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The Long Road to Justice: Why State Courts Should Lower the Evidentiary Burden for Proving Racialized Traffic Stops and Adopt the Exclusionary Rule as a Remedy for Equal Protection Violations

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THE *LONG* ROAD TO JUSTICE: WHY STATE COURTS SHOULD LOWER THE EVIDENTIARY BURDEN FOR PROVING RACIALIZED TRAFFIC STOPS AND ADOPT THE EXCLUSIONARY RULE AS A REMEDY FOR EQUAL PROTECTION VIOLATIONS

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ABSTRACT

Racist and brutal policing continues to pervade the criminal legal system. Black and brown people who interact with the police consistently

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face unequal targeting and treatment. Routine traffic stops are especially dangerous and harmful and can lead to death. Under Whren, a police officer's racist motivations or implicit bias towards a driver do not influence the constitutionality of a traffic stop. An officer only needs to show there was probable cause to believe a traffic stop occurred. Although the unconstitutionality of pre-textual traffic stops has been widely explored since Whren, both federal and state courts have struggled to find legal solutions that fight back against a doctrine that fails to protect minority drivers. This note explores those failed solutions and argues that state courts have a legal obligation to both ease the burden of proving an equal protection violation and recognize the exclusionary rule as a remedy for those violations. As long as Whren is good law, state courts must get creative in the fight against racist policing and the selective prosecution of traffic laws.

INTRODUCTION

"No justice, no peace. No justice, no peace." Those words echoed throughout the streets of Brooklyn and the rest of the United States when protests erupted in June 2020. People were outraged by the police killing of George Floyd, and structural racism and police brutality became the focal point of daily protests across the nation that lasted for months.[1] Today, racist police practices are not a mystery. Numerous studies reveal that our criminal justice and police systems are systematically racist.[2] Traffic stops are especially dangerous and harmful for Black and brown drivers.[3] A recent study analyzing over 100 million traffic stops across the nation found that racial bias regularly influenced a police officer's decision to initiate a traffic stop.[4] However, drivers targeted for their race face insurmountable legal barriers when attempting to seek redress for racialized traffic stops while police officers and police departments shirk responsibility.

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[1] Laura Putnam et al., *The Floyd Protests are the Broadest in U.S. history — and are Spreading to White, Small-town America*, WASH. POST (Jun. 6, 2020, 2:10 AM), https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/.

[2] Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/.

[3] Emma Pierson et al., *A large-scale analysis of racial disparities in police across the United States*, 4 NAT. HUM. BEHAV., 736 (2020), http://www.nature.com/articles/s41562-020-0858-1.

[4] *Id*.

The Supreme Court legalized and sanctioned pretextual stops in 1996 when they decided *Whren v. United States.*[5] *Whren* dictates that as long as a police officer has probable cause to believe that any civil traffic violation occurred, an officer's subjective and potentially racialized reason for the stop does not matter.[6] A pretextual traffic stop occurs when the police use a civil traffic violation as an excuse to pull over a driver to then investigate more serious crimes.[7] The police officers do not have probable cause or any other evidence to suspect criminal activity. However, once the valid traffic stop occurs, the legitimacy of the traffic violation justifies their further investigation of more serious criminality.[8] These investigations then can lead to the discovery of illegal contraband such as drugs or the illegal possession of firearms.[9]

Typically, a violation of the Fourth Amendment occurs if an officer stops and seizes a driver without probable cause to suspect criminality.[10] However, under *Whren*, if there is probable cause for a civil traffic violation, a lack of probable cause for the later observed criminal activity does not violate the Fourth Amendment.[11] As long as pretextual traffic stops are not in violation of the Fourth Amendment, drivers who fall victim to a racialized traffic stop cannot seek an important Fourth Amendment remedy: suppression of evidence.[12] The basic tenet of the exclusionary rule is that a defendant can move to suppress evidence found as a direct result of a Fourth Amendment violation.[13] When these police-sanctioned pretextual stops are racially motivated, biased, and deemed federally legal under the U.S. Constitution, it leads to the unfair and unjust application of the law against minorities.[14]

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[5] Whren v. United States, 517 U.S. 806, 806 (1996).
[6] *Id.*at 810.
[7] Marsha Mercer, *Police 'Pretext' Traffic Stops Need to End, Some Lawmakers Say*, PEW (Sept. 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say.
[8] Erin Killeen, *Traffic Stops and Discriminatory Policing in the United* States, GEO. J. ON POVERTY L & POL'Y BLOG (Apr. 26, 2018), https://www.law.georgetown.edu/poverty-journal/blog/traffic-stops-and-discriminatory-policing-in-the-united-states/.
[9] Mercer, *supra* note 7.
[10] *Whren*, 517 U.S. at 810.
[11] *See id*. at 817–18.
[12] *See generally* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. U.S*, 2011 CATO SUP. CT. REV. 237, 238 (2011).
[13] *Id*. at 239.
[14] White drivers were searched 1.5 to 2 times less than Black drivers but were more likely to have contraband. Pierson et al., *supra* note 3, at 740–41.

While most states follow the standard set forth in *Whren*, a few states provide greater protections for drivers against pretextual traffic stops under their state constitutional equivalent of the Fourth Amendment.[15] In *Ladson*, the Washington Supreme Court held pretextual traffic stops violate their state constitution, and the court provided suppression as a remedy.[16] Similarly, in *Ochoa*, the New Mexico Court of Appeals held that pretextual traffic stops are per se unreasonable.[17] As a result, the pretextual stops violate the search and seizure protections under their state constitution, allowing for suppression as a remedy.[18] Greater state protections, however, do not provide greater protection for Black and brown drivers in Washington and New Mexico because the courts rarely find a stop to be pretextual unless an officer admits their pretextual motivations.[19]

While *Whren* shut the door on a defendant's ability to use the Fourth Amendment to fight against a racially motivated traffic stop, the Court explicitly stated that the Equal Protection Clause is the appropriate legal avenue for drivers to fight a racially motivated pretextual traffic stop.[20] However, history shows that "demonstrating a race-based equal protection violation . . . can prove quite challenging."[21] Not only must a driver show that their racial group was disproportionally targeted by the police over the broader class of people, they must also show the discrimination was intentional.[22] If an officer does not admit to profiling someone because of their race, drivers must utilize circumstantial or statistical evidence to show discriminatory intent.[23] Although courts recognize aggregate population statistics as a legitimate way to show discriminatory impact, courts do not recognize those statistics as legitimate for proving intent, leaving drivers with the near-impossible task of showing discriminatory intent.[24] Additionally, if a defendant does

[15] Margaret M. Lawton, *State Responses to the When Decision*, 66 CASE W. RES. L. REV. 1039, 1040 (2016).
[16] State v. Ladson, 979 P.2d 833, 842–43, 138 Wash. 2d 343, 357–59 (1999).
[17] *See* State v. Ochoa, 206 P.3d 143, 153 (N.M. Ct. App. 2008).
[18] *Id.*
[19] Lawton, *supra* note 15, at 1056–57.
[20] Whren v. United States, 517 U.S. 806, 813 (1996).
[21] Brooks Holland, *Safeguarding Equal Protection Rights: The Search for an Exclusionary Rule Under the Equal Protection Clause*, 37 AM. CRIM. L. REV. 1107, 1009 (2000).
[22] Melissa Whitney, Note, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 282 (2008).
[23] *Id.* at 283.
[24] *Id.*

prove an Equal Protection violation occurred under the Constitution, they are left without suppression as a remedy in lower federal courts.[25] Currently, federal and most state jurisprudence leads to dead-ends and near impossible barriers for Black and brown drivers who seek an adequate remedy against racialized traffic stops. The Massachusetts Supreme Court, in *Commonwealth v. Long*, may be providing an appropriate solution.

