

# NOTE

## Road to Reform: The Case for Removing Police from Traffic Regulation

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## INTRODUCTION

An eighteen-year-old Black male is pulled over on his way home from work for allegedly making a “wide turn.”<sup>1</sup> One officer approaches the driver’s window and asks the driver for his license while a second officer approaches the passenger side, attempting to look inside the vehicle. There is no telling why the second officer is investigating the interior of the vehicle—the alleged offense was a wide turn, and by no stretch of the imagination could this officer find evidence of the wide turn by looking through the passenger-side window.

The driver is cooperative, but, nonetheless, the first officer orders the driver out of the vehicle and holds his hands together. “You don’t have any weapons on you?” he asks. “Any drugs?” The driver answers in the negative. The officer then turns the driver around and pats him down for weapons—none are found. A drug-sniffing dog is brought onto the scene, first sniffing the exterior of the driver’s vehicle, and then, once the dog allegedly alerts the officer to the existence of drugs, the dog is sent into the car and searches through all the compartments and the trunk of the driver’s vehicle. Simultaneously, when the “canine indication” is made, the driver is handcuffed. No evidence of criminal activity is found.

Twenty-five minutes after initially being stopped, the driver is free to go on his way, albeit with a scheduled court date for “improper turning” and a car that has been rummaged through by a dog. Not to mention the car’s contents are almost completely emptied and placed on top of the vehicle. All of this because the driver made a “wide turn.”

Compared to what could have happened, the driver may be considered lucky. Under current Fourth Amendment doctrine, the officers could have arrested the driver for improper turning.<sup>2</sup> In that case, he could be searched even more thoroughly by the officer,<sup>3</sup> booked and detained in a police station,<sup>4</sup> and his car could be subject to an all-inclusive inventory search if it were impounded.<sup>5</sup> Or maybe the driver

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1. This story is based on the actual occurrences captured in a YouTube video. *Louisville Metro PD Falsely Alert K-9 to Conduct an Illegally Search*, YOUTUBE (Feb. 11, 2019), <https://www.youtube.com/watch?v=9CCQv-i6UBI> [<https://perma.cc/HT4K-6N8U>]; see also RACHEL A. HARMON, *THE LAW OF POLICE* 289 (2021).

2. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2000) (finding officers may arrest citizens for minor crimes like traffic violations). Minor traffic violations carry criminal punishment in twenty-eight states. Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 679–80 (2015).

3. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *New York v. Belton*, 453 U.S. 454, 460 (1981); *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

4. *Atwater*, 532 U.S. at 354.

5. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

has an outstanding warrant for missing a court date for a previous traffic violation. Again, he could be arrested and subject to subsequent searches and detainment.<sup>6</sup> Maybe, in fear of being arrested for the outstanding warrant, the driver attempts to flee by foot and is shot and killed by an officer.<sup>7</sup>

In *Whren v. United States*, the Supreme Court held it constitutional for officers to pull over drivers for traffic violations when the officers' actual intention is to investigate the driver for more serious criminal activities—hereby known as pretextual stops.<sup>8</sup> The Supreme Court's holding validated a long-standing police practice of using the traffic code to stop and investigate drivers. Because of implicit biases and institutional motivations, this practice has irrefutably had a disparate impact on communities of color, and especially Black<sup>9</sup> drivers, who are more likely to be stopped, searched, subjected to use of force, and killed by police than are white drivers.<sup>10</sup> Like many other aspects of policing in the United States, pretextual traffic policing has undermined the relationships and trust between Black communities and local police departments while simultaneously causing Black people to feel “stateless” and targeted by the system that is supposed to protect them.<sup>11</sup> Meanwhile, the Supreme Court has, over the course of many rulings, protected the police's ability to fight the War on Drugs while largely ignoring the rights of people subject to over-intrusive forms of policing such as pretextual traffic stops. In the words of Justice Stevens, “[the] Court has become a loyal foot soldier in the Executive's fight against crime.”<sup>12</sup>

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6. *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016).

7. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), <https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html> [<https://perma.cc/YMQ2-QLR4>].

8. 517 U.S. 806, 809–19 (1996).

9. This Note uses the term “Black” instead of “African-American” in order to recognize the larger community of Black people in the United States, as opposed to only recognizing those of African descent. *See, e.g.*, Cydney Adams, *Not all black people are African-American. And here's the difference.*, CBS NEWS (June 18, 2020), <https://www.cbsnews.com/news/not-all-black-people-are-african-american-what-is-the-difference/> [<https://perma.cc/R4DV-UY8K>].

10. *See infra* Part I.C; *infra* Part II.A; *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 333–34 (1998):

In America, police targeting of black people for excessive and disproportionate search and seizure is a practice older than the Republic itself. Thus, it was not startling to learn that a special squad of the North Carolina Highway Patrol that uses traffic stops to interdict illegal narcotics charged black male drivers with traffic offenses at nearly twice the rate of other troopers patrolling the same roads.

11. *See, e.g.*, Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017).

12. *California v. Acevedo*, 500 U.S. 565, 601 (1991) (Stevens, J., dissenting).

As issues with racially discriminatory traffic policing continue to be brought to light by the Department of Justice (“DOJ”)<sup>13</sup> and other investigations, proposed remedies like implicit bias training and police-worn body cameras remain ineffective in combatting the issue.<sup>14</sup> In the wake of the police-killing of George Floyd and the subsequent Black Lives Matter protests of 2020, however, some municipalities have proposed a novel remedy: removing police from traffic-law enforcement.<sup>15</sup>

This Note advocates for the removal of police from traffic-law enforcement and the creation of unarmed Civilian Traffic Forces (“CTF”) at the municipal and state levels. Since the Supreme Court’s decision in *Whren*, there has been a significant amount of legal scholarship criticizing pretextual policing and the consequential discriminatory traffic policing that was validated by *Whren*.<sup>16</sup> There is very little published scholarship, however, that whole-heartedly advocates for the removal of police from traffic-law enforcement and the creation of a CTF system.<sup>17</sup> The CTF will be a government organization of unarmed civilians that replaces police in enforcing traffic laws, but will be limited on when they can contact police and what they can do after stopping and ticketing a driver. The intention is to lessen the divide between communities and police by lessening the number of unpleasant encounters, thereby also reducing police violence and abuse.

This Note will demonstrate that the police’s role in traffic enforcement generates distrust between Black communities and police,

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13. U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/8WUM-GMP4>] [hereinafter DOJ BALTIMORE REPORT]; U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf) [<https://perma.cc/8MWN-FGSY>] [hereinafter DOJ NEW ORLEANS REPORT]; U.S. DEP’T OF JUST., C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/S58E-TU7Z>] [hereinafter DOJ FERGUSON REPORT].

14. See *infra* Part II.D.

15. See *infra* notes 215–2219 and accompanying text.

16. E.g., Maclin, *supra* note 10; David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

17. There is only one article that exclusively recommends a CTF-like policy change. See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021). Professor Woods is cited for multiple articles throughout this Note, and *Traffic Without the Police* offers a thorough framework for how a CTF system should work. While the system recommended in this Note is largely similar to the system recommended by Professor Woods, this Note differs in how it asserts outstanding warrants should be treated in the CTF system. This Note also adds to the scholarship on this topic by providing policymakers with a comprehensive framework for understanding why such a system is necessary.

and in turn, that by removing police from traffic enforcement, some of this distrust could be alleviated. Importantly, this Note recognizes that interactions at traffic stops are only responsible for a *fraction* of the distrust between Black communities and police, and that this solution is one of *many* changes that are necessary to address the disparate impacts of policing in today's United States.

This Note will proceed as follows: Part I explains the history and constitutional validation of pretextual traffic policing, and why officers are institutionally and implicitly motivated to target Black drivers under the current regime. Part I then empirically demonstrates how pretextual traffic policing has led to racially disparate traffic policing. Part II analyzes the effects that this phenomenon has on Black individuals and communities and discusses past attempts to mitigate these effects. Part II also asserts that pretextual traffic policing fails in its purpose of reducing and preventing the more serious crimes it is intended to address. Finally, Part III advocates for an unarmed Civilian Traffic Force and explains how the system will operate and be implemented, articulates its benefits, and assesses how it addresses the issues discussed in previous Parts. In doing so, this Note provides policymakers and advocates with a comprehensive framework to support their CTF proposals while also allowing opposing parties to become comfortable with the idea and its necessity.

## I. RACIALIZED TRAFFIC ENFORCEMENT IN THE UNITED STATES

Beginning in 1968 with *Terry v. Ohio*,<sup>18</sup> where the Supreme Court allowed for police to stop—but not detain—individuals based on a “reasonable suspicion” of criminal activity, the Court has continuously expanded police discretion in stopping and searching suspected criminals.<sup>19</sup> Most important to the traffic context, in *Whren v. United States*, a unanimous Supreme Court held that so long as an officer has probable cause<sup>20</sup> to believe that a driver has violated a traffic law, and regardless of whether the officer would have stopped the driver if not for an alternative objective, the stop is constitutionally permissible under the Fourth Amendment.<sup>21</sup> The parties in *Whren* agreed that the

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18. 392 U.S. 1, 30 (1968).

19. FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 11 (2018).

20. Probable cause has been defined by the Supreme Court as where an officer is presented with circumstances under which it would be reasonable to believe that a crime has been committed. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 241 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

21. 517 U.S. 806, 809–19 (1996).

arresting officer had probable cause to find numerous traffic violations had been committed.<sup>22</sup> The petitioners argued, however, that the probable cause standard in traffic law invited officers to pull over drivers, under the basis of a traffic violation, “as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists.”<sup>23</sup> Specifically, the petitioners in *Whren* alleged that the current law allowed for officers to stop drivers based on “impermissible factors, such as the race of the car’s occupants,” and investigate the drivers for “illegal drug-dealing activity” without any probable cause or reasonable suspicion to support the investigation.<sup>24</sup> The Court ruled that this practice, now commonly known as a “pretextual stop,” was constitutionally permissible.<sup>25</sup>

### A. Traffic Policing as the “General Warrant”

Over twenty million people in the United States are pulled over each year for traffic violations, making traffic stops one of the most common ways that people interact with police.<sup>26</sup> Because of the vast and comprehensive nature of state traffic codes, it is virtually impossible for a driver to avoid committing a traffic violation on any given drive.<sup>27</sup> Traffic codes regulate everything from the equipment on one’s car to the manner in which one is driving and often include peculiar and nuanced provisions that very few drivers are aware of.<sup>28</sup> At the same time, traffic codes provide broad and unspecific provisions that allow officers extensive discretion to find probable cause for traffic violations.<sup>29</sup> As many police officers would therefore agree, the average driver violates the traffic code every three blocks that they drive.<sup>30</sup>

In turn, under *Whren*, it follows that an officer may single out any individual for any reason, tail the individual’s car until she

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22. *Id.* at 810.

23. *Id.*

24. *Id.* at 809–10.

25. *Id.* at 814.

26. 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, 736 (2020).

27. *See Harris, supra* note 16, at 545.

28. *See id.* at 558–59.

29. *Id.* at 558. Consider, for example, some of the laws that the driver was found to have violated in *Whren*: “An operator shall . . . give full time and attention to the operation of the vehicle”; “No person shall turn any vehicle . . . without giving an appropriate signal”; “No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions . . .” 517 U.S. 806, 810 (1996).

30. *See Harris, supra* note 16, at 558.

inevitably violates the traffic code, and pull the driver over for said violation.<sup>31</sup> This phenomenon has been described as a modern day “general warrant,” referring to a colonial practice where law enforcement officials could search any person without reason or suspicion.<sup>32</sup> Ironically, the Fourth Amendment was directly intended to end “general warrants,” and was a product of decades of disdain towards the practice in the colonies.<sup>33</sup>

### 1. Fourth Amendment Doctrine and the Supreme Court

Of course, if pretextual stops ended with police giving drivers tickets or citations, they would be completely ineffective in their purpose of stopping nontraffic crime. Crucially, once a driver is stopped, the Supreme Court has held it permissible for police to perform a variety of actions.<sup>34</sup> To name a few, police may conduct a records check of the stopped driver;<sup>35</sup> ask the driver if she has drugs, sells drugs, is involved in a gang, or any other question that may come to mind;<sup>36</sup> order the driver to get out of her car;<sup>37</sup> call in a drug-sniffing dog to smell the vehicle in search of narcotics;<sup>38</sup> search within the driver’s arm span and passenger compartment if the officer is reasonably suspicious that the driver poses a threat of violence;<sup>39</sup> or ask the driver for consent to search the car without informing the driver that she has a right to refuse consent.<sup>40</sup> All of these constitutionally permitted actions are used by officers to discover crimes, especially those related to drugs and guns. Thus, officers are encouraged to pretextually stop potentially suspicious drivers and then use this wide range of leeway to explore criminal activity.<sup>41</sup>

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31. Diana Roberto Donahoe, “*Could Have, “Would Have”: What the Supreme Court Should Have Decided in Whren v. United States*,” 34 AM. CRIM. L. REV. 1193, 1204 (1997).

32. See Jay Schweikert, *Pretextual Stops and the General Warrant: Stopping the March of the Whren Doctrine*, CATO INST.: CATO LIBERTY (Apr. 25, 2018, 3:44 PM), <https://www.cato.org/blog/pretextual-stops-general-warrant-stopping-march-whren-doctrine> [<https://perma.cc/287F-8KPR>].

