If Black Lives Really Matter, We Must End Traffic Stops!

Kenneth Williams
IF BLACK LIVES REALLY MATTER,
WE MUST END TRAFFIC STOPS!

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Very few issues have garnered more public attention than police involved shootings and their use of deadly force, especially when this force is used against African Americans. That’s because African Americans are disproportionately killed by police. These fatal

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2. See Fatal Force, WASH. POST (Sept. 6, 2023), https://www.washingtonpost.com
shootings and deaths have resulted in a public outcry among many and demands for justice. As a result, there have been numerous proposals for reforming police practices regarding the use of deadly force and for making police more legally accountable for their actions. There was initial optimism that police body cameras would substantially reduce police involved shootings and make police more accountable. Although most police departments have outfitted their officers with body cameras, this reform has not changed the instances of police involved shootings, and as the police beating death of Tyre Nichols demonstrates, the cameras do not even seem to be a strong deterrent to the unlawful use of deadly force.

In response to the George Floyd murder and the protests that followed, more recent reform proposals have sought to make it more difficult for the police to justify the use of deadly force. These reforms assume that the core of the problem are a few bad officers and that the situation will improve once those bad officers are removed from police forces. However, the core of the problem is not individual racism among police officers; rather, the problem is institutional.


See, e.g., Lee, supra note 1, at 664–65. The reforms proposed in this article have been implemented in Connecticut, District of Columbia, and Virginia. See Cynthia Lee, Officer-Created Jeopardy: Broadening the Time Frame for Assessing a Police Officer’s Use of Deadly Force, 89 GEO. WASH. L. REV. 1362, 1371 n.13 (2021).


See CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL,
has been no reduction in police use of deadly force and, in fact, the numbers of police involved shootings have either remained steady or have increased despite the outcry over these deadly encounters.\(^\text{10}\) Furthermore, it explains why there has been no increase in charges being brought against officers and no increase in convictions of police officers involved in deadly shootings.\(^\text{11}\)

One of the primary reasons there has not been a decline in police-involved shootings, especially of African Americans, is because frequently these shootings occur during initial non-violent traffic stops and it is fairly easy for police officers to justify a traffic stop.\(^\text{12}\) Traffic stops are the most frequent interaction between the police and civilians.\(^\text{13}\) Many of the stops are for equipment violations such as broken taillights.\(^\text{14}\) Although there is little evidence that traffic stops control crime,\(^\text{15}\) they can be very dangerous encounters, primarily for the civilian who has been stopped.\(^\text{16}\)

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**Pulled Over: How Police Stops Define Race and Citizenship** 12 (2014) (“The investigatory stop is such a racially framed, institutionally supported practice. It is supported by scholarly research, numerous individual department policies, state-level training regimens, professional association resolutions, federal agency support, and judicial approval all the way up to the Supreme Court, and it is widely viewed in policing as a quintessentially professional practice.”).


14. A survey of police officers found that the second most common reason after speeding for traffic stops was equipment violations. See Nancy Perry, *Police Research: 1,000 Cops Address Non-Compliance During Traffic Stops* (June 29, 2021), https://www.police.com/traffic-patrol/articles/police-research-1000-cops-address-non-compliance -during-traffic-stops-C3mPToghCR2O4Dxu/#form-success-message [https://perma.cc/JH95-9XF].

15. See EPP, MAYNARD-MOODY & HAIDER-MARTEL, *supra* note 9, at 153 (“Although police widely believe that investigatory stops help fight crime, the evidence supporting this belief is surprisingly thin. To be sure, officers sometimes seize guns and illegal drugs in these stops. But this occurs rarely; most people subjected to these stops are innocent and no weapon or contraband is seized.”).

16. See Kirkpatrick, Eder, Barker & Tate, *supra* note 12. However, very few police officers are killed or injured during traffic stops. Woods, *supra* note 13, at 635 (concluding, after reviewing traffic stops that resulted in violence against officers across more than 200 law enforcement agencies in Florida over a ten-year period, that “[t]he findings reveal that violence against officers was rare and that incidents that do involve
investigation in 2021 found 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. 17 There is no way to know the number who are injured but not killed during traffic stops since that data is not collected. 18 These traffic stops are especially dangerous for African Americans. 19 African Americans are more likely to be stopped by police, and are disproportionately killed by police, even when they are not wielding a weapon or fleeing from a crime. 20

Although police fatally shoot suspects of all races, this Article’s focus is on the shootings of African Americans by the police because of the heavy and disproportionate toll of these fatal shootings on the African American community. 21 This Article will argue that African Americans will continue to be fatally shot and killed by police disproportionately and in many cases unjustifiably as long as police are allowed to stop motorists for minor non-violent traffic

violence are typically low risk and do not involve weapons.

17. See Kirkpatrick, Eder, Barker & Tate, supra note 12.


20. Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 NATURE HUM. BEHAV. 736, 737 (2020).


22. See Gardiner & Halleck, supra note 11.


24. Given the passage of new laws aimed at undocumented immigrants, police stops of members of Latinx communities are likely to become more common (“[T]here is nothing in the Court’s decision in Arizona v. United States [upholding Arizona’s requirement that local police check people’s immigration status] that will keep officers from stopping drivers on some pretext, calling the federal immigration authorities for documentation, and then, after waiting without response for fifteen minutes, releasing these drivers.”). EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 158–59.
infractions. These stops do little to combat crime and are not worth the lives they upend and the continued unconstitutional racial discrimination that motivates many of these stops. Although the standards for police use of force need to be reformed and police culture has to be changed, the other reform that is imperative in order to significantly reduce the disproportionate fatal police shootings of African Americans is to minimize interaction between police and African Americans and the best way to accomplish this is by eliminating non-violent traffic stops. Police should only be able to stop civilians for violations that truly pose a danger to public safety. However, this Article is not advocating that traffic infractions be ignored. Rather, this Article will argue that there are safer and more efficient means of enforcing traffic rules without police-initiated traffic stops.

In order to demonstrate how this issue impacts African Americans of all socio-economic backgrounds, this Article will begin with a description of one of my personal experiences with police-initiated traffic stops. Even though my experience thankfully did not end fatally, many unfortunately have. In the next section, therefore, I will discuss a few high-profile, police-involved fatal shootings of African Americans during traffic stops as illustrations of the problem. In the next section, I will discuss the purposes traffic stops serve other than public safety. Traffic stops are used by many jurisdictions for the purpose of enhancing their revenue. Traffic stops are also often used to investigate other suspected criminal activity. These pretextual stops frequently result in racial profiling thus putting African Americans at increased risk of being killed by police. There is an abundance of evidence that racial profiling in traffic stops is systemic, including traffic stop statistics and the fact that African Americans are stopped less frequently at night when their race is obscured by a “veil of darkness.” The Article then discusses how the U.S. Supreme Court, through a series of deci-

26. See id.
27. See id.
30. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 159; Kirkpatrick, Eder, Barker & Tate, supra note 12.
sions, has empowered the police to use racial profiling as a law enforcement mechanism and has made police essentially unaccountable when they do so.

In the next section, the Article argues that given the fact that the Supreme Court has empowered the police with the authority to racially profile with impunity, other reforms should be explored to minimize the risks of harm to African Americans. This Article discusses how police interaction with individuals can be minimized by removing traffic enforcement as a police function. This reform has been implemented in a few U.S. jurisdictions, as well as in some nations, such as New Zealand from 1936 to 1992, but needs to be universally adopted. In the final section, I will respond to some likely objections to eliminating traffic stops, explain why eliminating traffic stops will not imperil public safety or violate constitutional rights, and critique other proposals short of eliminating traffic stops that have been proposed, such as using unarmed traffic agents in lieu of police as enforcement agents, and explain why those measures do not go far enough.

I. MY PERSONAL EXPERIENCE

No African American is immune from being stopped and mistreated by the police, including myself. Like many African Americans, I have been stopped on numerous occasions by police for alleged traffic infractions. There is one traffic stop, however, that stands out more than the others. During the early 1990s, when I was in my twenties and had just begun my career as a law professor, I had a dangerous personal experience with a police officer. I had gone out one night for a couple of drinks with some friends. As I was driving home, I noticed flashing police lights behind me. I initially did not believe that I was the target since I was especially careful while driving at night in the predominately white neighborhood that I resided in at the time. I was also fully aware that the Houston police had recently been involved in the controversial fatal shooting of Byron Gillum, another African American male. When

32. See Kirkpatrick, Eder & Barker, supra note 25.
34. See Maclin, supra note 19, at 253.
35. Gillum was the third African American shot by the same white police officer during his seven years on the force. He was never indicted for either shooting. See Police
I realized that I was the target of the flashing lights I suspected that was because I was an African American male driving a sports car in a predominately white neighborhood at night, but I immediately pulled my car over and stopped.

The white officer began by requesting my driver’s license and insurance, which I immediately provided. Although the officer never explained why I was being pulled over, I knew that, as a then young African American male, it was important for me to be compliant and not argue with the officer since that would probably make the situation worse. After I provided my driver’s license and proof of insurance as requested, the officer ordered me out of my car. Since one of my teaching assignments was criminal law and procedure, I knew that police officers had been given that authority by the U.S. Supreme Court and I therefore complied. 36

The officer instructed me to walk straight ahead in the middle of the street which I did as requested. As I was doing so, he made a totally unprovoked comment, something like, “Don’t cause any trouble because if you do, I’ll have to shoot you.” I continued to walk as instructed. His comment caused me to be even more frightened than I already was, but I had to retain enough composure to walk in a straight line in order to avoid a DWI arrest and, of course, something much worse. After I completed walking as directed, the officer ordered me to stand by the police car with my hands up in the air. Shortly thereafter, apparently my license and insurance were cleared, and he allowed me to return to my car. He returned my driver’s license and insurance card, and I was allowed to leave. I was obviously relieved that I got out of that situation alive.

This encounter has stayed with me throughout my life. I have often thought about how one slight miscalculation or something as inadvertent as a sneeze could have easily caused me to be shot and killed as so many other African American males like me in similar situations have been and continue to be. 37 I have often thought about how I could have been denied my career as a law professor and lawyer by this officer’s bullet. 38 I have also often thought about how it was obvious that the officer believed that he could shoot me with impunity and how he believed that he would face no consequences.

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37. See, e.g., Kirkpatrick, Eder, Barker & Tate, supra note 12.

