

RETHINKING FEDERAL INDUCEMENT OF PRETEXT STOPS

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Few topics in policing have received more attention than pretextual traffic stops—traffic stops made for crime-fighting purposes. Community leaders, legislators, police executives, and even presidents have recognized that the overuse of pretext stops has deleterious effects, including racially disparate enforcement, needless death, and degraded public trust in law enforcement. The result is a growing movement at the state and local level to roll back the widespread use of this tactic.

As promising as these developments are, most discussions of pretext stops largely omit a key player that drives the problem: the federal government. Presidents from Bush to Biden have decried discriminatory pretext stops and federal investigations have pushed localities to limit their use of the tactic. Yet, behind the scenes, the federal government has long trained and incentivized police to use pretext stops widely.

This Article has two goals: First, to demonstrate that the federal government long has been and continues to be a key driver of pretextual traffic stops by state and local law enforcement. This Article catalogs the multitude of ways that federal agencies push this tactic, and in the process, tells a complex story about how the federal government influences national policing practices. The federal actors involved include law enforcement agencies (as one might expect), but also other administrative agencies whose ostensible missions seem to have little to do with policing.

Second, this Article calls for the federal government to develop a new, comprehensive, and coherent approach to traffic stops as a crime-fighting tool—an approach that centers on public safety and avoids falling into tired patterns of harmful and discriminatory enforcement. This Article proposes a variety of tangible reforms, such as changing federal law enforcement policy, creating a centralized review process for federal policing programs, and developing a method to calculate the social cost of a traffic stop. A strong federal response—in tandem with continued state and local action—is the only way to wean policing off traffic stops as a central crime-fighting tool.

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INTRODUCTION

On July 27, 2023, the U.S. Department of Justice (DOJ) announced it had opened a pattern or practice investigation into the Memphis Police Department's (MPD) "use of force and its stops, searches and arrests, as well as whether it engages in discriminatory policing."¹ DOJ's announcement came about six months after the brutal murder of Tyre Nichols following a traffic stop by a specialized criminal interdiction unit of the MPD. Within minutes of the stop, Mr. Nichols was viciously beaten, tased, repeatedly pepper sprayed, left handcuffed and immobile, and soon died from his injuries.²

DOJ's announcement came as no surprise. Recent memory is full of DOJ pattern-and-practice investigations following high-profile killings, such as in Minneapolis after George Floyd, Baltimore after Freddie Gray, and Ferguson after Michael Brown.³ Moreover, Memphis elected officials and community leaders publicly called for a DOJ investigation.⁴ And DOJ had already signaled a keen interest in Memphis: A few weeks after Nichols's murder, the Justice Department's Civil Rights Division announced a criminal investigation into the actions of the officers.⁵ In March, DOJ's Office of Community Oriented Policing Services (COPS

1. Press Release, Off. Pub. Affs., Justice Department Announces Pattern or Practice Investigation of the City of Memphis and the Memphis Police Department (July 27, 2023), <https://www.justice.gov/opa/pr/justice-department-announces-pattern-or-practice-investigation-city-memphis-and-memphis> [<https://perma.cc/5AS3-2MUL>].

2. City of Memphis, VIMEO (Oct. 10, 2023), <https://vimeo.com/CityofMemphis> [<https://perma.cc/KVB9-2HKQ>] (posting four official videos compiling footage of Nichols's death and the surrounding events); Bernd Debusmann Jr, *Tyre Nichols Autopsy Shows He Died of Blunt Force Injuries*, BBC (May 4, 2023, 7:18 AM), <https://www.bbc.com/news/world-us-canada-65490318> [<https://perma.cc/8MR8-Q46Y>]; Robin Stein, Alexander Cardia & Natalie Reneau, *71 Commands in 13 Minutes: Officers Gave Tyre Nichols Impossible Orders*, N.Y. TIMES, <https://www.nytimes.com/2023/01/29/us/tyre-nichols-video-assault-cops.html> [<https://perma.cc/4VDM-26XB>] (Feb. 1, 2023).

3. See Zoe Todd & Dan Glaun, *Amid George Floyd Protests, a Critical Question: Can the Feds Fix American Policing?*, PBS (Sept. 16, 2020), <https://www.pbs.org/wgbh/frontline/article/george-floyd-police-reform-justice-department/> [<https://perma.cc/X7B2-K9HA>] (discussing several recent DOJ pattern-and-practice investigations).

4. Lydian Kennin & Bria Bolden, *US Department of Justice Called To Investigate Policies, Protocols at MPD*, ACTION NEWS 5 (Feb. 17, 2023, 1:57 PM), <https://www.actionnews5.com/2023/02/17/state-representatives-local-leaders-make-major-announcement-memphis-police-conduct/> [<https://perma.cc/D7EY-Y98G>].

5. Adrian Sainz, *Feds: Investigation into Tyre Nichols' Death May Take Time*, AP (Jan. 25, 2023, 12:47 PM), <https://apnews.com/article/memphis-law-enforcement-1b59234caaf1a7be7cc0f87199103ef1> [<https://perma.cc/RW89-MH77>].

Office) announced a non-binding review of certain MPD policies and practices as requested by Memphis's mayor and police chief.⁶

There is little question that a federal investigation into policing in Memphis is warranted. Tyre Nichols's death appears, in many ways, to have been the tip of the iceberg.⁷ But if the federal government is serious about ending the kind of ineffective and deadly policing that caused Nichols's death in the first place, it also must look inward to the federal policies and programs that drive local police to use widespread traffic stops as a primary crime-fighting tool.

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Police traffic stops have long been a focal point of attention.⁸ Recently, a steady stream of visceral, on-camera killings during routine traffic stops has built momentum to rethink the relationship between policing and traffic enforcement.⁹ A number of jurisdictions around the

6. Adrian Sainz, *Tyre Nichols Death Spurs Justice Department Police Review*, AP (Mar. 8, 2023, 2:48 PM), <https://apnews.com/article/tyre-nichols-police-justice-department-force-beating-d40794be8cad7839432d88ae80613306> [<https://perma.cc/RV74-S2QL>].

7. See, e.g., Daphne Duret, Weihua Li & Marc Perrusquia, *Aggressive Policing in Memphis Goes Far Beyond the Scorpion Unit*, MARSHALL PROJECT (Mar. 14, 2023, 6:00 AM), <https://www.themarshallproject.org/2023/03/14/memphis-police-beatings-tennessee> (describing aggressive policing tactics throughout the MPD resulting in stark enforcement disparities). See also *Tennessee v. Garner*, 471 U.S. 1, 4 (1984) (arising from an officer shooting Garner in the back of the head as he climbed a fence to escape after stealing ten dollars and a purse).

8. The scholarly literature on police traffic enforcement is impossible to succinctly summarize. However, for book-length treatments of the topic, see SARAH A. SEO, *POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM* (2019); FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, *SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE* (2018); CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

9. The deaths of Tyre Nichols, Daunte Wright, Sandra Bland, and Philando Castile are just a few that made national headlines. See, e.g., Debusmann, *supra* note 2; Max Carter-Oberstone, *America's Traffic Laws Give Police Way Too Much Power*, TIME (May 11, 2022, 4:45 PM), <https://time.com/6175852/pretextual-traffic-stops/> [<https://perma.cc/T28P-ZU3B>]; Ryan Grim, *The Transcript of Sandra Bland's Arrest Is as Revealing as the Video*, HUFFPOST, https://www.huffpost.com/entry/sandra-bland-arrest-transcript_n_55b03a88e4b0a9b94853b1f1 [<https://perma.cc/D2SL-KUBS>] (July 23, 2015); *What To Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>. See also Beth A. Colgan, *Revenue, Race, and the Potential Unintended Consequences of Traffic Enforcement Reform*, 101 N.C. L. REV. 889, 890–93 (2023) (collecting examples of police killings during low-level traffic stops).

country have sought to limit low-level, pretextual traffic stops—singling out that tactic as particularly pernicious.¹⁰ Others are beginning to think more capaciously about what traffic enforcement without police might look like.¹¹

Presidential administrations from Bush to Biden are familiar with public outcry against discriminatory traffic enforcement and have responded publicly in support of change. “Driving while black” and racial profiling were a political issue in the presidential election of 2000; following the election, President George W. Bush “declared unequivocally before Congress that racial profiling ‘was wrong and we will end it in America.’”¹² More recently, President Joe Biden’s 2022 executive order on policing called for “ending discriminatory pretextual stops.”¹³ Investigations by DOJ into local police departments often criticize police overreliance on stops and find a pattern-and-practice of unconstitutional and discriminatory pretextual traffic stops.¹⁴ And the

10. See, e.g., Sarah Holder, *These Cities Are Limiting Traffic Stops for Minor Offenses*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2023-02-02/police-traffic-stops-face-new-scrutiny-after-tyre-nichols-death> (Feb. 2, 2023, 1:58 PM); David D. Kirkpatrick, Steve Eder & Kim Barker, *Cities Try To Turn the Tide on Police Traffic Stops*, N.Y. TIMES (Apr. 15, 2022), <https://www.nytimes.com/2022/04/15/us/police-traffic-stops.html>.

11. See, e.g., Joshua Vaughn, *Berkeley City Council Passes Sweeping Reforms To Limit Police Traffic Stops*, APPEAL (Feb. 23, 2021), <https://theappeal.org/berkeley-city-council-passes-sweeping-reforms-to-limit-police-traffic-stops/> [<https://perma.cc/PE7N-8HSD>] (explaining Berkeley, California, is exploring alternatives that include technologies like cameras and automated license plate readers and transferring minor traffic enforcement to a department staffed with unarmed employees). See generally Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471 (2021) (exploring traffic enforcement and traffic safety techniques that do not rely on police).

12. Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice’s 2003 Guidelines*, 50 LOY. L. REV. 67, 70–71 (2004) (quoting George W. Bush, President, Address of the President to the Joint Session of Congress (Feb. 27, 2001), <https://georgewbush-whitehouse.archives.gov/news/releases/2001/02/20010228.html> [<https://perma.cc/8Q76-FVLE>]) (discussing statements by former President George W. Bush, Attorney General nominee John Ashcroft, candidate Al Gore, and others).

13. Exec. Order No. 14074, 87 Fed. Reg. 32945, 32946 (May 25, 2022).

14. See, e.g., U.S. DEP’T OF JUST. & U.S. ATT’Y’S OFF. W. DIST. KY., INVESTIGATION OF THE LOUISVILLE METRO POLICE DEPARTMENT AND LOUISVILLE METRO GOVERNMENT 32 (2023), <https://s3.documentcloud.org/documents/23698479/202338-lmpd-findings-report.pdf> [<https://perma.cc/6HYA-QRBP>]. In the wake of Tyre Nichols’s murder, the COPS Office and the National Policing Institute began a review of specialized policing units. See NAT’L POLICING INST., CONSIDERATIONS FOR SPECIALIZED UNITS: A GUIDE FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES TO ENSURE APPROPRIATENESS, EFFECTIVENESS, AND ACCOUNTABILITY 27–36 (2024), <https://www.policinginstitute.org/wp-content/uploads/2024/01/Specialized-Units->

resulting consent decrees have limited local police use of pretextual stops.¹⁵

Yet, while decrying this harmful policing tactic in public, behind the scenes, the federal government has trained and incentivized police to use the very same tactic—and to do so aggressively. Federal agencies from DOJ to the Department of Transportation (DOT) direct state and local police to conduct traffic stops, create the conditions for police to profit from these stops, train police to use stops as a pretext for various law enforcement goals, and otherwise encourage the widespread use of traffic stops as a crime-fighting tool.¹⁶

It is difficult to quantify the impact of the federal government's long-standing embrace of pretextual traffic stops. Few of the federal programs collect data on their impact, and even fewer attempt to study their efficacy. None of the programs have addressed publicly the social harms they impose. Still, it is clear that state and local police make more pretext stops because of federal intervention. One can only speculate how much less ubiquitous pretext stops would be today if the federal government had actively discouraged the practice. Instead, the result of federal intervention has been the perpetuation of racial stereotypes among police, discriminatory and illegal stops, policing for profit, and the diversion of resources away from non-policing solutions to traffic safety.

This Article has three parts: Part I provides background for understanding the importance of the federal government's role in encouraging the widespread use of pretext stops. It begins by defining pretext stops, not as a single type of traffic stop, but as a spectrum of police activity that relies on traffic enforcement as a crime-fighting tactic.¹⁷ Using this broad definition, this Part then recounts the evidence and scholarship regarding the benefits and social harms of this tactic.¹⁸ Finally, this Part summarizes previous calls for reforms and details how these calls focus predominantly on the state and local level.¹⁹

Part II combines previous scholarship and original research to provide a comprehensive account of how the federal government has and

COPS-and-NPI.pdf [https://perma.cc/YAS8-SUSS]. Incredibly, the resulting report does not address the use of pretextual traffic stops. *See generally id.*

15. *E.g.*, Consent Decree at 15–17, *United States v. Police Dep't of Balt. City*, No. 17-cv-00099 (Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download> [https://perma.cc/NJ9J-DT3X]; Consent Decree at 19–20, *United States v. City of Ferguson*, No. 16-cv-00180 (Mar. 17, 2016), <https://www.justice.gov/opa/file/833431/download> [https://perma.cc/K62N-XZ5E].

16. *See infra* Part II.

17. *See infra* Section I.A.

18. *See infra* Section I.B.

19. *See infra* Section I.C.

continues to encourage police to rely heavily on pretextual traffic stops.²⁰ The range of federal agencies that play a role here is startling. They include law enforcement agencies that one might expect, such as the Drug Enforcement Agency (DEA) and the Department of Homeland Security (DHS), but also other administrative agencies that ostensibly have little to do with policing, such as the Office on National Drug Control Policy and the Federal Motor Carrier Safety Administration. In addition to the breadth of agencies involved, the mechanisms of federal influence are also myriad: from directing law enforcement investigations to providing training, funding, technology, and access to data.

Part III provides a path forward for the federal government to develop a new, comprehensive, and coherent approach to the use of traffic stops by law enforcement.²¹ This approach should center on public safety and avoid falling into tired patterns of harmful and discriminatory stops.²² To achieve this, this Article proposes a series of tangible reforms, including executive action that changes federal law enforcement policy, the creation of a centralized review process for federal policing programs, and the development of a regulatory method to calculate the social cost of traffic stops. The goal is for policymakers, researchers, and civil society to take up this agenda and spark meaningful change that is long overdue at the federal level.

