

PRETEXT SEARCHES AND SEIZURES: IN SEARCH OF SOLID GROUND

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ABSTRACT

Despite numerous attempts to subject the use of pretext law enforcement stops to Alaska Constitutional scrutiny, the issue has never been thoroughly reviewed. Alaska courts currently allow pretext investigative stops so long as a reasonable officer following permissible police practices could have made the stop for the proffered reason. This is a minority position, inconsistent with federal law which deems pretext motivations constitutionally irrelevant. It is also far less protective of individual rights than an outright ban on officer pretext. This reasonable officer standard, however, offers some advantages over banning all types of pretext. This Article explores Alaska's historical treatment of pretext justifications, discusses why pretext is prominent in police work, documents some of the leading arguments against pretext, and frames the issue in light of an opportunity to balance competing policy concerns. After considering precedent, reason, and policy, the authors urge the Court of Appeals to continue use of the reasonable officer standard, because it strikes the best balance between governmental, societal, and individual concerns. Nevertheless, the Article argues that the standard should be refined and suggests a workable test for determining when pretext stops are outside acceptable police practices.

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INTRODUCTION

One of the most pressing legal issues facing the nation is the belief that officers engage in racial profiling through the use of the pretext stop.¹ If the controversy surrounding Arizona's 2010 legislative attempts to curb illegal immigration demonstrated anything, it is the prevalence of the perception that police target minority racial and ethnic groups. Despite provisions in Arizona Senate Bill 1070 that expressly banned targeting individuals solely on the basis of their apparent ancestry,² many believed the new legislation shielded profiling from review and even encouraged it.³ Perhaps their fears were justified. Recently, the Southern District of New York ruled that the New York Police Department's "Stop and Frisk" policy allows officers to racially

1. See Michael L. Birzer & Gwynne Harris Birzer, *Race Matters: A Critical Look at Racial Profiling, It's a Matter for the Courts*, 34 J. CRIM. JUST. 643, 643 (2006) (noting the United States Commission on Civil Rights' (2000) declaration that racial profiling remains the highest priority, recommending legislation to prosecute violators, and increasing efforts to rid policing of this practice); see also *Ending Racial Profiling in America: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Anthony D. Romero, Executive Director, American Civil Liberties Union) [hereinafter *Ending Racial Profiling Hearing*] (detailing the ongoing presence of racial profiling in America and urging the passage of the End Racial Profiling Act of 2011).

2. Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) ("For any lawful stop, detention or arrest made by a law enforcement official . . . where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person. . . . A law enforcement official . . . may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution.").

3. See, e.g., Christina Boomer, *State Law Professor Claims S.B. 1070 'Expressly Authorizes Racial Profiling'*, ABC15.COM (July 26, 2010), <http://www.abc15.com/dpp/news/state/state-law-professor-claims-sb1070-%27expressly-authorizes-racial-profiling%27> (discussing University of Arizona law professor Gabriel Jackson Chin's belief that the bill "doesn't just create a probability of racial profiling, but authorizes it"). See also Gerry Harrington, *Holder: DOJ to Ensure No Ariz. Profiling*, UPI (July 8, 2012, 1:21 AM), <http://www.policeone.com/border-patrol/articles/5816235-Holder-DOJ-to-ensure-no-Ariz-profiling>. Attorney General Eric Holder addressed the nation's largest Hispanic citizens' organization La Razza and said he remained "seriously concerned" by the potential impact of the Supreme Court's decision to let a key provision of S.B. 1070 stand that instructs police to check the immigration status of those lawfully detained if they have reasonable suspicion they are illegal immigrants. *Id.* He stated, "[w]e'll work to ensure, as the court affirmed, that such laws cannot be seen as a license to engage in racial profiling." *Id.*

stereotype the individuals they stop and frisk.⁴ The controversies surrounding these policies in Arizona and New York call attention to a widespread belief that law enforcement officers do not equally enforce the laws of the land on all groups of citizens.⁵ For many commentators, pretext stops are one of the primary ways in which police engage in discriminatory enforcement of the law.

Pretext stops occur when police officers temporarily detain an individual for particular reasons, but then use that stop to search or question him in relation to offenses for which the officers have neither reasonable suspicion nor probable cause. These stops are “pretextual” in the sense that the purported reason for the stop is not the real reason for which the officers are acting.⁶ Using pretext legal justifications is a common and efficient tool that allows officers to engage in investigations that they would not otherwise be justified in performing.⁷

4. See *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at *73–74 (S.D.N.Y. Aug. 12, 2013) (“Whether through the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, targeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black or Hispanic men violates bedrock principles of equality.”); see also Joseph Goldstein, *Recording Points to Race Factor in Stops by New York Police*, N.Y. TIMES, Mar. 22, 2013, at A1, available at <http://www.nytimes.com/2013/03/22/nyregion/bronx-officers-recording-suggests-race-is-factor-in-stops.html?%20Joseph> (describing recent efforts to prove the existence of a policy and practice of racial profiling in New York through a class action suit against the city, the police department, and others). Numerous amicus briefs were filed arguing that racial profiling continues to exist and fosters a culture of racial hostility. *Id.* This Article primarily addresses traffic-related pretext stops, but not “Stop-and-Frisk” type policies, such as those adopted by the NYPD. Alaska’s cold temperatures make traffic encounters a frequent source of pretext in its case law.

5. See, e.g., Laura W. Murphy, *Time for Obama and Holder to Truly End Racial Profiling by Law Enforcement*, ACLU (Dec. 21, 2012, 12:18 PM), <http://www.aclu.org/blog/racial-justice/time-obama-and-holder-truly-end-racial-profiling-law-enforcement> (arguing that the Obama administration’s failure to revise Justice Department policies permits the continued use of racial profiling and stereotyping by federal law enforcement agencies); *Ending Racial Profiling Hearing*, *supra* note 1 (detailing the ongoing presence of racial profiling in America and urging the passage of the End Racial Profiling Act of 2011); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 13 (2011) (citation omitted).

6. See BLACK’S LAW DICTIONARY 1187 (6th ed. 1990) (defining pretext as the “ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive; false appearance, pretense”). As Shardul Desai explains, “applied to searches and seizures, pretext occurs when police use legal justifications to make stops or conduct searches for unrelated crimes for which they do not have the independent reasonable suspicion necessary to support the stop.” Shardul Desai, *Pretextual Searches and Seizures: Alaska’s Failure to Adopt a Standard*, 23 ALASKA L. REV. 235, 236 (Dec. 2006) (citation omitted).

7. See Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and*

For example, an officer who wants to question a driver about an unrelated crime can use stopping the driver for a minor traffic violation as a pretext for asking about the other crime.⁸ Similarly, an officer who stops and frisks persons during street encounters is sometimes using those stops as pretexts for investigating other crimes.⁹ While some believe these pretextual stops are a useful law enforcement tool,¹⁰ others argue that pretext violates constitutional standards for intrusion into the affairs of citizens¹¹ and shields race-based policing from discovery.¹²

Alaska has not yet confronted the issue of pretext stops in the same public, controversial manner in which Arizona and New York City have. Nevertheless, this Article recommends a proactive consideration of this issue in order to highlight legal alternatives to the practice and avoid any appearance of providing “legal cover” for discriminatory conduct. Toward this end, we examine pretext stops from three perspectives: precedent, reason, and policy.

This Article highlights the need for Alaska to avoid following precedent that has not been thoroughly explained or deemed constitutional. Toward this end, it examines the development of Alaska law on pretext investigations in the light of how courts in other states have addressed the issue. The Article also seeks to enrich the discussion by adding a law enforcement perspective to what has largely been a

Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared, 63 ALB. L. REV. 725, 726–27 (2000) (discussing the use of pretext stops for traffic violations when police officers are “in fact motivated by the desire to obtain evidence of other crimes”); *see also* Desai, *supra* note 6, at 236 (outlining common motivations for the use of pretext).

8. Abramovsky & Edelstein, *supra* note 7.

9. *See* Goldstein, *supra* note 4 (discussing the use of pretext in the NYPD’s stop and frisk policy).

10. Richard Cohen, *The Invasive Police Strategy that Pacified New York City*, WASH. POST (May 14, 2012), http://www.washingtonpost.com/opinions/did-new-york-city-stop-and-frisk-save-5600-lives/2012/05/14/gIQAUV2kPU_story.html (discussing the way Mayor Bloomberg, of New York City, defends stop and frisk procedures).

11. *See, e.g.*, *Ladson v. State*, 979 P.2d 833, 838–42 (Wash. 1999) (en banc) (noting that pretext allows officers to circumvent the generally accepted rule that police seizures must be reasonable, which requires a warrant or a warrant exception); *State v. Ochoa*, 206 P.3d 143, 155 (N.M. Ct. App. 2008) (holding that “pretextual traffic stops are not constitutionally reasonable”).

12. *See* Abramovsky & Edelstein, *supra* note 7, at 726 (“[T]he *Whren* Court validated one of the most common methods by which racial profiles are put into effect—the pretext stop.”); Capers, *supra* note 5, at 12 (“Here, the fact that our current Fourth Amendment jurisprudence now fosters an atmosphere in which racial profiling is often unremarkable and juridically tolerated, and in which racial minorities perceive themselves to be second-class citizens, evidences the current Court’s retreat from concerns about equality and citizenship.”); Birzer & Birzer, *supra* note 1, at 648 (critiquing continued allowance of pretext stops).

discussion amongst lawyers. This added perspective emphasizes why pretext justifications are prevalent in police work and how external influences on officers ensure their continued use. We encourage Alaska to adopt a standard that allows some unavoidable and beneficial forms of pretext while protecting against illegitimate forms such as racial profiling. Such a policy is grounded in reason and reality, while addressing the fears of many minorities regarding the dangers of pretext. If applied correctly, the reasonable officer standard is such a standard.

However, Alaska courts employ the reasonable officer standard differently than other jurisdictions.¹³ Alaska courts use it to define whether pretext motivations exist.¹⁴ Other jurisdictions acknowledge from the outset that pretext is present, and instead use the standard to decide whether the pretext will be permitted.¹⁵ Alaska's current application of the standard is problematic because it does not adequately address whether an officer's primary actual reason(s) for the stop are such that they eclipse the relevance of whether a reasonable officer *would have* acted on the observed infractions alone. For example, sometimes an officer's actual reasons are so illegitimate that the question of whether a reasonable officer might have done something similar is rendered moot. Alaska courts need to articulate a workable test for determining when police actions driven by a complex mixture of pretextual and other reasons are, on the whole, consistent with reasonable police practice or not.