33. Leonard W. Levy, *Origins of the Fourth Amendment*, 144 POL. SCI. Q. 79, 79, 82 (1999).

34. See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 156–62 (2017).

35. See *id.* at 157.

36. *Id.*

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

38. *Cf. Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (holding, however, bringing in drug-sniffing dogs becomes unconstitutional if it prolongs the traffic stop).

39. *Michigan v. Long*, 463 U.S. 1032, 1053 (1983).

40. *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

41. See *infra* notes 50–55 and accompanying text (discussing pretextual policing practices).

Further, the Court held in *Atwater v. City of Lago Vista* that it is constitutional under the Fourth Amendment for an officer to arrest an individual so long as he has probable cause to believe that the individual committed “even a very minor criminal offense in his presence.”<sup>42</sup> As Justice O’Connor explains in the dissenting opinion, “[a] custodial arrest exacts an obvious toll on an individual’s liberty and privacy.”<sup>43</sup> Under previous Supreme Court decisions, if arrested while driving or as a passenger in a car, police can fully search the arrestee’s body<sup>44</sup> and “[t]he arrestee may constitutionally be detained for up to forty-eight hours without having a magistrate determine whether there in fact was probable cause for the arrest.”<sup>45</sup> Additionally, if done in accordance with local police procedures, the arrestee’s car may be impounded and searched at the police station—this search includes the entirety of the car and containers therein.<sup>46</sup> Discovered evidence, regardless of its relationship to the original offense, is admissible.<sup>47</sup> While minor traffic violations are decriminalized in at least twenty-two states,<sup>48</sup> drivers in the remaining twenty-eight states may be subject to a custodial arrest and its consequences for something as minor as driving without their seatbelt fastened.<sup>49</sup> In sum, the consequences that stem from a pretextual stop are far reaching and have only been bolstered by the Supreme Court finding these invasive practices constitutional.

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42. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2000).

43. *Id.* at 364 (O’Connor, J., dissenting).

44. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.”).

45. *Atwater*, 532 U.S. at 364 (O’Connor, J., dissenting) (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 (1991)).

46. *Colorado v. Bertine*, 479 U.S. 367, 368 (1987). The Court in *Bertine* asserts that the search must be done in “good faith,” but the facts of the case indicate that the “good faith” requirement is minimal and it is difficult for an arrestee to show that an inventory search was pretextual. *Id.*; see also *South Dakota v. Opperman*, 428 U.S. 364 (1976) (holding that inventory searches are permissible under the Fourth Amendment).

47. *Bertine*, 479 U.S. at 368. The arrestee in *Bertine* was arrested for driving under the influence of alcohol and taken into custody. During the inventory search, officers discovered “controlled substances, cocaine paraphernalia, and a large amount of cash.” *Id.* at 369.

48. Woods, *supra* note 2, at 679–80.

49. This is specifically the offense that the driver in *Atwater* had been arrested for. The misdemeanor seatbelt offense carried a penalty of a \$50 fine. Nonetheless, *Atwater* was put in a squad car and taken to the local police station, “where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took *Atwater*’s ‘mug shot’ and placed her, alone in a jail cell for about one hour, after which she was taken before a magistrate and released on \$310 bond.” *Atwater*, 532 U.S. at 324.



## 2. Institutional, Implicit, and Systemic Motivations Behind Pretextual Policing

Police departments have used the traffic code as a tool in their efforts to prevent nontraffic crimes since police cars first took the roads in the 1930s.<sup>50</sup> Beginning in the 1970s, using “investigatory stops” as a way of “proactive policing” had become an institutionally encouraged practice that suggested officers pull over “suspicious” looking drivers.<sup>51</sup> Over the next two decades, a range of studies claimed to show that pretextual traffic stops were effective toward stopping nontraffic crime, and it became a common practice.<sup>52</sup>

Police departments encourage and reward officers who engage in pretextual stops to pull over and arrest drug traffickers and other criminals.<sup>53</sup> In turn, officers are also encouraged to rely on racial profiling to pull over drivers who they believe are more likely to be non-traffic criminals.<sup>54</sup> This was most notably apparent in the Drug Enforcement Agency’s (“DEA”) “Operation Pipeline,” a War on Drugs initiative that sought to apprehend drug traffickers and dealers by pulling over drivers who fit DEA-developed drug courier profiles.<sup>55</sup> These profiles originally included race-based factors and instructed officers to consider the race or ethnicity of a driver as a possible indicator that they were a drug trafficker.<sup>56</sup> In DEA training videos, Black people were explicitly identified as being more likely to have illegal drugs.<sup>57</sup> This training was not only federally institutionalized,

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50. See CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 30–33 (John M. Conley & Lynn Mather eds., 2014); see also, Maclin, *supra* note 10, at 334–36 (discussing how today’s police “continue to target blacks in a manner reminiscent of the slave patrols of colonial America. Using minor, generally under-enforced, traffic violations as pretext, officers target black and Hispanic motorists because they hope to discover illegal narcotics or other criminal evidence”).

51. See, e.g., EPP ET AL., *supra* note 50, at 31.

52. See *id.*

53. See Carbado, *supra* note 34, at 156; see also NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., THE HIGHWAY SAFETY DESK BOOK 4–11 (1996) (stating that increased traffic-law enforcement leads to lower levels of more serious crimes, and instructing officers on how to become “two people for the price of one: an officer skilled in traffic and another knowledgeable in general criminal investigative techniques”).

54. See Woods, *supra* note 2, at 719 (“Many scholars have criticized *Whren* from a constitutional angle for encouraging racial profiling in traffic settings.”).

55. E.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 671 (2002).

56. See Anthony A. Braga, Rod K. Brunson & Kevin M. Drakulich, *Race, Place, and Effective Policing*, 45 ANN. REV. SOCIO. 535, 539 (2019).

57. EPP ET AL., *supra* note 50, at 33; DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 49 (2002) (“[S]ome training stressed the ethnic and racial characteristics of narcotics organizations. . . . And surprisingly, the DEA still admits that it in fact trained local

but it was widespread. By the late 1990s, the DEA trained over twenty-seven thousand state and local officers, and this training was often passed down to the officers' own local departments.<sup>58</sup> Large-scale policing authorities and city-specific policies have similarly incorporated pretextual stops as an effective means for discovering non-traffic crimes and have included race as a factor in determining which drivers officers should pull over.<sup>59</sup>

Institutionally encouraged profiling is not the only factor involved when analyzing how pretextual stops target Black drivers. Social psychology research suggests that among the American citizenship, and especially among white people, "crime has a black face."<sup>60</sup> Generally preexisting racial implicit biases are substantially reinforced and bolstered by police training and experiences.<sup>61</sup> Studies have found that officers are implicitly biased to associate unidentified Black faces with crime and danger more than white faces.<sup>62</sup> Implicit

police to use race—as 'one of many factors' when considering whether to conduct a search of a vehicle.”).

58. EPP ET AL., *supra* note 50, at 33; HARRIS, *supra* note 57, at 50 (discussing how a 1999 task force investigation of the California Highway Patrol (“CHP”) discovered “that Pipeline’s roots had grown very deeply into CHP” and “that Pipeline’s tactics make extensive, primary use of profiling and that, despite denials that race is part of this, these profiles result in stops and searches that disproportionately affect minorities, especially Latinos”).

59. One of the leading authorities on police training, *Tactics for Criminal Patrol* by Charles Remsberg, recommends police use stops that “seek[ ] to maximize the number of citizen contacts in vehicle stops during each shift and, through specific investigative tactics, to explore the full arrest potential of each.” EPP ET AL., *supra* note 50, at 36 (quoting CHARLES REMSBERG, *TACTICS FOR CRIMINAL PATROL: VEHICLE STOPS, DRUG DISCOVERY AND OFFICER SURVIVAL* (1995)). Like the DEA, Remsberg encourages officers to seek out potential criminals by a number of factors that have very little to do with crime, and both implicitly and sometimes explicitly involve race. *Id.* at 37; *see also* Maclin, *supra* note 10, at 343–44. Maclin tells the story of Avon, Connecticut, where “the supervising sergeant of the Avon Police Department instructed his officers to find a reason to stop black and Hispanic motorists driving through Avon. The sergeant thought it proper to scrutinize and run license plate checks on motorists who do not appear to have business in Avon.” *Id.* at 345.

60. EPP ET AL., *supra* note 50, at 45; *see also* R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CALIF. L. REV. 1169, 1183 (2006) (discussing Race Implicit Association Tests where “[t]he majority of participants sort words and images faster when White is paired with the positive attribute, and Black with the negative attribute. The majority of participants are thus said to have an implicit bias against African Americans”).

61. EPP ET AL., *supra* note 50, at 45.

62. *See* Joshua Correll, Bernadette Park, Charles M. Judd, & Bernd Wittenbrink, *The Police Officer’s Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCH. 1314, 1317, 1319 (2003). *The Police Officer’s Dilemma’s* studies used video game simulations where Black and white men were depicted on screens, some armed and some not. Participants were told to shoot via the video game if the individual on the screen was armed. Across the board, participants were more likely to mistakenly shoot an unarmed Black individual than an unarmed white individual and were more likely to correctly shoot an armed Black individual than an armed white individual. *Id.*; Banks et al., *supra* note 60, at 1172; *see also* Braga et al., *supra* note 56, at 542.

bias, in conjunction with the institutional position that race-based traits indicate a higher likelihood of criminality, work together to lead police officers to believe that Black drivers are more likely to be guilty of nontraffic crimes.<sup>63</sup> Police are systemically incentivized to focus on drug and gun crime over traffic safety,<sup>64</sup> to police aggressively,<sup>65</sup> and to aim to make more arrests as a measure of their success.<sup>66</sup> Officers are thereby motivated to give in to the institutionally explicit and internally implicit biases discussed above and target Black drivers.<sup>67</sup> With this combination of incentives and biases in mind, and because of the institutional encouragement and constitutional authorization of pretextual stops, it becomes easy to understand why the term “driving while Black” has been coined an unlisted but openly enforced crime.<sup>68</sup>

### B. *The Effect of Warrants in Traffic Stops*

The current system of warrants in the United States and the Supreme Court jurisprudence surrounding warrants offer another motivation for discriminatory traffic policing. In *Utah v. Strieff*, an officer illegally stopped and detained an individual in violation of the Fourth Amendment,<sup>69</sup> but then, during the detainment, discovered that

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63. See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1497 (2016) (“When police officers think about crime and criminality, Black people are implicitly on their minds. And when officers think about or observe African-Americans, crime and criminality are implicitly on their minds. This research helps explain why Africans-Americans have repeated interactions with the police.”).

64. See, e.g., Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RESV. L. REV. 931, 942 (2016). Blanks goes on to assert that the drug trade was lucrative for law enforcement through “asset forfeiture and other incentives such as federal grants for drug enforcement task forces,” thus incentivizing drug trade enforcement and thereby pretextual policing. *Id.* at 942–43 (citations omitted).

65. *Id.* at 945. Recently, however, there is undoubtedly significant pushback to aggressive policing. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/YN4A-79NU>].

66. See Blanks, *supra* note 64, at 943 (“Whether or not there is an unofficial quota, officers may maximize arrests for arrests’ sake because they are easily quantifiable.”). Blanks identifies low level crimes like loitering, truancy, and illegal tobacco sales as areas where police have historically arrested Black people to increase their arrest numbers, *id.*, and small traffic infractions are similarly either unavoidable or low-level. *Id.* Because police are taught to and implicitly believe they will more likely have grounds to arrest a Black driver than a white driver, the arrest-metric incentivizes racial targeting.

67. See *supra* notes 53–63 and accompanying text.

68. See, e.g., Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 25, 2014), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html> [<https://perma.cc/CYS3-92EZ>].

69. The individual was stopped when leaving a house that was being investigated for “narcotics activity,” and the Court agreed with the trial court that the officer lacked reasonable

the individual had an outstanding arrest warrant.<sup>70</sup> The Supreme Court held the subsequent arrest for the outstanding warrant permissible and any evidence seized during the search incident to arrest as admissible, even though the original detainment violated the Fourth Amendment.<sup>71</sup>

*Strieff* therefore holds, as implied in Justice Sotomayor's dissent,<sup>72</sup> that when an officer is suspicious that any given driver may have an outstanding warrant, regardless of the basis for or level of her suspicion, the officer can stop the driver without any legitimate reason and run a warrant check.<sup>73</sup> If a warrant turns up, the officer can arrest and search the driver and whatever is within the driver's reaching distance<sup>74</sup> for evidence of illegal activity or impound the car for an inventory search.<sup>75</sup> If there is no outstanding warrant, the driver, "distressed though he may now be[,] is permitted to go on his way."<sup>76</sup> And, as Justice Sotomayor makes clear, "outstanding warrants are surprisingly common. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses."<sup>77</sup>

As with seemingly all other aspects of policing, "[w]arrant enforcement plays a critical role in cementing class and race disparity in the criminal justice system by creating 'arrest feedback.'" <sup>78</sup> The DOJ's *Investigation of the New Orleans Police Department*, for example, found that twenty-thousand of the sixty-thousand arrests made in 2009 by the New Orleans Police Department ("NOPD") were for outstanding traffic or misdemeanor warrants.<sup>79</sup> The investigation also found "troubling disparities in treatment of the City's African-American community" by the NOPD.<sup>80</sup> Similarly, in its *Investigation of the Ferguson, Missouri Police Department*, the DOJ found that during traffic stops between October 2012 and October 2014, Ferguson police arrested 460 individuals based exclusively on outstanding warrants,

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suspicion and the stop was therefore "an unlawful investigatory stop." 136 S. Ct. 2056, 2059–60 (2016).