I. DEFINING PRETEXT STOPS AND UNDERSTANDING THEIR IMPACT

This Part lays the foundation for assessing the federal government's role in encouraging the widespread use of pretextual traffic stops. Section A defines a pretextual traffic stop (or "pretext stop") and, in so doing, delineates a spectrum of policing tactics that rely on traffic enforcement as a crime-fighting tactic. Section B summarizes what is known about the benefits and harms of using large numbers of traffic stops to fight crime. Section C recounts previous suggestions for limiting police reliance on pretext stops—suggestions primarily directed at state and local actors.

20. This Article attempts a comprehensive account of the federal government's role in promoting pretext stops, but other scholars have explored important aspects of this issue. For example, regarding the Drug Enforcement Agency's role and Operation Pipeline, see *infra* notes 137–61 and accompanying text. Regarding the Department of Transportation's role, see *infra* notes 226–32 and accompanying text.

21. *Cf.*, e.g., Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 AM. CRIM. L. REV. 1665 (2022) (arguing that the fragmented nature of federal funding and responsibility for local social services makes it difficult to respond effectively to homelessness and mental health issues).

22. See PRINCIPLES OF THE L.: POLICING § 14.06 (AM. L. INST. 2022) ("The federal government should engage in sound policing, exercise its authority to promote sound policing nationwide, and avoid actions that undermine sound policing.").

A. *Spectrum of Pretext*

Defining a “pretext stop” is more complicated than it might seem. Most often, a pretext stop (also known as an “investigatory stop”) is defined by the officer’s intent when making the stop: Did the officer make the stop *because of* the traffic violation, or did the officer *intend* to investigate other criminal activity?²³ If the officer had an ulterior motive, it was a pretext stop; if not, then it is a run-of-the-mill traffic stop. This is the classic binary view of pretext stops.²⁴

Prior to the Supreme Court’s 1996 decision in *Whren v. United States*,²⁵ a few courts adopted a similar binary formulation.²⁶ These courts

23. See RACIAL & IDENTITY PROFILING ADVISORY BD., ANNUAL REPORT 2023, at 11 (2023), <https://oag.ca.gov/system/files/media/ripa-board-report-2023.pdf> [<https://perma.cc/TVD8-ZYXZ>]; I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 32–33 (2011) (discussing “*Whren v. United States*, in which the Court gave its imprimatur to pretextual stops, i.e., stops based on a minor violation where the underlying motivation for the stop is to search for contraband or otherwise identify criminality” (footnote omitted)); Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 (2007) (“These abuses occur in the form of pretextual stops: occasions when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop.”); Abraham Abramovsky & Jonathan I. Edelman, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses 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 . . .”).

24. See, e.g., PRINCIPLES OF THE L.: POLICING § 2.04 cmt. a (AM. L. INST. 2023) (“Under the definition [of pretext] in § 2.04(a), an officer acts pretextually when the officer would not have conducted the stop or search in question for the stated reason (which was legally justified) were it not for the actual reason (for which the officer lacked legal justification).”); BAUMGARTNER, EPP & SHOUB, *supra* note 8, at 191 (“We have repeatedly drawn a distinction between safety stops and investigatory stops Safety stops are those aimed at enforcing the rules of the road to decrease the likelihood of an accident. . . . Investigatory stops are those aimed at allowing an officer a look inside of a car.”).

Some scholarship also refers to “fabricated pretexts”—when the proffered reason for the stop is neither the true reason for the stop, nor factually supported. See Joh, *supra* note 23, at 209 n.59 (citing Edwin J Butterfoss, *Solving the Pretext Puzzle: The Importance of Ulterior Motives and Fabrications in the Supreme Court’s Fourth Amendment Pretext Doctrine*, 79 KY. L.J. 1, 5–6 (1990–91)). Although fabrication is undoubtedly a problem, this Article focuses on the more general pretext stop—one when the proffered basis of the stop is factually supportable.

25. 517 U.S. 806 (1996).

26. See *United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995) (noting that the inquiry asks “whether a reasonable officer, given the circumstances, would have made the stop absent a desire to investigate an unrelated serious offense” (citation omitted)); *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986) (holding that the

determined that a stop was not pretextual if “under the same circumstances a reasonable officer *would have* made the stop in the absence of the [pretextual] purpose.”²⁷ But predicting how a reasonable officer “would have” acted is a complicated factual inquiry. In part because of the difficulties courts faced in answering this question, the *Whren* Court rejected any inquiry into the officer’s subjective purpose in making the traffic stop.²⁸ And yet, *Whren*’s approach also was a binary one: if the officer making the stop had sufficient cause—*e.g.*, observed a traffic violation—the officer’s ulterior motive was irrelevant.²⁹

These simple definitions and legal tests bely the more complicated reality of how and why police use traffic stops. Police conduct traffic stops for multiple reasons. At the agency level, visible traffic stops are used simultaneously to uncover evidence of crimes, deter future criminal activity, punish traffic scofflaws, and reduce dangerous driving behavior.³⁰ An individual officer might also have mixed motives: an officer who observes a safety-related traffic infraction may make the initial stop for a traffic safety purpose, but once the stop is underway, that officer may use investigative tactics meant to search for criminal activity—questioning the driver, checking for open warrants, and asking for consent to search a vehicle. Washington state courts explicitly recognize such “mixed-motive” stops.³¹

determination of whether a stop is valid is made by asking whether a reasonable officer would have made the stop absent some invalid purpose).

27. *United States v. Whren*, 53 F.3d 371, 374 (D.C. Cir. 1995) (quoting *United States v. Smith*, 799 F.2d 704, 709 (11th Cir. 1986)) (explaining that defendants proposed the court apply the Eleventh Circuit’s “would have” test to the alleged pretextual stop), *aff’d*, 517 U.S. 806 (1996). *See also* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1055–63 (2010) (discussing the *Whren* decision and the defendant-petitioners’ proposed “would have” test that the Court ultimately rejected).

28. *Whren*, 517 U.S. at 813–15. *See also United States v. Botero-Ospina*, 71 F.3d 783, 786–88 (10th Cir. 1995) (noting this workability difficulty).

29. *See Whren*, 517 U.S. at 813–14, 819.

30. *See, e.g.*, Stephanie Slahor, *The Importance and Benefits of Traffic Enforcement*, POLICE & SEC. NEWS (Sept. 28, 2022), <https://policeandsecuritynews.com/2022/09/28/the-importance-and-benefits-of-traffic-enforcement/> [<https://perma.cc/JBM4-56AL>]; John Hall, *Why Police Need To Enforce Traffic Laws*, MANHATTAN INST. (Sept. 14, 2021), <https://manhattan.institute/article/why-police-need-to-enforce-traffic-laws> [<https://perma.cc/4QFB-XYCR>].

31. *See State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012) (“This case now requires us to determine whether a mixed-motive traffic stop—that is, a traffic stop based on both legitimate and illegitimate grounds—is a pretextual stop in violation of article I, section 7. We hold that a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for

Even within the universe of stops that are purely pretextual (*i.e.*, conduct *solely* for criminal enforcement purpose), there are variations. At one end of the spectrum is a wide-net approach to pretext stops: for example, officers in unmarked units target particular “high-crime neighborhoods” with large numbers of traffic stops as a tactic to fight violent crime.³² At the other end of the spectrum are targeted pretextual stops: for example, as discussed in more detail below, investigators who develop particularized suspicion to believe a vehicle is involved in a crime will use a patrol officer to find an independent basis to stop and search that vehicle (sometimes referred to as a “wall stop”).³³ And there are pretextual stops that fall somewhere in between, when some suspicion exists but is not particularized.³⁴

Understanding the variety of policing tactics and strategies that fall under the umbrella of pretextual traffic enforcement is vital. The multiple purposes that traffic stops serve is one reason why so many different federal agencies—the Departments of Justice, Homeland Security, Transportation, and the Interior, for example—encourage police to rely on traffic stops.³⁵ Importantly, the different types of pretext stops that police conduct—from pure fishing expeditions to ones based on some particularized suspicion—impact both the efficacy and the harms of the tactic. Section B turns to those benefits and costs.

which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop.”).

32. For a stark admission along these lines, see Jackson’s Investigations, *The Right Turn of Tae-Ahn Lea... That Turned Ugly!! Soooo What Happened Again?*, YOUTUBE, at 4:30–4:43 (Jan. 30, 2019), <https://www.youtube.com/watch?v=LtQG0JICORI> [<https://perma.cc/87HE-UPRB>] (showing police officers telling Lea they will stop “thirty more people after you” as part of their criminal interdiction efforts).

33. See, e.g., *United States v. Sanchez*, 839 F. App’x 388, 389 (11th Cir. 2020) (quoting *United States v. Benard*, 680 F.3d 1206, 1208–09 (10th Cir. 2012)); *United States v. McGowan*, No. 18-cr-253, 2022 WL 7105892, at *2 (E.D. Cal. Oct. 12, 2022); *United States v. Avila*, No. 15-cr-336-7, 2018 WL 654432, at *2 (D. Colo. Jan. 31, 2018).

34. See, e.g., PRINCIPLES OF THE L.: POLICING § 2.04 cmt. d (AM. L. INST. 2023) (“[T]here may be rare instances in which pretextual policing is acceptable. Police, for example, may have clear evidence that an automobile of a certain description was involved in a string of major robberies and so decide that when they see a driver of a car of that type commit a traffic offense they will stop the driver and investigate the car for evidence of its involvement in those robberies. Or officers may receive a report of uncertain reliability about someone forcibly being placed in a van and so might follow the van and stop it if a traffic offense provides an opportunity to investigate further.”).

35. On DOJ, see *infra* notes 216–25, 255–60 and accompanying text. On DHS, see *infra* notes 243–49, 262–63 and accompanying text. On DOT, see *infra* notes 226–32, 265 and accompanying text. On DOI, see *infra* notes 119–21 and accompanying text.

B. *The Impact of Pretextual Stops*

This Section offers a summary of the benefits and harms of the widespread use of traffic stops as a crime-fighting tool.³⁶ Although there are many unknowns, it appears that as stops are used on a wider scale, their benefits dissipate while the harms do not, suggesting that a limited use of pretext stops is more defensible than a heavy reliance on the tactic.

1. BENEFITS

There are two primary purported benefits of traffic stops: crime fighting and traffic safety. This Section addresses the evidence on both fronts.

a. *Crime Fighting*

Many policing agencies use stops, and particularly vehicle stops, as a key component of their crime-fighting strategy. Some view the traffic stop as one of “policing’s most effective crime-fighting tools.”³⁷ This view is based, in part, on numerous anecdotes of traffic stops that have played a key role in solving crimes. No tale is more ubiquitous than the apprehension of Oklahoma City bomber Timothy McVeigh, who was apprehended after an officer noticed his van did not have a license plate.³⁸ Although McVeigh’s stop is the highest profile, there are many other examples of traffic stops resulting in the apprehension of violent criminals.³⁹

36. For a comprehensive overview of the existing empirical evidence regarding pretextual traffic enforcement, see generally Donald Braman, Jared Fishman, Jarvis Idowu, Jess Sorensen, Lily Greer et al., *Prosecutors in the Passing Lane: Racial Disparities, Public Safety, and Prosecutorial Declinations of Pretextual Stops*, SAN DIEGO L. REV. (forthcoming) (summarizing studies of pretextual stops and resulting racial disparities in stops, searches, and uses of force; health and welfare impacts; effects on trust in police and government; and public safety impacts).

37. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 8, at 27. See also Hall, *supra* note 30 (“Police traffic enforcement saves lives, reduces street disorder, and plays an important role in criminal investigations.”).

38. The story of McVeigh’s encounter has been repeated countless times, including by Justice Kennedy. See *Maryland v. King*, 569 U.S. 435, 450 (2013) (including Justice Kennedy’s observation that “[i]t is a common occurrence that ‘[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals’” (quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334 (2012))); Farhang Heydari, *The Invisible Driver of Policing*, 76 STAN. L. REV. 1, 12 nn.45–47 (2024) (collecting examples).

39. See, e.g., Ariana Brockington, *How One Mind-Blowingly Simple Mistake Stopped Ted Bundy*, REFINERY29, <https://www.refinery29.com/en-us/2019/01/222447/how-was-ted-bundy-caught-arrested-story->

In the aggregate, however, traffic stops rarely turn up evidence of serious crime. In California, police confiscated firearms in 0.03 percent of traffic stops in 2019.⁴⁰ In North Carolina, police found illegal weapons in just 0.1 percent of stops.⁴¹ In 2022, the Chicago Police Department surged its use of traffic stops to more than 1,400 every day, and only 0.43 percent resulted in the recovery of weapons or drugs—about six of the 1,400 daily stops.⁴²

Rates remain anemic when police overtly act pretextually—that is, when police use stops to target criminal activity. In Los Angeles, the overall yield rate—searches that discovered contraband—was about two percent, but the rates were far lower for stops conducted by crime-suppression units or in supposed high-crime areas—the circumstances in which pretextual stops are most common.⁴³ A study of Nashville’s stops found that less than one percent of non-moving violation stops—stops that often are pretextual—resulted in an arrest that might impact serious crime.⁴⁴

One might argue that low hit-rates are evidence of the deterrent effect of stops. In other words, people may be less likely to engage in criminal activity in locations where they know police are likely to make stops, which in turn explains why police rarely turn up evidence of crimes

netflix#: ~ :text=So%20when%20it%20came%20down,to%20Bundy's%20arrests%20and%20death.[https://perma.cc/XTY6-4DPE] (May 3, 2019, 9:00 PM); *Joel Rifkin Arrest*, N.Y. ST. POLICE, <https://troopers.ny.gov/joel-rifkin-arrest> [https://perma.cc/9HFG-KHRC]; Associated Press, *Shooting Suspect Is Arraigned*, N.Y. TIMES, Apr. 21, 1993, at D22.

40. MAGNUS LOFSTROM, JOSEPH HAYES, BRANDON MARTIN & DEEPAK PREMKUMAR, RACIAL DISPARITIES IN TRAFFIC STOPS 3, 25 (2022), <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fracial-disparities-in-traffic-stops%2F> [https://perma.cc/SJ53-8AU4] (compiling data from 2019). In San Diego, only 1.3% led to arrests of any kind. Megan Welsh, Joshua Chanin & Stuart Henry, *Commentary: Our Research Showed Racial Disparities in San Diego Police Stops. Our Report Was Shelved.*, SAN DIEGO UNION-TRIB. (June 17, 2020, 3:08 PM), <https://www.sandiegouniontribune.com/opinion/story/2020-06-17/racial-disparities-san-diego-police-stops> [https://perma.cc/8CLF-ABXH].

