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**COUNTY COURT OF NEW YORK,
ESSEX COUNTY**

People v. Bordeau¹
(decided Oct. 27, 2008)

Marc Bordeau brought a pretrial motion to dismiss the State's five-count indictment against him and suppress all evidence procured by the police during a traffic stop.² Bordeau sought dismissal because the alleged traffic infraction that formed the basis of the indictment did not provide the police with the requisite probable cause to initiate such a traffic stop, constituting an unreasonable search and seizure³ in violation of both the United States Constitution⁴ and the New York Constitution.⁵ The Essex County Court granted Bordeau's motion and held that his three-second encroachment of the boundary line between the road and the shoulder, without more, was not a traffic infraction and therefore could not serve as a valid predicate for stopping his car and charging him with the five-count indictment.⁶

In February 2008, an intoxicated Marc Bordeau was driving down Joyce Road, a public highway in Essex County, New York.⁷ While Bordeau was driving, a state trooper observed "the passenger-side tires cross the white 'boundary' or 'fog' line separating the travel lane from the shoulder for a total of two or three seconds."⁸ Based solely on this one-time observation of the defendant driving on the

¹ No. 08-033-I, 2008 WL 4700522 (Essex County Ct. Oct. 27, 2008).

² *Id.* at *1.

³ *Id.*

⁴ U.S. CONST. amend. IV, states, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

⁵ N.Y. CONST. art. I, § 12, states, in relevant part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated"

⁶ *Bordeau*, 2008 WL 4700522, at *3.

⁷ *Id.* at *1.

⁸ *Id.*

shoulder, the officer pulled Bordeau over and initiated a traffic stop.⁹ The officer administered a breathalyzer test on Bordeau, which confirmed that he was driving under the influence of alcohol.¹⁰ These test results, combined with Bordeau's incriminating statements and the seizure of marijuana and alcohol, led directly to his arrest and indictment.¹¹ Bordeau was subsequently charged with four counts of driving while intoxicated, "consumption or possession of alcohol in a motor vehicle," and "unlawful possession of marijuana," all based upon the underlying traffic infraction for "moving from lane unsafely" which served as the probable cause for the stop.¹²

Pursuant to *People v. Ingle*,¹³ a hearing was held to determine the validity of the traffic stop; a lawful stop would render the search and seizure reasonable and preclude the suppression of both the incriminating statements and "all fruits of the stop."¹⁴ Upon the defendant's motion to dismiss, the Essex County Court sought to determine if the "one-time operation of a motor vehicle to the right of the 'fog' line constitute[d] a violation of Vehicle and Traffic Law [section] 1128(d)," and whether such a violation could serve as the sole basis for lawfully stopping the defendant's car.¹⁵ The court reasoned that it would have to suppress all statements and evidence if the charge of "moving from lane unsafely," based on the three second cross of the fog line, was not a traffic violation within the scope and meaning of the statute.¹⁶ Absent probable cause that Bordeau had committed a traffic violation, he possessed "the general right to be free from arbitrary State intrusion on his freedom of movement even in an automobile."¹⁷ The court's determination of probable cause turned on its interpretation of the clauses of the statute, rather than an

⁹ *Id.*

¹⁰ *See id.*

¹¹ *Bordeau*, 2008 WL 4700522, at *1.

¹² *Id.*

¹³ 330 N.E.2d 39, 41 (N.Y. 1975) ("[T]here must be some valid reason . . . for singling out a particular automobile and its operator for a stop and an inspection to determine compliance with the Vehicle and Traffic Law.")

¹⁴ *Bordeau*, 2008 WL 4700522, at *1, 3.

¹⁵ *Id.* at *1. N.Y. VEH. & TRAF. LAW § 1128(d), states: "When *official markings* are in place indicating those portions of any roadway where crossing such markings would be *especially hazardous*, no driver of a vehicle proceeding along such highway shall at any time drive across such markings." (emphasis added).

¹⁶ *See Bordeau*, 2008 WL 4700522, at *1, 3.

