

**NEW
ERA
OF
PUBLIC
SAFETY**

A GUIDE TO FAIR, SAFE, AND EFFECTIVE
COMMUNITY POLICING

3

STOPS, SEARCHES, AND ARRESTS

Every day, police officers across the United States stop drivers and pedestrians to ask them questions — and sometimes to detain them. They search people and their property — their belongings, their cars, and their homes — with and without their consent. They arrest people, handcuffing them, putting them in police cars, inking their finger prints, and taking their mug shots.

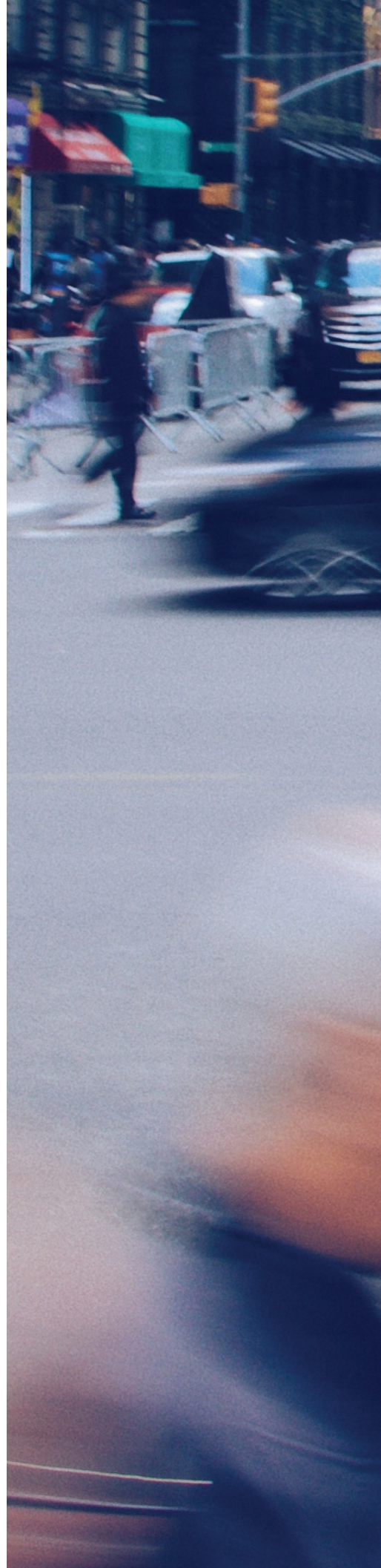
For officers, stops, searches, and arrests are everyday activities, but for members of the public, they are hardly routine. They deprive people of their liberty and harm individuals, families, and sometimes entire communities. The use of force can cause trauma, injury, and death, and arrests can lead to negative outcomes in education, employment, housing, earnings, social stigma, and other areas. This is true even when arrests don't result in conviction. These effects are amplified in Black and Latinx communities, where stops, searches, and arrests are more common than in White communities and which may have histories of police abuse.¹

Officer interactions affect the public's perception of police. Officer conduct during a stop, search, or arrest affects people's confidence in police and can build — or destroy — trust between departments and the communities they serve. When officers act fairly and impartially, explain their actions, and listen to people they encounter, they enhance the legitimacy of their department, of local government, and of police generally.² As a 2004 study put it, police legitimacy:

... increases the stature of the police in the eyes of citizens, creates a reservoir of support for police work, and expedites the production of community safety by enhancing cooperation with the police. ... Research has found that people obey the law not just because they are afraid of being punished or because they believe the law is morally right, but also because they believe the law and its enforcement are fairly administered. The public's judgment can be heavily influenced by the conduct of the police, one of the most visible representations of law and government in most citizens' lives.³

Federal and state constitutions (and their interpretation by courts) establish the legal baseline for stops, searches, and arrests. These standards establish the minimum protections departments must provide; department leaders can and should build on this threshold to protect personal liberty, communicate performance expectations, and promote safe, bias-free, and respectful interactions between officers and community members. Virtually all departments, for example, prohibit officers from firing “warning shots” because doing so, even though permitted by constitutional law, is widely regarded as dangerous and unprofessional.

This chapter lays out the minimum standards — i.e., the “constitutional floor” — that all departments are required to meet when making stops, searches, and arrests and the best practices that go beyond these standards to better protect individual liberty.





RECOMMENDED BEST PRACTICES

To protect privacy and allow for greater freedom of movement without compromising safety or effectiveness, departments should work with communities to:

3.1

Encourage officers to consider the costs of stops, searches, and arrests.

3.2

Ban formal and informal quotas.

3.3

Ensure officers inform people of their rights to refuse or revoke consent and to document it.

3.4

Limit the use of pretextual stops.

3.5

Seek search warrants whenever possible.

3.6

Integrate procedural justice into all enforcement activities.

3.7

Eliminate discriminatory and bias-based stops, searches, and arrests.

3.8

Safeguard against unconstitutional surveillance.

3.9

Provide comprehensive training on stops, searches, and arrests.

3.10

Require detailed reporting of stops, searches, and arrests.

3.11

Reduce reliance on arrests and incarceration.

FEDERAL, STATE, AND LOCAL PROTECTIONS

Stops, searches, and arrests must meet standards laid out in the U.S. Constitution and interpreted by the courts. These standards are minimum standards; they are not necessarily best practices or even common standards. The Fourth Amendment, for example, permits strip searches (a practice in which officers remove clothing to search for concealed items) in circumstances that many find offensive and traumatic. It also gives officers the discretion to conduct “lawful but awful” activities (legal activities that cause negative outcomes), which undermines community trust. State and local governments can — and should — enact laws that provide more protection from government intrusion, and police departments can implement policies that do so as well.

Many state constitutions grant broader protections than those provided by the U.S. Constitution. The U.S. Supreme Court, for example, ruled that the Fourth Amendment permits officers to stop vehicles regardless of their pretextual motives (i.e., their true intent) so long as they have probable cause to investigate traffic violations. The Washington state constitution, however, forbids the use of pretext to justify warrantless traffic stops.⁴

The New York and Vermont constitutions, meanwhile, provide broader protections regarding search warrants. To search a person or place for specific objects, officers must obtain a warrant — a court order finding probable cause that there’s a high probability that officers will find evidence of a crime at the place or on the person to be searched. Probable cause is an officer’s reasonable belief that a crime has or is about to occur;⁵ it is generally established on the basis of sworn testimony, usually in the form of an affidavit signed by an officer.

The Supreme Court has held that police officers don’t need a warrant to search areas immediately outside of homes (a.k.a. “curtilages”) because it found no reasonable expectation of privacy in an “open field.”⁶ Vermont and New York, however, extend privacy protections to curtilages if landowners post “no trespassing” signs; thus, officers in these states must obtain warrants to search curtilages if these signs are present.⁷

Many state laws also grant greater protections than those afforded by the U.S. Constitution. States such as Arkansas, California, Maine, and Utah limit the use of



automated license plate readers (which capture and upload license plate and other data),⁸ and Florida and Vermont regulate the use of government drones.⁹ State lawmakers have often enacted laws such as these after coming under community pressure to provide more protections in public spaces than granted by the U.S. Constitution.¹⁰ These types of state laws demonstrate that departments and communities can and should enact statutes and policies that give individuals greater freedoms than those provided for by federal law without compromising public and officer safety.



THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution protects people's rights to be free from unreasonable searches and seizures, and thus governs how police conduct stops, searches, frisks, and arrests.

Stops and searches. The Fourth Amendment secures “persons, houses, papers, and effects against unreasonable searches and seizures.” (The term “seizure” applies not only to property but also to people — i.e., arresting or temporarily stopping people without consent.) This means that officers must have probable cause to stop or search people they suspect are engaging in unlawful activity.¹¹ For brief stops, they must meet the lower standard of “reasonable suspicion” — the belief, based upon specific circumstances, that criminal activity may be afoot (i.e., that it is happening or is about to happen).¹²

Courts have, however, recognized that obtaining warrants before searches is not always practicable. Thus, they have long permitted officers to conduct warrantless searches in “exigent circumstances” — emergencies where the delay required to obtain a warrant presents real and immediate risks of injury or destruction of evidence. In the case of armed robbery, for example, officers are permitted to chase suspects into a house without a warrant to prevent injury to others — but they still need probable cause to conduct the search or seizure.¹³ Courts have, in fact, found so many exceptions to the warrant requirement that many officers conduct more searches without a warrant than with one.¹⁴

The rules — and rationales — for stops and searches have evolved over time. For example, courts initially exempted vehicle searches from the warrant requirement because vehicles are mobile, but they have since permitted warrantless searches even when there is little danger the vehicle will be moved.¹⁵ Courts initially justified warrantless searches when making a lawful arrest on the grounds of safety (i.e., to disarm suspects) and to prevent the destruction of evidence.¹⁶ However, courts now permit such searches, even for minor offenses and even when officers have no reason to believe they will find anything.¹⁷

Stop-and-frisk practices. In the 1960s, the Supreme Court approved “stop-and-frisk” practices in Terry v. Ohio,¹⁸ a case in which a plainclothes police officer in Cleveland saw two men standing on a street corner behaving in a manner he found suspicious. One of the men walked down the block, peered into the window of a closed store, and returned to the corner to talk to the other. Then the other man did the same. This pattern repeated several times. A third man then appeared on the corner, spoke to the men, and left. The two men joined him a few blocks away.

The officer suspected that the men were “casing” the store so they could rob it. He stopped the men and asked them their names but did not get a clear answer. He then spun Terry around, quickly patted down the outside of his overcoat, and found a gun. He also frisked the other men and felt a second gun in one of their overcoat pockets (Richard Chilton’s).

The case went to court, and Terry and Chilton were convicted of unlawful possession of a firearm. They challenged the convictions, arguing that the officer had conducted an unlawful search. The Supreme Court disagreed, ruling that the frisk did not substantially invade their privacy and was justified because the officer had reasonable suspicion that they may be about to commit unlawful activity (i.e., armed robbery).

Courts have applied the Terry holding to two types of stops and searches. First, when officers have reasonable suspicion that people are engaged in or are about to engage in unlawful activity — i.e., that criminal activity may be “afoot” — they may briefly stop them without a warrant. Second, when officers have reasonable suspicion that people are armed and dangerous, they may “frisk” them by quickly running their hands over their outer clothing to determine whether the person presents an armed threat.¹⁹ Communities have so many ordinances governing people’s behavior in public that even innocuous behavior, such as loitering, can violate the law. As a result, police can easily justify stopping and frisking people, which gives officers a “pretext” for detaining people they consider suspicious.

Consent searches. Long ago, the Supreme Court found that the Fourth Amendment protects people from unreasonable searches only when they do not give their consent. In other words, if people allow officers to search their cars or homes without a warrant or without suspicion of wrongdoing, their constitutional rights are not violated.²⁰

This begs the question: What constitutes voluntary consent? Most people who are stopped by an officer are apprehensive and uneasy; officers are, after all, armed and in positions of power. When asked, “May I search?” many people don’t feel at liberty to decline. As one study observed, “When a community member encounters an officer in full uniform who requests a search of their person, belongings, vehicle or home, a very thin line exists between voluntariness and coercion.”²¹ The power difference, in short, is difficult to ignore.

