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## RESPONSE

### Implicit Racial Bias and the Perpetrator Perspective: A Response to *Reasonable but Unconstitutional*

*L. Song Richardson\**

*In their Article, Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States, Professor Chin and Mr. Vernon not only provide a withering critique of the U.S. Supreme Court's unanimous decision in Whren v. United States but they also present novel doctrinal arguments for reversing its problematic dicta that racial discrimination is constitutionally reasonable. Their arguments are compelling and require no extension of current doctrine. For instance, Chin and Vernon embrace Whren's endorsement of pretextual traffic stops as long as those stops do not involve racial profiling. Additionally, the authors implicitly embrace a central premise of the Court's current race jurisprudence, which is that only conscious racism violates the Constitution. Thus, their framework allows the Court to reach the identical outcome in Whren, without sanctioning race-based policing. This Response argues, however, that there are some disadvantages to relying upon the Court's existing jurisprudence when questions of race are concerned. First, their defense of pretextual policing is troubling because the practice likely will exacerbate the racial burdens that non-Whites experience at the hands of the police, even if conscious racial bias is nonexistent. Furthermore, focusing solely on officers' subjective racial motivations to determine whether discrimination has occurred ignores the victims' experiences*

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of profiling. In sum, the Court's current conception of race discrimination is anemic and in urgent need of reform. Chin's and Vernon's arguments increase the likelihood that the Court will condemn racial discrimination as unreasonable under the Fourth Amendment. This would mark an important first step towards moving the Court to adopt a more realistic and broader conception of the harms of race discrimination.

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#### INTRODUCTION

The Supreme Court's decision in *Whren v. United States*<sup>1</sup> is infamous for its failure to denounce racial profiling. Rather, the unanimous Court held that subjective motivations, even those based upon racial animus, cannot "invalidate[ ] objectively justifiable behavior under the Fourth Amendment."<sup>2</sup> The decision has garnered widespread criticism for allowing officers to use probable cause of a traffic violation as a pretext for stopping individuals based upon racially motivated suspicions of criminality.<sup>3</sup>

In their Article, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*,<sup>4</sup> Professor Gabriel "Jack" Chin and Mr. Charles Vernon not only provide a withering critique of *Whren's* unfortunate and influential statements that racial discrimination is constitutionally reasonable under the Fourth Amendment but they also present novel doctrinal arguments for re-

<sup>1</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>2</sup> *Id.* at 812.

<sup>3</sup> See, e.g., Devon W. Carbado, (*E*)*Racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1033 (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 442 (1997); David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 545-46 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 340 (1998); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 981-82 (1999).

<sup>4</sup> Gabriel J. Chin & Charles J. Vernon, *Reasonable But Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882 (2015).

versing this problematic dicta.<sup>5</sup> Given the sheer amount of scholarship critical of *Whren* that exists, this is a remarkable achievement.

In his prior scholarship, Professor Chin has been extraordinarily successful in influencing courts through his thoughtful, thorough, and careful analysis of doctrine. He has the uncanny ability to see relationships that other scholars have overlooked. Additionally, because he often bases his novel arguments on current doctrine, his scholarship has been persuasive to judges and cited in numerous decisions, including one of the Supreme Court's recent groundbreaking opinions.<sup>6</sup> In their Article, Professor Chin and Mr. Vernon continue this tradition and utilize the Court's criminal procedure jurisprudence to demonstrate convincingly that there is no basis for legitimizing race discrimination under the Fourth Amendment.

One of their novel and ingenious arguments focuses on the Court's statement in *Whren* that the Fourth Amendment and the Fourteenth Amendment's Equal Protection Clause are distinct. Chin and Vernon point out that in making this claim, the Court ignored its own precedents holding that the Fourth Amendment governs the conduct of state officials only because of its incorporation in the Due Process Clause of the Fourteenth Amendment.<sup>7</sup> Hence, the Court is necessarily saying not that the Equal Protection Clause of the Fourteenth Amendment and the Fourth Amendment are distinct but rather "that the Fourteenth Amendment's Equal Protection Clause and the Fourteenth Amendment's Due Process Clause [are] distinct."<sup>8</sup> Yet, this is nonsensical because the Court has read both clauses of the Fourteenth Amendment as prohibiting race discrimination. Thus, it is

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<sup>5</sup> *Id.* at 886.

