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ENDING RACE-BASED PRETEXTUAL STOPS: STRATEGIES
FOR ELIMINATING AMERICA'S MOST EGREGIOUS POLICE
PRACTICE

*Bradley R. Haywood**

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ABSTRACT

Pretextual policing is the practice of stopping motorists or pedestrians for minor offenses like traffic infractions in hopes of learning that the person stopped has committed a more serious crime. Pretextual policing is also the main reason Black Americans are so much more likely than white Americans to be subjected to encounters with law enforcement. Shockingly, even in its most explicitly racist form, pretextual policing does not violate the Fourth Amendment’s proscription against unreasonable searches and seizures. In fact, police can pull a driver over merely because he is Black without violating the Fourth Amendment, so long as the officer points to one of the hundreds of traffic laws most drivers violate every day as the objective basis for initiating the encounter. According to the Supreme Court, the subjective motivations of a police officer for conducting a stop are entirely irrelevant.

During the 2020 special session of the Virginia General Assembly, the Commonwealth of Virginia passed landmark legislation eliminating many of the most commonly used pretexts, such as exhaust noise, objects hanging from the rearview mirror, tinted windows, jaywalking, and marijuana odor. Since doing so, many other states and localities have sought to pass similar reforms, recognizing the inordinate power police possess to do their jobs in a discriminatory manner without accountability. This article discusses the history of pretextual policing and urges policymakers and advocates to identify and pursue reforms to limit pretextual policing without jeopardizing true public safety.

INTRODUCTION

In 2020, Virginia became the first state to pass legislation broadly limiting the power of police to conduct certain types of pretextual stops.¹ Known in some contexts as “driving while Black,” a pretextual stop occurs when a police officer uses a very minor offense—typically a traffic or pedestrian infraction—as a pretext for conducting an investigation unrelated to the reason for the stop.² Almost by definition, police need only rely on pretexts where they lack particularized grounds to justify their true, subjective motivations for initiating the encounter. In practice, this means police officers are permitted to conduct stops motivated solely by their hunches, or worse—their implicit and even explicit racial bias. Indeed, a police officer may be motivated

¹ Simone Weichselbaum et al., *Police Face a 'Crisis of Trust' with Black Motorists. One State's Surprising Policy May Help.*, NBC (Oct. 7, 2021), <https://www.nbcnews.com/news/us-news/traffic-stops-are-flashpoint-policing-america-reformers-are-winning-big-n1280594>.

² Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CAL. L. REV. 199, 202 (2007).

entirely by racial animus, pulling over a motorist simply because he is Black, and that stop will not violate the Fourth Amendment so long as the officer comes up with a good enough “cover story.”³

Pretextual stops have been implicated in many high-profile deaths of Black Americans in recent years—Sandra Bland, Philando Castile, Daunte Wright, and Samuel Dubose, for example—were all stopped by police who used a traffic infraction as cover to conduct an investigation into something else.⁴ In Virginia, Lieutenant Caron Nazario, an Army officer, was pepper sprayed and dragged violently from his vehicle for no reason, after being stopped based on a pretext.⁵ His case subsequently led to a civil rights investigation and lawsuit, which alleged a pattern and practice of racist traffic enforcement by the City of Windsor Police Department.⁶

Traffic stops are, as it turns out, the most common reason that citizens interact with police in the United States, with Black motorists significantly more likely to be stopped and searched than white motorists.⁷ This is not because Black people drive more often, or are worse drivers than white people—it is because they are targeted for enforcement.⁸ And the reason they are targeted for enforcement by the police is because that is precisely what the law allows.

Yet when it came time to act on the moral imperative the world felt in 2020, following the deaths of George Floyd and Breonna Taylor, policymakers focused on process rather than power. Instead of recognizing power as the corrupting influence it is and seeking to curtail it, reforms centered on improving the attitude, manners, tolerance, and values of police officers through procedural reforms—in other words, focusing on how the police behaved while using their inordinate power, not whether they should have that

³ David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997).

⁴ See Alexes Harris, *Daunte Wright and the Grim Financial Incentive Behind Traffic Stops: How Pretext Traffic Stops Fund Police Departments — and Put Black Drivers in Danger*, VOX (Apr. 15, 2021), <https://www.vox.com/first-person/22384104/daunte-wright-police-shooting-black-lives-matter-traffic-stops>.

⁵ Ben Finley, *Army officer's Assault Suit Against Virginia Police Can Proceed to Trial*, L.A. TIMES, (Aug. 10, 2022), <https://www.latimes.com/world-nation/story/2022-08-10/soldiers-assault-suit-against-officers-can-proceed-to-trial>.

⁶ Ali Weatherton, *Herring Files Lawsuit Against Town of Windsor for 'Pattern Of Discriminatory Policing,' Town Responds*, 13 NEWS NOW (Dec. 30, 2021), <https://www.13newsnow.com/article/news/local/virginia/virginia-attorney-general-lawsuit-windsor-discriminatory-policing/291-67458af3-fae3-444e-893e-994959de6c05>.

⁷ See Jordan Bennett, *Research Shows Black Drivers More Likely to Be Stopped by Police*, NYU (May 5, 2020), <https://www.nyu.edu/about/news-publications/news/2020/may/black-drivers-more-likely-to-be-stopped-by-police.html>.

⁸ Magnus Loftstrom et al., *Racial Disparities in Law Enforcement Stops*, PUB. POL'Y INST. OF CAL. (Oct. 2021), <https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/>.

power to begin with.

In Virginia, it occurred to advocates and legislators that the answer to police harassment and violence might lie in something as simple as eliminating unnecessary contacts between police and Black citizens.⁹ By reducing unnecessary police contacts, opportunities for harassment and violence can be reduced without any impact on public safety. Drafted and proposed by Justice Forward Virginia, a public defender-led criminal justice reform advocacy organization, the legislation passed by the Virginia General Assembly in 2020 rendered certain common pretexts, such as vehicle equipment violations, jaywalking, and the odor of marijuana, unavailable to police as a primary reason to stop or search an individual. Although not the only possible strategy for addressing pretextual policing, the Virginia approach already appears to be working, eliminating incentives for racial harassment which had become a central feature of policing in Virginia.¹⁰

This article examines the history of racial profiling and pretextual policing in the United States, driven mainly by the War on Drugs. Although not a creation of the Supreme Court, pretextual stops received the Court's imprimatur in 1996 in *Whren v. United States*, which, combined with a heightened standard for proving selective enforcement civil rights claims, emboldened and aggrandized police in their use of pretextual practices.¹¹ In Virginia and several other states, new strategies are developing to end the use of traffic and pedestrian stops as a primary tool for drug interdiction and other law enforcement initiatives.¹²

I. RACIAL PROFILING AND THE HISTORY OF PRETEXTUAL POLICING PRIOR TO *WHREN V. UNITED STATES*

Although not formally endorsed by the Supreme Court until 1996, the practice of using pretexts to conceal arbitrary or discriminatory motives has long been present in American policing.¹³ Of course, "racial targeting . . . has constituted a fact of life for African Americans as long as there have been organized police forces in the United States—indeed, even before that, with

⁹ Wichesellbaum et al., *supra* note 1.

¹⁰ *Id.*

¹¹ See *Whren v. United States*, 517, U.S. 806 (1996).

¹² Wichesellbaum et al., *supra* note 1.

¹³ Clark Neily, *Race, Traffic Stops, and Whren v. United States*, CATO UNBOUND (Apr. 10, 2019), <https://www.cato-unbound.org/2019/04/10/clark-neily/race-traffic-stops-whren-vs-united-states/>.

the slave patrols of the American Antebellum South.”¹⁴ The modern, systematic form of pretextual policing, however, has mostly taken shape over the past fifty years, driven largely by the War on Drugs.¹⁵

Richard Nixon’s 1973 declaration of “an all-out global war on the drug menace” was not mere rhetoric; it signaled a comprehensive shift in drug policy that has defined American policing ever since.¹⁶ In fact, on the same day as his declaration, Nixon announced the creation of the U.S. Drug Enforcement Administration (“DEA”).¹⁷ It served the purpose of “consolidating drug enforcement operations,” maximizing “coordination between federal investigation and prosecution efforts,” eliminating “interagency rivalries that have undermined federal drug law enforcement[,]” and “providing a focal point for coordinating” federal and state drug enforcement efforts.¹⁸ From the very beginning, it was clear that the new approach entailed a major escalation of drug interdiction efforts that were fitting of the “war” rhetoric.¹⁹ Considering the enemy was a “global” one, it should come as no surprise that, within a few years, the DEA was already formally incorporating racial profiling into its enforcement practices²⁰

Specifically, the DEA developed “profiles” to identify potential “drug couriers” at airports, train stations, bus terminals, and other hubs of interstate and international travel.²¹ Drug courier profiles were “an informally compiled abstract of characteristics thought typical of persons carrying illicit drugs.”²² The DEA admitted that the “characteristics” used in these profiles “include[d] such elements as round trips of short duration between major drug centers, purchasing tickets with cash (particularly small bills), no baggage except carry-on items, deplaning last, and, in general, nervous or unusual behavior.”²³ The DEA was less candid about the inclusion of arbitrary and impermissible considerations such as race and ethnicity, or the fact that

¹⁴ David Harris, *Racial Profiling: Past, Present, and Future?*, A.B.A CRIM. JUST. MAG. (Jan. 20, 2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/ (citing DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002)).

¹⁵ *Id.*

¹⁶ Conor Friedersdorf, *The War on Drugs Turns 40*, THE ATLANTIC (June 15, 2011), <https://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472/>.

¹⁷ *Id.*

¹⁸ *Our History*, Drug Enf’t Admin. (May 20, 2018), <https://www.dea.gov/about/history> (quoting Report of the Senate Committee on Government Operations (Oct. 16, 1973)).

¹⁹ *Id.*

²⁰ See Michael Cogan, *The Drug Enforcement Agency’s Use of Drug Courier Profiles: One Size Fits All*, 41 CATH. UNIV. L. REV. 943, 976 (1992).

²¹ See *id.* at 952 (discussing airport drug courier profiles, their use, and criteria).

²² *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980).

²³ Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit at 3, *United States v. Mendenhall*, 446 U.S. 544 (1980) (No. 78-1821) (citing *United States v. Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976)).

the criteria were incomplete and often informal or unsupported by evidence.²⁴ Additionally, the agency was not at all candid about what took place after a suspect was identified, wherein agents would “ask the suspect to consent to questioning,” request “to see the suspect’s identification and ticket,”²⁵ and do whatever they could to further coerce consent to “a search of [the suspect’s] person, luggage, or both.”²⁶

For a time in the late 1970s and early 1980s, arrests arising out of “drug courier” profiling became an abundant source of Fourth Amendment jurisprudence.²⁷ This was due in part to the novel investigative technique employed, but even more so because the enforcement practices associated with “drug courier” profiling all seemed to dance near the margins of constitutional criminal procedure: probable cause or reasonable suspicion, coercion or consent, race-neutral traits versus impermissible discrimination.²⁸ As more courts reviewed drug courier arrests, a “consensus of judicial opinion” began to form that “a traveler’s mere conformity to some or all of the profile characteristics [did] not provide probable cause to arrest.”²⁹ Furthermore, although not as uniform on the question of reasonable suspicion, most courts also appeared to conclude that merely matching a drug courier profile would not be sufficient in the abstract to justify a *Terry* stop.³⁰

The constitutional hurdle described above—developing probable cause or

²⁴ See Harris, *supra* note 14.

²⁵ Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 848 (1985).

²⁶ *Id.* at 848-49.

