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ESSAY

PRETEXTUAL STOPS: THE REST OF THE STORY

J.E.B. Stuart VI *

INTRODUCTION

Pretextual stops made by law enforcement officers—stops aimed at serving some purpose other than the official reason for the stop—have received renewed attention in the public discourse following several high-profile law enforcement confrontations with people of color. Naturally, the conversations about pretextual stops have centered around their most horrid iteration: discriminatory stops made by bad cops.¹ These stops are damaging to both motorists and officers, and conversations about them are undeniably important. But there is more to pretextual stops than the nefarious purposes attributed to them.

As a former police officer² who regularly made pretextual stops for reasons entirely unrelated to race, I'd like to tell the rest of the story (as Paul Harvey would say). Whatever we as a society might decide about pretextual stops, the fact that cops regularly put pretext to use *for good* should be of the conversation. To that end, this

* J.D., 2021, University of Richmond School of Law; B.S., 2013, Virginia Tech. Former Deputy Sheriff, Goochland County Sheriff's Office. The author extends his heartfelt thanks to his wife for her constant support, and to Professor Corinna Barrett Lain for her guidance, comments, and edits.

1. See, e.g., Marsha Mercer, *Police 'Pretext' Traffic Stops Need to End, Some Lawmakers Say*, PEW CHARITABLE TRUSTS: STATELINE (Sept. 30, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say> [<https://perma.cc/G8HJ-C65S>] (explaining that “studies have shown [pretextual stops] to be racially biased”).

2. I recognize that “police officer” and “deputy sheriff” are technically two different positions in the governmental structure. That said, people filling both roles exercise police powers and frequently have identical duties. In this Essay, I use the term “police officer” to include sheriff's deputies assigned to patrol duties.

Essay offers a “boots on the ground” perspective. It aims to share how pretextual stops are used for good, and to shift the focus from how we can eliminate an officer’s discretion to make pretextual stops, to a candid evaluation of which laws are really worth having (and enforcing) and what else we might do to ameliorate the valid concerns that they raise.

I begin in Part I by outlining the doctrine of, and principal concerns with, pretextual stops. I complicate the issue in Part II by discussing the legitimate uses to which police officers regularly put pretextual stops. In Part III, I turn to a few thoughts about how to separate the bad from the good, refocusing the discussion as a question of what laws we want the police to enforce and how we might foster trust between the police and the policed.

I. THE DOCTRINE OF PRETEXTUAL STOPS (AND ITS PROBLEMS)

Any discussion of pretextual stops has to start with the legal doctrine that allows them. In this Part, I first lay out the doctrine, then turn to the problems it poses.

A. *The Doctrine*: *Whren v. United States*

The Supreme Court’s assessment of pretext started, and all but ended, with the 1996 decision of *Whren v. United States*.³ In *Whren*, the Court held that as long as a police officer has some objective justification for making a traffic stop—i.e., probable cause that the driver committed a traffic infraction, or reasonable suspicion of a criminal offense—then the officer’s subjective motivations for making the stop are irrelevant, at least when assessing whether the stop violated the Fourth Amendment.⁴

The controversy in *Whren* centered around a 1993 stop made in the “high drug area” of southeastern Washington, D.C., by two plain-clothed vice squad officers.⁵ While on patrol, the pair noticed

3. 517 U.S. 806, 810 (1996).

4. *See id.* at 813; *see also* *Kansas v. Glover*, 140 S. Ct. 1183, 1187 (2020) (explaining that “the Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has ‘a particularized and objective basis for suspecting the particular person stopped of criminal activity.’” (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981))). One of the attorneys who argued this case on behalf of the government in the D.C. Circuit calls this the “could have” test. Margaret M. Lawton, *State Responses to the Whren Decision*, 66 CASE W. RES. L. REV. 1039, 1039 (2016).

5. *Whren*, 517 U.S. at 808. Though not specified in the Court’s opinion, the District of Columbia Circuit Court noted that the stop occurred “in the area of Minnesota Avenue and

a Nissan Pathfinder “with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right.”⁶

After observing the vehicle sit at the intersection “for what seemed an unusually long time—more than 20 seconds,” the officers “executed a U-turn in order to head back toward the truck.”⁷ Once they did this, the Pathfinder made a “sudden[]” right turn without signaling and “sped off at an unreasonable speed.”⁸ Based on these traffic violations, the officers stopped the truck.⁹