In *Long*, the Massachusetts Supreme Court combines a host of solutions used by other courts while establishing a new, easier-to-meet standard to show a traffic stop was pretextual by allowing circumstantial evidence of the stop to be sufficient to prove a claim.[26] Additionally, Massachusetts recognizes the exclusionary rule as a remedy for violations of its state constitutional equivalent of the Equal Protection Clause.[27] Massachusetts is of only two states in the country to recognize this remedy;[28] other states are either undecided or outright refuse to recognize suppression as a remedy for racial profiling or equal protection violations.[29] *Long* is doctrinal proof that courts can address the systemic problem of racist policing in the context of traffic stops by developing legal standards that recognize the unique burden of proving a traffic stop was racialized. The decision demonstrates that both state courts and the Supreme Court have a path to protecting Black and brown people from racialized pretextual traffic stops should they choose to take it. Frankly, justice requires that they do.

The judicial system currently turns a blind eye to the systemic problem of racialized police practices. Some states use the excuse that suppression is not a recognized remedy for equal protection violations.[30] Other states refuse to address the problem when defendants cannot

[25] Although the Supreme Court has not definitively ruled on whether suppression is an available remedy for equal protection violations, no lower federal court has recognized the remedy to date. Brooks Holland, *Racial Profiling and A Punitive Exclusionary Rule*, 20 TEMP. POL. & CIV. RTS. L. REV. 29, 30 (2010).

[26] Commonwealth v. Long, 152 N.E.3d 725, 731 (Mass. 2020).
[27] *Id.* at 736.
[28] New Jersey also recognizes suppression as a remedy for equal protection violations. State v. Segars, 799 A.2d 541, 548–49 (N.J. 2002).
[29] State v. Coleman, 2014-Ohio-1483, 2014 WL 1384420, at *3 (Ohio Ct. of App. 3d Dist. Hancock County 2014); Portillo Funes v. State, 230 A.3d 121, 146 (Md. Ct. App. 2020).
[30] Portillo Funes, 230 A.3d at 146 (finding no evidence that a Maryland or Supreme Court "authority recognizing an exclusionary remedy in a criminal case for violations of the Equal Protection Clause"); *Coleman*, 2014-Ohio-1483, at *3 (rejecting "racial profiling as a legal basis for suppression of evidence").

demonstrate a violation of equal protection occurred.[31] *Long* is proof that social justice minded judicial reasoning is imperative to protecting Black and brown people from racialized police behavior.

This Note argues that an important way to protect citizens from racialized pretextual traffic stops lies in the hands of state courts. State courts must provide a holistic approach to fight against racialized pretextual traffic stops by recognizing suppression as a remedy for violations of their state equivalents of the Equal Protection Clause and lowering the evidentiary bar for showing a violation occurred to achieve that remedy. In addition to statistical evidence, the evidentiary bar should allow for nonstatistical, circumstantial evidence from the stop to be sufficient to show a stop was pretextual.[32] Additionally, courts must lower the bar for showing discriminatory intent by making two important assumptions specific to traffic stops.[33] First, the court should assume that a broader class of individuals violated the traffic laws and were not targeted by police because of how often drivers commit traffic violations.[34] Second, courts should assume every traffic stop is a deliberate choice by the police officer, satisfying the specific intent requirement.[35]

Part I of this Note provides a high-level overview of racialized police practices and demonstrates that racist policing is a systemic problem within our justice system to show why it is imperative the courts find a way to adjudicate racist pretextual traffic stops. Part II discusses *Whren*'s legacy and the outlier states who distinguish themselves from *Whren*,[36] and the legal difficulty of proving a pretextual traffic stop was racially motivated under search and seizure jurisprudence at the state level. Part III explores the dynamics surrounding the exclusionary rule and its application as a remedy to equal protection claims at both the state and federal level, and discusses the new standard established in *Long*. Part IV of this Note argues why the *Long* approach is the best legal solution for drivers who fall victim to racialized traffic stops, and why state courts should adopt the same solution.

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[31] *See* State v. Johnson, 852 S.E.2d 733, 9 (N.C. Ct. App. 2020) (unpublished) (holding the lower court did not err in denying the motion to suppress without addressing generally if the remedy was available for the equal protection violation); *see also* State v. Garcia, 7 A.3d 355, 370 (Conn. 2010).
[32] *See Long*, 152 N.E.3d at 738.
[33] *Id.* at 739–741.
[34] *Id.*
[35] *Id.*
[36] *See infra* pp. 13–18.

I. INSTITUTIONAL RACISM, POLICING IN THE UNITED STATES & PRETEXTUAL STOPS

Today, it is no surprise the police force, a system founded on values of racism and brutality,[37] continues to target, profile, and murder Black people at a rate much higher than white people.[38] The racist foundation of policing in the United States set the groundwork for biased police practices that continue today, including racialized traffic stops.[39] While numerous studies point to racial bias in policing on a systemic level, information on individual officer behavior remains incomplete because that data is typically self-reported.[40] Often, police departments fail to collect data and report it.[41] If strong data evidence is unavailable to a claimant who wants to show a traffic stop was pretextual where the legal standard requires statistical evidence to show discrimination, they cannot prove their case.[42] This leaves drivers with no legal outlet to remedy the wrong committed by the police.[43]

The root of policing in America follows two trajectories divided by geography.[44] In the North, informal watch teams developed into formal police forces.[45] New York City, for example, passed formal legislation that created a centralized police force in response to a growing number of riots in the City in the early 1840s.[46] As the population of poor, working-class immigrants increased, they began rioting regularly against their

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[37] *See* Jill Lepore, *The Invention of the Police*, NEW YORKER (Jul. 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police.
[38] Black teenagers aged fifteen to eighteen are vulnerable to police killings twenty-one times more than white men of the same age group. *See* Ryan Gabrielson et al., *Deadly Force, in Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), https://www.propublica.org/article/deadly-force-in-black-and-white; Black drivers are two times as likely to be pulled over than white drivers. *See also* John Sides, *What Data on 20 Million Traffic Stops Can Tell Us About 'Driving While Black'*, WASH. POST (Jul. 17, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/17/what-data-on-20-million-traffic-stops-can-tell-us-about-driving-while-black/.
[39] Pierson et al., *supra* note 3, at 736.
[40] Gabrielson et al., *supra* note 38.
[41] *Id.*
[42] *But see* Commonwealth v. Long, 152 N.E.3d 725, 731 (Mass. 2020).
[43] *Id.*
[44] Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing*, HUM. RTS. MAG. (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/.
[45] *Id*.; VICKY OSTERWELL, IN DEFENSE OF LOOTING: A RIOTOUS HISTORY OF CIVIL ACTION, 77–76 (2020).
[46] *Id*. at 78.

working conditions and unfair treatment.[47] Black New Yorkers rioted against the informal watch groups to protect Black people who had escaped the South from getting returned, and anti-Black riots, targeting Black communities, erupted throughout the City.[48] The police grew out of a desire and need to keep things orderly, and "orderly" meant, from its beginning, keeping the white and the rich on top by keeping the Black, Indigenous, immigrant, and poor in their place by limiting their organizing, street presence, and political power."[49]

In the South, formal police forces found their origins in informal slave patrols.[50] Upholding the system of slavery required specific systems of controls dedicated to keeping order and suppressing resistance and rebellion.[51] Originally, these patrols were composed of the planters themselves, but as the number of those enslaved grew, the patrols were incapable of keeping the system in check on their own.[52] Armed police forces developed in larger cities in order to control and terrorize the Black population.[53] Safety and crime prevention meant raiding homes, controlling movement, and violently enforcing the law against solely against Black people.[54] Although policing in the North and South had different historical origins, formal police forces evolved earlier in the south and influenced the development of formal forces in the North.[55]

