STOP THE STOPS

The Disparate Use and Impact of Police Pretext Stops on Individuals and Communities of Color

A PRELIMINARY REPORT

EMPIRE JUSTICE CENTER POLICE REFORM PROJECT

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AUTHORS' NOTE

The authors of this report have followed the Columbia Journalism Review in capitalizing the word "Black" when it refers to racial and ethnic identity. Mike Laws, *Why We Capitalize 'Black' (And Not 'White')*, COLUMBIA JOURNALISM REV. (2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php. When this report quotes from studies and other sources, we have preserved those authors' capitalization and style choices.

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I. EMPIRE JUSTICE CENTER

ABOUT EMPIRE JUSTICE CENTER

Empire Justice Center is a nonprofit law firm that seeks to make the law work for all New Yorkers, especially those who need it the most. We do so by identifying critical issues, developing and implementing creative solutions and monitoring ongoing results. Our staff has protected and strengthened the legal rights of people in historically marginalized communities in New York for more than forty years. We do this through three major service areas. We teach the law by providing training, support and technical assistance to legal services and private attorneys and other community-based advocates to help them better serve their clients. We practice the law by providing direct civil legal assistance and undertaking impact litigation. And we improve the law by engaging in policy analysis, research and advocacy.

EMPIRE JUSTICE CENTER'S POLICE REFORM PROJECT

Empire Justice Center's Police Reform Project is a subdivision of the Civil Rights Practice Group. It promotes equity, antiracism, and social justice within established criminal justice systems such as law enforcement departments and institutions of pre-trial incarceration. To achieve these goals, Empire Justice Center partners with organizations, community groups, and individuals to understand the needs of communities; educates the public about their legal rights and systemic inequities; develops policy positions; engages in strategic communication with organizational leaders; lobbies to achieve greater fairness and equity in legislation; and engages in targeted litigation.

In recent years, the world has come to recognize the history of institutional racism within the law enforcement and criminal justice systems in the United States. And while efforts are being made by some state and local governments, police departments and prosecutors' offices to recognize and respond to bias in policing, there are still many aspects of the system that remain unexamined, unchanged, and so embedded in our practices that they seem impervious to reform.

In the coming months and years, Empire Justice Center's newly developed Police Reform Project will examine these aspects of policing, provide information to the public, educate legislators, evaluate and recommend changes to the existing systems, and through various means, press for reforms that have been all too late in coming.

PRETEXT STOPS

The first area of focus for the Police Reform Project is what are commonly referred to as pretext stops. Addressing the problems presented by the police use of pretext stops would be a tremendous step towards reducing inequity in policing.

II. EXECUTIVE SUMMARY

In recent years our country has faced a racial reckoning. One of the areas of focus has been racial bias in policing. In the following pages we will address the law enforcement practice of pretext stops – stopping individuals for a reason that may not be lawful but using a low-level traffic or other violation to justify the stop. The following report is our working draft of what will later be released as a comprehensive review of pretext stops in New York. In the coming months, Empire Justice Center will be gathering more information and feedback that will be incorporated into later reports.

In Section III, the Introduction to this Report, we recognize that of the approximately 1,000 deaths of civilians during police-civilian encounters each year, approximately 10% occur during low-level traffic stops. We explain what pretext stops are, and how they came to be an integral part of modern policing. We preview the harm caused by pretext stops, further discussed in Section VII.

In Section IV, Racial Bias and the Data, we review information gleaned from numerous studies, as well as two books – *Pulled Over: How Police Stops Define Race and Citizenship*, by Charles Epp, Donald Haider and Steven Maynard-Moody, and *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race*, by Frank Baumgartner, Derek Epp and Kelsey Shoub. These sources demonstrate that pretext stops are executed far more frequently on People of Color, with most studies focusing on Black and white drivers. Additionally, once stopped, Black drivers are more likely to be searched than white drivers.

In Section V, The Law and Pretext Stops, we explain the cases that have led to the conclusion that absent proof of discriminatory intent on the part of a law enforcement officer, a high bar to reach, pretext stops are lawful.

In Section VI, The Community Safety Question, we address findings that pretext stops provide minimal enhancement of community safety, reviewing studies that have addressed the frequency of seizure of contraband, as well as arrests and charges of individuals stopped. In Section VII, The Harms Caused by Pretext Stops, we consider whether these minimal community safety benefits are worth the many harms caused by pretext stops – racial disparities in how policing occurs, civilian deaths, officer deaths, and the resulting lack of trust in law enforcement and the criminal justice system.

In Section VIII, Pretext Stops in Rochester, N.Y., we focus on the types of offenses that are the basis for some pretext stops in Rochester, New York, a city that has faced rising tension and civilian opposition to policing in recent years, and the racial disparities as well as geographic disparities in where these stops occur. We also review some of the statements and implicit recognition of racial disparities in policing by community leaders who have considered pretext stops.

Pretext stops have come under the microscope across the country. In Section IX, Laws and Policies Addressing Pretext Stops, we review laws and police and prosecution policies designed to limit or eliminate pretext stops. In Section X, A Path Forward, we recommend our solutions for how to reduce or eliminate pretext stops in New York.

Throughout this report, we urge you to consider whether any police process that has the effect of creating two classes of citizens – those who may walk and drive freely through their community and those who may not – is one that we, as New Yorkers, should preserve.

III. INTRODUCTION – PRETEXT STOPS

> *There has been renewed scrutiny of traffic stops since the [April 4th] killing of [Patrick] Lyoya, an unarmed 26-year-old in Grand Rapids, Michigan. He was shot in the back of the head after a struggle with an officer who pulled him over for having a mismatched license plate. Lyoya's death is the most recent that has captured headlines and calls for change.*
>
> *Daunte Wright, 20, was killed after being pulled over for an expired registration tag and a hanging air freshener; Sandra Bland, 28, was stopped for failing to signal; and 32-year-old Philando Castile died following a traffic stop after an officer claimed he looked like a suspect in a recent robbery, citing his "wide-set nose".*[1]
>
> *— The Guardian, April 21, 2022.*

In recent years, traffic stops by police for low-level equipment violations or other low-level offenses have spurred debate and been the subject of condemnation. According to the Mapping Police Violence project, a non-profit research group, about 10% of the roughly 1,000 civilians who are killed by police each year die in the course of interactions involving traffic violations.[2] As you will see in the following pages, the effect of the continued use of pretext stops is racially disparate policing. We submit the following report in an effort to encourage New York to join the ranks of cities and states across the country limiting or even eliminating the use of pretext stops.

WHAT IS A PRETEXT STOP?

Pretext stops are just what they sound like – law enforcement officers' stops of individuals on the street or in vehicles, or even on bicycles, in which the police claim one reason for the stop, when in actuality the basis is something entirely different. These stops are usually for low-level traffic or other infractions.

For example, while a person may be stopped for riding a bicycle without a bell (the pretext), the police are actually stopping the person because they believe, without sufficient legal basis, that the person is involved in criminal activity and the police lack a lawful reason to stop them for that. Or they may stop someone because the officer has entirely unlawful reasons – they may believe based on race or ethnicity the individual looks like they "don't belong" in an area, or that they are "acting suspicious." Pretext stops are often used by law enforcement officers to then engage in further police contact – pat down searches, searches of vehicles, and other types of intrusions. In some cases, items the person was carrying or had in their vehicle are seized and the person is charged with a crime. In the great majority of cases, the person is not in possession of any unlawful item and may or may not be issued a ticket for the pretext reason. In all too many situations, the encounter escalates and an individual, initially stopped for a minor offense, winds up injured or dead, or charged with far more serious crimes as a result of the interaction with police. At times, police may be harmed.

In what has been described as "the authoritative and widely used *Tactics for Criminal Patrol,* the author, Charles Remsberg teaches officers to use traffic stops 'to maximize the number of citizen contacts in

[1] Sam Levin, *US Police Have Killed Nearly 600 People in Traffic Stops Since 2017, Data Shows,* THE GUARDIAN (Apr. 21, 2022), https://www.theguardian.com/us-news/2022/apr/21/us-police-violence-traffic-stop-data.
[2] Mapping Police Violence, https://mappingpoliceviolence.us/ (updated through Dec. 10, 2022).

vehicle stops during each shift and, through specific investigative techniques, to explore the full arrest potential of each.'"[3] Remsberg set forth a "Criminal Patrol Pyramid" as follows:

1. Develop suspicion (or, typically, merely curiosity) about a driver.
2. Discover a legal justification to stop the driver (typically this justification is some minor violation of the traffic laws or vehicle code) and make the stop.
3. Decide, after making the stop, whether to seek to search the vehicle based on the close observation of the vehicle and its visible contents and dialogue with the driver (and passengers). Officers use this dialogue to assess the truthfulness of the driver.
4. Search the vehicle ("usually by consent").
5. Discover contraband or weapons.
6. Make an arrest.
7. Seek "bonus benefits" (forfeiture of vehicle, cash, etc.; information about additional criminal offenses).[4]

If a recipe could be written for pretext stops, this is it. And as it reflects, the first step is a completely discretionary basis for the stop. It is this discretion that is often at the heart of the bias in policing. In *Pulled Over: How Police Stops Define Race and Citizenship* ("*Pulled Over*"), a book addressing racial disparities in police investigatory stops, and their effect on the lives of those stopped, the authors write:

> Although police officers have carried out investigatory stops for decades, police leaders introduced a new twist in the 1980s that considerably heightened the level of racial discrimination in these stops, and then made this reinvented investigator practice a core tactic in the wars on drugs and crime. This innovation was to encourage the typical street-level officer to engage in proactive stopping of many drivers (and pedestrians) so as to carry out as many intrusive investigations of people as possible. "Proactive" is the key word. It means that officers are to stop drivers and pedestrians not only, or even primarily, when they do something wrong; officers are to stop as many people as possible so as to be able to investigate them more closely. As one of the early supporters of this tactic advised, officers are to "maximize the number of citizen contacts" in the hope that some yield fruit." But because officers cannot possibly stop all drivers or pedestrians and scrutinize all communities they must focus on some, and in the context of enduring racial stereotypes of black criminality and violence, they tend to target racial minorities and their neighborhoods. The vast majority of these stops and searches yield no contraband or illegal guns, and, as Jon Gould and Stephen Mastofski found in an observational study of street searches, a high proportion are clearly unconstitutional . . .
>
> Simply put, what has emerged in the past two decades is an institutionalized practice rather than the haphazard activity of individual officers. As police professional associations and leaders in the past twenty years deepened their commitment to

[3]Charles R. Epp, Steven Maynard-Moody, & Donald Haider-Markel, *Beyond Profiling: The Institutional Sources of Racial Disparities in Policing*, 77 PUB. ADMIN. REV. 168, 172 (2016).
[4] *Id.*

> investigatory stops, the practice has become more widespread, frequent, and racially discriminatory.[5]

The authors of *Pulled Over* refer to the stops they analyze as investigatory stops, noting,

> The investigatory stop is the deliberate creation of police leaders, led by police professional associations, policing researchers and police chiefs. It is implemented through professional training and the fostering of shared professional norms and culture. . .The investigatory stop is why blacks are stopped at much higher rates than whites and why police pursue intrusive lines of questioning and searches more commonly in stops of blacks than of whites.[6]

Other studies and writings by other researchers refer to pretext stops. We have elected to use the term "pretext stops," as it is a commonly understood term. In this discussion of pretext stops, we include police stops of pedestrians, cyclists and motorists for low-level violations. While most are equipment violations, some are moving violations such as failing to signal a turn the requisite number of feet in advance,[7] when those types of stops have been observed, anecdotally and through limited review of data in Rochester, New York, to be used in racially disparate ways.

WHAT IS WRONG WITH PRETEXT STOPS?

While we can all agree that pretext stops based on purely racial criteria are wrong, some might think that if police have a suspicion that a person may be involved in criminal activity, police interference may be a good thing. But when such suspicions are founded on a mere hunch and not a person's actual unlawful conduct, the situation is ripe for the influence of implicit bias. And, as we describe in Section VII, The Harms Caused by Pretext Stops, these discretionary stops are deeply damaging to individuals, the community, and the trust in the criminal justice system. Pretext stops are often committed against our friends, neighbors and family members of color, and far too often, result in their injuries and deaths. Time and again, as we discuss in the following pages, People of Color are subjected to pretext stops in their communities, while white people face no such proactive policing.

And the stops of People of Color result in searches and seizures far more frequently than those of white people. The additional intrusion of the search and its often-attendant unequal interactions between officer and citizen create the perception and reality of different types of citizenship, as recognized in the books *Pulled Over* and *Suspect Citizens – What 20 Million Traffic Stops Tell Us about Policing and Race* ("*Suspect Citizens*"). In *Suspect Citizens*, the authors point out,

> Based on the analysis of over 20 million [records of traffic stops in North Carolina beginning in 1999], we focus on racial differences in the likelihood of various outcomes, with a particular focus on whether the officer searches the driver of the car. Very few traffic stops lead to a search; just about 3 percent. But searches are highly targeted at

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[5] CHARLES R. EPP, STEVEN MAYNARD-MOODY, & DONALD P. HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 8-9 (2014).

[6] *Id.* at 7-8.

[7] In cases addressing the failure to signal the requisite number of feet, it is often the case that the driver signaled, but just not enough in advance. Speeding and other public safety stops are generally not considered pretext stops.

young men of color; over 20 percent of those stopped are searched in some jurisdictions. The majority of these searches yield no contraband, and when there is a contraband "hit" the amounts involved are rarely those associated with a dealer or a courier. In fact, courier-level contraband hits are vanishingly rare.[8]

WHY IS THIS PERMITTED?

In Section V, "Law and Pretext Stops," we review the federal and state law that permits police officers to engage in pretext stops. Although courts have concluded that one of the justifications for the lawfulness of the stops is that one cannot see inside the mind of the officer to assess whether the stop was based on racial bias, as you will see, statistics, anecdotes and a growing recognition of the racial disparities in the application of pretext stops reflect, if not individual biases, a system that promotes racially biased policing.

PRETEXT STOPS IN NEW YORK STATE

New York has begun to recognize the existence of racial disparities in traffic enforcement. A press release issued by Assembly Speaker Carl Heastie on March 10, 2022, titled "Assembly Passes Legislation to Address Racial Disparities in Traffic Stops" addressed Assembly Bill 7599 of the 2021-2022 Legislative Session. In the press release, Speaker Heastie stated, "Too often, we have seen these traffic stops involving minor violations result in tragedies. . .The Assembly Majority is committed to addressing the racial disparities that exist in interactions with police officers. Today's legislation will help to address these inequities and make New York Safer."[9]

On December 23, 2022 Governor Hochul signed this bill into law. The bill limits enforcement of certain motor vehicle equipment violations under certain circumstances. This bill is further discussed in Section (laws), *infra*. While we laud this bill and the Governor and Legislature's recognition of the impact of pretext stops on People of Color, we believe this statute is an initial step, but not a sufficient step, towards addressing the concerns raised in this report.

JOIN US

In the following pages, we invite you to learn about the practice of pretext stops, the law addressing such stops, the harm caused by them, steps being taken in jurisdictions by legislatures, police departments and prosecutors, and our recommendations for solutions. The report will address information and policies that exist in New York, with a particular focus on Rochester, New York, the city where this report was written. When applicable, it will also address national data, policies and trends. While you read this report, we ask you to consider the following questions:

1. What else would you like to know about this subject?
2. How do you think you can help?
3. What other suggestions do you have to help us #StopTheStops?
4. What would you like to see addressed in a final report?

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[8] FRANK BAUMGARTNER, DEREK A. EPP, & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 31 (2018).

[9] Press Release, New York State Assembly, Assembly Passes Legislation to Address Racial Disparities in Traffic Stops (March 10, 2022), https://www.assembly.ny.gov/Press/?sec=story&story=101102.

As we continue to develop this project, we will be calling on you to join us in and support our efforts to end pretext stops in New York.

IV. RACIAL BIAS AND THE DATA: RACE IS A CLEAR FACTOR IN WHO GETS STOPPED FOR MINOR TRAFFIC VIOLATIONS

> *In stops, racial minorities are questioned, handcuffed, and searched at dramatically higher rates than whites are; they are much more likely than whites to perceive the stops as unfair; and they distrust the police in general at much higher rates than whites do. On each of these dimensions, the racial gap is wide*.
>
> *– Pulled Over, p. 3.*

As methods of policing have captured the attention of the public, there have been increasing numbers of social scientists studying racial disparities in policing. Many organizations seeking to change policing are pressing for data collection on areas such as racial disparities in stops (comparisons between who gets stopped for the same types of charges), racial disparities in searches following a stop, and effectiveness in crime reduction and community safety. One study considered in Section VII, The Harms Caused by Pretext Stops, reviews the impact of proactive policing stops on youth of color. As discussed below, studies leave no room for doubt that investigatory and pretextual stops are routinely conducted in racially disparate ways – white people being stopped less frequently and searched less frequently.

A. PEOPLE OF COLOR ARE SUBJECTED TO PRETEXT STOPS AND SUBSEQUENT SEARCHES MORE OFTEN THAN WHITE PEOPLE

The following is a brief review of some of the findings shared by those studying this topic in the last 20 years. This review does not capture all of the studies or all of the data. It is important to recognize, as courts have, that in order to be completely certain that a stop is a pretext stop, an officer would have to acknowledge that they did not have a sufficient legal basis on other grounds for the stop. For that reason, some of the following information may relate only to low level stops that are not definitively established to be pretext stops.

In a study that did evaluate pretext stops, reported in a 2021 law review article, authors Stephen Rushin and Griffin Edwards analyzed stops conducted in Washington State from 2008 to 2015, in which pretext stops could be isolated to some extent.[10] Professors Rushin and Edwards analyzed 8,257,527 traffic stops conducted by the Washington State Patrol during that period. The data was collected during a transition phase when the law in Washington State changed from initially barring pretextual stops to permitting "mixed-motive traffic stops," legalizing the use of some pretext stops.

In 2012, the Washington Supreme Court modified the law prohibiting pretext stops in Washington in a case titled *State v. Arreola*, 290 P.3d 983 (2012), permitting officers to engage in some pretext stops which were previously prohibited. Professors Rushin and Edwards wrote,

> We find that the *Arreola* decision is associated with a statistically significant increase in traffic stops of drivers of color relative to white drivers. Further, we find this increase in traffic stops of drivers of color is concentrated during daytime hours, when officers can more easily ascertain a driver's race through visual observation.[11]

[10] Stephen Rushin & Griffin Sims Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN L. REV. 637 (2021).
[11] *Id.*

Racial disparities have been observed both nationwide and in studies of specific states and cities. In 2020, researchers published a comprehensive study of 100 million traffic stops across the country conducted by 21 state patrol and 35 municipal police agencies over nearly a decade. This study, titled "A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States," had findings similar to the Washington study, recognizing that nighttime stops were less likely to be racially disparate, due to the inability of police to identify the race of the driver. The authors wrote,

> We found that black drivers were less likely to be stopped after sunset, when a 'veil of darkness' masks one's race, suggesting bias in stop decisions. Furthermore, by examining the rate at which stopped drivers were searched and the likelihood that searches turned up contraband, we found evidence that the bar for searching black and Hispanic drivers was lower than that for searching white drivers. Finally, we found that legalization of recreational marijuana reduced the number of searches of white, black and Hispanic drivers—but the bar for searching black and Hispanic drivers was still lower than that for white drivers post-legalization. Our results indicate that police stops and search decisions suffer from persistent racial bias and point to the value of policy interventions to mitigate these disparities.[12]

While some states are viewed as liberal or conservative, the racial disparities in policing cut across state and cultural lines. In a study of Vermont traffic stop data, the authors noted, "Vermont, despite its reputation as a liberal state, is not different from other states in exhibiting wide racial disparities in policing."[13] After a prominent African American resident of Burlington asserted that he was stopped for "driving while Black," five Vermont police agencies voluntarily collected data to determine whether there was racial bias in policing.[14] The data, collected in 2009-2010, "identified notable racial disparities."[15] As a result, Vermont passed legislation to attempt to curb the differences in police traffic enforcement.[16] In 2016, the data required by the legislation was reported.[17] The authors of the study noted, "In all but a few towns, the black share of stops exceeds the estimated black share of the driving population. At the extreme is Vergennes, where black drivers are stopped at a rate that is almost three times their estimated share of the county population."[18] Black drivers were also searched at a rate higher than their white counterparts.