As one of the officers approached the vehicle, “he immediately observed two large plastic bags of what appeared to be crack cocaine” in passenger Michael Whren’s hands.¹⁰ Ultimately, the officers also recovered marijuana laced with PCP as well as additional crack cocaine from a “hidden compartment on the passenger side door,” and discovered other “tools of the trade” indicative of drug-dealing.¹¹ Officers arrested Whren and the driver, James Lester Brown, who were both African-American, and authorities eventually indicted the two for federal drug violations.¹²

It is hard to imagine a better set of facts for bringing the issue of pretext into focus. On the one hand, the allegation of pretext was well founded. These officers were specially tasked with rooting out vice crime. It is almost preposterous to think that they would break away from their assignment to affect a traffic stop for minor traffic violations. Indeed, department policy didn’t even allow traffic stops for these sorts of violations by officers in unmarked cars, such as the one these officers were operating.¹³ The stop was clearly, unequivocally pretextual.

On the other hand, the stop in this case made perfect sense. The officers were sent to work a “high drug area,” and seized upon the opportunity that these routine traffic violations provided to

Ely Place, in Southeast Washington. . . .” *United States v. Whren*, 53 F.3d 371, 372 (D.C. Cir. 1995).

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

7. *Id.*

8. *Id.*

9. *Id.*

10. *See id.* at 808–09.

11. *Whren*, 53 F.3d at 373.

12. *Whren*, 517 U.S. at 808–09.

13. *See id.* at 817.

investigate suspicious conduct that was their interest. These vice officers used the traffic code to investigate and apprehend vice crime.

At trial, Brown and Whren challenged the legality of the stop and moved to suppress the drug evidence on the ground that the officer's "asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual."¹⁴ They argued that "the stop had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug activity" and emphasized that such pretextual stops could permit officers to obscure a racist motivation for stopping a vehicle.¹⁵ For this reason, they argued, pretextual stops should not be allowed.¹⁶

The Court disagreed. In an opinion penned by Justice Scalia, the Supreme Court *unanimously* upheld the stop.¹⁷ The rule of *Whren* is quite simple: "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."¹⁸ Whatever else may motivate a police officer to stop a car is irrelevant as long as it is objectively justified, the Court explained. In short, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."¹⁹ After *Whren*, the Fourth Amendment analysis of the legality of a stop is binary: either the stop was objectively justified or it was not.

Indeed, according to the Supreme Court in *Whren*, not even an officer's racist motivation to stop a motorist is relevant to a Fourth Amendment analysis.²⁰ The Court reasoned that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."²¹ Even if a defendant could somehow prove that he was targeted because of his race, it would make no difference to a court assessing the Fourth Amendment "reasonableness" of the stop.

14. *Id.* at 809.

15. *See id.* at 813.

16. *See id.*

17. *Id.* at 819.

18. *Id.* at 810.

19. *Id.* at 813.

20. *Id.*

21. *Id.*

Again, so long as the stop is objectively justified, it is reasonable under the Fourth Amendment.

The *Whren* Court also declined to provide a limiting principle to address the reality “that the ‘multitude of applicable traffic and equipment regulations’ is so large and so difficult to obey perfectly that virtually everyone is guilty of violation,” which “permit[s] the police to single out almost whomever they wish for a stop.”²² Justice Scalia noted the lack of any “principle that would allow [the Court] to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the measure of lawfulness of enforcement.”²³ And even if, hypothetically, there was such an identifiable point, the Court did not “know by what standard (or what right) [it] would decide . . . which particular provisions are sufficiently important to merit enforcement.”²⁴ Basically the Supreme Court told the defendants to take up their problem with the legislature.

None of this is to say that *Whren* renders subjective intent irrelevant to every Fourth Amendment inquiry. For those search and seizure doctrines whose “reasonableness” does not turn on an objective justification of probable cause or reasonable suspicion—inventories searches, administrative inspections, and actions taken pursuant to the “community caretaker” doctrine, for example—subjective intent still matters.²⁵ *Whren*’s holding is limited to Fourth Amendment activity that relies on an objective justification, and does not include doctrines that are *defined by* a particular subjective motivation.²⁶ Motivation matters, just not where the Fourth Amendment activity is objectively justified.

22. *Id.* at 818–19.

23. *Id.*

24. *Id.*

25. *See id.* at 811–12 (“[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes.”); *United States v. Johnson*, 410 F.3d 137, 143–44 (4th Cir. 2005) (explaining that the community caretaker exception to the warrant requirement “only applies when [the police] are ‘engaged in what . . . may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.’” (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973))).

26. *See Whren*, 517 U.S. at 811–12.

B. *Three Potential Problems*

The *Whren* doctrine isn't perfect. Much might be said about it, but as I see it, the biggest downsides are these.