<sup>6</sup> See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713–18 (2002)); *United States v. Valdovinos*, 760 F.3d 322, 333 (4th Cir. 2014) (Davis, J., dissenting) (citing Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 880–81 (2005)); *Simmons v. Galvin*, 575 F.3d 24, 58 n.38 (1st Cir. 2009) (Torruella, J., dissenting) (citing Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 (2003)); *Hayden v. Pataki*, 449 F.3d 305, 351 n.3 (2d Cir. 2006) (Parker, J., dissenting) (citing Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004)).

<sup>7</sup> Chin & Vernon, *supra* note 4, at 919–26. Another obvious mistake that the Court made in its analysis is that because the District of Columbia is not a state, the Fourteenth Amendment's Equal Protection Clause does not apply. *Id.* at 919.

<sup>8</sup> *Id.* at 920 (emphasis omitted).

“untenable” to hold that the Due Process Clause “simultaneously prohibits and is indifferent to discrimination.”<sup>9</sup>

Second, Chin and Vernon argue that what is reasonable under the Fourth Amendment must be informed by other constitutional provisions because the Constitution should be read as a whole.<sup>10</sup> The Court has embraced this conception of the Constitution in other cases.<sup>11</sup> Furthermore, the Court has “consistently articulated . . . that unconstitutional behavior is unreasonable.”<sup>12</sup> Thus, since race discrimination is unconstitutional under the Fourteenth Amendment’s Due Process and Equal Protection clauses, it should also be unreasonable under the Fourth Amendment.

Third, Chin and Vernon contend that even if the reasonableness clause of the Fourth Amendment does not prohibit discrimination, the fruit of the poisonous tree doctrine would require suppression of any evidence obtained as a result of a search or seizure motivated by racism.<sup>13</sup> This is because race discrimination violates another core constitutional provision, namely the Equal Protection Clause. Thus, “given that Fourth Amendment, Fifth Amendment, Sixth Amendment, and Fourteenth Amendment due process violations can result in suppression of the fruits of otherwise valid searches or interrogations, it seems reasonable that Fourteenth Amendment equal protection violations should as well.”<sup>14</sup>

Fourth, Chin and Vernon emphasize that the Court’s rationales for rejecting inquiry into officers’ subjective motivations are purely prudential.<sup>15</sup> Two of the prudential rationales are consistent with prohibiting race discrimination, namely holding law enforcement to high standards of conduct and promoting even-handed law enforcement.<sup>16</sup> The final reason is judicial economy, and, as they argue, surely discovering and eliminating racism cannot be considered a “grave and fruitless misallocation of judicial resources.”<sup>17</sup> This is especially so given that the Court has not consistently eschewed inquiry into subjective motivations throughout its Fourth Amendment juris-

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<sup>9</sup> *Id.* at 918.

<sup>10</sup> *Id.* at 927–32.

<sup>11</sup> *Id.* at 929–30.

<sup>12</sup> *Id.* at 930.

<sup>13</sup> *Id.* at 932–35.

<sup>14</sup> *Id.* at 934.

<sup>15</sup> *Id.* at 906–12.

<sup>16</sup> *Id.* at 906–10.