Section One discusses legal standards governing pretext motivations and shows that Alaska courts have been reluctant to address whether pretext stops are allowed under the Alaska Constitution. This review of Alaska's legal precedents highlights the inherent conflict, analyzed in Section Four, between the high value society places on individual autonomy and freedom from government intrusion, and the similarly high value it places on public safety and social responsibility. Alaska courts often decide cases involving these competing values in favor of the former.¹⁶

13. *See infra* discussion Part I.

14. *See id.*

15. *See id.*

16. *See, e.g.,* Reeves v. State, 599 P.2d 727, 734-36 (Alaska 1979) (imposing greater limitations on jailhouse booking searches than the federal courts because of greater protections of the Alaska Constitution); State v. Daniel, 589 P.2d 408, 416 (Alaska 1979) (limiting the permissible scope of inventory searches of vehicles beyond what is required by the Fourth Amendment); State v. Glass, 583 P.2d 872, 878-80 (Alaska 1978) (refusing to follow federal law allowing the surreptitious and warrantless recording of conversations); Ellison v. State, 383

This preference for individual autonomy closely relates to arguments presented in Section Two, which examines how law enforcement (including the legislative branch, the executive branch, and various levels of law enforcement bureaucracy) balances concerns for individual autonomy and public safety. Police officers, in particular, are often forced to use creative strategies that attempt to bridge the gap between the demand to protect the public and the strict procedural requirements imposed by the courts. This fact places courts in the position of deciding when an officer's use of pretext is a reasonable police practice because it effectively balances competing interests. Recognizing that this balancing of interests is an unavoidable aspect of police work, courts should adopt a standard that allows for reasonable uses of pretext, but imposes sufficient constraints to allow them to adjudicate effectively cases where pretext stops were truly discriminatory.

Section Three examines the arguments against allowing pretext stops. While most jurisdictions allow pretext stops,¹⁷ there is a large body of literature criticizing the Supreme Court's decision in *Whren v. United States*,¹⁸ which allowed pretext stops, and an even larger body of research suggesting that racial profiling occurs under the guise of these stops.¹⁹ This section highlights the two most prominent arguments against allowing pretext stops and demonstrates the need for Alaska to place some limits on its use.

Section Four argues that courts will be able to devise an adequate approach to pretext stops if they examine the issue in the light of precedent, reason, and public policy. In light of this precedent, we encourage Alaska to adopt a holistic rule for pretext stops based on reason and policy rather than precedent alone. Such an approach offers

P.2d 716, 718-20 (Alaska 1963) (reasoning that automobiles are protected by a reasonable expectation of privacy from warrantless searches because the Alaska Constitution protects "other property"). Cf. *Chambers v. Maroney*, 399 U.S. 42, 49 (1970) (allowing the warrantless search of a vehicle in part because of the reduced expectations of privacy people have in their automobiles).

17. See *People v. Robinson*, 767 N.E.2d 638, 642 & n.1 (N.Y. Ct. App. 2001) (noting that more than 40 states and the District of Columbia have adopted the federal objective standard, and only one state has refused to adopt the federal standard on state constitutional grounds); see also *Abramovsky & Edelstein*, *supra* note 7, at 733 & n.60, 738 & n.98 (noting that the only state high court to reject *Whren* is the Washington Supreme Court and cataloguing a list of jurisdictions that have adopted *Whren's* objective standard). But note that New Mexico has also recently declined to follow *Whren*. See *State v. Ochoa*, 206 P.3d 143, 151-55 (N.M. Ct. App. 2008) (rejecting as unconstitutional the use of pretextual stops).

18. 517 U.S. 806 (1996).

19. See *Goldstein*, *supra* note 4. See also *infra* discussion Parts II and III.

the best chance of adequately addressing competing concerns raised in this contentious debate.

The final section provides recommendations for analyzing pretext stops that balance precedent, reason, and policy and conform to constitutional standards. We present these recommendations as a path toward devising an alternative to the Alaska Court of Appeals' use of the reasonable officer standard articulated in *Nease v. State*.²⁰ Our alternative approach does not reject this standard outright, but recommends a different way of understanding it. We believe it is time for the court to survey the landscape and see if this is the appropriate standard. If it is, the court needs to elaborate and defend it. We offer a way in which this might be done.

I. LEGAL PRECEDENT GOVERNING PRETEXT STOPS

Three legal standards have emerged to govern the permissibility of pretext stops by law enforcement officers. Varying by jurisdiction, courts have applied either a subjective, objective, or hybrid reasonable officer standard.²¹ The objective standard makes an officer's subjective motivations immaterial. Using this standard, a court examines whether there was some legal justification which could have allowed the stop or search to occur.²² Under this standard, pretext motivations are permissible in that they do not affect the legality of the stop so long as a separate and lawful reason for the stop or search exists.²³

Courts employing the subjective standard focus on the officer's true motivation to stop and investigate.²⁴ If the officer's actual motivation lacks a lawful justification for a stop, the subsequent search is unconstitutional.²⁵ Under this standard, all pretext stops are unlawful.²⁶

The reasonable officer standard requires courts to follow a more

20. 105 P.3d 1145 (Alaska Ct. App. 2005).

21. *See* Desai, *supra* note 6, at 243–46 (discussing the nuances of these three standards).

22. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (rejecting the notion that the constitutionality of traffic stops could turn on the subjective motivations of individual officers).

23. *See, e.g., id.* at 812–13 (1996) (reasoning that lawful conduct by officers will not be rendered invalid simply on the basis of ulterior motives).

24. *See* Ladson v. State, 979 P.2d 833, 843 (Wash. 1999) (“when determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including . . . the subjective intent of the officer”).

25. *See id.* at 842 (holding that pretext stops violate Washington's constitution).

26. *See, e.g., Ladson*, 979 P.2d at 837–42; *People v. Dickson*, 690 N.Y.S.2d 394, 396 (N.Y. Sup. Ct. 1998) (maintaining that pretextual stops are prohibited in New York).

stringent version of the objective approach by allowing officers to entertain pretext motivations, but only to the extent that the stop could have occurred under established police practice.²⁷

A. The Federal Objective Standard for Pretext Stops

In 1996, the United States Supreme Court created a bright-line rule allowing pretext traffic stops by a unanimous decision in *Whren v. United States*.²⁸ According to the *Whren* court, traffic stops are valid regardless of the subjective motivations of the investigating officers, so long as there is probable cause that some traffic violation has occurred which would allow a stop for that violation.²⁹ This is the objective standard referred to above.

In *Whren*, undercover narcotics detectives were patrolling a known drug area when they noticed a suspicious vehicle driven by two young black males they believed might be carrying drugs.³⁰ The vehicle was stopped at a stop sign for an unusually long period, had temporary plates, and the driver was seen looking at the lap of the passenger.³¹ When the police turned around, the truck turned without signaling and sped off.³² The officers pulled over the vehicle based on this observed traffic violation, and when they approached the car they saw two bags of crack cocaine in Whren's hands, for which he was later prosecuted.³³

Whren argued that the stop for the observed traffic violations was merely a pretext to investigate the vehicle for drug dealing, for which the officers lacked independent evidence needed to stop and investigate.³⁴ He contended that this stop was merely pretextual and

27. See, e.g., *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (“[C]ourts should inquire whether a reasonable officer ‘would have’ made the stop anyway, apart from his suspicions about other more serious criminal activity.”); *Nease v. State*, 105 P.3d 1145, 1148 (Alaska Ct. App. 2005) (“[T]he fact that a police officer may have an ulterior motive for enforcing the law is irrelevant . . . unless . . . this ulterior motive prompted the officer to depart from reasonable police practice.”).

28. *Whren*, 517 U.S. at 813.

29. See *id.* *Whren* did not expressly extend this to investigatory traffic stops based on just reasonable suspicion, but logic suggests the same rule would apply.

30. *Id.* at 808.

31. *Id.*

32. *Id.*

33. *Id.* at 808–09. It was not argued that this stop was based on any suspicions raised by the officer's observations. The stop was argued permissible based on the observed traffic violations. *Id.*

34. *Id.* at 809.

thus unconstitutional on Fourth Amendment grounds.³⁵ Whren argued that the extent of automobile regulations renders it nearly impossible to comply with all traffic and safety rules. This creates a situation where officers will almost “invariably be able to catch any given motorist on a technical violation.”³⁶ He argued that permitting pretext stops based only on probable cause of the observed traffic violation would create the temptation to inappropriately use traffic stops as a means of investigating other violations for which there was no probable cause or articulable suspicion.³⁷ He claimed that this could lead to stops based on impermissible factors, such as race.³⁸

Whren advocated for a rule that would only allow such a stop if a police officer, acting reasonably, would have made the stop for the reason given.³⁹ He argued it was unreasonable for plain clothes vice officers in an unmarked car to enforce this minor traffic violation when police regulations only permitted such vehicles to enforce traffic laws if the violation was grave enough to pose an immediate safety threat to others.⁴⁰

The Supreme Court noted it had previously prohibited the use of pretext investigative agendas in the context of inventory searches⁴¹ and administrative searches,⁴² but emphasized the limited breadth of those holdings. The Court distinguished these rulings from the facts of the *Whren* case, as they addressed only “the validity of a search conducted in the *absence* of probable cause” in the context of inventory and administrative searches.⁴³ In contrast, Whren was a passenger in a vehicle observed violating a traffic law.⁴⁴ According to the Court, when courts find pretext motivations prohibited, the Court did not intend to endorse the idea that ulterior motives can invalidate police conduct justified by probable cause.

By contrast when probable cause of a violation existed, the Court held that the subjective intentions of officers had no bearing on Fourth Amendment analysis.⁴⁵ Indeed, the Court had a track record of not

35. *Id.* at 810.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* This standard is referred to as the “reasonable officer standard.”

40. *Id.* at 815.

41. *Id.* at 811 (citing *Florida v. Wells*, 495 U.S. 1, 4 (1990) and *Colorado v. Bertine*, 479 U.S. 367, 372 (1987)).

42. *Id.* (citing *New York v. Burger*, 482 U.S. 691, 716–17 & n.27 (1987)).