When considering what constitutes genuine consent, the Supreme Court has often sided with law enforcement. It ruled, for example, that officers are not required to tell people they have a right not to consent or that they can refuse consent.²² If a motorist stopped for a traffic violation has received a ticket and is free to go, the officer may search the vehicle without telling the motorist they are free to go — a type of search the Court has deemed consensual.²³

Pretextual stops. The Supreme Court has ruled that officers can use minor traffic violations as a “pretext” for stopping people they suspect of criminal activity as long as they have probable cause for the violation.²⁴ Police can stop drivers for a broken taillight even if the real reason, or pretext, for the stop is to search for evidence of criminal activity, such as drug paraphernalia, and even if they would not have made the stop otherwise.²⁵ Because so many laws govern behavior in public — especially when it relates to





driving — officers can easily justify stopping people on the pretext of a minor traffic violation. Officers acknowledge they can follow almost any driver for a short distance and identify at least one infraction that would allow them to pull the driver over.

The cumulative effect of these laws and rulings gives officers broad leeway to stop, search, and arrest people. Officers in many departments use stop-and-frisk practices and consent searches as primary enforcement tactics. In some departments, officers are rewarded for stopping and searching people in communities with high rates of crime, substance use, or violence. In these departments, officers use stops and searches to find evidence of crime and to deter people from carrying weapons or contraband. This practice, known as “fishing,” is especially concerning when people of color are stopped in predominantly White neighborhoods because they are seen as “fish out of water.”

In sum, the Supreme Court has, over time, granted officers increasing stop-and-search powers. These activities interfere with liberty, invade privacy, and contribute to racial and ethnic disparities in police interactions.²⁶ The wide latitude officers have to stop and frisk people also damages community trust and can reduce cooperation with law enforcement.

Yet little evidence suggests stop-and-frisks are making us safer — and, in fact, they may be having the opposite effect. In New York City, the number of stop-and-frisks plummeted 98 percent between 2011 and 2017. During the same period, the homicide rate hit its lowest point since the 1960s, and



the rate of serious crime also declined.²⁷ Hit rates — the rate at which officers find contraband after stopping or searching — are quite low. The New York Police Department's (NYPD) large-scale stop-and-frisk program was, in fact, held unconstitutional in part because of the department's low hit rate.²⁸

Arrests. Courts have also given officers substantial discretion to make warrantless arrests. In communities where minor offenses, such as driving without a seatbelt, are treated as misdemeanors rather than civil infractions, officers have broad authority to arrest — even when arrests don't advance law enforcement goals or improve public safety. In 1997, Gail Atwater was arrested in front of her two young children because she had violated a seatbelt law, which was punishable by a \$50 fine. Atwater sued the city and police chief for violating her Fourth Amendment protection from unreasonable seizure. The Supreme Court held that the arrest met constitutional requirements because the violation was a misdemeanor under state law. The officer, according to the Court, “was accordingly authorized (not required, but authorized) to make a custodial arrest without balancing costs and benefits or determining whether or not [Atwater’s] arrest was in some sense necessary.”²⁹

Such broad constitutional authority risks unequal enforcement — a fear that is backed up by empirical data on arrest rates. A national study of misdemeanor offenses conducted in 2018 found “substantial racial disparity” in most misdemeanor arrest rates. For many offenses, officers arrested Black people at two to nearly 10 times the rate at which they arrested White people.³⁰

THE FOURTEENTH AMENDMENT

The Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property, without due process of law; nor deny[ing] any person ... the equal protection of the laws.” The Amendment’s due process clause thus guarantees that the process by which officers deprive people of life, liberty, or property must be fair. For example, it bars coercive interrogations because they deprive people of the liberty of deciding whether and when to speak.³¹

Police practices that intentionally discriminate based on race, ethnicity, religion, national origin, or gender violate the Fourteenth Amendment’s equal protection clause.³² Under certain circumstances, violations can also occur when officers enforce “facially neutral” laws or policies in a discriminatory manner or in a way that has a discriminatory effect.³³

Thus, an officer can comply with the Fourth Amendment (e.g., arresting people for marijuana possession) but violate the Fourteenth Amendment (disproportionately arresting Black members of the community despite similar marijuana usage rates among White community members). Targeting and arresting people of color who reside in high-crime areas may also run afoul of the Fourteenth Amendment. Officers’ actions,

regardless of their intentions, are unlawful if they have a racially discriminatory impact. (For more detail, see Chapter 2.)

Racial and ethnic impacts. Courts have largely been unwilling to curb the use of race and other personal characteristics in policing where abuse is not obvious or egregious. If race, gender, nationality, or another factor is used to describe someone suspected of the crime (e.g., a Latinx man in his late 40s wearing a yellow T-shirt), officers are allowed to use that description to find him. The use of race or ethnicity faces the strongest judicial scrutiny, but the courts have said officers can consider these characteristics so long as they are not the sole factor in their decisions or the basis of intentional discrimination.³⁴

In 1992, officers investigating an alleged assault by a young Black man in a small, predominantly White town “swept” the area, stopping and questioning people of color in public spaces and inspecting their hands for cuts. Officers questioned more than 200 people but did not apprehend anyone.³⁵ In a challenge to the constitutionality of the sweep, the court recognized that it was “understandably upsetting to the innocent plaintiffs who were stopped” and acknowledged the “impact of this police action on community relations.”³⁶ But it

found no violation because race was not the “sole” basis for the stops; age and gender were also factors.

Officers engage in profiling when they target people of a certain race or ethnicity because they believe (consciously or not) they are more likely to commit crime or have information about others’ criminal behavior. (For more detail, see Chapter 2.) A large body of evidence finds that profiling disproportionately affects people of color during stops, searches, and arrests.³⁷

A recent study of misdemeanor arrests found that Black people were arrested at least twice as often as White people for petty offenses like vagrancy and disturbing the peace.³⁸ This pattern emerges even when researchers take into account other factors that might play into decision-making, such as local crime rates, socioeconomics, and the like. What’s more, searches of people of color result in “hits” for contraband and weapons at a lower rate than searches of White people.³⁹

In 1996, 17 Black motorists moved to suppress evidence in a criminal case (New Jersey v. Soto) because they claimed that institutional racism resulted in the New Jersey State Police selectively enforcing traffic laws according to race. The motorists (i.e., the “defendants”) and the state both studied traffic stops and post-stop outcomes for presentation to the court, and experts tracked who was driving and who was violating traffic laws.

In reviewing the evidence, the New Jersey Superior Court found that state police disproportionately stopped Black motorists, constituting a “de facto policy” of “targeting Blacks for investigation and arrest.”⁴⁰ The motorists’ study found that, overall, 13 percent of motorists and 15 percent of people violating speed limit laws were Black, but between 35 and 46 percent of those stopped were Black.⁴¹ The court explained that the constitutionality of stops and searches hinges on whether the officer’s conduct is “objectively reasonable,” regardless of motive or intent. A stop is unconstitutional if the “objective evidence” evinces a de facto policy of racially or ethnically biased treatment.⁴²

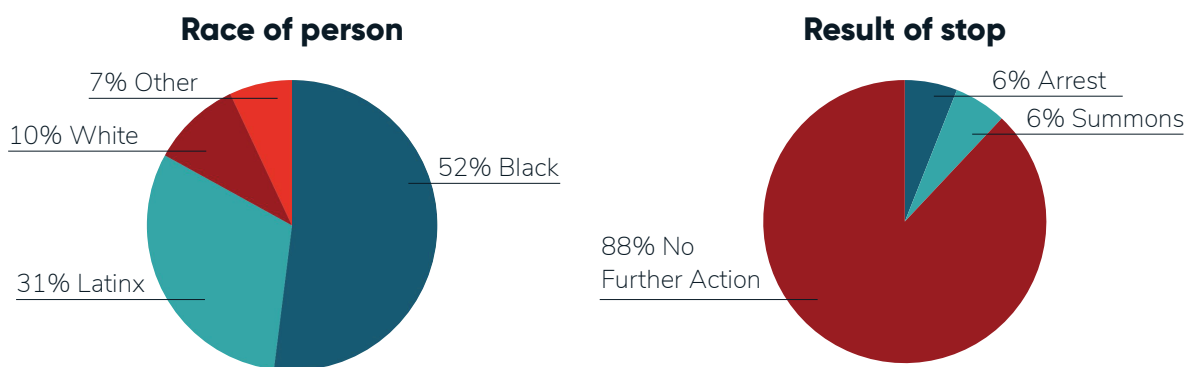
The Superior Court’s analysis squared with a subsequent investigation by the U.S. Department of Justice (DOJ) that found a pattern and practice of racial profiling by the New Jersey State Police. The result was a federal consent decree (i.e., a settlement agreement between the parties) that began December 30, 1999, and ended September 21, 2009.⁴³

A federal court weighed in on racial profiling again in Floyd v. City of New York, in which NYPD witnesses conceded that NYPD officers used race-based assumptions about which stops would increase “productivity” to target “the right people.”⁴⁴ The evidence — presented during nine weeks of testimony from more than 100 witnesses — demonstrated not only racial disparities but also the severe burden that aggressive police stops impose on people of color.

For reference, between 2004 and 2012, the NYPD conducted more than 4 million stop-and-frisks.⁴⁵ Frisks are lawful when officers have a reasonable suspicion that detainees are armed — and therefore pose a danger to officers. But the NYPD found weapons in only 1.5 percent of frisks and found guns specifically in less than 0.1 percent of frisks.⁴⁶

Data presented at trial showed additional evidence of racial disparities and ineffective practices. In 2010, the population of New York City was 23 percent Black, 29 percent Latinx, and 33 percent White.⁴⁷ But more than 80 percent of NYPD stops between 2004 to 2012 were of Black people and Latinxs; weapons were seized from Black people in 1 percent of stops, from Latinxs in 1.1 percent of stops, and from White people in 1.4 percent stops.⁴⁸ Only 6 percent of stops resulted in an arrest, and only 6 percent led to a summons.⁴⁹ In response, the court ordered the NYPD to end its stop-and-frisk policy and appointed an independent monitor to oversee substantial changes in NYPD policies, training, and practices.

NEW YORK POLICE DEPARTMENT STOP-AND-FRISKS (2004-2012)



Source: *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558-59 (S.D.N.Y. 2013).

New York City officials had claimed that its stop-and-frisk policies were needed to curb crime.⁵⁰ But the numbers tell a different story. By May 2017, NYPD stops had dropped from 686,000 in 2011 to under 11,000. During this period, crime rates declined.⁵¹

Harmful patterns in policing aren't fully explained by overt discrimination. Implicit, or subconscious, bias is also a factor, as is systemic, or institutional, bias. (For more detail, see Chapter 2.) Indeed, the same types of patterns exist in the broader criminal justice system and in society at large.⁵² Officers often claim that they stop people "where the crime is" — and crime, they say, tends to be in lower-income neighborhoods with larger communities of color.⁵³

Some officers who are sensitive to allegations of intentional bias note that they patrol neighborhoods in which most — and sometimes virtually all — residents, employees, and motorists are of color. The issue then is how officers engage with people in those neighborhoods, such as whether they rely heavily on pretextual stops or consent searches. Another question relates to the use of resources: Do departments use resources to crack down on low-level offenses (e.g., daily arrests for sex work or marijuana possession) or do they invest in addressing higher-level offenses (e.g., human trafficking or organized narcotics networks).