41. BAUMGARTNER, EPP & SHOUB, *supra* note 8, at 2, 35, 62 tbl.2.11.

42. IMPACT FOR EQUITY & FREE2MOVE, A NEW VEHICLE FOR “STOP AND FRISK”: UPDATE 1, 3 (2023).

43. OFF. OF THE INSPECTOR GEN., L.A. POLICE COMM’N, REVIEW OF STOPS CONDUCTED BY THE LOS ANGELES POLICE DEPARTMENT IN 2019, at 3–4 (2020), https://www.oig.lacity.org/_files/ugd/b2dd23_d3e88738022547acb55f3ad9dd7a1dcb.pdf [https://perma.cc/9SJD-7XPM].

44. ALEX CHOHLAS-WOOD, SHARAD GOEL, AMY SHOEMAKER & RAVI SHROFF, *An Analysis of the Metropolitan Nashville Police Department’s Traffic Stop Practices*, STAN. COMPUTATIONAL POL’Y LAB 7 tbl.1 (2018), policylab.stanford.edu/media/nashville-traffic-stops.pdf.

during their stops.⁴⁵ Even if plausible in the pedestrian stop context, this contention seems unlikely when it comes to vehicle stops, which frequently occur on highways and other thoroughfares that are traveled by wide cross sections of the population.⁴⁶ Even still, the possibility of deterrence makes it important to study the broader impact of stops on crime rates.

There is some evidence that traffic enforcement can impact crime rates, but this evidence comes from hot spot policing studies that rarely isolate the effect of traffic stops as opposed to other police activities. After reviewing a substantial literature on the topic, the National Academy of Sciences (NAS) concluded “hot spot” policing strategies “generate statistically significant crime reduction effects without simply displacing crime into immediately surrounding areas.”⁴⁷ NAS also concluded that the crime reduction benefits may extend outside of the immediate hot spot.⁴⁸ However, most of these studies do not focus on traffic stops as the enforcement tactic, but instead wrap in all manner of police activity, including other police enforcement activities and mere police presence in a hot spot.⁴⁹

Moreover, there is reason to doubt that stops remain as effective when their use is widespread, such as across a jurisdiction or as the policing agency’s primary strategy. The NAS study found “an absence of evidence” on “jurisdictional outcomes (e.g., on crime in a city or in large administrative areas such as precincts).”⁵⁰ Among studies that look at stops in particular, a number suggest that widespread use of stops may

45. NANCY G. LA VIGNE, PAMELA LACHMAN, SHEBANI RAO & ANDREA MATTHEWS, *URB. INST., STOP AND FRISK: BALANCING CRIME CONTROL WITH COMMUNITY RELATIONS* 16 (2014), <https://urban.org/sites/default/files/publication/33661/413258-Stop-and-Frisk-Balancing-Crime-Control-with-Community-Relations.PDF> [<https://perma.cc/U8PF-GNYJ>] (“Proponents of stop and frisk counter that low hit rates demonstrate that the presence of officers conducting stops is successfully deterring offenders from carrying weapons, narcotics, and other contraband. If people believe the police will likely stop them, they are less likely to carry a weapon in public; thus, the low hit rate indicates that pedestrian stops produce a favorable outcome.”).

46. See generally Maria Ponomarenko, *The Small Agency Problem in American Policing*, 98 N.Y.U. L. REV. (forthcoming 2024) (discussing how small jurisdictions concentrate their stops on highways).

47. COMM. ON PROACTIVE POLICING: EFFECTS ON CRIME, CMTYS., & C.L., NAT’L ACADS. OF SCIS., ENG’G & MED., *PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES* 6 (David Weisburd & Malay K. Majmundar eds., 2018) [hereinafter *PROACTIVE POLICING*].

48. *Id.* at 307.

49. See, e.g., Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime “Hot Spots”: A Randomized, Controlled Trial*, 12 JUST. Q. 625, 634, 638, 645–46 (1995).

50. *PROACTIVE POLICING*, *supra* note 47, at 6.

be less effective than alternative strategies. A study in Indianapolis, for example, found that a generalized traffic-stop strategy produced more stops and traffic tickets, but did not decrease gun violence, while an approach that attempted to develop suspicion regarding particular individuals had more deterrent effect.⁵¹ A rigorous study of Nashville, Tennessee, which was an early adopter of a federal program emphasizing the use of stops as a central policing tactic, found no relationship between crime and the number of police stops.⁵² A study of the Ramsey County District Attorney's recent policy of not prosecuting criminal offenses arising from certain pretextual stops found no impact violent crime rates.⁵³ Overall, aggressive order-maintenance tactics—flooding zones with police and making huge numbers of stops—are considered less effective than community-focused approaches to hot spots.⁵⁴

All of this suggests that although the use of stops by police may impact crime rates, it is most likely to do so when stops are used in a limited manner and in specific locations. And even then, alternative non-enforcement approaches may prove more effective with less social harm.

b. Traffic Safety

Pretext stops generally are more concerned with crime fighting than traffic safety, but as noted above, an agency or officer can have dual

51. EDMUND F. MCGARRELL, STEVEN CHERMAK & ALEXANDER WEISS, REDUCING FIREARMS VIOLENCE THROUGH DIRECTED POLICE PATROL: FINAL REPORT ON THE EVALUATION OF THE INDIANAPOLIS POLICE DEPARTMENT'S DIRECTED PATROL PROJECT, at ii, 1–2, 94 (2002), <https://www.ojp.gov/pdffiles1/nij/grants/194207.pdf> [<https://perma.cc/M2TM-8LE6>].

52. See CHOHLAS-WOOD, GOEL, SHOEMAKER & SHROFF, *supra* note 44, at 1.

53. Braman, Fishman, Idowu, Sorensen, Greer et al., *supra* note 36 (manuscript at 33) (describing the policy as “barr[ing] attorneys from prosecuting cases where there was no public safety benefit, namely those resulting from traffic stops based solely on minor equipment or registration violations or searches conducted purely on consent without any solid suspicion”); *id.* (manuscript at 46–48) (finding policy did not increase violent crime and caused “no major change” in firearm recovery rate).

54. See, e.g., Cynthia Lum, Christopher Koper, David Weisburd, Robin Engel, John Eck et al., *Experts: Place-Based Strategies Are Effective, Central to Police Reform*, NAT'L CRIM. JUST. ASS'N (Apr. 6, 2022), <https://www.ncja.org/crimeandjusticeneews/experts-place-based-strategies-are-effective-central-to-police-reform> [<https://perma.cc/HJT8-9GTZ>] (“An over-emphasis on aggressive enforcement or simply ‘flooding’ a place with cops aren’t smart hot spots approaches.”); Anthony A. Braga, Brandon C. Welsh & Cory Schnell, *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-Analysis*, 52 J. RSCH. CRIME & DELINQ. 567, 568 (2015) (concluding that, although there is some evidence of the crime reduction effects of community-focused and problem-solving interventions that “change social and physical disorder conditions at particular places,” there is no significant crime reduction benefits of more generalized “aggressive order maintenance strategies”).

purposes in using stops. It is therefore important to assess whether such stops have a positive effect on traffic safety.

There is some evidence that traffic enforcement generally—not limited to pretext stops—can improve driving behavior. Multiple studies suggest high-visibility traffic enforcement can improve poor driving.⁵⁵ A 2011 study, for example, found that more traffic tickets led to fewer vehicle crashes and injuries.⁵⁶ Other studies, however, have found that enforcement does not reduce fatalities, or that the benefits of enforcement dissipate shortly after the campaign ends.⁵⁷

It is a mistake, however, to assume the traffic safety benefits of traffic enforcement—whatever they may be—will accompany pretextual traffic stops. Pretextual traffic stops generally do not target dangerous driving. Rather, when officers use traffic stops as a crime-fighting tool, they use any violation of the traffic code, including minor violations unrelated to traffic safety.⁵⁸ In Chicago, for example, in response to a

55. *See generally* CATHERINE L. TAYLOR, ANGIE BYRNE, KAITLIN COPPINGER, DON FISHER, CHRISTINA FOREMAN & KENDALL MAHAVIER, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS 813 274-A, SYNTHESIS OF STUDIES THAT RELATE AMOUNT OF ENFORCEMENT TO MAGNITUDE OF SAFETY OUTCOMES (2022), https://www.nhtsa.gov/sites/nhtsa.gov/files/2022-06/NPD-210715-001-15489_NCREPSynthesis%20_main%20report-042922-v4-tag.pdf [<https://perma.cc/EAG8-N6DN>].

56. Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 866 (2011).

57. *E.g.*, Anuja L. Sarode, Vanessa P. Ho, Lin Chen, Katelynn C. Bachman, Phillip A. Linden et al., *Traffic Stops Do Not Prevent Traffic Deaths*, 91 TRAUMA ACUTE CARE SURGERY 141, 141–42, 144–45 (2021). *See also* Brad Tuttle, *Police All over the U.S. Are Issuing Fewer Traffic Tickets*, MONEY (Mar. 3, 2015), <https://money.com/traffic-ticket-decrease-speed-limits-police/> [<https://perma.cc/JT4M-W24F>] (“In other words, roads today are safer, not more dangerous, and it’s hard to argue that writing more tickets is going to make anyone safer.”); VISION ZERO SF, EXECUTIVE SUMMARY: SAFE SPEEDS SF HIGH VISIBILITY ENFORCEMENT CAMPAIGN FINDINGS (2019), www.sfmta.com/sites/default/files/reports-and-documents/2020/02/safespeedssfhighvisibilitycampaignfindingswithappendices_2020.01.pdf [<https://perma.cc/3SG3-MW8S>] (finding benefits dissipate quickly).

58. Jamelle Bouie, *Broken Taillight Policing*, SLATE (Apr. 8, 2015, 2:53 PM), <https://slate.com/news-and-politics/2015/04/north-charleston-shooting-how-investigatory-traffic-stops-unfairly-affect-blacks-and-can-lead-to-tragedy.html> [<https://perma.cc/96FL-KXJ8>] (explaining investigatory stops are “for exceedingly minor violations—driving too slowly, malfunctioning lights, failure to signal—which are used as pretext for investigations of the driver and the vehicle”); BAUMGARTNER, EPP & SHOUB, *supra* note 8, at 191 (“We have repeatedly drawn a distinction between safety stops and investigatory stops Safety stops are those aimed at enforcing the rules of the road to decrease the likelihood of an accident. . . . Investigatory stops are those aimed at allowing an officer a look inside of a car.”).

spiking crime rate,⁵⁹ the police department surged its use of traffic stops by 35%.⁶⁰ But 38% of those stops were for non-moving license and registration infractions while less than 1% were for speeding—the biggest driver of fatal crashes.⁶¹ A similar pattern exists in cities that implemented traffic enforcement programs designed to fight crime.⁶² By contrast, in Connecticut, when policing agencies deprioritized low-level stops associated with pretextual enforcement, arrests for DUIs increased, suggesting stops became more focused on traffic safety.⁶³

In short, using traffic stops as a crime-fighting tool may lead police seek out traffic violations that do little to promote traffic safety.

2. HARMS

No assessment of traffic enforcement is complete without an accounting of costs. The costs of police traffic stops are myriad, from financial costs—paying for officer patrol time—to opportunity costs—what receives fewer resources⁶⁴—and also social costs—the harms

59. Hannah Schmid, *Chicago Crime Spikes in 2022, but First Drop in Murder Since Pandemic*, ILL. POL’Y (Feb. 21, 2023), <https://www.illinoispolicy.org/chicago-crime-spikes-in-2022-but-first-drop-in-murder-since-pandemic> [https://perma.cc/A43C-GGVC].

60. IMPACT FOR EQUITY & FREE2MOVE, *supra* note 42, at 1.

61. *Id.* at 2. For data on leading causes of fatal crashes, see *Fatality Facts 2021: Yearly Snapshot*, IIHS-HLDI (May 2023), <https://www.iihs.org/topics/fatality-statistics/detail/yearly-snapshot> [https://perma.cc/3534-MH2X] (documenting that in 2021, 12,330 out of 42,939 fatal crashes involved speeding and 3,349 involved driver distraction); NAT’L HIGHWAY TRAFFIC & SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS 813 450, TRAFFIC SAFETY FACTS: 2021 DATA: ALCOHOL-IMPAIRED DRIVING 10 tbl.4 (2023) (documenting 13,384 traffic fatalities were alcohol related).

62. See Heydari, *supra* note 38, at 45–46 & nn.252–54 (compiling data from Nashville, Baltimore, and Philadelphia—all cities that adopted Data-Driven Approaches to Crime and Traffic Safety, a NHTSA program that encouraged traffic enforcement to promote crime-fighting and traffic safety—indicating high rates of non-safety related traffic stops).

63. Tom Condon, *After a Poor Start, CT’s Anti-Racial Profiling Effort Is Making Progress*, CT MIRROR (Jan. 30, 2022, 5:00 AM), <https://ctmirror.org/2022/01/30/after-a-poor-start-cts-anti-racial-profiling-effort-is-making-progress/> [https://perma.cc/JH22-E95E].

64. The widespread use of traffic stops as a crime-fighting tactic, and the low hit rates that result, drain police resources that might be better spent elsewhere. In Fayetteville, North Carolina, for example, when police shifted away from pretextual and non-safety related stops and instead focused on safety stops, there was a marked improvement in safety outcomes, with no increase in violent or property crime. Mike Dolan Fliss, Frank Baumgartner, Paul Delamater, Steve Marshall, Charles Poole & Whitney Robinson, *Re-Prioritizing Traffic Stops To Reduce Motor Vehicle Crash Outcomes and Racial Disparities*, 7 INJ. EPIDEMIOLOGY 1, 1, 6, 7 tbl.2 (2020)

imposed on individuals and communities that are targeted by stops. Concern for social harms is at the core of growing opposition to police reliance on widespread pretextual traffic stops.⁶⁵ A few of the most salient harms of widespread use of pretextual stops include:

Racial injustice. Study after study demonstrates substantial racial disparities in police use of traffic stops—from the rates at which drivers are stopped,⁶⁶ to rates of search, force,⁶⁷ and arrest.⁶⁸ And yet, although targeted more frequently, searches of Black people uncover contraband or evidence of a crime less often than searches of White people.⁶⁹

(documenting that overall safety stops increased dramatically—by about 250 percent—with racial disparities decreasing).

65. See, e.g., David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 580 (1998) (“But this conception of ‘cost’ is too narrow. What the Attorney General of Ohio and those who share her beliefs on this question fail to recognize is the full costs of these traffic stops. Any accounting of costs must include the impact on all the people innocent of any wrongdoing who are stopped, questioned and perhaps searched, and treated in many ways like suspected criminals in the effort to arrest the guilty.” (emphasis omitted)).

66. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing numerous studies that have demonstrated evidence of racial profiling). See *United States v. Harvey*, 24 F.3d 795, 797 (6th Cir. 1994) (Martin, Jr., J., dissenting) (citing police testimony asserting “[a]lmost every time that we have arrested drug traffickers from Detroit, they’re usually young black males driving old cars”); *United States v. Payano*, No. 17-238, 2017 WL 11466349, at *5 (E.D. Pa. Sept. 26, 2017) (“As courts have recognized, the disproportionate use of traffic stops to investigate crime among racial minorities is a widespread and troubling practice.”).

67. IMPACT FOR EQUITY & FREE2MOVE, *supra* note 42, at 3 (noting that in Chicago, Black and Latine people were subjected to ninety-seven percent of police uses of force during traffic stops).

68. Hossein Zare, Nicholas S. Meyerson, Paul Delgado, Michelle Spencer, Darrell J. Gaskin & Roland J. Thorpe, Jr., *Association Between Neighborhood and Racial Composition of Victims on Fatal Police Shooting and Police Violence: An Integrated Review (2000–2022)*, 11 SOC. SCIS., no. 153, 2022, at 1, 11. See also *Harvey*, 24 F.3d at 798 (Martin, Jr., J., dissenting) (“Indeed, by adopting the position that the police may stop any automobile with a minor equipment defect, or one whose driver commits any petty traffic violation, we have effectively declared that citizens relinquish all meaningful Fourth Amendment protections simply by choosing to enter an automobile. Armed with the comforting knowledge—available only in hindsight—that the car in this case did contain contraband, the Court has validated a police officer’s mere hunch as the basis for a legitimate traffic stop. In doing so, we appear to have abandoned the Fourth Amendment solely to expediency.”).

69. See, e.g., MAGNUS LOFSTROM, JOSEPH HAYES, BRANDON MARTIN & DEEPAK PREMKUMAR, PPIC, RACIAL DISPARITIES IN LAW ENFORCEMENT STOPS 15 (2021), <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fracial-disparities-in-law-enforcement-stops%2F> [https://perma.cc/8VVK-DS6J] (“Searches yield contraband or evidence in 0.6 percentage points fewer searches of Black

Uses of force. Traffic stops are dangerous, resulting in hundreds of police killings and scores more injuries over the last few years alone.⁷⁰ There also is a danger for officers (though far less than to the person being stopped).⁷¹

Economic harms. Traffic stops can result in fines and fees. For many Americans, inability to pay for these unexpected costs can spiral into larger problems, such as the suspension of one's driver's license or even an arrest warrant.⁷²

Targeting harms. Pretextual stops tend to be particularly intrusive: police ask probing questions, ask for consent to search, call in drug dogs, and so on—and insinuate that the person stopped is suspected of criminal

people compared to searches of white people, or at rates of 21.6 percent and 22.2 percent, respectively.”); Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-Marginality in Outcome Test for Discrimination*, 11 ANNALS APPLIED STAT. 1193, 1203 (2017).

70. David D. Kirkpatrick, Steve Eder, Kim Barker & Julie Tate, *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES, <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html> (Nov. 30, 2021) (finding over 400 police killings of motorists during a five-year period, many of which began with a stop for a minor violation—a hallmark of pretextual stops); Brian Howey, Wesley Lowery & Steven Rich, *The Unseen Toll of Nonfatal Police Shootings*, WASH. POST (Oct. 21, 2022, 6:30 AM), <https://www.washingtonpost.com/investigations/interactive/2022/police-shootings-non-fatal/> (investigating nonfatal police shootings in “every department with five or more deadly police shootings from 2015 through 2020” and finding that “for every five people shot and killed by police in these departments, four others were shot and survived” and that racial disparity in nonfatal police shootings of Black people was even higher than in fatal shootings).

71. NICK BREUL & DESIREE LUONGO, NAT’L L. ENF’T MEM’L FUND & CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., MAKING IT SAFER: A STUDY OF LAW ENFORCEMENT FATALITIES BETWEEN 2010-2016, at 39 (2017), <https://portal.cops.usdoj.gov/resourcecenter/ric/Publications/cops-w0858-pub.pdf> [<https://perma.cc/2LKS-4A5W>] (“Traffic Stops continued to be the most common self-initiated incident that led to officer fatalities” (emphasis omitted)).

72. Marin Cogan, *How Cars Fuel Racial Inequality*, VOX, <https://www.vox.com/23735896/racism-car-ownership-driving-violence-traffic-violations> [<https://perma.cc/GPW9-252M>] (June 13, 2023, 6:37 AM) (“As of 2021, about 11 million Americans had their driver’s licenses suspended due to nonpayment of fines and fees.”); Kira Lerner, *New Research Shows an Alarming High Rate of Arrests for Outstanding Bench Warrants*, ARNOLD VENTURES (June 7, 2021), <https://arnoldventures.org/stories/new-research-shows-an-alarming-high-rate-of-arrests-for-outstanding-bench-warrants> [<https://perma.cc/6SDY-64E3>] (“In [St. Louis and Louisville], a significant percentage of arrests involve outstanding bench warrants, issued for violations like failure to appear in court or unpaid fines and fees. These warrants are often associated with non-violent charges, with the most prevalent reason being traffic violations.”).

activity.⁷³ These tactics cause people to feel unfairly targeted and accused—an understandable sentiment considering the stark racial disparities in these stops and the tiny fraction of stops that result in evidence of a crime.⁷⁴ This feeling of being unjustly targeted is itself a traumatic harm,⁷⁵ but it also can lead to a broader disengagement from government:

They are less likely to vote, less likely to contact elected representatives, less likely to contact government agencies, and less likely to cooperate with government agents. They may even avoid things many of us take for granted, such as being involved with our children’s schools. Many may avoid engaging with welfare or unemployment offices even to request aid to which they may be entitled; in short, such individuals can pull away from government in all its forms.⁷⁶

Undermine police legitimacy and public trust and safety. Closely related is the fact that unjust stops undermine perception of police legitimacy, particularly among communities of color that are disproportionately targeted by these stops.⁷⁷ Mistrust, in turn, undermines public safety because people become less likely to report crimes or to cooperate with police, making it more difficult for police to solve crimes.⁷⁸ As President Biden’s 2022 executive order on policing explains:

73. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 8, at 14, 50, 102.

74. Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794, 1817 (2022) (noting how pretextual policing “can create the sense that people are ‘subject[s] of a carceral state’ who lack the basic liberty to move without fear of police intrusion” (quoting *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting))); EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 8, at 150; Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 CASE W. RESV. L. REV. 931, 933–34 (2016).

75. Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014) (finding Black youth in New York City who reported “more police contact also reported more trauma and anxiety symptoms”).

76. BAUMGARTNER, EPP & SHOUB, *supra* note 8, at 188–89 (citation omitted). See also Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2355 (2002) (noting racial profiling “arguably [has] the effect of reducing [minority] groups’ social status and increasing their sense of isolation from the broader American political community”).

77. See Blanks, *supra* note 74, at 933–34.

78. See, e.g., Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 105 (2020) (“Indeed, research demonstrates that a police department’s response to a crime

Our criminal justice system must respect the dignity and rights of all persons and adhere to our fundamental obligation to ensure fair and impartial justice for all. . . . Protecting public safety requires close partnerships between law enforcement and the communities it serves. Public safety therefore depends on public trust, and public trust in turn requires that our criminal justice system as a whole embodies fair and equal treatment, transparency, and accountability.⁷⁹

C. *The Usual Response*

Recognizing the harms of pretextual traffic stops, many have long called for reforms to limit the practice. Although a few of these proposals are aimed at the federal government—and are discussed in more detail in Part III—for the most part, these reforms have been directed at state and local actors.⁸⁰

One set of recommendations focuses on legislatively limiting the bases for police traffic stops. Some advocate for a minimized state traffic code, focusing on true risks to public safety,⁸¹ or the creation of civil traffic enforcement units rather than relying on police.⁸² Other proposals,

report and an individual's perception of how police will respond to their report may be more important to reporting rates than whether police can actually solve a crime. The studies show that, to improve reporting, police must improve relationships with the communities they serve.” (footnote omitted)); Carla J. Barrett & Megan Welsh, *Petty Crimes and Harassment: How Community Residents Understand Low-Level Enforcement in Three High-Crime Neighborhoods in New York City*, 41 QUALITATIVE SOCIO. 173, 174, 178, 190 (2018); Chris L. Gibson, Samuel Walker, Wesley G. Jennings & J. Mitchell Miller, *The Impact of Traffic Stops on Calling the Police for Help*, 21 CRIM. JUST. POL'Y REV. 139, 147 (2010) (finding that “citizens experiencing one or more than one motor vehicle traffic stop in the past 12 months were less likely to ask for assistance/information from the police than those not experiencing a traffic stop . . . or more than one stop”).

79. Exec. Order No. 14074, 87 Fed. Reg. 32945, 32945 (May 25, 2022).

80. See, e.g., Thaddeus Johnson & Natasha Johnson, *If We Want To Reduce Deaths at Hands of Police, We Need To Reduce Traffic Stops*, TIME (Feb. 3, 2023, 1:36 PM), <https://time.com/6252760/reducing-fatal-police-encounters-traffic-stops> [https://perma.cc/7UFE-HHBA]; KATIE BLUM & JILL PAPERNO, EMPIRE JUST. CTR., STOP THE STOPS: THE DISPARATE USE AND IMPACT OF POLICE PRETEXT STOPS ON INDIVIDUALS AND COMMUNITIES OF COLOR 52–68 (2023), <https://empirejustice.org/wp-content/uploads/2023/01/Stop-the-Stops-Empire-Justice-Center-Preliminary-Report-on-Racial-Disparities-in-Pretext-Stops.pdf> [https://perma.cc/XER4-YT3T].

81. See, e.g., Bradley R. Haywood, *Ending Race-Based Pretextual Stops: Strategies for Eliminating America's Most Egregious Police Practice*, 26 RICH. PUB. INT. L. REV. 47, 50 (2022).

82. *Id.* at 76–77; Ram Subramanian & Leily Arzy, *Rethinking How Law Enforcement Is Deployed*, BRENNAN CTR. FOR JUST. (Nov. 17, 2022), <https://www.brennancenter.org/our-work/research-reports/rethinking-how-law->

such as a model statute from the Policing Project, do not affect the codes themselves, but instead include state or local limits on which infractions police may make a stop.⁸³ And if not limiting stops, proposals at least call for data collection in order to analyze whether racial profiling is occurring.⁸⁴

Another set of reforms looks to courts. There is no shortage of criticism of the Supreme Court's decision in *Whren*.⁸⁵ But absent a

enforcement-deployed [<https://perma.cc/W2KS-8W32>]; MADELYN COLES, DONOVAN HICKS, MICHELLE PORTILLO, ERICA POSEY, JACOB SEIDMAN & K.C. SHAH, STAN. L. SCH., SAFETY BEYOND POLICING: PROMOTING CARE OVER CRIMINALIZATION 12–15 (2021), <https://law.stanford.edu/wp-content/uploads/2021/03/Selective-De-Policing-Policy-Lab-report-April-2021.pdf> [<https://perma.cc/87P6-XZUH>].

Somewhat related is a reliance on technology in lieu of police. See Joh, *supra* note 23, at 216–34.

83. See AN ACT TO CURTAIL PRETEXTUAL TRAFFIC STOPS § I (POLICING PROJECT, N.Y.U. SCH. OF L.), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/63dc54409f248b0f17a6ae48/1675383884348/Pretext+Model+Statute.pdf> [<https://perma.cc/7RWJ-BHRE>]. See also *STOPS (Sensible Traffic Ordinances for Public Safety)*, VERA, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/public-safety/redefining-public-safety-initiative/stops> [<https://perma.cc/QZZ2-5U72>] (describing new initiative to “work with localities across the country” to “study, draft, and introduce legislation/policy to end or limit the use of law enforcement stops for low-level issues that do not affect traffic safety”); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 697–705 (2021); Robert Courtney Smith, Andrés Besserer Rayas, Daisy Flores, Angelo Cabrera, Guillermo Yrizar Barbosa et al., *Disrupting the Traffic Stop-to-Deportation Pipeline: The New York State Greenlight Law’s Intent and Implementation*, 9 J. ON MIGRATION & HUM. SEC. 94, 106 (suggesting decriminalization of routine traffic offenses and statewide regulation on relationship between immigration and traffic enforcement).

84. BLUM & PAPERNO, *supra* note 80, at 53–55; Bob Harrison, *Using Police Observations on Traffic Stops To Inform Policy*, POLICE1 (June 22, 2021, 11:04 AM), <https://www.police1.com/traffic-patrol/articles/using-police-observations-on-traffic-stops-to-inform-policy-87vP0kpQ9xQ9deu9/> [<https://perma.cc/U47C-C4Y4>] (pointing to California’s Racial and Identity Profiling Act as a model); David A. Harris, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 579–82 (1997).

85. A complete accounting is impossible, but a few examples include: Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 155–56 (2017); Blanks, *supra* note 74, at 934; 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, 916–20 (2015); Johnson, *supra* note 27, at 1065–70, 1075; Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192–96; Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032–34 (2002); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 320–21 (2001); Wesley MacNeil Oliver, *With an Evil Eye and an Unequal Hand: Pretextual*

change in federal jurisprudence, some have called for a turn to state courts and state constitutions to limit pretext stops.⁸⁶ Some states have done so.⁸⁷

Finally, there are suggestions to regulate police conduct during the stop. These reforms include calls for increased use of body cameras;⁸⁸ the creation of civilian review boards;⁸⁹ and legislation that requires officers to inform people when they are free to leave,⁹⁰ that limits or abolishes consent searches during traffic stops,⁹¹ and that codifies “rules of behavior for police conducting routine traffic stops.”⁹² There also have been calls for local prosecutors to refuse to prosecute cases arising from

Stops and Doctrinal Remedies to Racial Profiling, 74 TUL. L. REV. 1409, 1413–14 (2000); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 978–83 (1999); 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 MEM. L. REV. 43, 56–57 (2018); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2010–11 (1998); Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 566–68 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 287–91, 309–13; Harris, *supra* note 84, at 582; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427 (1997); Diana Roberto Donahoe, “*Could Have*,” “*Would Have*.” *What the Supreme Court Should Have Decided in Whren v. United States*, 34 AM. CRIM. L. REV. 1193, 1199–200 (1997).

86. See, e.g., Phyllis W. Beck & Patricia A. Daly, *State Constitutional Analysis of Pretext Stops: Racial Profiling and Public Policy Concerns*, 72 TEMP. L. REV. 597, 597–98 (1999); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 583–85 (1997).

87. See, e.g., Margaret M. Lawton, *State Responses to the Whren Decision*, 66 CASE W. RESV. L. REV. 1039, 1040–41 (2016) (discussing New Mexico and Washington’s departures from the federal rule in *Whren*); *State v. Arreola-Botello*, 451 P.3d 939, 948–49 (Or. 2019) (limiting an officer’s questions during a traffic stop to those topics “reasonably related” to the basis for that stop).

