF RESIDENCE

### A. Age

When issuing traffic citations, police may also discriminate against youthful drivers. As one researcher noted the two groups who are “[s]ystematically discriminated against regarding traffic”<sup>167</sup> are teenagers and persons abusive to the police.<sup>168</sup> Research on perceptions of police legitimacy appear to fit well with this assertion. Young people view the police as far less legitimate than do older people.<sup>169</sup> This perception may at least be in part justified, as evidence suggests, that police treat younger motorists more harshly.<sup>170</sup>

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30- and 40-mile speed limits, which appeared far too low in light of the roadway engineering and which were violated by large numbers of motorists.

<sup>163</sup>REISS, *supra* note 100, at 6. “[T]he patrol officer has specific knowledge of places he has been, trouble spots, a few known persons, the best places to pick up ‘movers’ (moving traffic violations).”

<sup>164</sup>Mueller, *supra* note 15, at 960.

Or take the case of the driver who checks his tail lights before departure and finds they are operating. Later he is stopped by the highway police because his tail lights are off. Of course, the driver could not know his tail lights were off. But by punishing him nevertheless for intentionally driving without tail lights we shall happily succeed in frustrating the good man.

Vanderbilt, *supra* note 2, at 560.

<sup>165</sup>Mueller, *supra* note 15, at 946, 952.

<sup>166</sup>Vanderbilt, *supra* note 2, at 560.

There are some traffic regulations that offend our common sense as, for example, a 20-mile zone on a divided four lane concrete highway where the flow of traffic is light and where there is no visible reason for any such speed restriction. To an American individualist such a seemingly unreasonable regulation is almost a dare to defy it.

<sup>167</sup>GARDINER, *supra* note 117, at 151.

<sup>168</sup>BLACK, *supra* note 116, at 35 (“Police officers tend to be more aggressive and severe towards young people, often stopping them as a means of harassment.”).

<sup>169</sup>TIMOTHY FLANAGAN & DENNIS LONGMIRE, AMERICAN’S VIEW OF CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 33-34 (1996); Charles Thomas & Jeffery Hyman, *Perceptions of Crime, Fear of Victimization, and Public Perceptions of Police Performance*, 5 J. POLICE SCI. & ADMIN. 305, 314 (1977).

<sup>170</sup>LANGAN, *supra* note 26, at 15 (“[t]he younger the driver, the greater the likelihood of a ticket”).

*B. Race*

Racial profiling has received considerable attention over the past few years through legislative,<sup>171</sup> administrative,<sup>172</sup> and judicial reforms.<sup>173</sup> Because law reviews and other materials have paid considerable attention to this issue it will be addressed only briefly in this Article.

The data on race-based profiling and the exact impact race has had on police discretion has focused primarily on issues surrounding the initial stop and subsequent consent search practices and has provided little information concerning the influence of race on the use of discretion in issuing summonses. To attempt to analyze the data available for discriminatory practices in the enforcement of traffic offenses, which is possible, would require an entire article, or perhaps a book. Such an endeavor will not be undertaken in this research although there is evidence that people of varying races face the potential to be subjected to varying degrees of enforcement based upon factors unrelated to public safety.<sup>174</sup>

*C. Sex*

Sex is an immutable characteristic.<sup>175</sup> Commonsense and empirical research have clearly demonstrated that intra-sex and inter-sex communication and treatment often vary. Thus, it might reasonably be presumed that the sex of the motorist may influence how a particular police officer exercises discretion. The empirical research on the influence of sex on the use of police discretion during traffic stops is limited. That which does exist has revealed conflicting findings and perhaps provides the weakest supporting evidence for unfair enforcement practices in the immutable characteristics section.

One study has found that police are generally more lenient towards women during traffic stops.<sup>176</sup> While a survey administered on Canadian police found that if placed in view of a video camera during a motor vehicle stop, male and female officers were more likely to issue a ticket to the opposite sex.<sup>177</sup>

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<sup>171</sup>GEN. ACCT. OFF., RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORISTS STOPS (2000).