In June 2022, a study analyzing ten years of traffic data relating to non-traffic-safety police traffic stops in Suffolk County, Massachusetts was released by the Vera Institute of Justice. That study revealed that police in Suffolk County pulled over Black drivers at 2.3 times the rate of white drivers for non-traffic-safety violations, such as improperly displayed license plates or a single broken taillight. In some parts

[12] Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE & HUM. BEHAV. 736, 736 (2020).
[13] Stephanie Seguino & Nancy Brooks, *Driving While Black and Brown in Vermont: Can Race Data Analysis Contribute to Reform?*, 48 THE REV. OF THE BLACK POL. ECON. 42, 42 (2021).
[14] *Id.* at 45.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 46.
[18] *Id*. at 47.

of the county, including Boston and Winthrop, police stopped Black drivers at rates closer to 3.8 and 8.9 times the frequency of white drivers, respectively.[19]

In a study of investigatory stops in the Kansas City metropolitan area taking place in 2003, the authors of the book *Pulled Over* explained their findings in a 2017 article:

> Our basic observation is that racial disparities are concentrated in investigatory stops. When the police are enforcing traffic safety laws, such as stopping drivers for speeding at seven or more miles per hour over the limit or running a red light, they are not significantly more likely to stop black drivers (Epp, Maynard-Moody, and Haider-Markel 2014 , 64–66). Whatever the psychological and cultural sources of racial disparities are in police stops, these forces do not express themselves in traffic safety enforcement, the most common street-level activity of police officers. When the police are carrying out investigatory stops, they are significantly more likely to stop black drivers. Controlling for a wide range of alternative explanations, African Americans were 2.7 times more likely than whites to experience an investigatory stop (see Epp, Maynard-Moody, and Haider-Markel 2014, 65, table 3.1). Simply put, investigatory stops of vehicles especially target minority communities and people of color. Most whites, at least those over age 25, never experience this form of police stop (176). Put another way, in speeding stops, the most important influence on who is stopped is how fast you drive. In investigatory stops, the most important influence on who is stopped is not what you do but who you are: young black men are by far the most likely to be stopped.[20]

In New York City, patterns of disparate racial impact were observed by Judge Shira Sheindlin in her decision in *Floyd v. New York City*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). Although her decision was not restricted to pretext stops, her findings presented a stark contrast between the treatment of white people and People of Color. She noted, in her executive summary of the decision:

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million Terry stops.[21]
- The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.
- 52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.
- 8% of all stops led to a search into the stopped person's clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not. In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not.

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[19] Seleeke Flingai et al., *An Analysis of Racial Disparities in Police Traffic Stops in Suffolk County, Massachusetts, from 2010 to 2019*, VERA INST. OF JUST. 1, 2 (2022).

[20] Epp, Maynard-Moody, & Haider-Markel, *supra* note 3, at 173-74 (internal formatting omitted).

[21] "A Terry stop is another name for stop and frisk; the name was generated from the U.S Supreme Court case *Terry v. Ohio*. When a police officer has a reasonable suspicion that an individual is armed, engaged, or about to be engaged, in criminal conduct, the officer may briefly stop and detain an individual for a pat-down search of outer clothing. A *Terry* stop is a seizure within the meaning of Fourth Amendment." *Terry Stop*, Cornell Univ. Legal Info. Inst., https://www.law.cornell.edu/wex/terry_stop/stop_and_frisk.

- 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.
- In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white.
- In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white.
- In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.
- Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.
- Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.
- Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.[22]

In 2015, the California Legislature passed Assembly Bill #953 which required that all law enforcement agencies in the state collect "perceived demographic and other detailed data regarding pedestrian and traffic stops."[23] Data collected in 2019 and published in a report by Catalyst California was published in October 2022. The findings consistently reflected higher rates of stops for Black drivers.[24]

In January 2023 the California Racial and Identity Profiling Advisory Board, established by Assembly Bill #953, released its annual report[25] and recommendations and best practices "to promote evidence-based and data-driven policy reforms to eliminate racial and identity profiling and improve law enforcement and community relations."[26] Data contained in the report established that:

- In 2021, people who were perceived as Black were searched at 2.2 times the rate of people perceived as White. Overall, officers searched 6,622 more people perceived as Black than those perceived as White. In addition, those perceived to be Black adolescents between 15 to 17 years old were searched at nearly six times the rate of those perceived as White youth.
- At the conclusion of a stop, officers must report the outcome, e.g., no action taken, warning or citation given, or arrest. For individuals perceived as Black, officers reported "no action taken" approximately 2.2 times as often as they did for individuals perceived as White, indicating that a higher rate of those stopped who were perceived as Black were not actually engaged in unlawful activity. In addition, Black children and adolescents (10-14 and 15-17 years old) were detained curbside or in a patrol car, searched, or handcuffed during a higher percentage of stops than any other combination of perceived race or ethnicity and age groups.

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[22] *Floyd*, 959 F. Supp. 2d, at 558-59.
[23] RIPA FAQ, RIPALog (accessed Dec. 15, 2022), https://ripalog.com/ripa/ripa-faq.htm.
[24] Chauncee Smith et. al., *Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Well-being*, Catalyst Cali. (Oct. 25, 2022), https://www.catalystcalifornia.org/campaign-tools/publications/reimagining-community-safety-in-california.
[25] Annual Report 2023, Racial and Identity Profiling Advisory Board, https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf.
[26] Annual Report Recommendations and Best Practices 2023, Racial and Identity Profiling Advisory Board, https://oag.ca.gov/system/files/media/2023-ripa-report-best-practices.pdf.

- Using data from the 2020 American Community Survey, people who were perceived as Black were overrepresented in the stop data by nine percentage points and people perceived as White or Asian were underrepresented by four and nine percentage points, respectively, as compared to weighted residential population estimates.[27]

Suspect Citizens[28] details an analysis of 14 years of traffic stops in North Carolina through 2016. As an article about the book noted, the findings concerning racial disparities were stark but predictable. The article's author stated:

- Blacks were 63 percent more likely to be stopped even though, as a whole, they drive 16 percent less. Taking into account less time on the road, blacks were about 95 percent more likely to be stopped.
- Blacks were 115 percent more likely than whites to be searched in a traffic stop (5.05 percent for blacks, 2.35 percent for whites).
- Contraband was more likely to be found in searches of white drivers.[29]

Quoting one of the book's authors, Kelsey Shoub, the article went on to note,

> "[B]lack drivers were stopped disproportionately more than white drivers compared to the local population and were at least twice as likely to be searched, but they were slightly less likely to get a ticket," Shoub says. "That correlates with the idea that black drivers were stopped on the pretext of having done something wrong, and when the officer doesn't see in the car what he thought he might, he tells them to go on their way.[30]

Once stopped, officers may engage in a search of individuals – drivers and passengers – and vehicles. Often, the purpose of the pretext stop is to engage in the search. Unsurprisingly, searches of People of Color also occur with greater frequency, at a statistically significant rate, than searches of white people. In a review of research conducted of stops and searches in 16 states, the authors concluded:

> American law enforcement is in a state of crisis as city after city have seen protests about allegations of racially biased policing and headlines have brought examples of police shootings into the living rooms of all Americans. Our paper is a first step in addressing the question of whether the large databases that states have mandated to be collected can be of use in assessing the degree to which citizens of different demographic groups are subjected to different experiences in their interactions with the police. Indeed, they are. We focus on perhaps the most routine, and certainly the most common, police-citizen interaction: the routine traffic stop. Such encounters typically result in a citation or a warning. However, about three percent of them lead the officer to search the driver's vehicle. That rate, three percent, differs systematically depending

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[27] Press Release, Attorney General's Office, California Racial and Identity Profiling Advisory Board Releases Report on 2021 Police Stop Data (January 3, 2022), https://oag.ca.gov/news/press-releases/california-racial-and-identity-profiling-advisory-board-releases-report-2021.

[28] BAUMGARTNER, EPP, & SHOUB, *supra* note 8.

[29] Chris Horn, *Racial Disparities Revealed in Massive Stop Dataset*, UNIV. OF S.C. (June 12, 2020), https://sc.edu/uofsc/posts/2020/06/racial_disparities_traffic_stops.php#.Y5tfN3bMKUk.

[30] *Id.*

> on the circumstances. State highway patrol departments search less; police departments search more. Some individual departments search all drivers much more than others, following a much more aggressive policing posture than other departments. Search rates vary over time for any individual department. But the most politically and legally relevant point of variation in search rates is the demographic characteristic of the driver. With over 649 annual observations in more than a dozen states, we show huge variability by the race of the driver, **with Hispanic and black drivers searched, on average, at more than double the rate of whites.**[31]

B. STOPS OF CYCLISTS

Many are shocked to learn what Rochester, N.Y. defense attorneys have long known – that it is a violation of the law to ride a bicycle without a bell. And most are not stopped for this infraction. But pretext stops are not limited to automobile stops – they include bicycle and pedestrian stops. In the following pages we will discuss the racial disparities in enforcement of Vehicle and Traffic laws relating to cyclists.

Studies have been conducted on bicycle stops. In a working paper issued by the National Association of City Transportation Officials, the authors recognized that due to unsafe infrastructure,

> [P]eople on bikes are often forced to use sidewalks and vehicle lanes in ways that were not intended—especially in neighborhoods where investments and routine maintenance have been withheld. Yet studies show that Black, Latine/x, and low-income people are policed for violating bike laws at much higher rates than other demographics, often for infractions like biking on the sidewalk, even where there are no safe on-street bike facilities. In New York City, for example, Black and Latine/x bikers received 75% of all tickets for bike-related infractions in 2021, despite constituting just under half of all people on bikes. A Los Angeles Times analysis of more than 44,000 bike stops made between 2017-2021 across L.A. County revealed that 70% of stops involved Latine/x bicyclists, even though only 50% of the County's population is Latine/x.[32]

C. THE NEW YORK CIVIL LIBERTIES UNION'S SUMMARY OF RACIAL DISPARITIES IN BICYCLE AND MOTOR VEHICLE STOPS

In October 2022, the New York Civil Liberties Union ("NYCLU") filed an amicus brief addressing the legal basis required to support a bicycle stop in *People v. Lance Rodriguez.*[33] In its brief, NYCLU recognized the history of racial disparities in low-level stops across the country and in New York State: "Ample evidence

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[31] Frank R. Baumgartner et al., *Racial Disparities in Traffic Stop Outcomes*, 9 DUKE FORUM FOR LAW & SOCIAL CHANGE 21, 47 (2017) (emphasis added).

[32] *New NACTO Working Paper Recommends Reforming Bicycle Laws that Punish Black and Latine/x Bike Riders Without Improving Safety*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS (Aug. 11, 2022), https://nacto.org/2022/08/11/working-paper-recommends-reforming-bicycle-laws/#:~:text=The%20National%20Association%20of%20City,income%20and%20unhoused%20bike%20riders. *See also Breaking the Cycle: Reevaluating the Laws that Prevent Safe and Inclusive Biking*, NAT'L ASS'N OF CITY TRANSP. OFFICIALS (2022), https://nacto.org/wp-content/uploads/2022/08/Bikeway-Design-Enforcement-Paper.pdf.

[33] The authors of this report wish to thank Daniel R. Lambright, one of the authors of the NYCLU brief, for permission to quote from and cite the brief in this report.

from police departments in New York demonstrate that more permissive and discretionary standards that do not require reasonable suspicion are accompanied by rampant racialized policing practices that target Black and Brown communities."[34] NYCLU relied upon the following facts and resources in its brief:

New York data on bicycle stops:

- "Black and Latino riders comprise roughly half of New York City cyclists, but during the first nine months of 2021, 75% of tickets for bike related infractions issued by the New York City Police Department ("NYPD") went to Black and Latino New Yorkers. During these same months, only 10% of tickets were issued to white riders, even though white riders comprise approximately 40% of New York City cyclists. This type of disparate enforcement was not unique to 2021. During the same period in 2020, 76% of bicycle-related tickets were issued to Black and Latino New Yorkers, while 20% were issued to white cyclists; and during that same period in 2019, 82% of tickets were issued to Black and Latino New Yorkers, while only nine percent were issued to white cyclists."[35]
- "The disproportionate rates of NYPD criminal summonses issued for bicycle riding on sidewalks highlight additional racial disparities in bicycle-related enforcement. Of the 15 neighborhoods in New York City with the highest number of criminal summonses for bicycle riding on sidewalks between 2008 and 2011, 12 were majority Black and Latino neighborhoods."[36]
- And in 2018 and 2019, 86.4% of such summonses (for riding on sidewalks) were issued to Black and Latino New Yorkers—with 51% issued to Black men. Although this data is only available for New York City, there is no evidence these patterns do not also exist elsewhere in the state."[37]

NYCLU also provided evidence that racial disparities in bicycle stops occur on a national level:

- "In Chicago, police data from 2017 showed that although Black, Latino, and white people make up roughly equal portions of the city, 56% of all bike tickets were issued in predominantly Black neighborhoods while only 18% were issued in white neighborhoods…[38]

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[34] Brief for the Court of Appeals of the State of New York as Amicus Curaie Supporting Defendant-Appellant, *People v. Rodriguez*, APL-2021-00143, at 1 (Oct. 14, 2022), https://www.nyclu.org/sites/default/files/field_documents/peoplevrodriguez-amci-nyclu-_proposed_brief.pdf (hereinafter "Brief")(Although titled "proposed brief," the author confirmed the brief posted on the website is the one that was filed.).

[35] *Id.* at 9-10 (citing Julianne Cuba, *NYPD's Racial Bias in Ticketing Cyclists Continued Last Year*, Streetsblog NYC (Jan. 4, 2022), https://nyc.streetsblog.org/2022/01/04/nypds-racial-bias-in-ticketing-cyclistscontinued-last-year/).

[36] *Id.* (citing Harry Levine and Loren Siegel, Presented at the public event: "Summons: The Next Stop and Frisk," CUNY School of Law (Apr. 24, 2014), http://marijuana-arrests.com/docs/Criminal-CourtSummonses-in-NYC--CUNY-Law-School-April-24-2014.pdf).

[37] *Id.* at 10-11 (citing Julianne Cuba, *NYPD Targets Black and Brown Cyclists For Biking On The Sidewalk*, Streetsblog NYC (June 22, 2020), https://nyc.streetsblog.org/2020/06/22/nypd-targets-black-and-browncyclists-for-biking-on-the-sidewalk/).

[38] *Id.* at 7 n. 1 (citing Mary Wisniewski, *Black Neighborhoods Still See Most Bike Tickets, Police Data Show*, CHI. TRIBUNE, Feb. 12, 2018, https://www.chicagotribune.com/business/ct-met-bike-tickets-gettingaround-20180211-story.html).

Evidence suggests that these stark disparities are unrelated to areas that are dangerous for cyclists."

- "(In Chicago) Between 2017 and 2019, tickets for biking on the sidewalk were concentrated in majority-Black neighborhoods, despite a lack of a correlation between those neighborhoods and dangerous locations for cyclists."[39]
- "In Long Beach, California, data collected pursuant to the state's Racial and Identity Profiling Act reveal that the vast majority of bike stops occur in communities of color. Black cyclists were 3.5 times more likely than white cyclists to be stopped for a suspected bike infraction in 2019. Despite making up approximately 13% of the population in Long Beach, Black cyclists accounted for approximately 30% of bike stops."[40]
- "From 2017 to 2021 in Los Angeles County, where 51% of the population is Latino, 70% of the approximately 44,000 bike stops reported by the Sheriff's Department involved Latino cyclists. Cyclists in low-income communities of color were stopped and searched more frequently than cyclists from white, higher-income communities. Police did not find any illegal items in 92% of these searches, and they recovered weapons in less than half of one percent of all searches. Many of these cyclists of color report feeling humiliated, targeted, powerless, and angry at the repeated police stops and the assumption that cyclists of colors must be 'some sort of criminal.'"[41]
- "In Tampa, from January 2014 to August 2015, 73.2% of over 9,100 bike stops involved Black cyclists, while just 25.9% involved white cyclists. Yet Tampa is 26% Black and 63% white. Furthermore, the Tampa police were more likely to issue formal citations to the Black cyclists they stopped than the white cyclists. These disparities were not attributable to differences in bicycle ridership or manner of riding. For instance, white cyclists made up a larger proportion of bicycle crashes than did Black cyclists, yet were dramatically less likely to be stopped and issued citations than Black cyclists."[42]
- "In Washington D.C., Black cyclists under the age of 18 were stopped more than twice as often as white cyclists of all ages."[43]
- "In Tampa, during a twelve-year period, at least 142 bike tickets were issued to children aged 15 and under, including children as young as three years old. All but nine of these children were Black or Latino."[44]

D. LIMITATIONS ON DATA RELATING TO RACIAL DISPARITIES IN PRETEXT STOPS

Because there is no required conformity in data collection between states, counties, towns, cities and villages, we have no way of comparing the racial disparities in police stops and searches between

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[39] *Id.* at 7 n. 3 (citing Wisniewski, *supra* note 34).
[40] *Id.* at 7 n. 4-6 (citing Kevin Flores, '*Our Version of Stop-and-Frisk': Black Cyclists Most Likely to be Stopped and Searched by LBPD*, For the Org. (Aug. 10, 2020), https://forthe.org/journalism/black-cyclists-stopped/).
[41] *Id.* at 8 (citing Alene Tchekmedyian et al., *L.A. Sheriff's Deputies Use Minor Stops to Search Cyclists, with Latinos Hit Hardest*, L.A. TIMES (Nov. 4, 2021), https://www.latimes.com/projects/la-county-sheriffbike-stops-analysis/).
[42] *Id.* at 8-9 (citing Greg Ridgeway, et al., *An Examination of Racial Disparities in Bicycle Stops and Citations Made by the Tampa Police Department*, Office of Comm. Oriented Policing Servs., 20 (2016), https://cops.usdoj.gov/RIC/Publications/cops-w0801-pub.pdf).
[43] *Id.* at 14 (citing Dan Roe, *Black Cyclists Are Stopped More Often Than Whites, Police Data Shows*, BICYCLING (July 27, 2020), https://www.bicycling.com/culture/a33383540/cycling-while-black-police/).
[44] *Id.* at 16 (citing Nusrat Choudhury, *If You're Black or Brown and Ride a Bike in Tampa, Watch Out: Police Find That Suspicious*, ACLU (May 14, 2015), https://www.aclu.org/blog/racial-justice/race-and-criminaljustice/if-youre-black-or-brown-and-ride-bike-tampa-watch-out).

jurisdictions. While New York State Police collect data, many county, city, town and village police departments in New York, either do not, or do not make it transparent and available. Consequently, in order to draw conclusions about policing, we are dependent on studies that do not specifically address New York or its counties, cities, towns and villages. But given the trends seen in the studies, some observations made on very limited data collected in Rochester, and review of data in the *Floyd v. City of New York* case, there is no reason to believe that New York is exempt from this racially biased form of policing.

V. THE LAW AND PRETEXT STOPS

In 1996, the Supreme Court approved the use of pretextual stops in Whren v. United States. Since then, pretextual stops have become a cornerstone of law enforcement practice. Police officers follow a suspicious person until they identify a traffic violation to make a lawful stop, even though the officer intends to use the stop to investigate a hunch that, by itself, would not amount to reasonable suspicion or probable cause.

Often pulled over for minor traffic violations, these stops create grounds for violent—and often deadly—encounters that disproportionately harm people of color. When Whren was decided, the Court did not have what we have now—twenty-five years of data on the effects of pretextual stops. Indeed, the Whren Court differentiated pretextual stops from "extreme practices" like the use of deadly force. Today, traffic stops and the use of deadly force are too often one and the same—with Black and Latino drivers overrepresented among those killed—and have been sanctioned by numerous counties and major police departments

– Crane v. City of Arlington, 2022 WL 4592035, No. 21-10644 (5th Cir. Sept. 30, 2022).