88. See generally Matthew Makofske, *Pretextual Traffic Stops and Racial Disparities in Their Use* (Munich Pers. RePEc Archive, Working Paper No. 102435, 2020), https://mpa.ub.uni-muenchen.de/102435/15/MPRA_paper_102435.pdf [<https://perma.cc/6HSQ-XKC5>].

89. E.g., Hecker, *supra* note 86, at 592–93, 600–03.

90. E.g., Kathleen M. O’Day, *Pretextual Traffic Stops: Protecting Our Streets or Racist Police Tactics?*, 23 U. DAYTON L. REV. 313, 328–30 (1998).

91. E.g., Timothy P. O’Neill, *Vagrants in Volvos: Ending Pretextual Traffic Stops and Consent Searches of Vehicles in Illinois*, 40 LOY. U. CHI. L.J. 745, 772–79 (2009); Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), <https://www.aclu.org/news/criminal-law-reform/defunding-the-police-will-actually-make-us-safer> [<https://perma.cc/WWZ5-RQ4G>].

92. O’Neill, *supra* note 91, at 773. E.g., Christopher R. Dillon, *Whren v. United States and Pretextual Traffic Stops: The Supreme Court Declines To Plumb Collective Conscience of Police*, 38 B.C. L. REV. 737, 760–70 (1997) (encouraging action on the state level).

pretextual stops.⁹³ Again, these calls focus on what state and local actors should do.

These reforms are essential, but state and local approaches have serious limits. First, although some states and cities are taking action to mitigate the harms of pretextual traffic stops, they are the exception, not the rule. Even in the wake of high-profile traffic stop deaths, most jurisdictions have not imposed any limits beyond the constitutional baseline.⁹⁴ The fact is, many never will. It is no secret that over-policing affects some communities more than others.⁹⁵ In many places, those most impacted do not have the political power to change what policing looks like in their communities.⁹⁶ And when it comes to traffic stops, the public choice problems may be particularly acute:⁹⁷ there are policing agencies that deliberately target vehicles passing through their jurisdiction—passing on costs to non-residents who have even less ability to impact policing policy.⁹⁸

Second, even if state and local governments want to reform pretext stops, there is another key player pushing in the opposite direction: the federal government. From employing tens of thousands of police, to its bully pulpit, the federal government exercises tremendous influence over

93. *E.g.*, Jamila Hodge & Akhi Johnson, *Ending Pretextual Stops Is an Important Step Toward Racial Justice*, VERA (Dec. 18, 2020), <https://www.vera.org/news/ending-pretextual-stops-is-an-important-step-toward-racial-justice> [<https://perma.cc/4T3K-KYGN>]; Braman, Fishman, Idowu, Sorensen, Greer et al., *supra* note 36 (manuscript at 1) (conducting an empirical evaluation of the Ramsey County Attorney’s decision to “decline prosecution of non-public-safety stops” and concluding that “reduced stops have led to decreased racial disparities without affecting crime rates”).

94. *See* BRANDON L. GARRETT, WILSON CTR. FOR SCI. & JUST., *THE LAWS THAT REGULATE POLICE: THE WILSON CENTER’S POLICING LEGISLATION DATABASE 10* (2023), <https://wcsj.law.duke.edu/wp-content/uploads/2023/05/Policing-Database-Report-May-2023.pdf> [<https://perma.cc/95DH-LSFD>] (reviewing policing legislation since 2018 and concluding “[m]ost states did not enact any such bills, regardless of their politics”); Colleen Slevin, *States Diverge on Police Reforms After George Floyd Killing*, PBS NEWS HOUR (Dec. 30, 2021, 12:41 PM), <https://www.pbs.org/newshour/nation/states-diverge-on-police-reforms-after-george-floyd-killing> (explaining that some states actually passed legislation expanding police officers’ rights in the wake of George Floyd’s murder).

95. *See* Braman, Fishman, Idowu, Sorensen, Greer et al., *supra* note 36 (manuscript at 2–4); Alschuler, *supra* note 85, at 195.

96. *See, e.g.*, Reenah L. Kim, Comment, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 482–85 (2001); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1600–02 (2017).

97. *See* Ponomarenko, *supra* note 46, at 22–25.

98. *See id.* at 24–25.

policing at every level.⁹⁹ And as the next Part makes clear, the federal government has exercised its authority to promote the widespread use of pretextual traffic stops. Understanding how this occurs lays the groundwork for the federal reforms that are needed.

II. THE FEDERAL RECIPE FOR PRETEXTUAL POLICING

Although some aspects of policing are profoundly local,¹⁰⁰ much of policing today is a cooperative endeavor among federal, state, county, and local law enforcement. Some have criticized this cooperative federalism on the grounds that it undermines the ability of states and localities to hold their own police accountable.¹⁰¹ Without making broad judgments about the federal government's appropriate role in policing, this Part focuses on the underappreciated role of the federal government in promoting the widespread use of pretextual, crime-fighting traffic stops.

The mechanisms of the federal government's influence are complex. Section II.A begins with federal law enforcement agencies and the ways they direct local police to make stops as a criminal interdiction tactic. Sections II.B, II.C, and II.D look at less direct mechanisms. Section II.B examines how federal enforcement priorities—drug interdiction, traffic safety, and immigration—encourage local police to make pretextual stops. Section II.C explores federal financial incentives, including grant funding and asset forfeitures. Section II.D details the impact of federal databases and federally funded technology on pretextual stops.

99. See William Partlett, *Criminal Law and Cooperative Federalism*, 56 AM. CRIM. L. REV. 1663, 1665–66 (2019); Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 946–47 (2015); Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 42 (1996).

100. On policing policy coming from the local level, see, for example, Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018) (“American policing, like American politics, is a decidedly local affair.” (footnote omitted)); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 815 (2012) (“Even limited federal intervention into policing—which has always been a local concern—has been politically controversial.”); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1980 (2008) (“Of course, America’s justice system already is bureaucratized, but the most important bureaucracies — police forces and district attorneys’ offices — are governed by local politics and politicians.”).

101. See sources cited *supra* note 99.

A. Pretextual Stops as a Federal Law Enforcement Tactic

Although pretextual stops typically are thought of as a tactic of local police and state highway patrols, federal law enforcement officers use the tactic as well.

1. THE FEDS THEMSELVES

We begin with federal law enforcement agencies. As of 2020, the federal government employed over 115,000 full-time law enforcement officers across ninety agencies (excluding corrections).¹⁰² The largest agencies are Customs and Border Protection (46,993 officers), the Federal Bureau of Investigation (FBI) (13,575 officers), and Immigration and Customs Enforcement (12,989 officers).¹⁰³ In 2021, federal law enforcement agencies made nearly 80,000 arrests.¹⁰⁴

A number of federal law enforcement agencies have authority to make traffic stops. These agencies include, but are not limited to, the Bureau of Indian Affairs,¹⁰⁵ the Bureau of Land Management,¹⁰⁶ the

102. CONNOR BROOKS, BUREAU OF JUST. STAT., U.S. OF DEP'T JUST., NCJ 304752, FEDERAL LAW ENFORCEMENT OFFICERS, 2020 – STATISTICAL TABLES 17 (2023), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pdf> [<https://perma.cc/9SH6-HYGA>].

103. *Id.* at 4 tbl.1.

104. MARK MOTIVANS, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 305127, FEDERAL JUSTICE STATISTICS, 2021, at 1 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf> [<https://perma.cc/BNS8-8U4M>].

105. BUREAU OF INDIAN AFFS., OFF. OF JUST. SERVS., LAW ENFORCEMENT HANDBOOK 249–56 (3d ed. 2015), <https://www.bia.gov/sites/default/files/dup/BIA%20OJS%20Third%20Edition%20LE%20Handbook%202015%20%20Approved%20Public%20Release%283%29.pdf> [<https://perma.cc/F667-GQEJ>] (containing guidance on how to conduct traffic stops).

106. The Bureau of Land Management (BLM) enforces the traffic violations contained in 43 C.F.R. § 8365 (2024). Specifically, 43 C.F.R. § 8365.1-3 (2024) (providing for speeding and reckless driving) and 43 C.F.R. § 8365.2-4 (2024) (providing that motor vehicles only drive on roads and other designated places). The laws and regulations BLM enforces are listed on their website. *BLM's Law Enforcement Authority*, BUREAU LAND MGMT., <https://www.blm.gov/programs/public-safety-and-fire/law-enforcement/laws-and-regulations> [<https://perma.cc/E4CD-AMAU>].

National Park Service,¹⁰⁷ the National Zoological Park Police,¹⁰⁸ the U.S. Capitol Police,¹⁰⁹ the U.S. Fish and Wildlife Service,¹¹⁰ the U.S. Forest Service,¹¹¹ the U.S. Marshals Service,¹¹² and the U.S. Park Police.¹¹³ Some of these agencies, like the Marshals Service, limit their agents to making stops only for serious violations.¹¹⁴ But most do not publish any such limits and none appear to address pretext stops in particular.¹¹⁵

107. National Park Service (NPS) officers are authorized to enforce traffic rules under 36 C.F.R. § 1.2 (applicability) and §§ 4.1–.23 (traffic rules). 36 CFR §§ 1.2, 4.1–.23 (2024). In 2022, two people were convicted of making a false statement to a federal officer after presenting false identification to an NPS officer during a traffic stop. Press Release, U.S. Att’y’s Off. S.D. Miss., Man and Woman Convicted in Connection with False Statement to a Federal Officer (Aug. 3, 2022), <https://www.justice.gov/usao-sdms/pr/man-and-woman-convicted-connection-false-statement-federal-officer> [https://perma.cc/PA48-QSDP].

108. A partnership agreement between the National Zoo Park Police and the Metropolitan Police Department grants the Park Police “the same authority to enforce traffic and municipal regulations as the MPD officers” in a narrow geographical area immediately surrounding zoo property. *Cooperative Agreement: National Zoo and MPDC*, MPDC.DC, <https://mpdc.dc.gov/page/cooperative-agreement-national-zoo-and-mpdc> [https://perma.cc/W8JR-LGE8].

109. See *Arrest Summary Report*, U.S. CAPITOL POLICE, <https://www.uscp.gov/daily-arrests> [https://perma.cc/L6GV-QMP2].

110. In *State v. Sanchez*, the defendant was arrested for drug trafficking after a U.S. Fish and Wildlife Service officer stopped her for violating an Arizona state traffic law. No. 2 CA–CR 2008–0397, 2009 WL 2246480, ¶¶ 2, 13 (Ariz. Ct. App. July 28, 2009). A job description for a U.S. Fish and Wildlife Land Management Law Enforcement Officer includes the responsibility to “[i]nvestigate . . . traffic violations.” *Land Management Law Enforcement Officer*, USAJOBS, <https://www.usajobs.gov/job/615516500> [https://perma.cc/D2N6-UCVV].

111. FS Directive 5385.6, Traffic Enforcement Equipment for Law Enforcement Vehicles (U.S.D.A. 2023), https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsm?5300 [https://perma.cc/LR72-X855] (select link titled “wo_5380_Amend 2023-2_Law Enforcement Equipment.docx”).

112. U.S. MARSHALS SERV., POLICY DIRECTIVES § 8.9, at 3–4 (2018), <https://www.usmarshals.gov/sites/default/files/media/document/usms-policy-directive-arrests.pdf> [https://perma.cc/ET4J-UG5Y].

113. See, e.g., *Evans v. Solomon*, 681 F. Supp. 2d 233, 241–42 (E.D.N.Y. 2010) (holding that U.S. Park Police had authority to stop defendant for a traffic violation). See also *United States v. Feliciano*, 974 F.3d 519, 522 (4th Cir. 2020) (involving a U.S. Park Police officer stop of the defendant for driving a delivery truck on a road where commercial vehicles require permits).

114. The U.S. Marshals Service agency directive on arrests states that Marshals only can enforce state law, including traffic violations, when the violations are likely to cause injury. See U.S. MARSHALS SERV., *supra* note 112, at 4.

Federal Protective Service Agents testified in *United States v. House* that “agency policy prohibited officers from conducting traffic stops for minor traffic violations outside of federal property in the State of Georgia.” 684 F.3d 1173, 1185 (11th Cir. 2012).

115. The U.S. Secret Service Uniformed Division prohibits its agents from “pursuing vehicles for the sole purpose of effecting a traffic stop.” *Korsah v. United*

There is little information on how these agencies use their traffic stop authority. Federal agencies do not publish data on how many traffic stops they conduct or for what purpose. One can find anecdotes of stops that led to arrests for more serious offenses.¹¹⁶ But there also are examples of traffic stops by federal officers going awry. In 2015, U.S. Park Police unlawfully detained and badgered a Black Secret Service officer who was on duty attempting to join a motorcade.¹¹⁷ In 2003, a Park Police officer allegedly tailed, stopped, and used excessive force against a loss prevention manager traveling on a city road.¹¹⁸

Despite a dearth of data, there is some indication that federal agencies rely on pretextual traffic stops. The Bureau of Indian Affairs (BIA), for example, operates a Division of Drug Enforcement (DDE) that runs drug interdiction programs in “Indian Country.”¹¹⁹ A 2019 report describes various DDE operations, including one in New Mexico that conducted “high-volume traffic stops, based upon identifiable traffic infractions or motor vehicle operation violations.”¹²⁰ There have been media reports of BIA personnel conducting traffic stops of vehicles en route to the Burning Man festival, likely as a pretext to search for drugs.¹²¹ U.S. Border Patrol operates an interior checkpoint program,

States, No. 20-cv-03580, 2021 WL 2634666, at *1 (D.D.C. June 25, 2021) (quoting Decl. of David Garrett at 16, *Korsah*, *supra* (ECF No. 24-2)).

116. See, e.g., *State v. Sanchez*, No. 2 CA–CR 2008-0397, 2009 WL 2246480, (Ariz. Ct. App. July 28, 2009).

117. Rachel Weiner, *Park Police Pulled Over a Black Secret Service Officer — Twice*, WASH. POST (Mar. 31, 2023, 6:30 AM), <https://www.washingtonpost.com/dc-md-va/2023/03/31/park-police-secret-service-officer-lawsuit/>.

118. *Evans*, 681 F. Supp. 2d at 237–39.