43. *Id.*

44. *Id.*

45. *Id.* at 808, 812–13. In *United States v. Villamonte–Marquez*, the Court held that an otherwise valid warrantless boarding of a vessel by customs agents was

looking at the subjective intent of officers in both Fourth⁴⁶ and Fifth⁴⁷ Amendment cases where other circumstances create an opportunity for legal action. For example, in *New York v. Quarles*, the United States Supreme Court created the public safety exception to the *Miranda* warning requirement and held this exception was available regardless of the subjective motivations of the officers at the time the exception applied.⁴⁸

In *Whren*, the Court refused to apply a “reasonable officer standard.”⁴⁹ This standard, adopted at that time by the Ninth and

not invalid “because the Customs officers were accompanied by a Louisiana State Policeman, and were following an informant’s tip that a vessel in the ship channel was thought to be carrying marijuana.” 462 U.S. 579, 584 n.3 (1983). The Court dismissed any idea that an ulterior motive might serve to remove the agents’ legal justification for their actions. *Id.* at 588. In *United States v. Robinson*, the Court held that a traffic-violation arrest would not be rendered invalid because it was “a mere pretext for a narcotics search,” and that a lawful post-arrest search of the person would not be invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches. 414 U.S. 218, 221 n.1 (1973). *See also* *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (observing that the lawfulness of a search does not turn on the presence of an evidentiary purpose). In *Scott v. United States*, the Court rejected the argument that wiretap evidence should be excluded because the agents controlling the tap failed to make any effort to comply with the statutory requirement that unauthorized acquisitions be minimized. 436 U.S. 128, 136–38 (1978). In response the Court said “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.” *Id.* at 136. According to *Robinson*, “the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” *Id.* at 138.

46. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006).

47. *New York v. Quarles*, 467 U.S. 649, 655–56 (1984).

48. *Id.* (“On these facts there is a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence, and the availability of that exception does not depend upon the motivation of the individual officers involved. . . . Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.”)

49. *Whren*, 517 U.S. at 814–15 (citation omitted) (“Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind. . . . Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act upon the traffic violation. While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity. Moreover, police enforcement practices, even if they

Eleventh Circuits, did not expressly look at officer motivation, but rather focused on whether the officer had acted outside of what reasonable officers following normal police procedures would have done once the traffic violation was observed.⁵⁰ Under this approach, if the police action was deemed to be taken in good faith and within the scope of reasonable police practice, then it is not pretextual. If it was not so taken, then it is considered an unlawful form of pretext.⁵¹

Given the speculative nature of ascertaining underlying motivations as well as the degree to which police standards vary across jurisdictions, the Court was hesitant to adopt the reasonable officer standard.⁵² Such a standard would vary widely across the rules of different jurisdictions and involve judicial speculation about the hypothetical motives of a hypothetical officer—"an exercise that might be called virtual subjectivity."⁵³

Instead, the Court adopted the purely objective, bright-line approach that pretext searches and seizures are valid so long as there is probable cause of some violation that could justify the initial stop.⁵⁴ The logic of the *Whren* decision lays the foundation for extending the objective standard to investigative traffic stops when based on an articulated suspicion of a violation, as these temporary investigative detentions are considered reasonable under the Fourth Amendment.⁵⁵

One author has summarized the two standards discussed in *Whren*

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 . . .").

50. See *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) (concluding that "in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer *would* have made the seizure in the absence of the illegitimate motivation"); *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994) (noting that a search is valid "even if the searching officer had an investigatory motive, as long as the officer would have conducted the search in question anyway pursuant to police inventory practices").

51. See *Smith*, 799 F.2d at 708 (finding officer's "hunch" was not a lawful form of pretext and declining to uphold the stop); *Cannon*, 29 F.3d at 476 (finding stopping a car because the driver was driving with a suspended license was lawful).

52. *Whren*, 517 U.S. at 814–15. For example, in this particular case, *Whren* argued that a reasonable officer would not have made this stop because police regulations permit undercover officers to enforce traffic laws "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others." *Id.* at 815 (citation omitted) (internal quotation marks omitted) (emphasis in original).

53. *Id.* at 815.

54. *Id.* at 818–19.

55. See *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (discussing the determination of reasonableness in police searches).

by calling the objective standard the “could test” and the reasonable officer standard the “would test.”⁵⁶ The objective standard allows the court to support officers’ actions if, given the facts and circumstances, an officer *could* lawfully perform the contested action, notwithstanding having a pretext motive. The reasonable officer standard only protects those actions where the facts and circumstances *would* lead reasonable officers to act, despite having other pretext motives as well.

B. Refusing to Follow *Whren*: The Subjective and Reasonable Officer Standards

While most states have adopted the objective approach announced in *Whren*,⁵⁷ several states have refused to follow that trend based on their own state constitutional protections against unreasonable searches and seizures.⁵⁸ In *Ladson v. State*,⁵⁹ the Washington Supreme Court held that pretext traffic stops violate Article I, Section 7 of the Washington Constitution.

In *Ladson*, officers on gang patrol noticed a vehicle driven by Richard Fogle with a passenger, Thomas Ladson.⁶⁰ The officers had heard rumors that Fogle was involved with drugs.⁶¹ Based on this suspicion, and the desire to investigate further, the officers tailed Fogle’s vehicle looking for a legal justification to stop the car.⁶² After some time, the officers pulled over the vehicle on the grounds that the license plates had expired.⁶³ When it was discovered that Fogle was driving on a suspended driver’s license, they arrested him, ordered Ladson out of the car, and performed a full search incident to arrest of the passenger compartment.⁶⁴ Inside Ladson’s coat, which was lying on the passenger seat, the officers found a pistol, marijuana, and \$600 cash. ⁶⁵ Ladson was charged with possession of a stolen firearm and drug possession with intent to distribute.⁶⁶

56. Celia G. Gamrath, *The Law of Pretext Stops Since Whren v. United States*, 85 ILL. B.J. 488, 489 (1997).

57. See sources cited *supra* note 17.

58. See *Ladson v. State*, 979 P.2d 833, 842–43 (Wash. 1999) (en banc); *State v. Heath*, 929 A.2d 390, 402 (Del. Super. Ct. 2006); *State v. Ochoa*, 206 P.3d 143, 151–55 (N.M. Ct. App. 2008) (declining to adopt the *Whren* standard).

59. 979 P.2d at 842–43.

60. *Id.* at 836.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

Ladson moved to suppress the evidence arguing it was obtained during an unconstitutional pretext traffic stop.⁶⁷ The officers candidly admitted it was standard practice to look for traffic violations to enable them to investigate other crimes, and that the reason they followed and pulled over this vehicle was their desire to investigate other crimes.⁶⁸ The trial court suppressed the evidence and held that pretext stops by law enforcement officers violate the Washington Constitution.⁶⁹ The State appealed in light of the recently decided *Whren v. United States*.⁷⁰

On appeal, Ladson argued that Article I, Section 7 of the Washington Constitution provides broader protection than the Fourth Amendment in the area of pretext stops and renders them unconstitutional.⁷¹ This provision reads “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.”⁷² The Washington court acknowledged that the essence of every pretext traffic stop is a situation where police pull over a citizen, not to enforce the traffic code, but rather to conduct a criminal investigation unrelated to the driving.⁷³ The reasonable suspicion to investigate the unrelated crime is missing.⁷⁴ Reviewing applicable state search and seizure standards, the court noted that even routine traffic stops are a seizure that must be reasonable, and that pretext stops do not fall within one of Washington’s “jealously and carefully drawn” exceptions to the warrant requirement.⁷⁵ Washington’s constitutional search and seizure provision is designed to guard against “unreasonable search and seizure, *made without probable cause.*”⁷⁶ The Washington court believed pretext stops violated this standard. The Ladson majority stated:

The problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. WASH. CONST. art. I, § 7.

73. *Ladson*, 979 P.2d at 836.

74. *Id.* at 837–38.

75. *Id.* (quoting *State v. Hendrickson*, 917 P.2d 563, 568 (1996)). Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to arrest, inventory searches, plain view, and *Terry* investigative stops. *Hendrickson*, 917 P.2d at 568.

76. *Ladson*, 979 P.2d at 838 (emphasis added) (quoting *State v. Fields*, 530 P.2d 284, 286 (Wash. 1975)).

triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.⁷⁷

Accordingly, the court refused to break from its historical disapproval of police pretext in Washington case law.⁷⁸

The *Ladson* dissent argued the search was not justified by the pretextual stop, but by the independent grounds discovered at the stop.⁷⁹ The majority countered that such a conclusion presumes that the initial pretext stop was justified—the very question to be decided.⁸⁰ The majority declined to follow *Whren* and held that Article I, Section 7 of the Washington Constitution forbids use of pretext as a justification for a warrantless search or seizure, but rather requires the court to look beyond the formal justification for the stop to the actual one.⁸¹ Ultimately, in the case of pretext stops the actual reason for the stop will be inherently insufficient, otherwise the pretext motivation would have been unnecessary.⁸² Summarizing its holding, the court stated:

Once again, warrants are the rule while exceptions are narrowly tailored to meet the reasonable necessity of the common law ground which provides the authority of law to dispense with the warrant requirement. Pretext is no substitute for reason. Thus, this and other pretextual inventory search cases prove the rule that recognized exceptions to the warrant

77. *Id.*

78. *Id.* at 838–42. On multiple occasions, the Washington Supreme Court has held pretext searches and seizures are unlawful. *See City of Seattle v. McCready*, 868 P.2d 134, 140 (Wash. 1994) (affirming that the government cannot disturb an individual's private affairs without a legally valid warrant based upon probable cause); *City of Seattle v. Mesiani*, 755 P.2d 775, 777 (Wash. 1988) (prohibiting pretext stops under Article I, Section 7 of the Washington Constitution, reasoning that such stops lack the articulable suspicion mandated in warrantless searches); *State v. Michaels*, 374 P.2d 989, 993–94 (Wash. 1962) (adopting a strict no-pretext rule where defendant was stopped and arrested for failing to use a turn signal and was searched incident to arrest).

79. *Ladson*, 979 P.2d at 845.

80. *Id.* at 839 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). "Such is the dissent's ultimate dilemma: How [sic] can this court articulate an exception to the warrant requirement based upon reasonable necessity when the warrant is avoided, not for a reason which would justify the warrantless investigatory stop, but upon a pretext of form lacking connection to a reasonable, articulable suspicion of criminal activity which would justify the exception to the warrant requirement in the first place?" *Id.* at 838–39.

