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Arbitrary Law Enforcement is Unreasonable: *Whren's* Failure to Hold Police Accountable for Traffic Enforcement Policies

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ARBITRARY LAW ENFORCEMENT IS
UNREASONABLE: *WHREN*'S FAILURE
TO HOLD POLICE ACCOUNTABLE FOR
TRAFFIC ENFORCEMENT POLICIES

Jonathan Witmer-Rich[†]

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INTRODUCTION

*Whren v. United States*¹ is surely a leading contender for the most controversial and heavily criticized Supreme Court case that was decided in a short, unanimous opinion.² The slip opinion is only thirteen pages long, and provoked no dissents or even concurring opinions. Critical reaction has been overwhelmingly negative.³ Criticism notwith-

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1. 517 U.S. 806 (1996).
2. See Arnold H. Loewy, *Cops, Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 557 (2002) (referring to the “surprising unanimity” of the *Whren* Court’s “implicit sanctioning of unbridled arbitrariness or racial profiling in upholding the constitutionality of a stop by plain clothes vice squad officers to issue a traffic warning to individuals whom they suspected of drug dealing”).
3. For critical commentary, see David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005 (1998); Tracey Maclin,

standing, the Court has not retreated from *Whren*, but continues to repeat its core holding.⁴

Some justices who joined the unanimous opinion have since expressed reservations about the breadth of powers available to police in traffic stops. Justice Kennedy, writing just a year after *Whren*, dissented from the Court's holding in *Maryland v. Wilson*⁵ that passengers during a lawful traffic stop could be ordered to exit the car with no individualized suspicion. He stated, “[w]hen *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most public way.”⁶

Justice Ginsburg, joined by Justices Stevens, O'Connor, and Breyer, likewise raised questions in a concurring opinion in *Arkansas v. Sullivan*.⁷ These justices joined the majority “[g]iven the Court's current case law”—namely *Whren*.⁸ Yet Justice Ginsburg added that “if experience demonstrates ‘anything like an epidemic of unnecessary minor-

Race and the Fourth Amendment, 51 VAND. L. REV. 333 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409 (2000); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Loewy, *supra* note 2; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010). *But see* STEVE HOLBERT & LISA ROSE, *THE COLOR OF GUILT & INNOCENCE: RACIAL PROFILING AND POLICE PRACTICES IN AMERICA* 120 (2004) (defending *Whren* and stating that “[a]t first glance, it may appear that these stops are intended to target those of a particular ethnicity,” but “a well-trained officer need not consider the race of the driver when targeting suspected violators”).

4. *See, e.g.*, *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (citing *Whren v. United States*, 517 U.S. 806, 810, 813 (1996)) (“[A] stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment.”); *Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001) (Ginsburg, J., concurring) (re-stating the holding of *Whren*, and rejecting an attempt by the Arkansas Supreme Court to read *Whren* narrowly).
5. 519 U.S. 408 (1997).
6. *Id.* at 423 (Kennedy, J., dissenting).
7. 532 U.S. 769, 772–73 (2001) (Ginsburg, J., concurring).
8. *Id.* at 773 (Ginsburg, J., concurring).

offense arrests,' I hope the Court will reconsider its recent precedent"⁹—an apparent reference to both *Atwater v. City of Lago Vista*¹⁰ and *Whren*. Justice Ginsburg likewise quoted earlier decisions suggesting that precedent should be overruled “when necessary ‘to bring its opinions into agreement with experience and with facts newly ascertained.’”¹¹

In recent years “facts newly ascertained” have indeed come to light—such as clear statistical evidence that the New York City Police Department’s stop-and-frisk program was being conducted in a patently unconstitutional manner, even under such generous standards as *Whren* and *Terry v. Ohio*.¹² New York police conducted a huge number of stops—over 685,000 stops in 2011, up from around 97,000 in 2002.¹³ Suspects were frisked for weapons in about half of these stops, but a weapon was actually found in only 1.5% of the frisks.¹⁴ Prosecutors obtained convictions for only around three percent of stops.¹⁵ Those persons stopped were disproportionately African American or Hispanic—fifty-two percent and thirty-one percent, respectively.¹⁶ And while minorities were the overwhelming targets of stops and frisks, the “hit rate” for searches of minorities was lower than that for whites.¹⁷

These results were both predictable and actually predicted.¹⁸ As Tracey Maclin has explained, this discovery is nothing new: “In Amer-

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9. *Id.* at 773 (Ginsburg, J., concurring) (quoting *Atwater v. Lago Vista*, 532 U.S. 318, 353 (2001)).
 10. 532 U.S. 318 (2001).
 11. *Sullivan*, 532 U.S. 769, 773 (Ginsburg, J., concurring) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).
 12. 392 U.S. 1 (1968).
 13. ERIC T. SCHNEIDERMAN, N.Y. STATE OFFICE OF THE ATT’Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES 5 (Nov. 2013) [hereinafter N.Y. ATT’Y GEN. REPORT]; see also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 573–74, 591–92 (S.D.N.Y. 2013) (noting the “uncontested statistics”).
 14. *Floyd*, 959 F. Supp. 2d at 573.
 15. N.Y. ATT’Y GEN. REPORT, *supra* note 13, at 3, 6 (citing statistics from 2009–2012).
 16. *Floyd*, 959 F. Supp. 2d at 574.
 17. *Id.* (“Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites. Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.”).
 18. See *Harris*, *supra* note 3, at 560 (“We can comfortably predict the effect of *Whren*: police will use the case to justify and expand drug interdiction efforts against people of color.”).

ica, police targeting of black people for excessive and disproportionate search and seizure is a practice older than the Republic itself.”¹⁹

Given the immediate and sustained scholarly criticism of *Whren*, and the significant and ever-growing body of evidence of the real harms inflicted through arbitrary and discriminatory policing, why did all nine justices of the Supreme Court join in a brief opinion squarely rejecting the argument that racially discriminatory law enforcement was unreasonable under the Fourth Amendment?

