BANS WITH NO BITE: WHY RACIAL PROFILING BANS ARE UNABLE TO CREATE RACIAL JUSTICE IN POLICING

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INTRODUCTION

Over the summer of 2020, the nation faced yet another reckoning over policing and use of force.[1] Once again, the nation stood witness to mass protests against the use of force in policing and, more broadly, the fraught relationship between communities of color and the police officers that are meant to protect them.[2] Once again, police reform is being seriously discussed at multiple levels of government across cities in multiple states.[3] And, once again, renewed interest in police reform has led activists to propose a broad variety of policy, legislative, and judicial proposals.[4]

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1 Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/U6MC-SVZT].

2 Riots and protests stemming from police killings are sprinkled throughout the past three decades of this country's history. The L.A. Riots spanned six days in 1992 following the acquittal of police officers in the unprovoked beating of Rodney King. Jeff Wallenfeldt, *Los Angeles Riots of 1992*, ENCYCLOPAEDIA BRITANNICA (Nov. 5, 2021), https://www.britannica.com/event/Los-Angeles-Riots-of-1992 [https://perma.cc/5CXZ-DLZC]. Michael Brown's death in 2014 at the hands of police officers in Ferguson, Missouri, sparked days of protests in the city. Shannon Luibrand, *How a Death in Ferguson Sparked a Movement in America*, CBS NEWS (Aug. 7, 2015, 5:39 AM), https://www.cbsnews.com/news/how-the-black-lives-matter-movement-changed-america-one-year-later [https://perma.cc/67S4-GDRP]. Freddie Gray's death while in the custody of the Baltimore Police Department sparked weeks of protests in Baltimore. German Lopez, *The Baltimore Protests Over Freddie Gray's Death, Explained*, VOX (Aug. 18, 2016, 9:38 AM), https://www.vox.com/2016/7/27/18089352/freddie-gray-baltimore-riots-police-violence (last visited Mar. 14, 2022). Nationwide protests similarly took place after Eric Garner, an unarmed Black man, died after an NYPD officer placed him in a chokehold. Oliver Laughland, Kayla Epstein & Jessica Glenza, *Eric Garner Protests Continue in Cities Across America Through Second Night*, GUARDIAN (Dec. 5, 2014, 8:09 AM), https://www.theguardian.com/us-news/2014/dec/05/eric-garner-case-new-york-protests-continue-through-second-night [https://perma.cc/3BKS-TPEC].

3 *See* Kayla Branch, *Oklahoma City Recently Adopted Six Police-Focused Reforms. Here's What Is Next.*, OKLAHOMAN (July 15, 2020, 1:32 AM), https://www.oklahoman.com/article/5666806/oklahoma-city-recently-adopted-six-police-focused-reforms-heres-what-is-next [https://perma.cc/F6PV-37WT]; Talal Ansari & Jennifer Calfas, *Despite Calls to Defund the Police, Some Cities Are Spending More*, WALL ST. J. (July 16, 2020, 8:00 AM), https://www.wsj.com/articles/despite-calls-to-defund-the-police-some-cities-are-spending-more-11594900803 [https://perma.cc/9QU9-KM4M]. Responding to calls to reevaluate their departments' budgets, New York City; Los Angeles; Portland, Oregon; Baltimore; and San Francisco have all cut or said they have plans to cut their police budgets. *Id.* Minneapolis, where George Floyd was killed by four police officers, has vowed to dismantle and rebuild its department entirely in response to the protests that occurred there. *Id.*

4 Proposals include

> end[ing] "broken windows" policing, more community oversight of police departments, stricter limits on the use of force, independent investigations of police misconduct, community representation in municipal governments, body cameras,

In order to investigate the racially disparate impact of policing, it is imperative to critically interrogate the nature of police-civilian interactions and how these interactions may be infected by individual bias. Traffic stops represent one of the most common forms of police-civilian contact, and thus are a fitting category of interaction to serve as a target for this type of inquiry.[5] Traffic laws in the United States are generally extremely broad; they tend to "regulate the details of driving in ways both big and small, obvious and arcane."[6] The breadth of such codes and the latitude offered to officers in enforcing them make traffic violations potent openings that officers can exploit to investigate persons they would not otherwise have the requisite suspicion to investigate.[7] As a result, millions of people each year interact with the criminal legal system by way of traffic enforcement.[8] While traffic enforcement may seem harmless in the long run, perhaps even crucial to public safety, the reality is that traffic stops can serve as an opening to more severe penalties. From a valid traffic stop, an officer may, for example, order the driver to exit the vehicle,[9] run background and related records checks on the driver,[10] and conduct certain limited

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better training, an end to "policing for profit," demilitarization, and union contracts that don't protect misbehaving police officers from being held accountable.

Conor Friedersdorf, *How to Distinguish Between Antifa, White Supremacists, and Black Lives Matter*, ATLANTIC (Aug. 31, 2017), https://www.theatlantic.com/politics/archive/2017/08/drawing-distinctions-antifa-the-alt-right-and-black-lives-matter/538320 [https://perma.cc/32BZ-DEL5].

5 ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018—STATISTICAL TABLES (2020), https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/QAY5-TZ86].

6 David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

7 Since traffic code violations qualify as criminal activity, a reasonable suspicion that a minor infraction, such as a failure to comply with vehicle regulations, has occurred can justify a stop without requiring evidence of the more serious "target" crime, like drug possession. *See id.*; *see also* Keith S. Hampton, *Stranded in the Wasteland of Unregulated Roadway Police Powers: Can "Reasonable Officers" Ever Rescue Us?*, 35 ST. MARY'S L.J. 499, 504–10 (2004) ("The reasonable suspicion standard accommodates police interests by enabling them to stop drivers even when the indications of criminal conduct are ambiguous. Because criminal conduct includes any infraction under the Transportation Code . . . the police have a wide array of laws to justify automobile stops based on admittedly ambiguous behavior.").

8 HARRELL & DAVIS, *supra* note 5, at 3 tbl.1.

9 Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (finding no constitutional violation where officer ordered driver out of the vehicle during a routine traffic stop as a precautionary safety measure).

10 Rodriguez v. United States, 575 U.S. 348, 355 (2015) (holding that an officer without reasonable suspicion may conduct "certain unrelated checks" during a routine traffic stop, so long as the officer does not do so in a way that would prolong the stop).

searches of the vehicle as well as the driver.[11] Consequently, disproportionate application of traffic enforcement will necessarily reinforce racialized patterns in policing, as it will continue to bring certain groups into contact with the criminal legal system more often than others.

For decades, activists and community members have lamented the traffic stop as a vehicle for impermissible racial profiling.[12] Generally defined, racial profiling is the practice of targeting individuals for crime enforcement or criminal investigation "based on [an] individual's race, ethnicity, religion or national origin."[13] While some states currently have laws that meaningfully prohibit racial profiling, the majority do not.[14] Even fewer specifically prohibit the use of race as a factor to any degree in selecting who to subject to routine investigation, like a short traffic stop.[15]

Laws against racial profiling may seem like a commonsense place to start in terms of addressing the racially disparate impacts of policing. In response, this Note makes two arguments. First, even the most robust bans against race-based policing are alone insufficient to address the issue of policing's racially disparate effects, which can be demonstrated by the enduring inequality in traffic enforcement nationwide. Definitional defects, judicial interpretation, and lack of effective enforcement mechanisms work both separately and together to undercut the policy goals that are held up to justify such bans. Second, given the inefficacy of statutory bans, jurisdictions should pursue change through other state-level reforms, either through aggressive

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11 Michigan v. Long, 463 U.S. 1032, 1035 (1983) (holding that police may conduct search of vehicle's passenger compartment when there is reasonable suspicion that the vehicle contains weapons or the driver is dangerous).

12 ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 7 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/G4ZF-S9K7].

13 *Racial Profiling: Definition*, ACLU, https://www.aclu.org/other/racial-profiling-definition [https://perma.cc/K54J-K2TJ].

14 At a minimum, a meaningful racial profiling ban should also contain a data collection provision for monitoring and enforcement purposes. POLICING PROJECT, IT'S TIME TO START COLLECTING STOP DATA: A CASE FOR COMPREHENSIVE STATEWIDE LEGISLATION (2019), https://www.policingproject.org/news-main/2019/9/27/its-time-to-start-collecting-stop-data-a-case-for-comprehensive-statewide-legislation [https://perma.cc/X3FZ-6UDY].

15 *See* NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA app. I (2014). Routine investigatory behaviors are police encounters stemming from activity generally understood to be within the purview of a police officer's daily responsibilities, such as conducting traffic stops for minor violations, conducting safety checks, or answering citizen complaints. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 435 (1984) (implying that pulling driver over after officer witnessed the driver weaving in and out of lanes constitutes a routine traffic stop).

interpretation of state constitutions, or alternatively by changing their police forces' approach to traffic stops.

The argument proceeds in three parts. Part I begins by giving an overview of the history of racial profiling and the role that pretextual stops have played in the perpetuation of racially biased patterns in policing. It then examines how the current state of the law makes traffic stops particularly vulnerable to selective application, subsequently enabling officers to bypass prohibitions on race-based policing. Part I ends by explaining why state-level reform is better suited to addressing the racially disparate impact of traffic enforcement than federal reform. Part II analyzes police traffic stop data to determine whether there has been any downward trend in the overrepresentation of Black drivers in the states that have enacted racial profiling bans as well as bans on race-based pretextual stops. Part II then goes on to identify the weaknesses in each law and then assesses how they may work individually and in tandem to undercut the intended purpose of the enacted racial profiling laws. Part III examines alternative proposals and assesses the strengths and weaknesses of each in turn.

I. BACKGROUND

A. *A System Primed for Abuse*

In 2018, over twenty-four million people came into contact with the police as the result of a traffic stop.[16] Theoretically, traffic stops are performed when a police officer has a reasonable articulable suspicion that a violation of the jurisdiction's traffic code has occurred or is occurring.[17] The problem is that traffic codes are sweeping in scope and extremely detailed; a given state's code can contain prescriptions as straightforward as when to use a vehicle's turn signals, [18] or requirements as exacting as the precise positioning of and distance that a license plate must sit from the ground.[19] Violations of either type could form the valid basis of a traffic stop. Moreover, officers need not always be correct in thinking that a violation has occurred in order for

16 HARRELL & DAVIS, *supra* note 5, at 4 tbl.2.

17 Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that to stop a person, an officer must have at least a reasonable suspicion of criminal activity).

18 N.Y. VEH. & TRAF. LAW § 1163 (McKinney 2022).

19 N.J. STAT. ANN. § 39:3-33 (West 2021) ("The owner of an automobile which is driven on the public highways of this State shall display not less than 12 inches nor more than 48 inches from the ground in a horizontal position . . . an identification mark or marks to be furnished by the division.").

a traffic stop—and, by extension, any evidence recovered from it—to be considered valid.[20] Finally, since the traffic codes are typically so comprehensive that universal enforcement would be impossible, officers are allowed to use their discretion to decide who to stop.[21] This broad latitude in enforcement is what gives the pretext stop its outsized power.

A pretext stop occurs when an officer who wishes to investigate an unrelated crime uses a minor traffic infraction as a pretext to stop a citizen and begin their investigation.[22] The United States Supreme Court has famously declined to prohibit this practice under the Fourth Amendment, reasoning that the Fourth Amendment does not take an individual officer's reasons for conducting a stop into account.[23] As such, under the current law, traffic stops are generally permissible under the Fourth Amendment as long as the officers making the stop have probable cause to believe that a traffic violation has occurred.[24] This is true regardless of how minor the violation, or any ulterior motives that the officers might have in making those stops.[25]

Scholars have consistently criticized this aspect of the Court's Fourth Amendment jurisprudence as virtual carte blanche for police to stop whomever they choose, often with inequitable results.[26] Although selective enforcement based on race is decidedly unconstitutional, critics have asserted that the scope of the traffic code necessarily leaves so much discretion to police officers that factors such as race, gender, or national origin could be used, either consciously or not, to target individuals for enforcement.[27] Critics worried that the *Whren* decision

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20 Heien v. North Carolina, 574 U.S. 54, 57 (2014) (holding that a traffic stop is valid when based on an officer's reasonable mistake of law). *But see, e.g.*, State v. Scheffert, 910 N.W.2d 577, 585 & n.2 (Iowa 2018) (refusing to apply *Heien* on state law grounds).