70. The outstanding arrest warrant was for a traffic violation. *Id.* at 2060.

71. *Id.* at 2059.

72. *Id.* at 2065 (Sotomayor, J., dissenting).

73. See HARMON, *supra* note 1, at 332.

74. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

75. See *supra* notes 42–49 and accompanying text (describing the consequences of arrests).

76. *Id.*

77. *Strieff*, 125 S. Ct. at 2068 (Sotomayor, J., dissenting) (citation omitted).

78. Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 972 (2018).

79. DOJ NEW ORLEANS REPORT, *supra* note 13, at 29.

80. *Id.* at 35.

and that ninety-six percent of those individuals were Black.<sup>81</sup> These statistics are the byproduct of a cycle in policing:

Where there are a disproportionately high number of outstanding warrants for poor and minority defendants, police will target those communities for warrant enforcement. In the course of doing so, police will likely identify new criminal cases. This feedback supplies its own self-supporting rationale because the demographic profile of those with outstanding warrants reaffirms pre-existing, racialized notions about crime-prone neighborhoods and communities.<sup>82</sup>

Not surprisingly, the most common reason for an outstanding warrant is that an individual failed to appear in court for a traffic citation.<sup>83</sup> Thus, traffic tickets, even when they are for noncriminal traffic violations, create incentives for officers to more heavily police areas where they believe more outstanding warrants exist.<sup>84</sup> Because police are motivated to make more arrests, they target individuals who are more likely to have outstanding warrants.<sup>85</sup> Once an individual is recognized in a neighborhood as somebody who has not been able to afford previous fines, or whose license plate number brings up an outstanding warrant, they become continuously targeted by police.<sup>86</sup> Each encounter brings a greater risk of police using force against the individual, and as made evident by the police killing of Philando Castille, the more often one is stopped by police, the more likely a tragedy will occur.<sup>87</sup> One can also imagine how an individual with outstanding warrants could react when being pulled over. Walter Scott, for example, attempted to flee from police after being pulled over because he allegedly feared being arrested for unpaid child support, and was shot and killed by an officer.<sup>88</sup> In aggregate, the system of outstanding warrants and Supreme Court jurisprudence incentivizes discriminatory traffic policing that disproportionately affects Black drivers by, at a minimum, giving officers the latitude to make more pretextual stops and searches, and at worst, creating more opportunities for police violence against Black people.

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81. DOJ FERGUSON REPORT, *supra* note 13, at 67.

82. Sekhon, *supra* note 788, at 972.

83. *Id.* at 984.

84. See German Lopez, *The Tyranny of a Traffic Ticket*, VOX (Aug. 10, 2016, 11:20 AM), <https://www.vox.com/2016/8/5/12364580/police-overcriminalization-net-widening> [<https://perma.cc/V2AK-BCXU>] (“And it happens disproportionately to poor people of color. As those who are already heavily policed, they are the ones who are more likely to catch a cop’s eye if they run a stop sign, fail to signal on a turn, have a broken taillight, or sell untaxed cigarettes.”).

85. See *supra* note 66 and accompanying text.

86. See Lopez, *supra* note 84.

87. See *id.* (Castille “had incurred dozens of traffic stops, fines, and suspensions—adding up to more than \$6,000 in fines through 46 police stops,” making police more likely to stop him and increasing the opportunities for a violent incident to occur).

88. See *infra* Part II.A; see also Schmidt & Apuzzo, *supra* note 7.

C. *The Unofficial Criminalization of “Driving While Black”*

The criminalization of “driving while Black”<sup>89</sup> is not a fallacy<sup>90</sup>—proportionately compared to the national population, Black drivers are statistically pulled over far more often than white drivers.<sup>91</sup> 2010 statistics from North Carolina, for example, indicate that based on their share of the population, Black drivers were sixty-three percent more likely to be pulled over than white drivers.<sup>92</sup> This phenomenon is irrefutably not the product of different driving behaviors between races—there is no evidence that Black drivers make more traffic violations,<sup>93</sup> and some data even indicates the opposite.<sup>94</sup>

Perhaps even more alarming is the increased frequency that Black drivers are searched during traffic stops as compared to white drivers. Between 1995 and 1996, while Black drivers represented seventeen percent of drivers on Maryland state highways, they made

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89. Importantly, many statistical analyses indicate that Latinx and Hispanic drivers are also subject to the disparate impacts of traffic regulation. This is an equally important issue to address. Because more scholarship and statistical analyses exist pertaining to Black drivers, this Note stays focused on the effects that traffic policing and pretextual stops have on Black communities. Readers should recognize that most things said relating to Black drivers in this Note are also applicable to Latinx and Hispanic drivers, and that the CTF solution will equally mitigate the disparate effects that traffic policing has had on Latinx and Hispanic people.

90. See, e.g., Harris, *supra* note 16, at 546 n.10 (“I heard this phrase often from clients I represented in Washington, D.C. and its surrounding Maryland counties; among many of them, it was the standard way of describing the common experience of constant stops and harassment of blacks by police. Thus I was not surprised to see the phrase show up recently in the popular press.”).

91. Pierson et al., *supra* note 26, at 737. This study is particularly informative because of its wide scope: the data was taken from 2011 to 2018 and consists of approximately ninety-five million stops from a combination of fifty-six state and municipal police forces. The study found that “among state patrol stops, the annual per-capita stop rate for black drivers was 0.10 compared to 0.07 for white drivers.” *Id.* In cities, the difference was 0.20 to 0.14. *Id.*

92. BAUMGARTNER ET AL., *supra* note 19, at 69. The authors go on to state that the Black population in North Carolina drives eighty-four miles for every 100 miles driven by white people, further substantiating the inequity discussed above. *Id.* at 72. Moreover, the study indicates that Black populations are overpoliced in all localities, regardless of how big the Black community is within each locality. *Id.* at 73.

93. See Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 657 (2021) (describing the “extensive and growing body of literature” on the different experiences of white and Black drivers with police, and how the literature indicates “differences in driving behavior generally do not explain this differential treatment”); Maclin, *supra* note 10, at 357 (“The statistical disparities discussed above cannot be explained away by claiming that blacks are worse drivers than whites, simply because there is no evidence that blacks as a group drive differently from whites.”).

94. EPP ET AL., *supra* note 50, at 57 (finding Black drivers speed less than white drivers and violate smaller traffic rules, like properly signaling or completely stopping at stop signs, at a lesser rate than white drivers as well). The authors do mention that Black people spend, on average, a half hour more time driving than white people, which the authors admit is statistically significant but not enough to lead to such significant differences in stop and search rates. *Id.*

up almost seventy-three percent of drivers whose cars were searched.<sup>95</sup> Statistics from North Carolina show Black drivers are 115 percent more likely to be searched during a traffic stop than white drivers.<sup>96</sup> Another study of over ninety-five million stops across the country between 2011 and 2018 found that while 4.3 percent of stopped Black drivers were searched, only 1.9 percent of stopped white drivers were searched.<sup>97</sup> Importantly, this study also found fewer objective indicators of crime are required for officers to decide to search Black drivers than white drivers.<sup>98</sup> Overwhelmingly, statistics indicate that these higher stop and search rates are a product of police acting on biases and doing pretextual stops.<sup>99</sup>

The disproportionate impact that pretextual stops have on Black drivers becomes far more apparent when analyzing the statistics with a different approach. By distinguishing between what they call “traffic-safety stops” and “investigatory stops,” Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel are more accurately able to identify how Black drivers are often stopped for different violations than white

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95. HARRIS, *supra* note 57, at 79; Maclin, *supra* note 10, at 349–50.

96. BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 85; *see also* Maclin, *supra* note 10, at 352 (showing that in Orlando, Florida, Criminal Patrol Unit officers were six-and-a-half times more likely to search a Black driver after a stop than a white driver). A series of other localized studies have yielded similar results in all categories. In places ranging from Boston to San Diego to medium-sized North Carolina suburbs, Black drivers are consistently stopped and searched at higher rates. RONNIE A. DUNN & WORNIE REED, *RACIAL PROFILING: CAUSES & CONSEQUENCES* 35 (2011).

97. Pierson et al., *supra* note 26, at 738.

98. *Id.* at 739. Pierson et al. use a “threshold test,” which is designed to estimate the perceived likelihood that a driver is carrying contraband, to supplement the more typically used “hit rates” test. The test assumes that, during each stop, officers “observe a myriad of contextual factors,” such as race, gender, and stop location, and “that officers distill” these factors into single number “that represents their subjective estimate of the likelihood that the driver is carrying contraband.” *Id.* at 743. By giving numerical values to different factors, the authors compute inferred threshold levels for each race. They found that white drivers had twice as high a threshold as Black drivers, meaning non-race factors had to be significantly more present for white drivers to be searched. *Id.* at 739. As will be demonstrated in Part II.E, *infra*, this decreased threshold of suspicion is misguided; evidence of crime is more likely found in cars of white drivers than Black drivers.

99. BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 88 (indicating that Black drivers are more likely to be stopped for pretextual investigatory purposes because they are significantly more likely to experience “light outcomes” in traffic stops); Rushin & Edwards, *supra* note 93, at 644 (comparing data on traffic stops from Washington in periods when the Washington Supreme Court held pretextual stops as unconstitutional in *State v. Ladson*, 979 P.2d 833 (Wash. 1999) (en banc), to when it was subsequently held constitutional in *State v. Arreola*, 290 P.3d 983 (Wash. 2012) (en banc), the authors found an increase in traffic stops of Black drivers relative to white drivers following the 2012 decision, thus indicating that pretextual stops directly produce disproportionate traffic policing); *see also* Nicola Persico & Petra E. Todd, *The Hit Rates Test for Racial Bias in Motor-Vehicle Searches*, 25 JUST. Q. 37 (2008) (confirming the validity of using hit-rate tests to measure levels of bias in policing). *But see* Rohit Asirvatham & Michael D. Frakes, *Are Constitutional Rights Enough? An Empirical Assessment of Racial Bias in Police Stops*, DUKE L. SCH. PUB. L. & LEGAL THEORY SERIES NO. 2020-56 (forthcoming 2021) (manuscript at 8) (challenging Rushin & Edwards’s analysis of Washington traffic stop data).

drivers.<sup>100</sup> Traffic-safety stops are, according to police, justified by “must stop” violations, such as speeding, reckless driving, suspicion of driving under the influence, and running a red light—often situations where the driver’s conduct is dangerous.<sup>101</sup> Investigatory stops, on the other hand, are justified by “de minimis” driving violations—such as malfunctioning lights, expired tags, slow driving, long stops, and failure to signal—that, according to police, prompt discretionary decisions of whether to stop the driver.<sup>102</sup> Under this distinction, it becomes clear that Black drivers are pulled over for investigatory stops far more often than white drivers.<sup>103</sup> In the authors’ survey, fifty-two percent of traffic stops of Black drivers were “investigatory,” whereas thirty-four percent of stops of white drivers were “investigatory.”<sup>104</sup> Therefore, according to the study, Black drivers are subject to pretextual stops at a higher rate than white drivers, which, as explained above, can be attributed to institutional practices and implicit biases that target Black drivers under a suspicion that they are committing nontraffic crimes.

## II. IMPACTS OF THE CURRENT TRAFFIC POLICING REGIME

As stated before, traffic stops are the most common way for people to interact with police.<sup>105</sup> Therefore, traffic stops are likely one experience people draw from when determining their feelings toward law enforcement generally. Given the leverage afforded by Fourth Amendment doctrine that police have to stop, search, and interact with drivers,<sup>106</sup> this Part will demonstrate how traffic stops create opportunities for use of force and verbal abuse by police, particularly against Black drivers. Then, this Part will argue that the combination of disproportionate traffic policing and experiences of physical and verbal abuse by police has the sociological effect of leaving Black people with a feeling of “statelessness,” which has its own negative consequences. This Part will then address some previous attempts to remedy the current system, and finally this Part will show that the ends

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100. EPP ET AL., *supra* note 50, at 59–61.

101. *Id.*

102. *Id.* Investigatory stops also include instances where police provide no justification for stopping a driver or stop the driver to check that they have valid driver’s license and no outstanding warrants. *Id.*

103. *Id.*

104. *Id.* Black drivers were pulled over for “traffic safety” stops only thirty-five percent of the time. *Id.*

105. Bureau of Just. Stat., *Traffic Stops*, OFF. OF JUST. PROGRAMS, <https://www.bjs.gov/index.cfm?tid=702&ty=tp> [<https://perma.cc/PHH3-K2YR>].

106. *See supra* Part I.A.1.



do not come close to justifying the means—pretextual traffic policing is not effective for discovering criminal activity.

### A. Use of Force and Traffic Regulation

Of the over thirteen million traffic stops surveyed by the DOJ in 2011, six percent of pulled over drivers—780,311 people—experienced “some type of force” by police ranging from threats, shouting, and violence, and 1.5 percent—195,077 people—were subject to *physical force* during a traffic stop.<sup>107</sup> Analysis of databases on police violence indicate that “a substantial number” of reported instances of police violence began with traffic stops, and that eight to nine percent of killings by police from November to December 2016 occurred during a traffic stop.<sup>108</sup> According to a 2021 *New York Times* investigation, over the past five years, more than one unarmed person per week has been killed during a traffic stop.<sup>109</sup> Moreover, it is important to note that police use of force is extremely underreported in the United States, leaving major gaps in the current data.<sup>110</sup> While injured drivers do have a constitutional avenue for challenging police use-of-force under the Fourth Amendment and *Graham v. Connor*,<sup>111</sup> these instances are nonetheless a product of an expansive traffic code, the *Whren* doctrine, and the widespread use of pretextual traffic policing.<sup>112</sup>

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107. LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011, at 2, 10 (2013) [<https://perma.cc/9JB8-23NG>]. The report only includes one round number—that 62,936,500 people of sixteen years or older had contact with the police in 2011. Based off the rates of general involuntary contact (49.2 percent) and, within that, contact from traffic stops (forty-two percent), I was able to extrapolate these specific figures.