Even when officers comply with the letter of the law, bias, whether individual or institutional, can devastate communities of color, weaken police-community relationships, and allow “big fish” criminals to prosper. (For more detail, see Chapter 2.) High rates of stops, searches, and arrests also undermine community health and wellbeing. Studies show that people who have been stopped and frisked experience higher levels of anxiety.⁵⁴ Frequent stop-and-frisk interactions demean and humiliate people.⁵⁵

Stopping and arresting young people, meanwhile, increases their likelihood of future delinquency and amplifies deviant attitudes.⁵⁶ Real or perceived racial and ethnic profiling reduces trust in police and undermines public safety. Young people who have been stopped multiple times are less likely to report crimes or seek police help, research shows.⁵⁷ And communities with high levels of police interactions are less likely to cooperate with officers to combat crime.



BEST PRACTICES IN STOPS, SEARCHES, AND ARRESTS

To integrate the values of community policing, departments need policies and practices that serve and protect the interests of communities. Because stops, searches, and arrests intrude on liberty — and disproportionately affect communities of color — departments should adhere to practices that build community trust and foster community-police cooperation. To protect privacy and allow for greater freedom of movement without compromising safety or effectiveness, departments should work with communities to:



RECOMMENDATION 3.1 ENCOURAGE OFFICERS TO CONSIDER THE COSTS OF STOPS, SEARCHES, AND ARRESTS.

Policing, like other government functions, requires cost-benefit analysis. Officers should weigh not only the benefits of their actions but also their costs, such as the use of time and resources, infringement on personal liberty, and strain on community relationships. An officer who spies a reliable informant drinking from an open container of alcohol, for example, should consider whether to cite (i.e., ticket) the informant (and possibly lose them as a source) or simply tell them to empty the container and issue a verbal warning.

Even when officers have legal justification to stop people, doing so isn't always in the best interests of departments or communities. The NYPD's stop-and-frisk policy, for example, demeaned and humiliated thousands of young men of color,⁵⁸ which, in turn, frayed police-community relationships. The department ultimately curtailed the practice (after a court found it had engaged in a pattern of unconstitutional stops) even when stops were legal, which purportedly began to improve community relationships.⁵⁹

In some departments, the cost-benefit analysis is out of step with community needs. Officers in some departments frequently stop motorists for traffic violations as part of aggressive policies to deter serious crime.

During a stop, they might see something suspicious inside a car, smell alcohol or illegal substances, or persuade the driver to consent to a search. This is the idea behind "fishing": More stops yield more "catches." The question is whether these stops enhance public safety or detract from it. The effectiveness of fishing has not been proven;⁶⁰ but it does interfere with individual liberty and fuels cynicism and resentment.

RECOMMENDATION 3.2 BAN FORMAL AND INFORMAL QUOTAS.

Many departments require officers to issue a certain number of tickets and arrests within a specified period. A 2017 study by the Pew Research Center found that only 3 percent of officers were formally expected to meet a predetermined number of citations and arrests, but 34 percent of officers were informally expected to do so.⁶¹ In short, quotas — whether formal or informal — pressure officers, particularly patrol officers,⁶² to produce.⁶³

Some officers have challenged the use of quotas in court on the grounds that they have a disproportionate impact on communities of color.⁶⁴ Informal quotas contributed to disproportionately high ticketing of Black residents in Ferguson, Missouri. Black people comprise 67 percent of the city's population but received 90 percent of the local department's citations, according to a civil rights investigation

by the Department of Justice. This discriminatory practice imposed financial hardship and resulted in debt, jail time, and the loss of driver's licenses, housing, and employment.⁶⁵

Some states have outlawed formal and informal quotas because they cause unnecessary and intrusive interactions between police and individuals, especially in communities with a heavier police presence.⁶⁶ California, for example, adopted a vehicle code that states: "No state or local agency employing peace officers or parking enforcement employees engaged in the enforcement of this code or any local ordinance adopted pursuant to this code may establish any policy requiring any peace officer or parking enforcement employees to meet an arrest quota."⁶⁷

In addition to banning quotas, department leaders should not use the number of stops, arrests, and citations as a primary metric for evaluating officers. This is an example of measuring what is easy to count rather than what is important to count — and implies that arrests and citations are more important than uncounted activities. Performance evaluations should also include metrics such as the number of contacts officers make with community members (including with owners and employees of small businesses); the number of community engagements they attend and actively participate in; and the number of complaints and commendations they receive. (For more detail, see Chapters 1 and 10.)




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**The St. Paul
(Minnesota) Police
Department's consent
search policy requires
officers to read the
following advisory:**

1. I would like to search you (or your vehicle).
2. You should know that you have the right to refuse to allow me to search you and your vehicle.
3. If you do grant me permission, you may stop the search at any time.
4. If I find anything illegal, you will likely be arrested and prosecuted.
5. Do you understand what I have told you?
6. May I search you?
7. May I search your vehicle?

Source: Saint Paul Police Dep't, 409.08, Physical Searches, Saint Paul Police Department Manual (Oct. 2018).

RECOMMENDATION 3.3

ENSURE OFFICERS INFORM PEOPLE OF THEIR RIGHTS TO REFUSE OR REVOKE CONSENT AND TO DOCUMENT IT.

Consent searches are particularly problematic because they unnecessarily and unproductively intrude on liberty and disproportionately affect communities of color. At the same time, they place officers in close contact with people who are not handcuffed or otherwise restrained, which puts them at risk. Communities have dealt with consent searches in a variety of ways. Some, such as the Baltimore Police Department (as the result of a DOJ investigation), require officers to tell people they have the right to refuse or revoke consent at any time after giving it.⁶⁸ Others, such as the St. Paul Police Department in Minnesota, require officers to clearly state that people are free to leave (if and when they are).⁶⁹

Some departments require officers to document consent in writing,⁷⁰ and others require officers to document the reason for the search.⁷¹ A few departments require officers to obtain supervisor approval before conducting consent searches.⁷² These practices protect people from unwarranted intrusions and enable those who don't know their rights to make more informed decisions.

In Austin, Texas, data indicated a pattern of stops with disparate racial effects. In response, the local police department implemented a policy⁷³ requiring officers to obtain approval from their supervisors before conducting a consent search; to tell motorists of their right to refuse consent; and to document consent in written form.⁷⁴

Disparities also exist in consent searches. A study of consent searches in four states found that Black motorists are more likely to be consent-searched than White motorists, even though police find contraband less often when drivers are Black.⁷⁵

In sum, departments should adopt policies to avoid unnecessary searches, ensure that consent is truly voluntary, prevent coercion, and reduce disparate impacts on communities of color.



RECOMMENDATION 3.4 LIMIT THE USE OF PRETEXTUAL STOPS.

Pretextual stops pose a difficult challenge. Although upheld by the Supreme Court, they are not necessarily ethical or effective.⁷⁶ Departments appear dishonest and untrustworthy when officers stop someone to “fish” for evidence of other, unrelated crimes. Studies find that pretextual stops contribute “heavily to police mistrust and ill will” among Black communities.⁷⁷

Motorists of all races and ethnicities generally feel they are treated fairly when pulled over for speeding, research shows. But people become upset and resentful when stopped for a minor infraction and then asked prying questions and/or to search the vehicle.⁷⁸ The feeling is more pronounced among Black and Latinx motorists, who are subject to traffic stops more often than White motorists. This delegitimizes police and decreases people’s willingness to engage and cooperate with officers, especially in communities of color.

Pretextual stops may have a role in rare and limited circumstances. Police may have reliable information that someone is involved in a serious crime and may want to conduct a lawful stop for another legitimate reason (such as a traffic infraction) to try to learn more. To increase legitimacy, though, departments should adopt policies that curtail, or, ideally, end, pretextual stops.⁷⁹ Doing so will alleviate strained relationships between departments and communities.

Indeed, several states and jurisdictions have limited or banned pretextual stops. In 1999 and 2008, state appellate courts in Washington and New Mexico ruled that their state constitutions prohibit using traffic law violations as a pretext for stopping vehicles for other investigative purposes.⁸⁰ The Delaware Superior Court held that purely pretextual stops violate the state constitution, noting that the state's traffic code is so extensive that virtually everyone is in violation of some regulation as soon as they get in their car.⁸¹

In 2003, California relinquished the use of pretextual stops by highway patrol officers as part of a civil rights settlement.⁸² More recently, in 2019, Los Angeles Mayor Eric Garcetti ordered the Los Angeles Police Department to scale back pretextual stops because of the disproportionate rate at which Black drivers were stopped.⁸³ Because the city had experienced a decrease in homicides and violent crimes, Garcetti directed the police chief to focus instead on strategies that not only stop crime but also strengthen community trust.

RECOMMENDATION 3.5 SEEK SEARCH WARRANTS WHENEVER POSSIBLE.

Neutral judges issue search warrants when officers have probable cause that the search location contains evidence of past or current crimes. Officers must present judges with specific facts to justify this finding; hunches

and suspicions are not enough. This process protects people from privacy intrusions — especially when officers are more focused on obtaining evidence than protecting privacy.

Whenever possible, officers should get warrants — even when not required — to ensure they have probable cause when conducting searches. Warrants give officers greater confidence that evidence seized will be admissible in court and increase police legitimacy. They are also easy to obtain in most cases, especially now that telephonic warrants enable officers in the field to obtain warrants quickly.

RECOMMENDATION 3.6 INTEGRATE PROCEDURAL JUSTICE INTO ALL ENFORCEMENT ACTIVITIES.

To police fairly and build community trust, departments should adhere to the principles of procedural justice — that is, treating people with dignity and respect and giving them a voice during police encounters; making neutral and transparent decisions; and having trustworthy motives.⁸⁴ All officers should be trained in procedural justice at the academy and on the job.

Leaders should integrate the principles of procedural justice externally, into all enforcement activities, and internally, into how they treat officers. Creating and sustaining a culture of procedural justice encourages officers to speak with

members of the public (including those suspected of criminal activity) with fairness and respect; to listen to what people have to say; and to explain what is happening and why during encounters.⁸⁵

Some departments incorporate procedural justice concepts into fair and impartial policing policies. In California, the Sacramento Police Department acknowledges that “[d]uring a contact, misunderstandings may occur from an officer’s failure to explain why contact was made.”⁸⁶ Even if the circumstances call for detaining someone, the policy nonetheless says officers “should inform the detainee of the reason

for the contact if it will not compromise the safety of officers or other persons or an investigation.”⁸⁷ The Charleston (South Carolina) Police Department’s Fair and Impartial Policing policy applies procedural justice principles to all stops.

The Charleston Police Department requires officers to use procedural justice techniques in day-to-day practice.⁸⁸ Other departments view procedural justice training as an essential component of community policing. In 2016, the Fort Worth Police Department in Texas established a stand-alone Procedural Justice Unit tasked with “providing training and support to the Fort Worth Police

The Charleston (South Carolina) Police Department’s Fair and Impartial Policing Policy:

In an effort to prevent inappropriate perceptions of biased law enforcement, each officer shall do the following when conducting pedestrian and vehicle stops:

- Introduce themselves to the person (providing name and assignment within the department) and state the reason for the stop as soon as practical, unless providing this information will compromise officer or public safety. In vehicle stops, the officer shall provide this information before asking the driver for their license and registration.
- Ensure that the detention is no longer than necessary to take appropriate actions for the known or suspected offense, and the citizen understands the purpose of reasonable delays.
- Answer any questions the citizen may have, including explaining options for traffic citations disposition, if relevant.
- Provide their name and badge number in writing on a business card as they are disengaging from the stop.