38. The bulk of my career as a lawyer has been spent representing death row inmates in habeas corpus proceedings. See, e.g., Guidry v. Dretke, 397 F.3d 306 (5th Cir. 2005); Martinez v. Davis, 653 F. App’x 308 (5th Cir. 2016).
for doing so. I have also thought about the result had I been fatally shot during this encounter. In 1990, there were no body cameras. 39 There were no witnesses to the encounter between the officer and myself. Thus, the officer most likely would have justified the shooting with a false claim that I had reached for his gun or that I had tried to escape. 40 He might have even planted a gun next to my dead body. 41 It is likely that whatever justification he proffered would have been sufficient. 42 That was an era during which a police officer's statement was almost gospel. 43 His justification would likely have been perfectly acceptable to both the local prosecutor and the Houston Police Department and the case probably would have been closed without any indictment or disciplinary action taken against this officer. 44 This officer would likely have immediately returned to the streets as though nothing had happened. 45 The killing of a young African American male at that time would have been irrelevant to most. 46 Sadly, I have thought about how this officer probably has shot others during his career, or at the very least, has violated the civil rights of many and how he probably retired from the police force with a generous pension and maybe even received accolades for his service. 47 As I have reflected on this encounter, I believe it is likely that he has never had to face any consequences for the lives that he has probably detrimentally impacted. Thankfully, I was not one of those and I survived. I am able to write about my experience and use the power I have obtained as a law professor to try to bring

39. Norwood, supra note 5.
40. See Dewan, supra note 11 (discussing officers misleading courts to believe they reasonably feared for their life).
41. See, e.g., Lee, supra note 7, at 688 n.342 (discussing a case where an officer likely planted a gun on someone he shot).
42. See Dewan, supra note 11 (noting that officers' reasoning for using deadly force is often accepted by courts and that they are often found innocent).
43. See Lee, supra note 7, at 633 (“Until fairly recently, police officers seemed to enjoy an immunity from scrutiny for fatalities resulting from officer-involved shootings.”).
44. See id.
46. See Hannah Fingerhut, Wide Shift in Opinion on Police, Race Rare in US Polling, AP NEWS (July 2, 2022, 8:00 AM), https://apnews.com/wide-shift-in-opinion-on-police-race-rare-in-us-polling-8a0269689d3f981e8d1620adbe4b95 [https://perma.cc/sZUT-SG96] (discussing how public opinion on the severity of police brutality and racial injustice is a recent and rare change).
about change so that officers like him are not able to abuse their authority and when they do, they can be held accountable.

II. EXAMPLES OF FATAL TRAFFIC STOPS

There have been many police-initiated traffic stops of African Americans that have not ended with the stopped driver being as fortunate as I was to be able to drive away. The following sections discuss how Patrick Lyoya, Philando Castille, Walter Scott, Daunte Wright, and Jayland Walker are just a few Black men stopped for traffic violations who were not so fortunate.

A. Patrick Lyoya

Patrick Lyoya was a twenty-six-year-old refugee from the Democratic Republic of the Congo.\(^{48}\) He was the father of two daughters.\(^{49}\) On April 4, 2022, he was pulled over by a police officer on a traffic stop because the license plate did not match the car.\(^{50}\) The officer and Lyoya had driven by each other and the officer turned his cruiser around and followed Lyoya before pulling him over.\(^{51}\) After he was stopped, Lyoya stepped out of his car and asked what did he do wrong.\(^ {52}\) Following “a brief exchange about whether [Lyoya] understood English and had a driver’s license, Mr. Lyoya turned away and [was] grabbed by the officer.”\(^ {53}\) Then, “he start[ed] to run

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\(^{49}\). Id.

\(^{50}\). Lyoya had been stopped previously by police on numerous occasions for traffic infractions “such as driving without a license, failing to stop at the scene of an accident and unlawful use of a vehicle.” Brittany Shammas, For Patrick Lyoya, the American Dream Became the American Nightmare, WASH. POST (May 2, 2022, 6:00 AM), https://www.washingtonpost.com/nation/2022/05/02/patrick-lyoya-grand-rapids [https://perma.cc/5JS5-ZQL2].


\(^{53}\). Id.
and [was] chased by the officer."\(^54\) The officer wrestled Lyoya to the ground where “there appear[ed] to be a struggle over the officer’s Taser.”\(^55\) The officer, while on top of Lyoya, yelled “Let go of the Taser.”\(^56\) Immediately thereafter, while still on top of Lyoya, the officer pulled out his gun and shot Lyoya in the head.\(^57\) Lyoya died as a result of the shooting.\(^58\) The entire encounter between Lyoya and the police officer lasted a total of two minutes and forty seconds.\(^59\) The officer’s body camera was deactivated just before the shooting, but a passenger in Lyoya’s automobile recorded the shooting on his cell phone.\(^60\) Some have questioned the necessity of using deadly force in this case given the fact that the police officer was on top of Lyoya and Lyoya had no weapon.\(^61\)

B. Philando Castile

Philando Castile was a thirty-two-year-old African American male and a kitchen supervisor for the St. Paul, Minnesota school district.\(^62\) On July 6, 2016, Castile was driving his car while returning from grocery shopping.\(^63\) There were two passengers in his car: his girlfriend and her four-year-old daughter.\(^64\) Castile was pulled over by Minneapolis police officer Jeronimo Yanez for an alleged broken taillight.\(^65\) Castile had previously been stopped by police forty-six times for minor traffic infractions.\(^66\) Yanez approached the

54. Id.
55. Id.
56. Id.
57. Id.
58. See Another Black Man Killed by Police, supra note 52.
59. Id.
64. Id.; Davis, supra note 62.
65. Scott, supra note 63. Castile’s girlfriend maintains that the taillight was not broken. Davis, supra note 62.
66. See Eyder Peralta & Cheryl Corley, The Driving Life and Death of Philando
car and asked Castile for his license and proof of insurance. Before complying with the officer’s command, Castile informed the officer that he had a firearm in the car. Yanez then told Castile not to pull out the weapon; Castile told him that he was not, but Yanez shot Castile multiple times. Castile’s girlfriend recorded the incident, streamed the video on social media, and narrated what had happened.

Yanez was initially allowed to return to work. After a community outrage, Yanez was suspended and charged with manslaughter. Yanez told investigators that he feared for his life because he smelled marijuana in Castile’s car. Approximately a year after the shooting, Yanez was acquitted by a jury of the manslaughter charge. It was subsequently revealed that the broken taillight was a pretext for stopping Castile. The real reason for the stop was that Yanez believed that Castile resembled a suspect in a recent armed robbery in the area.


67. Scott, supra note 63.

68. Id.

69. Id.


C. Walter Scott

On April 4, 2015, North Charleston Police Department police officer Michael Slager, while on duty, stopped Walter Scott’s vehicle for an alleged defective brake light. Following the stop, Scott, an African American male, fled on foot and Slager chased him. During the chase, Slager fired his taser at Scott twice, “hitting and bringing down Scott with the second [taser] shot.” Scott and Slager were on the ground briefly together. Scott soon thereafter got up and fled. While on the ground, “Scott did not wrestle the taser [from Slager]” and “never had the taser in his hands.” While Scott was running away, Slager “drew his department-issued firearm and fired eight shots at Scott, five of which struck Scott in the back.” Slager fired the first shot when Scott was nearly fifteen feet away. The eighth shot was fired when Scott was nearly forty feet away. At no point during the shooting did Scott turn around and face Slager. Scott died on the scene as a result of his wounds. The shooting was filmed by an innocent bystander. The video of the shooting confirmed that Scott was unarmed and running away from Slager when Slager opened fired.

Slager provided four different accounts of the shooting. Before he was aware that the shooting was filmed, Slager claimed that Scott wrestled the taser away from him and pointed the taser at him. He claimed that he shot Scott as a result. During a second interview following the shooting, Slager “claimed that Scott was ‘coming straight at him’ holding the taser, with his ‘arm extending straight out.’” Slager gave a third account at his trial. He testified that Scott took his taser and that he shot Scott as he continued

77. See United States v. Slager, 912 F.3d 224, 227–28 (4th Cir. 2019).
78. Id. at 228.
79. Id.
80. Id. at 231.
81. Id. at 228.
82. Id. at 232.
83. Slager, 912 F.3d at 228.
84. Id. at 232.
85. Id.
86. Id.
87. Id. at 228.
88. Id.
89. Slager, 912 F.3d at 234.
90. Id. at 229.
91. Id.
92. Id.
93. Id.
94. Id. at 230.
to approach him.\textsuperscript{95} Finally, he claimed that Scott was “on top of [him] at some point.”\textsuperscript{96} Neither the video of the shooting nor the innocent bystander’s account of the shooting supported any of Slager’s claims.\textsuperscript{97} The trial court described Slager’s accounts as “‘contradictory,’ ‘self-serving, evolving, and internally inconsistent.’”\textsuperscript{98}

Slager was tried in South Carolina state court for murder.\textsuperscript{99} That trial resulted in a hung jury and a mistrial.\textsuperscript{100} Slater was also indicted by a federal grand jury with violating Scott’s civil rights.\textsuperscript{101} Slager pled guilty to the charge in exchange for both the federal government dropping the other charges and South Carolina agreeing not to retry him for the murder.\textsuperscript{102} During his federal sentencing proceedings, Slager made another claim—that Scott had provoked him and thus he was entitled to a more lenient sentence.\textsuperscript{103} Although the court found that Scott yelled “Fuck the police” while on the ground with Slager, and that he ran away from Slager, neither running away nor words would constitute provocation of a reasonable person.\textsuperscript{104} Slager was sentenced to a 240-month term of imprisonment.\textsuperscript{105}

\textbf{D. Daunte Wright}

On April 11, 2021, the automobile of Daunte Wright, a twenty-year-old African American, was stopped by the Brooklyn Center police for an alleged traffic violation.\textsuperscript{106} There is dispute over the reason for the stop.\textsuperscript{107} One of the officers who stopped him, Kim Potter, claimed that Wright was observed making an inappropriate turn signal, having an illegal air freshener, and expired tags.\textsuperscript{108} Potter claims that she would not have pulled Wright over if she had

\begin{itemize}
\item \textsuperscript{95} Slager, 912 F.3d at 230.
\item \textsuperscript{96} Id. (alteration in original).
\item \textsuperscript{97} Id. at 234.
\item \textsuperscript{98} Id. at 231.
\item \textsuperscript{99} Id. at 227.
\item \textsuperscript{100} Id.
\item \textsuperscript{101} Slager, 912 F.3d at 227.
\item \textsuperscript{102} Id. at 227–28.
\item \textsuperscript{103} Id. at 232.
\item \textsuperscript{104} Id. at 237.
\item \textsuperscript{105} Id. at 227.
\item \textsuperscript{106} See What to Know About the Death of Daunte Wright, N.Y. TIMES (Feb. 21, 2022), https://www.nytimes.com/article/daunte-wright-death-minnesota.html [https://perma.cc/HPE3-RW6N].
\item \textsuperscript{108} Id.
not been training a new officer that day.\textsuperscript{109} Wright’s mother, however, claims that her son called her during the stop and told her that “he’d been pulled over for hanging air fresheners from his rearview mirror.”\textsuperscript{110}