<sup>17</sup> *Id.* at 910 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting)).

prudence. In fact, a “critical, directly relevant category of cases where the Supreme Court has held that it is appropriate to examine subjective motivation are those involving an otherwise valid search challenged as resting on an independent illegality or wrong.”<sup>18</sup>

Additionally, Chin and Vernon draw attention to the fact that the Court has allowed inquiry into officers’ racial motivations when doing so is helpful to establish probable cause or reasonable suspicion.<sup>19</sup> Thus, since “evidence of racial motivation is perfectly admissible when it helps the prosecution’s case, . . . there is only one reason not to allow inquiry into racial motivation when it helps the defendant: that the Court has a special disfavor of claims of racial discrimination.”<sup>20</sup>

With these powerful arguments, Chin and Vernon use the Court’s existing jurisprudence to make a compelling case that racism is unreasonable under the Fourth Amendment, that the products of searches motivated by racial animus should be suppressed, and that inquiry into officers’ subjective motivations is appropriate during suppression hearings. Because their elegant analysis fits comfortably within prevailing doctrine, there is reason for optimism that the Court will adopt their arguments and reject *Whren’s* problematic dicta.

There are, however, some disadvantages to relying upon the Court’s existing jurisprudence when questions of race are concerned. This is demonstrated by Chin and Vernon’s argument that the Court could have reached the identical outcome in *Whren*, without sanctioning race-based policing, by using the *Oyler v. Boles*<sup>21</sup> framework.<sup>22</sup>

In *Oyler*, the Court “applied equal protection principles to establish the rule that prosecutors are free to bring charges supported by probable cause for any reason, except that they may not charge based on race, religion, or other unconstitutional considerations.”<sup>23</sup> Using this framework, Chin and Vernon assert that, provided racism does not motivate an officer’s conduct, “there is no Fourth Amendment problem in stopping a driver based on probable cause of a traffic violation in hopes that the stop will lead to evidence or a statement about a wholly unrelated crime.”<sup>24</sup> In other words, the authors embrace pretext stops as long as these stops do not involve racial profiling. Furthermore, in addition to defending *Whren’s* endorsement of pretextual

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<sup>18</sup> *Id.* at 914.

<sup>19</sup> *Id.* at 940–41.

<sup>20</sup> *Id.* at 941.

<sup>21</sup> *Oyler v. Boles*, 368 U.S. 448 (1962).

<sup>22</sup> Chin & Vernon, *supra* note 4, at 888.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 884.

traffic stops, Chin and Vernon implicitly embrace a central premise of the Court's current race jurisprudence—that only conscious racism violates the Constitution.<sup>25</sup>

From a purely instrumental perspective, these arguments make sense. Their goal of convincing the Court to overrule *Whren*'s problematic dicta in the next appropriate case is facilitated if the Court can decide *Whren* “the same way, but without the unnecessary ruling that race discrimination was not unreasonable under the Fourth Amendment.”<sup>26</sup> The authors highlight the fact that

[i]f the Court adopt[s] *Oyler* as the rule for police as well as prosecution discretion, broad categories of heretofore permissible forms of police conduct would not be called into question. The only issues now submerged in the objective test that would become cognizable are forms of discrimination that are already prohibited by other provisions of the Constitution.<sup>27</sup>

Importantly, their argument that conscious racial profiling is unreasonable under the Fourth Amendment is completely persuasive. So too is their argument that it is consistent with existing precedent to allow inquiry into officers' subjective motivations to uncover race discrimination. If Chin and Vernon are able to convince the Court to create a bright-line rule that race discrimination is unreasonable under the Fourth Amendment, this will be a groundbreaking and important achievement.

As discussed below, however, their embrace of pretextual policing is troubling because the practice likely will exacerbate the racial burdens that individuals of color experience at the hands of the police, even if conscious racial bias is nonexistent. Furthermore, focusing solely on officers' subjective racial motivations to determine whether discrimination has occurred, what Devon Carbado has termed the “perpetrator perspective,”<sup>28</sup> ignores the victims' experiences of profiling. Thus, the perpetrator perspective misapprehends the harm of race discrimination, which occurs regardless of whether a malicious racial actor exists.<sup>29</sup>

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<sup>25</sup> See *id.* at 888–89.

<sup>26</sup> *Id.* at 889.

<sup>27</sup> *Id.* at 915–16.

<sup>28</sup> Carbado, *supra* note 3, at 968.

