

William & Mary Journal of Race, Gender, and Social Justice

Volume 30 (2023-2024)
Issue 2

Article 4

1-24-2024

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

Kenneth Williams

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Fourth Amendment Commons](#), [Law and Race Commons](#), and the [Law Enforcement and Corrections Commons](#)

Repository Citation

Kenneth Williams, *If Black Lives Really Matter, We Must End Traffic Stops!*, 30 Wm. & Mary J. Race, Gender, & Soc. Just. 309 (2024), <https://scholarship.law.wm.edu/wmjowl/vol30/iss2/4>

Copyright c 2024 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmjowl>

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

KENNETH WILLIAMS*

- I. MY PERSONAL EXPERIENCE
 - II. EXAMPLES OF FATAL TRAFFIC STOPS
 - A. *Patrick Lyoya*
 - B. *Philando Castile*
 - C. *Walter Scott*
 - D. *Daunte Wright*
 - E. *Jayland Walker*
 - III. PURPOSES OF TRAFFIC STOPS
 - A. *Public Safety*
 - B. *Revenue Source*
 - C. *Pretextual Stops and Racial Profiling*
 - 1. *Ferguson*
 - 2. *Minneapolis*
 - D. *“Veil of Darkness”*
 - E. *Searches*
 - IV. SCOTUS, PRETEXTUAL STOPS AND RACIAL PROFILING
 - A. *Terry v. Ohio*
 - B. *Whren v. United States*
 - C. *Qualified Immunity*
 - V. PROPOSAL
 - A. *Public Safety*
 - B. *Constitutional Concerns*
 - C. *Outsourcing Enforcement*
 - D. *Continued Racial Disparities*
- CONCLUSION

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.¹ That’s because African Americans are disproportionately killed by police.² These fatal

* Professor of Law, South Texas College of Law Houston. I would like to thank my two colleagues, Professors Dru Stevenson and Amanda Peters for their helpful comments.

1. See Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 631–32 (2018).

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.³ 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.⁴ There was initial optimism that police body cameras would substantially reduce police involved shootings and make police more accountable.⁵ 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.⁶

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.⁷ 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.⁸ However, the core of the problem is not individual racism among police officers; rather, the problem is institutional.⁹ Because the problem is institutional, it explains why there

/graphics/investigations/police-shootings-database/ [https://perma.cc/CZE5-XTGC]; see also MINN. DEP'T OF HUM. RTS., INVESTIGATION INTO THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT 10 (2022) ("[S]ince 2010, of the 14 individuals that MPD [Minneapolis Police Department] officers have killed, 13 of those individuals were people of color or Indigenous individuals.").

3. See Marisa Iati, Steven Rich & Jennifer Jenkins, *Fatal Police Shootings in 2021 Set Record Since The Post Began Tracking, Despite Public Outcry*, WASH. POST (Feb. 9, 2022, 5:22 PM), <https://www.washingtonpost.com/investigations/2022/02/09/fatal-police-shootings-record-2021> [https://perma.cc/R2N8-LZDC].

4. See, e.g., George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).

5. See Candice Norwood, *Body Cameras Are Seen as Key to Police Reform. But Do They Increase Accountability?*, PBS NEWS HOUR (June 25, 2020, 4:41 PM), <https://www.pbs.org/newshour/politics/body-cameras-are-seen-as-key-to-police-reform-but-do-they-increase-accountability> [https://perma.cc/SQ8D-5W5U].

6. See *id.*; Sonia Pruitt, *Opinion: Why Police Reform Utterly Failed to Protect Tyre Nichols*, CNN (Jan. 28, 2023, 8:50 PM), <https://edition.cnn.com/2023/01/28/opinions/tyre-nichols-police-reform-pruitt/index.html> [https://perma.cc/6AP5-A32N] ("But the beating of Nichols is actually much worse because it shows that after nearly 32 years, the needle of police reform has barely moved, and seemingly minor traffic violations continue to lead to the deaths of Black and other minority men and women in police encounters."); German Lopez, *A Disappointing Policing Change*, N.Y. TIMES (Dec. 14, 2023), <https://www.nytimes.com/2023/12/14/briefing/police-body-cameras.html> [https://perma.cc/GF8W-AL87].

7. 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).

8. See Sean Illing, *Why the Policing Problem Isn't About "A Few Bad Apples"*, VOX (June 6, 2020, 8:01 AM), <https://www.vox.com/identities/2020/6/2/21276799/george-floyd-protest-criminal-justice-paul-butler> [https://perma.cc/LP69-GN35].

9. 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.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.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.¹² Traffic stops are the most frequent interaction between the police and civilians.¹³ Many of the stops are for equipment violations such as broken taillights.¹⁴ Although there is little evidence that traffic stops control crime,¹⁵ they can be very dangerous encounters, primarily for the civilian who has been stopped.¹⁶ *A New York Times*

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.”).

10. See Iati, Rich & Jenkins, *supra* note 3.

11. See Aidan Gardiner & Rebecca Halleck, *Few Charges, Fewer Convictions: The Chauvin Trial and the History of Police Violence*, N.Y. TIMES (Apr. 19, 2021), <https://www.nytimes.com/interactive/2021/04/19/us/derek-chauvin-police-killings.html> [https://perma.cc/3BXP-A65D]; Shaila Dewan, *Few Police Officers Who Cause Deaths Are Charged or Convicted*, N.Y. TIMES (Sept. 24, 2020), <https://www.nytimes.com/2020/09/24/us/police-killings-prosecution-charges.html> [https://perma.cc/7N7Q-7R4J].

12. See David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> [https://perma.cc/RXW2-8JS7]; EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 9, at 159.

13. Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 637 (2019).

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.police1.com/traffic-patrol/articles/police-research-1000-cops-address-non-compliance-during-traffic-stops-C3mPToqhCR2O4Dxu/#form-success-message> [https://perma.cc/JH95-9XKF].

15. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *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,²⁰ and are disproportionately killed by police,²¹ even when they are not wielding a weapon or fleeing from a crime.²²

Although police fatally shoot suspects of all races,²³ 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.²⁴ 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.”); Margareth Etienne, *Disarming the Police: Blue Lives, Black Lives and Guns*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (Jan. 6, 2022), <https://firearmslaw.duke.edu/2022/01/disarming-the-police-blue-lives-black-lives-and-guns> [<https://perma.cc/C9ZW-RJKB>] (noting that “most officers are not typically harmed . . . on the job.”).

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

18. See Mark Berman & David Nakamura, *From George Floyd to Tyre Nichols, Pleas for Police Reform Meet Bleak Reality*, WASH. POST (Feb. 2, 2023, 7:05 PM), <https://www.washingtonpost.com/national-security/2023/02/02/memphis-tyre-nichols-police-reform/> [<https://perma.cc/6C8C-VT5B>].