²⁷ See, e.g., Mendenhall, 446 U.S. 544 (1980) (whether encounter with “drug courier” was consensual); Florida v. Royer, 460 U.S. 491 (1983) (whether “drug courier” validly consented to search); Reid v. Georgia, 448 U.S. 438 (1980) (criteria matched were too innocuous to support a seizure; dissent argued there was no seizure, so sufficiency of criteria was moot). See also Cogan, *supra* note 20 (discussing Supreme Court’s series of drug courier cases and the reshaping of Fourth Amendment jurisprudence as a result).

²⁸ See, e.g., Mendenhall, 446 U.S. 544 (whether encounter with “drug courier” was consensual); Royer, 460 U.S. 491 (whether “drug courier” validly consented to search); Reid 448 U.S. 438 (criteria matched were too innocuous to support a seizure; dissent argued there was no seizure, so sufficiency of criteria was moot).

²⁹ See Royer, 460 U.S. at 507; United States v. Moore, 675 F.2d 802, 808 (6th Cir. 1982); United States v. Smith, 574 F.2d 882, 884 (6th Cir. 1978); United States v. Ballard, 573 F.2d 913, 915 (5th Cir. 1978); United States v. Pope, 561 F.2d 663, 667 (6th Cir. 1977); United States v. Craemer, 555 F.2d 594, 597 (6th Cir. 1977); United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977); United States v. Hunter, 550 F.2d 1066, 1069-70 (6th Cir. 1977); Sands v. State, 414 So. 2d 611, 616 (Fla. 3rd Dist. Ct. App. 1982); Reid v. Georgia, 448 U.S. 438, 441 (1980); United States v. Gooding, 695 F.2d 78, 83 (4th Cir. 1982); United States v. Moore, 675 F.2d 802, 808 (6th Cir. 1982); United States v. Corbin, 662 F.2d 1066, 1069 (4th Cir. 1981); United States v. Allen, 644 F.2d 749, 752 (9th Cir. 1980); United States v. Herbst, 641 F.2d 1161, 1166 (5th Cir. 1981); United States v. Harrison, 667 F.2d 1158, 1161 (4th Cir.); United States v. Black, 675 F.2d 129, 137 (7th Cir. 1982).

³⁰ See Royer, 460 U.S. 507; Moore, 675 F.2d 808; United Smith, 574 F.2d 884; Ballard, 573 F.2d 915; Pope, 561 F.2d 667; Craemer, 555 F.2d 597; McCaleb, 552 F.2d 720; Hunter, 550 F.2d 1069-70; Sands, 414 So. 2d 616; Reid 448 U.S. 441; Gooding, 695 F.2d 83; Moore, 675 F.2d 808; Corbin, 662 F.2d 1069; Allen, 644 F.2d 752; Herbst, 641 F.2d 1166; Harrison, 667 F.2d 1161; Black, 675 F.2d 137.

reasonable suspicion for a stop in an airport or bus terminal—was easily circumvented on the nation’s highways. Unlike in an airport, motorists must obey a voluminous set of rules governing their driving conduct and the good working order of their vehicles. The first application of the practice to roadways appeared to occur in Florida, in 1985, when the state’s Department of Highway Safety and Motor Vehicles issued guidelines for the police on “The Common Characteristics of Drug Couriers.”³¹ Unlike many DEA drug courier profiles, where the race-based criteria were informal or unspoken, Florida’s criteria contained both implicitly and explicitly racist factors, “caution[ing] troopers to be suspicious of rental cars, ‘scrupulous obedience to traffic laws,’ and drivers wearing ‘lots of gold,’ or who do not ‘fit the vehicle,’ and ‘ethnic groups associated with the drug trade.’”³²

The Florida program appealed to the DEA which, in 1986, introduced its own, more sophisticated and systematized “racially biased drug courier profile . . . to the highway patrol,” incorporating it in an initiative called Operation Pipeline.³³ Operation Pipeline was a collaborative drug interdiction program between federal and state law enforcement agencies, with the goal of apprehending drug users and drug traffickers on highways.³⁴ In DEA parlance, a “pipeline stop” occurred when a vehicle, its occupants, or both fit a drug courier profile.³⁵ Once stopped, police would “attempt to gain consent to search the vehicle in order to locate evidence of drug trafficking,” or through “questioning [of] the occupants or other observations,” attempt to manufacture suspicion sufficient to justify a non-consensual search.³⁶

“The bare essentials of a ‘routine traffic stop’ consist of causing the vehicle to stop, explaining to the driver the reason for the stop, verifying the credentials of the driver and the vehicle, and then issuing a citation or a warning.”³⁷ What Operation Pipeline and similar pretextual policing programs did, however, was identify the constitutional boundaries for police practices during traffic stops, and train officers to push those boundaries as much as possible in order to facilitate additional investigation.³⁸ Those boundaries had previously been established in cases like *Schneekloth v. Bustamonte*, which allowed officers to ask for “voluntary” consent to search even without

³¹ David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (June 1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways>.

³² *Id.*

³³ *Id.*

³⁴ *United States v. Sosa*, 104 F. Supp. 2d 722, 728 (E.D. Mich. 2000).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *State v. Dalton*, 165 N.H. 263, 266 (N.H. 2013).

³⁸ See Guy Padula, *Utah v. Strieff: Lemonade Stands and Dragnet Policing*, 120 W. VA. L. REV. 469, 507 (2017).

probable cause; *Pennsylvania v. Mimms*, which allowed police to order every driver to exit their car, regardless of the seriousness of the traffic infraction; and *Berkemer v. McCarty*, which authorized questioning of drivers without converting the stop into custodial interrogation.³⁹ As a result of these and other holdings, the following have become routine aspects of pretextual stops: “(1) a records check via radio or computer regarding the criminal history of those stopped and any outstanding arrest warrants for those individuals; (2) interrogation of those stopped directly on the subject of drugs or about the nature and purpose of their travels; (3) seeking (and often obtaining) consent to conduct a full search of the stopped vehicle; and (4) using a drug-sniffing dog to detect the presence of any drugs in the stopped vehicle.”⁴⁰

Police have treated the maximum allowable limits on their actions as standard protocol. Roadside “questioning is often ‘intense, very invasive and extremely protracted,’ and the driver may be confronted with a virtual barrage of questions about drugs and related matters.”⁴¹ Consent to search is often obtained because motorists do not realize they can refuse, they are intimidated or scared, or simply because they know that if they refuse, the stop will be protracted and they will be inconvenienced.⁴² All of the questioning and other investigative techniques employed, however, are consistent with department policy and formal training. Indeed, in many instances, that training came from Operation Pipeline itself—as of 1999, the program had trained “approximately 27,000 police officers in 48 participating states to use pretext stops in order to find drugs in vehicles,” with some incarnations of Pipeline training materials “implicitly (if not explicitly) encourag[ing] the targeting of minority motorists.”⁴³

Nevertheless, the DEA and state agencies that joined Operation Pipeline deny that the program “teaches or practices profiling by race.”⁴⁴ However, by the mid-1990s, police targeting Black drivers, as encouraged by Operation Pipeline, had become so common that it was beginning to lead to litigation in the form of claims of racial bias.⁴⁵ Lawsuits filed in New Jersey and Maryland, challenging pretextual policing practices along the I-95 corridor, were

³⁹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977); *Berkemer v. McCarty*, 468 U.S. 420, 421 (1984).

⁴⁰ Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874 (2004).

⁴¹ *Id.* at 1885.

⁴² Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 221, 254-55 (2001).

⁴³ Harris, *supra* note 31.

⁴⁴ Samuel Gross & Katherine Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 672 (2002).

⁴⁵ Harris, *supra* note 14.

especially enlightening.⁴⁶

In *State v. Pedro Soto* in New Jersey, evidence demonstrated that although Black motorists made up “only 13.5 percent of those on the road,” they comprised “approximately 35 percent of all of those stopped by police” which corresponded to odds of such a disparity “occurring accidentally” being “substantially less than one in one billion.”⁴⁷ The plaintiff’s expert concluded, and the court agreed, that “the race of the occupants and/or drivers of the cars is a decisive factor or a factor with great explanatory power . . . strongly consistent with the existence of a discriminatory policy, official or *de facto*, of targeting blacks for investigation. . . .”⁴⁸ Two years after the Court’s decision in *Soto*, the State conceded the reality that police were engaged in intentional, systematic racial profiling.⁴⁹

In Maryland, a 1993 lawsuit challenging racist pretextual policing practices arose out of a single stop of a Black motorist, who also happened to be an attorney with the Public Defender Service of Washington, DC.⁵⁰ During that encounter, the plaintiff, Robert Wilkins—now a Federal Court of Appeals judge—was stopped for a minor traffic offense, but it immediately became clear that the police were much more interested in searching him and his family than they were in his driving behavior.⁵¹ Wilkins knew his rights and refused to consent to a search of his car, leading police to order him and his family to the side of the road while they summoned a narcotics-sniffing dog.⁵²

As now-Judge Wilkins later recalled:

In the scheme of things it was a small matter you can say . . . But the indignity of standing there in the rain while this German Shepard was going around our car and these people are driving past and looking at us and looking at the flashing police lights and looking at the dog and putting two and two together and [thinking], “these people must have done something bad, when we hadn’t. We were just coming home from a funeral.” What added insult to injury was that this happened on May the 8th of 1992, I don’t know if you recall what happened on April the 29th of 1992, but that was the day that the jury acquitted all the officers . . . in the Rodney King trial. So, Los Angeles was literally still smoldering as we were smoldering there on the side of the road because of what had happened. We had spent a good part of that 12 hour drive to Chicago talking about, “Los Angeles is up in flames, does the criminal justice system work, does the court

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Reasonably Speaking, *Robert L. Wilkins v. Maryland State Police*, A.L.I (May 2020) <https://www.ali.org/news/podcast/episode/robert-l-wilkins-v-maryland-state-police/>.

system respect the rights of African American?” My uncle was talking about various times he had been beaten up by the police as a young man living in the Bay Area. I was probably the one who was defending the system. And then coming back, here I am with my fancy Harvard Law degree and I can even cite by name and date the U.S. Supreme Court case and it means nothing. It still didn't matter ‘cause you were black.”⁵³

When Wilkins sued, he retained the same expert as in *Soto*, who conducted another observational study, yielding results even more shocking than before.⁵⁴ The study “found that while 17% of the driving population on the interstate highway in Maryland was Black, 72% of those stopped and searched were Black.”⁵⁵ That lawsuit also produced an internal document from the Maryland State Police documenting an explicit practice of targeting Black motorists.⁵⁶

In *Soto*, the class of plaintiffs alleging racial profiling relied not on the Fourth Amendment but “the equal protection and due process clauses of the Fourteenth Amendment,” supplemented and expanded by Article I, paragraphs one and five of the New Jersey Constitution, which in the Court’s words reflected a separate state commitment to “[t]he eradication of the ‘cancer of discrimination’” as “‘one of [New Jersey’s] highest priorities.’”⁵⁷ According to the New Jersey Supreme Court, the federal and state constitutional principles, taken together, required suppression of seized evidence upon proof that police “embarked upon an officially sanctioned or de facto policy of targeting minorities for investigation and arrest.” Relevant to the United States Supreme Court’s holdings in *Whren* and *Atwater*, discussed below, the New Jersey court explained the purpose of the suppression remedy was “to deter future insolence in office by those charged with enforcement of the law.”⁵⁸

Although based partly on state law, *Soto* essentially involved a claim of selective enforcement under the Equal Protection Clause of the Fourteenth Amendment—selecting whom to arrest based on impermissible criteria, like race. *Wilkins* was likewise a selective enforcement suit.⁵⁹ Selective enforcement can be alleged during a criminal case.⁶⁰ More commonly, however, selective enforcement is a civil matter, raised separately from and subsequent

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *State v. Soto*, 734 A.2d 350, 359-60 (N.J. Super. Law Div. 1996) (quoting *Dixon v. Rutgers, The State U. of N.J.*, 110 N.J. 432, 451 (1988)).