The stop escalated when the police learned that Wright, though not armed, was wanted for arrest for failing to appear in court on a weapons charge.\textsuperscript{111} When an officer attempted to arrest and handcuff Wright, he got back into his car.\textsuperscript{112} Potter then shouted, “I’m going to tase you.”\textsuperscript{113} “Five seconds later, she yelled, ‘Taser! Taser! Taser!’ and then fired . . . into Wright’s side.”\textsuperscript{114} However, she shot him with her gun, not her taser.\textsuperscript{115} The footage of the incident shows that immediately after the shooting, Potter appears shocked and says, “I grabbed the wrong f***ing [sic] gun.”\textsuperscript{116} She was subsequently charged and convicted of manslaughter.\textsuperscript{117} However, her twenty-four-month sentence, well below the presumptive sentence for manslaughter under Minnesota law, was seen by some in the community as too lenient.\textsuperscript{118}

\textit{E. Jayland Walker}

Jayland Walker was a twenty-five-year-old African American resident of Akron, Ohio.\textsuperscript{119} On June 27, 2022, while Walker was driving, the police attempted to pull him over for an equipment violation and moving violation.\textsuperscript{120} Walker eluded the police, first by car

\begin{itemize}
  \item \textsuperscript{109} Id.
  \item \textsuperscript{112} Id.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Romo, Sullivan & Hernandez, supra note 111.
  \item \textsuperscript{118} See Nicholas Bogel-Burroughs, \textit{Kim Potter Sentenced to 2 Years in Prison for Killing Daunte Wright}, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/kim-potter-sentence-manslaughter.html [https://perma.cc/P8P4-LCRR] (stating the presumptive sentence for manslaughter under Minnesota law is about seven years in prison).
  \item \textsuperscript{120} Id.
\end{itemize}
and then by foot.  When Walker exited his vehicle, he was chased by eight Akron police officers, seven of whom were white while one was African American. These officers chased Walker for seven minutes, eventually fatally shooting him. Walker’s body had at least sixty gunshot wounds and it is estimated that at least ninety shots were fired by the officers. At the time he was shot and killed, Walker was not in possession of a gun.

III. PURPOSES OF TRAFFIC STOPS

Traffic stops are the most common interaction between police and the public. This section argues that police make traffic stops for three reasons: one official and two unofficial. First, the official justification for traffic stops is public safety. Second, many jurisdictions also use traffic infractions in order to generate revenue. Finally, many traffic stops are pretextual. The traffic infraction is not the real reason for the stop. Instead, the traffic stop is used to investigate other possible criminal activity. These pretextual stops often result in racial profiling.

A. Public Safety

The stated purpose of traffic stops is to protect public safety. There are numerous traffic infractions that a driver may commit. Some are moving violations such as speeding and failure to use turn

121. Id.
123. Id.
124. Id.
128. See McIntire & Keller, supra note 28.
129. See Corn, supra note 19, at 619–20.
130. See id.
131. See Pierson et al., supra note 20, at 738.
132. See, e.g., If You Are Pulled Over, supra note 127 (“Traffic stops are a very important law enforcement function, which maintains safety throughout our state.”).
133. See id.
There are also numerous stops that occur as a result of nonmoving violations, such as air fresheners hanging from a rear-view mirror, broken headlights or taillights, and failure to wear seat belts. These infractions are punished by fines, court costs, driving school, or community service hours. There are a handful of other traffic infractions that can result in incarceration. These include driving under the influence, driving with a suspended license, and reckless driving. There is little evidence that traffic ticket writing reduces fatal car crashes.

B. Revenue Source

As described by the New York Times, “[a] hidden scaffolding of financial incentives underpins the policing of motorists in the United States, encouraging some communities to essentially repurpose armed officers as revenue agents searching for infractions largely unrelated to public safety.” A New York Times investigation found that “at least 20 states have evaluated police performance on the number of traffic stops per hour” and that “[m]any municipalities across the country rely heavily on ticket revenue and court fees to pay for government services, and some maintain outsize police departments to help generate that money.” According to the Times investigation, “[o]ver 730 municipalities rely on fines and fees for at least 10 percent of their revenue.”

Communities that rely on traffic ticket revenue are dispersed throughout the United States. In Valley Brook, Oklahoma, a town of less than a half square mile with 870 residents, roughly $1 million is collected yearly from traffic cases, seventy-two percent of its revenue. Many of these traffic violations involve defective equipment.

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135. See, e.g., id.
136. See, e.g., id.
137. See, e.g., id.
138. See id.
139. See McIntire & Keller, supra note 28 (“For all the billions spent to promote ticket-writing by police, there is little evidence that it has helped achieve the grants’ primary goal: reducing fatal car crashes. . . . Traffic safety experts say targeted enforcement works, but improvements in automobile technology and highway engineering account for much of the progress since the 1970s and ’80s, when annual fatal crashes routinely exceeded 40,000.”). “In 2019 there were 33,244 fatal crashes nationwide.” Id.
140. Id.
141. Id.
142. Id.
143. See id.
144. Id.
Henderson, Louisiana, a town of 2000 residents, collected $1.7 million in traffic fines in 2019, about eighty-nine percent of its general revenue. Its officers were allegedly provided cash rewards for writing tickets. Oliver, Georgia, a town of 380 residents, collects half its budget from fines. A subsequent investigation discovered that police improperly wrote more than $40,000 in tickets outside of their jurisdiction. In Bratenahl, Ohio, “the police chief castigated his officers as ‘badge-wearing slugs’ in an email” in response to a downturn in ticket revenue.

Windsor, Virginia, is one of 100 communities in the state that receives a federal grant in order to encourage ticket writing by police officers. In fact, states often track the number of tickets issued as one measurement of the grant recipient’s effectiveness. A video was released in 2021 showing a Black and Latinx Army Lieutenant being threatened and pepper-sprayed by Windsor police over a license plate infraction. Just days later, elected officials questioned the police chief on why ticket revenue was down that year. The police chief subsequently “reminded his officers to issue at least ‘two tickets per hour.’”

Following the fatal police involved shooting of Michael Brown and the outcry that followed, the U.S. Department of Justice conducted an investigation of the Ferguson, Missouri, Police Department. One of the findings was that “[c]ity officials have consistently set maximizing revenue as the priority for Ferguson’s law enforcement activity. . . . City, police, and court officials for years have worked in concert to maximize revenue at every stage of the enforcement process . . . .” A report by Ferguson’s Finance Director noted approvingly that Ferguson’s fines, compared to those of surrounding municipalities, were “at or near the top of the list.” The Justice Department investigation further found that the city directs its police department to aggressively enforce its municipal code: “City and police leadership pressure officers to write citations, independent of

146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. McIntire & Keller, supra note 28.
152. Id.
153. Id.
154. Id.
155. Id.
157. Id. at 9–10.
158. Id. at 10.
any public safety need, and rely on citation productivity to fund the City budget.\textsuperscript{159}

As a result of the pressure to generate revenue through ticketing:

FPD [Ferguson Police Department] officers routinely conduct stops that have little relation to public safety and a questionable basis in law. FPD officers routinely issue multiple citations during a single stop, often for the same violation. Issuing three or four charges in one stop is not uncommon in Ferguson. Officers sometimes write six, eight, or, in at least one instance, fourteen citations for a single encounter. Indeed, officers told us that some compete to see who can issue the largest number of citations during a single stop.\textsuperscript{160}

It is not just small communities that depend on ticket revenue to sustain their governmental functions.\textsuperscript{161} A ProPublica study found that aggressive traffic ticketing accounts for about seven percent of Chicago, Illinois’s operating budget.\textsuperscript{162} Most of the ticketing is for red-light camera violations such as turning illegally or running through a red light, lacking a city sticker or having expired license plates.\textsuperscript{163} The study found that the City’s aggressive ticketing impacts the City’s African American community the hardest.\textsuperscript{164} According to ProPublica, eight of the ten zip codes with the most accumulated ticket debt in Chicago are mostly Black.\textsuperscript{165} This debt causes many to file bankruptcy because they cannot afford to pay the tickets and the additional fees, especially late fees.\textsuperscript{166} Those who do not file for bankruptcy sometimes remain indebted to the City indefinitely.\textsuperscript{167}

\textbf{C. Pretextual Stops and Racial Profiling}

In every U.S. jurisdiction there is an abundance of traffic regulations.\textsuperscript{168} Most of the regulations are relatively minor while a few

\begin{itemize}
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id. at 11.
\item \textsuperscript{162} Id.
\item \textsuperscript{163} Id.
\item \textsuperscript{164} Id.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} Id.
\item \textsuperscript{167} Sanchez & Kambhampati, supra note 161.
\item \textsuperscript{168} See Mike Baker & Nicholas Bogel-Burroughs, \textit{How a Common Air Freshener Can}
are major. Some are well known, such as speeding, texting while driving, and running a red light, while others are fairly arcane. For instance, in a number of jurisdictions drivers can be ticketed for driving too slowly. In Ohio, a driver can be ticketed for wearing headphones while driving. In Florida, a driver can be ticketed for making a right turn that spills into the left lane. As we unfortunately learned as a result of Daunte Wright’s death, some jurisdictions prohibit air fresheners on rear view mirrors.

The large number of traffic infractions empower the police to stop anyone they want since it is fairly easy for a driver to violate one of the myriad traffic regulations. It is said that the average driver commits a traffic infraction of some kind every three blocks. Thus, police have almost unfettered discretion to stop a driver. As a result of this unfettered discretion, pretextual stops have become fairly common. A pretextual stop occurs when a police officer stops a driver for a traffic violation, typically minor, for the underlying purpose of investigating possible separate and unrelated criminal offenses.

Unfortunately, there is plenty of evidence that the police do not use the power to stop drivers evenhandedly. Rather, the evidence indicates that the power to make pretextual stops often leads to racial profiling. Profiling in the law enforcement context “refers to the ‘police practice of viewing certain characteristics as indicators of a High-Stakes Traffic Stop, N.Y. TIMES (Apr. 17, 2021), https://www.nytimes.com/2021/04/17/us/police-air-fresheners.html [https://perma.cc/ZS4T-NJGQ].


170. See, e.g., OHIO REV. CODE ANN. § 4511.22 (West 2018); N.M. STAT. ANN. § 66-7-305 (West 2023).

171. See OHIO REV. CODE ANN. § 4511.84 (West 2020).

172. See FLA. STAT. ANN. § 316.510 (West 2023).

173. See Corn, supra note 19, at 619–20 (“Why [pretextual stops]? Because this legal foundation tolerates, and as a result incentivizes, the use of traffic stops as a subterfuge for wholly unrelated investigations.”).

174. Id. at 621–22.

175. See Pierson et al., supra note 20, at 736.


177. See id.

178. See id.
of criminal behavior.” Certain types of profiling are acceptable. Certain types of profiling are acceptable. For instance, when the police believe that a serial killer may be responsible for murders in a community, the police will develop a profile of what they believe might be the characteristics of the serial killer. When police have a specific description of a suspect, there is no objection to the police paying closer attention to individuals who might fit the specific description of the suspect. However, profiling becomes unacceptable when it is based solely on race.