19. See Geoffrey S. Corn, “*Light Him Up*: Addressing the Dangerous Intersection of Traffic Stops and Consent”, 20 GEO. J. L. & PUB. POL’Y 617, 620 (2022) (“And for many Americans, most notably Black and Brown Americans, a traffic stop likely generates fear that the encounter may escalate into a confrontation creating a genuine risk of violence.”); Tracey Maclin, “*Black and Blue Encounters*”—*Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 255 (1991) (“What underlies my thesis is that police encounters involving black men contain a combination of fear, distrust, anger and coercion that make these encounters unique and always potentially explosive.”).

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).

21. See *Fatal Force*, *supra* note 2.

22. See Gardiner & Halleck, *supra* note 11.

23. See *Fatal Force*, *supra* note 2.

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.²⁵ 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.²⁶ Police should only be able to stop civilians for violations that truly pose a danger to public safety.²⁷ 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.²⁸ Traffic stops are also often used to investigate other suspected criminal activity.²⁹ These pretextual stops frequently result in racial profiling thus putting African Americans at increased risk of being killed by police.³⁰ 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.”³¹ The Article then discusses how the U.S. Supreme Court, through a series of deci-

25. See David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try to Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html#:~:text=Los%20Angeles%20last%20month%20became,have%20all%20taken%20similar%20steps> [https://perma.cc/NXW7-9ENR].

26. See *id.*

27. See *id.*

28. Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> [https://perma.cc/DD5H-BCAR].

29. See Woods, *supra* note 13, at 637–40.

30. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 9, at 159; Kirkpatrick, Eder, Barker & Tate, *supra* note 12.

31. Pierson et al., *supra* note 20.

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,³² as well as in some nations, such as New Zealand from 1936 to 1992, but needs to be universally adopted.³³ 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.³⁴ 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.³⁵ When

32. See Kirkpatrick, Eder & Barker, *supra* note 25.

33. See Jordan Blair Woods, *Traffic Enforcement Would Be Safer Without Police. Here's How It Could Work*, WASH. POST (Apr. 21, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/04/21/traffic-enforcement-without-police> [https://perma.cc/6G22-FYRD].

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

Brutality: Hearings Before the Subcomm. on Civ. and Const. Rts. of the Comm. on the Judiciary, 102d Cong. 158–59 (1991).

36. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

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.*

45. See Tim Stelloh, *Most Officers Never Fire Their Guns. But Some Kill Multiple People—and Are Still on the Job*, U.S. NEWS (Apr. 22, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/most-officers-never-fire-their-guns-some-kill-multiple-people-n1264795> [<https://perma.cc/9JJ8-8RRT>].

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-8a0269689d3f981e8db1620adbde4b95> [<https://perma.cc/5ZUT-SG96>] (discussing how public opinion on the severity of police brutality and racial injustice is a recent and rare change).

47. See Stelloh, *supra* note 45; Blake Ellis & Melanie Hicken, *Officer Charged with Killing George Floyd Still Eligible for Pension Worth More than \$1 Million*, CNN (June 12, 2020), <https://www.cnn.com/2020/06/12/us/chauvin-minneapolis-police-pension-invs/index.html> [<https://perma.cc/V6KF-PTQE>].

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] underst[oo]d English and ha[d] a driver’s license, Mr. Lyoya turn[ed] away and [was] grabbed by the officer.”⁵³ Then, “[h]e start[ed] to run

48. See *Grand Rapids Police Release Video Of Officer Shooting, Killing Patrick Lyoya*, 13 ON YOUR SIDE (Apr. 13, 2022, 3:52 PM), <https://www.wzzm13.com/article/news/local/patrick-lyoya-police-shooting-video-background/69-ac921eed-d957-413f-85a9-1d5067ab3d4f> [https://perma.cc/8XFJ-PLNH].

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 Shammass, *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].

51. See Kim Barker, Steve Eder & Julie Tate, *The Driver, the Officer and the Deadly Traffic Stop in Grand Rapids*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/us/patrick-lyoya-christopher-schurr-traffic-stop.html> [https://perma.cc/W2ZN-5LR9].

52. *Another Black Man Killed by Police: When Is Enough Enough?*, WASH. POST (Apr. 18, 2022, 2:26 PM) [hereinafter *Another Black Man Killed by Police*], <https://www.washingtonpost.com/opinions/2022/04/18/patrick-lyoya-killed-police-shooting-grand-rapids-change-needed> [https://perma.cc/JET7-ED97].

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.*

60. See Julian Mark, *Video Shows Officer Fatally Shooting Patrick Lyoya in Michigan*, WASH. POST (Apr. 14, 2022, 9:08 AM), <https://www.washingtonpost.com/nation/2022/04/14/patrick-lyoya-videos-grand-rapids> [<https://perma.cc/H5TJ-6YEH>].

61. *Another Black Man Killed by Police*, *supra* note 52. The officer was subsequently charged with second-degree murder. Peter Nickeas & Ray Sanchez, *Grand Rapids Officer Charged with Second-Degree Murder in Shooting of Patrick Lyoya*, *Prosecutor Says*, CNN (June 10, 2022, 12:15 AM), <https://edition.cnn.com/2022/06/09/us/patrick-lyoya-police-shooting-charges/index.html> [<https://perma.cc/7RVE-JR3G>].

62. See Rachael Davis, *15 Facts About the Unjustified Police Killing of Philando Castile*, ESSENCE (Oct. 27, 2020), <https://www.essence.com/news/15-facts-about-philando-castile> [<https://perma.cc/M9G3-LE2R>].

63. Gabriel Scott, *Philando Dival Castile (1983–2016)*, BLACKPAST (Sept. 30, 2017), <https://www.blackpast.org/african-american-history/castile-philando-divall-1983-2016> [<https://perma.cc/JS4Z-96FS>].

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.⁶⁷ Before complying with the officer's command, Castile informed the officer that he had a firearm in the car.⁶⁸ Yanez then told Castile not to pull out the weapon; Castile told him that he was not, but Yanez shot Castile multiple times.⁶⁹ Castile's girlfriend recorded the incident, streamed the video on social media, and narrated what had happened.⁷⁰

Yanez was initially allowed to return to work.⁷¹ After a community outrage, Yanez was suspended and charged with manslaughter.⁷² Yanez told investigators that he feared for his life because he smelled marijuana in Castile's car.⁷³ Approximately a year after the shooting, Yanez was acquitted by a jury of the manslaughter charge.⁷⁴ It was subsequently revealed that the broken taillight was a pretext for stopping Castile.⁷⁵ The real reason for the stop was that Yanez believed that Castile resembled a suspect in a recent armed robbery in the area.⁷⁶

Castile, NPR (July 15, 2016, 4:51 AM), <https://www.npr.org/sections/thetwo-way/2016/07/15/485835272/the-driving-life-and-death-of-philando-castile> [https://perma.cc/8VKG-WCMX].