⁵⁸ *Id.* at 360 (quoting *State v. Kennedy*, 247 N.J. Super. 21, 29-30 (App.Div. 1991)).

⁵⁹ *Harris*, *supra* note 14.

⁶⁰ Jonathan J. Marshall, *Selective Civil Rights Enforcement and Religious Liberty*, 72 STAN. L. REV. 1446-47 (2020).

to a criminal case, if one was brought.⁶¹ Besides being exceptionally difficult to prove, selective enforcement actions typically do not provide redress for the immediate harms of arrest, prosecution, and punishment.⁶² In order to obtain a meaningful remedy for an unlawful stop and search in a criminal case, an individual would have to retroactively assert their rights under the Fourth Amendment.⁶³

II. *WHREN V. UNITED STATES*: HOW RACIAL PROFILING BECAME IRRELEVANT UNDER THE FOURTH AMENDMENT

Until 1996, the extent to which impermissible subjective motivations, like racial animus, could impact the constitutionality of a stop or search under the Fourth Amendment remained something of an open question.⁶⁴ The majority of states and circuits that considered the question had held that, generally speaking, the subjective motivations of an officer were insufficient to render a stop unconstitutional.⁶⁵ Even so, it seemed inconceivable that subjective motivations would be deemed completely irrelevant, regardless of the facts.

In *Whren v. United States*, the Supreme Court held that a police officer's subjective motivations for stopping a motorist or pedestrian were indeed irrelevant—as long as there is an objective basis for the stop, it does not violate the Fourth Amendment.⁶⁶ In *Whren*, the police observed two Black men in a car and based on their movements and appearance, formed a hunch that they were engaged in drug activity.⁶⁷ Although nothing the men had done was criminal in nature, the police endeavored to stop their car and search it, using a traffic violation to initiate that process.⁶⁸ Writing for the majority, Justice Scalia saw no problem with the procedure employed, finding that as long as the police had in fact observed a traffic violation, they were entitled to stop the vehicle, even if their real purpose had nothing to do with traffic enforcement.⁶⁹ To the extent the police were targeting the occupants of the car because they were Black, the majority held the Constitution “prohibits selective

⁶¹ See *id.* at 1450-51.

⁶² See *id.* at 1446-57.

⁶³ See *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁶⁴ David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U. Pa. J. Const. L. 374-76 (2001) (noting a circuit split prior to *Whren*).

⁶⁵ *Id.* at 375-77.

⁶⁶ *Whren*, 517 U.S. at 813.

⁶⁷ *Id.* at 808-09.

⁶⁸ *Id.* at 808.

⁶⁹ *Id.* at 813.

enforcement of the law based on considerations such as race,” but that “the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”⁷⁰

What the Court failed to mention is that meaningful remedies for racial profiling are effectively unavailable to a defendant in a criminal case pursuant to the Fourteenth Amendment. In fact, the Supreme Court itself had raised the bar for proving selective enforcement just weeks before *Whren*, in *United States v. Armstrong*.⁷¹ Although decided in the context of prosecutions, rather than arrests, *Armstrong* made clear that in order to even obtain discovery from the government, a petitioner must first “produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”⁷²

Moreover, the common sense avenues for making this threshold showing, such as those found in *Soto* and *Wilkins*, were substantially foreclosed by the Court, which held that “only in rare cases will a statistical pattern of discriminatory impact conclusively demonstrate a constitutional violation.”⁷³ In other words, lacking direct proof of racial animus, such as racist statements made by an officer, or explicitly racist policy and procedure manuals—which a defendant could never obtain without court-ordered discovery—a selective enforcement claim is destined to fail. Finally, even in the exceedingly rare case a defendant meets his considerable burden of production, there remains the problem of remedies. In a criminal case, selective enforcement does not entail a suppression remedy, meaning the most a defendant might be able to earn is dismissal of a traffic infraction, leaving any other charges resulting from a pretextual stop and search unaffected by the constitutional violation.⁷⁴

With the Court in *Whren* refusing to allow inquiry into an officer’s subjective motivations pursuant the Fourth Amendment and directing defendants to Fourteenth Amendment selective enforcement claims which *Armstrong* had just rendered nearly impossible to prove, many began to question the Court’s own “subjective motivations.” Criticism of *Whren* was sharp and immediate, with scholars and lower courts warning of the obvious consequences of declaring racial animus “irrelevant,” so long as police officers kept their

⁷⁰ *Id.*

⁷¹ *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

⁷² *Id.* at 469.

⁷³ *McCleskey v. Kemp*, 481 U.S. 279, 293 n.12 (1987).

⁷⁴ *See* Lafave, *supra* note 40, at 1861.

racism to themselves.⁷⁵ That is effectively what the case held—a police officer absolutely could stop a motorist because he is Black, so long as there was some race-neutral “cover story” justifying his stop. In fact, the opinion suggests an officer could even make his racial animus *explicit* without violating the Fourth Amendment, openly using racist language without conferring a suppression remedy on the defendant.⁷⁶ Many questioned if Scalia truly meant for the rule to be so broad and permissive, prohibiting any inquiry into the subjective intentions or bad faith of the officer.⁷⁷ Subsequent opinions, however, made clear that is exactly what he meant.

One critic unwilling to believe the Supreme Court had adopted such a broad, permissive rule was the Arkansas Supreme Court. In *Arkansas v. Sullivan*, the Supreme Court reversed the Arkansas court’s ruling declaring a pretextual stop and search “unreasonable.”⁷⁸ The officer had stopped Sullivan for speeding and having illegal window tint, at which time the officer realized Sullivan was rumored to deal drugs.⁷⁹ The officer eventually noticed a rusted roofing hatchet on the floorboard and arrested Sullivan on that basis. In the officer’s estimation, the hatchet was a weapon, and Sullivan was possessing it illegally—a questionable conclusion, but one that the statute just barely supported.⁸⁰ After arresting Sullivan, the officer conducted an inventory search of the vehicle, during which he found suspected methamphetamine and drug paraphernalia.⁸¹

The trial court believed “that the arrest was pretextual and made for the

⁷⁵ Gabriel Chin & Charles Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 (2015) (The critical literature is large.). See, e.g., Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 UNIV. OF CHI. LEGAL F. 163, 192-6 (2002); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032-4 (March 2002); Harris, *supra* note 3, at 582; Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L. J. 1005, 1065-75 (2010); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010-11 (1998); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI-KENT L. REV. 559, 566-68 (1998); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 344 (1998). Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual Stops and Doctrinal Remedies to Racial Profiling*, 74 TUL. L. REV. 1409, 1413-14 (2000); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 320-22 (2001); see also David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 274 (1997) (suggesting that Whren and contemporaneous decisions reflect “a systematic disregard for the distinctive concerns of racial minorities [that] has become embedded in the structure of Fourth Amendment doctrine and constrains the doctrine’s growth”); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978-83 (1999).

⁷⁶ See *Whren*, 517 U.S. at 812-19.

⁷⁷ *State v. Sullivan*, 16 S.W.3d 551, 551-53 (2000).

⁷⁸ *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001).

⁷⁹ *Sullivan*, 16 S.W.3d at 552.

⁸⁰ See *id.* at 318B.

⁸¹ See *id.*

purpose of searching Sullivan's vehicle for evidence of a crime.”⁸² Without any nexus between the defendant’s driving behavior or the presence of the hatchet and the stop and search, the Arkansas Supreme Court did not find the police practices were constitutional.⁸³ At the trial court level, the court did “not believe that *Whren* goes so far as to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.”⁸⁴ Despite the holding of *Whren*, on appeal, the Arkansas Supreme Court distinguished the case on the facts, interpreting an aspirational reasonableness requirement to Fourth Amendment searches and seizures: “We draw a clear distinction between arresting a person with crack cocaine in his hands as was the case in *Whren* and effecting a pretextual arrest for purposes of a search, such as we have in the instant case. Surely that flies in the face of reasonableness, which is the essence of the Fourth Amendment.”⁸⁵ As the Arkansas Supreme Court saw it, *Whren* could not possibly have meant that objective grounds for a traffic stop provides police “blanket authority for pretextual arrests for purposes of a search in all cases.”⁸⁶

In retrospect, the Arkansas Supreme Court’s ruling can be seen as a *de facto* protest vote—the facts were not analytically distinguishable from *Whren*, and the Court simply refused to accept the new, narrow scope of Fourth Amendment protections.⁸⁷ There did remain, however, the question of whether the *Whren* rule applied to any stop for any offense, no matter how minor, and whether reasonableness was irrelevant even where an officer’s post-stop conduct “shocked the conscience.” The United States Supreme Court answered those questions emphatically in *Atwater v. Lago Vista*, decided one month before *Sullivan*, emphasizing just how irrelevant the Court believed subjective motivations to be when assessing the constitutionality of a stop and seizure.⁸⁸

In *Atwater*, the petitioner was stopped because neither she nor her children were wearing seatbelts. The officer “was loud and accusatory from the moment he approached Atwater's car,” threatening to handcuff and detain both Atwater and her children at the local jail.⁸⁹ “Atwater's young children were terrified and hysterical. Yet when Atwater asked [the officer] to lower his

⁸² See *id.* at 318C.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See *id.*

⁸⁶ See *id.* at 318B.

⁸⁷ See *id.*

⁸⁸ *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001).

⁸⁹ *Atwater*, 532 U.S. at 367 (O’Connor J. dissenting).

voice because he was scaring the children, he responded by jabbing his finger in Atwater's face and saying, 'You're going to jail.'"⁹⁰ He then handcuffed only Atwater, placed her in a locked squad car, transported her to the police station without her children, searched her and her belongings, took booking photographs, and placed her in a cell alone for an hour.⁹¹ However, the fact that Atwater's children were never cuffed or taken to jail did not shield them from trauma.

Understandably, the 3-year-old boy was "very, very, very traumatized." After the incident, he had to see a child psychologist regularly, who reported that the boy "felt very guilty that he couldn't stop this horrible thing . . . he was powerless to help his mother or sister." Both of Atwater's children are now terrified at the sight of any police car. According to Atwater, the arrest "just never leaves us. It's a conversation we have every other day, once a week, and it's—it raises its head constantly in our lives."⁹²

Even the majority conceded Atwater's arrest "was a 'pointless indignity' that served no discernible state interest."⁹³

At the time, Texas law required front-seat car passengers to wear seatbelts was a misdemeanor punishable by a fine of not more than \$50.⁹⁴ Atwater sued, alleging that the stop, arrest and detention were unreasonable pursuant to 42 U.S.C. § 1983, on the grounds that an arrest for a first offense seatbelt violation was extraordinary and unnecessary, if not cruel and vindictive.⁹⁵ The Supreme Court sided with the officer, holding that if an officer has probable cause to believe an individual has committed even a very minor criminal offense in the officer's presence, then the officer is authorized—but not required—by the Fourth Amendment to make a custodial arrest "without balancing costs and benefits or determining whether the arrest is in some sense necessary."⁹⁶ Essentially, if the law allows it, an officer can do it, and cannot be held accountable—or even questioned—for imprudent, petty, racist or vindictive exercise of his discretion.

Although *Whren*, *Sullivan*, and *Atwater* all stridently rejected any "reasonableness" limitation on the Fourth Amendment, the Court did eventually adopt a reasonableness test in the Fourth Amendment context—one that, ironically, *expanded* police powers rather than protecting individual rights, by finding pretextual stops lawful even where there was no authority for the stop, if the officer was mistaken about the law. In *Heien v. North Carolina*,

⁹⁰ *Id.*

⁹¹ *Id.* at 369.

⁹² *Id.* at 370.

⁹³ *Id.* at 371 (O'Connor J. dissenting).

⁹⁴ *Id.* at 323.

⁹⁵ *Id.* at 325.

