WHEN COPS ARE ROBBERS: RECONCILING THE *WHREN* DOCTRINE AND 18 U.S.C. § 242

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In 1996, the Supreme Court handed down Whren v. United States*, which prohibits inquiry into police officers' subjective motivations in conducting a search or seizure when there is reasonable suspicion or probable cause on which to base the search. The* Whren *doctrine has largely restricted the availability of the exclusionary rule and 42 U.S.C. § 1983 suits to combat pretextual traffic stops under the Fourth Amendment. But* Whren*'s applicability to 18 U.S.C. § 242, a criminal statute under which federal prosecutors may charge officers for willful violation of rights under color of law, remains an open question. This Note engages with the disagreement among circuit courts and the federal government regarding* Whren*'s application to § 242. It explores the implications of rejecting or modifying* Whren *in the § 242 context for protecting the civil rights of citizens who have been targets of corrupt police action, ultimately proposing factual triggers that would permit inquiry into subjective intent in these cases.*

INTRODUCTION

On August 31, 2007, Officer Barry Washington of the Tenaha police department in Texas pulled James Morrow over for "failing to drive in a single marked lane."[1] Officer Washington did not issue Morrow a citation for this alleged traffic violation,[2] but instructed Morrow to get into his police cruiser,[3] where he asked if Morrow was carrying any money.[4] Morrow responded that he was carrying about $3,900.[5] At that point, Officer Washington claimed that he smelled burnt marijuana and asked his colleague, Officer Randy Whatley, to search Morrow's car:[6]

> Washington: Would you take your K-9. If he alerts on the vehicle, I'm gonna take his momma's vehicle away from him, and I'm gonna take his money.

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1. Morrow v. Washington, 277 F.R.D. 172, 182 (E.D. Tex. 2011) (order certifying class).

2. Id.

3. Plaintiff's Original Complaint at 7, Morrow v. Washington, No. 2:11-cv-00467-JRG-RSP (E.D. Tex. Nov. 3, 2011) [hereinafter Individual Complaint].

4. Plaintiffs' Original Complaint at 3, Morrow v. Washington, No. 2:08-cv-00288-JRG (E.D. Tex. July 24, 2008) [hereinafter Class Action Complaint].

5. Id. Officer Washington seized $3,969 and two cell phones from Morrow. Id.

6. *Morrow*, 277 F.R.D. at 182. This conversation was recorded by the camera in Officer Whatley's vehicle. Individual Complaint, supra note 3, at 8. Officer Washington failed to produce video from his vehicle's camera. Id at 7.

Whatley: Oh, yeah. OK.
Washington: I'm gonna take his stuff from him.
Whatley: [Chuckles] OK.[7]

Officers Washington and Whatley searched Morrow's vehicle and, despite not finding any drugs, confiscated Morrow's money, cell phones, and vehicle.[8]

The same year, Officer Washington pulled over Ron Henderson, his girlfriend Jennifer Boatright, and her two young sons for traveling in the left lane without passing. Officer Washington asked to search the car and found the couple's cash savings, with which they planned to buy a used car, and a glass pipe that Boatright was taking as a present to her sister-in-law.[9] Though Officer Washington found no drugs in the car, he claimed to smell marijuana and took the family to the police station. There the district attorney offered the family a choice: turn over the cash or face charges for money laundering and child endangerment, which would result in the arrest of the adults and foster care for the children. The family chose to give up their money. When they later attempted to challenge the district attorney's actions and get their money back, the district attorney threatened to indict the couple on felony charges.[10]

Between 2006 and 2008, over 140 people were pulled over in Tenaha and given the choice to sign over their property or face felony charges.[11] The driving force behind this number was Officer Washington, who joined the Tenaha Police Department at the end of 2006 to pioneer a

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7. *Morrow*, 277 F.R.D. at 182.

8. Id.; Individual Complaint, supra note 3, at 2. In certifying the plaintiffs' class, the judge observed that the officers "[did] only a cursory search of [Morrow's] car, [found] the money, and confirm[ed] with each other that they ha[d] reasonable suspicion to keep the funds." *Morrow*, 277 F.R.D. at 182. The judge further noted that Officer Washington's justifications for the seizure were undermined by his failure to charge Morrow with a drug offense, by the video of the stop, and by Officer Washington's own notes. Id. at 182–83.

9. Sarah Stillman, Taken, New Yorker (Aug. 12, 2013), http://www.newyorker.com/magazine/2013/08/12/taken (on file with the *Columbia Law Review*).

10. Id.

11. Howard Witt, Driving Through Tenaha, Texas, Doesn't Pay for Some, L.A. Times (Mar. 11, 2009), http://articles.latimes.com/2009/mar/11/nation/na-texas-profiling11 (on file with the *Columbia Law Review*). The officers were purportedly enforcing civil-forfeiture laws when they seized the property. One (1) 1998 Blue Chevrolet Camaro v. State, No. 02-10-00252-CV, 2011 WL 3426263, at *2 (Tex. App. Aug. 4, 2011). If challenged, the state must prove by a preponderance of the evidence that the property was contraband. El-Ali v. State, 388 S.W.3d 890, 893 (Tex. App. 2012). For more on the forfeiture regime in Tenaha, including the assertion that Officer Washington targeted motorists of color, see Plaintiffs' First Amended Complaint at 1–2, Morrow v. Washington, No. 2:08-cv-00288-TJW (E.D. Tex. Nov. 3, 2011), 2008 WL 5864387; Marian R. Williams et al., Inst. for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture 16 (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf (on file with the *Columbia Law Review*).

drug-interdiction program[12] with the promise that "money from thugs could pay the town's bills."[13] With Officer Washington's arrival, the proportion of people of color pulled over in Tenaha jumped from 32% in 2006 to between 46.8% and 51.9% in 2007.[14]

In 2008, Morrow, Henderson, Boatright, and several others brought a class action challenging the Tenaha Police Department's traffic-enforcement regime,[15] claiming that it was racially discriminatory and that the true purpose behind the officials' actions was to "enrich the city of Tenaha and the Defendants personally."[16] Also in 2008, the Civil Rights Division of the Department of Justice opened a criminal investigation into the matter[17] pursuant to 18 U.S.C. § 242, a statute permitting federal prosecutors to charge officers for willful deprivation of rights under color of law.[18] The Eastern District of Texas certified Morrow's class based on an equal-protection theory,[19] but denied certification on Fourth Amendment claims,[20] citing the *Whren* doctrine. The *Whren* doctrine prohibits inquiry into officers' subjective intent in conducting a search or seizure when there is reasonable suspicion or probable cause on which to base the search.[21] In each case, because Officer Washington had reasonable suspicion that a traffic violation occurred, his true motivation for making the traffic stops was irrelevant to the search's legality under the Fourth Amendment.

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12. Washington's program made heavy use of pretextual stops, purportedly to interrupt the flow of drugs through the town from the Mexican border. The program resulted in few arrests, but substantial seizures of property. Stillman, supra note 9.

13. Id.

14. Morrow v. Washington, 277 F.R.D. 172, 179 (E.D. Tex. 2011) (order certifying class). Perhaps more tellingly, after a class action challenging the regime was filed, the percentage of nonwhite motorists stopped dropped from 45.7% in 2008 to 23% in 2009. Id. at 179–80.

15. Class Action Complaint, supra note 4, at 1–2.

16. *Morrow*, 277 F.R.D. at 180.

17. Danny Robbins, Texas County Returning Alleged Shakedown Cash, Associated Press (Nov. 1, 2012), http://bigstory.ap.org/article/texas-county-returning-alleged-shakedown-cash (on file with the *Columbia Law Review*). The investigation was still open as of 2012, though no charges had been filed. Id.

18. 18 U.S.C. § 242 (2012); see also infra Part I.C (discussing § 242's application and scope).

19. *Morrow*, 277 F.R.D. at 189 ("[T]he fact that class members may have committed traffic violations will not absolve the Defendants under the Equal Protection Clause of the Fourteenth Amendment if the Defendants targeted racial minorities in enforcing the traffic laws.").

20. Id. ("[T]he Supreme Court made it clear that the subjective motivations of an officer have no bearing on the reasonableness of a search under the Fourth Amendment . . . .").

21. Whren v. United States, 517 U.S. 806, 813 (1996) (foreclosing "any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved").

The *Whren* doctrine has largely eliminated the availability of the exclusionary rule and 42 U.S.C. § 1983 suits to combat pretextual stops, insulating these stops from legal scrutiny.[22] But *Whren*'s applicability to 18 U.S.C. § 242 remains an open question. If courts decline to extend *Whren* to § 242, the federal government could use § 242 to investigate instances, such as in Tenaha, in which minority motorists are disproportionately stopped and forced to choose between facing criminal charges or giving up their possessions. Alternatively, extending *Whren* to § 242 would add an extra hurdle to a criminal statute that already affords significant insulation to defendant officers[23] and would foreclose scrutiny into traffic regimes like that in Tenaha. While officers deserve leeway under which to enforce the law, officers who act with bad motives and routinely harass motorists should be subject to some level of scrutiny. *Whren*'s insulation of officers' intent may be appropriate where the stakes are exclusion of inculpatory evidence or civil damages, but the doctrine is poorly suited to § 242, which requires inquiry into officers' specific intent, includes strong protections for defendant officers, and carries no risk of windfall to "guilty victims."[24]

This Note engages with the disagreement among circuit courts and the federal government regarding *Whren*'s application to § 242, and it counsels against fully applying *Whren* to the statute. Part I introduces the *Whren* doctrine and its application to the exclusionary rule and § 1983. It then introduces § 242. Part II evaluates the disagreement between the Sixth Circuit, the Eleventh Circuit, and the federal government as to whether *Whren* applies to § 242. Finally, Part III presents further argument against transplanting *Whren* to § 242: It explains how the criminal prosecution of police officers is substantially different from the exclusionary rule and § 1983, and it notes the detrimental effect that *Whren* would have on the federal government's ability to vindicate Fourth Amendment rights. Part III also explores the possibilities that rejecting or modifying *Whren* in the § 242 context would have for protecting the civil rights of citizens who have been targets of corrupt police action.

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22. See, e.g., 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, 1039 (1996) ("[T]he Supreme Court and lower federal courts have killed any true pretext doctrine through their insistence on objectivity.").

23. See infra Part I.C (discussing 18 U.S.C. § 242); infra Part III.A (discussing § 242's added hurdles).

24. "Guilty victims" refers to individuals who have had their Fourth Amendment rights violated, but were engaging in criminal activity. Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2011 (1998). The classic example of a windfall to a "guilty victim" is the fruits of a warrantless search that discovered inculpatory evidence being thrown out pursuant to the exclusionary rule. Id. at 2008–09. For an explanation of the exclusionary rule, see infra notes 26–27.

I. *WHREN V. UNITED STATES* AND THE DEVELOPMENT OF THE OBJECTIVELY REASONABLE DOCTRINE

A. *The Decision in* Whren *as Applied to Exclusionary Claims*

1. *The Facts of* Whren. — In *Whren v. United States*,[25] the Supreme Court declined to apply the exclusionary rule[26]—a fundamental Fourth Amendment protection[27]—to evidence collected from an investigatory motor-vehicle stop, despite indications that the stop was pretextual.[28] In *Whren*, vice-squad officers pulled petitioners over in a "'high drug area'" of Washington, D.C., allegedly for several traffic violations.[29] After petitioners were pulled over, police noticed two bags of what appeared to be crack cocaine in plain view in the vehicle.[30] Before trial, petitioners challenged the introduction of the drugs into evidence based on strong indications that the traffic stop was pretextual:[31] The officers, who were plain-clothes members of the vice squad, were patrolling a high-drug area in an unmarked car.[32] Accordingly, they were prohibited by a city ordinance from making traffic stops unless there was an "*immediate threat*" to others.[33]

The Supreme Court rejected petitioners' pretext argument. Neither party denied that the officers technically had probable cause to pull the

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25. 517 U.S. 806.

26. Under the exclusionary rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." United States v. Calandra, 414 U.S. 338, 347 (1974).

27. See id. (explaining exclusionary rule "was adopted to effectuate the Fourth Amendment right of all citizens"). In *Calandra*, the Court explained that "[t]he purpose of the exclusionary rule is not to redress the injury" to the criminal defendant but "[i]nstead . . . to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." Id.

28. *Whren*, 517 U.S. at 819.

29. Id. at 808. These violations included turning away from an intersection, failing to signal, and speeding off at an "unreasonable" rate. Id.