Department and citizenry that enhances internal and external police legitimacy thereby increasing trust, reducing crime, [and] improving officer and public safety.”⁸⁹ The unit also hosts meetings on topics of particular interest to the community, including implicit bias and intimate partner violence.⁹⁰

The Washington State Criminal Justice Training Commission (WSCJTC) integrates procedural justice into its entire curriculum through the LEED Model (Listen and Explain with Equity and Dignity), which simplifies the key components of procedural justice.⁹¹ Recruits participate in mock scenarios and are graded on whether they listen to parties involved and effectively explain the reasons for their actions. Explanations must reflect fair and equitable decision-making, and all parties must be treated with dignity.

Departments can use this model to assess performance in the field by calling people whom officers contacted and asking them: Did officers take the time to listen to your side of the story? Did they explain the reasons for their actions? Did they do so in a way that you believe was fair and free of bias? Were you treated with dignity and respect? When officers meet the first two requirements, they usually also meet the third and fourth, and community members usually perceive equitable and dignified treatment.

RECOMMENDATION 3.7

ELIMINATE DISCRIMINATORY AND BIAS-BASED STOPS, SEARCHES, AND ARRESTS.

As discussed above, the equal protection clause of the Fourteenth Amendment prohibits officers from enforcing the law in a manner that discriminates against people on the basis of protected categories, such as race and gender. Courts have interpreted this clause in a manner that often gives officers discretion to take personal characteristics into account. Nonetheless, the public expectation remains the same: Personal identifying characteristics are relevant only to the extent that they align with descriptions of suspects.

As such, departments must clearly forbid unlawful vehicle and pedestrian stops, searches, and arrests, and they should adopt policies and practices that minimize the costs and effects of lawful stops, searches, and arrests. To reduce bias-based and unnecessary stops, searches, and arrests, some communities have enacted laws and policies that go beyond federal requirements. For example, some cities and states prohibit using traffic law violations as a pretext for stopping vehicles to look for evidence of other crimes, in part because of the disproportionate impact these practices have on people of color.⁹² (For more detail, see Recommendation 3.4.)

States are also increasingly enacting laws prohibiting racial and ethnic profiling and requiring the collection, publication, and analysis of traffic stop and demographic data. (For more detail, see Chapter 2.) Departments should consider best practices for addressing bias in police enforcement activities emerging out of states,⁹³ such as:

- Requiring annual racial and bias-based policing training (Kansas).
- Establishing community advisory boards that reflect the racial and ethnic community to assist in policy development (Kansas).
- Requiring data collection for vehicle stops and reporting to the state attorney general (Missouri).
- Requiring counseling for officers who engage in race-based stops (Missouri).
- Prohibiting investigatory police activities based on characteristics including language, gender, gender identity, sexual orientation, political affiliation, religion, physical or mental disability, or serious medical condition (New Mexico).

Importantly, these practices do not prohibit interactions between police officers and communities that are voluntary efforts to build positive relationships with communities. (For more detail, see Chapter 1.) Departments should take particular care to protect communities of color from discriminatory stops, searches, and arrests. Because communities of color experience higher rates of these activities, departments need policies that provide clear guidance about when race or ethnicity may play a role in an encounter. (For more detail, see Chapter 2.) As the Baltimore Police Department notes, only when a “personal characteristic is physically observable, and part of a reliable and trustworthy description of a specific suspect in an ongoing investigation, where that description also includes other appropriate non-demographic identifying factors[.]” may an officer consider that characteristic.⁹⁴

Departments should also prohibit biased police enforcement based on personal characteristics including race, ethnicity, national origin, religion, gender, gender identity, sexual orientation, age, disability, familial status, immigration status, veteran status, health status, housing status, economic status, occupation, or proficiency with the English language. Here, too, policies should provide clear guidance as to when it is permissible to consider such characteristics. The Seattle Police Department’s Bias-Free Policing policy restricts the use of “personal characteristics” and permits the use of characteristics, such as mental health disabilities or housing status, only when referring people to appropriate social services.⁹⁵

Departments should also prohibit officers from stopping people based on their sexual orientation or gender identity. Departments should adopt specific policies for interactions with LGBTQ people to ensure they are treated in a respectful and professional manner and, when possible, to ensure that searches honor preferences regarding the gender of the officer conducting the search. Many

departments are developing policies governing interactions with members of the LGBTQ community that address personal privacy during searches, safe transport and custody, and personal dignity, such as using people's preferred pronouns.⁹⁶ The Salt Lake City Police Department's policy includes many of these guidelines:⁹⁷

The Salt Lake City Police Department's Guidelines for Interactions with Transgender Individuals:

During interactions with transgender individuals, members will:

- Respectfully treat individuals in a manner appropriate to their gender, or gender identity/expression.
- Use pronouns requested by the individual (i.e., "she, her, hers" for those identifying as female, and "he, him, his" for those identifying as male). If one is uncertain about which gender the individual wishes to be addressed, one may respectfully ask the individual.
- If requested, refer to the individual by their preferred name rather than what is indicated on their government-issued identification.

Members will not:

- Stop, detain, or frisk an individual for the sole reason of determining gender or gender identity/expression.
- Require proof of gender or challenge a person's gender identity or expression unless legally necessary.
- Use language that a reasonable person would find demeaning or derogatory with regard to an individual's actual or perceived gender, gender identity/expression, or sexual orientation.
- Disclose an individual's gender identity or sexual orientation to other arrestees, members of the public, or other government personnel, absent a proper law enforcement purpose.
- Make assumptions about an individual's sexual orientation based upon their gender or gender identity/expression. ...

Source: Salt Lake City Police Dep't, Salt Lake City Police Department Policy Manual, Policy 344: Transgender Individuals 279-80 (rev. Mar. 8, 2018), <http://www.slcdocs.com/police/ppm.pdf>.

Importantly, communities can pass laws and ordinances that require police to implement fair and impartial policing. Vermont, for example, requires all law enforcement agencies to implement a fair and impartial policing policy that complies with standards set by the state council that is responsible for training and certifying all Vermont officers.⁹⁸

RECOMMENDATION 3.8 SAFEGUARD AGAINST UNCONSTITUTIONAL SURVEILLANCE.


New surveillance technologies, such as GPS trackers, cell phones, video surveillance cameras, drones, body-worn cameras, and biometric identification software can capture large amounts data and information about people's movements and associations, which impacts community trust. As police increasingly use these technologies, the question of what constitutes a "search" is becoming more complicated (not that it has ever been a simple matter).

Over time, the Supreme Court's interpretation of what constitutes a search under the Fourth Amendment has evolved from a physical intrusion and the "seizure" of something tangible, to an invasion of a person's "reasonable expectation of privacy" (as opposed to a physical intrusion), to whether the place or thing "searched" was exposed to the public.⁹⁹

These doctrines were developed at a time when justices could not imagine that government officials would someday be able to track people's movements in public

for indefinite periods and at little cost. It was also beyond imagining that people would one day carry in their pockets small devices that contain (and provide access to) seemingly limitless information about themselves and everyone they know. As courts have considered government efforts to exploit this technology, they have become less willing to hold on to traditional doctrine and more willing to curb government intrusions into privacy.

One of the first signs of the tension between old doctrine and new technology came in United States v. Jones, in which officers installed a GPS tracking unit underneath a suspect's car one day after the search warrant's deadline. Officers then tracked the suspect's movements for 28 days — generating more than 2,000 pages of surveillance data. The Court unanimously agreed that the officers' actions constituted an unlawful search but struggled to reach consensus about why it was unlawful. A slim majority ultimately agreed that the officers' actions could be viewed as a technical "trespass" to the undercarriage of the car.¹⁰⁰ Notably, the Court's conservative and liberal wings reached consensus in objecting broadly to the technology's "big brother" implications and looked for a new means of preserving privacy.



In Riley v. California, the Court rejected traditional doctrine when it held warrantless searches of cell phones after lawful arrests unconstitutional. Writing for the Court, Chief Justice John Roberts noted that searching a smartphone upon arrest is a far cry from searching a wallet or a bank statement.¹⁰¹ Text messages, photos, and even apps (such as those for coping with addiction), he noted, reveal intimate details about people in a way that other documents and items don't.

In both decisions, justices acknowledged that judges may be slow to understand and anticipate the rapid development of new technologies. However, police departments, unlike courts, are not reactive institutions. They can and should lead the way by working with stakeholders to develop and implement policies and practices that address privacy concerns and reduce community distrust. Leaders should resist the temptation to obtain every new bit of information that technology can provide. Drone technology, for example, carries the temptation to subject entire communities to aerial surveillance. Though intentions may be honorable, the availability and affordability of this technology has sparked widespread alarm, prompting some jurisdictions to enact laws to ban or sharply limit the use of drones.¹⁰²

Departments should notify communities when considering the adoption of surveillance technologies and engage them at the outset. In an effort to give communities more control over the use of these technologies, some jurisdictions have passed laws that require departments to get approval from their city councils before acquiring surveillance technologies and requiring community input.¹⁰³ These laws are intended to give communities, through their elected officials, a voice in the decision-making process about how these technologies are used.¹⁰⁴

Working with community stakeholders, departments should craft policies that place well-defined restrictions on surveillance that consider community interests and concerns, specific local needs, and national standards.¹⁰⁵ This process should address protections for marginalized people, who are most likely to live in surveilled, high-crime areas. Because these groups are often not represented in the decision-making process, departments need strategies to engage them in meaningful ways.

RECOMMENDATION 3.9

PROVIDE COMPREHENSIVE TRAINING ON STOPS, SEARCHES, AND ARRESTS.

Chapter 11 discusses academy and in-service training, and Chapter 2 discusses training officers to eliminate bias-based policing. This chapter addresses training related to bias in stops, searches, and arrests. Training should be led by qualified legal instructors with significant experience in issues related to the U.S. Constitution and related case law and should review restrictions on officers' rights relating to stops, searches, and arrests.

Many departments have found that the best training for this sort of police activity uses some version of the "Tell, Show, Do" model. In this model, instructors (1) lecture on legal requirements; (2) show students examples of correct and incorrect conduct (often through videos followed by group discussion); and (3) walk officers through various scenarios in which they apply knowledge and skills. This model gives officers the opportunity to work with peers and colleagues to practice skills and talk about the best ways of handling real-world situations.¹⁰⁶ It also gives instructors the opportunity to identify officers who demonstrate superior knowledge, skills, or leadership abilities and who might later serve as field training officers or mentors.