21 Illya Lichtenberg, *Police Discretion and Traffic Enforcement: A Government of Men?*, 50 CLEV. ST. L. REV. 425, 428 (2003).

22 Tracey Maclin & Maria Savarese, *Martin Luther King, Jr. and Pretext Stops (and Arrests): Reflections on How Far We Have Not Come Fifty Years Later*, 49 U. MEM. L. REV. 43, 46 (2018); *see* Abraham Abramovsky & Jonathan I. Edelstein, *Pretext Stops and Racial Profiling After* Whren v. United States*: The New York and New Jersey Reponses Compared*, 63 ALB. L. REV. 725, 726–27 (2000) ("Pretext stops . . . occur when police officers ostensibly stop motorists for traffic violations but are in fact motivated by the desire to obtain evidence of other crimes . . . .").

23 Whren v. United States, 517 U.S. 806, 813 (1996).

24 *Id.* at 819.

25 *Id.* at 816–18.

26 *See, e.g.*, Harris, *supra* note 6, at 546; Maclin & Savarese, *supra* note 22, at 56 (quoting Roy Caldwell Kime, who noted that, "had *Whren* been decided differently, 'a major shift in the way crimes are investigated and prosecuted in the United States would have occurred'"); Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 886 (2015) (listing the varied and numerous grounds upon which the *Whren* decision has been criticized).

27 *Whren*, 517 U.S. at 813; Harris, *supra* note 6, at 545–47, 550.

would effectively leave victims of discriminatory police tactics with no recourse.[28]

B. *The Racial Profiling Problem*

Around the same time that the Supreme Court took up the question of pretextual stops, state governments faced a public reckoning over their racial profiling practices.[29] Although racially discriminatory policing practices have existed as long as the institution of policing itself,[30] racial profiling as it is traditionally understood first gained widespread use by the federal Drug Enforcement Administration (DEA) during the Reagan era.[31] In the 1980s, the DEA began creating "profiles" of typical drug couriers, which included race-neutral factors such as driving patterns or particular stopping points, but also listed characteristics such as race, age, and gender.[32] These profiles were then disseminated to local law enforcement officers in trainings on drug interdiction best practices.[33] Scholars and civil rights organizations began challenging the use of racial profiles during routine traffic stops as a form of discrimination in the 1990s after several high-profile incidents of police brutality drew broader attention to the issue.[34] These challenges, supported by studies at the local level demonstrating the inefficiency of racial profiling practices,[35] resulted in the passage of

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28 Criticism of *Whren* has been so consistent and unrelenting that in a 2018 opinion, Justice Ginsburg, who had joined the *Whren* opinion in full, acknowledged the denunciation of *Whren* and expressed a willingness to consider an officer's subjective reason for acting in some circumstances. *See* District of Columbia v. Wesby, 138. S. Ct. 577, 594 (2018) (Ginsburg, J., concurring); *see also* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.4(f) n.85 (6th ed. 2020) (citing broad scholarship criticizing the decision in *Whren* as well as a number of state criminal cases in which the courts have chosen to reject the *Whren* standard).

29 MO. ATT'Y GEN.'S OFF., MISSOURI VEHICLE STOPS 2020 ANNUAL REPORT 4 (2020), https://ago.mo.gov/docs/default-source/vsr/2020-vehicle-stops-annual-report.pdf [https://perma.cc/5BEJ-2RF3].

30 Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/JA5L-M9G4].

31 Donald Tomaskovic-Devey & Patricia Warren, *Explaining and Eliminating Racial Profiling*, 8 CONTEXTS 34, 35 (2009).

32 Cigdem V. Sirin, *From Nixon's War on Drugs to Obama's Drug Policies Today: Presidential Progress in Addressing Racial Injustices and Disparities*, 18 RACE, GENDER & CLASS 82, 86 (2011).

33 *Id.*

34 Tomaskovic-Devey & Warren, *supra* note 31, at 36.

35 Despite aggressive use, pretextual traffic stops rarely lead to arrests for contraband, making them one of the most inefficient policing tools. David A. Harris, *Racial Profiling: Past, Present,*

legislation that banned the use of race in determining which individuals to subject to more intrusive police behavior.[36] This legislative project, which began in the late 1990s, is ongoing today.[37] Currently, existing bans come in an assortment of structures; some prohibit racial profiling but omit any enforcement mechanism for officers who engage in prohibited behavior,[38] while others merely impose data collection requirements.[39] Some statutes, like Missouri's, impose consequences for noncompliance.[40] Only seven states both expressly prohibit the use of racial profiling in selecting individuals for enforcement and actually give a specific definition of what racial profiling is.[41] These statutes consist of most or all of the following provisions: a definition of racial profiling that includes reliance on race, ethnicity, national origin, sexual orientation, gender, or religion in deciding whether to subject an individual to investigatory proceedings;[42] a mandate requiring law enforcement agencies in the state to draft a policy prohibiting such practices and outlining requirements for such policies;[43] officer training requirements;[44] collection of demographic data for those who are subjected to traffic stops or submit complaints of profiling;[45] and the

and Future?, ABA (Jan. 21, 2020) (citing FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE (2018)), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future [https://perma.cc/A9K5-FYHY].

36 *Id.*; *see also* 33A N.J. PRAC. SERIES § 14:15(a) (5th ed. 2021) ("N.J.S.A. 2C:30-6 was enacted . . . in response to the State Police–New Jersey Turnpike racial profiling controversy.").

37 *See, e.g.*, S. 91, 2021 Leg., Reg. Sess. (Ala. 2021); S. 3026, 2021 Leg., 2021–2022 Leg. Sess. (N.Y. 2021); George Floyd Justice in Policing Act of 2021, H.R. 1280, 117th Cong. (2021); End Racial and Religious Profiling Act of 2021, S. 597, 117th Cong. (2021).

38 *See, e.g.*, Racial Profiling Prevention and Data Oversight Act, 20 ILL. COMP. STAT. ANN. §§ 2715/5, 2715/40 (West 2021); Racial Profiling Prevention Act, TENN. CODE ANN. §§ 38-1-501 to -503 (West 2022).

39 *See, e.g.*, LA. STAT. ANN. § 32:398.10 (West 2021).

40 MO. ANN. STAT. § 590.650(6) (West 2021).

41 These states are Arkansas, California, Connecticut, Kansas, Missouri, New Jersey, and New Mexico. *See* NAACP, *supra* note 15, at app. I.

42 ARK. CODE ANN. § 12-12-1401(a) (West 2022); CAL. PENAL CODE § 13519.4(e) (West 2022); KAN. STAT. ANN. § 22-4606(d) (West 2022); MO. ANN. STAT. § 304.670(1)(5) (West 2021) (identifying which data needs to be collected to be analyzed for evidence of racial profiling); N.J. STAT. ANN. § 2C:30-6(a) (West 2021); N.M. STAT. ANN. § 29-21-2(A) (West 2022).

43 ARK. CODE ANN. § 12-12-1403(a)(1)–(7) (West 2022); CAL. PENAL CODE § 13519.4(a)–(b) (West 2022); KAN. STAT. ANN. § 22-4610 (West 2022); MO. ANN. STAT. § 590.650(5) (West 2021); N.J. STAT. ANN. § 2C:30-5(d) (West 2021); N.M. STAT. ANN. § 29-21-3(A)(1) (West 2022).

44 ARK. CODE ANN. § 12-12-1404 (West 2022); CAL. PENAL CODE § 13519.4(g)–(i) (West 2022); KAN. STAT. ANN. § 22-4610(c)(2)(A) (West 2022); MO. ANN. STAT. § 590.650(5)(3) (West 2021); N.M. STAT. ANN. § 29-21-3(A)(2) (West 2022).

45 ARK. CODE ANN. § 12-12-1405 (West 2022); CAL. GOV'T CODE § 12525.5 (West 2022); KAN. STAT. ANN. § 22-4611a (West 2022); MO. ANN. STAT. § 590.650(2) (West 2021).

creation or identification of a distinct entity to whom the data or complaints will be submitted for review.[46] At first glance, these statutes appear to be comprehensive, and thus the most likely to succeed. However, traffic enforcement continues to have racially disparate effects nationwide, even in these states where race may not be used as a factor in activity as routine as traffic enforcement.[47]

State-level reform is the best vehicle to address enduring inequalities in policing for two related reasons. First, the vast majority of police personnel in this country operate under state and local management, subject to rules—and sanctions—set by their commanding departments as well as their state and local governments.[48] As such, department policy changes, state judicial review, and specific legislative action are the most direct means of influencing police behavior. Second, while it is true that police are generally constrained by federal equal protection statutes as well as the Constitution, the federal government's authority to regulate state and local police practices is limited.[49] Federal power in this sphere is confined to indirect influence. The federal government can certainly *incentivize* change—for example, it could condition federal grants to departments on certain policy commitments, or it could leverage the Department of Justice's enforcement power and sue noncompliant departments.[50] Incentives, however, only work at the department level. They are not guaranteed to engender change in individual officers' behavior the way that state- and department-specific policy changes or judicial review can. It is generally acknowledged that changes in behavior are essential to the successful implementation of any type of policing reform.[51] Despite the fact that racially disparate policing is a nationwide problem, in this instance, it is

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46 ARK. CODE ANN. § 12-12-1405 (West 2022); CAL. PENAL CODE § 13519.4(j) (West 2022); KAN. STAT. ANN. § 22-4610(d) (West 2022); MO. ANN. STAT. § 590.650(3) (West 2021); N.M. STAT. ANN. §§ 29-21-3 to -4 (West 2022).

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

48 As of May 2020, 614,990 of the nation's 654,900 police and sheriff's patrol officers were employed by state and local governments. *Occupational Employment and Wages, May 2020: 33-3051 Police and Sheriff's Patrol Officers*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/oes/current/oes333051.htm [https://perma.cc/7XQH-Y4LA].

49 NATHAN JAMES & BEN HARRINGTON, CONG. RSCH. SERV., IF10572, WHAT ROLE MIGHT THE FEDERAL GOVERNMENT PLAY IN LAW ENFORCEMENT REFORM? 1 (2020), https://sgp.fas.org/crs/misc/IF10572.pdf [https://perma.cc/V32M-5DHN].

50 Alexis Karteron, *Congress Can't Do Much About Fixing Local Police—But It Can Tie Strings to Federal Grants*, CONVERSATION (June 1, 2021, 8:50 AM), https://theconversation.com/congress-cant-do-much-about-fixing-local-police-but-it-can-tie-strings-to-federal-grants-159881 [https://perma.cc/6WFF-GBHJ].

51 JOSHUA DRESSLER, 3 ENCYCLOPEDIA OF CRIME & JUSTICE: JUVENILE JUSTICE: JUVENILE COURT–RURAL CRIME 1100 (2d ed. 2002).

actually the states that occupy the better position to find workable solutions.

II. ANALYSIS

The difficulty in drafting statutory bans on race-based pretextual stops that can address racial disparities in police enforcement is multifaceted.[52] The statutes from the states highlighted in this Part are helpful in that they require departments to collect raw data, but for reasons discussed in Section II.A, drawing causal conclusions from raw data alone is complicated. However, what the data can and does show, as discussed in Section II.B, is that racial disparities persist in states that have express statutory bans in place, underscoring their inefficacy as currently drafted.[53] The majority of statutory bans operate under a handicap: not only do they suffer from mechanical infirmities, such as a failure to include enforcement mechanisms and definitional gaps, but their force is also undercut by judicial review. As discussed in Section II.C, these impediments handicap the statutes and make it impossible for them to bring about their intended result.[54]

A. *Limitations of Traffic Stop Data*

At the outset, it should be noted that race-based pretextual stops are difficult to identify even when one has the benefit of police testimony, let alone in the vacuum of quantitative data.[55] It is often impossible to know when the given reason for a stop is pretextual, save for an officer testifying as such.[56] Identifying race-based pretextual stops is doubly difficult; an officer is unlikely to admit they stopped a civilian because that person was of a certain racial group, as such an

52 *See infra* Section II.A.