<sup>172</sup>PETER VERNIERO & PAUL ZOUBEK, THE INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999).

<sup>173</sup>State v. Soto, 734 A.2d 350 (N.J. Super. Ct. Law Div. 1996); Wilkins v. Maryland State Police, civil action No. CCB-93-468 and MJG-93-468.

<sup>174</sup>See generally DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY POLICE PROFILING CANNOT WORK (2002).

<sup>175</sup>Frontiero v. Richardson, 411 U.S. 677 (1973).

<sup>176</sup>Schellenberg, *supra* note 3, at 671. Findings indicate “[t]hat officers were less likely to ticket women than men.” *Id.*

<sup>177</sup>*Id.*



*D. Place of Residence*

Not being a resident of a particular municipality or area might also subject certain motorists to greater enforcement by police,<sup>178</sup> where the same offense if committed by residents of the community<sup>179</sup> may not receive a traffic summons.<sup>180</sup> In essence, because of the lack of public support for traffic enforcement, the police do not enforce the traffic laws against local residents,<sup>181</sup> or only against unpopular residents. In this respect, traffic enforcement may be considered a “tax” on non-residents or simply selective taxation.

*E. The Privileged, Non-enforcement and Ticket Fixing*

“Is there not in many places a tradition that certain public officials are above the traffic laws.”<sup>182</sup>

“[T]he areas leading citizens may enjoy a degree of immunity.”<sup>183</sup>

To this point in the Article the review of the policing research has been limited to those areas of traffic enforcement where a traffic summons is the result of the police abusing their discretion in traffic enforcement by relying on factors unrelated to legislative intent or rationally based public policy. This section covers another area of law enforcement: Non-enforcement and de facto exemption from traffic enforcement. Specifically, it is contended that those holding certain positions or in certain occupations are immune from the often harsh use of police discretion in traffic enforcement.<sup>184</sup> The American Bar Association felt strongly enough

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<sup>178</sup>Vanderbilt, *supra* note 2, at 561. “Particularly abhorrent to the fair-minded citizens is discrimination in selecting the ‘victim’ of enforcement, especially nonresidents, and the evil practices that generally accompany it. . . .”; BLACK, *supra* note 116, at 32. “It is also likely in a small town or village, where they have more social information about the automobiles they encounter, selective ticketing is more frequent: cars of strangers are probably more vulnerable than those of local residents. . . .” *Id.*

<sup>179</sup>Smith, *supra* note 26, at 66. “The police officer can favor local offenders over those who are non-residents, and vice-versa.” *Id.*

<sup>180</sup>WILLIAM WESTLEY, VIOLENCE AND THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM, AND MORALITY 59 (1970).

[T]he policemen divides the public into two major categories: the town driver and the out-of-town driver. Little effort is made to arrest the town driver since the men on one hand feel some degree of identification with him, and on the other recognize that the case may be fixed. The out-of-town driver, however, is legitimate prey.

*Id.*

<sup>181</sup>Schellenberg, *supra* note 3, at 668. “Thus, police have a predilection to trade leniency for legitimacy, especially in smaller communities.” *Id.*

<sup>182</sup>Vanderbilt, *supra* note 2, at 560.

<sup>183</sup>BLACK, *supra* note 116, at 32.

<sup>184</sup>*Id.*

concerning the abuse of discretion in ticket fixing to propose model rules to govern the dismissal of traffic complaints.<sup>185</sup>

Who does not receive traffic citations? People who are police,<sup>186</sup> are related to the police,<sup>187</sup> hold positions of power and authority,<sup>188</sup> or who frequently work with<sup>189</sup> or come in friendly contact<sup>190</sup> with the police are largely immune from traffic enforcement. Regardless of the particular locality, people of high status in a

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<sup>185</sup>A.B.A. Comm. on the Traffic Court Program, STANDARDS FOR TRAFFIC JUSTICE 10-11 (1975) Section 6.0C General Principal. The court, or other tribunal, should maintain strict control over case processing, to insure that all charges are properly classified and terminated;