30. Id. at 808–09.

31. Id. at 809.

32. Id. at 808.

33. Id. at 815 (quoting Metro. Police Dep't, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992)); see also David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271, 278 ("[Defendants] had been pulled over and ultimately arrested not by traffic officers but by plainclothes vice-squad officers patrolling a 'high drug area' of the city in an unmarked car—officers who were actually prohibited, as a matter of departmental policy, from making routine traffic stops."). The Court maintained that evaluating the consistency of police officers' actions with departmental policy would create unacceptable variance both between departments and between officers within the same department. *Whren*, 517 U.S. at 815; cf. Virginia v. Moore, 553 U.S. 164, 175–76 (2008) (declining to apply state-imposed limitations to Fourth Amendment inquiry).

car over for traffic violations.[34] The Court held that, so long as there is probable cause for a search or seizure, the subjective motivation of the officers is not a permissible line of inquiry.[35] This rule has become known as the *Whren* doctrine. It serves to protect officers from judicial second-guessing when they have objective justification for their actions.[36] *Whren*'s enduring takeaway is that "a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's *real* reason for making the stop or search has nothing to do with the validating reason."[37]

2. Whren*'s Extension of Previous Jurisprudence.* — Commentators interpret *Whren* as a major, unwelcome development in the Court's Fourth Amendment jurisprudence that severely limits motorists' rights.[38] To the

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34. *Whren*, 517 U.S. at 810. The petitioners' argument was premised more on the idea that traffic violations are so numerous that "a police officer will almost invariably be able to catch any given motorist in a technical violation." Id.

35. Id. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). The Court cabined this statement, noting that officers' actions constituting equal-protection violations would not enjoy the insulation of *Whren*. Id. ("[T]he Constitution prohibits selective enforcement of the law based on considerations such as race.").

36. See United States v. Sease, 659 F.3d 519, 524 (6th Cir. 2011) (noting rationale for *Whren* "comes out of a concern that courts are poorly positioned to engage in post hoc analysis of officer motivations, particularly in light of the snap decisions that law enforcement officers must make in stressful situations").

37. Florida v. Jardines, 133 S. Ct. 1409, 1416 (2013) (second emphasis added); see also *Whren*, 517 U.S. at 810 ("An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."). The Court has since disclaimed the necessity of probable cause for a vehicle stop, holding reasonable suspicion is sufficient to validate the stop. E.g., Navarette v. California, 134 S. Ct. 1683, 1687 (2014). The Court applies an "objective standard to warrantless searches justified by a lesser showing of reasonable suspicion." Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2082 (2011). The Court also explicitly carved out the realm of administrative searches, which do not require probable cause, from *Whren*'s reach. Id. at 2083 (citing *Whren*, 517 U.S. at 811–12).

38. See David O. Markus, *Whren v. United States*: A Pretext to Subvert the Fourth Amendment, 14 Harv. BlackLetter L.J. 91, 98–100 (1998) (arguing precedents are distinguishable and do not speak primarily to pretext); see also Lewis R. Katz, "Lonesome Road": Driving Without the Fourth Amendment, 36 Seattle U. L. Rev. 1413, 1420 (2013) ("The Court's holding in *Whren* institutionalizes pretextual stops and arrests . . . . No matter how selective the stop, *Whren* forecloses the issue under the Fourth Amendment."); Margaret M. Lawton, The Road to *Whren* and Beyond: Does the "Would Have" Test Work?, 57 DePaul L. Rev. 917, 928–32 (2008) (summarizing scholarly reaction to *Whren* and noting "[m]ost legal scholars have excoriated the *Whren* decision"); Christopher R. Dillon, Note, *Whren v. United States* and Pretextual Traffic Stops: The Supreme Court Declines to Plumb Collective Conscience of Police, 38 B.C. L. Rev. 737, 739 (1997) ("[T]aken in context with other recent decisions, *Whren* tilts the precarious balance between efficient law enforcement and individual rights too far to the side of efficient law enforcement."). But see David A. Harris, Car Wars: The Fourth Amendment's Death on the Highway, 66 Geo. Wash. L. Rev. 556, 556–57 (1998) (noting *Whren* and two cases decided in 1996 and 1997 are "only the latest installments in a trend visible for at least two decades: steadily increasing police power and discretion over cars and their occupants").

Court, however, *Whren* is a logical application of its precedents,[39] particularly *United States v. Robinson*,[40] *United States v. Villamonte-Marquez*,[41] and *Scott v. United States*.[42] The most analogous of the Court's cited precedents is *Robinson*, which upheld a bodily search upon arrest for driving without a license.[43] In a footnote, the *Robinson* Court acknowledged that the traffic stop might have been pretextual, as the arresting officer was potentially aware that the defendant had two prior narcotics convictions.[44] The *Robinson* Court did not, however, go through an explicit evaluation of the constitutionality of a pretextual traffic stop.[45] The other two cases cited by the Court, *Villamonte-Marquez* and *Scott*, are less analogous to *Whren*, as they involved law enforcement acting with express statutory authority to make a stop without probable cause,[46] and law enforcement acting in accordance with a judicially issued search warrant, respectively.[47] The disagreement between the Court and legal scholars as to *Whren*'s extension of precedent is significant: If *Whren* truly was an extension, or perversion,[48] of the previous jurisprudence, then the Court should carefully consider the specific areas to which *Whren* properly applies.[49]

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39. *Whren*, 517 U.S. at 811–13 ("[O]nly an undiscerning reader would regard [the Court's precedent] as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred.").

40. 414 U.S. 218 (1973).

41. 462 U.S. 579 (1983).

42. 436 U.S. 128 (1978).

43. 414 U.S. at 236.

44. Id. at 221 n.1.

45. The Court noted only that it was "sufficient . . . that respondent was lawfully arrested for an offense, and that" taking him into custody "was not a departure from established police department practice." Id. The Court did not determine "questions which would arise on facts different from these." Id.

46. *Villamonte-Marquez*, 462 U.S. at 580–81. *Villamonte-Marquez* dealt with the permissibility of customs officers, accompanied by a Louisiana State Police officer, boarding a vessel to check the vessel's documentation, pursuant to a statute permitting as much. Id. at 580–81, 583. In its opinion, the Court noted in a footnote its rejection of the defendant's argument that the search was invalidated by the Louisiana state officer's presence and the fact that officers "were following an informant's tip that a vessel in the ship channel was thought to be carrying marijuana." Id. at 584 n.3. The Court noted the incongruity of allowing officers to board innocent vessels, but precluding officers from boarding vessels that might be transporting drug smugglers. Id.

47. *Scott*, 436 U.S. at 130–31. In *Scott*, the Court refused to suppress wiretap recordings based on an argument that they violated a statute and the Fourth Amendment, in that law enforcement had not attempted to minimize the intrusion. Id. at 138–39. The Court agreed with the government that inquiries into good faith are not proper when determining at the outset whether officers violated the Fourth Amendment. Id. at 137–38 ("[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.").

48. See, e.g., Leary & Williams, supra note 22, at 1025 (calling *Whren* "a rickety piece of judicial scholarship . . . built upon unreasoned distinctions, perversions of precedent, a

B. Whren*'s Spread to the § 1983 Context*

In *Devenpeck v. Alford*, the Supreme Court extended *Whren*'s logic from the exclusionary-rule context to civil suits brought under 42 U.S.C. § 1983 alleging Fourth Amendment violations.[50] Section 1983 creates civil liability for violations of civil rights under color of law.[51] It allows citizens to sue police officers for abuse, including Fourth Amendment violations.[52] It was enacted in 1871 as part of the Ku Klux Klan Act,[53] pursuant to Congress's newly vested authority under section 5 of the Fourteenth Amendment.[54] Part I.B.1 discusses *Devenpeck*, which extends *Whren* to § 1983, and Part I.B.2 explores the effect of this extension.

1. *The Decision in* Devenpeck. — Jerome Alford brought a § 1983 action against Officers Devenpeck and Haner after he was arrested for recording his interaction with the officers during a traffic stop.[55] Alford was originally pulled over because police thought that he was impersonating an officer,[56] but he was placed under arrest after officers noticed that

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question-begging unarticulated and unsupported premise, bootstrapping, logical inconsistencies, and a narrow vision of the Fourth Amendment").

49. More than forty states and the District of Columbia agree with the Court that pretext alone does not invalidate a stop. People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001). This almost uniform agreement by the states means that the exclusionary rule is not a viable option for combating pretextual police action in virtually any forum. See, e.g., State v. Farabee, 22 P.3d 175, 180 (Mont. 2000) (citing *Whren* for proposition "constitutional reasonableness of a traffic stop under the Fourth Amendment does not depend on the subjective motivations of the individual officers involved"); State v. Styles, 665 S.E.2d 438, 441 (N.C. 2008) (holding, under *Whren*, reasonable suspicion based on failure to signal was sufficient to justify stop under Fourth Amendment); State v. Bartelson, 704 N.W.2d 824, 829 (N.D. 2005) ("*Whren* does not require us to delve into an officer's intent. An officer's probable cause does not disintegrate simply because another police officer had previously stopped the same vehicle for the same violation."); Damato v. State, 64 P.3d 700, 705–06 (Wyo. 2003) (upholding tag-team use of pretextual stop pursuant to *Whren*). But see State v. Ladson, 979 P.2d 833, 842 (Wash. 1999) (rejecting *Whren* and stating it "does not define or limit our rights under independent state constitutional safeguards"). The Arkansas Supreme Court also tried to reject *Whren*. It was reversed by the United States Supreme Court, however, because it did not base its interpretation on the state constitution, but rather tried to interpret the Fourth Amendment of the Federal Constitution more broadly than the Supreme Court's precedent allowed. Arkansas v. Sullivan, 532 U.S. 769, 772 (2001).

50. 543 U.S. 146 (2004).

51. 42 U.S.C. § 1983 (2012).

52. See, e.g., Alison L. Patton, Note, The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality, 44 Hastings L.J. 753, 753 (1993) (noting § 1983 creates civil liability for excessive-force claims).

53. Ch. 22, § 1, 17 Stat. 13, 13 (1871) (codified as amended at 42 U.S.C. § 1983).

54. Monroe v. Pape, 365 U.S. 167, 171 (1961), overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 659 (1978)..

55. *Devenpeck*, 543 U.S. at 149, 151.

56. He was driving a car with "wig-wag" roof lights and had stopped to help motorists with a flat tire, but he sped off when police arrived at the scene. Id. at 148–49.

he was recording the interaction.[57] Alford correctly told the officers that recording interactions with the police was legal in Washington, but the officers arrested him anyway.[58] Charges against Alford were soon dismissed, and he sued for unlawful arrest and imprisonment under § 1983 and other statutes.[59]

The jury at Alford's civil trial was instructed that his actions in recording the encounter were lawful, as announced by the Washington Court of Appeals five years before the incident.[60] Nonetheless, the jury rendered a verdict for the officers. The Ninth Circuit reversed, noting that the officers' basis for arrest—that Alford was recording the interaction—did not constitute probable cause.[61] The court rejected the argument that the officers could have legitimately arrested Alford for impersonating an officer and held that probable cause to support an arrest must be "closely related" to the offense identified by officers at the time of arrest.[62]

On appeal, the Supreme Court reversed the Ninth Circuit, reiterating *Whren*:

> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause . . . .
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> The rule that the offense establishing probable cause must be "closely related" to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest is inconsistent with this precedent. Such a rule makes the lawfulness of an arrest turn upon the motivation of the arresting officer . . . .[63]

Essentially, the Court established that as long as probable cause exists, it does not matter whether the officer was subjectively aware of it at the time of arrest, nor is the officer bound to the probable cause he affirmatively stated as the basis for arrest. The Court was presumably

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57. Id. at 149.

58. Id. at 149–50.

59. Id. at 151 ("[Alford] asserted a federal cause of action under Rev. Stat. § 1979, 42 U.S.C. § 1983, and a state cause of action for unlawful arrest and imprisonment, both claims resting upon the allegation that petitioners arrested him without probable cause in violation of the Fourth and Fourteenth Amendments.").

60. Id. In *State v. Flora*, the Washington Court of Appeals held that Washington's statutory ban on recording private conversations did not extend to Flora's recording of his interaction with police officers, as "the police officers . . . could not reasonably have considered their words private." 845 P.2d 1355, 1356, 1358 (Wash. Ct. App. 1992).