A. INTRODUCTION

The following section addresses the case law – law based on decisions by courts – that has allowed the practice of pretext stops to flourish. This section contains extensive legal discussion. For those who do not wish to read the full legal discussion, a brief summary follows in the next paragraph, and certain parts of the full discussion emphasize the racial disparities and other damage caused by pretext stops.

Both the United States Supreme Court (the highest federal court) and the New York State Court of Appeals (the highest New York State Court) have found that pretext stops – the practice of police stopping someone for a low-level traffic or other violation, when they really want to stop them for another reason for which they don't have a legal basis, is permissible. But courts are starting to recognize just how inequitable the use of pretext stops is, and have begun to address this unfairness in decisions, usually by judges who are dissenting, or disagreeing, with the decision made by their colleagues.[45] Although pretext stops are lawful, we contend they are unjust, and do harm to both communities of color and our society. We believe changes can be made to reduce or eliminate pretext stops.

B. THE LEGALITY OF PRETEXT STOPS UNDER CURRENT CASE LAW

While some may not be familiar with the phrase "pretext stops," many of us have heard the phrase "Driving While Black." Its prevalence is so known that some refer to it simply as "DWB." And the concept has been expanded to include such actions as "Walking While Black." These phrases summarize concepts addressed in many court rulings.

Pretext stops have been the subject of decisions in both federal and state courts. In federal law, the lead case addressing pretext stops is *Whren v. U.S.*, 517 U.S. 806, decided by the United States Supreme

[45] *See e.g.*, *United States. v. Cole*, 21 F.4th 421, 436–37 (7th Cir. 2021) (Hamilton, J., dissenting), *cert. denied*, 212 L. Ed. 2d 405 (2022); *United States. v. Magallon-Lopez*, 817 F.3d 671, 676-77 (9th Cir. 2016) (Berzon, J., dissenting); *Commonwealth v. Long*, 152 N.E.3d 725, 751 (Mass. 2020) (Budd, J., concurring).

Court in 1996. In New York State, the lead case addressing pretext stops, decided by New York's highest court in 2001, is *People v. Robinson*, 97 N.Y. 2d 341.

In criminal cases, when the defendant alleges that evidence was seized unlawfully, the trial court must determine if the evidence was seized in a way that violated a defendant's right to be free from unreasonable search and seizure. If so, it is considered a violation of a defendant's Fourth Amendment right to be free from unreasonable search and seizure under the United States Constitution. A Fourth Amendment violation may lead to the suppression of evidence – if suppressed it cannot be used at the criminal trial. Both *Whren* and *Robinson* were criminal cases in which the appellate courts reviewed whether the trial courts' rulings on admissibility of evidence seized during what defendants alleged were pretext stops were in error. Both *Whren* and *Robinson* addressed whether a stop is unlawful when police may be detaining, searching and seizing evidence from an individual for a reason other than the stated one.

C. FEDERAL CONSTITUTIONAL LAW - *WHREN V. U.S.* AND ITS PROGENY

In general, federal courts may review decisions relating to both federal and state criminal convictions when a defendant claims that their rights under the United States Constitution have been violated. In *Whren v. United States*, the United States Supreme Court considered whether the defendant's right to be free from unreasonable search and seizure was violated by the police. This case was a landmark decision on the subject of pretext stops.

In *Whren*, the Supreme Court considered whether a traffic stop of Michael Whren and his codefendant by plainclothes vice-squad officers who claimed to be patrolling a "high drug area" of Washington, D.C. for failing to signal a turn, which led to seizure of cocaine, was improper. If found to be improper, the evidence seized would have been suppressed from use at a trial of the person alleged to have possessed the unlawful item. That is because the Fourth Amendment prohibits unreasonable searches and seizures,[46] and in general, with some exceptions, evidence seized in violation of the Fourth Amendment may not be used at trial.

In the *Whren* case, the officers' attention was initially drawn to Mr. Whren's vehicle for several reasons, none of which were the basis for a lawful stop.[47] Often, pretext stops involve claims that those stopped were engaging in behavior that is not unlawful, and often cannot be clearly defined – "furtive movements," possession of a "bulge" in one's clothing, presence in a "high crime" area, "blading" one's body, and more.

[46] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

[47] *Whren*, 517 U.S. at 808 (". . . suspicions were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time-more than 20 seconds. When the police car executed a U-turn in order to head back toward the truck, the Pathfinder turned suddenly to its right, without signaling, and sped off at an "unreasonable" speed.).

Ultimately, officers claimed to observe a failure to properly signal a turn.[48] Under Washington, D.C. police policies, officers were not supposed to engage in traffic stops when in plainclothes unless the violation was "so grave as to pose an immediate threat to the safety of others."[49] Michael Whren's appellate attorney argued that the basis for the stop, failure to signal a turn, was unlawful, since the police were seemingly intent on stopping Whren based on the suspicion without sufficient evidence he might have been involved in drug-related activity.[50]

The Supreme Court addressed whether the stop was unlawful under the United States Constitution's Fourth Amendment prohibition against unreasonable search and seizure. Whren's attorneys argued that nearly any person could be subject to a stop given the myriad of requirements when operating a motor vehicle, and that the opportunity to engage in traffic stops "creates the temptation for officers to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists."[51] Whren and his codefendant, both of whom were Black, argued that "police officers might decide which motorists to stop based on decidedly impermissible factors such as the race of the car's occupants."[52] They sought a different standard for low-level traffic stops, urging the Court that to avoid the danger of race-based stops, "the Fourth Amendment test for traffic stops should be, not the normal one (applied by the Court of Appeals) of whether probable cause existed to justify the stop; but rather, whether a police officer, acting reasonably, would have made the stop for the reason given."[53]

The Supreme Court rejected Whren's arguments, concluding that it is permissible for police to engage in pretext stops.[54] However, the Court also stated, "*We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.* But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[55]

It is clear from the Court's decision that while the *Whren* decision permitted pretext stops and refused to consider the potential for disparate treatment of motorists under Fourth Amendment law, the Court also recognized selective enforcement of the law based on race is prohibited by the Equal Protection Clause of the Fourteenth Amendment.

There are a growing number of state and federal decisions that contain concurring or dissenting decisions that criticize *Whren.*[56] One recent decision issued by the Second Circuit, the federal Court of Appeals that hears appeals from New York and other states, is *United States v. Weaver,* 9 F.4th 129 (2d Cir. 2021). In *Weaver*, the Second Circuit was called upon to decide whether the search of the defendant was unreasonable and violated the Fourth Amendment. As with many cases, the encounter between Weaver and police started with lawful behavior. The Court described the police officer

[48] *Id.* at 810.
[49] *Id.* at 815.
[50] *Id.*
[51] *Id.* at 810.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 813.
[55] *Id.* (emphasis added).
[56] In these cases, concurring and dissenting judges criticize *Whren* for enabling racially discriminatory pretext stops and searches. *See e.g.*, *Cole*, 21 F.4th at 436–37; *Magallon-Lopez*, 817 F.3d at 676-; *Long*, 152 N.E.3d at 751.

observing Weaver as "staring at the officers' unmarked police car" and "visibly hitching up his pants as he got into a sedan."[57] Later, the police pulled Weaver over for traffic stop.[58] When searched, police recovered a gun and baggies of cocaine from Weaver's pants.[59] While the majority of the Court concluded the stop was lawful, the concurring and dissenting opinions called upon the Supreme Court to reconsider *Whren.*

Second Circuit Judges Lohier and Carney stated, in their concurring opinion:

> . . . [I]t is time for the Supreme Court to veer away from existing law and to revisit decisions that have provided unjustifiable cover for racial bias in policing; and regardless, legislatures and administrative bodies should consider adopting regulations that increase police accountability beyond the bare constitutional minimum provided by the Fourth Amendment.[60]

They continued:

> As a practical matter, *Whren* and later cases have unfortunately given police officers a green light to make pretextual stops based on racial profiling. Although a criminal defendant victimized by a racially biased pretextual stop can claim a violation of the Equal Protection Clause in a separate civil proceeding, any evidence obtained as a result of the racially biased stop could still be used against him in his criminal proceeding.[61]

And they concluded,

> Judge Carney and I therefore join the chorus of voices who say that *Whren* "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." Allowing the fruit of a stop tainted by racial bias to be admitted at a trial or hearing undermines the integrity of judicial proceedings, imperils trust in the justice system, and decreases public safety. Residents of affected communities, especially young people targeted by law enforcement, are less likely to cooperate with the police, even when they are in danger or have been the victim of crime. *Whren* should be reconsidered. . .
>
> It is time to regulate police departments and the officers they employ. Substantive regulation of the police has several advantages and benefits beyond giving full effect to the Fourth Amendment's protections. Among other things, regulations can enhance police accountability in a way that current Fourth Amendment doctrine does not. And unlike current Fourth Amendment doctrine—which generally allows law enforcement to act first and assess the lawfulness of their actions only if challenged in later litigation—regulations provide police departments and officers clear guidance well in advance of any police conduct or litigation. More broadly, giving communities and their elected representatives greater input on police activities, including searches, promotes police

[57] *Weaver*, 9 F.4th, at 133.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 154.
[61] *Id.* at 158-59 (internal citations omitted).

> legitimacy and trust. For these reasons (and others), communities are beginning to assert more control over the police departments that serve them. Today's majority decision does nothing to counter or cast doubt on these helpful developments.[62]

Three of the Circuit Judges dissented, also urging that the *Whren* decision be revisited by the Supreme Court. While the entire dissent is well worth reading, the following paragraphs reflect both the degree of damage caused by pretext stops, and how universally recognized the disparate racial impact is:

> Because state traffic laws prohibit many innocuous activities, such as hanging air freshener from a rearview mirror or having a loud exhaust, "probable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action." WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(f) (6th ed. 2020). Simply put, "[i]f an officer follows any motorist long enough, the motorist will eventually violate some traffic law, making any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police." *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 Stan. L. Rev. 637, 641 (2021) (internal quotation marks and alterations omitted). The victims of police officers' whims are disproportionately people of color.
>
> Black drivers are more likely to be pulled over by police officers than white drivers, and police officers search stopped black and latino drivers twice as often as stopped white drivers, despite data suggesting searches of these black and latino drivers are less likely to discover guns, drugs, or other illegal contraband. As a distinguished black educator has noted, "there's a moving violation that many African-Americans know as D.W.B.: Driving While Black." Henry Louis Gates, Jr., *Thirteen Ways of Looking at a Black Man*, New Yorker (Oct. 16, 1995). Research also suggests that court decisions that expand police discretion, such as *Whren*, contribute to racial discrimination in policing. For example, an empirical analysis of more than eight million traffic stops conducted by the Washington State Patrol from 2008 through 2015 demonstrated that the Washington Supreme Court's easing of its restriction on pretextual traffic stops led to a statistically significant increase in traffic stops of drivers of color relative to white drivers. *See* Rushin & Edwards, 73 Stan. L. Rev. at 642-43.
>
> Traffic stops can be particularly dangerous, and even fatal, for motorists. On April 11, 2021, just a few days before this Court's en banc hearing in this case, an officer fatally shot Daunte Wright, a 20-year-old black man, during a traffic stop. See Nicholas Bogel-Burroughs & Julie Bosman, *The Minnesota Officer Who Killed Daunte Wright Was Charged with Manslaughter*, N.Y. TIMES (Apr. 14, 2021). A Minnesota police officer killed Philando Castile, a black man, after pulling him over for a broken taillight. See TJ Grayson & James Forman Jr., *Opinion: Get Police Out of the Business of Traffic Stops*, WASHINGTON POST (Apr. 16, 2021). Of all fatal shootings by police in 2015, about 11 percent occurred during traffic stops. *Id*.[63]

[62] *Id.* at 158-62 (internal citations and quotations omitted).
[63] *Id.* at 171-72.

In their 2021 law review article, Professors Stephen Rushin and Griffin Edwards surveyed scholarly criticism of *Whren*, and highlighted its damaging consequences.[64] The authors summarized three primary problems with *Whren* as recognized by legal scholars. First, they noted, some argue *Whren* disproportionately harms drivers of color.[65] Second, many argue that it forces litigants to bring challenges to pretext stops under the Equal Protection Clause rather than the Fourth Amendment, leaving victims of racial profiling with few remedies due to the many obstacles faced by claimants which prevent successful litigation under the Equal Protection Clause.[66] Third, some argue that *Whren* was wrongly decided based on constitutional law.[67]

D. NEW YORK STATE CONSTITUTIONAL LAW – *ROBINSON* AND ITS PROGENY

i. People v. Robinson – The Second Circuit Adopts *Whren*

There are times that the New York State Constitution has been determined by New York courts to grant greater protection to citizens than the United States Constitution. In *People v. Robinson*, 97 N.Y. 2d 341 (2001) (and other cases decided in that decision), the defendants argued that the New York State Constitution's right to be free from unreasonable search and seizure[68] provides greater protection than the United States Constitution as interpreted by the U.S. Supreme Court in *Whren.* In *Robinson* and its companion cases, each defendant was stopped for a seemingly pretextual reason. The Court of Appeals followed the *Whren* decision and concluded that these stops did not violate the New York State Constitution. The Court stated:

> The issue here is whether a police officer who has probable cause to believe a driver has committed a traffic infraction violates article I, § 12 of the New York State Constitution when the officer, whose primary motivation is to conduct another investigation, stops the vehicle. We conclude that there is no violation, and we adopt *Whren v. United States* as a matter of state law.[69]

The Court noted that a defendant subjected to a pretext stop who alleged that the stop was based on racial profiling could seek damages in a lawsuit based on violation of the Equal Protection Clause. The Court stated:

> The real concern of those opposing pretextual stops is that police officers will use their authority to stop persons on a selective and arbitrary basis. *Whren* recognized that the answer to such action is the Equal Protection Clause of the Constitution. We are not unmindful of studies, some of which are cited by defendants and the amici, which show that certain racial and ethnic groups are disproportionately stopped by police officers, and that those stops do not end in the discovery of a higher proportion of contraband

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[64] Rushin & Edwards, *supra* note 10, at 649-52.
[65] *Id.* at 649-50.
[66] *Id.* at 650-51.
[67] *Id.* at 651-52.
[68] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." N.Y. Const. art. I, § 12.
[69] *Robinson*, 97 N.Y. 2d, at 346.

> than in the cars of other groups. The fact that such disparities exist is cause for both vigilance and concern about the protections given by the New York State Constitution. Discriminatory law enforcement has no place in our law.[70]
>
> Indeed, in *Brown v. State of New York* (89 N.Y.2d 172), this Court recognized that in New York State, a plaintiff has a cause of action for a violation of the Equal Protection Clause and the Search and Seizure Clause of the State Constitution. [71]

In the dissent, the dissenting Justices noted:

> Moreover, as has been repeatedly documented, and as the majority acknowledges, drug courier interdiction through traffic infraction stops has a dramatically disproportionate impact on young African-American males (*see,* Harris, *Car Wars: The Fourth Amendment's Death on the Highway, supra;* Abramovsky and Edelstein, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared,* 63 Alb L Rev 725; Harris, *' 'Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops,* 87 J Crim L & Criminology 544; Maclin, *Race and the Fourth Amendment,* 51 Vand L Rev 333; Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment,* 1997 Sup Ct Rev 271). Yet both the majority and the *Whren* Court dismiss the relevance of such disparate treatment in the constitutional search and seizure context. They instead suggest that the remedy lies in invoking the Federal Constitution's Equal Protection Clause. The same studies that recognize the existence of a disparate racial impact, however, also demonstrate the inadequacy of the Equal Protection Clause as a remedy for those abuses. A "racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove" (Beck and Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns,* 72 Temp L Rev 597, 612 [1999]). The Equal Protection Clause prohibits race-based selective enforcement of the law only when such enforcement " 'had a discriminatory effect and ... was motivated by a discriminatory purpose' " (*United States v Armstrong,* 517 US 456, 465). Of course, "[i]t is easy for an accused to allege that she was subjected to police interference based on race, but it is difficult to support the allegation" (Beck and Daly, *supra,* at 612).
>
> Moreover, the problems of proof in establishing an equal protection claim may be all but insurmountable. Putting aside the unquestionably expensive and time-consuming process of assembling statistical evidence, it is debatable whether the requisite data would even be available (*see,* Beck and Daly, *supra,* at 613). Supreme Court precedent also suggests that minority motorists alleging that a pretextual traffic stop constituted a denial of equal protection must show that similarly situated white motorists could have been stopped, but were not (*see, United States v Armstrong, supra,* 517 US, at 465; *see also,* Davis, *Race, Cops, and Traffic Stops,* 51 U Miami L Rev 425, 437-438). These hardly

[70] The Court's recognition that discriminatory law enforcement has no place in the law of New York, coupled with its decision to follow *Whren*, provides a compelling reason for the New York State Legislature to address these concerns.

[71] *Robinson*, 97 N.Y. 2d, at 352.

> show that equal protection challenges constitute a viable remedy for the disparate racial impact of pretextual traffic stops.[72]

Robinson remains the law in New York.[73] A majority of states, like New York, have adopted *Whren* as a matter of state law.[74] Only five states—Washington, New Mexico, Arkansas, Delaware, and Kansas—have applied their own constitutions, statutes or common law to apply the exclusionary rule[75] to traffic stops predicated on racial profiling.[76] However, recently in New York State, in *People v. Jones*, 2022 N.Y. Slip Op. 05892 (3d Dept. 2022), the Third Department concluded that a defendant may seek suppression of evidence based on racial profiling. Retired Judge Barry Kamins, a nationally known authority on search and seizure, interpreted the *Jones* decision in a New York Law Journal article, stating,

> For the first time in New York, after *Whren*, an appellate court has held that the exclusionary rule can be applied to a racially motivated traffic stop even where a police officer has probable cause to believe a traffic infraction was committed.[77]

Despite the Third Department's interpretation of the New York Constitution's protection against racial profiling in the context of suppression hearings, there is no reason to believe the Court of Appeals, the highest court in New York, will be revisiting the *Robinson* decision in the near future.

ii. Floyd v. City of New York – "Stop and Frisk" – Different Stops, Similar Results

While the "stop and frisk" policies of the New York City Police Department that became the subject of extensive litigation bore some similarity to stops based on pretexts, there were also significant differences. But a review of one of the cases that addressed stop and frisk, and the data analysis described in the decision, reveals many similarities between the two types of stops: similar reasons used to elevate police intrusion; similarities among those stopped; and similar problems in disparate racial impact.

Judge Shira Scheindlin, the Southern District of New York Court Judge who presided over the New York City stop and frisk lawsuits, introduced the 2013 decision in *Floyd v. City of New York*, with the following quotations:[78]

> "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation."
>
> — *Railway Express Agency v. People of State of New York*, 336 U.S. 106, 112–13, 69 S.Ct. 463, 93 L.Ed. 533 (1949) (Jackson, J., concurring).

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[72] *Id.* at 366-67.
[73] *See e.g.*, *People v. Mortel*, 197 A.D.3d 196 (N.Y. App. Div. 2021), leave to appeal denied, 37 N.Y.3d 1097, 156 N.Y.S. 3d 795 (2021), and appeal withdrawn, 37 N.Y.3d 1163 (2022); *People v. Addison*, 199 A.D.3d 1321 (N.Y. App. Div. 2021).
[74] Hon. Barry Kamins, *Exclusionary Rule Applied for the First Time to Racial Profiling*, N.Y. L. J. (Dec. 5, 2022).
[75] The exclusionary rule prohibits the introduction of evidence in a court of law that was obtained in violation of a defendant's constitutional rights.
[76] Hon. Kamins, *supra* note 75.
[77] *Id.*
[78] *Floyd*, 959 F. Supp. 2d, at 555-56.

> It is simply fantastic to urge that [a frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.'
>
> — *Terry v. Ohio*, 392 U.S. 1, 16–17, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

> Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.
>
> *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir.2005) (Posner, J.)

iii. The Decision

In *Floyd*, Judge Scheindlin concluded that stop and frisk policies employed by the New York City Police Department (NYPD) had a disparate racial impact and violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. In so ruling, she evaluated both the stated policies of the NYPD and the types of conduct of citizens that formed the basis of many stops.