¹⁷ *Id.* at *1 (quoting *Ingle*, 330 N.E.2d at 43) (internal quotation marks omitted).

analysis of either: the subjective intent of the officer who initiated the stop; what a reasonable officer under the circumstances would have done; or a balancing of the State's interest in public safety against the privacy rights of the individual.¹⁸

The court's determination of probable cause focused on the analysis of section 1128(d)'s requirements of "official markings" and "especially dangerous," which were necessary for Bordeau's actions to be a traffic infraction.¹⁹ Relying upon the reasoning of *People v. Shulman*,²⁰ which found that crossing a fog line was "discouraged, but not prohibited," the court concluded that if crossing such a line was *not even prohibited*, then it could neither be "especially dangerous" nor the basis for a valid traffic stop under the statute.²¹ Furthermore, the term "official markings" was only referenced in one statutory provision, which required that: "[a]n order, ordinance, rule, or regulation establishing specific lane changing prohibitions for a particular section of roadway is necessary for no-lane-changing markings to be [']official markings,' as referred to in Section 1128(d) of the Vehicle & Traffic Law."²² As there was no rule or regulation in effect that made the fog line on Joyce Road an "official marking," and crossing that fog line was merely discouraged and not "especially dangerous," the court held that the officer had no probable cause to believe that Bordeau had committed a traffic infraction based upon section 1128(d).²³ Absent probable cause for the stop under either section 1128(d) or any other provision of the Vehicle and Traffic Law ("VTL"), the traffic stop of Bordeau was deemed "unreasonable" thus violating Bordeau's constitutional protections, and resulted in the suppression of all statements and evidence procured from the traffic stop—including incriminating statements, breathalyzer results, illegal drugs, and alcohol—and the dismissal of all charges against Bordeau.²⁴

The Supreme Court has long protected the rights of every citizen to be free from unreasonable searches and seizures under the

¹⁸ See *id.* at *1-2 (citing *People v. Robinson*, 767 N.E.2d 638, 642 (N.Y. 2001)).

¹⁹ *Id.* at *2.

²⁰ 2006 WL 3858337, at *1 (N.Y. App. Term 2006).

²¹ *Bordeau*, 2008 WL 4700522, at *2 (citing *Shulman*, 2006 WL 3858337, at *1).

²² *Id.* (quoting N.Y. COMP. CODES R. & REGS. tit. 17, § 3B.04 (West 2009)).

²³ *Id.* at *2-3.

²⁴ *Id.* at *1, 3.

Fourth Amendment, regardless of whether the subject of the search involved a person, a home, or an automobile on a public highway.²⁵ The “reasonableness” of a traffic stop turns on whether probable cause existed for the officer to make such a stop.²⁶ In *Brinegar v. United States*, the Court addressed the fine line between “mere suspicion and probable cause” while balancing the privacy interests of individual citizens against the ability of the police to adequately protect that citizen’s community.²⁷

The Supreme Court found probable cause to exist, “where the facts and circumstances within . . . (the officer’s) knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”²⁸ A citizen driving on the public highway in a vehicle with illegal cargo “who has given no good cause for believing he is engaged in that sort of [criminal] activity is entitled to proceed on his way without interference,” regardless of the suspicion elicited in the police officer’s mind.²⁹ The Court’s quasi-objective standard focused on whether a reasonable police officer would believe that an offense had been committed based on the facts and knowledge the officer actually and subjectively possessed *prior* to making the traffic stop.³⁰

The Court then expressly balanced the rights of citizens to be free from “unreasonable interferences with privacy” against the “leeway” needed to allow the police officer to protect the community as a

²⁵ *Brinegar v. United States*, 338 U.S. 160, 164 (1949) (citing *Carroll v. United States*, 267 U.S. 132, 147 (1925)). The importance of the Fourth Amendment was eloquently addressed by Justice Jackson, when he stated:

These, I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Id. at 180-81 (Jackson, J., dissenting).

²⁶ *Id.* at 175 (majority opinion) (“In dealing with probable cause, however . . . we deal with probabilities. . . . [T]he factual and practical considerations of everyday life on which reasonable and prudent men . . . act.”).

²⁷ *Id.* at 176.

²⁸ *Id.* at 175-76 (citing *Carroll*, 267 U.S. at 162) (internal quotation marks omitted).

²⁹ *Brinegar*, 338 U.S. at 177.