The answer lies at least in part in the baseline from which the Court chose to evaluate police conduct in pretextual stops. From one perspective, the question in *Whren* is whether police can pull over a motorist when the police “have probable cause to believe [the motorist] has committed a civil traffic violation.”²⁰ From this perspective, it seems hard to see how the answer could be “no”—after all, “[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”²¹ The text of the Fourth Amendment limits government discretion by, among other things, requiring individualized suspicion—probable cause that is particular to the place, person, or item sought.²² Once there is probable cause, the Fourth Amendment’s concern seems to be satisfied.

The Court found itself at loss to imagine a world in which police would be constitutionally prohibited from making a traffic stop in the face of clear evidence that a traffic violation had in fact occurred: “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.”²³ In the end, the Court could not imagine things from a different perspective: “we think there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.”²⁴

But there is another baseline against which one might evaluate the reasonableness of police conduct—the baseline created by police policy and practice. When the police consistently choose to enforce the law—here, the traffic code—by using standards different from those written into the code, then the appropriate baseline for assessing the reasonableness of police conduct is by evaluating that conduct against the police department’s own chosen enforcement practices and policies. As stated

19. Maclin, *supra* note 3, at 333.

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

21. *Id.* at 810.

22. U.S. CONST. amend IV.

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

24. *Id.* at 819.

well before *Whren* by Wayne LaFave: “[i]t is the *fact* of the departure from the accepted way of handling such cases which makes the officer’s conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.”²⁵

The Court’s decision to evaluate police conduct against the written traffic code, as opposed to evaluating police conduct against police practice and procedure, is what led the justices to unanimously conclude that police conduct must be reasonable when there is probable cause of a traffic infraction. This framing of the issue is one of the fundamental mistakes of *Whren*.²⁶ It represents a failure by the Court to hold police to the standards that police create themselves, resulting in a clear practice of arbitrary—and thus unreasonable—policing.

Part I frames the problem in *Whren* with a story. Part II sets forth the fundamental Fourth Amendment principle underlying this article—the prohibition against arbitrary search and seizure. Part III explains how arbitrariness applies to *Whren*, and to police enforcement policies. Part IV describes pretextual traffic stops as a form of entrapment. Part V addresses the *Whren* Court’s concern that the Fourth Amendment should not vary from place to place. Part VI notes that arbitrariness is distinct from discrimination, and acknowledges that ending arbitrariness would not necessarily end discriminatory law enforcement.

I. WRITTEN RULES VERSUS ENFORCEMENT PRACTICE: CREATING THE CONDITIONS FOR ARBITRARINESS

Every fall, when I teach *Whren v. United States*,²⁷ most of my students seem to share the basic framing adopted by the justices: if the police have probable cause that a motorist has violated the traffic code, the resulting traffic stop must therefore be constitutionally reasonable. To hold otherwise would be perverse—somehow forbidding the police from conducting a traffic stop when it is plain a violation has been committed.

After hearing this near-consensus, I have begun sharing with my students the following story:

This fall, as every fall, I distribute and then read aloud my Criminal Procedure syllabus: class begins promptly at 2:00 p.m., and any student entering after 2:00 p.m. will be marked late—and suffer a corresponding penalty in the class participation grade.

For the first few classes, nervous supplicants come to the podium after class, begging forgiveness for arriving one or two minutes late—

25. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 120–21 (3d ed. 1996).

26. Another fundamental mistake, discussed repeatedly by other commentators, is the Court’s dismissal of the concern that arbitrary police enforcement will in fact be used to conduct racially discriminatory policing. *See supra* note 3.

27. 517 U.S. 806 (1996).

always with a good reason. I reassure each of them that I will not penalize them for their minor tardiness; I am understanding professor. After a few weeks, my students have learned that my written 2:00 p.m. policy actually has a built-in buffer zone. Only students who show up significantly late are penalized. By halfway through the semester students even have a pretty good sense of what “significantly late” means—somewhere around five to six minutes. I have never told them there is a five-minute grace period, but they have learned it nonetheless.

Near the end of the term, one of my students (Maggie) walks into class at 2:03 p.m.—plainly a few minutes late for class. After class, Maggie smiles politely at me as she walks past my podium on her way out, and I inform her, “Just so you know, you just lost five class participation points for your tardiness today.” Stunned and (initially) ashamed, she turns red and mumbles an apology.

Later, having had the time to compose herself and talk with other students in the class, Maggie’s embarrassment turns to anger. She petitions me to remove the penalty; I refuse. She then petitions the academic standards committee, arguing that my imposition of a penalty on her was unreasonable.

You are on the committee. I defend my sanction by pointing to the written policy in the syllabus, adding that I also read the policy aloud on the first day of class.

So, I ask my students: Am I being unreasonable?

My students overwhelmingly conclude that I am. What is the nature of my unreasonableness? It is clear—my imposition of a sanction on Maggie is arbitrary. It is true that I wrote and explained a 2:00 p.m. attendance policy. But then, through my conduct, I repeatedly and consistently adopted a “de minimis” enforcement practice. My students learned from my consistent enforcement pattern that in practice they would not suffer a penalty as long as they showed up within about five minutes of the beginning of class. My imposition of a sanction on Maggie is unreasonable.

In addition, my sanction may or may not also be discriminatory—it may be motivated by some improper consideration, such as Maggie’s gender or race. But apart from whether the policy is discriminatory, it is clearly arbitrary, and objectionable—and unreasonable—on that ground alone.

This is the story that is entirely missing from the unanimous opinion in *Whren*.