Under the United States Constitution, a stop such as the ones used by NYPD must be based on "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity."[79] Police officers, relying on the New York statutory authority to frisk individuals after stopping them under certain circumstances (See Criminal Procedure Law Section 140.50(3)), engaged in 4.4 million stops between January of 2004 and June of 2012.[80] Over 80% of these stops were of Black or Latinx individuals.[81]

The plaintiffs in the *Floyd* case argued that the policy of engaging in widespread stops resulted in racially disparate impact on New Yorkers. While the policy—stopping people when there is a belief that criminal activity has, is or is about to be occurring—was the basis for the stops in New York City, pretext stops involve traffic and other stops for one reason, when the police are actually stopping someone for a different reason. Although the underlying basis for the two types of stops are different, the conduct considered by police justifying engaging or increasing the level of the stop is similar. This report focuses on pretext stops, but the use of subjective, vague, undefined reasons to stop an individual, as was detailed in the *Floyd* case, must also be restricted.

Examples of the types of observations made by police that led to police stops under stop and frisk included "high crime area," "furtive movements", "bulge in the clothing," and "evasive response."[82] These same factors are often cited in cases involving pretext stops, as excuses for the need to engage in a search of a vehicle, clothing or backpack. As noted in the *Floyd* decision, there was insufficient training on the meaning of these terms, and inconsistency and subjectivity in their application.

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[79] *United States v. Place*, 462 U.S. 696, 702 (1983). For a more detailed explanation of the types of stops police engage in and the information they must possess in order to do so, see *People v. Debour*, 40 NY2d 210 (1976).
[80] *Floyd*, 959 F. Supp. 2d, at 556.
[81] *Id.*
[82] *Id.* at 561.

In evaluating stop and frisk policies based on detailed statistical analysis and expert testimony, Judge Scheindlin concluded that the New York City Police Department's policies intentionally discriminated based on race. She found that the policies violated both the Fourth Amendment and the Fourteenth Amendment.

E. CONCLUSION

Both the New York State Court of Appeals and the United States Supreme Court have concluded that pretext stops are not unlawful unless they are based exclusively on racial, ethnic or membership in another constitutionally protected class. But there are legal obstacles to establishing racial disparities in the cases in which they arise. Some judges are recognizing the disparate racial impact of pretext stops and have called for a change in the law. But until courts reconsider the lawfulness of pretext stops, change cannot happen within the judicial system.

When contraband or other evidence is seized as a result of a pretext stop, defendants have a nearly and often completely impossible task of establishing racial bias for the stop in order to obtain suppression of the evidence on Fourth Amendment grounds. And as the dissenting judges noted in *Robinson,* "the problems of proof in establishing an equal protection claim may be all but insurmountable."[83]

And so the stops go on, unchecked.

[83] *Robinson*, 97 N.Y. 2d, at 367.

VI. THE COMMUNITY SAFETY QUESTION: IS COMMUNITY SAFETY ENHANCED BY THE USE OF PRETEXT STOPS?

We're not talking about less enforcement, we are talking about better enforcement.

—Kenneth Barone, Manager of the Connecticut Racial Profiling Prohibition Project and Associate Director of the University of Connecticut's Institute for Municipal and Regional Policy.

Pretext and other low-level traffic stops, as seen in Part IV of this report, are conducted in racially disparate ways. But some would argue that if there are benefits to the community – increased safety, fewer drugs and fewer guns – then the disparities are worthwhile.

In the following pages we discuss the actual crime-fighting results of such stops, the harm caused by these stops, and whether the cost is worth any arguable benefit.

A. LACK OF IMPACT ON COMMUNITY SAFETY AND CRIME REDUCTION

Many studies have assessed whether the use of low-level traffic stops, frequently if not always pretext stops, are effective in reducing crime or enhancing community safety. The conclusion that must be drawn based on research is that there is a negligible increase in public safety, and any increase is far outweighed by the damage to communities and individuals. The following is a review of data reflecting the infrequency of discovery of evidence of crimes during traffic and pedestrian stops for low-level offenses.

In their discussion of pedestrian stops in *Suspect Citizens* the authors note that in a study conducted in 2014 which reviewed young adults' experiences with "stop and frisk" policing in New York City, 'almost none turn up guns (0.11 percent of all stops) or other contraband (1.5 percent).[84]

In 2017 the Policing Project of New York University ("NYU") was asked by the mayor of Nashville to suggest a plan to address community concerns about suspected racially biased policing. The Policing Project assembled a national team of social scientists and sought to answer several questions. One question posed was whether traffic stops are an effective crime reduction tool and if so, to what extent. Their conclusions, quoted below, included the following:

- Traffic stops do not appear to have a significant impact on long-term crime trends. As the number of traffic stops declined between 2012 and 2017, crime rates remained quite flat.
- Traffic stops also do not appear to have any effect on crime in the short-term. This was some of the team's most sophisticated and important analysis. As officers increase the number of stops in a particular area, crime does not necessarily fall as a result. In some weeks, officers made an above average number of stops—and crime indeed went down. But sometimes crime went down without any change in the number of stops. And sometimes crime would go up despite the stops. On average, we simply did not find a relationship between stops and crime.

[84] It must be remembered that until recently, even small amounts of marijuana were considered contraband in New York, and that could account for some of the contraband produced as a result of these stops.

- Finally, non-moving violation stops rarely lead to an arrest, or to the recovery of drugs or weapons. For every 1,000 non-moving violation stops, just over 2% (or 21) resulted in an arrest, or the recovery of drugs or other contraband. An additional 61 stops (6.1%) resulted in a misdemeanor citation for a non-drug related charge. The vast majority of these citations (89%) were for driving with a revoked or suspended license.[85]

In a 2022 article in Time Magazine reviewing the Nashville study, Max Carter-Oberstone, the author, wrote,

> So, what's wrong with pretextual stops? For starters, they don't make us safer. Rigorous studies have shown that pretext stops turn up evidence of non-traffic crimes at abysmally low rates, and that they have no effect on crime rates. These same studies confirm that when we invite officers to be led by their gut instincts and other unchecked heuristics, it is people of color who are disproportionately affected. Racial disparities in who gets pulled over erode trust in the police, and deepen the perception that police use race as a proxy for criminality.[86]

In a review of the effects of *Terry* stop and frisk interactions in 2011, the authors of another study noted that the New York Police Department "made 524,873 more stops than in 2003, an increase of over 300%, but recovered only 176 more guns, an incremental recovery rate of 0.03%. And in 2012, the police conducted approximately 297,000 frisks (56% of all stops) and weapons were found in only 2% of these cases. Blacks and Latinos were more likely to be frisked than Whites, even though Whites were much more likely to be found in possession of weapons."[87]

In a study of the impact on crime of increased police activity in New York City neighborhoods from 2004 to 2012, several findings seemed to establish that certain police activity reduced certain crimes. But the authors reported, "[t]he findings suggest that saturating high crime blocks with police helped reduce crime in New York City, *but that the bulk of the investigative stops did not play an important role in the crime reductions.* The findings indicate that crime reduction can be achieved with more focused investigative stops."[88]

After years of collecting data on racial disparities in traffic stops and a racial profiling scandal, the Connecticut General Assembly passed the Penn Act, which created the Connecticut Racial Profiling Prohibition Project. The mission of the project included identifying and addressing racial and ethnic disparities in traffic enforcement. Following analysis of the data collected since 2013 concerning traffic stops, Connecticut police departments refocused traffic enforcement, reducing the use of pretext stops.[89]

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[85] *An Assessment of Traffic Stops and Policing Strategies in Nashville*, THE POLICING PROJECT AT N.Y.U. SCH. OF L., https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5bf2d18d562fa747a554f6b0/1542640014294/Policing+Project+Nashville+Report.pdf.

[86] Max Carter-Oberstone, *America's Traffic Laws Give Police Way Too Much Power,* TIME, May 11, 2022, https://time.com/6175852/pretextual-traffic-stops/.

[87] David Rudovsky & David Harris, *Terry Stops-and-Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 535 (2018).

[88] John MacDonald, Jeffrey Fagan, & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE (2016) (emphasis added).

[89] Tom Condon, *After a Poor Start, CT's Anti-Racial Profiling Effort is Making Progress*, CT MIRROR, Jan. 30, 2022, https://ctmirror.org/2022/01/30/after-a-poor-start-cts-anti-racial-profiling-effort-is-making-progress/.

The project worked. After reviewing the data, the Newington, Connecticut police department shifted emphasis in police traffic enforcement, focusing more on moving violations. With the increased attention to moving violations there was a 250% increase in DWI arrests.[90] As Kenneth Barone, the project's manager and a leader in the effort stated, "We're not talking about less enforcement, we are talking about better enforcement."[91]

In California, analysis of data made available by the state's Racial & Identity Profiling Act ("RIPA") legislation similarly demonstrated that law enforcement energies are better directed elsewhere. The authors of Catalyst California and SoCal ACLU's report, "Reimagining Community Safety in California: From Deadly and Expensive Sheriffs to Equity and Care-Centered Well-Being" found that time allocated on responses to calls is far less than time spent policing minor traffic violations. In an opinion piece in the *Sacramento Bee*, the authors stated,

> Law enforcement resources, as they're used today, are more effective at targeting people of color than they are at preventing crime. In Sacramento County, for example, sheriff's deputies are nearly five times more likely to stop a Black person for a traffic violation than they are a white person, even though drivers of color are not more likely to commit crimes than white motorists. Furthermore, over two-thirds of Sacramento County sheriff's Office patrol time is spent on officer-initiated traffic stops. This is not public safety; it's waste.[92]

> In interpreting data related to community safety, the Vera Institute of Justice notes on its website,

> Evidence shows that non-public safety stops reflect racial bias, and police stop, question, and search people of color at higher rates than white people. In addition, non-public safety stops do not improve public safety, as the majority do not result in the discovery of contraband or weapons. When prosecutors condone non-public safety stops, they encourage police officers to focus on people, rather than actions, they deem "suspicious."[93]

It is clear that the data does not support a conclusion that pretext or other low-level non-safety stops result in any appreciable increase in community safety or crime-reduction.

When law enforcement agencies spend time on low-level stops, they are, of necessity, diverting resources from other activities, whether patrolling neighborhoods, investigating crime or engaging in community relations. These low-level stops, as seen above, have minimal community safety value. And

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[90] *Id.*

[91] *Id.*

[92] Chauncee Smith & Eva Bitrán, *How Are California Police Spending Most of Their Time? It's Not Responding to Emergencies*, THE SACRAMENTO BEE, Dec. 3, 2022, https://www.sacbee.com/opinion/op-ed/article269097942.html. The full report is available at The full report is available at https://catalyst-ca.cdn.prismic.io/catalyst-ca/126c30a8-852c-416a-b8a7-55a90c77a04e_APCA+ACLU+REIMAGINING+COMMUNITY+SAFETY+2022_5.pdf.

[93] Nicholas MacDonald, As Part of Vera Institute Initiative, Progressive County Attorney Will Stop Prosecuting Non-Public Safety Traffic Stops to Address Systemic Bias, Honoring Philando Castile and Others, THE VERA INST. OF JUST. (Oct. 18, 2022), https://www.vera.org/newsroom/as-part-of-vera-institute-initiative-progressive-county-attorney-will-stop-prosecuting-non-public-safety-traffic-stops-to-address-systemic-bias-honoring-philando-castile-and-others.

as discussed below, they cause harm. The minimal number of contraband items seized, arrests or charges emanating from such stops is not worth the immense cost.

B. WHAT IS THE COST?

> In a manner less overt but no less clear than apartheid in South Africa's past laws…images of stopped, detained, and searched black drivers, so common on the shoulders of our roads, define a diminished version of citizenship for blacks in mobile America.
>
> — *Suspect Citizens*, p. 137.

If we were to seek elimination of all crime, one method might be to search every person, vehicle, backpack, purse, home, business, and office. But there are several reasons we do not. Most importantly, we live in a country in which search and seizure at whim are unlawful. But indulge us for a moment, and picture what life would be like if you lived in a country when you could be searched at any time, for no reason. How would you feel? How would that impact your quality of life? Your confidence in our government? If you are asking these questions, it may be because this is not your reality. But for some, that is daily life.

Many of the studies analyzing effectiveness of pretext or investigatory stops occurred during the period when marijuana was illegal. New York's comprehensive legalization statute, the Cannabis Act, was just passed in 2021. Thus, without further sorting of data, we are unable to determine whether some of the crimes and offenses discovered as a result of these stops were marijuana-related crimes. It is reasonably possible that they are likely many of such offenses included in the data. And further, these numbers do not account for the situations in which people are stopped and no tickets are issued.

Some of the data as collected reflects a ballpark estimate of 2% or less of stops resulting in some type of detection of criminal activity. Which means, as collected, there are 98 out of 100 people stopped for low-level violations who have committed no crime or offense other than an equipment or minor vehicle and traffic or pedestrian violation. When that is coupled with the recognition that a disproportionate number of stops are executed against People of Color, and predominately young Black men, we must consider the impact of this marginal crime-stopping benefit against the cost of stopping, searching and seizing in racially biased ways. If, as we suspect, the rates of offenses that are still offenses – non-marijuana offenses – are lower than the reported rates of crimes detected, then the effect is to have neighborhoods or individuals facing frequent stops with nearly no crime-stopping benefit, but extensive loss of trust, destruction of community relations, and even negative impact on future conduct.

> Is it worth it?

In the following pages, we discuss the harm caused by pretext stops, and conclude it is not worth the potential marginal increase in community safety. An extremely low number of pretext or low-level stops result in rare seizure of unlawful items, and arrests and charges against some. But the cost of stopping the vast majority of law-abiding citizens results in no increase in community safety, and instead creates a community of two types of citizenship, leads to deaths of civilians and police, and increases distrust in police and the criminal justice system.

VII. THE HARMS CAUSED BY PRETEXT STOPS

> *There are roughly 20 million traffic stops every year, many for petty infractions. For drivers like Castile and Daunte Wright, these stops can quickly turn lethal. But the consequences need not be deadly to have lasting effects. Even citations for minor traffic offenses can lead to hefty fines, and for those unable to pay, late fees and even license suspensions. And this is to say nothing of the fright, humiliation, and other indignities that these stops visit upon the innocent.*
>
> *— TIME, May 11, 2022.*

Throughout our community and across the country we have begun a national conversation on methods of policing. Many have concluded that communities of color are over-policed, while many also believe there is a need for law enforcement to ensure public safety. How are these competing concerns to be reconciled? Efforts to restrict discretion of officers, limit the types of contexts in which police operate, or redistribute funding to police departments are often met with opposition.

In recent years, New York State implemented bail and discovery reform. Many police chiefs and prosecutors pushed back on these efforts, which reduced their discretion in handling cases. Those who staunchly support law enforcement discretion also support maintaining discretion in police-citizen encounters, often claiming public safety demands greater monitoring of the community. However, few would argue that a system that subjects friends, neighbors and community members of color to greater scrutiny and intrusion on a daily basis with no demonstrable impact of public safety should continue. Yet pretext stops often result in just that – greater scrutiny, intrusion and contact by police with People of Color alleged to have engaged in minor violations of the law than their white counterparts.

In their book, *Pulled Over*, Professors Charles Epp, Steven Maynard-Moody and Donald Haider-Markel conclude that the disparate racial impact of investigatory stops is not the product of individual officers deliberately engaging in racist conduct, though that can occur, but instead, of a system that has created processes leading to these results.[94] The conclusion that pretext and other investigatory stops are far more frequently employed against People of Color is not dependent on a belief that officers are intentionally racist. For an in-depth analysis of the factors contributing to these results, readers are encouraged to read *Pulled Over* and *Suspect Citizens.*[95]

In the following pages, we will discuss the harms caused by pretext stops.

A. HARM – RACISM AND PRETEXT STOPS

Any policing that creates the belief or actuality that law enforcement methods and tactics are applied differently depending on one's race, religion, ethnicity, sex, gender identity, sexual orientation, disability or other characteristic is antithetical to the principles and ideals upon which this country was founded. For this reason, no matter the perceived effectiveness of pretext stops by some,[96] it must be recognized that pretext stops, which are statistically demonstrated to be racially biased, undermine this country's foundational principles.

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[94] EPP, MAYNARD-MOODY, & HAIDER-MARKEL, *supra* note 5.
[95] BAUMGARTNER, EPP, & SHOUB, *supra* note 8.
[96] The actual effectiveness of pretext stops in increasing public safety will be discussed below.

This racial bias, standing alone, is harmful. But some have evaluated the impact of racial disparities on the criminal justice system as well as those stopped.

B. HARM – AN UNJUST SOCIETY

The Vera Institute for Justice, an organization that seeks to improve the criminal justice and immigration systems, has recognized the racial disparities in pretext stops. In seeking to promote reform in prosecution policies, and citing *Pulled Over,* it noted,

> Research has shown that limiting police stops to those made for public safety reasons reduces racial disparities. Officers often describe two categories of stops: "must stop" situations, when there is a serious risk to safety like someone driving under the influence, and situations where there are pretext reasons like dark window tint, when officers merely want to stop someone. When researchers isolated the two categories, they found that "virtually all of the wide racial disparity" could be attributed to pretextual stops.[97]

In *Suspect Citizens*, the authors recognize the myriad harms caused by the unjust treatment of one segment of society.

> Considerable research has shown that people who feel that they are operating within an unjust system perpetuated by government agencies are less likely to engage with that system. They are less likely to vote, less likely to contact elected representatives, less likely to contact government agencies, and less likely to cooperate with government agents (Lerman and Weaver 2014; Tyler and Jackson 2014; Boeckmann and Tyler 2002). They may even avoid things many of us take for granted, such as being involved with our children's schools. Many may avoid engaging with welfare or unemployment offices even to request aid to which they may be entitled; in short, such individuals can pull away from government in all its forms.[98]

In his article analyzing pretext stops, "Thin Blue Lies," Jonathan Blanks considered whether pretext stops create damaging societal consequences, and recommends they be severely curtailed or eliminated in order to improve police relationships with African Americans.[99] He goes on to say,

> There is no question that pretextual stops ensnare more innocent people than guilty ones. Furthermore, they may alienate police from the public through legal but ethically dubious actions in furtherance of their institutional incentives that are not necessarily congruent with the public interest. The longer-term social costs of pretextual stops far outweigh the fleeting gains from the arrests they enable.

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[97] Jamila Hodge & Akhi Johnson, *Ending Pretextual Stops is an Important Step Toward Racial Justice*, VERA INST. OF JUST. (Dec. 8, 2020), https://www.vera.org/news/ending-pretextual-stops-is-an-important-step-toward-racial-justice.

[98] BAUMGARTNER, EPP, & SHOUB, *supra* note 8, at 188-189.

[99] Jonathan Blanks, *Thin Blue Lies*, 66 CASE WESTERN RESERVE L. REV. 931, 933 (2016).

> Ending or severely limiting pretextual stops should be part of a broader shift away from shown that people who feel that they are operating within an unjust system perpetuated by unnecessary hostile confrontations with the public and toward more positive everyday interactions with people in those communities. So long as police act as antagonistic agents with the law abiding public, trust will be impossible.[100]

Racially biased policing, in and of itself, is a harm that we should all seek to end. As we know from *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander, as well as other sources, bias in policing results in harm far greater than to just the individuals harmed. When People of Color are stopped, searched, and even killed at higher rates for low-level violations, the belief that we share a just society is shattered.