108. Rushin & Edwards, *supra* note 93, at 700 (citing *The Counted: People Killed by Police in the US*, GUARDIAN (June 1, 2015), <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> [<https://perma.cc/URF8-2KPE>]).

109. David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Oct. 31, 2021), [https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html?campaign\\_id=190&emc=edit\\_ufn\\_20211101&instance\\_id=44333&nl=updates-from-the-newsroom&regi\\_id=141932745&segment\\_id=73241&te=1&user\\_id=84ed60da5c6a4359d6de69a737aa1c28](https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html?campaign_id=190&emc=edit_ufn_20211101&instance_id=44333&nl=updates-from-the-newsroom&regi_id=141932745&segment_id=73241&te=1&user_id=84ed60da5c6a4359d6de69a737aa1c28) [<https://perma.cc/X8UP-DG5B>].

110. See Tom Jackman, *FBI May Shut Down Police Use-of-Force Database Due to Lack of Police Participation*, WASH. POST (Dec. 9, 2021), <https://www.washingtonpost.com/crime-law/2021/12/09/fbi-police-shooting-data/> [<https://perma.cc/W9TZ-UTAW>] (asserting that the *Washington Post* has found there to be roughly twice as many fatal shootings by police per year than is reported in the federal database and that only fifty-five percent of officers had reported to database in 2020).

111. 490 U.S. 386 (1989) (developing an “objective reasonableness” test for assessing civilian excessive force claims against police). *But see* Kirkpatrick et al., *supra* note 109 (“Most of the officers did so with impunity. Only five have been convicted of crimes in those killings, according to a review of the publicly reported cases.”).

112. See *supra* Part I.

According to a 2015 U.S. Bureau of Justice Statistics report, Black people are disproportionately impacted by use of force from police.<sup>113</sup> Three percent of Black people had experienced the threat or use of force by police, compared to one percent of white people.<sup>114</sup> Further, Black people who experienced either the threat or use of force were seventeen percent more likely than white people to consider the force excessive.<sup>115</sup> Lastly, for all respondents who had a police-initiated contact with police, 5.2 percent of Black people reported force being threatened or used in their most recent police-initiated contact, while 2.4 percent of white people reported similarly.<sup>116</sup> Therefore, when approached by police, Black people are more than twice as likely as white people to be subjected to or threatened with force.<sup>117</sup> Crucially, all of these statistics account for the disproportionate frequency in which Black people encounter police, and irrefutably show that in any given interaction, Black people are more likely to be subject to the threat or use of force than white people. Black men are also 2.46 times as likely as white men to be killed by police,<sup>118</sup> and unarmed Black men are killed by police at three times the rate as unarmed white men.<sup>119</sup> As some critics note, the *Graham* jurisprudence has sequestered any Equal Protection discussions of racial injustice from how courts analyze use-of-force claims.<sup>120</sup> Thus, the courts do not present an avenue to address the unequal treatment discussed above.

But these instances are better understood as real people's stories, not statistics. Walter Scott, at fifty years old, was shot and killed by a police officer in South Carolina after being pulled over for a broken taillight.<sup>121</sup> Scott, as discussed above, was shot while fleeing

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113. ELIZABETH DAVIS, ANTHONY WHYDE & LYNN LANGTON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015, at 17 (2018) [<https://perma.cc/7NL5-UC6T>].

114. *Id.*

115. *Id.*

116. *Id.* at 16.

117. Alexi Jones, *Police Stops Are Still Marred by Racial Discrimination, New Data Shows*, PRISON POL'Y INITIATIVE (Oct. 12, 2018), <https://www.prisonpolicy.org/blog/2018/10/12/policing/> [<https://perma.cc/7X46-UDNZ>] (summarizing key statistics from the Bureau of Justice Statistics report).

118. Frank Edwards, Hedwig Lee & Michael Esposito, *Risk of Being Killed by Police Use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 PROC. NAT'L ACAD. SCI. U.S. 16793, 16794–95 (2019).

119. Brita Belli, *Racial Disparity in Police Shootings Unchanged Over 5 Years*, YALE NEWS (Oct. 27, 2020), <https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years> [<https://perma.cc/6JPU-8ZUR>].

120. Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of Graham v. Connor*, 112 NW. L. REV. 1465, 1497 (2018).

121. Schmidt & Apuzzo, *supra* note 7.

from the officer on foot because he feared going to jail for unpaid child support that he owed.<sup>122</sup> Samuel DuBose was forty-three years old when he was pulled over for an alleged missing license tag.<sup>123</sup> DuBose was shot in the head and killed by an officer when, after being asked to remove his seatbelt, DuBose allegedly turned on his car and attempted to drive away.<sup>124</sup> Twenty-eight-year-old Sandra Bland was stopped for failing to signal in Texas.<sup>125</sup> The police dashcam video shows the officer forcibly pulling Bland out of her car, threatening to tase her, and indicates further physical confrontation ensued after her arrest.<sup>126</sup> Bland hanged herself and died in her jail cell three days later.<sup>127</sup> As stated by Professor Devon Carbado, “relatively nonserious activities on the part of African Americans are so often the precursors to police violence, including killings . . . .”<sup>128</sup>

### B. Verbal Disrespect During Traffic Stops

Not only are Black drivers more likely to be pulled over, searched, and subjected to police violence,<sup>129</sup> they are also more likely to be verbally disrespected by officers during traffic stops.<sup>130</sup> A systematic analysis of police body camera footage from 981 traffic stops in Oakland, California found police were sixty-four percent more likely to use disrespectful speech toward Black drivers than toward white

122. *Id.*

123. Dana Ford, *University Cop Indicted for Murder in Shooting of Motorist Samuel DuBose*, CNN, <https://www.cnn.com/2015/07/29/us/ohio-sam-dubose-tensing-indictment/index.html> [<https://perma.cc/N6XF-G9JX>] (last updated July 30, 2015, 12:18 AM) (includes body-cam footage of the shooting).

124. *Id.*; see also *The Shooting of Samuel DuBose*, 129 HARV. L. REV. 1168, 1170–77 (2016) (providing an interesting analysis on campus police departments following DuBose’s killing).

125. *Sandra Bland Arrest Video Released by Texas Officials*, BBC (July 22, 2015) <https://www.bbc.com/news/world-us-canada-33613783> [<https://perma.cc/Z3WG-UF8Y>] (includes video of Bland’s arrest).

126. *Id.*

127. *Id.*

128. Carbado, *supra* note 334, at 164. Police are also vulnerable and subjected to violence when conducting traffic stops. Between 1988 and 1997, an average 8.9 police homicides and 5,850 assaults against police occurred each year during traffic stops. Ilya D. Lichtenberg & Alisa Smith, *How Dangerous Are Routine Police–Citizen Traffic Stops? A Research Note*, 29 J. CRIM. JUST. 419, 422 (2001). As this Note will later show, *infra* notes 270–277 and accompanying text, there is a misguided narrative that traffic stops are uniquely dangerous for police.

129. *E.g.*, Pierson et al., *supra* note 26, at 737 (“In particular, among state patrol stops, the annual per-capita stop rate for black drivers was 0.10 compared to 0.07 for white drivers; and among municipal police stops, the annual per-capita stop rate for black drivers was 0.20 compared to 0.14 for white drivers.”); *supra* Part II.A.

130. Rob Voigt, Nicholas P. Camp, Vinodkumar Prabhakaran, William L. Hamilton, Rebecca C. Hetey, Camilla M. Griffiths, David Jurgens, Dan Jurafsky & Jennifer L. Eberhardt, *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROC. NAT’L ACAD. SCI. U.S. 6521, 6521 (2017).

drivers.<sup>131</sup> Meanwhile, white drivers were fifty-seven percent more likely to hear respectful utterances from police.<sup>132</sup>

The study also insists that police enter interactions with Black drivers with a predisposition that the Black driver is going to be disrespectful toward the officer.<sup>133</sup> It found officers speak less respectfully to Black drivers than white drivers at the very beginning of their interactions, “suggesting that officers speak differently to community members of different races even before the driver has had the opportunity to say much at all.”<sup>134</sup> This study adds to previous scholarship about Black community relations with police by showing that even in interactions where no search or force occurs, Black people are still subject to disproportionately worse experiences.<sup>135</sup> These experiences of disrespect contribute to the sociological feeling of statelessness and the cycle of animosity that is explained below.

### C. Sociological Consequences

#### 1. Procedural (In)justice

While these instances of violence and verbal abuse are both disturbing and a call for concern, they are not the only issue brought forth by the police’s role in traffic-law enforcement. Because Black drivers are disproportionately subject to traffic stops,<sup>136</sup> searches,<sup>137</sup> and improper police behavior,<sup>138</sup> police are rightfully perceived to be

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131. *Id.* at 6524. By analyzing the body camera footage of traffic stops, the study identified specific utterances made by police that ranged from the most to least respectful and tracked to whom and how often each utterance was used.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *E.g.*, HARRIS, *supra* note 57, at 53–64 (citing studies in New Jersey, where Black drivers made up for 13.5 percent of the cars on the highway, thirty-five percent of the cars stopped on the highway; Maryland, where Black drivers made up seventeen percent of the driving population but seventy-two percent of stopped drivers; and in Florida, where Black and Hispanic drivers combined for five percent of the cars on the highway but seventy percent of the stopped cars).

137. *E.g.*, LANGTON & DUROSE, *supra* note 107, at 9 (“A lower percentage of white drivers stopped by police were searched (2%) than black drivers (6%) or Hispanic drivers (7%).”).

138. *E.g.*, *id.* at 3 (“White drivers pulled over by police (89%) were more likely than black drivers (83%) to think that police behaved properly.”); Josh Allen & Elizabeth Monk-Turner, *Citizen Perceptions of Legitimacy of Traffic Stops*, 38 J. CRIM. JUST. 589, 590, 593 (2010) (corroborating the results of a previous study where authors Lundman and Kaufman found that ninety-two percent of white drivers who were stopped believed police acted properly during the stops, while eighty-two percent of Black drivers who were stopped held the same beliefs); Voigt et al., *supra* note 130, at 6524.

treating Black drivers in a procedurally unjust manner.<sup>139</sup> Procedural justice is an essential factor in police legitimacy—when people do not believe the police are procedurally just, they do not believe the police are legitimate.<sup>140</sup> In turn, members of Black communities that are overpoliced or who believe they have been pulled over because of constitutionally accepted racial profiling are doubtful of police legitimacy.<sup>141</sup> This is particularly illuminated by a 2020 Gallup Panel Survey, which gathered that only eighteen percent of Black Americans are “very confident” that police in their area “would treat [them] with courtesy and respect” during a typical interaction.<sup>142</sup> Comparatively, fifty-six percent of white Americans held this level of confidence.<sup>143</sup> Similarly, while twelve percent of Black Americans felt “not at all confident” that they would be treated well by police, only two percent of white Americans had the same doubts.<sup>144</sup> The dangers in lacking police legitimacy are two-fold: people who view police as illegitimate feel less obligated to obey police authority,<sup>145</sup> and they are likewise less likely to utilize police services and call for police assistance.<sup>146</sup> Further, people’s levels of perceived police legitimacy affect their interactions with government broadly: while thirty-six percent of people who perceive high levels of police legitimacy vote, the voting rate is only twenty-three percent for those who perceive low levels of legitimacy.<sup>147</sup> Again, these

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139. See Bell, *supra* note 11, at 2076–77 (describing people, across all races and ethnicities, to view police as procedurally just when they receive “the same type of treatment from police regardless of their race or class”); Braga et al., *supra* note 56, at 547 (“Procedural justice focuses on how the police treat citizens in their everyday encounters.”); BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 109 (“Citizens who feel they have become suspects withdraw from the police and government in general.”).

140. See Braga et al., *supra* note 56, at 547 (“The process-based model of police legitimacy suggests that when police are perceived to make fair decisions and treat people with respect, they will be viewed as legitimate authorities.”).

141. See *id.* at 541 (“[A]ggressive policing strategies have been shown to erode police legitimacy in the eyes of community members.”).

142. Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx> [<https://perma.cc/VBP5-L9YK>].

143. *Id.*

144. *Id.*

145. Bell, *supra* note 11, at 2059 (“Empirical evidence suggests that feelings of distrust manifest themselves in a reduced likelihood among African Americans to accept law enforcement officers’ directives and cooperate with their crime-fighting efforts.”); see also Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC’Y REV. 513, 534 (2003) (finding that public evaluations of police legitimacy had the greatest influence on whether people complied with the law).