After the Civil War ended and slavery was officially abolished, the police legally targeted and brutalized Black people through enforcing the Black Codes, and after the passage of the Fourteenth Amendment, enforcing Jim Crow laws.[56] Enslavement of Black people shifted to the criminalization of Blackness.[57] The entire legal system–from police to prosecutors to juries to judges–disproportionately targeted Black people at all stages of policing, including patrols, arrests, indictments, and

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Hassett-Walker, *supra* note 44.
[51] Osterwell, *supra* note 45, at 79.
[52] *Id.* at 80.
[53] *Id.* at 81.
[54] *Id.*
[55] *Id.* at 82 (Police forces "evolved and modernized *earlier* in cities with slavery. . .").
[56] Michael A. Robinson, *From the Slave Code to Mike Brown: The Brutal History of African Americans and Law Enforcement*, LONDON SCH. OF ECON.: USAPP BLOG (Oct. 5, 2017), http://blogs.lse.ac.uk.usappblog/2017/10/05/from-the-slave-codes-to-mike-brown-the-brutal-history-of-african-americans-and-law-enforcement/.
[57] Colleen Walsh, *Solving Racial Disparities in Policing*, THE HARV. GAZ. (Feb. 23, 2021), http://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing/; Lepore, *supra* note 37.

sentencing.[58] This treatment then created the mistaken belief that Black people were "disproportionately inclined to criminality" that continues to pervade modern day policing.[59] Once the Civil Rights Act and Voting Rights Acts were passed and the Jim Crow era formally ended, the harassment and brutalization of Black people continued due to racial bias and profiling justified by the new "War On Drugs."[60] Pretextual traffic stops are a significant way police continue to harm Black and brown communities.[61]

Statistically, the most common interaction a citizen has with the police is a traffic stop.[62] After the Supreme Court decided *Whren*, the term "Driving While Black" or "DWB" entered the academic mainstream to refer to racist targeting of Black drivers by the police.[63] Study after study consistently shows the disproportionate targeting of Black drivers in all parts of the United States.[64] One of the more recent studies indicates that the disparity among traffic stops between white and Black people decreased at night when distinguishing race is more challenging, implying race influenced officers' decisions to make a stop.[65] The eradication of pretextual traffic stops is especially important, as encounters between Black drivers and police officers often start as simple traffic stops but escalate to fatal shootings.[66] One survey found that of 100 people killed during a traffic stop, one in three were black.[67]

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[58] *See* Lepore, *supra* note 37.
[59] *Id*. (quoting KHALIL GIBRAN, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (1st ed. 2010)).
[60] President Nixon's War on Drugs intentionally vilified and targeted Black communities under the guise of solving the heroin problem in America. Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST.(May 10, 2021), https://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs.
[61] *See* Robinson, *supra* note 56.
[62] Ronnie A. Dunn, *Racial Profiling: A Persistent Civil Rights Challenge Even in the Twenty-First Century*, 66 CASE WEST. L. REV. 957, 961 (2016).
[63] Jamila Jefferson-Jones, *"Driving While Black" as "Living While Black,"* 106 IOWA L. REV. 2281, 2295 (2021).
[64] Balko, *supra* note 2.
[65] Emma Pierson et al., *supra* note 3, at 738.
[66] *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (last updated Nov. 11, 2022) ; *see also* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1580 (2019) (detailing two specific instances where a traffic stop of a Black driver escalated to the unjustifiable killing of a Black man).
[67] Jefferson-Jones, *supra* note 63, at 2298 (citing Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST (Dec. 24, 2015),

Racism and brutality were foundational to the creation of the police force and continue to pervade policing today.[68] And although there have been efforts to counteract the racial foundations of the United States,[69] the Supreme Court currently falls short in protecting Black and brown people from discrimination at the hands of the police during pretextual traffic stops.[70]

II. THE HARMFUL LEGACY OF *WHREN*

Whren v. United States[71] is one of the most commented on and controversial opinions handed down by the United States Supreme Court.[72] In *Whren*, vice-squad officers were patrolling a "high drug area" in the District of Columbia in an unmarked car when they passed a truck.[73] The truck, with temporary license plates and two young Black occupants, aroused the officers' suspicion when the driver of the truck looked over into the lap of the passenger.[74] The truck waited for more than twenty seconds at the intersection, and when the officers pulled a U-turn to drive back towards the truck, the truck suddenly turned without using a turn signal and sped off at an "unreasonable" speed.[75] The officers followed the truck until they reached a red light.[76] As one of the officers approached the vehicle, he saw two bags of what looked like crack cocaine in the passenger's hands and arrested the two people in the truck.[77]

Part II unpacks the harmful legacy and legal significance of *Whren*'s holding under the Fourth Amendment. Although *Whren* leaves drivers who fall victim to pretextual stops without any protection under the Fourth Amendment, a few outlier states attempt to provide greater protection under their state law equivalents.[78] Unfortunately, proving a

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https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html.

[68] *See supra* Part I.

[69] U.S. CONST. amends. XIII, XVI, XV.

[70] *See infra* Part II.

[71] Whren v. U.S., 517 U.S. 806 (1996).

[72] *See e.g.*, David O. Markus, *Whren v. U.S.: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 91 (1996); *see also* Craig M. Glantz, *Could This be the End of the Fourth Amendment Protections for Motorist*, 87 J. CRIM. L. & CRIMINOLOGY 864, 864 (1997).

[73] *Whren*, 517 U.S. at 808.

[74] *Id*. at 808–810.

[75] *Id*. at 808.

[76] *Id*.

[77] *Id*. at 808–809.

[78] *See infra* Part II.A and Part II.C.

pretextual traffic stop was racially motivated under search and seizure jurisprudence at the state level presents legal difficulties.[79]

A. *Whren and the Fourth Amendment*

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."[80] Temporary detention during a traffic stop executed by the police is considered a seizure under Fourth Amendment doctrine.[81] In order for a seizure to be constitutional, the traffic stop must be reasonable, meaning that the officer must have probable cause to believe a traffic violation occurred.[82] The standard to determine if an officer had probable cause to effect the traffic stop is an objective one, assessed under the totality of the circumstances.[83] Until *Whren*, the Court had not ruled on whether the execution of a pretextual traffic stop violated the Fourth Amendment's prohibition against unreasonable searches and seizures.[84]

On the surface, *Whren* remained consistent with Fourth Amendment jurisprudence, holding that the subjective motivation of a police officer does not matter in determining the reasonableness of a traffic stop so long as the officer had probable cause to believe a traffic violation occurred.[85] Here, the officers saw the truck turn without a signal, which gave them probable cause to pull the truck over.[86] However, viewed through the lens of racial profiling and policing, pretextual traffic stops permit the police to pull a driver over for a minor traffic infraction "as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists."[87] This is particularly problematic because total adherence to the traffic code is nearly impossible given how "heavily and minutely regulated" it is.[88] As the petitioners in *Whren* argue, an officer with racial animus or unconscious bias will almost always be able to catch a driver committing even the

[79] *See infra* Part II.C.
[80] U.S. CONST. amend. IV.
[81] *Whren*, 517 U.S. at 809–810.
[82] *Id.* at 810.
[83] Terry v. Ohio, 392 U.S. 1, 21 (1968).
[84] 517 U.S. at 808.
[85] *Id.* at 813.
[86] *Id.* at 808–810. It is important to note that the Metropolitan Police Department policy at the time only sanctioned traffic stops made by unmarked police cars when the violation posed an "immediate threat" to others. *Id.* at 815. According to some, this is strong evidence showing the stop was pretextual. Yankah, *supra* note 66, at 1580–81.
[87] 517 U.S. at 810.
[88] *Id.*

smallest infraction.[89] Additionally, by legalizing pretextual traffic stops and excluding the Fourth Amendment as a way to challenge them, the Court barred the exclusionary rule as a remedy. Suppression is an important remedy in search and seizure jurisprudence available to citizens who suffer Fourth Amendment violations at the hands of the police.[90]

B. *The Exclusionary Rule*

The Exclusionary Rule first appeared in American jurisprudence in 1914 and applied only to federal prosecutions.[91] The Supreme Court did not apply the remedy to the states until 1961 in *Mapp v. Ohio.*[92] The purpose of the rule is to suppress evidence seized in violation of the Fourth Amendment.[93] Over time, the exclusionary rule has been curtailed with various exceptions that narrow the scope of the remedy.[94] The principles behind the exclusionary rule are important to understand when justifying the application of the rule to equal protection violations.