53 *See infra* Section II.B.

54 *See infra* Section II.C.

55 Margaret M. Lawton, *The Road to* Whren *and Beyond: Does the "Would Have" Test Work?*, 57 DEPAUL L. REV. 917, 937–38 (2008) (observing that, in a jurisdiction that looks to an officer's subjective motivation, "there are arguably either fewer pretextual stops than suspected or it is difficult for courts to identify pretextual behavior without such an admission").

56 *Id.* at 953 ("In most of [the cases where an officer has been found to engage in pretextual behavior], the officer has either admitted acting under a pretext or the court has considered the officer's testimony to be incredible."); *see also* State v. Ladson, 979 P.2d 833, 836 (Wash. 1999) ("The officers do not deny the stop was pretextual.").

admission would automatically make the stop unconstitutional.[57] For that reason, much of the evidence that race-based pretext stops continue to occur is anecdotal.[58] One way to make up for this empirical deficit is by looking at the proportion of each population that is subject to a stop, whether or not they were searched, and on what grounds they were subjected to that search.[59] For example, if a larger proportion of a racial group is subjected to a search once the driver has been stopped, that could be indicative of bias in decisions regarding who to search.[60] Even better is to discern the proportion of the population that is subjected to a search when the traffic infraction justifying the stop is relatively minor, such as a failure to signal.[61] In states that provide data on the basis for a search, one could potentially estimate the number of stops that are pretextual by isolating the number of traffic stops that result in searches that were conducted pursuant to consent rather than probable cause.[62] Since consent searches require the least amount of articulable evidence to justify the search,[63] they are the strongest indicators that the desire to investigate another crime motivated the stop outside of a direct admission to that effect.[64] This conclusion could be further bolstered by

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57 Whren v. United States, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.").

58 *See, e.g.*, NAACP, *supra* note 15, at 13–16; Marsha Mercer, *Police "Pretext" Traffic Stops Need to End, Some Lawmakers Say*, PEW TRUSTS (Sept. 3, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/09/03/police-pretext-traffic-stops-need-to-end-some-lawmakers-say [https://perma.cc/JZW4-RB9C]; CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014) (using police survey data to isolate pretextual stops from traffic safety stops and finding that Black drivers are far more likely to be subject to the former than white drivers).

59 Pierson et al., *supra* note 47, at 738.

60 *Id.* at 738–39.

61 *See generally* EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 58.

62 While this conclusion is not expressly stated by the Stanford Open Policing Project, the threshold test employed to assess discrimination assumes that when a group is searched more often than another on the basis of less evidence, that disparity is indicative of discrimination rather than genuine desire to enforce laws. Pierson et al., *supra* note 47, at 739.

63 To conduct a consent search, officers generally only need the target to willingly agree to the search. No heightened degree of suspicion is required. Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973).

64 *See* Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RSRV. L. REV. 931, 934 (2016) (explaining that pretextual stops occur where "the stop was for a minor infraction and led to the officer asking prying questions and requesting to search the vehicle"); Charles Epp, *Do You Know Why You Pulled Me Over?*, WASH. MONTHLY (Aug. 26, 2018), https://washingtonmonthly.com/magazine/september-october-2018/do-you-know-why-you-pulled-me-over [https://perma.cc/9XVX-TDEG] ("Racial disparities . . . are greatest in so-called consent-based searches, in which the officer's legal justification for doing the search is nothing more than the driver's acquiescence, likely reluctant, to the officer's request to search.").

evaluating the search "hit rate" for each racial group.[65] For example, in some jurisdictions in 2020, Hispanic drivers were searched twice as often as white drivers, but searches of Hispanic drivers were less likely to turn up contraband.[66] This disparity could potentially support a claim that Hispanic drivers were unjustifiably targeted for stops and subsequent searches in those jurisdictions.[67]

However, traffic stop data can be difficult to interpret, especially when used to make comparisons between states. Differences between each state in specific data collection requirements can create the impression of bias or discrimination where none exists.[68] The data provided often spans different date ranges.[69] These complexities are further compounded by varying departmental policies on how to collect and record data.[70] Moreover, the quality of collected data can vary between departments within a state.[71] Finally, conclusions drawn from stop rates alone can be problematic, because differences between groups of people are not necessarily attributable to discrimination, but rather could be due to race- or gender-specific driving habits.[72]

Using data from the Stanford Open Policing Project can help account for such difficulties.[73] To date, the project has aggregated traffic stop data from over 255 million records.[74] The project collects data by filing public records requests with the individual state patrol agencies

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65 The "hit rate" is the proportion of stops in which a search resulted in the discovery of contraband. Pierson et al., *supra* note 47, at 739.

66 *Id.*

67 *Id.*

68 *Compare, e.g.*, ARK. CODE ANN. § 12-12-1405 (West 2022) (requiring data collection but not identifying any specific characteristics that should be recorded), *with* CAL. GOV'T CODE § 12525.5(b) (West 2022). If Arkansas, hypothetically, had much lower statewide contraband hit rates than California, that could simply indicate differences in each state's definition of "contraband" rather than bias on the part of Arkansas police officers.

69 *See* Pierson et al., *supra* note 47, at 737.

70 *stanford-policylab/opp*, GITHUB, https://github.com/stanford-policylab/opp/blob/master/data_readme.md [https://perma.cc/7A8Z-2DNC] ("Take care when making direct comparisons between locations. For example, if one state has a far higher consent search rate than another state, that may reflect a difference in search recording policy across states, as opposed to an actual difference in consent search rates.").

71 For example, in California, the Los Angeles Police Department did not provide data on the reason that a stop occurs, while the Oakland Police Department did. *Id.*

72 Pierson et al., *supra* note 47, at 737 ("In particular, per-capita stop rates do not account for possible race-specific differences in driving behaviour, including amount of time spent on the road and adherence to traffic laws.").

73 Only a select number of police departments directly make their traffic stop data available to the public, and those that do are inconsistent across jurisdictions in what they report. *See id.* at 736–37.

74 *Id.* at 737.

as well as municipal police departments.[75] The advantage of using data from the Stanford Open Policing Project is that the project standardizes the collected data such that more accurate conclusions can be drawn about policing on both a departmental and national level.[76] Such standardization is necessary because of idiosyncrasies in each department's submitted data, which, as explained above, can vary based on department policy, as can the time period covered by the data.[77] The relatively vague language in most statutes' data collection mandates, along with weak enforcement mechanisms in each, compounds this issue.[78] Furthermore, not only does each state differ at the statutory level regarding what type of data departments are supposed to collect, but the degree of each department's compliance, even within a state, varies as well. For example, although Section 12525.5(b) enumerates the specific data points that officers are required to record upon making a traffic stop,[79] the Los Angeles Police Department did not provide data on each enumerated category to the Stanford Open Policing Project's public records request.[80] New Mexico's police departments do not collect traffic stop data at all, and therefore could not be included in the dataset published by the project.[81] For those reasons, analysis in this Note is limited to intrastate trends within individual departments to the extent possible, rather than extending to interstate or interdepartmental comparisons.[82]

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75 *Id.*

76 To access the raw data and an in-depth explanation of the standardization process, see *Data*, STAN. OPEN POLICING PROJECT, https://openpolicing.stanford.edu/data [https://perma.cc/9NR9-5PAY].

77 Pierson et al., *supra* note 47, at 737.

78 See *infra* Section II.B for a discussion on the enforcement of data collection requirements.

79 The relevant provision, enacted in 2018, requires data records to include, at minimum: (1) the time, date, and location of the stop; (2) the reason for the stop; (3) the result of the stop, such as no action, warning, property seizure, or arrest; (4) whether a warning or citation was issued; (5) what the charge was, if an arrest was made; (6) perceived race, gender, and age of the driver; and (7) actions taken by the officer, including whether they asked for consent to search, if they seized property and the basis for doing so, and whether a search was conducted along with the basis for doing so. CAL. GOV'T CODE § 12525.5(b) (West 2022).

80 *See Data*, *supra* note 76. The data is published independently by the California Department of Justice. *How Do Stops Unfold?*, OPEN JUST., https://openjustice.doj.ca.gov/exploration/stop-data [https://perma.cc/83VK-VXXY]. Data from this source was rejected in favor of data from departments that submitted information to the Stanford Open policing project in order to preserve uniformity in the data and to better evaluate multiyear trends.

81 Jeff Proctor & Elaina Jameson, *NM Lacks Criminal Justice Data on Race, Ethnicity*, N.M. IN DEPTH (Mar. 11, 2019), http://nmindepth.com/2019/03/11/nm-lacks-criminal-justice-data-on-race-ethnicity [https://perma.cc/8FJD-RQ82].

82 Because the department from Arkansas only reported data covering a single year, it is excluded from this analysis. *See Data*, *supra* note 76. Furthermore, while the state police

B. *Traffic Stop Demographics*

At time of writing, there are only seven states that have statutes that approach the NAACP's definition of a comprehensive racial profiling law[83] and apply it to prohibit racial profiling in pretextual stops.[84] In theory, these statutes represent some of the most thorough prohibitions on racial profiling. A closer look at the demographics collected from these states belies the statutes' impotence.

The purported goal of these racial profiling and race-based pretextual stop statutes was to help reduce the disparate impact of policing across racial groups.[85] If these statutes were, in fact, having that effect, one would expect to see stop and search rates that closely mirror population demographics in those states, or at least to see demographic overrepresentation diminish over time.[86] Instead, the data shows relative stagnancy across years in stop rates, with Black drivers consistently overrepresented in stop data compared to their proportion of the state population.[87] This holds true for almost every department examined in this Note.[88] In Wichita, Kansas, Black people made up 11.5% of the population in 2015.[89] However, between 2006 and 2016, Black drivers made up between 12% and 16% of traffic stops in the city.[90] In Missouri, Black people made up 11.5% of the state's population

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department was preferred when selecting representative data, this author chose to prioritize quality of data in terms of detail over the department it came from.

83 NAACP, *supra* note 15, at app. II ("A comprehensive definition [of racial profiling] would prohibit the profiling of individuals and groups by law enforcement agencies even partially on the basis of race, ethnicity, national origin, religion, gender identity or expression, sexual orientation, immigration or citizenship status, language, disability . . . housing status, occupation, or socioeconomic status except when there is trustworthy information, relevant to the locality and time frame, which links person(s) belonging to one of the aforementioned groups to an identified criminal incident.").

84 *See supra* Section I.B.

85 *See, e.g.*, Tomaskovic-Devey & Warren, *supra* note 31, at 36; N.J. STAT. ANN. § 2C:30-5(c)–(f) (West 2021); *see also* MO. ATT'Y GEN.'S OFF., 2019 VEHICLE STOPS EXECUTIVE SUMMARY: MESSAGE FROM ATTORNEY GENERAL ERIC SCHMITT, https://ago.mo.gov/home/vehicle-stops-report/2019-executive-summary [https://perma.cc/23QY-LDC9].

86 Pierson et al., *supra* note 47, at 736 (explaining that although not conclusive, population benchmarks "are a starting point for understanding racial disparities in traffic stops").

87 *Id.*

88 The exceptions to this pattern are the Connecticut state police and the Camden, New Jersey police department, both of which have stop demographics that closely parallel the demographics of the general population. *See Data*, *supra* note 76; *infra* notes 99–101 and accompanying text.

89 U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: WICHITA, KANSAS (2015), https://data.census.gov/cedsci/table?g=0400000US20_1600000US2079000&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2015.DP05 [https://perma.cc/9DKT-4DC9].

