THROWING THE BABY OUT WITH THE BATHWATER: HOW CONTINENTAL-STYLE POLICE PROCEDURAL REFORMS CAN COMBAT RACIAL PROFILING AND POLICE MISCONDUCT

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I. INTRODUCTION

Until the day she was stopped in March 1997, Gail Atwater never considered herself anti-cop.[1] As a white woman living in the suburbs, she was not the type to complain about police misconduct. Her encounter that day with Officer Turek of the Lago Vista, Texas police department, however, led to one of the most controversial decisions of the Supreme Court's 2001 term. Atwater was driving her pickup truck in Lago Vista with her two children, a three-year-old son and a five-year-old daughter. She unbuckled their seat belts after one of the children dropped a toy. At the time, Atwater claims she was driving about fifteen miles per hour.[2] Noticing the passengers of the truck were not wearing their seatbelts, Officer Turek pulled over Atwater. The events that followed could scarcely be more shocking to the average suburban parent. After verbally berating Atwater for failing to wear her seat belt, Turek handcuffed Atwater and drove her to the local police station. She was then booked and placed in a holding cell for one hour before finally being released on $310 bond. She ultimately pled no contest to several minor seatbelt offenses and paid a $50 fine.[3] She posed no physical threat to Officer Turek, nor was she possessing any illegal weapons or drugs.[4]

Atwater subsequently filed suit against the City of Lago Vista under 42 U.S.C. § 1983, alleging that her Fourth Amendment rights against search and seizure had been violated.[5] In a 5-4 opinion written by Justice Souter – an unexpected member of the majority – the Supreme Court ruled that there was no seizure.[6] The Justices had little trouble concluding Officer Turek had probable cause to make the arrest, given that the officer spotted Atwater's children without their seatbelts fastened.[7] Furthermore, the Court showed little sympathy for what

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1. *The Early Show* (CBS television broadcast, Dec. 4, 2000).
2. *Id.*
3. Atwater v. City of Lago Vista, 532 U.S. 318, 318 (2001).
4. *See id.*
5. *Id.* at 325.
6. *Id.* at 326.
7. *Id.* at 354.

many might consider a clear abuse of police authority, noting that she suffered no more indignity than the normal custodial arrest.[8]

The *Atwater* case poses a complex constitutional dilemma. To the lay observer, this appears to be a cut-and-dry abuse of police power. Such an observer would undoubtedly expect some sort of redress, either at the state or federal level. But Texas law explicitly authorizes a police officer to arrest a person found committing a seatbelt violation.[9] Moreover, since Officer Turek was found to have met the standard of probable cause, the arrest did not violate the Fourth Amendment. Without a constitutional violation, a civil rights action under § 1983 cannot succeed.[10] As the law stands, a rogue police officer like Officer Turek can selectively choose when to arrest scofflaws based on his own whims. Officer Turek's arrest of Atwater was in this case motivated by a strange personal vendetta,[11] but an officer may choose to arrest based on the scofflaw's skin color or personal creed. The *Atwater* decision leaves state and federal law at an impasse when it comes to curbing objective, individual abuses of discretion committed by police officers.

The *Atwater* decision also threatens to erode the trust citizens have in their police departments. Traditionally, white Americans like Gail Atwater have been among the most supportive of the police.[12] However, after an experience like hers turns her "anti-cop," it is worth considering what consequences will result from this abrogation of trust. Police officers rely on the good-faith cooperation of the communities they serve in order to fight crime.[13] When this important link of trust is broken – as it already has been in many American minority communities[14] – the impact on the effectiveness of law enforcement can only be negative.

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8. *Id.*

9. TEX. TRANSP. CODE ANN. § 543.001 (1999).

10. *See* Whren v. United States, 517 U.S. 806, 817 (1996) ("[I]n principle every Fourth Amendment case, since it turns upon a reasonableness determination, involves a balancing of all relevant factors. With rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.").

11. Officer Turek had previously stopped Atwater for a seatbelt violation. *Atwater,* 532 U.S. at 341 n.1. According to Atwater, Officer Turek's behavior was unusually aggressive; as he approached the car, Atwater claimed that he "yelled" that she was "going to jail" and that they had "met before." *Id.* at 341.

12. After considering herself a liberal, Atwater now wants to "limit the government's power as much as possible." Ross E. Milloy, *Public Lives; For Seat-Belt Violator, a Jam, a Jail, and Unmoved Justices*, N.Y. TIMES, Apr. 28, 2001, at A9.

13. *See generally* James Forman Jr., *Arrested Development: The Conservative Case Against Racial Profiling,* NEW REPUBLIC, September 10, 2001, at 24 (arguing that racial profiling subtly discourages young black students from achieving).

14. The author acknowledges that there are many different groups of people who may identify with the term "minority," many of which are paradoxically no longer minorities in certain regions of the United States. The term might adequately describe Native Americans, Asian Americans, Arab Americans, African Americans, Latinos, people

Although the type of "legal" police misconduct tolerated in *Atwater* is worrisome, official police misconduct is a much larger and amorphous problem. "Official police misconduct" is conduct endorsed by the police either formally or informally that leads to harassment and constitutional violations of citizens' rights – one of the most publicized examples of which is the phenomenon known as "racial profiling."[15] Challenges to the practice have largely failed in the courts,[16] but complaints persist.

In the most benign cases, racial profiling yields only minor indignities – an unnecessary roadside stop or a few minutes of inconvenience. In the more serious cases, African-Americans have been severely inconvenienced, humiliated, beaten, and even killed. Police stopped Erroll McDonald, a Pantheon Publishing executive, while he was driving a rented Jaguar to ask him to, in his words, "show cause why [he] shouldn't be deemed a problematic Negro in a stolen car."[17] Robert Byrd, an eleven-year veteran of the D.C. police, tried to stop a carjacking while out of uniform and was beaten by white police who believed he was the carjacking suspect.[18] A number of African-American celebrities have complained of the problem, including R. Kelly,[19] Marcus Allen, LeVar Burton, Johnnie Cochran, Christopher Darden, Miles Davis, Walter Mosley, Wesley Snipes, Blair

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with disabilities, and lesbian, gay and transgendered people. In the interest of clarity, the author shall use the term "minority" to refer to persons of African-American and Latino descent, two ethnic groups that have historically suffered the most from racial profiling. Additionally, following the events of September 11, 2001, law enforcement officials have increasingly and unjustly targeted Americans of Arab and Middle Eastern descent in anti-terrorism policing efforts.

15. The term "racial profiling" has only come into popular use within the past decade or so, but the practice of targeting minorities for harassment dates back to post-colonial America. *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 336 (1998) (racial profiling practice carried out in a manner "reminiscent of the slave patrols of colonial America"). This Note uses the term "official police misconduct" both to contrast it with the "unofficial police misconduct" exhibited in the *Atwater* case, and to suggest that both types of misconduct have a similar impact on society.

There are many other types of conduct that would fall under the banner of official police misconduct as defined in this Note, such as evidence tampering, report falsifying, and corruption. This Note will focus solely on the peculiar phenomenon of racial profiling, a practice which is presumptively legal, yet which raises a host of Constitutional problems.

16. *See* Whren v. United States, 517 U.S. 806 (1996).

17. Forman, *supra* note 13, at 25.

18. *Id.*

19. Adero S. Jernigan, Note, *Driving While Black: Racial Profiling in America,* 24 LAW & PSYCHOL. REV. 127 (2000) (citing Ashley Bach, *Singer R. Kelly Ticketed, Put in Lineup and Cleared*, CHI. TRIB., July 10, 1999, at 6). Police evidently stopped Kelly and his two companions on grounds that their 1998 silver Mercedes matched the description of a vehicle identified in a robbery, and were not released until after an eyewitness failed to identify them.

Underwood, and Cornel West.[20] In 1998, Sergeant First Class Rossano V. Gerald alleges that he and his twelve-year-old son Gregory were stopped by police on the Oklahoma border and were forced to wait in a squad car for two hours while the officers searched the car simply because they were black.[21] Most tragic of all these stories is the tale of Amadou Diallo, a 22-year-old immigrant from West Africa who was gunned down by a New York City police task force outside his apartment building after the police mistook Diallo's wallet for a gun.[22]

The decision in *Whren v. United States*[23] added to the cumulative toll of countless racial profiling incidents across the country, and has had even a more grievous effect on Americans' trust in law enforcement than the *Atwater* decision. Most young African-Americans have more reasons to fear the police than to trust them, much less cooperate with them.[24] Young African-Americans are regularly subject to indignities that few Anglo-Americans would tolerate.[25] Ironically, much of this mistrust stems from policies intended to increase the public's trust in their officers, which tend to encourage racial profiling.[26] If American policymakers wish to combat racial profiling, they must focus part of their efforts upon rebuilding the trust of minority communities in the police.

The mistrust that many minorities bear toward the police extends deep into the criminal justice system. Just as minorities are discouraged in practice from cooperating with the police for various objective reasons – the constant air of suspicion born against them, random searches in the street, capricious traffic stops – they are equally discouraged from participating in the trial process. In the constitutionally guaranteed American adversarial system with its constitutional guarantees, defendants are often discouraged from taking the stand in their own defense.[27] Furthermore, the American emphasis on plea-bargaining tends to avoid

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20. Katheryn K. Russell, "*Driving While Black": Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717, 720 n.15 (1999).

21. Sean P. Trende, *Why Modest Proposals Offer the Best Solution for Combating Racial Profiling*, 50 DUKE L.J. 331, 331-32 (2000). The police officers maintain that they had a "reasonable and articulable" suspicion that Gerald was smuggling drugs.

22. *See* Dolores D. Jones-Brown, *Fatal Profiles: Too Many "Tragic Mistakes," Not Enough Justice*, N.J. LAW. MAGAZINE, Feb. 2001.

23. 517 U.S. 806 (1996). *See* discussion *infra* Part II.

24. *See* Trende, *supra* note 21, at 362-63 ("[T]he existence of profiling and the press attention given to the practice only serve to increase tensions between minorities and police."); *see also* Forman, *supra* note 13, at 26 ("[D]iscriminatory police practices create unnecessary and unproductive hostility between police and the communities they serve.").