61. The officers arrested Alford for recording them, which was not a crime. *Devenpeck*, 543 U.S. at 151–52.

62. Id. at 152. The officers did not identify impersonating an officer as a basis for arrest. Id. at 150.

63. Id. at 153–54 (footnote omitted) (citing Whren v. United States, 517 U.S. 806, 812–13 (1996)).

motivated by a desire to grant leeway to officers,[64] consistent with the policy behind *Whren*[65] as applied to the exclusionary rule.[66]

2. Whren*'s Effect on § 1983*. — *Whren* has added a real hurdle to already difficult § 1983 claims.[67] For example, the Fifth Circuit in *Hudspeth v. City of Shreveport* cited *Whren* in upholding summary judgment for a defendant police officer in an excessive-force case.[68] The family of a man who was shot and killed by police sued officers and the city under § 1983, and they opposed summary judgment on the basis that there was a material issue of fact as to whether the officer who fired the fatal shots believed that deadly force was necessary.[69] Relying on *Devenpeck* and *Whren*, the court upheld summary judgment for the officers; the court rejected as irrelevant "the Officers' *subjective* beliefs . . . namely whether any of the Officers truly thought: [the victim] had a gun; their lives were in danger; or, [the victim] was pointing the device (whether gun or cell phone) *at* an Officer."[70] Because of *Whren*, the victim's family did not get the opportunity to argue to a jury that the officers killed their family member for a reason other than necessity.

Whren has also foreclosed § 1983 suits based on alleged patterns of pretextual stops. The Southern District of New York in *Aikman v. County of Westchester* rejected a § 1983 claim based on allegations of racial profiling and pretextual stops by police. The court held that, under *Whren*, the officers' subjective motivations were not relevant.[71] Similarly, the § 1983 class action initiated by James Morrow discussed in the introduction was

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64. For a discussion of the Court's motives in general Fourth Amendment jurisprudence, including *Whren* specifically, see Sklansky, supra note 33, at 308 ("[T]he reason Fourth Amendment cases tend not to generate much conflict within the Court is . . . because the justices now share a set of underlying understandings that heavily favor law enforcement.").

65. See United States v. Sease, 659 F.3d 519, 524 (6th Cir. 2011) ("*Whren*'s holding that officer intentions are irrelevant to Fourth Amendment analysis comes out of a concern that courts are poorly positioned to engage in post hoc analysis of officer motivations, particularly in light of the snap decisions that law enforcement officers must make in stressful situations.").

66. See Harold J. Krent, The Continuity Principle, Administrative Constraint, and the Fourth Amendment, 81 Notre Dame L. Rev. 53, 91 (2005) ("Police officers do not have the luxury of sifting through the evidence to determine whether probable cause exists to make an arrest. In the face of the need to make a split-second decision, reflection and deliberation are not options.").

67. See generally Patton, supra note 52 (describing difficulty of bringing successful § 1983 claim for police misconduct).

68. 270 F. App'x 332, 337–38 (5th Cir. 2008).

69. Original Brief for Plaintiffs-Appellants at 17, *Hudspeth*, 270 F. App'x 332 (No. 07-30260), 2007 WL 5356839. "Deadly force, a subset of excessive force, violates the Fourth Amendment unless 'the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Hudspeth*, 270 F. App'x at 336 (quoting Tennessee v. Garner, 471 U.S. 1, 11 (1985)).

70. *Hudspeth*, 270 F. App'x at 337.

71. 491 F. Supp. 2d 374, 381 (S.D.N.Y. 2007).

partially foreclosed by *Whren*. The class was certified under an equal-protection theory that officers were targeting racial minorities in traffic stops,[72] but *Whren* barred certification of allegations that officers violated the plaintiffs' Fourth Amendment rights.[73] It is safe to assume that courts will continue to reject § 1983 claims challenging police action under the Fourth Amendment when the veneer of probable cause or reasonable suspicion accompanies that action.[74]

C. *18 U.S.C. § 242*

While the Court has extended *Whren* to § 1983 claims, it has not yet addressed whether *Whren* applies to criminal prosecutions of police officers under 18 U.S.C. § 242.[75] Although § 1983 and § 242 are largely treated as analogous doctrines,[76] they differ in several important respects. Unlike § 1983 cases, § 242 cases are criminal, demand a higher burden of proof, and are subject to prosecutorial discretion. Most importantly, conviction under § 242 requires proof of willfulness, an element not required under § 1983. This section explains the history and requirements of § 242, and Parts II and III discuss whether *Whren* properly applies in the context of the statute.

1. *The Statute.* — Section 242 was enacted as section 2 of the Civil Rights Act of 1866[77] pursuant to Congress's power under section 5 of the Fourteenth Amendment.[78] It enables federal prosecutors to criminally

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72. Morrow v. Washington, 277 F.R.D. 172, 189 (E.D. Tex. 2011) (order certifying class) ("[T]he fact that class members may have committed traffic violations will not absolve the Defendants under the Equal Protection Clause of the Fourteenth Amendment if the Defendants targeted racial minorities in enforcing the traffic laws.").

73. Id. ("The Supreme Court made it clear that the subjective motivations of an officer have no bearing on the reasonableness of a search under the Fourth Amendment."); see also supra notes 19–21 and accompanying text (discussing certification of Morrow's suit).

74. Of course, when a traffic stop lacks reasonable suspicion or probable cause, plaintiffs may be able to challenge civil asset forfeiture through § 1983 suits without *Whren*'s hindrance. Recently, two individuals brought a lawsuit in the Southern District of Iowa challenging the seizure of their cash and property. The officer who pulled them over cited a failure to signal when changing lanes as justification for the stop, but a video of the stop showed that the plaintiffs did in fact signal before changing lanes, meaning there was no reasonable suspicion or probable cause to justify the stop. Complaint at 4, 8–13, Davis v. Simmons, No. 4:14-cv-00385-REL-CFB (S.D. Iowa Sept. 29, 2014). This scenario—a traffic stop not justifiable by reasonable suspicion or probable cause—is exceedingly rare. See infra note 185 (noting difficulty of driving without violating traffic laws).

75. 18 U.S.C. § 242 (2012).

76. Both § 1983 and § 242 are Reconstruction-era statutes premised on Congress's power under section 5 of the Fourteenth Amendment. See supra notes 53–54 and accompanying text (discussing origin of § 1983); infra notes 77–78 and accompanying text (discussing origin of § 242). For a full description of the similarities between these two statutes, see infra notes 179–182 and accompanying text.

77. Ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242).

78. Screws v. United States, 325 U.S. 91, 98 (1945) (plurality opinion).

charge police officers for willfully violating individuals' civil rights[79] and thus serves as an important rights-vindication tool. Section 242 prosecutions often allege excessive force by police officers under the Fourth Amendment[80] or corrections officers under the Eighth Amendment.[81] Officers can also be prosecuted under § 242 for violating the Fourth Amendment by stealing from victims,[82] entering victims' homes without cause,[83] or otherwise unlawfully detaining or searching individuals.[84] At trial, federal prosecutors must show that the defendant officer willfully violated the victim's Fourth Amendment rights and that the officer acted intentionally, knowing that what he was doing was unreasonable.[85] This willfulness requirement has been a difficult burden for prosecutors to meet in prosecuting § 242 cases.

2. *The Willfulness Requirement.* — As enacted, section 2 of the Civil Rights Act of 1866 stated that "any person who, under color of any law . . . shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act . . . shall be deemed guilty of a misdemeanor."[86] From its enactment until 1909, the statute did not require proof of the defendant's state of

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79. 18 U.S.C. § 242.

80. See Graham v. Connor, 490 U.S. 386, 388 (1989) (holding claims of excessive force are properly analyzed under Fourth Amendment, not substantive due process); Tennessee v. Garner, 471 U.S. 1, 7 (1985) (holding use of excessive force constitutes Fourth Amendment violation as unreasonable seizure); United States v. Brown, 250 F.3d 580, 584 (7th Cir. 2001) (noting excessive-force claim "is grounded in the Fourth Amendment right to be free of unreasonable searches and seizures").

81. See United States v. Walsh, 27 F. Supp. 2d 186, 191 (W.D.N.Y. 1998) (recognizing Eighth Amendment protects prisoners from unnecessary infliction of pain by prison officials), aff'd, 194 F.3d 37 (2d Cir. 1999).

82. United States v. Sease, 659 F.3d 519, 520–21 (6th Cir. 2011) (upholding conviction of officer for stealing from victims). *Sease* is discussed in detail in Part II.A–C.

83. United States v. Ferguson, 377 F. App'x 718, 718 (9th Cir. 2010) (upholding conviction of officer for home robberies under color of law).

84. United States v. Ramey, 336 F.2d 512, 514–16 (4th Cir. 1964) (upholding § 242 conviction for arrest pursuant to fabricated warrant).

85. See Screws v. United States, 325 U.S. 91, 103–06 (1945) (plurality opinion) (interpreting meaning of willfulness in § 242 context). Recent events in Ferguson, Missouri, have prompted explanation of § 242 in popular media. One former senior official in the Civil Rights Division of the Department of Justice described § 242 standards as "difficult to apply," as they require, in an excessive-force context, "the government to show that the officer acted with the specific intent to use more force than was reasonably necessary under the circumstances. In other words, the officer had to knowingly exceed the amount of force reasonably required to handle the situation." William Yeomans, Why Officer Wilson Probably Won't Go to Jail, Politico (Aug. 24, 2014), http://www.politico.com/magazine/story/2014/08/why-officer-wilson-probably-wont-go-to-jail-110308.html (on file with the *Columbia Law Review*).

86. Ch. 31, § 2, 14 Stat. 27, 27 (codified as amended at 18 U.S.C. § 242 (2012)). Where bodily injury occurs, the perpetrator is guilty of a felony. 18 U.S.C. § 242.

mind.[87] In 1909, Congress amended the statute to require willful deprivation of rights.[88] This change was made in an effort to make the statute less severe,[89] and it significantly restricted § 242's scope.[90] The willfulness requirement was meant to ensure that individuals would be punished only when they acted with a bad purpose.[91]

Screws v. United States[92] provides the authoritative interpretation of willfulness under § 242. *Screws* involved the prosecution of Sheriff M. Claude Screws, Special Deputy Jim Bob Kelly, and Officer Frank Edward Jones of Baker County, Georgia, for the beating death of Robert Hall while he was in the officers' custody.[93] The officers arrested Hall purportedly for stealing a tire, though the record indicates that the arrest was part of an ongoing personal dispute between Hall and Screws, motivated in part by race.[94] After arresting him, officers beat Hall while he was handcuffed for fifteen to thirty minutes until Hall was unconscious.[95] The officers then placed him in a cell. Eventually, Hall was taken to a hospital, where he died.[96]

Screws and his codefendants were charged with violating section 20 of the Criminal Code, which today is codified as 18 U.S.C. § 242.[97] After

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87. John V. Jacobi, Prosecuting Police Misconduct, 2000 Wis. L. Rev. 789, 807 (noting statute did not require proof of willfulness or "any specific state of mind when acting to deprive another of his or her civil rights").

88. Criminal Code, ch. 321, § 20, 35 Stat. 1088, 1092 (1909) (codified as amended at 18 U.S.C. § 242). The statute now reads: "Whoever, under color of any law . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined under this title or imprisoned not more than one year . . . ." 18 U.S.C. § 242.

89. *Screws*, 325 U.S. at 100 ("[W]e are told 'willfully' was added to [§ 242] in order to make the section 'less severe.'" (quoting 43 Cong. Rec. 3599 (1909)).

90. Jacobi, supra note 87, at 809 (placing beyond dispute that willfulness restricted scope of § 242); see also infra Parts I.C.3, III.A (discussing effect of willfulness requirement on use of § 242).

91. See *Screws*, 325 U.S. at 101 (noting willful in criminal context denotes bad purpose); cf. Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law 138–39 (1999) [hereinafter Lawrence, Punishing Hate] (describing difficulty of proving "willfulness").

92. 325 U.S. 91.

93. Id. at 92–93.

94. Lawrence, Punishing Hate, supra note 91, at 134 ("During the federal investigation, Screws told an agent of the FBI that he had known Hall all of Hall's life, that he had experienced 'considerable trouble' with him for the two years prior to his death, and that Hall was a 'biggety Negro' . . . .").

95. *Screws*, 325 U.S. at 93.

96. Lawrence, Punishing Hate, supra note 91, at 134–35.

97. Screws, 325 U.S. at 93. They were also charged with conspiracy to violate section 20, in violation of section 37 of the Criminal Code, which today is codified as 18 U.S.C. § 241. For purposes of this Note, §§ 242 and 241 will not be discussed separately. Section 241 proscribes conspiracies to violate rights:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free

their conviction, Screws and his codefendants challenged § 242 as unconstitutionally vague in that it failed to define a standard of guilt.[98] In an attempt to save the statute from vagueness, the Court confined the reach of § 242 to encompass a narrow definition of willfulness: "specific intent to deprive a person of a federal right made definite by decision or other rule of law."[99] A defendant must have acted "not to enforce local law but to deprive a citizen of a right . . . protected by the Constitution."[100]

The *Screws* Court reversed the officers' convictions because the jury instructions at trial asked only that the jury consider whether officers applied more force than was necessary under the circumstances. The Court noted that, given its construction of willfulness, the jury instructions would more properly ask the jury to find that the defendants acted with "the purpose to deprive [Hall] of a constitutional right."[101]

3. *The Willfulness Requirement's Effect on Police Prosecutions.* — Courts and commentators have struggled with the exact meaning of willfulness under *Screws*.[102] Nonetheless, federal courts have been mindful of § 242's heightened willfulness requirement. For example, in *United States v. Bradfield*, the Sixth Circuit affirmed the district court's grant of a motion for acquittal after the jury returned a guilty verdict against a police officer for violating § 241 as part of a conspiracy to violate § 242.[103] The court gave special attention to willfulness's added hurdle, noting:

> The language of the relevant statutes provides dispositive guidance . . . . [T]he defendant must, under color of law, "willfully" subject a person to the deprivation of . . . rights . . . . It is well-established that specific intent is the state of mind

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exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . [t]hey shall be fined under this title or imprisoned . . . .