90 *See Data*, *supra* note 76.

in 2015,[91] but between 2012 and 2019, Black drivers represented between 17% and 20% of stops made by the Missouri police departments statewide.[92] In an extreme case, in Oakland, California, Black people constituted just 26% of the population in 2015.[93] However, between 2013 and 2017, Black drivers made up between 57% and 60% of the stops made by the Oakland Police Department.[94] With the exception of California,[95] all of these state statutes have been effective since at least 2011.[96] Even allowing for a grace period as departments begin the initial process of collecting data, agencies have had ample time to use the data they have collected to inform their practices. The fact that disparities in enforcement consistently remain high, and in fact have increased over time, is indicative of the statutes' inability to achieve that goal, especially since some of them have remained unamended since their initial enactment.[97]

Data from Connecticut, Missouri, and California, which all include the necessary information to calculate hit rates, support the conclusion that despite the enactment of racial profiling and race-based pretextual stop bans, traffic enforcement is still being applied inequitably.[98] In Connecticut, the demographics of the population in 2015 were as follows: 77.3% white, 10.3% Black, 4.2% Asian, and 14.7% Hispanic or

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91 U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: MISSOURI (2015), https://data.census.gov/cedsci/table?g=0400000US29&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2015.DP05 [https://perma.cc/A6RF-JCYB].

92 MO. ATT'Y GEN.'S OFF., VEHICLE STOPS REPORT (2000–2020), https://ago.mo.gov/home/vehicle-stops-report [https://perma.cc/HWU8-W55U].

93 U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: OAKLAND, CALIFORNIA (2015), https://data.census.gov/cedsci/table?g=0400000US06_1600000US0653000&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2015.DP05 [https://perma.cc/PB5D-4WZ2].

94 *See Data*, *supra* note 76.

95 CAL. PENAL CODE § 13519.4 (West 2022) (effective Jan. 1, 2017), *amended by* CAL. PENAL CODE § 13519.4 (West 2022) (effective Jan. 1, 2023).

96 ARK. CODE ANN. §§ 12-12-1401 to -1404 (West 2022) (effective July 16, 2003); ARK. CODE ANN. § 12-12-1405 (West 2022) (effective July 31, 2009); KAN. STAT. ANN. § 22-4609 (West 2022) (amendment effective May 26, 2011); MO. ANN. STAT. § 590.650 (West 2021) (amendment effective 2004); N.J. STAT. ANN. § 2C:30-5 (West 2021) (effective Mar. 14, 2003); N.M. STAT. ANN. § 29-21-2 (West 2022) (effective June 19, 2009). California's statute was enacted in 1990, but that version only required the development and dissemination of racial sensitivity training. 1990 Cal. Legis. Serv. 480 (West). Compulsory data collection and reporting did not become effective until 2018. CAL. GOV'T CODE § 12525.5 (West 2022) (effective Jan. 1, 2018), *amended by* CAL. GOV'T CODE § 12525.5 (effective Jan. 1, 2023).

97 New Jersey and New Mexico do not appear to have amended their statutes since their enactment. N.J. STAT. ANN. § 2C:30-5; N.M. STAT. ANN. § 29-21-2.

98 Pierson et al., *supra* note 47, at 739; *see also Data*, *supra* note 76 (explaining that California and Connecticut provide data from a limited time period, so it is impossible to meaningfully examine long-term trends); MO. ATT'Y GEN.'S OFF., *supra* note 29, at 14.

Latino.[99] These demographics remained relatively stable between 2013 and 2015, with only minimal variations.[100] For those years, the traffic stop data indicates that the stop rate actually reflects population demographics rather closely: white drivers made up between 69% and 73% of stops, while stops of Black drivers constituted between 13% and 14% of stops.[101] However, Black drivers made up about 26% of total searches.[102] In comparison, despite making up the vast majority of total stops, searches of white drivers made up, on average, only 50% of the total search count.[103] The Stanford Open Policing Project's analysis of officers' decisions to search indicates that this disparity is most likely due to discrimination in selecting who to search.[104] In Missouri, the data published by the state indicates that since 2000, Black and Hispanic drivers have consistently been searched more often than white drivers with little meaningful shift, yet have consistently had lower hit rates.[105] This evidence indicates that, despite the presence of the racial profiling and race-based pretextual stop bans, there is a good chance that pretextual stops are still being applied in ways that have racially disparate effects. Moreover, this trend could be present in all the departments in the aforementioned jurisdictions but is simply not visible due to the lack of data reporting.

C. *Self-Sabotaging Statutes*

A preliminary analysis of the stop data indicates that these statutes have not had the desired effect of reducing the use of racially discriminatory policing tactics. There are at least three reasons that this could be true. First, not all of these statutes mandate the type of data

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99 U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: CONNECTICUT (2015), https://data.census.gov/cedsci/table?g=0400000US09&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2015.DP05 [https://perma.cc/DM35-C3DA].

100 U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: CONNECTICUT (2014), https://data.census.gov/cedsci/table?g=0400000US09&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2014.DP05 (last visited Mar. 16, 2022); U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: CONNECTICUT (2013), https://data.census.gov/cedsci/table?g=0400000US09&d=ACS%205-Year%20Estimates%20Data%20Profiles&tid=ACSDP5Y2013.DP05 (last visited Mar. 16, 2022).

101 *See Data*, *supra* note 76.

102 *See id.*

103 *Id.*

104 *See id.* For an in-depth explanation of how search data is analyzed to detect discrimination, see Pierson et al., *supra* note 47, at 739.

105 *See* MO. ATT'Y GEN.'S OFF., *supra* note 92.

needed to create effective policy solutions.[106] Collecting the most basic demographics can be helpful in establishing that disparities exist but will not explain *why* those disparities exist.[107] To be useful, the data needs to eliminate potentially obfuscating factors, like criminality and race-specific driving habits. [108] It also needs to cover enough departments in a state such that policymakers have an adequate sample size from which to make inferences. Finally, the data must span a sufficient number of years to detect long-term trends.[109] Without this information, state legislatures and local law enforcement departments will not be able to obtain a clear picture of what is happening from department to department, and therefore could never adequately address failures. The fact that each department in the states above is free to draft its own policies regarding training and stop procedures can bring a powerful element of flexibility to law enforcement—after all, the challenges facing law enforcement in each state can vary widely, and department policy decisions reflect that variety.[110] However, gaps in data collection will always create a blind spot in policy creation, preventing police from serving their communities equitably. While some of the datasets examined in this Note satisfy the above-mentioned criteria, the majority do not.[111] The extent of the problem is made clear by revisiting the data from Connecticut. Recall that Connecticut's traffic stop demographics parallel the population fairly closely.[112] If one looked

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106 *See* Emily Badger, *Why It's So Hard to Study Racial Profiling by Police*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/04/30/it-is-exceptionally-hard-to-get-good-data-on-racial-bias-in-policing [https://perma.cc/5M23-3LEV] (describing the problem with current policing data as one where "we are fundamentally trying to compare stop and arrest rates (about which we have data) with criminal behavior (about which we seldom do)").

107 *See id.*

108 *See id.* ("What you'd want to know is this: Since African-Americans are six times more likely to be stopped and frisked, are they six times more likely to be in possession of something criminal when they're stopped?" (quoting John Roman, Senior Fellow, Urb. Inst., Just. Pol'y Ctr.)).

109 For example, the Missouri Vehicle Stops Reports compare disparity indexes to monitor any changes over time. *See, e.g.*, MO. ATT'Y GEN.'S OFF., *supra* note 29, at 12–15.

110 *Compare* LANSING POLICE DEP'T, INTERNAL MEMORANDUM: NEW GUIDELINES FOR TRAFFIC STOPS (2020) [https://perma.cc/C3VX-NT4U] (prohibiting officers from initiating traffic stops for secondary violations, defined as defective equipment violations), *with* PHILA. POLICE DEP'T, DIRECTIVE 12.8: VEHICLE OR PEDESTRIAN INVESTIGATIONS 1 (2019) [https://perma.cc/WZ84-5Z53] ("[Without exception,] [a] police officer will stop any vehicle where the driver or occupant(s) are observed violating the law, or where the officer reasonably believes the vehicle, driver, or occupant(s) were violating the law.").

111 Connecticut's police departments provide data on how often contraband is found during a search. Oakland, California's police department only provides hit rates for two years, 2016 and 2017. *Data*, *supra* note 76.

112 *See supra* Section II.B.

only at the demographics of traffic stops, one might believe that police departments in Connecticut had succeeded in eliminating racial profiling as a policing tactic. It is only by looking to the search data that one can observe the bias in its policing tactics. If Connecticut did not collect the search data—and, indeed, many states are in such a position—that statistic would be wholly invisible except in anecdotal form, and department policies would not be able to respond appropriately.

However, there is evidence that data collection alone cannot resolve the racial profiling problem and that the statutes, as enacted, are inherently incapable of doing so as well. Section 590.650 of Missouri's Code is relatively robust in comparison to the other states' statutes. It includes an enforcement mechanism by which the governor may withhold state funds from noncompliant agencies.[113] It has typically had fairly universal compliance from all departments that are bound by the statute to report their traffic stop data.[114] Finally, the data it requires police departments to collect is thorough; departments are obligated to collect stop data, search data, and hit rates, and review such data periodically to look for patterns among individual officers.[115] The Attorney General's report is obligated to include a "disparity index": a proportion equaling the actual number of drivers stopped in a particular demographic over the number that is expected based on their proportion of the population.[116] But even though Section 590.650 addresses the majority of the concerns raised above, Missouri's stop and search rates of Black and Hispanic drivers started high in 2000 when the state first began collecting data and have stayed high in subsequent years.[117] Furthermore, despite its ostensibly powerful racial profiling and pretext stop ban, Missouri has had a number of high-profile police brutality and racial profiling incidents in recent years stemming from traffic stops; Ferguson, a city in the Greater St. Louis metropolitan area, has been under a consent decree with the Department of Justice since 2016, following an investigation revealing persistent patterns of

113 MO. ANN. STAT. § 590.650(6) (West 2021).

114 *Id.* § 590.650; *see also* POLICING PROJECT, *supra* note 14 ("Missouri, which has a noncompliance penalty, received stop data from 97.6% of its law enforcement agencies in 2018.").

115 MO. ANN. STAT. § 590.650(2).

116 MO. ATT'Y GEN.'S OFF., *supra* note 29, at 12.

117 Summer Ballentine, *Black Missouri Drivers 91% More Likely to Be Stopped, State Attorney General Finds*, PBS NEWS HOUR (June 10, 2019, 2:11 PM), https://www.pbs.org/newshour/nation/black-missouri-drivers-91-more-likely-to-be-stopped-state-attorney-general-finds [https://perma.cc/44KU-JLRR].

prejudiced policing and abuses of power.[118] Analysis of Missouri's traffic stop data has indicated that the statute has inspired no significant change in racial disparities, and in fact racial gaps have widened over the past twenty years since Section 590.650 became effective.[119] This data reveals over- or underrepresentation of groups within the population of those subjected to stops.[120] Since Missouri has begun collecting traffic stop data, Black and Hispanic drivers have consistently been overrepresented in the total number of stops and searches.[121] Given the relative strength of Missouri's statute and the lack of resulting change, there is strong evidence that racial profiling and pretextual stop bans, without further guidance, simply cannot equalize the racially disparate impacts of pretextual stops.

There are at least three reasons why, despite seemingly robust language, a statutory ban on pretextual stops and racial profiling may be impotent. First, judicial interpretation of these statutes is lacking. Claims of racial profiling are generally raised as a matter of equal protection under the Federal Constitution rather than as a question of state law.[122] As such, there has been scant opportunity for state judiciaries to apply an aggressive interpretation of these statutes, or to articulate any binding interpretation at all. Even when claims of racial profiling are raised as a matter of state constitutional law, all of the aforementioned states apart from New Mexico have applied some

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118 *See* Consent Decree, United States v. City of Ferguson, No. 16-cv-000180 (E.D. Mo. Mar. 17, 2016), https://www.justice.gov/opa/file/833431/download [https://perma.cc/4BML-M8PM]; *see also* CIV. RTS. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/GED5-292J]. The Department of Justice's investigation into the Ferguson Police Department was prompted in part by the fatal police shooting of Michael Brown, leading to nearly a year of protests in the city. *See* Jon Swaine, *Ferguson Protests: State of Emergency Declared After Violent Night*, GUARDIAN (Aug. 10, 2015, 9:06 PM), https://www.theguardian.com/us-news/2015/aug/10/ferguson-protests-st-louis-state-of-emergency [https://perma.cc/22AA-KLBT]; Shaila Dewan & Mike Baker, *Rage and Promises Followed Ferguson, but Little Changed*, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/13/us/unrest-ferguson-police-reform.html [https://perma.cc/2VQJ-F44W].