There are two types of racial profiling. First, racial profiling occurs when race is the sole criterion for questioning, stopping, or searching a suspect. Virtually every law enforcement agency would deny that this type of profiling occurs in its agency and, in fact, most states outlaw racial profiling by its law enforcement agents. However, although there are undoubtedly still police officers who stop drivers solely based on their race, most racial profiling does not involve such overt racism. “As Professor Randall Kennedy has often observed, even the most racist police officers do not act solely on the basis of race; other factors ordinarily also come into play.” Other factors that might come into play include the age of the driver, the location of the driver (for instance, an African American driving in a white neighborhood), and the type of car being driven.

Therefore, most racial profiling falls into the second category. Racial profiling also “occurs whenever race is part of the calculus of suspicion, which may include other factors such as gender, age, general appearance, and behavior,” as well as location, type of car driven, etc. “Properly understood, . . . racial profiling occurs whenever police routinely use race as a negative signal that, along with an accumulation of other signals, causes an officer to react with suspicion.” It’s possible that an officer may not even be

183. Id.
184. Id. at 1202 n.33.
185. See id.
186. See id. at 1204.
187. Id.
188. Ramirez, Hoopes & Quinlan, supra note 182, at 1204.
189. See, e.g., 37 TEX. ADMIN. CODE § 1.114(a)(14) (2023); CAL. PENAL CODE § 13519.4(f) (West 2023).
190. Ramirez, Hoopes & Quinlan, supra note 182, at 1204.
191. Id.
194. Id.
195. Id. at 1204–05.
conscious of the fact that they are considering race in their decision to stop a driver.  

Racial profiling has become so prevalent that the term “Driving While Black” has been adopted to both describe and deride the practice. There is an abundance of evidence that racial profiling in traffic stops is widespread. First, there have been numerous studies by both governmental and non-governmental entities that have validated the widespread use of racial profiling by law enforcement officers in making traffic stops. While government findings of systemic racial profiling in Ferguson, Missouri, and Minneapolis, Minnesota, will be used as examples, it is likely that a study of most communities in the United States would result in similar findings. Second, compelling evidence that police engage in systemic racial profiling would be studies which reveal that Black drivers get pulled over less at night than during daylight when their race is often obscured by a “veil of darkness.” Third, when stopped, African American drivers are searched at a much higher rate than whites even though whites who are stopped are arrested at a higher rate, indicating that there are a greater number of African Americans being targeted than is warranted based on actual criminal behavior.

1. Ferguson

As discussed previously, the U.S. Department of Justice investigation of the Ferguson, Missouri Police Department (FPD) found that FPD “[e]ngages in a [p]attern of [u]nconstitutional [s]tops and [a]rrests in [v]iolation of the Fourth Amendment.” According to DOJ, “[s]everal incidents suggest that officers are more concerned with issuing citations and generating charges than with addressing community needs.” In addition, according to DOJ, “[t]he data

196. Id. at 1205.
198. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 155 (“Racial disparities mar most aspects of U.S. social life from employment to lifespan—but few are as wide as the disparity in who is pulled over in investigatory stops.”).
199. Id. (“African Americans are 270 percent more likely than whites to be subjected to an investigatory stop. This in itself is a deep racial injustice.”).
200. See U.S. DEP’T OF JUST., supra note 156, at 62.
201. See Pierson et al., supra note 20, at 736.
202. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 156.
204. Id. at 17.
show, moreover, that FPD misconduct in the area of stops and arrests disproportionately impacts African Americans.  

2. Minneapolis

In response to the murder of George Floyd and the ensuing outcry, the Minnesota Department of Human Rights filed a discrimination claim against the City of Minneapolis in order to investigate and determine if the City’s Police Department (MPD) engages in a pattern or practice of race discrimination as opposed to isolated, sporadic incidents of discrimination. After completing its investigation, the Department of Human Rights found that “there is probable cause that the City and MPD engage in a pattern or practice of race discrimination in violation of the Minnesota Human Rights Act.” The finding was based in part on “[r]acial disparities in how MPD officers use force, stop, search, arrest and cite people of color, particularly Black individuals, compared to white individuals in similar circumstances.”

Traffic stops are one of the most common law enforcement activities of law enforcement agencies throughout the nation, including MPD. The investigation concluded that “MPD officers are more likely to stop vehicles with people of color and Indigenous individuals when officers are more likely to identify the race/ethnicity of a vehicle’s occupants.” Between 2017 and 2020, fifty-four percent of MPD-initiated traffic stops involved African Americans—who comprise only nineteen percent of the Minneapolis population. During the same time period, only thirty-three percent of MPD officer initiated stops involved white individuals, even though they comprise sixty-three percent of the city’s population. Furthermore,

205. Id. at 16.
206. See MINN. DEPT OF HUM. RTS., supra note 2, at 5.
207. Id. These findings have been corroborated by the United States Department of Justice (DOJ) which found that the “MPD [Minneapolis Police Department] unlawfully discriminates against Black and Native American people when enforcing the law.” See U.S. DEPT OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 9 (2023). With respect to traffic stops, DOJ found that “MPD stops Native American people at 7.9 times the rate at which it stops white people, given population shares.” Id. at 32. “These racial disparities were not a result of traffic safety needs.” Id. at 34.
208. See MINN. DEPT OF HUM. RTS., supra note 2, at 8.
209. Id. at 20.
210. Id.
211. Id.
212. Id.
the racial disparity in traffic stops exists across Minneapolis and are not the result of traffic enforcement practices in a single precinct. \(^{213}\)

The conclusion that MPD officers engage in racial profiling was based on more than just statistical disparities. \(^{214}\) For instance, “[c]ommunity members [of color] reported being racially profiled by MPD officers during traffic stops.” \(^{215}\) Community members of color also “reported that they are often pulled over by MPD officers for minor [traffic] offenses such as having a broken or dim license plate light or moving to the curb to park without using signals,” and are often asked if they had guns in the car. \(^{216}\) In contrast, white community members reported that when they were pulled over for moving violations, they were “never asked . . . if they had guns or drugs in their vehicles.” \(^{217}\) Minneapolis community members of color also reported that MPD officers sometimes immediately began searching their vehicles for guns or drugs following a traffic stop. \(^{218}\) Public defenders also reported that they have been involved in cases in which MPD officers justified a search of a community member of color’s car based on a claim of marijuana scent, but officers subsequently found no evidence of drugs. \(^{219}\)

Most surprisingly, there were admissions of racial profiling from “current and former high-level City [of Minneapolis] officials, MPD supervisors, and patrol officers . . . .” \(^{220}\) They “admitted that MPD stops vehicles with people of color for either no genuine reason or for low-level violations in an effort to find guns or drugs in cars operated by people of color.” \(^{221}\) One patrol officer interviewed provided an example of how they might solve a crime based on racial stereotypes. \(^{222}\) “This officer did not appear to understand that searching for someone based solely on racial stereotypes was, in fact, racial profiling.” \(^{223}\)

**D. “Veil of Darkness”**

One way to test for racial profiling is to compare the race distribution of stops made during daylight to the race distribution of

\(^{213}\) *Id.* at 21.
\(^{214}\) See MINN. DEPT OF HUM. RTS., *supra* note 2, at 20.
\(^{215}\) *Id.*
\(^{216}\) *Id.*
\(^{217}\) *Id.*
\(^{218}\) *Id.*
\(^{219}\) *Id.*
\(^{220}\) MINN. DEPT OF HUM. RTS., *supra* note 2, at 22.
\(^{221}\) *Id.*
\(^{222}\) *Id.*
\(^{223}\) *Id.*
stops made after dark.\textsuperscript{224} Since there are no reasons to assume any racial differences in traffic patterns, driving behavior, and exposure to law enforcement between daylight and darkness, then there should be no differences in the race distribution of stops depending on the time of day.\textsuperscript{225} However, studies do indicate that there are racial differences between stops that occur during the day as opposed to at night.\textsuperscript{226} African American motorists are stopped more frequently when there is daylight.\textsuperscript{227} The data suggests there is a “veil of darkness” effect: police are less likely to know the race of a motorist before making a stop after dark than they are during the daylight.\textsuperscript{228} Thus, African American drivers are pulled over less at night when their race is obscured by a “veil of darkness.”\textsuperscript{229}

One “veil of darkness” study narrowed the range of potential variables by choosing to analyze stops at a particular time of day—around 7:00 PM—when the probable causes for a stop were more or less constant.\textsuperscript{230} Another advantage of using 7:00 PM is the fact that, during certain times of the year, it is dark at that time, while at other times of the year, it is still daylight as a result of daylight savings time.\textsuperscript{231} The researchers found that Black drivers were stopped less frequently when it was dark: “we find that [B]lack drivers comprise a smaller proportion of drivers stopped after sunset, suggestive of discrimination in stop decisions.”\textsuperscript{232}

The Minneapolis study revealed a similar “veil of darkness” racial disparity in traffic stops.\textsuperscript{233} MPD officers were twelve percent more likely to stop a vehicle occupied by a person of color or Indigenous person during daylight compared to when it was dark outside.\textsuperscript{234}

Analysis of MPD’s traffic stop data demonstrates that when MPD officers are more likely to see the race of a vehicle’s occupants, officers are more likely to stop vehicles with people of color or Indigenous individuals than vehicles with only white occupants. In other words, race is the likely reason for the racial disparity in MPD’s traffic stop practices.\textsuperscript{235}

\begin{flushright}224. Id. at 21.  
225. Id.  
226. See Pierson et al., supra note 20, at 736.  
227. Id. at 737.  
228. Id. at 736.  
229. Id.  
230. Id. at 738.  
231. Id.  
232. Pierson et al., supra note 20, at 736.  
233. See MINN. DEPT OF HUM. RTS., supra note 2, at 21.  
234. Id.  
235. Id. at 20.\end{flushright}
E. Searches

After stopping a driver, police officers are permitted to search the driver’s car if they believe that the car may contain evidence of more serious criminal activity.236 Multiple studies have shown that while African Americans are searched at higher rates, searches of white motorists are more likely to turn up contraband than searches of Black motorists.237 This data suggests that many African American drivers are being targeted because of their race rather than because of any suspicious criminal behavior.238

IV. SCOTUS, PRETEXTUAL STOPS AND RACIAL PROFILING

There are serious consequences as a result of systemic racial profiling in traffic stops.239 First and foremost, “intrusive police stops carry on the legacy of long-repealed segregationist laws: they exclude African Americans from full and equal membership in the community.”240

237. See MNN. DEPT OF HUM. RTS., supra note 2, at 24; Ben Poston & Cindy Chang, LAPD Searches Blacks and Latinos More. But They’re Less Likely to Have Contraband than Whites, L.A. TIMES (Oct. 8, 2019, 3:52 PM), https://www.latimes.com/local/lanow/l -me-lapd-searches-20190605-story.html [https://perma.cc/RHJ2-K3FY]; CITY OF AUSTIN, OFF. OF POLICE OVERSIGHT, OFF. OF INNOVATION & EQUITY OFF., JOINT REPORT: ANALYSIS OF APD RACIAL PROFILING DATA 15 (2020) (finding that Black people and Latinx people were more likely to be stopped than white people despite similar “hit rates” for illicit drugs among those groups); Don Thompson, Report: California Cops More Likely to Stop Black Drivers, U.S. NEWS (Jan. 2, 2020, 10:13 PM), https://www.usnews.com/news/best -states/california/articles/2020-01-02/report-california-cops-more-likely-to -stop-black-drivers [https://perma.cc/GH6V-PAX3] (reporting that, in an analysis of police stops by the eight largest law enforcement agencies in California, Black drivers were stopped at a rate 2.5 times higher than the per capita rate of white people and were three times more likely than any other group to be searched, even though searches of white people were more likely to turn up contraband); Max Ehrenfreund, 17 Disturbing Statistics from the Federal Report on Ferguson Police, WASH. POST (Mar. 4, 2015, 4:34 PM), https://www.washingtonpost.com/news/wonk/wp/2015/03/04/17-disturb ing-statistics-from-the-federal-report-on-ferguson-police [https://perma.cc/2PSD-86W2] (“African Americans [in Ferguson, Missouri] are 2.07 times more likely to be searched during a vehicular stop but are 26 percent less likely to have contraband found on them during a search. They are 2.00 times more likely to receive a citation and 2.37 times more likely to be arrested following a vehicular stop.”).
238. See MNN. DEPT OF HUM. RTS., supra note 2, at 20.
239. See id. at 31.
240. EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 136.