Two major rationales for the exclusionary rule are deterrence and judicial integrity.[95] The deterrence rationale is a simple one: exclude evidence illegally obtained by an officer in the hope that the officer will stay within constitutional boundaries in the future.[96] Under the judicial integrity rationale, courts should not encourage or condone illegal police

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[89] *Id*.
[90] E.H. Schopler, Annotation, *Modern Status of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R. 2d 531 § 2[c] (2022). This note will later argue that the exclusionary rule can be applied to an equal protection violation.
[91] Weeks v. U.S., 232 U.S. 383, 346 (1914) (holding that evidence seized in violation of the Fourth Amendment is "a denial of the constitutional rights of the accused.").
[92] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding that evidence obtained by unconstitutional search was inadmissible and vitiated conviction).
[93] *Id*. at 655, 660.
[94] The nuances of the various exceptions to the exclusionary rule as applied in Fourth Amendment cases are beyond the scope of this note. Exceptions to the rule include good faith, inevitable discovery, independent source, and attenuation. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (holding evidence found during a search based off an invalid warrant should not be suppressed because the officer relied on the warrant in good faith); Nix v. Williams, 467 U.S. 431, 444 (1984) (holding evidence that would have been independently found by police need not be suppressed); Murray v. U.S, 487 U.S. 533, 537 (1988) (holding evidence initially discovered during an illegal search but later found by lawful means does not warrant suppression); Utah v. Streiff, 579 U.S. 232, 238 (2016) (holding evidence is admissible if the unconstitutional police behavior and the evidence is "too remote").
[95] Mike Madden, *A Model Rule for Excluding Improperly or Unconstitutionally Obtained Evidence*, 33 BERKELEY J. INT'L L. 442, 447, 450 (2015).
[96] *Id*. at 447.

behavior by admitting illegally obtained evidence.[97] The deterrence theory focuses on the bad actor, while the judicial integrity rationale focuses on the role of the judiciary.[98] These two rationales are used by the New Jersey and Massachusetts courts to justify the application of the remedy to race-based equal protection violations.[99]

The exclusionary rule is often viewed as one of the more controversial remedies in American jurisprudence. It is seen as an exception to be used on rare occasions because the rule can protect the guilty by suppressing evidence of criminality at trial.[100] This philosophical take on the rule is implicated in the context of pretextual traffic stops. If a pretextual stop is made and no incriminating evidence is found, suppression is not a relevant remedy because there is nothing to suppress. In a case where a racialized pretextual stop is made and incriminating evidence is found, a guilty defendant may potentially walk free.[101] This can be even more problematic when evidence of a particularly serious crime is found during a pretextual traffic stop.

Critics also question the rule's ability to deter poor police conduct.[102] Discouraging racialized police behavior through deterrence may be effective when a police officer is consciously biased, aware of their bad behavior, and motivated to change that behavior.[103] However, if an officer thinks they pulled someone over for valid reasons, the deterrence argument becomes circular. The officer cannot consciously deter racist behavior of which they are not aware. The exclusionary rule is not the only remedy for pretextual traffic stops and may not be the very best solution to combat implicit police bias. However, until *Whren* is overturned, applying the remedy to equal protection violations at the state level is a valid avenue to combat racist policing.

C. *State Reactions to Whren*

To date, *Whren*, despite its controversy, only spurred two states to provide greater legal protection to drivers who fall victim to pretextual traffic stops under their state equivalents of the search and seizure

[97] *Id*. at 445.
[98] *Id*. at 450.
[99] *See infra* Part III.c.ii–iii.
[100] Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule*, 43 TEX. TECH. L. REV. 391, 421 (2010).
[101] *See* Brinegar v. U.S., 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).
[102] Madden, *supra* note 95, at 449.
[103] *See id.* at 448.

doctrine: Washington and New Mexico.[104] In theory, the Washington and New Mexico courts give drivers more protections because evidence found during a pretextual traffic stop can be suppressed.[105]However, in practice, the courts rarely find that a stop was pretextual.[106] A discussion of their attempted solutions is important to show the various paths to a remedy for drivers pulled over for racialized pretextual reasons.

1. Washington

In 1999, the Supreme Court of Washington declared that pretextual traffic stops violated the state constitution in *State v. Ladson*.[107] The Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without the authority of law."[108] This section is interpreted by the Court to provide broader protection than the Fourth Amendment because it places no "express limitations" on the right to privacy.[109]

In *Ladson*, officers recognized the driver of a car from an unsubstantiated street rumor that the driver could be involved with illegal narcotics.[110] Both people in the car were Black. [111] Once they realized the license plate tabs on the car were expired, they pulled the driver over and arrested him for a suspended license.[112] They also charged Ladson with possession of a firearm and drug charges when they found a handgun and marijuana on his person during the stop.[113] The officers later admitted the stop was pretextual.[114]

The *Ladson* Court held that without a valid warrant, a traffic violation cannot justify a seizure for other criminality if the seizure would be unconstitutional in the absence of the traffic violation.[115] The Court considers the subjective intent of the officers and the objective reasonableness of the officer's actions under the totality of the

[104] State v. Ladson, 979 P.2d 833, 138 Wash. 2d 343 (1999); State v. Arreola, 290 P.3d 983, 176 Wash. 2d 284 (2012); State v. Ochoa, 206 P.3d 143, 149 (N.M. Ct. App. 2008).
[105] Lawton, *supra* note 15, at 1045.
[106] *Id.* at 1047, 1051.
[107] *Ladson*, 979 P.2d at 839.
[108] WASH. CONST. art. I, § 7.
[109] *Ladson*, 979 P.2d at 837.
[110] *Id.* at 836.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 839.

circumstances to determine if a stop was pretextual.[116] Here, the officers admitted the stop was pretextual, so the subjective intent of the officers was easily determined.