67. Scott, *supra* note 63.

68. *Id.*

69. *Id.*

70. See Christina Capecchi & Mitch Smith, *Officer Who Shot Philando Castile Is Charged with Manslaughter*, N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/us/philando-castile-shooting-minnesota.html?searchResultPosition=1> [https://perma.cc/M6XW-SVZQ].

71. See *Minnesota Police Officer Who Fatally Shot Philando Castile Back on Administrative Leave*, ABC NEWS (Aug. 25, 2016, 2:24 PM), <https://abcnews.go.com/US/minnesota-police-officer-fatally-shot-philando-castile-back/story?id=41642460> [https://perma.cc/ME2N-WA9Y].

72. See Morgan Winsor, *Minnesota Police Officer Charged With 2nd-Degree Manslaughter in Philando Castile's Death*, EVERYTHING LUBBOCK (Nov. 16, 2016, 11:06 AM), <https://www.everythinglubbock.com/news/minnesota-police-officer-charged-with-2nd-degree-manslaughter-in-philando-castiles-death> [https://perma.cc/K23Z-4M5S].

73. See Christopher Ingraham, *Officer Who Shot Philando Castile Said the Smell of Marijuana Made Him Fear for His Life*, WASH. POST (June 21, 2017, 2:39 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/06/21/officer-who-shot-philando-castile-said-smell-of-marijuana-made-him-fear-for-his-life> [https://perma.cc/8TSE-KJP7].

74. See Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [https://perma.cc/2ZKX-ZE4V].

75. See Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017, 5:22 PM), <https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting> [https://perma.cc/L9GB-4C6G].

76. *Id.* According to Yanez, Castile look[ed] more like one of our suspects, just "cause [sic] of the wide-set nose." German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017, 4:15 PM), <https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video> [https://perma.cc/W9TL-CAZ5].

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.⁷⁷ Following the stop, Scott, an African American male, fled on foot and Slager chased him.⁷⁸ During the chase, Slager fired his taser at Scott twice, "hitting and bringing down Scott with the second [taser] shot."⁷⁹ Scott and Slager were on the ground briefly together.⁸⁰ Scott soon thereafter got up and fled.⁸¹ While on the ground, "Scott did not wrestle the taser [from Slager]" and "never had the taser in his hands."⁸² 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."⁸³ Slager fired the first shot when Scott was nearly fifteen feet away.⁸⁴ The eighth shot was fired when Scott was nearly forty feet away.⁸⁵ At no point during the shooting did Scott turn around and face Slager.⁸⁶ Scott died on the scene as a result of his wounds.⁸⁷ The shooting was filmed by an innocent bystander.⁸⁸ The video of the shooting confirmed that Scott was unarmed and running away from Slager when Slager opened fired.⁸⁹

Slager provided four different accounts of the shooting.⁹⁰ 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.⁹¹ He claimed that he shot Scott as a result.⁹² 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.'"⁹³ Slager gave a third account at his trial.⁹⁴ 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.⁹⁵ Finally, he claimed that Scott was “on top of [him] at some point.”⁹⁶ Neither the video of the shooting nor the innocent bystander’s account of the shooting supported any of Slager’s claims.⁹⁷ The trial court described Slager’s accounts as “‘contradictory,’ ‘self-serving, evolving, and internally inconsistent.’”⁹⁸

Slager was tried in South Carolina state court for murder.⁹⁹ That trial resulted in a hung jury and a mistrial.¹⁰⁰ Slater was also indicted by a federal grand jury with violating Scott’s civil rights.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.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.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.¹⁰⁴ Slager was sentenced to a 240-month term of imprisonment.¹⁰⁵

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.¹⁰⁶ There is dispute over the reason for the stop.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.¹⁰⁸ Potter claims that she would not have pulled Wright over if she had

95. *Slager*, 912 F.3d at 230.

96. *Id.* (alteration in original).

97. *Id.* at 234.

98. *Id.* at 231.

99. *Id.* at 227.

100. *Id.*

101. *Slager*, 912 F.3d at 227.

102. *Id.* at 227–28.

103. *Id.* at 232.

104. *Id.* at 237.

105. *Id.* at 227.

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>].

107. See *Kim Potter Trial, Dec. 17: Potter Breaks Down on the Stand, ‘I’m Sorry It Happened’*, CBS MINNESOTA (Dec. 18, 2021, 4:30 AM), <https://minnesota.cbslocal.com/2021/12/18/kim-potter-testifies-daunte-wright-shooting> [<https://perma.cc/3XEB-MVEH>].

108. *Id.*

not been training a new officer that day.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."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.¹¹¹ When an officer attempted to arrest and handcuff Wright, he got back into his car.¹¹² Potter then shouted, "I'm going to tase you."¹¹³ "Five seconds later, she yelled, 'Taser! Taser! Taser!' and then fired . . . into Wright's side."¹¹⁴ However, she shot him with her gun, not her taser.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."¹¹⁶ She was subsequently charged and convicted of manslaughter.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.¹¹⁸

E. Jayland Walker

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

109. *Id.*

110. Faith Karimi, *Yes, Police Can Pull You Over for Hanging an Air Freshener in your Car*, CNN (Apr. 13, 2021), <https://www.cnn.com/2021/04/12/us/police-shooting-air-freshener-trnd/index.html> [<https://perma.cc/H2VA-QWCC>].

111. Vanessa Romo, Becky Sullivan & Joe Hernandez, *Kim Potter Is Found Guilty of Manslaughter in the Death of Daunte Wright*, NPR (Dec. 23, 2021, 3:58 PM), <https://www.npr.org/2021/12/23/1066012247/kim-potter-trial-daunte-wright> [<https://perma.cc/V875-YA3J>].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Romo, Sullivan & Hernandez, *supra* note 111.

118. See Nicholas Bogel-Burroughs, *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/F8P4-LCRR>] (stating the presumptive sentence for manslaughter under Minnesota law is about seven years in prison).

119. See Daniel McGraw & Luke Vander Ploeg, *Videos of Jayland Walker Shooting by Police Raise More Questions*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/03/us/akron-police-shooting-jayland-walker-video.html> [<https://perma.cc/LTP6-HY7U>].

120. *Id.*

and then by foot.¹²¹ When Walker exited his vehicle, he was chased by eight Akron police officers, seven of whom were white while one was African American.¹²² These officers chased Walker for seven minutes, eventually fatally shooting him.¹²³ Walker's body had at least sixty gunshot wounds and it is estimated that at least ninety shots were fired by the officers.¹²⁴ At the time he was shot and killed, Walker was not in possession of a gun.¹²⁵

III. PURPOSES OF TRAFFIC STOPS

Traffic stops are the most common interaction between police and the public.¹²⁶ 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.¹²⁷ Second, many jurisdictions also use traffic infractions in order to generate revenue.¹²⁸ Finally, many traffic stops are pretextual.¹²⁹ The traffic infraction is not the real reason for the stop. Instead, the traffic stop is used to investigate other possible criminal activity.¹³⁰ These pretextual stops often result in racial profiling.¹³¹

A. Public Safety

The stated purpose of traffic stops is to protect public safety.¹³² There are numerous traffic infractions that a driver may commit.¹³³ Some are moving violations such as speeding and failure to use turn

121. *Id.*

122. See Andrea Simakis, Brittany Shammass, Praveena Somasundaram & Kim Bellware, *Akron Police Release Video of Officers Shooting Black Man Dozens of Times*, WASH. POST (July 4, 2022, 12:25 AM), <https://www.washingtonpost.com/nation/2022/07/03/akron-police-jayland-walker-video> [<https://perma.cc/46SC-DPYC>].