25. *See* Forman, *supra* note 13, at 25 (police conduct pat-down searches on students weekly at Maya Angelou Public Charter School in Washington, D.C.).

26. *See* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety,* THE ATLANTIC, March 1982,
available at http://www.theatlantic.com/politics/crime/windows.htm.

27. They have a good reason not to do so: the Fifth Amendment protects against self-incrimination while on the stand in a criminal trial or in the interrogation room. U.S.

the road of truth-seeking in favor of speedy resolution and risk aversion.[28] Granted, given the immensely crowded state of affairs in today's criminal justice system, a preference for plea-bargaining is understandable.[29] However, it is possible that a policy favoring plea bargaining at the expense of actual truth-seeking may be undermining the faith of minorities in the criminal justice system.[30] This is not merely an intellectual matter, since a felony conviction carries great consequences in American society, such as political disenfranchisement and a loss of economic opportunity.[31] A system that favors quick plea bargaining over truth-seeking, especially in light of new "get tough on crime" mandatory sentencing requirements, may reap other social problems that sour the bargain.[32]

While Gail Atwater may not have much in common, socially, economically or otherwise, with the average African-American victim of racial profiling, they share a common distrust of the police. There is a sense – particularized in the former case, generalized in the latter – that the police are unaccountable, reckless, and untrustworthy. The *Atwater* decision is a sterling example of the federal government's impotence to control and discipline law enforcement officers for abuses of their otherwise lawful authority.[33] It is a

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CONST. amend. V. Also, evidence obtained in violation of this right may be excluded at trial. Miranda v. Arizona, 384 U.S. 436 (1966).

28. *See* Raneta Lawson Mack, *It's Broke So Let's Fix It: Using a Quasi-Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System,* 7 IND. INT'L & COMP. L. REV. 63, 69 (1996) (discussing how the American trial process, with its extensive constitutional protections, may deter the search for truth).

29. Using California as a bellwether example, over three-fourths of its convictions come from guilty pleas, a clear majority that has taken hold on average across the United States since the mid-19th century. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 465-70 (1992).

30. *See* Mack, *supra* note 28, at 83 (stating that although American constitutional protections, such as the right against self-incrimination apparently "promote and maximize the independence and control of the defendant, such protections may, in practice, contribute to and encourage a general reluctance on the part of the defendant to assist in a search for the truth.").

31. The subject of disenfranchisement takes special significance in light of the cliffhanger 2000 presidential election. In Florida alone, more than 525,000 ex-felons have been barred from voting, a significant increase from 61,000 in 1976. Sasha Abramsky, *The Other Election Scandal*, ROLLING STONE, Aug. 30, 2001, at 47.

32. *See* Mack, *supra* note 28, at 83 (suggesting that a failure of both factually innocent and factually guilty defendants to testify "may ironically produce a result similar" in each case).

33. Justice O'Connor, a surprising dissenter in the *Atwater* case, wrote in her opinion: "Such unbounded discretion [granted to police officers] carries with it grave potential for abuse. . . . Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual." Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting).

problem that many other systems of government, particularly those with civil traditions of law, find alien to their own experience.

Comparative criminal procedure studies, although no longer popular, might pose a solution to the ongoing problem of police misconduct. Many writers have taken a "pie in the sky" approach, praising the advantages of the continental system while ignoring the practical barriers to overhauling the American system into an "inquisitorial" model.[34] The intersection of the judicial function with the prosecutorial function common to the inquisitorial system (in the French system, the examining magistrate), for example, makes it difficult to import such a system without violating constitutional guarantees, such as the right to a jury trial.[35] Consequently, most studies of continental criminal procedure remain largely intellectual exercises, with little hope of influencing reform.[36]

Few writers have taken the smaller, more measured approach of examining what components of a continental system might be practically imported into our system.[37] This Note will focus on the French Code of Criminal Procedure, and examine the extent to which French-style procedural reforms could reduce police misconduct, and consequently the number of appellate reversals in criminal trials stemming from that misconduct, in the following problem areas: individual (or "rogue") cases of police misconduct, racial profiling, and the false confession problem. Part II of the Note will be an overview of the problems facing the American criminal justice system relating to police misconduct, both official and unofficial. Part II will also serve as a basic primer on the workings of the French criminal justice system, specifically with regards to the areas in which it might present an ideal model for reform. Part III of the Note will consider the ramifications, both positive and negative, of adopting French-style procedural reforms. Part IV will address constitutional implications of these reforms, and will propose the most effective means of implementing reforms without running afoul of constitutional guarantees. Or, where this is not possible, Part IV will consider the tradeoffs involved in sacrificing features of our American system for the French system.

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34. I am inspired by the approach of Professor Richard Frase, who favors a more measured approach to adapting inquisitorial-style reforms. *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How Can We Find Out, and Why Should We Care?,* 78 CAL. L. REV. 539, 550 (1990) (in examining general criminal reforms that might be imported from France, argues "that smaller transplants are possible" and that a hybrid system of both French and English elements "may be superior to either parent system.").

35. *Id*. at 547.

36. For an example of the typical academic approach to continental criminal procedure study, *see* George W. Pugh, *Ruminations Re Reform of American Criminal Justice (Especially Our Guilty Plea System): Reflections Derived from a Study of the French System*, 36 LA. L. REV. 947 (1976).

37. *See* Frase, *supra* note 34.

II. LEGAL OVERVIEW

A. Unofficial Police Misconduct in the United States and Its Effects

As protectors of the peace, police officers play an important role in American society. The system cannot afford to harbor many "bad apples" among its ranks if it hopes to maintain the trust of the American public. By many indications, Officer Barton "Bart" Turek was a bad apple.

Officer Turek was unusually aggressive when he stopped Gail Atwater. Turek remembered Atwater from an incident three months earlier, where he had also stopped Atwater for failing to wear her seatbelt.[38] This time, the children's seatbelts were unbuckled.[39] Atwater unbuckled them so that they could search for a rubber vampire bat that had fallen from the car window.[40] Turek pointed his finger at Atwater's chest and berated her for being a bad mother, within earshot of her frightened children.[41] Her purse was stolen a day earlier, so she was without her license or proof of insurance.[42] Unmoved, Turek took Atwater to the station, had her fingerprinted, and released her several hours later.[43] Angered by Officer Turek's conduct, Atwater filed a § 1983 action against the City of Lago Vista for false arrest.[44]

In a 5-4 ruling, the Supreme Court held that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a seatbelt infraction.[45] In finding the arrest constitutional, the Court rejected the arguments of Atwater and the dissenting justices in the Fifth Circuit, who had argued that the common law restricts the authority of police officers to make warrantless arrests for misdemeanors.[46] Atwater argued that common law rules at the time of the adoption of the Constitution forbade warrantless misdemeanor arrests except in cases of "breach of the peace."[47] The Court rejected this argument for lack of unanimity, noting that the commentators of the day did not unanimously subscribe to her view.[48] Furthermore, a litany of statutes enacted contemporaneously with the Constitution also opposed Atwater's argument.[49]

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38. *Atwater,* 532 U.S. at 324 n.1. *See also* sources cited *supra* note 12.
39. *Atwater*, 532 U.S. at 324.
40. Milloy, *supra* note 12.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
46. *Id.* at 325.
47. *Id.* at 327.
48. Justice Souter, writing for the Court, contrasted Blackstone (in support of Atwater) with Sir Matthew Hale (in opposition) in reaching this conclusion. *Id*. at 329-30.
49. *Id.* at 333.

Although Atwater's argument did not find favor with the justices, she suggests ideas of particular interest to this Note. Specifically, she attempted to convince the court to distinguish between "jailable" and "fine-only" offenses.[50] The Court rejects this distinction on a number of grounds, including the difficulties it would impose on police officers, and the general ineffectiveness such a distinction.[51] Interestingly, this distinction was also raised in *Illinois v. McArthur*[52] in the 2001 term. At issue in *McArthur* was whether the police, in detaining a person at his mobile home while waiting to obtain a search warrant, violated the Fourth Amendment.[53] In upholding the seizure, the Court noted that exigent circumstances can influence the "reasonableness" calculation,[54] finding that, given a free hand, the defendant would have destroyed or disposed of incriminating drug evidence inside the mobile home.[55] In response to defendant's argument that police could not enter a home without a search warrant to prevent loss of evidence,[56] the Court countered that more severe crimes demanded a less stringent reading of the Fourth Amendment[57] and McArthur's case involved a "jailable" offense.[58] Given the "jailability" of the drug offense, the Court thought it justifiable to detain a citizen outside his home without a search warrant for two hours.[59] Like *Atwater*, *McArthur* gives police substantial discretion to enforce the law. Such discretion, in the hands of an unscrupulous police officer, might lead to abuse.

Atwater and *McArthur* suggest that the citizenry might benefit from a bifurcation of offenses into "jailable" and "fine-only" categories. Or, if this specific categorization is not employed, limiting the power of the police to arrest without warrants in certain cases, particularly for misdemeanor offenses, might have a similar effect. Such a broad reform of the system would have the effect of limiting the discretion of individual police officers, thus making it more difficult

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50. *Id.* at 348.

51. Regarding the former, Souter writes: "The trouble with this distinction, of course, is that an officer on the street might not be able to tell ["jailable" versus "fine-only" offenses] . . . but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the time of arrest." Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001). Regarding the latter, he questions whether certain offenses such as speeding would lose their deterrent value if they were confined as "fine-only" offenses. *Id.* at 349.

52. 531 U.S. 326 (2001).

53. *Id.* at 329-30.

54. *See*, *e.g.,* United States v. Place, 462 U.S. 696, 701 (1983) (permitting temporary warrantless seizure if "exigencies of the circumstances" require it); *see also* Schmerber v. California, 384 U.S. 757, 770-71 (1996) (allowing warrantless blood test for alcohol where loss of evidence is at risk).

55. *McArthur*, 531 U.S. at 332.

56. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984).

57. *Id.* at 753.

58. *McArthur,* 531 U.S. at 336; *see also* sources cited *supra* note 54.

59. *McArthur*, 531 U.S. at 328-29.

for them to exert their frustrations or personal biases on civilians. Unless and until the Court reconsiders *Atwater*, the Fourth Amendment does not inherently protect a citizen from arrest in the context of a non-"breach of the peace" misdemeanor. The alternative must be to look at individual state legislation addressing the problem, and the benefits and drawbacks it might have.