C. HARM – UNDERMINING THE PERCEPTION OF LEGITIMACY OF LAW ENFORCEMENT

In his article, Blanks recognizes the importance of a society's acceptance of police legitimacy in order to achieve compliance with the law. In his review of the study analyzing individuals' responses to traffic stops in *Pulled Over,* Blanks notes that generally speeding stops did not contribute to distrust of police – if an individual felt they were legitimately stopped, they accepted the consequence without it impacting their perception of law enforcement.[101] But he also notes,

> The Kansas researchers also found that pretextual investigatory stops—such as those condoned by *Whren*—contributed heavily to police mistrust and ill-will by African Americans. Their data, taken from a sample of traffic stops in Kansas City and published in their book *Pulled Over*, showed that white and black drivers generally felt the traffic safety stops were legitimate because they knew they were pulled over for speeding and were most often treated in a way they viewed was fair. However, when the stop was for a minor infraction and led to the officer asking prying questions and requesting to search the vehicle, the stops engendered hostility and resentment among all races, but particularly among African Americans and Latinos—who were stopped much more often for investigatory purposes—whether or not the officer was polite and respectful.
>
> In those encounters, the drivers were kept for up to an hour—sometimes in handcuffs or standing in front of their car as the police searched and as traffic drove by. Given that the people most often subjected to these denigrating investigative searches—both in pedestrian stops and traffic stops—are black, if African Americans trust police less, it should surprise no one.[102]

In *Suspect Citizens*, the authors expanded on the harms caused by biased policing:

> [P]olice investigations rely on citizen cooperation. Epp, et al. (2014) document an extreme example of mutual mistrust where feelings of alienation within a community were so deeply rooted that residents would not cooperate with police investigations in any capacity, even for crimes with many eyewitnesses such as drive-by shootings. A 2016 *New York Times Magazine* story explored the case of a gang shooting in a New

[100] *Id.* at 946.
[101] *Id.* at 933.
[102] *Id.* at 934-35.

> York housing project that left a mother dead in the cross-fire, and the difficulties of the police in finding any witnesses to help, though the event had been witnessed by many (see Mueller and Baker 2016). Desmond, Papachristos and Kirk (2016) described a sharp reduction in 911 calls from black neighborhoods following racially charged incidents in Milwaukee, but no effect in more affluent white areas of the city; they attribute this lack of engagement with the police, even calling for assistance with a crime, to highly publicized racial incidents that make black residents feel the police may not be trusted. Crime investigations require not only freedom from intimidation by criminal gangs, but also trust in the authorities; some communities have neither.
>
> Finally, while we have focused on the effects of a lack of trust on citizens, we might also point to the costs of such a system for government officials, including police officers themselves. Who wants to work in an area where one is mistrusted and viewed with suspicion, especially if one's motivation is to provide a public service at considerable personal sacrifice and danger? In fact, the few surveys that have targeted police officers suggest that they dislike working in communities that distrust them (citation omitted). Thus, there appears to be a real marketplace for reform, as both citizens and police officers stand to benefit from changes that could foster greater cooperation.[103]

D. HARM – ECONOMIC IMPACT

While we have not found articles specifically addressing the economic impact of racially disparate policing in New York, there is evidence of detrimental impact to communities in California:[104]

> [The Racial Identity & Profiling Act data] shows, for example, that in 2019, 89% of the Los Angeles County Sheriff's Department's patrol time was spent on stops initiated by officers rather than responding to calls for help. That means those stops ended up costing over $981 million in man-hours, while just $124 million was spent responding to community concerns. And of that $981 million, over $776 million was spent enforcing minor traffic violations.
>
> This comports with research by the California Pan-Ethnic Health Network showing that California's 58 counties and 482 cities annually spend over $25 billion on law enforcement and only $3.7 billion on public health. These exorbitant costs are approved by city and county governments despite evidence showing that investments in social services, health and education are more effective in preventing crime.[105]

We believe that there are strong reasons to conclude that there is an economic impact in New York, though it may be immeasurable. In this report we have noted the following:

- More frequent delinquent behavior of youth of color after being stopped by police, even for low-level offenses;
- Distrust of police in communities of color leading to refusal to assist in criminal investigations;

[103] BAUMGARTNER, EPP, & SHOUB, *supra* note 8, at 189.
[104] Smith et al., *supra* note 24.
[105] Smith & Bitrán, *supra* note 92.

- Deaths of civilians and police officers, impacting families and communities, and leading to costly lawsuits; and
- Diversion of police from addressing higher level offenses and crime-solving.

Additionally, there are other effects not addressed above that are likely to have an economic impact on communities. For example:

- In a study published in 2016 reviewing the economic impact of racial discrimination in Australia, it was estimated that racial discrimination cost $37.9 billion per year based on disability adjusted life years lost. In the study's conclusion, the authors stated, "Substantial cost is incurred due to increased prevalence of racial discrimination as a result of its association with negative health outcomes (e.g. depression, anxiety and PTSD). This implies that potentially significant cost savings can be made through measures that target racial discrimination."[106]
- Unpaid tickets may lead to the loss of a driver's license, insurance, or an automobile which can in turn impact employment and education.
- While fines may serve to help some communities by providing income, those paying the fines and their communities suffer economic losses.
- In addressing broad racial inequity in the United States, a 2021 study from the Brookings Institute found that "racial and ethnic inequities have cost the U.S. economy some $51 trillion in lost output since 1990."[107] In response, San Francisco Federal Reserve President Mary Daly stated, "[t]he imperative for equity, for closing some of these gaps, is not only a moral one, but it's also an economic one."[108]

E. HARM – IMPACT ON COMMUNITY HEALTH

Repeated experiences by African Americans in being policed in racially biased ways have been recognized to cause trauma.

> [T]rauma can be both real and perceived. According to [Dr. Walter Howard Smith, Jr.], racial trauma takes three forms for African Americans: directly experiencing racist events that lead to physical, psychological or emotional injury (violence, social profiling, false allegations of crime, etc.) that have a traumatic effect, witnessing events that have racial overtones, and living in or under difficult conditions as a result of race or poverty.[109]

[106] Amanuel Elias & Yin Paradies, *Estimating the Mental Health Costs of Racial Discrimination*, 16 BMC PUB. HEALTH 1205, 1205 (2016).
[107] Reuters Staff, Racial and Ethnic Inequality has Cost US Economy $51 Trillion since 1990, World Econ. Forum (Sept. 12, 2021), https://www.weforum.org/agenda/2021/09/racial-and-ethnic-inequality-has-cost-us-economy-51-trillion-since-1990/.
[108] *Id.*
[109] Kimeu W. Boynton, *Repeated, Ongoing, and Systemic Incidents of Racism and Their Harmful Mental Health Effects: Addressing Trauma in the Lives of African Americans*, 6 DEL. J. OF PUB. HEALTH 12 (2020).

F. HARM – CIVILIAN INJURIES AND DEATHS

Pretext stops too often result in deaths of young People of Color. For those of us who are white, middle class, and live in suburban neighborhoods, we may not be able to imagine the effect of being routinely stopped, questioned, searched, and detained. Philando Castile, a 32-year-old cafeteria worker had been stopped 46 times before he was killed by a police officer during a traffic stop in 2016.

Time after time, we have seen first the images, then the videos. A body on the ground, or perhaps a pair of shoes, or a bookbag. A body-worn police camera, or dashcam video of police approaching a vehicle, a driver frozen, passengers begging. And so often, disproportionately given the racial makeup of our communities and our country, the vehicle's driver, passenger, or the pedestrian, is Black or brown. Campaign Zero's Mapping Police Violence project, which tracks people killed by police, breaks down the frequency and nature of deaths in devastating detail. [110]

Police engage in many different types of activities, ranging from directing traffic to investigating murders. In this range of police responsibilities, there are few that are optional. But low-level stops, many of which are pretext stops, are a completely voluntary choice. A voluntary choice that may suddenly result in the death or injury of one of our neighbors, friends, family members, and fellow citizens.

In an article aptly titled "A Disproportionate Number of Black Victims in Fatal Traffic Stops," Washington Post journalist Wesley Lowery wrote, in 2015, that of those individuals killed during traffic stops, "1 in 3 of them was black, making the roadside interaction one of the most common precursors to a fatal police shooting of a black person in 2015."[111] In 2022, the New York Times reported that "in the previous five years police officers pulling over cars had killed more than 400 motorists who were neither wielding a gun or knife nor under pursuit for a violent crime — a rate of more than one a week."[112]

Pretext stops are often justified by those pointing to seizure of contraband, including weapons. But studies have shown that although there are many cases in which drivers have possessed weapons, white drivers tend to possess weapons more than drivers of color, though they make up fewer of the stops and deaths. The NYU Policing Project, citing the Stanford Open Policing Project, noted,

> [i]n a dataset of nearly 100 million traffic stops across the United States, black drivers were about 20 percent more likely to be stopped than white drivers relative to their share of the residential population. The study also found that once stopped, black drivers were searched about 1.5 to 2 times as often as white drivers, while they were less likely to be carrying drugs, guns, or other illegal contraband compared to their white peers.[113]

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[110] Mapping Police Violence, Campaign Zero (accessed January 5, 2022), https://mappingpoliceviolence.org.
[111] Wesley Lowery, *A Disproportionate Number of Black Victims in Fatal Traffic Stops*, WASH. POST, Dec. 24, 2015, https://www.washingtonpost.com/national/a-disproportionate-number-of-black-victims-in-fatal-traffic-stops/2015/12/24/c29717e2-a344-11e5-9c4e-be37f66848bb_story.html.
[112] David D. Kirkpatrick, Steve Eder &Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES, Apr. 15, 2022, https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html?partner=slack&smid=sl-share.
[113] Research Shows Black Drivers More Likely to Be Stopped by Police, N .Y. Univ. (May 5, 2020), https://www.nyu.edu/about/news-publications/news/2020/may/black-drivers-more-likely-to-be-stopped-by-police.html (internal formatting omitted).

The authors of the article *An Empirical Assessment of Pretextual Stops* commented on the increased likelihood of police violence during low-level traffic stops and the apparent link of pretext stops to police violence against People of Color:

> Relatedly, our findings may have important implications for the study of police violence. In the years since the protests in Ferguson, Missouri, in 2014, media outlets and civil rights groups have attempted to document the frequency of civilian deaths at the hands of American law-enforcement officials. Databases like those maintained by the Washington Post, The Guardian, Fatal Encounters, and Mapping Police Violence have attempted to document not just the number of killings by police, but also the circumstances that contribute to these deaths. One topic, though, has received somewhat less attention in the growing literature on police violence: how traffic stops serve as the starting point for many violent interactions between police and civilians, including those interactions that ultimately result in officers utilizing deadly force. No existing database provides an easy way to search for police killings that happened after police officers executed a traffic stop. Nevertheless, a quick analysis of the Guardian database from 2016 suggests that a substantial number of such incidents began with traffic stops. For example, approximately 8% or 9% of all police killings in November and December 2016 happened subsequent to a police traffic stop. Thus, it seems possible that by contributing to more routine traffic stops of drivers of color, pretextual-stop doctrines may expose these individuals to a greater likelihood of coercive behavior and ultimately police violence.[114]

Many of the incidents involving deaths of young men of color during traffic stops start with a traffic stop for a low-level offense, often a pretext stop, and include the flight of the driver or passengers in the stopped vehicle. While some may view such flight as a reason to engage greater force, in the context of over 1,000 deaths of civilians a year, disproportionately those of men of color, perhaps flight is a natural, frightened response to being pulled over. But whether or not one can accept that perspective, the ultimate question is whether a person should be killed for not having a proper license or having a dangling air freshener.

Not all injury is physical. One of the most compelling and tragic arguments for elimination of low-level stops is demonstrated by a study conducted on adolescent youth of color. In a longitudinal study of adolescent boys of color conducted by Del Toro, Lloyd, Buchanan et. al., the authors reported more frequent engagement in delinquent behavior 6, 12 and 18 months after they were stopped by police, whether or not they had exhibited prior delinquency. They highlighted the following;

> Four waves of longitudinal survey data demonstrate that contact with law enforcement predicts increases in black and Latino adolescents' self-reported criminal behaviors 6, 12, and 18 months later. These results are partially mediated by psychological distress. The younger boys are when stopped for the first time, the stronger these relationships. Boys' race and prior engagement in delinquent behaviors did not moderate the effect. These findings fill a gap in the research literature on labeling, life course, general strain, and deterrence theories. To our knowledge, the relationships among police contact, psychological strain, and subsequent criminal behavior for young boys had not been

[114] Rushin & Edwards, *supra* note 10, at 700.

tested quantitatively before. These findings raise policy questions about the influence of proactive policing on the trajectory of children.[115]

G. HARM – POLICE INJURIES AND DEATHS

As noted above, there are a number of civilians killed and injured each year during traffic stops for minor non-public safety violations. But the danger to physical safety is not limited to civilians. Though fewer in number, police officers engaging in low level non-traffic safety stops also face injury and death.[116]

The F.B.I. obtains, categorizes and publishes records from police departments around the country on officer injuries and deaths. The Law Enforcement Officers Killed and Assaulted ("LEOKA") web page reflects the numbers of officers killed and assaulted in various types of incidents. As can be seen from the 2019 page, the type of incident is detailed for each death or assault.[117] From 2015 to 2019 there were 16 officers killed during traffic violation enforcement incidents.[118]

In 2019, the FBI released its statistics for that year on law enforcement officers killed in the line of duty.[119] It was reported that 89 law enforcement officers were killed in the line of duty.[120] Forty-eight officers died as a result of "felonious acts" and 41 died in accidents. Of those, the report stated that 6 deaths occurred while the officers were "conducting traffic violation stops."[121]

According to the LEOKA data, in 2019, 4,687 law enforcement officers were assaulted during traffic stops.[122]

In 2019, Jordan Blair Woods, an associate law professor at the University of Arkansas School of Law, published his findings of what he described as the "largest and most comprehensive study to date on violence against the police during routine traffic stops: defined in [his] article as motor vehicle stops initiated only to enforce traffic violations."[123]

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[115] Del Toro, Lloyd, Buchanan et. al, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS 8261 (Apr. 23, 2019).

[116] In his article, *Policing, Danger Narratives and Routine Traffic Stops* 117 MICH. L. REV. 635, 639 (2019) Jordan Blair Woods notes "the narrative that routine traffic stops are fraught with danger to the police is longstanding. But as [the] article explains, this narrative finds little support in existing studies or data. (Internal citations omitted). However, the perception that these stops are among the most dangerous activities impacts the conduct and thought processes of officers trained to anticipate the highest level of peril when engaging in these stops. *Id.*

[117] 2019 Law Enforcement Officers Killed and Assaulted, Fed. Bureau of Investigation (accessed Dec. 15, 2022), https://ucr.fbi.gov/leoka/2019.

[118] Law Enforcement Officers Feloniously Killed: Circumstance Encountered by Victim Officer upon Arrival at Scene of Incident, 2015–2019, Fed. Bureau of Investigation (accessed Dec. 15, 2022), https://ucr.fbi.gov/leoka/2019/tables/table-24.xls.

[119] FBI Releases 2019 Statistics on Law Enforcement Officers Killed in the Line of Duty, Fed. Bureau of Investigation (May 4, 2020), https://www.fbi.gov/news/press-releases/press-releases/fbi-releases-2019-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty.

[120] *Id.*

[121] *Id.*

[122] Law Enforcement Officers Feloniously Killed, *supra* note 116.

[123] Woods, supra note 116, at 639.

Woods reviewed the breakdown of types of incidents and concluded that the LEOKA categories were insufficiently descriptive to provide adequate understanding of the contexts in which officers were injured or killed, though they became more informative in 2012.[124] He noted that the categories failed to sufficiently distinguish between the types of traffic incidents that led to officer deaths. In his study, Woods obtained information from 220 police agencies in Florida and analyzed data collected during a ten-year period. Woods also reviewed the types of factors contributing to escalation and violence. He observed,

> Pretextual stops are a key tool of modern proactive policing. From an officer safety perspective, however, pretextual traffic stops actually put officers in a reactive position. In obscuring the dangers of the stop at hand, officers can be caught off guard when a violent threat emerges during the stop, and that surprise can lead them to respond in aggressive ways that facilitate escalation and violence during the encounter.[125]

Discretionary stops such as pretext stops create uncertainty and unpredictability for officers expected to engage in proactive policing such as traffic stops. Those engaging in analysis such as the authorities cited above recognize that the type of proactive policing that encourages pretext stops creates unnecessary challenges to officers on the ground.

[124] *Id.* at 647.
[125] *Id.* at 704.

VIII. PRETEXT STOPS IN ROCHESTER, N.Y.

> *Recommendations for improvement of policing in Rochester: "Provide training on the proper use of pretextual stop, with the goal of reducing racial profiling."*
>
> *– City Response to Governor Cuomo's Executive Order 203*

Rochester, New York is a mid-size upstate New York city. While it appears to be a diverse community, due to a history of redlining[126] it is actually quite segregated. Certain areas of the city are predominantly Black, others white, and still others, Latinx. In recent years Rochester has made national news following the death of Daniel Prude at the hands of Rochester police, and the demonstrations held in response. Rochester leaders have engaged in efforts to reduce segregation and racism within the community, and to address police misconduct. These efforts include the development of the Commission on Racial and Structural Equity ("RASE Commission") and the Police Accountability Board.

Study after study recognizes the importance of collecting and analyzing data to determine whether and to what extent there are racial disparities in policing. Yet we are aware of no comprehensive effort to collect such data to date, despite the creation of the RASE Commission and the Police Accountability Board in part to address such disparities. We have sought to collect some of this data through Freedom of Information Law ("FOIL") requests and have obtained some information but have also received responses indicating that the Rochester Police Department does not maintain some of the requested data, including racial demographics in certain areas. The responses we have received thus far appear to reflect racial disparities in who gets stopped for minor traffic violations. This initial conclusion is consistent with national data. As we continue working on this project, we will be gathering and analyzing additional information and make it available in our next report.

A. RASE COMMISSION RECOMMENDS ENDING USE OF PRETEXTUAL STOPS

The history of policing in Rochester[127] and information available reflect the strong likelihood that, as in other communities across the country, there are longstanding racial disparities in the use of pretext stops in Rochester. If one result of this report is to enable the public to have access to such data, we anticipate that there will be a recognition and desire to remedy any racial inequities found.

In June 2020, the City of Rochester formed the RASE Commission, chaired by former William A Johnson, Jr., Arline Bayó Santiago and Muhammed Shafiq, Ph.D. The Commission issued its initial report in March 2021. The RASE Commission suggested the Rochester Police Department "[e]nd practices that disproportionately drain resources from Black and Latinx communities. Recommendations include: End the use of pretextual stops (stops for a minor offense to investigate something else), decriminalize and de-prioritize violation-level offenses. . . ."[128]

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[126] *See e.g.*, Alex J. Schneider, *Redlining in Rochester*, REPORTER MAG., Feb. 11, 2022, https://reporter.rit.edu/news/redlining-rochester.

[127] Barbara Lacker-Ware & Theodore Forsyth, *The Case for an Independent Accountability System: Transforming the Civilian Review Process in Rochester, New York*, Enough is Enough (2017), https://enoughisenough.rocus.org/wp-content/uploads/2017/02/The-Case-for-an-Independent-Police-Accountability-System-2.1.17-FINAL.pdf .

[128] *No Time for Excuses: It's Time for Action*, Comm'n on Racial & Structural Equity (March 12, 2021), https://rocrase.com/files/report-rase.pdf.