123. *Id.*

124. *Id.*

125. McGraw & Vander Ploeg, *supra* note 119.

126. *Traffic Stops*, BUREAU OF JUSTICE STATISTICS (May 6, 2015), <http://www.bjs.gov/index.cfm?ty=tp&tid=702> [<https://perma.cc/C98Y-UNM5>] (“The most common reason for contact with the police is being a driver in a traffic stop.”).

127. See *If You Are Pulled Over*, STATE OF R.I. STATE POLICE, DEP’T OF PUB. SAFETY, <https://risp.ri.gov/safety-education/motor-vehicle-safety-information/if-you-are-pulled-over> [<https://perma.cc/5W6U-7Z58>] (“Traffic stops are a very important law enforcement function, which maintains safety throughout our state.”).

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.*

signals.¹³⁴ 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.¹³⁵ These infractions are punished by fines, court costs, driving school, or community service hours.¹³⁶ There are a handful of other traffic infractions that can result in incarceration.¹³⁷ These include driving under the influence, driving with a suspended license, and reckless driving.¹³⁸ There is little evidence that traffic ticket writing reduces fatal car crashes.¹³⁹

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.”¹⁴⁰ 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.”¹⁴¹ According to the *Times* investigation, “[o]ver 730 municipalities rely on fines and fees for at least 10 percent of their revenue.”¹⁴²

Communities that rely on traffic ticket revenue are dispersed throughout the United States.¹⁴³ 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.¹⁴⁴ Many of these traffic violations involve defective equipment.¹⁴⁵

134. See, e.g., *Types of Traffic Offenses*, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/self-help/traffic/types_of_violations [<https://perma.cc/QPK5-ZBZF>].

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.*

145. McIntire & Keller, *supra* note 28.

Henderson, Louisiana, a town of 2000 residents, collected \$1.7 million in traffic fines in 2019, about eighty-nine percent of its general revenue.¹⁴⁶ Its officers were allegedly provided cash rewards for writing tickets.¹⁴⁷ Oliver, Georgia, a town of 380 residents, collects half its budget from fines.¹⁴⁸ A subsequent investigation discovered that police improperly wrote more than \$40,000 in tickets outside of their jurisdiction.¹⁴⁹ In Bratenahl, Ohio, “the police chief castigated his officers as ‘badge-wearing slugs’ in an email” in response to a downturn in ticket revenue.¹⁵⁰

Windsor, Virginia, is one of 100 communities in the state that receives a federal grant in order to encourage ticket writing by police officers.¹⁵¹ In fact, states often track the number of tickets issued as one measurement of the grant recipient’s effectiveness.¹⁵² 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.¹⁵³ Just days later, elected officials questioned the police chief on why ticket revenue was down that year.¹⁵⁴ The police chief subsequently “reminded his officers to issue at least ‘two tickets per hour.’”¹⁵⁵

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.¹⁵⁶ 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”¹⁵⁷ 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.”¹⁵⁸ 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.*

156. See U.S. DEP’T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015).

157. *Id.* at 9–10.

158. *Id.* at 10.

any public safety need, and rely on citation productivity to fund the City budget.”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.¹⁶⁰

It is not just small communities that depend on ticket revenue to sustain their governmental functions.¹⁶¹ A ProPublica study found that aggressive traffic ticketing accounts for about seven percent of Chicago, Illinois’s operating budget.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.¹⁶³ The study found that the City’s aggressive ticketing impacts the City’s African American community the hardest.¹⁶⁴ According to ProPublica, eight of the ten zip codes with the most accumulated ticket debt in Chicago are mostly Black.¹⁶⁵ This debt causes many to file bankruptcy because they cannot afford to pay the tickets and the additional fees, especially late fees.¹⁶⁶ Those who do not file for bankruptcy sometimes remain indebted to the City indefinitely.¹⁶⁷

C. Pretextual Stops and Racial Profiling

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

159. *Id.*

160. *Id.* at 11.

161. See Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy*, PROPUBLICA ILL. (Feb. 27, 2018), <https://features.propublica.org/driven-into-debt/chicago-ticket-debt-bankruptcy> [<https://perma.cc/53R6-4RD2>].

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Sanchez & Kambhampati, *supra* note 161.

168. See Mike Baker & Nicholas Bogel-Burroughs, *How a Common Air Freshener Can*

are major.¹⁶⁹ Some are well known, such as speeding, texting while driving, and running a red light, while others are fairly arcane.¹⁷⁰ For instance, in a number of jurisdictions drivers can be ticketed for driving too slowly.¹⁷¹ In Ohio, a driver can be ticketed for wearing headphones while driving.¹⁷² In Florida, a driver can be ticketed for making a right turn that spills into the left lane.¹⁷³ As we unfortunately learned as a result of Daunte Wright's death, some jurisdictions prohibit air fresheners on rear view mirrors.¹⁷⁴

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.¹⁷⁵ It is said that the average driver commits a traffic infraction of some kind every three blocks.¹⁷⁶ Thus, police have almost unfettered discretion to stop a driver.¹⁷⁷ As a result of this unfettered discretion, pretextual stops have become fairly common.¹⁷⁸ 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.¹⁷⁹

Unfortunately, there is plenty of evidence that the police do not use the power to stop drivers evenhandedly.¹⁸⁰ Rather, the evidence indicates that the power to make pretextual stops often leads to racial profiling.¹⁸¹ Profiling in the law enforcement context “refers to the ‘police practice of viewing certain characteristics as indicators

Result in 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>].

169. See Texas Department of Transportation, *Driving Safety and Laws*, <https://www.txdot.gov/safety/driving-laws.html> [<https://perma.cc/D88S-8PA7>]; Baker & Bogel-Burroughs, *supra* note 168.

170. See Texas Department of Transportation, *supra* note 169.

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

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

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

174. See Baker & Bogel-Burroughs, *supra* note 168 (noting that “[a] majority of states have laws making it illegal to hang anything from a rearview mirror that obscures a driver’s view. But critics say the laws are often used as pretexts.”).

175. See *Whren v. United States*, 517 U.S. 806, 818 (1996).

176. See David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 558 (1997).

177. See *id.*

178. 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.”).

179. *Id.* at 621–22.