B. Fixing "Broken Windows": *Whren*, Racial Profiling, and Official Police Misconduct

The examples from the previous section fall into the category of individual acts of police misconduct – or the "bad apple" problem. System-wide acts of police misconduct, however, pose a larger and more insidious problem, because many of the problems result from well-meaning attempts at managing crime. Racial profiling has existed informally for decades, but has only recently been recognized as a major problem.[60] It has surfaced as an official means of reaching various desired ends, including catching drug offenders, stopping violent crime, and maintaining neighborhood order.[61] Unfortunately, the side effects of racial profiling tend to be harassment of innocent people of color, often leading to humiliating and tragic results.

Several theories have been raised in favor of racial profiling, but one of the most basic is its tendency to promote order. Psychologists and researchers often make reference to the "broken windows" theory.[62] Largely anecdotal until it was tested in the 1960s, the theory states that vandalism and disorder is contagious, and that this disorder leads to apathy, reduced neighborhood morale, and crime.[63] A Stanford psychologist named Philip Zimbardo tested the broken-window theory in 1969, and observed that a community's response to, and respect for property was far lesser in lower-income neighborhoods.[64] By association,

60. *See* Trende, *supra* note 21, at 334 (stating that racial profiling has "only recently become a 'hot' issue. A number of factors seems to have contributed to this, the most important of which have been the development of the drug courier profile, the increasing anecdotes about racial profiling that have spread as a result of the profile, and the introduction of the Traffic Stops Statistics Act of 1997.") (citations omitted).

61. Not surprisingly, it has become a hammer for the American right-wing. John Derbyshire of the National Review has written extensively on the subject; for a contemporary example regarding the debate over profiling at airports, see John Derbyshire, *At First Glance: Racial Profiling, Burning Hotter*, NAT'L REV. ONLINE, OCT. 5, 2001, *available at* http://www.nationalreview.com/derbyshire/derbyshire100501.shtml.

62. The term "broken windows" was coined in an Atlantic article bearing the same name; *see* Wilson & Kelling, *supra* note 26.

63. *Id*.

64. *See id.* Zimbardo placed a car without license plates in each of two different neighborhoods – the Bronx and Palo Alto. The Bronx car was beset by scavengers in less than 10 minutes, and was almost completely stripped within 24 hours. By comparison, the car in Palo Alto was left intact for about a week before Zimbardo took a sledgehammer to

then, a lack of attention to the behavior of those who live in the neighborhood can lead to a similar decline in respect for property.[65] The community becomes less involved in the neighborhood, and less likely to assist the police in maintaining order in the neighborhood.[66]

Zimbardo's psychological study underscores the fact that the police are generally involved in two different tasks: order maintenance and crime resolution. During the late 1960s and 1970s, police departments focused on crime resolution: making arrests, solving crimes, and collecting evidence.[67] However, this intense focus on crime resolution tended to take police officers off the neighborhood streets, and their role as neighborhood peacekeepers took a backseat to these tasks.[68]

In a sense, racial profiling is a side effect of a return to a focus on "order maintenance" in policing. Part of this order maintenance requires that assiduous attention be paid to so-called "victimless offenses" such as vagrancy and public drunkenness.[69] It also requires that policemen become part of the community, questioning members of the neighborhood and looking to eradicate the types of behavior that lead to a breakdown in order.[70] Often, this crackdown on behavior means that police pay disproportionate attention to minorities, particularly African-Americans and Latinos.

The legal battle over racial profiling stems largely from a 1996 case, *Whren v. United States*.[71] The defendants, Michael Whren and James Brown, were both African-American. D.C. vice police stopped their car after they remained at an intersection for more than twenty seconds, then "sped off at an 'unreasonable' speed."[72] When one of the officers walked up to the defendants' window, he immediately saw "what appeared to be crack cocaine" in Whren's hands.[73] The defendants were then arrested for violating various federal drug laws. At issue was the officers' justification for stopping the vehicle. The defense argued that the pervasive nature of automobile regulation made total compliance with all traffic laws nearly impossible, giving police officers essentially unlimited pretext to stop an automobile.[74] They instead advocated a test different than the typical probable cause determination required by the Fourth Amendment,

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it. Random vandals then took to the car, almost completely destroying it within a few hours.

65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. 517 U.S. 806 (1996).
72. *Id.* at 808.
73. *Id.* at 808-09.
74. *Id.* at 810.

requiring that officers make the stop on the pretext of investigating the offense with which the defendant is charged.[75]

In unanimously rejecting the defense's argument, the Court held that a law enforcement official's ulterior motive has never invalidated an otherwise constitutionally valid search.[76] The Court further noted that determining an objective standard for police behavior applicable in all circumstances would be prohibitively difficult. The Court reasoned that "one would be reduced to speculating about the hypothetical reaction of a hypothetical constable – an exercise that might be called virtual subjectivity."[77] In *Whren*, the Court refused to impose the discretion of the judiciary onto the police force.

The facts in *Whren* do not indicate a clear-cut case of police misconduct. There is no definite indication that the police officers pulled over Whren and Brown solely because they were black. However, the decision allowing seizures based on pretext may exacerbate the problem of racial profiling by individual officers who use their authority to harass and humiliate minorities. There may yet be a judicial solution to this problem, although the ideological makeup of the current Court makes it unlikely.[78] In the absence of a judicial solution, however, there may be an alternative remedy available through institutional reforms according to the French criminal procedure model.

C. Elements of the French Criminal Justice System

Commentators tend to refer to the French system as an "inquisitorial" system, a distinction it shares with several other continental European countries.[79] These Continental systems are characterized by the expanded role they assign to the judicial function in court proceedings. The "inquisitorial" characterization well summarizes the general American sentiment toward Continental European jurisprudence. The image of the somber, Torquemada-esque inquisitor presiding over the Continental criminal trial has made it easy for the Anglo-American model to dismiss the Continental model as being unfair. Indeed, until the 1960s,

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75. *Id.* at 811.

76. *Id.* at 813 (quoting United States v. Robinson, 414 U.S. 218 (1973)).

77. *Whren*, 517 U.S. at 815.

78. This Note does not intend to explore the various arguments being made in favor of a judicial remedy for racial profiling. Sean Trende examines some of the problems a plaintiff challenging the practice must face in addition to those posed by *Whren*, such as standing. Trende, *supra* note 21, at 342-50; *see also* City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (threat of plaintiff receiving another injury at the hands of police was too speculative to satisfy Article III standing requirements).

79. *See* Bron McKillop, *Anatomy of a French Murder Case,* 45 AM. J. COMP. L. 527, 528 n.1 (1997). The author notes that the Continental model has been variously characterized as "inquest," "official inquiry," "investigatory," and "judicial." This Note shall use the term "inquisitorial" to describe the French justice system.

American courts adhered largely to the "accusatorial" criminal justice system, trusting that the adversary nature of the proceeding would see the truth come to light.[80] However, with the rise of the Warren Court, the judicial system began to play a mediating role in the power of the state versus the individual.[81] The Warren Court, through decisions such as *Miranda*[82] and *Katz*[83] suggested that the American adversarial model is not perfect, and might need some judicial supervision to prevent injustices, such as false confessions, from being admitted.[84] Thus, it is reasonable to suppose that the American judiciary might have an important activist role to play in preventing police misconduct.

Notwithstanding the ascension of the conservative Rehnquist Court, there is much constitutional resistance to adopting the most significant features of the inquisitorial model. The Fifth and Fourteenth Amendments, and their guarantee that no person be deprived of "life, liberty, or property, without due process of law"[85] are major obstacles, as is the right to trial by jury guaranteed by the Seventh Amendment.[86]

The French system stands little chance of being adopted in this country. However, as a system with a longstanding judicial tradition, it is a solid example of the "inquisitorial" criminal adjudication system.[87] The following section of the Note will present some background information on the French criminal justice

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80. *See* Mack, *supra* note 28, at 63 (favoring the accusatorial system "has been a constant refrain in decisional precedent and serves as the fundamental underpinning of the United States' criminal justice system."); *see also* Miller v. Fenton, 474 U.S. 104, 109-10 (1985) (reaffirming the previous statement in context of an involuntary confession case); Rogers v. Richmond, 365 U.S. 534, 541 (1961) ("Ours is an accusatorial and not an inquisitorial system.").

81. *See* Katz v. United States, 389 U.S. 347 (1967) (defining "search" and setting limits on what police can survey without a warrant); Miranda v. Arizona, 384 U.S. 436 (1966) (setting standards for admissible confessions); *see also* Mack, *supra* note 28, at 63 (explaining how the Warren Court initiated a tradition of "judicial activism" not previously seen in American courts).

82. 384 U.S. 436 (1966).

83. 389 U.S. 347 (1967).

84. *See* Mack, *supra* note 28, at 63 (The Warren Court "effectively revolutionized the nature and quality of the accusatorial system through proactive interpretation and application of the Due Process clause and its protections.").

85. U.S. CONST. amend. V, XIV, § 1.

86. U.S. CONST. amend. VII.

87. Although the French are currently working on their fifth Republic since the revolution, their court system has steadily evolved from its beginnings in the Napoleonic era, and French substantive criminal law is based largely on the Penal Code of 1810. *Code de Procédure Pénale*, *translated in* THE FRENCH CODE OF CRIMINAL PROCEDURE xv (Edward M. Wise ed., Gerald L. Kock & Richard S. Frase trans., rev. ed. 1988) [hereinafter CPP]. This Note adopts the conventions employed by Gerald L. Kock and Richard S. Frase in their translation of the French Code of Criminal Procedure. Hereafter, the English translations provided by Kock and Frase will be substituted for their French equivalents. Subsequent translations of other French judicial terms will be noted as they are introduced.

system, and will also point out some particular areas of interest to American reformists.