81. *Id.* at 842.

82. *Id.*

requirement are limited by the reason which called them into existence, not a pro forma device, as the dissent would have it, to undermine the “authority of law” warrant requirement enshrined in our state constitution.⁸³

Based on its constitution, Washington has decided it is an abuse of police discretion to conduct warrantless searches under the guise of recognized warrant exceptions if the reason for activating those exceptions is something other than one of the legitimate government interests necessary for deviation from the warrant standard in the first place.⁸⁴ In other words, where the actual motivation for the stop or search does not match the reason for deviating from the general rule requiring probable cause and a warrant, the stop and search is then unreasonable under the Washington Constitution. As applied in the State of Washington, the subjective standard proscribes the use of pretext stops, and requires the court to ascertain the officer’s actual motivation.

Similarly, New Mexico has rejected *Whren’s* objective standard and moved toward the reasonable officer standard. In *State v. Ochoa*,⁸⁵ an undercover drug detective was watching a suspected drug trafficking residence when he observed an unfamiliar vehicle.⁸⁶ Wanting to search the vehicle, he observed the vehicle leaving the residence and he radioed a patrol officer to stop it because the driver was seen not wearing his seatbelt.⁸⁷ After following the vehicle for thirteen blocks, but not personally witnessing the seatbelt violation, the patrol officer stopped the vehicle based on the reported observation of the drug detective.⁸⁸ The driver was arrested for having outstanding warrants, and when the drug detective arrived, he received consent to search the car and located some drugs and a gun.⁸⁹ The driver moved to suppress this evidence as fruit of a pretext traffic stop in violation of the state constitution.⁹⁰ Specifically, he argued the state constitution provides a “distinctive, extra layer of protection against unreasonable searches and seizures involving automobiles that is unavailable at the federal level,” and this

83. *Id.* at 841.

84. *Id.*

85. 206 P.3d 143 (N.M. Ct. App. 2008). *See also* *State v. Gonzales*, 257 P.3d 894, 896, 898–99 (N.M. 2011) (adopting the appellate court’s reasonable officer test in *Ochoa* and affirming that pretext stops are unconstitutional in New Mexico).

86. *Ochoa*, 206 P.3d at 147.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

requires meaningful review of all evidence about the reasonableness of the officer's conduct.⁹¹

The appellate court noted that there were many criticisms of *Whren's* legal reasoning, policy choices, and consequences.⁹² After agreeing with these critiques of *Whren*, the court declined to adopt the objective test and held that pretextual traffic stops violate the New Mexico Constitution.⁹³ Instead, the court adopted a reasonable officer standard, a test which rejects unreasonable pretext stops,⁹⁴ later described in detail in Section Four of this Article. This test defines "unreasonable" pretext stops as "purely pretext" stops.⁹⁵ Applying this standard, the defendant was able to establish a presumption of unlawful pretext that the State was unable to rebut.⁹⁶

Washington and New Mexico both refused to follow *Whren* by subjecting officer pretext to a more thorough judicial scrutiny. Each state has rejected police officers' use of minor traffic violations to skirt state constitutional limits on police intrusion. Each of the cases discussed above provide good reasons for Alaska courts to consider when they address whether pretext searches are valid under its state constitution.

C. Alaska's Inconsistent Approach to Pretext

Alaska courts have inconsistently applied the subjective, objective, and reasonable officer standards to pretext vehicle stops. Like other state and federal courts, the shift towards allowing pretext stops emerged during the 1980s and 1990s when the United States Supreme Court began to place greater emphasis on the need for crime control strategies.⁹⁷ Originally, officer pretext was considered unlawful in

91. *Id.* at 148.

92. *Id.* at 148-49 (citing Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597 (1999); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 96-109 (1998); Patricia Leary & Stephanie Rae Williams, *Towards a State Constitutional Check on Police Discretion to Patrol the Fourth Amendment's Outer Frontier: A Subjective Test for Pretextual Seizures*, 69 TEMP. L. REV. 1007, 1025 (1996)).

93. *Id.* at 150-55.

94. *Id.* at 155-56.

95. *Id.*

96. *Id.* at 156-57.

97. See generally Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1630 (2006) (discussing the Rehnquist Court's approach to constitutional criminal procedure). "The new revolution deals with what happens in court, not on the street; it is concerned with regulating lawyers and judges, not police officers; and, with a minor qualification, it is indifferent to—that is, treats as not a matter relevant to its

Alaska.⁹⁸ Since 2005, the Alaska Court of Appeals has consistently applied the “reasonable officer standard.” However, the reason the court adopted this standard over alternatives is unclear.

1. *Pre-Whren Cases*

*McCoy v. State*⁹⁹ is one of the earliest reported cases where the Alaska Supreme Court expressed its distaste for pretext legal justifications.¹⁰⁰ *McCoy* defines the permissible circumstances for initiating a lawful search incident to arrest.¹⁰¹ The court condemned using an arrest for the pretext desire to search the individual or area in his immediate control for evidence of criminality.¹⁰² In *McCoy*, the court also limited these searches to a search for destructible or concealable evidence of the crime for which the arrest was made because this would remove the “danger of a pretext arrest.”¹⁰³

*Brown v. State*¹⁰⁴ is another 1970s case addressing pretext issues, and perhaps the first involving a pretext traffic stop argument. In *Brown*, an officer responded to a reported burglary of a liquor store and saw a vehicle leaving the general area.¹⁰⁵ The officer observed the vehicle make several traffic violations.¹⁰⁶ The officer decided to stop the vehicle,¹⁰⁷ and, while he was pulling the car over, he received a description (of person, clothes, and weapon) of the robbery suspect from dispatch.¹⁰⁸ When Brown got out of the car, the officer saw that his description matched that of the robbery suspect.¹⁰⁹ The officer ordered Brown to lie on the ground and as he approached Brown he looked into the car and saw a jacket and weapon inside that matched the dispatcher’s report.¹¹⁰

concerns—the way the criminal justice system meshes with racial inequality in the United States.” *Id.*

98. *McCoy v. State*, 491 P.2d 127 (Alaska 1971).

99. *Id.*

100. *See id.* at 138 (“The arrest must not be a pretext for the search; a search incident to a sham arrest is not valid.”).

101. *See id.* (proffering a list of requirements for a valid search).

102. *Id.*

103. *Id.* at 139.

104. 580 P.2d 1174 (Alaska 1978).

105. *Id.* at 1175.

106. *Id.* The officer noticed the vehicle bouncing erratically, which led him to believe the vehicle was speeding. *Id.* The officer also observed the vehicle turning without stopping at the intersection or signaling. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

Brown was arrested, convicted, and then appealed.¹¹¹ He argued the evidence used to convict him was obtained through an unlawful pretext traffic stop.¹¹² The Alaska Supreme Court stated that, while “[i]t [was] true that an arrest (or a traffic stop) should not be used as a pretext for a search,” there was substantial evidence to show that Brown’s vehicle was stopped for the observed traffic violations and was not a pretext stop.¹¹³ There was no evidence in the record that the officer harbored a subjective intent that differed from his stated reasons for the stop,¹¹⁴ and nothing suggested that he had fabricated the traffic observations he relied upon as the reasoning for the stop.¹¹⁵

In *Brown*, the court never clearly announced the specific standard it was using to evaluate this pretext claim. But, by expressly condemning pretext traffic stops and commenting on the lack of any evidence in the record to suggest the officer had ulterior motives for this vehicle stop,¹¹⁶ it appeared that the court applied the subjective standard.

The court of appeals relied upon *Brown* ten years later in *Townsel v. State*,¹¹⁷ which involved another alleged pretext traffic stop.¹¹⁸ Like *Brown*, this case involved a robbery where the defendant argued a traffic stop was used as a pretext to search for evidence of the robbery,¹¹⁹ and again the court focused on the officer’s subjective motivations for the stop.¹²⁰ In *Townsel*, an Anchorage officer responded to a liquor store robbery.¹²¹ Upon arrival, the officer contacted the victim who described the suspect as a “juvenile black male between the ages of 16-20, approximately 5’6”-5’7” and 130-140 pounds with black hair and brown eyes” and that the suspect had fled the area on foot carrying a rifle.¹²² Another officer on duty near the area overheard the dispatch call and

111. *Id.* at 1176.

112. *Id.*

113. *Id.*

114. Experience and common police practice suggest otherwise. However, without this type of testimony in the record it was impossible to determine that this was a pretext stop without making an unsupported inference from the proximity of the burglary report and the traffic stop.

115. *Brown*, 580 P.2d at 1176.

116. *Id.*

117. 763 P.2d 1353 (Alaska Ct. App. 1988).

118. *Id.* at 1354–55.

119. *Id.* at 1355.

120. *See id.* (“Officer Rochford testified that he stopped the vehicle for the traffic and vehicular infractions, not on a pretext to enable him to investigate the robbery. He testified that he would have made this stop under normal conditions if he was not investigating the robbery.”).

121. *Id.* at 1354.

122. *Id.*

observed a vehicle driving near that area.¹²³ The officer observed several vehicle violations including speeding, missing headlight, and a cracked tail light lens.¹²⁴ Based on these vehicle infractions, the officer stopped the vehicle and ordered the driver out of the car.¹²⁵ As the driver was exiting the car, the officer observed the muzzle of a rifle in the back seat, drew his duty weapon, and ordered the driver not to touch it.¹²⁶ At that point the driver grabbed the rifle, threw it to the ground, and ran from the scene.¹²⁷ The suspect escaped, but subsequent search warrants for the suspect's car and home led to his arrest and conviction for the robbery of the liquor store.¹²⁸

Arguing that the evidence brought against him was obtained as the result of a traffic stop that was used as a pretext for a search, the defendant cited *Brown v. State* as the leading Alaska case to condemn pretext stops.¹²⁹ The newly established Alaska Court of Appeals addressed this argument by noting that, while *Brown* does establish that “an arrest (or a traffic stop) should not be used as a pretext for a search,” it also supports the idea that “where ‘there is substantial evidence to support the trial court’s determination that [the defendant’s] vehicle was stopped for a violation of traffic regulations and that [the stop] was not a pretext stop’ then the stop was not illegal.”¹³⁰ Here, the officer testified that he stopped the vehicle for the traffic and vehicular infractions, not on a pretext to enable him to investigate the robbery.¹³¹ Further, he testified that he would have made this stop under normal conditions if he was not investigating the robbery,¹³² which would justify his stop under the subjective test. Based on this testimony, which the trial court found to be credible, the Alaska Court of Appeals affirmed the conviction because this was not a situation involving pretext.¹³³

At this point in the development of Alaska case law, however, change was on the horizon regarding the impact of subjective intentions on the legality of pretext traffic stops. In 1992, the Alaska Court of

123. *Id.*

124. *Id.*

125. *Id.* at 1355.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* (alterations in original) (quoting *Brown v. State*, 580 P.2d 1174, 1176 (Alaska 1978)).