³⁰ *See id.* at 175-77.

whole.³¹ The Court concluded that the police must be allowed to make reasonable mistakes in “more or less ambiguous” situations in order to avoid “unduly hamper[ing] law enforcement” or “leav[ing] law-abiding citizens at the mercy of the officers’ whim or caprice.”³²

In *Terry v. Ohio*, the Court addressed the repercussions of an unlawful search and seizure and further defined the scope of reasonableness.³³ The only meaningful deterrent to unlawful searches and seizures has been the exclusion of all evidence procured after the illegal stop, and “without it the constitutional guarantee against unreasonable searches and seizures would be a mere ‘form of words.’”³⁴ The Court acknowledged that the “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat” must be judged by the *reasonableness* of the officer’s conduct and the principles underlying probable cause.³⁵

The determination of “reasonableness” is a balancing of the privacy interests of citizens against the police’s need to intrude upon those interests, when “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”³⁶ Without these particular facts known to the officer *prior to* the stop or seizure, a judge would not be able to objectively assess the reasonableness of the search or seizure, scrutinize the lawfulness of the stop, or exclude the evidence procured from an illegal stop.³⁷ Anything less than this factual analysis and reasonableness under the circumstances standard would result in lawful searches and seizures based on either “inarticulate hunches”³⁸ or the arresting of-

³¹ *Id.* at 176.

³² *Id.*

³³ 392 U.S. 1, 15 (1968).

³⁴ *Id.* at 12 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961)).

³⁵ *Id.* at 20.

³⁶ *Id.* at 20-21 (“In order to assess the reasonableness of . . . conduct as a general proposition, it is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen” (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967)) (internal quotation marks omitted).

³⁷ *Id.* at 21.

³⁸ *See Terry*, 392 U.S. at 38 (Douglas, J., dissenting).

Only that line [between probable cause and mere suspicion] draws a meaningful distinction between an officer’s mere inkling and the presence of facts within the officer’s personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime.

ficer's "subjective good faith," causing the "protections of the Fourth Amendment [to] evaporate, and the people [to] be secure in their persons, houses, papers and effects, only [at] the discretion of the police."³⁹

The Supreme Court applied these principles to an officer who, while on the beat, noticed three men strolling up and down the street peering into the window of a business for an extended period of time, stopping to confer with each other after each pass.⁴⁰ The Court noted that the officer's swift response to stop and seize the individuals was both permissible and reasonable—that the facts known to the officer at the time would have led a reasonable officer to believe that the individuals were "casing" the business and about to commit a crime—and *outbalanced* the privacy rights of these three individuals.⁴¹

In *Whren v. United States*, the Court applied the underlying reasoning and rationale of both *Terry* and *Brineger* to the "temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation."⁴² In *Whren*, an officer stopped a motorist on the public highway after observing the vehicle linger at a stop sign in a "high drug area," turn suddenly without a signal, and speed off at an "unreasonable" rate of speed.⁴³ After pulling the car over for the traffic infractions, the officer noticed large bags of illegal drugs, arrested the motorists, and charged them with violating federal drug laws based solely on the probable cause that a traffic violation had occurred.⁴⁴ The Court found no distinction between the seizure of a person on the street, as in *Terry*, and the temporary detention of an automobile, stating:

Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision . . . [and] the decision to stop an automobile is

Id.

³⁹ *Id.* at 22 (majority opinion) (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (internal quotation marks omitted).

⁴⁰ *Id.* at 23.

⁴¹ *See id.* at 22-23.

⁴² 517 U.S. 806, 808 (1996).

⁴³ *Id.*

⁴⁴ *Id.* at 809.

reasonable where the police have probable cause to believe that a traffic violation has occurred.⁴⁵

The motorists did not contest that the traffic infractions had occurred, but argued that the use of “heavily and minutely regulated” traffic laws could not serve as a valid basis for an officer’s probable cause to search an automobile for illegal drugs; the traffic infraction was a mere pretext to allow the officer to perform an “unreasonable” search and seizure and eviscerate the protections incumbent in the Fourth Amendment.⁴⁶ The motorists proposed that the standard for probable cause should be altered to address the problem of pretextual stops: “the Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given.”⁴⁷

A unanimous Court rejected these arguments because the subjective intentions or ulterior motives of an arresting officer “play no role in ordinary probable-cause Fourth Amendment analysis,” and “the Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent [of the officer].”⁴⁸ The Court noted that the “foremost method of enforcing traffic and vehicle safety regulations . . . is acting

⁴⁵ *Id.* at 809-10.