⁹⁶ *Id.* at 354.

the petitioner was stopped because of a broken taillight. The officer believed state law prohibited motorists from operating vehicles with only one working brake light.⁹⁷ However, the officer was mistaken—the statute only prohibited driving without two working lights, as the North Carolina courts would subsequently rule.⁹⁸ Nevertheless, the Supreme Court upheld the stop as constitutional under the Fourth Amendment, finding that even though the petitioner was not breaking the law, it was reasonable for an officer to conclude he was, because the statute was somewhat vague in that lawyers could argue for either a narrow or broad construction. Considering many statutes permit competing interpretations, *Heien* has the potential to significantly curtail Fourth Amendment protections, by allowing police to stop even individuals who are scrupulously abiding by the law.⁹⁹

The holding in *Heien* seemed at odds with the old adage that “ignorance of the law is no excuse.” The majority responded to this criticism by arguing its holding did not incentivize subjective ignorance—“an officer can gain no Fourth Amendment advantage through a sloppy study of the laws he is duty bound to enforce” because the law “tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable.”¹⁰⁰ For this proposition, the Court cited *Whren*, and the principle that the court does not examine the subjective motivation of the particular officer involved.¹⁰¹ However, in doing so, the Court held that an officer’s subjective understanding is similarly irrelevant in analyzing an apparent mistake about the law. In other words, *Heien* allows officers to claim mistakes of law when in fact they had utter clarity as to the meaning of the statute.¹⁰² It even allows officers to claim mistake when they subjectively believed a stop to be unlawful.¹⁰³ Although not as consequential as *Whren* or *Atwater*, *Heien* creates an opening for police to exploit statutes that permit competing interpretations.

⁹⁷ *Heien v. North Carolina*, 574 U.S. 54, 57 (2014).

⁹⁸ *Heien*, 574 U.S. at 58-59.

⁹⁹ See Sherry F. Colb, *The Shrinking Fourth Amendment: Heien v. North Carolina*, VERDICT LEGAL ANALYSIS & COMMENT. FROM JUSTIA (June 10, 2015), <https://verdict.justia.com/2015/06/10/the-shrinking-fourth-amendment-heien-v-north-carolina>.

¹⁰⁰ *Heien*, 574 U.S. at 66-67.

¹⁰¹ *Whren*, 517 U.S. at 813.

¹⁰² See *Heien*, 574 U.S. at 66.

¹⁰³ See *id.*

III. “BLINKING AT REALITY”: WIDESPREAD ABUSE OF POLICE
DISCRETION PROMPTS CALLS FOR RECONSIDERATION OF
WHREN AND *ATWATER*

Although these four cases created and then expanded a controversial rule of constitutional criminal procedure, the attitudes of individual justices reflected a growing discomfort with the trajectory of the court’s jurisprudence. When *Whren* was originally decided, not a single justice dissented—eight of them were either unbothered by or unaware of the implications of *Whren* to racial profiling.¹⁰⁴ Scalia, on the other hand, was keenly aware, having injected race into the decision even though it had not been argued by the parties: “*Whren*’s immunization of the use of race is remarkable because it was emphatic, even though the question was not raised by the facts of the case. Although there was no claim of actual racial discrimination, the Court reached out to decide it.”¹⁰⁵

By the time *Sullivan* and *Atwater* were decided, significant concerns began to materialize among the rest of the justices.¹⁰⁶ *Atwater* was a five-to-four majority, with Souter writing for the majority, and O’Connor the dissent.¹⁰⁷ A dialogue had opened between the two factions of the Court, centered on the likelihood of widespread abuse of police discretion, with the majority claiming there was no proof of “widespread abuse of minor-offense arrest authority,” and the dissent warning of an opening of the floodgates.¹⁰⁸ As discussed below, that empirical point about the existence or likelihood of the police abusing their discretion, especially in a racist manner, may have been dispositive, suggesting that additional data ought to warrant reconsideration of precedent.

As Justice O’Connor argued in the *Atwater* dissent, the case was just one more reminder of how “unbounded discretion carries with it grave potential for abuse,” with the power to stop and arrest representing just the first in a cascade of consequences impacting an individual’s liberty and privacy rights.¹⁰⁹ From O’Connor’s perspective, if the Court was to maintain the rule in *Whren* disregarding subjective motivations for a stop, then it “must

¹⁰⁴ *Whren v. United States*, OYEZ, <https://www.oyez.org/cases/1995/95-5841> (last visited Oct. 20, 2022).

¹⁰⁵ Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 885 (2015).

¹⁰⁶ *Atwater*, 532 U.S. at 372-73 (O’Connor, J., dissenting); *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring).

¹⁰⁷ *Atwater v. City of Lago Vista*, OYEZ, <https://www.oyez.org/cases/2000/99-1408> (last visited Oct. 10, 2022).

¹⁰⁸ *Atwater*, 532 U.S. at 353.

¹⁰⁹ *Id.* at 371-72 (O’Connor, J., dissenting).

vigilantly ensure that officers' post-stop actions -- which are properly within our reach -- comport with the Fourth Amendment's guarantee of reasonableness."¹¹⁰ The majority, however, rejected claims that the Fourth Amendment guaranteed reasonableness or proportionality, which in O'Connor's estimation meant officers had "unfettered discretion to choose" the most or least restrictive course of action, "without articulating a single reason why such action is appropriate."¹¹¹

Interestingly, just as the majority did not contest the "pointless indignity" to which Atwater was subjected, neither did it disagree that widespread abuse of discretion in this context might be constitutionally problematic. Rather, the majority argued that Atwater's case was an anomaly, that there was no evidence of "widespread abuse" or the "parade of horrors" alleged by the dissent, and that warnings against future abuse were "speculative."¹¹² Although "the majority [took] comfort in the lack of evidence of 'an epidemic of unnecessary minor-offense arrests,'" the dissent replied that "the relatively small number of published cases dealing with such arrests proves little and should provide little solace."¹¹³

Over the years, Justice Ginsburg made a point to remind her colleagues of the tenuous underpinnings of *Whren* and *Atwater*—specifically that the "parade of horrors" her colleagues had seemingly mocked had materialized, and therefore reconsideration of precedent was warranted. Ginsburg first staked her position in *Sullivan*, where she concurred but noted the "disturbing discretion" the majority granted police "to intrude on individuals' liberty and privacy," and specifically urged the Court "to reconsider its recent precedent" on the basis of those intrusions.¹¹⁴ Ginsburg again urged reconsideration of *Whren* and *Atwater* in *District of Columbia v. Wesby*, quoting Professor Wayne LaFare in arguing that "[t]he apparent assumption of the Court in *Whren*, that no significant problem of police arbitrariness can exist as to actions taken with probable cause, blinks at reality."¹¹⁵

A. The "Parade of Horrors": Racially-Disparate Traffic and Pedestrian Enforcement Following Whren

The assumptions underlying *Whren* and *Atwater*—that police, insulated from scrutiny regarding their motives, would never abuse their discretion to

¹¹⁰ *Id.* at 372 (O'Connor, J., dissenting).

¹¹¹ *Id.*

¹¹² *Id.* at 353.

¹¹³ *Id.* at 372 (O'Connor, J., dissenting).

¹¹⁴ See *Sullivan*, 532 U.S. at 772-7 (Ginsburg, J., concurring) (citing *State v. Sullivan*, 16 S.W.3d 551, 551-552 (Ark. 2000)).

¹¹⁵ See *District of Columbia v. Wesby*, 138 S.Ct. 577, 594 (2018) (Ginsburg, J., concurring) (quoting WAYNE R. LAFARE, SEARCH AND SEIZURE §1.4(f), at 186 (5th ed. 2012)).

conduct pretextual stops—has more than “blinked at reality”; it has been blinded to it. Emboldened by traffic and pedestrian codes that keep expanding, providing police more and more reasons to stop motorists and pedestrians virtually on a whim, pretextual policing has become the bread and butter of patrol and vice units across the country. As discussed below, improved data collection practices have cast a spotlight on how fundamental traffic enforcement in particular has become to American policing—especially the War on Drugs—and how disregarding subjective motivations behind traffic stops has led to greater and more troubling racial disparities in stops and arrests.

In 1996, the same year *Whren* was decided, traffic stops accounted for approximately 10,500,000 police-citizen interactions, or 24% of all police-citizen encounters.¹¹⁶ A greater percentage—about 33% of police-citizen interactions in 1996—were as a result of reporting a crime, making crime reporting the most common reason a person might interact with police.¹¹⁷ Since the early-2000s, however, police-initiated traffic or pedestrian stops have easily outpaced crime reporting as the most common reason citizens interact with police, accounting for approximately 27,896,700 police-citizen interactions in 2018 alone—more than 45% of all police-citizen interactions.¹¹⁸ By contrast, interactions as a result of reporting a crime totaled 19,109,200 in 2018, and interactions resulting from a non-crime emergency totaled 9,971,500.¹¹⁹

Even at the time *Whren* was decided, compelling evidence existed to support the conclusion that police considered race in determining how to exercise their discretion with respect to traffic or pedestrian stops.¹²⁰ That said, it did not nearly approach the current consensus. Data on traffic and pedestrian stops has not always been robust or reliable, which may have accounted in part for the “dearth of horrors” that the *Atwater* court derisively

¹¹⁶ See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUST., POLICE USE OF FORCE: COLLECTION OF NAT'L DATA 8 (1997).

¹¹⁷ See *id.*

¹¹⁸ See ERIKA HARRELL & ELIZABETH DAVIS, BUREAU OF JUST. STAT., CONTACTS BETWEEN POLICE AND THE PUBLIC 4 (2020).

¹¹⁹ See *id.*

¹²⁰ "Shortly after the *Whren* decision, David Rudovsky wrote a detailed summary of the then-existing universe of studies on racial profiling by police in traffic stops. At that point, studies of the New Jersey State Police, Illinois State Police, Philadelphia Police Department, New York City Police Department (NYPD), and Boston Police Department all showed evidence of racial profiling by law enforcement. Indeed, Rudovsky's summary from two decades ago foreshadowed a research field that has since grown substantially." Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 657-58 (2021).

described.¹²¹ As states began passing data collection laws, and data became more available, it became clear that the results of research collected for cases like *Soto* and *Wilkins* were not anomalous or isolated. In fact, the evidence was conclusive and profound: racial disparities in traffic and pedestrian stops were widespread and uniform throughout the entire country.¹²²

No matter the city, county, or state, traffic stop data reveals stark racial disparities between white and Black people in stops and searches.¹²³ In Berkeley, California, for example, Black motorists are nearly seven times more likely than white motorists to be stopped for a traffic infraction, and more likely to be searched following the stop, even though those searches produced illegal contraband half as often as the searches of cars belonging to white drivers.¹²⁴ In Montgomery County, MD, 2018 data demonstrated that although Black people were 18% of all county residents, they accounted for 32% of all traffic stops in the County, and if stopped, were about 2.5 times more likely to be searched than white drivers.¹²⁵

In January of 2019, the *Los Angeles Times* released a jaw-dropping analysis of traffic and pedestrian stops by Los Angeles Police (“LAPD”) between 2015 and 2018, demonstrating that Metropolitan Division “officers stop[ped] African American drivers at a rate more than five times their share of the city’s population.”¹²⁶ The Metropolitan Division, considered an “elite” unit within the LAPD, had been expanded in 2015, with “special units” created “to swarm crime hot spots,” often “spend[ing] their entire shifts on vehicle

¹²¹ Gross & Barnes, *supra* note 44. “So far, most disputes about racial profiling have been battles over police records. Racial profiling is impossible to detect or prove without detailed information on police conduct: whom they stop, question, and search, by race; why they take these actions; and what they discover in the process. Historically, most police departments did not systematically keep this type of information. In general, they only maintained records of arrests, and of those searches that resulted in seizures or that were conducted pursuant to court warrants. Police departments may be reluctant to allow outsiders to see the records they do keep, but they can be compelled to do so by courts in discovery in civil or criminal litigation, or by legislatures under freedom of information acts. The essential step is to require that the information be recorded and kept in the first place. For several years, police departments and police unions managed to defeat most efforts to require the sort of record keeping that would make it possible to detect racial profiling, but in the last few years, as racial profiling has become an increasingly powerful political issue, the tide has turned.” Gross & Barnes, *supra* note 44, at 656.