*Commentary:* The obligation for sound administration cannot be delegated. The supervising judge or hearing official is responsible for the proper disposition of every citation returnable to his tribunal, and constant vigilance of non-adjudicatory functions should be maintained. *Id.*

“Ticket fixing should not be tolerated. A ticket ‘fix’ is an obstruction of justice, destructive of the rule of law, public morality and public safety.” See also sections 6.1 and 6.2 placing additional restrictions on the ability to ticket fix. Section 6.3 requires that audits be conducted of police ticket books. Finally, Section 6.5 proposes that fines and costs should not be used for revenue generating purposes. NATIONAL CENTER FOR STATE COURTS, MAINE TRAFFIC COURT STUDY 38 (1975). “Overall control of the issuance and distribution of traffic tickets will narrow the opportunity associated with the processing of traffic cases to ‘fix’ tickets.” N. GARY HOLTEN & LAWSON LAMAR, THE CRIMINAL COURTS: STRUCTURES, PERSONNEL, AND PROCESSES 64 (1991). “Among the faults found with these [lower] courts are their capriciousness, their arbitrariness, their ignorance of the law and of proper procedure, their denial of fundamental rights to some litigants and defendants, their subservience to local political cliques, and their concern with generating fines and fees for themselves and their towns or counties.” James P. Economos, *Traffic Courts and Justice of Peace Courts*, 25 N.Y.U. L. REV. 66, 67 (1950). A classic study of how certain classes make themselves immune, or at least partially immune from the law is C. WRIGHT MILLS, THE POWER ELITE (1959).

<sup>186</sup>PAYTON, *supra* note 121, at 13. “There is an unwritten rule in law enforcement that you do not give a traffic ticket to a fellow officer . . . [a reporter in San Diego] . . . found that out of 108,000 traffic citations issued during the six months of his study, not one citation was issued to police officers, their wives, city council members, county supervisors, municipal and superior court judges, and major county and city department heads . . . he concluded that the policemen were exceptionally good drivers, since 10 to the 36th power [this was the chance of them not receiving a ticket] would equal more stars and planets than there were in the sky.” 16 THE NEWS MEDIA AND THE LAW Winter 1992 36-37. A Kansas City reporter using drivers license records found that “[t]hree of 1,100 police officers received traffic tickets, significantly fewer than the average 1,000 of every 1,100 drivers.”; BLACK, *supra* note 116, at 34-35. “If the police learn that a driver is himself an officer, this too discourages them from writing a ticket . . . People with other ties to the police also have a degree of immunity . . . friends and acquaintances . . . relatives of another officer, and ex-officers. . . . Taxi drivers, truck drivers, fire fighters, government officials, and clergymen—all respectable people who also work on the streets or who serve the public—are among those who are likely to receive special consideration.” Vanderbilt, *supra* note 2, 560-61.

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

particular community are generally immune from traffic laws.<sup>191</sup> Families may also have some degree of immunity from receiving a ticket from police officers. One officer had reported that in his nine years of policing he had never given a ticket to someone in a family car.<sup>192</sup> Another officer stated

I like to get them when they're alone. I make it a point not to stop cars with whole families in them. I can't take it when kids say, 'Is he a real policeman?' and I'm writing a ticket for daddy. Daddy can do no wrong, so I don't like to embarrass him in front of the kids.<sup>193</sup>

For certain privileged persons mentioned in this section, once a ticket has been issued it can still be overcome though an absolute liability offense, by means of political, rather than legal process. Other factors such as purchasing varied police promotional stickers or cards may also result in the motorist not receiving a citation<sup>194</sup> (e.g. tickets to the policeman's ball or donations to a favorite police-sponsored charity).