This test seems like a step in the right direction towards properly adjudicating pretextual traffic stops. However, in practice, the "test identifies police pretextual behavior in limited circumstances . . . when police admit such behavior," setting a high bar for finding that a stop was racially motivated.[117] Thus, in the majority of cases, the court found the traffic stop to be lawful.[118] After *Ladson*, in the rare instances where the Court held a traffic stop to be pretextual, there was a consistent fact pattern where an officer would admit that their own suspicions of criminal activity led them to follow the vehicle until a traffic violation occurred.[119] The hesitancy of the court to apply the test in circumstances without direct officer testimony highlights the difficulty in assessing the subjective intent of an officer.[120]

In 2012, the Supreme Court of Washington loosened protections for drivers when they decided *State v. Arreola* by holding that a "mixed-motive" stop does not violate the Washington State Constitution.[121] In *Arreola*, police responded to a report of potential drunk driving.[122] After locating the vehicle, the officer did not observe any signs of drunk driving, however, he did notice the exhaust pipe was altered.[123] The officer admitted that the "primary motivation" for pulling the car over was to investigate the potential DUI and the secondary motivation was the muffler.[124] At trial, the officer testified that he sometimes pulls drivers over for altered exhaust pipes to prove that he had a secondary legitimate reason for the stop and absent the drunk driving tip, he may have pulled the defendant over regardless.[125]

The court held that if an officer decides that conducting a stop for the traffic violation is reasonably necessary for public safety, the stop is not pretextual even if the officer's primary reason for the stop could be considered pretextual.[126] When assessing if a stop was pretextual, the

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[116] *Id.* at 843.
[117] Margaret M. Lawton, *The Road to Whren and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 918–19 (2008).
[118] *Id.*
[119] Lawton, *supra* note 15, at 1048.
[120] *Id.* at 1047.
[121] State v. Arreola, 290 P.3d 983, 176 Wash. 2d 284, 288 (2012).
[122] *Id.* at 986.
[123] *Id.* at 987.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 991.

court not only considered the subjective intent and objective circumstances as *Ladson* dictates,[127] but the court also considered if the reason for the stop was the actual and independent cause for the stop.[128] Here, it is hard to distinguish *Arreola's* holding from *Whren*. Justice Chambers, one of the dissenters in *Arreola*, said it best, "the majority asserts this primary motivation does not matter as long as there was an independent secondary justification . . . [t]his reasoning is for all practical purposes indistinguishable from the reasoning this court rejected in *Ladson*."[129] Since *Arreola*, Washington courts have found mixed-motive stops to be constitutional in most cases, essentially undoing any legal progress made by *Ladson*.[130] Although the New Mexican approach is slightly different, the legal outcomes are similar.

2. New Mexico

In 2008, the New Mexico Court of Appeals held that pretextual traffic stops violate the New Mexico State Constitution in *State v. Ochoa*.[131] Their state version of search and seizure doctrine grants protections to New Mexicans in their cars akin to those available to them when they are in their home.[132] Therefore, these extra protections for drivers "preclude our adoption of the federal [bright line] rule that a technical traffic violation automatically legitimizes a stop."[133] The reasonableness of a seizure is determined on the specific facts of a case.[134]

In *Ochoa,* a drug task force officer was surveilling a house when he observed a car he didn't recognize.[135] He wanted to investigate the car for drug related crimes, so he continued to check on the car.[136] The officer observed the defendant drive away in the vehicle without a seatbelt on, so he radioed another officer to pull the driver over.[137] The second officer followed the car, but he could not see if the driver was wearing his seatbelt because the windows were tinted.[138] After following

[127] State v. Ladson, 979 P.2d 833, 843, 138 Wash. 2d 343, 359 (1999).
[128] *Arreola*, 290 P.3d at 992.
[129] *Id.* at 993.
[130] Lawton, *supra* note 15, at 1056.
[131] State v. Ochoa, 206 P.3d 143, 146 (N.M. Ct. App. 2008).
[132] *Id.* at 151; N.M. CONST. art. II, § 10.
[133] *Id.* at 153 (quoting State v. Gomez, 122 N.M. 777, 932 P.2d 1 (1997)).
[134] *Id.*
[135] *Id.* at 147.
[136] *Id.*
[137] *Id.*
[138] *Id.*

the car for some time, the officer pulled the driver over and recognized the driver as someone with outstanding arrest warrants.[139] The officer proceeded to arrest the defendant, but he could not recall whether the defendant was wearing his seatbelt or not.[140]

The *Ochoa* court adopted a similar test to the Supreme Court of Washington to determine whether a traffic stop was pretextual, however, the court clarified what facts are pertinent to the analysis.[141] As in *Ladson*, the test considers the totality of the circumstances around the stop, including both the objective reasonableness and subjective intent of the officer.[142] Facts to consider when assessing the totality of the circumstances include:

> whether the defendant was arrested for and charged with a crime unrelated to the stop; the officer's compliance or non-compliance with standard police practices; whether the officer was in an unmarked car or was not in uniform; whether patrolling or enforcement of the traffic code were among the officer's typical employment duties; whether the officer had information, which did not rise to the level of reasonable suspicion or probable cause, relating to another offense; the manner of the stop, including how long the officer trailed the defendant before performing the stop, how long after the alleged suspicion arose or violation was committed the stop was made, how many officers were present for 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 for the protection of traffic safety; and the officer's testimony as to the reason for the stop.[143]

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[139] *Id*.
[140] *Id*.
[141] *Id.* at 155–56.
[142] *Id*. at 156.
[143] *Id*. (citing State v. Heath, 929 A.2d 390, 403 (N.M. Ct. App. 2008)); Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of Whren v. United States*, 24 AM. J. CRIM. L. 627, 640 (1997); Patricia Leary & Stephanie Rae Williams, *Toward 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, 1038–39 (1996).

Unlike in *Ladson*, to rebut a showing of pretext, the state is allowed to show an officer would have stopped the defendant without the unrelated motive.[144] Here, the first officer's interest was in investigating the defendant for drug related crimes without the reasonable suspicion to justify a stop.[145] Further, the officer who pulled over the defendant would not have done so without the radio call from his fellow officer.[146] Therefore, the stop was pretextual.[147]

As in Washington, on the surface New Mexico is applying a stricter standard than *Whren*.[148] However, in cases where the court has applied the test, few courts have found a stop to be pretextual absent an explicit admission of pretext.[149] Additionally, in an unpublished opinion, the New Mexico court clarified that an officer could have more than one suspicion, allowing for mixed-motived stops like in *Arreola*.[150] In both states, the courts rely heavily on admission from officers to establish a pretextual traffic stop.[151] This dependence limits the greater protections of their state constitutions because, as seen from the caselaw in both states, police rarely admit to an ulterior motive for a stop.[152]

The Fourth Amendment is closed off as an avenue for drivers to seek redress for pretextual traffic stops on the federal level.[153] In states where more privacy protections are extended to drivers through state constitutional provisions of search and seizure doctrine, proving a stop is pretextual is mostly illusive.[154] Therefore, suppression of evidence collected during pretextual stops remains an unreachable remedy. However, in *Whren*, Justice Scalia prompted litigants to use the Equal Protection Clause as the constitutional basis to seek redress for a racialized pretextual on the federal level.[155] However, today, Scalia's recommended path is a legal dead-end for drivers.

III. EQUAL PROTECTION AT THE FEDERAL AND STATE LEVEL AND THE EXCLUSIONARY RULE

[144] *Id.*
[145] *Id.* at 157.
[146] *Id.*
[147] *Id.* at 156.
[148] Lawton, *supra* note 15, at 1051.
[149] *Id.*
[150] *Id.* at 1051 (citing State v. Tapia, No. 32,868, 2013 U.S. Dist. WL 5309804, at *1-2 (N.M. Ct. App. Aug. 12, 2013)).
[151] *See id.* at 1051.
[152] *See Ladson*, 979 P.2d at 836; *see also Ochoa*, 206 P.3d at 147.
[153] *See supra* pp. 10–13.
[154] *See supra* Section II.A.
[155] Whren v. U.S., 517 U.S. 806, 813, 818-19 (1996).

There are two major limitations when using the Fourteenth Amendment's Equal Protection Clause to fight against discriminatory policing during pretextual traffic stops: the difficulty of proving an equal protection violation based on race, and the inability to suppress evidence even if an Equal Protection violation can be shown.[156] These limitations ensure that the federal Equal Protection Clause is no protection at all.