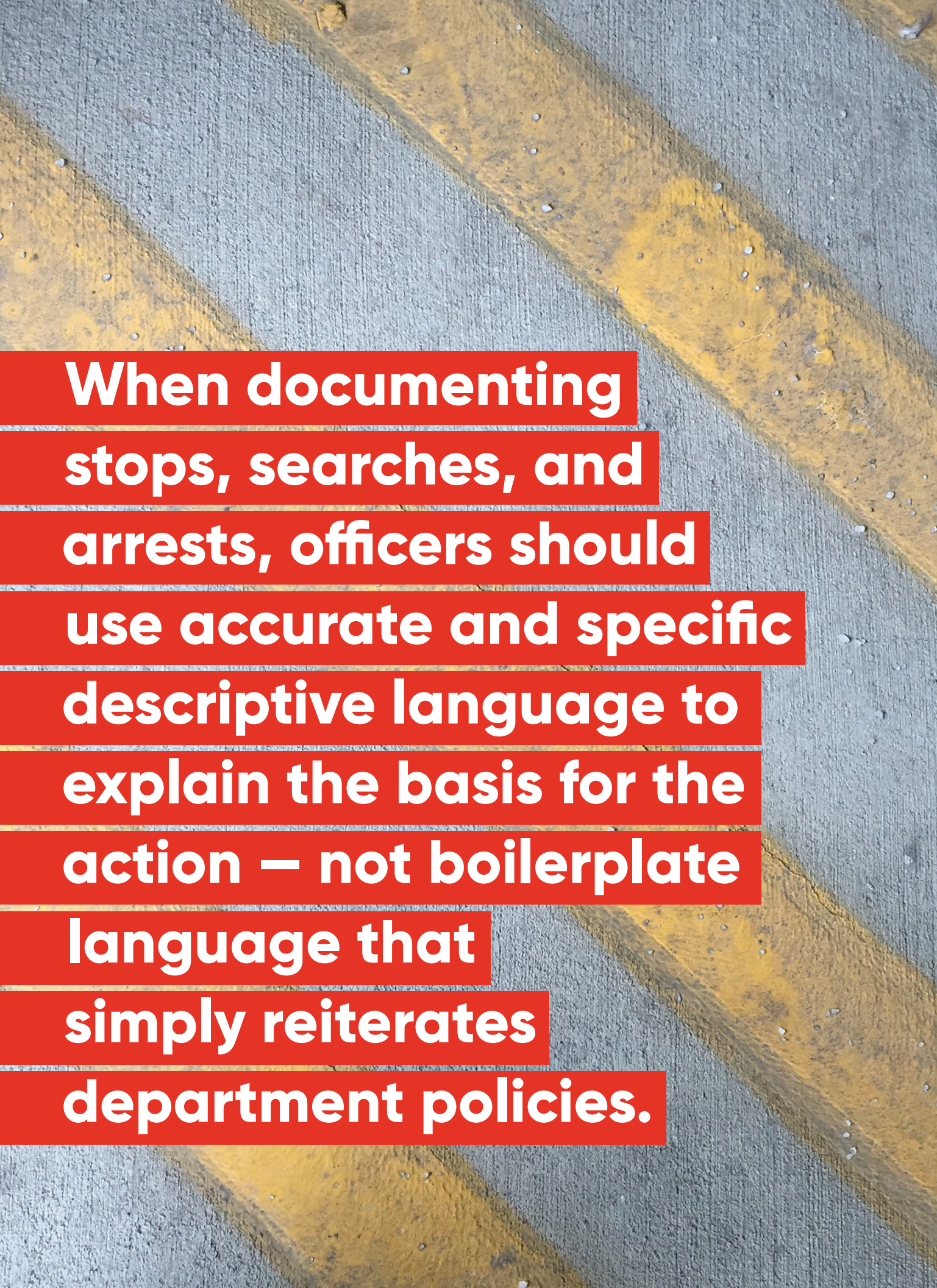
This training should also include a philosophical discussion about fundamental constitutional values and the need to strike the proper balance between liberty and security. Recruits at the Washington State Criminal Justice Training Commission are given a copy of the U.S. Constitution and the Declaration of Independence and reminded that countless men and women in the military have sacrificed their lives to uphold the values and rights contained in these foundational documents. This training conveys that disregarding a person's civil rights is tantamount to dishonoring the sacrifices of military heroes; it instills the belief that honoring people's civil rights is the ultimate expression of patriotism.

To prevent bias-based policing, training should go beyond court interpretations of the U.S. Constitution and should be developed with input from community members and professional educators. Departments should also discuss policies with impacted communities, such as the disability, immigrant, and LGBTQ communities, to ensure they promote tolerance and appropriate and respectful interactions.

For example, the San Francisco Sheriff's Department recently enacted a series of policies on searches and detentions to protect and respect the safety and rights of transgender people in its custody. These enactments arose out of lengthy discussions with stakeholders, including the Transgender Law Center and Just Detention International.¹⁰⁷

Departments should select instructors carefully and include members from affected communities in trainings. Because addressing bias involves difficult and emotionally charged conversations, instructors should be comfortable engaging with other personnel on these issues. Finally, instructors should emphasize the importance of treating people with respect (in accordance with procedural justice principles) to improve interactions between officers and community members.





When documenting stops, searches, and arrests, officers should use accurate and specific descriptive language to explain the basis for the action – not boilerplate language that simply reiterates department policies.

RECOMMENDATION 3.10

REQUIRE DETAILED REPORTING OF STOPS, SEARCHES, AND ARRESTS.

Historically, police departments have not required officers to record information about stops, searches, and arrests. Documentation that has been required has tended to be cursory and has not always been carefully reviewed. To ensure that officers police in a way that complies with departmental policy and with the U.S. Constitution, departments should have adequate and accurate mechanisms for reporting stops, searches, and arrests. Supervisors should closely review collected information to ensure compliance with department policy and law. Ideally, this process is electronic so data can be easily and regularly analyzed to determine patterns and trends in policing behavior. (For more detail, see Chapter 8.)

Public reporting and review requirements are particularly important. Detailed reporting of enforcement activities enables departments to identify officers who engage in problematic practices and departmentwide trends that require attention. When documenting stops, searches, and arrests, officers should use accurate and specific descriptive language to explain the basis for the action — not boilerplate language that simply reiterates department policies.

Departments should collect specific and clear information about the facts creating reasonable suspicion or probable cause as well as information about perceived race, ethnicity, age, and gender; the reason for the enforcement action; search conducted (if any); evidence located (if any); and identification of officers involved.

Departments should ensure that data and information requirements are integrated into officer workflows and, ideally, are captured electronically for effective and efficient collection and analysis. Departments should strike a balance between documenting instances in which officers are depriving people of their personal liberties (even temporarily or with good cause) and giving officers enough time to patrol, respond to calls for service, and help communities solve problems.

After collecting data, departments should require periodic analysis, develop interventions to address potential problems, and promote transparency by providing public access to the data (in both raw and aggregate form). This allows community members to analyze departments' activities, identify problems, and hold officers and departments accountable.

A growing number of states are passing bills requiring data collection and reporting. In 2012, Connecticut enacted legislation requiring state and local law enforcement agencies to standardize data collection of traffic stops, searches, and arrests.¹⁰⁸ And in 2015, Illinois and California expanded their data collection laws to include demographic information on pedestrian and traffic stops.¹⁰⁹

Departments are also using simple, web-based tools to report data online in a format that allows for customized searches by researchers and members of the public. The Minneapolis Open Data Portal encourages public access to data managed by the city (which includes data relating to law enforcement). The portal makes information available in a variety of formats, such as spreadsheets, bar charts, and city maps. People can also subscribe to the portal via RSS feed to receive notices when data are updated.¹¹⁰ Similar data portals with searchable police databases exist in Dallas, Texas, and Raleigh, North Carolina.¹¹¹ Some cities, such as Raleigh, make it easy for members of the public to submit additional requests for data collection and reporting.¹¹²

RECOMMENDATION 3.11

REDUCE RELIANCE ON ARRESTS AND INCARCERATION.

Stops, searches, and arrests contribute to our nation's high incarceration rates — which, despite recent downward trends, remain the highest in the world.¹¹³ These activities have uncertain deterrent effects, carry enormous societal costs, and funnel people into the larger criminal justice system. People who are incarcerated once, even for a short time, are more likely to be incarcerated again, studies show.¹¹⁴

Communities use fines to generate revenue, but these fines impose a high cost on low-income people.¹¹⁵ The Supreme Court has held that officers may arrest people on the basis of probable cause for misdemeanors, no matter how minor.¹¹⁶ Thus, the legal analysis does not consider the social costs of these interactions, but departments and communities can — and should — when setting policies and priorities.

Departments can adopt policies that minimize the risk of incarceration and fines that disproportionately impact poor communities because of the inability to pay. To meaningfully implement these policies, leaders should develop and promote an affirmative values statement that acknowledges that stops, searches, and arrests harm people and their loved ones and should therefore be used only when necessary. Specifically, departments should:

Encourage officers to issue summonses rather than making warrantless arrests when possible. When officers issue a summons, they deliver a written notification, or ticket, to appear in court at a later date to answer charges. When they make an arrest, they lock people up, possibly for

extended periods. For this reason, department leaders should encourage officers to issue summonses rather than make warrantless arrests, unless they have reason to believe the person poses a danger to the public or a flight risk. Thus, officers identifying criminal violations in the field should exercise discretion and avoid making warrantless arrests unless people pose a threat to others or there's an identifiable risk that they will not show up for court.

The Minneapolis Police Department takes this approach to misdemeanors including nontraffic offenses; traffic offenses in connection with accidents; arrests; driving after license revocation, suspension, or cancellation; and charges of DWI (driving while intoxicated), careless or reckless driving, or violations of laws prohibiting open containers of alcohol in vehicles.¹¹⁷ The department's arrest policy calls for citations instead of arrests.

An Excerpt of the Minneapolis Police Department's Arrest Policy:

Adult misdemeanor violators shall be issued citations in lieu of arrest unless the officer [reasonably] believes that one of the following circumstances exists:

- To prevent bodily harm to the accused or another.
- To prevent further criminal conduct.
- There is a substantial likelihood that the accused will fail to respond to a citation.
- The officer cannot verify the identity of the accused.
- The officer has found that the accused has an outstanding warrant.

Source: Minneapolis Police Dep't, *Minneapolis Police Department Policy and Procedure Manual Section 9-103, Misdemeanor Arrests* (Sept. 14, 2018), http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_9-100_9-100.

Some cities and towns are experimenting with alternative ways to ensure people appear in court, such as sending reminders.¹¹⁸ Indeed, people often miss court dates not because they are avoiding charges but because they don't have child care, can't access transportation, or can't take time off from work. A 2004 examination found that 25 to 33 percent of county jail inmates in Jefferson County, Colorado, were "compliance violators," meaning they had been arrested for failing to appear in court, pay a fine, or perform some other task.¹¹⁹

An Excerpt of the Bedford (Massachusetts) Police Department's Arrest Policy:

Although police officers must always be guided by the intent and purpose of the law, there are limited circumstances in the discretion of the officer involved when the public interest would be better served by not making an arrest, even though there is legal justification for such action. Arrest alternatives include citations, summonses, informal resolutions, warnings, and referrals to other agencies to include Restorative Justice or Diversion Programs including the Jail Diversion Program for mental health issues.

Circumstances where alternatives to arrest may be appropriate include the following:

- When an arrest could aggravate community conflict or possibly precipitate a serious disorder.
- When there is a greater priority to respond to a more serious crime or to an urgent public emergency.
- In neighborhood quarrels, noisy parties, landlord-tenant problems and minor disturbances of the peace where no serious crime has been committed and the officer can successfully act as a mediator.
- In other minor offenses where a summons can effectively accomplish the intended purpose.

Source: Bedford Police Department, *Policies and Procedures, Policy 1-1, Arrest Policy 6* (Aug. 11, 2015), https://www.bedfordma.gov/sites/bedfordma/files/file/file/arrest_policy_chapter_1-1_0.pdf.

The 2004 percentage was significantly higher than it was in 1995, when only 8 percent of inmates were compliance violators. To reverse the trend, county officials began exploring ways to reduce the negative impact of incarceration on local communities and to better use the resources spent on jailing people for missed court appearances. Ultimately, they opted for a telephone notification service that reminded residents of upcoming court obligations.¹²⁰ Technological advances now allow for text and email notices.