First, and most importantly, is what the doctrine permits the few racist police officers to do (police officers who, let's face it, are unworthy of the badge they wear). At bottom, *Whren* permits police officers to exercise substantial discretion in deciding which cars to stop. And as the *Whren* opinion itself highlighted, the doctrine permits bigoted police officers to disguise a discriminatory motivation for a stop with an "objective justification."²⁷ In short, because the constitutional standard is so deferential, it leaves room for horrid discriminatory abuses.

This first problem is amplified by a second. As Michael Whren noted, the sheer breadth of criminal and traffic codes affords law enforcement officers in many jurisdictions near complete discretion to stop almost any car on the road.²⁸ From failing to use a turn signal, to having overly-tinted windows, to speeding a few miles-per-hour over the speed limit—there are countless objective justifications sufficient to provide a legal basis for a police officer's stop of a vehicle.²⁹ This works to the advantage of any bigoted police officer intent on making stops to harass people based upon their race (or sex or religious markings or any other illegitimate factor). Such officers can easily peruse the "multitude of applicable traffic and equipment regulations" and find justification for a stop actually motivated by discriminatory intent.³⁰

The final issue is a product of what can come from any traffic stop for a minor infraction: a top-to-bottom search of the stopped vehicle based upon the driver's uninformed "consent." To understand this issue, one must understand how *Whren* interacts with *Schneckloth v. Bustamonte*.³¹

In *Schneckloth*, the Supreme Court considered whether the Fourth Amendment permits searches to be justified by consent if the consenting person had no idea that he or she could say "no."³²

27. *Id.* at 813.

28. *See id.* at 818–19.

29. *See, e.g.*, FLA. STAT. § 316.155 (2021) (requiring use of turn signal); *id.* § 316.187 (prohibiting exceeding posted speed); *id.* § 316.2953 (prohibiting overly tinted windows).

30. *See Whren*, 517 U.S. at 818–19.

31. 412 U.S. 218 (1972).

32. *Id.* at 223.

The answer was yes.³³ The Fourth Amendment requires only that the government “demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied,” the Court explained, emphasizing that “[v]oluntariness is a question of fact to be determined from all the circumstances.”³⁴ According to the Supreme Court, “[t]he subject’s knowledge of a right to refuse” is simply one, nondeterminative, factor to be taken into account.³⁵

Understanding what *Schneckloth* allows is important because when an officer combines his *Whren* discretion with the *Schneckloth* “consent” search doctrine, he wields a powerful tool. Any officer who has a basic knowledge of the traffic code, and who is moderately adept at verbal judo, can not only stop most cars, but also search every nook and cranny of many of them. All that is needed is an unwitting driver to say “go ahead” to an officer’s “do you mind . . .” question. This is all it takes for a search to be justified.

You might be thinking, “Come on, do people really just say ‘yes search my stuff’”? Ask any police officer, and he or she will tell you that they do. And they do so frequently. This makes much more sense when one considers the “voluntariness” standard in light of the power dynamic of a traffic stop. Indeed, with this dynamic in mind, *Schneckloth*’s conception of “voluntariness” hardly seems satisfactory. Absent some affirmative step that a stopping officer takes to inform a motorist of his or her rights, the gun-toting authority figure’s “request” for “consent” to search is likely interpreted by many as a polite demand.³⁶

Combine these two doctrines and now we’ve got the potential for real trouble. Taken together, they permit bigoted officers to easily target, stop, and search people of color. Little wonder that pretextual stops are viewed with skepticism. Part of the reason is the stop itself, and part is what happens because of it.

But wait—*Whren* said that people who suffer at the hands of racist cops can still invoke the Equal Protection Clause.³⁷ What about that as a potential protection against the problems with

33. *Id.* at 227.

34. *Id.*

35. *Id.*

36. *Cf.* *Florida v. Bostick*, 501 U.S. 429, 447 (1991) (Souter, J. dissenting) (arguing that a person “unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him”).

37. *See supra* note 21 and accompanying text.

pretextual stops? Unfortunately, the Equal Protection Clause is an unsatisfactory remedy for two reasons.

First, a driver trying to prove an equal protection claim based upon a police officer's targeting him because of his race faces a steep uphill battle. As the Supreme Court has explained, to prevail on such a claim, a criminal defendant must prove that "the existence of purposeful discrimination. . . . 'had a discriminatory effect' on him."³⁸ The reality is that in most instances where a stop was motivated by the race of the driver, only the stopping officer would be able to prove it. Of course, police officers engaged in this behavior are unlikely to leave behind a trail of bread crumbs sufficient to prove their bigotry after-the-fact.