180. See Pierson et al., *supra* note 20, at 736.

181. See *id.*

of criminal behavior.”¹⁸² Certain types of profiling are acceptable.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ However, profiling becomes unacceptable when it is based solely on race.¹⁸⁶

There are two types of racial profiling.¹⁸⁷ First, racial profiling occurs when race is the sole criterion for questioning, stopping, or searching a suspect.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰ “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.”¹⁹¹ 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.¹⁹²

Therefore, most racial profiling falls into the second category.¹⁹³ 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.¹⁹⁴ “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.”¹⁹⁵ It’s possible that an officer may not even be

182. See Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post–September 11 World*, 40 AM. CRIM. L. REV. 1195, 1202 (2003).

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.*

192. Randall Kennedy, *Suspect Policy*, NEW REPUBLIC (Sept. 13, 1999), <https://newrepublic.com/article/63137/suspect-policy> [<https://perma.cc/WN86-44Y6>].

193. Ramirez, Hoopes & Quinlan, *supra* note 182, at 1204.

194. *Id.*

195. *Id.* at 1204–05.

conscious of the fact that they are considering race in their decision to stop a driver.¹⁹⁶

Racial profiling has become so prevalent that the term “Driving While Black” has been adopted to both describe and deride the practice.¹⁹⁷ There is an abundance of evidence that racial profiling in traffic stops is widespread.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ 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.”²⁰¹ 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.²⁰²

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.”²⁰³ According to DOJ, “[s]everal incidents suggest that officers are more concerned with issuing citations and generating charges than with addressing community needs.”²⁰⁴ In addition, according to DOJ, “[t]he data

196. *Id.* at 1205.

197. David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/695W-2URU>].

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.

203. U.S. DEP’T OF JUST., *supra* note 156, at 16.

204. *Id.* at 17.

show, moreover, that FPD misconduct in the area of stops and arrests disproportionately impacts African Americans.”²⁰⁵

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.²⁰⁶ 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.”²⁰⁷ 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.”²⁰⁸

Traffic stops are one of the most common law enforcement activities of law enforcement agencies throughout the nation, including MPD.²⁰⁹ 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.”²¹⁰ Between 2017 and 2020, fifty-four percent of MPD-initiated traffic stops involved African Americans—who comprise only nineteen percent of the Minneapolis population.²¹¹ 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.²¹² Furthermore,

205. *Id.* at 16.

206. *See* MINN. DEP’T 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. DEP’T 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. DEP’T 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. DEP’T OF HUM. RTS., *supra* note 2, at 20.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. MINN. DEP’T OF HUM. RTS., *supra* note 2, at 22.

221. *Id.*

222. *Id.*

223. *Id.*

stops made after dark.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.²²⁵ However, studies do indicate that there are racial differences between stops that occur during the day as opposed to at night.²²⁶ African American motorists are stopped more frequently when there is daylight.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.²²⁸ Thus, African American drivers are pulled over less at night when their race is obscured by a “veil of darkness.”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.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.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.”²³²

The Minneapolis study revealed a similar “veil of darkness” racial disparity in traffic stops.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.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.²³⁵

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. DEP’T OF HUM. RTS., *supra* note 2, at 21.

234. *Id.*

235. *Id.* at 20.

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

236. See *Arizona v. Gant*, 556 U.S. 332 (2009); *Michigan v. Long*, 463 U.S. 1032 (1983).

237. See MINN. DEP'T 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/la-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-disturbing-statistics-from-the-federal-report-on-ferguson-police> [<https://perma.cc/2P5D-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 MINN. DEP'T 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.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.²⁴² Another important consequence of racial profiling in police stops is that it undermines the African American community's confidence in the police.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.²⁴⁴ Racial profiling in traffic stops also creates financial burdens for many African Americans.²⁴⁵ Finally, there is evidence that racial profiling creates or exacerbates health problems of African Americans.²⁴⁶

241. *Id.* at 159.

242. See MINN. DEPT OF HUM. RTS., *supra* note 2, at 10.

243. See *id.* at 38; see also EPP, MAYNARD-MOODY & HAIDER-MARKEL, *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.").

244. See Nicole Sealey, *The Ferguson Report: An Erasure*, 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).

245. Colleen Walsh, *Solving Racial Disparities in Policing*, HARV. GAZETTE (Feb. 23, 2021), <https://news.harvard.edu/gazette/story/2021/02/solving-racial-disparities-in-policing> [<https://perma.cc/T8QQ-FHK2>].

246. See Cato T. Laurencin & Joanne M. Walker, *Racial Profiling Is a Public Health and Health Disparities Issue*, 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.²⁴⁷ Justice Sotomayor, writing in dissent, has stated that “[r]acial bias is ‘odious in all aspects,’ but especially pernicious in the administration of justice.”²⁴⁸ “That is because racial bias is too grave and systemic a threat to the fair administration of justice to be tolerated or ignored.”²⁴⁹ The Court, however, has rendered decisions which cannot be reconciled with these statements.²⁵⁰ 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.²⁵¹

A. *Terry v. Ohio*²⁵²

When the police execute a traffic stop, that constitutes a seizure of the individual and implicates the Fourth Amendment.²⁵³ No Supreme Court decision expanded the authority of the police to stop and seize individuals more than *Terry v. Ohio*.²⁵⁴ Prior to *Terry*, the police needed probable cause to stop and seize an individual.²⁵⁵ The probable cause standard is the foundation of the Fourth Amendment.²⁵⁶ 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].

248. See *Love v. Texas*, 142 S. Ct. 1406, 1406 (2022) (Sotomayor, J., dissenting) (quoting *Buck v. Davis*, 137 S. Ct. 759 (2017)).

249. *Id.* at 1408.

250. See *Terry v. Ohio*, 392 U.S. 1 (1968).

251. See *id.*

252. *Id.*

253. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 149 (2017) (explaining how the reasonableness doctrine for searches and seizures applies to traffic stops).

254. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1047–50 (1983) (holding that *Terry* applies to traffic stops and searches).

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.²⁵⁷ In *Terry*, however, the Court created an exception to the probable cause requirement for stops and seizures.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.²⁵⁹ The Court held that a stop and seizure occurs whenever an “officer accosts an individual and restrains his freedom to walk away.”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.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.²⁶² Reasonable suspicion, however, cannot be based on hunches.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.”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,²⁶⁵ and search the car for weapons.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.²⁶⁷ One scholar, for

Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor, 112 NW. U. L. REV. 1465, 1472 (2018) (describing the historical context that produced the probable cause requirement in the Fourth Amendment).

257. See *Johnson v. United States*, 333 U.S. 10, 15 (1948).

258. See *Terry*, 392 U.S. at 20.

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.”).

260. *Id.* at 16.

261. *Id.* at 20.

262. See *id.* at 21–22.

263. See *id.*

264. *Terry*, 392 U.S. at 21.