The French Criminal Code divides offenses into three categories: *crimes*, *delits*, and *contraventions*, respectively translating as felonies, delicts, and contraventions.[88] A felony is roughly equivalent to the more serious American felonies, generally meriting imprisonment ranging from five years to life.[89] Delicts compare roughly to American misdemeanors and lesser American felonies, and carry similar punishments.[90] Contraventions are best likened to American petty misdemeanors and are punishable with smaller fines and prison terms not exceeding two months.[91]

The structure of the French criminal justice system hinges largely on these distinctions. The protections afforded the accused in a criminal prosecution depend largely on the degree of the offense. Felonies are tried in the Assize Court, or *cour d'assises*, which is limited to hearing criminal cases.[92] Delicts are tried in the criminal branch of the court of general jurisdiction, or *tribunal de grande instance*.[93] Contraventions are tried in the police court, or *tribunal de police*.[94]

The Assize Court institutes a number of judicial safeguards unique to the inquisitorial system. Felony charges must be reviewed by an examining magistrate (*juge d'instruction*) before they may be brought before the Assize Court.[95] The examining magistrate is also available in cases of delict and contravention, although optional in these cases.[96] After reviewing the felony charges, the magistrate may choose to approve the charges for the Assize Court; this decision may be reviewed by the indicting chamber, or *chamber d'accusation*.[97] The fact that the judicial investigation is optional in the case of delicts allows the prosecution some wiggle room around the examining magistrate, a problem that will be examined in greater detail below.

Just as crimes fall into several different categories, pretrial investigatory procedures are divided according to the time of commission and severity of the offense. There are four essential categories: investigation of so-called flagrant

88. *Id*. at xvii.

89. *Id*. at 41, 44.

90. *Id*. at 41, 44, 60-64; *see id*. at 2, 35, nn.262-66, (punishment ranges from restitution to "temporary loss of certain civil . . . rights.").

91. *Id*. at 41, 207-08.

92. *Id.* at 141-80.

93. *Id.* at 181-225.

94. *Id.* at 226-38.

95. *Id.* at 64-65, 79.

96. *Id.* at 79 (providing that judicial investigation by examining magistrate is available in delict and controvention cases at the prosecuting attorney's discretion).

97. *Id.* at 122, 132.

offenses, preliminary investigations, identity checks, and formal "judicial investigations" conducted by an examining magistrate.[98]

Searches stemming from flagrant offenses share some similarities with the American "hot pursuit" exception to the warrant requirement.[99] The Code defines a "flagrant" felony or delict as one that is "in the process of being committed or which has just been committed."[100] In such cases, those responsible for conducting the search, such as officers of the judicial police, as well as prosecutors and examining magistrates, may go to the scene of the offense and seize any evidence they find on the scene and on persons present at the scene, detain persons on the scene for questioning, summon persons capable of furnishing evidence, and perform other functions "useful to the manifestation of the truth."[101] Most importantly, investigators have access to the *garde à vue* in the case of flagrant offenses, which potentially allows the police to detain a witness or suspect for questioning for up to forty-eight hours.[102]

The Code provides for several unique procedural safeguards during the flagrant offense investigatory period. For example, all house searches must be witnessed by an independent party not subject to the administrative authority of the judicial police or officers conducting the search.[103] The Code also mandates that all searches be conducted with respect for professional secrets and "the rights of the defense," a uniquely French concept that is difficult to describe in American terms.[104] Aside from these protections and bureaucratic safeguards, the scope of the searches allowable under the Code is not limited by "probable cause" as in the American constitutional sense.

Preliminary investigations are consensual investigatory procedures that may be initiated by officers of the judicial police.[105] Searches cannot be conducted "without the express consent of the person on whose property the

98. *Id*. at 8.

99. *See* Warden v. Hayden, 387 U.S. 294 (1967) (authorizing warrantless entry into robbery suspect's house).

100. CPP, *supra* note 87, at 66.

101. *Id.* at 66-70.

102. *Id.* at 70.

103. *Id.* at 67-68. Article 57 provides first that all searches shall be conducted "in the presence of the person at whose domicile the search was made." *Id.* at 68. If that person is unavailable, he may designate a representative to be present at the time of the search; if this too is impossible, then the officer conducting the search must appoint two witnesses "not . . . subject to his administrative authority" to be present. *Id.*

104. *See* Edward A. Tomlinson, *Symposium: Comparative Criminal Justice Issues in the United States, West Germany, England, and France: Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 171 (1983) (describing the rights of the defense available to the defendant at trial and pretrial; although the rights are ill-defined and not constitutionally protected, at minimum they guarantee that the defendant receive access to the "dossier" or prosecution's case, and a right to counsel).

105. CPP, *supra* note 87, at 74-78.

operation takes place."[106] This type of investigation is typical in the case of traffic offenses and other minor delicts and contraventions.

Identity checks may be conducted by officers of the judicial police, and certain parties under their authority.[107] The judicial police may generally demand identification "to prevent a breach of the public order, particularly a violation of the security of persons and property."[108] Additionally, the person under suspicion may be detained up to four hours so that the police may obtain the necessary information from the witness.[109]

Lastly, there is the judicial investigation conducted by the examining magistrate.[110] The examining magistrate has the most sweeping power to conduct searches and seizures, as described below. Judicial investigations are mandatory at this stage.[111] As in the case of flagrant offenses, the examining magistrate can undertake any investigations "deemed useful to the manifestation of the truth."[112] The examining magistrate is free to go to the scene of the crime or to any other location "in the scope of national territory" to conduct the investigation — a fact that sharply distinguishes the powers of the examining magistrate from her comparatively weak American counterpart.[113] A judicial investigation may be initiated either by the prosecutor or the victim (in cases of delict only).[114] The examining magistrate also has the authority to depose additional witnesses and conduct additional searches and seizures unrestricted by probable cause requirements.[115]

The French criminal justice system radically differs from the American system in its approach to search and seizure, probable cause, and in where it allocates its authority. As befits a highly centralized nation, the French Code of Criminal Procedure creates a tight hierarchical model of accountability and authority within law enforcement. Are there features of the French inquisitorial system that might be adaptable to the American system, in hopes of alleviating the problems highlighted by *Atwater* and *Whren*? Part III below will examine the parts of the French model that could be adapted or incorporated into the American system in hopes of reducing racial profiling and other forms of police misconduct.

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106. *Id.* at 74.

107. *Id.* at 75-76.

108. *Id.*

109. *Id* at 76-77.

110. *Id.* at 79-137.

111. *Id.* at 79.

112. *Id.* at 80.

113. *Compare id.* at 85 (allowing examining magistrates to go "anywhere in the scope of national territory" to conduct an investigation), *with* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (invalidating search warrant as overbroad when magistrate accompanied police officers to pornographic store to view incriminating evidence).

114. CPP, *supra* note 87, at 80.

115. *Id.* at 93-99 (describing warrants that may be issued by examining magistrate), 84-86 (describing searches and seizures).

III. ANALYSIS

A. Introduction: The Perils of a Double-Duty System of Law Enforcement under the Adversarial System

Much of the stress facing the police in the United States comes from the pressure of its ever-mounting responsibilities. The police are charged with maintaining order, enforcing the law, collecting evidence, and investigating crimes when violations of the law have occurred.[116] Most American law enforcement officials are at the disposition of local authorities, who are responsible for properly training them in constitutional law, and the legal procedures that must be followed to avoid due process violations.[117] This training is essential to prevent the order-maintaining function from interfering with the evidence-gathering function, a breach that can lead to police misconduct and racial profiling.

A possible solution would be to physically separate these two functions, following the French model of maintaining administrative and judicial police forces. Though this separation is not always absolute,[118] the principle works to ensure that only those officers with a few years of law enforcement experience will have the capability to seize evidence, initiate the *garde à vue*, and perform other invasive investigatory functions. Such a principle might be easily imported or modified in America.

Those commentators who favor the continental inquisitorial system have long advocated such a shift. In his book criticizing the American criminal justice system, Lloyd Weinreb proposes the adoption of several continental-style reforms.[119] He notes the inherent difficulty in asking law enforcement officials to respect the intricacies of the criminal process when their primary responsibility is

116. *Compare* LLOYD L. WEINREB, DENIAL OF JUSTICE 118-19 (1977) (noting the two-fold task of order-maintenance and evidence gathering faced by police), *with* Tomlinson, *supra* note 104, at 157 (noting the similar division in the French police force: "The function of the administrative police is to prevent crime or, more generally, to protect public security, health and tranquility. The judicial police's function, on the other hand, is to investigate offenses by gathering proof and apprehending offenders.").

117. It is difficult to get a comprehensive sense of how American police are instructed in constitutional law, since so much of the instruction takes place at the local level. Some studies have shown that law-enforcement members' understanding of Fourth Amendment related issues is less than optimal. In one study, conducted by William Heffernan and Richard Lovely, of officers in four mid-sized police departments in New England and the mid-Atlantic states, based on a six-question, true-false test, the officers on average scored only 57% correct answers (or slightly better than chance). William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J. L. REFORM 311, 332-33 (Winter 1991).

118. *See* Tomlinson, *supra* note 104, at 157 (noting that judicial/administrative distinction is "functional and not institutional.").

119. LLOYD L. WEINREB, DENIAL OF JUSTICE (1977).

to act decisively to maintain order in dangerous circumstances: "We cannot expect [the police] to act in dangerous, violent, unpredictable, and uncertain circumstances with the minimum of harm to themselves or others and also to act judiciously, with discretion, and mindful of conflicting interests [between the state and the accused]."[120]

In sum, Weinreb argues, the police's peacekeeping function is perpetually at odds with the criminal justice system's guarantee of due process.[121] The police must both stop crime and arrest the people responsible for those crimes. To a certain extent this is unavoidable, and often even desirable. For example, police are often best situated to collect evidence in so-called "emergencies," and the Supreme Court has repeatedly afforded them the capability to do so.[122] Suppose a police officer arrives at the scene of a bank robbery and apprehends a person believed responsible for the robbery. The officer has now performed his peacekeeping duties, but his responsibility does not end there. He must now, with the aid of his fellow officers, collect evidence and question suspects, usually subject only to the oversight of his immediate superiors. The combined pressures of preventing crime and scrupulously following procedure to ensure that individual constitutional rights are not violated results in an overburdened police force that may be ineffective in suborning its law enforcement role to demands of criminal process.