18 U.S.C. § 241.

98. *Screws*, 325 U.S. at 94–95.

99. Id. at 103.

100. Id. at 106. The defendant need not have been thinking of the *specific* right violated when he or she acted. Id.

101. Id. at 106–07. The Court further noted that in undertaking this inquiry, the jury could consider "all the attendant circumstances," including "the malice of petitioners, the weapons used in the assault, its character and duration, the provocation, if any, and the like." Id. at 107.

102. See, e.g., United States v. Johnstone, 107 F.3d 200, 208 (3d Cir. 1997) ("As is evident from the text, and has oft been noted, *Screws* is not a model of clarity."); Jacobi, supra note 87, at 808–09 ("The exact meaning of the specific intent requirement has never been entirely clear . . . ."); Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 Tul. L. Rev. 2113, 2185 (1993) (noting formulation of willfulness in *Screws* plurality opinion "slid from specific intent to violate a constitutional right to something akin to negligence").

103. No. 98-2407, 2000 WL 1033022, at *10 (6th Cir. July 18, 2000).

> representing the greatest level of culpability. Specific intent is also the most difficult state of mind for a prosecutor to prove.[104]

The *Screws* Court explained its imposition of this "most difficult" mens rea requirement on § 242 as saving the statute from unconstitutional vagueness.[105] In practice, the added hurdle has served to insulate officers from overly burdensome scrutiny. To establish willfulness, the prosecutor must prove "a conscious purpose to do wrong . . . a determination to do [wrong] with bad intent or with an evil purpose or motive . . . to deprive [the victim] of rights."[106] Further, the factfinder must conclude that the officer's actions were not justified by the line of duty.[107]

While police officers undoubtedly deserve a degree of insulation from liability, the *Screws* willfulness requirement represents a significant hurdle for the Department of Justice in prosecuting police officers for violating civil rights.[108] In fact, after the Supreme Court reversed the convictions in *Screws*, the Department of Justice retried the officers and lost. The newly minted willfulness requirement was likely a main contributor to this disparate outcome.[109] The prosecutor who retried the *Screws* case felt "handicapped by the necessity of proving 'willfulness,'"[110] and the chief of the Civil Rights Section[111] within the Department of

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104. Id. at *9 (internal quotation mark omitted). For other examples of courts' mindfulness of this heightened requirement, see, e.g., United States v. Kerley, 643 F.2d 299, 303 (5th Cir. 1981) (reversing § 242 conviction based on trial court's failure to properly instruct jury as to meaning and requirements of willfulness, noting willfulness is one essential element of § 242 and crucial to jury deliberation); Lynch v. United States, 189 F.2d 476, 480 (5th Cir. 1951) ("We think that it must appear beyond a reasonable doubt that the officer's dereliction of his duties, whether of omission or commission, sprang from a willful intent to deprive his prisoner or prisoners of any or all of the rights hereinabove mentioned.").

105. See *Screws*, 325 U.S. at 103 ("[A] requirement of a specific intent . . . saves [§ 242] from any charge of unconstitutionality on the grounds of vagueness.").

106. Apodaca v. United States, 188 F.2d 932, 937–38 (10th Cir. 1951).

107. See, e.g., United States v. Bradley, 196 F.3d 762, 769 (7th Cir. 1999) (noting in excessive-force case, force used must have been "unreasonable and excessive," not justified by circumstances presented).

108. See Lawrence, Punishing Hate, supra note 91, at 138 ("*Screws* greatly reduced the ability of the . . . Department of Justice to prosecute civil rights crimes."); see also Jacobi, supra note 87, at 806 (noting § 242 is "tool that is rarely used in the fight against police misconduct," "in part because of the specific intent requirement"); id. at 810 (describing analysis from Department of Justice showing that of 10,129 civil-rights complaints during 1996, charges were filed in only seventy-nine cases, only twenty-two of which involved official misconduct).

109. See Jacobi, supra note 87, at 809 (speculating willfulness interpretation was outcome determinative on retrial).

110. Lawrence, Punishing Hate, supra note 91, at 138–39 (quoting Robert K. Carr, Federal Protections of Civil Rights: Quest for a Sword 114 (1947)) (internal quotation marks omitted).

111. The Civil Rights component of the Department of Justice is now called the Civil Rights Division, but at the time of *Screws* was referred to as the Civil Rights Section.

Justice opined that the judge's instruction under *Screws* "was clearly very damaging," adding that "the burden that the Government now has under the general theme of the *Screws* case in proving the necessary willful intent in such cases is going to continue to build up very high hills to climb."[112] As the retrial in *Screws* demonstrates, making § 242 convictions harder to achieve will inevitably leave instances of officer misconduct unaddressed.[113]

II. SHOULD *WHREN* APPLY TO § 242 PROSECUTIONS?

Given the importance of § 242 prosecutions based on Fourth Amendment violations,[114] courts are faced with the question of whether officers should enjoy the insulation provided by *Whren* when being prosecuted for willfully violating the Fourth Amendment. The *Screws* plurality's construction of willfulness requires an eventual inquiry into the defendant officer's intent,[115] but the question remains, for purposes of establishing that a right has been violated, whether *Whren* affords the defendant officer insulation.

This Part explores two possible approaches to this question. The first approach, taken by the Sixth Circuit and delineated in Part II.A, argues that *Whren* should not apply to § 242 prosecutions at all. This argument treats § 242 as distinct from the exclusionary rule and from § 1983 claims in that it is a punitive statute with a different purpose, and thus offers different protections, from the contexts in which the Court has found *Whren* to apply. The second approach—taken by the government and the Eleventh Circuit, and summarized in Parts II.B.1 and II.B.2, respectively—answers in the affirmative. It argues that § 242 prosecutions require a two-step process of first establishing that a right has been violated, and then determining whether the officer acted willfully in doing so. Under this approach, a court would only inquire into an officer's subjective intentions in the second step, after the prosecution has shown, independently of the officer's intentions, that an officer violated a right under *Whren*'s definition. Part II.C analyzes the strength of each position.

Compare id. (referring to Civil Rights Section), with Civil Rights Division, U.S. Dep't of Justice, http://www.justice.gov/crt/index.php (on file with the *Columbia Law Review*) (last visited Oct. 2, 2014) (referring to Civil Rights Division).

112. Lawrence, Punishing Hate, supra note 91, at 139 (quoting Carr, supra note 110, at 115) (internal quotation marks omitted).

113. See infra note 227 and accompanying text (noting eighteen percent of cases Civil Rights Division decided not to pursue in 1995 were due to insufficient evidence of criminal intent).

114. See supra notes 78–84 and accompanying text (noting importance of § 242 in vindicating Fourth Amendment rights).

115. The willfulness requirement in *Screws* relies heavily on specific intent. See supra notes 99–100 and accompanying text.

A. *First Approach: Rejecting* Whren*'s Application to § 242*

In *Sease v. United States*, the Sixth Circuit rejected the application of the *Whren* doctrine to 18 U.S.C. § 242.[116] The court found that inquiry into a police officer's subjective motivation when he is facing § 242 charges is entirely permissible given the criminal statute's punitive nature and its requirement that the officer act with a purpose to violate rights.

1. *The Facts of* Sease. — Arthur Sease was a Memphis police officer[117] charged with violating 18 U.S.C. §§ 241, 242, and 1951.[118] Sease was charged as the principal co-conspirator in a scheme in which he, three other Memphis police officers, and other non-officer associates stole drugs, money, and other property from drug dealers to keep for their own personal use.[119] The indictment charged Sease with offenses stemming from fourteen incidents, each of which followed a similar pattern.[120] Sease would set up a drug deal using drugs that he acquired from previous shakedowns. He would recruit one of his non-officer associates as the drug front man. As the deal was being made, Sease, or one of the other officers involved, would arrive on the scene, pretend to make an arrest, seize the drugs and money, and then release the people they had purported to arrest while keeping the money and drugs for themselves.[121]

Sease was convicted on forty-four out of fifty-one counts, including eleven counts of violating § 242.[122] On appeal, Sease argued that his actions were lawful under his duty as a law-enforcement officer and that, because he was acting pursuant to probable cause in stopping individuals engaging in narcotics crimes, his actions were insulated by *Whren*.[123] The district court had instructed the jury that "seizure of money, drugs, or other personal property solely for the personal enrichment of an individual law enforcement officer is not a legitimate law enforcement purpose."[124] On appeal, Sease argued that, "as in *Whren*, it is improper to consider why he and his fellow officers made the stops in question."[125]

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116. 659 F.3d 519, 524–25 (6th Cir. 2011).

117. The Memphis Police Department had fired Sease by the time of his indictment. Id. at 521.

118. Id. at 520. Section 1951 prohibits interference with commerce by robbery, extortion, or threats of physical violence. 18 U.S.C. § 1951 (2012).

119. *Sease*, 659 F.3d at 521.

120. For a detailed account of each of the fourteen incidents, see Brief for the United States as Appellee at 5–19, *Sease*, 659 F.3d 519 (No. 09-5790).

121. *Sease*, 659 F.3d at 521. Sease took a half-kilogram of cocaine and $11,000 in cash from one of his targets. Id.

122. Id. Sease was charged with twelve counts of violating § 242 but was found not guilty on one of those counts. Id.

123. Id. at 523.

124. Id. at 522 (quoting Supplemental Instruction) (internal quotation marks omitted).

125. Id. at 523.

The Sixth Circuit conceded that "making traffic stops and looking for drugs are valid and appropriate law enforcement activities,"[126] but rejected Sease's contention that *Whren* shielded him from criminal liability on two grounds. First, the court noted that Sease was not acting with any "bona fide law enforcement" purpose, but was instead using law enforcement to cover his illegal activities.[127] Second, and perhaps more significantly, the court held that in the § 242 context, the *Whren* doctrine does not shield officers from inquiry into their subjective intentions.[128] Thus, Sease was not afforded *Whren*'s insulation, and his convictions were upheld.[129]

2. *Bona Fide Law-Enforcement Purposes.* — The Sixth Circuit first distinguished *Whren* by noting that the officers in *Sease* were not engaged in any "bona fide law enforcement activities" when making the stops at issue.[130] The court characterized Sease's behavior as "thoroughly and objectively illegal from start to finish."[131] The court noted that Sease acted outside his assigned precinct, did not file reports of the stops and thus avoided notifying his superiors of his actions, and did not report the money or drugs that he seized from the stops.[132] Additionally, when Sease's actions came to the attention of the Memphis Police Department, the Department initiated an internal investigation that resulted in Sease's removal from the force.[133] As Sease was acting outside the scope of his authority when making these stops, he could not benefit from *Whren*'s insulation.[134]

3. *Rejecting* Whren*'s Application to § 242.* — The court also held that, given § 242's punitive nature, the policy goals motivating the decision in *Whren* should not apply in these prosecutions.[135] The court held that "although for the purposes of the exclusionary rule the subjective intent of the officer is irrelevant, in the context of a § 242 prosecution, the courts may inquire whether the officer acted with a corrupt, personal,

126. Id. at 523–24.

127. Id. at 524.

128. Id. at 524–25.

129. Id. at 519.

130. Id. at 524.

131. Id.

132. Id.

133. Id.

134. Id. The court's "bona fide law enforcement" formulation would take *Whren* off the table because officers who violate rights under color of law are undoubtedly acting outside their authority.

