Dicta Mines, Pretext, and Excessive Force: Toward Criminal Procedure Futurism

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Scholars have recently criticized Fourth Amendment pretext doctrine for leading to more police contact with Black and Brown people and thus to racially disproportionate uses of excessive force. This Essay reveals the intersection of the Court's pretext and excessive force doctrines by unearthing their shared roots in the 1973 United States v. Robinson *search-incident-to-arrest opinion.*

This Essay's new insight is that Robinson *contains what it calls a "dicta mine." A dicta mine is (1) an unnecessary statement that (2) a Court silently recharacterizes as having already resolved an issue, (3) exploding it into a significant doctrine. The* Robinson *dicta mine claims, without support, that "it is of no moment that [officer] Jenks did not indicate any subjective fear of the Respondent or that he did not himself suspect that the Respondent was armed." Citing* Robinson*'s dicta mine, the 1978* Scott v. United States *opinion takes* Robinson*'s aside and explodes it into a general principle that courts may not review officers' subjective motivations. The 1989* Graham *opinion then cites* Scott*, at the place where it cites* Robinson*'s dicta mine, for the proposition the anti-subjectivity principle is required in excessive force doctrine. Finally, the 1996* Whren *opinion argues that* Robinson *and* Scott *had already "foreclose[d]" the possibility that the*

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Fourth Amendment could consider police racial bias to be unreasonable. This Essay's principal contribution to criminal procedure literature is being the first publication to demonstrate how excessive force and pretext doctrines are illegitimate because they rest upon the shaky foundation of Robinson*'s dicta mine.*

This Essay's second contribution is its proposal that we should respond to the criminal procedure redemption—the systematic undoing of civil liberties, especially for racial minorities, that began in the early 1970s—by adopting a criminal procedure futurism perspective. The goals of this approach are to delegitimate anti-egalitarian doctrines in the present and create doctrinal principles for a second criminal procedure revolution in the future. To prepare for the future, law professors should discontinue teaching Robinson *as a stand-alone search incident to arrest case. Instead, we should connect it to the excessive force and pretext doctrines as part of showing students how to read opinions with a critical eye.*

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INTRODUCTION

There is a long-running and perhaps inherent problem of determining which parts of cases should be followed and which parts were merely a preview of potential future analysis. The United States' common law system of argument says there is a distinction between such holdings (the former) and dicta (the latter). Courts must follow a holding, assuming it applies, but need not follow dicta. A holding should be followed because it was, assumedly, well considered by a prior court and based in precedent or a reasonable extension thereof. Dictum should not be treated as precedent without explaining why it is persuasive.[1] A decision that elevates dictum without explanation is dubious because it does not

1. *See generally* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219 (2010) (considering the relationship between dicta and holdings). Stinson attributes the blurring of appropriate dicta/holding boundaries to three primary causes. First, the recursive nature of the legal system means mistakes compound and ripple outward such that a judge who confuses dicta and holding later confuses lawyers, who do the same and feed those same misconceptions back to judges. *Id.* at 241–42. Second, the tendency of courts to mimic the Supreme Court has caused lower court opinions to balloon, creating increasingly voluminous dicta even in simple disputes. *Id.* at 242–45. Finally, the overemphasis on words, phrases, and quotations in modern keyword legal research systems leads law clerks and judges to seek out snippets of useful dicta rather than take the time to synthesize the holding of a particular case, elevating dicta to the exclusion of true legal principles. *Id.* at 245–55. The type of dicta this Essay critiques in *Robinson* should be characterized as "judicial efficiency dicta." *See* Judith M. Stinson, *Preemptive Dicta: The Problem Created by Judicial Efficiency*, 54 LOY. L.A. L. REV. 587, 589 (2021) (distinguishing judicial efficiency dicta from "obiter dicta" and "considered dicta"). Such dicta are still problematic. *Id.* at 590–91. Richard Re is another scholar exploring the dicta/holding distinction. *See, e.g.*, Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 951–53 (2016) (discussing means for lower courts to narrow the Court's precedent); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1867–74 (2014) (considering ways the Court narrows precedent). Lauren McLane has recently argued that Re's approach would allow lower courts to undermine pretext doctrine based on *Whren v. United States*, 517 U.S. 806, 813 (1996). *See* Lauren McLane, Confronting Racist Authority: The Vertical Narrowing of Whren v. United States 1 (Aug. 4, 2023) (unpublished manuscript) (on file with author). McLane's argument fits with this Essay's call to delegitimate anti-egalitarian doctrines in the present while laying the foundations for a second criminal procedure revolution in the future. Because this essay examines how anti-egalitarian pretext and excessive force doctrines were created, it will not delve deeply into debates over what makes dicta different than holdings.

help us believe the Court is minimizing the countermajoritarian difficulty.[2] An opinion explaining either how a holding applies or why a statement that was dictum has been elevated is evidence that the Court has shown restraint. This Essay considers how the distortion of dicta has had a negative effect in the context of Fourth Amendment pretext and excessive force doctrines.[3]

Pretextual policing, and its tendency to result in disproportionately excessive force against racial minorities, has been going on for quite some time.[4] Pretextual policing is the use of a generally accepted reason for law enforcement investigation, such as a potential traffic violation, as an excuse to investigate other potential offenses.[5] Police use pretexts when they do not have the probable cause or reasonable suspicion required to justify seizing or searching someone

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2. *But see* Franita Tolson, *Countering the Real Countermajoritarian Difficulty*, 109 CALIF L. REV. 2381, 2386 (2021) ("In reality, the judiciary is best equipped to determine the scope of its involvement in the political thicket, a fact that even Alexander Bickel recognized over fifty years ago, as opposed to relying on the countermajoritarian difficulty as a reason, in and of itself, to justify staying its hand.").

3. This Essay accepts the critiques of neutrality launched by the legal realist and Critical Legal Studies movements. *See infra* Part II.C.2. Accordingly, it proposes critiquing the distortion of dicta described herein as an immanent critique of anti-egalitarian doctrines as illogical on their own terms. Launching immanent critiques of doctrine is not inconsistent with pursuing social movements that would influence law or make it irrelevant.

4. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129 (2017) (demonstrating that "the Court's legalization of racial profiling exposes African Americans not only to the violence of ongoing police surveillance and contact but also to the violence of serious bodily injury and death"); *see* Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 973 (2020) ("Police patrol Black and other nonwhite neighborhoods more intensively and are thus more likely to initiate contact with local residents once in those neighborhoods. These contacts are characterized by harsher interactions—including potentially deadly force."). *Cf.* Stewart Chang, Frank Rudy Cooper, & Addie C. Rolnick, *Race and Gender and Policing*, 21 NEV. L.J. 885, 891 (2021) (reviewing the George Floyd-Breonna Taylor era of police and other violence to conclude that "policing's involvement in the maintenance of race-gender hierarchy is larger in scope than has traditionally been portrayed"); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward A Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 500 (1996) (concluding that "stereotypes about Blacks as criminals, Asians as foreigners and martial artists, and Latinos as immigrants and gang members, may affect the ability of legal decisionmakers, from prosecutors to jurors, to decide issues of reasonableness fairly and impartially").

5. *See, e.g.*, Lauren McLane, *Our Lower Courts Must Get in 'Good Trouble, Necessary Trouble,' and Desert Two Pillars of Racial Injustice —* Whren v. United States *and* Batson v. Kentucky, 20 CONN. PUB. INT. L.J. 181, 200–01 (2021) ("In looking more broadly at the whole data set collected over the course of fourteen years from the over twenty million traffic stops, Baumgartner et al.'s data indicated that 46.27% of the stops were 'investigatory' in nature . . . the stops for 'investigatory purposes are more likely to relate to minor offenses that may serve as a pretext for pulling a driver over.'"); Melanie D. Wilson, "*You Crossed the Fog Line!"— Kansas, Pretext, and the Fourth Amendment*, 58 U. KAN. L. REV. 1179, 1191 (2010) ("Even if Kansas police do not distort the truth, claiming phantom fog-line violations, officers appear to pre-select certain drivers and then use fog-line infractions to justify pretextual drug investigations.").

to investigate a different potential offense.[6] Pretextual policing can thus be an end-run around the Fourth Amendment.[7]

It has long been recognized that pretextual policing is disproportionately used against racial minorities.[8] Scholars have recently concluded that disproportionate pretextual policing of racial minorities leads to greater police contact with racial minorities, which results in higher instances of police using excessive force against them.[9]

This Essay takes as a premise that pretextual policing's creation of racially disproportionate use of excessive force stems from indifferent caselaw.[10] The pro-pretext *Whren v. United States* opinion declared that Fourth Amendment reasonableness analysis bars considering police officers' subjective motivations for their actions, including pretextual policing for the purpose of racial

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6. *See, e.g.*, Michael D. White, Henry F. Fradella & Michaela Flippin, *How Can We Achieve Accountability in Policing? The (Not-So-Secret) Ingredients to Effective Police Reform*, 25 LEWIS & CLARK L. REV. 405, 446 (2021) (arguing that "cases like *Whren v. United States*, . . . [] have empowered lawbreaking by police.").

7. *See, e.g*., David O. Markus, Whren v. United States*: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER L.J. 91, 98 (1998) ("The Court has always been concerned that officers would use one Fourth Amendment justification to circumvent other requirements. *Whren* presents exactly that case."); 1 WAYNE LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(f) (6th ed. 2020) [hereinafter LAFAVE, SEARCH & SEIZURE] ("The effect of *Whren*, then, is that (with limited exceptions, discussed below) the pretext doctrine has disappeared from Fourth Amendment jurisprudence, thus leaving citizens without, adequate protection against arbitrary seizures and searches. . . .").

8. *See* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1037 (2010) ("Unfortunately, the Supreme Court in *Brignoni-Ponce* arguably increased reliance on race in immigration stops by allowing immigration officers great discretion in making stops and deferentially reviewing the 'totality of the circumstances' offered by the officers for justifying the stop."). This phenomenon is also manifested in police-led targeting of heavily minority urban areas and enforcement of boundaries between racial minority versus "white spaces." *See, e.g*., I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 66 (2009) ("[C]ommonsense geography" informs [police officers'] decisions about whom to deem "out of place . . . ."); Frank Rudy Cooper, *Intersectionality, Police Excessive Force, and Class*, 89 GEO. WASH. L. REV. 1452, 1503 (2021) ("Simply, the police execute their duties differently in different neighborhoods.").

9. *See* Carbado, *supra* note 4 (detailing connections between lenient doctrine and racially disproportionate police uses of excessive force); *see generally* DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022) (arguing selective enforcement increases racial disparities in excessive force).

10. *See, e.g.*, Osagie K. Obasogie & Anna Zaret, *Medical Professionals, Excessive Force, and the Fourth Amendment*, 109 CALIF. L. REV. 1, 8 (2021) ("By using democratic sources of constitutional interpretation that include broader community sensibilities, diverse constituents' perspectives, and other expert opinions, federal courts can apply standards regarding the appropriate use of force that balance the needs and expectations of community members with those of law enforcement."); Carbado, *supra* note 4, at 129 (contending that stopping more Black people leads to killing more Black people); Ion Meyn, *The Invisible Rules that Govern Use of Force*, 2021 WIS. L. REV. 593, 621 (identifying how police trainings urged officers to "always bring deadly force" to their encounters and to not hesitate to use higher levels of force) (quoting *Reality Training: Staying in the Fight*, POLICE1 BY LEXIPOL (Apr. 13, 2018), https://www.police1.com/dave-smith/videos/reality-training-staying-in-the-fight-KRq8uc0VwUeRO4sF/ [https://perma.cc/AN6Y-8ZRK]).

profiling.[11] The pro-force *Graham v. Connor* decision declared that claims the police used excessive force must be scrutinized for Fourth Amendment reasonableness, yet barred factfinders from considering even "evil intentions," such as racial bias.[12]

Inquiring where pro-pretext and pro-excessive force doctrines come from, we arrive at Rehnquist's 1973 *United States v. Robinson* opinion.[13] Having just celebrated its fiftieth anniversary, that opinion is quietly one of the most important statements of criminal procedure doctrine since the Warren Court's criminal procedure revolution[14] of the 1960s.[15] Indeed, the *Robinson* opinion

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11. 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."). "Racial profiling is best thought of as requiring three components: (1) a categorization of people with certain characteristics as a 'race'; (2) a 'profile' that describes the implications of someone's status as a member of a particular race; and (3) a 'profiler' who links the racial categorization to a profile and applies the profile to an individual." Frank Rudy Cooper, *The Un-Balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 895 (2002) (applying concepts from Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1690 (2000)).