Second, the Equal Protection Clause remedy referred to by the *Whren* Court, in some states, is hardly a remedy at all. Unlike violations of the Fourth Amendment, Equal Protection Clause violations do not uniformly require suppression of illegally obtained evidence in all jurisdictions.³⁹ This means that, even with the Equal Protection Clause, people can sit in jail after being targeted by a police officer because of the color of their skin. They might win some civil suit (in theory), but that won't help them with the criminal charge that resulted from the discriminatory action.

Here, then, are the three main problems with pretextual stops. The question then becomes how the bad things associated with

38. The entire passage from *McCleskey v. Kemp*, 481 U.S. 279 (1987), is worth including in its entirety: "A defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.' *Whitus v. Georgia*, 385 U.S. 545, 550 (1967). A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination 'had a discriminatory effect' on him. *Wayte v. United States*, 470 U.S. 598, 608 (1985)."

39. Compare *People v. Fredericks*, 829 N.Y.S.2d 78, 78 (App. Div. 2007) (citing *People v. Robinson*, 741 N.Y.S.2d 147 (2001); and then citing *United States v. Chavez*, 281 F.3d 479, 486–87 (5th Cir. 2002)) (explaining that "suppression of evidence is not a recognized remedy" for Equal Protection Clause violations), with *Commonwealth v. Lora*, 886 N.E.2d 688, 699–700 (Mass. 2008) (noting that "the application of the exclusionary rule to evidence obtained in violation of the constitutional right to the equal protection of the laws is entirely consistent with the policy underlying the exclusionary rule" and therefore "if a defendant can establish that a traffic stop is the product of selective enforcement predicated on race, evidence seized in the course of the stop should be suppressed unless the connection between the unconstitutional stop by the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint'" (quoting *Wong Sun v. United States*, 371 U.S. 471, 487–488 (1963))). See also Alyson A. Grine & Emily Coward, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 2.3 (2014); Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 349 (2012) (noting that whether the exclusionary rule applies to equal protection violations is still an open question in Supreme Court jurisprudence).

these stops compare to the good uses to which officers put pretext every day. This is the topic I turn to next.

II. HOW LAW ENFORCEMENT USES PRETEXT FOR GOOD

The discretion an average law enforcement officer exercises during the course of any shift is immense and, as noted above, can be misused for horrid purposes. Thankfully, such uses are the exception, not the rule. Generally, discretion and pretext are used in a nondiscriminatory manner for good reasons—reasons that further legitimate law enforcement objectives.

To understand how “good pretext” works, one must first understand what police officers do and how they do it efficiently. Every day, patrol officers across the country strap on their body armor, pin on their badge, and drive around their jurisdiction for (usually) twelve hours at a time. After months and then years of repeating this ritual, a police officer develops an intuition. That intuition allows her to identify situations worthy of further attention, frequently for reasons that on their own would not justify a stop in accordance with the Fourth Amendment.

The first example of “good pretext” is the use of traffic code enforcement as a means to discover intoxicated drivers. Drunk driving kills over ten-thousand people per year.⁴⁰ What is more, only about one percent of drunk driving episodes are discovered by law enforcement.⁴¹ Here’s how those numbers influenced me (and many other police officers): at 6:00 p.m., I usually didn’t feel compelled to put down my convenience store “dinner” sandwich to stop a car for a burned-out headlight. But on a Friday or Saturday night, especially when the bars were closing, I was all for stopping cars however I could. For a patrol officer, DUI enforcement is perhaps the most tangible way to keep friends, family, and neighbors safe. This is the stuff cops sign up to do, and many feel, like I did, duty-bound to proactively detect and apprehend drunk drivers.

The targeted approach described above is backed up by statistics. National Highway Traffic Safety Administration data show that impaired drivers are far more likely to be on the road (1) at

40. *Transportation Safety: Get the Facts*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 24, 2020, 12:00 AM), https://www.cdc.gov/transportationsafety/impaired_driving/impaired-driv_factsheet.html#:~:text=How%20big%20is%20the%20problem,involved%20an%20alcohol%2Dimpaired%20driver [https://perma.cc/3KJD-5332].

41. *Id.*

night and (2) during the weekend.⁴² The more stops made during times when impaired drivers are on the road, the more likely law enforcement is to discover their impairment. You can't smell booze on a driver's breath as his car whizzes by. It takes a traffic stop to get that, and when cops know that a large number of impaired drivers are out, a simple traffic infraction is the way to make traffic stops happen. In this case, pretext doesn't just aid in the discovery of crime—it undoubtedly saves lives.