135. Id. at 525 ("Section 242 is a punitive statute designed to punish officers who willfully violate constitutional rights under color of law. The punitive purpose would be undermined were the court to allow a corrupt officer to hide behind the policy goals of the exclusionary rule.").

and pecuniary purpose."[136] In upholding Sease's convictions, the court reiterated that, in the face of clear evidence that the "officers were not engaged in bona fide law enforcement activities, but instead acted with a corrupt, personal, and pecuniary interest, the officers violate[d] the civil rights of those that [were] stopped, searched, or [had] their property seized."[137]

The court did not engage in a lengthy explanation of how it reached this conclusion. It noted that the exclusionary rule derives from an effort to balance deterring police misconduct on the one hand and upholding law-enforcement purposes where probable cause exists on the other hand.[138] The court found this balance inapplicable to § 242, which is meant to punish willful violations of civil rights. The court's reasoning rests on the proposition that when officers willfully violate rights, they do not engage in "a complex set of assessments" that well-meaning officers might make in an effort to effect law-enforcement purposes and thus do not merit *Whren*'s insulation.[139]

B. *Second Approach: Applying* Whren *to § 242 Prosecutions*

1. *The Government's Take.* — The federal government adopted a different view in its 2011 brief opposing certiorari to the Supreme Court from the Sixth Circuit in *Sease*.[140] The government characterized *Whren* as "part of a long line of cases holding that reasonableness under the Fourth Amendment is 'predominantly an objective inquiry' that does not turn on the subjective motivations of individual officers."[141] The government contended that regardless of any corrupt purpose, violation of the Fourth Amendment turns on whether there is an objective justification for the officer's actions.[142] Arguing that "the specific cause of action does not change the nature of the substantive right at issue," the government concluded that a § 242 conviction based on a theory of

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136. Id. The Sixth Circuit further noted that "the court must already inquire into the subjective intent of the officer because willfulness is an element of an offense" under § 242; "there is no additional evidentiary burden to justify ignoring subjective intent." Id.

137. Id. at 526.

138. Id. at 524.

139. Id.

140. Brief for the United States in Opposition at 18, Sease v. United States, 133 S. Ct. 102 (2012) (No. 11-9037) [hereinafter Government Brief]. The government argued to uphold the § 242 conviction, but it disagreed with the Sixth Circuit's conclusion that *Whren* did not apply to § 242. Id. at 19–20. The brief represents an internal struggle within the government: Though the government is responsible for defending the legality of § 242 convictions, it is also often responsible for defending against *Bivens* actions and thus has an interest in keeping the scope of Fourth Amendment violations constrained. While it did not want the Supreme Court to grant certiorari in this case, as it won in the Sixth Circuit, the government also seems to have wanted to make clear that it disagreed with the Sixth Circuit's interpretation of § 242's interaction with *Whren*.

141. Id. at 20 (quoting Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080 (2011)).

142. Id.

Fourth Amendment violations "requires the government to show that the officer acted objectively unreasonably in the circumstances, whatever his subjective intent."[143] Under this view, an officer's illicit purpose cannot alone turn an otherwise objectively reasonable search into a Fourth Amendment violation.

The government conceded that "[t]he officer's intent is, of course, relevant to whether the officer 'willfully' violated others' constitutional rights," which § 242 charges require.[144] The brief did not explain how this necessary inquiry into intent to violate a constitutional right can be reconciled with *Whren*'s ban on inquiry into subjective intention, but the government's argument is likely premised on an understanding of § 242 prosecutions as two-part inquiries. Pursuant to this understanding, the government must first show that a violation of a federal right occurred. According to the government, when a § 242 charge is "premised on a violation of Fourth Amendment rights," the government must "show that the officer acted objectively unreasonably in the circumstances, whatever his subjective intent."[145] After establishing this violation, the government must then prove that the officer acted willfully in violating the right, at which point "[t]he officer's intent is, of course, relevant."[146] This view dictates that the preliminary step, establishing the violation of a right, cannot *in itself* turn on the officer's subjective intent, but once a violation is established independently of the officer's state of mind, it is appropriate to turn to the officer's mental state to determine whether the officer *meant* to violate the right. The officer must have acted objectively unreasonably and with the intent to violate rights. Under this conception, *Whren* governs the Fourth Amendment, regardless of the cause of action.

2. *The Eleventh Circuit in* United States v. House. — The Eleventh Circuit recently followed the government's lead, applying *Whren* to § 242 in *United States v. House*.[147] In *House*, prosecutors charged Federal Protective Service officer Stephen House "with eight counts of depriving a motorist of the constitutional right to be free from unreasonable seizure by a law enforcement officer" under § 242 and four counts of making false statements in his written reports regarding these incidents under 18 U.S.C. § 1001.[148]

House was accused of violating the Fourth Amendment by wrongfully stopping seven motorists under the guise of his authority as a

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143. Id. at 20–21.

144. Id. at 21.

145. Id.

146. Id.

147. 684 F.3d 1173, 1199 (11th Cir. 2012) (citing Whren v. United States, 517 U.S. 806, 813–16 (1996)).

148. Id. at 1184. Section 1001 criminalizes knowingly and willfully making false statements regarding a matter within the jurisdiction of the federal government. 18 U.S.C. § 1001 (2012).

Federal Protective Service officer.[149] At trial, House requested several jury instructions, including that "an officer's subjective motivation for conducting a traffic stop is irrelevant in determining the reasonableness of the stop under the Fourth Amendment," "a traffic stop is reasonable if based on probable cause," and "the reasonableness of a law enforcement officer's actions under the Fourth Amendment does not depend on the officer's compliance with local law or policy."[150] The district court refused all of these proposed instructions. The court did instruct the jury that "a law enforcement officer must have authority or jurisdiction and sufficient legal basis to make a traffic stop,"[151] the legal basis required was probable cause or a reasonable suspicion that a violation had occurred,[152] and "if defendant, acting with authority, had probable cause to make a traffic stop, there was no civil rights violation."[153]

On appeal, both sides briefed the issue of *Whren*'s applicability. House argued that the court's failure to instruct the jury "that an officer's subjective motivation for conducting a traffic stop is irrelevant in determining the reasonableness of the stop under the Fourth Amendment"[154] violated *Whren*. According to House, the jury needed to hear this instruction because the government alleged House was pulling people over for getting in his way: "The jury needed to be instructed that it did not matter whether this was House's motivation, all that mattered was whether he had probable cause for the stops."[155] At least one testifying victim motorist admitted that he committed a traffic violation,

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149. Stopping a motorist is considered a seizure under the Fourth Amendment. See, e.g., *Whren,* 517 U.S. at 809–10 ("Temporary detention of individuals during the stop of an automobile by the police . . . constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment] . . . . An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances."). The pattern of facts in *House* as to the seven motorists is largely similar: The victims testified that they encountered House while driving on the highway. House exhibited erratic behavior such as accelerating at an alarming rate behind the motorists and stopping short in front of them for no apparent reason. House's actions were usually preceded by the victims either passing House or changing lanes in front of him. House then activated his emergency lights and the victims pulled over. He then either turned his lights off and sped away or parked his vehicle, blocking the victim's vehicle. House then called local law enforcement and gave responding officers a false account of events, on several occasions leading to the arrest of the victims by local law enforcement. *House*, 684 F.3d at 1186–93.

150. *House*, 684 F.3d at 1194.

151. Id.

152. Id. at 1195.

153. Brief for Appellee at 51–52, *House*, 684 F.3d 1173 (No. 10-15912-DD), 2011 WL 2118509. The Eleventh Circuit invalidated the district court's requirement that the officer act with authority or jurisdiction, noting probable cause or reasonable suspicion are all that are required to legitimate a stop, regardless of departmental policy. *House*, 684 F.3d at 1206; see also infra note 159 (discussing agency policy's irrelevance to *Whren*). Full discussion of this point of law is beyond the scope of this Note.

154. *House*, 684 F.3d at 1194.

155. Brief of Appellant at 54, *House*, 684 F.3d 1173 (No. 10-15912), 2011 WL 1977740,.

providing House with probable cause to stop him.[156] House argued that because the jury convicted him despite this probable cause, it must have considered his subjective intent in finding a Fourth Amendment violation.[157]

The government contended that "the substance of this [requested] charge was given."[158] The government noted that the district court unequivocally charged the jury that an arrest based on probable cause and with authority is not a civil-rights violation, and that from this instruction "the jury would have understood that defendant's motive for making the stop was not at issue if defendant had authority and probable cause."[159]

The Eleventh Circuit confronted this issue after invalidating several of House's convictions based on an unrelated erroneous jury charge[160] and after affirming the rest of House's convictions based on its conclusion that House lacked reasonable suspicion in making the stops associated with those charges.[161] Thus the question of subjective motivation was not a central issue at this point in the opinion.[162] Nonetheless, the court indicated its belief that *Whren* applied in House's favor, noting that "a law

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156. *House*, 684 F.3d at 1202.

157. Brief of Appellant at 54, *House*, 684 F.3d 1173 (No. 10-15912), 2011 WL 1977740 ("Given that many individuals admitted to traffic violations, it is likely that the failure to provide this instruction had an effect on the outcome of the case.").

158. Brief for Appellee, supra note 153, at 51, 2011 WL 2118509, at *50.

159. Id. at 51–52, 2011 WL 2118509. This argument clearly implicates the court's instruction that House needed to act with jurisdiction or authority in order to make a lawful stop. See supra text accompanying note 151 (giving instruction). The question of jurisdictional authority was settled in *Whren* and Virginia v. Moore, 553 U.S. 164, 172–73 (2008), see supra note 33, and a discussion of the merits of that rule is beyond the scope of this Note. It is sufficient to note that the Eleventh Circuit reversed several of House's convictions based on the district court's erroneous charge that lack of jurisdiction or authority could render unconstitutional an otherwise valid stop based on reasonable suspicion or probable cause. *House*, 684 F.3d at 1206. Although House, as a Federal Protective Service officer, was prohibited by agency policy from stopping motorists for minor traffic violations, and from activating his emergency lights outside federal property when not faced with a life-threatening emergency, id. at 1185, this policy restriction did not change the constitutional analysis, id. at 1206.

160. The district court erroneously instructed the jury that House could not make stops outside of his jurisdiction. See supra notes 33, 151, 159 and accompanying text (discussing district court instruction and Supreme Court's treatment of agency policy).

161. In the counts it affirmed, the court determined that the jury concluded that House lacked reasonable suspicion or probable cause for the stops. *House*, 684 F.3d at 1205–06. It made this determination based on the jury's conviction of House on the associated § 1001 charges, for false statements in the written reports regarding the stops. Id. The court reasoned that because the jury "credited the motorists' accounts of those seizures and discredited House's accounts of those seizures," the jury must have believed that House "lacked probable cause or reasonable suspicion for those seizures." Id. at 1206. Thus, the court upheld the convictions under § 242 on the counts that had associated § 1001 convictions. Id.

162. Note that where an officer acts without probable cause or reasonable suspicion—or, in other words, without an objectively reasonable basis—*Whren* is inapplicable. See supra notes 34–37 and accompanying text.

enforcement officer's subjective intent is irrelevant to the reasonableness of a traffic stop under the Fourth Amendment."[163] Significantly, all parties took *Whren*'s application to the § 242 context as a given,[164] and the Eleventh Circuit adopted this assumption.

C. *Problems Inherent in Each Approach*

Both of the discussed approaches suffer from serious flaws. Because the government's brief in *Sease* and the Sixth Circuit's opinion in the same case conflict most directly on this point, and because they deal with the same facts, they provide a helpful contrast to evaluate whether *Whren* should be extended to § 242. The following sections analyze how each position fails to develop a fully satisfying argument.

1. *Evaluating the Sixth Circuit's Approach.* — The Sixth Circuit's approach, rejecting *Whren*'s application to § 242, is attractive in that it makes § 242 available beyond the constricted view taken by the Eleventh Circuit and the government. Under the Sixth Circuit's approach, for instance, Officer Washington could be held accountable under the Fourth Amendment for pulling motorists over based on race or with the purpose to take the motorists' possessions, even if his actions were accompanied by reasonable suspicion of a minor traffic violation.[165] The Sixth Circuit's reasoning, however, is not fully convincing. It fails to satisfactorily distinguish § 242 from § 1983 and the exclusionary rule,[166] and it does not adequately answer the government's argument that *Whren* is an enduring Fourth Amendment doctrine, the application of which does not change based on the cause of action.

In its attempt to differentiate treatment of Fourth Amendment claims under § 242 from the exclusionary rule, the Sixth Circuit focused exclusively on the purpose behind each doctrine. The court explained the rationale for *Whren*'s application to the exclusionary rule: "[C]ourts are poorly positioned to engage in post hoc analysis of officer motivations, particularly in light of the snap decisions that law enforcement officers must make in stressful situations."[167] Section 242, as "a punitive statute designed to punish officers who willfully violate constitutional rights under color of law," does not carry these same concerns.[168] According to the court, § 242's "punitive purpose would be

163. *House*, 684 F.3d at 1207. The court found this instruction irrelevant to the remaining § 1001 charges as well. Id.

164. See supra notes 154–159 and accompanying text (delineating arguments on appeal).

165. See supra text accompanying notes 1–14 (describing Officer Washington's interdiction regime).

166. See infra notes 167–169, 175–176 and accompanying text (discussing Sixth Circuit's attempt at distinguishing exclusionary rule from § 242, and § 1983 from § 242, respectively).