⁴⁶ *Id.* at 810. The motorists further justified the need for an enhanced level of Fourth Amendment protection for motorists on the public highway, stating:

[I]n the unique context of civil traffic regulations probable cause is not enough. Since . . . the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible, a police officer will almost invariably be able to catch any given motorist in a technical violation. This creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.

Whren, 517 U.S. at 810 (internal quotation marks omitted).

⁴⁷ *Id.*

⁴⁸ *Id.* at 813-14. The Court expressed doubt about perceiving the subjective intent of a reasonable officer, stating:

[It is] easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a “reasonable officer” would have been moved to act upon the traffic violation. . . . [O]ne would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.

Id. at 815.

upon observed violations which afford the quantum of individualized suspicion necessary to ensure that police discretion is sufficiently constrained.”⁴⁹

Furthermore, the Court distanced itself from the explicit balancing test, performed in both *Terry* and *Brinegar*, explaining that it was generally only required where no probable cause existed or where the search and seizure was “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.”⁵⁰ In *Whren*, the traffic stop was not “such an extreme practice, and so is governed by the usual rule that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”⁵¹ Subsequently, the Court rejected the defendant’s last argument—that the multitude of minute traffic regulations serve as a pretext for an officer to stop any motorist they wish—reasoning that courts possess no way to either identify when a law becomes “so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement,” or decide which laws are “sufficiently important to merit enforcement.”⁵²

New York has also been vigilant in protecting a citizen’s Fourth Amendment right to be free of unreasonable searches and seizures on the public highways. These protections have been guaranteed by adopting the federal jurisprudence under *Terry* and *Whren* and holding police officers and prosecutors to the strictest construction of the traffic rules and regulations, which now serve as the objective standard for probable cause in New York.⁵³ In *People v. Ingle*, the New York Court of Appeals promulgated their standard to judge the validity of an officer’s vehicle stop under the guise of a “routine traffic stop.”⁵⁴ The court addressed two distinct police practices of stopping vehicles pursuant to the VTL: “A single automobile traveling on a public highway may be stopped for a ‘routine traffic check’

⁴⁹ *Id.* at 817-18 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55, 659 (1979)) (internal quotation marks omitted).

⁵⁰ *Whren*, 517 U.S. at 818 (noting that deadly force, warrantless or unannounced entry into a home, or “physical penetration of the body” exemplifies such extreme circumstances).

⁵¹ *Id.*

⁵² *Id.* at 818-19.

⁵³ See *People v. Robinson*, 767 N.E.2d 638, 640, 643 (N.Y. 2001). “[A] stop of an automobile as for a ‘routine traffic check’ is a seizure within constitutional limitations.” *People v. Ingle*, 330 N.E.2d 39, 43 (N.Y. 1975).

⁵⁴ 330 N.E.2d at 40.

when [either] a police officer reasonably suspects a violation of the Vehicle and Traffic Law . . . [or] when conducted according to non-arbitrary, nondiscriminatory, uniform procedures for detecting violations.”⁵⁵ Outside of those permissible vehicle stops, “any other kind of stopping without cause or reason or by arbitrary caprice or curiosity is an impermissible intrusion on the freedom of movement,” requiring the suppression of all evidence acquired as the “fruit” of the unlawful stop.⁵⁶

This line between the permissible lawful traffic stop and the impermissible violation of a motorist’s Fourth Amendment rights requires a court to balance the interests of the State against those of the individual.⁵⁷ The court explicitly adopted the rationale and reasoning of *Terry*—that “reasonableness” is determined by balancing the privacy interests of citizens against the police’s need to intrude upon those interests—declaring that the interest balancing and the objective standard for measuring probable cause are both *reflected in the language of the particular statutory section of the VTL* for which a traffic stop was made.⁵⁸ The court held that “an arbitrary stop of a single automobile for a purportedly ‘routine traffic check’ is impermissible unless the police officer reasonably suspects a violation of the Vehicle and Traffic Law” based on a minimal factual basis known to, or observed by, the officer *prior to* engaging the stop.⁵⁹

In *People v. Robinson*, a sharply divided New York Court of Appeals expressly adopted *Whren*, holding:

[W]here a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate article I, [section]

⁵⁵ *Id.* (noting “the degree of suspicion required” is less than that required for probable cause).