Another example of “good pretext” that immediately comes to mind involves what I'll call the vague “be on the lookout” (“BOLO”). During shift-change roll call meetings, officers are briefed on BOLO bulletins and similar crime alerts. During the course of a shift, a patrol officer also digests new BOLOs coming in over the radio, spurred by incidents that the other folks working in the area respond to. In either circumstance, the police officer is told “X person (or car)” is (or may be) somehow involved with a crime and advised to keep an eye out for him (or it).

Frequently, these BOLOs are not specific enough to single out a particular person or car, and even if they were, they might not be enough to objectively justify a Fourth Amendment seizure anyway. The BOLO may simply suggest that the car or person is somehow involved in a crime, or could have been a witness to one, and that more information about the car or person's involvement would help advance an investigation.

So imagine you're a police officer getting ready to start your midnight shift. You've just left roll call, where your shift supervisor told you that day shift dealt with a larceny from a shed earlier in the day. Apparently, the victim saw a “white pickup truck” near his home as he got back from work before discovering that his weed eater was stolen. Does this provide a basis for “reasonable suspicion” sufficient to justify stopping every white pickup truck you see? Obviously not. How about white pickups within a certain distance from the victim's home? No to that too. Maybe just white pickups that you see a weed eater sitting in the bed of? Closer, but I'm thinking not. The possible scenarios an officer may face are

42. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: 2013 DATA 2 (Dec. 2014) (noting that “[t]he rate of alcohol impairment among drivers involved in fatal crashes in 2013 was nearly 4 times higher at night than during the day” and that “15 percent of all drivers involved in fatal crashed during the week were alcohol-impaired, compared to 30 percent on weekends”).

endless, and making on-the-fly decisions implicating tricky search and seizure jurisprudence is not as easy as it might look.

This is where pretext comes in. While the BOLO on its own is likely not a sufficient basis for investigating every white pickup in the county, the officer can surely stop and speak to the driver of every white pickup that has a tail light out, or an expired tag, or is speeding (even if only a couple of miles per hour over the speed limit).⁴³ In this case, pretext allows the officer to use enforcement of less serious infractions to investigate more serious crimes. Here again, society benefits.

Yet another illustration of “good pretext” makes the “vague BOLO” officer’s job seem easy. Imagine that you’re on-duty when you hear dispatch direct some of your shift-mates to respond to a shooting on the other side of the jurisdiction. Responding officers aren’t given any information other than that the victim was shot multiple times by unknown assailants who fled in a car, description unknown. Twenty minutes later, you see a car without registration stickers on its license plate. As you pass it, all three occupants stare at you and the car immediately dives into the first business open to the public as you continue down the road.

“That was weird,” you think. While weird, a car’s occupants staring at you before pulling into a gas station is hardly justification to stop the car. But improperly displayed registration is.⁴⁴ And while you may not have cared about the registration violation, given the recent shooting and unusual behavior of the car’s occupants, you’ll likely stop the car, address the registration issue, and try to figure out why the occupants acted the way they did. Situations like this occur all the time and allow police to use their well-honed intuition to investigate much more harmful (and often dangerous) violations of the law than registration offenses.

Even beyond these specific examples, more traffic stops generally mean more discovery of crime and people who have committed it. Each time a driver is stopped, law enforcement checks state and national databases to determine whether he or she is wanted and has a valid license. These checks frequently result in the discovery of people with outstanding warrants and people who are prohibited

43. That said, in some jurisdictions, the breadth of offenses justifying a traffic stop is narrowing. *See infra* section III.A.

44. Registration decals must “be placed on the license plates in the manner prescribed by the Commissioner [of the Department of Motor Vehicles], and shall indicate the month and year of expiration.” VA. CODE ANN. § 46.2-712 (Repl. Vol. 2017).

from driving on public highways—often (though not always) with proven track records of dangerous conduct. I’ll be the first to say that this most certainly does not warrant police officers stopping cars just to check the driver’s licensure status. The point is simply that by enforcing the minor laws they are charged with enforcing, police regularly apprehend more serious crimes in the course of their investigations.

Now we’ve seen the good and bad of pretext. Common sense tells us that as long as police officers are permitted to exercise discretion, at least some will use it in unlawful, discriminatory ways. The trick is preventing these trust-eroding encounters without prohibiting good cops from keeping the public safe. I have some thoughts on how we might do that, which is where I turn to next.