167. United States v. Sease, 659 F.3d 519, 524 (6th Cir. 2011).

168. Id. at 525.

undermined were the court to allow a corrupt officer to hide behind the policy goals of the exclusionary rule."[169] While the court is correct that the contexts of the exclusionary rule and § 242 are distinct,[170] it neither acknowledged nor satisfactorily addressed the similarities between the two doctrines. Both the exclusionary rule and § 242 are meant to deter police misconduct,[171] and both inquire into actions taken while officers are ostensibly carrying out their law-enforcement duties. The same fact pattern could easily make up an exclusionary claim as well as form the basis for § 242 charges. The purposes of § 242 and the exclusionary rule do not sufficiently distinguish the doctrines to justify treating § 242 differently.[172]

Similarly, the Sixth Circuit's attempt to differentiate § 242 from § 1983 based on purpose is incomplete. *Whren* has consistently been applied to § 1983,[173] under which "an objective finding of probable cause is an absolute defense to liability for a wrongful arrest claim."[174] The Sixth Circuit distinguished § 1983 from § 242 by noting that the purpose of § 1983 is to "compensate a plaintiff whose constitutional rights were violated" and that compensation is inappropriate where an arrest is "reasonable."[175] The court contended that this compensation scheme "stands in contrast" to § 242's punitive purpose, but did not elaborate upon this point.[176]

The true distinction that the court seemed to make is one of remedy: Section 242 prosecutions directly punish the errant officer, whereas § 1983 actions provide a direct remedy in the form of damages to those whose rights are violated. Presumably the court elevated the importance of punishing errant officers over the value of compensating victims and was perhaps concerned with the windfall to "guilty victims"[177] that might

169. Id.

170. Compare supra note 27 (defining exclusionary rule as governing admissibility of evidence against person who is claiming Fourth Amendment violation), with supra text accompanying note 79 (explaining § 242 as inquiry into whether officer deserves to be criminally punished for malicious behavior).

171. The Supreme Court has defined the exclusionary rule not as protecting the rights of the individual defendant, but instead as a general deterrent to police misconduct. See supra note 27 (stating purpose of exclusionary rule). Section 242, as a punitive statute, presumably also has a deterrent purpose. See, e.g., Jacobi, supra note 87, at 803 ("[P]rosecution of police guilty of serious crimes serves the important social interests of deterring future lawlessness of police officers and assuring civilians that all, including those in uniform, are treated equally in the enforcement of criminal law.").

172. This Note attempts to further distinguish the doctrines in Part III.B.

173. See supra Part I.B (noting *Whren*'s extension to § 1983 in *Devenpeck v. Alford*).

174. *Sease*, 659 F.3d at 525 n.1 (citing Jackson v. Parker, 627 F.3d 634 (7th Cir. 2010)).

175. Id. Presumably the court was advancing the point that an arrest can be "reasonable" under an objective inquiry but still in violation of the Fourth Amendment due to the officer's malicious intentions in making the arrest.

176. Id.

177. See supra note 24 and accompanying text (explaining windfall to "guilty victims").

follow from the exclusionary rule or § 1983, but certainly would not follow from a § 242 conviction.[178] Otherwise it is unclear why the court would assume that an officer who acted pretextually should be open to criminal prosecution, but not liable for damages to the victim.

Basing the distinction between § 1983 and § 242 on the difference in mode of enforcement does not satisfactorily overcome the reality that § 242 and § 1983 have been largely treated as analogous doctrines.[179] The Court borrowed § 1983's qualified-immunity standard in defining the requirement under § 242 that a defendant officer must be found to have deprived a person of a right "protected by the Constitution or laws of the United States."[180] In fact, the language in § 242 prohibiting deprivation of "rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States" was borrowed from the statute creating § 1983 liability.[181] Similarly, the Supreme Court borrowed the interpretation of "under color of law" from § 242 cases when interpreting the phrase's meaning under § 1983.[182] The only attempt the Sixth Circuit made to distinguish § 242 from § 1983 was to argue that plaintiffs should not be compensated for "reasonable" arrests, which "stands in contrast to" § 242's punitive purpose.[183] As with the exclusionary rule, the court must further justify treating § 242 differently from § 1983 in order to legitimate its argument that *Whren* should not apply to § 242.

2. *Evaluating the Government's Approach.* — The government's position in *Sease* is flawed in at least two ways. First, the government's brief rejected the Sixth Circuit's position without offering a coherent solution. Specifically, it ignored Sease's argument that he was acting with probable cause, which, if accepted, would shield his motivations from scrutiny under the government's interpretation. Second, the government's position would severely restrict the number of prosecutions available under § 242, without an adequate explanation of why *Whren* should be

178. For more discussion of windfall, see infra Part III.B.2.

179. See, e.g., Matthew V. Hess, Good Cop–Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 Utah L. Rev. 149, 178 (noting § 242 and § 1983 "share a similar history," specifically in that both are "progeny of Reconstruction era enforcement of the newly ratified Thirteenth, Fourteenth, and Fifteenth Amendments").

180. United States v. Lanier, 520 U.S. 259, 270–71 (1997) ("The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective . . . to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.").

181. See Screws v. United States, 325 U.S. 91, 99–100 (1945) (plurality opinion) (noting quoted language was taken from Klu Klux Klan Act, "which provided civil suits for redress of such wrongs").

182. Monroe v. Pape, 365 U.S. 167, 183–87 (1961) (adopting "under color of law" definition for § 1983 from three Supreme Court cases interpreting § 242), overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 659 (1978).

183. United States v. Sease, 659 F.3d 519, 525 n.1 (6th Cir. 2011).

extended to § 242 at all. As the petitioners in *Whren* argued, there are innumerable traffic violations upon which an officer could base a traffic stop.[184] *Whren*'s insulation would provide officers with significant leeway to make stops ostensibly based on a traffic violation, but really executed for unlawful reasons.[185] As Part I demonstrates, *Whren* has largely obstructed remedies for Fourth Amendment violations—§ 242 stands as one of the last options for vindicating Fourth Amendment rights.[186] The decision to severely restrict this rights-vindication avenue merits in-depth and coherent justification, which the government's brief did not provide.

The government advocated upholding Sease's conviction but disagreed with the Sixth Circuit's formulation of the underlying law.[187] It flatly rejected the Sixth Circuit's "no bona fide law enforcement purpose" distinction and the court's contention that, given the nature of § 242 inquiries, *Whren* was inappropriate:

> To the extent . . . that the court of appeals believed that *Whren* does not apply where police officers had probable cause to make stops but "were not engag[ed] in bona fide law enforcement activities," and that "subjective intent" can be consulted in a civil rights prosecution to determine whether the Fourth Amendment was violated because *Whren* is an exclusionary rule decision, its reasoning is unsound.[188]

The government offered examples of what might make a search or seizure objectively unreasonable and therefore establish that a right was violated, including, among other things, whether officers failed to act with an "objectively valid law enforcement interest."[189] According to the

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184. Whren v. United States, 517 U.S. 806, 810 (1996).

185. See 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, 223 (1989) (noting wide discretion to officers to make traffic stops leading to searches that "might be motivated" by desire to harass); Sklansky, supra note 33, at 273 (noting "virtually everyone violates traffic laws," meaning officers "can eventually pull over almost anyone they choose, order the driver and all passengers out of the car, and then ask for permission to search the vehicle without first making clear the detention is over"); see also David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. Crim. L. & Criminology 544, 558 (1997) [hereinafter Harris, Driving While Black] ("Police in some jurisdictions have a rule of thumb: the average driver cannot go three blocks without violating some traffic regulation.").

186. See supra Part I.A–B (discussing *Whren*'s limitations on exclusionary rule and § 1983 claims).

187. For an explanation of the government's contrary purposes, see supra note 140.

188. Government Brief, supra note 140, at 20 (second alteration in original) (citations omitted).

189. Id. at 14 (noting Sease acted "without any objectively valid law enforcement interest" when seizing property without clear connection to narcotics). The brief also offered as examples the length of time that a person is detained, the diligence of investigation stemming from the search or seizure, the connection of the seized objects to the criminal activity at issue, the manner of execution, and the balance between the

government, Sease's actions were "objectively unreasonable" because he "participated in seizures of personal property that the police lacked probable cause to believe was connected with crime."[190] The government did not offer a convincing distinction between its proffered inquiry into whether there was an "objectively valid law enforcement interest" and the Sixth Circuit's "no bona fide law enforcement purpose" formulation.

Next, the government ignored Sease's argument that he acted with probable cause: Sease knew that the people he detained were engaging in narcotics crimes.[191] The government did not acknowledge the possibility that Sease was acting pursuant to probable cause[192] because if it had done so, under the government's position, *Whren* would apply and Sease would have merited a reversal of his conviction.

Finally, the government argued that *Whren* applies to all Fourth Amendment claims and should not vary based on the remedy pursued.[193] This argument has merit—consistent application of Fourth Amendment principles makes logical sense and is in line with Supreme Court jurisprudence[194]—though the Court has not yet taken up the question of whether *Whren* applies to § 242 or whether § 242 merits an exception.[195] But the brief failed to acknowledge the ramifications of its position. *Whren* would significantly hamper § 242, restricting a rights-vindication tool that is already largely limited by its stringent willfulness requirement.[196] The systematic pretextual stops in Tenaha,[197] for example, would be legally untouchable under the Fourth Amendment. Although the officers were subjectively targeting racial minorities and arguably acting to enrich their departments and themselves, they could point to minor traffic violations providing the cover of reasonable suspicion and thereby insulate their actions from Fourth Amendment scrutiny.[198] The brief did

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"'nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake." Id. at 14–16 (quoting Graham v. Connor, 490 U.S. 386, 395–96 (1989)).

190. Id. at 21–22.

191. See supra text accompanying note 123. The Sixth Circuit effectively separated probable cause from Sease's situation by finding that "it is inherently improper for officers to set up drug deals for the purpose of taking the money and drugs for themselves, regardless of the context." United States v. Sease, 659 F.3d 519, 524 (6th Cir. 2011).

192. See Government Brief, supra note 140.

193. Id. at 20–21.

194. Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2083 (2011) ("[O]ur opinion [in *Whren*] emphasized that we had . . . rejected every request to examine subjective intent outside the narrow context of special needs and administrative inspections.").

195. The Court has carved out exceptions to *Whren*. See id. (noting exceptions for "special needs and administrative inspections").

196. See supra Part I.C.2 (outlining willfulness under § 242).

197. See supra text accompanying notes 1–14 (outlining pattern of pretextual traffic stops leading to *Morrow* litigation).

198. It is important to acknowledge here that the Supreme Court expressly left open the possibility of pursuing an equal-protection claim under the Fourteenth Amendment when racial profiling is at issue. Supra note 35 and accompanying text. In fact, as

not fully acknowledge that § 242 is a last-resort mechanism by which the government keeps official misconduct under check and is already limited by the heightened willfulness requirement.

The government's reflexive extension of *Whren* to § 242 offered a limited analysis that failed to take into account the full consequences of its position. While the Sixth Circuit's decision did not fully flesh out the distinction between § 242, the exclusionary rule, and § 1983, it was on the right track in declining to extend *Whren*. The final Part of this Note attempts to supplement the Sixth Circuit's argument while respecting the merits of the government's position.

III. REACHING A SATISFACTORY SOLUTION

Whren created a space in which officers could act freely, unhindered by second-guessing when performing their law-enforcement duties.[199] This space makes sense given the danger that officers face on a daily basis: It benefits society to give officers leeway, within bounds, to take actions they think are best suited to keeping the community safe. In extending *Whren* to § 1983, the Court further narrowed the scrutiny officers faced in performing their duties.[200] But *Whren*'s insulation is inappropriate where an officer is facing criminal punishment for violating individual rights with the intent to do so. Section 242 already carries robust safeguards that protect the officer's ability to act freely in the line of duty.[201] Adding *Whren*'s insulation would unjustifiably restrict the government's ability to hold officers accountable for their wrongful acts and would amount to an unacceptable windfall to certain officers who act with malicious motives.

In order to root out officers who are not acting with the best interests of the community in mind, it is necessary to allow inquiry into an officer's subjective intentions when his or her behavior has risen to the

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acknowledged, the plaintiffs in *Morrow* were successful in certifying their class based on that theory. Supra note 19 and accompanying text. Pursuing equal-protection class-action suits, however, has proven extremely difficult and is an unrealistic mode of enforcing Fourth Amendment rights. See Harris, Driving While Black, supra note 185, at 553 (arguing, given Court precedents in equal-protection claims, "[i]t is hard to avoid the conclusion that . . . the Justices do not mean for many equal protection cases to succeed"). Furthermore, it does not address the violations that are not based on racial considerations and thus would be futile in attempting to address Fourth Amendment violations that did not carry proof of discriminatory intent.