Police stops, the most frequent and visible exercise of public authority over our daily lives, convey an especially powerful message about our place in society . . . . Racially biased investigatory stops tell a driver that they look like a criminal and people like them are subject to arbitrary control befitting their subordinate status; they are not an equal member of society.

Id. at 135–36.
Investigatory stops erode individual liberty, undermine democratic equality, and divide local communities by income, race, and ethnicity. They target those who are mainly racial or ethnic minorities for intrusive surveillance and leave others, who are mainly white, free from this intrusion. To be white is to be honored as an equal member of the community and treated fairly; to be African American or Latino is to be disrespected as less than an equal and subject to manipulation by arbitrary inquisitive power.\textsuperscript{241}

Another serious consequence of racially based police stops is that it increases the likelihood that force will be used and too often this force has become fatal when African American drivers are stopped.\textsuperscript{242} Another important consequence of racial profiling in police stops is that it undermines the African American community’s confidence in the police.\textsuperscript{243} When African Americans are victims of crime or witness criminal activity, they may be reluctant to cooperate with law enforcement based on their past experiences with police.\textsuperscript{244} Racial profiling in traffic stops also creates financial burdens for many African Americans.\textsuperscript{245} Finally, there is evidence that racial profiling creates or exacerbates health problems of African Americans.\textsuperscript{246}

\begin{itemize}
  \item 241. \textit{Id.} at 159.
  \item 242. \textit{See} \textit{MINN. DEPT. OF HUM. RTS.}, \textit{supra} note 2, at 10.
  \item 243. \textit{See id.} at 38; \textit{see also} \textit{EPP, MAYNARD-MOODY & HAIDER-MARKEL}, \textit{supra} note 9, at 135 ("Trust in the police is important because people who do not trust the police are less willing to call the police for help, may be more likely to turn to self-help vigilantism, and may be less willing to cooperate with the police in criminal investigations.").
  \item 244. \textit{See} Nicole Sealey, \textit{The Ferguson Report: An Erasure}, \textit{NEW YORKER} (July 31, 2023), https://www.newyorker.com/magazine/2023/07/31/the-ferguson-report-an-erasure-nicole-sealey-poem [https://perma.cc/XS8M-5C79] ("A growing body of research, alongside decades of police experience, is consistent with what our investigation found in Ferguson: that when police and courts treat people unfairly, unlawfully, or disrespectfully, law enforcement loses legitimacy in the eyes of those who have experienced, or even observed, the unjust conduct. Further, this loss of legitimacy makes individuals more likely to resist enforcement efforts and less likely to cooperate with law enforcement efforts to prevent and investigate crime.") (internal citations omitted).
  \item 246. \textit{See} Cato T. Laurencin & Joanne M. Walker, \textit{Racial Profiling Is a Public Health and Health Disparities Issue}, \textit{J. RACIAL ETHNIC HEALTH DISPARITIES} 393, 393 (2020) (citing four direct and two indirect ways in which racial profiling adversely impacts Black American health: (1) violent confrontation with police that causes injury or death; (2) police language that escalates a confrontation through micro-aggressions or macroaggressions; (3) sub-lethal confrontations with police; (4) adverse health consequences of perceived or vicarious threat; i.e., the mere belief in potential harm by police injures health. There are two indirect ways: (5) through knowledge of or personal relationship with someone who directly experienced racial profiling; (6) through public events without...
Despite these serious consequences, the police have been allowed to use pretextual stops and racial profiling as a criminal investigative tool largely due to U.S. Supreme Court holdings. Justice Sotomayor, writing in dissent, has stated that “[r]acial bias is ‘odious in all aspects,’ but especially pernicious in the administration of justice.” That is because racial bias is too grave and systemic a threat to the fair administration of justice to be tolerated or ignored. The Court, however, has rendered decisions which cannot be reconciled with these statements. In several key decisions, the Court has provided its imprimatur to the current policies and have made the police largely unaccountable for engaging in racial profiling.

A. Terry v. Ohio

When the police execute a traffic stop, that constitutes a seizure of the individual and implicates the Fourth Amendment. No Supreme Court decision expanded the authority of the police to stop and seize individuals more than Terry v. Ohio. Prior to Terry, the police needed probable cause to stop and seize an individual. The probable cause standard is the foundation of the Fourth Amendment. Any seizure of an individual without probable cause is

a personal knowledge of the unarmed person threatened or killed by police as a result of racial profiling, but where such events cause both individuals and the community at large to perceive a threat.”; EPP, MAYNARD-MOODY & HAIDER-MARKEL, supra note 9, at 135 (“Psychological studies demonstrate that African Americans subjected to intrusive police stops experience heightened levels of psychological stress.”).

247. See Jonathan Blanks, Twenty Years Ago the Supreme Court Effectively Legalized Racial Profiling, CATO INST. (June 10, 2016), https://www.cato.org/commentary/twenty-years-ago-supreme-court-effectively-legalized-racial-profiling [https://perma.cc/L2Y7-GNB7].


249. Id. at 1408.


251. See id.

252. Id.


255. See Dunaway v. New York, 442 U.S. 200, 207–08 (1979) (“Before Terry v. Ohio, the Fourth Amendment’s guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause.” (internal citations omitted)).

256. See Osagie K. Obasogie & Zachary Newman, The Futile Fourth Amendment:
presumed to be unreasonable.\textsuperscript{257} In Terry, however, the Court created an exception to the probable cause requirement for stops and seizures.\textsuperscript{258}

In Terry, the Court had to decide whether there were circumstances in which the police could stop, seize, and search an individual without probable cause.\textsuperscript{259} The Court held that a stop and seizure occurs whenever an “officer accosts an individual and restrains his freedom to walk away.”\textsuperscript{260} However, the Court held that there were circumstances in which “necessarily swift action predicated upon the on-the-spot observations of the officer on the beat” is warranted.\textsuperscript{261} Therefore, an officer is permitted to stop and seize an individual if there is reasonable suspicion to believe that the individual has committed, is committing, or is about to commit a crime.\textsuperscript{262} Reasonable suspicion, however, cannot be based on hunches.\textsuperscript{263} In order to justify the seizure absent probable cause, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”\textsuperscript{264}

As a result of Terry, the police are allowed to stop and search a motorist based only on reasonable suspicion, order the driver and passengers out of the car,\textsuperscript{265} and search the car for weapons.\textsuperscript{266} The expansive power bestowed on the police by the Court in Terry has been criticized because of the detrimental impact that this power has had on members of minority communities.\textsuperscript{267}

\textsuperscript{258} See Terry, 392 U.S. at 20.
\textsuperscript{259} Id. at 15 (“[W]e turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest.”).
\textsuperscript{260} Id. at 16.
\textsuperscript{261} Id. at 20.
\textsuperscript{262} See id. at 21–22.
\textsuperscript{263} See id.
\textsuperscript{264} Terry, 392 U.S. at 21.
\textsuperscript{267} See, e.g., Paul Butler, The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform, 104 Geo. L.J. 1419, 1425 (2016) (arguing that legal police conduct perpetuates racial inequality in the criminal justice system, not illegal police misconduct); see also Obasogie & Newman, supra note 256, at 1498–99 (concluding that the Supreme Court’s doctrinal choice to evaluate police excessive force claims under the Fourth Amendment rather than under Equal Protection has contributed to the perpetration of police excessive use of force in many communities of color); Carbado,
instance, states that “[s]ince Terry was decided, African-American men appear to have been the primary targets of stops and frisks.”

B. Whren v. United States

One evening in Washington, D.C., “plainclothes vice-squad officers of the District of Columbia Metropolitan Police department were patrolling a ‘high drug area’ of the city in an unmarked car.” The officers’ “suspicions were aroused when they passed a dark . . . truck with temporary license plates and youthful occupants” looking down into the lap of one of the passengers. The truck had been stopped at an intersection for more than twenty seconds. When the driver sped off, the police followed and eventually overtook the truck. When the officer approached the truck, he “observed two large plastic bags of what appeared to be crack cocaine in . . . Whren’s hands.” Whren was subsequently charged with violating federal drug laws. He sought to have the evidence suppressed, arguing that the officers violated his Fourth Amendment rights. The substance of Whren’s argument was that the officer’s “asserted ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual,” and that his race—Whren is African American—was the real reason for the stop.

Whren argued that the standard for determining whether a stop was pretextual should be whether a police officer acting reasonably would have made the stop. The Court rejected Whren’s proposed standard. Instead, it held that the Fourth Amendment provided no remedy for pretextual stops. As long as the officer had cause to stop a driver, an officer’s “[s]ubjective intentions play no

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supra note 253, at 128 (arguing that “[a] significant part of the problem [of police killings of African Americans] is Fourth Amendment law.”).

268. Butler, supra note 267, at 1447. See also Maclin, supra note 19, at 267–68 (“The ruling in Terry was a significant setback in the fight against discriminatory police tactics.”).