146. See Bell, *supra* note 11, at 2073.

147. BAUMGARTNER et al., *supra* note **Error! Bookmark not defined.**, at 4.

issues are primarily derived from whether or not people believe that the police are procedurally just and fair.<sup>148</sup>

Because, under the Fourth Amendment,<sup>149</sup> police are constitutionally permitted and are both institutionally and implicitly motivated to enforce traffic laws in a discriminatory manner, traffic enforcement inherently undermines Black people's perceptions of police legitimacy and leads to the damaging issues discussed above. This perception is not just created on an individual basis from personal experiences with police but is equally generated from other people's negative experiences and cultural feelings of mistreatment.<sup>150</sup> Explaining this phenomenon in the context of Black communities, Professor Monica Bell puts it best:

[T]he ritualistic observation of Black men and women having unjust, and often deadly, interactions with law enforcement conveys a message to their coethnics and other similarly situated observers. That message might be that police as a whole are dangerous, untrustworthy, and opposed to the idea that African Americans and the poor are truly members of the polity. Group conversations, both in person and through social media, can crystallize that message.<sup>151</sup>

These shared negative experiences, brought forth by the law itself, leave Black Americans feeling “stateless—unprotected by the law and its enforcers . . . .”<sup>152</sup>

## 2. A Self-Perpetuating Cycle of Animosity

Even where discriminatory traffic policing is not prevalent, the police's role in traffic enforcement has still been found to create animosity toward police. According to a multi-year study published in 1971, respect for police is greater in jurisdictions where police do not

148. *Id.* (“The core determinant of whether law enforcement is perceived as legitimate, and thus worthy of obedience and assistance, is whether police officers behave in a procedurally just manner.”).

149. *See supra* Part I.A.1.

150. *See* Bell, *supra* note 11, at 2105 (describing this phenomenon as being grounded in sociological and socio-legal theory).

151. *Id.*; *see also* Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 442 (1997) (at the conclusion of her criticism of the *Whren* decision, Professor Davis writes: “When people of color experience injustices that are tolerated and even sanctioned by courts and other criminal justice officials, they develop distrust and disrespect for the justice system.”); BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 188 (describing “the damages from excessive police attention” as “compounding”).

152. Bell, *supra* note 11, at 2057; *see also* BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 13 (“We should not be surprised that these more aggressive tactics, which effectively (though perhaps inadvertently) treat as criminal suspects large numbers of individuals depending on where they live or work, how they dress, and how they look, would have generated a great deal of mistrust, anger, and alienation.”).

play an active role in traffic enforcement.<sup>153</sup> While the study does not attempt to analyze why this is the case, one answer could be that discretionary policing naturally breeds resentment,<sup>154</sup> and traffic policing is naturally discretionary.<sup>155</sup> Especially where discretionary stops are culturally acknowledged and where Black drivers are disproportionately affected by such discretion,<sup>156</sup> resentment toward police is a natural consequence.<sup>157</sup>

With all of this in mind, one can imagine how a self-perpetuating cycle ensues. The systems described above lead to a disproportionately high number of Black drivers being pulled over,<sup>158</sup> and therefore more opportunities for Black people to have negative experiences with police that shape their perceptions of police and the perceptions held by members of their communities.<sup>159</sup> In turn, Black individuals become less trusting of police and develop disrespect for police and the greater law enforcement system.<sup>160</sup> This disrespect and expectation of discriminatory discretion manifests when Black drivers are pulled over for minor traffic infractions. In a survey where drivers were asked questions about their own behavior, Black drivers self-identified to be significantly more likely to be disrespectful to police officers when pulled over.<sup>161</sup> By both experience and ingrained norms among police forces,<sup>162</sup> officers likely begin to expect to be disrespected when they pull

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153. P.R. Wilson & D. Chappell, *The Effects of Police Withdrawal from Traffic Control: A Comparative Study*, 61 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 567, 569 (1971).

154. See DOJ FERGUSON REPORT, *supra* note 13, at 81 (stating that even when police were acting lawfully, their discretionary enforcement actions led to community distrust of police).

155. Because all drivers are making multiple traffic violations per drive, Harris, *supra* note 16, at 545, police can pick and choose who they pull over, making traffic policing discretionary.

156. See EPP ET AL., *supra* note 50, at 123–25 (describing how, when stopped, Black drivers “focus on whether or not the stop was really about traffic-law enforcement or something else”).

157. Blanks, *supra* note 64, at 939.

158. *Supra* Part I.C.

159. Bell, *supra* note 11, at 2105 (describing how experiences that individuals have with police tend to shape the perceptions of not just those individuals, but also people in the individuals’ communities); EPP ET AL., *supra* note 50, at 120 (“Past research has suggested that African Americans are more likely than whites to hear stories of police stops. These studies also suggest that many of the stories shared by African Americans are of disrespectful behavior by police officers, and it is thought that hearing such stories leads people to more negatively evaluate police behavior in their own stops.”).

160. See Davis, *supra* note 151, at 442.

161. See EPP ET AL., *supra* note 50, at 86 (the survey asked drivers different questions about their own behavior, and determined that Black drivers spoke significantly more disrespectfully to officers than white drivers, however, the survey found that during investigatory stops, Black and white drivers were almost equally likely to speak disrespectfully to police).

162. See DAVID H. BAYLEY, POLICE FOR THE FUTURE 135 (1994) (stating police think traffic stops are “unpredictable”).

over a Black driver.<sup>163</sup> Importantly, police officers often exhibit a masculinity complex that manifests in an exaggerated need to appear “macho.”<sup>164</sup> Because of what Professor Frank Rudy Cooper has labeled the “hegemonic pattern of masculinity” among police officers, two expected behaviors are likely to ensue when officers enter interactions with the expectation that they will be disrespected: (1) a “command presence,” and (2) the “punishment of disrespect.”<sup>165</sup> Ergo, as evidenced by the Oakland police body camera study, police will treat Black drivers disrespectfully at the onset of the traffic stop.<sup>166</sup> These behaviors are received negatively by Black drivers, and thus, the cycle perpetuates itself: experiences are shared within Black communities and police departments and expectations are shaped for future interactions.<sup>167</sup> When these expectations are compounded with the experiences and stories of police violence, the issue becomes even more pervasive and a more painful message echoes through Black communities—feelings of illegitimacy and legal estrangement,<sup>168</sup> and ultimately, “that, in the context of police interactions, Black lives don’t matter.”<sup>169</sup>

#### *D. Attempted Reforms*

Municipalities, police departments, and scholars have for decades pursued policies and reforms that were designed to curtail both police violence and discriminatory traffic policing. While many potential reforms are valuable and should never be ignored, they often miss the mark on adequately addressing the painful and sometimes lethal effects of the current traffic policing regime.<sup>170</sup>

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163. See generally Carbado, *supra* note 63, at 1508–09 (describing the self-instantiating cycle where police officers implicitly expect African Americans to be violent, and then interact with African Americans in law enforcement situations where violence is likely to occur, which substantiates this expectation). This same logic can be applied to disrespect during traffic stops.

164. See generally Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671 (2009).

165. *Id.* at 693 (“I contend that the desire to boost one’s masculine esteem is a train traveling behind, and obscured by, the desire to boost one’s racial esteem in some officers’ decisions to disproportionately stop and frisk men belonging to racial minorities.”).

166. See Voigt et al. *supra* note 130, at 6524.

167. See Bell, *supra* note 11, at 2107–09.

168. See *id.*

169. Carbado, *supra* note 34, at 164. Further, a second self-perpetuating cycle might exist as well. Because negative personal and cultural perceptions of police among Black communities likely leads to Black individuals being less likely to call on police for help, see Bell, *supra* note 11, at 2073, police perceive that they cannot rely on community members to help them stop crime in communities, and therefore must use proactive means of policing such as pretextual traffic stops. When police believe pretextual stops are more necessary, and therefore happen more often, they become more a part of the collective experience in Black communities that continues to shape negative perceptions of police—thus, the cycle described above is more likely to grow.

170. *Supra* Part II.A–C.



Many jurisdictions, per recommendations and funding from the DOJ, have required officers to wear body cameras and record their interactions with civilians in order to deter officer misconduct.<sup>171</sup> Studies have shown, however, that body cameras have not had the expected effect and have made no significant change to police behavior.<sup>172</sup> Similarly, beginning in 2014 and once again brought forth in 2020, reformers have advocated for “implicit bias training” to combat racial discrimination in policing.<sup>173</sup> Implicit bias training teaches officers how their preconceived and unconscious stereotypes can lead them to make quick and unfounded judgments, often times determining that Black people are suspects or violent with less of a foundation than for white people.<sup>174</sup> Like the deployment of body cameras, however, these trainings have not had their intended effect.<sup>175</sup>

There are also traffic-specific remedies that have attempted to address discriminatory traffic policing. Berkeley, California recently passed a set of “sweeping police reforms” that included the “elimination of police stops for low-level offenses—such as failing to wear a seat belt or driving with expired license plate tags.”<sup>176</sup> Similarly, Philadelphia’s

171. See, e.g., Heather Haddon, *New Jersey Police to Get Body Cameras*, WALL ST. J. (July 28, 2015, 12:00 AM), <https://www.wsj.com/articles/new-jersey-police-to-get-body-cameras-1438044845> [<https://perma.cc/7ZMW-XVSZ>] (discussing how, because officers will know their conduct is recorded and could be watched, they will be deterred from improper conduct); Ethan Zuckerman, *Why Filming Police Violence Has Done Nothing to Stop It*, MIT TECH. REV. (June 3, 2020), <https://www.technologyreview.com/2020/06/03/1002587/sousveillance-george-floyd-police-body-cams/> [<https://perma.cc/C5VA-XVE9>].

172. See Zuckerman, *supra* note 171; David Yokum, Anita Ravishankar & Alexander Coppock, *Evaluating the Effects of Police Body-Worn Cameras: A Randomized Controlled Trial* 18–22, LAB @ DC (Oct. 20, 2017), [https://bwc.thelab.dc.gov/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](https://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf) [<https://perma.cc/NC6C-PYMF>] (study done on behalf of the Executive Office of the Mayor in D.C. involving 2,224 Metropolitan Police Department officers).

173. E.g., Michael Hobbes, *Implicit Bias’ Trainings Don’t Actually Change Police Behavior*, HUFFINGTON POST (June 12, 2020, 5:45 AM), [https://www.huffpost.com/entry/implicit-bias-training-doesnt-actually-change-police-behavior\\_n\\_5ee28fc3c5b60b32f010ed48](https://www.huffpost.com/entry/implicit-bias-training-doesnt-actually-change-police-behavior_n_5ee28fc3c5b60b32f010ed48) [<https://perma.cc/32NJ-YVHY>].

174. See Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020, 5:00 AM), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> [<https://perma.cc/UVX9-GDET>].

175. *Id.* (discussing an NYPD study that found that even while officers “expressed more awareness of the concept of implicit bias and greater willingness to try to manage it,” when examining “data about NYPD officers’ actions on the job before and after the training . . . [and looking] at a breakdown of the ethnic disparities among the people who were arrested and had other kinds of interactions with those officers . . . they found no meaningful change”) (citing ROBERT E. WORDEN, SARAH J. MCLEAN, ROBIN S. ENGEL, HANNAH COCHRAN, NICHOLAS CORSARO, DANIELLE REYNOLDS, CYNTHIA J. NAJDOWSKI & GABRIELLE T. ISAZA, *THE IMPACTS OF IMPLICIT BIAS TRAINING IN THE NYPD* (2020)); Hobbes, *supra* note 173 (citing a study published in the *Journal of Experimental Psychology*).

176. Sarah Ravani, *Berkeley Adopts Sweeping Police Reforms Including Taking Cops off Routine Traffic Stops*, S.F. CHRON. (Feb. 23, 2021, 9:16 PM),

municipal government has recently gained some notoriety for its “Driving Equality Bill,” which was signed by the city’s mayor on November 3, 2021.<sup>177</sup> The law prohibits police from pulling drivers over for low-level traffic violations such as broken lights, bumper issues, and license plate visibility violations.<sup>178</sup> By no means are these changes steps in the wrong direction, but given the vastness of the traffic code and the fact that drivers make moving violations every three blocks they drive,<sup>179</sup> they could potentially have no effect at limiting pretextual stops.

Automated traffic enforcement is another proposed solution that certainly has merit. Proponents of speed and red light cameras argue that they are effective and do not distinguish between different races of drivers, while also dramatically reducing police-involved traffic stops.<sup>180</sup> Automated traffic enforcement faces serious public<sup>181</sup> and legal<sup>182</sup> opposition, however. Thus, a complete switch to automatic enforcement is very unlikely.

Many scholars have argued for changes within police departments.<sup>183</sup> Unfortunately, these types of changes have been found

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<https://www.sfchronicle.com/bayarea/article/Berkeley-to-consider-sweeping-police-reforms-15971071.php> [<https://perma.cc/4BE7-UHL7>].

177. E.g., Evan Simko-Bednarski, Maya Brown & Emma Tucker, *Mayor Signs Legislation Making Philadelphia the First Major US City to Ban Police from Stopping Drivers for Low-Level Traffic Violations*, CNN (Nov. 3, 2021), <https://www.cnn.com/2021/11/03/us/philadelphia-traffic-stop-equality-bill-mayor-approval/index.html> [<https://perma.cc/97JA-3UW6>].

178. *Id.*

179. See *supra* notes 27–30 and accompanying text.

180. See Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 221 (2007) (analyzing automated traffic enforcement as a complete solution for many of the issues discussed in this Note). A recent study in Washington, D.C., however, found that traffic cameras were disproportionately placed in predominantly Black neighborhoods, leading to a disproportionate number of tickets for Black drivers. William Farrell, *Predominantly Black Neighborhoods in D.C. Bear the Brunt of Automated Traffic Enforcement*, D.C. POL’Y CTR. (June 28, 2018), <https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement/> [<https://perma.cc/D5G3-WP47>].

181. See Joh, *supra* note 180, at 230–32 (discussing why, for reasons about privacy, preference for human-enforcement, fairness, and supposed distinctions between “technically legal violations, and abiding by the purpose for which the laws exist,” the public may be opposed to an all-automated traffic enforcement system).