12. 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force . . . .").

13. 414 U.S. 218 (1973).

14. The Warren Court's criminal procedure revolution was the dramatic expansion of defendants' rights during the 1960s. It included incorporating the Fourth Amendment's exclusionary rule to apply it to the states, providing counsel to all, requiring *Miranda* warnings, and so on. *See*, *e.g.*, Donald F. Tibbs, *The Start of A Revolution:* Mapp v. Ohio *and the Warren Court's Fourth Amendment Case That Almost Wasn't*, 49 STETSON L. REV. 499, 500 (2020) ("This ruling [*Mapp*] is generally regarded as having launched the "Warren Court Revolution" in constitutional criminal procedure."); John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2129 (2013) ("laying out how [*Gideon*] has survived largely intact, in sharp comparison to other landmark Warren Court criminal procedure decisions" and showing how it has been undercut); Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work As Chief Justice*, 3 OHIO ST. J. CRIM. L. 11 (2005) ("Many critics of the Warren Court's 'revolution' in American criminal procedure led the public to believe that Earl Warren and his colleagues were unworldly creatures who failed to grasp (and had no interest in grasping) the harm their rulings were inflicting on law enforcement. In Earl Warren's case, nothing could be further from the truth."); *see also* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to states); Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (requiring the provision of counsel to indigents); Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring officers to warn defendants of their rights to silence and counsel if custodially interrogated). For nuanced challenges to the existence of a Warren Court "revolution," see Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) (arguing "the Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions"); Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010) (arguing that incorrectly assuming a liberal Warren Court got scared by crime and reversed itself "has turned progressive attention away from the vital and difficult task of generating a doctrinal and political account of policing: its justification, intrinsic limits, and proper means of regulation").

15. For scholarship recognizing *Robinson's* significance, see Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 117 (2012) (emphasizing "the significance of *Robinson*'s refusal to look at officers' states of mind to the undoing of *Chimel*'s limits on searches incident to arrest"); Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting*

ushered in criminal procedure redemption[16]—a concerted and systematic effort at undoing civil liberties, especially with respect to racial minorities—by expanding police powers through search-incident-to-arrest doctrine.[17]

Legal scholars often incorrectly think of *Robinson* as a stand-alone case. Leading casebooks address it in their section on the power and scope of searches incident to arrest of persons.[18] Search-incident-to-arrest doctrine grants an automatic full search of a suspect's person to law enforcement officers whenever they have the right to seize a suspect for an indefinite period of time by arresting them.[19] When scholars connect *Robinson* to other doctrines, they allude to it as a precedent for *Whren*'s pro-pretext holding.[20] Meanwhile, a scholarly consensus has emerged that pretext doctrine, and its echoes in *Graham* excessive force

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Rules to Implement That Purpose, 48 U. RICH. L. REV. 479, 514 (2014) ("The significance of *Robinson* was to distinguish the search incident to arrest principle from other situations where the Court has found an exception to the warrant preference rule."); Wayne A. Logan, *An Exception Swallows A Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 394 (2001) ("Taken together, *Robinson* and *Gustafson* marked a significant advance in police authority to search incident to arrest."). *See generally* Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127 (arguing that Court defers to police judgment and emphasizes police protection).

16. Following the Civil War, Southern Whites referred to reestablishment of White domination of Black as "redemption." *See* James Gray Pope, *Snubbed Landmark: Why* United States v. Cruikshank *(1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385, 435 (2014) ("[I]t was not long before Democratic paramilitaries, emboldened by their Louisiana victories, spread the offensive to other Republican-controlled states, contributing to the "redemption" of Alabama in 1874 and Mississippi in 1875.").

17. In a nutshell, search-incident-to-arrest doctrine says that if police have the level of justification needed to arrest someone (generally, probable cause), they can also search that person without second intrusion. *See, e.g.*, LAFAVE, SEARCH AND SEIZURE, *supra* note 7, § 5.5(a) (stating that "the question may arise as to whether [a] search may be properly characterized as a search incident to the arrest, for such a search requires no more justification than that a lawful custodial arrest was made").

18. *See, e.g.*, CYNTHIA LEE & L. SONG RICHARDSON, CRIMINAL PROCEDURE: INVESTIGATION x (3d ed. 2022) (discussing *Robinson* among search-incident-to-arrest-cases); JAMES J. TOMKOVICZ & WELSH S. WHITE, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF viii–ix (9th ed. 2021) (placing *Robinson* with search incident to arrest exception to warrant requirement); RIC SIMMONS & RENÉE MCDONALD HUTCHINS, LEARNING CRIMINAL PROCEDURE: INVESTIGATIONS xiv, 313–17 (2nd ed. 2019) (discussing *Robinson* mostly with search incident to arrest exception materials); YALE KAMISAR, WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, ORIN KERR & EVE PRIMUS, BASIC CRIMINAL PROCEDURE XXIII, (15th ed. 2019) (discussing *Robinson* as warrantless search of persons case); DONALD A. DRIPPS, CRIMINAL PROCEDURE: RIGHTS AND REMEDIES IN CRIMINAL INVESTIGATIONS vi, 427 (2020) (discussing *Robinson* largely as search-incident-to-arrest case).

19. *See* LAFAVE, SEARCH AND SEIZURE, *supra* note 7, § 5.5(a).

20. *See, e.g.*, Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 903 n.99 (2015) (noting use of *Robinson* for *Whren* rationale); Johnson, *supra* note 8, at 1068 n.338 (linking *Robinson* to *Whren's* holding); Margaret M. Lawton, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 927 (2008) (discussing *Whren*'s use of *Robinson* as rationale for Arkansas v. Sullivan, 532 U.S. 769, 772 (2001)).

doctrine, have increased police killings of Black and Brown people.[21] Those critiques all assume that the antisubjectivity principle—a refusal to consider officers' motivations for seizing or searching a civilian—is "good law."

This Essay's new insight is that the antisubjectivity principle should be deemed doctrinally illegitimate because it is based upon a "dicta mine." Dicta are unnecessary statements in a court's opinion.[22] They are not binding precedent, instead serving, at best, as persuasive authority.[23]

The dicta mine metaphor imagines the planting of land mines. Those are explosive devices that are buried in the earth during a conflict and meant to explode upon contact. The side that plants the land mine expects an enemy soldier, tank, or civilian to step on the mine and be destroyed.

Continuing the metaphor, we can think of a justice as "planting" dicta in a case. That justice may simply have unintentionally waxed poetic about implications of a holding or might be hoping their aside will eventually be adopted as the holding of a later case. In a subsequent case, that justice or another justice "steps" on the dicta mine by citing it as binding authority for a holding. That "explodes" the dicta mine, converting it into a holding. Like a landmine, an exploding dicta mine often catches its enemies by surprise.[24]

A dicta mine should thus be defined as (1) an unnecessary statement that (2) a Court later silently recharacterizes as having already resolved an issue, (3) exploding it into a significant doctrine. Dicta mines, being unnecessary statements that are not acknowledged as such, cannot provide as solid a foundation for a proposition as a citation to the actual holding of a case or a frank discussion of why the dictum is being elevated. This Essay is the first publication to point out the crucial relationship between *Robinson*'s dicta mine, pretext doctrine, and excessive force doctrine.

This analysis raises the question, what should we do in response to the Court's surreptitious doctrinal endorsement of pretextual policing? Rehnquist's actions were part of a broad political and legal backlash against the Warren

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21. *See generally* DEVON W. CARBADO, UNREASONABLE: BLACK LIVES, POLICE POWER, AND THE FOURTH AMENDMENT (2022) (arguing pretext doctrine creates more police contact with Black people and thus racially disproportionate excessive force).

22. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 961 (2005). Because this is an article about pretext, this essay will not linger in the debate over the dicta-holding distinction.

23. *See id.* There are, of course, other definitions of dicta. *See, e.g.*, Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2006) (declaring particular Supreme Court *dicta* "not law" because the issue "remain[ed] unadjudicated"); Stinson, *supra* note 1, at 219 (identifying causes of dicta/holding confusion); *In re* Waters, 276 B.R. 879, 884 (Bankr. N.D. Ill. 2002) (concluding dicta is "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding–that, being peripheral, may not have received the full and careful consideration of the court that uttered it").

24. Moreover, the unannounced elevation of a dicta mine suggests that it will serve a dubious purpose. Here, Rehnquist wanted to establish the antisubjectivity principle without relying on an actual prior holding.

Court's criminal procedure revolution, which dramatically expanded the rights of criminal defendants during the 1960s.[25] Since *Robinson*, Fourth Amendment doctrine has increasingly been "a project by the Burger, Rehnquist, and Roberts Courts to expand the power of the police against people of color, especially [B]lacks and Latinos."[26] Given the Trump-era takeover of the Court by movement conservatives, calls for tweaks in doctrine would likely go unheard, and the response would be insufficient at best. This Essay thus calls for criminal procedure futurism: we should delegitimate anti-egalitarian doctrines in the present and create the doctrinal architecture for a "second criminal procedure revolution" in the future.

Part I of this Essay explores four cases that insulated pretextual policing and excessive force and argues that those cases used the rhetorical strategy of laying and exploding a dicta mine.[27] Justice Rehnquist's *Robinson* opinion held that a search incident to a custodial arrest does not require a showing of a likelihood that the suspect will be armed or destroy evidence.[28] The *Robinson* case's sneakily important aside—that "it is of no moment that [officer] Jenks did not indicate any subjective fear of the respondent or that he did not himself

25. This raises the question of Rehnquist's intent when exploding *Robinson*'s dicta mine into *Scott*'s antisubjectivity holding. Reasonable minds might disagree about Rehnquist's degree of mens rea toward allowing racist policing without a likelihood of proving its existence or absence. This argument does not depend on Rehnquist's intent.

26. *See* Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 246 (2010) (arguing the present occupiers of the Court's majority have an anti-egalitarian racial agenda that is immune to rational argument) (internal citation omitted).

27. A foundational text defines rhetoric as "ways of winning others over to our views, and of justifying those views to ourselves as well as others, when the question of how things in the world ought to work is *contested* or *contestable*." ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 14 (2000) (emphasis in original). Leaders in the field define rhetoric as "persuasion," especially the "strategies and techniques" for "inventing persuasive arguments." LINDA L. BERGER & KATHRYN M. STANCHI, LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE 5 (2018). This Essay defines rhetorical analysis of criminal procedure as the study of how judges, lawyers, policy makers, and the broader community use tools of persuasion to argue for particular legal or policy conclusions about the criminalization system. Based primarily upon the above two texts, I propose the following questions for rhetorical analysis: (1) how was identification with the author or parties made or broken?; (2) how were facts and rules categorized?; (3) how did the narrative describe the characters, trouble, and desirable resolution?; (4) what argumentative structures were utilized?; and (5) what were culture's effects on the crafting of the text? For additional examples of rhetorical analysis of law, see Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, (2020); Doron Samuel-Siegel, *Reckoning with Structural Racism in Legal Education: Methods Toward a Pedagogy of Antiracism*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 67 (2022); Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, 17 DUKE J. CONST. L. & PUB. POL'Y 63, 90–91(2022); Christine M. Venter, *Dissenting from the Bench: The Rhetorical and Performative Oral Jurisprudence of Ruth Bader Ginsburg and Antonin Scalia*, 56 WAKE FOREST L. REV. 321, 323–26 (2021). *But see generally* Dennis Patterson, *Fashionable Nonsense*, 81 TEX. L. REV. 841, 858 (2003) (reviewing ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000)); STEVEN L. WINTER, A CLEARING IN THE FOREST; LAW, LIFE, AND MIND (2001) (criticizing Amsterdam & Bruner's approach).