## VI. DISCUSSION

Throughout the Article the use and abuse of traffic enforcement power has been explored. It has also been demonstrated that the legal protections afforded citizens are ineffective at preventing law enforcement from abusing this discretionary power, if there is any current right to warrant judicial intervention at all. This section explores the fundamental constitutional underpinnings that address this specific issue, yet does not appear to have been applied by the court. In *Marbury v. Madison*<sup>195</sup> the Court stated that we "live by a government of laws, not of men."<sup>196</sup> Justice Scalia, the author of the *Whren* opinion, boldly dissented in *Morrison v. Olsen*<sup>197</sup> on these very grounds.<sup>198</sup>

A "government of laws, not of men"<sup>199</sup> signifies a deeply rooted distrust for expansive official discretion<sup>200</sup> as perhaps best demonstrated in the historical origins

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<sup>191</sup>WILSON, *supra* note 133, at 141. "In all cases, circumstances of person and condition are taken into account-community notables are excused because they have influence . . ." *Id.*

<sup>192</sup>BLACK, *supra* note 116, at 34.

<sup>193</sup>*Id.*

<sup>194</sup>Smith, *supra* note 26, at 67.

<sup>195</sup>5 U.S. 137 (1803).

<sup>196</sup>*Id.* at 163 ("The government of the United states has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.").

<sup>197</sup>487 U.S. 654, 697 (1987).

<sup>198</sup>*Id.* at 697 (Scalia, J. dissenting) ("[i]t is the proud boast of our democracy that we live by 'a government of laws and not of men.' Many Americans are familiar with the phrase; not many know its derivation. It comes from Part the First, Article XXX, of the Massachusetts Constitution of 1780 . . .").

<sup>199</sup>*Id.*

of the Fourth Amendment.<sup>201</sup> The purpose of the Fourth Amendment was to prevent the law from being applied according to the discretionary powers of “petty officers.”<sup>202</sup> The Writs of Assistance are the clear origin of the Fourth Amendment in the colonies,<sup>203</sup> though the roots can be traced much further back to post-Magna Carta England,<sup>204</sup> Roman Law,<sup>205</sup> and the Old Testament.<sup>206</sup>

Clearly the implicit discretionary authority given to law enforcement in *Whren* and the discretionary authority explicitly given to law enforcement in *Atwater* contradict the premise that we live by a government of laws and embraced by countless courts throughout the history of this nation.<sup>207</sup> If police have the unbridled discretion to stop any motorist because they observe a traffic violation and need not provide any additional justification, while at the same time it is commonly known that virtually every motorist is violating the law, a disparity exists between the law as it is written and the law as it is enforced.<sup>208</sup> Some legal scholars have come to define a disparity between the law as it is written and the law as it is enforced as the definition of a police state.<sup>209</sup> Yet the motor vehicle stop is not the end of the police discretion; it continues with the discretion of whether or not to issue a summons and the decision of whether to arrest. How does this discretionary authority relinquished to the police comply with the original intent of the Fourth Amendment? It does not. In fact it is more offensive than the evil it was created to prevent.

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<sup>200</sup>Anthony Amsterdam, Note, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 369 (1974). “The regulation of police behavior is what the Fourth Amendment is all about.” *Id.*

<sup>201</sup>JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 96-97 (1980). “A major point of the [Fourth] amendment, obviously, was to keep the government from disrupting our lives without at least moderately convincing justification. The rationale intertwines with another - and the historic customs abuses are relevant here too - namely, a fear of official discretion.” *Id.*

<sup>202</sup>*Id.*

<sup>203</sup>LASSON, *infra* note 204, at 51-78; Joseph Strengel, Note, *The Background to the Fourth Amendment of the Constitution of the United States, Part I*. 3 U. RICH. L. REV. 278, 295-98 (1969).

<sup>204</sup>Joseph Strengel, Note, *The Background of the Fourth Amendment to the Constitution of the United States: Part I*. 3 U. RICH. L. REV. 278, 281 (1969); NELSON LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 20 (1937).

<sup>205</sup>LASSON, *supra* note 204, at 15-18.

<sup>206</sup>*Id.* at 13-15; W.W. DAVIES, *THE CODES OF HAMMURABI AND MOSES* 33 (1905); SAMUEL HOFSTADTER & GEORGE HOROWITZ, *THE RIGHT TO PRIVACY* 9-11 (1964).

<sup>207</sup>Try using search term “government of laws, not of men” in an electronic search on Lexis or Weslaw.