182. Automated enforcement of traffic law has also been called constitutionally questionable and was struck down as unconstitutional by the Missouri Supreme Court in 2015. See *Automated Enforcement Overview*, NCSL (July 21, 2020), <https://www.ncsl.org/research/transportation/automated-enforcement-overview.aspx> [<https://perma.cc/W7ZG-9WTK>].

183. See Blanks, *supra* note 64, at 946 (“Ending or severely limiting pretextual stops should be part of a broader shift away from unnecessary hostile confrontations with the public and toward more positive everyday interactions with people in those communities.”); Harris, *supra* note 16, at 582 (“Perhaps police departmental regulation, and further study, can lead us in new directions.”); EPP ET AL., *supra* note 50, at 160 (“The immediate task is to change institutionalized practices that

to be insufficient as well. In Oakland, California, for example, the Oakland Police Department responded to a finding of discriminatory traffic policing by encouraging its officers to materially decrease the amount of stops they made for minor traffic offenses.<sup>184</sup> Following the department's policy change, however, Black drivers were still significantly more likely to be stopped and arrested than white drivers.<sup>185</sup> In conclusion, there is little doubt that discriminatory enforcement is an unavoidable consequence of traffic policing, and therefore requires that the police be removed from the area entirely.

*E. Is Pretextual Traffic Enforcement an Effective Policing Tactic? (No.)*

Proponents of pretextual stops in policing argue that it is an effective and necessary means of proactively fighting crime.<sup>186</sup> That is why the practice was first promoted in the War on Drugs<sup>187</sup> and why police officials defended the practice after it was condemned by the Clinton Administration in 1999.<sup>188</sup> But the practice is ineffective and falsely promoted.<sup>189</sup> A 1990 DOJ survey found that police discovered evidence of crime in ten percent of the stop and search procedures they conducted.<sup>190</sup> The vast majority of discovered evidence is small amounts of drugs, specifically marijuana.<sup>191</sup> A study in Maryland found that marijuana was twice as likely to be seized as cocaine and that the

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have become the taken-for-granted definitions of professionalism, of what it means to do good police work.”).

184. See Woods, *supra* note 17, at 1489–90.

185. *Id.*

186. See, e.g., EPP ET AL., *supra* note 50, at 153 (“Although police widely believe that investigatory stops help fight crime, the evidence supporting this belief is surprisingly thin.”); Aaron Gordon, *We Don't Need Cops to Enforce Traffic Laws*, VICE: MOTHERBOARD (June 11, 2020, 7:00 AM), <https://www.vice.com/en/article/g5pvgm/we-dont-need-cops-to-enforce-traffic-laws> [https://perma.cc/WB5J-RVMZ ] (explaining how police unions lobby against automated traffic enforcement, like traffic cameras, “because they say the traffic stop has become a key crimefighting tool in arresting people with guns and drugs”); Harris, *supra* note 16, at 571–72 (quoting a Maryland State Police official: “The facts speak for themselves . . . When you got a high number of these consent searches resulting in drug arrests do we in law enforcement or the public want to say the state police should discontinue these searches?”); BAYLEY, *supra* note 162, at 135 (“In defense of their importance to crime prevention, traffic police often point out that in enforcing regulations they discover wanted persons, stolen cars, contraband drugs, and evidence pertaining to other crimes.”).

187. See, e.g., HARRIS, *supra* note 57, at 48–51.

188. See EPP ET AL., *supra* note 50, at 48–49.

189. See, e.g., *id.* at 153 (“It is easier to remember the successful stop: . . . officers intentionally exaggerate how often they find drugs or guns. In truth, it is extremely rare.”); BAYLEY, *supra* note 162 (“Unfortunately, there is no evidence to support this common claim. No department that I studied [ ] could cite a study of the proportion of traffic ‘stops’ resulting in crime ‘hits.’”).

190. HARRIS, *supra* note 57, at 86.

191. *Id.*

average quantity was 4.2 grams—far below the quantity that felon drug-dealers typically carry.<sup>192</sup>

Race-specific evaluations give further reason to doubt the effectiveness of pretextual traffic policing. As posed by a former high-ranking police official, “Why do [police departments] send people into minority or high-crime neighborhoods to look for guns? Because that’s where the guns are.”<sup>193</sup> But the empirical evidence indicates that this strategy is misguided. Data from New Jersey in 2000 shows that police were twice as likely to find contraband when searching white drivers’ cars as they were when searching Black drivers’ cars.<sup>194</sup> Therefore, while Black drivers were being searched at significantly higher rates, searches were not more likely to lead to evidence of crime.<sup>195</sup> As Professor Sarah Seo stated in August 2020:

Statistical studies conducted in states that collect traffic stop data uniformly indicate that “hit rates”—the percentage of car searches that lead to the discovery of criminal evidence—are low, and most drugs that are found are in small amounts. Investigative traffic stops are ineffective, especially at pursuing dealers and traffickers, and mostly harass and alienate those who are unjustifiably targeted for inspection.<sup>196</sup>

In one study, where Black drivers were five times as likely to have their cars searched as white drivers, police discovered contraband in eleven percent of vehicle searches of Black drivers.<sup>197</sup> When searching white drivers’ cars, however, police found contraband twenty-seven percent of the time.<sup>198</sup> One particularly illuminating set of statistics comes from the DOJ’s report on the Ferguson Police Department.<sup>199</sup> The Ferguson report found that Black drivers were more likely to be stopped and searched by police, but were “[twenty-six percent] *less* likely to have contraband found on them than whites.”<sup>200</sup> The DOJ discovered a very similar trend in Baltimore in 2016.<sup>201</sup> Reflecting on these statistics, the DOJ concluded that the lower hit rate for Black drivers demonstrates that the police were acting with bias and

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192. *Id.*; see also BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 103–05 (“A major drug bust is a vanishingly rare occurrence on the motorways.”).

193. HARRIS, *supra* note 57, at 79.

194. *Id.* at 80.

195. *Id.*

196. SARAH A. SEO, A PATH TO NON-POLICE ENFORCEMENT OF CIVIL TRAFFIC VIOLATIONS, JUST. COLLABORATIVE INST. 3 (Aug. 2020), <https://tjc.institute.com/wp-content/uploads/2020/09/non-police-enforcement-of-civil-traffic-violations.pdf> [<https://perma.cc/Y99P-DZTV>].

197. EPP ET AL., *supra* note 50, at 105.

198. *Id.*

199. DOJ FERGUSON REPORT, *supra* note 13, at 4.

200. *Id.*

201. DOJ BALTIMORE REPORT, *supra* note 13, at 53.

that “this disparate enforcement practice is ineffective.”<sup>202</sup> Similarly, analysis from North Carolina shows that, compared to white drivers, “[o]fficers are [twenty-two] percent less likely to find contraband on Black drivers following consent searches and [twelve] percent less likely after probable cause searches.”<sup>203</sup> From this data, the authors deduced that officers either have a lower threshold when determining whether to search a Black driver or are worse at assessing whether they should search Black drivers.<sup>204</sup>

While the *Whren* doctrine explicitly permits officers to make pretextual stops, the holding does not require pretextual policing be executed effectively. Statistical indications that pretextual traffic stops are ineffective tools for policing against drugs and violence should make one immediately wary of the practice, especially considering the damaging consequences discussed above. But, from the police’s perspective, the cost-benefit analysis of using traffic stops to detect crime is favorable when compared to other means of policing. “Street ‘sweeps,’ stops and frisks, and traffic stops are all relatively easy, quick, and inexpensive.”<sup>205</sup> More in-depth investigations, on the other hand, “require police officers to work hard to penetrate these operations, either by going undercover or using informants.”<sup>206</sup> Police need to generate enough evidence to meet the probable cause standard required before they are issued a warrant and are ultimately spending more time and money, and facing more danger in this context.<sup>207</sup> Whereas innocent people bear the costs of routine, noninvestigative traffic stops—namely, time and dignity—and officers expend very little during such stops, the opposite is true of nontraffic based investigations.<sup>208</sup> Police are able to externalize costs onto innocent civilians, making the use of traffic stops for proactive crime fighting a preferable route for departments.<sup>209</sup> Of course, the effects of fruitless searches are not considered when determining whether this type of policing is worthwhile.<sup>210</sup> From the police’s perspective, citizens should not mind a brief stop and inconvenience by an officer with the intention to stop more pressing

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202. DOJ FERGUSON REPORT, *supra* note 13, at 65; *see also* SEO, *supra* note 196; HARRIS, *supra* note 57, at 79 (based on similar statistics about hit rates, Harris stoutly concludes: “Racial profiling is neither an efficient nor effective tool for fighting crime”).

203. BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 113.

204. *Id.*

205. HARRIS, *supra* note 57, at 90.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. BAUMGARTNER ET AL., *supra* note **Error! Bookmark not defined.**, at 99.

crimes.<sup>211</sup> But when we consider that this practice repeatedly inconveniences a subset of the population, the true cost on society is amplified. This is unsettling, especially because of the practice's ineffectiveness and negative consequences affecting minority communities.<sup>212</sup> Thus, the following Part will advocate for a novel alternative.

### III. THE CIVILIAN TRAFFIC FORCE SOLUTION

To limit the negative consequences derived from citizen-police interactions during traffic stops, one simple yet fundamental change ought to be made: police should be largely removed from the traffic-law enforcement context. This is not to say that traffic laws should not be enforced,<sup>213</sup> but rather they should generally be enforced by a separate government entity that functions similarly to the nonpolice authorities who administer parking tickets in many U.S. jurisdictions.<sup>214</sup> These nonpolice authorities, whom, for the rest of this Note, will be referred to as the “Civilian Traffic Force” (“CTF”), would operate similarly to today’s traffic patrol, except that they would have limited authority, be entirely outside of the criminal system, and not carry any weapons.

Following forty-six-year-old George Floyd’s death by the kneeling chokehold of a Minneapolis police officer<sup>215</sup> and the subsequent “defund the police” movement,<sup>216</sup> multiple municipalities and counties began considering fundamental changes to their traffic-law enforcement regimes that would remove police from traffic

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211. *Id.* at 109.

212. See HARMON, *supra* note 1, at 291 (recommending that “any coercive government practices should (1) serve important public goals; (2) impose harms no greater than its benefits; (3) not unfairly burden individuals or groups; and (4) be reasonable in light of alternatives”).

213. This Note recognizes the importance of traffic safety—9,478 people died because of speeding in 2019. *Speeding*, NAT’L HIGHWAY SAFETY ADMIN., <https://www.nhtsa.gov/risky-driving/speeding#:~:text=Overview,faster%20doesn't%20mean%20safer> [<https://perma.cc/HM9E-QY3B>] (last visited Sept. 27, 2021).

214. Some authors have briefly addressed this idea when criticizing the current state of traffic enforcement but have not significantly focused on it. See, e.g., Woods, *supra* note 2, at 756 (“Jurisdictions would create alternative regimes that shift the responsibility to enforce decriminalized traffic violations to state actors without traditional police powers. Some jurisdictions have partially gone in this direction by removing parking enforcement from the hands of the police.”); Rushin & Edwards, *supra* note 93, at 703 (describing how jurisdictions have “experimented” by “transferring traffic enforcement to units whose only responsibility is to enforce the traffic code” that “may result in more evenhanded enforcement, and it would presumably eliminate the use of traffic enforcement as a pretext for other criminal investigations”).

215. E.g., *George Floyd: What Happened in the Final Moments of His Life*, BBC (July 16, 2020), <https://www.bbc.com/news/world-us-canada-52861726> [<https://perma.cc/H7RW-RQZ5>].

216. See, e.g., Rashawn Ray, *What Does ‘Defund the Police’ Mean and Does It Have Merit*, BROOKINGS: FIXGOV (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/> [<https://perma.cc/XB93-8SMU>]

regulation.<sup>217</sup> Proponents of these changes cite many of the issues discussed above when articulating why the change may be necessary. In Bethesda, Maryland, policy advocates cited a 2018 study that found Black drivers are seven times as likely to be stopped as white drivers.<sup>218</sup> The proposed policy drafted in Cambridge, Massachusetts specifically reads:

Routine traffic stops disproportionately impact Black and Brown drivers, who are pulled over and searched more often than white drivers, leading to potentially stressful interactions with police. This racist outcome is not the result of biases by individual officers, although those may play a role, but rather is primarily the result of systemic biases, including overpolicing in Black neighborhoods, and training of police officers to be hypervigilant and to expect violent resistance, despite such incidents being very rare.<sup>219</sup>

Thus, the ultimate goal of these potential policies, and the CTF solution promoted by this Note, is as follows: to end the practice of discriminatory traffic-law enforcement by removing any incentives to use the traffic code pretextually. In turn, Black drivers will be less suspicious of unfair treatment by police, which would ultimately reduce the animosity existing between police and Black communities, garner more trust for police, and lessen the opportunities for confrontational and violent interactions.

### A. Defining the CTF System<sup>220</sup>

The CTF would use a combination of patrol cars and traffic cameras to identify drivers violating traffic laws and administer warnings or citations to drivers whom they pull over or catch on camera.