28. United States v. Robinson, 414 U.S. 218, 235 (1973).

suspect that the respondent was armed"—was a dicta mine.[29] The *Robinson* opinion's foreshadowing of the antisubjectivity principle in that dicta mine was a naked assertion that came after the true holding of the case.[30] Rehnquist's 1978 *Scott* opinion then recharacterized *Robinson's* dicta mine as the holding of *Robinson*, thereby exploding that dicta into a general antisubjectivity principle.[31]

Part I of this Essay continues by showing that the explosion of *Robinson*'s dicta mine had significant consequences. The key excessive force case, Rehnquist's 1989 *Graham* opinion, revamped the then-prevailing doctrine to make it much friendlier to police who use excessive force.[32] To accomplish its pro-force stance, the *Graham* opinion cited *Scott*'s reference to *Robinson*'s dicta mine. The *Graham* Court thus concluded that an officer's "evil intentions" may not be considered even *relevant* to excessive force analysis.[33] Scalia's 1996 *Whren* opinion also used *Robinson*'s dicta mine as the key piece of evidence that bars finding a police officer's racial profiling to be unreasonable under the Fourth Amendment whenever there is also probable cause.[34] Part I ends by demonstrating that such dicta mining harms the Court's legitimacy.

Part II of this Essay calls for criminal procedure futurism. With apologies to those seeking to make "lemonade" from this Court's paltry offerings,[35] criminal procedure futurism would mean giving up on the present Court, delegitimating its doctrines through means such as revealing they are based on dicta mines, and preparing for a second criminal procedure revolution. This Essay thus proposes that legal scholars think about and teach *Robinson* in a new way: linking it to the excessive force and pretext doctrines and using it as an example of how to read opinions with a critical eye. This Essay then briefly concludes.

I.
TRACING *ROBINSON*'S DICTA MINE

While many scholars critique *Whren* pretext doctrine and *Graham* excessive force doctrine based on their results, this Part of the Essay challenges them based on the illegitimacy of their doctrinal foundation. This case study delegitimates the excessive-force and pretext doctrines by showing that the

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29. *Id.* at 236 (internal footnote omitted). The footnote following this sentence quotes the record to establish that Jenks did not fear Robinson, Jr. and did not think about whether to search. *Id*. at 236 n.7.

30. *See id.* (stating dicta mine in Part IV of opinion rather than with the holding in Part III).

31. Scott v. United States, 436 U.S. 128, 138 (1978).

32. *See* Graham v. Connor, 490 U.S. 386, 390 (1989) ("Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder . . . .").

33. *Id.* at 397.

34. *See* Whren v. United States, 517 U.S. 806, 813 (1996).

35. For an excellent explanation of the strategy of exploiting some of this Court's relatively progressive opinions, see Daniel Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's Criminal Jurisprudence*, 110 CALIF. L. REV. 681, 685–87 (2022) (suggesting using recent victories against explicit racism to create a better jurisprudence).

antisubjectivity principle rests upon the unstable ground of *Robinson*'s dicta mine.[36]

To establish the existence of *Robinson*'s dicta mine, this Section proceeds as follows. First, it shows that *Robinson*'s dicta mine was an unnecessary statement. Second, it critiques Rehnquist's *Scott* opinion for mischaracterizing *Robinson*'s dicta mine as a holding and exploding it into a general antisubjectivity principle. Third, it uncovers that Rehnquist's *Graham* rationale took the *Scott* principle as a given while obliquely citing the *Robinson* dicta mine. Fourth, it highlights the way Justice Scalia's crucial argument in *Whren* relied upon *Robinson*'s dicta mine.[37]

A. Robinson*: Planting the Dicta Mine*

Understanding the *Robinson* case requires considering how a search-incident-to-arrest case became the basis for the antisubjectivity principle. The *Robinson* Court proposed that whenever law enforcement officers have the right to arrest someone, they automatically also have the right to fully search their person. The rationale for this rule is that officers may be endangered by close contact with the suspect. Thinking critically about Rehnquist's framing of the *Robinson* opinion shows that his statement leading to the antisubjectivity principle was actually dictum.

1. How Rehnquist created Robinson*'s dicta mine*

The facts of this case are only slightly in dispute. Rehnquist said that Officer Jenks came upon Willie Robinson, Jr., (whom Rehnquist referred to only as "Robinson" or "Respondent") at night. Jenks had previously checked Robinson, Jr.'s operator's permit and determined that he was driving without a valid license.[38] Jenks traffic-stopped Robinson, Jr., and arrested him. Per department instructions, Jenks then patted down Robinson, Jr. Feeling an unknown object underneath Robinson, Jr.'s heavy overcoat, Jenks reached inside

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36. Again, the dicta mine is this statement from *Robinson*: "Since it is the fact of custodial arrest which gives rise to the authority to search, *it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that the respondent was armed*." United States v. Robinson, 414 U.S. 218, 236 (1973) (internal footnote omitted) (emphasis added).

37. One could consider including *Chimel v. California*, 395 U.S. 752 (1969), in this genealogy of the antisubjectivity principle. *Chimel* addresses the scope of a search incident to arrest beyond the person in a home. However, the case does constrain itself to the scope issue, so Rehnquist does not try to use it to set up the antisubjectivity statements analyzed in this Essay. *See id.* at 768.

38. The facts suggest that *Robinson* may have been a pretext case. Jenks may have had a hunch that Robinson, Jr. was a drug dealer, which would explain his research into the license prior to this encounter. *See Robinson*, 414 U.S. at 220 ("Jenks, as a result of previous investigation following a check of respondent's operator's permit four days earlier, determined there was reason to believe that respondent was operating a motor vehicle after the revocation of his operator's permit."); *Id.* at 248 (Marshall, J., dissenting) (predicting that "case-by-case adjudication will always be necessary to determine whether a full arrest was effected for purely legitimate reasons or, rather, as a pretext for searching the arrestee").

the coat and retrieved a crumpled cigarette pack. Feeling something in the package that was neither a weapon nor cigarettes, he opened the package and discovered fourteen gelatin capsules of what he thought to be heroin.[39] Robinson, Jr. was prosecuted for the heroin and challenged the search. As Rehnquist transitioned from the facts to the legal analysis, he chastised the court of appeals for suggesting that "one unexplained and unelaborated sentence" created "a novel and far-reaching" proposition.[40]

Rehnquist described the issue as whether the court of appeals was correct that a search incident to arrest does not automatically allow a full search of the arrestee's person.[41] The court of appeals had distinguished between an allowable search for weapons and a broader, sometimes unnecessary, "full-blown"[42] search incident to arrest.[43] The court of appeals utilized the 1968 *Terry v. Ohio* Court's distinction between "full blown" searches and "limited" searches.[44] The *Terry* opinion limited "frisks" to pat-downs of the exterior in a way designed to discover weapons,[45] whereas "full blown" searches may include interiors, such as pockets.[46] Justice Marshall's *Robinson* dissent thus argued that Jenks's *Terry* frisk was allowable for his protection, but his full search of Robinson, Jr.'s pocket was unreasonable.[47]

Robinson's majority opinion began by collapsing the distinction between frisks for officer safety and full-blown searches for other reasons. Rehnquist did so by citing nineteenth-century cases that allowed police a broad search of the person incident to arrest.[48] Next, he contended that the *Terry* Court's allowance of frisks on mere reasonable suspicion implied that searches incident to arrest, being based on the higher justification of probable cause to arrest, should allow full-blown searches.[49] Ultimately, Rehnquist took issue with the court of appeals' argument that a full-blown search incident to arrest is only justified by

39. *Id*. at 220–23.

40. *Id.* at 229.

41. *See id.* at 227–29 (expressing disagreement with the court of appeals' decision that a search incident to arrest must remain limited to where police could reasonably believe the suspect has a weapon).

42. Terry v. Ohio, 392 U.S. 1, 8 (1968). *See* Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 DENV. L. REV. 53, 69 (2015) ("A *Terry* frisk—which is something less than a "full-blown search"—is justified if an officer has a reasonable suspicion that a person he or she has stopped is armed and dangerous.").

43. *See Robinson*, 414 U.S. at 241 (Marshall, J., dissenting) (noting that the officer reached into the suspect's pocket and took out the cigarette packet even though he did not think it felt like a weapon).

44. *See Terry*, 392 U.S. at 29–30 ("The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden . . . did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. . . . He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.").

45. *See id.* at 8, 10, 19, 26 (using this language).

46. *Id.* at 29–30.

47. *Robinson*, 414 U.S. at 240–41 (Marshall, J., dissenting) (distinguishing the searches).

48. *See id.* at 230–33.

49. *See id.* at 227.

the desire to find further evidence of the crime of arrest, of which there could be none in this case.[50] Rehnquist instead contended the full-blown search incident to arrest is also justified by the need for officer safety.[51] According to Rehnquist, since the danger to the officer is greater in the prolonged seizure of an arrest than in the limited seizure of a *Terry* stop, all arrests should allow a full-blown search of the person.[52] At that point, the issue that created the case—whether officers arresting someone may always conduct a full-blown search incident to arrest—was resolved.

Yet Rehnquist continued, "But quite apart from these distinctions, our more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."[53] While that sentence begins a paragraph in Part IV of the opinion that draws the same conclusion as Part III (that all arrests justify full-blown searches), it seems to be an aside. Rehnquist was asserting that a bright-line rule is preferred over case-by-case analysis.[54] So he drew the conclusion that a full-blown search incident to arrest is not only a warrant exception but also *per se* reasonable under the Fourth Amendment.[55]

Rehnquist's preference for bright-line rules can be read as an alternative basis for his holding, but the one-paragraph Part IV of the opinion should not. There, Rehnquist made the eventually crucial statement, "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed."[56] This was *Robinson*'s dicta mine. While it had both a footnote that followed and an internal footnote, it cited no authorities in support.[57]

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50. *See id.* at 233.
51. *See id.* at 234.
52. *See id.* at 234–35.
53. *Id.* at 235. Note that these searches were long referred to as "S.I.L.A.," as in Searches Incident to *Lawful* Arrest. Then the Court dumped the requirement that the arrest providing for the automatic search be *lawful*. *See* Virginia v. Moore, 553 U.S. 164, 178 (2008) (construing search incident that was unlawful under state law as not creating Fourth Amendment claim).
54. In an important piece, Professor Donald Dripps notes that the "Iron Triangle" of cases supporting extreme police discretion in traffic stops traces to this move in *Robinson*. *See* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rule*s, 74 MISS. L.J. 341, 392–93 (2004) ("Each leg of the triangle is supported primarily by the need for bright-line rules."); *see also* Frank Rudy Cooper, *Post-Racialism and Searches Incident to Arrest*, 44 ARIZ. ST. L.J. 113, 127 (2012) (calling *Robinson* "a 'sea change' in that it links the discretionary search incident to arrest to a necessity for the Court to ignore officers' subjective motivations for their actions.").
55. *Robinson*, 414 U.S. at 235 (stating that "a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but also is a 'reasonable' search under that Amendment").
56. *Id.* at 236.
57. Neither footnote has a citation to a case. *See id.* at 236 nn.6–7.

