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Doctrine, Discretion, and Discrimination: A Response to Professor Richardson

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Professor Richardson has presented a characteristically insightful and gracious analysis of the critique of *Whren v. United States*[1] offered in the Article I co-authored with Charles Vernon.[2] She, like us, would like to see *Whren* overruled.[3] She believes, however, that our solution has not gone far enough in a couple of ways.[4] Although I do not exactly disagree with her observations, I do defend our argument as an appropriate step forward.

One central objection is to the Article's defense of pretextual but non-race-based stops.[5] The Article argues that some sort of "pretextual" law enforcement is inevitable because the police will legitimately have to stop some speeders but not others and because the individual and programmatic reasons for these decisions are irrelevant—this speeder may be reckless or drunk, this month police are cracking

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

2 For the critique of *Whren v. United States* offered by Charles Vernon and myself, see Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO WASH. L. REV. 882 (2015). For Professor Richardson's response, see L. Song Richardson, Response, *Implicit Racial Bias and the Perpetrator Perspective: A Response to "Reasonable but Unconstitutional"*, 83 GEO WASH L. REV. 1008 (2015).

3 *See* Richardson, *supra* note 2, at 1020–22.

4 *See id.*

5 *See id.* at 1014–19 (noting the author's concerns with pretextual policing).

down after a serious accident[6]—so long as they do not rest on suspect classifications.[7] Professor Richardson points out that continuing approval of pretextual stops will allow racial profiling to continue.[8] This is particularly so because implicit bias—subconscious racism—will inevitably mean that discretionary police attention is disproportionately aimed at African Americans.[9]

I completely agree that implicit bias is a problem and would remain so even if *Whren* were overruled. One of the academy's greatest achievements in recent decades is the demolition of the rational actor model of human behavior.[10] The evidence definitively proves that people are subject to a range of unconscious cognitive biases when making choices and judgments.[11] This phenomenon applies to police in the field, judges on the bench, and also to scholars when they write. Although this does not mean that society should abandon the search for rational public policy, it probably does mean that we should restrain our expectations for what legal doctrine can accomplish. Concretely, I suspect that it would be difficult to eliminate implicit bias from the law enforcement and prosecution process even if we found a way to prohibit pretext.

Eliminating pretext would seem to require full enforcement of the law.[12] As a matter of policy choice or constitutional mandate, jurisdictions could decide not to criminalize conduct unless they are prepared to make a reasonable effort at full enforcement. This could be beneficial; prohibitions that are frequently violated but rarely punished may well not be that important, or perhaps are better handled without resort to the criminal justice system.

A related approach would be to require police and prosecutorial discretion to be exercised based on explicit and disclosed principles. For example, the Highway Patrol might say that it will only stop drivers if they are going more than seventy-five in a sixty-five mile per

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6 *See* Chin & Vernon, *supra* note 2, at 897–99.

7 *See id.* at 917–35 (noting that "racial selectivity in enforcement is not constitutionally ordinary.").

8 Richardson, *supra* note 2, at 1012–13.

9 *Id.*

10 *See, e.g.*, Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO L.J. 1, 144–52 (2004) (noting that the rational actor model ignores "systematic biases that simply do not cancel out").

11 *See id.* at 161.

12 *See* Chin & Vernon, *supra* note 2, at 894–96 (discussing the systematic difficulties of achieving full enforcement of the law). A nonpretextual, nonmandatory system would require arbitrary decisions, decisions for no conscious reason, which would seem particularly susceptible to objectionable unconscious motivation or to police dissimulation.

hour zone, or the County Attorney might state that it will only charge statutory rape if the age difference is greater than a specified number, or if the circumstances indicate the conduct was in fact forcible. Under such a system, it might be a defense that someone was prosecuted when the policy provided they should not have been; it might also be a defense if a defendant showed that the criminal justice system failed to make a good-faith effort to detect and prosecute every case within the policy.

Either a full enforcement system or an expressed discretion system would be a revolutionary change to the current criminal justice system. Either might be an improvement for a variety of reasons.[13] Yet, implicit bias would likely still have room to operate under these systems just as it does now. In the process of pruning the criminal code, or drafting and publishing explicit enforcement policies, it is likely that the programmatic and individual decisions made would be ones that were congenial to the majority.