To prevent the police from allowing its peacekeeping function to inhibit or pollute the operation of justice, the Supreme Court has issued constitutional rulings to guide police conduct.[123] These decisions maintain the balance between having an efficient, effective peacekeeping force on the one hand, and a respect for civil liberties on the other.[124] Despite these rulings, official abuses and due process violations inevitably occur, and the recent trend has been to interpret the Fourth Amendment in such a way that a violation does not lead to an exclusion of

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120. *Id.* at 119-20.

121. *Id.* at 120 ("Many of the situations to which the police respond as keepers of the peace involve crimes. Often their response has consequences for criminal process.").

122. *See id.* at 121 (noting that the needs of the criminal process to obtain evidence are often so strong that the police are the most appropriate agency to respond); *see also* New York v. Quarles, 467 U.S. 649 (1984) (waiving *Miranda* in cases where public safety is at risk); Terry v. Ohio, 392 U.S. 1 (1968) (authorizing police to perform protective frisk of suspect to search for weapons).

123. *See, e.g,* Warden v. Hayden, 387 U.S. 294 (1967) (defining "hot pursuit" exception to the warrant requirement of the Fourth Amendment); Katz v. United States, 389 U.S. 347 (1967) (defining when a search implicates the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence gathered in violation of the Fourth Amendment is inadmissible).

124. WEINREB, *supra* note 119, at 120 ("When the police are asked to respond to a disturbed situation, often there is a choice to be made between an effective peacekeeping response and the value of an unintrusive government in a free society.").

evidence at trial.[125] These reversals suggest that a regimen of judicially enforced rules may not be the best way to combat police misconduct. In light of the Court's more conservative climate, any effort to extend rules to hamstring police effectiveness will likely result in an adverse reaction leading to further erosion of due process protections.

Weinreb proposes a system in which the peacekeeping and criminal process functions are split among separate agencies. In particular, he proposes that a judicial officer, not unlike that found in the French system, be charged with clerical tasks like booking and fingerprinting, as well as investigative tasks like lineups and witness questioning.[126] Weinreb argues that the state should minimize the individual's contact with the police force, which he considers the agency that, more than any other, represents "the physical power of the state."[127] According to Weinreb, the exertion of physical power on the part of the state has the potential to corrupt the outcome of the criminal process. This is a view shared by many international jurisdictions that apply the inquisitorial system.[128] Such a system would presumably rely less upon exclusionary rules and other judicial remedies designed to curb constitutional abuse by placing control at the hands of administrators specially trained in the trade of evidence gathering.

Assuming this separation of enforcement and investigating powers would cause a decrease in racial profiling and other forms of police misconduct, a profound shift in people's trust and confidence in police could result. This change might cause the most significant psychological impact on minority communities.

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125. The collision of several Supreme Court cases have weakened the particularity requirement of the warrant clause of the Fourth Amendment, making it easier for police to obtain warrants; *see* United States v. Leon, 468 U.S. 897 (1984) (holding that arrest by officers relying in good faith on a warrant later determined to be lacking in probable cause does not violate Fourth Amendment); Illinois v. Gates, 462 U.S. 213 (1983) (holding that warrants must meet a "totality of the circumstances" threshold to satisfy probable cause).

126. WEINREB, *supra* note 119, at 123.

127. *Id.*

128. Another way of making this point would be to argue that an inquisitorial system, since it is theoretically more interested in finding the truth of a matter than in obtaining a conviction, is less disposed to abuse its law enforcement arm for evidence-gathering purposes.

For an illustrative take on this argument, see Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L. L. 1121, 1129 (1995). In the following passage from the article, a fictional law professor discusses the inquisitorial system with a prosecutor during the trial of an American, "Mr. Sampson," held in an anonymous inquisitorial jurisdiction somewhere on the Continent:

> There is no "game." Prosecutors never lose, but they never win, either. They simply don't think in terms of winning or losing. If the tribunal acquits the defendant, the prosecutor feels no sense of having lost the case. He has done his job, and the tribunal has done its job. His responsibility is to assist the tribunal in finding a just result, not to "win."

Id.

A key element of this separation is the detachment of the examining magistrate from law enforcement. In the American system, the magistrate often becomes little more than a rubber stamp for the police, signing on to warrants when requested without much thought.[129] But an independent magistracy according to the French model is of a different conceptual character: a neutral party charged with searching for the truth.[130]

Of course, accepting continental-style reforms requires that policymakers choose between the virtues of an adversarial system versus those of an inquisitorial one. Rudolph Schlesinger, an advocate of the inquisitorial system, pitches the debate in terms of "truth-seeking" versus "truth-defeating" rules.[131] He cites examples of truth-defeating rules, including exclusionary rules[132] and the rule prohibiting the drawing of natural inferences from the silence of the accused.[133] Schlesinger then urges a reexamination of those rules in light of the benefits they provide at the expense of truthfulness.[134]

Schlesinger's discussion of truth-defeating rules provides an excellent crossroads for this analysis in Part III. A discussion of the merits of the exclusionary rule naturally leads into a discussion of rules and their impact on police misconduct. Accordingly, the first subsection will examine the benefits of adopting a truth-seeking rule, the first step of which would be to vest much of the police's investigatory power into a independent magistracy and judicial police. The second subsection will address the truth-defeating rule in *Griffin*, and examine how its abolishment coupled with the adoption of inquisitorial mode of evidence gathering and witness questioning might have positive ramifications for the problem of racial profiling.

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129. Needless to say this is a generalization, but several Supreme Court cases have dealt with the problem of magistrates "rubber-stamping" warrants in various ways; *see, e.g.,* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979) (judicial officer accompanying police to pornography shop was not "neutral and detached"); Connally v. Georgia, 429 U.S. 245 (1977) (finding that magistrate paying for issuance of a warrant is not "neutral and detached.").

130. CPP, *supra* note 87, at 80 ("The examining magistrate shall undertake, in conformance with law, all acts of investigation that he deems useful to the manifestation of the truth."); *see also* WEINREB, *supra* note 119, at 124 ("We could . . . expect a magistrate who does not have the peacekeeping and emergency responsibilities of the police to follow a more neutral course.").

131. Rudolph B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFF. L. REV. 361, 385 (1977).

132. Mapp v. Ohio, 367 U.S. 643 (1961).

133. Griffin v. California, 380 U.S. 609 (1965).

134. Schlesinger, *supra* note 131, at 385.

B. Eliminating the *Atwater* Problem through Neutralization of the Truth-Defeating Exclusionary Rule

The exclusionary rule, as stated above, exists to deter police misconduct. In particular, it seeks to prevent constitutional violations that deny individuals their rights to privacy and freedom from illegal search and seizure.[135] The heading of this section is a bit misleading; a solution to the *Atwater* problem of "rogue" police misconduct will not directly result from an abolition of the exclusionary rule, or even from a policy shift toward favoring so-called "truth-seeking" rules. However, the bureaucratic reforms that would precede such a policy shift could have an immediate impact on our ability to punish and restrain the Officer Tureks of the American law enforcement system.

The first step in employing such a system would be to create a "judicial police" force, similar to the French model under the purview of the examining magistrates and the attorney generals.[136] At first, this need not be an institutional distinction; a rudimentary division could be implemented even within the same organization following the rules set forth in the French model. For example, the French Code of Criminal Procedure includes the following within the ranks of the judicial police: mayors "and their adjuncts," and officers and noncommissioned officers of the gendarmerie plus those gendarmes that have served longer than five years.[137] Also counted within the ranks of the judicial police are certain members of the National Police, including inspectors general, police commissioners, and "civil servants of the police inspector's corps of the National Police having at least two years of active service in the corps with tenure" appointed by the Ministers of Justice and the Interior following the recommendations of a commission.[138]

While a possible American analogue would inevitably differ – the above model includes officers who would be considered operators at the state and federal level under our system, requiring a different set of laws for each – the French system sets forth well-defined requirements for an officer or civil servant to meet before she may join the judicial police.[139] Regardless of any possible differences in application, the philosophy is the same: officer training takes on a positive, rather than a negative quality. Rather than setting negative limits on conduct through an exclusionary rule, it enforces positive guidelines for promotion, and sets a premium on education.

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135. Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourth Amendment.").

136. CPP, *supra* note 87, at 49-50 (generally outlining the duties of the judicial police and to whom they are accountable).

137. *Id.* at 50-51.

138. *Id.*

139. Recall that the officers of the judicial police are charged with carrying out the will of the examining magistrate, and have the power to search homes without a warrant in case of flagrant offenses. *See* CPP, *supra* note 87, at 8, 122, 132.

Most importantly, it appears to be an effective means of improving the trust factor between citizens and law enforcement. If only the best—or at least, the better—among law enforcement are permitted to wield the investigatory power, then the public will be more inclined to have faith in the police, and will be more willing to cooperate with them.[140]

C. Combating the *Whren* Problem of Pretextual Searches Through Adoption of French Inquisitorial-Style Limitations on Police Authority

A solution at the criminal procedure level to the racial profiling problem as posed in *Whren* may lie within two distinct approaches: an institutional solution and a judicial solution. In an institutional solution, procedural reforms akin to the French inquisitorial model may equally prevent racial profiling. In a judicial solution, the adoption of deeper French inquisitorial style reforms may have an immediate impact on the number of minorities incarcerated.

Implementing the changes proposed in the section above may also reduce the instances of racially-motivated traffic stops. The logic behind this argument is simple: if there is a more sophisticated screening system for choosing the police who actually have the power to seize evidence, question witnesses and the like, then there will be fewer chances for abuse. It bears mentioning, however, that the *Whren* case is not as clear an example of police misconduct as *Atwater*.[141] Though it appears from the facts of *Whren* that the defendants were stopped on the pretext of a minor traffic offense so that the police could conduct a vehicle search for drugs, such conclusions are difficult to surmise.[142] Justice Scalia was certainly inhospitable to this argument when he wrote that holding the police to a "reasonable officer" standard would be to "plumb the collective consciousness of law enforcement," or to "speculat[e] about the hypothetical reaction of a hypothetical constable – an exercise that might be called virtual subjectivity."[143]

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140. Trust in law enforcement has the important side effect of making criminal activity seem more "wrong"; *see* Forman, *supra* note 13, at 26 ("Many black people report that, when they see the police pulling over a car with a black driver or searching a black kid on the street, they don't ask: 'What did that guy do?' They instead wonder: 'Why is that cop harassing that guy?' *The stigma of lawbreaking is weakened.*") (emphasis added).