131. *Id.*

132. *Id.*

133. *Id.* Again, common sense and the proximity of the dispatch call and this traffic stop suggests otherwise.

Appeals discussed the effect of an officer's subjective intentions for making an investigative stop in dicta in the case of *Beauvois v. State*.¹³⁴

The defendant robbed a convenience store in Fairbanks and fled on foot towards a campground.¹³⁵ The store clerk alerted the authorities, and a responding officer decided to check the nearby campground.¹³⁶ The officer observed a car leaving the campground, and stopped the vehicle.¹³⁷ One passenger, who matched the description of the robber, alighted from the vehicle.¹³⁸ A license plate check also indicated the vehicle was reported stolen, and a check of the driver's identity indicated she had been reported missing.¹³⁹ A third person was found hiding under a blanket in the backseat.¹⁴⁰ The store clerk reported to the scene and confirmed that the man in the back seat, Beauvois, was the person who had just robbed the store.¹⁴¹

At an evidentiary hearing, Beauvois argued the stop of the car violated the Fourth Amendment and Article I, Section 14 of the Alaska Constitution because there was not a sufficient legal justification for this investigatory stop.¹⁴² The trial judge denied the defendants' Motion to Suppress, holding that under the facts of this case it was permissible to stop any potential witnesses found in this particular area. The court of appeals agreed.¹⁴³ But, instead of stopping at the holding, the court also stated that the officer's subjective motivation for the stop would be irrelevant because under these facts the officer *could have* objectively stopped vehicles in this area for the purpose of identifying potential witnesses.¹⁴⁴

This case demonstrates that the Alaska Court of Appeals was willing to adopt an objective standard for pretext stops as early as 1992. At this point in time, the United States Supreme Court had not definitively announced whether such a standard was permissible under the Fourth Amendment.

134. 837 P.2d 1118 (Alaska Ct. App. 1992).

135. *Id.* at 1119-20.

136. *Id.* at 1120.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1121-22.

144. *Id.* at 1121 n.1. At an evidentiary hearing the officer admitted his intent was to stop the car to check for the robbery suspect and not to conduct a witness-type inquiry. However, the court of appeals stated "[the officer's] subjective intent when he stopped the car is irrelevant. The test is whether, under the facts known to the police officer, the stop of the car was objectively justified." *Id.*

The Alaska Court of Appeals next addressed pretext traffic stops in *Combs v. Anchorage*¹⁴⁵ in 1994. While this case is an unpublished opinion with no precedential effect, it is still instructive regarding the appellate court's approach to these cases during this era.¹⁴⁶

In *Combs*, the defendant pled no contest to driving while intoxicated and on a revoked license, but reserved the right to appeal the legality of the initial traffic stop which he asserted was based on pretext.¹⁴⁷ In this case police received a report that a woman was seen being thrown from a vehicle in the parking lot of a grocery store.¹⁴⁸ The report included a description of the vehicle, license plate number, and description of the vehicle's occupants and the victim.¹⁴⁹ The responding officer found no one in the area matching the descriptions.¹⁵⁰ Forty minutes later, another officer, who had heard the earlier dispatch report, saw a car matching that description try to make a U-turn on a business district roadway in that same general area.¹⁵¹ The vehicle had to back up to complete the turn, which caused the officer to apply his brakes and allow the vehicle to move out of the way.¹⁵² The officer saw that the license plate number matched that of the report.¹⁵³ The officer followed the car for about half a mile before stopping it.¹⁵⁴ The officer discovered the driver, Combs, was intoxicated and arrested him.¹⁵⁵

The trial judge found that the officer had observed Combs commit two traffic violations, but that the primary motivation for this stop was to investigate the earlier reported assault.¹⁵⁶ Despite these findings the trial judge concluded that an officer probably would have stopped a vehicle attempting an illegal U-turn directly in front of him even in the absence of the earlier dispatch report.¹⁵⁷ Therefore, the stop was upheld as valid.¹⁵⁸

On appeal, Combs argued that the stop was illegal pretext based on the judge's findings that (a) the traffic violations were not the actual

145. No. A-5157, 1994 WL 16196676, at *1 (Alaska Ct. App. Oct. 5, 1994).

146. Memorandum decisions of this court do not create legal precedent. See ALASKA R. APP. P. 214(d).

147. *Combs*, 1994 WL 16196676, at *1-2.

148. *Id.* at *1.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* (internal quotation marks omitted).

157. *Id.*

158. *Id.*

motivation for the stop and (b) there was no reasonable suspicion to support the actual motivation for the stop.¹⁵⁹ Combs referred the Court to two cases from other jurisdictions holding that a traffic stop will not be valid when made with an invalid motivation, unless a reasonable police officer would have made the stop for the observed traffic violation even without the invalid motivation.¹⁶⁰ However, the court concluded that it did not need to decide whether or not to adopt this reasonable officer standard because even under that standard Combs's stop would be legal given the trial court's findings.¹⁶¹ The conviction was affirmed.¹⁶²

While not a reported case, *Combs* remains important, and we believe influential, in the court's future approach to pretext traffic stops. Because the court did not choose to proactively adopt the reasonable officer standard, it suggests that, prior to this case, the reasonable officer standard did not govern pretext situations and that courts were still applying the subjective standard.¹⁶³ This case might also explain what turned the focus of the court of appeals to other jurisdictions' use of the reasonable officer standard—the defendant, Combs, may have argued for the reasonable officer standard because he was familiar with the dicta from the court of appeals just two years earlier which suggested a willingness to adopt a wholly objective standard, a standard most detrimental to defendants.

2. *Post-Whren Cases*

Since the United States Supreme Court decided *Whren* in 1996 the Alaska Court of Appeals has been presented with many pretext stop arguments. In *Hamilton v. State*,¹⁶⁴ the court of appeals, in dicta, cited favorably the objective standard that had been applied by other courts pursuant to *Whren*.¹⁶⁵ Three years later, in *Nease v. State*,¹⁶⁶ the court went further and began to employ the reasonable officer standard.¹⁶⁷ In

159. *Id.* at *2.

160. *Id.* Interestingly, the defendant did not need to argue precedent from other jurisdictions. *See id.* (holding that the question of what doctrine to adopt did not need to be decided at that time).

161. *Id.*

162. *Id.*

163. *See id.* (declining to adopt the reasonable officer standard because it would make no difference on the facts of this case).

164. 59 P.3d 760 (Alaska Ct. App. 2002).

165. *Id.* at 904; *Hamilton*, 59 P.3d at 765–66.

166. 105 P.3d 1145 (Alaska Ct. App. 2005).

167. *See id.* at 1149 (“[T]he question is whether Officer Torok departed from reasonable police practice . . .”).

doing so, the court of appeals offered no explanation for resorting to a standard that appears inconsistent with pre- and post-*Whren* Alaska case law. Yet, the reasonable officer standard used in *Nease* has been continuously followed up until the present time.¹⁶⁸

Hamilton involved a defendant who was convicted of murder and appealed his conviction by arguing that the evidence used in his conviction was derived from an unlawful pretext stop.¹⁶⁹ A responding officer saw a sedan driving away from the area of a reported stabbing.¹⁷⁰ That officer radioed another officer to follow the car and record the license plate number for later questioning as a possible witness.¹⁷¹ The vehicle's license plate was obscured by snow and could not be read, so the officer stopped the vehicle and approached it.¹⁷² After brushing off the snow and reporting the number to her superiors, the officer approached the driver's window and observed Hamilton with bloody hands.¹⁷³ Hamilton was arrested and the majority of the evidence presented at trial was located at that time.¹⁷⁴

Hamilton argued the obscured license plate was not the actual motivation for the stop, which made the stop an illegal pretext.¹⁷⁵ The State offered two justifications for this stop.¹⁷⁶ First, it was a violation of the traffic laws to have an obscured license plate, and the stop could be justified on that ground.¹⁷⁷ Second, the stop was a permissible investigative stop to inquire whether the occupant was a witness to the reported crime.¹⁷⁸ The court of appeals agreed with both of the prosecution's arguments.¹⁷⁹ Following its dicta in *Beauvois*, the court held that the legality of this investigative stop hinged on an "objective test: whether the facts known to the officers established a legitimate basis for the stop."¹⁸⁰ The court further stated that "the officers' subjective theories as to why the stop was proper [were] irrelevant."¹⁸¹

168. *Marley v. State*, No. A-9285, 2006 WL 1195668, at *3-4 (Alaska Ct. App. May 3, 2006); *Grohs v. State*, 118 P.3d 1080, 1081-82 (Alaska Ct. App. 2005); *Olson v. State*, No. A-8595, 2005 WL 1683588, at *2-3 (Alaska Ct. App. July 20, 2005).

169. *Hamilton*, 59 P.3d at 764.

170. *Id.* at 763.

171. *Id.*

172. *Id.* at 764.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 767.

180. *Id.*

181. *Id.* at 765.

Yet, the court of appeals declined to rule on the constitutionality of this standard, adopted by the United States Supreme Court in *Whren*, finding the stop was justified because the driver was a possible witness to a crime and prompt investigation was a matter of practical necessity.¹⁸² In other words, this case involved no pretext justification because the actual motivation was permissible under the law.¹⁸³

In *Nease v. State*, the court stopped signaling favor of the objective standard and instead applied the reasonable officer standard.¹⁸⁴ The reasonable officer standard is defined as whether a reasonable officer following normal police practice would have made the seizure in the absence of illegitimate motivation.¹⁸⁵ In *Nease*, a Juneau police officer was on patrol in the early morning when he observed Nease's red pickup truck parked at a local bar.¹⁸⁶ The officer had recently tried to make a lawful arrest of the truck's presumed driver for driving under the influence,¹⁸⁷ but continued his patrol after seeing the truck at the bar.¹⁸⁸ One hour later, the officer observed Nease's pickup truck in the parking lot of a nearby restaurant.¹⁸⁹ He then saw the truck leave the parking lot and pull onto the Glacier Highway.¹⁹⁰ The officer began to follow Nease.¹⁹¹ The officer observed no problems with Nease's driving; however, when Nease came to a stop, the officer observed that one of Nease's brake lights was not working.¹⁹² He stopped Nease and determined he was intoxicated.¹⁹³ Nease successfully moved to suppress

182. *Id.* at 766-67.