II. ARBITRARY LAW ENFORCEMENT IS UNREASONABLE

Arbitrary law enforcement is unreasonable, and the Supreme Court has said so many times. According to the Court, “[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against

arbitrary invasions by governmental officials.”²⁸ And the Court has repeatedly recognized, “[t]he security of one’s privacy against arbitrary intrusion by the police’ as being ‘at the core of the Fourth Amendment and basic to a free society.’”²⁹

Much has been written about *Whren*’s conclusion that even an overtly discriminatory subjective motivation does not render a traffic stop unreasonable under the Fourth Amendment.³⁰ Those concerns are important, and ongoing empirical evidence continues to bear out the concern that some motorists—such as African Americans—are disproportionately subjected to stops and frisks.³¹

Arbitrariness is an evil related to but distinct from discrimination. Apart from whether a government official is motivated by some improper concern—such as race—government action is also objectionable when it is arbitrary. Tracey Maclin explained, “[e]ven where there is no proof that the police are acting with a specific racial intent, a police intrusion may violate Fourth Amendment norms due to its arbitrary nature.”³²

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28. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967); *see also City of Ontario v. Quon*, 560 U.S. 746, 755–56 (2010) (quoting *Skinner v. Ry. Labor Executives’ Assn.*, 489 U.S. 602, 613–14 (1989)) (“The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government.”).
29. *Schmerber v. California*, 384 U.S. 757, 767 (1966) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)). Other Fourth Amendment cases in which the Court has expressed a concern against “arbitrary” government action include *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975), *United States v. Ortiz*, 422 U.S. 891, 895 (1975), *United States v. Martinez-Fuerte*, 428 U.S. 543, 554–56 (1976), and *Delaware v. Prouse*, 440 U.S. 648, 653–55 (1979). *See also Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (stating that arbitrariness is one of the concerns underlying void-for-vagueness doctrine).
30. *See, e.g.*, Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882 (2015) (discussing *Whren*’s permissiveness regarding blatant racial discrimination); *see also supra* note 3 (listing articles critical of *Whren*).
31. *See, e.g.*, Ronnie A. Dunn, *Racial Profiling: A Persistent Civil Rights Challenge Even in the 21st Century*, 66 CASE W. RES. L. REV. 957 (2016) (discussing racial disparities in an empirical study of traffic stops).
32. Maclin, *supra* note 3, at 373. *See also LAFAVE, supra* note 25, at 120–21 (“It is the *fact* of the departure from the accepted way of handling such cases which makes the officer’s conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.”); Loewy, *supra* note 2, at 571 (“If the local police regulations forbid a plainclothes police officer to make a traffic stop unless certain specified special circumstances are present, it is hard to construct an argument that the stop, in the absence of such circumstances, was reasonable.”).

One form of arbitrariness is when government officials randomly target persons without any good reason to do so.³³ Under the Fourth Amendment, reasonable suspicion or probable cause that the individual is committing a crime or traffic infraction ordinarily provides the “good reason” for the government action.³⁴ So long as reasonable suspicion or probable cause is present, the government has some non-arbitrary reason for acting. This is the logic used in *Whren*: “[a]n automobile stop is thus subject to the constitutional imperative that it not be ‘unreasonable’ under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”³⁵

But this is not the only way government conduct can be arbitrary. If the government, by policy or practice, consistently underenforces the law in a particular way, then a random act of strict enforcement is also arbitrary.

III. POLICE ACCOUNTABILITY FOR ENFORCEMENT POLICY

It is clear that arbitrary government conduct is unreasonable. To assess how this principle applies to pretextual stops, it is critical to determine the appropriate baseline, a concept mentioned above. Should arbitrariness be measured against the written traffic code, or against police enforcement policy and practice?

The story in Part I is meant to elicit the intuition that enforcement practice, and not merely written policy, is a critical aspect of measuring arbitrariness. In that story, why should we measure the professor’s sanction against his enforcement practice as opposed to his written policy? The most natural answer is that it is the professor himself who chooses his written policy as well as how he will enforce that policy. It is the professor who has chosen to consistently allow a five to six minute *de minimis* allowance to his 2:00 p.m. starting time. Under that regime, if ten students each arrives three minutes late, nine are given a pass, and one is sanctioned, that sanction is arbitrary.

In the context of police traffic enforcement, it is police departments who choose how to enforce the written traffic code. The concern about

33. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974) (noting that the Fourth Amendment is concerned not only with unjustified search and seizure but also “*arbitrary* searches and seizures,” namely those “conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize”).

34. Lewis R. Katz, *Introduction to Whren at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 928 (2016).

35. *Whren v. United States*, 517 U.S. 806, 810 (1996).

government arbitrariness is therefore fundamentally about holding the police accountable for their own policies and procedures.

It is frequently observed, in the context of *Whren*, that total compliance with the traffic code is nearly impossible, due to the extraordinary breadth, detail, and complexity of the traffic code. David Rudovsky argued, “[s]ince virtually every driver commits violations of the traffic laws on a regular basis, the police have enormous discretion to effectuate stops of a very high number of cars, thus presenting the critical issue of pretextual stops and searches.”³⁶ David Harris observed that due to the “the comprehensive scope of state traffic codes . . . no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention.”³⁷

Commentators have repeatedly argued that due to the comprehensive and detailed nature of the traffic code, permitting pretextual stops so long as there is probable cause of some traffic violation effectively gives the police unfettered discretion—the power to stop any motorist at any time.³⁸

These observations are true, although there is a deeper issue at play that has received less critical attention. It is not merely the case that compliance is difficult because traffic codes are lengthy and complex. More fundamentally, it is the police themselves that create the conditions of near-uniform noncompliance with the written traffic code. Police departments around the country consistently—and by deliberate policy—underenforce the written traffic code. In fact, they often do so in relatively predictable ways.