Reviewing the definition of dicta helps establish that Rehnquist's "it is of no moment" statement was dictum. In short, dicta are unnecessary statements.[58] The bar on advisory opinions means courts should stick to statements necessary to resolve the narrow legal question. Although the Court has sometimes been overgenerous in its characterization of what counts as a holding,[59] scholars generally accept this narrow approach: "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta."[60] Put another way, the problem with dicta is that, "being peripheral, [they] may not have received the full and careful consideration of the court that uttered them."[61]

Applying those definitions to the *Robinson* dicta mine confirms that we are discussing a peripheral statement. The *Robinson* opinion's "it is of no moment" declaration was not decided in reaching the holding. Issues are decided when they lie on the path to the judgment.[62] The placement of this statement in Part IV of the opinion, rather than with the holding in Part III, helps illustrate that it lies beyond the path to the holding. At best, this is a case of the Court labeling something as a holding even though it was not necessary, which does not remove it from the category of dicta.[63]

The companion case to *Robinson*, *Gustafson v. Florida*,[64] requires a brief description, as it pops up again alongside citations to *Robinson* in *Whren*'s analysis. The *Gustafson* opinion dealt with an evidence-yielding *Terry* frisk of a suspect incident to his arrest for not having his driver's license when operating a motor vehicle.[65] The *Gustafson* facts are distinguishable from *Robinson* because in *Gustafson*, police department regulations did not instruct the officer to conduct even a limited *Terry*-frisk level of search. Rehnquist's reasoning for the *Gustafson* majority consisted almost entirely of quotes from *Robinson.* Most relevantly, the *Gustafson* Court paraphrased *Robinson* for the proposition that "*it is of no moment* that Smith did not indicate any subjective fear of the petitioner

58. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1552 (2020) ("Unnecessary statements are dicta and needn't be followed.").

59. *See id.* at 1553 ("The Supreme Court, for instance, has in recent years suggested that a case's holding is (i) the proposition that the outcome follows from the facts of the case; (ii) the principal rationale for the outcome; (iii) any but-for condition for the outcome; and (iv) any proposition that was on the court's analytical route to the outcome.") (internal footnotes omitted). The minority approach (adjudicative model) says, "[T]he key question is whether an issue has been ruled on–that is, adjudicated–not whether that ruling was necessary." *Id.* at 1554.

60. Abramowicz & Stearns, *supra* note 22, at 961.

61. *In re* Waters, 276 B.R. 879, 884 (Bankr. N.D. Ill. 2002).

62. *See* Abramowicz & Stearns, *supra* note 22, at 1070 (determining that "actually decided" is a term that "excludes some statements that figure in the reasoning of the case, but that a fair construction of the opinion would not find to lie on the path from case facts to case disposition").

63. *See id.* at 1072 ("[S]ometimes a court will label a proposition as a holding. We do not think that such a label can transform dicta into a holding . . . .").

64. 414 U.S. 260 (1973).

65. *Id.* at 262.

or that he did not himself suspect that the petitioner was armed."[66] Having doubled down on *Robinson*'s dicta mine, the *Gustafson* opinion concluded that the *Terry* frisk conducted therein was reasonable.

2. *Original limits on* Robinson*'s dicta mine*

The most important limit on the full statement of *Robinson*'s dicta mine is its conditional nature. It begins with "Since" and then refers to "the fact of custodial arrest" as providing "the authority to search" before it concludes, "it is of no moment."[67] The word "since" is a classic conditional statement. In this sentence structure, it signals that it is *because* the first clause is true that the second clause applies. Strictly speaking, the "it is of no moment" declaration is not only dictum, but dictum that applies only in cases where there has been a lawful custodial arrest that justifies the ensuing automatic search.

The conditional form of *Robinson*'s dicta mine points to two special aspects of the case. First, the suspect was being arrested, which meant he would be taken into custody for an indefinite period of time. As Rehnquist pointed out, to the extent there is some danger to an officer in a *Terry* stop, which is a temporary seizure, that danger would be heightened when the officer has prolonged contact with the suspect because of the indefinite length of an arrest-level seizure.[68] Second, the search incident to arrest is *automatic*. If we did a typical balancing analysis of the overall reasonableness of a nonautomatic search, we would have to ask if the law enforcement interest outweighed the privacy interests.[69] But unlike in the ordinary situation, a search incident to arrest is automatically considered justified simply because the seizure was justified. Rehnquist was able to create a majority for the proposition that, the arrest being reasonable, the automatic search is also reasonable.[70] Those two aspects of *Robinson* make searches incident to arrest a special context and suggest that conditioning *Robinson*'s antisubjectivity statement, "It is of no moment," upon there being a search incident to a lawful arrest should have been a meaningful limitation. Later cases, especially Rehnquist's *Scott* opinion, obscured the conditional nature of *Robinson*'s dicta mine.

3. *Potential Objection: Not Dicta?*

Before turning to *Scott*'s analysis, we must answer a question that this dicta mine analysis often raises: Does *Robinson*'s "it is of no moment" language

66. *Id.* at 266 (emphasis added).

67. *Id.*

68. *See* United States v. Robinson, 414 U.S. 218, 234–35 (1973) (reasoning that the danger is greater in a case of "extended exposure").

69. *See* Camara v. Mun. Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 534–35 (1967) ("[I]t is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.").

70. *See Robinson*, 414 U.S. at 235 (holding that a full search of the person incident to a lawful arrest is "reasonable").

actually count as dictum?[71] When criminalization[72] scholars heard or read drafts of this Essay, a majority of them agreed that *Scott* had recharacterized dictum from *Robinson* as a holding. But some opined that the *Robinson* statement was not truly dictum. Honestly, as long as the reader agrees the *Scott* Court manipulated and expanded *Robinson*, it does not matter what one calls the dicta mine.

One argument that *Robinson*'s "it is of no moment" declaration is not dictum is that it seems to be an implication of the core holding in Part III of that opinion. That is, if Jenks could search Robinson, Jr., despite having no opportunity to find further evidence of the crime of arrest on Robinson, Jr., or reason to fear for his safety, then Jenks's thinking seems irrelevant. But such an implication does not a holding make. Recall that a holding is a statement that is necessary for the legal issue to arrive at the judgment. The *Robinson* opinion's "it is of no moment" statement was not necessary to determine its legal issue of whether a search incident to arrest automatically allows a full search of the arrestee's person.[73]

Another argument that *Robinson*'s "it is of no moment" statement is not dictum is that the structure of *Robinson* has become more prevalent. Opinions with a core holding in Part III and then an additional implication/holding in Part IV are apparently more common today.[74] That argument is unpersuasive because the question is, was the "it is of no moment" statement of a sort that the rest of the Court would have deemed to be dictum in 1973? Rehnquist's *Robinson* majority colleagues were probably not on notice that they were signing onto the antisubjectivity principle just because of this statement.

B. Scott*: Exploding the Dicta Mine into a General Antisubjectivity Principle*

The *Scott* case, which extended *Robinson*, is known for holding that courts should not consider a law enforcement officer's state of mind when determining

71. It was dictum. For instance, a leading authority concluded that *Robinson*'s "it is of no moment" concept did not resolve the issue of whether pretext could be considered. *See* LAFAVE, SEARCH AND SEIZURE, *supra* note 7, § 1.4(f) ("The fact that "a lawful custodial arrest" permits such a full search without a case-by-case showing of need or the officer's thoughts about that need says nothing about whether the taking of custody should itself be deemed lawful even when it is pretextual (a matter not even at issue in *Robinson*).").

72. *See generally* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023) (critiquing the use of "justice" to describe criminalization system).

73. *Robinson*, 414 U.S. at 227–29 (expressing disagreement with the court of appeals' decision that a search incident to arrest must remain limited to situations where the police could reasonably believe the suspect has a weapon).

74. On the increasing use of what might be called *dicta* as precedent in the lower courts, see Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 198 (2014) ("Many lower courts have described Supreme Court statements as entitled to deference even when those statements were made in dicta."). This Essay does not endorse Kozel's perspective.

the validity of a search or seizure.[75] Rather, courts should consider only whether the objective facts would have justified the action.[76] *Scott* thus held that the F.B.I. could keep evidence gained from searches not in compliance with the federal wiretapping statute's requirement that officers minimize their intrusion when listening in on conversations. This Section does two things. First, it demonstrates that *Scott* created the antisubjectivity principle only by exploding *Robinson*'s dicta mine.[77] Second, it argues that while *Scott*'s manipulation of *Robinson*'s dicta could be called mere "distortion," the "dicta mining" concept fits at least as well and is more descriptive of Rehnquist's actions.

1. The Scott *Reasoning*

The *Scott* Court considered the federal wiretapping statute's minimization requirement. The minimization requirement appears to dictate that officers must make good faith efforts to prevent overlistening to irrelevant conversations or portions thereof. The statute declares that electronic surveillance must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."[78] In *Scott*, the F.B.I. had intercepted communications pursuant to a court order requiring minimization.[79] The federal district court suppressed the evidence on grounds that the agents made an "admitted knowing and purposeful failure" to comply with the minimization order that was "unreasonable."[80]

Looking at the reasoning for *Scott* makes clear that Rehnquist exploded *Robinson*'s dicta mine into a general antisubjectivity principle. Rehnquist began his analysis by characterizing the statute as a "balance" between tools necessary to combat crime and "unnecessar[y]" infringements on privacy.[81] Rehnquist's description is the general Fourth Amendment balancing test for considering new categories of searches or seizures, which he assumed was not altered by the presence of a law created by the other two branches. Rehnquist's first substantive argument paraphrased the government's position, asserting that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[82] He next argued that this rule flowed from *Terry*'s call for an objective standard.[83] He then claimed, seemingly paraphrasing *Robinson*'s dicta mine, "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the

75. Scott v. United States, 436 U.S. 128, 138 (1978).
76. *Id.*
77. *See Robinson*, 414 U.S. at 236.
78. *Scott*, 436 U.S. at 130 (quoting 18 U.S.C. § 2518(5) (1976)).
79. *Id.* at 130–31.
80. *Id.* at 131.
81. *Id.* at 130.
82. *Id.* at 136.
83. *Id.* at 137.

circumstances, viewed objectively, justify that action."[84] Next Rehnquist paraphrased the facts of *Robinson*[85] and then directly quoted *Robinson*'s dicta mine.[86] He further cited five federal circuit court cases as evidence of the lower courts' agreement with the antisubjectivity principle.[87] He ultimately absolved the officers from responsibility for not even trying to minimize listening to suspects' private, noncriminal conversations on the grounds that evaluating their compliance would have involved considering their states of mind.[88]

While masquerading as a summary of recent law, the thinness of *Scott*'s reasoning is striking. Its key declaration began with the words, "We have since held,"[89] but the Court had not so held. Rather, the *Scott* Court's support for its decision was generally that *Robinson* did not let Robinson, Jr. off the hook based on Jenks's lack of subjective fear of weapons or flight of evidence. Then *Scott* exploded *Robinson*'s "it is of no moment" dictum into a general principle that the Court may not consider an officer's subjective reasons for acting. The specific lack of exclusion in *Robinson* became the basis for a logical leap to a general antisubjectivity principle. Next came the citation to the circuit court opinions without explanation of why they were persuasive. There was no further discussion of how *Robinson*'s dictum became the basis for *Scott*'s holding.

It is ironic, if not hypocritical, that Rehnquist's *Robinson* opinion chastised the court of appeals for suggesting that "one unexplained and unelaborated sentence" had created "a novel and far-reaching " proposition.[90] Yet in *Scott* Rehnquist cited *Robinson*'s one-sentence dicta mine as authority for the general antisubjectivity principle.[91] The *Scott* opinion is now the primary citation for that principle, which bars courts from considering law enforcement officers' states of mind when they seize or search someone.[92] It thus exploded *Robinson*'s dicta mine into the antisubjectivity principle. As many scholars have demonstrated,

84. *Id.* at 138.

85. *Id.*

86. *Id.* (quoting United States v. Robinson, 414 U.S. 218, 236 (1973) (internal footnote omitted). The quoted language is as follows: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed."

87. *See Scott*, 436 U.S. at 138 n.12.

88. Rehnquist adds two arguments against an interpretation of the statute that requires minimization. First, the statute's use of the word "conducted" supposedly implies objective analysis. *See id.* at 139. Second, the Court has held in another context that the statute was not meant to go beyond Fourth Amendment law. *See id.*

89. *Id.* at 138.