<sup>29</sup> For articles critiquing the Supreme Court's intent requirement, see Barbara J. Flagg, “Was Blind, but Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 958 (1993); Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”*, 40 CONN. L.

## I. PRETEXT STOPS

Pretext stops allow officers to use traffic violations as a cover to act on their suspicions of criminality in the absence of reasonable suspicion or probable cause.<sup>30</sup> In support of their argument that pretext is defensible, Chin and Vernon highlight that officers often consider factors unrelated to the interest of enforcing traffic regulations in deciding whether or not to stop a driver.<sup>31</sup> For instance, officers may stop vehicles to boost their numbers after being reprimanded for being lazy or to train new recruits on how to conduct traffic stops.<sup>32</sup> Thus, Chin and Vernon conclude,

[i]f police may consider matters which have no relation to the culpability or the conduct of the defendant in determining who to investigate (such as public concerns about particular types of crimes or the officer's own reputation), then it is not clear why they could not also consider potential offenses committed by the motorist in determining who to stop.<sup>33</sup>

In their view, as long as conscious racial animus is nonexistent, pretext stops are justifiable. Pretextual policing, however, will facilitate race-based policing even in the absence of conscious bias because of the influence of implicit racial bias on officer judgments.

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REV. 931, 946 (2008) (making the point that under the Supreme Court's jurisprudence, "because the defendants were not intentional racists, no constitutional violation had occurred, even though the facts showed dramatic racial inequality"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1136-37 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 326 ("[C]hallenges to discriminatory police practices [under the Equal Protection Clause] will fail without proof of conscious racial animus on the part of the police.").

<sup>30</sup> Others have more fully discussed why the Fourth Amendment should prohibit pretextual conduct and I will not repeat those arguments here. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 433-39 (1974) (discussing pretext); James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 641-43 (1985); Harris, *supra* note 3, at 554-59; Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 257-58 (1989) (noting that traffic laws provide the twentieth century equivalent of the general warrant); Sklansky, *supra* note 29, at 329 ("[A] Fourth Amendment jurisprudence more alert to minority interests and experiences probably would find room for a rule disallowing pretextual detentions for traffic violations . . .").

<sup>31</sup> Chin & Vernon, *supra* note 4, at 898-900.

<sup>32</sup> See *id.* at 898.

<sup>33</sup> *Id.* at 899.



### A. *Implicit Racial Bias*

Copious evidence demonstrates that police disproportionately stop Black and Latino drivers despite the fact that those populations do not commit traffic offenses at significantly higher rates than Whites.<sup>34</sup> Often the assumption is that this results from conscious and intentional racial profiling, and it is certainly true that officers engage in this conduct.<sup>35</sup> Individuals of color, however, will continue to bear the brunt of pretextual policing even in the absence of conscious bias because of the effect of implicit racial biases on officer judgments of criminality and suspicion.<sup>36</sup>

The phrase “implicit racial bias” refers to the influence of unconscious stereotypes (beliefs) and attitudes (feelings) about racial groups on our judgments and behaviors.<sup>37</sup> For instance, research consistently demonstrates that most people unconsciously associate Blacks with criminality, even if this association conflicts with their consciously held beliefs.<sup>38</sup> This implicit association exists in our minds because we are constantly exposed to it in our society. Over three decades of research regularly demonstrates that these implicit biases, once activated, can negatively influence our behaviors towards and judgments of people of color in ways we are unaware of and often cannot control.<sup>39</sup>