III. KEEPING THE GOOD AND DITCHING THE BAD

How do you get inside of a stopping officer’s head and determine why he *really* stopped someone? As illustrated by the Supreme Court’s refusal to go there in *Whren*, the short answer is that it is nearly impossible.⁴⁵

So what are we to do? Because both good and bad results flow from allowing police officers to make pretextual stops, we must at least try to keep the few bad actors who would misuse their discretion at bay. The first and most obvious solution is to hire only good officers. So noted! But aside from that, I suggest two more discrete possibilities, both of which require tough balancing decisions, as well as a clear understanding of the roles of legislatures (that make the laws) and cops (who enforce them).

A. *Solution One: Make Laws Worth Enforcing*

The first solution is wholly in the hands of the legislature and is a response to the folks who would say that the tactics I described in Part II are not “legitimate” law enforcement strategies at all. My answer is that if the case I made isn’t convincing, then legislators should only make laws that are worth enforcing.

When the legislature enacts a law, it proclaims a community standard. A standard that, theoretically, is valuable to have because the community as a whole benefits from its existence. Each

45. See *Whren v. United States*, 517 U.S. 806, 810, 813 (1996).

and every time that lawmakers create these standards (whether they have thought about it or not) they have struck a balance between individual liberty interests and the need for the standards. Standards require enforcement, and police officers are the enforcers. Consequently, lawmakers should only pass laws if they are willing to have police officers enforce them.

Some state legislatures have taken an imperfect half-measure towards this solution, explaining *how* they would like their laws to be enforced, and limiting police officers' ability to stop people for traffic violations. In Virginia, for instance, recent legislation has altered which traffic violations justify a police officer's stopping a car. Infractions like driving a car with a burned-out head, tail, or brake light; an obscured windshield; "unsafe equipment"; or even an expired state inspection or registration that is three months or less out of date, alone, can no longer serve as the basis for a traffic stop in the Commonwealth.⁴⁶ Indeed, if a police officer chooses to stop a driver for one of these violations despite the law, any evidence of a crime he uncovers during the stop is not admissible at a later criminal trial.⁴⁷

Legislators justified downgrading these infractions to "secondary offenses"—infractions that a driver can be cited for, but only if he is pulled over for a different reason—on the basis of racial disparities.⁴⁸ "A disproportionate number of people pulled over for minor traffic offenses tend to be people of color, this is a contributor to the higher incarceration rate among minorities," said Del. Patrick Hope, D-Arlington, who carried the bill in the House.⁴⁹

But is keeping laws in place and just telling police to enforce them less really the solution? Consider the reality of what the Virginia legislature did. It did not repeal any traffic code provisions prohibiting equipment violations or requiring a state inspection. Instead, it simultaneously demanded that law enforcement continue to enforce the laws while diluting the only real tool to enforce them. In trying to have its cake and eat it too, lawmakers have directed police officers to do their job, but only a little bit. This can only mean one thing: the legislature thinks that the standards are

46. 2020 Va. Acts Ch. 45; *see also* H.B. 5058, Va. Gen. Assembly (Spec. Sess. 2020).

47. 2020 Va. Acts Ch. 45.

48. *See id.*

49. Ned Oliver, *Virginia Lawmakers Pass Bill Limiting Pretextual Traffic Stops, Barring Searches Based On Smell of Marijuana*, VA. MERCURY (Oct. 2, 2020), <https://www.virginiamercury.com/2020/10/02/virginia-lawmakers-pass-bill-banning-pretextual-traffic-stops-and-searches-based-on-the-smell-of-marijuana> [<https://perma.cc/4J9W-GYC8>].

worth having, yet does not trust law enforcement to enforce them in a nondiscriminatory way.

This approach misses the point on two fronts. First, while racist police officers surely do exist, stopping all police officers from enforcing the law hardly fixes the problem—the bigoted people at issue will find other ways to impose their hate. Second, the subtext of these laws is that “minor” equipment violations are unimportant and do not warrant a traffic stop. I submit that if the legislature has established a standard, then it is worth enforcing. And if we don’t think the current standard is worth enforcing, we ought to change it to a standard that is worth enforcing.

So why not just change the standard? In Virginia, for instance, why not just say that it’s only illegal to drive with an inspection sticker that is fifteen or more months old? Or that it is only illegal to drive with no headlights rather than just one? The answer is pretty obvious: Virginians are unlikely to be OK with highways rife with unsafe cars. Surely constituents would voice concern to their representatives should the legislature decide to undo all of the vehicle equipment standards established by the Code of Virginia. Instead, the legislators have taken the easy way out, doing just enough to (falsely) claim to have remedied discriminatory policing. Actually addressing the issue is too hard, so instead the General Assembly has said: “enforce the law, but not really.”