Speed limits are a simple traffic rule, yet those limits are routinely and consistently violated. The ubiquity of speeding is not due to the complexity or breadth of the traffic code—the speed limit is a simple and straightforward rule, posted on clear signs at regular intervals, and understood by most motorists. The fact that the flow of regular traffic on an ordinary highway is often proceeding at around five (or more) miles per hour (mph) above the speed limit is not a reflection of driver confusion. It is due to one fact: the knowledge, on the part of the

36. Rudovsky, *supra* note 3, at 318.

37. Harris, *supra* note 3, at 545.

38. See Harris, *supra* note 3, at 582 (“*Whren* leaves us in an unsatisfactory situation. Any time we use our cars, we can be stopped by the police virtually at their whim because full compliance with traffic laws is impossible.”); Oliver, *supra* note 3, at 1414 (“If several, or in the case of traffic offenses, most, persons are committing the same offense and practical realities preclude an officer from stopping them all, then probable cause does not meaningfully limit an officer’s discretion.”); Rudovsky, *supra* note 3, at 318 (“Since virtually every driver commits violations of the traffic laws on a regular basis, the police have enormous discretion to effectuate stops of a very high number of cars, thus presenting the critical issue of pretextual stops and searches.”).

drivers, that the police will not pull over cars traveling five mph over the speed limit.

Is it possible to determine exactly what law enforcement policies are with respect to enforcement of speeding laws? In the United States, law enforcement is highly decentralized. Even in major cities, there does not seem to be publicly available written policy informing the public of police speed limit enforcement policies.

In the United Kingdom, the Crown Prosecution Service actually publishes standards for speed limit enforcement.³⁹ The CPS relies on guidelines established by the Association of Chief Police Officers, an organization that coordinated law enforcement policy across England, Wales, and Northern Ireland.⁴⁰ These guidelines establish the circumstances under which “enforcement will normally occur”—that is to say, when the police will pull over a driver and issue a citation.⁴¹ In ordinary circumstances, the enforcement standard “is normally 10 per cent over the speed limit plus 2 mph.”⁴² When a driver is speeding very excessively—above an even higher threshold—the officer may issue a court summons rather than a citation with a fixed monetary penalty.⁴³ That higher “summons” standard is also set forth in the guidelines:

Speed limit: 20 mph
ACPO charging threshold: 24 mph
Summons: 35 mph

* * *

Speed limit: 40 mph
ACPO charging threshold: 46 mph
Summons: 66 mph

* * *

Speed limit: 60 mph
ACPO charging threshold: 68 mph
Summons: 86 mph⁴⁴

39. *Road Traffic Offences: Guidance on Fixed Penalty Notices: Speed Enforcement*, THE CROWN PROSECUTION SERV. http://www.cps.gov.uk/legal/p_to_r/road_traffic_offences_guidance_on_fixed_penalty_notices/#speed [<https://perma.cc/JT6G-SFG4>] (last visited Feb. 13, 2016).

40. *See History and Background*, NAT'L POLICE CHIEFS' COUNCIL <http://www.npcc.police.uk/About/History.aspx> [<https://perma.cc/H4GY-C7P4>] (last visited Feb. 18, 2016). In 2015, the ACPO was replaced by a different body, the National Police Chief's Council. *Id.*

41. THE CROWN PROSECUTION SERV., *supra* note 39.

42. *Id.*

43. *Id.*

44. *Id.*

Finally, the guidelines provide that “a police officer has discretion to act outside of them providing he acts fairly, consistently and proportionately.”⁴⁵

Law enforcement agencies in the United States do not engage in this type of transparency about their enforcement policies.⁴⁶ From region to region, drivers (partly through trial and error) develop local knowledge about enforcement standards.

While there do not seem to be published speed enforcement policies in the United States, it is possible to find individual officers sharing and discussing enforcement practices on various internet discussion forums. While these comments by no means represent a statistical sampling of department policies, they nevertheless provide some scattered insight.

A discussion thread on “forums.officer.com” includes the following responses by pseudonymous users who purport to be current or former law enforcement officers⁴⁷:

Dingo990:

I've heard stories of cops in such and such department that will give you a ticket for 4 over the speed limit. Personally I've worked for three departments in my career and I've never known an officer to do that.

Me personally, I'm pretty lean on speed enforcement. I typically give 12-15mph leeway on highways and 8-10 over on residential streets.

10 over is pretty much the standard among cops I've spoken to.⁴⁸

Axelfoley4:

45. *Id. See also* Kenny Hemphill, *How Far over the Limit Before You Get a Speeding Ticket?*, MENTAL_FLOSS (Apr. 8, 2015), <http://mentalfloss.com/uk/society/28119/how-far-over-the-limit-before-you-get-a-speeding-ticket> [<https://perma.cc/HA7C-LC46>] (“Generally, a fixed penalty notice is triggered by travelling at 10% above the legal limit plus 2mph, and a court summons by a speed between 11mph and 26mph above the limit, depending on the speed limit on the road.”).

46. While states do not appear to publish standards for when an officer should (or may) pull over a driver, some states do set forth explicit “buffer zones” in the penalties that can be imposed. *See, e.g.*, FLA. STAT. ANN. § 318.18(3)(b) (West Supp. 2016) (establishing that the statutory penalty for a driver exceeding the limit by one to five mph is merely a “warning”).

47. All mistakes in the following comments were in the original source material.

48. *Thread: How Much Over the Speed Limit Can You Go Without Getting Pulled Over by Radar Gun?*, OFFICER.COM (July 26, 2010, 8:25 PM), <http://forums.officer.com/t150556/> [<https://perma.cc/QV2H-HPP6>] [hereinafter OFFICER.COM].

in the chicagoland area, most of the guys i work with wont stop until 15+ over on residential, i tend to go 11+ for myself. they wont stop on the higway until 80mph since its a 55mph limit. its because of the risks making stops on the highway here.⁴⁹

VA Dutch (purportedly a former deputy sheriff):

The law says that 1mph over is speeding. Of course, I know of no cop who will stop you or cite for 1mph.