⁵⁶ *Id.* at 42-43.

⁵⁷ *Id.* at 43 (citing *Terry*, 392 U.S. at 20-21). Furthermore, the court noted the difficulty inherent in this balancing “is the separation of the permissible from the impermissible without unduly frustrating legitimate police purposes or encroaching unduly on the rights of individuals even as motorists.” *Ingle*, 330 N.E.2d at 41.

⁵⁸ *See id.* at 43. This “statutory objective standard and balancing test” has been strictly adhered to by the inferior courts of New York. *See People v. Walters*, 623 N.Y.S.2d 396, 397 (App. Div. 3d Dep’t 1995) (finding a driver’s repeated crossing of “the center double yellow line and the white fog line” observed by a police officer was a permissible basis for lawful stop, as measured by the traffic regulation, and sufficient to uphold DWI conviction).

⁵⁹ *Ingle*, 330 N.E.2d at 43-44 (“All that is required is that the stop be not the product of mere whim, caprice, or idle curiosity.”).

12 of the New York State Constitution . . . [regardless of either] the primary motivation of the officer . . . [or] what a reasonable traffic officer would have done under the circumstances.⁶⁰

In adopting *Whren*, the majority simplified the Fourth Amendment analysis by excluding any evidence of the officer's subjective intent, bypassing the explicit balancing of governmental and individual interests, and determining the "reasonableness" of the officer's search and seizure solely on the judicial interpretation of the verbiage included in the VTL.⁶¹

In *Robinson*, three appeals were consolidated to consider whether an officer, "whose primary motivation [was] to conduct another investigation" subsequently stopped a vehicle under the pretext of a traffic law infraction, violated the motorist's constitutional right to be free from unreasonable searches and seizures.⁶² In each case, a police officer observed a traffic infraction—running a red light, expired registration, or turn without signal—stopped the vehicle and observed or suspected other violations—gun possession, driving while intoxicated, or possession of drugs—for which the motorist was subsequently charged with the more serious crime.⁶³ The defendants argued that "although probable cause existed warranting a stop of the vehicle for a valid traffic infraction, the officer's primary motivation was to conduct some other investigation," requiring dismissal of all charges and the suppression of all evidence procured from the unreasonable search and seizure.⁶⁴ The court summarily rejected the defendants argument, noting that it has never regarded either the subjective intent of a police officer or whether a "reasonable traffic officer would have made the same stop" as relevant to the determination of probable cause.⁶⁵

The court split over the significance of adhering to their past expression of disapproval over such pretextual stops and the need for

⁶⁰ 767 N.E.2d 638, 643 (N.Y. 2001).

⁶¹ See *id.* at 642-43.

⁶² *Id.* at 640-41.

⁶³ *Id.*

⁶⁴ *Id.* at 642.

⁶⁵ *Robinson*, 767 N.E.2d at 643. The majority and dissent unanimously agreed "that the primary motivation test is not, and should not be, part of our State constitutional jurisprudence." *Id.*

extending the “protections of our Constitution beyond those given by the Federal Constitution.”⁶⁶ The majority explained that in past “pretextual” jurisprudence—where the court has found that “police stops of automobiles in this State are legal only pursuant to routine, non-pretextual traffic checks to enforce traffic regulations *or* when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime”—there was no objective standard to distinguish the permissible from the impermissible traffic stop.⁶⁷ However, in all of these consolidated appeals, the violated section of the VTL served as the basis for the stop, the “safeguard[] circumscribing the exercise of police discretion,” and the objective standard for which probable cause and therefore “reasonableness” is determined.⁶⁸

Furthermore, the court rejected the argument that New York should provide greater protection for its citizens by further impeding or “regulating the ability of the police to stop a vehicle when there is probable cause to believe that a traffic regulation has been violated.”⁶⁹ The court found, by *implicitly balancing* the interests of the government and the individual, that further regulations would probably “lead to the harm of innocent citizens” who would be the victims of the drunken driver or illegal handgun that avoided discovery because of further regulation.⁷⁰ The majority vehemently stated:

The alternatives to upholding a stop based solely upon reasonable cause to believe a traffic infraction has been committed put unacceptable restraints on law enforcement. This is so whether those restrictions are based upon the primary motivation of an officer or upon what a reasonable traffic police officer would have done under the circumstances. *Rather than restrain the police in these instances, the police should be permitted to do what they are sworn to do—uphold*

⁶⁶ *Id.*

⁶⁷ *Id.* (quoting *People v. Spencer*, 646 N.E.2d 785, 787 (N.Y. 1995)) (emphasis added).