In 2022, RASE published a progress report that addressed many of the original recommendations. In that section of the report, titled "Recommendation: End Pre-Textual Stops," the report stated:

> Action: Lt. Joseph Hayes, Research and Evaluation, has reviewed current department procedures regarding Pre-Textual Stops and is reviewing current literature and case studies. He will draft an updated policy for the Department, expected to be presented to the Chief in mid-March 2022. [129]

B. ROCHESTER TACITLY ACKNOWLEDGES USE OF RACIAL PROFILING IN PRETEXT STOPS

In response to rising concerns about policing following the death of George Floyd, Governor Cuomo issued Executive Order 203 in 2020. He surveyed police agencies and other organizations, requiring they answer certain questions. Among the questions asked in the survey was the following:

> Does your Police Department use these practices and, if so, which should be reformed, curtailed or discontinued?
>
> - "Broken Windows"
> - "Stop and Frisk"
> - Chokeholds and Other Restrictions on Breathing
> - Use of Force for Punitive or Retaliatory Reasons
> - Pretextual Stops
> - Informal Quotas for Summonses, Tickets or Arrests
> - Shooting at Moving Vehicles
> - High Speed Pursuits
> - Use of SWAT Teams
> - No-Knock Warrants
> - Less-Than-Lethal Weaponry such as Tasers and Pepper Spray
> - Facial Recognition Technology[130]

The guidance provided to agencies filling out the survey noted, citing the Leadership Conference on Civil Rights, "the wide latitude officers have to conduct a pretextual stop can contribute to the distrust between the community and officers."[131]

The City of Rochester tacitly acknowledged its engagement in racial profiling in the use of pretext stops.[132] In its response to Executive Order 203, the City of Rochester briefly addressed pretext stops,

[129] *2022 Progress Report*, Comm'n on Racial & Structural Equity , https://rocrase.com/files/2022-rase-progress-report.pdf.
[130] *Resources & Guide for Pub. Officials and Citizens*, N.Y. Police Reform and Reinvention Collaborative (Aug. 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/Police_Reform_Workbook81720.pdf.
[131] *Id.* at 29.
[132] Rochester Police Department General Order 502 bars racial profiling but fails to provide consequences for any officers who engage in such profiling and fails to provide concrete directives relating to pretext stops.

with the following line in its stated goals: "Provide training on the proper use of pretextual stop, with the goal of reducing racial profiling." [133]

On August 9, 2022, a FOIL request was submitted to the City of Rochester FOIL website seeking information on what steps the City of Rochester had taken to address its concerns identified in its response to Executive Order 203. After numerous email exchanges with the City's FOIL officer providing certain references to longstanding orders and policies, it appears there have been no concrete steps taken to effectuate the City's own recommendations with respect to racial disparities in policing. Given the City's recognition of its participation in racial profiling, as noted above, the lack of action is disappointing at best.

C. ROCHESTER POLICE DEPARTMENT TRAINING BULLETIN AND GENERAL ORDERS

The Rochester Police Department (RPD), like all police departments, engages in a variety of vehicle and traffic and pedestrian stops. RPD Training Bulletin P-90-22 issued in May of 2022 states, "[t]he Rochester Police Department (RPD) prohibits the use of any bias-based profiling in any actions, including but not limited to arrests, traffic contacts, field contacts, investigations, or asset seizure and forfeiture efforts." The Training Bulletin references several general orders which address the prohibition against bias-based policing. Among the orders referenced are General Orders 415, 502 and 505.[134]

RPD General Order 415 states, "[i]t is acceptable for an officer to use a vehicle and traffic violation as a pretext for stopping a vehicle to further an investigation." This order does not address the disparate racial impact of pretext stops.

RPD General Order 502, titled "Equitable Policing," includes the following provision in its policy section: "The Rochester Police Department (RPD) neither condones nor permits the use of any bias-based profiling in arrests, traffic contacts, field contacts, investigations, or asset seizure and forfeiture efforts, and is committed to equitable policing and equal rights for all. " In the section addressing training the General Order states:

> Members of the RPD will report any observed or known violations of bias-based profiling and other violations of this Order to their immediate supervisor. B. Supervisors will initiate action(s) in response to acts of bias-based profiling and other violations of this General Order as outlined in G.O.s 301, Discipline and 310, Citizen Complaints.

In its section on criminal profiling procedures, the General Order states:

> All vehicle and individual stops, investigative detentions, arrests, search and seizures (to include asset forfeiture procedures) by members of the RPD will be based on a standard of reasonable suspicion, probable cause, or as otherwise required by the U.S. Constitution and the New York State Constitution. Members must be able to articulate

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[133] *City of Rochester Community Response to Governor Cuomo's Exec. Order 203 Police Reform and Reinvention Collab.: Exec. Summary*, City Of Rochester, at 11 (Feb. 2021), https://www.cityofrochester.gov/uploadedFiles/Departments/Mayor/_Documents/21%20Order%20203%20EXEC%20SUM%20FINAL%20-%20Web.pdf.

[134] Rochester Police Department General Orders may be found on the Rochester Police Department Open Data Portal: https://data-rpdny.opendata.arcgis.com/search?tags=GO.

specific facts, circumstances, and conclusions which provide objective, credible evidence to support probable cause or reasonable suspicion for a stop, investigative detention, or arrest.

General Order 505, issued in September of 2019 and titled "Traffic Enforcement/Direction and Control is a 21 page document that includes the following provisions:

A. The Rochester Police Department (RPD) neithercondones [sic] or [sic] permits the use of any bias based profiling as defined in G.O. 502, Equitable Policing, in traffic contacts.
B. Members of the RPD will fairly and impartially enforce the provisions of traffic laws to include, but not be limited to: speed violations, other hazardous violations, off-road violations, equipment violations, public carrier/commercial vehicle violations, other non-hazardous violations, multiple violations, pedestrian and bicycle violations, newly enacted traffic laws and/or regulations, and pedestrian and bicycle violations.

While the intent and language of these policies reflect admirable aspirations, as noted in the section below on laws and policies addressing pretext stops, prohibitions on racial profiling are too often ineffective without specific statutory or procedural restrictions. While some of these policies have been in effect for several years, initial anecdotes and analysis of some stops seem to demonstrate that the policies are not enough.

D. DATA COLLECTED IN ROCHESTER, N.Y.

Through two FOIL requests submitted in 2020 and 2022, sometimes after extensive back-and-forth communication with the City of Rochester Law Department, we collected information concerning enforcement by the Rochester Police Department of three New York Vehicle and Traffic Law ("V&T")[135] violations often used as pretext stops – one relating to bicycles, one relating to pedestrians, and one relating to motorists. They are not (a) having a bell on a bicycle,[136] (b) walking in the street when the sidewalk is available,[137] and (c) failing to signal a turn 100 feet in advance of the turn.[138]

The data covered periods between 2020 and 2022. The data, sadly but predictably, reflects the same trends seen around the country – large racial disparities in who gets stopped. For those not familiar with Rochester, the City has areas known as "The South Wedge," "The Park Avenue Area," and "East Avenue" that are wealthier and inhabited by primarily white residents. These and certain other areas had few or no stops for these violations. In the Northeast and Northwest areas of the City, in which more People of Color reside, residents were subjected to substantially more ticketing.

While it cannot be stated with certainty that every stop analyzed in this small sample was a pretext stop, the vast majority of tickets were issued in a pattern that suggests that if the basis for these types of stops was community safety, that concern was only expressed in limited geographic areas.

[135] N.Y. Veh. & Traf. § 100 *et seq.*
[136] § 1236.
[137] § 1156.
[138] § 1163.

Furthermore, Rochester has a bicycle path that runs along the Genesee River and Erie Canal. That path is frequented by bicyclists from many of the neighboring suburbs. Very few if any tickets were issued to those on the bike path, despite this report's authors' admittedly anecdotal observation of few bells on bicycles. More information is necessary to assess whether and to what extent race plays a role in police-initiated contacts with civilians for low level V&T violations in the Rochester area.

In response to one of the FOIL requests that sought data on the racial demographics of who gets arrested in Rochester, the FOIL response provided the following information:

All City of Rochester Arrests by Race and Ethnicity (1/1/21-7/31/22):

	Asian/Oriental	Black	American Indian	White	Grand Total
Hispanic	0	202	0	1132	1334
Non-Hispanic	63	6285	4	1704	8056
Total	**63**	**6487**	**4**	**2836**	**9390**

Comparatively, the U.S. Census population estimates from July 2021 identify the racial demographics of Rochester as follows:[139]

White alone	45.1%
Black or African American alone	38.4%
American Indian or Alaska Native alone	0.5%
Asian alone	3.5%
Native Hawaiian or Other Pacific Islander alone	0.2%
Two or More Races	6.9%
Hispanic or Latino	18.7%
White alone, not Hispanic or Latino	37.1%

As recognized in the *Whren* and *Robinson* decisions, it is often difficult to examine the primary motivation[140] of an officer to conclusively determine whether a stop was pretextual and based on racial profiling. But recognizing that certain low-level traffic stops are often conducted in racially disparate ways compels an examination of those stops and an assessment of whether the stops were truly because there was a law enforcement concern about the activity for which the individual was stopped. And we must determine whether that law enforcement concern is applied equally throughout the community.

E. INITIAL OBSERVATIONS AND FURTHER FUTURE ANALYSIS

Anecdotally, criminal defense attorneys in the Greater Rochester Area have observed Rochester Police Department officers use certain types of violations as pretext stops, primarily against People of Color, and primarily in communities of color. A limited assessment of FOIL responses support this observation – stops conducted for certain vehicle and traffic and pedestrian violations were overwhelmingly conducted in communities of color, and against young men of color. Because statistics and data are not

[139]Rochester City, N.Y., U.S. Census Bureau (accessed Dec. 15, 2022), https://www.census.gov/quickfacts/rochestercitynewyork.

[140] In October 2022, the Third Department recognized that racial profiling as a motivation for a pretext stop may result in suppression of evidence. *People v. Jones*, N.Y. Slip Op. 5892 (3rd Dept. Oct. 20, 2022).

available to the public without FOIL requests, and often FOIL disputes, and the authors have not conducted a comprehensive review thus far, there is no conclusive data that can be included in this report at this time. This is why one of the first recommendations we are making is that data be collected and available to the public. As we gather data, we must remember that not every stop results in a ticket.

Low-level stops that are often perceived by community members and criminal defense attorneys as pretext stops in Rochester include the V&T violations listed below.[141] More commonly cited provisions are in bold.

> *§ 375. Equipment.*[142]
>
> (30) It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon the vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield, or to prevent him from having a clear and full view of the road and condition of traffic behind such vehicle.
>
> *§ 1156. Pedestrians on roadways.*[143]
>
> (a) Where sidewalks are provided and they may be used with safety it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.
>
> (b) Where sidewalks are not provided any pedestrian walking along and upon a highway shall when practicable walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction. Upon the approach of any vehicle from the opposite direction, such pedestrian shall move as far to the left as is practicable.
>
> *§ 1163. Turning movements and required signals.*[144]
>
> (a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided.
>
> (b) A signal of intention to turn right or left when required shall be given continuously **during not less than the last one hundred feet traveled by the vehicle before turning.**

[141] The V&T also addresses movement of bicycles and pedestrians on roadways.
[142] This is cited when police stop someone for an air freshener or other item dangling from the rearview mirror.
[143] This is cited when a person is stopped when walking on the street if the sidewalk is unobstructed, although at times people are stopped when there is snow on the sidewalk and the street is clear.
[144] This is cited when someone signals a turn less than 100 feet in advance of the turn.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

(d) The signals provided for in section eleven hundred sixty-four shall be used to indicate an intention to turn, change lanes, or start from a parked position and not be flashed on one side only on a parked or disabled vehicle, or flashed as a courtesy or "do pass" signal to operators of other vehicles approaching from the rear.

(e) The driver of a vehicle equipped with simultaneously flashing signals as provided for in subdivision eighteen-a of section three hundred seventy-five shall use such signals when the vehicle is stopped or disabled on a public highway, except when such vehicle is stopped in compliance with a traffic-control device or when legally parked. The driver of a vehicle so equipped may use such signals whenever necessary to warn the operators of following vehicles of the presence of a traffic hazard ahead of the signaling vehicle, or to warn the operators of other vehicles that the signaling vehicle may itself constitute a traffic hazard, taking into account traffic and highway conditions. No person shall use such signals for any other purpose.

§ 1236. Lamps and other equipment on bicycles.[145]

(a) Every bicycle when in use during the period from one-half hour after sunset to one-half hour before sunrise shall be equipped with a lamp on the front which shall emit a white light visible during hours of darkness from a distance of at least five hundred feet to the front and with a red or amber light visible to the rear for three hundred feet. Effective July first, nineteen hundred seventy-six, at least one of these lights shall be visible for two hundred feet from each side.

(b) **No person shall operate a bicycle unless it is equipped with a bell** or other device capable of giving a signal audible for a distance of at least one hundred feet, except that a bicycle shall not be equipped with nor shall any person use upon a bicycle any siren or whistle.

(c) Every bicycle shall be equipped with a brake which will enable the operator to make the braked wheels skid on dry, level, clean pavement.

(d) Every new bicycle shall be equipped with reflective tires or, alternately, a reflex reflector mounted on the spokes of each wheel, said tires and reflectors to be of types approved by the commissioner. The reflex reflector mounted on the front wheel shall be colorless or amber, and the reflex reflector mounted on the rear wheel shall be colorless or red.

(e) Every bicycle when in use during the period from one-half hour after sunset to one-half hour before sunrise shall be equipped with reflective devices or material meeting the standards established by rules and regulations promulgated by the commissioner;

[145] Subdivision c is commonly cited when a person is riding a bicycle that is not equipped with a bell.

provided, however, that such standards shall not be inconsistent with or otherwise conflict with the requirements of subdivisions (a) and (d) of this section.

The types of low-level violations for which motorists, cyclists, and pedestrians are stopped in Rochester, such as those detailed above, are similar to those used as a basis for stops across the country, as noted in earlier sections of this report. As with those other communities, and as acknowledged by the City of Rochester, there are racial disparities in who gets stopped. As you consider the above V&T violations, we invite you to think about and discuss with others whether you or they have been stopped for one of these types of charges. Did you know that these minor infractions could lead to a stop? A search? Are there racial differences between those you know who were stopped for these charges and those who were not?

It is our intent to seek more comprehensive information and provide more details about these stops in our final report. We will also be partnering with local universities to provide greater analysis of the impact and data related to pretext stops in our community. It is our hope that the Rochester Police Department and other local police agencies will assist us in this endeavor.

IX. LAWS AND POLICIES ADDRESSING PRETEXT STOPS

> *Their officers, like cops across the U.S., had been trained for decades in the art of pretextual stops: Pull a driver over for a minor infraction such as broken taillight, use something vaguely suspicious – a shaking hand, a whiff of pot - to justify a search, hope to find drugs or weapons.*
>
> *The tactic is legal and has led to plenty of seizures. But Los Angeles Police Department Chief Michel Moore and the civilian oversight commission were grappling with the fact that the city's Black and Latino residents were disproportionately targeted for the fishing expeditions…*
>
> *Under a policy approved in March, officers must have a reason to suspect a more serious crime is afoot before initiating a pretext stop, and they are required to record their reasoning on body camera before the stop.*
>
> *– Los Angeles Times, November 14, 2022.*

The summer of 2020, in the wake of the murder of George Floyd, marked a moment of reckoning in communities across the nation regarding policing practices and the disproportionate impact they may have on communities of color. With this reckoning has come a renewed push toward effective police reform, including state and local efforts to combat the use of pretext stops. However, such efforts are hardly novel; "[f]or decades, activists and community members have lamented the traffic stop as a vehicle for impermissible racial profiling."[146] In the 1990s, scholars and civil rights activists similarly challenged the use of racial profiling during routine traffic stops, leading to a first wave of legislative efforts to combat the problem of pretext stops.

However, not all states and localities have adopted the same approach nor are all solutions created equal. Some states and cities have adopted or are considering legislation as a solution. In other cities, police departments and district attorneys' offices have created internal policies regarding pretext stops. As this section will illustrate, legislation is a more effective solution than internal policies because it is more stable and durable than policies, which are more often subject to change.

A. LEGISLATIVE APPROACHES

In order for legislation to be an effective means of eliminating or reducing pretext stops, it must have teeth; legislation must set forth obligations that police officers must follow and have the ability to punish those who violate the law.

In *An Empirical Assessment of Pretextual Stops*, the authors reviewed traffic stops occurring over a seven-year period in Washington State, concluding that officers' increased discretionary authority following a change in the law had the potential to create racially discriminatory law enforcement.[147] They recommended change in police procedures.

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[146] Rebecca Yin, *Bans with No Bite: Why Racial Profiling Bans are Unable to Create Racial Justice in Policing*, 43 Cardozo L. Rev., 1677, 1680 (2022).
[147] Rushin & Edwards, *supra* note 10.

The law in Washington had changed, first barring pretext stops as unconstitutional under the state constitution, then permitting some stops. The authors noted, "[e]mploying a novel analysis of a newly available dataset (resulting from the change in the law), this Article is the first to illustrate empirically that judicial doctrines permitting police officers to engage in pretextual traffic stops contribute to a statistically significant increase in racial profiling of minority drivers."[148] The authors further concluded that the stops of nonwhite drivers increased during the day when officers were more easily able to discern race. They wrote,

> This increased targeting of drivers of color via pretextual stops is a matter of serious concern, as even routine traffic stops can escalate to more serious encounters involving the use of force, searches, and other coercive police actions. More broadly, our findings suggest that legal rules granting police officers increased discretionary authority may create the risk of racially discriminatory law enforcement. This insight provides ammunition for scholarly proposals to decouple criminal investigations from traffic enforcement. It may also strengthen calls for the integration of technology into traffic enforcement so as to limit police discretion.[149]

The authors noted,

> Our data suggests that police-reform advocates concerned about racial bias in policing should consider lobbying for legislative enactments that provide additional protections against pretextual stops. With *Whren* decided a little over two decades ago, it seems unlikely that the Supreme Court will reconsider its holding anytime soon. But this does not prevent states from using their legislative powers to enact limitations on police authority to conduct pretextual stops.[150]

B. LEGISLATION BARRING RACIAL PROFILING

Prior to 2020, legislative efforts included the outright ban of racial profiling and race-based pretext stops, an approach that has proven to be unsuccessful at eliminating or even reducing pretext stops. Around the same time the Supreme Court held that pretext stops do not violate the Fourth Amendment of the U.S. Constitution in 1996, activists and academics began to challenge the use of them.[151] In 1984, the U.S. Drug Enforcement Agency ("DEA") started the Operation Pipeline, which trained 25,000 state and local police officers in 48 states to recognize, stop, and search potential drug couriers.[152] This training included the consideration of a suspect's race.[153] In other words, Operation Pipeline trained police officers to use pretext stops in order to find drugs in vehicles.[154] This, in conjunction with several egregious cases of police brutality in the 1990s, including the beating of Rodney King in 1991 and the shooting of Amadou Diallo in 1999, led to numerous challenges to racial profiling.[155]

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[148] *Id.* at 643.
[149] *Id.* at 645.
[150] *Id.* at 698.
[151] Yin, *supra* note 139, at 1683.
[152] Donald Tomaskovic-Devey & Patricia Warren, *Explaining and Eliminating Racial Profiling*, 8 CONTEXTS 34, 35 (2009).
[153] *Id.*
[154] *Id.* at 36.
[155] *Id.*

As a result, states began to pass legislation banning the use of race in determining which individuals to subject to more intrusive police behavior, a legislative project that continues today.[156] These bans vary from state to state. Some prohibit racial profiling but do not include any consequences for police officers who engage in prohibited behavior.[157] For example, in 2008, Illinois enacted the "Racial Profiling Prevention and Data Oversight Act," which was enacted to "identify and address bias-based policing through the monitoring, review, and improvement of the collection of racial profiling information."[158] To do so, the law created a Racial Profiling Prevention and Data Oversight Board, which acts "purely as an advisory board," to make recommendations and coordinate the development and implementation of racial profiling elimination plans and strategies in Illinois.[159] This includes promulgating and recommending model policies for police agencies to protect civil rights related to traffic enforcement, as well as issuing reports and recommendations to the Governor, Secretary of State, and General Assembly in order to improve data collection among under-reported minority populations.[160] However, the law is silent regarding penalties or enforcement mechanisms for police officers who engage in racial profiling.