141. Indeed, much of the plaintiff's argument in *Whren* was based on a D.C. police traffic manual, which permitted traffic stops "only in the case of a violation that is so grave as to pose an *immediate threat* to the safety of others." *Compare* Whren v. United States, 517 U.S. 806, 815 (1996), *with* Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

142. *Whren*, 517 U.S. at 810. Justice Scalia puts the defendant's argument this way: "[T]he Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given" (in this case, whether a "reasonable" police officer would have made the traffic stop). *Id*.

143. *Id.* at 815.

In other words, it is unclear whether the police in cases like *Whren* acted improperly. Whether this was an actual incident of racial profiling depends largely on one's point of view. Some commentators characterize *Whren* as placing an implicit stamp of approval on racial discrimination.[144] Others have criticized the decision on constitutional grounds.[145] Some, such as Justice Scalia, view the decision as a "run-of-the-mill case" that does not merit the overhauling of the probable cause standard for search and seizure.[146] The law as it stands today would allow certain officers to engage in *Whren*-style racial profiling without repercussions. However, without any uniform standard of what is acceptable profiling and what is not, these kinds of activities will continue.

A French-style division of authority among the police ranks has the advantage of doing an end run around the constitutional problem of racial profiling. Rather than preventing racial profiling as a matter of law, the selection and promotion process theoretically would filter out the cops more likely to engage in racial profiling, thereby reducing the number of objectionable stops. If racial profiling is an unfortunate by-product of the "broken windows" theory of police enforcement, then limiting the authority of the police to conduct invasive searches while separating the preventive and investigatory functions of the police may correct this unfortunate side effect.[147]

Procedural forms according to the French inquisitorial model have implications for the racial profiling problem outside of vehicular stops. Recall that the French criminal procedure code distinguishes between "flagrant" and "non-flagrant" felonies, and creates different search and seizure provisions for each.[148] This distinction, and the concomitant limitation on authority to search of individual police officers, might limit the most grievous invasions of privacy under the current American system. The flagrant/non-flagrant felony distinction places limits on police authority to search, and thus reduces the possibility of abuse. Of course, conservatives and strong law-and-order advocates will decry such a policy as an unnecessary, even dangerous impediment to police effectiveness. The numbers tell a different story: in spite of such impediments,

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144. *See* Kenneth Gavsie, *Making the Best of* Whren*: The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 391-92 (1998).

145. *See* David O. Markus, Whren v. United States: *A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 110-11 (1998) ("Because the Whren Court decided that officers' motivations for a seizure are irrelevant to Fourth Amendment reasonableness analysis, each and every one of us are now subject to the unchecked and unfettered whims of police officers whenever we enter our automobiles.").

146. *Whren,* 517 U.S. at 818-19.

147. Ironically, the efforts of the Clinton Administration to increase the number of policemen on the streets by 100,000 may have intensified the racial profiling issue, or at least drawn attention to the problems it presents, by introducing so many new (and presumably less experienced) police officers onto the streets. Trende, *supra* note 21, at 335 n.18.

148. CPP, *supra* note 87, at 66; *see also* discussion *infra* Part II.

the French "clearance rate" or percentage of known crimes that police believe to have been solved, compared quite favorably to American clearance rates during a two-year study conducted in 1979-80.[149]

Any discussion of the possible benefits of adopting French inquisitorial-style reforms must consider the possible downsides. It simply will not do to view the French system with rose-colored glasses; many have criticized the system and its putative benefits.[150] One of the most chiefly criticized aspects of the French system is the effectiveness of the examining magistrates. This is troublesome, since one of the most oft-cited benefits of the French inquisitorial model is the impartiality and unique station of the examining magistrate.[151] In practice, the examining magistrate's authority is limited by the growing authority of the police and the discretion of the prosecutor.[152]

The judicial police's authority to search independently in case of flagrant offenses – once a factor that severely curtailed its independent authority – has been steadily eroded over the years. Most notably, the French Code of Criminal Procedure was amended in 1958 to allow an *enquete de flagrance*, an investigative inquiry conducted when a flagrant offense is committed, in cases of delicts punishable by imprisonment.[153] This means that police authority to search is actually greater than might be presumed under a cursory review of the French system.[154] Additionally, administrative features of the French system that have been praised by various writers, such as the division of authority between the administrative and judicial police, are not always as effective as they seem. This distinction is, according to the description of one writer, "functional and not institutional: the same police officer may act as a member of the administrative police one moment and as a member of the judicial police the next."[155] This does

149. Frase, *supra* note 34, at 590. For example, the French murder clearance rate for that period was 79% compared to 72% in the U.S. The clearance rate for burglary and theft cases was 17% in both France and the U.S.

150. For an even-handed view of the French criminal justice system, warts and all, see Tomlinson, *supra* note 104 (discussing in depth the politics of the French system and limitations placed on the examining magistrate by the prosecuting attorney).

151. *See* Mack, *supra* note 28, at 94 (citing as one of the important features of the inquisitorial system "effective checks and balances that significantly limit the effects of bias and prejudice"); *see also* Frase, *supra* note 34, at 666-67 (examining magistrates "allow[ ] for more direct and efficient judicial control over both police and prosecutorial discretion at the investigatory and charging stages.").

152. Recall that the prosecutor has discretion to use (and not to use) the examining magistrate during investigation of delicts and contraventions. *See* CPP *supra* note 87; *see also* Frase, *supra* note 34, at 575 n.164 (use of judicial investigations by examining magistrate occurs very rarely in contravention cases, and in less than 10% of delicts).

153. Tomlinson, *supra* note 104, at 157.

154. Judges can also impart their power to issue arrest orders, conduct searches, and question witnesses through use of "rogatory commissions"; *see* Frase, *supra* note 34, at 575 n.164.

155. Tomlinson, *supra* note 104, at 156.

not mean that the distinction is meaningless. For example, only judicial police can conduct an *enquete de flagrance*, and there are certain tenure requirements that prevent just any police officer from becoming a member of the judicial police.[156] These criticisms do not foreclose the possibility of employing French inquisitorial-style procedural reforms, but they are nonetheless important to consider.

In addition to flaws inherent in the administrative division between judicial and administrative police, the prosecutor's discretion to bring certain charges over others, and the shortage of available examining magistrates, cripples the benefits of the French inquisitorial system. The number of examining magistrates is dwarfed by the sheer number of judicial investigations that must be carried out per year.[157] As a practical matter, the French parliament legalized a procedure called the *enquete preliminaire* (preliminary inquiry, formerly known as an *enquete officieuse* or official inquiry) in 1958, which allowed the police to investigate non-flagrant offenses with or without the authority of the prosecutor.[158] Such inquiries do not carry the force of an official judicial investigation,[159] but they give the police considerable power nonetheless. Additionally, these inquiries allow the police to engage in a similar kind of pretextual searching so deplored by critics of *Whren*. Often, when a prosecutor cannot find sufficient evidence to charge a person with a felony or severe delict, she will initiate a preliminary investigation for a lesser offense in hopes of turning up evidence for the greater offense.[160]

Although these flaws slightly diminish the luster of the French inquisitorial system, they do not mean that an application of French inquisitorial-style reforms would be ineffective at combating racial profiling. After all, no system is perfect. Abuses of any prosecutorial and investigatory system, while regrettable, should not commit that system to the dustbin of uselessness. Such flaws merely inform us of concerns that should be addressed through application of the system. Perhaps these problems could be addressed by increasing the number of examining magistrates, or by imposing stricter controls on preliminary investigations to prevent prosecutorial abuse. In sum, these flaws counsel us to be

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156. CPP, *supra* note 87, at 50-51. Generally speaking, gendarmes (police officers generally found in rural France) must have at least five years of service, and members of the National Police must serve at least two years. Both must also obtain the recommendations of a commission "determined by an administrative regulation issued on the initiative of the Minister of Justice and the other interested ministers." *Id*. at 50.

157. As of 1983, there were less than 600 examining magistrates in all of France responsible for conducting between 60,000 and 70,000 judicial investigations per year. Tomlinson, *supra* note 104, at 155 n.72.

158. *Id.* at 158.

159. CPP, *supra* note 87, at 74-75. For example the *garde a vue* is not available, and express written consent is required before a suspect's dwelling may be searched. *Id*.

160. Tomlinson, *supra* note 104, at 158.

both "idealistic and realistic" in our efforts to apply continental solutions to American criminal justice problems.[161]

D. Approaching the Racial Profiling Problem Via a Reexamination of the Adversarial System's Approach to Defendant's Testimony at Trial

The French inquisitorial model has applications beyond the realm of criminal procedure. As noted above in Part II, the French system has quite a different approach to questioning witnesses. Examining magistrates play an essential role in the questioning of witnesses, both in the pre-interview stage of collecting evidence and conducting investigations and in the actual conducting of the interview.[162] An adoption of this model in America, either in whole or in part, might go a long way toward closing the "trust divide" between minority suspects and the police, and thus curb the psychological and social effects of racial profiling.

Defendants in the American criminal justice system have long had a strong disincentive to testify on their own behalf. The Fifth Amendment guarantees defendants the right against self-incrimination.[163] The Supreme Court held in *Griffin v. California*,[164] the definitive ruling on a defendant's "right to remain silent" in the courtroom, that a jury may not draw inferences from the silence of the accused. The decision also provided a forum for the justices to discuss their feelings on the adversarial and inquisitorial systems.

In *Griffin*, the Court held that commenting on the defendant's refusal to testify violates the Self-Incrimination Clause of the Fifth Amendment. Justice Douglas, author of the Court's opinion, derides the notion of permitting a jury to make inferences from the silence of an accused as a relic of the inquisitorial system of justice.[165] The ruling ran in contrast to California's constitution at the time, which allowed "the court or counsel" to comment upon the silence of the accused, and allowed it to be considered by the jury.[166]

Justice Stewart, in his *Griffin* dissent, expressed misgivings about whether California's rule was unconstitutionally offensive to the Fifth Amendment.[167] He noted that under the California rule, while the prosecution will undoubtedly put a negative spin on the defendant's silence, the defense will have an equal opportunity to explain that silence, thereby "rebut[ting] the natural if uneducated assumption that it is because the defendant cannot truthfully deny the

161. Frase, *supra* note 34, at 664.

162. *See* CPP, *supra* notes 110-15.