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<sup>34</sup> See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 560, 562–65 (1997) (discussing statistical studies); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 & n.58 (2007); see also CHRIS KOSTER, MO. ATT’Y GEN., 2013 ANNUAL REPORT: MISSOURI VEHICLE STOPS, EXECUTIVE SUMMARY 6 (2014), available at <https://ago.mo.gov/docs/default-source/public-safety/2013analysisbykoster.pdf?sfvrsn=2> (noting that “African-Americans were 66 percent more likely than whites to be stopped based on their respective proportions of the Missouri driving-age population in 2013”); JACK McDEVITT ET AL., NORTHEASTERN U. INST. ON RACE & JUST., RHODE ISLAND TRAFFIC STOP STATISTICS DATA COLLECTION STUDY: INITIAL FINDINGS REPORT, at iii (2014), available at <http://www.northeastern.edu/irj/wp-content/uploads/2014/06/RI-Traffic-Stop-Statistics-Data-Collection-Study-Executive-Summary-1.13.2014.pdf> (noting that “in 23 communities in Rhode Island, non-white residents were more likely to be stopped than census data would have suggested”).

<sup>35</sup> See, e.g., Hecker, *supra* note 34, at 566 & n.74.

<sup>36</sup> See *id.* at 586.

<sup>37</sup> See L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2042–43, 2053 (2011).

<sup>38</sup> See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 878 (2004); Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. & HUM. BEHAV. 483, 485 (2004); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 433 (2007); Sophie Trawalter et al., *Attending to Threat: Race-Based Patterns of Selective Attention*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1322, 1322 (2008).

<sup>39</sup> See Lane, *supra* note 38, at 444.

There is ample reason for concern that implicit racial biases will have pernicious effects on police officers' judgments of Blacks.<sup>40</sup> In the discussion that follows, I will focus on the influence of these implicit biases as they pertain to the Black community because the scientific literature is most developed in this area.

First, these biases flourish in situations where individuals make decisions based upon limited information.<sup>41</sup> This is precisely the situation that exists when officers are acting on hunches of criminality that do not rise to the level of reasonable suspicion or probable cause—in other words, when they are engaged in pretext stops. For instance, research demonstrates that when officers are asked to interpret ambiguous evidence, implicit biases negatively affect their judgments. In one study, police officers concluded that a male juvenile's ambiguous behaviors were more culpable and more deserving of severe punishment when implicit racial biases were activated.<sup>42</sup> In another, officers were more likely to see weapons in the hands of unarmed Black individuals than in the hands of unarmed White individuals as a result of implicit bias.<sup>43</sup>

These findings are consistent with a classic study showing that racial stereotypes can cause individuals to evaluate ambiguous actions performed by Black individuals with more suspicion than identical actions performed by White individuals.<sup>44</sup> In this study, individuals were asked to rate an ambiguous shove as aggressive or horsing around. Researchers found that the race of the actors affected how the subjects rated the shove. For instance, when both actors were White, only thirteen percent evaluated the behavior as aggressive.<sup>45</sup> But when both actors were Black, sixty-nine percent of the subjects rated the shove as aggressive.<sup>46</sup>

The second reason implicit biases are likely to influence officers is that officers are constantly on the lookout for criminality. Problemati-

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<sup>40</sup> For a more in-depth discussion, see Richardson, *supra* note 37, at 2042–52; L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1148–51 (2012).

<sup>41</sup> Graham & Lowery, *supra* note 38, at 486–87.

<sup>42</sup> *Id.*

<sup>43</sup> Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1327 (2002); see also B. Keith Payne, *Weapon Bias: Split-Second Decisions and Unintended Stereotyping*, 15 CURRENT DIRECTIONS PSYCHOL. SCI. 287, 287–88 (2006).

<sup>44</sup> Birt L. Duncan, *Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks*, 34 J. PERSONALITY & SOC. PSYCHOL. 590, 596–97 (1976).

<sup>45</sup> *Id.* at 595.

<sup>46</sup> *Id.*

cally, research demonstrates that simply thinking about crime is sufficient to trigger implicit racial biases in police officers.<sup>47</sup> This is believed to occur because the association between Blacks and crime is so well rehearsed that it has become bidirectional—thoughts of crime unconsciously activate thoughts of Blacks, and, reciprocally, thoughts of Blacks activate thoughts of crime.<sup>48</sup> Researchers discovered that this association led officers to pay more attention to Black faces than to White faces,<sup>49</sup> a form of unconscious racial profiling. .