Other state racial profiling laws only impose data collection requirements.[161] For example, in 2001, Louisiana passed a law requiring police officers to collect and retain the following information:

- The number of people stopped for traffic violations;
- Characteristics of race, gender, age, and state of residence of such individuals, but the identification of such characteristics must be based on the observation and perception of the officer responsible for reporting the stop and not the assertion of the individual stopped;
- The nature of the alleged traffic violation that resulted in the stop;
- Whether a warrant or citation was issued, an arrest was made, or a search conducted due to the stop;
- The type of search conducted, if any, the legal basis for the search, and whether contraband was discovered and property was seized; and
- The number of people, including minors, stopped for using cell phones, including texting and making calls.[162]

Some statutes establish consequences for noncompliance. For example, Missouri's racial profiling ban is much more multifaceted. First, police officers are required to collect the following data each time they stop a motor vehicle:

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[156] Yin, *supra* note 146, at 1683-84. States that have implemented racial profiling bans include Alabama; Arizona; Arkansas; California; Colorado; Connecticut; Florida; Illinois; Kansas; Kentucky; Louisiana; Maryland; Massachusetts; Minnesota; Missouri; Montana; Nebraska; Nevada; New Jersey; New Mexico; North Carolina; Oklahoma; Rhode Island; Tennessee; Texas; Utah; Virginia; Washington State; West Virginia; and Wisconsin. NAACP, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America*, Appendix 1: State Racial Profiling Laws (Sept. 2014).

[157] Yin, *supra* note 146, at 1684.

[158] 20 ILL. COMP. STAT. 2715/5 (2008). For another example, *see* TENN. CODE ANN. §§ 38-1-501—503 (West 2022) (enacted in 2001).

[159] 20 ILL. COMP. STAT. 2715/15.

[160] *Id.*

[161] LA. REV. STAT. ANN. § 32:398.10 (2021).

[162] *Id.*

- The age, gender, and race or minority group (meaning individuals of African, Hispanic, Native American, or Asian descent) of the individuals stopped;
- The reasons for the stop;
- Whether a search was conducted due to the stop;
- If a search was conducted, whether the individual stopped consented to the search, the probable cause for the search, whether the person or person's property was searched, and the duration of the search;
- Whether any contraband was discovered during the search, and if so, what type;
- Whether a warning or citation was issued and if so, the violation charged or warning provided;
- Whether an arrest was made due to the stop or search, and if so, the crime charged; and
- The location of the stop.[163]

Each law enforcement agency must then compile all data for the calendar year into a report and submit it for review to the Attorney General, who is required to analyze all reports and submit a report of the findings to the Governor, General Assembly, and each law enforcement agency.[164]

The Missouri law also requires each law enforcement agency to adopt a policy on race-based traffic stops that prohibits routinely stopping members of minority groups for violations of vehicle laws as a pretext for investigating other violations of criminal law."[165] In addition, law enforcement agencies must periodically review the Attorney General's annual report and determine whether any officers have a pattern of stopping members of minority groups for vehicle law violations in a disproportionate number to the population of minority groups living or traveling in the agency's jurisdiction.[166] If this review reveals a pattern, the agency must conduct an investigation to determine whether any individual officers routinely engage in pretext stops in a manner that reflects racial disparities, and provide appropriate counseling and training for any officer found to have engaged in race-based traffic stops within 90 days of the review.[167] If an agency fails to do so, the Governor can withhold state funds appropriated to the agency.[168]

However, only seven states expressly prohibit racial profiling *and* provide a definition of racial profiling. These states include Arkansas, California, Connecticut, Kansas, Missouri, New Jersey, and New Mexico.[169] Each of these statutes includes similar provisions that (1) define racial or biased profiling to include reliance on race, ethnicity, or national origin when determining whether to stop an individual;[170] (2) require law enforcement agencies to draft a policy prohibiting such practices and outline

[163] MO. ANN. STAT. § 590.650(6) (West 2004).
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] NAACP, *supra* note 149
[170] Yin, *supra* note 146, at 1684-85 (citing ARK. CODE ANN. § 12-12-1401(a) (2017); CAL. PENAL CODE § 13519.4(e) (West 2011); KAN. STAT. ANN. § 22-4606(d) (2005); MO. ANN. STAT. § 304.670(1)(5) (West 2020); N.J. STAT. ANN. § 2C:30-6(a) (West 2003); N.M. STAT. ANN. § 29-21-2(A) (West 2009)).

requirements for the policies;[171] (3) include officer training requirements;[172] (4) require data collection of demographics for those subjected to traffic stops or who submit racial profiling complaints;[173] (5) and create or identify an entity who will review the data and complaints.[174]

It is clear from the legislation enacted by these seven states that there is a recognition that collection of these categories of data is necessary to understand and interpret whether pretext stops are being used in a biased manner. While we support the collection of this kind of information, especially in jurisdictions that fail to uniformly collect any data, collection is not enough to reduce or eliminate racial disparities in traffic enforcement.

While such legislation appears to be comprehensive in that it bans and defines racial profiling, as well as requires policies to be established and data to be collected, data shows that traffic enforcement continues to disproportionately impact individuals on the basis of race, including in the states who have adopted such legislation.[175] If such statutes were successful in reducing this disparate impact, it would be expected that stop and search rates would mirror the population demographics in states that enacted the statutes, or at the very least, decrease overrepresentation over time.[176] However, the information instead shows Black drivers are consistently overrepresented in stop data compared to their proportional population in a state.[177] For example, Black people comprised 11.5% of the population in the state of Missouri in 2015.[178] Though Missouri implemented its seemingly comprehensive racial profiling ban in 1999, Black drivers represented between 17 and 20% of stops made by Missouri police departments between 2012 and 2019.[179] Therefore, in order to eliminate racial bias in pretext stops, legislation must go beyond a blanket ban of racial profiling and data collection; it must have concrete obligations imposed on police officers and enforceability mechanisms.

C. LEGISLATION REQUIRING COLLECTION OF DATA

Many states have implemented statutes that require collection of data concerning traffic stops as part of broader legislation addressing secondary or pretext stops. Some states have initially focused on the collection of data. For example, in 2015 the California Legislature passed the Racial and Identity Profiling Act ("RIPA"). This statute barred racial profiling and mandated collection of demographic and

[171] *Id.* (citing ARK. CODE ANN. § 12-12-1403(a)(1)-(7) (West 2020); CAL. PENAL CODE § 13519.4(a)-(b) (West 2005); KAN. STAT. ANN. § 22-4610 (2005); MO. ANN. STAT. § 590.650(5) (West 2004); N.J. STAT. ANN. § 2C:30-5(d) (West 2003); N.M. STAT. ANN. § 29-21-3(A)(1) (West 2009)).
[172] *Id.* (citing ARK. CODE ANN. § 12-12-1404 (West 2020); CAL. PENAL CODE § 13519.4(g)-(i) (West 2005); KAN. STAT. ANN. § 22-4610(c)(2)(A) (2005); MO. ANN. STAT. § 590.650(5)(3) (West 2004); N.M. STAT. ANN. § 29-21-3(A)(2) (West 2009)).
[173] *Id.* (citing ARK. CODE ANN. § 12-12-1405 (West 2022); CAL. GOV'T CODE § 12525.5 (West 2022); KAN STAT. ANN. § 22-4611a (West 2022); MO. ANN. STAT. § 590.650(2) (West 2021)).
[174] *Id.* (citing ARK. CODE ANN. § 12-12-1405 (West 2022); CAL. PENAL CODE § 13519.4(j) (West 2022); KAN. STAT. ANN. § 22-4610(d) (West 2022); MO. ANN. STAT. § 590.650(3) (West 2021); N.M. STAT. ANN. §§ 29-21-3 to 21-4 (West 2022)).
[175] *Id.* at 1685.
[176] *Id.* at 1691.
[177] *Id.*
[178] *Id.* at 1690.
[179] *Id.*

other data on pedestrian and traffic stops. The data is collected and published by a statutorily created Racial Profiling Advisory Board.[180]

D. LEGISLATION PROHIBITING SUMMONS FOR CERTAIN MINOR VIOLATIONS

In the 2021-2022 legislative session, the New York State Assembly passed Assembly Bill 7599/Senate Bill S7353. This bill was signed into law by New York Governor Kathy Hochul in December 2022. The law limits issuance of traffic summonses for two specific traffic violations relating to obstruction of a driver's view of the front and rear windshields. An officer may only issue a summons for this violation when the officer has probable cause to believe a motorist has also committed another violation. When it passed the Assembly in March 2022, a press release issued by Assembly Speaker Carl Heastie stated:

> Speaker Carl Heastie today announced that the Assembly has passed legislation to address racial disparities in traffic stops by reducing the number of traffic stops for minor, nonmoving violations such as stickers on vehicle windows and objects placed or suspended in or on the vehicle (Darling, A.7599).
>
> "Too often, we have seen these traffic stops involving minor violations result in tragedies," said Speaker Heastie. "The Assembly Majority is committed to addressing the racial disparities that exist in interactions with police officers. Today's legislation will help to address these inequities and make New York safer."
>
> "Traffic stops are one of the most common interactions with law enforcement and they often cause extreme anxiety for people of color," said Assemblymember Taylor Darling. "This legislation will help reduce the number of unnecessary traffic stops that too often target people of color and do little to make our streets safer."
>
> Today's legislation would require that a traffic summons for operating a vehicle in violation of the prohibition on placement of posters or stickers on a vehicle windshield or rear windows could only be issued when there is reasonable cause to believe that the driver has committed a violation of another state law. The legislation would also require that a traffic summons for operating a vehicle with any object placed or hung in or upon the vehicle in a manner that obstructs or interferes with the view of the driver can only be issued when there is reasonable cause to believe the driver has violated another state law.
>
> According to 2020 research published by the Stanford Open Policing Project, of a dataset of nearly 100 million traffic stops carried out across the United States, Black drivers were about 20 percent more likely to be stopped than white drivers relative to their share of the residential population. The study also found that once stopped, Black drivers were searched about 1.5 to two times as often as white drivers. [181]

The bill states:

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[180] AB 953: The Racial and Identity Profiling Act of 2016, Cali. Dep't of Just. (accessed Dec. 21, 2022), https://oag.ca.gov/ab953.

[181] Press Release, *supra* note 9.

Section 1. Subparagraph (i) of paragraph (b) of subdivision 1 of section 375 of the vehicle and traffic law, as amended by chapter 624 of the laws of 2005, is amended to read as follows:

(i) The use or placing of posters or stickers on windshields or rear windows of motor vehicles other than those authorized by the commissioner, is hereby prohibited. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A SUMMONS FOR OPERATING A MOTOR VEHICLE IN VIOLATION OF THIS SUBPARAGRAPH SHALL ONLY BE ISSUED WHEN THERE IS REASONABLE CAUSE TO BELIEVE THAT THE PERSON OPERATING SUCH MOTOR VEHICLE HAS COMMITTED A VIOLATION OF THE LAWS OF THIS STATE OTHER THAN A VIOLATION OF THIS SUBPARAGRAPH.

(I-A) The attaching to windshields and windshield wipers of handbills and other forms of advertisements, is hereby prohibited.

§ 2. Subdivision 30 of section 375 of the vehicle and traffic law is amended to read as follows:

30. It shall be unlawful for any person to operate a motor vehicle with any object placed or hung in or upon the vehicle, except required or permitted equipment of the vehicle, in such a manner as to obstruct or interfere with the view of the operator through the windshield, or to prevent him from having a clear and full view of the road and condition of traffic behind such vehicle. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A SUMMONS FOR OPERATING A MOTOR VEHICLE IN VIOLATION OF THIS SUBDIVISION SHALL ONLY BE ISSUED WHEN THERE IS REASONABLE CAUSE TO BELIEVE THAT THE PERSON OPERATING SUCH MOTOR VEHICLE HAS COMMITTED A VIOLATION OF THE LAWS OF THIS STATE OTHER THAN A VIOLATION OF THIS SUBDIVISION.

§ 3. This act shall take effect immediately.

One way in which statutes have been used to reduce pretext stops has been to limit the types of charges for which drivers can be stopped. Assembly Bill 7599/Senate Bill S7353 has the potential to reduce stops in some circumstances but does not require data collection to determine its effectiveness, and while it is a start, it does not seem to prevent the actual stopping of a motorist for the violation. It is our hope that the Legislature will consider other types of traffic violations for similar restrictions in future bills.

E. LEGISLATION PROHIBITING STOPS FOR CERTAIN MINOR OR "SECONDARY VIOLATIONS"

Some of the authors and researchers who examine pretext stops nationally distinguish between traffic stops conducted for public safety reasons, like speeding or driving while intoxicated, and other stops for minor violations such as an item hanging from a rearview mirror. The first types of stops are sometimes referred to as "public safety stops" or "primary stops." The second types of stops are sometimes referred to as "secondary stops." For the purpose of the discussion below, we will use the term "secondary stops" to refer to these non-safety stops.

Since 2020, one of the most common approaches to eliminating pretext stops considered by states and cities is legislation that prohibits the police from initiating stops solely for minor or "secondary" violations. Under such laws, police may only enforce these secondary violations if they are accompanied by a primary, or more serious, offense. Currently, three states—Virginia, Oregon, and California—have adopted this approach, while several others are considering it.

In 2020, Virginia passed a law that prohibits police from stopping vehicles solely based on the following minor traffic violations:[182]

- Driving without a light illuminating a license plate;
- Driving with defective and unsafe equipment, such as unapproved lighting, warning, or signal devices, or safety glass;
- Driving without brake lights or a high mount stop light;
- Driving without an exhaust system that prevents excessive or unusual levels of noise;
- Driving with certain sun-shading materials and tinting films;[183]
- Driving with certain objects, other than a rear-view mirror, sun visor, or other approved equipment, suspended in the vehicle in such a way to substantially obstruct the driver's view;[184]
- Driving with an expired safety inspection or registration sticker until the fourth day of the month after the original expiration date;[185]
- Driving while smoking a cigarette, cigar, pipe, or any other type of lighted smoking equipment with a minor child in the motor vehicle;[186] or
- Driving without wearing a seatbelt.[187]

Police officers are additionally prohibited from stopping a vehicle solely because of the smell of marijuana. While these offenses remain infractions under Virginia law, police can only enforce them if they pull drivers over for primary traffic offenses, such as speeding. These prohibitions are backed by the exclusionary rule; any evidence discovered or obtained as a result of the above stops is inadmissible in any trial, hearing, or other proceeding.

Similarly, the Virginia law protects new drivers from being stopped for minor offenses, including driving while using a cell phone or other wireless telecommunications device, regardless of whether the device

[182] In 2022, soon after implementation of the bill and before any study of its effect, Virginia Del. Ronnie Campbell proposed legislation to rescind this law, noting, *inter alia*, that rescission would help to catch serial killers. In response to this proposal, Executive Director of the Neighborhood Resource Center of Greater Fulton, Breanne Armbrust stated that "data doesn't show that serial killers are pulled over. However, pretextual policing has disproportionately impacted Richmond's Fulton neighborhood residents." Josephine Walker, *Virginia House Bill Would Reverse Law Limiting Minor Traffic Stops*, PRINCE WILLIAM TIMES (February 23, 2022), https://www.princewilliamtimes.com/news/va-house-bill-would-reverse-law-limiting-minor-traffic-stops/article_255b32dc-94e3-11ec-a932-a7f2d666a6b1.html.
[183] Va. Code Ann. § 46.2-1052(p) (1950).
[184] § 46.2-1054(b).
[185] § 46.2-646(e).
[186] § 46.2-810.1(c).
[187] § 46.2-1094(f).

is hand-held or not;[188] driving with more than one passenger under the age of 21;[189] or driving between the hours or midnight and 4:00 a.m.[190] The law also protects pedestrians by prohibiting police from stopping them for jaywalking[191] or entering a highway where the pedestrian cannot be seen.[192] Finally, the Virginia law limits the authority of local jurisdictions to initiate pretext stops. It prohibits local ordinances relating to the ownership or maintenance of a motor vehicle from being the cause to stop or arrest a driver unless that violation is a jailable offense. In addition, a county, city, or town is prohibited from allowing police officers to stop a driver when such stop is prohibited by Virginia law.[193]

In March 2022, Oregon followed Virginia's suit and passed legislation prohibiting police from initiating motor vehicle stops based on certain minor infractions regarding vehicle lighting. Specifically, police cannot stop a driver for:

- A headlight that is not in compliance with Oregon law if the vehicle has a headlight that is in compliance;
- A taillight that is not in compliance with Oregon law if the vehicle has a taillight that is in compliance;
- A brake light that is not in compliance with Oregon law if the vehicle has a brake light that is in compliance;
- A taillight that does not emit a red light as required by Oregon law; or
- A registration plate light that is not in compliance with Oregon law.[194]

A police officer may issue a citation for such circumstances only if the police officer has already stopped and detained the driver operating the motor vehicle for a separate traffic violation or other offense.[195]

By contrast, the California law is much more limited than the Virginia and Oregon laws. On September 30, 2022, Governor Newsom signed into law a bill that prohibits police officers from stopping pedestrians who jaywalk when roadways are clear, unless there is an immediate danger of collision with a moving vehicle or other device moving exclusively by human power.[196] The law went into effect on January 1, 2023.[197]

California, Virginia, and Oregon are not the only states to address the issue of pretext stops, as more legislators have introduced state bills to prohibit the police from stopping drivers for minor offenses. In May 2021, a bill was introduced in Maine that is very similar to the Virginia and Oregon laws; if enacted, it will prohibit a police officer from enforcing a secondary offense unless the officer has detained a driver for a suspected primary violation.[198] The driver will only be subject to a penalty for a violation of

[188] § 46.2-335(e). This also applies to a holder of a provisional license, the initial license issued to any person younger than 18 years of age. § 46.2-334.01(c)(1).
[189] § 46.2-335(c). This also applies to the holder of a provisional license. § 46.2-334.01(b).
[190] § 46.2-335(d). This also applies to the holder of a provisional license. § 46.2-334.01(c).
[191] § 46.2-923(c).
[192] § 46.2-926(b).
[193] § 46.2-1300(c).
[194] SB 1510 (Ore. 2022).
[195] *Id.*
[196] AB 2147 (Cali. 2022).
[197] *Id.*
[198] LD 1479, 130th Leg. (Maine 2021). As of April 2022, the bill was still pending.

the secondary offense if the driver is required to pay a fine for the primary violation.[199] Secondary offenses include:

- Operating a motor vehicle after suspension for failure to pay a fine or fee;
- Failing to register a vehicle, in the vehicle was registered and the registration has been expired for less than 150 days;
- Operating a defective vehicle, if the inspection certificate has been expired for less than 7 months and if there is no imminent safety problem clearly visible;
- Operating a vehicle with an object placed in a manner that obstructs or interferes with the view of the driver, if the object is hanging from the rearview mirror;
- Operating a vehicle with windows or the windshield obscured;
- Operating a vehicle that is not equipped with a muffler that prevents excessive or unusual noise;
- Improperly displaying a registration plate, if the registration plate is visible;
- Improperly displaying a registration plate, if the registration plate is visible but not legible due to mud, snow, or inclement weather;
- Operating a vehicle without a proper registration; and
- Operating a vehicle in violation of traffic lane requirements.

A primary violation is defined in the statute as a violation other than a secondary offense.[200]

In March 2022, a bill was introduced in New Jersey that is slightly different from the other laws but will have the same effect of prohibiting the police from initiating stops for minor offenses. The bill takes a more robust approach to preventing pretext stops; rather than identifying a list of minor offenses for which a police officer cannot initiate a stop, it identifies a list of offenses for which a police officer can initiate a stop. Thus, police officers may only initiate stops in certain limited situations.

If enacted, the law will require police officers to issue a citation *by mail* for a violation of New Jersey's motor vehicles and traffic regulations rather than initiating a motor vehicle stop in most cases.[201] However, a police officer must stop a vehicle for the following violations:

- racing;
- illegal passing;
- tailgating;
- reckless driving;
- using a cell phone or electronic communication device in a moving vehicle;
- driving in speeds in excess of 30 miles per hour over the speed limit;
- leaving the scene of an accident; or
- driving while intoxicated.