A. *The Near Impossibility of Proving an Equal Protection Violation*

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;…nor deny to any person within its jurisdiction the equal protection of the laws."[157] Originally, the Fourteenth Amendment was written against the backdrop of sanctioned racist police behavior.[158] Additionally, the Fourteenth Amendment "added to the Constitution the guarantee of equal protection of law, [by] requiring the police to enforce the law in a nondiscriminatory fashion."[159] A core purpose of the Equal Protection Clause was to end discriminatory policing and the unequal application of the law.[160] Today, it is rare for laws to overtly discriminate on the basis of race, so race-based challenges to government actions are attacked for their discriminatory purpose when the law itself is neutral.[161] When a law is neutral on its face, it is not enough to show that the application of the law had a disproportionate impact on a particular racial group.[162] Proof that a discriminatory purpose was a motivating factor in the police officer's application of the law must also be shown in the specific case.[163] The requirement to show discriminatory purpose continues to be an almost impossible standard to reach, and "dooms virtually all

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[156] David H. Gans, *We Do Not Want to Be Hunted: The Right to be Secure and our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE L. 239, 321 (2021); *See* Lewis R. Katz, *Whren at Twenty: Systemic Racial Bias and the Criminal Justice System*, 66 CASE W. RES. L. REV. 923, 927 (2016).
[157] U.S. CONST. amend. XIV, § 1.
[158] Gans, *supra* note 157, at 269; *see also supra* note 37 and accompanying text.
[159] *Id*. 270.
[160] *Id*.
[161] *The Equal Protection Clause: Background to Racial Discrimination*, CONST. L. REP., https://constitutionallawreporter.com/amendment-14-01/equal-protection-clause/#EPIntroRacial (last visited Nov. 28, 2022).
[162] Washington v. Davis, 426 U.S. 229, 242 (1976).
[163] Vil. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

challenges to discriminatory policing."[164] Two important cases show the failures of current Equal Protection doctrine to protect citizens from law enforcement:[165] *McCleskey v. Kemp*[166] and *U.S. v. Armstrong*.[167]

In *McCleskey*, a Black man was convicted of robbery and the murder of a white police officer by a jury in Georgia.[168] The jury recommended McCleskey be sentenced to death, and the court followed the recommendation.[169] McCleskey appealed his case on Equal Protection grounds.[170] He presented an extensive and thorough statistical study to show the racial disparities in the administration of the death penalty.[171] The data indicated that defendants convicted of killing a white person were 10% more likely to receive the death penalty than those convicted of killing a black person, like in this case.[172] Additionally, "prosecutors sought the death penalty in 70% of the cases involving Black defendants and white victims" versus 32% for cases with a white defendant and a white victim.[173]

The Court rejected the statistical data as proof of discriminatory intent and purpose.[174] For the Court, the decision by the jury was too dependent on the facts of the specific case and contained too many variables for an inference from general statistics to indicate specific racial animus against the defendant.[175] Further, the Court reasoned, "[b]ecause discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused."[176] It is hard to imagine what "exceptionally clear proof" would look like if it is not the thorough and definitive data presented in this case. The dearth of systemic challenges to police

[164] Gans, *supra* note 157, at 321; David A. Slanksy, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT REV. 271, 326 (1997) ("challenges to discriminatory police practices will fail without proof of conscious racial animus on the part of police.").
[165] *Id.* at 321.
[166] McCleskey v. Kemp, 481 U.S. 279, 279 (1987).
[167] U.S. v. Armstrong, 517 U.S. 456, 456 (1996).
[168] *McCleskey*, 481 U.S. at 283.
[169] *Id.* at 285.
[170] *Id.* at 286.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 287.
[174] *Id.* at 297.
[175] *Id.* 294–95.
[176] *McCleskey*, 481 U.S. at 297.

behavior since *McCleskey* shows the near impossibility of meeting this standard.[177]

In *Armstrong*, the defendant, a Black man, was indicted on drug and firearm offenses.[178] In response, the defendant filed a motion for discovery and presented an affidavit alleging that in all 24 cases related to similar charges in 1991, each defendant was Black.[179] The standard for granting a motion for discovery requires "some evidence tending to show the existence of the essential elements of' a selective-prosecution claim."[180] The court held the study did not fulfill this standard because the study did not include information on non-black defendants who "could have been prosecuted" for the same offense.[181] The holding in *Armstrong* created a "catch-22" where a defendant must present "clear evidence" of selective-prosecution to obtain discovery.[182] If a defendant cannot make a compelling claim for an equal protection violation *prior to* discovery, they cannot utilize discovery to prove their claim.[183]

These two cases demonstrate the serious challenge of proving a discriminatory purpose, especially in the context of racialized interactions with police where the bias against defendants will likely be implicit, and an officer is unlikely to admit pretext.[184] Even if a claimant can show a violation of the equal protection clause, the appropriate remedy is not available.[185] Evidence found during that violation cannot be suppressed because The Supreme Court has not addressed the question of whether the exclusionary rule is applicable to equal protection violations.[186]

B. *The Exclusionary Rule is Unavailable as a Remedy for Fourteenth Amendment Violations at the Federal Level*

Federal courts at each level have failed to recognize the exclusionary rule as a remedy for equal protection violations. The Supreme Court has not addressed the question of whether the remedy is

[177] Aziz Z. Huq, *The Consequences of Disparate Policing: Evaluating Stop and Frisk as a Modality of Urban Policing*, 101 MINN. L. REV. 2397, 2453 (2017).
[178] U.S. v. Armstrong, 517 U.S. 456, 458 (1996).
[179] *Id.* at 459.
[180] *Id.* at 470 (quoting U.S. v. Berrios, 501 F.2d 1207, 1211 (2nd Cir. 1974)).
[181] *Id.*
[182] Gans, *supra* note 158, at 322 (quoting U.S. v. Armstrong, 517 U.S. 456, 465 (1996)).
[183] *Id.*
[184] *Id.* at 323.
[185] Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341, 350 (2012); U.S. v. Nichols, 512 F.3d 789, 794 (6th Cir. 2008).
[186] *Id.*

available.[187] Additionally, the lower federal district courts who have considered the exclusionary rule as a remedy reject it by agreeing with reasoning from *U.S. v. Nichols*.[188] In *Nichols*, the court explicitly rejected the exclusionary rule as a remedy and instead endorsed 42 U.S.C § 1983[189] as a way for defendants to seek redress for discriminatory police behavior.[190] It should be noted that a small number of lower federal courts acknowledge that the exclusionary rule *would* be a remedy for an equal protection violation if a defendant could prove a violation occurred.[191] As long as the remedy is not recognized by the Supreme Court and most lower federal courts, the Equal Protection Clause won't be able to provide adequate protection against pretextual traffic stops in federal court.

Again, the ability to fight against pretextually made traffic stops finds itself at the "dead-end" of the federal Equal Protection Clause.[192] So, now what? The door is shut for drivers to bring claims for pretextual traffic stops under the Fourth Amendment and the Fourteenth Amendment. The need, however, to battle back against racist policing is ever present.