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217. See Arianna MacNeill, *Cambridge is Considering Shifting 'Routine Traffic Enforcement' Away From Police. Here's What to Know*, BOSTON.COM (July 30, 2020), <https://www.boston.com/news/local-news/2020/07/30/cambridge-routine-traffic-enforcement-proposal> [<https://perma.cc/N3JQ-28JZ>] (Cambridge, Massachusetts City Council “is considering a proposal that would move ‘routine traffic enforcement’ duties from police officers to a group of unarmed city employees”); Janie Har, *Berkeley Moves Toward Removing Police From Traffic Stops*, AP NEWS (July 15, 2020), <https://apnews.com/article/1fddb1955d5ce8b7e60a6d4619dd214e> [<https://perma.cc/4WG4-T3MB>]; Rebecca Tan, *Should Police Be in Charge of Traffic Enforcement? In a Suburb Beset by Racial Inequities, Lawmakers Aren't Sure.*, WASH. POST (Aug. 10, 2020), [https://www.washingtonpost.com/local/md-politics/montgomery-police-bias-traffic-2020/08/07/818fd860-d72e-11ea-aff6-220dd3a14741\\_story.html](https://www.washingtonpost.com/local/md-politics/montgomery-police-bias-traffic-2020/08/07/818fd860-d72e-11ea-aff6-220dd3a14741_story.html) [<https://perma.cc/8XMH-BATE>]; Kiara Alfonseca, *Police Reform Moves Forward Amid Officer's Trial for Death of Duante Wright*, ABC NEWS (Dec. 9, 2021), <https://abcnews.go.com/US/police-reform-moves-forward-amid-officers-trial-death/story?id=81628190> [<https://perma.cc/VZ6H-A939>].

218. Tan, *supra* note 217.

219. MacNeill, *supra* note 217.

220. Woods' article offers a more comprehensive framework of how “traffic without police” would work, as that is the main focus of his paper. See Woods, *supra* note 17, at 1488–1507. This Note defers to Woods' framework as to what policymakers should follow, and the following section only notes some key aspects of the CTF system's design. On one point, however, this Note disagrees with Woods' proposed system and suggests police be even more limited in when they way stop drivers. See *infra* note 228 and accompanying text.

The CTF would be entirely unarmed and have no authority to use force of any kind. Crucially, the CTF would not have the authority to run warrant checks or criminal record checks,<sup>221</sup> question drivers about anything not directly related to the traffic violation,<sup>222</sup> detain and search drivers and their cars,<sup>223</sup> or call in drug-sniffing dogs.<sup>224</sup> Their function would be simple and outside of the criminal process, which would remove all incentives for pretextual and discriminatory traffic regulation and instead ensure the traffic code is only used for what it is ultimately designed to protect—safety on the roads.

Under a CTF system, police officers would retain the ability to pull over drivers whom they have a “reasonable suspicion” to believe committed nontraffic criminal felonies.<sup>225</sup> These stops would be most prevalent where officers are stopping drivers who are fleeing the scene of a crime or are believed to have committed criminal traffic offenses like driving a stolen vehicle or street racing.<sup>226</sup> In order to prevent the abuse of warrant enforcement that occurs through traffic policing,<sup>227</sup>

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221. See Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874–85 (2003) (analyzing and criticizing the constitutionality of criminal record and warrant checks during traffic stops—a common police practice).

222. See, e.g., Woods, *supra* note 2, at 709 (reflecting on previous scholarship about the harms perpetuated by police traffic enforcement, specifically stemming from “embarrassing and humiliating questioning, intrusive searching, deprivations of property, and applications of police force that become possible once police officers initiate a routine traffic stop”).

223. See, e.g., Davis, *supra* note 151, at 438:

When the police detain and search a motorist, they intrude on his privacy and possessory rights, his right to be left alone. While one might be tempted to conclude that when the police detain an individual and ultimately release him, he suffers little or no harm, when the detention is based on race, the harm is felt long past the duration of the stop.

224. Consider, for example, the experience of Sergeant Rossano Gerald, who was pulled over for changing lanes without a signal, calmly refused to consent to search of his car, and was put in the officer’s squad car while a drug-sniffing dog was brought onto the scene. According to Sergeant Gerald, who had experience with drug-detection dogs, the dog never made a signal that drugs were detected, but the officer told Sergeant Gerald that the dog identified the smell of drugs and that they were going to conduct a full search of his car. The officers tore up Gerald’s car and found nothing, so after two and a half hours, Gerald was left with a thousand dollars of damage to his car and a warning ticket for the traffic violation. HARRIS, *supra* note 57, at 2; see also LaFave, *supra* note 221, at 1845 (describing the possible events that transpire during a “routine” traffic stop under the modern Fourth Amendment regime, which allows for drug-sniffing dogs to be used so long as they do not require detention to go beyond a reasonable length of time).

225. See *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000) (“Pursuant to *Terry v. Ohio*, police officers may stop and briefly detain an individual for investigative purposes if they have reasonable suspicion that criminal activity is afoot.”) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)); *United States v. Gomez*, 623 F.3d 265, 269 (5th Cir. 2010) (applying the rule from *Terry* as articulated in *Goodson* to a vehicle stop where the officer “had reasonable suspicion to conduct a felony stop”).

226. See Woods, *supra* note 17, at 1492.

227. See *supra* Part I.B.



officers would not retain the power to stop drivers who they believe have outstanding warrants.<sup>228</sup> In very limited situations, such as when dealing with a drunk driver who needs to be picked up or when drivers and passengers are acting disorderly towards a traffic enforcer, the CTF will be permitted to call for police assistance. Otherwise, the CTF *cannot* contact police, even through a 9-11 emergency line, if they suspect any non-traffic criminality while on duty.

For a CTF system to proffer its intended benefits,<sup>229</sup> it is crucial that the public is aware of the change and its implications. A widespread public awareness campaign would have to accompany the new policy so that citizens know the limits and constraints now imposed on both the CTF and the police. Further, CTF cars and uniforms must be extremely distinct from police cars and uniforms for the policy to have its desired effects.

### *B. Implementing the CTF*

As has been seen in Berkeley, California, Montgomery County, Maryland, Cambridge, Massachusetts, and Brooklyn Center, Minnesota, a shift to a CTF system can and should occur at the local policing level. In Berkeley, the city council approved a proposal for removing police from traffic enforcement in July 2020.<sup>230</sup> The proposal would create a separate department of transportation—named BerkDOT—that would enforce parking and traffic laws in place of police.<sup>231</sup> Importantly, a recent poll asking whether people would support a CTF system shows citizen support in big cities is likely, and is certainly more likely than at the state level.<sup>232</sup> Thus, whether passed

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228. *Cf.* Woods, *supra* note 17, at 1492–93. Woods’ system allows police to still make stops based on suspected outstanding warrants.

229. *See infra* Part III.C.

230. Sam Levin, *California City Moves to Replace Police with Unarmed Civilians for Traffic Stops*, GUARDIAN (July 15, 2020), <https://www.theguardian.com/us-news/2020/jul/15/berkeley-police-california-unarmed-civilians-traffic-stops> [<https://perma.cc/9K33-9JAV>].

231. Meg O’Connor, *What Traffic Enforcement Without Police Could Look Like*, APPEAL (Jan. 13, 2021), <https://theappeal.org/traffic-enforcement-without-police/> [<https://perma.cc/BZL7-BG27>]. As recently as February 2021, the plan to make this transition is still in place. Ravani, *supra* note 176.

232. A recent poll shows that while sixty-four percent of Democrats are at least somewhat supportive of a CTF, only fifty-one percent of the general population would support the policy. SEO, *supra* note 196, at 2. But given that the majority of big city dwellers vote Democrat, *e.g.* Richard Florida, *What is it Exactly That Makes Big Cities Vote Democratic?*, BLOOMBERG: CITYLAB (Feb. 19, 2013, 6:00 AM), <https://www.bloomberg.com/news/articles/2013-02-19/what-is-it-exactly-that-makes-big-cities-vote-democratic> [<https://perma.cc/MJA8-9EJ9>] (reviewing the 2012 president election and stating that Obama received over sixty percent of the vote in New York, Los Angeles, and Chicago, and that cities with more than one million people voted 53.4% for Obama, while only forty-five percent for Romney), it can be deduced that a CTF would be well received by big city populations.

through ballot referendum or city councils,<sup>233</sup> a transition toward a CTF system would likely create a new department—separate from the police department—to regulate traffic, and would simultaneously remove police authority to do the same. In Berkeley, for example, the city envisioned BerkDOT performing six roles that currently fall under the police department’s umbrella: “an unarmed traffic unit, crossing guards, parking enforcement, paving, collision investigation and traffic control.”<sup>234</sup> In cities, like Cambridge, where a separate parking and transportation department already exists,<sup>235</sup> the transition to a CTF system would be simpler; it would only require that the transportation department take on the previously-police responsibility of traffic enforcement.

A potential obstacle, and one currently facing BerkDOT, is that certain state laws may not allow for nonpolice civilians to enforce the traffic code.<sup>236</sup> For example, in states like Pennsylvania, where the traffic statute explicitly authorizes police officers to enforce the code,<sup>237</sup> state-level statutory change may be required.<sup>238</sup> In these states, CTF advocates will have two options: (1) lobby state legislators to adopt new provisions that explicitly allow the traffic code to be enforced by

233. There is a question of whether, under certain state constitutions and laws, this transition would be legal. While there are no reports of this type of pushback in Berkeley, a since delayed proposal to create a CTF (though still maintaining police authority to enforce traffic laws and not aimed at subduing discriminatory policing) in Philadelphia drew skepticism because of a Pennsylvania statute that “describe[d] traffic enforcement as a power reserved for state and local police.” Jason Laughlin, *Police Union Opposes Using Civilian Workers for Traffic Enforcement in Philly*, PHILA. INQUIRER (Jan. 25, 2018), <https://www.inquirer.com/philly/business/transportation/philadelphia-police-union-opposes-using-civilian-workers-for-traffic-enforcement-20180125.html> [https://perma.cc/DN9X-B4X5].

234. Iris Kwok, *Berkeley Public Works Commission discusses formation of transportation department*, DAILY CALIFORNIAN (Mar. 7, 2021), <https://www.dailycal.org/2021/03/07/berkeley-public-works-commission-discusses-formation-of-transportation-department/> [https://perma.cc/WMB7-TUYJ].

235. *About Us*, CITY OF CAMBRIDGE TRAFFIC, PARKING & TRANSP. DEP’T, <https://www.cambridgema.gov/traffic/aboutus> [https://perma.cc/SGL5-RMS3] (last visited Aug. 30, 2021).

236. Emily Raguso, *Plans Firm up to Remove Police From Traffic Stops, but It’s a Long Road Ahead*, BERKLEYSIDE (May 25, 2021, 4:53 PM), <https://www.berkeleyside.org/2021/05/25/berkeley-department-of-transportation-civilian-traffic-enforcement> [https://perma.cc/74AG-ZZWB].

237. 75 PA. STAT. AND CONS. STAT. ANN. § 6308 (West 2021):

Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has reasonable suspicion that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle’s registration, proof of financial responsibility, vehicle identification number or engine number or the driver’s license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

See also California’s vehicle code, CAL. VEH. CODE § 2400 (West 2021), which states that the commissioner of the California Highway Patrol “shall enforce all laws regulating the operation of vehicles and the use of the highways . . . .”

238. Laughlin, *supra* note 233.

civilians, or (2) defend the CTF in courts by arguing that the existing traffic laws do not preclude civilian enforcement. Seeing as pretextual traffic policing occurs on state and interstate highways just as it does on local streets, removing police from traffic enforcement and implementing a CTF system is equally necessary at the state level. State governments should therefore adopt the CTF framework as well, most likely through legislation.

### *C. Benefits of a CTF System*

If police officers are replaced with the CTF, the perceived systemic incentives to disproportionately pull over and search Black drivers will entirely evaporate.<sup>239</sup> Given the vast and all-encompassing nature of the modern traffic code,<sup>240</sup> the CTF will still be exercising discretionary authority in deciding whom to pull over.<sup>241</sup> But without the authority or incentive to investigate drivers for contraband or outstanding warrants, there will be nothing compelling the CTF to pull over drivers pursuant to race-based suspicions.<sup>242</sup> Thus, the disproportionate amounts of stops, searches, warrant checks,<sup>243</sup> and police violence against Black drivers<sup>244</sup> that occur during traffic stops would, in theory, cease to exist.

Because pretextual traffic enforcement is a direct cause of the procedural injustice felt by Black Americans,<sup>245</sup> and therefore a direct source of the distrust that Black Americans feel towards police,<sup>246</sup> a CTF system should help mend the relationships between Black communities and law enforcement.<sup>247</sup> In turn, the police would be better able to keep communities safe.<sup>248</sup> More importantly, a CTF system

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239. *See supra* Part I.A.2.

240. *See supra* notes 28–29 and accompanying text.

241. *See Woods, supra* note 2, at 758 (“[I]t is also possible that nonpolice actors will disproportionately target or insult minority drivers and passengers.”).

242. *Cf. supra* Part I.A.2. Of course, the CTF could still be motivated by explicit or implicit biases when deciding whom to pull over. Ideally, people with these biases would be screened out and not hired by the CTF. But even if that is not the case, all incentives to target Black drivers would be diminished.

243. *See supra* Part I.C.

244. *See supra* notes 113–1128 and accompanying text.

245. *See supra* notes 139–1148 and accompanying text.

246. *See Davis, supra* note 151.

247. The public awareness campaign discussed in Part III.A is crucial here. Black drivers need to have reason to believe and trust that when they are pulled over, there is no pretextual intent behind the decision to stop them.