270. Id. at 808.

271. Id.

272. Id.

273. Id.

274. Id. at 808–09.

275. Whren, 517 U.S. at 809.

276. See id.

277. Id.

278. Id. at 810.

279. Id. at 812–13.

280. Id. at 813.
role in ordinary, probable-cause Fourth Amendment analysis.”281 The Court did acknowledge “that the Constitution prohibits selective enforcement of the law based on considerations such as race.”282 It held that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”283

Despite the Court’s pronouncement, its Equal Protection jurisprudence does not provide a realistic basis for relief for those who believe that a police officer’s decision to stop them was based on their race.284 That is because it is unlikely that these litigants will have direct proof of the officer’s intent.285 Instead, they are likely to rely on statistics to substantiate their claims.286 For instance, they may be able to obtain statistics regarding the racial breakdown of those who have been stopped or searched by a particular officer, how many complaints have been filed against that officer, and the racial breakdown of any force—including deadly force—that has been employed in the past by the officer.287 However, because of the Supreme Court’s Equal Protection jurisprudence, they will not even be able to make a prima facie case of discrimination that could survive summary judgment.288

The Court has precluded the use of statistics as prima facie evidence of an equal protection violation.289 In McCleskey v. Kemp, for instance, Warren McCleskey had been sentenced to death for killing a police officer.290 He argued that he was sentenced to death because he was Black and his victim was white.291 In support of his claim, he proffered a study showing that Black people accused of

281. Whren, 517 U.S. at 813.
282. Id.
283. Id.
284. See Obasogie & Newman, supra note 256, at 1498–99 (explaining that requiring proof of discrimination in individual cases undermines efforts to address widespread racialized discrimination).
285. Id. at 1496 (arguing that litigants need to produce a “smoking gun of explicit racist intent” to succeed on Equal Protection grounds).
287. See, e.g., Carbado, supra note 253, at 127 (describing statistics collected on Ferguson, Missouri police officers).
289. See McCleskey, 481 U.S. at 312–13 (finding that statistical indications of race-correlated disparate treatment is not proof of “constitutionally significant” racial bias).
290. Id. at 285.
291. See id. at 286.
killing white people were 4.3 times more likely to be sentenced to death. \(^{292}\) The study also found that the most likely defendant-victim combination to result in a death sentence was a Black defendant and a white victim. \(^{293}\) Although the Court accepted the statistics as legitimate, the Court rejected McCleskey’s claim. \(^{294}\) According to the Court, the statistics “at most . . . indicated a discrepancy that appear[ed] to correlate with race,” but the study “d[id] not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.” \(^{295}\) Instead of relying on statistics, the Court held that McCleskey “must prove that the decision-makers in his case acted with discriminatory purpose.” \(^{296}\)

The McCleskey decision is a continuation of the Court’s pattern of only acknowledging and providing relief for discrimination which is intentional and overt. \(^{297}\) When confronted with claims of racial bias that are more subtle and subconscious (as in McCleskey), rather than address the difficult issues these claims raise, the Court created an onerous standard for proving discrimination that no litigant is ever likely to satisfy. \(^{298}\) For instance, no person on death row is likely to be able to prove that the decision makers—the judge, jury, or prosecutor—in their case intentionally discriminated against them, absent statistical evidence. \(^{299}\) Since the Court was unwilling to allow statistics as proof of an Equal Protection violation in a death penalty case, it almost certainly will not allow statistical evidence as proof that police officers have committed an Equal Protection violation by racially profiling African American motorists. \(^{300}\) Thus, with its decision in Whren, the Court has put its official imprimatur on racial profiling. \(^{301}\)

\(^{292}\) McCleskey, 481 U.S. at 287.

\(^{293}\) See id.

\(^{294}\) Id. at 291 n.7 (“As did the Court of Appeals, we assume the study is valid statistically . . . .

\(^{295}\) Id. at 312–13.

\(^{296}\) Id. at 292.


\(^{298}\) Id. at 286–87 (arguing that Supreme Court “tried to have it both ways” when it refused to confront the implications of the study at issue in McCleskey).


\(^{300}\) See, e.g., David A. Harris, The Stories, the Statistics, and the Law: Why “Driving While Black” Matters, 84 MINN. L. REV. 265, 277–81, 288, 291 (1999) (describing the findings of racialized traffic stop studies and the Supreme Court’s ambivalence towards widespread discrimination cases).

\(^{301}\) See Corn, supra note 19, at 623 (“When coupled with the density of traffic codes, Whren unquestionably opens the door to what the Court characterized as pretextual traffic stops.”).
C. Qualified Immunity

The Court’s Fourth Amendment and Equal Protection jurisprudence have made the police largely immune from claims of racial profiling. The Court has also provided police officers with qualified immunity which shields most officers from accountability except “all but the plainly incompetent or those who knowingly violate the law.” 302 “[T]he Court has held that Government officials are entitled to qualified immunity with respect to ‘discretionary functions’ performed in their official capacities.” 303 Whether an officer is entitled to qualified immunity turns on the “objective legal reasonableness” of his acts. 304 The Court also noted that “reasonableness of official action, in turn, must be ‘assessed in light of the legal rules that were clearly established at the time [the action] was taken.’” 305

V. PROPOSAL

The Supreme Court is unlikely to change its Fourth Amendment and Equal Protection jurisprudence in the foreseeable future, and, even if it were willing to do so, it is difficult to conceive of any solution it could offer to the problem of pretextual traffic stops. 306 Although Justice Thomas has shown a willingness to rethink qualified immunity, 307 his colleagues on the Court have passed up several opportunities to reassess the doctrine. 308 Moreover, other reforms such as body cameras, police training, and community policing have not had a serious impact on police involved shootings of African Americans. 309 These reform efforts assume that the core of the problem are a few bad police officers and therefore reform efforts tend to focus on weeding out these bad officers. 310 However, “[t]he core of the problem is not individual racism among a few officers. It

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304. Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).
305. Id. (quoting Anderson, 483 U.S. at 639) (alteration in original).
306. See, e.g., Corn, supra note 19, at 624 (“While there are no doubt situations when such a stop is in fact purely pretextual, providing courts with a workable mechanism to discern such police conduct seems near impossible.”).
310. See id.
is not simply officers’ isolated discretionary choices to stop black people and, increasingly, Latinos and other minorities. It is, instead, an institutionally supported practice celebrated by police professional associations, leaders, and local departments.”311 Therefore, solutions to the ongoing problem of police use of force and especially deadly force against African Americans and the lack of police accountability need to be pursued outside of the judicial system.312 In order to be truly effective, the solutions need to limit the interactions between the police and the public.313

One alternative suggested by some activists is to “defund the police.”314 To some in the defund movement, this means literally what it says.315 These activists argue that police have a history of inflicting violence and death upon African Americans and other marginalized people.316 They believe that any reform effort is doomed to fail.317 What they want is to replace police with alternative means of ensuring safety: “[T]hey seek to create ways to connect that are sensitive to the needs of the most marginalized in society, particularly intersectionally vulnerable [B]lack people. In the long term, such a world would not include police, in any form or for any function. Defunding the police moves society in that direction.”318 These activists believe that the billions that go to police departments can be spent instead on “providing health care, housing, education, and good jobs.”319 The theory is that “[i]f we did this, there would be less need for the police in the first place.”320

Others in the “defund” movement do not want to totally abolish the police.321 Instead they want to reduce police funding in order to recalibrate police responsibilities.322 For instance, when an individual is in mental distress, quite often the police are dispatched in response to a 911 call.323 The defund movement wants the response to come from mental health professionals, not the police.324 “By
defunding the police, significant resources can be reallocated to create a new community emergency services to support the mental health needs of our vulnerable community members. Teams trained in de-escalation and who root their work in community-informed practices could provide crisis support and care.\[325\]

The “defund” solution is not a viable option for the foreseeable future; it has become politically toxic.\[326\] The political support to defund is simply not there at the moment, especially at a time of rising crime rates.\[327\] Even though very few Democrats support “defund,” the Republican Party has used it to portray Democrats as soft on crime.\[328\] In Minneapolis, the epicenter of the movement for police reform, the voters were asked to vote on whether the Minneapolis Police Department should be replaced by a Department of Public Safety overseen by the mayor and city council.\[329\] The Department would have been required to take a “comprehensive public health approach” to safety, which would include the dispatch of “mental health workers to certain calls and more investment in violence prevention efforts.”\[330\] However, fifty-six percent of the voters of Minneapolis voted to reject the “defund” proposal.\[331\]

Since defunding the police is not a politically palatable option and likely will not be for the foreseeable future, other alternatives to minimize police and individual interaction need to be considered.\[332\] One reasonable alternative advanced by Professor Jordan Blair Woods would be to completely remove police from traffic enforcement.\[333\] Professor Woods’s proposal would shift traffic enforcement from police to newly created traffic agencies.\[334\] These traffic agencies would “operate wholly independently of the police.”\[335\] They would “hire their own traffic monitors to conduct and oversee traffic enforcement.”\[336\] These traffic monitors would “enforce traffic laws

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325. Id.
327. See id.
328. See id.
330. Id.
331. Id.
332. See Cillizza, supra note 326.
334. See id. at 1495.
335. Id. at 1488.
336. Id.
through in-person traffic stops. . . .”

Professor Woods describes how the proposed traffic monitors would enforce traffic laws as follows:

The function of traffic monitors would be strictly limited to traffic-law enforcement, not criminal investigations. Traffic monitors would not be vested with typical police powers to detain, search, or arrest. They also would not be armed. Rather, their authority would be limited to initiating traffic stops for traffic-law violations, requesting documentation, and issuing traffic citations. With regard to documentation, traffic monitors could ask for driver documents (for instance, driver's licenses, registration, and proof of insurance); run DMV checks to determine the current status of a driver's license or registration; and inspect the VIN on the vehicle dash. Traffic monitors would not be authorized, however, to run criminal background checks, and traffic agencies would not have access to that information.

Professor Woods would allow some limited collaboration between police and traffic monitors: “Typically, those circumstances would exist when a traffic monitor was faced with a more serious traffic offense (perhaps driving a stolen vehicle, driver’s license offenses, or DUI). Traffic monitors would process the minor traffic violations and, when necessary, request police assistance to handle the more serious traffic offense.”

Professor Woods is correct in that police need to be removed from traffic enforcement. However, I do have two concerns regarding his proposal. The first is over the role of his proposed traffic monitors in the event that they observe criminal activity during a traffic stop. For instance, what if the traffic monitors stop a car in order to issue a traffic ticket but when they approach the car they observe drugs in plain view? What if they observe a child with bruises? Should they alert the police or ignore what they saw? It

337. Id.
338. Id. at 1495–96.
340. For Professor Woods's argument, see id. at 1471–72.
341. Id. at 1496.
seems hard to imagine the latter should be the response. Therefore, they will ultimately be involved in some form of ordinary criminal law enforcement.

My second question relates to the safety of the traffic monitors. Professor Woods proposes that they engage in their duties unarmed. However, if it is inevitable that the traffic monitors will play some role in ordinary criminal law enforcement as just described then there are serious safety concerns. There will also likely be threats to traffic monitors from irate motorists. The safety concerns would therefore shift from the driver and passengers during police stops to concerns about the traffic monitors’ safety under Professor Woods’s proposal. Professor Woods would probably point out in response that, despite the public perception, police officers are rarely harmed when they make traffic stops and therefore the risk to unarmed traffic monitors will be minimal also.