In January 2018, New York City launched a pilot program that sends residents text messages to “nudge” them to appear in court.¹²¹ The program is now testing the efficacy of different messages, such as describing the consequences for appearing in court (e.g., avoiding an arrest warrant) and reinforcing social norms (e.g., noting that most people appear in court to address citations).

Some departments don't require officers to issue summons but do clearly state expectations that officers consider alternatives to arrest when making decisions in the field. The Bedford Police Department in Massachusetts, for example, identifies instances when arrests may conflict with department or community interests.¹²² The department's arrest policy encourages officers to exercise discretion and consider alternatives to arrest.

Officers may not be able to consider alternatives if an arrest warrant has already been issued. In Arizona, the Tucson Police Department's arrest policy states: "An arrest warrant is a written order issued and signed by a neutral Magistrate directed to all peace officers, commanding them to arrest the person named in the warrant and to bring that person before the court to answer criminal charges."¹²³ Departments do, however, have substantial discretion in advising officers when and under what circumstances to seek arrest warrants.

Require officers to give verbal warnings rather than writing tickets or making arrests, when possible. Often, warnings sufficiently address problems, particularly those involving minor offenses and first-time offenders. Instead of writing tickets or making arrests, officers should give verbal warnings and counseling when responding to nonviolent offenses such as loitering, carrying open containers of alcohol, and littering.¹²⁴ Stricter enforcement policies have proven costly both to public confidence and community budgets — especially when they violate law. In 2012, New York City paid \$15 million to settle a class action lawsuit over the NYPD's practice of enforcing loitering ordinances that had been declared unconstitutional.¹²⁵

Work with community members to explore alternatives to enforcement, such as diversion programs. Communities benefit when programs provide people who commit lower-level offenses with social services instead of jail and prosecution.

Seattle's Law Enforcement Assisted Diversion (LEAD) program steers people who have committed low-level offenses relating to drugs and sex work toward treatment and social services rather than to jail and the larger criminal justice system.¹²⁶ In Texas, the Hurst-Eules-Bedford Teen Court diverts adolescents from the criminal justice system and dismisses cases when teens successfully complete its diversion program.¹²⁷

These programs don't give offenders a "get out of jail free" card but rather an opportunity to access support services that have the potential to change behavior and produce better individual and community outcomes. A 2015 evaluation found that LEAD participants were less likely to be arrested again than those whose cases were processed through the criminal justice system.¹²⁸ The Tucson Police Department has piloted a program to deflect people with opioid addictions from arrest and jail to treatment. (For more detail, see Chapter 5.) This innovative program offers several avenues to treatment: self-referral, deflection from arrest, and officer outreach to people with substance use disorders.¹²⁹

Chapter 3

- ¹ See generally Lynn Langton & Matthew Durose, U.S. Dept of Justice, Bureau of Justice Statistics, *Police Behavior During Traffic and Street Stops* (2011), <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf>; see also, e.g., Department of Justice, Civil Rights Division, *Investigation of the Baltimore City Police Department 47–73* (2016), <https://www.justice.gov/opa/file/883366/download>; New York Civil Liberties Union, *Stop-and-Frisk Data* (“Innocent New Yorkers have been subjected to police stops and street interrogations more than 5 million times since 2002, and that black and Latino communities continue to be the overwhelming target of these tactics”), <https://www.nyclu.org/en/stop-and-frisk-data> (last accessed Dec. 17, 2018); Wesley Lowery, *New Study: Only 24% of Population, Blacks in Boston Make Up 63% of Stop and Frisk Encounters*, *Wash. Post*, Oct. 8, 2014 (“even after controlling for crime, stop-and-frisk encounters were more likely to occur in the city’s traditionally black neighborhoods”), https://www.washingtonpost.com/news/post-nation/wp/2014/10/08/new-study-only-24-of-population-blacks-in-boston-make-up-63-of-stop-and-frisk-encounters/?utm_term=.352c97f03c03; Thomas Fuller, *U.S. Cites Bias by San Francisco Police Against Blacks*, *N.Y. Times*, Oct. 12, 2016, (“... 24 percent higher chance that African-Americans were pulled over by the police given the estimated number of black drivers in the city”), <https://www.nytimes.com/2016/10/13/us/us-cites-bias-by-san-francisco-police-against-blacks.html>; David Hurst, *Durham Police Deny Claims of Racial Profiling During Traffic Stops*, *WNCN* (June 4, 2015) (demonstrating that traffic stop and search incidents are disparately biased against black drivers), <http://wncn.com/2015/06/04/durham-police-deny-claims-of-racial-profiling-during-traffic-stops>; Rebecca Neusteter & Megan O’Toole, *Vera Institute of Justice, Every Three Seconds: Emerging Findings* (Jan. 2019) (“[B]lack people now make up 12 percent of the U.S. population, but an estimated 28 percent of all arrests.”), <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings>.
- ² Maarten Van Craen & Wesley G. Skogan, *Achieving Fairness in Policing: The Link Between Internal and External Procedural Justice*, 20(1) *Police Q.* 3, 14 (2017), <https://journals.sagepub.com/doi/pdf/10.1177/1098611116657818>.
- ³ National Research Council, *Fairness and Effectiveness in Policing: The Evidence* 6 (Wesley Skogan & Kathleen Frydl, 2004).
- ⁴ Compare *Whren v. U.S.*, 517 U.S. 806, 818–19 (1996) (holding that pretextual traffic stops are constitutional where officers have probable cause to believe that a traffic violation occurred) with *State v. Ladson*, 979 P.2d 833, 837–40 (Wash. 1999) (holding that the state constitution forbids officers from using traffic violations as pretext to stop vehicles for unrelated criminal investigations). Law enforcement agencies in Washington have adopted stop policies that reflect the prohibition of pretextual stops. See also *Seattle Police Dept*, 6.220 *Voluntary Contacts, Terry Stops & Detentions*, *Seattle Police Department Manual* (effective date Aug. 1, 2015) (“This policy prohibits Terry stops when an officer lacks reasonable suspicion[.]”), <https://www.seattle.gov/police-manual/title-6---arrests-search-and-seizure/6220---voluntary-contacts-terry-stops-and-detentions>.
- ⁵ See *Carroll v. United States*, 267 U.S. 132, 149 (1925).
- ⁶ See *United States v. Dunn*, 480 U.S. 294, 302–05 (1987) (holding that a barn located 60 yards from the owner’s home did not fall within the property’s curtilage and thus was not subject to Fourth Amendment protection).
- ⁷ *Vt. Const.* art. XI; *N.Y. Const.* art. I § 12. Compare *Hester v. United States*, 265 U.S. 57, 59 (1924) (reasoning that the Fourth Amendment’s protection against unreasonable search and seizure does not extend to the “open fields” outside of the homeowner’s property) and *Oliver v. United States*, 466 U.S. 170, 180, 184 (1984) (asserting that the Fourth Amendment protects the curtilage, or “the land immediately surrounding and associated with the home,” from unreasonable search and seizure but does not protect the “open fields” beyond it) with *State v. Kirchoff*, 587 A.2d 988, 994 (Vt. 1991) (concluding that warrantless search of property beyond the owner’s home “where indicia would lead a reasonable person to conclude that the area is private” violated the state constitution) and *People v. Scott*, 79 N.Y.2d 474, 491 (1992) (holding that warrantless search of property where owners “indicate unmistakably that entry is not permitted” violated the state constitution).
- ⁸ *Ark. Code Ann.* §§ 12-12-1801-1808 (2018); *Cal. Civ. Code* §§ 1798.90.5–.55 (2018); *Me. Rev. Stat.* § 2117-A(2) (2018); *Utah Code Ann.* §§ 41-6a-2001–2005 (2018); see also National Conference of State Legislatures, *Automated License Plate Readers: State Statutes* (Nov. 6, 2018) (providing a list of state statutes limiting the use of automated license plate readers), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx>.
- ⁹ *Fla. Stat.* § 934.50 (2018) (searches and seizure using a drone); *Vt. Stat. Acts. Ann. tit. 20, § 4622* (2018) (law enforcement use of drones).
- ¹⁰ Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 *Mich. L. Rev.* 1117, 1147–49 (2017), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1661&context=mlr>.
- ¹¹ *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“The substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’”) (internal citations omitted).
- ¹² *Terry v. Ohio*, 392 U.S. 1, 27 (explaining that the officer “need not be absolutely certain that the individual is armed” but may draw “specific reasonable inferences” based on “the facts in light of his experience” to make the arrest).
- ¹³ *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978)) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”).

¹⁴ See, e.g., *id.* (holding exigent circumstances exist when an officer reasonably believes a person in a home is injured); *Maryland v. Dyson*, 527 U.S. 465 (1999) (holding that probable cause is sufficient and no exigency is required to search a vehicle without a warrant); *Chimel v. California*, 395 U.S. 752 (1969) (authorizing searches of the area around a person under arrest for the safety of the arresting officer); *United States v. Robinson*, 414 U.S. 218 (1973) (holding searches of people under arrest are an exception to the warrant requirement and reasonable).

¹⁵ Compare *Carroll v. United States*, 267 U.S. 132, 153 (1925) (explaining that risk of a vehicle moving out of jurisdiction justifies a warrantless search of the vehicle) with *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (finding that if probable cause exists to search a vehicle, no exigent circumstances are required to conduct a warrantless search). The rationale has long shifted from mobility and potential loss of evidence to a diminished expectation of privacy regarding the interior of vehicles.

¹⁶ See *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”).

¹⁷ *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’ search under that Amendment.”).

¹⁸ *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that where an officer has reasonable suspicion that a suspect may engage in criminal activity and may be armed, the officer may perform a limited search of the outer clothing of the suspect to verify there are no weapons that may jeopardize the safety of the officer or those around him).

¹⁹ *Id.* at 24.

²⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (holding that police may conduct a warrantless search of an individual who has consented to the search, when the consent is “voluntarily given, and not the result of duress or coercion, express or implied.”).

²¹ Gov’t of the District of Columbia Police Complaints Board Office of Police Complaints, PCB Policy Report #17-5 Consent Search Procedures 3-4 (2017), <https://policecomplaints.dc.gov/sites/default/files/dc/sites/office%20of%20police%20complaints/publication/attachments/Consent%20Search%20Report%20FINAL.pdf>.

²² *Schneckloth*, 412 U.S. at 247-49.

²³ *Id.* (consent must be voluntarily given, but law enforcement need not demonstrate the individual’s knowledge of a right to refuse); see also *Ohio v. Robinette*, 519 U.S. 33, 35 (1996) (holding that the Fourth Amendment does not require police to inform a lawfully stopped person that he is free to go before that

person’s consent is recognized).

²⁴ *Whren v. U.S.*, 517 U.S. 806, 813 (1996) (holding that the reasonableness of a traffic stop is not determined by the motivations or pretext of the officers involved).

²⁵ *Id.* at 812-13.

²⁶ See e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557, 661 (S.D.N.Y. 2013) (acknowledging that although “one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience” and finding that “statistical evidence of racial disparities in stops is sufficient to show a discriminatory effect.”), <https://ccrjustice.org/sites/default/files/assets/Floyd-Liability-Opinion-8-12-13.pdf>.

²⁷ Kyle Smith, *We Were Wrong About Stop-and-Frisk*, *Nat’l Rev.*, Jan. 1, 2018, <https://www.nationalreview.com/2018/01/new-york-city-stop-and-frisk-crime-decline-conservatives-wrong/>.