* * *

My general feeling was (and I have been a civilian for years now) that 12 mph over the limit in a 45-mph zone or less might cause a traffic stop. 15 mph over the limit in faster zones would be good reason to see blue lights behind you.

* * *

Most folks generally go 5 to 10 mph over the limit in light traffic conditions, so stay in the slower end of that camp and keep your fingers crossed! Just don't be the car in front or leading the packLOL!⁵⁰

Jeeves44:

It all depends on traffic and my mood. I've stopped for 5 over and have not stopped for 15 over. I've written tickets for 6 over and given warnings for 30 over.⁵¹

Rick Bruno (purportedly a former police commander in Illinois):

Depending on road/weather conditions, I gave the first 14 miles to the motorist. If they were 15 over, I'd stop them.

* * *

Sometimes, on *Special Operation Assignments* the discretion was taken away from me. The order might be to stop and ticket anyone driving over 10 miles over the limit. These were usually the result of citizen complaint about speeders in residential areas.⁵²

49. *Id.*

50. *Id.*

51. *Id.*

52. *Thread: How Much over the Speed Limit Do Most Officers Let You Go Before Pulling You Over?*, QUORA.COM (Nov. 2, 2014), <https://www.quora.com/How-much-over-the-speed-limit-do-most-officers-let-you-go-before-pulling-you-over?share=1#!n=12> [<https://perma.cc/GT98-EMKX>].

Comments left in internet forums should always be taken with a grain of salt, and there is no way to ensure that all comments purporting to come from law enforcement officers are genuine. That said, the comments reflect a few themes that are consistent with experience. The commentators acknowledge that police departments in the United States do not conduct traffic stops for very minor infringements of the speed limit. The “buffer zone” is consistently described as relatively large—ten to fifteen mph over the speed limit. Some commenters note that the enforcement limits are discretionary and largely left up to the individual officer. Others note that at least sometimes, supervisors set the enforcement limits.

Finally, it is worth noting an additional type of response on these discussion forums. Some officers seem to believe that speed limit enforcement practices should be secret—almost a form of “trade secret” by the police. The public should not be permitted to learn the enforcement thresholds—perhaps to keep them “on their toes.”⁵³

The speed limit is the clearest example of underenforcement, but not the only example. It is difficult to determine which traffic violations police enforce strictly and which they enforce laxly, given the lack of published policies. Many enforcement decisions appear to be driven, sensibly, by safety concerns. A driver who fails to signal at night, in the rain, in heavy traffic, may pose a genuine safety threat, and may well be pulled over for nothing more than the failure to signal. A driver who fails to signal during the daytime on a near-deserted road likely poses no danger to anyone and is unlikely to be pulled over for that infraction alone.

Regardless of whether police adopt clear and public enforcement policies—as in the U.K.—or keep the enforcement policy shrouded in secrecy—as in the U.S.—what is clear is that police departments themselves choose to systematically underenforce certain traffic regulations, such as the speed limit.

The upshot is that police departments control their own enforcement policies, and the choice to systematically underenforce certain traffic regulations is just that—a choice by police departments. Underenforcement may be a reasonable approach to certain traffic regulations. As the Court has noted, enforcement policies are generally viewed as an executive function, not under the control of the judiciary.⁵⁴

Once the police have chosen to consistently underenforce parts of the traffic code, the question then becomes whether it is reasonable for the police to arbitrarily enforce the laws against motorists whose

53. See, e.g., OFFICER.COM, *supra* note 48 (suggesting that there is no clear answer for when an officer will pull someone over for speeding). The person posing the question noted that his brother, an LAPD officer, would not tell him how much he could exceed the speed limit before being ticketed. One commenter, “Iowa #1603,” responded, “Well, we aren’t going to either.” *Id.*

54. *Whren v. United States*, 517 U.S. 806, 815 (1996).

conduct does not violate those enforcement standards. This is the question posed by the story told above, in which I in my role as professor adopted an underenforcement policy as to class starting time, and then arbitrarily chose to strictly enforce the policy against one student.

The *Whren* decision totally fails to acknowledge this basic point—that the widespread violation of the traffic code is caused primarily by police decisions to consistently underenforce parts of the traffic code. After noting that the traffic code is frequently violated, the Court states:

[W]e 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.⁵⁵

The Court's response here fails to recognize that a significant reason the traffic laws are "so commonly violated"—namely, police policy and practice to systematically underenforce the traffic code. This failure similarly undercuts the Court's concluding observation. The Court is evidently uncomfortable with the idea that the judicial branch would determine "which particular provisions are sufficiently important to merit enforcement."⁵⁶ From the Court's perspective, it is not clear why the judicial branch has any business making judgments about how to enforce the laws—a quintessential executive function. As Margaret Lawton has stated, "by determining when it is reasonable for a police officer to ignore violations of the law, is the court substituting its own judgment for the police officer's—and the legislature's—as to what the officer 'should have' done?"⁵⁷

The answer to this question is clearly "no." The Court's basic mistake lies in its failure to recognize that the enforcement standard comes from the police, not from the courts. Had the Court accepted petitioner's "reasonable officer" test, the courts would be doing nothing other than determining the policies that police departments themselves have

55. *Id.* at 818–19.

56. *Id.*

57. Margaret M. Lawton, *The Road to Whren and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 919 (2008).

adopted.⁵⁸ It does not require the courts to determine, in the abstract, what sorts of traffic violations it is “reasonable” to enforce. Rather, the courts need simply determine what the police department itself has determined regarding when and how to enforce the traffic laws.⁵⁹ This resolves both the “standard” issue and the “authority” issue—the standard comes from the police’s own enforcement policies, and the police are the appropriate authority to set enforcement policy.