One big distinction, however, is that police officers have guns in their possession when making traffic stops. The fact that they are in possession of a gun undoubtedly has some deterrent effect. This deterrent impact would not exist with respect to traffic monitors. Therefore, there is cause to be concerned about unarmed traffic monitors stopping and approaching motorists in order to perform a law enforcement function in a nation that is heavily armed, as a result of a very expansive interpretation of the Second

344. See Woods, supra note 333, at 1479.
345. See id. at 1495.
346. See id. at 1496.
347. Id. at 1500.
348. Id. at 1501.
349. See Woods, supra note 13, at 635 (concluding, after reviewing traffic stops that resulted in violence against officers across more than two hundred law enforcement agencies in Florida over a ten-year period, that “[t]he findings reveal that violence against officers was rare and that incidents that do involve violence are typically low risk and do not involve weapons.”); Etienne, supra note 16 (noting that “most officers are not typically harmed by civilians on the job.”).
350. Etienne, supra note 16.
351. See id. (“It is probable that the guns police carry have some deterrent effect and help account for the low police deaths . . . .”).
352. See Woods, supra note 333, at 1500.
353. A report by the Small Arms Survey found that the United States was the only country in its report that had more civilian-owned guns than people. U.S. gun owners possess 393.3 million weapons while its total population is approximately 330 million. Furthermore, since gun ownership usually increases after mass shootings, this number is probably larger after the mass shootings in Uvalde, Texas, and Buffalo, New York. See Thomas Black, Americans Have More Guns than Anywhere Else in the World and They Keep Buying More, BLOOMBERG NEWS (May 25, 2022, 2:03 PM), https://www.bloomberg.com/news/articles/2022-05-25/how-many-guns-in-the-us-buying-spree-bolsters-lead--as-most-armed-country [https://perma.cc/6SRF-GL57].
Amendment, and minimal gun regulations in most of the United States. Therefore, Professor Woods’ proposal needs to go a step further; instead of using traffic monitors to stop and ticket vehicles, there needs to be a system of non-human enforcement of non-violent traffic infractions. Some jurisdictions have already begun to remove police from traffic enforcement. Many jurisdictions have installed cameras for red-light and speeding violations. This practice needs to become universal and used for all but the most serious traffic infractions. In addition, police officers can continue to be involved in traffic enforcement on a limited basis. When an officer or traffic monitor observes a traffic violation they can record the violation and the license plate of the violator. This can be done with the police car’s camera system. A citation can then be sent to the registered owner of the vehicle. There is no reason why most traffic infractions, especially those involving equipment violations, could not be handled in this manner.

Here is an illustration of how automated enforcement would work in practice:


357. See Kirkpatrick, Eder & Barker, supra note 25.


360. See Woods, supra note 333, at 1499.

361. See id. at 1503–04.


364. See id.
Brandon Calloway, a twenty-five-year-old African American male was driving to his father’s home in Oakland, Tennessee. He apparently failed to stop at a sign. The police officers who witnessed the violation could have recorded his license plate and a citation could have been forwarded to him or the owner of the vehicle. Instead, after Calloway refused to stop police followed him home. After Calloway ran into his home, two officers “made entry [into Calloway’s home] by kicking in the front door.” Calloway “ran up the stairs and locked himself in his room.” The police went into his room, beat him with a baton, and tased him. One officer even put his boot on Calloway’s neck. Calloway sustained serious physical injuries as a result of the encounter and says that he has “constant headaches and eye pain.” This was a totally unnecessary encounter.

Brazil provides another example of how traffic enforcement can occur without traffic stops for minor infractions. In 2013, I was a Fulbright Scholar at the Universidade Federal da Bahia. I have been a regular visitor since 2013. Because I have never observed police stopping motorists on the streets and highways during my many visits, I did some research into traffic enforcement in Brazil. It turns out that I was correct. While Brazil has numerous traffic laws, these laws are often not enforced by police stops of motorists on the streets. Rather Brazil’s traffic enforcement occurs as follows:

The owner of the vehicle that has committed the driving offense will receive an [sic] Notificacao de Autuacao de Infracao de

366. Id.
367. See Woods, supra note 333, at 1504.
368. Albeck-Ripka, supra note 365.
369. Id.
370. Id.
371. Id.
372. Id.
373. Id.
374. See Woods, supra note 333, at 1501.
377. See Farah, supra note 375.
378. See id.
379. See id.
Transito, which is the notification that a penalty was imposed, within 30 days after the offense has occurred. The document will present data such as the type of offense that was made, when, where, and the amount of the fine. Then there is a period of 15 days for the owner of the vehicle to declare who actually committed the infraction, whether it was the owner or someone else.  

Police should continue to make traffic enforcement stops for those offenses that more imminently endanger public safety. Those would include “(1) driving under the influence, (2) driving without, with a revoked, or with a suspended, driver’s license or vehicle registration, (3) reckless driving, (4) failure to stop at the direction of, or eluding, a police officer, (5) vehicle racing, and (6) excessive speeding (over 30 mph above the speed limit).”  

Removing police and other individuals from direct traffic enforcement of minor offenses would be enormously beneficial. First, by minimizing interactions between police and the community, it would substantially reduce the risk of a fatal or even non-fatal use of force by the police. Second, as a result of fewer instances of fatal uses of force, police might begin to regain some of the trust it has lost in the African American and other marginalized communities. Third, regaining the trust of these communities will help the police perform their jobs and make these communities safer. Finally, removing traffic enforcement from the police’s responsibilities would allow them to concentrate time and resources on offenses that truly threaten public safety.

There are three likely objections to completely eliminating police-initiated traffic enforcement: First, there will be concerns that eliminating in-person traffic enforcement will jeopardize public safety. Second, there will be arguments that using automation for traffic enforcement violates the Constitution. Third, there will be concerns over outsourcing of traffic enforcement to private contractors. I will address each concern separately.

380. Id.
381. See Woods, supra note 333, at 1493.
382. Id. at 1494.
383. See id. at 1515.
384. See id. at 1519.
385. See Corn, supra note 19, at 619–20 (discussing how traffic stops have caused the police to lose legitimacy in Black and Brown communities).
386. See id. at 638.
387. See Woods, supra note 333, at 1544.
388. See id. at 1536.
389. Cf. id. at 1549 (describing the constitutional issues with stop-and-frisk tactics).
390. See id. at 1503.
A. Public Safety

There will likely be concerns that eliminating police from traffic enforcement will endanger the public. First, that the streets and highways will become less safe. Second, that during a routine traffic stop the police might discover other evidence of more serious crimes and more serious criminals. For instance, some would point to the fact that the perpetrator of one of the most notorious crimes in U.S. history, the Oklahoma City bomber Timothy McVeigh, was discovered through a routine traffic stop. There is evidence to suggest that these concerns are unwarranted. Studies have debunked the idea of a relationship between traffic stops and reductions in general crime rates.

Many jurisdictions enforce speed and traffic light violations through the use of cameras. This alone is a tacit admission that the public streets and highways are not less safe by eliminating police from enforcement of these violations. However, there is also evidence “that traffic safety is not contingent on police-initiated traffic stops.” There are studies, for instance, which indicate an actual reduction in crashes related to red-light-running and speed violations.

391. See id. at 1535–36.
392. Id.
393. Woods, supra note 333, at 1535–36.
396. See, e.g., POLICING PROJECT, NYU SCH. OF L., AN ASSESSMENT OF TRAFFIC STOPS AND POLICING STRATEGIES IN NASHVILLE 10 (2018) (finding that disproportionate traffic stops of African Americans in Nashville, Tennessee, did not result in a reduction of crime); Engel & Calnon, supra note 395, at 85 (noting "findings from empirical studies that have demonstrated that the generalized targeting of minority drivers, in an effort to disrupt the flow of drug trafficking and/or to confiscate weapons, is an ineffective and inefficient use of police resources").
397. See U.S. Communities Using Red Light Cameras, supra note 358.
400. See Woods, supra note 333, at 1537; Sutton & Tilahun, supra note 399, at 3 ("Prior studies of red-light and speed camera enforcement are generally positive . . . the evidence suggests that roadways are typically safer once cameras are installed.").
As for the concern that removing the police from traffic enforcement will impair the ability of police to discover evidence of more serious crimes and criminals, several studies indicate that there is no correlation between traffic stops and crime reduction. A Policing Project study in conjunction with the Stanford Computational Policy Lab (SCPL) of traffic stops in Nashville, Tennessee found that “traffic stops do not appear to have a significant impact on long-term crime trends.” The study further found that:

Traffic stops also do not appear to have any effect on crime in the short-term. This was some of the SCPL 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.

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.

Further evidence that traffic stops do not have a strong correlation to crime control comes from the Bureau of Justice Statistics, which shows that only a small percentage of traffic stops result in the discovery of evidence. Furthermore, a study of the New York Police Department’s stop-and-frisk program found that about ninety percent of people stopped by the police were not committing any crime and did not have any contraband or weapons on them. The small possibility of police discovering evidence of more serious crimes during a traffic stop is not worth the damage that these stops have inflicted on the African American and other marginalized com-

402. See POLICING PROJECT, supra note 396, at 10.
403. Id. (internal citations omitted).
404. See Woods, supra note 333, at 1538.
munitions and the distrust of law enforcement that these stops have engendered in those communities. 406

B. Constitutional Concerns

Constitutional challenges are likely to be raised to automated enforcement of traffic infractions. 407 These constitutional challenges are likely to be similar to the constitutional challenges that have been raised to red-light and speed cameras. 408 The constitutional claims are that these automated enforcement mechanisms violate both Due Process and the Confrontation Clauses. 409 The same arguments are likely to be made with regard to automated enforcement of other traffic violations. 410 Courts have upheld the use of cameras to enforce red-light and speeding violations and for the same reasons are likely to uphold the use of cameras and other automated means of enforcing non-violent traffic infractions. 411

In Bevis v. City of New Orleans, plaintiffs challenged the City’s use of red-light and speed cameras as a violation of due process. 412 The City engaged a private contractor to install and maintain the cameras. 413 The private contractor first views the footage then forwards it to the New Orleans Police Department (NOPD) who decides whether to issue a citation. 414 If NOPD decides to issue a citation, a notice is sent to the vehicle’s registered owner charging that a violation occurred and the amount of the violation, ranging from $105–$300. 415 This notice also includes a website address where the video of the violation can be viewed. 416

The notice explains the procedures for contesting the fine. 417 The owner can contest by appearing before an administrative officer on or before a hearing date stated in the notice. 418 If the hearing

406. See Let’s Re-imagine a New System, supra note 323.
409. See id.; Fegan, supra note 407.
410. See Fegan, supra note 407.
411. See Bevis v. City of New Orleans, 686 F.3d 277, 281 (5th Cir. 2012).
412. Id. at 279.
413. Id.
414. Id.
415. Id.
416. Id.
417. Bevis, 686 F.3d at 279.
418. Id.
date passes and the owner has failed to contest the fine then an additional fine will be imposed.\footnote{419} No\ mens\ rea\ is\ required\ for\ liability\ but\ the\ individual\ receiving\ the\ notice\ has\ an\ affirmative\ defense\ if\ he\ is\ not\ the\ owner\ of\ the\ motor\ vehicle\ at\ the\ time\ of\ the\ infraction.\footnote{420}