In addition, even with arrest and prosecution policies mandating action in some circumstances and inaction in all others, decisions still have to be made in individual cases about whether there is probable cause or proof beyond a reasonable doubt that facts triggering the policy exist. Rigidity and lack of discretion in bodies of law like sentencing guidelines and mandatory minimum sentences have not operated to the benefit of people of color or the poor.[14] If one believes in cognitive bias as I do, one must fear that even—or especially—under a mandatory system, borderline cases will result in disproportionate minority arrest and prosecution.

In short, I doubt that alterations to doctrine alone, even radical ones, can solve the problem of implicit bias because it is too big of a problem. Nevertheless, (and I do not think Professor Richardson disagrees with this) overruling *Whren* would be a step in the right direction because it would make it possible to have a conversation about implicit bias in the shadow of the Constitution and would make it more probable that institutions would combat implicit bias through training and policy. As long as conscious racial bias does not violate

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13 *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 573 (1960) ("Full enforcement will place the legislature in a position to evaluate its . . .laws by providing a basis for answering such questions as . . .will full enforcement reduce . . .the frequency of connected crimes." (emphasis omitted)).

14 *See, e.g.*, David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1285–90 (1995) (discussing how mandatory minimums for drug crimes disproportionately impact African-Americans).

the Constitution, unconscious racial bias is necessarily legally irrelevant.

Professor Richardson offers a second criticism of the article. Using Devon Carbado's phrase, Professor Richardson expresses "discomfort with [the Article's] adoption of the perpetrator perspective"[15] in that the doctrinal structure the paper proposes focuses on the conduct and mental state of the police rather than the experience of the people stopped by the police.[16] Professor Richardson further notes that "[t]he absence of conscious animus does not eliminate the racial burdens of being the victim of racial profiling."[17] This is true enough. And yet, in its own way, the Article serves a radical purpose.

Legal doctrine is a kind of an anti-discrimination device. The premise of doctrine is that it affects me no differently than you; that a court will apply it when it results in an outcome that the court prefers or that it does not prefer. The current Chief Justice, who had no part in *Whren*, claims that he is an umpire calling balls and strikes;[18] it is quite probable that every Justice who has ever served on the Court has claimed to make decisions based on principle rather than prejudice, political inclination, or caprice. Precedent and doctrine do not always carry the day, and sometimes for good reason,[19] but our system insists that they are entitled to respectful consideration. The conceit of the Article—and one with which Professor Richardson seems to share in the sense that she treats the Article's framing of the arguments as meaningful—is that regular people, even law professors, can converse with the government, even with the Supreme Court, and if compelling reasons and principles are presented, they will be taken seriously.[20]

The Article is an experiment. Perhaps the Article's logic is fatally flawed in a way I did not appreciate (for that inevitable possibility I apologize in advance). But if the argument is sound, some litigant, some day, I hope, will get the Article's contentions before a court,

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15 Richardson, *supra* note 2, at 1020–21.

16 *Id.* at 1013.

17 *Id.* at 1020.

18 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr.) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

19 *See, e.g.* Batson v. Kentucky, 476 U.S. 79 (1986), *overruling* Swain v. Alabama, 380 U.S. 202 (1965)); Gideon v. Wainwright, 372 U.S. 335 (1963), *overruling* Betts v. Brady, 316 U.S. 455 (1942)).

20 *See* Richardson, *supra* note 2, at 1009–10.

perhaps eventually before the Supreme Court. Perhaps the Court will ignore the arguments; perhaps racial profiling is too unimportant to write about it further. Perhaps the power of precedent precludes devoting more attention to a topic the Justices have already addressed. Or perhaps the Court will recognize that it made a mistake in *Whren* and reconsider it. The price of getting an answer of this kind is putting the argument in terms that the Court can engage, giving the Justices the benefit of the doubt, assuming that if it is true that they adopted the perspective of the perpetrators of racial profiling and ignored the victims, they did so as a wrong turn in the course of an effort to be just.