90. *Robinson*, 414 U.S. at 229.

91. *Scott*, 436 U.S. at 138.

92. *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 404 (2006) ("An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively,* justify [the] action." *Scott v. United States,* 436 U.S. 128, 138 (1978) (emphasis added).").

the cost of the antisubjectivity rule has been frequent pretext-based uses of force against Black and Latino communities.[93]

2. Potential Objection: Dicta Mining or Mere Distortion?

The preceding sub-Section argued that *Scott* exploded *Robinson*'s *dicta* mine into the holding that courts may not consider law enforcement officers' subjective reasons for their actions; this sub-Section asks if it matters whether we use that dicta mine metaphor or some other language connoting distortion.[94] At best, *Robinson*'s dicta mine was a holding, but one that the *Scott* Court significantly distorted.

Does it matter that *Scott*'s use of *Robinson*'s dicta mine might be called a mere "distortion" of a prior holding rather than the explosion of a dicta mine? The previous sub-Section demonstrated that Rehnquist based the *Scott* antisubjectivity principle on the fact that *Robinson* did not exclude the evidence despite Jenks's lack of fear for evidence or safety. Rehnquist thus made a logical leap from *Robinson*'s "it is of no moment" dictum to the broader antisubjectivity holding in *Scott*. This Essay recognizes that accusing Rehnquist of exploding dictum into a holding and accusing him of distorting prior holdings to support later broader holdings are essentially the same proposition. This Essay will therefore proceed with its dicta mine analysis.

The key point to take away from this Section is that *Scott* distorted *Robinson*'s dicta mine, which had significant consequences for both the excessive force and pretext doctrines. The next two Sections show how *Robinson*'s dicta mine was key to the expansion of *Scott*'s antisubjectivity principle in both of those domains.

C. Graham*: Transporting the Dicta Mine into Excessive Force Doctrine*

While *Scott* exploded *Robinson*'s dicta mine into a general antisubjectivity principle, *Graham* took that principle for granted. The official holding of *Graham* was that all claims of police excessive force must be considered under the Fourth Amendment's reasonableness balancing test—whether the law enforcement interest outweighs the civilian's privacy interest—rather than the

93. *See, e.g.*, Carbado, *supra* note 4, at 128 ("Across the United States, police officers routinely force interactions with African Americans. Because these interactions are often the precursors to excessive force, including homicide, they should figure more prominently in our analysis of police violence."); Fagan & Campbell, *supra* note 4, at 1001–04 (arguing racial bias and police focus on "high crime" communities can lead to disproportionate deadly force); *cf.* Chang, Cooper & Rolnick, *supra* note 4, at 891 (tying racially disproportionate policing into maintenance of race and gender hierarchies); Lee, *supra* note 4, at 496 ("Interpreting reasonableness as a function of typicality is problematic because it permits racial stereotypes to have too great an influence on juror determinations in self-defense cases.").

94. I thank David Owens for suggesting this point. I thank my colleague Eve Hanan for suggesting the alternative framing of doctrinal distortion.

substantive due process test then prevailing in the circuit courts.[95] *Graham*'s holding was not clearly a victory for police at the time but has since proven to make excessive force claims nearly impossible.[96] The *Graham* opinion would have amply shielded police officers from excessive force claims without the antisubjectivity principle, but refusing to allow evidence of bad intentions exacerbated the problem. This Section shows how *Graham* smuggled *Robinson*'s dicta mine into the excessive force doctrine.

1. Graham*'s General Reasoning Skews Against Finding Excessive Force*

To understand the *Graham* decision, it is necessary to consider that it was decided against the backdrop of a decision from four years prior, *Tennessee v. Garner*.[97] The *Garner* decision had been controversial among conservatives because it applied the Fourth Amendment to an excessive force claim in a way that limited the police.[98] In *Garner*, a white police officer investigated a potential break-in and saw Edward Garner, a fourteen-year-old, five-foot-four, 140-pound Black youth, running away from the scene.[99] The officer reasoned that he would not be able to catch the child if they climbed over the fence, prompting the officer to shoot the child in the back of the head, resulting in their death.[100] A Tennessee law allowed police to use deadly force to prevent escape under any circumstances, including the one here.[101] The victim's family brought a civil suit under Section 1983's constitutional tort.[102] The Court overturned the Tennessee law on grounds that the use of deadly force must be reasonable under the Fourth Amendment.[103] Rehnquist joined Justice O'Connor's vehement dissent from that determination.[104] He then wrote the *Graham* opinion.

In *Graham*, the Court effectively confined *Garner* to its facts and took the excessive force doctrine in a new direction.[105] The case involved Dethorne

95. *Graham*, 390 U.S. at 396.

96. *See* Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465, 1469–70 (2018) ("[T]he Fourth Amendment has been used to depoliticize, deracialize, decontextualize, and ahistoricize a distinctive racial justice issue concerning the disproportionate use of force against people of color. This individualizing dynamic not only warps our understanding of the causes and consequences of police violence, but often leaves victims without any remedy.").

97. 471 U.S. 1 (1985).

98. *See id.* at 32 (O'Connor, J., dissenting) (decrying "second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances").

99. The police officer allegedly believed Garner was a late-teen or adult. *Id.* at 3–4. *See also* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 678 (2018) (criticizing civilians' and police officers' tendencies to overestimate Black youths' ages).

100. *Garner*, 471 U.S. at 4.

101. *Id.*

102. *Id.* at 5.

103. *Id.* at 11.

104. *Id.* at 22 (O'Connor, J., dissenting).

105. *See* Cooper, *supra* note 6, at 1464 (calling *Graham* "stealth overturning" of *Garner*).

Graham, a Black man with diabetes, who had a friend drive him to a convenience store because he was suffering from an insulin reaction.[106] A Black police officer had seen Graham run into and out of the store quickly and decided this was suspicious, so the officer followed and stopped Graham's car.[107] Despite being told that Graham was having an insulin episode, when Graham did not stay put, a group of officers threw him into a patrol car head first with such force as to break his ankle and cause other significant injuries.[108] Graham brought a Section 1983 civil suit claiming excessive force.[109] Rehnquist's opinion described the test for future cases.

Rehnquist began his *Graham* analysis by ruling out the predominant lower court test for use-of-force cases. He criticized the prior use-of-force standard for using a substantive due process standard rather than the Fourth Amendment for searches and seizures and the Eighth Amendment for prisoner claims.[110] In light of *Garner*'s use of Fourth Amendment reasonableness analysis, he argued, an excessive force claim must balance privacy interests versus governmental interests.[111] Rehnquist's *Graham* test considers, under the totality of the circumstances, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[112] The severity factor had an antecedent, but Rehnquist appears to have made up the other two factors.[113] After *Graham*, then, the test for police excessive force emphasizes what a plaintiff could have done wrong.

2. Graham *Relied on* Scott*'s General Antisubjectivity Principle and* Robinson*'s Dicta Mine*

The *Graham* opinion had already set a pro-police standard before it got to explaining the application of the reasonableness approach to excessive force cases. Then, it took a turn for the worse. It stated extra, pro-police facets of the approach as though they were just luggage that came with the reasonableness standard's trip into excessive force doctrine. Specifically, in the paragraph after the stating of the test, Rehnquist declared as follows:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

106. Graham v. Connor, 490 U.S. 386, 388 (1989).

107. *Id.* at 389.

108. *Id.* at 389–90.

109. *Id.* at 390.

110. Substantive due process asks whether, the procedure notwithstanding, can the government take life liberty or property in a particular way based on the asserted justification? The *Graham* Court thoroughly criticized the idea that the substantive due process analysis should apply to police excessive force claims. *Id.* at 392–93, 397–98.

111. *Id.* at 396.

112. *Id.*

113. *See* Tennessee v. Garner, 471 U.S. 1, 32–33 (1985) (O'Connor, J., dissenting) (providing antecedent for severity factor, not the other factors).

> 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.[114]

Reasonableness under the excessive force doctrine thus already includes a heavy thumb on the scale in two ways. First, it takes an officer's viewpoint, not that of a reasonable person. That is significant because it seems to be placing the reasonable person somewhat into the subjective state of mind of the officer. Such an objective-subjective test inherently favors defendants—here, the police.[115] Second, the standard is further lowered to accommodate the sense that police always act in the "heat" and on the "spur" of the moment.[116] That twice-lowered standard is already an affront to the value of civilians' lives.

But that is not the only way the Court created a permissive standard. The next paragraph imposed the antisubjectivity principle as follows:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officer's actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *See Scott v. United States*, 436 U.S. 128, 137-139 . . . *see also Terry v. Ohio, supra*, 392 U.S., at 21 . . . (in analyzing the reasonableness of a particular search or seizure, "it is imperative that the facts be judged against an objective standard"). An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force, nor will an officer's good intentions make an objectively unreasonable use of force constitutional. *See Scott v. United States, supra*, 436 U.S., at 138 . . . citing *United States v. Robinson*, 414 U.S. 218 . . . [117]

That two-sentence paragraph smuggles *Robinson*'s dicta mine into the excessive force doctrine. The first sentence assumes that courts may not consider officers' subjective motivations when their actions are objectively sufficient to establish probable cause.[118] This would only later by established by *Whren*. That sentence then walks a tight rope by saying that "facts and circumstances confronting" the police, which are likely to help the police, must be counted, but

114. *Graham*, 490 U.S. at 396–97 (internal citations omitted).

115. For analysis of cases using subjective-objective standard, *see generally* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (2003) (discussing race and reasonable person standard).

116. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.").

117. *Graham*, 490 U.S. at 397 (internal citations omitted).

118. *See* Whren v. United States, 517 U.S. 806, 814 (1996); *see infra* Part II.D.2.

their intentions and motivations are out of bounds. Considering that slanted view on the officer's state of mind, it is interesting that the opinion's first sentence then has a citation to a three-page range in *Scott* where it created its general antisubjectivity principle.[119] That citation also references the specific passage in *Terry* where the Court called for an objective standard.[120] The *Terry* reference is only seen on the first of the three *Scott* pages cited, so the broad citation implicitly includes *Scott*'s long discussion of *Robinson*.[121] The omission of a specific reference to *Robinson* is strange, as the second sentence of this block quote cites to the specific page in *Scott* where it quoted *Robinson*'s dicta mine.[122] Rehnquist must have known the first sentence of this paragraph derived from *Robinson*'s dicta mine, but his prose obscures that fact.

The second sentence of this antisubjectivity approach to reasonableness in the excessive force context doubles down on the pro-police approach. The Court held that police officers' "evil intentions" are somehow irrelevant to whether their actions are unreasonable. This seems to create a hypocritical meaning for the term "unreasonable" in the text of the Fourth Amendment. The *reasons* for an officer's behavior must account for the facts "known to them,"[123] but an "evil intention" does not count as a *reason* the officer acted for purposes of asking whether an intrusion was *unreasonable*.[124] Beyond that, the citation for this sentence is also strange. The *Graham* Court referred to the specific page in *Scott* where it created its antisubjectivity principle.[125] The pinpoint cite to *Scott* then says that *Scott* is citing the whole of the *Robinson* case generally.[126] Recall that *Scott*'s antisubjectivity principle was actually based on a specific reference to *Robinson*'s dicta mine. That ghostly presence of *Robinson*'s dicta mine in *Graham* suggests that the latter's downplaying of officers' "evil intentions" is set upon a shaky foundation.

D. Whren*'s Expansion of the Antisubjectivity Principle into Pretext Doctrine*

The *Whren* opinion is famous for approving racial profiling and rejecting an anti-pretext perspective. Technically, it held that an ordinary traffic stop based

119. *Graham*, 490 U.S. at 397; *see* Scott v. United States, 436 U.S. 128, 137–39 (1978).

120. *Graham*, 490 U.S. at 397; *see* Terry v. Ohio, 392 U.S. 1, 21 (1968) ("[I]t is imperative that the facts be judged against an objective standard.").