119. BIA operates twenty-three police agencies which are “responsible for maintaining law and order within Indian Country by patrolling Indian reservations, enforcing tribal laws, and making arrests.” *Careers*, U.S. DEP’T. INTERIOR: INDIAN AFFS., <https://www.bia.gov/bia/ojs/careers> [<https://perma.cc/LN4E-SG6L>]; *Tribal Law Enforcement*, BUREAU JUST. STAT., U.S. DEP’T JUST., <https://bjs.ojp.gov/topics/tribal-crime-and-justice/tribal-law-enforcement/#lw5ibp> [<https://perma.cc/PT9W-BKKR>]. BIA police sit under the BIA’s Office of Justice Services, which is the “exclusive federal entity charged with maintaining law and order on Indian reservations.” *Office of Justice Services*, U.S. DEP’T INTERIOR: INDIAN AFFS., <https://www.bia.gov/bia/ojs> [<https://perma.cc/98P5-JFBX>].

120. U.S. DEP’T OF INTERIOR, BUREAU OF INDIAN AFFS., FY 2019 YEAR END REPORT 19 (2020), https://www.bia.gov/sites/default/files/dup/assets/bia/ojs/ojs/pdf/DDE_2019_Annual_Report_draft_08-18-2020.pdf [<https://perma.cc/FH34-7UDY>]. See also *id.* at 21 (“An Impact Plus operation consists of covert investigations along with high visibility traffic enforcement . . .”).

121. See Jennifer Kane, *Burning Man: Traffic Stops ‘Aggressive, Unconstitutional’ on Tribal Land*, RENO GAZETTE J., <https://www.rgj.com/story/life/arts/burning-man/2018/08/21/burning-man-traffic-stops->

nominally for immigration control, but that is used in concert with local law enforcement for pretextual drug enforcement.¹²²

* * *

In addition to making their own pretext stops, federal law enforcement agencies direct state and local police to make pretextual traffic stops in two contexts: (1) via joint task forces, and (2) requesting that state or local police conduct “wall” or “whisper” stops.

2. FEDERAL TASK FORCES

Across the country, hundreds of federal task forces, comprised of thousands of local police, deputy sheriffs, and state troopers, cross-deputized as federal agents, rely on traffic stops as a key tactic. In January 1992, the FBI launched its Safe Streets initiative within the Violent Crime and Major Offenders Program to create long-term, proactive task forces “that focus on violent crimes and the apprehension of violent fugitives.”¹²³ Today, there are over one thousand task forces across numerous federal agencies, enlisting thousands of local officers.¹²⁴ Numerous federal grant programs funnel hundreds of millions of dollars annually into these task forces.¹²⁵

aggressive-unconstitutional/1059608002/ [https://perma.cc/4Y2X-RF8U] (Aug. 22, 2018, 11:46 AM).

122. Elizabeth N. Jones, *Possible Problems at the San Clemente Checkpoint*, 6 VA. J. CRIM. L. 43, 47–48 (2018) (“Border Patrol agents might be engaging in a secretive, deceitful, and arguably unlawful process known as parallel construction. It posits that the Border Patrol is most likely working in tandem with outside law enforcement to perfectly and profitably ‘predict’ when to open specific checkpoints and on which vehicles to concentrate. Border Patrol agents later rewrite facts and create phony documents to submit as evidence to courts, prosecutors, and defense attorneys.” (footnote omitted)).

123. Douglas Shur, *Safe Streets: Combining Resources To Address Violent Crime*, FED. BUREAU INVESTIGATION L. ENF’T BULL., Apr. 1995, at 1, 2, <https://www.ojp.gov/pdffiles1/Digitization/154257NCJRS.pdf> [https://perma.cc/BP3R-C8VG].

124. Nick Sibilla, *Deputizing Gone Wild: Federal Task Forces Give State and Local Cops Ridiculously Broad Immunity*, USA TODAY, <https://www.usatoday.com/story/opinion/columnist/2022/02/15/local-police-ridiculous-qualified-immunity/6616330001> [https://perma.cc/E5TA-8628] (Sept. 7, 2022, 4:39 PM).

125. See Harmon, *supra* note 99, at 946–47 (discussing Byrne Justice Assistance Grants, the Organized Crime Drug Enforcement Task Forces Program, Project Safe Neighborhoods, Operation Stonegarden, the High Intensity Drug Trafficking Areas Program and other grants and programs that support task forces). See also, e.g., *Narcotics Task Force Support Project*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST.

Federal task forces have their proponents and critics. The FBI touts their successes in fighting violent crime,¹²⁶ and has argued that task forces effectively combine federal funds, equipment, and expertise with local intelligence and familiarity with their communities.¹²⁷ But critics argue that task force officers operate in unaccountable ways.¹²⁸ Multiple police departments have withdrawn from task forces because local police assigned to those task forces operate unbound from local policies, such as limits on use of force and other prohibited tactics.¹²⁹

There is good reason to believe that at least some federal task forces rely on pretextual traffic stops as a key tactic. Launched in summer 2020—during President Trump’s re-election campaign—Operation Legend promised “to fight the sudden surge of violent crime” by sending hundreds of FBI, DEA, Bureau of Alcohol, Tobacco, Firearms and Explosives, and Marshals Service officers into select cities to work with state and local law enforcement.¹³⁰ At the close of the operation, DOJ touted its successes, including the arrest of over 6,000 individuals.¹³¹ But community activists described heavy-handed blunderbuss tactics used by

(Aug. 27, 2014), <https://bja.ojp.gov/funding/awards/2014-dj-bx-0529> (awarding funding to Nye County Sheriff’s Office for Narcotics Task Force Support “to fund personnel costs for officers conducting highway narcotics interdiction”).

126. *Combating Gang Violence in America: Examining Effective Federal, State and Local Law Enforcement Strategies: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 11–14 (2003) (statement of Grant D. Ashley, Assistant Director, Criminal Investigative Division, FBI).

127. Shur, *supra* note 123, at 2–5.

128. See, e.g., Sibilla, *supra* note 124 (discussing immunity from civil rights lawsuits); Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism and the War on Terror*, 41 WILLAMETTE L. REV. 941, 941–42 (2005) (observing joint state and federal task forces have “muddled the lines of authority and accountability that have characterized our dual sovereignty model of federalism”).

129. See, e.g., Simone Weichselbaum, Sachi McClendon & Uriel J. Garcia, *U.S. Marshals Act Like Local Police with More Violence and Less Accountability*, MARSHALL PROJECT (Feb. 11, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/02/11/u-s-marshals-act-like-local-police-with-more-violence-and-less-accountability> [<https://perma.cc/JBR5-RTZ9>]; Simone Weichselbaum, *Why Some Police Departments Are Leaving Federal Task Forces*, MARSHALL PROJECT, (Oct. 31, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/31/why-some-police-departments-are-leaving-federal-task-forces> [<https://perma.cc/MJ4W-6V4J>]; Brennan Center for Justice, *Bad Partners: Why Local Law Enforcement Should Leave FBI Joint Terrorism Task Forces*, YOUTUBE (Feb. 11, 2021), <https://www.youtube.com/live/IOik7Nq24cU>.

130. Press Release, Off. of Pub. Affs., Attorney General William P. Barr Announces Launch of Operation Legend (Sept. 1, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-legend> [<https://perma.cc/M55G-7QUT>].

131. *Id.*

task force officers, including that officers would harass community members via pretextual traffic stops.¹³²

Texas’s system of federally funded regional narcotics task forces appear to rely on similar tactics.¹³³ An ACLU analysis of these task forces’ stops found much higher rates of stops than local police and sheriffs, fewer citations issued (suggesting stops were unrelated to serious traffic safety concerns), and high levels of consent searches.¹³⁴ The analysis also shows patterns of racial disparities.¹³⁵ All of this is a hallmark of pretextual stops.¹³⁶

3. “WALL” AND “WHISPER” STOPS

Federal agencies and task forces sometimes enlist state and local police to conduct pretextual traffic stops in order to conceal the federal fingerprint on the stop. Sometimes referred to as “wall” or “whisper” stops, these stops occur when one law enforcement officer (or agency) asks another to develop an independent basis to stop a particular vehicle.¹³⁷ This tactic allows the original agency to insulate itself—to prevent the target of the stop from knowing about (or challenging) the original agency’s interest in the stop.¹³⁸ This practice appears

132. See generally Pod for the Cause, *Talking Traffic Stops: The Urgent Need for Police Accountability and Transparency*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 9, 2023), <https://civilrights.org/podcast/s06e08/>.

133. SCOTT HENSON, ACLU, *FLAWED ENFORCEMENT* 3 (2004), <https://www.aclu.org/wp-content/uploads/legal-documents/flawed%20enforcement.pdf> [<https://perma.cc/LD6U-5DGA>].

134. *Id.*

135. *Id.* (revealing that task force officers were significantly more likely to search Black drivers).

136. Heydari, *supra* note 38, at 12 & nn.44–47.

137. *State v. Lopez*, No. 1 CA-CR 21-0220, 2023 WL 367512, ¶ 3 (Ariz. Ct. App. Jan. 24, 2023) (“Suspecting contraband may be in the SUV, a [DEA] task force member requested a ‘whisper stop’ be conducted on the vehicle. As explained at trial, a law enforcement agency investigating a particular vehicle may request another agency develop an independent legal basis to stop and search it.”); *United States v. Vargas-Gonzalez*, No. 20-CR-00078, 2021 WL 5881450, at *4 (D. Conn. Dec. 13, 2021) (“Officer Breen asked Trooper Chokbengboune to conduct a ‘walled-off’ or ‘whisper’ stop, which is a traffic stop in which a trooper in a marked vehicle tries to establish independent probable cause to stop and search a vehicle so that the DEA can limit its interactions with the person being stopped and avoid disclosing a full investigation.”); *United States v. Benard*, 680 F.3d 1206, 1208–09 (10th Cir. 2012) (“In a wall stop, a patrol officer is asked to find his own lawful reason to stop and search the vehicle and is not advised of the information known by investigators in order to protect the secrecy of the ongoing investigation.”).

138. See, e.g., *United States v. McGowan*, No. 18-cr-253, 2022 WL 7105892, at *2 (E.D. Cal. Oct. 12, 2022) (“At the request of the federal agents, the state troopers then coordinated to search the truck and trailer for drugs using an investigative technique

widespread, including among federal agencies.¹³⁹ A DEA official, for example, described the practice as an almost daily occurrence.¹⁴⁰

Although legal, this type of pretext stop creates a problem. As one court observed, after a whisper stop, “law enforcement officers . . . somewhat routinely omit or misrepresent the actual origins of their evidence when seeking warrants or pursuing charges that originate from pretextual traffic stops.”¹⁴¹ This practice—concealing the

which the government has referred to as a ‘wall stop,’ designed to avoid compromising a wiretap that is being utilized in an ongoing criminal investigation. In short, this investigative technique involves a pretextual vehicle stop, ostensibly based on a traffic violation, so the driver is unaware that he is actually a suspect in a larger investigation.” (citation omitted); *United States v. Parker*, No. 19-cr-46, 2019 WL 8440693, at *2 (E.D. Tenn. Dec. 5, 2019), *report and recommendation adopted*, No. 19-cr-46, 2020 WL 729514 (E.D. Tenn. Feb. 13, 2020) (“DEA planned to conduct a ‘walled off traffic stop’ of Defendant to protect the integrity of the ongoing investigation. Therefore, DEA arranged for a ‘whisper stop’ by the GSP Criminal Interdiction Unit to avoid revealing information known by law enforcement to Defendant. In other words, GSP troopers were asked to attempt to develop probable cause to initiate a traffic stop to try to ‘get in’ the truck without exposing the existence of the ongoing investigation.”).

139. HUM. RTS. WATCH, DARK SIDE: SECRET ORIGINS OF EVIDENCE IN US CRIMINAL CASES 31–32 (2018), https://www.hrw.org/sites/default/files/report_pdf/us0118.pdf [<https://perma.cc/PX3T-K267>] (“The earliest published court opinions located by Human Rights Watch describing what may have been pretextual stops for parallel construction purposes describe stops requested in Indiana and Illinois in 1985. Over time, such cases appear to have become far less unusual” (footnote omitted)). For examples of federal agency involvement, see *Lopez*, 2023 WL 367512, at *1 (involving DEA task force); *United States v. Rodriguez*, 57 M.J. 765, 767–68 (N.M. Ct. Crim. App. 2002), *aff’d*, 60 M.J. 239 (C.A.A.F. 2004) (involving Naval Criminal Investigative Service); HUM. RTS. WATCH, *supra*, at 17 (noting evidence that the FBI, Immigration and Customs Enforcement, and the Bureau of Alcohol, Tobacco, Firearms and Explosives use this practice).

For examples involving task forces, see *Jarrott v. Madrid*, No. 22-298, 2022 WL 14812623, at *1 (D.N.M. Oct. 26, 2022) (alleging that “[New Mexico State Police] officers use these pretextual whisper stops to assist other agencies”); *United States v. Gaston*, No. 19-cr-211, 2021 WL 1263453, at *2 (D. Minn. Apr. 5, 2021) (describing the Ramsey County Violent Crime Enforcement Team arranging whisper stop through Minnesota State Patrol).

140. John Shiffman & Kristina Cooke, *Exclusive: U.S. Directs Agents To Cover Up Programme Used To Investigate Americans*, REUTERS (Aug. 5, 2013, 7:58 AM), <https://www.reuters.com/article/idUSBRE9740HP/> (revealing DEA training documents that train agents “to ‘recreate’ the investigative trail to effectively cover up where the information originated, a practice that some experts say violates a defendant’s Constitutional right to a fair trial”). See also *United States v. Alvarez-Tejeda*, 491 F.3d 1013, 1017 (9th Cir. 2007) (recounting an elaborate staged incident by the DEA to seize and noting that “[i]f people can’t trust the representations of government officials, the phrase ‘I’m from the government and I’m here to help’ will become even more terrifying”).

141. *United States v. Avila*, No. 15-cr-336-7, 2018 WL 654432, at *8 n.11 (D. Colo. Jan. 31, 2018).

original source of a law enforcement action by creating a parallel basis for the action—is known as parallel construction.¹⁴² Although legal, parallel construction degrades legal accountability. Courts have criticized whisper stops as “reduc[ing] the articulation of probable cause to an exercise in gamesmanship.”¹⁴³ Parallel construction can “prevent prosecutors from fully assessing their discovery and disclosure obligations in criminal cases”¹⁴⁴ and can make it difficult if not impossible for criminal defendants to challenge the evidence against them.¹⁴⁵ At scale, parallel construction creates transparency problems, making it difficult to know how police and task forces use their resources.

B. Federal Training and Enforcement Priorities

In addition to conducting pretextual stops and directing state and local police to carry out pretextual stops on behalf of federal law enforcement, the federal government also has a long history of using federal enforcement priorities as entrée to training local police on the virtues of pretextual stops.