¹²² Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>.

¹²³ Sarah Ravani, *Black Drivers Are Far More Likely to be Stopped by Berkeley Police than White People, Audit Finds*, SAN FRANCISCO CHRONICLE, <https://www.sfchronicle.com/local/article/Black-drivers-far-more-likely-to-be-stopped-by-16121603.php> (last updated Apr. 22, 2021).

¹²⁴ *Id.*

¹²⁵ Elaine Bonner-Tompkins & Natalia Carrizosa, *Local Policing Data and Best Practices*, MONTGOMERY CNTY. MD.: OFF. OF LEGIS. OVERSIGHT (July 21, 2020), <https://www.montgomerycountymd.gov/OLO/Resources/Files/2020%20Reports/OLOREport2020-9.pdf>.

¹²⁶ Cindy Chang & Ben Poston, “*Stop-and-Frisk in a Car: Elite LAPD Unit Disproportionately Stopped Black Drivers, Data Show*,” L.A. TIMES (Jan. 24, 2019), <https://www.latimes.com/local/lanow/la-me-lapd-traffic-stops-20190124-story.html>.

stops and other ‘proactive’ policing tactics intended to root out” those they suspected—without evidence—to be “violent criminals.”¹²⁷

Although LAPD’s Chief denied relying on what he described as “hunch policing,” the practice he described was exactly that: “[officers] typically use a violation such as a broken tail light as a starting point to question the driver and potentially get inside the car — a type of stop known as a pretextual stop, which [the Chief] acknowledged is more invasive than an ordinary traffic stop.”¹²⁸ In the Chief’s estimation, the fact that his department was “trained to recognize their own implicit racial bias” and engage individuals in a manner reflective of “procedural justice,” was adequate to guard against whatever problems are associated with the practice.¹²⁹

During this three year time period, 65% of those stopped by LAPD’s “Metropolitan Division” were Black, despite the City being only 9% Black, and the areas targeted for enforcement being only 31% Black.¹³⁰ By contrast, LAPD’s dedicated traffic officers, “stopped a far lower proportion of Black drivers than Metro officers did”—in the same targeted area with a 31% Black population, 45% of the drivers stopped by the traffic division were Black.¹³¹

Later that same year, using data required by a new law to be collected concerning traffic stops, the *Los Angeles Times* published additional analysis demonstrating that “police officers search Blacks and Latinos far more often than whites during traffic stops, even though whites are more likely to be found with illegal items.”¹³² Considering only what occurred to drivers after the police had already conducted a traffic stop, the Times found that “24% of Black drivers and passengers were searched” following a traffic stop, “compared with 16% of Latinos and 5% of whites,” meaning “a Black person in a vehicle was more than four times as likely to be searched by police as a white person, and a Latino was three times as likely.”¹³³ This was despite the fact that “whites were found with drugs, weapons or other contraband in 20% of searches, compared with 17% for blacks and 16% for Latinos.”¹³⁴ Dozens of

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *See id.*; accord L.A. POLICE DEP’T, *Community Inquiries on LAPD Training and Practice*, <https://www.lapdonline.org/community-inquiries-on-lapd-training-and-practice/> (last visited Sept. 29, 2022).

¹³⁰ Chang & Poston, *supra* note 126.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* Findings from both analyses later received independent confirmation that pretextual policing was “of limited effectiveness in identifying evidence of illegal firearms or other serious crimes.” Kevin Rector & Cindy Chang, *Racial Disparities in LAPD Stops Fueled by Failed Crime-Fighting Strategy, Audit Finds*, L.A. TIMES (Oct. 24, 2020), <https://www.latimes.com/california/story/2020-10-24/racial-disparities-in-lapd-stops-fueled-by-failed-crime-fighting-strategy-audit-finds>.

other state and local studies, conducted by academics, the media, advocates, and state and local governments have demonstrated similar disparities in stops and searches—as well as the inefficiency of pretextual policing, considering how infrequently pretextual stops and searches turn up contraband.

In 2020, researchers from Stanford and New York Universities released a study in which they analyzed approximately 100 million traffic stops by twenty-one state patrol agencies and thirty-five municipal police departments over almost a decade.¹³⁵ This comprehensive, nationwide study confirmed what smaller state and local studies had uniformly suggested: Black drivers are much more likely to be stopped by police than white drivers—at least 20% more likely, to be exact.¹³⁶ In addition, the study found that “once stopped, Black drivers were searched about 1.5 to 2 times as often as white drivers, while they were less likely to be carrying drugs, guns, or other illegal contraband compared to their white peers.”¹³⁷

In order to account for potential differences in driving behavior between races, the Stanford and NYU researchers also examined data collected using a “veil-of-darkness test,” under the assumption that “officers who engage in racial profiling are less able to identify a driver’s race after dark than during the day,” meaning that “if officers are discriminating against black drivers . . . one would expect black drivers to comprise a smaller share of stopped drivers at night.”¹³⁸ This is, in fact, exactly what the data show—racial disparities in traffic stops decrease when one only examines stops made at night.¹³⁹

Virginia was one of the states where for many years data was hard to come by. Not only was arrest data not collected comprehensively throughout the state, but to the extent it was, it was flawed and virtually unusable.¹⁴⁰ For example, prior to 2020, Virginia State Police did not even track whether individuals they arrested were Hispanic.¹⁴¹ Rather, all people of Hispanic ethnicity were categorized, often inaccurately, according to the race the officer

¹³⁵ See Emma Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE OF HUM. BEHAV. 736, 736 (2020).

¹³⁶ See *id.* at 737.

¹³⁷ Bennett, *supra* note 7.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See generally Tom Jackman, *Virginia Begins Steps to Repair Flawed Criminal-Records Database*, THE WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/local/public-safety/virginia-begins-steps-to-repair-flawed-criminal-records-database/2018/12/30/ce447f38-049b-11e9-b6a9-0aa5c2fcc9e4_story.html (explaining how Virginia plans to better its criminal records database).

¹⁴¹ Summary of *HB 1250 Virginia Community Policing Act; data collection and reporting requirement*, VA.’S LEGIS. INFO. SYS. (Jan. 8, 2020), <https://lis.virginia.gov/cgi-bin/leqp604.exe?201+sum+HB1250> (last visited Oct. 1, 2022).

felt was closest—Black, white, or indigenous.¹⁴²

In 2020, however, the Virginia General Assembly passed the Community Policing Act, which “dramatically improved data collection on police interactions with Virginia drivers.”¹⁴³ Although good news for government transparency and accountability, the data confirmed that Virginia police were just like those in the rest of the country, if not worse. “Even though just 19.6% of Virginia’s driving age population between July 2020 and July 2021 was Black, 31% of drivers stopped by police [during that time period] were Black.”¹⁴⁴ This disparity “exceeds the national disparity found in recent research from Stanford and New York Universities” showing that “Black drivers across the country are about 20% more likely to be subject to a police stop than white drivers.”¹⁴⁵

IV. BEYOND *WHREN* AND *ATWATER*: HOW OVERCRIMINALIZATION AND JUDICIAL DEFERENCE TO POLICE WEAPONIZED SUPREME COURT PRECEDENT

The rule announced in *Whren* and expanded in *Atwater*, and even the practices encouraged by Operation Pipeline, were not sufficient in themselves to make pretextual stops a bedrock feature of law enforcement. If police had only limited authority to conduct traffic stops, for example—either because traffic enforcement was the job of another agency, or because there were far fewer traffic statutes, with the existing statutes strictly construed to address only legitimate, imminent risks to public safety—then the opportunities for abuse would be limited.

The problem is that in the United States, traffic and pedestrian laws are neither limited in number nor narrowly drafted to encompass only dangerous conduct.¹⁴⁶ To the contrary, traffic laws, and to a lesser extent pedestrian laws, are seemingly unlimited in number, and legislatures and courts alike have gone many steps further to ensure police can interpret them as broadly

¹⁴² See generally Amelia Vorpahl, *How are Hispanic Individuals Represented in the Criminal Justice System?*, THE COUNCIL OF STATE GOV’TS (Oct. 12, 2021), <https://csgjusticecenter.org/2021/10/12/how-are-hispanic-individuals-represented-in-the-criminal-justice-system/> (explaining how Hispanics are represented through the criminal justice system).

¹⁴³ Brad Haywood, *We Can’t Go Back to Broken Taillight Policing*, *Richmond Times Dispatch*, RICH. TIMES DISPATCH (Feb. 1, 2022), https://richmond.com/opinion/columnists/brad-haywood-column-we-cant-go-back-to-broken-taillight-policing/article_a1e4ce07-6719-5955-aa13-19efe496ad12.html.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; Bennett, *supra* note 7.

¹⁴⁶ See e.g., VA. CODE ANN. § 46.2 (2022).

as possible.¹⁴⁷ “If an officer follows any motorist long enough, the motorist will eventually ‘violat[e] some traffic law,’ making ‘any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.’”¹⁴⁸

Some of the worst examples of these phenomena can be observed in Virginia’s Code and jurisprudence. Before 2020, Virginia had created an ideal environment for pretextual policing, with a regressive, expansive, and confusing traffic code; a complete lack of transparency and lack of access to law enforcement training and policy records; a near-complete absence of policing data; and perhaps worst of all, a judiciary that went well beyond *Whren*, not just refusing to inquire into subjective motivations, but imputing honorable motives to police officers engaged in pretextual practices.¹⁴⁹

The absurdity of precedent in Virginia has been especially apparent with respect to vehicle equipment violations. Prior to changes in the Code passed in 2020, police could stop drivers for all manner of ridiculous reasons, including for having tint on their windows, even if that tint was legal, provided an officer testified they *thought* it might be too dark.¹⁵⁰ Police could stop cars for legal, factory-installed exhaust systems, if an officer felt the exhaust note was too loud, and potentially produced by a broken muffler or merely an aftermarket muffler.¹⁵¹ Virginia precedent allowed officers to stop drivers for having a single broken “tag light” surrounding the license plate, even if that light was one of three “tag lights,” even if the license plate was perfectly illuminated by other lights on the car, and even if it was daytime.¹⁵²

Perhaps the most egregious of the vehicle equipment pretexts available to police in Virginia was the “dangling objects” statute, which became infamous when appellate courts held that under the statute, even hanging an air freshener from one’s rearview mirror was dangerous and illegal.¹⁵³ The development of precedent with respect to the “dangling objects” statute provides an excellent example of how thoroughly Virginia courts embraced *Whren* and pretextual policing. Over the course of fifteen years, Virginia’s appellate courts went from narrowly upholding questionable stops and searches based on principles announced in *Whren*, to wholesale credulity regarding the “honorable motives” of police officers who relied on pretexts.

¹⁴⁷ See e.g., *Ohio v. Martinette*, 519 U.S. 33, 35 (1996).

¹⁴⁸ *Rushin & Edwards*, *supra* note 120, at 641.

¹⁴⁹ See e.g., *Warner v. Commonwealth*, No. 0871-18-4, 2019 Va. App. LEXIS 272, at *11 (Va. Ct. App. Nov. 26, 2019).

¹⁵⁰ *Prunty v. Commonwealth*, No. 2074-00-1, 2001 Va. App. LEXIS 401, at *9 (Va. Ct. App. Jul. 3, 2001).