121. *Graham*, 490 U.S. at 397; *Scott*, 436 U.S. at 137.

122. *Graham*, 490 U.S. at 397.

123. *See* George E. Dix, *Subjective 'Intent' As a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 393; (2006); *see also id.* at 379–80 (discussing significance of facts "known to" officers).

124. This dual use of the word "reason" is necessary because police should not be allowed to intrude upon people when they do not know of the facts justifying the seizure or search. *See id.* at 477 (calling for "giv[ing] subjectivity a chance" because a subjective definition of reasonableness is more likely to prevent officers from intruding on Fourth Amendment protections).

125. *Graham*, 490 U.S. at 397; *Scott*, 436 U.S. at 137–39.

126. *Graham*, 490 U.S. at 138.

on probable cause may not be challenged on grounds that it was a pretext for a seizure or search the officer could not justify. It consigned claims of racist motivations for seizures and searches to the Fourteenth Amendment (where the intent requirement would kill almost all such claims).[127] It is now important for this Section to connect the *Whren* opinion to the earlier case analyses.

1. *The Official Story*

In *Whren*, two young Black men—Michael A. Whren and James L. Brown—were pursued for the traffic violation of stopping for "an unusually long time" at a stop sign, and then arrested for having crack cocaine in plain view.[128] The plaintiffs argued that the Fourth Amendment should prohibit racial profiling.[129] The *Whren* opinion made two interlocking holdings. In Part II, the Court began from the presumption that a traffic stop is constitutionally reasonable when based on probable cause.[130] Part II-A of the opinion then contended that prior caselaw not only did not actually hold that pretextual stops are unconstitutional, but instead "foreclose[d]" the possibility that subjective intent invalidates objectively justifiable behavior.[131] The Court then concluded—in a two sentence holding—that claims of racially discriminatory policing must proceed under the Fourteenth Amendment's Equal Protection Clause.[132] In Part II-B, the Court rejected a proposed reasonable officer rule for probable cause-based traffic stops on grounds that the standard would allow the Fourth Amendment to vary based on local practice and be inconsistent with prior caselaw.[133] Part III then concluded that the implicit balancing test for reasonableness "is not in doubt" whenever there is probable cause and a non-"extraordinary" intrusion.[134]

2. Whren*'s Reliance on* Robinson*'s Dicta Mine and* Scott*'s General Antisubjectivity Principle*

The pivotal rhetorical move in the *Whren* opinion was its assertion that prior case law not only did not support an anti-pretext rule, but also "foreclose[d]" such an approach. First, Scalia grouped several, but not nearly all, of the Court's prior anti-pretext statements.[135] He argued that statements in

127. *See* Johnson, *supra* note 8, at 1049 ("Because it poses a formidable barrier to proving Equal Protection claims, the discriminatory intent requirement has been the subject of sustained scholarly criticism."). *But see* Floyd v. City of New York, 959 F. Supp. 2d 540, 662 (S.D.N.Y. 2013) (finding intent because "[u]nder the NYPD's policy, targeting the 'right people' means stopping people in part because of their race").

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

129. *Id.* at 808–09.

130. *Id.* at 809–10.

131. *Id. at* 813.

132. *Id.*

133. *Id.* at 813–16.

134. *Id.* at 817–18.

135. *Id.* at 813.

Florida v. Wells,[136] *Colorado v. Bertine*,[137] and *New York v. Burger*,[138] were all invalid because each addressed an inventory or administrative search.[139] This matters, we are told, because the searches were conducted in the absence of probable cause.[140] Scalia's grouping of these cases early on had the effect of making it seem like most of the Court's anti-pretext statements were inapposite, but at that point in the opinion he left multiple key cases out of his early discussion. For instance, he completely ignored *Jones v. United States*.[141] The *Jones* opinion's rejection of a home search under a warrant that was found to be a pretext for seeking evidence of another crime meant the anti-pretext interpretation of the Fourth Amendment was hardly "foreclosed."[142]

In the *Whren* opinion, Scalia next turned in Part II-A to an anti-pretext statement in a case that seemed to be on all fours with *Whren* since it also involved a traffic stop: *Colorado v. Bannister*.[143] To distinguish that case, Scalia got semantic, arguing that its reference to "pretext" might merely have applied only to cases where the police officer had not actually viewed the offense.[144] Probably realizing that was a weak argument, Scalia buttressed it with a contention that accepting the *Bannister* pretextual statement would be allowing a footnote in a per curiam opinion to reverse prior law.[145]

The denial of *Bannister*'s validity initiated Scalia's offensive in favor of pretext. Ironically, he next said that in a footnote in *United States v. Villamonte-Marquez*,[146] the Court "flatly dismissed" the significance of ulterior motive. In fact, the *Villamonte-Marquez* footnote had cited a four-page range in *Scott* (including that case's reference to *Robinson*'s dicta mine) in order to reject a vaguely stated argument in the alternative against pretextual searches.[147] Then Scalia cited the *Robinson* facts and holding for the proposition that pretext does not invalidate an arrest.[148] He also tacked on a specific citation to the page in *Scott* containing *Robinson*'s dicta mine as authority that a post-arrest search is

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136. 495 U.S. 1, 4 (1990).
137. 479 U.S. 367, 372 (1987).
138. 482 U.S. 691, 716–17 n.27 (1987).
139. *Whren*, 517 U.S. at 811–12.
140. *Id.*
141. 357 U.S. 493 (1958).
142. Tracey Maclin, United States v. Whren: *The Fourth Amendment Problem With Pretextual Traffic Stops*, *in* WE DISSENT: TALKING BACK TO THE REHNQUIST COURT 90, 102–03 (Michael Avery ed., 2009).
143. *Whren*, 517 U.S. at 812; *Bannister*, 449 U.S. 1 (1980) (*per curiam*).
144. *Whren*, 517 U.S. at 812.
145. *Id.*
146. 462 U.S. 579, 584 n.3 (1983).
147. *Id.*
148. *Whren*, 517 U.S. at 812–13 ("In *United States v. Robinson*, 414 U.S. 218 (1973), we held that a traffic-violation arrest (of the sort here) would not be rendered invalid by the fact that it was "a mere pretext for a narcotics search," *id.*, at 221, n. 1; and that a lawful post-arrest search of the person would not be rendered invalid by the fact that it was not motivated by the officer-safety concern that justifies such searches, see id., at 236. See also *Gustafson v. Florida*, 414 U.S. 260, 266 (1973).").

not invalidated by its motivations.[149] After that sentence is a naked citation to *Robinson*'s companion case, *Gustafson*.[150] Scalia then cited *Scott*'s facts and holding at the place where it had cited *Robinson*'s dicta mine.[151] In light of those cases, contended Scalia, the petitioners could not argue that Fourth Amendment reasonableness turns on a police officer's actual motivations.[152] The paragraph then ends with a quote of *Robinson*'s dicta mine, but severed from the conditional statement that actually begins the quote.[153]

While *Robinson* was crucial to Part II-A of *Whren*, Scalia brought it back again in Part II-B. There, he shot down the idea that Fourth Amendment reasonableness could use a reasonable police officer standard. His first argument was that a reasonable police officer test would present evidentiary difficulties.[154] Perhaps cognizant of the law's pervasive use of reasonable person tests, Scalia quickly supplemented that argument by contending that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."[155] His support for that proposition? *Robinson*'s dicta mine. He cited *Robinson* and provided this parenthetical: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that [the arrestee] was armed."[156] He also cited *Gustafson* with the parenthetical "same." It seems that *Robinson*'s dicta mine had gained such authority that it no longer needed to hide as the trumped-up holding in *Scott*; it had become generalizable.

It is important to note that Scalia's argument that prior case law "foreclose[d]" considering officer motivations relied on citations to *Robinson*, its companion case *Gustafson*, and the case that turned *Robinson*'s dicta mine into a rule, *Scott*.[157] However, when arguing against an anti-pretext statement in another case, Scalia's *Whren* opinion did cite one more case for this proposition, *Villamonte-Marquez*. At this point, it should come as no surprise that the latter

149. *Id.* at 813 ("And in *Scott v. United States*, 436 U.S. 128, 138 (1978), in rejecting the contention that wiretap evidence was subject to exclusion because the agents conducting the tap had failed to make any effort to comply with the statutory requirement that unauthorized acquisitions be minimized, we said that '[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.'").

150. *Id.* at 813.

151. *Id.*

152. *Id.*

153. *Id.* (quoting United States v. Robinson, 414 U.S. 218, 138 (1973)).

154. *Id.* at 813–14.

155. *Id.*

156. *Id.*

157. There is an interesting prefiguring of the language of the *Whren* decision in *Robinson*. Rehnquist's *Robinson* opinion dismisses the court of appeals' reference to the *Peters* case as dictum that hardly "foreclose[d]" a different holding later. *Robinson*, 414 U.S. at 228–30. Scalia's *Whren* decision cited *Robinson*'s dicta mine for the proposition that the possibility of considering officer's subjective motivations under the Fourth Amendment had been "foreclose[d]" by prior cases, including *Robinson*. *Whren*, 517 U.S. at 813.

was also a Rehnquist opinion. In an earlier *Whren* citation to *Villamonte-Marquez*, Scalia highlighted the latter's footnote 3 as supporting police officers' pretextual intrusions.[158] That footnote cited to a broad range of pages in *Scott* that included its use of *Robinson*'s dicta mine.[159]

The *Whren* opinion's uses of Rehnquist's *Robinson*, *Gustafson*, *Scott*, and *Villamonte-Marquez* opinions raises another point about the relationship between *Robinson* and pretext doctrine more generally. The key arguments in *Whren* are built upon a house of cards with Rehnquist's face on them. That house, the antisubjectivity principle in both pretext and excessive force doctrines, stands upon one statement: *Robinson*'s dicta mine.

E. Potential Objection: What's the Problem with Dicta *Mining?*

This Section has conducted an immanent critique of the pretext and excessive force doctrines. An immanent critique challenges an idea on its own terms.[160] The pretext and excessive force doctrines are thought to be "good law" that must be followed by lower courts. But this immanent critique argues those doctrines are not worthy of precedential value because they are based on *Scott*'s mischaracterization of *Robinson*'s dicta mine as a holding and further expansion of *Scott*'s antisubjectivity principle into excessive force and pretext doctrines. This Section now explains why dicta mines are generally problematic.

Again, the metaphor of the dicta mine suggests that a justice "plants" dictum in a case, like a landmine; then, the same or another justice eventually "trips" that landmine by "exploding" it into a holding. In this view, what matters

158. *Whren*, 517 U.S. at 812.

159. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983).