119 Mike Sherry & Mary Sanchez, *Decades of Data Suggest Racial Profiling Is Getting Worse, Not Better*, FLATLAND KC (Oct. 28, 2020, 6:00 AM), https://www.flatlandkc.org/stopped-profiling-the-police/decades-of-data-suggest-racial-profiling-is-getting-worse-not-better [https://perma.cc/N7TC-8B9G].

120 MO. ATT'Y GEN.'S OFF., *supra* note 92 (viewing the data collected from 2010 to 2019 as a cohesive dataset to observe long-term trends).

121 *Id.*

122 The Supreme Court's holding in *Whren v. United States*, 517 U.S. 806, 813 (1996) foreclosed any argument that a search motivated by racial profiling was unreasonable within the meaning of the Fourth Amendment and directed defendants who claimed they were victims of selective enforcement due to racial profiling to seek their remedy under the Equal Protection Clause.

version of the Supreme Court's holding in *Whren v. United States*.[123] In *Whren*, the Court held that so long as there is an objectively reasonable basis for conducting the stop— for example, a witnessed traffic violation or belief that one has occurred—an inquiry into the factors that led a police officer to decide to stop the individual is inappropriate.[124] The Court argued that the Fourth Amendment only required probable cause to believe that a violation of law occurred.[125] Since violations of the traffic code qualify as violations of law, the Court reasoned, the Fourth Amendment required no further inquiry.[126]

The states that have adopted this approach weaken their statutes' potential impact. Whether or not a racially motivated pretextual stop has occurred necessarily requires a subjective inquiry, because the question examines a particular officer's motivation for executing the stop. Because the *Whren* approach forecloses analysis based on an officer's subjective motivations in the Fourth Amendment context, courts are unable to detect when a pretextual stop has occurred contrary to existing laws. Without undertaking an inquiry into subjective intent, the statutes—and any potential consequences for violating them—can be bypassed entirely. As a result, citizens are left vulnerable to profiling even in states where public servants are expressly forbidden from considering race in carrying out their duties. Under this framework, the bans on racial profiling become little more than data collection requirements with strong language that purport to protect citizens from misconduct without actually doing so.

A second problem with these statutes is that four out of the seven states discussed in this Note have express exceptions in which race may still be employed in policing, and the language of Connecticut's statute is ambiguous as to whether race may be used in combination with other factors.[127] In these states, allowing the use of race in combination with

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123 Margaret M. Lawton, *State Responses to the* Whren *Decision*, 66 CASE W. RSRV. L. REV. 1039, 1045 (2016) ("Only Washington and New Mexico have determined that their state constitutions provide broader protection than the United States Constitution on the issue of when a traffic stop is reasonable."); *see also* People v. Robinson, 767 N.E.2d 638, 649–50 (N.Y. 2001) (listing which state courts follow *Whren* without qualification, which state courts cite *Whren* with approval, and which state courts employ a *Whren* analysis without expressly citing *Whren*).

124 *Whren*, 517 U.S. at 819.

125 *Id.* at 817–18.

126 *Id.*

127 Arkansas, California, Kansas, and New Mexico's statutes all state that the use of race in a specific suspect description would not fall within the definition of racial profiling. *See* ARK. CODE ANN. § 12-12-1401(b) (West 2022); CAL. PENAL CODE § 13519.4(e) (West 2022); KAN. STAT. ANN. § 22-4606(d) (West 2022); N.M. STAT. ANN. § 29-21-2 (West 2022); *see also* CONN. GEN. STAT. ANN. § 54-1*l*(d) (West 2022) (specifying that race may not be the "sole" factor without addressing whether or not it may be used in combination with others).

other factors creates room for race to play an otherwise impermissible role in deciding which individuals to subject to search.[128] For example, the Arkansas, California, Kansas, and New Mexico statutes all create an exception to the proscription on the use of race when race is identified with other characteristics in a specific suspect description.[129] However, suspect descriptions can be extremely unreliable and can themselves be the product of racial biases.[130] Moreover, even when police have a number of descriptive characteristics for an individual suspect, the race descriptor often bears an outsized effect on who they choose to investigate.[131] The result is that innocent people have the shadow of probable cause cast over them for no reason other than their perceived race, directly contravening the purpose of the statutes. One notorious example is in *Brown v. City of Oneonta*.[132] That case involved the burglary and assault of an elderly white woman at night.[133] Despite not being able to see clearly due to poor lighting, the victim alleged that she could tell the assailant's arm was brown and that he moved quickly.[134] Based on that information alone, she identified her assailant as a young Black man and told police that he had cut his hand in the struggle of the assault.[135] Using this description, police officers stopped over two hundred Black university students and residents to inspect their hands.[136] At the time, there were less than three hundred Black people total living in Oneonta.[137]

These exceptions also compound the risk that innocent people will be swept up in the net of the criminal legal system. There is limited

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128 Bela August Walker, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 COLUM. L. REV. 662, 664 (2003) (arguing for the elimination of race-based suspect descriptions because even when police have multiple descriptors of a suspect, "race becomes not one of many characteristics, but instead the defining characteristic employed").

129 ARK. CODE ANN. § 12-12-1401(b); CAL. PENAL CODE § 13519.4(e); KAN. STAT. ANN. § 22-4606(d); N.M. STAT. ANN. § 29-21-2.

130 Dov Fox, *The Second Generation of Racial Profiling*, 38 AM. J. CRIM. L. 49, 49–50 (2010).

131 *See, e.g.*, Choi v. Gaston, 220 F.3d 1010, 1013–14 (9th Cir. 2000) (Noonan, J., concurring) (involving a description identifying a Vietnamese man named Phu Nguyen, five feet and ten inches tall, black hair and brown eyes, eighteen years of age, and wearing a white T-shirt and black pants, while the man police arrested was a five-foot-seven, thirty-two-year-old Korean man named Yong Ho Choi); Washington v. Lambert, 98 F.3d 1181, 1183–84 (9th Cir. 1996) (involving Black men targeted for stop and search due to alleged similarity to suspect description when in fact the only common characteristic was their race).

132 Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 1999).

133 *Id.* at 334.

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

evidence of legislative intent associated with these statutes,[138] which means that there are fewer guiding principles for judges to follow when interpreting these statutes.[139] That lack of context can translate into an unwillingness to invalidate searches based on race and exclude the evidence that results from them. The exclusionary rule is an incentive for police officers to operate within the bounds of the Constitution.[140] Without it, there is no practical reason for police to change their investigatory tactics. Consequently, in its absence, individual biases can permeate enforcement decisions. Moreover, since inquiries into subjective intent in pretextual stop cases are categorically repudiated, courts may be less able to identify or remedy those harms when they do occur.[141] These statutes are then even further undermined by additional exceptions to the proscription of the use of race in policing: Missouri carves out an exemption from the statute for certain types of roadblocks and checkpoints,[142] and New Mexico allows police to use race-specific investigations if they get a credible tip linking persons of a certain race to a particular crime.[143] These exceptions threaten to swallow the rule against racial profiling.

Finally, the race-based policing statutes as a whole cannot be effective because they largely carry no enforcement mechanism for departments that violate them. Each statute carries with it mandates, be they data collection requirements, training requirements, or policy-drafting requirements, but out of the seven states discussed in this Note, only Missouri and New Jersey name any potential consequences for failure to comply with their respective demands. [144] Without

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138 For example, in California, there is very little evidence of the legislature's intent or the statute's historical context available, even in newspapers from that time. To the extent it exists in useful form, it is limited to an official declaration preceding the prohibition reiterating the harms of racial profiling and declaring that officer training is necessary. CAL. PENAL CODE § 13519.4(d) (West 2022).

139 LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2014) ("[S]ome Justices may be willing to look to legislative history to clarify ambiguous text.").

140 Herring v. United States, 555 U.S. 135, 141 (2009) ("[T]he exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence' [of police misconduct]." (first alteration in original) (quoting United States v. Leon, 468 U.S. 897, 909 (1984))).

141 *See* Whren v. United States, 517 U.S. 806, 813 (1996).

142 MO. ANN. STAT. § 590.650(8) (West 2021).

143 N.M. STAT. ANN. § 29-21-2(B) (West 2022).

144 MO. ANN. STAT. § 590.650(6) (providing that failure to comply with the enumerated requirements can result in the withholding of state funds that were otherwise appropriated to the noncompliant law enforcement agency); N.J. STAT. ANN. § 2C:30-6(a) (West 2021) ("[A] public servant acting or purporting to act in an official capacity commits the crime of official deprivation

enforcement mechanisms in place, there is little statutory incentive for police departments to comply with any of the requirements. However, even *with* enforcement mechanisms in place, the statutes seem poorly positioned to gain real results. Missouri's statute provides that each law enforcement agency should create a policy that "[p]rohibits the practice of routinely stopping members of minority groups," reviews police officers for patterns, provides training for those who have developed patterns of stopping minorities, and provides counseling for them.[145] However, aside from a brief description of what a training should cover, there are no details as to how the law enforcement agency can satisfy this policy requirement.[146] Moreover, the singular enforcement tool—the withholding of funds—is entirely discretionary.[147] Given that police departments have notoriously poor internal and interdepartment accountability structures, the lack of consequences for officers who continue to engage in race-based policing practices is particularly alarming.[148]

New Jersey's statute takes a different approach by creating criminal penalties for public servants who engage in discriminatory behavior while carrying out their public duties.[149] However, even that penalty is not necessarily going to be effective. First of all, the statute has never successfully been applied to a police officer.[150] Second, even if an

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of civil rights if, knowing that his conduct is unlawful, and acting with the purpose to intimidate or discriminate against an individual or group of individuals because of race, color, religion, gender, handicap, sexual orientation or ethnicity, the public servant: (1) subjects another to unlawful arrest or detention, including, but not limited to, motor vehicle investigative stops, search, [and] seizure . . . .").

145 MO. ANN. STAT. § 590.650(5).

146 *Id.* ("[The course] shall stress understanding and respect for racial and cultural differences, and development of effective, noncombative methods of carrying out law enforcement duties in a racially and culturally diverse environment.").

147 *Id.* § 590.650(6) (specifying that the governor *may* withhold state funds from noncompliant law enforcement agencies, not that the governor shall or must).

148 *See, e.g.*, Martha Bellisle, *Fired Repeatedly, but Back on the Job: Police Officers in Misconduct Cases Routinely Return to Force Through Arbitration Process*, CHI. TRIB. (June 24, 2020, 10:38 AM), https://www.chicagotribune.com/nation-world/ct-nw-police-misconduct-arbitration-20200624-de63ttai3nh6hpfefb6ruf64yi-story.html (last visited Mar. 22, 2022) (detailing how officers often use the arbitration process to overturn disciplinary action taken against them); Timothy Williams, *Cast-Out Police Officers Are Often Hired in Other Cities*, N.Y. TIMES (Sept. 10, 2016), https://www.nytimes.com/2016/09/11/us/whereabouts-of-cast-out-police-officers-other-cities-often-hire-them.html [https://perma.cc/7H8C-W4VB].

149 N.J. STAT. ANN. § 2C:30-6.

150 *See, e.g.*, El v. Wehling, No. 12-7750, 2015 WL 1877667, at *3–4 (D.N.J. Apr. 23, 2015) (claim against police officers dismissed on procedural grounds); State v. Jenkins, No. A-1192-10T2, 2013 WL 462265, at *2 (N.J. Super. Ct. App. Div. Feb. 8, 2013) (claim against police officers dismissed); Mouratidis v. Katz, No. 18-15528, 2019 WL 2004328, at *4 (D.N.J. May 7, 2019)

officer's conduct was severe enough to warrant indictment, it is not immediately clear that the officer would be found guilty. An element of the crime is that the officer must subject another to unlawful arrest or detention, with the term "unlawful" defined later in the statute as an act that either (1) violates the United States Constitution or the New Jersey Constitution, or (2) is a criminal offense under the laws of New Jersey.[151] Under the Supreme Court's decision in *Whren*, subjecting someone to a pretextual stop is not a violation of the Fourth Amendment, even if the main impetus for the stop is race-based.[152] New Jersey courts have typically applied the *Whren* decision in most cases of pretext stops regardless of whether race was a motivating factor, with the only exceptions being in cases where defendants were able to present incredibly detailed statistical evidence demonstrating discriminatory treatment.[153] Therefore, given the state of the law, it is hard to say whether such conduct would actually violate the New Jersey Constitution as well. There is also the additional mens rea problem: for criminal liability to apply, the state would have to be able to show that the officer knowingly engaged in conduct that was unlawful with the purpose to intimidate or discriminate.[154] Aside from the fact that it is not immediately clear whether making pretextual stops, even if using race as a factor, is actually unlawful as defined by N.J.S.A. 2C:30-6, it is conceivable that an officer still may not be convicted for failure to act with the requisite purpose.