C. *Protections Under State-level Equal Protection Clauses and the Exclusionary Rule*

Similarly to when states grant more protection under Fourth Amendment state equivalents, states grant citizens more individual protections through their state constitutional equivalent of equal protection.[193] A few states acknowledge this principle through case law.[194] In *Ramos v. Town of Vernon*, the Supreme Court of Connecticut stated that "depending on the facts and circumstances, the state constitution may afford greater protection than the federal constitution with regard to equal protection claims."[195] In *Baker v. State*, the Supreme

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[187] *Id.*
[188] *Id.*; *see also Nichol*s, 512 F.3d at 795.
[189] § 1983 of the Civil Rights Act of 1871 permits people to sue someone acting under the color of state law for civil rights violations. 42 U.S.C.A § 1983 (1996).
[190] *Nichol*s, 512 F.3d at 794–95.
[191] Holland, *supra* note 185, at 349.
[192] Gans, *supra* note 158, at 322.
[193] Jeffrey M. Shaman, *The Rise of State Constitutional Law: Equality and Liberty*, 72 RUTGERS U. L. REV. 1247, 1250 (2020).
[194] *See infra* pp. 26–27.
[195] Ramos v. Town of Vernon, 761 A.2d 705, 723 (Conn. 2000). The relevant section of the Connecticut State Constitution reads "[n]o person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment

Court of Vermont definitively acknowledged their Common Benefits Clause differs substantially and is a counterpart to, the federal Equal Protection Clause and therefore, "the federal amendment may thus supplement the protections afforded by the Common Benefits Clause, it does not supplant it."[196] By providing more protections under their state constitutions, particularly when it comes to race, courts can justify broader protections for drivers who fall victim to pretextual traffic stops.

It bears repeating that a right is hardly a right if a remedy does not follow.[197] Where states provide broader protections for citizens under their Equal Protection Clause equivalents, the exclusionary rule should be available as a remedy.[198] Whether state courts consider suppression as a remedy for equal protection violations is not discussed at length in legal academia or by state courts. Of the four states who addressed the question and do not adopt the exclusionary rule as a remedy, three different reasons were given.[199]

1. States That Fail to Adopt Exclusion as a Remedy for Equal Protection Violations

The Court of Appeals in Maryland and Ohio denied adopting suppression as remedy because other courts decline to recognize the exclusionary rule as a remedy for equal protection violations.[200] Both courts cited *Nichols* in their reasoning.[201] The North Carolina Court of Appeals did not outwardly reject the remedy, however, they declined to address the defendant's claim because an equal protection violation was

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of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex, or physical or mental disability." CONN. CONST. art. 1, § 20.

[196] Baker v. State, 744 A.2d 864, 870 (Vt. 1999). The relevant section of the Vermont State Constitution reads "That government is, or ought to be, instituted for common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such a manner as shall be, by that community, judged most conducive to the public weal." VT. CONST. ch. I, art. 7.

[197] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[198] Holland, *supra* note 21, at 1112.

[199] *See infra*. pp. 27–8.

[200] Portillo Funes v. State, 230 A.3d 121, 146 (Md. 2020) (finding no evidence of a "Maryland or Supreme Court authority recognizing an exclusionary remedy in a criminal case for violations of the Equal Protection Clause"); State v. Coleman, No. 5-15-13, 2014 WL 1384420, at *3 (Ohio Ct. App. Apr. 7, 2014) (rejecting "racial profiling as a legal basis for suppression of evidence").

[201] Portillo Funes, 230 A.3d at 146; Coleman, 2014 WL 1384420, at *3.

not proven.[202] Finally, the Supreme Court of Connecticut placed the onus on the defendant for failing to "demonstrate why suppression…is the appropriate remedy for any possible equal protection violation."[203] Both federal courts and state courts hesitate to extend the exclusionary rule as a remedy for equal protection violations in the context of police investigations.[204]

2. States That Adopt the Exclusionary Rule as a Remedy for Equal Protection Violations

Two state courts, New Jersey and Massachusetts, do recognize the remedy and use deterrence of racial bias and targeting in police as the rationale.[205] In *State v. Kennedy*, the New Jersey Appellate Court reviewed a trial court's decision denying discovery to support a defendant's claim of selective enforcement based on a *de facto* police policy that targeted minority groups.[206] The Court held the lower court mistakenly denied defendants' pretrial motion to obtain State Police records.[207] The records were to be used to support the defendants' claim of selective enforcement of traffic laws based on a de facto policy that targeted minority groups.[208] The court ultimately remanded and ordered that should discovery reveal materials supportive of defendants' claims, the defendants' motion to suppress evidence should be reconsidered.[209]

The court reasoned that deterrence of future unlawful police conduct and judicial integrity are the basis for the recognition of the remedy.[210] They further referenced the racist history and legacy of the law, and the duty of the legal system to eliminate racial prejudice.[211] Interestingly, the court called out the removal of subjectivity from Fourth Amendment

[202] State v. Johnson, No. COA19-529-2, 2020 WL 7974001, at *8 (N.C. Ct. App. Dec. 31, 2020).
[203] State v. Garcia, 7 A.3d 355, 370 (Conn. 2010). It should be noted that the defendant failed to show an equal protection violation. *Id.*
[204] Holland, *supra* note 185, at 350 (describing this hesitancy by the courts as "judicial ambivalence").
[205] State v. Segars, 799 A.2d 541, 548–49 (N.J. 2002); State v. Kennedy, 588 A.2d 834, 838–39 (N.J. Super. Ct. App. Div. 1991); Com. v. Lora, 886 N.E.2d 688, 699 (Mass. 2008).
[206] *Kennedy*, 588 A.2d at 838–39.
[207] *Id.* at 840.
[208] *Id.*
[209] *Kennedy*, 588 A.2d at 842.
[210] *Id.* at 839.
[211] *Id.*

analysis as an incentive to provide suppression as a remedy for equal protection violations.[212]

A decade later in *State v. Segar*, the court considered another equal protection case.[213] The highest court in New Jersey reiterated the importance of deterring discriminatory investigatory behavior and judicial integrity, making a point to say they "apply equally, *if not more so*, to cases of racial targeting" in comparison to search and seizure violations.[214]

In *Commonwealth v. Lora*, the Massachusetts Supreme Court heard a case involving alleged selective enforcement of the law during a traffic stop.[215] Although the defendant did not prevail on their motion to the suppress, the court chose to extend the exclusionary rule as a remedy for violations of their state equal protection clause in order to deter unconstitutional police behavior and protect rights granted by the Massachusetts constitution.[216] While the court did not explicitly reference race in their dicta, they quoted the same passage from *Segar* quoted above in their justification.[217] Additionally, the court established a new, lowered standard for proving a stop was pretextual.[218] Under the *Lora* standard, defendants could show a reasonable inference of racial intent "based on broader patterns involving other defendants."[219] This standard also opened the door for defendants to "challenge implicit bias, by demonstrating an officer's patterned behavior" through statistical data.[220] However, after *Lora*, there has been only one case where a defendant successfully suppressed evidence found during a pretextual traffic stop.[221] Although *Lora* did little to protect drivers from racialized traffic stops, the decision set the ground work for the Massachusetts Supreme Court to transform jurisprudence as it pertains to pretextual traffic stops.

3. The Long Decision

[212] *Id.*
[213] State v. Segars, 799 A.2d 541, 548–49 (N.J. 2002).
[214] *Id.* at 549 (emphasis added).
[215] Commonwealth v. Lora, 886 N.E.2d 688, 690 (Mass. 2008).
[216] *Id.* at 699.
[217] *Id.*
[218] Commonwealth v. Long, 152 N.E.3d 725, 736 (Mass. 2020).
[219] *Id.*
[220] *Id.*
[221] *Id.* at 737; *See* Commonwealth v. Vargas, No. 1481CR1135, slip op. at 1, 16 (Middlesex Sup. Court Aug. 16, 2019).