Nothing here requires law enforcement agencies to underenforce parts of the traffic code. There is no constitutional right to “de minimis” speeding. But when the police choose to adopt an enforcement policy whereby, for example, no driver will be pulled over for driving five mph (or less) over the speed limit, the police have created a situation whereby strict enforcement against one driver will constitute arbitrary enforcement of the traffic code.

IV. PRETEXTUAL STOPS AS ENTRAPMENT

One way to conceptualize the problem is to analogize this situation to the criminal law defense of entrapment. In an entrapment case, a defendant argues that he should be acquitted even if he committed the offense charged. The entrapment defense is satisfied if the defendant can show two elements: (1) that the defendant was “induced or persuaded by law enforcement officers . . . to commit the offense,” and (2) that the defendant had no “previous intent or disposition or willingness to commit the crime charged.”⁶⁰

An early Supreme Court case discussed a rationale behind this defense:

[I]t is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an

58. The suggested test was “whether the officer's conduct deviated materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given.” *Whren*, 517 U.S. at 814.

59. See Maclin, *supra* note 3, at 378 (“The problem in *Whren* and other pretextual stop cases is not deciding ‘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.’ Rather, the problem is deciding whether officers jeopardize Fourth Amendment norms when they conduct seizures under a traffic code in a manner that brazenly deviates from normal procedures or wildly defies statistical expectations.” (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996))).

60. KEVIN F. O’MALLEY ET AL., 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS 768 (6th ed. 2008). See also *Mathews v. United States*, 485 U.S. 58, 63 (1988) (“[A] valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct.”).

offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.⁶¹

This explanation is not complete, as it does not spell out why it is unconscionable for the government to punish in these circumstances. The Seventh Circuit has explained the fundamental rationale as follows:

The federal government shall not use its resources to increase the criminal population by inducing people to commit crimes who otherwise would not do so. . . . A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character.⁶²

Two distinct concerns can be identified. First is a concern over improper government conduct: it is not a proper role of government in the liberal state to conduct itself in a way that encourage or induces its citizens to commit crimes, and then punish them when they fall prey to those inducements.⁶³ The role of the state is to prevent individuals from committing harms to others, not to actively engage in conduct to determine whether any of its citizens harbors a weak character.⁶⁴

Second is a concern about punishing individuals who do not exhibit the right type of culpability. As the Court has stated, “[l]aw enforcement officials go too far when they ‘implant in the mind of an innocent person the *disposition* to commit the alleged offense and induce its commission in order that they may prosecute.’”⁶⁵ A person with no predisposition to commit a crime is a person who, left to his own devices, does not pose sufficient danger to society to justify punishing him.⁶⁶

61. *Sorrells v. United States*, 287 U.S. 435, 444–45 (1932) (quoting *Butts v. United States*, 273 F. 35, 38 (8th Cir. 1921)).

62. *United States v. Hollingsworth*, 9 F.3d 593, 598 (7th Cir. 1993).

63. See PAUL MARCUS, *THE ENTRAPMENT DEFENSE* § 1.04B (4th ed. 2009) (discussing policy justifications behind the entrapment defense in *Sorrells v. United States*).

64. *Id.* at § 1.04B n.52 (“[T]he proper use of the criminal law in a liberal society is to regulate potentially harmful conduct for the protection of society, rather than to purify the minds and to perfect character.”) (quoting *United States v. Hollingsworth*, 9 F.3d 593, 597–98 (7th Cir. 1993)).

65. *Jacobson v. United States*, 503 U.S. 540, 553 (1992) (quoting *Sorrells v. United States*, 287 U.S. 435, 442 (1932)).

66. MARCUS, *supra* note 63, at § 1.04B n.52 (“A person who would not commit a crime unless induced to do so by the government is not a threat to society and the criminal law has no proper concern with him, however evil his thoughts or deficient his character.”) (quoting *United States v. Hollingsworth*, 9 F.3d 593, 598 (7th Cir. 1993)).

The concerns underlying the entrapment defense are also relevant to the issue at hand—arbitrary police enforcement of underenforced traffic regulations. In the context of speed limit enforcement, the problem becomes systematic. The police do not induce one (or a few) citizens to violate the written traffic code. Rather, through their consistent underenforcement policy, the police induce almost *all* drivers to violate the written traffic code.

As noted above, it is not a proper role of government in the liberal state to conduct itself in a way that induces its citizens to violate the law, and then punish them when they accept those inducements. In the context of speed limits, it is improper for the police to conduct itself in a way that encourages all drivers to drive in excess of the speed limit (up to a certain enforcement limit), and then arbitrarily punish a few drivers who—like others—are driving within the enforcement limits established by the police.

Several of the commenters in the police forums, discussed above, expressed the view that the public has no right to know or understand the actual standards that police will use to enforce the traffic code. The “right thing” to do, these police explain, is not to speed at all—even though the police themselves routinely exceed the posted limit, and routinely fail to pull over those who exceed the posted limit. The *de facto* limit, in this view, is a police trade secret, and members of the public must proceed at their own peril— “stay in the slower end of that camp and keep your fingers crossed! Just don’t be the car in front or leading the pack.....LOL!”⁶⁷

The notion that drivers must simply “keep their fingers crossed” that they will not be arbitrarily selected by an individual police officer runs counter to the basic principles of the liberal state. Citizens are entitled to notice of the rules they are expected to follow, and a reasonable opportunity to comply with those rules.⁶⁸

The second concern underlying the entrapment defense is the punishment of individuals who do not have the sort of culpability that justifies punishment. In the traffic context, police underenforcement sends the message to all drivers that driving five to ten mph over the speed limit is not sanction-worthy behavior. The police create and instill the general belief that moderate speeding, even though a violation of the written speed limit, is not the sort of behavior that warrants police intervention and enforcement.

67. OFFICER.COM, *supra* note 48.

68. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (stating that the due process vagueness doctrine “may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement”).