III. POSSIBLE SOLUTIONS

The data suggests that, in their current forms, the type of bans on racial profiling and race-based pretextual stops in these seven states are insufficient to eliminate, or even mitigate, the role that racial profiling plays in perpetuating a racially discriminatory policing system. A

(unsuccessful suit against N.J. Superior Court judge and judicial staff); Henry v. Essex Cnty. Prosecutor's Off., No. 16-8566, 2017 WL 1243146, at *3–4 (D.N.J. Feb. 24, 2017) (claim against county prosecutor's office dismissed); Wilson v. Somerset Cnty. Prosecutors Off., No. 15-6034, 2016 WL 1090811, at *10–11 (D.N.J. Mar. 21, 2016) (claim against county prosecutor's office dismissed); Major Tours, Inc. v. Colorel, 799 F. Supp. 2d 376, 406 (D.N.J. 2011) (claim against state-run bus inspection unit survived defendants' motion for summary judgment); Lewis v. Harris, 908 A.2d 196, 214 (N.J. 2006) (same sex couples brought claims against local officials for refusing to grant marriage licenses).

151 N.J. STAT. ANN. § 2C:30-6(e).

152 Whren v. United States, 517 U.S. 806, 813 (1996).

153 Abramovsky & Edelstein, *supra* note 22, at 743–44; *see* State v. Soto, 734 A.2d 350, 360 (N.J. Super. Ct. 1996) (plaintiffs's claim of selective enforcement succeeded after plaintiffs presented an intense empirical study demonstrating the breadth of the problem).

154 N.J. STAT. ANN. § 2C:30-6(a).

commonly proposed reform is to limit the use of pretextual stops, although the form that such a ban would take is often debated.[155] Many scholars and lawmakers have proposed legislative solutions, which often involve reducing, in some form, the role that police play in traffic enforcement.[156]

What drives disparities in policing seems largely to be police discretion.[157] As such, reform-minded jurisdictions should strive to eliminate police discretion from the equation altogether, either by limiting jurisdiction over traffic enforcement or wholly disentangling traffic enforcement from criminal enforcement. There have been a number of proposals to accomplish these goals, couched both in legislative and judicial solutions. The following Sections consider these proposals in turn.

A. *Legislative and Policy Reform*

The main problem with allowing officers to engage in traffic stops is that the amount of discretion that is afforded to officers makes them extremely vulnerable to unconscious biases in deciding who to stop.[158] Moreover, because crime prevention is a major function of policing and often a high priority,[159] police officers will always have an incentive to instigate more stops in the hopes of detecting criminal activity. As such, some scholars and activists have argued that disentangling traffic enforcement from crime prevention, namely by replacing police officers with a wholly separate traffic enforcement body, would be the most

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155 Blanks, *supra* note 64, at 932 ("I contend the use of pretextual stops ought to be severely curtailed or eliminated outright in order to improve police relationships with African Americans.").

156 Summer 2021 saw renewed calls to "Defund the Police," a movement that generally calls for the reduction of police budgets and the reallocation of those funds to other public safety and health measures. Dionne Searcey, *What Would Efforts to Defund or Disband Police Departments Really Mean?*, N.Y. TIMES (Dec. 10, 2020), https://www.nytimes.com/2020/06/08/us/what-does-defund-police-mean.html [https://perma.cc/JCX8-GYLG]; Brett Simpson, *Berkeley Approves Goals to Cut Police Budget by 50%, Reduce Cops' Role in Traffic Enforcement*, S.F. CHRON. (July 21, 2020, 8:46 PM), https://www.sfchronicle.com/crime/article/Berkeley-council-bans-police-from-traffic-15410326.php [https://perma.cc/G79Z-6GT9]; *see also infra* Section III.A.

157 *See supra* Part II.

158 Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 697 (2021) ("The data from Washington suggest that legal rules giving police officers increased discretion to conduct pretextual or mixed-motive traffic stops may contribute to inequality by facilitating racial profiling.").

159 NAT'L INST. OF JUST., U.S. DEP'T OF JUST., CRIME AND POLICING 1 (1988) ("The core mission of the police is to control crime. No one disputes this.").

effective solution to the pretext stop problem.[160] The city of Berkeley, California has elected to take such an approach.[161] In the Berkeley model, all traffic stops—infractions such as speeding or running red lights—could be outsourced to cameras, which only capture when a car violates a traffic safety law.[162] So long as cameras are not disproportionately placed in neighborhoods of color, they may provide the necessary neutrality to avoid creating racially disparate traffic outcomes. For minor traffic violations, Berkeley is planning to outsource enforcement to an unsworn, unarmed group of transportation workers, called BerkDOT.[163] BerkDOT workers will have no authority to enforce criminal laws; when they observe a traffic violation, such as a broken taillight, they will only be authorized to issue a "fix-it" ticket.[164] This "fix-it" ticket, in turn, is not a fine in and of itself, but rather more like a warning to resolve whatever issue that the driver was pulled over for.[165] Should a driver fail to comply with the ticket, the punishment is community service rather than a fine.[166] This approach has received quite a bit of pushback from police unions, which raise safety and cost concerns in opposition to the proposal.[167] Moreover, though the proposal tries to delay the use of fees, they may yet be imposed if the driver fails to resolve the ticket within a given time frame.[168] Using fees at all introduces risk that low-income people will bear a disproportionate burden, further perpetuating a cycle of income

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160 *See, e.g.*, Rushin & Edwards, *supra* note 158, at 702; Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1491 (2021); Michael R. Sisak, *NYPD Should Stop Making Traffic Stops, Attorney General Says*, ASSOCIATED PRESS (Sept. 25, 2020), https://apnews.com/article/bronx-arrests-traffic-archive-new-york-c93fa5fc03f25c2b625d36e4c75d1691 [https://perma.cc/7LGM-W38S].

161 Ryan Kost, *Berkeley's Bold Vision for the Future of Policing*, S.F. CHRON. (Aug. 16, 2020), https://www.sfchronicle.com/culture/article/What-will-a-traffic-stop-in-Berkeley-look-like-15482873.php [https://perma.cc/L4EU-NTPL].

162 California state law does not currently allow automated speed cameras or civilian traffic enforcement. Emilie Raguso, *Plans Firm up to Remove Police from Traffic Stops, but It's a Long Road Ahead*, BERKELEYSIDE (May 25, 2021, 4:53 PM), https://www.berkeleyside.org/2021/05/25/berkeley-department-of-transportation-civilian-traffic-enforcement [https://perma.cc/Y7HZ-83VC].

163 Kost, *supra* note 161.

164 *Id.*

165 *Id.*

166 *Id.*

167 Rachel Sandler, *Berkeley Will Become 1st U.S. City to Remove Police from Traffic Stops*, FORBES (July 15, 2020, 8:22 PM), https://www.forbes.com/sites/rachelsandler/2020/07/14/berkeley-may-become-1st-us-city-to-remove-police-from-traffic-stops/?sh=2556a29970fa [https://perma.cc/JW88-BY68].

168 The plan is still in its early stages and has not ruled out the use of fines, fees, and towing policies in traffic enforcement. OFF. OF THE CITY MANAGER, UPDATE ON RE-IMAGINING PUBLIC SAFETY (2021).

insecurity and, potentially, contact with the criminal legal system. However, this proposal would effectively negate the possibility of pretext stops as well as avert at least some inequities resulting from contact with the criminal legal system, since police would no longer have discretionary authority to conduct traffic stops at all.[169]

Alternatively, some departments have chosen to limit the discretion that officers have when engaging in traffic enforcement.[170] Under this model, the department continues to enforce traffic stops, but deliberately reduces the number of discretionary traffic stops it may engage in.[171] The Oakland Police Department in California made such a policy shift in 2018, with the specific intention of reducing racial bias in traffic stops.[172] Under the department's policy, the number of discretionary stops—stops where police initiated the interaction, rather than being called out to help—dropped by nearly 13,000 stops.[173] The program is still in its early stages, so detailed search and hit rate analysis, which could give a fuller picture of the program's efficacy, has yet to emerge. In the meantime, advocates are wary of the racial disparities that appear to persist, since the data indicates that Black drivers are still being stopped at higher rates than every other group despite being less than a quarter of the city's population.[174] Moreover, opponents are still skeptical, as they believe that the refusal to stop drivers for low-level offenses could constitute a shirking of duty in a city that is already notorious for its dangerous roads.[175]

It should be noted that, in an attempt to reassure the public, the Oakland Police Department has stated that despite the new stop guidelines, it will continue to execute traffic stops when there is dangerous driving involved.[176] This assurance directly undermines the purpose of the program, which is to reduce the number of discretionary stops entirely.[177] This, in turn, makes it much less likely for the program to succeed. Whether or not certain behavior can be considered

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169 Kost, *supra* note 161.

170 Mercer, *supra* note 58.

171 Under this model, departments would create a policy listing the types of traffic infractions for which traffic stops would be prohibited. *Id.*

172 Rachel Swan, *To Curb Racial Bias, Oakland Police Are Pulling Fewer People Over. Will It Work?*, S.F. CHRON. (Nov. 16, 2019, 5:12 PM), https://www.sfchronicle.com/bayarea/article/To-curb-racial-bias-Oakland-police-are-pulling-14839567.php [https://perma.cc/8W49-BLPT].

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.* ("Officials in the Police Department assure they still pull people over for speeding or other forms of reckless driving.").

177 *Id.*

dangerous is extremely subjective.[178] The promise to continue stopping "dangerous" drivers may simply be an attempt to address public concerns, but is also fundamentally inconsistent with the program's premise, since officers could continue to stop drivers based on subjective judgment calls rather than according to any objective standard. This kind of ambiguity is another source of vulnerability for reforms based strictly in department policy.

Another weakness of department-based reforms is that they are not particularly capable of creating lasting change. For one, department policy decisions are inherently less durable than legislation, and police departments, while accountable on some level to local mayors and governors, are generally free to adopt policies as they see fit.[179] For another, so long as a particular traffic violation remains on the books as a law with criminal penalties for violation, police may use it as a ground to conduct arrests.[180] If such an arrest occurred, there would be no remedy for the arrested citizen; their arrest would be consistent with the Fourth Amendment even if the violation in question were only punishable by a fine.[181] This is what gives the Berkeley model more potential to succeed as a policing reform: not only are the Berkeley reforms couched in legislation rather than mere policy choices—making them more enduring—but they also sidestep some of the doctrine that has made the pretext stop so powerful by decriminalizing traffic enforcement altogether.[182]

An alternative legislative proposal similarly limits police discretion in traffic stops while retaining police as the traffic enforcement body. In

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178 *Cf.* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879 (2009) (finding that participants shown the same video footage of a high-speed car chase nonetheless had different views on whether that chase was dangerous enough to warrant the use of deadly force by police officers to intervene, often along lines of political ideology or minority group membership).

179 *See supra* Section II.C.

180 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding that custodial arrests are not violative of the Fourth Amendment so long as the arrestee committed a crime in the officer's presence, even if the crime was only punishable by a fine).

181 Virginia v. Moore, 553 U.S. 164 (2008) (holding lawful an arrest for driving with a suspended license despite being directly contrary to Virginia law that expressly limited punishment for that offense to a summons).