¹⁵¹ *United States v. Cousins*, 291 Fed. Appx. 497, 499 (4th Cir. 2008).

¹⁵² *Lewis v. Commonwealth*, No. 1089-16-2, 2017 Va. App. LEXIS 272, at *6 (Va. Ct. App. Oct. 31, 2017).

¹⁵³ VA. CODE ANN. § 46.2-1054(A) (2020).

The first significant judicial endorsement of Virginia's "dangling statute" as a pretext came in *Commonwealth v. Bryant*.¹⁵⁴ In this case, a Black man was stopped for having an air freshener measuring "three-and-a-half by one-and-a-half inches" hanging from his rearview mirror.¹⁵⁵ The windshield itself was fifty-six inches by thirty-and-a-half inches, meaning that over 99% of his windshield was not obstructed.¹⁵⁶ The trial court granted the motion to suppress, commenting both on the lack of a safety violation, and the ubiquity of objects like air fresheners, which would basically give officers carte blanche to stop any motorist for the flimsiest of reasons.¹⁵⁷

The court of appeals reversed the ruling of the trial court, however, arguing that the trial court's implicit finding that an air freshener could never obstruct the driver's view indicated it had applied the wrong standard—probable cause or proof beyond a reasonable doubt rather than reasonable suspicion.¹⁵⁸ The court of appeals essentially held that a dangling object would give an officer the basis to stop a vehicle and investigate further, even if the officer, the courts, and the public in general know as a matter of common sense and experience that small items do not appreciably obstruct a driver's view.¹⁵⁹

The court of appeals first reached this conclusion in a published case in *Freeman v. Commonwealth*.¹⁶⁰ In *Freeman*, the court first acknowledged that "three officers 'were conducting surveillance of Freeman,' " a Black man, "in connection with a drug investigation," which should have made it clear that whatever they would do next was purely pretextual.¹⁶¹ When *Freeman* left his residence in a vehicle, the officers tailed him, and evidently started scrambling to identify a reason to stop him.¹⁶²

As they tailed *Freeman*'s car, one of the officers claimed to have seen multiple air fresheners "clumped" together, dangling from the rearview mirror.¹⁶³ It would have been sufficient, in light of *Bryant* and *Whren*, merely to acknowledge that a "clump" of objects provided reasonable suspicion for a traffic stop, without entertaining the idea that this was anything other than a pretext. However, in upholding the constitutionality of the stop and search, the court went out of its way to credit the officer's genuine "concern," based

¹⁵⁴ *Commonwealth v. Bryant*, No. 0076-04-1, 2004 Va. App. LEXIS 283, at *1 (Ct. App. June 15, 2004).

¹⁵⁵ *Id.* at *4-5.

¹⁵⁶ *Id.* at *5.

¹⁵⁷ *Id.* at *7.

¹⁵⁸ *Id.* at 8-9.

¹⁵⁹ *Id.* at *12-16.

¹⁶⁰ *Freeman v. Commonwealth*, 778 S.E.2d 519, 522 (Va. Ct. App. 2015).

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *Id.*

on “the size alone,” that “the objects might impair or obstruct Freeman's view of the highway,” as if vehicle safety had anything to do with why they stopped the car.

The lack of objectivity in Virginia’s “dangling objects” jurisprudence reached its pinnacle in 2016, when the Supreme Court of Virginia decided *Mason v. Commonwealth*.¹⁶⁴ In *Mason*, the appellant Loren Mason, who was also Black, was stopped for having a three-by-five inch parking pass hanging from the rearview mirror of her car.¹⁶⁵ The police officer initiated a traffic stop, claiming “reasonable suspicion” that the driver was violating Virginia’s “dangling object” statute.¹⁶⁶ The parking pass, which was less than a quarter the size of a sun visor, and less than half the size of the rearview mirror itself, did not obstruct the driver’s view any more than the air fresheners in *Bryant* or *Freeman*.¹⁶⁷

Nevertheless, the Supreme Court of Virginia went to great lengths to warn of the dangers of parking passes and air freshener in modern automobiles.¹⁶⁸ Without any apparent factual basis for these conclusions, the majority began by documenting the history of vehicle windshields, describing how they used to be very large and nearly vertical, whereas in modern cars they “have become markedly tilted, for streamlining and aesthetic reasons. In many vehicular configurations today, the net effect of these factors may be to reduce the vertical space through which the driver may view the road ahead to a relatively narrow band of glass.”¹⁶⁹ According to the court, “any obstruction”—even an obstruction of less than 1%—risked “serious consequences.”¹⁷⁰ The court not only affirmed the presence of reasonable suspicion in these circumstances, but concluded that prohibiting air fresheners and parking passes was, in fact, *the intent of the legislature* in creating the statute.¹⁷¹

Any obstruction in th[e] area [of the rearview mirror] can lead to tragic consequences when, for example, another vehicle backs out of a shrubbery-screened driveway ahead or a child darts out from between parked cars into a residential street in pursuit of a ball or a runaway pet. The legislative purpose underlying the statute is clearly to lessen such dangers.¹⁷²

The notion that this statute was enacted to guard against children and pets

¹⁶⁴ *Mason v. Commonwealth*, 786 S.E.2d 148, 150 (Va. 2016).

¹⁶⁵ *Id.*

¹⁶⁶ *Mason*, 786 S.E.2d at 154; VA. CODE ANN. § 46.2-1054(A) (2022).

¹⁶⁷ Compare *Mason*, 786 S.E.2d 148 (Va. 2016), with *Bryant*, No. 0076-04-1, 2004 WL 1313044 (Va. Ct. App. June 15, 2004), and *Freeman*, 778 S.E.2d 519 (Va. Ct. App. 2015).

¹⁶⁸ See *Mason*, 786 S.E.2d at 153.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 152-53.

¹⁷² *Id.* at 153.

being run over by vehicles with air freshener or rosary beads hanging from the rearview mirror is patently absurd. But as a paradigm of pretext jurisprudence and the complicit expansion of police powers, it fits.

V. VIRGINIA'S SUCCESSFUL EFFORTS TO ADDRESS PRETEXTUAL POLICING, AND LEGISLATIVE AND MUNICIPAL STRATEGIES ATTEMPTED ELSEWHERE

In 2020, when the United States found itself amidst a historic civil rights movement centered on criminal justice reform, pretextual policing was rarely even mentioned in the overarching reform dialogue. Virginia was different. Unlike many states and the federal government, Virginia had a vibrant state-level criminal justice reform advocacy community that had asserted itself in the legislature over the preceding several years. This included Justice Forward Virginia, led by current and former public defenders who had firsthand awareness of how pretextual policing affected their clients. For that reason, while other states and localities were focusing on the “how” of policing, Justice Forward Virginia focused on the “what,” drafting legislation—HB 5058, patroned by Delegate Patrick Hope, and SB 5029, patroned by Senator Louise Lucas—designed to prohibit police from using certain traffic and pedestrian infractions as reasons for initiating a police-citizen encounter. The mechanism the legislation used to accomplish this converted infractions listed in about twenty different statutes from primary offenses to secondary offenses, meaning those infractions were still against the law, but could no longer serve as the basis for a traffic or pedestrian stop.¹⁷³ The language added to most of these statutes, which also created a suppression remedy, was as follows: “No law-enforcement officer shall stop a motor vehicle for a violation of this section. No evidence discovered or obtained as the result of a stop in violation of this subsection, including evidence discovered or obtained with the operator's consent, shall be admissible in any trial, hearing, or other proceeding.”¹⁷⁴

In addition, the bill prohibited police from stopping, searching, or seizing any person, place, or thing based only on the odor of marijuana.¹⁷⁵ As noted, both the provisions regarding vehicle and pedestrian stops and those

¹⁷³ The following statutes were modified by HB 5058 and SB 5029: Va. Code §§ 15.2-919, 18.2-250.1, 46.2-334.01, 46.2-335, 46.2-646, 46.2-810.1, 46.2-923, 46.2-926, 46.2-1003, 46.2-1013, 46.2-1014, 46.2-1014.1, 46.2-1030, 46.2-1049, 46.2-1052, 46.2-1054, 46.2-1094, 46.2-1157, and 46.2-1300. H.D. 5058, 2020 Leg., Spec. Sess. I (Va. 2020); S. 5029, 2020 Leg., Spec. Sess. I (Va. 2020).

¹⁷⁴ H.D. 5058, 2020 Leg., Spec. Sess. I (Va. 2020); S. 5029, 2020 Leg., Spec. Sess. I (Va. 2020).

¹⁷⁵ H.D. 5058, *supra* note 174 ; S. 5029, *supra* note 174.

concerning the odor of marijuana extended the suppression remedy to instances where the stop was unlawful, but the individual nevertheless consented to a search of their person or property.¹⁷⁶ This legislation passed during the 2020 special session of the Virginia General Assembly and became law on March 1, 2021.¹⁷⁷

The statutes affected by the legislation were chosen by Justice Forward Virginia because of how commonly or transparently police used them as pretexts.¹⁷⁸ Some pretexts, like Virginia Code § 46.2-1054 (“dangling objects”), Va. Code § 46.2-1049 (loud exhaust), and Va. Code § 46.2-1014.1 (supplemental high mount brake light), had been expanded to such an absurd degree by Virginia courts, that they seemed to exist and be used by police *only* as pretexts. Amazingly, Virginia was the only state that not only took action to limit pretextual policing, but meaningfully attempted to implement such reforms.

The strategy Justice Forward Virginia proposed was chosen mainly for pragmatic reasons—other strategies simply did not seem viable at the time, either because of politics, costs, administrative burden and complexity, or some combination of the foregoing.¹⁷⁹ Since Virginia passed its legislation limiting pretextual policing practices, however, advocates and the media began to take notice, leading to a number of other states and localities attempting to follow suit.¹⁸⁰

A. Primary v. Secondary Infractions

Some attempted a similar approach to Virginia’s, proposing to eliminate certain pretexts from the law, or convert them to “secondary” offenses. In Washington state, for example, a bill similar to Virginia’s legislation was introduced in 2021 and remains pending in committee. That bill, Senate Bill 5485, would prohibit police from stopping or detaining a driver to enforce about ten different offenses, including “failure to keep to the right,” improper turn, “failure to dim lights,” parking violations, lack of insurance, and others. As with the Virginia legislation, those infractions would remain punishable

¹⁷⁶ H.D. 5058, 2020 Leg., Spec. Sess. I (Va. 2020); S. 5029, 2020 Leg., Spec. Sess. I (Va. 2020).

¹⁷⁷ Summary of *HB 5058 Marijuana and Certain Traffic Offenses; Issuing Citations, Etc.*, VA.’S LEGIS. INFO. SYS. (Nov. 9, 2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?202+ful+HB5058>; Summary of *SB 5029 Marijuana and Certain Traffic Offenses; Issuing Citations, Etc.*, VA.’S LEGIS. INFO. SYS. (Nov. 9, 2022), <https://lis.virginia.gov/cgi-bin/legp604.exe?221+sum+HB133>.

¹⁷⁸ *Success Story: Many Policing “Pretexts” Eliminated in Virginia*, JUST. FORWARD VA., <https://justiceforwardva.com/pretextual-policing> (last visited Oct. 8, 2022).

¹⁷⁹ See generally Ashna Kanna et al., *Legal Marijuana in Virginia is Just the First Step*, WASH. POST, (Apr. 8, 2021), <https://www.washingtonpost.com/opinions/2021/04/08/legal-marijuana-virginia-is-just-first-step/> (discusses difficulties in passing legislation for marijuana legalization).