To illustrate why this half-measure is a bit of a misfire, consider the state of affairs created by “secondary offenses.” When a Virginia police officer sees a vehicle with a single headlight out while watching traffic, what is he to do? One option is to ignore the infraction—leaving the standard entirely unenforced. Another option requires using the very pretext that the legislature was trying to defeat: finding a “primary offense” that can serve as a reason to stop the car. But given the obvious message sent by the legislature—“we don’t care about these infractions”—why should cops spend any time enforcing “secondary offenses” at all?

The better solution is for the legislature to consider whether the laws it passes are really worth enforcing in the first place. If a standard is worth imposing, it is worth enforcing. Otherwise, what’s the point? The law becomes just a piece of good advice.

To be clear, this doesn’t mean that we necessarily need to have laws regulating every aspect of driving a car—reasonable people could say that enforcing minor traffic offenses is not worth the imposition on liberty interests associated with a run-of-the-mill

traffic stop.⁵⁰ But until the legislature makes this call, is it really fair to fault cops for trying to enforce the laws on the books through the only real means to do so? To say that officers who stop drivers who have violated a law passed by the legislature—albeit in the hopes of finding something more—have somehow abused their discretion illustrates a fundamental misunderstanding of law enforcement. Law enforcement officers enforce the law. As their title suggests, this is the essence of what they do.

This is why assailing pretextual stops on the basis that the stopping officer didn't really care about enforcing the traffic violation isn't much of a reason to bar them—or to make certain violations “secondary offenses.” It shouldn't matter how excited a stopping officer is about enforcing a duly passed law: The legislature established a standard, the entire purpose of a standard requires its enforcement, and absent some discriminatory motive, why a police officer takes reasonable, minimally intrusive, steps to enforce it is beside the point.

A minor infraction serving as the basis for a stop certainly does not make a subsequent discovery of the stopped individual's more substantial criminal activity unfair. This is just good luck on the part of the police—and society that is getting its community standards enforced. To state my point plainly, we should be excited when law enforcement discovers and addresses serious crime through traffic stops (as long as the stop was warranted in the first place).

This is all to say that legislators should closely consider whether the laws they pass are really worth passing and/or keeping. And the standard for assessing this should turn on whether they are worth enforcing—worth subjecting citizens to at least a minimal intrusion upon their liberty in the form of a brief traffic stop.

B. *Solution Two: Let People Know They Can Say “No”*

The second potential remedy for the ails of pretextual stops discussed in Part I involves the *Schneckloth* consent doctrine described above. As a reminder, *Schneckloth* explained that law enforcement's search of a vehicle is justified by consent as the long as

50. No traffic stop is “run-of-the-mill” from an officer-safety perspective. Any encounter could trigger a dangerous confrontation with armed individuals. Here, I merely refer to the imposition on motorists created by an average, short-duration stop that culminates in a warning or citation.

the consent was “voluntarily given,” and that standard can be met even where the consentor is unaware of his right to say “no.”⁵¹

Herein lies a great opportunity for building trust between cops and the communities they serve. In jurisdictions where people perceive the “uninformed consentor” as someone wronged by the government, why not require the police to alert a stopped motorist of his or her right to refuse? This is hardly an outlandish idea. Indeed, Justice Marshall advocated for this in his *Schneckloth* dissent.⁵² And at least one state constitution requires the government to prove “knowing” consent before a defendant is deemed to have waived his rights.⁵³ Actually, even in some states where there is no such constitutional provision, officers are required to inform a suspect of his right to refuse consent to be searched in certain contexts.

Take Virginia DUI stops for example. The legislature years ago decided that DUI suspects should be informed of their right to refuse (and in certain circumstances to take) a preliminary breath test (“PBT”).⁵⁴ (These tests are the ones administered on the scene of a traffic stop that measure a driver’s blood alcohol concentration and used to inform an officer’s arrest decision.) State law has long provided that law enforcement must inform DUI suspects of their statutory rights before administering a PBT.⁵⁵ As a result, many law enforcement officers in the Commonwealth carry “preliminary breath test warning cards,” which have a script for advising suspects of their rights.

A similar approach could be used for advising any driver who might be the subject of a consent search of his or her rights. Officers could carry a “consent rights card” outlining a short statement to read to motorists that would advise them of their right to say “no” to a consent search. Indeed, localities would not need to wait

51. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 284–85 (1973) (Douglas, J., dissenting).