265. See *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

266. See *Michigan v. Long*, 463 U.S. 1032, 1053–54 (1983).

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.”²⁶⁸

*B. Whren v. United States*²⁶⁹

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.”²⁷⁰ 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.²⁷¹ The truck had been stopped at an intersection for more than twenty seconds.²⁷² When the driver sped off, the police followed and eventually overtook the truck.²⁷³ When the officer approached the truck, he “observed two large plastic bags of what appeared to be crack cocaine in . . . Whren’s hands.”²⁷⁴ Whren was subsequently charged with violating federal drug laws.²⁷⁵ He sought to have the evidence suppressed, arguing that the officers violated his Fourth Amendment rights.²⁷⁶ 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.²⁷⁷

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.²⁷⁸ The Court rejected Whren’s proposed standard.²⁷⁹ Instead, it held that the Fourth Amendment provided no remedy for pretextual stops.²⁸⁰ As long as the officer had cause to stop a driver, an officer’s “[s]ubjective intentions play no

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.”).

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

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).

286. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987) (describing the statistics defendant introduced to support his discrimination claim).

287. See, e.g., Carbado, *supra* note 253, at 127 (describing statistics collected on Ferguson, Missouri police officers).

288. To prove an Equal Protection violation, the Court has held that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.” *Washington v. Davis*, 426 U.S. 229, 240 (1976); see also *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65, 271 (1977).

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 "[a]t 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.

297. *See* Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 261 (2015) (discussing the Supreme Court's avoidance of race in death penalty cases).

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*).

299. *See* KENNETH WILLIAMS, MOST DESERVING OF DEATH? AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE 48 (2012).

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

302. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

303. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638).

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.").

307. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1862–65 (2020) (Thomas, J., dissenting).

308. *See Jay Schweikert, Supreme Court Reaffirms Unwillingness to Reconsider Qualified Immunity*, CATO INST. (Oct. 22, 2021), <https://www.cato.org/blog/supreme-court-re-affirms-unwillingness-reconsider-qualified-immunity> [<https://perma.cc/ENA9-AV6A>].

309. *See Mariame Kaba, Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/J7MG-7HTG>].

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

311. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 9, at 159.

312. *See id.* at 165.

313. *See id.*

314. *See* Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 122 (2021).

315. *See id.* at 123–24; *see also* Kaba, *supra* note 309.

316. *See* Kaba, *supra* note 309.

317. *See id.*

318. Eaglin, *supra* note 314, at 127.

319. Kaba, *supra* note 309.

320. *Id.*

321. *See* Eaglin, *supra* note 314, at 136.

322. *See id.* at 132.

323. *See Let's Re-imagine a New System*, BLACK LIVES MATTER, <https://defundthepolice.org/alternatives-to-police-services> [<https://perma.cc/C63B-E77J>].

324. *See id.*

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

325. *Id.*

326. See Chris Cillizza, *Even Democrats Are Now Admitting ‘Defund the Police’ Was a Massive Mistake*, CNN (Nov. 5, 2021), <https://edition.cnn.com/2021/11/05/politics/defund-the-police-democrats/index.html> [<https://perma.cc/5NNW-WGCD>].

327. *See id.*

328. *See id.*

329. See Holly Bailey, *Minneapolis Rejects Measure to Replace Police Department in First Major Electoral Test of Reform Movement After George Floyd’s Murder*, WASH. POST (Nov. 3, 2021, 12:01 AM), <https://www.washingtonpost.com/nation/2021/11/02/minneapolis-mayor-police-vote/> [<https://perma.cc/NZC3-LPD5>].

330. *Id.*

331. *Id.*

332. See Cillizza, *supra* note 326.

333. Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1477 (2021).

334. *See id.* at 1495.

335. *Id.* at 1488.

336. *Id.*

through in-person traffic stops. . . .”³³⁷ 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.³³⁸

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.”³³⁹

Professor Woods is correct in that police need to be removed from traffic enforcement.³⁴⁰ 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.³⁴¹ 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?³⁴² What if they observe a child with bruises?³⁴³ Should they alert the police or ignore what they saw? It

337. *Id.*

338. *Id.* at 1495–96.

339. Woods, *supra* note 333, at 1496.

340. For Professor Woods’s argument, *see id.* at 1471–72.

341. *Id.* at 1496.

342. *See, e.g.*, Kyle Jones, *Madison Police Arrest Four After Gun, Drugs Found During Traffic Stop*, CHANNEL 3000 (Sept. 14, 2023), https://www.channel3000.com/news/madison-police-arrest-four-after-gun-drugs-found-during-traffic-stop/article_aa6a2b82-5331-11ee-8ff2-2b885ebfd591.html [<https://perma.cc/2N74-2D2P>].

343. *See, e.g.*, Kait Newsum, *Florence Man Charged with Child Abuse After ‘Bruises,’ ‘Dried Blood’ Found on Infant: Report*, NEWS 19 (Mar. 16, 2023, 8:01 AM), <https://whnt.com/news/shoals/florence-man-charged-with-child-abuse-after-bruises-dried-blood-found-on-infant-report> [<https://perma.cc/4UQR-AASZ>].

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.³⁴⁴ Professor Woods proposes that they engage in their duties unarmed.³⁴⁵ 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.³⁴⁶ There will also likely be threats to traffic monitors from irate motorists.³⁴⁷ 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.³⁴⁸ 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.³⁴⁹ One big distinction, however, is that police officers have guns in their possession when making traffic stops.³⁵⁰ The fact that they are in possession of a gun undoubtedly has some deterrent effect.³⁵¹ This deterrent impact would not exist with respect to traffic monitors.³⁵² 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,³⁵³ 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/6SKF-GL57>].

Amendment,³⁵⁴ and minimal gun regulations in most of the United States.³⁵⁵

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.³⁵⁶ Some jurisdictions have already begun to remove police from traffic enforcement.³⁵⁷ Many jurisdictions have installed cameras for red-light and speeding violations.³⁵⁸ This practice needs to become universal and used for all but the most serious traffic infractions.³⁵⁹ In addition, police officers can continue to be involved in traffic enforcement on a limited basis.³⁶⁰ When an officer or traffic monitor observes a traffic violation they can record the violation and the license plate of the violator.³⁶¹ This can be done with the police car's camera system.³⁶² A citation can then be sent to the registered owner of the vehicle.³⁶³ There is no reason why most traffic infractions, especially those involving equipment violations, could not be handled in this manner.³⁶⁴

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

354. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment protects the right of ordinary, law-abiding citizens to possess a handgun in the home for self-defense); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022) (holding that the Second Amendment protects the right of ordinary, law-abiding citizens to possess a handgun outside the home for self-defense).