160. Immanent critique is "an argument that establishes that our society fails . . . on its *own terms*." Titus Stahl, *What is Immanent Critique?* 2 (Goethe University Frankfurt, Working Paper 2013), https://philpapers.org/archive/STAWII-3.pdf [https://perma.cc/M7BW-2F7Y]. As Stahl puts it, "In a nutshell, an immanent critique of society is a critique which derives the standards it employs from the object criticized, that is, the society in question, rather than approaching that society with independently justified standards." *Id. See also* Sora Y. Han, *The Politics of Race in Asian American Jurisprudence,* 11 ASIAN PAC. AM. L.J. 1, 38 (2006) ("Immanent critique is a method by which the historically situated object (Asian American jurisprudence) is tested by its own concepts (narrativity, cosynthesis, and praxis) in order to negate the object/concept for the purpose of identifying the underlying social (racial) interests."); Päivi Johanna Neuvonen, *A Revised Democratic Critique of EU (Citizenship) Law: From Relative Homogeneity to Political Judgment*, 21 GERMAN L.J. 867, 882 (2020) (calling for "the critical inquiry in EU legal studies [to expand] both towards more contextual, presumably immanent, and more creative, presumably transformative, forms of critique); Dana Villa, *Hannah Arendt: Modernity, Alienation, and Critique, in* JUDGMENT IMAGINATION, AND POLITICS THEMES FROM KANT AND ARENDT 292, 303 (Ronald Beiner & Jennifer Nedelsky eds., 2001) (distinguishing rejectionist and immanent critiques); Richard A. Jones, *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 17, 22 (2009) (promoting genealogical method for pairing with "an immanent critique of the intersection of race and law" in Critical Race Theory). *But see* Nicola Lacey, *Approaching or Re-Thinking the Realm of Criminal Law?*, 14 CRIM. L. & PHIL. 307, 310 (2020) (contending that in Antony Duff's form of immanent critique, "the normative vision that is distilled by the theorist from the vast array of rules, institutional arrangements, and practices involves a process of selection that is itself inevitably shaped by norms and values that are also the ostensible outcome of the process of theory-building").

is that the future doctrine is buried in dictum but then becomes a holding. For the dictum to seem like a land mine, though, the second opinion must silently explode the dictum. If the second Court identifies the prior statement as dictum and then explains why it should be elevated to a holding, we would not say the dictum was a "mine." Such dictum exploded, but the process of elevating it to holding was not hidden, so it lacks the quality of surprise that characterizes a dicta mine.[161]

The key problem with dicta mining is that it confuses the distinction lawyers usually make between dictum and holding. First, as was noted, scholars generally define holdings narrowly.[162] Holdings are only those statements that decide the specific legal issue.[163] Everything else are dicta.[164] The reason dicta should not govern the next case is that, being unnecessary, they may not have received the full attention of the entirety of the Court.[165]

Second, the fundamental problem with *Robinson*'s dicta mine is its hypocrisy. The Court often assumes there is a real distinction between dictum and holding, yet *Robinson*'s dicta mine violates that principle. Our system of common law precedential progress assumes that some statements from cases are holdings and others are mere dicta. Only when a new set of facts is governed by the holding of a prior case is it to be deemed already decided by precedent. Dictum, having been a mere foreshadowing of future analysis rather than the thorough and *necessary* analysis provided in a holding, is not binding. It is common sense that dictum should not be elevated to a holding without an explanation of why it is now persuasive as a rule applicable to new facts.

Distinguishing holdings from dicta brings us to the power of precedent, which is reflected in the recent debate over stare decisis. The *Dobbs v. Jackson Women's Health Org.* decision helps demonstrate that use of precedent is ultimately about power.[166] A majority of five justices can seemingly establish

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161. There are alternative metaphors for the elevation of dicta into holdings. Perhaps dicta mining is like mining for ore. Courts may often be said to be searching precedent for useful "nuggets." A Court might discover a good passage in a prior opinion and use it to support a broader proposition. However, *Robinson*'s dicta mine was not gold, as it had to be expanded and even twisted to support the broader proposition that courts may never consider officers' states of mind. Or maybe *Robinson*'s dicta mine was like a seed that is planted in the hopes it will grow into a mighty tree. Rehnquist and other justices might well be said to have often planted seeds that they hoped would grow into an invasive species and take over the doctrinal area. Justices probably do hope at least some of their dicta will one day grow into a broad holding. While capable of being stated in other metaphors, the concept of the dicta mine is useful, nonetheless. When we see (1) an unnecessary statement in a legal opinion that (2) a later Court recharacterizes as having already resolved an issue and (3) the new holding accomplishes a significant doctrinal expansion, we are dealing with a dicta mine.

162. Abramowicz & Stearns, *supra* note 22, at 961.

163. *Id.*

164. *Id.*

165. *In re* Waters, 276 B.R. 879, 884 (Bankr. N.D. Ill. 2002).

166. 142 S. Ct. 2228, 2278 (2022) (ironically, and perhaps hypocritically, stating that "[t]he *Casey* plurality was certainly right that it is important for the public to perceive that our decisions are based on principle, and we should make every effort to achieve that objective by issuing opinions that carefully show how a proper understanding of the law leads to the results we reach").

whatever case law serves their political interests, subject only to their own senses of judicial restraint. Still, even if the Court does not really care about precedent, it does need to at least pay lip service to it. The *Dobbs* decision was preordained as a political matter by the appointment of six movement conservatives to the Court,[167] yet it had to be described as a necessary departure from the usual power of a prior holding.[168] To the extent that one does not believe there is a straight-faced argument for overturning *Roe* and *Casey*, the post-*Dobbs* Court is seen as less legitimate.

The Court's legitimacy—the notion that its pronouncements should be followed[169] —thus depends upon people's beliefs that the Court is adhering to a set of rules designed to produce outcomes that are consistent with our nation's values. When the Court explodes a dicta mine, it is less legitimate because it relies on sleight of hand rather than the usual rules. Just as *Dobbs* calls the Court's legitimacy into question, so too should its continuing use of *Robinson*'s dicta mine to shield pretext-based, racially disparate uses of force.

II.
PROPOSAL: TRAINING FOR THE NEXT CRIMINAL PROCEDURE REVOLUTION

The preceding case study of the doctrinal path to racially disproportionate uses of force through pretextual policing should lead us to ask, how can we stop this? Mounting a proper response requires acknowledging that the explosion of *Robinson*'s dicta mine was part of criminal procedure redemption. To overcome criminal procedure redemption, we must adopt a criminal procedure futurism perspective that delegitimates anti-egalitarian doctrines in the near term and

167. Rick Joslyn, *For the Right Reasons: The Rules of the Game for Institutionalists*, 54 CONN. L. REV. 1027, 1065 (2022) ("The new conservative majority's willingness to eviscerate *Roe* and reward conservatives' decades-long effort to dismantle reproductive rights for women has 'rocked' confidence in the Court and left commentators to speculate over what precedents could be next.").

168. *See* Lisa Schultz Bressman, *The Rise and Fall of the Self-Regulatory Court*, 101 TEX. L. REV. 1, 78 (2022) (suggesting some of the Court's movement conservatives have "an impulse to preserve legitimacy of the Court by joining the liberal Justices when not too damaging to their conservative credibility").

169. This Essay takes seriously what has sometimes been called the "scholarly folklore" that the United States Supreme Court's "special ability to legitimize government policies and actions" is "crucial to the political system because legitimacy engenders voluntary compliance with law by citizens." James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 470 (1989), *quoted in* Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 109 n.5 (2009). This view is sympatico with a Habermasian definition of political legitimacy: "*Legitimacy means a political order's worthiness to be recognized*. This definition highlights the fact that legitimacy is a contestable validity claim. . . ." JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 178 (1979), *quoted in* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 399 n.45 (1983) (emphasis added). For a somewhat contradictory view, see Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 976 (2018) ("The Justices would have to first concede the falsity of Extreme Legal Formalism and Extreme Legal Realism . . . .").

imagines transformative policies for the future. For example, we should teach *Robinson* in ways that prepare for a second criminal procedure revolution.[170]

A. A Framework for Analysis: Criminal Procedure Futurism

This Essay calls for criminal procedure futurism: imagining what a more egalitarian set of rules for searches and seizures and interrogation might look like and how we get there. This Essay joins critical race theorists of criminalization in calling upon criminal procedure scholars to think about the future.[171] Like Bennett Capers's work, this Essay is inspired by Afrofuturism, which can be defined as a cultural aesthetic (e.g., the appearance of Wakanda and Wakandans in *Black Panther* movies) and philosophy (e.g., Critical Race Theory) aimed at imagining the future through the lens of people from the African diaspora.[172] What might more broadly be called criminal procedure futurism considers how the constitutional constraints on search and seizure and interrogation could be made more egalitarian.[173] Through the lens of criminal procedure futurism, antiracism, antisexism, and attention to class-based dynamics would necessarily be central concerns, but so too would the inherent value of strengthening constitutional criminal procedure rights for everyone.

Further, this perspective assumes that the goal is a progressive future. We can start determining what would constitute a progressive future by "looking to

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170. This doctrinal goal can be pursued simultaneously with transformative social movements.

171. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 6 (2019) ("What can Afrofuturists and Critical Race Theorists tell us about what is likely to be decriminalized, and what 'innocent' acts will in the future be deemed criminal? Or how the criminal procedure amendments—our 'code of criminal procedure'—will be interpreted? Or about punishment, and even the abolition of prisons?"); *see also* Ngozi Okidegbe, *Of Afrofuturism, Of Algorithms*, 9 CRITICAL ANALYSIS OF LAW 35 (2022) (applying Afrofuturist principles to data analysis).

172. *See, e.g.*, Capers, *supra* note 171, at 11 ("Beyond these broad definitions melding [B]lack culture and technology, one can discern certain themes. The most important of these is the insistence that people of color in fact *have* a future, and a commitment to disrupting racial, sexual, and economic hierarchies and categories. Subsidiary themes include foregrounding alienation and envisioning reclamation.") (emphasis in original); Mark Dery, *Black to the Future: Interviews with Samuel R. Delany, Greg Tate, and Tricia Rose*, *in* FLAME WARS: THE DISCOURSE OF CYBERCULTURE 179, 180 (Mark Dery ed., 1994) (defining afrofuturism); YTASHA L. WOMACK, AFROFUTURISM: THE WORLD OF BLACK SCI-FI AND FANTASY CULTURE 9 (2013) ("Afrofuturism is an intersection of imagination, technology, the future, and liberation.").

173. The Boyd School of Law at UNLV's Program on Race, Gender, and Policing will be hosting a conversation on Black legal futurism April 5–6, 2024. It uses the term Black Futurism rather than Afrofuturism for three primary reasons: First, Afrofuturism has been linked to the history of black arts. Black Legal Futurism concentrates on what law would look like in the future if Black people's interests were centered. Second, Afrofuturism is very much focused on aesthetics, which should be considered, though not exclusively. Third, the conference calls on participants to produce concrete, "outside the box" socio-legal policy proposals, not just ruminations on the future. The conference will feature perspectives seeking the well-being of peoples of African descent and will be oriented toward the future, which could include a five-, twenty-five, or fifty-year horizon.

the bottom."[174] That is, we seek a dramatic expansion of protections for those who are currently socially marginalized. Determining the content of such rules is part of the process of engaging in criminal procedure futurism.

With those thoughts in mind, a tentative outline of criminal procedure futurism would involve at least the following steps. First, scholars should give up on reforming the present occupiers of the majority on the Court. Second, in the near future, scholars should use immanent critique in order to delegitimate anti-egalitarian doctrines. Finally, in the long term, scholars should lay the doctrinal foundations for a second criminal procedure revolution.

B. The Present: The Importance of Giving Up on the Current Court

In order to move on to imagining a better future, we must give up on the present Court. This is necessary because a criminal procedure futurist project's focus on a progressive future means it must eschew "reformist reforms."[175] Reformist reforms are those that continue to legitimate fundamentally oppressive institutions or practices. Such reforms may expand the number or powers of police while incorporating the sometimes-helpful practice of requiring them to wear body cameras.[176] While understanding that lawyers are sometimes going to have to make "lemonade"[177] out of present doctrine, the criminal procedure futurist approach worries that will only result in reformist reforms. The six movement conservatives currently in control of the Court will never provide the strong protections called for by criminal procedure futurists.[178] While, as founding critical race theorist Derrick Bell noted, there are existential benefits to fighting battles one does not expect to win in the near future,[179] we cannot reach

174. *See generally* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 32 HARV. C.L.-C.R. L. REV 323 (1987) (arguing to determine what constitutes justice by asking what the socially marginalized need).

175. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 26–27 (2022) ("Abolitionists often refer to "non-reformist reforms" as partial abolitions—reforms that reduce the capacity of police and prisons and refuse to contribute to their legitimacy even if they do not yet fully abolish these systems. Unlike standard reforms, which often expand the scope of policing and prisons and legitimate the assumed need for them in society to maintain safety, non-reformist reforms can seek to "reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."); Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L.J. 2497, 2527 (2023) (defining non-reformist reform).

176. *See generally* MARY D. FAN, CAMERA POWER: PROOF, POLICING, PRIVACY, AND AUDIOVISUAL BIG DATA (2019) (discussing issues surrounding body cameras).