1. DRUG ENFORCEMENT ON THE HIGHWAYS

The federal government has long trained and advocated for state and local police to use pretextual traffic stops as a drug interdiction tactic.¹⁴⁶

142. See HUM. RTS. WATCH, *supra* note 139, at 17–18 (describing federal support for parallel construction, including pretextual traffic stops, FBI use of stingrays, and other examples). See generally Natasha Babazadeh, *Concealing Evidence: “Parallel Construction,” Federal Investigations, and the Constitution*, 22 VA. J.L. & TECH. 1 (2018) (discussing the practice, problems, justifications, and critiques of parallel construction and proposing solutions).

143. *Avila*, 2018 WL 654432, at *8 n.11.

144. OFF. OF THE INSPECTOR GEN., U.S. DEP’T. OF JUST., A REVIEW OF THE DRUG ENFORCEMENT ADMINISTRATION’S USE OF ADMINISTRATIVE SUBPOENAS TO COLLECT OR EXPLOIT BULK DATA iv (2019), <https://oig.justice.gov/reports/2019/o1901.pdf> [<https://perma.cc/BE6T-H9W6>] (taking this position and finding “troubling statements in the DEA’s training materials and other documents, including . . . investigative products [that] cannot be shared with prosecutors”).

145. See *Avila*, 2018 WL 654432, at *8 n.11.

146. Scholars have long noted the tie between pretextual traffic stops and drug enforcement. See, e.g., Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 743–44 (2016); Wayne R. LaFave, *The “Routine Traffic Stop” from Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1874 (2004); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 670 (2002); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249.

The most well-known example of this comes from an expected source—the DEA—but over the last few decades, numerous federal agencies with varied missions—such as the Office on National Drug Control Policy and the Federal Motor Carrier Safety Administration—have embraced programs that tie together drug interdiction and traffic stops.

In 1984, the DEA launched “Operation Pipeline” (OP), a “nationwide highway interdiction program” meant to teach state police and highway patrol officers how to use traffic stops to search for drugs.¹⁴⁷ OP involved three areas of support: “training, real-time communication, and analytic support.”¹⁴⁸ Among other tactics, OP taught trainees questions to ask to obtain consent to search a vehicle and purported to teach officers about common characteristics of drug traffickers, including the presence of “air fresheners, atlases, cellular phones, fast food wrappers, attorney business cards, pre-paid phone cards, rental cars, and borrowed cars.”¹⁴⁹ OP also gave agents access to the El Paso Intelligence Center, which could provide officers with real-time information about stopped individuals.¹⁵⁰

The benefits of OP are difficult to assess. In its first decade and a half, OP and another DEA operation (Operation Convey) purportedly had seized nearly three million pounds of marijuana and \$704 million of cash.¹⁵¹ According to the DEA, OP was one of the agency’s “most effective operations.”¹⁵² Though the agency has provided little insight into how it arrived at this conclusion, OP’s reach is undeniable. By 2000,

147. DRUG ENF’T ADMIN., HISTORY: 1980-1985, at 54 (2018), https://www.dea.gov/sites/default/files/2021-04/1980-1985_p_49-58.pdf. See generally Ricardo J. Bascuas, *Fourth Amendment Lessons from the Highway and the Subway: A Principled Approach to Suspicionless Searches*, 38 RUTGERS L.J. 719, 761–62 (2007); Mary Murphy, *Race and Civil Asset Forfeiture: A Disparate Impact Hypothesis*, 16 TEX. J. ON C.L. & C.R. 77, 91 (2010); Lewis R. Katz, “Lonesome Road”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1424 (2013).

148. DRUG ENF’T ADMIN., *supra* note 147, at 54.

149. Bascuas, *supra* note 147, at 763 (“The officers are also trained to have drivers exit their cars and to ask them a series of questions about their origin, travel plans, and destination while looking for signs of nervousness or inconsistencies. After the questioning, the script calls for officers to turn and say, in classic Colombo style, ‘Just one more thing . . .’ and ask whether there are any drugs or guns in the car. That is followed by something along the lines of, ‘You don’t mind if I search your car then, do you?’ Most drivers give consent.” (footnotes omitted)).

150. DRUG ENF’T ADMIN., *supra* note 147, at 54; *El Paso Intelligence Center*, DRUG ENF’T ADMIN., <https://www.dea.gov/what-we-do/law-enforcement/epic> [<https://perma.cc/KF7F-UA7R>].

151. Brian J. Litwak, *Diligence and Digiovanni: The Fourth Circuit’s Interpretation of Investigatory Traffic Stop Reasonableness After Arizona v. Johnson*, 90 N.C. L. REV. 2142, 2142 (2012).

152. DRUG ENF’T ADMIN., *supra* note 147, at 54.

the program had trained over 25,000 officers in forty-eight states.¹⁵³ With this federal support, states created their own drug interdiction units, such as the New Jersey State Police's Drug Interdiction Training Unit.¹⁵⁴

The harms of OP are similarly difficult to estimate with precision, but they appear stark. Although the DEA claims its guidance did not advocate racial or ethnic profiling,¹⁵⁵ numerous scholars have detailed how OP implicitly and explicitly trained police to spot minority drivers and disproportionately stop them.¹⁵⁶ One of the prolific training videos depicted thirty characteristic traffickers, twenty-nine of which were Latinos.¹⁵⁷ This training has translated into real-world disparities: an ACLU suit against the California Highway Patrol—an adopter of Operation Pipeline tactics—revealed that “Hispanics were three times more likely and blacks twice as likely to be stopped as whites and that Hispanics were stopped and let go with a warning more than any other racial group.”¹⁵⁸ Similarly, a court found the New Jersey State Police's Drug Interdiction Training Unit engaged in a pattern of racially discriminatory traffic stops.¹⁵⁹

The status of Operation Pipeline is unclear. DEA materials refer to the program in the past tense,¹⁶⁰ but as recently as 2019, the DEA posted about a three-day “Operation Pipeline Training” in Virginia.¹⁶¹ The

153. Bascuas, *supra* note 147, at 762; DAVID A. HARRIS, ACLU, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS 6 (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/4YK7-FQSB>].

154. See Katz, *supra* note 147, at 1427.

155. See MICHAEL D. LYMAN, DRUGS IN SOCIETY: CAUSES, CONCEPTS AND CONTROL 333 (6th ed. 2011) (“Although Operation Pipeline relies in part on training officers to use characteristics to determine potential drug traffickers, it is important to understand that the program does not advocate such profiling by race or ethnic background” (quoting Drug Enforcement Agency, 2007)).

156. HARRIS, *supra* note 153; Bascuas, *supra* note 147, at 761–62. See also Murphy, *supra* note 147, at 93 (“The officer should look for everything from the odor of marijuana to inconsistencies in the motorists' or occupants' jewelry and socioeconomic status. Nonverbal clues by motorists such as nervous behavior, gang symbols in dress, bloodshot eyes, and possession of walkie-talkies all indicate the suspect is a likely drug courier.” (footnote omitted)).

157. Guy Padula, *Utah v. Strieff: Lemonade Stands and Dragnet Policing*, 120 W. VA. L. REV. 469, 505 (2017).

158. Bascuas, *supra* note 147, at 762.

159. Katz, *supra* note 147, at 1427–28.

160. See DRUG ENF'T ADMIN., *supra* note 147, at 54.

161. *Operation Pipeline Training Course (3-Day)*, DRUG ENF'T ADMIN., <https://www.dea.gov/events/2019/2019-09/2019-09-10/operation-pipeline-training-course-3-day> [<https://perma.cc/73TJ-U7XU>] (“This is the basic course of instruction for uniformed patrol officers, detectives, agents, or investigators, covering the fundamental principles of criminal roadway interdiction of passenger and commercial motor vehicles. . . . Topics Covered: Motor Vehicle Interdiction[;] Hidden Compartments[;]

author's inquiries to the DEA about future OP trainings have gone unanswered.

Whatever its current status, OP's legacy of tying together drug interdiction and highway traffic enforcement remains intact. Case law is replete with testimony of officers explaining their practice of making "high volume traffic stops" on highways.¹⁶² The whisper and wall stops discussed above routinely relate to drug enforcement efforts.¹⁶³ The Bureau of Indian Affairs's Indian Police Academy, which delivers "training specific to Indian Country Justice Services needs for police officers,"¹⁶⁴ focuses heavily on drug interdiction, which at least in some cases relies on high-volume traffic enforcement.¹⁶⁵

Drug interdiction on the highways even lives on within the Office on National Drug Control Policy (ONDCP). ONDCP is a component of the Executive Office of the President that leads and coordinates the nation's drug policy in order to reduce substance use disorder and its consequences.¹⁶⁶ ONDCP coordinates efforts across numerous federal agencies, state, and local governments, the private sector, and foreign governments.¹⁶⁷ A key aspect of this effort is administering the High-Intensity Drug Trafficking Areas (HIDTA) program, which seeks to assist law enforcement agencies operating in critical drug trafficking

Officer Safety[;] Intelligence Trends and Traffic[;] El Paso Intelligence Center (EPIC) Operations and Access[.]").

162. See, e.g., *State v. Noli*, 529 P.3d 813, 819 (Mont. 2023); *United States v. Yopez*, No. 18CR351, 2019 WL 3219388, at *3 (D. Neb. May 14, 2019); *United States v. Snell*, No. 16-169, 2016 WL 7743047, at *1 (D. Minn. Nov. 29, 2016); *United States v. Cornejo*, 196 F. Supp. 3d 1137, 1141 (E.D. Cal. 2016); *United States v. Wallace*, No. 14-cr-585, 2015 WL 2249976, at *1 (D. Utah May 13, 2015); *State v. Chettero*, 297 P.3d 582, 584 (Utah 2013); *State v. Blackwell*, No. COA10-132, 2010 N.C. App. LEXIS 2330, at *2 (N.C. Ct. App. Dec. 7, 2010); *People v. Taylor*, No. E028762, 2002 WL 15885, at *1 (Cal. Ct. App. Jan. 7, 2002).

163. See, e.g., *supra* note 138.

164. *Training and Technical-Assistance: The U.S. Indian Police Academy*, U.S. DEP'T INTERIOR, <https://www.bia.gov/bia/ojs/training-and-technical-assistance> [<https://perma.cc/X8V4-WQCH>].

165. U.S. DEP'T INTERIOR, BUREAU INDIAN AFFS., *supra* note 120, at 2, 19, 21.

166. *Office of National Drug Control Policy*, WHITE HOUSE, <https://www.whitehouse.gov/ondcp/> [<https://perma.cc/25L9-3WUM>]; 21 U.S.C. § 1705(b)(1); U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105508, DRUG CONTROL: OFFICE OF NATIONAL DRUG CONTROL POLICY MET SOME STRATEGY REQUIREMENTS BUT NEEDS A PERFORMANCE EVALUATION PLAN 6 (2022), <https://www.gao.gov/assets/gao-23-105508.pdf> [<https://perma.cc/M973-HJZK>] (outlining ONDCP's responsibilities).

167. OFF. NAT'L DRUG CONTROL POL'Y, FY 2001 - FY 2007 STRATEGIC PLAN 3 (2001), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/office-national-drug-control-policy-fy-2001-fy-2007-strategic-plan> [<https://perma.cc/VV2J-JFDZ>].

areas.¹⁶⁸ An estimated two-thirds of Americans live in a HIDTA-designated county.¹⁶⁹

There are indications that pretextual traffic stops are a key HIDTA tactic. One of ONDCP's few national HIDTA initiatives is the Domestic Highway Enforcement (DHE). DHE is a coordinated highway enforcement strategy involving thousands of law enforcement personnel across the country, a key goal of which is drug interdiction.¹⁷⁰ The Los Angeles DHE Team relies on traffic stops as a central tactic and has been found to target Latino drivers for stops and searches.¹⁷¹ In 2020, the ACLU of Kansas filed suit against the Kansas Highway Patrol DHE Team,¹⁷² alleging this unit targeted out-of-state drivers for stops and asset forfeitures with significant racial disparities.¹⁷³ Kansas Highway Patrol admitted to using stops as a drug interdiction tactic¹⁷⁴ and described its

168. CONG. RSCH. SERV., R45188, HIGH INTENSITY DRUG TRAFFICKING AREAS (HIDTA) PROGRAM 1 (2018), https://www.everycrsreport.com/files/20180503_R45188_f85fbafb0ce12452925929d80a87d1f0106a7de3.pdf [<https://perma.cc/3L2U-EEKN>].

169. *HIDTA Works: 2022 STATS*, OFF. NAT'L DRUG CONTROL POL'Y (2022), <https://www.hidtaprogram.org/summary.php> [<https://perma.cc/LT2C-QZLT>].

170. OFF. OF NAT'L DRUG CONTROL POL'Y, HIGH INTENSITY DRUG TRAFFICKING AREAS PROGRAM 2022 REPORT TO CONGRESS 194-95 (2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/HIDTA-Annual-Report-to-Congress-2022.pdf> [<https://perma.cc/8A9M-8ZUJ>].

171. *Id.* at 88 (listing Los Angeles Domestic Highway Enforcement Team as a federal task force funded by HIDTA); Joel Rubin & Ben Poston, *Must Reads: L.A. County Deputies Stopped Thousands of Innocent Latinos on the 5 Freeway in Hopes of Their Next Drug Bust*, L.A. TIMES (Oct. 4, 2018, 6:50 PM), <https://www.latimes.com/local/lanow/la-me-sheriff-latino-drug-stops-grapevine-20181004-htm1story.html> [<https://perma.cc/QUY2-P3E9>] (finding that from 2012 to 2017 more than two-thirds (sixty-nine percent) of the drivers pulled over by the DHE Team were Latino and that vehicles of Latino drivers were searched more than any other race or ethnicity, despite a low success rate in finding illegal drugs or contraband); Devon Miller, *Report Outlines 'Constitutionally Troubling' Impact of Sheriff's Highway Enforcement Team on Latinos*, KHTS (Apr. 22, 2019, 4:56 PM), <https://www.hometownstation.com/santa-clarita-news/public-safety-2/report-outlines-constitutionally-troubling-impact-of-sheriffs-highway-enforcement-team-on-latinos-274898> [<https://perma.cc/2A9W-QEZA>] (finding from Office of Inspector General that DHET practices have a "constitutionally troubling impact on Latino drivers").

172. Press Release, Mark McCormick, Dir. of Strategic Commc'ns, ACLU, Highway Patrol's "Kansas Two Step" Violates Fourth Amendment Rights of Motorists Against Illegal Search, Seizures (Jan. 30, 2020), <https://www.aclukansas.org/en/press-releases/highway-patrols-kansas-two-step-violates-fourth-amendment-rights-motorists-against> [<https://perma.cc/76EN-ZCWW>].