183. *Id.* Similarly, in *Way v. State*, 100 P.3d 902, 904 (Alaska Ct. App. 2004), the defendant argued for the adoption of the subjective standard used in Washington state because of Alaska's heightened constitutional protections. However, the court of appeals concluded it was not a pretext stop and there was no concern about any ulterior subjective motivations the officer may have had, so did not decide the issue. *Id.*

184. *Nease v. State*, 105 P.3d 1145, 1150 (Alaska Ct. App. 2005).

185. This is the definition applied in the Ninth and Tenth Circuits. Desai, *supra* note 6, at 243 (citing *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986); *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994)).

186. *Nease*, 105 P.3d at 1146.

187. *Id.* On an earlier occasion, Officer Torok had observed Nease speeding 75 miles per hour in snowy conditions. *Id.* When Officer Torok caught up with Nease, he was already out of his truck and denied driving. *Id.* During the stop, Officer Torok observed that Nease "could barely walk" and "reeked of alcohol," and he suspected that Nease had been driving while intoxicated. *Id.* Yet, Nease was not arrested because he could not definitively be identified as the driver of the vehicle. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1146-47.

193. *Id.* at 1147.

the evidence seized as a result of this stop by arguing the broken brake light was a pretext to investigate him for drunk driving.¹⁹⁴ The trial judge believed he would not have been stopped except for the officer's subjective motivation to investigate the DUI.¹⁹⁵

The State filed a petition for review to the superior court arguing that the wrong standard was applied.¹⁹⁶ The superior court agreed, remanded the case, and directed the district court, quoting *Beauvois*, to determine "whether, under the facts known to the police officer, the stop of the car was objectively justified."¹⁹⁷ When the matter came before the court of appeals,¹⁹⁸ Nease argued that his stop was illegal because it was made on subjectively pretextual grounds.¹⁹⁹ He argued the officer did not stop him for a broken taillight, but rather because he was suspicious that Nease might be driving while intoxicated.²⁰⁰ Nease argued that "the Alaska Constitution forbids the police from using a traffic infraction as a pretext to stop a motorist for an offense for which the police do not have enough individualized suspicion to justify a stop."²⁰¹ Nease acknowledged that under the United States Supreme Court's decision in *Whren*, the officer's motivations for the stop were considered irrelevant.²⁰² But, he argued that the Alaska courts should adopt the subjective standard that the Washington Supreme Court did in *Ladson*.²⁰³

The court of appeals found sufficient evidence in the record that the officer had observed a traffic code violation.²⁰⁴ Nease was thus not entitled to suppression of evidence even if the traffic violation was a pretext for stopping the defendant for driving while intoxicated.²⁰⁵ The court again said it was unnecessary to decide whether to adopt the standard in *Whren* or to adopt the standard in *Ladson* as a matter of state law.²⁰⁶ It based this decision on the fact that Nease failed to allege sufficient facts to bring the traffic stop within the doctrine of pretext stops.²⁰⁷ To explain, the court of appeals turned to a popular treatise on

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* (emphasis omitted) (citing *Beauvois v. State*, 837 P.2d 1118, 1121 n.1 (Alaska Ct. App. 1992)).

198. *Id.*

199. *Id.* at 1148.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 1150.

206. *Id.* at 1148.

207. *Id.*

pretext stops to explain that “whether a police officer may have an ulterior motive for enforcing the law is irrelevant for Fourth Amendment purposes—even under the doctrine of pretext searches—unless the defendant proves that this ulterior motive prompted the officer to depart from reasonable police practices.”²⁰⁸ The court subsequently chose to apply the reasonable officer standard.²⁰⁹

Since *Nease*, the court of appeals has consistently applied the reasonable officer standard in every case involving a question of whether an officer engaged in a pretext stop.²¹⁰ In *Olson v. State*, for example, reasonable police practice is defined broadly.²¹¹ After noting that, in deciding pretext claims, the reasonable officer standard focuses on the issue of whether or not the law enforcement officer departed from reasonable police practices, the court found that Olson presented “no evidence to suggest that police officers *never* stop motorists to issue citations for equipment violations, or that they *would never* do so”²¹² It is difficult to imagine any pretext traffic stop that meets this burden, and consequently it has nearly the same effect as the objective standard.

On several occasions criminal defendants have challenged the use of pretext stops and urged the Alaska courts to declare that these stops violate the Alaska Constitution. By deciding that pretext only occurs when the police activity falls outside of common police custom or practice—even if the stated reason for the stop was merely used to allow investigation into other matters—the court of appeals has shielded review of this important issue. While the court may ultimately decide that the reasonable officer standard best balances competing interests and respects the Alaska Constitution, it has yet to explain its reasoning.

II. THE REASON FOR PRETEXT IN MODERN POLICING

To fully understand the best legal standard to apply to pretext stops, it is important to consider the purpose of these stops and why they are part of established police practice. This section examines how the law enforcement system (including the legislative branch, the

208. *Id.* (citing 1 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4, at 115–25 (3d ed. 1996)).

209. *Id.* at 1149–50.

210. See *Marley v. State*, No. A-9285, 2006 WL 1195668, at *3–4 (Alaska Ct. App. May 3, 2006) (applying the reasonable officer standard); *Grohs v. State*, 118 P.3d 1080, 1081–82 (Alaska Ct. App. 2005) (applying the reasonable officer standard); *Olson v. State*, No. A-8595, 2005 WL 1683588, at *2–3 (Alaska Ct. App. July 20, 2005) (applying the reasonable officer standard).

211. *Olson*, 2005 WL 1683588, at *2–3.

212. *Id.* at *3 (alteration in original) (emphasis added).

executive branch, and various levels of law enforcement bureaucracy) responds to limits placed on its powers to investigate and enforce the law.

Law enforcement officials are closely tied to both political leaders who respond to broad-based social demands and to victims of crime who make specific pleas for vigorous enforcement. These social and political forces cause officers to use creative strategies that reasonably bridge the gap between these demands and the strict procedural requirements imposed by the courts. One of the major ways in which police respond to new legal constraints is to adopt proxy strategies. Very basically, officers employ proxy strategies when they use the investigation of one crime or activity as an opportunity to investigate other crimes unrelated (or only very generally related) to the crime under immediate investigation. For example, officers often link seemingly benign public activity with more covert crimes, such as associating the purchase of diet pills, red phosphorus, and high thread count fabrics with the manufacture of methamphetamine. In this example, a crime that is difficult to investigate in private spaces is replaced with a proxy that routinely occurs in public spaces but which may not be illegal absent its connection to an illegal act occurring in private spaces.

Pretext stops are a different form of proxy. This practice is a useful law enforcement tool because police can stop and observe suspects that they may not have been able to detain absent the observed violation. Because of the difficulty of observing many types of criminal activity, officers capitalize on opportunities that present themselves to further their crime control role in society.

While courts are expected to manage an adversarial system in consideration of the accused person's rights, law enforcement routinely deals with victims who demand results. On the one hand, law enforcement empathizes with the plight of victims. Law enforcement may even feel that suspects are behaving in predatory ways, thus officers may feel a need to protect potential victims. Officers may feel some need to target predators. In any case, victims place direct and indirect demands on the law enforcement system. These demands, if unfulfilled, often result in appeals to the political system, but may also result in appeals to the press.

It hardly matters whether the press is critical or supportive of law enforcement. Positive reports of officers' attempts to control crime probably encourage the law enforcement response, while negative reports may result in redoubled efforts to improve public perception. There are also periods where the press becomes a direct influence on public policy, including severe cases where the press contributes to a

moral panic.²¹³

Thus, in evaluating law enforcement systems, one must consider various influences including the macro demands of the political system, the micro demands of victims, and the impacts of the press. These influences generate significant political pressure on law enforcement systems.²¹⁴

The “art of policing” is shorthand for the effort of officers and others to devise appropriate responses to the competing pressures on their job. This “art” incorporates discretion, intuitive investigation, and the “spirit of the law” that may be difficult to define and defend solely under strict procedural standards. On this view, officers engage in a complicated mental exercise that accounts for various social demands while also being mindful of reigning legal precedent and potential future court decisions. Officers learn to stack layers of reasonable suspicion, probable cause, and other intuitive quasi-evidence and to anticipate defenses for the investigative acts that they undertake. Officers employ complex reasoning that attempts to simultaneously access “artistic” processes of policing while also navigating the requirements of procedure.

III. OBJECTIONS TO PRETEXT

Two major arguments, often discussed in tandem, against the use of pretext stops emerge in the court decisions and other literature on the topic.²¹⁵ First, some argue that pretext stops make it impossible for courts to enforce the legal constraints on policing imposed by the Fourth Amendment. Second, pretext stops allow officers to conceal evidence of impermissible race-based stops. The first argument was raised by the defendants in *Whren v. United States*²¹⁶ and accepted by the courts in *State v. Ladson*,²¹⁷ and *State v. Ochoa*,²¹⁸ discussed in Section One. Some

213. ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE 88-108 (2009).

214. *Id.*

215. See Abramovsky & Edelstein, *supra* note 7, at 733 (describing how the Fourth Amendment no longer applies while driving a car and how those stopped because of race have little recourse).

216. 517 U.S. 806, 810 (1996) (“Since, [defendants] contend, the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.”).

217. 979 P.2d 833, 838 (Wash. 1999) (en banc) (“[T]he problem with a pretextual traffic stop is that it is a search or seizure which cannot be

courts, like the Supreme Court of Washington, find accepting pretext a problematic deviation from the bedrock standards set forth in their constitutional law that require probable cause and a warrant to search and seize individuals unless they fall within a narrow set of exceptions.²¹⁹ This reasoning suggests that police should not do things under the guise of fabricated legal justifications if they could not do them when acting solely on the basis of their underlying intent.