163. U.S. CONST. amend. V.

164. 380 U.S. 609 (1965).

165. *Id*. at 613 (quoting Murphy v. Waterfront Comm., 378 U.S. 52, 55 (1964) ("The refusal to testify is a remnant of the 'inquisitorial system of criminal justice' . . . . ").

166. *Id*. at 610 (quoting CAL. CONST. article 1, § 13).

167. *Id.* at 617 (Stewart, J., dissenting).

accusations made."[168] He argued that the rule is not coercive at all, but rather an attempt to rationally deal with a problem juries inevitably face: how to interpret the silence of an accused.[169] Then, in describing California's approach to criminal procedure, he confronts the primary concern of inquisitorial system advocates: the promotion of "truth-seeking" rules:

> The California procedure is not only designed to protect the defendant against unwarranted inferences which might be drawn by an uninformed jury; *it is also an attempt by the State to recognize and articulate what it believes to be the natural probative force of certain facts*. Surely no one would deny that the State has an important interest in throwing the light of rational discussion on that which transpires in the course of a trial, both to protect the defendant from the very real dangers of silence *and to shape a legal process designed to ascertain the truth*.[170]

With its concern for promoting and protecting the probative force of facts, it seems as though Justice Stewart is describing the French system.

The Court has examined the *Griffin* rule in the context of a prison disciplinary hearing, and Justice White, who joined in Justice Stewart's dissent in *Griffin*, wrote the majority opinion in *Baxter v. Palmigiano*, disparaging the *Griffin* rule without dispensing with it entirely.[171] Citing Justice Brandeis, who opined that "[s]ilence is often evidence of the most persuasive character,"[172] Justice White questioned whether the rule served a legitimate purpose. The Court in *Baxter*, however, went no further than criticizing the existing rule, and refusing to extend it to prison disciplinary hearings.[173]

Griffin provides an excellent starting point for a discussion of French inquisitorial-style reforms both in the courtroom and interrogation room, in that it raises questions about how to determine and evaluate facts. Under the present American system, defendants are given an incentive *not* to testify at trial, and *not* to disclose information to police when they are arrested.[174] The American system,

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168. *Id.* at 622.

169. *Id.*

170. *Id.* (emphasis added).

171. 425 U.S. 308 (1976).

172. United States *ex. rel.* Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923).

173. *Baxter*, 425 U.S. at 315.

174. Conversely, a wide range of decisions indicate that the law discourages law enforcement and the prosecution from commenting on a defendant's silence. *See, e.g., Griffin*, 380 U.S. at 615 (Fifth Amendment prohibits prosecutor from commenting on defendant's silence at trial); Michigan v. Tucker, 417 U.S. 433 (1974) (excluding confession obtained in violation of *Miranda*); Miranda v. Arizona, 384 U.S. 436 (1966) (guaranteeing defendant's right to remain silent).

in favoring adversarial proceedings, emphasizes an approach that, in practice, may contribute to the lack of trust for the law enforcement community generally held by minorities.

The distinction proposed by Schlesinger between truth-seeking and truth-defeating rules becomes most apparent in this area.[175] In assessing the value of a truth-defeating rule, such as the *Griffin* rule prohibiting inference drawing from a defendant's silence, Schlesinger proposes the following three criteria:

> First, the "other value" invoked as overcoming the value of truth must be clearly spelled out. Secondly, it must be shown in the light of reason and experience that the truth-defeating rule actually serves such other value. And thirdly, the other value must be found to be so strong that it justifies suppression of the truth, even though such suppression may lead to conviction of the innocent or to massive release of the guilty.[176]

The "other value" in the *Griffin* rule is quite clear: protection of the Fifth Amendment right against self-incrimination.[177] Or at least, this is the reason typically given as its justification. But the Court in *Baxter*, as noted above, has already questioned the utility of the rule.[178] Once we begin to consider the Court's insistence on maintaining the *Griffin* rule in spite of the generally inhospitable climate it fosters for defendants, the "other value" becomes more difficult to discern.

In light of the perceived trust deficit between minority communities and the police, rules coming from decisions such as *Griffin* should be reevaluated to consider their continuing usefulness. This leads to the second step in Schlesinger's comparative analysis structure: whether in the "light of reason and experience . . . the truth-defeating rule actually serves such other value."[179] While the *Griffin* rule ostensibly prohibits the jury from drawing inferences from the silence of an accused, there are exceptions.[180] Human nature being what it is, a jury will naturally reach its own conclusions from a defendant's silence, whether officially or unofficially. Prosecutors may even use the *Griffin* rule as a weapon

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175. Schlesinger, *supra* note 131, at 385.

176. *Id.* (citations omitted).

177. *Griffin*, 380 U.S. at 615 ("The Fifth Amendment . . . forbids either comment by the prosecution on the accused's [sic] silence or instructions by the court that such silence is evidence of guilt."). *Id*.

178. *Baxter*, 425 U.S. at 315.

179. Schlesinger, *supra* note 131, at 385.

180. *See* Frase, *supra* note 34, at 679-80; *see also* California v. Perez, 422 P.2d 597 (Cal. 1967) (regarding a defendant's silence as to particular counts on a multiple-count indictment, judge can instruct jury that it may draw inferences from the defendant's silence on those particular counts).

against the defendant.[181] While the *Griffin* rule is well-intentioned and may protect Fifth Amendment values, in many cases it may turn out to be a paper tiger when put against the natural feelings and prejudices of a jury.

Finally, having contemplated the first two elements of Schlesinger's analysis, we arrive at the third question: whether the "other value must be found to be so strong that it justifies suppression of the truth, even though such suppression may lead to conviction of the innocent or to massive release of the guilty."[182] While the *Griffin* rule does indeed protect the Fifth Amendment right against self-incrimination, the pursuit of that goal may not be worth the cost. Consider an analogy to the other truth-defeating rule previously mentioned in Part III: the exclusionary rule. Neither the exclusionary rule nor the *Griffin* rule is an explicit guarantee, although the Supreme Court has found that the Constitution guarantees both.[183] In particular, the *Griffin* rule is, in the words of Justice Douglas, "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."[184] But even Justice Douglas recognizes doubts of the "rule against inferences from silence" in the next line when he notes that "the inference of guilt for failure to testify as to facts peculiarly within the accused is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege."[185] It is possible that the *Griffin* rule does more harm than good.[186] Although the *Griffin* rule theoretically works in the interests of the defendant, its true effectiveness is hard to quantify, and the ramifications of eliminating the rule are worth considering.

The implications that might follow from abandoning the *Griffin* rule, beyond the constitutional ones that will be considered in Part IV, are difficult to predict. However, such a step would be a necessary prerequisite to establishing a more inquisitorial-style system in the French vein. Also, the potential benefits of such reforms are predicated on the existence of other features unique to the French

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181. Prosecutors have been known to request a "no-inference-from-silence" instruction themselves, knowing that "the instruction has the effect of inviting the jury to make the prohibited inference." Frase, *supra* note 34, at 679; *see also* Lakeside v. Oregon, 435 U.S. 333, 339-41 (1978) (finding the practice constitutional).

182. Schlesinger, *supra* note 131, at 385.

183. *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) (evidence gathered in violation of the Fourth Amendment is inadmissible and hence excluded), *with* Griffin v. California, 380 U.S. 609, 609 (1965) (conviction overturned based on prosecutor's statements despite California "comment rule" that allowed the practice on Fifth Amendment grounds). *See* CAL. CONST. art. I, § 13.

184. *Griffin*, 380 U.S. at 614.

185. *Id.*

186. Recall that prosecutors can independently demand an instruction not to infer guilt from a defendant's silence, knowing that the instruction will have exactly the opposite effect. *See id*. at 615.

system.[187] Some of these features would be difficult to adopt under our Constitution; these features will also be discussed further in Part IV.

Shifting into a "truth-seeking," rather than a "truth-defeating" mindset could have interesting implications for alleviating the trust deficit between police and minority communities by decreasing the disincentive for witnesses to testify on their own behalf. At the very least, the introduction of an inverse *Griffin* rule – an instruction that juries *may* draw inferences from the silence of the accused – would probably encourage defendant testimony. Professor Frase goes one step further by recommending that evidence rules be amended to allow admissibility of prior criminal records as encouragement for witnesses to testify.[188]

These provisions, combined with an adoption of the French inquisitorial style in which the judge has a strong role in controlling the direction of the case,[189] would create a "truth-seeking" environment in an American courtroom. This would defuse two of the most powerful disincentives on the part of defendants to testify, both from a strategic and psychological perspective: the threat of impeachment by prior criminal record, and the risk of perjury charges.[190] It would also somewhat diminish the dominating presence of the prosecuting attorney in the courtroom.[191] A shift towards the French "truth-seeking" model could create a sense of trust for law enforcement by reintegrating the defendant into the trial process by encouraging his testimony and providing a hospitable environment for that testimony.

IV. IMPLICATIONS

Introducing a host of French-style inquisitorial reforms would have its own constitutional implications. Many of the reforms contemplated in this Note

187. For example, many of the strictures and evidence limitations present in the American system are unknown to the French system. *Compare* Fed. R. Evid. 404(b) (barring the introduction of "prior bad acts" evidence), *with* CPP, *supra* note 87, at 54-57 (outlining the powers of judicial police in reviewing the criminal records of those accused of contraventions, delicts, and felonies).

188. Frase, *supra* note 34, at 677. *See generally* CPP, *supra* note 87, at 22 (noting the loose evidentiary restrictions of French courts, which provide that "offenses may be established by any manner of proof, and the judge shall decide according to his thorough conviction.").

189. *See* CPP, *supra* note 87, at 22 ("The parties and attorneys then have limited rights to question the accused, usually through the intermediary of the presiding judge.").