182 The pretext stop draws its power from the police's authority to investigate violations of law, including traffic stops. *Supra* Part I. If traffic stops remain criminal offenses, officers will retain the authority under the Federal Constitution to conduct those stops, and they will be subject to the *Whren* standard. Whren v. United States, 517 U.S. 806, 810 (1996). A traffic stop is reasonable under the Fourth Amendment so long as the officer has probable cause that a traffic violation has occurred. *Id.* Those stops will be upheld as reasonable because current doctrine states that arrests that are contrary to state laws may still be reasonable for Fourth Amendment purposes, even for minor offenses. *See Atwater*, 532 U.S. at 318; *Moore*, 553 U.S. at 171.

this model, it is the legislature, as opposed to individual police departments, that decides which offenses to remove from police officers' jurisdiction.[183] At least one state has adopted this approach, with others still considering the proposal.[184] In late 2020, the Virginia General Assembly passed a bill that made it unlawful for law enforcement officers to stop cars for a number of minor traffic offenses.[185] The bill expressly limits the use of traffic stops for offenses that are often abused as pretext to investigate other crimes, such as window tints, broken exhaust systems, and failure to illuminate a license plate.[186] It also forbids law enforcement officers from searching or arresting someone solely on the basis of a perceived odor of marijuana, which would eliminate a particularly potent ground upon which police searches are conducted.[187] As one Virginia politician who supported the bill noted, police intervention can often be extremely problematic.[188] Because the bill does not decriminalize such offenses, but rather prohibits officers from conducting stops or arrests, traffic violations remain valid grounds upon which officers can conduct searches and arrests without interference from the Fourth Amendment.[189] As such, while this measure creates more lasting change than a simple shift in department policy would, it is still lacking in that key regard.

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183 Meg O'Connor, *What Traffic Enforcement Without Police Could Look Like*, APPEAL (Jan. 13, 2021), https://theappeal.org/traffic-enforcement-without-police [https://perma.cc/C4XQ-RS5U] (identifying a number of jurisdictions that have explored policing models like Berkeley's, and others that have proposed bills to strip police of their authority to stop for minor traffic violations).

184 *Id.*

185 S.B. 5029, 2020 Legis., 2020 1st Spec. Sess. (Va. 2020).

186 *Id.*

187 *Id.* In most jurisdictions, an odor of marijuana is sufficient to establish probable cause for a search of a vehicle. 68 AM. JUR. 2D *Searches and Seizures* § 133 (2022); *see also* George L. Blum, Annotation, *Validity of Warrantless Search of Motor Vehicle Passenger Based on Odor of Marijuana*, 1 A.L.R. 6th 371 (2005). This is concerning in light of the documented willingness of police officers across the country to lie in order to justify otherwise unconstitutional searches. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996). In jurisdictions outside of Virginia, most notably New York City, the frequency with which officers claim to smell marijuana during traffic stops has raised suspicions amongst some fellow officers as well as judges. Joseph Goldstein, *Officers Said They Smelled Pot. The Judge Called Them Liars.*, N.Y. TIMES (Sept. 13, 2019), https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html [https://perma.cc/P8AB-JDBQ].

188 Mercer, *supra* note 58.

189 Virginia v. Moore, 553 U.S. 164, 176 (2008); Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

As illustrated in opposition points raised against the programs in Oakland and Virginia, there are legitimate safety concerns that must be addressed if legislatures choose to pursue jurisdiction removal.[190] This is what the Berkeley proposal seems to acknowledge: the reason that pretextual stops are so insidious is because they are often plausibly couched in real safety concerns.[191] Any proposal that strips away police authority to make those stops, without an entity to replace them, is going to be vulnerable to insinuations that proponents are not properly prioritizing road safety. For that reason, it can be particularly difficult to garner support for such a proposal, making it all the more difficult to get meaningful reforms passed.

The proposed Berkeley model addresses this vulnerability directly. In his paper *Traffic Without the Police*, Jordan Blair Woods outlines a number of stops that, under his proposal, police would no longer have the authority to make.[192] Instead, the authority to enforce the vast majority of traffic violations would be transferred to a traffic monitoring entity that is divorced from law enforcement in the normal course of its duties.[193] This includes the stops that the Oakland and Virginia plans have already phased out, such as failures to signal or low-level speeding.[194] This is exactly what the Berkeley model proposes, although Berkeley identifies a slightly different set of traffic violations that would be removed from police authority.[195] Woods also identifies a subset of traffic stops that could potentially involve police presence, such as driving a stolen vehicle, driving under the influence, or driving

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190 Swan, *supra* note 172. When asked about the new traffic stop policy, one resident said, "Look, I do not support racial profiling, but I don't know if this is the best way to solve it." *Id.* The resident was from San Francisco's Chinatown, which is notorious for speeding on pedestrian-heavy streets.

191 It is important to note that despite police advocates' claims, the authority to conduct pretext stops is not a particularly efficient means of drug interdiction or crime control. *See* Harris, *supra* note 6, at 582.

192 Under his proposal, the only time police officers would be involved in traffic stops is if the stop implicates a nontraffic-related crime, such as kidnapping, rape, or aggravated battery. In such cases, the traffic monitor would record any minor offenses, and then request police assistance with the nontraffic-related crime. Woods, *supra* note 160, at 1494–1500.

193 *See id.* at 1495.

194 Woods essentially calls for an end to routine traffic stops, which are defined as speeding, failure to maintain a lane, running a red light, or failing to obey a traffic device. *Id.* at 1488–91.

195 Both Woods and the Berkeley model identify automated enforcement as a significant source of traffic enforcement for violations like speeding and running red lights. Accounts of the Berkeley model currently focus on the use of traffic monitors to enforce equipment failures, while Woods imagines a broader set of responsibilities for them. *Compare* Kost, *supra* note 161, *with* Woods, *supra* note 160, at 1502–04.

without a license.[196] This proposal would address opponents' concerns about traffic safety while still advancing the goal of disentangling competing criminal and traffic enforcement interests. Moreover, if employed in conjunction with the systematic decriminalization of certain traffic offenses, this proposal could further strengthen the movement toward racial and economic justice in the criminal justice system.[197]

B. *Judicial Remedies*

Given the resistance to eliminating police from traffic enforcement entirely, it is important to consider reforms that retain police in the traffic enforcement role, but disincentivize the overuse of the traffic stop to further criminal enforcement goals. State courts can be a powerful vehicle for this change. State supreme courts are recognized to have the authority to decide whether their state constitutions demand protection beyond what is afforded in the Federal Constitution.[198] This authority allows state courts to interpret their respective state constitutions as requiring an application of the "would have" standard proposed by the petitioners in *Whren*.[199] The petitioners in the case advanced the theory that the Fourth Amendment test of reasonableness for traffic stops should be whether or not a reasonable officer would

196 Woods, *supra* note 160, at 1497 (describing a hypothetical situation in which a traffic monitor pulls someone over only to discover the driver does not have a valid license or is otherwise potentially dangerous).

197 Decriminalization of offenses such as driver's license infractions (e.g., driving without a license or with a suspended license) and driving under the influence (in favor of administrative interventions or rehabilitation) would likely have a significant impact in furthering racial and economic justice goals by (1) removing a potential ground for police contact, which, as established, disproportionately involves Black and Hispanic drivers; and (2) reducing the number of people who would be subject to fines and court fees upon conviction. *Id.* at 1526–31. It should be noted that suspicion of driving under the influence is another example of a ground for traffic enforcement that is couched in reasonable safety concerns, but is inefficiently applied and leaves officers with immense discretion in selecting individuals against whom to enforce the violation. *Id.* at 1531–33 ("Many stops on suspicion of DUI never result in a DUI arrest."). A feature of the Berkeley model is the use of restorative justice principles as punishment; instead of requiring fines, which typically impact low-income drivers more severely, the Berkeley model will require community service for certain traffic violations. Kost, *supra* note 161.

198 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

199 Whren v. United States, 517 U.S. 806, 810 (1996) ("[Petitioners] say[] the Fourth Amendment test for traffic stops should be . . . whether a police officer, acting reasonably, would have made the stop for the reason given.").

have made the stop under the given circumstances.[200] Research is conflicted on how effective a "would have" standard may be in actually protecting drivers.[201] However, new research implies that it may have at least some constraining effect on police discretion.[202] This suggests that an aggressive application of the standard may help equalize racial disparities while more permanent solutions are pursued in the legislature.

Before the summer of 2020, there were two states that applied the "would have" standard to traffic stops as a matter of state constitutional law: New Mexico[203] and Washington.[204] New Mexico does not collect stop data,[205] so it is difficult to quantify any differences in police behavior. But in Washington, police departments have provided sufficient data to the Stanford Open Policing Project to evaluate the difference that expressly allowing pretextual stops makes in racial disparities.[206] This type of analysis is possible in Washington because it is the only state to apply a "would have" standard, and then revert to something closer to the federal rule.[207]

For over ten years after the *Whren* decision, Washington courts consistently applied the "would have" test to traffic stops.[208] However, in late 2012, the Washington Supreme Court changed course and introduced what it calls "mixed-motive" stops: stops in which the officer is motivated to make a traffic stop on both legitimate and illegitimate grounds.[209] In doing so, the court narrowed its pretextual

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200 In academic circles, this test became known as the "would have" test. *Id. See generally* Lawton, *supra* note 55, at 917 ("The Fourth Amendment inquiry under the 'would have' test was whether 'a police officer, acting reasonably, would have made the stop for the reason given' . . . .").

201 Lawton, *supra* note 55, at 932–38 (finding that courts in Washington appeared to apply a high standard in determining whether a stop was pretextual in suppression hearings); *see* Rushin & Edwards, *supra* note 158, at 642–44 (finding a statistically significant increase in stops of people of color after a doctrinal shift away from the "would have" standard).

202 *See* Rushin & Edwards, *supra* note 158, at 699.

203 State v. Ochoa, 206 P.3d 143, 155–56 (N.M. Ct. App. 2008).

204 State v. Ladson, 979 P.2d 833, 842 (Wash. 1999).

205 Proctor & Jameson, *supra* note 81.

206 Pierson et al., *supra* note 47, at 738 (explaining that the Washington state patrol was one of only fourteen departments nationwide that provided data that allowed the Stanford Open Policing Project to assess the role that race played in search decisions).

207 *See* Rushin & Edwards, *supra* note 158, at 643–44.

208 *Id.* at 653–55.

209 The court distinguished a pretextual stop (which it maintained was still unconstitutional) from a mixed-motive stop by distinguishing the testimony between the two officers. State v. Arreola, 290 P.3d 983, 986 (Wash. 2012). In *Ladson*, the officer did not deny that the violation was a contrivance, whereas in *Arreola*, the officer testified that the traffic violation was "an actual reason for the stop" that he would have pulled the defendant over for anyway, even if he had not been suspicious of a DUI. *Id.* at 987.

stop ban to an extremely small subset of cases, and, in the words of the dissent, effectively lifted the ban on pretextual stops.[210]

Researchers have found that after the Washington Supreme Court handed down *Arreola*, there was a statistically significant increase in stops of people of color in the years following the decision.[211] Moreover, this shift regarding the treatment of drivers of color was consistent with the theory that police officers were using the mixed-motive stop to engage in racial profiling.[212] While the study is only limited to a single jurisdiction, its findings make a strong case for the proposition that once officers were given more leeway to make traffic stops under Washington's pretext stop doctrine, they might have applied that discretion in ways that adversely impacted people of color. [213] Application of the "would have" standard in Washington led to evidence suppression in at least some cases where officers engaged in pretextual behavior.[214] If the state were to return to a "would have" standard, police might be less likely to engage in pretextual behavior, and if not, drivers would at least have some modicum of protection against pretextual traffic stops.[215]

There are strong arguments that interpretation of state constitutions can be leveraged to apply the "would have" standard to traffic stops as opposed to the *Whren* standard. State supreme courts are recognized to have the authority to decide whether their state constitutions demand protection beyond what is afforded in the Federal Constitution. [216] The language of its state constitution that the Washington Supreme Court relied upon in applying the "would have" standard is admittedly broader than that of the Fourth Amendment,[217] but New Mexico's constitutional protection against search is virtually

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210 *Id.* at 993 (Chambers, J., dissenting) ("Going forward, police officers in Washington will be free to stop citizens *primarily* to conduct an unconstitutional speculative investigation as long as they can claim there was an independent secondary reason for the seizure.").