The bill authorizes police to initiate a motor vehicle stop following a motor vehicle or traffic violation if there is a risk to public safety as a result of the violation.[202] A police officer may also initiate a stop if

[199] *Id.*
[200] *Id.*
[201] A3603, 220th Leg. (N.J. 2022).
[202] *Id.*

there is an outstanding warrant for the arrest of the registered owner of a vehicle or the officer has reasonable cause to believe the driver of the motor vehicle has committed a crime.[203]

States are not the only jurisdictions taking this approach. At a local level, cities have begun to adopt legislation that prohibits police from initiating stops for certain low-level offenses. In October 2021, Philadelphia became the first large city to do so. Under the Philadelphia law, vehicle and traffic violations are split into primary and secondary violations, with primary violations constituting infractions that are not secondary.[204] Secondary violations include:

- Driving an unregistered car when the vehicle had been previously registered within the Commonwealth within 60 days of the observed infraction;
- Failing to place a temporary registration permit to the extreme lower left-hand (driver side) inside corner of the rear window of a vehicle with the printed information visible from the outside so long as the registration card is clearly displayed in the rear window;
- Driving with a registration plate that is not securely fastened to the vehicle but is otherwise clearly displayed;
- Failing to use car lights and other illuminating devices where the violation is limited to a single brake, head, or running light, a single bulb in a larger light of the same, or any other single light or bulb of a vehicle light;
- Driving with any object or material hanging from the inside rearview mirror or otherwise hung, placed, or attached so as to materially obstruct, obscure, or impair the driver's vision through the front windshield or any manner as to constitute a safety hazard;
- Driving without bumpers in both the front and rear of the vehicle;
- Operating a vehicle without an official Certificate of Inspection, where the certificate was valid within 60 days of the observed infraction; or
- Operating a vehicle without an Evidence of Emission Inspection, where the certificate was valid within 60 days of the observed infraction.

In December 2021, mere months after Philadelphia passed its law, Pittsburgh adopted the same law.[205]

F. STATUTE REQUIRING ANALYSIS OF PRIMARY VERSUS SECONDARY STOPS

Although legislation limiting some police conduct in secondary stops was originally prepared for the Vermont General Assembly last year, the proposed statute has been amended. The current law, enacted in May 2022, requires Vermont's Executive Director of Racial Equity, the Commissioner of Motor Vehicles, and the Commissioner of Public Safety to examine all motor vehicle violations for the purpose of making recommendations on whether statutes should be repealed, modified, or limited to secondary enforcement.[206] The Executive Directors and Commissioners are required to provide an interim report on the House and Senate Committees on Judiciary and Transportation on or before January 15, 2023 and a final written report on or before October 1, 2023.[207]

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[203] *Id.*
[204] Bill Nos. 210635 & 210636 (2021) (amending Phila. Code, Tit. 12 (1958)).
[205] Ordinance No. 2021-2174 (2021) (amending Pitt. Code of Ordinances § 503.17).
[206] H. 635 (Vt. 2022).
[207] *Id.*

G. THE STRENGTHS OF MINOR STOP BANS

Identifying pretext stops is difficult absent an admission by an officer that a stop was pretextual. Identifying a race-based stop is "doubly difficult; an officer is unlikely to admit they stopped a civilian because that person was of a certain racial group, as such admission would automatically make the stop unconstitutional."[208] Thus, statutes that bar racial profiling may have been written with the best of intentions, but can be challenging to apply. On the other hand, statutes that remove subjective analysis of a police officer's motivation, such as those that prohibit police officers from stopping drivers and pedestrians for minor offenses, eliminate the requirement of assessing whether racial profiling is occurring. By limiting a police officer's ability to initiate stops for low-level offenses, such statutes eliminate the necessity to analyze the officer's subjective intent. Prohibiting stops for low-level and secondary offenses decreases the likelihood that pretext stops will occur.

H. ALTERNATIVES TO MINOR STOP BANS

Some critics believe there are more effective ways to reduce racial disparities in traffic enforcement than eliminating stops for secondary violations. They recommend separating traffic enforcement from crime prevention.[209] By creating a separate entity, proponents argue that safety concerns can still be addressed without incorporating the criminal justice system. [210] To do so, police officers would be replaced by a separate traffic enforcement body.[211] In their 2021 law review article, Professors Rushin and Edwards note,

> Finally, our results may support emerging scholarly calls for the decoupling of criminal investigations and traffic enforcement. The pretextual stops that occurred in major cases like *Whren* and *Ladson*[212] happened when police officers tasked with the enforcement of more serious criminal offenses used a technical traffic violation to justify the investigation of a hunch or suspicion. For example, in *Ladson*, Officers Mack and Ziesmer were not actually concerned about whether the driver had an expired registration sticker. As members of a local gang-patrol unit, they suspected that the driver was trafficking drugs. Similarly, in *Whren*, the officers were patrolling an area known for drug trafficking, seemingly in anticipation of uncovering evidence of drug crimes. In each case, the officers were able to conduct a pretextual stop because the law empowered them both to make traffic stops and to make arrests for other criminal offenses. Some non-U.S. jurisdictions have experimented with decriminalizing some traffic offenses and transferring traffic enforcement to units whose only responsibility is to enforce the traffic code, not to investigate and respond to criminal acts more broadly. This kind of decoupling of traffic enforcement from other police work may result in more evenhanded enforcement, and it would presumably eliminate the use of traffic enforcement as a pretext for other criminal investigations.[213]

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[208] Yin, *supra* note 146, at 1686.
[209] *Id.* at 1702.
[210] *Id.* at 1706.
[211] *Id.*
[212] *State v. Ladson*, 979 P.2d 833 (Wash. 1999).
[213] Rushin & Edwards, *supra* note 10, at 702-03.

For example, Berkeley, California is considering the possibility of establishing a separate Department of Transportation, called "BerkDOT," which will be comprised of unsworn, unarmed transportation workers with no authority to enforce criminal laws. When BerkDOT workers observe a traffic violation, they will be authorized to issue a "fix-it" ticket, which is a warning to resolve the issue at the basis for the stop, rather than a fine. If the driver fails to comply, the punishment will be community service rather than a fine. [214]

Because pretext stops are "often plausibly couched in real safety concerns," a law that eliminates police authority to make those stops will likely receive criticism that it does not prioritize road safety.[215] This in turn can make it difficult to gain support for such a law.[216] Professors Rushin and Edwards note,

> Opponents of such a proposal [to transfer certain traffic enforcement duties to non-law enforcement personnel] may understandably argue that enforcement of traffic laws exposes non-law-enforcement officers to unreasonable risks of physical harm. Policing, they may argue, is a dangerous job, even if an officer is primarily engaged in traffic stops. But compelling new evidence suggests that many may overestimate the risk of injuries to police officers engaged in routine traffic enforcement. Analyzing over 200 law-enforcement agencies in Florida over a ten-year period, Jordan Blair Woods found that the risk of violence in traffic enforcement was extremely low. Roughly one in every 6.5 million routine traffic stops results in the felonious killing of an officer, and one in every 361,111 stops results in an assault causing serious injury. This finding suggests, at a minimum, that traffic enforcement may not be so dangerous as to necessitate the involvement of traditional police personnel.[217]

Another proposal to reduce the use of law enforcement officers in low-level traffic stops is to increase the use of technology, such as automated cameras that generate photos and videos. Professors Rushin and Edwards considered this option:

> Alternatively, our findings may strengthen arguments for reducing police discretion in traffic enforcement through the integration of emerging technology. Elizabeth Joh has persuasively argued that traffic-enforcement technologies could eliminate the need for most discretionary traffic stops. *Whren*, she argued, has made challenges to police discretion "[i]mpracticable." Instead, a number of technologies could, in effect, partially supplant ordinary, discretionary traffic enforcement by police officers: red-light cameras, speed cameras, and automatic license-plate readers. As Joh explains, such automated enforcement technologies could more fairly and consistently perform moving-violation enforcement, criminal-record checks, vehicle-defects checks, and drunk-driving enforcement. And Joh has argued that automated enforcement could avoid police interactions that are "humiliating or discriminatory." Obviously, these traffic-enforcement technologies may still create significant risks of inequality in how they are developed, in the algorithms they employ, in the data they create, and in where they are utilized. Andrew Guthrie Ferguson has written extensively on the risks associated with these types of advanced policing technologies. To be clear, our study

[214] Yin, *supra* note 146, at 1702.
[215] *Id.*
[216] *Id.*
[217] Rushin & Edwards, *supra* note 10, at 703-04.

> alone does not support a wholesale move from human to technological enforcement of traffic codes. Nevertheless, our data is consistent with the hypothesis that police may abuse the discretion given to them by *Whren* and similar state cases. To the extent that technological enforcement of traffic codes may limit opportunities to exercise such discretion, it is possible that a careful and well-regulated technological-enforcement regime could produce more equitable outcomes.[218]

These types of reforms would have economic consequences that might be both advantageous and disadvantageous to communities. While there might be loss of fines revenue for a community, there would also be a reduction in court staffing and costs.

I. POLICE DEPARTMENT POLICIES

Some police departments have adopted internal policies targeting pretext stops. For example, in March 2022, the Los Angeles Police Department ("LAPD") adopted a policy that prohibits pretext stops unless officers are, in addition to the traffic violation, acting on articulable information which may or may not amount to reasonable suspicion regarding a serious crime (potential bodily injury or death).[219] The policy further states that such decisions should not be based on a "mere hunch or on generalized characteristics such as a person's race, gender, age, homeless circumstance, or presence in a high-crime location."[220] The reason for all pretext stops, as well as the citations and warning resulting from them, should be articulated on the officer's body camera, and should include the officer's responses to any questions asked by the stopped individual.[221] A failure to articulate the information which, in addition to the traffic violation, caused the officer to make the stop will result in progressive discipline, starting with counseling and retraining.[222]

Also in 2022, the Seattle Police Department ("SPD") adopted an internal policy to deprioritize low-risk public safety violations by agreeing not to treat certain low-level offenses as primary reasons to initiate a traffic stop.[223] These include:

- Expired or missing vehicle registrations;
- Issues with the display of registration plates;
- Items hanging from the rear-view mirror and cracks in the windshield; and
- Bicycle helmet violations.[224]

Such violations can still be enforced if accompanied by a primary violation.[225]

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[218] *Id.*
[219] 240.06 Policy – Limitation on Use of Pretextual Stops, L.A.P.D. (March 9, 2022), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/03/3_9_22_SO_No._3_Policy_Limitation_on_Use_of_Pretextual_Stops_Established.pdf.
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] Letter to Inspector General Lisa Judge, Seattle Police Dep't (Jan. 14, 2022), https://spdblotter.seattle.gov/2022/01/14/spd-updates-traffic-stop-guidelines/.
[224] *Id.*
[225] *Id.*

The Hamden Police Department in Hamden, Connecticut is another police department that has addressed the issue of pretext stops. While no written directives have been issued, former Hamden Police Chief Timothy Wydra communicated to the police department in 2015 that the "priority is safety, not tail light stops."[226] Data from that year showed that Hamden police officers made far fewer stops and did not disproportionately stop people of color.

Currently, the San Francisco Police Department is considering a policy that, if enacted, will ban police from making nine specific types of low-level stops.[227] These stops include failing to display registration tags or driving with an expired registration; failing to illuminate a license plate; driving with one tail light, or driving without tail lights during the day;[228] affixing objects to windows or hanging objects from the rearview mirror;[229] failing to signal while turning or changing lanes; sleeping in a car; failing to display or properly mount license plates when the rear plate is still visible and legible; driving with a missing or broken brake light;[230] and walking or cycling in violation of the California Vehicle Code or San Francisco Transportation Code.[231]

As previously noted in this report's section on Rochester and Monroe County, the Rochester Police Department's general orders bar racial profiling, permit pretext stops, and fail to address how to avoid racial disparities when engaging in pretext stops.

J. DISTRICT ATTORNEYS' POLICIES

Several district attorneys have adopted policies regarding pretext stops. In 2020, the San Francisco District Attorney's Office adopted a policy prohibiting prosecutors from charging people with the possession of contraband stemming solely from pretext stops.[232] The Ingham County Prosecutor's Office in Michigan adopted a similar approach in July 2021, stating that the Office would no longer charge crimes resulting from traffic stops not related to public safety.[233] Likewise, in September 2021, Ramsey County District Attorney's Office in Minnesota announced it would no longer prosecute felony offenses solely stemming from non-public safety stop, which include: vehicle registrations; license plate illumination; muffler noise violations; windshield violations; window tint; and headlights, signal lights, or rear lamp violations (unless both headlights do not work).[234] In January 2022, the Chittenden County

[226] Jeff Cohen, *One Police Department's Response to Data on Racial Disparities in Traffic Stops*, Conn. Pub. Radio (May 11, 2016).
[227] Eleni Balakrishnan, *New SFPD Traffic Police Would Ban Nine 'Pretext' Stops*, MISSION LOCAL, Dec. 2, 2022.
[228] Police would still be able to stop a driver with no taillights at night.
[229] Police would still be able to stop a driver if the object obstructs the driver's vision and "substantially increases the likelihood of injury or death."
[230] Police would still be able to stop a driver for driving with no brake lights.
[231] Police would still be able to stop someone if there is "immediate danger" they will crash with another vehicle or bicycle.
[232] Policy Directive: Declination of Contraband Charges Based on Pretextual Stops, San Fran. Dist. Attorney's Office (2020), https://sfdistrictattorney.org/wp-content/uploads/2020/11/Declination-of-Contraband-Charges-Based-on-Pretextual-Stops.pdf.
[233] Kara Berg, *Ingham County Prosecutor: Office Won't Issue Charges from Non-Safety-Related Traffic Stops*, Lansing State Journal, July 27, 2021, https://www.lansingstatejournal.com/story/news/2021/07/27/ingham-county-prosecutor-changes-traffic-stop-policy-reduce-disparity/5383398001/.
[234] Val Lick, *Ramsey County to End Felony Prosecutions From Non-Public Safety Traffic Stops*, KARE11, Sept. 8, 2021, https://www.kare11.com/article/news/local/ramsey-county-end-felony-prosecutions-non-public-safety-traffic-stops/89-672301f3-0824-4f12-87a1-890fba5d0a86.

Prosecutor's Office in Vermont adopted the same approach, stating that the Office would no longer pursue charges in cases where evidence of a crime was gathered during a non-safety traffic stop.[235]

K. A SUMMARY OF LEGISLATION AND POLICY COMPONENTS ADDRESSING PRETEXT STOPS

The above legislation and policies of police departments and prosecutors' offices contain several common components. They include:

- Restricting the types of charges for which police officers may stop motorists;
- Prior to engaging in a stop, requiring the police officer to articulate the reason for the stop on body-worn camera (BWC);
- Prior to engaging in a search of an individual, vehicle, or item within a vehicle, requiring the police officer to articulate the reason for the search on BWC;
- Collection of data on the racial and other demographics of who gets stopped for low-level or secondary violations;
- Making data collected publicly accessible on governmental or law enforcement websites;
- Requiring written consent from a motorist prior to engaging in a search of a vehicle or item within a vehicle;
- Suppression of evidence seized as a result of a pretext stop by courts pursuant to legislation;
- Refusal by prosecutors to use evidence seized by law enforcement officer as a result of a pretext stop;
- Discipline and/or retraining of officers who violate prohibitions related to pretext stops;
- Discipline and/or retraining of officers who violate requirements that information be collected concerning demographic and other data relating to individuals who are stopped;
- Creating an unarmed, non-police traffic enforcement organization that addresses low-level traffic violations;
- Prohibiting vehicle stops based on the odor of marijuana;
- Prohibiting use of drug detection canines following stops for low-level traffic violations; and
- Automating some traffic enforcement through use of cameras and video technology.

In addition to the suggestions above, articles about pretext stops suggest other possible additions to this list. They include:

- Ensuring that stops for warrants are based on well-founded information;
- Monitoring individual officers who are observed through data collection to engage in racially disparate policing and requiring a higher level of scrutiny before prosecuting pretext stop-related cases in which they are involved; and
- Stricter protocols for engaging in low-level stops.

[235] Non-Public Safety Stop Policy, Office of the Chittenden County State's Attorney (Dec. 21, 2021, updated Jan 7, 2022), https://vtdigger.org/2022/01/12/chittenden-prosecutor-wont-try-charges-resulting-from-non-public-safety-traffic-stops/.

L. FINAL THOUGHTS ON LEGISLATION VERSUS INTERNAL POLICIES

At first glance, internal policies from District Attorney's Offices and police departments seem comprehensive and effective. Most of them operate similarly to legislation banning minor offense stops. However, internal departmental reforms are less likely to create lasting change; leadership in police departments and district attorney offices can change or adopt different policies as they see fit.[236] Legislation is much more durable because overturning a statute requires another legislative act.

[236] Yin, *supra* note 146, at 1704.

X. A PATH FORWARD

> *This book's concluding message is simple: the benefits of investigatory stops are modest and greatly exaggerated, yet their costs are substantial and largely unrecognized. It is time to end this failed practice.*
>
> *– Pulled Over, p. 153.*

As this report demonstrates, pretext stops are conducted in racially disparate ways across the country. The authors of *Pulled Over* consider the harm caused to our communities as a result of policies that permit these practices to continue.

> How harmful are these experiences that target African Americans? Do they cause fleeting annoyance or lasting scars? How do they affect one's life, sense of freedom and security, and perceived place in society? Do these experiences erode faith that the police are fair? Do they affect society more broadly by contributing to racial divisions and inequalities?
>
> While social scientists are beginning to address these questions, policy makers are not. Judges see only cases in which stops and searches yield drugs or illegal guns. They typically conclude that the harm to a driver who is found with illegal drugs was outweighed by the benefits of reducing crime. Judges do not see the many more stops and searches that yield no drugs or guns, and they rarely ask whether these stops harm the innocent, who are subjected to intrusive questions, searches, handcuffing, and worse. Even the police, those closest to the stop, rarely consider the possibility that investigatory stops may cause deep and lasting harm. As we have seen, stopped drivers try to remain stoic, and officers may interpret this as a sign of indifference to the ordeal. Perhaps in the context of the destruction of lives and communities caused by drug and gun crime – conditions police face daily- the brief questioning and incarceration of a fruitless investigatory stop may seem trivial.
>
> An accumulating body of research suggests that intrusive police stops cause deep and lasting harm; they are a form of racial subordination.[237]

It is time – indeed, long past time – to make a change.

There are ways of redressing wrongful discrimination, such as lawsuits and police review boards. And we support those efforts. But it is our belief that in this time of recognition of the institutional biases in the criminal justice system, the best way to confront and eliminate the racial bias in this area of policing is to prevent it from happening in the first place. The authors of *Pulled Over*, *Suspect Citizens*, and other studies and articles cited in this report have recommended various solutions.

> What is needed is motivation to change. Pressure from litigation, the public, media, and scholars may play a role. This helped to end the practice of shooting at fleeing felons. It makes a difference in police stops too. As [two researchers] have shown, police

[237] EPP, MAYNARD-MOODY, & HAIDER-MARKEL, s*upra* note 5, at 136.

> departments that have come under pressure from media attention over racial profiling have reduced the level of racial disparities in police stops in their jurisdictions. . . Changes in law and court rulings, too, are necessary and could provide an enduring foundation for reforms.[238]

Changes can be made in several contexts. Some of those focused on change seek to eliminate pretext stops through enactment of laws that restrict or end the practice. Some, like the Vera Institute, seek to alter prosecution policies. And some, like police chiefs in Los Angeles and other jurisdictions seek to modify police policies.

Empire Justice Center recognizes that New York has taken an important step in recognizing the racial disparities in enforcement of low-level stops by its passage of Assembly Bill A7599/Senate Bill S7353. But we believe that law should be seen as a beginning, not a conclusion, of these efforts. Empire Justice Center will be seeking to gain support for additional legislation that will, based on recommendations of the experts, further reduce racial disparities in policing. We need your support to work towards this important change. As we work to eliminate this form of bias in policing, we will be asking you to join us. We will also be asking for your input.

As we noted in the beginning of this report, this is a preliminary report. We intend to issue a report later in 2023 with additional information and suggestions. We have tried to anticipate questions and provide information in this report that will educate the public to the problems that exist with pretext stops. But we invite you to share with us your answers to the questions we posed in our introduction:

5. What else would you like to know about this subject?
6. How do you think you can help?
7. What other suggestions do you have to help us #StopTheStops?
8. What would you like to see addressed in a final report?

If you have answers to the above questions, more questions, or additional information to share, please email us at JPaperno@empirejustice.org

Thank you.

[238] *Id.* at 163.

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