177. *See* Harawa, *supra* note 35, at 685–87.

178. *See* Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1553 (2019) ("Reversing cases like *Whren, Strieff*, and their peers is insufficient. By clarifying our philosophical commitments, we embark on a new constitutional understanding of the Fourth Amendment—one that requires, rather than avoids, the question of whether a police stop or policing regime is racially motivated, and explicitly holds that racist police practices, even when they rely on an objective justification, are unreasonable and thus a violation of the Fourth Amendment.").

179. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 198 (1992) (discussing existential benefits of struggle); *see also* George H. Taylor, *Racism As 'The*

our ultimate goal of a progressive future through this Court. Letting go of that dream is an emotional precursor to building a better future.

C. The Near Future: The Importance of Undermining Present Doctrine

1. Robinson*'s Dicta Mine as Example*

Since the Court's legitimacy depends on the belief that new holdings are based on principled application of constitutional interpretation, the unprincipled use of dicta is damning. The explosion of *Robinson*'s dicta mine is a prime example of the illegitimate use of dictum. The illegitimacy of *Robinson*'s dicta mine should be apparent. It was originally cordoned off as dictum in part IV of the *Robinson* opinion. Then, the *Scott* opinion recharacterized that aside as having already resolved the question of whether courts could consider officers' motivations. That explosion of *Robinson*'s dicta mine had profound effects for a key idea in excessive force and pretext doctrines: the antisubjectivity principle. The part of excessive force doctrine that is based in the antisubjectivity principle and all of pretext doctrine are thus illegitimate.

Making that type of argument in the near future is important because our long-term goal of egalitarian doctrine requires a rationale. We need to demonstrate that the present is not okay. While many scholars have shown that the antisubjectivity principle leads to arbitrary and biased results, few have deconstructed the logic of the opinions.[180] Attacking the legitimacy of anti-egalitarian criminal procedure doctrine as legal reasoning provides a new path to an egalitarian future. This Essay's case study of how *Robinson*'s dicta mine was exploded into the antisubjectivity principle provides an example of the type of work that must be done.

2. Potential Objection: Does Legal Realism Bar Insisting on Dicta's Illegitimacy?

There is a potential objection to challenging doctrines as violating legal reasoning: it may suggest that there was a stable logic to legal reasoning to begin with. If we learned anything from the legal realism and Critical Legal Studies movements, though, it is that legal results are better explained by power than fidelity to legal principles.[181] As was discussed with respect to the *Dobbs*

Nation's Crucial Sin': Theology and Derrick Bell, 9 MICH. J. RACE & L. 269, 302–03 (2004) (arguing Bell followed Albert Camus's existentialism before arguing Bell added a religious element).

180. There are some noteworthy exceptions. *See, e.g.*, Chin & Vernon, *supra* note 20, at 887 (declaring that "the rationale for *Whren*'s immunization of racial discrimination has collapsed"); Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 450 (2021) ("Whether to use objective or subjective tests calls for a context-sensitive examination of both the benefits of narrower rules and the risks of measurement error for the particular subjective test being considered.").

181. *See, e.g.*, Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 522 (1987) ("The principal legacy of Legal Realism for mainstream legal thought is the

opinion, many believe the current conservative Court is imposing its views on the Constitution.

This Essay does not argue that the formal distinction between dictum and holding is true in the sense of embodying an essential dichotomy, but that the Court's legitimacy depends on the myth that there is a distinction between dictum and holding. To be clear, the distinction between dictum and holding is inherently unstable. The key articles on the distinction cited in this Essay are merely the tip of the iceberg of the debate over what is dicta. Even if scholars could agree on the distinction, that would not mean the Court's holdings represent objective reasoning. There is no neutral "view from nowhere"[182]; hence, the Court cannot hand down "the truth." Legal realism and Critical Legal Studies have made it clear that formal legal distinctions, like that between dictum and holding, are constructs that seek to hold together a system of meaning making.[183]

Nonetheless, the Court would have us believe that its holdings are well reasoned and not just the imposition of the justices' views. If a holding is different than dictum because it was well considered, the Court should be following its holdings and either rejecting its dicta or explaining why an unnecessary statement from the past is now being elevated into a holding. When the Court ignores the dictum/holding distinction, it undercuts the authority of the whole enterprise.

Legitimacy is at stake in the dictum/holding distinction because there are more or less legitimate ways of elevating dicta into holdings. A fair way to elevate dictum to a holding is to acknowledge that the dictum was not binding, but to find it persuasive now based on clearly explained reasoning. After all, if a Court must hide the fact that it elevated dictum, that is probably because there is a pernicious reason for hiding the seam where the old doctrine was sutured to the new.

Less famously than *Dobbs*, *Robinson*'s dicta mine was an imposition of the Court's views under the guise of a reasoned opinion. This Essay has taken the dictum/holding distinction as a given and revealed the violation of that principle through *Robinson*'s dicta mine in order to show the illegitimacy of these doctrines, even under the legal formalism the Court's legitimacy traditionally

introduction of 'social policy' analysis as an acceptable and indeed indispensible [sic] element of sophisticated legal reasoning and argument. . . .").

182. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1357 (2015) ("Many would say that there is no 'view from nowhere' that would allow us to understand 'what it means to be human' under all circumstances." (citing THOMAS NAGEL, THE VIEW FROM NOWHERE (1986)).

183. *See id.* ("Fineman would say that, to the extent it is impossible to create a universal, we must construct one anyways because we are dealing with law. This is implied by her claim that '[w]hen we deal with the law . . . we employ a system dependent on the process of classification, generalization, and universal applicability.'").

relies upon.[184] Showing that present doctrine is both anti-egalitarian and illegitimate should call people to the task of constructing a better future.

D. Building a Better Future: Toward a Second Criminal Procedure Revolution

The opposite of the reformist reforms critiqued in Part II-B of this Essay is "transformative" policies. Transformative action is "focused on changing the root societal causes of crime."[185] Rather than responding to crime through expansion of police discretion by means of doctrines that are pro-pretextual policing and lax on excessive force, as the Court has, we should call for transformative social change. The answer to crime is complete reorganization of the political sphere[186] such that people have greater hope for their economic and social situations and thus less incentive to commit crime.

Certainly, we could look at the racially disproportionate uses of force justified by current doctrine and choose to abandon law as a means of transformative change, but that would be short-sighted. While political, economic, social, and cultural change is necessary, so is legal change. Even after the transformation, there will be something like law. It will need to be both fair and logically sound to be legitimate.

And individuals cannot be everywhere at once; we must each do our part toward transformative changes based on where we are and the aptitudes we bring to the table. As law professors, our role is to push for transformative laws, albeit ones that are consistent with broader social, cultural, economic, and political transformation. So, we should help lay the groundwork for a second criminal

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184. *Cf.* Iuliano, *supra* note 169, at 976 ("In perpetuating this façade of Extreme Legal Formalism, the Supreme Court has exhibited a profound disdain for core democratic principles and diminished the ability of the public to engage in informed constitutional debate.").

185. *See, e.g.*, Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not A Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130, 162 (2022) (calling for a more transformative progressive prosecutor movement).

186. *See, e.g.*, Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 462 (2018) (positing political change as a better solution than law); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 U.C.L.A. L. REV. 1156, 1161 (2015) (advocating for "strengthen[ing] the social arm of the state"). For an abolitionist vision of transformative legal education, see Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, *Subversive Legal Education: Reformist Steps Toward Abolitionist Visions*, 90 FORDHAM L. REV. 2089, 2114 (2022) ("We explore ways to approach abolitionist visions where legal knowledge is democratized and legal education is lifelong."). For critiques of abolition, *see, e.g.*, Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 255 (2023) (considering whether "calls for abolition will ultimately further or frustrate" decarceration and the alleviation of suffering); Trevor George Gardner, *The Conflict Among African American Penal Interests: Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. 1699, 1703 (2023) (arguing that addressing African-American interests in both equality and security is a "far more complicated theoretical proposition than either the reform or abolition literatures acknowledge"); Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2018 (2022) (asking how existence of seemingly inherently dangerous people challenges abolition).

procedure revolution. What does laying that groundwork look like? In short, we must teach our students how to transgress by revealing doctrinal sleights of hand and showing them how to imagine a better future.[187]

The desire to use *Robinson* to show students why and how to read with a critical eye suggests several changes to typical teaching in the Criminal Procedure: Investigation course.[188] First, law professors should teach the entire majority opinion of *Robinson*. That is, assign students to read the full majority opinion rather than an excerpt from a casebook. This would allow the professor to show students the way the Court separated *Robinson*'s dicta mine in part IV from the holding of the case in part III of the opinion.

Second, we should not emphasize the *Robinson* holding that searches are automatic if an arrest is valid but instead focus on the language of its dicta mine. As was noted, the *Robinson* opinion is currently taught as a stand-alone search incident to arrest case.[189] Emphasizing *Robinson*'s dicta mine instead of its holding will allow us to foreshadow the antisubjectivity principle that students will see in the pretext and excessive force doctrines.

Third, we should more explicitly link *Robinson*'s dicta mine to the pretext and excessive force doctrines. One way to do this is to reveal *Whren*'s reliance upon *Robinson*'s dicta mine and that *Graham* utilized a similar strategy. With both *Graham* and *Whren* depending, in part or whole, on the validity of *Robinson*'s dicta mine, this technique necessarily calls those doctrines into question.

Fourth, to get students to see the general problem of accepting the Court's pronouncements as unassailable, we should emphasize the doctrinal sleight of hand involved in using *Robinson*'s dicta mine to spawn the antisubjectivity principle. This would require adding the *Scott* opinion to the Criminal Procedure: Investigation canon in order to show that *Scott* improperly treated *Robinson*'s dicta mine as having already resolved the issue at hand. Students can be assigned an excerpt from *Scott* that centers on its discussion of *Robinson*.

Analyzing the use of *Robinson* in *Whren* can also help show that what might seem to students like airtight anti-egalitarian logic often falls apart upon careful inquiry. Professors should inform students that Scalia's *Whren* opinion completely ignored a relevant anti-pretext opinion.[190] At least two powerful

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187. *Cf.* BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 15, 22 (1994) (suggesting why and how to teach against the norm).

188. Here again, Capers' work is helpful because he has challenged the way we teach criminal procedure. *See* Bennett Capers, *The Law School As A White Space*, 106 MINN. L. REV. 7, 34 (2021) ("If the hope of incoming students, minority or otherwise, is to learn the law so that they can help 'make America what America must become'—'fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing'—we are sure to disappoint them.") (internal citations omitted).

189. *See supra* note 18 and accompanying text.

190. *See* Maclin, *supra* note 142, at 101 (dissenting from *Whren*).

rewrites of *Whren* exist, and each highlights Scalia's omissions.[191] Those rewrites can inform the professor's discussion of *Whren*.

Ultimately, noting the tricks that justices use, and not just questioning whether particular doctrines are still good law, will bring home the point that law students and lawyers should always read the Court's opinions with a critical eye. Such an approach will help create a generation of lawyers capable of both delegitimating present doctrine and imagining that future doctrine might be transformative.

CONCLUSION

Prior critiques of criminal procedure redemption as it is expressed through the excessive force and pretext doctrines usually challenged it for creating racially disproportionate negative results. This essay delegitimates those doctrines on their own terms based on how they were constructed. The excessive force and pretext doctrines are not good law because they rely on *Robinson*'s dicta mine.

Critiques like this Essay will help undermine anti-egalitarian doctrines, but criminal procedure futurism calls on us to do more. We must start to construct the principles undergirding egalitarian future doctrines. Scholars should follow up on this piece with proposals for ways to ground a second criminal procedure revolution. Be it five, twenty, or fifty years from now, the time will come when transformative change is possible. We should begin preparing for that better future.

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191. *Id.*; *See, e.g.*, Devon W. Carbado & Jonathan Feingold, *Rewriting* Whren v. United States, 68 UCLA L. REV. 1678, 1678 (2022).