355. U.S. gun laws are more permissive than most countries in the world. See Jonathan Masters, *U.S. Gun Policy: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 10, 2022, 9:00 AM), <https://www.cfr.org/backgrounders/us-gun-policy-global-comparisons> [<https://perma.cc/YBH9-LGWK>]; see also Jamie Hancock, *What Are the Gun Laws in Texas?*, DALL. MORNING NEWS (May 25, 2022, 2:59 PM), <https://www.dallasnews.com/news/politics/2022/05/24/what-are-the-gun-laws-in-texas> [<https://perma.cc/SGY5-63FN>] (noting that Texas allows permit-less carry of handguns, no background checks, no firearm safety courses, open carry of guns, and campus-carry which allows handguns to be carried in campus buildings and dorms).

356. Woods, *supra* note 333, at 1494.

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

358. See *U.S. Communities Using Red Light Cameras*, INS. INST. FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/red-light-running/red-light-camera-communities> [<https://perma.cc/A274-Z38Z>].

359. See *Investing in Evidence-Based Alternatives to Policing: Non-Police Responses to Traffic Safety*, VERA INST. OF JUST. (2021), <https://www.vera.org/downloads/publications/alternatives-to-policing-traffic-enforcement-fact-sheet.pdf> [<https://perma.cc/YX4L-L76E>].

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

361. See *id.* at 1503–04.

362. See *You Are Being Tracked*, ACLU (July 17, 2013), <https://www.aclu.org/issues/privacy-technology/you-are-being-tracked> [<https://perma.cc/4CGT-657T>].

363. Woods, *supra* note 333, at 1504.

364. See *id.*

Brandon Calloway, a twenty-five-year-old African American male was driving to his father's home in Oakland, Tennessee.³⁶⁵ He apparently failed to stop at a sign.³⁶⁶ 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.³⁶⁷ Instead, after Calloway refused to stop police followed him home.³⁶⁸ After Calloway ran into his home, two officers "made entry [into Calloway's home] by kicking in the front door."³⁶⁹ Calloway "ran up the stairs and locked himself in his room."³⁷⁰ The police went into his room, beat him with a baton, and tased him.³⁷¹ One officer even put his boot on Calloway's neck.³⁷² Calloway sustained serious physical injuries as a result of the encounter and says that he has "constant headaches and eye pain."³⁷³ This was a totally unnecessary encounter.³⁷⁴

Brazil provides another example of how traffic enforcement can occur without traffic stops for minor infractions.³⁷⁵ In 2013, I was a Fulbright Scholar at the Universidade Federal da Bahia.³⁷⁶ 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.³⁷⁷ It turns out that I was correct.³⁷⁸ While Brazil has numerous traffic laws, these laws are often not enforced by police stops of motorists on the streets.³⁷⁹ 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*

365. Livia Albeck-Ripka, *Tennessee to Investigate Use of Force in Arrest of Black Man*, N.Y. TIMES (July 22, 2022), <https://www.nytimes.com/2022/07/22/us/tennessee-police-beating-traffic-brandon-calloway.html#:~:text=Brandon%20Calloway%2C%2025%2C%20was%20arrested,he%20ran%20into%20a%20home> [https://perma.cc/W2KG-QHZE].

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.

375. See Ana Gabriela Verotti Farah, *Traffic Penalties in Brazil*, BRAZIL.BUS. (Oct. 31, 2013), <https://thebrazilbusiness.com/article/traffic-penalties-in-brazil> [https://perma.cc/G6UP-M2EX].

376. Kenneth Williams, *curriculum vitae*, S. TX. COLL. OF L. (Aug. 2016), https://www.stcl.edu/wp-content/uploads/2016/08/Williams.cv_.2016.pdf.

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.³⁸⁰

Police should continue to make traffic enforcement stops for those offenses that more imminently endanger public safety.³⁸¹ 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).”³⁸²

Removing police and other individuals from direct traffic enforcement of minor offenses would be enormously beneficial.³⁸³ 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.³⁸⁴ 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.³⁸⁵ Third, regaining the trust of these communities will help the police perform their jobs and make these communities safer.³⁸⁶ Finally, removing traffic enforcement from the police’s responsibilities would allow them to concentrate time and resources on offenses that truly threaten public safety.³⁸⁷

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.³⁸⁸ Second, there will be arguments that using automation for traffic enforcement violates the Constitution.³⁸⁹ Third, there will be concerns over outsourcing of traffic enforcement to private contractors.³⁹⁰ 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.³⁹¹ First, that the streets and highways will become less safe.³⁹² Second, that during a routine traffic stop the police might discover other evidence of more serious crimes and more serious criminals.³⁹³ 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.³⁹⁴ There is evidence to suggest that these concerns are unwarranted.³⁹⁵ Studies have debunked the idea of a relationship between traffic stops and reductions in general crime rates.³⁹⁶

Many jurisdictions enforce speed and traffic light violations through the use of cameras.³⁹⁷ This alone is a tacit admission that the public streets and highways are not less safe by eliminating police from enforcement of these violations.³⁹⁸ However, there is also evidence “that traffic safety is not contingent on police-initiated traffic stops.”³⁹⁹ There are studies, for instance, which indicate an actual reduction in crashes related to red-light-running and speed violations.⁴⁰⁰

391. *See id.* at 1535–36.

392. *Id.*

393. Woods, *supra* note 333, at 1535–36.

394. *See* Dean Scoville, *Killer Stops*, POLICE MAG. (May 31, 2006), <https://www.police-mag.com/patrol/article/15349197/killer-stops> [<https://perma.cc/4NEX-TF34>] (discussing notorious killers apprehended by police following routine traffic stops).

395. Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49, 82 (2004).

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.

398. Anuja L. Sarode, Vanessa P. Ho, Lin Chen, Katelynn C. Bachman, Philip A. Linden, Alaina M. Lasinski, Matthew L. Moorman & Christopher W. Towe, *Traffic Stops Do Not Prevent Traffic Deaths*, 91 J. TRAUMA ACUTE CARE SURGERY 141, 142 (2021).

399. *See* Woods, *supra* note 333, at 1537; Stacey Sutton & Nebiyu Tilahun, *Red-Light and Speed Cameras: Analyzing the Equity and Efficacy of Chicago's Automated Camera Enforcement Program, Executive Summary*, DEPT. URB. PLAN. & POL'Y, U. ILL. CHI. 3 (2022).

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.⁴⁰¹ 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.”⁴⁰² 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.⁴⁰³

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.⁴⁰⁴ 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.⁴⁰⁵ 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-

401. See ALEX CHOHLAS-WOOD, SHARAD GOEL, AMY SHOEMAKER & RAVI SHROFF, *An Analysis of the Metropolitan Nashville Police Department’s Traffic Stop Practices*, STAN. COMPUTATIONAL POL’Y LAB 2 (2018).

402. See POLICING PROJECT, *supra* note 396, at 10.

403. *Id.* (internal citations omitted).