### B. *Officer Judgments of Suspicion*

Importantly, Chin and Vernon do not endorse racial profiling. They argue that all pretext stops, whether they are based upon race, sex, sexual orientation or religion, are unjustifiable. Thus, in making their argument in support of pretextual policing, they ask the reader to “put[ ] aside the possibility of selection based on race . . . [and] imagine for simplicity that there is no possibility of discrimination.”<sup>50</sup> The problem is that given the ubiquity of implicit racial bias, it is impossible to set aside the possibility of selection based on race. Because officers are on the lookout for criminal activity, they are likely steeped in unconscious Black stereotypes that will influence their judgments of suspicion.

Consider one of the examples given by Chin and Vernon. They argue that “it should not be objectionable to select from among all speeders those who demonstrate indicia, falling short of reasonable suspicion or probable cause, of drunk driving.”<sup>51</sup> If we extend this argument to allow officers to stop individuals who are speeding in order to investigate possible drug dealing, we have the facts of *Whren*. In that case, the officers were on patrol for criminal activity.<sup>52</sup> As the research demonstrates, thinking about crime is sufficient to activate unconscious bias, which can lead to increased scrutiny of young, Black men. This can explain why Whren’s vehicle drew the officers’ attention even if the officers were not engaged in conscious racial profiling.

Once their attention was captured, the officers noticed the male driver looking at his passenger’s lap while they were stopped at a stop sign.<sup>53</sup> There is nothing inherently suspicious or criminal about this

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<sup>47</sup> See Eberhardt et al., *supra* note 38, at 883.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

<sup>50</sup> Chin & Vernon, *supra* note 4, at 896–97.

<sup>51</sup> *Id.* at 899.

<sup>52</sup> *Whren v. United States*, 517 U.S. 806, 808 (1996).

<sup>53</sup> *Id.*

behavior. Had the occupants been White, the officers may not have noticed the behavior or may not have thought twice about it. However, because of the strong implicit association between Blacks and crime and because young, Black men serve as the conscious and unconscious mental prototype of drug dealers,<sup>54</sup> it is unsurprising that the officers developed a gut feeling that this behavior was suspicious. Again, setting aside the possibility of conscious bias, implicit racial bias can also explain why these ambiguous behaviors aroused the officers' suspicions. Once this occurred, it was relatively simple to find a traffic violation to use as a pretext to stop the vehicle and conduct a drug investigation unsupported by reasonable suspicion or probable cause.<sup>55</sup> Thus, even in the absence of conscious profiling, race can influence pretextual traffic stops.

The probable effect of implicit bias on pretext stops is not limited to the initial decision to stop the vehicle. Chin and Vernon give another example of a pretext stop involving a suspected residential burglar who escapes in a blue 2005 Honda Accord.<sup>56</sup> They argue that "a possibility falling short of reasonable suspicion that the motorist has committed a burglary should not immunize the motorist from being stopped."<sup>57</sup> Hence, they contend that using traffic offenses to stop all cars matching this description in an attempt to catch the burglar is legitimate.<sup>58</sup>

If officers actually stop *all* cars matching this description, then implicit bias will not influence the decision because officers are not exercising any discretion. These biases, however, are likely to influence discretionary decisions that occur after the stop, such as whether to issue a ticket, arrest the driver, seek consent to search, or bring a drug dog to the scene. Again, implicit biases can still influence officers' judgments of suspicion in ways that will burden Blacks more than Whites even when officers are not engaged in conscious profiling.

Thus, pretext stops will continue to undercut the privacy rights of individuals of color, even in the absence of conscious bias. People of color will be stopped more often because implicit biases will likely

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<sup>54</sup> See Trawalter et al., *supra* note 38, at 1322.

<sup>55</sup> See Harris, *supra* note 3, at 545 ("In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention."); Sklansky, *supra* note 29, at 273 ("Since virtually everyone violates traffic laws at least occasionally, the upshot of [the Supreme Court's Fourth Amendment Cases] is that police officers, if they are patient, can eventually pull over almost anyone they choose . . .").