⁶⁸ *See id.*

⁶⁹ *Robinson*, 767 N.E.2d at 643-44.

⁷⁰ *See id.* The court acknowledged the concern that allowing pretextual stops will allow police officers to selectively stop certain racial and ethnic minorities at will, but the court noted that any action would be best protected by the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 644.

*the law.*⁷¹

Lastly, the majority denounced the dissent's efforts to introduce a "reasonable police officer" standard—the same standard rejected in *Whren*—which would only permit the prosecution of the underlying traffic infraction and result in the suppression of all evidence if the stop were deemed to be pretextual.⁷² The stop of a motorist would be non-arbitrary if a reasonable officer "with traffic enforcement responsibilities" would have stopped the vehicle under the circumstances, leading to a "result [that] would be all too ironic: a police officer could 'arbitrarily' stop someone for speeding and the stop would be valid, but a gun seen in plain view in the car during the stop would be suppressed as unlawfully seized."⁷³

The majority recognized that the popularity of driving automobiles on the public highway has increased over the last century and has changed most American's lives, but noted that "the frequency of their time on the road cannot recast the functional parameters of the Fourth Amendment or article I, [section] 12."⁷⁴ The use of the reasonable officer test would require a court to know which of the multitude of traffic laws should be, or would be, selectively enforced by the reasonable officer under the circumstances, resulting in the courts being given the freedom "to pick and choose which laws deserve our adherence."⁷⁵ The only "reasonableness" standard that uniformly circumscribes the officer's conduct, arbitrariness, or discretion in an objective and verifiable manner is that of "probable cause under the Vehicle and Traffic Law and its related regulations that govern the safe use of our highways."⁷⁶

⁷¹ *Id.* at 644-45 (emphasis added).

⁷² *Id.* at 647.

⁷³ *Robinson*, 767 N.E.2d at 647 (noting that no court has adopted, or employs, the reasonable police officer test).

⁷⁴ *Id.* at 648.

⁷⁵ *Id.*

⁷⁶ *Id.* The majority expounded on the implications of the reasonable officer test, stating:

[I]t is the violation of a statute that both triggers the officer's authority to make the stop and limits the officer's discretion. We agree with *Whren* that the *test used by the dissenters would unduly restrict police from enforcing laws that the Legislature has seen fit to impose on individuals for the privilege of driving in this State.*

Id. at 647 (emphasis added). This approach—using the provision of the Vehicle and Traffic Law violated as the objective standard to both measure probable cause and exemplify the

The dissent argued that due to the convergence of the popularity of motor vehicle travel by Americans with the “virtual impossibility of sustained total compliance” with the multitude of minutely regulated traffic laws, “the police [possess] wide discretion to engage in investigative seizures, only superficially checked by the probable cause requirement for the traffic infraction that is the ostensible predicate for the stop.”⁷⁷ The dissent took issue with the decision of the majority, and *Whren*, to summarily dismiss the reasonable police officer standard—“whether a reasonable police officer, under the circumstances, would have made the stop for the reasons given”—based on what the court mistakenly thought was a standard based on the subjective intent or ulterior motives of the police officer.⁷⁸ The proposed standard, “indistinguishable from the objective test in *Terry* for determining the reasonableness of an investigative stop and frisk,” was an objective test which focused on “*the stop’s deviation from the norm.*”⁷⁹

The dissent offered its own explanation of the reasonable police officer standard:

[W]ould a reasonable officer assigned to Vehicle and Traffic Law enforcement in the seizing officer’s de-

proper balancing of government and individual interests—has been strictly adhered to by the New York courts. *See* *People v. Shulman*, 2006 WL 3858337, at *1 (N.Y. App. Term 2006) (finding that “the testimony of the State Police Trooper that defendant crossed over the subject solid white line on two occasions was insufficient to establish defendant’s guilt of violating section 1128(d) of the Vehicle and Traffic Law,” because the crossing of the solid line was not prohibited under the statute and therefore could not serve as the valid basis for probable cause or a reasonable search and seizure).