199. United States v. Sease, 659 F.3d 519, 524 (6th Cir. 2011) ("*Whren*'s holding that officer intentions are irrelevant to Fourth Amendment analysis comes out of a concern that courts are poorly positioned to engage in post hoc analysis of officer motivations, particularly in light of the snap decisions that law enforcement officers must make in stressful situations.").

200. See supra Part I.B (discussing *Devenpeck* and effects of extending *Whren* to § 1983).

201. See infra Part III.A (discussing § 242's added hurdles including proof beyond a reasonable doubt, government gatekeeping, and willfulness).

level of criminal liability. This Part argues against full application of *Whren* to § 242. Part III.A discusses the barriers facing prosecutors who seek convictions under § 242. Part III.B distinguishes § 242 from § 1983 and the exclusionary rule. Part III.C suggests a solution that would allow for inquiry into motive while preserving the basic principles of the Fourth Amendment.

A. *Section 242's Added Hurdles*

Section 242 provides insulation to defendant officers that does not exist under the exclusionary rule or § 1983 and that the Sixth Circuit failed to acknowledge in *Sease*. This insulation counsels against transplanting *Whren* to § 242. Prosecutions under the statute are "resource intensive, legally challenging, and factually difficult to prove."[202] The statute is constrained by the requirement that guilt be proven beyond a reasonable doubt, by federal gatekeeping over cases brought, and by the willfulness requirement discussed in Part I.C.[203] These hurdles are unique to § 242 and counsel against treating the statute identically to § 1983 or the exclusionary rule.

1. *Beyond a Reasonable Doubt.* — The most obvious added hurdle differentiating § 242 from § 1983 and the exclusionary rule is that § 242 is a criminal statute. In order to convict an officer for willful deprivation of rights under color of law, the government must convince a jury beyond a reasonable doubt that the officer violated a right and acted with the intent to do so.[204] A higher burden of proof is undoubtedly appropriate when criminal sanctions are at stake, but prosecuting police officers entails added difficulty compared to other criminal prosecutions. For instance, in cases in which official misconduct is not caught on tape, guilt often comes down to the officer's word against the victim's.[205] Further, the risk of jury nullification is ever present given the community's respect for law-enforcement officers.[206] These added difficulties amplify

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202. Rachel Harmon, Limited Leverage: Federal Remedies and Policing Reform, 32 St. Louis U. Pub. L. Rev. 33, 48 (2012) [hereinafter Harmon, Limited Leverage].

203. For a layperson-geared explanation of why § 242 convictions are hard to come by, see Yeomans, supra note 85 (explaining barriers to prosecuting and convicting police officers of civil-rights violations, specifically in excessive-force context).

204. Both § 1983 and the exclusionary rule carry a preponderance-of-the-evidence standard. See, e.g., Shaw v. Nevada, 333 F. App'x 186, 188 (9th Cir. 2009) (stating standard for § 1983); United States v. Martinez, 696 F. Supp. 2d 1216, 1236–37 (D.N.M. 2010) (stating standard for exclusionary rule), aff'd, 643 F.3d 1292 (10th Cir. 2011).

205. Cf. Hess, supra note 179, at 185 (noting "criminal burden of proof precludes a high rate of conviction" and "[w]itness credibility only adds to the burden" because "[o]ften the only witnesses of the misconduct have criminal histories themselves").

206. Id. ("[P]olice officers are well respected by jurors and, because they are experienced witnesses, are highly credible."); see also Rachel A. Harmon, Promoting Civil Rights Through Proactive Policing Reform, 62 Stan. L. Rev. 1, 9 (2009) ("Federal criminal civil rights prosecutions face significant legal and practical obstacles, including that . . .

the requirement that the government prove guilt beyond a reasonable doubt, making § 242 convictions more difficult than § 1983 claims, exclusionary claims, and even many other types of criminal prosecutions.

2. *Government Gatekeeping.* — The second hurdle is government gatekeeping. Because § 242 is a federal criminal statute, only federal prosecutors have the authority to bring charges.[207] Prosecutors are afforded wide discretion in deciding whether to charge a case,[208] and the Department of Justice is particularly selective in bringing official-misconduct prosecutions.[209] The Department of Justice "picks to prosecute the cases most likely to result in a conviction . . . . This carefully prioritized prosecution program plainly does not deal with all or even most violations . . . ."[210]

In 2003, the Civil Rights Division (the "Division"), the office principally tasked with bringing § 242 charges,[211] brought only twenty-seven police cases.[212] The Division stepped up enforcement efforts after the change in administration in 2009,[213] bringing forty-four police cases in

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juries frequently believe and sympathize with defendant officers."); Hess, supra note 179, at 185 (noting conviction of police often "hampered by jurors' law-and-order bias").

207. Section 1983 is a civil cause of action, and private individuals may sue under the statute. See, e.g., Runyon v. McCrary, 427 U.S. 160, 174 n.11 (1976) ("The right of individuals to bring suits in Federal courts to redress individual acts of discrimination . . . was first provided by the Civil Rights Acts of 1866 and 1871, 42 U.S.C. sections 1981, 1983."). The exclusionary rule is an argument available to criminal defendants. See, e.g., Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding "evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible" both in state and federal court).

208. See Ronald Jay Allen et al., Criminal Procedure: Adjudication and Right to Counsel 961–87 (2011) (discussing prosecutorial discretion).

209. See, e.g., James P. Turner, Police Accountability in the Federal System, 30 McGeorge L. Rev. 991, 993 (1999) (discussing Justice Department's selectivity).

210. Id. at 993. In 1996, the Civil Rights Division received 10,129 civil rights complaints but filed only twenty-two official-misconduct cases. Jacobi, supra note 87, at 810. Undoubtedly not all complaints received were meritorious, nor were they all complaints of official misconduct, but these numbers underscore the disconnect between the number of people who feel that their rights have been violated and the capacity of the Justice Department to vindicate rights through § 242. Professor Richman and his coauthors note that "[w]hat is perhaps most surprising about federal enforcement of . . . [§ 242] is . . . the infrequency of the cases." Daniel C. Richman et al., Defining Federal Crimes 423 (2014).

211. United States Attorney Offices ("USAOs") also have authority to bring § 242 prosecutions, but statistical information on the number of cases brought by USAOs independently of the Division is not available. USAOs are required to advise the Division of the initiation of § 242 investigations, which may lead to the low number of § 242 cases brought. Richman et al., supra note 210, at 423.

212. U.S. Dep't of Justice, FY2014 Performance Budget Congressional Submission: Civil Rights Division 48 (2013) [hereinafter CRT FY2014 Budget], available at http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/11/crt-justification.pdf (on file with the *Columbia Law Review*).

213. See, e.g., Charlie Savage, Justice Department to Recharge Civil Rights Division, N.Y. Times (Aug. 31, 2009), http://www.nytimes.com/2009/09/01/us/politics/01rights

2012.[214] In 2008, the Division reported a ninety-seven percent favorable resolution rate of its criminal cases.[215] This high rate of favorable resolution underscores the selectivity with which the Department allocates its enforcement resources. Since redoubling its efforts in 2009, the Division's favorable resolution rates were eighty-eight percent in 2009, eighty-nine percent in 2010, eighty-four percent in 2011, and ninety-four percent in 2012.[216] The drop in percentage from 2008 to 2011 may indicate a greater willingness to bring cases that were more difficult to win, but the resolution rates still indicate a preference for allocating resources to the most egregious cases, inevitably forgoing pursuit of other meritorious cases.

Beyond prosecutorial discretion, the number of cases that the Department of Justice can bring has been hampered by budgetary restrictions. While in July 2012 the Division had already exceeded the number of official-misconduct cases brought in the previous year,[217] in its 2013 fiscal year budget request, the Division indicated that "[t]he substantial restoration and reinvigoration progress achieved through the enactment of [the Division's] FY2010 program increases has been reversed because full funding of these program areas was not provided."[218] Given the government's selectivity in the cases that it brings, and its restricted choices due to budgetary constraints, numerous instances of official misconduct inevitably will go uninvestigated and unprosecuted, undermining an important deterrent to this misconduct.[219]

3. *Willfulness Requirement.* — The final and perhaps most significant hurdle that insulates officers under § 242 is the stringent mens rea requirement discussed in Part I.C. The willfulness requirement in § 242 was added in 1909[220] and interpreted by the *Screws* Court in 1945.[221] The legislative history of § 242 offers little guidance as to what the addition of willfulness signified, except that it was meant to make the statute less

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.html (on file with the *Columbia Law Review*) (highlighting Obama Administration's planned "revival of high-impact civil rights enforcement").

214. CRT FY 2014 Budget, supra note 212, at 48.

215. The Division does not differentiate between official-misconduct, hate-crime, and human-trafficking prosecutions.

216. CRT FY2014 Budget, supra note 212, at 19.

217. The Division charged a total of fifty-nine officers in forty-four indictments in fiscal year 2012. Id. at 48.

218. U.S. Dep't of Justice, FY2013 Budget Request: Traditional Missions 3 (2012), available at http://www.justice.gov/sites/default/files/jmd/legacy/2014/08/26/traditional-missions.pdf (on file with the *Columbia Law Review*).

219. By no means should the low number of cases brought indicate that § 242 is irrelevant. As discussed throughout this Note, § 242 stands as one of the last realistic means of combating police abuses; the government's continued capacity to bring § 242 cases is crucial to maintaining law and order. See infra note 256.

220. Supra note 88.

221. Supra notes 99–100 and accompanying text.

severe.[222] As discussed previously, the Supreme Court imposed a strict specific-intent requirement on the statute through its interpretation of willfulness, requiring proof that the defendant acted with a "specific intent to deprive a person of a federal right made definite by decision or other rule of law."[223]

This interpretation of willfulness has proved to be a high hurdle for the government to overcome in securing convictions.[224] When asked to comment on the low number of official-misconduct cases filed in 1996,[225] the chief of the Criminal Section of the Civil Rights Division responded that "federal civil rights prosecutions are difficult due to the requirement of proof of the accused officer's 'specific intent' to deprive an individual of his or her civil rights as distinguished, for example, from an intent simply to assault an individual."[226] In 1995, eighteen percent of cases that the Division decided not to pursue were classified as having a "lack of evidence of criminal intent,"[227] presumably indicating that the Division did not think it could meet the heightened willfulness requirement.

The specific-intent standard in § 242 limits officers' criminal exposure both in the courtroom, as it imposes a higher hurdle for conviction and gives juries more leeway to acquit, and in the Department of Justice's calculation as to whether to pursue certain cases.[228] The significant insulation that the willfulness requirement affords, along with the other obstacles described above, shows that applying *Whren* to § 242 would further restrict an already restricted means of rights vindication. If the Court wishes to impose *Whren* on § 242, it should consider revisiting the plurality decision in *Screws* defining the willfulness requirement so narrowly. Both *Screws* and *Whren* are judicially imposed hurdles that insulate official misconduct; the two doctrines cannot coexist if the Court wishes to respect the will of the legislature that enacted § 242 and allow the government to work toward deterring misconduct. Alternatively, Congress could amend § 242 to loosen the willfulness requirement and make the statute less vague in other ways, perhaps by directly targeting official mis-

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222. Supra note 89 and accompanying text.

223. Screws v. United States, 325 U.S. 91, 103 (1945) (plurality opinion).

224. See supra notes 110–112 and accompanying text (describing high hurdle imposed by willfulness); see also Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 Mich. L. Rev. 1323, 1351 (1952) (noting "extensive and alarming" limitations on effectiveness of § 242 after *Screws*); Hess, supra note 179, at 185 ("In federal prosecutions, the specific intent requirement, coupled with the beyond a reasonable doubt burden of proof, makes obtaining a conviction extraordinarily difficult.").

225. See supra note 210 (discussing low percentage of complaints that turn into charges filed).

226. Jacobi, supra note 87, at 810.

227. Id.

228. See id. (noting § 242 prosecutions limited by difficulties prosecuting police and heightened intent requirement).

conduct and laying out actions that would trigger criminal liability.[229] Imposing both insulating standards on § 242 would surely do violence to its effectiveness.

B. *Differentiating § 242 from § 1983 and the Exclusionary Rule*

As noted in Part II.C.1, in order to justify treating § 242 differently from the exclusionary rule and § 1983, courts must recognize and discuss the distinctions between the doctrines beyond just pointing to their different purposes. Part III.B.1 differentiates § 242 from § 1983 and Part III.B.2 differentiates § 242 from the exclusionary rule. Part III.C offers a solution to the question of *Whren*'s applicability to § 242.