As a consequence, almost all drivers, including careful, responsible drivers who assiduously seek to comply with most other laws and driving requirements, routinely drive in moderate excess of the speed limit. These individuals are not proper subjects for enforcement and sanction. In one sense, these moderate speeders exhibit a disregard for the law—a disregard for the written speed limits. But the police, through their consistent enforcement practices, have illustrated to drivers that strict observance is not required, and thus moderate violations of the written code are not the sort of “disregard for the law” that the police believe warrant punishment.

The argument in Part III rested on emphasizing the importance of police enforcement practices as opposed to focusing solely on the written traffic code. In the entrapment context, the Supreme Court recognized this same conflict between the written code and police practice—but unlike in *Whren*, the Court recognized the importance of holding the police accountable for their own practices.

In an early entrapment case, at a time when it was not clear whether the entrapment defense would be recognized at all under federal law, the Court noted that the government’s arguments against entrapment “rest entirely upon the letter of the statute.”⁶⁹ The government’s rejection of entrapment as a defense took “no account of the fact that its application in the circumstances under consideration is foreign to its purpose”—the fact that the police were enforcing the law in a manner “so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the Government itself, to protect it from the illegal conduct of its officers and to preserve the purity of its courts.”⁷⁰

The argument here is not that the entrapment defense applies directly to certain violations of the traffic code. After all, the entrapment defense is a defense to conviction, not a rule regarding enforcement. The point instead is that the concerns underlying the entrapment defense are fully applicable to the question of pretextual enforcement. When police adopt enforcement practices that permit, tolerate, and in effect promote moderate violations of the traffic code, then arbitrary strict enforcement of the written code is unreasonable—it is improper conduct by the state, and it targets persons who are not proper subjects for law enforcement or sanction. And finally, as the Court recognized in the entrapment context, police enforcement practices are relevant to assessing the fairness of punishing individuals, even as against individuals who violate the letter of the law.

69. *Sorrells*, 287 U.S. at 446.

70. *Id.*

V. THE FALSE DANGER OF FOURTH AMENDMENT
“VARIABILITY”

The *Whren* Court raised an additional objection to the petitioner’s argument that law enforcement officers should be held to their own enforcement policies and practices. The concern is about local variability of the Fourth Amendment:

[P]olice enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities.⁷¹

The Court here draws on an intuition that a constitutional right, being fundamental, cannot vary from place to place based on the differing enforcement policies of a local police department.

This intuition is misplaced. At a fundamental level, the Fourth Amendment does depend on local laws, many of which vary from state to state and even municipality to municipality. In some areas, the speed limit is thirty-five mph, and thus observing a car traveling at thirty-five mph does not furnish police with the probable cause or reasonable suspicion necessary to justify a stop under the Fourth Amendment. In other areas, the speed limit is twenty-five mph, and thus observing the same car traveling at thirty-five mph does furnish probable cause required to justify a stop under the Fourth Amendment.

It is, therefore, misleading to suggest that the Fourth Amendment improperly “varies” from state to state or even from one stretch of road to another. The Fourth Amendment does not dictate any particular speed limit. The Fourth Amendment is thus consistent throughout the country, and the rule can be formulated in a uniform manner: police observation of a person driving in excess of the posted speed limit provides probable cause to stop the driver. What varies substantially from place to place is not the Fourth Amendment, but the posted speed limit.

The same can be said of police enforcement policies. The general Fourth Amendment principle could be articulated as follows: If the police establish, through policy or consistent practice, a standard of enforcing a traffic rule only beyond some de minimis level, then police action contrary to the policy or practice is arbitrary and therefore unreasonable. Like the speed limit itself, those underlying enforcement policies and practices will likely vary from place to place. But the basic Fourth Amendment command—that police may not arbitrarily vary from the enforcement practices—does not change.

The Court should not, of course, articulate a constitutional standard that is variable in a way that makes it difficult for law enforcement

71. *Whren v. United States*, 517 U.S. 806, 815 (1996) (citation omitted).

officers themselves to understand and comply with the Fourth Amendment limitations. But with variable police enforcement policies—as with variable speed limits—that problem does not exist. It may be difficult for a police officer from Anchorage, Alaska, to know and enforce the speed limits in Albuquerque, New Mexico, but fortuitously enough, the enforcement of Albuquerque speed limits are left to local Albuquerque police officers. The same can be said of enforcement policies. An officer from Cleveland, Ohio, may not know the enforcement policies of the local police in Clarksburg, West Virginia, but the Cleveland officer is only required to enforce the laws in Cleveland, and can be fully expected to understand the traffic code enforcement policies of the Cleveland Division of Police (whatever they may be).

The Court made a similar mistake in Fourth Amendment logic in *Virginia v. Moore*,⁷² holding that an arrest that was not authorized by state law did not thereby constitute an “unreasonable” seizure under the Fourth Amendment.⁷³ The Court in *Moore* started with the uncontroversial point that the Fourth Amendment is not violated simply because some state law is violated. If a state by law provides greater restrictions on the police than those provided by the Fourth Amendment, those state-law limitations do not thereby also become Fourth Amendment violations.⁷⁴ The *Moore* Court gave the following example: the fact that the California constitution protects against warrantless search of an individual’s garbage does not mean that the Fourth Amendment thereby also provides this protection.⁷⁵

The Court then analogized to *Whren*, stating that “[w]e have applied the same principle in the seizure context.”⁷⁶ The Court noted that *Whren* “held that police officers had acted reasonably in stopping a car, even though their action violated regulations limiting the authority of plainclothes officers in unmarked vehicles.”⁷⁷ Raising the “variability” concern, the Court explained, “[w]e thought it obvious that the Fourth Amendment’s meaning did not change with local law enforcement practices—even practices set by rule.”⁷⁸

Turning back to the issue at hand, the Court thus concluded that so long as there was probable cause of a state-law violation, an arrest was reasonable under the Fourth Amendment, even if arrest for that offense was not authorized by state law.⁷⁹

72. 553 U.S. 164 (2008).