248. *See supra* note 145–146 and accompanying text; *see also Woods, supra* note 2, at 758:

Improving perceptions of police legitimacy is not only important on its own terms but can have important long-term benefits for compliance with the law. It may encourage greater respect for the institutions of law and police, improve civilian cooperation with

would be a step toward mending the feeling of legal estrangement that is in part a product of discriminatory policing and is endured in Black communities.<sup>249</sup>

Removing traffic enforcement from the policing umbrella would also help police departments by giving officers more time to focus on protecting communities.<sup>250</sup> Traffic enforcement is a costly aspect of policing,<sup>251</sup> and while police falsely applaud its effectiveness in detecting other crimes,<sup>252</sup> it may be an area that police are open to eliminating in the interest of efficiency.<sup>253</sup> Police, even in major cities, spend around four times as many of their working hours regulating traffic as they do handling violent crime.<sup>254</sup> Following a year where the homicide rate increased by 36.7 percent nationally and rose in fifty-one of fifty-seven cities, increasing by more than fifty percent in major cities like Chicago, Boston, and New Orleans,<sup>255</sup> removing police from traffic enforcement and freeing up department personnel and resources is ever more important. By placing traffic enforcement in the hands of people with no crime-fighting agenda, traffic safety would likely benefit as well.<sup>256</sup> So long as the CTF is well trained in recognizing roadway dangers, it will be entirely focused on maintaining safety and will pull people over for the level of danger they are posing to other drivers, not because of a perceived likelihood of other criminal activity.<sup>257</sup>

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the police during criminal investigations, and instill greater trust in civilians to report crimes to the police.

249. See, e.g., Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2324–25 (2018).

250. BAYLEY, *supra* note 162, at 134. In Brooklyn Center, Minnesota, supporters of the city’s Civilian Traffic Enforcement Department have argued the new policy will free up police’s time and have found that “[p]olice departments] are coming around and seeing how valuable this type of transformation is.” Alfonseca, *supra* note 217.

251. See BAYLEY, *supra* note 162, at 135 (finding that nine percent of police are dedicated to traffic personnel, making it the third largest specialization, and possibly the most costly specialization because “they often undergo special instruction in motor-vehicle laws, high-speed chases, motor-vehicle maintenance and safety, and the operation of radar guns, video cameras, and breathalyzers”).

252. See *supra* Part II.E.

253. See BAYLEY, *supra* note 162, at 135 (claiming that police themselves may be most willing to eliminate traffic enforcement from their responsibilities, and that most police consider traffic enforcement to be “chicken shit work” that is “trivial and resented by the public”).

254. Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://perma.cc/AF2Y-RRHA>] (presenting data from police departments in New Orleans, Montgomery County, Maryland, and Sacramento).

255. Cheryl Corley, *Massive 1-Year Rise in Homicide Rates Collided with the Pandemic in 2020*, NPR (Jan. 6, 2021, 5:00 AM), <https://www.npr.org/2021/01/06/953254623/massive-1-year-rise-in-homicide-rates-collided-with-the-pandemic-in-2020> [<https://perma.cc/Z3QL-6DEP>].

256. Woods, *supra* note 2, at 758.

257. *Id.*

*D. Potential Criticisms*

Two principal criticisms are likely evoked by the CTF solution. Though they highlight important concerns, both are misguided. The opposition may first argue that it is necessary for police to enforce traffic law because it allows them to investigate other crimes.<sup>258</sup> But this depends on the types of nontraffic crimes that traffic enforcement is intended to combat. As stated in the National Highway Safety Traffic Administration’s *The Highway Safety Desk Book*, published in 1996, traffic police can achieve “two for the price of one” by pulling over “[m]urderers, robbers, auto thieves, and drug traffickers” for violating traffic laws.<sup>259</sup> In a CTF system, however, police retain the ability to stop drivers if they have a “reasonable suspicion” that the driver has committed a nontraffic crime.<sup>260</sup> Therefore, a CTF system only removes the police’s ability to investigate nontraffic crime through stopping random people and using the various constitutionally permitted tactics explained in Part I.A in hope of finding drugs and weapons.<sup>261</sup>

This invites a whole other conversation about whether police should prioritize nonviolent drug crimes at all.<sup>262</sup> Assuming they should, statistics indicate that traffic enforcement does not effectively achieve this nontraffic crime purpose.<sup>263</sup> According to the Bureau of Justice Statistics, evidence of criminal behavior was discovered in approximately “8.4 [percent] of searches of a vehicle, driver, or both” in 2008.<sup>264</sup> Among that small percentage of “successful” searches, large seizures are very rare.<sup>265</sup> Particularly given the widespread legalization

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258. See *supra* notes 186–1188 and accompanying text; Woods, *supra* note 17, at 758–59 (explaining how a CTF-like system “could vastly undermine a major crime-fighting tool” by requiring police to have a “clearly articulable suspicion” that a driver has committed a non-traffic crime before stopping the driver and conducting a search).

259. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., *supra* note 53, at 2–4.

260. See *supra* notes 225–2228 and accompanying text.

261. See *supra* Part I.A; EPP ET AL., *supra* note 50, at 32–34 (explaining how police were encouraged to use traffic enforcement as a means to find guns and drugs when pulling over drivers).

262. See, e.g., Emily Ekins, *Public Priorities for Policing*, CATO INST. (Dec. 7, 2016), <https://www.cato.org/policing-in-america/chapter-3/public-priorities-for-policing> [<https://perma.cc/ES44-58Z5>] (finding per a 2016 survey, only thirty percent of Americans believe “enforcing drug laws” should be a “top three priority” for police).

263. See Woods, *supra* note 17, at 1487–88 (citing a variety of studies that indicate contraband is found in eight to ten percent of car searches).

264. CHRISTINE EITH & MATTHEW R. DUROSE, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 11 (2011).

265. See HARRIS, *supra* note 57, at 86 (citing data from Maryland where, after removing unusually large seizures, the average marijuana seizure was 4.2 grams, and data from New Jersey, which reported that seizures of significant amounts of drugs was “rare”).

of marijuana and the impending end to the War on Drugs,<sup>266</sup> policymakers should be willing to forfeit the small amount of drug seizures if it means remedying the painful effects that police involvement in traffic regulation has on Black Americans and the United States broadly.<sup>267</sup>

Critics may also claim that there is a risk of danger involved in every traffic stop that should not be imposed on the unarmed CTF.<sup>268</sup> As one officer has stated, “[t]raffic stops are one of the most unpredictable and therefore dangerous duties of law enforcement,”<sup>269</sup> and tasking untrained civilians with this duty could have dangerous consequences. This concern, however, is largely based on a false narrative—in reality, routine traffic stops are not very dangerous for police.<sup>270</sup> Professor Jordan Blair Woods, a leading scholar in traffic enforcement reform, has published a comprehensive article that derails the danger narrative, stating:

266. Jonah Engel Bromwich, *This Election, a Divided America Stands United on One Topic: All Kinds of Americans Have Turned Their Back on the War on Drugs*, N.Y. TIMES (updated Jan. 6, 2021), <https://www.nytimes.com/2020/11/05/style/marijuana-legalization-usa.html> [https://perma.cc/JD2T-DGXS].

267. See *supra* Part II.

268. Adam Tuss, *Montgomery Co. Exploring Whether to Reassign Traffic Stops Away from Police*, NBC: WASH. (Sept. 9, 2020, 8:52 PM), <https://www.nbcwashington.com/news/local/montgomery-co-exploring-whether-to-reassign-traffic-stops-away-from-police/2414272/> [https://perma.cc/8HH3-BRJV] (“You don’t know who is driving. It’s the unknown which is concerning,” said the Montgomery County Assistant Police Chief. “I just don’t think it’s a good plan to put all our civilians in harm’s way.”); Associated Press, *Berkeley Moves Toward Removing Police from Traffic Stops*, ABC NEWS (July 15, 2020, 10:28 AM), <https://abcnews.go.com/US/wireStory/berkeley-moves-removing-police-traffic-stops-71796720> [https://perma.cc/7NMU-STE8] (“What happens when the felon with an illegal gun gets pulled over by the parking police? Nothing good, we’re sure of that,” said the police unions for Los Angeles, San Francisco, and San Jose in a joint statement); Har, *supra* note 217 (quoting a former police captain: “Traffic stops are one of the most unpredictable and therefore dangerous duties of law enforcement. There is no such thing as a routine traffic stop and to perform them effectively and safely takes months of police training in and outside of an academy.”); MacNeill, *supra* note 217:

‘[B]ecause of the inherent risk of significant danger associated with the local proposal in the city of Cambridge to allow unarmed, unprotected and untrained civilians the ability to stop occupied motor vehicles to issue RMV citations, we felt compelled to comment and call attention to the fact that there is never anything routine in stopping a car for a traffic violation,’ [said the president of the Massachusetts Major Cities Chiefs of Police Association]. Hundreds of Police Officers across the country have been killed over the years during traffic stops. This proposal would absolutely put individuals in harms way and is incredibly dangerous;

Rushin & Edwards, *supra* note 93, at 63 (“Opponents of such a proposal may understandably argue that enforcement of traffic laws exposes non-law enforcement officers to unreasonable risks of physical harm. Policing, they may argue, is a dangerous job, even if an officer is primarily engaged in traffic stops.”).

269. Har, *supra* note 217.

270. See Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 640 (2019) (“[T]he findings do not support the dominant danger narrative surrounding routine traffic stops.”).

Based on a conservative estimate, . . . the rate for a felonious killing of an officer during a routine traffic stop for a traffic violation was only [one] in every 6.5 million stops. The rate for an assault that results in serious injury to an officer was only [one] in every 361,111 stops. Finally, the rate for an assault (whether it results in officer injury or not) was only [one] in every 6,959 stops.<sup>271</sup>

Importantly, Woods points out that forty percent of the 509 times police were killed during traffic stops between 2007 and 2016 were during “felony vehicle stops” where drivers were stopped for nontraffic reasons.<sup>272</sup> While this leaves the other sixty percent to have occurred during “traffic violation stops,” this figure is crucial because felony stops are relatively rare<sup>273</sup> and the CTF will not be authorized to perform them, eliminating the disproportionate danger that such stops invite.<sup>274</sup> Woods also found violence from drivers was “unprovoked” in only 3.55 percent of cases of violence against police during traffic stops.<sup>275</sup>

Woods’ study indicates that a CTF system will not put traffic enforcers in exceptionally dangerous positions for two reasons. First, the perceived danger narrative associated with traffic stops does not differentiate between true traffic violation stops and nontraffic criminal stops, which leads to inflated statistics supporting the danger narrative.<sup>276</sup> And second, “routine traffic stops are not as dangerous as conventionally assumed in the law enforcement domain.”<sup>277</sup>

The CTF system will inherently eliminate many of the catalysts motivating violence against police during traffic stops. The CTF will not be authorized to run records checks or be able to use any other form of authority after stopping the driver, which, according to Woods, triggers the “provoked” violence that accounts for nearly all violence against police in traffic stops.<sup>278</sup> Drivers who under the current regime would be scared for their benign outstanding warrants to turn up in records checks, and thus attempt to fight or flee, will no longer have this fear

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271. *Id.*

272. *Id.* at 651.

273. *Id.*

274. *See supra* Part III.A.

275. Woods, *supra* note 270, at 689. Woods defines “unprovoked” as:

Cases of violence that occurred after the officers made contact with the drivers or passengers and before the officers invoked any additional police authority beyond initiating the stop, asking for documentation, or running a records check. Importantly, this scenario captures the prototypical cases of apparently random and unprovoked violence that animate the dominant danger narrative surrounding routine traffic stops.

*Id.*

276. *Id.* at 294.

277. *Id.*

278. *Id.*

and thus have no reason to respond in such a way.<sup>279</sup> As such, the public awareness campaign discussed above<sup>280</sup> is critical—people need to know that the CTF are not checking for outstanding warrants and that there is no possibility of their cars being searched for drugs.<sup>281</sup> Further, by removing police from traffic stops, the cycle of animosity that is generated by the current regime will no longer exist and will no longer manifest itself through acts of violence.<sup>282</sup> Therefore, because violence against police during traffic stops is rarer than commonly believed, and because a CTF system would effectively make these occurrences even rarer, critics are misguided in arguing that civilian traffic enforcers will be endangered.

### CONCLUSION

While seemingly entrenched in American society, the police's current role in traffic regulation causes disparate impacts, discriminatory enforcement, and procedural injustices. Scholars and policymakers alike have attempted to fix the system, but to no avail. Thus, a different option remains: to remove the system entirely and have an unarmed nonpolice organization regulate traffic. Fortunately, such a significant change is both realistic and feasible. The CTF system offers a compelling opportunity to continue enforcing the traffic code while limiting the injustices that occur on America's roads. Of course, this change would only be a start in the long fight toward a nondiscriminatory criminal justice system. But at a time where such changes are being welcomed and considered, municipalities and states ought to rise to the occasion. The CTF system is a much-needed change on the road to reform.

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279. Consider the killing of twenty-five-year-old rookie officer Liquori Tate, who was shot and killed while providing backup for a minor violation traffic stop in Hattiesburg, Mississippi. Gabe Gutierrez & Jon Schuppe, *They Took Away My Baby: Mom Mourns Slain Cop Son Liquori Tate*, NBC NEWS (May 11, 2015, 9:14 AM), <https://www.nbcnews.com/news/us-news/they-took-away-my-baby-mom-mourns-slain-cop-son-n357051> [<https://perma.cc/L94U-6SVX>]. As the city's mayor explained the situation, "I think we had police officers in the wrong place at the wrong time. . . . And someone didn't want to go to jail, would rather shoot his way out . . . ." *Id.*

280. *See supra* Part III.A.

281. *See supra* Part III.A.

282. *See supra* notes 158–1169 and accompanying text.

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