This was the historical approach to pretext in New York as well.²²⁰ New York's pre-*Whren* decisions applied a series of factors to determine the existence of alternative intentions of officers, and, if pretext was found, suppress any evidence gathered on this basis.²²¹ Even after *Whren*, some New York courts continued to follow the subjective factors approach. One court succinctly explained the problem it saw with pretext:

We also cannot blind ourselves to the dangers inherent in according the police the discretion that *Whren* seems to permit. If, in fact, the subjective intent of police officers is not to be considered in the face of a credited traffic violation, then we have effectively eliminated the decades-old protection against stops based upon whim, caprice, idle curiosity, hunch, or gut reaction.

More troubling still, the inability to look past a proffered broken taillight or speed violation precludes exploration of malevolent motives, such as stops based upon racial

constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason.”).

218. 206 P.3d 143, 149 (N.M. Ct. App. 2008) (“We are not persuaded that the distinction made by the United States Supreme Court is meaningful in the context of a pretextual traffic stop. In performing a pretextual traffic stop, a police officer is stopping the driver, ‘not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.’ Although there may be a technical violation of the traffic law, the true reason for the stop lacks legal sufficiency.”) (quoting *Ladson*, 979 P.2d at 837–38).

219. *Ladson*, 979 P.2d at 838–39; see *supra* Section I.B and accompanying discussion.

220. *Abramovsky & Edelstein*, *supra* note 7, at 734–35. This also was the early approach of Alaska. See *supra* Section I.C.1 and accompanying discussion.

221. *Abramovsky & Edelstein*, *supra* note 7, at 734–38.

profiling.²²²

The final portion of this quotation suggests a related argument that arises in the literature on this topic: the idea that making officers' subjective motivations irrelevant under Fourth Amendment analysis prevents courts from detecting and addressing race-based policing.²²³

Race-based policing has been the subject of numerous court cases, news reports, empirical studies, and legal commentary. As one commentator puts the point, "[f]ew issues are more important to American policing than race."²²⁴ Race-based policing, often referred to as "racial profiling," is described as a practice whereby officers routinely make law enforcement decisions, such as the decision to stop an individual, solely on the basis of a citizen's race or ethnicity.²²⁵ "Hard profiling" occurs when police use race as the only factor in assessing criminal suspiciousness, while "soft profiling" occurs when officers use race as one factor among others in determining criminal suspiciousness.²²⁶ At their core, both definitions hinge upon an officer's prejudicial assumption that members of some racial or ethnic group are more likely than others to engage in criminal behavior. Not all uses of racial information fall into these definitions. For example, even ardent opponents of racial profiling consider it appropriate to use race or ethnicity as one of several identifiers of a *known* suspect to make an

222. *Id.* at 742 (quoting *People v. Dickson*, 690 N.Y.S.2d 390, 396 (N.Y. Sup. Ct. 1998)).

223. See Capers, *supra* note 5, at 12 ("Here, the fact that our current Fourth Amendment jurisprudence now fosters an atmosphere in which racial profiling is often unremarkable and juridically tolerated, and in which racial minorities perceive themselves to be second-class citizens, evidences the current Court's retreat from concerns about equality and citizenship."); Abramovsky & Edelstein, *supra* note 7, at 733 ("In practical terms, an officer's subjective motivation in conducting a traffic stop can no longer be the subject of federal constitutional inquiry . . ."); Birzer & Birzer, *supra* note 1, at 644, 647-48 (relating contemporary public perceptions of racial profiling in police pretext stops in light of *Whren* and its progeny). See also Desai, *supra* note 6, at 236 (noting potentially discriminatory uses of pretextual stops).

224. BRIAN L. WITHROW, *THE WICHITA STOP STUDY*, Acknowledgements (2002); see generally Capers, *supra* note 5 (discussing how most of our criminal rules of procedure have developed out of the need to protect racial minorities from abusive processes and the Supreme Court's concern for equal protection).

225. WITHROW, *supra* note 226, at 4. See Birzer & Birzer, *supra* note 1, at 644 (internal quotation marks omitted) ("[The U.S. Department of Justice states that] racial profiling is any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.").

226. WITHROW, *supra* note 226, at 4.

enforcement decision regarding that individual.²²⁷

Racial profiling is not merely paranoia or the late penalty flag thrown by a guilty defendant; rather, several studies on racial profiling indicate minority groups are stopped and searched at disproportionately high rates.²²⁸ Researchers analyzing vehicle stop and search statistics from the Boston Police Department discovered that 43% of all vehicle searches were of black motorists even though they comprised only 33% of all the cars stopped by police.²²⁹ In four major cities in Ohio, statistics showed that blacks were twice as likely to be stopped by police as non-blacks.²³⁰ Statistics in San Diego, California showed black and Hispanic drivers were overrepresented in vehicle stops. In that study, blacks were nearly 60% more likely to be stopped and Hispanics 37% more likely to be stopped than white drivers.²³¹ A report from the Maryland State Police showed that during the period of examination blacks comprised 72.9% of the drivers stopped and searched along a major interstate although they comprised only 17.5% of

227. *Id.*; see Brian R. Jones, *Bias-Based Policing in Vermont*, 35 VT. L. REV. 925, 926-27 (2011) (arguing that the focus is too much on race and not on the root problem of "bias-based policing").

228. See, e.g., Capers, *supra* note 5, at 14-19 (relating statistical results of studies done in Maryland, New York City, and by the ACLU indicating the disproportionate frequency and thoroughness of traffic stop and search protocols among minorities); Birzer & Birzer, *supra* note 1, at 644-46 (discussing the results of one study where 90% of blacks believed that racial profiling was pervasive nationwide, substantiated by a second "windshield study" revealing that along the New Jersey Turnpike black motorists constituted 13.5% of all drivers, 15% of those exceeding the speed limit, but 46% of those stopped by the State Police); David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 561-63 (1997) (analyzing a case study performed in Florida where minority drivers made up 5% of the population commuting on I-95, but represented more than 70% of all recorded stops during the study); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571, 575-76 (2003) (summarizing a multi-jurisdictional study including federal and state law enforcement that concluded there is a disproportionate investigation of blacks and latinos, even in jurisdictions that prohibit racial profiling); WITHROW, *supra* note 226, at 5-7 (indicating through a conglomeration of studies the heightened and disproportionate frequency at which minority drivers are stopped by the police); NICHOLAS P. LOVRICH ET AL., RESULTS OF THE MONITORING OF WSP TRAFFIC STOPS FOR BIASED POLICING: ANALYSIS OF WSP STOP, CITATION, SEARCH AND USE OF FORCE DATA AND RESULTS OF THE USE OF OBSERVATIONAL STUDIES FOR DENOMINATOR ASSESSMENT, 1, 4, 15-16 (2007) (demonstrating that various Washington state trooper activities result in a population-proportionate amount of self-initiated contact with whites and minorities via collisions, break-downs, etc., but, there is a disproportionate number of minorities stopped for violations).

229. Birzer & Birzer, *supra* note 1, at 643.

230. *Id.* at 643-44.

231. *Id.* at 644.

the drivers violating traffic laws.²³² These black motorists were also searched more frequently, despite the fact that the rate at which contraband was found was statistically identical to that for whites.²³³

Statistics reviewed by the ACLU confirm the disproportionate impact racial profiling has on law abiding minorities.²³⁴ Data collected in Los Angeles, California showed that the stop rate was 3,400 stops higher per 10,000 residents for blacks than whites, and 350 stops higher for Hispanics than whites.²³⁵ This data indicated that police were 127% more likely to search stopped blacks than stopped whites and 43% more likely to search stopped Hispanics than whites.²³⁶ Yet, blacks were actually 37% less likely to be found with weapons and 23% less likely to be found with drugs than whites who were searched.²³⁷ Similar numbers were found for Hispanics.²³⁸

Researchers note that evidence of disparities along racial or ethnic lines does not necessarily offer definitive proof of race-based policing because police discretion is complicated, dynamic, and reactive. To understand the results of police decisions we must also understand the process by which these decisions are made. Few, if any, data sets can document this process.²³⁹ Legal professionals have been less cautious about providing commentary about the cause and effect relationship of these numbers and the police discrimination.²⁴⁰

Regardless of whether police bias against certain groups is real or imagined, the perception that police target minorities still persists.²⁴¹ A 2009 CNN poll showed that 56% of blacks believe they have been treated unfairly by police because of their race and 46% believe that police racism against blacks is “very common.”²⁴² Only 11% of whites share this same view.²⁴³ The recent turmoil regarding Arizona’s attempts

232. Capers, *supra* note 5, at 14–15.

233. *Id.* at 15.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 15–16.

239. WITHROW, *supra* note 226, at 9.

240. *See, e.g.,* Capers, *supra* note 5, at 14 (“Here, the numbers *are* the argument.”).

241. *See id.* at 2 (footnotes omitted) (observing that “[e]ven when racial animus is absent, the perception that racial bias is present, or even inevitable often persists”).

242. *Id.* at 14–15.

243. *Id.* 2013 polling statistics indicate that 61% of blacks surveyed believe the U.S. justice system is biased against blacks, 70% believed they are treated less fairly by the police, and 68% believed they were treated less fairly by the courts. *Race and Ethnicity*, POLLINGREPORT.COM, <http://www.pollingreport.com/>

to pass the anti-illegal immigration Senate Bill 1070 also emphasizes this prevailing belief among the Hispanic population.

Less evident, and perhaps entirely immeasurable, is the role pretext stops play in the numbers and perceptions just described. While expressly forbidding racially-motivated traffic stops,²⁴⁴ the United States Supreme Court's adoption of the objective standard is believed by some to validate "one of the most common methods by which racial profiles are put into effect—the pretext stop."²⁴⁵ It is argued that this validation causes a number of harms to minority citizens.²⁴⁶

Allowing pretext stops makes it extremely difficult for defendants to challenge racial profiling in court. There are two primary ways of pursuing such a challenge. The first is to argue selective prosecution, a violation of the Fourteenth Amendment. This requires showing that members of the defendant's racial or ethnic group are unfairly targeted by law enforcement by proving systemic profiling through objective evidence, such as statistics, that members of other races were not prosecuted²⁴⁷ or that members of their racial group are being prosecuted disproportionately.²⁴⁸ This argument requires more than just highlighting individual instances of racially discriminatory conduct. It requires showing patterns of discriminatory conduct. This requirement forces defendants to look beyond their own cases to find extensive factual evidence.²⁴⁹ Discovery of this type of evidence under applicable criminal rules of procedure is extremely limited.²⁵⁰

The second way of challenging race-based policing is to attack it directly as an illegal act of profiling.²⁵¹ But here, racial profiling is defined as an explicit policy of targeting individuals for investigation because of their race.²⁵² If a defendant proves the existence of such a policy then there is no need to show statistical data showing they are members of a group being targeted for enforcement.²⁵³ The policy shows a direct connection between race and the search or seizure; such a policy can only be used if it survives strict scrutiny analysis.²⁵⁴

Prior to *Whren*, a defendant claiming racial profiling did so through

race.htm (last visited Oct. 7, 2013).