73. *Id.* at 165.

74. *Id.* at 171–172.

75. *Id.* (citing *California v. Greenwood*, 486 U.S. 35, 43 (1988)).

76. *Id.* at 172.

77. *Id.* (citing *Whren v. United States*, 517 U.S. 806 (1996)).

78. *Id.*

79. *Id.* at 174.

While *Moore* was pending, Professor Orin Kerr argued that the contrary rule should prevail:

The reason is simple: the “search incident to a lawful arrest” exception only permits searches incident to lawful arrests, not searches incident to *unlawful* arrests. Going back to English common law, courts have held that a lawful arrest justifies a search of the person pursuant to that lawful arrest. The lawfulness of the arrest has always been a critical part of the reasonableness of the search. *Moore* concerns an arrest by state police for a state crime. If the state law makes an arrest unlawful, any search incident to arrest is a search incident to an unlawful arrest rather than a search incident to a lawful arrest. It therefore violates the Fourth Amendment.⁸⁰

The Court’s “variability” concern thus represents a mistake about the relationship between the Fourth Amendment and state law. It is of course true that state law does not dictate the meaning of the Fourth Amendment as a general matter. But in some contexts, the reasonableness of conduct under the Fourth Amendment will depend on state law. In *Moore*, the state-law restriction on arrest meant that the arrest was not “lawful,” and thus the “search incident to lawful arrest” rule should not have been applied. The Fourth Amendment rule is that search-incident-to-lawful-arrest doctrine must be premised on a “lawful arrest”—and what constitutes a “lawful arrest” may well vary from place to place, depending on the law of the local jurisdiction.

In *Whren*, the relevant Fourth Amendment principle is that an arbitrary seizure is unreasonable. If the police adopt an enforcement rule consistently permitting moderate speeding below a certain threshold, then pulling over a car that is not exceeding that threshold is arbitrary and therefore unreasonable. It is not that the Fourth Amendment prohibits stopping cars for minor traffic violations. It is that the Fourth Amendment prohibits arbitrariness.

VI. PREVENTING ARBITRARINESS IS NOT ENOUGH TO PREVENT DISCRIMINATION

This article has focused on one mistaken aspect of *Whren*—the Court’s failure to appreciate the arbitrariness that results from permitting the police to randomly deviate from their ordinary traffic enforcement practices. This is not the only objection to *Whren*. Many other commentators have focused on the problem of discriminatory law enforcement.⁸¹

80. Orin Kerr, *Why the Defendant Should Win in Virginia v. Moore*, THE VOLOKH CONSPIRACY (Jan. 7, 2008, 9:49 PM), <http://volokh.com/posts/1199753815.shtml> [<https://perma.cc/F8YZ-YEY3>].

81. See, e.g., *supra* note 3 (providing articles that are critical of *Whren*).

It is worth emphasizing that these are distinct problems. A traffic stop of a motorist for driving fifty-eight mph in a fifty-five-mph zone is likely arbitrary, but may not be discriminatory. A traffic stop of a motorist for driving sixty-eight mph in a fifty-five-mph zone might be discriminatory, but may not be arbitrary. Arbitrariness can be described objectively—it is about unjustified deviations from the ordinary rules of traffic enforcement. Discrimination is typically subjective—it is about the motivations of the officer, regardless of the ordinary rules of traffic enforcement.

Because “arbitrariness” and “discrimination” are distinct problems, it is also true that solving one will not necessarily be sufficient to solve the other. Under the “reasonable officer test”—advocated by the petitioner in *Whren* and defended in this article—traffic stops would be deemed unreasonable under the Fourth Amendment if they were out of line with the police department’s enforcement policy and practice. This is an important principle, one rooted firmly in the Fourth Amendment’s prohibition against arbitrary search and seizure. And yet this test would not be sufficient to end, or prohibit, discriminatory law-enforcement practices. Thus if we end to aim discrimination in law enforcement—as we should—putting an end to arbitrary stops is not enough.

Whren’s problem of discriminatory law enforcement has been discussed extensively⁸²—and for good reason. *Whren*’s problem of arbitrary law enforcement has received much less attention, which is why I have chosen to emphasize the point at length here. Prohibiting arbitrary law enforcement—by, among other things, requiring police to reasonably follow their own enforcement procedures—is a worthwhile goal, even though it is not the only important Fourth Amendment value.

CONCLUSION

The Court unanimously determined in *Whren* that a traffic stop is reasonable so long as there is probable cause that a traffic violation occurred. This conclusion, so stated, seems almost self-evident. Buried in that conclusion is a hidden principle that the Court failed to appreciate—a principle related to arbitrary government conduct and holding police accountable for their own chosen enforcement policies.

At the heart of *Whren* is an issue of arbitrary law enforcement. Police around the country systematically underenforce the traffic laws. They do not pull over drivers who drive sixty mph in a fifty-five-mph zone on a clear day. The police are fully entitled to adopt their own enforcement policies, including policies that systematically and consistently underenforce the traffic code. But once the police have done so, it is arbitrary—and thus unreasonable—to randomly enforce minor violations and the written traffic code that do not trigger the police’s own enforcement policies.

82. See *supra* note 3.

The Court's failure to recognize this point is a basic flaw in *Whren*. The resulting decision authorizes improper police behavior—inducing almost all drivers to engage in moderate violations of the traffic code, and then arbitrarily stopping one of them on pretextual grounds. The decision likewise authorizes searches of persons who have not displayed the type of disregard for the law that should be required to trigger police scrutiny—as those drivers are merely following the commonly understood enforcement limits the police themselves have created and taught drivers to understand. In recognition of this fact, and in light of “experience and . . . facts newly ascertained”⁸³ regarding the problem of discriminatory enforcement, the Court should revisit its holding in *Whren*.

83. *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986)).