¹⁸⁰ See Weichselbaum et al., *supra* note 1.

as secondary offenses if a motorist is stopped for an offense not listed in the bill.¹⁸¹

Philadelphia attempted to do the same as Washington—and succeeded. The Philadelphia “Achieving Driving Equality” bill passed in November of 2021. Like Virginia’s legislation, the bill lists numerous infractions that may not serve as the basis for a stop. Unlike Virginia, Philadelphia’s bill also includes a general prohibition on stops unless the driver’s conduct poses a “public safety risk,” defined as “an imminent and articulable risk of bodily injury to a specific person or damage to private or public property or actual bodily injury to a specific person or damage to public or private property.”¹⁸² However, the ordinance also includes a long list of about sixty “exceptions”—infractions or instances where an officer need not identify a “public safety risk” prior to executing a stop.¹⁸³ It appears the end result, as in Virginia, still gives police many grounds for conducting pretextual stops, but eliminates many of the most frequently abused that did not serve a public safety purpose.

In the short term, Virginia’s approach does offer some advantages. For one, the messaging is easy—the ubiquity of car air fresheners, or the absurdity of allowing cars to be pulled over for redundant license plate lighting, are easy issues to explain and tend to resonate with the public. In addition, they are clear legal rules that are not difficult for police to follow or courts to adjudicate. Lastly, the statutes converted to secondary offenses do not have a significant impact on traffic safety. However, this last benefit is also the strategy’s main limitation; traffic and criminal codes are voluminous, after all, and even after removing twenty infractions, officers still have hundreds of others to choose from if they wish to conduct a pretextual stop. Most of those cannot be converted to secondary offenses since they have a direct bearing on traffic safety.

B. Blanket Restrictions on “Pretexts”

Other states and localities merely proposed blanket restrictions on “pretextual stops,” without eliminating specific grounds for traffic or pedestrian

¹⁸¹ See S. 5485, 67th Gen. Assemb., Reg. Sess. (Wash. 2021).

¹⁸² PHILA. PA. CODE § 12-102 (2020).

¹⁸³ *Id.*

stops, and without particularizing what a pretextual stop consists of.¹⁸⁴ This approach is similar to a judicially-created rule which was in effect in Washington State for many years, and which some scholars believe reduced racial disparities in traffic enforcement until it was mostly abrogated in recent years.¹⁸⁵ This could come in the form of legislation expressly overturning *Whren* or creating a state constitutional right to be free from pretextual policing practices.

In Massachusetts, Senate Bill 1546, introduced in 2021, provided that “no law enforcement officer shall engage in a pretextual traffic stop,” which the bill defined as “[a] traffic stop in which a reasonable law enforcement officer would not have made a stop without a pretextual motivation.” Furthermore, the bill would have prohibited a police officer from conducting unrelated investigations following a traffic stop, stating that “[n]o law enforcement officer shall ask questions during a traffic stop that are not reasonably related to the purpose of the stop without independent justification,” and “[n]o law enforcement officer shall search a vehicle or a person during a traffic stop unless that search is reasonably related to the purpose of the stop, without independent justification.”¹⁸⁶ The Massachusetts legislature did not act on the bill in 2021-22, but rather ordered a study both of SB 1546 and several other proposed bills related to racial profiling.¹⁸⁷

C. Civil Traffic Enforcement Units

Unfortunately, the strategy with the greatest potential to end pretextual

¹⁸⁴ New Hampshire’s experience was similar to those of Washington and Massachusetts in that the state considered, but declined to impose specific limits on pretextual policing. *See* Exec. Order 2020-11, State of N.H. Off. of the Governor, An Order Establishing the New Hampshire Commission on Law Enforcement Accountability, Community, and Transparency (June 16, 2020) (establishing a state commission partly for the purpose of identifying opportunities to limit racial bias in policing); *but see* Paul Cuno-Booth, *States, Cities Rethink Use of Police Traffic Stops as Investigatory Tool*, CONCORD MONITOR (May 16, 2022), <https://www.concordmonitor.com/States-cities-rethink-use-of-traffic-stops-as-investigatory-tool-46389801> (highlighting that, despite advocates urging them to consider legislation addressing pretextual policing practices, the State Police and the commissioner of the Department of Safety “denied [that officers] were trained to conduct pretextual stops,” and that ultimately the “commission didn’t issue any recommendations about pretextual stops.” When subsequently confronted with evidence of “pretextual stop cases” the Assistant Commissioner responded that they had not denied relying on pretextual practices, but only that they denied “pretextual stops based on race or ethnicity”).

¹⁸⁵ *See* State v. Ladson, 979 P.2d 833, 836 (Wash. 1999) (holding that “pretextual traffic stops violate article I, section 7, of the Washington Constitution”); *but see* State v. Arreola, 290 P.3d 983, 986 (Wash. 2012) (abrogating *Ladson*, holding that “a mixed-motive traffic stop is not pretextual so long as the desire to address a suspected traffic violation (or criminal activity) for which the officer has a reasonable articulable suspicion is an actual, conscious, and independent cause of the traffic stop”). Arreola demonstrates how general bars on pretextual policing encounter the further problem of crafting a rule that is clear enough to be meaningful and enforceable, without significantly curtailing legitimate law enforcement practices. Absent sufficient clarity, general rules against pretextual stops can be abrogated by judicial interpretation, as was the case in *Arreola*.

¹⁸⁶ S. 1546, 192d Gen. Ct., Reg. Sess. (Mass. 2021).

¹⁸⁷ COMMONWEALTH OF MASS. S. COMM. ON PUB SAFETY AND HOMELAND SEC., S. 192-2764, Reg. Sess. (2022).

policing—creating a civil traffic enforcement unit completely detached from the police—is also the most expensive and complicated from a legal perspective, as other states and localities have learned.¹⁸⁸ One major obstacle to non-police traffic enforcement is state law, which often prohibits reassignment of traffic enforcement to a civil or non-police agency, such as the Department of Transportation.¹⁸⁹ This is also the law in Virginia, where only sworn police officers or sheriff’s deputies may conduct traffic stops.¹⁹⁰

In July 2020, as part of its Reimagining Public Safety process, the City of Berkeley, California, began development of a Berkeley Department of Transportation (“BerkeDOT”), with unarmed, civil traffic enforcement patrols in lieu of police-led traffic enforcement, partly to eliminate traffic stops as pretexts for criminal investigations. As of May 2022, the city had conducted “initial background research on free-standing departments of transportation,” but the idea of a civil traffic enforcement unit remains distant reality, in light of state law which only authorizes sworn law enforcement officers to conduct traffic stops.¹⁹¹ The cities of Cambridge, Massachusetts, and Brooklyn Center, Minnesota, have likewise taken steps to create a civilian traffic enforcement agency, but have encountered the same obstacle as Berkeley—state law does not allow for persons other than sworn law enforcement officers to conduct traffic stops.¹⁹²

Montgomery County, Maryland, began the process of examining non-police options for traffic enforcement, in light of stark racial disparities. In 2018, “Black drivers were about seven times more likely than White drivers to be stopped by police” in Bethesda, Maryland, and county-wide, “police searched the vehicles of Black drivers more than twice as frequently as White drivers, and were more likely to cite ‘probable cause’ if the drivers were Black.”¹⁹³ County officials looked into proposals like those considered by

¹⁸⁸ See Meg O’Connor, *What Traffic Enforcement Without Police Could Look Like*, THE APPEAL (Jan. 13, 2021), <https://theappeal.org/traffic-enforcement-without-police/> (discussing the significance of separating traffic enforcement from local police departments and identifying which states have proposed plans to do so); see also Jordan B. Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1542-43 (2021) (addressing the financial concerns associated with removing police from traffic enforcement).

¹⁸⁹ CITY OF BERKLEY OFF. OF THE MAYOR, FULFILLING THE PROMISE OF BERKELEY’S REIMAGINING PUBLIC SAFETY INITIATIVE: RECOMMENDATIONS FOR A COMPREHENSIVE, PHASED APPROACH 14 (2022), https://berkeleyca.gov/sites/default/files/2022-05/2022-05-05%20Special%20Item%2001a%20Fulfilling%20the%20Promise%20of%20Berkeley_0.pdf.

¹⁹⁰ VA. CODE ANN. § 46.2-102 (1995).

¹⁹¹ CITY OF BERKELEY OFF. OF THE MAYOR, *supra* note 189, at 25.

¹⁹² JUSTIN ANDERSON ET AL., KINGS COUNTY AUDITOR’S OFF., TRAFFIC ENFORCEMENT: STRATEGIES NEEDED TO ACHIEVE SAFETY GOALS 25 (2022), <https://kingcounty.gov/~media/depts/auditor/new-web-docs/2022/traffic-stops-2022/traffic-stops-2022.ashx?la=en>.

¹⁹³ 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.

Berkeley and Cambridge, Massachusetts, but also automated traffic enforcement.¹⁹⁴ As with the other localities, Maryland determined that state law prevented some of the proposed policy changes. Other recommended changes have yet to be acted upon.¹⁹⁵

D. Restricting Investigative Techniques Employed Following a Stop

Short of removing traffic enforcement from police departments entirely, there is also the option of making traffic stops by police resemble those that would be conducted by a civil traffic force by prohibiting warrant checks and requests for consent searches. As discussed *supra* in Section I, traffic and pedestrian infractions are merely the first step in conducting a pretextual stop—the rest of the script entails either manufacturing or coercing consent to search a pedestrian, or a vehicle and its occupants.¹⁹⁶

Although Massachusetts, discussed above, sought to limit further investigation following a traffic stop, it does not appear that any other state or locality has expressly adopted this approach yet. Relatedly, police could be required to provide written notice to a motorist or pedestrian of their rights to refuse a consent search, similar to a *Miranda* waiver. Some police departments currently include an advisement of rights and a written waiver prior to consent searches in their policies and procedures, but with substantial exceptions and no enforcement mechanism, they are of limited efficacy.¹⁹⁷

E. Limiting Pretexts Through Changes to Internal Police Policies

Numerous localities have attempted to reduce pretextual policing practices through their police departments, by changing police policies and procedures. These strategies have occasionally had success, but because the changes are not codified as legislation, that success is often fleeting. For example, in response to the criticism of racial disparities in traffic enforcement discussed above, “prompted by the [Los Angeles] Times investigation,” the Los Angeles Police Department committed to “drastically cut[ting] back on pulling over random vehicles.”¹⁹⁸ Interestingly, in addition to conceding the “tremendous cost to innocent drivers who felt they were being racially profiled,” and the subsequent impact on the community, LAPD’s chief acknowledged that

¹⁹⁴ LESLIE RUBIN & BLAISE DEFAZIO, MONTGOMERY COUNTY OFFICE OF LEGISLATIVE OVERSIGHT, A STUDY ON ASSIGNING TRAFFIC ENFORCEMENT FROM THE MONTGOMERY COUNTY DEPARTMENT OF TRANSPORTATION iii–iv, (2021), https://www.montgomerycountymd.gov/OLO/Resources/Files/2021_Reports/OLOReport21-10.pdf.

¹⁹⁵ *Id.* at iv.

¹⁹⁶ See *Schneekloth*, 412 U.S. 248–49; *Mimms*, 434 U.S. 111; *Berkemer*, 468 U.S. 421.

¹⁹⁷ See, e.g., ARLINGTON CNTY. POLICE DEP’T, DIRECTIVE MANUAL 5–6 (2021), <https://public.powersdms.com/ARLVAPD/tree/documents/15> (explaining this specific department’s pre-search procedures).

¹⁹⁸ Cindy Chang & Ben Poston, *LAPD Will Drastically Cut Back on Pulling Over Random Vehicles Over Racial Bias Concerns*, L.A. TIMES (Oct. 13, 2019), <https://www.latimes.com/california/story/2019-10-13/after-times-investigation-lapd-to-make-major-changes-to-elite-metropolitan-division>.