⁷⁷ *Robinson*, 767 N.E.2d at 652-53 (Levine, J., dissenting). The dissent focused on the probable impact of adopting the *Whren* decision:

With automobiles serving as the common denominator in our society, probable cause, reasonable suspicion, and other Fourth Amendment-type safeguards have, for all practical purposes, disappeared from large parts of our public and private lives. Thus no matter how incremental the legal changes brought about by each car case ha[ve] been, the big picture has been altered, and dramatically so. And this affects the lives of all Americans—not just those who are stopped frequently, but every person who could be.

Id. at 654 (quoting David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 GEO. WASH. L. REV. 556, 576 (1998)) (internal quotation marks omitted).

⁷⁸ *Robinson*, 767 N.E.2d at 656.

⁷⁹ *Id.* at 657 (“Just as the ulterior motives of the police in *Terry* . . . were not dispositive, those of the seizing officers in *Whren* would not be decisive under the [reasonable police officer] test advanced by the petitioners in that case.”).

partment have made the stop under the circumstances presented, absent a purpose to investigate serious criminal activity of the vehicle's occupants. Whether the stop was carried out in accordance with standard procedures of the officer's department would be a highly relevant inquiry in that regard.⁸⁰

This objective standard, if violated, would simply deny a police officer the right to use any evidence unrelated to the initial traffic infraction in a later prosecution, when the stop is determined to result from the arbitrary enforcement of the traffic laws as a pretext to other unlawful investigative searches and seizures.⁸¹ The underlying traffic infraction and any observations made prior to the stop could still be used to prosecute the traffic infraction, but any evidence of other crimes would be suppressed.⁸² This alternative standard is meant to counter the reality that a "persevering police officer, armed only with a copy of the Vehicle and Traffic Law and bent on subjecting a vehicle and its occupants to an unjustified investigative stop, will ultimately be able to accomplish that objective virtually *at will*."⁸³

Although *Bordeau's* analysis of the existence of probable cause—by examining and construing the individual clauses of section 1128(d) of the VTL to determine the unlawfulness of the traffic stop—was in accord with the indistinguishable standards for measuring the "reasonableness" of a search and seizure announced in *Whren* and *Robinson*, the decision itself exemplifies the need to create a relaxed standard that actually allows a police officer to do her job—

⁸⁰ *Id.* at 659.

⁸¹ *Id.* at 657.

⁸² *Id.*

⁸³ *Robinson*, 767 N.E.2d at 660. The dissent noted that the scope of a seizure, seemingly only protected or mitigated by the judiciary, has crossed the boundary line of what the framer's would consider "reasonable," stating:

Our case law permits the stopping officer . . . to open the passenger door; make outside visual inspections, including shining a flashlight into the interior of the vehicle; order the driver and all occupants out; and detain the vehicle and its occupants for purposes of verification of license, registration and insurance information. These are severe, and mostly standardless intrusions upon the liberty of motorists and their passengers, which are already authorized upon a stop for even a minor traffic violation, and which no amount of subsequent judicial regulation will prevent.

Id.

uphold the law. The current objective standard disregards the case-by-case factual analysis of “reasonableness” and the explicit balancing of governmental and individual interests, as illustrated in *Terry* and *Brinegar*, and replaces that analysis with an “objective standard,” which does not adequately measure the reasonableness of a particular traffic stop or allow a police officer to protect the interests of the community.

As a drunken Marc Bordeau drove down the highway, he made the “lucky” error of swerving to the right side of the road and crossed the fog line onto the shoulder of the highway. If he had swerved left into oncoming traffic, the charges for DWI and possession of drugs and alcohol, stemming from the traffic infraction, would have been upheld. However, the police officer who observed the defendant’s erratic driving, and thought it prudent to perform a traffic stop based on his observations, did not realize that the legislature had not proclaimed the fog line on this particular section of Joyce Road to be an “official marking.” Lucky for Bordeau, the officer was attempting to be prudent, perform his job, and assess whether the erratic driving was a simple mistake or a prelude to an accident that could have claimed the lives of guiltless victims. Does the *non-existence* of a specific section in the VTL prohibiting a driver to cross the fog line and drive on the shoulder of Joyce Road in Essex County adequately balance the State’s interests in public highway safety and “effective crime prevention and detection” against the individual motorist’s interests of freedom of movement and avoiding police contact?