1. *Section 1983.* — The aforementioned hurdles—higher burden of proof, government gatekeeping, and a heightened mens rea requirement—differentiate § 242 from § 1983. While the 1871 amendment to § 242 added language to the criminal statute mirroring that of § 1983, indicating that the two statutes were directed at the same behavior,[230] the 1909 amendment adding willfulness to § 242 differentiates it from its civil counterpart: § 1983 "is not burdened with a statutory or constitutional requirement of willfulness."[231] The Supreme Court further distinguished § 1983 from § 242 in *Imbler v. Pachtman*, establishing that prosecutorial and judicial immunity applicable to § 1983 suits do not apply to shield prosecutors and judges from criminal punishment for their willful acts.[232]

2. *Exclusionary Rule.* — Charges under § 242 are also easily distinguished from the exclusionary rule, especially in the context of pretextual stops. Under the exclusionary rule, a criminal defendant who was stopped ostensibly for failing to signal, but really because the police suspected that he was carrying drugs, would receive an unjust windfall from the suppression of drugs that the police found during their search.[233] Under § 242, exposing and condemning pretextual stops offers no windfall to the person stopped. The statute serves only as punishment to the officer and deterrent for future official misconduct; it provides no direct benefit to the subject of police misconduct. This distinction should not be underestimated: It positions § 242 as the most viable means by

229. E.g, William Yeomans & Georgina Yeomans, Mad About Ferguson? Blame Congress, Politico Mag. (Jan. 16, 2015), http://www.politico.com/magazine/story/2015/01/ferguson-eric-garner-blame-congress-114341.html (on file with the *Columbia Law Review*) (discussing possible federal remedies to § 242's high hurdles).

230. See supra notes 179–181 and accompanying text (noting both statutes target violations of federal rights "under color of law").

231. Gressman, supra note 224, at 1355; see also United States v. Walsh, 27 F. Supp. 2d 186, 191 (W.D.N.Y. 1998) ("What distinguishes 18 U.S.C. § 242 actions from 42 U.S.C. § 1983 actions is the state of mind requirement—a defendant must act 'willfully' in order to violate this statute." (citing Monroe v. Pape, 365 U.S. 167, 187 (1961))).

232. 424 U.S. 409, 428–29 (1976).

233. See Karlan, supra note 24, at 2008 (noting for some defendants "Fourth Amendment suppression would be the purest form of windfall").

which to directly combat pretextual traffic stops based on harmful motivations such as racial discrimination or the desire to confiscate property.[234]

Patterns have emerged in which police use pretextual stops "to investigate many innocent citizens."[235] The stops can be "quite intrusive" and "concern drugs, not traffic," and "African Americans and Hispanics are the targets of choice for law enforcement."[236] While § 242 has not been widely used to combat regimes of pretextual traffic stops, the reality that *Whren* has limited access to other modes of redress counsels in favor of pursuing these cases: Section 242 may be the only method for the government to combat stops based on racial discrimination or schemes to confiscate property.[237]

Scholars lamented the loss of rights that inevitably flowed from the *Whren* decision[238] and offered proposals such as ramping up administrative regulations and more closely monitoring police departments to combat pretextual stops.[239] Section 242, however, offers an attractive method of law enforcement. Limiting *Whren*'s application to § 242 would allow the government to investigate officers who act with malicious motives, including Officer Washington.[240] It directly punishes officers who act with bad intentions, and because the statute imposes only a misdemeanor where bodily injury does not occur,[241] it is not a draconian enforcement policy.

C. *Grappling with Established Fourth Amendment Law*

The government argued in *Sease* that *Whren*'s objective-inquiry test is a Fourth Amendment doctrine that should not change based on the cause of action,[242] and the Supreme Court has expressed support for this

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234. See supra notes 11–14 and accompanying text (discussing Tenaha enforcement program); see also Harmon, Limited Leverage, supra note 202, at 41 (discussing § 242 as powerful deterrent to individual officers).

235. Harris, Driving While Black, supra note 185, at 560.

236. Id.

237. See supra Part I.A–B (discussing limited availability of other rights-vindication mechanisms).

238. Harris, Driving While Black, supra note 185, at 576 ("[M]otorists are now fair game for police . . . .").

239. Id. at 576–82 (offering proposals for combating pretextual stops).

240. Suggesting that conduct such as Officer Washington's be corrected by criminal penalty may seem extreme, but under § 242 Officer Washington would only be liable for a misdemeanor, carrying a fine and/or less than one year in jail. Because other means of redress have been cut off by *Whren*, prosecution under § 242 for a misdemeanor serves as the last remaining deterrent to such conduct.

241. Supra note 86 and accompanying text (explaining misdemeanor violation in statute).

242. Supra notes 142–143 and accompanying text.

point.[243] The foregoing discussion has attempted to establish that § 242 should be an exception to this rule.[244] But perhaps instead of a complete rejection of *Whren* in § 242 prosecutions, a more nuanced workaround would better serve the purposes of *Whren* and would preserve Fourth Amendment jurisprudence while still allowing the government to combat unlawful police activity.

In keeping with the Court's understanding that the Fourth Amendment is an objective inquiry when reasonable suspicion or probable cause exists, the Court could establish factual triggers that, when met, would permit inquiry into the officer's motivation under § 242. Factual triggers could include an officer pulling a person over and seizing his assets, but not making an arrest;[245] seizing assets that are not logically connected to the suspected crime;[246] or a pattern of behavior that suggests foul play, such as the jump in minority motorists pulled over in Tenaha.[247] Alternatively, evidence of a cover-up could trigger an inquiry into motive. Once the factual triggers are met, courts would be free to move past *Whren* and look into the officer's motivation. This scenario represents a compromise that recognizes that the objective test of the Fourth Amendment is well established and serves a valuable purpose, but preserves the effectiveness of § 242 as a law-enforcement mechanism.

These objective factual triggers would allow inquiry into subjective intentions in cases such as that of Boatright and Henderson, who, after being pulled over by Officer Washington of the Tenaha Police Department, were forced to choose between giving up their entire cash

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243. See supra note 194 and accompanying text (discussing Supreme Court jurisprudence).

244. The Court has already recognized exceptions to *Whren* for special needs and administrative inspections. Supra note 37.

245. In fact, Attorney General Eric Holder recently "barred local and state police from using federal law to seize cash, cars and other property without warrants or criminal charges." Robert O'Harrow Jr., Sari Horwitz & Steven Rich, Holder Limits Seized-Asset Sharing Process That Split Billions with Local, State Police, Wash. Post (Jan. 16, 2015), http://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharing-process-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html (on file with the *Columbia Law Review*). Using non-arrest as a factual trigger has the potential to lead to more arrests, but would have the immediate effect of requiring the police to present legitimate evidence backing up their basis for seizing assets. For an investigation into aggressive civil forfeitures that do not result in charges or arrest, see Michael Sallah, Robert O'Harrow, Jr. & Steven Rich, Stop and Seize: Aggressive Police Take Hundreds of Millions of Dollars from Motorists Not Charged with Crimes, Wash. Post (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/ (on file with the *Columbia Law Review*).

246. For instance, the Washington Supreme Court has held that it is an abuse of authority for police to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception. State v. Ladson, 979 P.2d 833, 842 (Wash. 1999).

247. See supra notes 11–14 and accompanying text (describing increase in traffic stops of nonwhite drivers from 32% to 51.9% in one year under Tenaha drug-interdiction program).

savings or being arrested and having their children turned over to Child Protective Services.[248] After establishing that the couple had their assets seized, but were not arrested, and were essentially threatened into giving up their possessions, a court could inquire into whether Officer Washington pulled them over impermissibly because Henderson was Latino or to take the motorists' possessions, or permissibly because Henderson was driving in the left lane without passing.[249] Additionally, evidence of a cover-up—such as the fact that Officer Washington had a habit of forgetting to activate his camera during stops,[250] or that Henderson and Boatright were threatened with felony charges when they tried to file a complaint with Tenaha County[251]—could serve as objective indicators triggering permissible inquiry into motive.[252]

The proposed approach would be consistent with the Supreme Court's conception of the Fourth Amendment, which regulates "conduct rather than thoughts."[253] A pattern of conduct demonstrating racially motivated behavior, for instance what occurred in Tenaha between 2006 and 2008,[254] should objectively indicate foul play. This solution would preserve the outer shell of objectivity surrounding Fourth Amendment inquiries, but would grant prosecutors more leeway to inquire into motive in well-defined circumstances in order to establish that a Fourth Amendment violation had occurred.[255]

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248. See Stillman, supra note 9 (describing "cash-for-freedom" scenario imposed on Hendersons).

249. Id. (noting Officer Washington justified stopping Hendersons because they were driving in left lane without passing).

250. See Individual Complaint, supra note 3, at 7 (alleging Officer Washington "avoids recording traffic stops . . . to prevent the creation of evidence of the interdiction program"); see also Stillman, supra note 9 ("Curiously, most of Barry Washington's traffic stops were absent from the record. In those instances where Washington had turned on his dashboard camera, the video was often of such poor quality as to be 'useless' . . . .").

251. Stillman, supra note 9 (noting district attorney told Henderson and Boatright if they continued to contest waiver they signed giving up their savings "they could be indicted on felony charges").

252. These objective triggers would be resolved through pretrial motions and hearings. While some might counsel against creating a further burden on judicial resources or dragging out the trial process through extended motions practice, the fact that § 242 prosecutions are rare, see supra Part III.A.2 (discussing limited number of § 242 prosecutions), signifies that this would not be overly burdensome.

253. Ashcroft v. Al-Kidd, 131 S. Ct. 2074, 2080 (2011).

254. See supra notes 11–14 and accompanying text (describing increase in traffic stops of nonwhite drivers under Tenaha drug-interdiction program).

255. The government may balk at creating exceptions to the Fourth Amendment objective test, but this move would not be unprecedented. See, e.g., Craig M. Bradley, The Reasonable Policeman: Police Intent in Criminal Procedure, 76 Miss. L.J. 339, 344, 372 (2006) (arguing despite *Whren* there remain "various contexts in which the mental state of the police is still at issue" and "there is no such thing as a purely objective Fourth Amendment inquiry"). For example, Professor Bradley posits that there is a distinction between whether the police think they have legal probable cause and whether they believe the facts upon which they base probable cause. Id. at 360. He suggests that if the police do

CONCLUSION

The fact that the safeguards discussed above necessarily limit § 242 prosecutions should not suggest that § 242 is somehow insignificant. Prosecutions of police misconduct provide an important public condemnation of abuse of power.[256] Many of the cases brought under § 242 address abuses that could not or would not be addressed through § 1983 or the exclusionary rule.[257] The prospect of facing criminal prosecution and either a misdemeanor or felony conviction[258] serves as an important reminder to police officers that they are not to abuse the public's trust.[259] Transplanting *Whren* to § 242 would unjustly cut off a vital and often last-resort means of safeguarding civil rights and is not merited given the significant insulation already afforded police officers by § 242. Dispensing with the Fourth Amendment objective test entirely may not be a viable option, but creating objective triggers that serve as gatekeepers for inquiry into motive would preserve § 242 as an effective means to combat Fourth Amendment violations.

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not believe the facts backing up probable cause, their intentions should not be insulated from scrutiny. Id. at 360–63. On the other hand, the Court held in *Heien v. North Carolina* that a reasonable mistake of law can justify a traffic stop. 135 S. Ct. 530, 534 (2014).

256. See Alexa P. Freeman, Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality, 47 Hastings L.J. 677, 712–13 (1996) (noting criminal prosecutions of police misconduct "are critical," underscore seriousness of behavior at issue, and evidence "willingness by society to back up its statement of condemnation by its use of collective power"); Gressman, supra note 224, at 1353 (arguing chance of vindication by federal government for victim of police misconduct is "complicated by the requirement of willfulness . . . [b]ut . . . is nonetheless an important and desirable chance").

257. Cases go unaddressed by the exclusionary rule because not every instance in which the Fourth Amendment is violated results in a prosecution where the exclusionary rule would apply. Section 1983 cases are often hampered by the fact that they are brought by private individuals who may not be able to finance the lawsuit or convince a lawyer to take the case. And, of course, many cases cannot be addressed through the exclusionary rule and § 1983 because of *Whren*'s limitations. See, e.g., Harris, Driving While Black, supra note 185, at 576 ("[T]he door of judicial redress [for pretextual stops] has closed, and . . . the Supreme Court's suggested equal protection remedy seems unlikely to bear any fruit . . . ."). See generally Karlan, supra note 24, at 2004–05 (noting general difficulty of prevailing on equal-protection claim).

258. Section 242 imposes a felony conviction only where bodily injury has resulted from the misconduct or if violation of the statute entailed the "use, attempted use, or threatened use of a dangerous weapon, explosives, or fire." 18 U.S.C. § 242 (2012).

259. See Freeman, supra note 256, at 713 (pointing out consequences of criminal conviction, including "severe social stigma").