<sup>208</sup>Hayes Elder, Comment, *Police Discretion and Traffic Law Enforcement*, 39 WASH. L. REV. 840, 845 (1964). “Substantial variation between enforced law and written law virtually defines a ‘police state.’” *Id.*

<sup>209</sup>*Id.*

The Fourth Amendment was adopted in response to the repeated, lawful abuses by petty officers in the name of the King. The Writs of Assistance<sup>210</sup> were issued by the King of England<sup>211</sup> to petty officers for the life of the King plus six months<sup>212</sup> for the purpose of insuring that colonists did not evade taxes.<sup>213</sup> Similar powers were granted to petty officers in England but under different titles.<sup>214</sup> The general purpose of the Writ of Assistance was to insure that revenue was generated for the King.<sup>215</sup> During the colonial period the King was the de facto equivalent of the state. Has much changed? What is the purpose behind requiring police to issue a certain number of tickets? The answer is to generate revenue for the state.<sup>216</sup> Adding further offense<sup>217</sup> to the indignity of utilizing the criminal justice system as a means to generate revenue is that the police may utilize traffic summons writing as a bargaining chip for their own self gain.<sup>218</sup>

## VII. CONCLUSIONS

As the *Marbury* Court stated: “The government of the United states has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right.”<sup>219</sup> The abuse of discretion by government agents was declared unconstitutional again by the Court in *Yick Wo v. Hopkins*.<sup>220</sup>

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to make unjust and illegal discriminations between

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<sup>210</sup>Noted earlier in the text and accompanying footnotes of this section, the Writs of Assistance were the impetus behind the Fourth Amendment.

<sup>211</sup>LASSON, *supra* note 204, at 57

<sup>212</sup>*Id.*

<sup>213</sup>*Id.* at 51-52.

<sup>214</sup>TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24-30; Geoffrey Hemphill, *The Administrative Search Doctrine: Isn't This Exactly What the Framers Were Trying to Avoid?*, 5 REGENT U. L. REV. 215, 218 (1995).

<sup>215</sup>LASSON, *supra* note 204, 51-52.

<sup>216</sup>Netherdon, *supra* note 150, at 583 (noting self sufficiency from revenue derived from fines is common place for courts handling traffic offenses). “To put it briefly, violations bureaus in most cities seem to exist mainly for revenue purposes and appear to be considered in that light by the motoring public.” *Id.* at 588 citing WARREN TRAFFIC COURTS 21 (1942).

<sup>217</sup>Hayes Elder, *Police Discretion and Traffic Enforcement* 39 WASH. L. REV. 840, 41 (1964). “Although the first concern with traffic safety law is to increase the motorist’s chance for survival, these traffic laws, and the enforcement of them, create other problems that can undermine values fundamental to our society.” *Id.*

<sup>218</sup>*See* text and footnotes referring to the police use of ticket writing as a means to gain bargaining power in union negotiations.

<sup>219</sup>5 U.S. 137, 163.

<sup>220</sup>118 U.S. 356 (1886).

persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.<sup>221</sup>

The decisions of *Whren* and *Atwater* are in direct contradiction to *Marbury*, the dominant pillar of American jurisprudence. *Whren* and *Atwater* simply cannot exist in the same jurisprudential scheme with *Marbury*. Either *Marbury* has been overturned or *Whren* and *Atwater* cannot stand. If at the discretion of a patrolman a citizen can be arbitrarily taken into custody for not wearing a seatbelt and the next citizen stopped who is not wearing a seatbelt can be released without any penalty, there is no law. There is a man who simply punishes suspects at will. Enforcement practices such as this, bearing the official authorization of the courts, represents a police state. It cannot be reconciled with any conception of a government of laws.

How courts have evaded addressing this constitutional issue is mind boggling. What courts will do in the future remains to be seen. Until the unbridled discretion of police is restricted in the traffic enforcement context, the infamous quote of *Marybury* has been reduced to, and remains little more than, a mere “form of words.”<sup>222</sup>

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<sup>221</sup>*Id.* at 373-74.

<sup>222</sup>*Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).