The standards promulgated in *Whren* and *Robinson* disregard the historical importance of a flexible standard to measure the reasonableness of a search and seizure based on the particular facts known to the police officer prior to the traffic stop, the need for swift but cautious action, and the need to explicitly balance the interests of the State and the individual. *Brinegar* and *Terry* provided that probable cause, and therefore “reasonableness,” was established once the facts and rational inferences of the observation would have led an officer of reasonable caution to believe that a crime is, was, or was about to be committed. Furthermore, in balancing the interests of the State and the individual, the courts reasoned that the police, in order to adequately protect the community, must be able to make reasonable mistakes based on these observed facts and rational inferences, as

long as they do not subject the law-abiding citizen to traffic stops based on whim or caprice. Thus, the facts leading a reasonable police officer to stop a motorist, and the subsequent reasonableness and balancing analysis performed by the court, served the dual function of protecting the law-abiding individual by excluding any unlawfully seized evidence as part of an unlawful stop, while allowing the police to preserve the safety of the highways for the other motorists.

Ingle began the simplification of probable cause analysis by providing that the specific section of the VTL encompassed both the objective measure of probable cause and the implicit balancing of governmental and individual interests. Although still referring to the need for a factual analysis of each traffic stop's circumstances and an explicit interest balancing, the court declared that the *only* measure of "reasonableness" was the express language of the statute itself. *Whren* and *Robinson* followed this decision by not only providing that the specific section of the traffic law served as the *sole basis* for reasonableness and probable cause, but also disallowed any consideration of what a reasonable police officer under the circumstances would have done. Any explicit balancing of interests, outside of what is implicitly provided for in the statute, would no longer be required unless the search and seizure was "conducted in an extraordinary manner." With the elimination of considering the subjective intent of the officer, the actions of the reasonable officer under the circumstances, and a true balancing of the interests of the State and individual motorists, *Whren* and *Robinson* effectively stripped the courts from adjudicating the true nature of the traffic stop, leaving them at the mercy of criminal defense lawyers and intoxicated drivers who have realized how to beat the system.

The standard must change to incorporate a "reasonable police officer" element into the traditional probable cause analysis. Where a traffic stop is initiated based on a violation of the VTL, the probable cause analysis should begin with the *Whren* standard by determining if the driver actually violated the statute. If the statutory section is inapplicable to the facts of the traffic stop, as in the case of *Bordeau*, then the court must consider if the facts observed, and rational inferences drawn therefrom, would support a reasonable officer under the circumstances to believe that a crime is, was, or was about to be committed. This would provide the courts with the judicial discretion to truly consider the circumstances of each traffic stop, suppress evi-

dence as needed, and close the “loopholes” for criminals.

In *Bordeau*, the officer followed the defendant based on his observation of erratic driving and a suspicion of drunk driving, and stopped him under the pretext of a traffic violation for crossing a fog line. Unfortunately, the officer made the mistake of citing an inapplicable portion of the VTL as the sole basis for the stop—citing the section for driving on the shoulder probably would have led to a conviction on all counts. Under the proposed standard, the non-existence of an applicable statute would allow the court to analyze the facts and balance the interests of each of the parties. Was it reasonable for a police officer to believe that a car swerving on the road is a danger to public safety? Was it reasonable to believe that something was wrong with either the driver or the car? Was it reasonable to stop such a car to protect either the driver of that car and other motorists from potential danger? Would a reasonable officer who observed a car swerve out of his lane on a Friday night have initiated a traffic stop to check the condition of the driver, or the car, in an effort to protect the other motorists from an unsafe driver? These are the questions that are forestalled by the current standard, a standard which has castrated the ability of police officers and judges to punish the guilty and protect innocent citizens on the highways. Although the reasonable police officer standard has been dismissed by both the United States Supreme Court and the New York Court of Appeals, hopefully, the innocent lives lost on our highways because the police are “handcuffed” by a restrictive standard for measuring probable cause will force the courts to reconsider the wisdom of the reasonable police officer standard.

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