<sup>56</sup> Chin & Vernon, *supra* note 4, at 899.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 899–901.

influence how the police interpret their ambiguous behaviors and not because they necessarily engaged in more suspicious behaviors than White individuals. Furthermore, giving officers license to engage in pretext stops encourages officers to act on their racial hunches based upon highly ambiguous evidence, which increases the influence of unconscious racial bias on their judgments. If anything, more evidence of criminality should be required before allowing officers to conduct seizures to investigate potential wrongdoing.<sup>59</sup> This is because, although implicit biases are ubiquitous, studies demonstrate that gathering more information can reduce the biases' effects on behaviors and judgments.<sup>60</sup> In sum, although Chin and Vernon's reasons for defending pretext may be purely instrumental, ultimately pretext stops will continue to exacerbate race-based policing even when conscious bias is absent.

## II. PERPETRATOR PERSPECTIVE

Under the Court's existing doctrine, racial discrimination claims fail without proof of malicious racial motives.<sup>61</sup> Thus, the Court's race jurisprudence only recognizes the harm of racial discrimination when perpetrated by an intentionally racist actor. Additionally, the Court has not shown a willingness to embrace a different conception of race discrimination. This can explain why Chin and Vernon focus their arguments against racial profiling on discovering officers' subjective motivations.

As Charles Lawrence astutely observed, however, the Court's "motive-centered inquiry, its requirement that we identify a perpetrator, a bad guy wearing a white sheet and hood, ma[kes] no sense if equality [is] our goal."<sup>62</sup> By arguing that the Court should allow inquiry into the subjective motivations of officers to determine if racial animus motivated their pretextual traffic stops, Chin and Vernon implicitly adopt the "perpetrator perspective."<sup>63</sup> The problem with the

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<sup>59</sup> For an in-depth discussion of this point, see Richardson, *supra* note 40, at 2075–83.

<sup>60</sup> See, e.g., Patricia G. Devine & Lindsay B. Sharp, *Automaticity and Control in Stereotyping and Prejudice*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION 61, 72 (Todd D. Nelson ed., 2009) (noting that gathering more individuating information can reduce reliance on stereotypes).

<sup>61</sup> *Washington v. Davis*, 426 U.S. 229, 239–42 (1976) (“[The Court’s] cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.”).

<sup>62</sup> Lawrence, *supra* note 29, at 944.

<sup>63</sup> As Devon Carbado writes, “race potentially matters in the Fourth Amendment context only when a case involves a ‘racially bad’ cop. Police officers who cannot be so described are

perpetrator perspective is that it misapprehends the harm of race discrimination.

Because race discrimination can occur even in the absence of conscious bigotry, this Response argues against limiting the remedy for discrimination in law enforcement to those instances where a racially-motivated, bad actor can be discovered. The absence of conscious animus does not eliminate the racial burdens of being the victim of racial profiling. The harm consists of the victim's lost sense of security and privacy as well as the humiliation of being a constant target of police enforcement activity.<sup>64</sup> These harms exist independently of an officer's conscious motives. Thus, as Devon Carbado observes, the "victim's perspective . . . is less concerned with whether police officers are racially blameworthy or racially culpable in the 'bad cop' sense" and, as a result, "provides a more complete understanding of the harms of race-based policing."<sup>65</sup>

Furthermore, because racial discrimination claims are not cognizable in the absence of a malicious actor,<sup>66</sup> the perpetrator perspective is even more pernicious. It allows police departments to abdicate responsibility for discovering and addressing the institutional and structural practices that unevenly distribute the burdens of policing amongst individuals of color even in the absence of conscious racial animus. In this way, the perpetrator perspective supports racial subordination.<sup>67</sup>

## CONCLUSION

Despite my disagreement with Chin and Vernon's argument that pretextual policing is justifiable and my discomfort with their adoption

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presumed to be 'racially good,' and their racial interactions with people on the street are presumed to be constitutional." Carbado, *supra* note 3, at 968–69 (footnote omitted).