The hearing is conducted by an administrative officer employed by the City.\footnote{421} At the hearing the owner may “respond and present evidence on all issues of fact involved and argument on all issues of law involved.”\footnote{422} “The owner may request that witnesses be subpoenaed” and is allowed to examine witnesses who testify.\footnote{423} The owner may seek judicial review of an adverse decision within thirty days.\footnote{424} The plaintiffs claimed that this was not constitutionally adequate process.\footnote{425} The U.S. Court of Appeals for the Fifth Circuit, however, rejected plaintiffs’ Due Process claim.\footnote{426} The court held that the fact that the hearing is presided over by a judge employed by the City does not alone violate due process.\footnote{427} Furthermore, the court agreed with the City that it had an interest in reducing the risk of road accidents and that outweighed any interests plaintiffs may have.\footnote{428} Therefore, according to the Fifth Circuit, “[t]he features of the Ordinance’s adjudicatory scheme raised in this appeal fall comfortably within the ‘great leeway’ given to governments in ‘protect[ing] public health and safety.’”\footnote{429}

Due process claims have also been made based on the fact that a vehicle owner may receive a traffic citation even though the owner was not the driver of the vehicle when the traffic infraction occurred and that it is therefore unconstitutional to hold the owner vicariously liable.\footnote{430} In\ \textit{Idris v. City of Chicago}, plaintiffs contended that vicarious liability offended substantive due process.\footnote{431} They challenged the Chicago ordinance which made the owner liable for red-light or illegal turn violations that were captured by the City’s cameras.\footnote{432}

\footnotesize
\begin{itemize}
\item \footnote{419} Id.
\item \footnote{420} Id. at 279–80.
\item \footnote{421} Id. at 279.
\item \footnote{422} Id.
\item \footnote{423} \textit{Bevis}, 686 F.3d at 279.
\item \footnote{424} Id. at 280.
\item \footnote{425} Id.
\item \footnote{426} Id. at 281.
\item \footnote{427} Id.
\item \footnote{428} Id.
\item \footnote{429} \textit{Bevis}, 686 F.3d at 281 (second alteration in original) (quoting Mackey v. Montrym, 442 U.S. 1 (1979)).
\item \footnote{430} Idris v. City of Chicago, 552 F.3d 564, 565–66 (7th Cir. 2009).
\item \footnote{431} Id.
\item \footnote{432} Id. at 565.
\end{itemize}
The U.S. Court of Appeals for the Seventh Circuit characterized plaintiffs’ due process argument as “a dud.” The Court indicated that “substantive due process depends on the existence of a fundamental liberty interest . . . and no one has a fundamental right to run a red light or avoid being seen by a camera on a public street.” Furthermore, “[t]he interest at stake is a $90 fine for a traffic infraction, and the Supreme Court has never held that a property interest so modest is a fundamental right.

Another constitutional challenge is likely to be that the automated enforcement of traffic infractions violates the Sixth Amendment’s Confrontation Clause. The Confrontation Clause is violated when testimonial statements of an unavailable witness are offered against a criminal defendant who has had no prior opportunity to cross examine the witness. The California Supreme Court addressed this issue in People v. Goldsmith. In Goldsmith, “Defendant was cited for failing to stop at a red traffic light at an intersection . . . in Inglewood,” California. The evidence of this infraction “was generated by an automated traffic enforcement system (ATES).” The defendant was convicted and on appeal she argued “that the ATES evidence is ‘unquestionably testimonial’ and as a result” the use of the ATES evidence violated her federal constitutional right to confrontation since she cannot confront a camera. The California Supreme Court rejected her Confrontation Clause argument. The court held that ATES evidence is generated by a machine and that a machine cannot make a statement. As a result, the ATES evidence was not hearsay and does not implicate the Confrontation Clause: “. . . we conclude that our determination that the ATES evidence is not hearsay necessarily requires the rejection of defendant’s confrontation claims. Because, unlike a person, a machine cannot be cross-examined, here the prosecution’s introduction into evidence of the machine-generated printouts . . . did not implicate the Sixth Amendment’s right to confrontation.”

433. Id. at 565–66.
434. Id. (internal citation omitted).
435. Idris, 552 F.3d at 566.
436. See Barnett, supra note 408.
439. Id.
440. Id.
441. Id. at 274.
442. Id. at 275.
443. Id.
444. Goldsmith, 326 P.3d at 275.
These decisions make it clear that there are no constitutional impediments to automated traffic enforcement. Additionally, the proposal outlined in this Article would certainly not violate the Confrontation Clause because a police officer, who can be subpoenaed and cross-examined, could still issue a citation for any violations that they observe. My proposal would simply not allow them to stop the violator to issue the citation. Rather, the citation would be issued to the registered owner through the mail or other electronic means.

C. Outsourcing Enforcement

In the event that most traffic infractions are enforced through automation there is a good chance that some jurisdictions will outsource this function. Some cities have already outsourced part of their traffic enforcement. The city of New Orleans, for instance, hired a private contractor to install and maintain its red-light and speed cameras. The City of Denver hired a contractor to install and operate a “photo radar” system for catching speeders. Because private contractors are interested in making as much money as possible there is an inherent conflict of interest. Private contractors will have an interest in catching and ticketing as many violators as possible. In Denver, for instance, the “contractor’s payment was based on the number of photos of speeders taken, but the firm also had control of the calibration of the sensors and the number of photos.” When challenged in court, the judge . . . [recognized] the inherent bias created by the per-photo payment scheme. Any other contractual arrangement is likely to create similar biases.

445. See supra Section V.B.
447. See Woods, supra note 333, at 1501.
448. See id. at 1501 n.145.
450. See id.
451. See id.
453. Id. at 1298–99.
454. Id. at 1297.
455. Id.
456. Id.
457. See id. at 1290 (“[P]rivatization arrangements generally take three basic forms: (1) price-per-case contracts, (2) flat-fee contracts (to provide service for a term of years), and (3) incentive contracts (payment for accomplishing certain results). Each presents special problems and advantages.”).
Although privatization of traffic enforcement may minimize the racial profiling problem, it is likely to create other problems. In the event that traffic cameras become universal and enforcement is outsourced, it is likely that there will be a lot of companies competing for the contracts and they would start to promise things like detecting MORE crimes than other camera operators. As detailed earlier in this Article, aggressive traffic enforcement often creates long term indebtedness for the neediest people in society since they are least able to afford to pay the traffic fines. When they fail to pay or become delinquent they are charged additional fees which makes it even more difficult for them to pay. Failure to pay may then cause their driver’s license and registration to be suspended and may even result in arrest. One goal of automated traffic enforcement is to reduce the financial incentive to issue citations yet privatization would merely shift the incentive from jurisdictions that rely on traffic revenue to private contractors. Therefore, traffic enforcement should not be outsourced; it should not be administered by private contractors with a financial incentive to issue as many citations as possible. It is best that the enforcement be handled by newly created traffic agencies, as Professor Woods advocates, rather than by private contractors.

D. Continued Racial Disparities

A final concern might be that while automated enforcement of traffic infractions might reduce the number of police involved shootings, it is likely that the use of traffic cameras will produce racial disparities in who receives tickets. For instance, a study of red-light and speed cameras in Chicago found that “predominantly Black and Latino areas receive a higher number of tickets per household as compared to other parts of the city.” These disparities result in greater economic hardship among Black and Latinx residents. The same study found that “Black, Latino and low-income residents

458. See Stevenson, supra note 452, at 1303–04.
459. See id.
460. See Sanchez & Kambhampati, supra note 161.
461. Id.
462. Id.
463. See Woods, supra note 333, at 1511.
464. See id.
465. See id. at 1495.
466. See Sutton & Tilahun, supra note 399, at 3.
467. Id. at 5.
468. Id. at 6.
pay a disproportionate share of both fines and fees relative to income.”

There are two possible responses to these serious concerns. The disparity in the distribution of tickets can be addressed by careful location of the cameras. In Chicago, for instance, some of the racial disparities can be explained by the location of the cameras. The Chicago study also found that “ticketing levels are highest among red-light cameras located within 350 feet of freeways.” The study also found that in Black neighborhoods, red-light cameras are disproportionately located within 350 feet of freeways. It is not surprising therefore that Black residents of Chicago would be ticketed more frequently.

The concern regarding the inequities that automated ticketing might produce could be addressed by tying traffic fines to the disposable income of the ticket recipient. Unlike the flat-rate fine system in the United States, in Finland and other Scandinavian countries, some traffic fines, such as speeding, are assessed based on the disposable income of the violator. Thus, fines for poor Finns are much less burdensome than they are for poor Americans, particularly those in the Black and Latinx communities.

CONCLUSION

There is not one solution to the problem of police involved killings of African Americans. The best solution would of course be to change the hearts and minds of those police officers whose conscious and subconscious biases cause them to be more fearful of African Americans and to associate them with crime. Changing hearts and minds, however, is a process that occurs over a long period of time. There needs to be more immediate solutions. Most of the reforms that have occurred, such as police body cameras, have been helpful in that they have exposed the problem but incomplete because they have not led to many criminal convictions of the police.

469. Id. at 7.
470. See id. at 6.
471. See id.
472. See Sutton & Tilahun, supra note 399, at 6.
473. Id.
474. Id.
475. See id.
477. See id.
478. See id.
even when warranted. For instance, it is hard to imagine why a South Carolina jury was unable to reach a verdict after watching a video of the officer shooting a clearly unarmed Walter Scott in the back as he was running away and after watching the officer plant a taser next to Scott’s body, all following a stop for a minor traffic violation.

There is only one reform that will absolutely reduce the number of police shootings and that is to minimize the interactions between the police and individuals by discontinuing the use of traffic stops in order to enforce traffic rules. This much needed reform benefits both the police and motorists. By eliminating traffic enforcement from their responsibilities, the police would be able to devote their time to more serious crimes. They also would benefit from not having to deal with both the emotional difficulties that result from fatally shooting a suspect and the legal difficulties that they may encounter as a result. The motorists, especially African Americans and other marginalized individuals, benefit also. That’s because for most whites, being stopped by the police is an annoyance but for African Americans, an encounter with a police officer is a potential life-threatening event.

480. See id.
481. See Kenneth Williams, Why Police Have a Legal Duty to Provide Medical Aid to People They Shoot, 18 OHIO STATE J. CRIM. L. 391, 398 (2020) (discussing the emotional impact of an officer-involved shooting on the officer).
482. See Maclin, supra note 19, at 256 (“But I wonder whether the average white person worries that an otherwise routine police encounter may lead to a violent confrontation. When they are stopped by the police, do whites contemplate the possibility that they will be physically abused for questioning why an officer has stopped them? White teenagers who walk the streets or hang-out in the local mall, do they worry about being strip-searched by the police? Does the average white person ever see himself experiencing what Rodney King or Don Jackson went through during their encounters with the police?”).