²⁸ *Floyd*, 959 F. Supp. 2d at 602-03.

²⁹ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (parenthetical in original).

³⁰ Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 *B.U. L. Rev.* 731, 737-759 (2018), <http://www.bu.edu/bulawreview/files/2018/06/STEVENSON-MAYSON.pdf> (“There is substantial racial disparity in the majority of offense categories. The black arrest rate is at least twice as high as the white arrest rate for disorderly conduct, drug possession, simple assault, theft, vagrancy, and vandalism. The black arrest rate for prostitution is almost five times higher than the white arrest rate, and the black arrest rate for gambling is almost ten times higher.”).

³¹ *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936) (noting that the “rack and torture chamber may not be substituted for the witness stand” and concluding that coerced confessions violate the due process clause of the Fourteenth Amendment).

³² *Adarand Constructors v. Peña*, 515 U.S. 200, 213, 227 (1995) (concluding that “classifications based explicitly on race” violate the equal protection clause unless they are “narrowly tailored measures that further compelling governmental interests.”); *Reed v. Reed* 404 U.S. 71, 76 (1971) (“To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment[.]”).

³³ See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (reasoning that although a policy may “be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”); *Washington v. Davis*, 426 U.S. 229, 241 (1976) (“A statute, otherwise neutral on its face, must not be applied so as to invidiously discriminate on the basis of race.”); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”).

³⁴ See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329 (2d. Cir. 2000).

³⁵ *Id.* at 334.

³⁶ *Id.* at 337, 339 (concluding that officers stopped individuals based “not only [on] race, but also [on] gender and age, as well as the possibility of a cut on the hand.”), overruled in part on other grounds by *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

³⁷ See Am. Civ. Liberties Union, *The War on Marijuana in Black and White* 4 (June 2013) (finding Blacks are 3.73 times more likely to be arrested for marijuana possession than Whites despite similar usage rates), <https://www.aclu.org/files/assets/aclu-the-war-on-marijuana-rel2.pdf>; Langton & Durose, *supra* note 1; NAACP, *Born Suspect: Stop-and-Frisk Abuses & the Continued Fight to End Racial Profiling in America* 9 (2014) (discussing national data on racial profiling that show “racial profiling happened to men, women, and children of all ages and socio-economic backgrounds, and in virtually every context of people’s lives: on the streets, inside cars, at home, at airports, at shopping centers, and at places of worship”), http://action.naacp.org/page/-/Criminal%20Justice/Born_Suspect_Report_final_web.pdf; New York Civil Liberties Union, *Stop-and-Frisk Data* (noting that “[n]early nine out of 10 stopped-and-frisked New Yorkers have been completely innocent” and “black and Latino communities continue to be the overwhelming target of these tactics”), <https://www.nyclu.org/en/stop-and-frisk-data> (last accessed Dec. 17, 2018); Lowery, *supra* note 1.

³⁸ Stevenson & Mayson, *supra* note 30, at 759.

³⁹ L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2037–38 (2011), http://www.minnesotalawreview.org/wp-content/uploads/2011/06/Richardson_PDF.pdf; see also Ian Ayres & Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* (Oct. 2008), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf>.

⁴⁰ *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996).

⁴¹ *Id.* at 352-57.

⁴² *Id.* at 360.

⁴³ Consent Decree, *United States v. State Police of New Jersey*, No. 99-5970 (MLC) (D.N.J. Dec. 30, 1999), <https://www.justice.gov/crt/us-v-new-jersey-joint-application-entry-consent-decree-and-consent-decree>; Press Release, Office of the Att’y Gen., N.J., *State Police Racial Profiling Consent Decree Dissolved* (Sept. 21, 2009), <https://www.nj.gov/oag/newsreleases09/pr20090921a.html>.

⁴⁴ Floyd, 959 F. Supp. 2d at 561, 602.

⁴⁵ *Id.* at 556.

⁴⁶ *Id.* at 558-59, 565-69, 574 n.118.

⁴⁷ *Id.* at 556, 559.

⁴⁸ *Id.* at 559.

⁴⁹ *Id.* at 558-559.

⁵⁰ Jason Hanna, *Judge Rules NYC’s Stop-and-Frisk Policy Unconstitutional; City Vows Appeal*, CNN (Aug. 12, 2013), <https://www.cnn.com/2013/08/12/justice/new-york-stop-frisk/>.

⁵¹ Peter L. Zimroth, *Fifth Report of the Independent Monitor Analysis of NYPD Stops Reported, 2013-2015*, 7 (May 30, 2017), <http://nypdmonitor.org/wp-content/uploads/2017/06/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf> (examining trends in the NYPD’s stop, question, and frisk data during the period 2013-2015); N.Y. Civ. Liberties Union, *Stop-and-Frisk Data*, <https://www.nyclu.org/en/stop-and-frisk-data> (last accessed Dec. 17, 2018); see also Al Baker, *Street Stops by New York City Police Have Plummeted*, N.Y. Times, May 30, 2017 at A17, <https://www.nytimes.com/2017/05/30/nyregion/nypd-stop-and-frisk.html>; Ashley Southall, *Crime in New York City Plunges to a Level Not Seen Since the 1950s*, N.Y. Times, Dec 27, 2017, <https://www.nytimes.com/2017/12/27/nyregion/new-york-city-crime-2017.html>.

⁵² See The Sentencing Project, *Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance Regarding Racial Disparities in the United States Criminal Justice System* (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>.

⁵³ See e.g., Katherine Reed, *Q&A: Police Chief Ken Burton Talks about Racial Profiling, Community Policing and Why He’s So Frustrated*, *Missourian* (Sept. 17, 2017) (discussing traffic stop data and the problem of racial profiling coming into sharper focus), https://www.columbiamissourian.com/news/local/q-a-police-chief-ken-burton-talks-about-racial-profiling/article_9538af60-9990-11e7-98bf-5b5bb91f3a3d.html; Heather MacDonald, *What Looks Like Profiling Might Just Be Good Policing*, *Manhattan Institute* (Jan. 19, 2003) (discussing the effects of racial profiling such as going “where the crime is”), <https://www.manhattan-institute.org/html/what-looks-profiling-might-just-be-good-policing-1506.html>.

⁵⁴ Amanda Geller et al., *Aggressive Policing and the Mental Health of Urban Young Men*, 104 *Am. J. Public Health* 2321 (Dec. 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4232139/> (finding that participants with more police contact generally reported more trauma and anxiety-like symptoms, which were associated with the number of stops reported, the level of the encounter, and perception); see also Nancy La Vigne, Pamela Lachman, Shebani Rao & Andrea Matthews, U.S. Dep't of Justice, *Community Oriented Policing Services, Stop and Frisk: Balancing Crime Control with Community Relations 20* (2014), <https://ric-zai-inc.com/Publications/cops-p306-pub.pdf> (discussing the importance of "community policing"); Jennifer Fratello, Andres F. Rengifo, Jennifer Trone & Brenda Velazquez, Vera Institute of Justice, *Coming of Age with Stop and Frisk: Experiences, Perceptions, and Public Safety Implications 27* (2013), https://storage.googleapis.com/vera-web-assets/downloads/Publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications/legacy_downloads/stop-and-frisk-technical-report-v4.pdf (describing young people who were stopped as having "lingering feelings of fear and anxiety"); Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 *Wm. & Mary Bill Rts. J.* 689, 727 (2016), <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1804&context=wmborj> ("[R]esearchers recorded self-reported mental health factors and measured them against the number of times the person had been stopped. As anticipated, greater police contact correlated with higher anxiety scores[.]").

⁵⁵ See La Vigne, Lachman, Rao & Matthews, *supra* note 54, at 20; Center for Constitutional Rights, *Stop and Frisk: The Human Impact 6* (2012), <https://ccrjustice.org/sites/default/files/attach/2015/08/the-human-impact-report.pdf> ("The experience of being stopped and frisked by police often has a lasting emotional impact. People interviewed by CCR described feeling a range of emotions during stops, including anger, fear, shame, and vulnerability. One man described feeling 'disgusted, insulted, humiliated!"; U.S. Dep't of Justice, U.S. Attorney's Office Dist. of N.J., *Investigation of Newark Police Department 9 n.8* (Jul. 22, 2014) ("Being placed in the backseat of a police vehicle can be a humiliating and often frightening experience."); Gellar et al., *Aggressive Policing and the Mental Health of Young, Urban Men, Men*, *supra* note 54, at 2322.

⁵⁶ Stephanie A. Wiley & Finn-Aage Esbensen, *The Effect of Police Contact: Does Official Intervention Result in Deviance Amplification*, 62 *Crime & Delinquency* 283, 299 (2013) ("[O]ur findings show that the negative consequences of police contact are compounded for arrested youth), https://www.researchgate.net/publication/277456150_The_Effect_of_Police_Contact_Does_Official_Intervention_Result_in_Deviance_Amplification; subsequent to arrest, they report less anticipated guilt and more delinquency compared with stopped youth"); see also Fratello, Rengifo, Trone & Velazquez, *supra* note 54, at 1 ("There's reason to believe that being stopped can also influence young people's self-perceptions, potentially causing them to see themselves as deviant and to actually commit delinquent acts[.]"); U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department 94* (Mar. 4, 2015) [hereinafter *Ferguson Investigation*] (discussing how to change responses to students "to avoid criminalizing youth while maintaining a learning environment"), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁵⁷ Fratello, Rengifo, Trone & Velazquez, *supra* note 54, at 5.

⁵⁸ Floyd, 959 F. Supp. 2d 540.

⁵⁹ Stephanie Gosk et. al., *After Stop and Frisk, the NYPD Reinvents Policing Yet Again*, NBC News, May 13, 2018, <https://www.nbcnews.com/news/crime-courts/after-stop-frisk-nypd-reinvents-policing-yet-again-n873446>.

⁶⁰ See Jeffery Fagan & Amanda Geller, *Profiling and Consent: Stops, Searches and Seizures after Soto*, 5th Annual Conference on Empirical Legal Studies Paper 17 (July 16, 2010) (finding that New Jersey State Police found contraband in only 0.52% of vehicle stops between October 2005 and March 2007), https://www.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/Fagan%20and%20Geller%20%20Profiling%20and%20Consent%2011_01_10.pdf.

⁶¹ Rich Morin, Kim Parker, Renee Stepler & Andrew Mercer, Pew Research Ctr., *Behind the Badge* (Jan. 11, 2017), <http://www.pewsocialtrends.org/2017/01/11/behind-the-badge/>.

⁶² *Id.*

⁶³ See Floyd, 959 F. Supp. at 561, 596-602 (describing the pressure on officers to meet numerical enforcement goals); see also Christopher Mathias, *Police Quotas Are Terrible, and the NYPD Still Seems to Be Using Them*, *Huffington Post* (Oct. 2, 2014) ("If there's one subject on which New York City police unions and police reform advocacy groups seem to agree, it's this: Arrest quotas for police officers are terrible and counterproductive, and they sow distrust between cops and communities."), http://www.huffingtonpost.com/2014/10/02/nypd-quotas_n_5916596.html.