In 2020, the Massachusetts Supreme Court expanded precedent to lessen the statistical standards for proving a pretextual traffic stop because the evidentiary burden *Lora* created was too difficult to overcome.[222] In *Commonwealth v. Long*, the defendant, a Black male driver, drove down a residential street when an officer noticed the defendant.[223] After observing the defendant, the officer immediately decided to check the license plate without observing a traffic violation.[224] The check revealed the car was registered to woman, and the car lacked an inspection sticker.[225] The officer stopped the vehicle and found the driver had outstanding warrants, a suspended license, and a gun in the car, so the officer made an arrest.[226] The high court reversed the lower court's denial of the motion to suppress, ruling the defendant presented sufficient statistical evidence under the old standard held in *Lora*.[227]

Importantly, although the court ruled the defendant met the old standard for showing pretext, the court chose to revise the standard to make it even easier for defendants to show a stop was racially motivated.[228] The opinion openly acknowledged the danger and toxicity of the "discriminatory enforcement of traffic laws" and how the negative effect of that discrimination on minorities was the impetus for changing the legal standard and rejecting their own precedent.[229]

The court revised their test to determine if a stop was pretextual in three ways: they expanded the categories of permissible evidence, shifted the way a defendant can establish a reasonable inference of discrimination, and redefined the meaning of reasonable inference.[230] Now, a defendant can prove their case with specific, circumstantial facts taken from the stop without presenting wider statistical evidence showing a pattern of discrimination.[231] The new standard for establishing a reasonable inference is one where a defendant produces evidence "upon which a reasonable person could rely to infer that the officer discriminated on the basis of defendant's race."[232]

The specific evidence the court deemed relevant to support a reasonable inference of a racial stop in a motion to suppress includes:

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[222] Commonwealth v. Long, 152 N.E.3d 725, 737 (Mass. 2020).
[223] *Id.* at 730.
[224] *Id.*
[225] *Id.*
[226] *Long*, 152 N.E.3d at 730–31.
[227] *Id.* at 731.
[228] *Id.*
[229] *Id.* at 735.
[230] *Id.* at 738–39.
[231] *Id.* at 731.
[232] *Id.* at 739.

"statements by the defendant and others, may be based on the defendant's personal knowledge…[or] own investigation, evidence obtained during discovery, and other relevant sources."[233] The court encourages judges to consider certain factors when assessing the totality of the circumstances:

> patterns in enforcement actions by the particular police officer, regular duties of the officer involved in the stop, the sequence of events prior to the stop, the manner of the stop, the safety interests in enforcing the motor vehicle violations, and the specific police department's policies and procedures regarding traffic stops.[234]

Once a reasonable inference of pretext is shown, the burden shifts to the Commonwealth to rebut the inference at a hearing.[235] This burden-shifting is similar to *Ochoa*, however, there is an important difference.[236] The Commonwealth must outright prove the stop was not racially motivated rather than simply show the officer would have made the stop without the racial motivation.[237]

The court also removed the general requirements to prove selective prosecution in the specific context of pretextual traffic stops.[238] A driver no longer needs to show evidence that a broader class of persons also violated the law and were not prosecuted.[239] The court draws the inference that traffic violations occur so often that it can always be assumed that "'a broader class of persons violated the law than those against whom the law was enforced.'"[240] This shift allows a driver to present evidence solely based on their specific stop.[241] Additionally, a driver does not need to show that "failure to prosecute the broader class of drivers was consistent or deliberate" because an officer always makes a deliberate choice on which vehicle to stop.[242] By making these two inferences, it becomes easier for a driver to show a reasonable inference

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[233] *Id.*
[234] *Id.* at 740–41.
[235] *Id.* at 741.
[236] *Id.*; State v. Ochoa, 206 P.3d 143, 149 (N.M. Ct. App. 2008).
[237] *Long*, 152 N.E.3d at 741; *Ochoa*, 206 P.3d at 149.
[238] 152 N.E.3d at 738.
[239] *Id*
[240] *Id.* (citing Commonwealth v. Bernardo B, 900 N.E.2d 834, 843 (Mass. 2009), quoting Com. v. Lora, 886 N.E.2d 688, 698 (Mass. 2008)).
[241] *Id.*
[242] *Long*, 152 N.E.3d at 738 (citing *Bernardo B*, 900 N.E.2d 834, 843, quoting *Lora*, 886 N.E.2d at 698)).

that the stop was racially motivated and pretextual by using circumstantial evidence under the totality of the circumstances. [243]

IV. *LONG* FITS THE RIGHT LEGAL PIECES TOGETHER

Since *Whren*, drivers have faced a host of legal dead ends if they wanted to seek redress for a racially motivated pretextual traffic stop.[244] Federal and state courts have continuously failed to support Black and brown people who are stopped simply because of their race by creating insurmountable legal standards. This failure to adjudicate racist police action has not only failed to hold officers and police departments accountable, but it has perpetuated the unfair application of the law by failing to acknowledge the racist application of the law by the police. The standard set forth in *Whren* and the nearly impossible legal standard required to prove an equal protection violation at the federal level necessitates that drivers who fall victim to a racialized traffic stop turn to state courts to find legal redress to counteract the harmful legacy of *Whren*.

No court today extends better protections to drivers against racialized traffic stops than Massachusetts. The *Long* standard removes the difficulty of interpreting the subjective intentions of an officer that the courts take in Washington and New Mexico. While their approaches incorporate the subjective intent of the officer and are thus distinct from *Whren*, in practice, these courts continuously fail to make findings of pretext where officers do not openly admit their pretextual motivations. This approach fails to protect drivers because often officers will not admit to their pretext, especially if they are not aware of their own unconscious bias. *Long* allows for reasonable inferences to be made through circumstantial evidence without depending fully on proving the police officer's subjective intent, which is very challenging to show without a direct statement from the officer.

Additionally, *Long's* solution avoids the difficulty required to prove the standard set in *McCleskey* by eliminating the dependency on statistical data to show an equal protection violation occurred. By automatically inferring a traffic stop both purposely targets a narrower group of individuals who violated the law and that failure to target the broader class was a deliberate choice, *Long* removes the difficult barrier of proving specific discriminatory intent that is normally required to prove an equal protection violation. This is a crucial assumption to make

[243] *Id.*
[244] *See supra* Parts II and III.

because the data typically required to prove discriminatory intent is largely unavailable to defendants.[245]

States courts must begin to right *Whren's* wrongs by adopting the standard set forth in *Long.* The unique circumstances surrounding traffic stops justifies the adaptation and evolution of the legal standards required to prove equal protection violations. Given the grave impact of racialized policing, especially in the context of traffic stops, state courts have a duty to drivers to protect them. Where other solutions have failed, states must adopt the *Long* approach so drivers can finally find legal redress for racialized traffic stops. Although the positive legal effects of *Long* are yet to be determined and theoretical, the failures of the current solutions are evident.

Not only must courts loosen the standard for showing a stop was pretextual, but they must adopt the appropriate remedy. State courts must not shy away from adopting the exclusionary rule as a remedy for equal protection violations. As argued above, the justifications for the remedy under search and seizure equally apply for equal protection violations. Although a deterrence rationale does not support suppression where an officer's racist behavior is unconscious, the remedy must still be offered in the interest of justice. Racial discrimination, no matter the form, continues to harm Black and brown individuals and ensures our society remains unequal. Excluding evidence of criminal activity can come at a cost, however, those costs are a small price to pay when the police continue to unfairly persecute minorities. Additionally, state courts may choose to impart exceptions to the exclusionary rule in extreme circumstances where suppression would seriously endanger society.

CONCLUSION

Racist policing is a problem that pervades many aspects of American life for Black and brown people. Pretextual traffic stops are just one way the police unfairly apply the law. So long as the Supreme Court sanctions racist police behavior, state courts must get creative in fighting against *Whren* by adopting the legal standard set for in *Long* and applying the exclusionary rule as a remedy for equal protection violations.

[245] *Long*, 152 N.E.3d at 737.