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

245. Abramovsky & Edelstein, *supra* note 7, at 726.

246. Capers, *supra* note 5, at 19–29.

247. Abramovsky & Edelstein, *supra* note 7, at 729.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 730.

252. *Id.*

253. *Id.*

254. *Id.*

a hearing.²⁵⁵ During these hearings, defendants could question officers about whether the stop arose out of a particularized suspicion or was based on pretext alone.²⁵⁶ Establishing pretext was helpful in showing that unlawful considerations such as race factored into their decision to make the stop.²⁵⁷ If courts adopt *Whren's* purely objective standard for pretext, an officer's subjective intentions become irrelevant under Fourth Amendment analysis and it prohibits the further questioning needed to uproot individual cases of racially-motivated investigations.

The problems created by profiling are concerning and can be exacerbated by the use of pretext. Thus, any decision Alaska makes regarding pretext should include a careful review of these concerns and how they can be mitigated.

IV. AN ALASKAN APPROACH

The time is overdue to explain why Alaska courts follow the reasonable officer standard. Alaska courts should articulate how that standard will actually work in individual cases and describe how it honors Alaska's constitutional provisions. In developing a standard, Alaska courts should look beyond precedent, procedure, and the rule of law, and instead incorporate additional perspectives related to the benefits of pretext. While jurisprudence often makes precedent, procedure, and the rule of law its primary concern, we argue that it should incorporate additional perspectives based on police practice. Only then can an Alaskan jurisprudence articulate an appropriate legal standard consistent with the State's constitutional protections against unreasonable search and seizure.

The debate about the propriety of pretext stops is part of a much larger ethical and philosophical dilemma facing our policymakers and courts. As a society, we are constantly struggling to create policies that balance the desire to protect the rights of all persons and the need to infringe upon those freedoms and liberties to enhance collective public safety goals. Some refer to this as a "value tradeoff" wherein society is forced to emphasize one at the expense of the other.²⁵⁸

Irrespective of this need to strike an appropriate balance between competing interests in our policies, we also face the harsh reality that we

255. *Id.*

256. *Id.*

257. *See id.* at 733 (explaining how defendants no longer have a mechanism to show racial motivation causing stops).

258. *See* MICHAEL C. BRASWELL ET AL., JUSTICE CRIME AND ETHICS 46–48 (7th ed. 2012) (discussing the weighing of competing values in a police context).

lack the ability to control all the variables leading to disparate enforcement. In few areas is this more observable than in our criminal justice system. Social factors outside of the system's control often influence who is exposed to governmental observation, apprehension, prosecution, and punishment. There are so many variables that influence who becomes subject to prosecution that it is difficult to isolate any one causal source of the disparate representation we see in our statistics.

We are faced with this reality when we consider pretext. There is real doubt that we will ever eradicate the use of pretext motivations even if we were to prohibit them. We all make judgments and mental shortcuts based on our past experiences and training. If we recognize this fact, the question arises whether to prohibit pretext outright and push its use further into the shadows or to pursue a policy that identifies clear injustices and creates pragmatic solutions.²⁵⁹ As Marx famously mused: philosophers interpret the world, but the point is to change it.²⁶⁰

As we have shown in the first section of this paper, other courts across the nation have responded to the challenges of pretext stops with a range of "reasonableness standards." Perhaps in an effort to capture universal values, some courts (such as those in Washington) have adopted a "subjective standard." This standard restricts officers' use of pretext stops by emphasizing what the officer intended before the stop. If an officer intended to intervene in a dangerous driving incident, the stop is allowed; but if the officer uses the same stop as a proxy to investigate an unsupported suspicion that another crime might be afoot, then the stop is not allowed. This standard seems to signal, even if only in perception, that the court is protecting the most vulnerable.

On the other end of the spectrum, the Supreme Court's decision in *Whren* permits the use of pretext stops.²⁶¹ In *Whren*, the Court recognized that allowing examination of officers' motives in detaining drivers would open courts to an incredible workload and difficult questions.²⁶² According to the Court, an officer's subjective motivations are irrelevant as long as he could lawfully stop the driver for an observed traffic violation.²⁶³ The Court concluded that pretext selectively used on certain classes can be remedied elsewhere.²⁶⁴

259. AMARTYA SEN, *THE IDEA OF JUSTICE* vii (2009) (praising the identification of redressable injustice even without trying to achieve a perfectly just world).

260. KARL MARX, *THESES ON FEUERBACH* § XI (1845).

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

262. *Id.* at 813-17.

263. *Id.* at 816-19.

264. *Id.*

Yet, we have described how these other civil remedies are useless to most criminal defendants who need a workable opportunity to show inappropriate racial motivations in their cases through a suppression hearing.²⁶⁵ The objective standard offers the police nearly unchecked discretion, and the probable cause and reasonable suspicion standards relied on by *Whren* do not limit police from targeting certain types of vehicle operators.²⁶⁶ Additionally, under this standard pretext can be used to act on unsupported hunches by officers acting outside of reasonable police practices. For these reasons, the standard runs afoul of Article I, Section 14 of the Alaska Constitution. The objective standard prevents review of many police actions which may offend our notions of justice—a review which is at the core of Article I, Section 14.

The reasonable officer standard strikes the appropriate balance regarding competing interests and the realities of police work. Further, it is in keeping with the tenets of Alaska's Constitution. This standard permits pretext stops that would have been made regardless of the officer's subjective motivations: for example, where the observed violation poses an immediate safety threat or would otherwise require immediate action by the officer. These are situations where the observed violation poses an immediate safety threat to others or where the officer's typical duties would cause the officer to take immediate action. Under this standard, defendants have the opportunity to reveal "purely"²⁶⁷ or "classic"²⁶⁸ pretextual fishing expeditions for what they are. They can also demonstrate instances where racial profiling is motivating the stop without having to point to an official policy or amass broader statistical proof. This standard allows judicial review of the reasonableness of police seizures, which is the hallmark of Article I, Section 14.

Alaska should continue to use the reasonable officer standard, but should adjust its application of this standard to conform to other jurisdictions like New Mexico. Alaska has traditionally used the standard to decide whether a situation is classified as pretext. If the traffic stop was within what would be expected of a reasonable officer in that situation, irrespective of the fact that there were other subjective motivations that could not have been independently acted upon, then the court of appeals has concluded that the stop was not pretext. Other

265. See *supra* Part III.

266. *State v. Ochoa*, 206 P.3d 143, 150 (N.M. Ct. App. 2008).

267. See *State v. Heath*, 929 A.2d 390, 397-98 (Del. Super. Ct. 2006) (defining a purely pretextual stop).

268. See *Way v. State*, 100 P.3d 902, 905 (Alaska Ct. App. 2004) (defining a classic pretext search).

jurisdictions candidly recognize that even in these situations there is an element of pretext present, but test to see if it is a type they are willing to accept. We urge Alaska to follow their lead. New Mexico has articulated an application of the reasonable officer standard that provides a workable test.²⁶⁹

New Mexico determines if a stop is based on pretextual subterfuge by considering the totality of the circumstances, judging the credibility of the witnesses, weighing the evidence, and excluding evidence if the stop constitutes unreasonable pretext.²⁷⁰ The court uses a three part test:

1. The court decides if there was reasonable suspicion or probable cause to justify the traffic stop. The state bears this burden.
2. If objectively reasonable on its face, but the defendant contends it was pretextual, the court must decide whether the officer's true motivation for the stop differed from the objective existence of the traffic violation. Here the defendant has the burden of proof to show that under the totality of the circumstances pretext motivated the stop. The defendant must place substantial facts in dispute that indicate pretext.
3. If the defendant can establish the presence of a pretext motivation for the stop it creates a rebuttable presumption that the stop was impermissible pretext. The burden then shifts to the state to show that based on the totality of the circumstances, even without the unrelated motive, the officer would have stopped the defendant for the traffic violation.²⁷¹

The court considers a non-exclusive list of factors relevant to the burdens required in steps two and three. These include:

- Whether the defendant was arrested for and charged with a crime unrelated to the stop;
- Whether the officer complied with standard police practices;
- Whether the officer is in an unmarked patrol car or not in uniform;
- Whether patrolling or enforcement of the traffic code were among the officer's typical employment duties;
- Whether the officer had information, not rising to the level of reasonable suspicion or probable cause, relating to another offense;
- The manner of the stop;
- The conduct, demeanor, and statements of the officer during the stop;
- The relevant characteristics of the defendant;
- Whether the objective reason articulated for the stop was necessary to protect traffic safety; and
- The officer's testimony as to the reason for the stop.²⁷²

269. *Ochoa*, 206 P.3d at 155.

270. *Id.*

271. *Id.* at 155-56.

272. *Id.* at 156.

A standard, applied in this manner, preserves law enforcement's ability to use reasonable proxies in criminal investigation, to candidly testify as to the presence of other subjective motivations, and to demonstrate the reasonableness of their actions.

The only actions prohibited by this approach are those where officers are seeking to use minor traffic violations to pursue hunches without developed reasonable suspicion and probable cause. In addition, this standard reduces the threshold for an individual to raise an objection to a pretext stop that might be based upon prohibited factors such as race or social classifications.

The New Mexico standard, if adopted in Alaska, would enable the court to justify the reasonable officer standard in a manner consistent with Alaska's Constitution.

CONCLUSION

Alaska's appellate courts have been asked on several occasions to explain and defend the legalities of pretext stops. We conclude that Alaska has informally adopted the correct standard, but urge some changes to its application and clarification regarding why it is the best of available alternatives.

This Article provides a review of the standards used, Alaska's historical treatment of pretext, policy, and practice considerations. We provide an argument to justify the standard the court is currently using. Furthermore, this Article provides arguments that the reasonable officer standard balances all competing interests and encourages reasonable and practical policing, while protecting the interests of Alaska's citizens.