52. See *id.* (“If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police.”).

53. *State v. Johnson*, 346 A.2d 66 (N.J. 1975) (interpreting the New Jersey State Constitution to provide that “if the State seeks to rely on consent as the basis for a search, it has the burden of demonstrating knowledge on the part of the person involved that he had a choice in the matter”)

54. In the first law it passed relating to PBTs, the Virginia General Assembly provided that DUI suspects not only had a right to refuse a PBT, but had a right to *be informed of their right to refuse* one. See 1970 Va. Acts 1104–05.

55. VA. CODE ANN. § 18.2-267(F) (Cum. Supp. 2021) establishes several rights enjoyed by a DUI suspect related to a preliminary breath test and explains that law enforcement officers must “advise the person of his rights” established by the code section.

for state legislatures to act. Individual agencies could adopt their own “informed consent” procedures, as the police department serving Asheville, North Carolina, has.⁵⁶

Of course, this is not a one-size-fits-all approach, and some communities may be perfectly fine with the *Schneckloth* rule. However, those localities that are willing to risk officers not finding as much contraband (which would surely be the result of more people knowing that they could say “no”) in favor of building trust between the police and the policed, could require law enforcement to educate people of their rights.

CONCLUSION

What I’ve offered is two independent ways to address the concerns many have with the discretion police officers exercise in making pretextual stops—one that looks at what laws we as a society actually deem worthy of enforcement and one that could put police officers and citizens on a more even playing field as a traffic stop progresses.

But these are isolated remedies that barely begin to scratch the surface of the larger problems.⁵⁷ For instance, the policy choices that I’ve highlighted do not address how to actually identify and remove racist police officers—an issue of paramount importance to law enforcement officers and citizens alike. I can assure you, good cops want to see bad cops get fired. As we know all too well, one police officer’s harmful conduct impugns the profession as a whole.

My suggestions also do nothing to address the larger backdrop against which cops work. The thousands of police officers on patrol as you read this Essay are downstream actors in a society with flaws. The environments they step into are rife with the effects of

56. See ASHEVILLE POLICE DEPARTMENT POLICY MANUAL § 605.1(B) (2019) (explaining that whenever officers seek to conduct a consent search, “officers shall inform the person granting consent to search of their right to refuse consent prior to conducting such a search”).

57. Remedying the larger issues I describe below requires an in-depth, empirical analysis of the data surrounding traffic stops. I encourage readers interested in this topic to see generally Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021).

racist housing policies,⁵⁸ addiction,⁵⁹ and the absence of much-needed mental health facilities.⁶⁰ This is the society within which cops operate, trying to keep people safe in their jurisdiction, as it presently exists, with the tools at their disposal.

In short, neither the criticisms of pretextual stops nor the proposed solutions I have offered here will stop every bad actor from violating the Constitution by making race-based stops. But to the extent that pretextual stops have their own bad rap, perhaps this will add some balance to the conversation. I hope so, because the conversation itself is well worth having.

58. Cf. Catherine Komp, *Mapping Projects Show Lasting Impact of Redlining, Racial Covenants in Virginia*, VA. PUB. MEDIA (July 29, 2019), <https://vpm.org/radio/news/mapping-projects-show-lasting-impact-of-redlining-racial-covenants-in-virginia> [<https://perma.cc/J785-VS6W>] (explaining how federal housing laws created segregated communities that exist to this day).

59. A recently revised Department of Justice report revealed that, as of the 2007–2009 time period, “[a]bout 4 in 10 state prisoners and sentenced jail inmates who were incarcerated for property offenses committed the crime to get money for drugs or to obtain drugs.” JENIFER BRONSON, JESSICA STROOP, STEPHANIE ZIMMER & MARCUS BERZOFSKY, *DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009* 6 (2020), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5966> [<https://perma.cc/Y93M-QVVM>].

60. As David Brown, then Chief of the Dallas Police Department, explained in 2016, “We’re asking cops to do too much in this country. We are. Every societal failure, we put it off on the cops to solve. Not enough mental health funding, let the cops handle it. . . . Here in Dallas we got a loose dog problem; let’s have the cops chase loose dogs. Schools fail, let’s give it to the cops. . . . That’s too much to ask. Policing was never meant to solve all those problems.” Brady Dennis, Mark Berman & Elahe Izadi, *Dallas Police Chief Says ‘We’re Asking Cops To Do Too Much in This Country,’* WASH. POST (July 11, 2016, 10:56 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-cotinue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing> [<https://perma.cc/B9K-VLL5>].