But note that some jurisdictions have prohibited police from using quotas, pursuant to state law or court order. See *Consent Decree, United States v. City of Ferguson*, No. 4:16-CV-00180-CDP, ¶ 91 (D. Mo. Mar. 17, 2016) (prohibiting the city from using "citation or arrest quotas, whether formal or informal, of any kind."); *https://www.justice.gov/opa/file/833431/download*; see *Cal. Veh. Code § 41602* (2017) ("No state or local agency employing peace officers or parking enforcement employees engaged in the enforcement of this code or any local ordinance adopted pursuant to this code, may establish any policy requiring any peace officer or parking enforcement employees to meet an arrest quota.").

⁶⁴ See, e.g., *Gravitt v. N.C. Div. of Motor Vehicles*, 33 Fed. Appx. 45 (4th Cir. Mar. 25, 2002), cert denied, 537 U.S. 884 (2002) (affirming district court's dismissal of claim by officer and union that the police department's ticket quota policy forced officers to violate motorists' constitutional rights).

⁶⁵ *Ferguson Investigation*, *supra* note 56, at 3-4.

⁶⁶ See Morin, Parker, Stepler & Mercer, *supra* note 61; Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, *Nat'l Public Radio*, Apr. 4, 2015 (California, Florida, New York, and Illinois have outlawed quota systems), <http://www.npr.org/2015/04/04/395061810/despite-laws-and-lawsuits-quota-based-policing-lingers>.

⁶⁷ *Cal. Veh. Code § 41603* (2018).

⁶⁸ *Consent Decree, United States v. Police Dep't of Baltimore City*, No. 1:17-CV-00099-JKB, ¶¶ 56-57 (D. Md. Jan. 12, 2017) [hereinafter *Baltimore Consent Decree*], <https://www.justice.gov/>

opa/file/925056/download.

⁶⁹ Amer. Civ. Liberties Union of Northern Cal., Know Your Rights: Police Interactions, May 2015, <https://www.aclunc.org/our-work/know-your-rights/your-rights-and-police>; Saint Paul Police Dep't, 409.08, Physical Searches, Saint Paul Police Department Manual (Oct. 2018), <https://www.stpaul.gov/books/40908-physical-searches>.

⁷⁰ Chapel Hill Police Dep't, Policy Manual: Fair and Impartial Policing (rev. Jul. 1, 2018) ("The Chapel Hill Police Department requires written documentation on any consent search that is conducted"), <https://www.townofchapelhill.org/home/showdocument?id=28619>; Baltimore Consent Decree, *supra* note 68, at ¶ 56.

⁷¹ Agreement for the Sustainable Reform of the P.R. Police Dep't, United States v. Commonwealth of P.R., No. 3:12-cv-02039-GAG (D.P.R. July 17, 2013), ¶ 60 (requiring officers of the Puerto Rico police department to document the reason for each stop and/or search), https://www.justice.gov/sites/default/files/crt/legacy/2013/07/17/prpd_agreement_7-17-13.pdf; Baltimore Consent Decree, *supra* note 68, at ¶ 46 (requiring officers to document the reason for each stop and the facts giving rise to probable cause for a search, if one was conducted).

⁷² New Orleans Police Dep't, New Orleans Police Department Operations Manual, Chapter 1.2.4: Title: Search and Seizure ¶ 20 (Jul. 10, 2016), <https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Chapter-1-2-4-Search-and-Seizure.pdf/>.

⁷³ Austin Police Dep't, Austin Police Dep't Policy Manual, 306.5 Consent 145-7 (Jul. 20, 2017), https://www.austintexas.gov/sites/default/files/files/Current_APD_Policy_Manual_2017-1.5_issued_7-20-2017.pdf.

⁷⁴ *Id.*

⁷⁵ Sharon LaFraniere & Andrew W. Lehren, The Disproportionate Risks of Driving While Black, N.Y. Times (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html>.

⁷⁶ Jonathan Blanks, Thin Blue Lines: How Pretextual Stops Undermine Police Legitimacy, 66 Case W. Res. L. Rev. 931, 932 (2016), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=4660&context=caserev>.

⁷⁷ *Id.*

⁷⁸ *Id.* at 931, 934.

⁷⁹ See *id.* at 931, 946; see also Adero S. Jernigan, Driving While Black: Racial Profiling in America, 24 L. & Psychol. Rev. 127, 136-37 (2000) (unless Whren v. United States is overturned or legislators address the issue, police will continue to search minority drivers based on race).

⁸⁰ Ladson, 979 P.2d at 837-40 (holding that under Washington State Constitution, pretextual traffic stops are prohibited); State v. Ochoa, 206 P.3d 143, 155 (N.M. Ct. App. 2008) (holding that "pretextual traffic stops are not constitutionally reasonable in New Mexico").

⁸¹ State v. Heath, 929 A.2d 390, 402 (2006) ("traffic stops demonstrated to have been made exclusively for the purpose of investigating an officer's hunch about some other offense" are

unconstitutional).

⁸² John M. Broder, California Ending Use of Minor Traffic Stops as Search Pretext, N.Y. Times, Feb. 28, 2003, <https://www.nytimes.com/2003/02/28/us/california-ending-use-of-minor-traffic-stops-as-search-pretext.html>.

⁸³ Cindy Chang & Ben Poston, Garcetti Orders LAPD to Scale Back Vehicle Stops Amid Concerns Over Black Drivers Being Targeted, L.A. Times, Feb. 6, 2019, <https://www.latimes.com/local/lanow/la-me-ln-garcetti-lapd-metro-20190206-story.html>.

⁸⁴ The President's Task Force on 21st Century Policing, Final Report of the President's Task Force on 21st Century Policing 10 (2015) [hereinafter President's Task Force Report] (citing Lorraine Mazerolle, et al., Legitimacy in Policing: A Systematic Review, The Campbell Collection Library of Systematic Reviews 9 [2013]), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

⁸⁵ Int'l Ass'n of Chiefs of Police, Model Policy: Standards of Conduct (Aug. 1997) ("Officers shall treat violators with respect and courtesy, guard against employing an officious or overbearing attitude or language that may belittle, ridicule, or intimidate the individual, or act in a manner that unnecessarily delays the performance of their duty."); Megan Quattlebaum et al., The Justice Collaboratory at Yale Law Sch., Principles of Procedurally Just Policing 47-56 (2018), https://law.yale.edu/system/files/area/center/justice/principles_of_procedurally_just_policing_report.pdf; La Vigne, Lachman, Rao & Matthews, *supra* note 54, at 21-22 (2014).

⁸⁶ Sacramento Police Dep't, Sacramento Police Department General Orders 210.05: Bias-Based Policing (June 5, 2017), <https://www.cityofsacramento.org/-/media/Corporate/Files/Police/Transparency/GO-21005-Bias-Based-Policing.pdf?la=en>.

⁸⁷ *Id.*

⁸⁸ City of Charleston Police Dep't, City of Charleston Police Department Policy and Procedure Manual Administrative General Order 8: Fair and Impartial Policing (Apr. 6, 2018), <https://www.charleston-sc.gov/DocumentCenter/View/18114>.

⁸⁹ Fort Worth Police Dep't, National Initiative, <https://police.fortworthtexas.gov/About/national-initiative> (last visited Dec. 18, 2018).

⁹⁰ Fort Worth Police Dep't, Fort Worth Police Department General Orders, 347.01 Police and Community Relationships 231-34 (Jul. 18, 2018), <https://police.fortworthtexas.gov/Public/general-orders> (download "General Orders").

⁹¹ Seattle Police Dep't., WA State Justice Based Policing Initiative, Apr. 25, 2011, <http://spdblotter.seattle.gov/2011/04/25/wa-state-justice-based-policing-initiative/>.

⁹² See Chang & Poston, *supra* note 83.

⁹³ Kan. Stat. Ann. § 22-4609 (2017), http://www.kslegislature.org/li_2018/b2017_18/statute/022_000_0000_chapter/022_046_0000_article/022_046_0009_section/022_046_0009_k/; Mo. Rev. Stat. § 590.650 (2018), <http://revisor.mo.gov/main/OneSection.aspx?section=590.650&bid=30357&hl=>; N.M. Stat. §§ 29-21-1 to 29-21-4 (2009), <https://law.justia.com/codes/new-mexico/2009/chapter-29/article-21/>.

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- ⁹⁵ Seattle Police Dep't, Seattle Police Department Manual, 5.140 – Bias-Free Policing (Jul. 15, 2018), <https://www.seattle.gov/police-manual/title-5---employee-conduct/5140---bias-free-policing> (eff. July, 15 2019).
- ⁹⁶ See, e.g., Anne Arundel County Police Department, Interactions with Transgender Individuals (eff. Dec. 27, 2017), <https://www.powerdms.com/public/aac/documents/1278177>; Seattle Police Dep't, Policy 16.200: Interaction With Transgender Individuals (Oct. 29, 2018), <https://www.seattle.gov/police-manual/title-16---patrol-operations/16200---interaction-with-transgender-individuals>.
- ⁹⁷ Salt Lake City Police Dep't, Salt Lake City Police Department Policy Manual, Policy 344: Transgender Individuals 273-4 (rev. Mar. 8, 2018), <http://www.slcdocs.com/police/ppm.pdf>.
- ⁹⁸ Vt. Stat. tit. 20 § 2366; See Vermont Criminal Justice Training Council, Fair and Impartial Policing Policy (Dec. 7, 2017), <https://vcjtc.vermont.gov/sites/vcjtcc/files/files/Fair%20and%20Impartial%20Policing%20Policy%202012-7-2017.pdf>.
- ⁹⁹ *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (asserting that Fourth Amendment violations occur when “there has been an official search and seizure of [the defendant’s] person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure”); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring) (explaining that the Fourth Amendment’s protections extend beyond tangible items to include conversations and anything in which a person has “exhibited an actual (subjective) expectation of privacy” that society would consider reasonable); *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (“The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected reasonable expectation of privacy.”) (internal citations omitted).
- ¹⁰⁰ *United States v. Jones*, 565 U.S. 400, 412 (2012).
- ¹⁰¹ *Riley v. California*, 134 S. Ct. 2473, 2493 (2014).
- ¹⁰² Wis. Stat. § 175.55 (2018); Ind. Code § 35-33-5-9 (2017).
- ¹⁰³ See Oakland, Cal. Ord. 16-1028 Surveillance and Community Safety Ordinance (2018), codified Oakland, Cal. Code § 9.64, <https://oakland.legistar.com/LegislationDetail.aspx?ID=3034026&GUID=FOBB8485-CDFA-40F9-B9B3-1E9B58C8AA73&Options=&Search=>; Nathan Sheard, Electronic Frontier Found., Oakland: The New Gold Standard in Community Control of Police Surveillance (May 18, 2018) (discussing Community Control Over Policing Surveillance ordinances passed in Oakland, CA; Santa Ana, CA; Seattle, WA; Berkley, CA; and Davis, CA), <https://www.eff.org/deeplinks/2018/05/oakland-new-gold-standard-community-control-police-surveillance>; Am. Civ. Liberties Union of Mass., Cambridge Passes Law Requiring Community Control of Police Surveillance (Dec. 10, 2018), <https://www.aclum.org/en/news/cambridge-passes-law-requiring-community-control-police-surveillance>.
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- ¹⁰⁵ President’s Task Force Report, *supra* note 84, at 34.
- ¹⁰⁶ Judith Andersen et al., Highly Realistic Scenario Based Training Simulates the Psychophysiology of Real World Use of Force Encounters: Implications for Improved Police Officer Performance, J. L. Enforcement (2016), https://tspace.library.utoronto.ca/bitstream/1807/73822/3/highly_realistic_scenario_based.pdf.
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