404. See Woods, *supra* note 333, at 1538.

405. See Geetika Rudra, *About 90 Percent of New Yorkers Stopped and Frisked Were ‘Innocent,’ Says NYCLU*, ABC NEWS (Aug. 12, 2013), <https://abcnews.go.com/blogs/headlines/2013/08/about-90-percent-of-new-yorkers-stopped-and-frisked-were-innocent-says-nyclu> [<https://perma.cc/DDN4-ZJVV>].

munities 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.

407. See Maya Fegan, *Speeding into the Future: The Pitfalls of Automated Traffic Enforcement*, BERKELEY J. CRIM. L. BLOG (Apr. 15, 2021), <https://www.bjcl.org/blog/speeding-into-the-future-the-pitfalls-of-automated-traffic-enforcement> [<https://perma.cc/7XS7-EC9B>].

408. See Joe Barnett, *Red-Light Cameras Undermine Rule of Law*, THE HILL (Aug. 18, 2019, 8:00 AM), <https://thehill.com/opinion/criminal-justice/457790-red-light-cameras-undermine-rule-of-law> [<https://perma.cc/PR3C-8ES2>].

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.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.⁴²⁰

The hearing is conducted by an administrative officer employed by the City.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.”⁴²² “The owner may request that witnesses be subpoenaed” and is allowed to examine witnesses who testify.⁴²³ The owner may seek judicial review of an adverse decision within thirty days.⁴²⁴ The plaintiffs claimed that this was not constitutionally adequate process.⁴²⁵ The U.S. Court of Appeals for the Fifth Circuit, however, rejected plaintiffs’ Due Process claim.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.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.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.’”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.⁴³⁰ In *Idris v. City of Chicago*, plaintiffs contended that vicarious liability offended substantive due process.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.⁴³²

419. *Id.*

420. *Id.* at 279–80.

421. *Id.* at 279.

422. *Id.*

423. *Bevis*, 686 F.3d at 279.

424. *Id.* at 280.

425. *Id.*

426. *Id.* at 281.

427. *Id.*

428. *Id.*

429. *Bevis*, 686 F.3d at 281 (second alteration in original) (quoting *Mackey v. Montrym*, 442 U.S. 1 (1979)).

430. *Idris v. City of Chicago*, 552 F.3d 564, 565–66 (7th Cir. 2009).

431. *Id.*

432. *Id.* at 565.

The U.S. Court of Appeals for the Seventh Circuit characterized plaintiffs' due process argument as "a dud."⁴³³ 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."⁴³⁴ 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."⁴³⁵

Another constitutional challenge is likely to be that the automated enforcement of traffic infractions violates the Sixth Amendment's Confrontation Clause.⁴³⁶ 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.⁴³⁷ The California Supreme Court addressed this issue in *People v. Goldsmith*.⁴³⁸ In *Goldsmith*, "Defendant was cited for failing to stop at a red traffic light at an intersection . . . in Inglewood," California.⁴³⁹ The evidence of this infraction "was generated by an automated traffic enforcement system (ATES)."⁴⁴⁰ 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.⁴⁴¹ The California Supreme Court rejected her Confrontation Clause argument.⁴⁴² The court held that ATES evidence is generated by a machine and that a machine cannot make a statement.⁴⁴³ 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."⁴⁴⁴

433. *Id.* at 565–66.

434. *Id.* (internal citation omitted).

435. *Idris*, 552 F.3d at 566.

436. See Barnett, *supra* note 408.

437. See Crawford v. Washington, 514 U.S. 36 (2004).

438. *People v. Goldsmith*, 326 P.3d 239, 242 (Cal. 2014).

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.⁴⁴⁵ 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.⁴⁴⁶ My proposal would simply not allow them to stop the violator to issue the citation.⁴⁴⁷ Rather, the citation would be issued to the registered owner through the mail or other electronic means.⁴⁴⁸

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.⁴⁴⁹ Some cities have already outsourced part of their traffic enforcement.⁴⁵⁰ The city of New Orleans, for instance, hired a private contractor to install and maintain its red-light and speed cameras.⁴⁵¹ The City of Denver hired a contractor to install and operate a “photo radar” system for catching speeders.⁴⁵² Because private contractors are interested in making as much money as possible there is an inherent conflict of interest.⁴⁵³ Private contractors will have an interest in catching and ticketing as many violators as possible.⁴⁵⁴ 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.”⁴⁵⁵ “When challenged in court, the judge . . . [recognized] the inherent bias created by the per-photo payment scheme.”⁴⁵⁶ Any other contractual arrangement is likely to create similar biases.⁴⁵⁷

445. See *supra* Section V.B.

446. See *Crawford v. Washington*, 514 U.S. 36, 51 (2004).

447. See *Woods*, *supra* note 333, at 1501.

448. See *id.* at 1501 n.145.

449. See *Bevis v. City of New Orleans*, 686 F.3d 277, 279 (2012).

450. See *id.*

451. See *id.*

452. See Dru Stevenson, *Privatization of State Administrative Services*, 68 LA. L. REV. 1285, 1297 (2008).

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.⁴⁵⁸ 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.⁴⁵⁹ 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.⁴⁶⁰ When they fail to pay or become delinquent they are charged additional fees which makes it even more difficult for them to pay.⁴⁶¹ Failure to pay may then cause their driver's license and registration to be suspended and may even result in arrest.⁴⁶² 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.⁴⁶³ 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.⁴⁶⁴ It is best that the enforcement be handled by newly created traffic agencies, as Professor Woods advocates, rather than by private contractors.⁴⁶⁵

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.⁴⁶⁶ 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."⁴⁶⁷ These disparities result in greater economic hardship among Black and Latinx residents.⁴⁶⁸ 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.”⁴⁶⁹

There are two possible responses to these serious concerns.⁴⁷⁰ The disparity in the distribution of tickets can be addressed by careful location of the cameras.⁴⁷¹ In Chicago, for instance, some of the racial disparities can be explained by the location of the cameras.⁴⁷² The Chicago study also found that “ticketing levels are highest among red-light cameras located within 350 feet of freeways.”⁴⁷³ The study also found that in Black neighborhoods, red-light cameras are disproportionately located within 350 feet of freeways.⁴⁷⁴ It is not surprising therefore that Black residents of Chicago would be ticketed more frequently.⁴⁷⁵

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.⁴⁷⁶ 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.⁴⁷⁷ Thus, fines for poor Finlanders are much less burdensome than they are for poor Americans, particularly those in the Black and Latinx communities.⁴⁷⁸

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.*

476. *See* Joe Pinsker, *Finland, Home of the \$103,000 Speeding Ticket*, ATLANTIC (Mar. 12, 2015), <https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484> [<https://perma.cc/5ZQT-QDJG>].

477. *See id.*

478. *See id.*

even when warranted.⁴⁷⁹ 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.⁴⁸⁰

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.⁴⁸¹ 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.⁴⁸²

479. See, e.g., *United States v. Slager*, 912 F.3d 224, 227–28 (4th Cir. 2019).

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?”).