“vehicle stops have not proven effective, netting about one arrest for every 100 cars stopped,” most for possession of drugs.¹⁹⁹

Despite pledging to “cut back” on pretextual stops, LAPD never abandoned the practice, and by early-2021 had “ramped stops back up.”²⁰⁰ It was amidst this ongoing debate that in June of 2020, members of the City Council proposed a study of alternatives to police-led traffic enforcement, such as a civil traffic division.²⁰¹ The study was explicitly motivated by the council’s conclusion that “structural and systemic racism” that had come to shape traffic enforcement practices:

The Los Angeles Police Department’s history of misusing traffic enforcement has fostered decades of distrust in communities of color that ultimately undermines true traffic safety initiatives. Data has shown that Los Angeles police officers stop and search Black and Latino motorists far more often than whites. Blacks and Latinos are more likely to be removed from the vehicle and twice as likely to either be handcuffed or detained at the curb. Many Black residents speak of frequently being pulled over for “driving while Black.”²⁰²

Although the study and report failed to materialize promptly, on March 9, 2022, Special Order No. 3 went into effect, which “establish[ed] Department Manual Section 1/240.06, Policy - Limitation on Use of Pretextual Stops.”²⁰³ The new guidance, approved by the Los Angeles Police Commission and formally issued by the Chief of Police, defined “a pretextual or pretext stop” as “one where officers use reasonable suspicion or probable cause of a minor traffic or code violation as a pretext to investigate another, more serious crime that is unrelated to that violation.”²⁰⁴ The Order further declared that “traffic or pedestrian stops” for violations of “the Vehicle Code or other codes are intended to protect public safety,” and officers should therefore “make stops for minor equipment violations or other infractions only when the officer believes that such a violation or infraction significantly interferes with public safety.”²⁰⁵

In implementing these principles, the Order states that officers should

¹⁹⁹ *Id.*

²⁰⁰ Kevin Rector, *Will LAPD Hand Off Traffic Enforcement? Patience for Promised Study Wears Thin*, L.A. TIMES (Aug. 27, 2021), <https://www.latimes.com/california/story/2021-08-27/activists-lead-ers-decry-slow-pace-of-promised-report-on-removing-lapd-from-traffic-enforcement>.

²⁰¹ L.A. CITY COUNCIL, COUNCIL FILE: 20-0875, at 2 (2020), https://clkrep.lac-city.org/onlinedocs/2020/20-0875_mot_06-30-2020.pdf.

²⁰² *Id.* at 1.

²⁰³ OFF. OF THE L.A. CHIEF OF POLICE, SPECIAL ORDER NO. 3, at 2 (2022), https://lapdonlines-trgeacc.blob.core.usgovcloudapi.net/lapdonline-media/2022/03/3_9_22_SO_No_3_Policy_Limitation_on_Use_of_Pretexual_Stops_Established.pdf.

²⁰⁴ L.A. POLICE DEP’T, NO. 240.06, DEP’T MANUAL: LIMITATION ON USE OF PRETEXTUAL STOPS 1 (2022), https://lapdonlines-trgeacc.blob.core.usgovcloudapi.net/lapdonline-media/2022/03/3_9_22_SO_No_3_Policy_Limitation_on_Use_of_Pretexual_Stops_Established.pdf.

²⁰⁵ *Id.*

articulate the reason for every stop to the motorist or pedestrian, and ensure the explanation is captured on the officer's body worn camera.²⁰⁶ Additionally, the Order clearly circumscribes the scope of officers' authority during stops:

[O]fficers' actions during all stops (e.g., questioning, searches, handcuffing, etc.) shall be limited to the original legal basis for the stop, absent articulable reasonable suspicion or probable cause of criminal activity that would justify extending the duration or expanding the scope of the detention. Officers shall not extend the duration or expand the scope of the detention without additional reasonable suspicion or probable cause (beyond the original legal basis for the stop).²⁰⁷

All that being said, it is unclear whether the guidance creates any enforceable remedies for individuals subjected to pretextual stops. In order to deter officers, the Order creates grounds for officer discipline, indicating that “[a] failure to sufficiently articulate the information which — in addition to the traffic violation — caused the officer to make the pretext stop, shall result in progressive discipline, beginning with counseling and retraining,” and that [d]iscipline shall escalate with successive violations of this mandate.”²⁰⁸ However, it does not state that the department will decline to use evidence obtained in violation of the Order—or provide for anything else resembling a suppression remedy—nor does it state that it will concede civil claims alleging civil rights abuses from violations of the Order.²⁰⁹ According to Los Angeles activists, “the state’s Racial and Identity Profiling Advisory Board is turning its attention to pretextual stops,” which may strengthen Los Angeles’ policy, or expand it to the rest of the state.²¹⁰

Several other localities have taken approaches similar to that of Los Angeles. In Lansing, Michigan, city officials, at the urging of the mayor, changed police department policies to eliminate officers’ authority to stop motorists for “secondary traffic violations.” The mayor urged the change because of data showing that minor vehicle equipment violations that did not endanger the public had come to make up 15% of traffic stops.

In Fayetteville, North Carolina, city leaders in 2013 were simultaneously “called to respond to the city’s consistently high motor vehicle crash rate,” and concerns from community grounds that police were “disproportionately target[ing] Black residents.”²¹¹ In turn, a new police chief, Harold Medlock,

²⁰⁶ *Id.* at 1-2.

²⁰⁷ *Id.* at 2.

²⁰⁸ *Id.*

²⁰⁹ *See id.* (omitting any mention of the above-stated provisions).

²¹⁰ Emily E. Dugdale, *LAPD Officers Must Now Explain on Camera Why They Plan to Stop a Driver or Pedestrian*, LAIST (Mar. 1, 2022), <https://laist.com/news/criminal-justice/lapd-stops-bodycamera>.

²¹¹ Mike D. Fliss et al., *Re-prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities*, 7 INJ. EPIDEMIOLOGY, no. 1, 2020, at 3.

implemented new traffic enforcement policies “focus[ing] on traffic crash reductions and improving community trust exacerbated by racial disparities in traffic stops and other outcomes.”²¹² He directed officers to “highly prioritize safety stops in order to prevent traffic crash fatalities” and to make investigatory stops a distant second priority, with the hope that the combined effect of reprioritization would reduce racial disparities.²¹³

The strategy achieved its intended goals: between 2013 and 2016, data demonstrated reduced racial disparities in traffic stops, fewer motor vehicle accidents resulting in injury or death, fewer non-safety related traffic stops, and, most critically for addressed police arguments, “no changes in crime rates for non-traffic-related crime.”²¹⁴ However, in 2017, Fayetteville hired a new chief, and since then racial disparities in traffic enforcement have increased again. In 2020, for example, Black drivers in Fayetteville were 1.8 times more likely than white drivers to be pulled over for a vehicle equipment violation.²¹⁵

F. New Remedies for Racial Profiling and Pattern and Practice Violations

Part of the reason *Whren* and *Atwater* have become so harmful is that the alternative path toward proving discrimination—a Fourteenth Amendment Equal Protection claim—is nearly impossible. That said, states can strengthen their own constitutions, or create their own rules of criminal and civil law procedure. This is exactly what New Jersey did with respect to *de facto* Equal Protection violations, which allowed the plaintiff in *Soto* to prevail in his case. New Jersey’s constitution includes broader protections against discrimination, such that those who were racially profiled can more easily prove Equal Protection violations in both criminal and civil cases, allowing them to suppress evidence or to seek damages through a civil process. States can likewise strengthen Fourth Amendment protections through their own constitutions and codebooks, either by adding a “reasonableness” requirement for stops and searches, or expressly allowing inquiry into subjective motivations.

The evidentiary hurdles established through cases like *Armstrong* could also be addressed via state legislation, by allowing remedies even where a claimant can only establish a pattern and practice of racial discrimination through empirical evidence. This could be implemented in the Fourth Amendment context by allowing a defendant to prove a pretext with

²¹² *Id.* at 4.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Samantha Kummerer & Maggie Green, *Racial Disparities in Traffic Stops Increase in Central NC, Data Shows*, WTDV-TV RALEIGH-DURHAM (May 21, 2021), <https://abc11.com/traffic-stop-racial-disparities-daunte-wright-stops/10621472/>.

empirical evidence of racial bias. Lastly, states and the federal government could abolish or substantially curtail qualified immunity.

VI. STRATEGIES FOR FUTURE ADVOCACY

As discussed above, Virginia elected to limit pretextual policing by eliminating some of the most common pretexts as grounds for a traffic or pedestrian stop.²¹⁶ This is only one of a number of potential strategies, however, and it was chosen mainly for pragmatic reasons—other strategies simply did not seem viable at the time, either because of politics, costs, administrative burden and complexity, or some combination of the foregoing.²¹⁷ Unfortunately, the strategy with the greatest potential to end pretextual policing—creating a civil traffic enforcement unit completely detached from the police—is also the most expensive and complicated.²¹⁸ As other localities that have tried to implement this have demonstrated, state law can pose the greatest obstacle to implementation by prohibiting reassignment of traffic enforcement to a civil or non-police agency, such as the Department of Transportation.²¹⁹ State law is not the only obstacle, however—the planning process alone poses a multitude of novel challenges, and once a plan has been developed, there will be the issue of funding it and, once established, there will be inevitable bumps in the road that tend to accompany new bureaucracy.

Another approach would be to enact laws expressly overturning *Whren* or creating a state constitutional right to be free from pretextual policing practices. However, there is the problem of crafting a rule that is clear enough as to be meaningful and enforceable without significantly curtailing legitimate law enforcement practices. A simpler approach would be to prohibit requests for consent searches unless the officer finds additional probable cause. This would eliminate the burden on the defendant to prove the mental state of the officer and would reduce potential burdens of obtaining empirical evidence of discrimination.

Providing a remedy for those who can establish a pattern and practice of racial discrimination would undoubtedly help. This could be implemented in

²¹⁶ *Success Story: Many Policing “Pretexts” Eliminated in Virginia*, *supra* note 178.

²¹⁷ *See id.* (explaining that establishing a civilian traffic enforcement agency would be very expensive).

²¹⁸ *See, e.g.,* Emilie Raguso, *Plans Firm Up to Remove Police From Traffic Stops, but It’s a Long Road Ahead*, BERKELEYSIDE, (May 25, 2021) <https://www.berkeleyside.org/2021/05/25/berkeley-department-of-transportation-civilian-traffic-enforcement> (explaining Berkeley, California’s difficulties in reassigning traffic enforcement to a civil or law enforcement agency).

²¹⁹ *See, e.g., id.* (explaining Berkeley’s difficulties in circumnavigating state law in reassigning traffic enforcement to a civil or law enforcement agency).

the Fourth Amendment context by allowing a defendant to prove a pretext with empirical evidence of racial bias, or more likely it could be permitted by passing legislation to preempt the near-complete barriers to selective enforcement claims under *Armstrong*. Whether this would entail a suppression remedy pursuant to the Fourteenth Amendment, or simply open departments to lawsuits, the ability to litigate pattern and practice claims would likely have a deterrent effect against using race or other impermissible criteria as a motivation for enforcing the law.

CONCLUSION

Despite fifty years of systematic racial profiling—twenty-six years with the imprimatur of our nation’s highest court—and despite the nation’s conscience burdened by the deaths of George Floyd and Breonna Taylor, only one state and several municipalities have taken action to limit pretextual policing. Much of the inaction stems from ignorance of policymakers, the media, the public, and even many advocates concerning the prevalence and significance of the practice. Pretextual policing plays the largest role in producing racial disparities in police-citizen contacts, which not only gives police many more opportunities to use excessive force against people of color, but eviscerates the trust of people and communities of color in the institution ostensibly created to protect them. Challenging powers of the police is never easy, which is why public education and a critical mass of support will be so essential to furthering progress—and in Virginia, to protecting the landmark reforms codified into Virginia law.

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