<sup>64</sup> The perspective of many Black victims is that traffic stops are "a systematic, humiliating, and often frightening form of police harassment." Sklansky, *supra* note 29, at 312; *see also* Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2355 (2002) (stating that racial profiling "arguably ha[s] the effect of reducing [minority] groups' social status and increasing their sense of isolation from the broader American political community").

<sup>65</sup> Carbado, *supra* note 3, at 970.

<sup>66</sup> Lawrence, *supra* note 29, at 946.

<sup>67</sup> Speaking about the equal protection clause, Professor Charles Lawrence recognized that the search for a bad actor means that when none exists, none of us have a responsibility for creating a remedy for racial discrimination, no matter what form it takes. As he writes, "The rest of us [are] held guiltless as well, all of us exculpated from any responsibility for society's institutional and structural racism, because no intentional racist planned the unequal result. While blacks continue[ ] to suffer from conditions of inequality, none of us [are] to blame." *Id.* at 946–47.

of the perpetrator perspective, it is difficult to fault Chin and Vernon for making these choices. Although they provide the Court with multiple ways to reverse *Whren's* problematic dicta that race discrimination is reasonable under the Fourth Amendment, the path of least resistance is for the Court to excise the problematic dicta while leaving the remainder of *Whren* undisturbed.<sup>68</sup> Thus, their reasons for endorsing pretext and the perpetrator perspective are understandable.

If Chin and Vernon's arguments are able to convince the Court to create a bright-line rule that race discrimination is unreasonable under the Fourth Amendment, this will be a seminal achievement for a number of reasons. First, it would send a strong message to the police that racial profiling is wrong. Not only may this limit police departments' overt and subtle encouragement of racial profiling,<sup>69</sup> but it also may facilitate the ability of progressive police management to implement programmatic changes to reduce racial disparities in policing. The decision would provide them with a mandate and thus some cover, especially with recalcitrant unions and officers, because they will be able to argue that their proposed changes are required in the face of a Supreme Court decision. It might also empower sergeants and patrol officers to speak out when they witness officers engaged in racial profiling. Second, allowing inquiry into officers' subjective motivations at suppression hearings would finally make race claims cognizable under the Fourth Amendment.<sup>70</sup>

In sum, in their groundbreaking and persuasive article, Chin and Vernon provide powerful arguments for how the Court can overrule its problematic *Whren* dicta. It is true that under their framework, racial discrimination would still be difficult to prove. Chin and Vernon forcefully insist, however, that *Whren's* doctrinal endorsement of race discrimination must be remedied nonetheless. As they write, "*Whren* is in many ways the *Plessy* of its era. It endorsed racial discrimination, and thereby encouraged its spread."<sup>71</sup> In fact, they maintain that *Whren* is even more egregious than *Plessy* because "[t]he

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<sup>68</sup> Chin & Vernon, *supra* note 4, at 942.

<sup>69</sup> Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010) (noting that *Whren* "made legal challenges to profiling more, not less, difficult, thereby implicitly encouraging police officers to rely on racial profiles in law enforcement").

<sup>70</sup> For a discussion of this point, see Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 560 (1998).

<sup>71</sup> Chin & Vernon, *supra* note 4, at 941.

Court could have reached the same outcome with pretext searches or arrests, while saying that racial discrimination was prohibited.”<sup>72</sup>

The Court’s current conception of race discrimination is anemic and in urgent need of reform. The doctrine must move beyond its focus on discovering a bad racial actor and begin to address the institutional and structural inequities that continue to plague policing regardless of an officer’s conscious and unconscious motives. By working within the Court’s existing doctrine to support their arguments, Chin and Vernon increase the likelihood that the Court will condemn race discrimination as unreasonable under the Fourth Amendment. This would be an incredible achievement and an important first step towards moving the Court to adopt a more realistic and broader conception of the harms of race discrimination.

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