211 Rushin & Edwards, *supra* note 158, at 683–90.

212 *Id.* at 690–93.

213 For a full discussion of the study's limitations, see *id.* at 695–97 ("[O]ur analysis is limited to a single law-enforcement agency. . . . The depth and extensiveness of the Washington State Patrol dataset, though, helps alleviate some of the concerns about our focus on a single jurisdiction.").

214 Lawton, *supra* note 55, at 955–57.

215 Rushin & Edwards, *supra* note 158, at 699 ("If moving from *Ladson* to *Arreola* contributed to a statistically significant increase in apparent racial profiling by Washington state troopers . . . . it suggests that *Whren*'s holding was not merely symbolic. Had the Court ruled differently . . . it conceivably could have influenced police behavior in a way that reduced racial bias by officers.").

216 Brennan, *supra* note 198, at 491.

217 State v. Ladson, 979 P.2d 833, 837 (Wash. 1999) ("Article I, section 7, is explicitly broader than that of the Fourth Amendment . . . .").

identical to it.[218] Aside from the language, the courts in those states relied on the fact that interpretation of their respective state constitutions has traditionally been more protective of individual liberties than the Federal Constitution.[219] Such an interpretive principle is neither novel nor unique to those states—New Jersey has likewise held that its state constitution's Fourth Amendment equivalent is more protective of its citizens, particularly in the motor vehicle context.[220] Judicial reform of the pretext stop doctrine is available in other similarly situated states and would not even require application of the state's racial profiling ban to the facts of a case before the courts.

However, judicial reform is constrained by precedent in a way that makes it inferior to legislative- or policy-based reforms. As explained in Section II.C, one reason that the statutes are inert is because courts in those states have consistently adhered to the federal standard regarding pretextual stops, even when a specific claim of racial profiling is raised.[221] Such precedents are the main obstacle to judicial reform of state courts' pretextual stop doctrine. While judicial doctrine can always change, principles of reasoned judicial decision-making dictate that some semblance of stare decisis must stand.[222] If a given state does not have a settled precedent of departing from the federal rule, the courts are much less likely to implement a "would have" standard, even if their

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218 New Mexico's protection against unreasonable searches and seizures differs from the federal equivalent only in that New Mexico requires a "written showing of probable cause." *Compare* N.M. CONST. art. II, § 10 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, *nor without a written showing of probable cause*, supported by oath or affirmation." (emphasis added)), *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

219 *Ladson*, 979 P.2d at 842 ("But in this case the state asks us to abandon our commitment against pretext and significantly undermine the vitality of article I, section 7, in favor of the lower standard under the Fourth Amendment announced in *Whren v. United States* . . . . *Whren* does not define or limit our rights under independent state constitutional safeguards." (citations omitted)); State v. Ochoa, 206 P.3d 143, 148 (N.M. Ct. App. 2008) ("We depart from federal constitutional law in this case because we find the federal analysis unpersuasive and incompatible with our state's distinctively protective standards for searches and seizures of automobiles.").

220 *See* 51 ROBERT RAMSEY, N.J. PRAC., MUNICIPAL COURT PRAC. MANUAL § 15:4 (2020–2021 ed.) ("[T]he protections guaranteed under the Fourth Amendment should be viewed as the minimum protections to which people in the United States are entitled. . . . [I]n the motor vehicle context, people in New Jersey are frequently afforded enhanced protections under the State Constitution of 1947.").

221 *See supra* Section II.C.

222 *See Stare Decisis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/stare_decisis [https://perma.cc/J3C8-ETG7].

state's constitutional language was similar to that of New Mexico's or Washington's constitutions.[223] Moreover, even if the courts in a particular state had consistently interpreted their state constitution more broadly than the Federal Constitution, judicial reforms are not necessarily the most effective way to achieve lasting systemic change. Both Washington's and New Mexico's state supreme courts have since narrowed the application of the "would have" standard, either expressly or in practice.[224] Given how the "would have" standard has changed in both New Mexico and Washington, judicial reform in this respect does not seem likely to be a long-term solution to the racial profiling problem as legislative or policy solutions could be.

However, a departure from *Whren* need not emerge from the search and seizure principle it articulated. In the *Whren* opinion, Justice Scalia expressly stated that the defendants' insinuation that they had been subjected to selective enforcement on the basis of their race was a matter for the Equal Protection Clause rather than the Fourth Amendment.[225] Recognizing the equal protection issue, the Massachusetts Supreme Judicial Court decided a case in September 2020 that lowered the standard of evidence for defendants who allege that they were subjected to a traffic stop on the basis of their race.[226] In that case, the Massachusetts court overturned a prior precedent that required defendants to present statistical evidence demonstrating the officer's bias to support an allegation of racial profiling;[227] it found that imposing such a high burden of evidence was inconsistent with both state and federal formulations of equal protection.[228] It also

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223 *See, e.g.*, State v. Brown, 930 N.W.2d 840, 846–48 (Iowa 2019) (rejecting a burden-shifting test that would require police to show that the traffic stop was the "real" reason for the stop, in part because the state supreme court had consistently interpreted Iowa's constitutional search and seizure provision to track that of the Fourth Amendment based on their "nearly identical language"); People v. Robinson, 767 N.E.2d 638, 641–44 (N.Y. 2001) (affirming application of the *Whren* rule and citing New York's long history of interpreting the state's constitutional search and seizure protection as parallel to that of the Fourth Amendment in light of their "identical" language as well as the state's longstanding precedent rejecting the "would have" test).

224 *See, e.g.*, State v. Arreola, 290 P.3d 983, 987, 992 (Wash. 2012) (holding that a traffic stop is not pretextual when the traffic violation constitutes an "actual" motive for the stop, even if there are other investigatory reasons an officer wishes to execute a traffic stop); *see also* Lawton, *supra* note 123, at 1051 n.73 (listing cases in which the New Mexico Court of Appeals declined to find a stop pretextual in the absence of an admission to that effect by the officer involved).

225 Whren v. United States, 517 U.S. 806, 813 (1996) ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

226 Commonwealth v. Long, 152 N.E.3d 725, 731 (Mass. 2020).

227 *Id.* at 736–37.

228 *Id.* at 738 ("[P]revious decisions that required comprehensive statistics showing prior discriminatory action amounted to 'crippling burden of proof' on defendants attempting to vindicate rights to equal protection." (citing Batson v. Kentucky, 476 U.S. 79, 92 (1986))).

acknowledged the unique difficulties that traffic stops pose, which it cited as justification for a different approach, thus providing a roadmap to other state supreme courts that may wish to reevaluate their respective pretextual stop doctrines but do not want to adopt the "would have" standard.[229] However, it should be noted that by nature of being a purely judicial reform, this approach is likewise vulnerable to the longevity issues identified above. Therefore, while it may be an effective intermediate solution, it remains less likely to create long-term reform the way that legislative or policy changes can.[230]

An alternative to constitutional intervention is judicial interpretation of other statutes to bolster the racial profiling and pretextual stop bans. This is the approach that Kansas has undertaken in its efforts to address the racial profiling problem. The Kansas Supreme Court has held that Kansas state law as articulated in Section K.S.A. 22-4609, the statutory prohibition on the use of race in policing, requires a subjective inquiry into the officer's intent when an officer conducts a traffic stop.[231] The court made this determination in *State v. Gray*. In that case, the Kansas Supreme Court heard a motion to suppress based on Kansas's statutory exclusionary rule, and it found that it could undertake an inquiry into an officer's subjective intent for making a traffic stop to resolve the question.[232] This approach was made possible by Kansas's statutory exclusionary rule, which is separate from any Fourth Amendment or state constitutional equivalent and specifies that the exclusionary rule is the remedy for all unlawful searches.[233] Since K.S.A. 22-4609 indicates by its plain meaning that a stop made with reliance on race as a factor is unlawful, the court reasoned that the statute required exclusion in that case.[234] In doing so, the court sidestepped the constitutional question in order to give fuller protections than would otherwise be available under *Whren*.[235]

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229 *Id.* at 738–40.

230 *See* Rushin & Edwards, *supra* note 158, at 643 (explaining that *Ladson* was only on the books for thirteen years before it was significantly limited by *Arreola*).

231 State v. Gray, 403 P.3d 1220 (Kan. 2017); *see also* State v. Gill, 445 P.3d 1174, 1178 (Kan. Ct. App. 2019).

232 *Gray*, 403 P.3d at 1222–23, 1227–30.

233 KAN. STAT. ANN. § 22-3216 (West 2022).

234 *Gray*, 403 P.3d at 1227 ("[T]he Kansas legislature has tied the suppression remedy to one consideration and one consideration alone: Was there 'an *unlawful* search and seizure?' . . . . Circling back to the plain language of K.S.A. 2014 Supp. 22-4609 that '[i]t is unlawful to use racial or other biased-based policing,' we hold that K.S.A. 22-3216 provides a remedy for a violation of Kansas' biased-based policing statutes, K.S.A. 2014 Supp. 22-4606 *et seq.*").

235 *See id.*

This method of interbranch teamwork only works if there is a statutory exclusionary rule to apply and if the state's search and seizure jurisprudence otherwise supports its application in a particular case.[236] In other words, this solution only works if there is a combination of legislative and judicial support for it, further supporting the idea that judicial reforms alone are not likely to result in long-term change. For the most part, states' interpretation of the exclusionary rule can range from exactly parallel to the federal analogue to expressly contradictory, so long as the language of the state constitution supports a particular interpretation.[237] In a state where the common law exclusionary rule doctrine tends to closely follow the federal doctrine, it may be harder to justify a departure from existing practice without express directive from the legislature, as the Kansas Supreme Court had done.[238] Moreover, a state must have already passed a statute declaring traffic stops based on race unlawful for the Kansas approach to work.[239] These preconditions make the Kansas approach a generally impracticable solution, especially when compared to the legislative reforms proposed above.[240]

CONCLUSION

When the defendants in *Whren* stood before the Supreme Court, they argued that the traffic code was too broad in scope for police officers to enforce it equitably.[241] They were right. Study after study shows that when police officers are given the discretion to enforce the traffic laws as they see fit, they invariably do so in ways that

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236 State v. Vrabel, 347 P.3d 201, 211 (Kan. 2015) (holding that the statutory exclusionary rule does not apply to evidence obtained during a city officer's unauthorized exercise of police power outside of the officer's employing city unless it is during a search or seizure).

237 Megan McGlynn, Note, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law*, 127 YALE L.J. 406, 416–18 (2017).

238 *Cf.* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854–55 (1992) (articulating a stare decisis analysis that inquires whether a prior decision has become unworkable, has engendered significant reliance interests, has been rendered obsolete by subsequent legal developments, or has lost applicability due to subsequent changes in underlying facts).

239 *See Gray*, 403 P.3d at 1295 ("'Pointedly, the statutory right to suppress evidence is not restricted to those defendants who were aggrieved by an *unconstitutional* search and seizure. Instead, the statute applies to an *unlawful* search and seizure' . . . . [Kansas's statute] begins by stating: 'It is *unlawful* to use racial or other biased-based policing.'").

240 *See supra* Section III.A.

241 Whren v. United States, 517 U.S. 806, 810 (1996) ("[T]hey contend[] the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible . . . .").

disproportionately impact Black and Hispanic drivers.[242] This may not solely be the result of conscious bias, but rather the result of centuries of systemic bias compounding upon itself. It would have been astounding if systemically ingrained biases could have been resolved simply by enacting broad statutory prohibitions on racialized policing. This analysis suggests the truth of that sentiment. Bans on racialized policing are not effective when other types of pretextual stops remain part of the policing playbook, even when combined with specific bans on race-based pretextual stops. As reform-minded jurisdictions begin to sort through the panoply of options available to them, one thing is clear: statutory bans on racial profiling and race-based pretextual stops, without more, do not go far enough. It is time for new ideas.

242 Pierson et al., *supra* note 47, at 736.