190. *See* Frase, *supra* note 34, at 679-81 ("French defendants need not fear impeachment with their prior criminal record since it is admissible whether or not they choose to testify. . . . Another explanation for American defendants' reluctance to testify at trial is that some are discouraged by the risk of being charged with perjury."). Also, a mere suggestion that a defendant may have lied may be grounds for an increase in sentence. *Id.* (citation omitted).

191. *Id.* at 677-78.

have the potential to run afoul of the Constitution – in particular the Fourth and Fifth Amendments.

Professor Frase, one of the more optimistic proponents of comparative criminal procedure reforms, describes the following three characteristics as being essential to successful reform proposals:

> First, they can be implemented one at a time, or at least in fairly small "packages," by individual prosecutors or defenders, or by single acts of the legislature or rules-drafting body, and they require no major, simultaneous changes in other areas of law or practice. Second, they build on institutions or practices already existing in some form within the same jurisdiction. Third, they have elements that can appeal to both prosecution and defense interests, thus ensuring the "bipartisan" support needed for adoption and successful implementation.[192]

In evaluating how these reforms might be implemented, I shall pay heed to these three characteristics and consider the resulting constitutional consequences.

A. Reforming the Police According to the French Inquisitorial Model

Of all the reforms proposed in this Note, introducing a judicial/administrative law enforcement split according to the French model looks to be the easiest to accomplish, both from a procedural and constitutional standpoint. A state legislature could easily take up the issue of police misconduct on its own initiative, and pass legislation limiting the authority of certain members of its police force, or effect a division akin to the French distinction between judicial and administrative police.

Whether a state legislature could take the next step modeled after the French standard, and allow judges to participate in the authorization of searches and seizures, is another matter. Magistrate judges have existed at the federal level since the passage of the Federal Magistrates Act of 1968.[193] Originally, their jurisdiction was limited to issuing warrants and conducting various types of preliminary hearings in criminal cases,[194] but that jurisdiction was later expanded in 1979 to include certain civil cases.[195] It is conceivable that the role of federal

192. *Id*. at 664.

193. 28 U.S.C. § 631 (1968).

194. *Id.*

195. Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643 (1979). Parties may consent to have their cases heard by a federal magistrate. Those accused of federal criminal misdemeanors can also consent to have their cases tried before a federal magistrate. *Id*.

magistrates, as well as the role of those in similar positions at the state level, could be expanded to include the authority to *independently* issue search warrants upon application of the police.[196] Of course, this initiative would compose part of the effort to separate the purely peacekeeping function of the police from the investigatory or crime resolution function of the judicial process.[197] Those who conduct the investigation would be a higher class of police officers, similar to the judicial police of the French system, who have the benefit of at least a few years experience.[198] In sum, the French inquisitorial system subjects officers to additional layers of bureaucratic oversight, and increases the potential for fair treatment.[199] Ostensibly, a reduction in the amount of questionable stops and seizures, of the kind exemplified in *Atwater* and *Whren*, would follow.

The Fourth Amendment poses the biggest obstacle to such a broad reformation of the magistrate's role. Although the Fourth Amendment does not explicitly require an independent magistrate to issue a search warrant,[200] the Supreme Court has long held that search warrants must issue from a "neutral and detached magistrate" to prevent the magistrate from becoming a rubber stamp for the police.[201] However, the French model turns the relationship between magistrate and police on its head, because it is the examining magistrate and not the police who are in charge of the investigation (except in flagrant offenses).[202] Needless to say, the French system has its own drawbacks, and is prone to manipulation from both the police and the prosecution.[203] However, imbuing the magistrate with more independent investigatory power may assuage the Court's concerns about collusions between the police and the magistracy.

Also, it is worth considering the constitutional ramifications in light of Frase's second characteristic of ideal comparative reforms: those ideas that build upon existing practices are more likely to succeed, and less likely to wilt under constitutional challenges.[204]

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196. For a sampling of the investigative powers available to the French examining magistrate see CPP, *supra* note 87, at 81.

197. *See* WEINREB, *supra* note 119, at 126.

198. *See generally* CPP, *supra* note 87, at 49-58 (outlining the function and qualification of the various strata of French judicial police).

199. *See* Mack, *supra* note 28, at 91.

200. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

201. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979) (citing Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (magistrate "did not manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure").

202. *See* CPP, *supra* notes 87, at 79-137.

203. *See* discussion *infra* Part III.

204. *See* Frase, *supra* note 34, at 664.

B. Confrontation, Confession, Constitution and the Courts: The Ramifications of Rethinking American Courtroom Procedure

Of chief concern is the Fifth Amendment, which makes it illegal for a witness to be forced to testify against herself.[205] There are two stages at which the Fifth Amendment becomes a concern in our discussion of French inquisitorial reforms: first, at the pretrial investigatory stage, and second, during the actual trial stage.

With regards to the first stage, Fifth Amendment concerns would largely affect the extent to which an investigatory procedure such as the *garde à vue* could be implemented in the United States criminal justice system.[206] There is no French analogue protecting the right against self-incrimination in such situations; indeed, by the nature of the French proceedings, the defendant is encouraged to respond to police questioning.[207] Though a major change to the set of *Miranda* protections guaranteed the defendant during police questioning seems unlikely, particularly in light of recent decisions,[208] change in the area of trial procedure looks to be more fruitful. Between the two applications of the Fifth Amendment discussed in Parts III and IV – questioning in both the custodial and trial stages of the criminal process – the latter rule, represented by *Griffin* and its progeny, is weaker for reasons stated earlier.[209] Instituting a series of reforms in this area, from giving a judge more authority to question a witness to allowing the prosecution or judge to comment on a defendant's silence, can introduce a buffer between accused and prosecutor. This can improve the lost trust factor at issue in *Atwater* and racial profiling cases generally, and empower a defendant to tell his own story. Over time, such reforms might steady or even reverse the inexorable trend towards plea bargaining that leaves so many minorities with a career and livelihood-inhibiting criminal record.

V. CONCLUSION

> I was surrounded by white folks and I have learned that when this happens, if you're black, there is no justice. None. . . . At

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205. U.S. CONST. amend. V (no witness "shall be compelled in any criminal case to be a witness against himself . . . .")

206. *Compare* CPP, *supra* note 87, at 97 (outlining provisions for *garde a vue*) *with* Miranda v. Arizona, 384 U.S. 436 (1966) (allowing witness to stop questioning by invoking right to silence).

207. *See* Tomlinson, *supra* note 104, at 173 (noting that the lack of evidentiary rules barring the introduction of potentially damaging information such as prior convictions encourages defendants to testify on their own behalf).

208. *See* Dickerson v. United States, 530 U.S. 428 (2000) (upholding the central holding of *Miranda* despite the misgivings of individual members of the Court).

209. *See* discussion *infra* Part III.D.

> the hearing, the district attorney said to me, "When the policeman said, 'You're under arrest,' and you looked at him, what did that look mean?" . . . What they were trying to say was that I was going to knock the policeman down or something. My lawyers didn't put me on the witness stand, because they thought that the white judge and white jury would mistake my confidence for arrogance, and because of my bad temper, which they didn't trust me to keep in check. But that incident changed me forever, made me much more bitter and cynical than I might have been.[210]
>
> -Miles Davis

Gail Atwater spent over $100,000 prosecuting her case to the Supreme Court.[211] Even though she lost, she is confident that she did the right thing. "We've made a large sacrifice trying to help people," she said, "but you don't live in a free society for free."[212] Like Miles Davis and countless other African-Americans, Atwater's trust in the system has taken a serious blow from which it may never wholly recover.

Examination of these cases reveals an interesting irregularity unique to the American system. The American criminal procedure model, with its groundings in the adversarial system and reliance on devices such as the exclusionary rule, is quite effective at protecting the rights of defendants, but is often inherently less effective at preventing police misconduct. In a complicated federal system such as the United States', it is difficult to pin down a reason for this failure, and even more difficult to compose an effective solution at a national level. Most law enforcement officials are hired at the state and local level, and the federal government has little opportunity to influence those hiring decisions. As a result, bad cops and harmful policing approaches slip through the cracks, and innocent people are forced to suffer, often without personal recourse. Gail Atwater discovered this, but only after spending $100,000 to try to convince a court to rule otherwise. African-Americans, of which Miles Davis was a highly visible example, suffer the effects of racial profiling and generalized police misconduct in even greater numbers.

Studying the French inquisitorial system suggests several useful approaches to remedy this problem, but they are not perfect solutions. Indeed, the French system has many of its own problems, and these problems could replicate themselves in the United States in some form, should any sort of inquisitorial-style reform be attempted. The prospects of such a large-scale attempt at reform

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210. MILES DAVIS & QUINCY TROUPE, MILES: THE AUTOBIOGRAPHY 239-40 (1989).
211. Milloy, *supra* note 12.
212. *Id.*

are dim, and there is certainly little to no talk of importing the French inquisitorial system for use in the United States.

Additionally, a review of the constitutional difficulties in implicating such reforms underscores the fact that small efforts at reform are preferable to larger ones.[213] Perhaps, in lieu of a large nation-wide overhaul such reform attempts may be embarked upon at the state level, in areas particularly overworked with criminal cases. While there are many possible approaches to reform, there is a single theme common to all: increased scrutiny of official police action, either at the enforcement, investigatory, or trial level. At the enforcement level, these reforms propose to introduce a new stratum of police officers, who answer to an independent body of professional judges, ideally unburdened by political concerns. At the investigatory level, the same body of professional judges oversees the work of the prosecutors and police who investigate offenses, thus ensuring that abuse of the system does not grow widespread. Finally, at the trial level, the judge, assisted by "truth-seeking" rules of evidence, controls her courtroom in such a way as to encourage the defendant to trust the system and to tell his story without fear of being intimidated by the prosecution.

To be sure, Gail Atwater did not expect to spend $100,000 trying to defend her rights. But she did not expect to discover a criminal justice system that has, over the course of the past few decades, lost the trust of a significant sector of its population, either. Where litigation has failed to regain this public trust, reform proposals gleaned from a careful comparative analysis of the French inquisitorial system may succeed.

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213. *See* Frase, *supra* note 34, at 664 ("However much we believe that our criminal justice system can and should be fundamentally changed, we must constantly keep in mind that such reform is difficult and slow; modest, incremental change is the most we can hope to achieve.").