173. *Id.*

174. *Kansas Highway Patrol Needs To End Its 'Two-Step' Practice of Vehicle Stops*, TOPEKA CAP.-J. (June 2, 2023, 5:03 AM), <https://www.cjonline.com/story/opinion/editorials/2023/06/02/kansas-highway-patrol->

work as consistent with ONDCP and DHE’s mission.¹⁷⁵ Other local HIDTAs train police on using traffic enforcement for drug interdiction as well.¹⁷⁶

Even the Federal Motor Carrier Safety Administration (FMCSA) has gotten into the drug enforcement act.¹⁷⁷ The FMCSA’s mission is “to reduce crashes, injuries, and fatalities involving large trucks and buses.”¹⁷⁸ Straying from this mandate, in 1988, FMCSA established the Drug Interdiction Assistance Program (DIAP) to assist law enforcement in drug interdiction efforts involving commercial motor vehicles.¹⁷⁹ DIAP offers free training regarding highway drug interdiction as well as the use of predictive analysis and seizure data to identify “Carriers of Interest.”¹⁸⁰ Since its inception, DIAP-certified instructors have trained approximately 170,000 federal, state, and local officials in drug and criminal interdiction tactics and techniques involving commercial vehicles.¹⁸¹

There is little public information about the details of DIAP training, but it appears to embrace pretextual traffic stops. The FMCSA explains: “A successful criminal interdiction program begins with the initial traffic

needs-to-end-two-step-method-of-vehicle-stops/70270278007/ [https://perma.cc/TDH2-ADNW].

175. KAN. HIGHWAY PATROL, ANNUAL REPORT – 2014, at 36 (2014), <https://kansashighwaypatrol.org/wp-content/uploads/2022/05/2014-Annual-Report-PDF.pdf> [https://perma.cc/UVZ6-73F9] (“Troopers assigned to the unit work the road and adhere to the Office of National Drug Control Policy (ONDCP), Domestic Highway Enforcement Mission of combating all crimes and all hazards.”).

176. The Montana HIDTA, for example, offers a course designed to teach law enforcement and prosecuting attorneys how “to broaden a common traffic stop into a roadside investigation when faced with the criminal element.” *MONTANA - Criminal Interdiction Through Traffic Enforcement*, ROCKY MTN. HIGH INTENSITY DRUG TRAFFICKING AREA, <https://www.rmhidta.org/event-details/montana-criminal-interdiction-through-traffic-enforcement> [https://perma.cc/KW3E-GVH4]. See also Bill Snyder, *HIDTA Conference Shed Light on How To Stay Steps Ahead of Drug Smugglers*, WLOX, <https://www.wlox.com/2020/03/04/hidta-conference-shed-light-how-stay-steps-ahead-drug-smugglers/> [https://perma.cc/DFA4-HX4W] (Mar. 4, 2020, 2:00 PM) (honoring “2019 HIDTA Officer of the Year after 20 of his traffic stops resulted in some type of drug, money, or weapons seizure”).

177. See LaFave, *supra* note 146, at 1844 n.8; Alschuler, *supra* note 85, at 170 n.25.

178. *Who We Are*, FED. MOTOR CARRIER SAFETY ADMIN., DEP’T TRANSP., <https://www.fmcsa.dot.gov/mission/who> [https://perma.cc/XKZ9-WKVU] (July 6, 2022).

179. *Drug Interdiction Assistance Program*, FED. MOTOR CARRIER SAFETY ADMIN., DEP’T TRANSP., <https://www.fmcsa.dot.gov/national-training-center/drug-interdiction-assistance-program> [https://perma.cc/2RFB-UJ6J] (Apr. 5, 2022).

180. Joe DeLorenzo, *Innovation and Modernization Charts the Path for FMCSA’s National Training Center*, GUARDIAN, Third Quarter 2010, at 1, 10.

181. FED. MOTOR CARRIER SAFETY ADMIN., *supra* note 179.

stop. All Department officers are trained to look beyond the initial traffic stop for indicators of criminal behaviors and activities.”¹⁸² A longtime DIAP-certified trainer provided some insights, describing his training as teaching officers the “art” of recognizing suspicious drivers on the road and identifying suspicious behavior on routine traffic stops.¹⁸³ Examples of behavioral cues he taught included looking for drivers who “react immediately” upon seeing law enforcement, “take an exit to nowhere,” have “certain items inside a vehicle,” and more.¹⁸⁴

2. RELEGATING TRAFFIC SAFETY FOR CRIMINAL ENFORCEMENT

In addition to using pretext stops to fight the War on Drugs, the federal government drove a merger of traffic safety and pretextual traffic enforcement.¹⁸⁵ The automobile-driven transformation of American society brought with it substantial safety risks. For decades, driver education campaigns and traffic enforcement programs became the cornerstone of a city-by-city, state-by-state response.¹⁸⁶ By the 1960s, however, there came a growing realization that this focus on driver behavior had allowed automakers to neglect investment in safer vehicles.¹⁸⁷ Public outrage eventually spurred Congress to act, creating the National Highway Traffic Safety Administration (NHTSA) within DOT and endowing them with regulatory authority to compel the auto industry to improve the design of their vehicles.¹⁸⁸

But over time, NHTSA shied away from regulating the auto industry and instead leaned into driver behavior interventions, including encouraging traffic stops as a crime-fighting tactic. Since the early 1990s, NHTSA has promoted the widespread use of traffic stops as a crime-fighting tool.¹⁸⁹ NHTSA tactics include sponsored research, partnerships with private law enforcement associations, and police training programs

182. FED. MOTOR CARRIER SAFETY ADMIN., DEP’T OF TRANSP., TEXAS COMMERCIAL VEHICLE SAFETY PLAN FOR THE FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION’S MOTOR CARRIER SAFETY ASSISTANCE PROGRAM FISCAL YEAR 2017, at 4 (2016), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/fastact/83181/texasaccepted-20161216.pdf> [<https://perma.cc/55PH-NLBZ>].

183. *Learning the Art of Interdiction*, HILL COUNTRY CMTY. J. (Aug. 25, 2022), https://www.hccommunityjournal.com/article_6314c504-2311-11ed-8910-474deb88b50a.html [<https://perma.cc/RJ6Z-5V6J>].

184. *Id.*

185. *See Heydari, supra* note 38, at 28–32 (discussing NHTSA’s role in promoting the crime-fighting effect of traffic stops).

186. *See id.* at 21.

187. *Id.* at 22.

188. *Id.* at 23.

189. *Id.* at 20–30.

that embraced the role of pretextual traffic stops.¹⁹⁰ NHTSA’s “Conducting Complete Traffic Stops,” for example, taught police how to “detect illegal activities during traffic stops.”¹⁹¹ The curriculum emphasized the “relationship between traffic enforcement and criminal interdiction” and encouraged police to look for “suspicious indicators.”¹⁹² NHTSA’s Data-Driven Approaches to Crime and Traffic Safety (DDACTS) program, launched in 2008, taught “police to use data and mapping techniques to identify crime and traffic-crash hot spots, and then target those areas with highly visible traffic enforcement.”¹⁹³ One DDACTS trainer used the words “shock and awe” to describe the tactic.¹⁹⁴ Unsurprisingly, numerous agencies that implement DDACTS report steep spikes in numbers of traffic stops.¹⁹⁵ Both of these NHTSA programs have seen wide adoption.¹⁹⁶ DDACTS has been endorsed by DOJ’s Bureau of Justice Assistance and the National Institute of Justice.¹⁹⁷

The problem with a traffic safety agency like NHTSA embracing the crime-fighting value of traffic stops is that the tactic may ultimately relegate traffic safety to an afterthought. Pretextual stops often begin with low-level infractions that have little to do with unsafe driving.¹⁹⁸ Accordingly, data from cities that rely on stops as a crime-fighting tactic

190. *Id.* at 59.

191. *Id.* at 33 (citing *Conducting Complete Traffic Stops: A Crash and Crime Reduction Effort*, BUILDING SAFE CMTYS. (June 2000), https://web.archive.org/web/20070826173716/http://www2.edc.org/buildingsafecommunities/vol3_4/resource.htm).

192. *Id.* (citing Jeffrey W. Runge, *The Role of Traffic Law Enforcement in Homeland Security*, POLICE CHIEF, Oct. 2002, at 90, 94).

193. *Id.* at 34 (citing NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DATA-DRIVEN APPROACHES TO CRIME AND TRAFFIC SAFETY: OPERATIONAL GUIDELINES ii (2014), https://www.nhtsa.gov/sites/nhtsa.gov/files/811185_ddacts_opguidelines.pdf [<https://perma.cc/69SE-FASE>]).

194. *Id.* (citing Christopher Bruce, *DDACTS and the Role of the Crime Analysts*, YOUTUBE, at 27:00–27:08 (Jan. 22, 2019), https://www.youtube.com/watch?v=gz-KNXiidm4&ab_channel=ChristopherBruce).

195. *Id.* at 51–53 (describing evidence from a number of jurisdictions across the country).

196. *Id.* at 33 (discussing Conducting Complete Traffic Stops adoption); *id.* at 35–36 (discussing DDACTS adoption).

197. See E-mail from Kate McNamee, Senior Pol’y Advisor, Bureau of Just. Assistance, to Christine Frank, Highway Safety Specialist, Nat’l Highway Traffic Safety Admin. (Mar. 9, 2021, 8:21 AM) (on file with author) (DOJ Response to FOIA of Farhang Heydari); *Program Profile: Data-Driven Approaches to Crime and Traffic Safety (DDACTS) in Kansas*, NAT’L. INST. JUST. (July 11, 2016), [crimesolutions.ojp.gov/ratedprograms/479](https://www.crimesolutions.ojp.gov/ratedprograms/479) [<https://perma.cc/RA7T-XGQK>].

198. See *supra* note 58.

indicates high levels of non-safety related stops.¹⁹⁹ Not only are these stops unlikely to impact traffic safety, but they divert police attention from the types of violations that might have a traffic safety impact.²⁰⁰ Unsurprisingly, therefore, the traffic safety benefits of programs like DDACTS seem mixed at best.²⁰¹ The problem is compounded when the federal agency neglects its regulatory authority regarding vehicle design.²⁰²

* * *

In February 2024, DOT announced in a letter to select stakeholders that NHTSA had “ended” its contractual arrangement regarding DDACTS and that it would replace the program with “a model promoting community-driven and evidence-based traffic law enforcement . . . [that] prioritize[s] safety and public trust through an improved focus on risky driving behaviors such as speeding, impaired driving, and distraction.”²⁰³ This change—focusing on risky driving behavior in lieu of crime fighting—appears to be an acknowledgement of the concerns some observers and I have raised for years regarding this program. Time will tell whether NHTSA’s replacement program falls into the same pretextual traps as previous iterations.

3. IMMIGRATION ENFORCEMENT

Federal drug interdiction and traffic safety are not the only policy priorities under which the federal government has promoted pretextual policing. Recent federal engagement of local police in immigration enforcement is a third example.

In the 1990s, Congress created multiple programs that brought local law enforcement into immigration enforcement.²⁰⁴ The 287(g) program authorized the U.S. Attorney General “to enter into agreements with state and local governments that permit police to carry out federal immigration functions such as investigating, apprehending, and detaining aliens.”²⁰⁵

199. See *supra* notes 62–64.

200. Heydari, *supra* note 38, at 45–46.

201. See *id.* at 43–47.

202. See *id.* at 9, 64. See also *infra* notes 356–57 (discussing NHTSA regulatory failures).

203. Letter from Christopher Coes, Assistant Sec. for Transp. Pol’y, U.S. Dep’t of Transp., to participants in the DOT meeting series on Traffic Enforcement and Roadway Safety (Feb. 15, 2024) (on file with author).

204. Barbara E. Armacost, “Sanctuary” Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197, 1200.

205. *Id.* at 1207.

The Secure Communities program sent fingerprint data from local arrests to federal immigration authorities, creating a way for the federal government to alert local police if someone in their custody was wanted for an immigration offense.²⁰⁶ The specifics of these programs have evolved over time, with some of the more troubling aspects being mitigated by recent administrations.²⁰⁷

By involving local police in immigration enforcement, the federal government encouraged their use of pretextual traffic stops. It is now well understood that some police use traffic stops and arrests as a pretext to investigate a person's immigration status.²⁰⁸ Perhaps the starkest example arises out of Maricopa County, Arizona. Pursuant to the 287(g) program, the Maricopa County Sheriff's Office (MCSO) began a widespread practice of using pretext stops against Latino drivers.²⁰⁹ The U.S. government ultimately intervened, suing Sheriff Joseph Arpaio and the MCSO for "routinely target[ing] Latino drivers and passengers for pretextual traffic stops aimed at detecting violations of federal immigration law."²¹⁰ Although Maricopa County's use of pretextual stops for immigration purposes is perhaps the most notorious, it was hardly

206. *Id.* at 1209.

207. *See, e.g.*, Bill Ong Hing, *Entering the Trump Ice Age: Contextualizing the New Immigration Enforcement Regime*, 5 TEX. A&M L. REV. 253, 280–82 (2018) (discussing changes in Section 287(g) during the Obama and Trump Administrations).

208. *See, e.g.*, Jain, *supra* note 74, at 1817–18 ("Police officers who suspect an individual lacks status may choose to make arrests they would not otherwise pursue."); Armacost, *supra* note 204, at 1204 ("[P]olice officers' anticipation of downstream immigration enforcement affects their upstream law enforcement priorities. In particular, police officers have strong incentives to engage in so-called 'pretextual policing,' using non-immigration stops and arrests (especially for traffic offenses and minor crimes) to funnel suspected illegal immigrants into the federal immigration system.").

209. *Melendres v. Arpaio*, 695 F.3d 990, 994–95 (9th Cir. 2012) ("The Plaintiffs contend that the Defendants have a 'custom, policy and practice of racial profiling toward Latino persons in Maricopa County and an unconstitutional policy and practice of stopping Latino drivers and passengers pretextually and without individualized suspicion or cause, and of subjecting them to different, burdensome, stigmatizing and injurious treatment once stopped,' under the auspices of enforcing federal immigration laws and/or Arizona state immigration-related laws."). *See also Melendres v. Arpaio*, 784 F.3d 1254, 1261 (9th Cir. 2015) (recounting "multiple instances of [Maricopa County] deputy sheriffs' testimony in which it was confirmed that at least some MCSO deputies 'continue[] to investigate the identity and immigration status of persons it detains during [all] vehicle stops' irrespective of whether they occur during a saturation patrol").

210. *United States v. County of Maricopa*, 889 F.3d 648, 649 (9th Cir. 2018). *See also* Letter from Thomas E. Perez, Assistant Att'y Gen., to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. (Dec. 15, 2011), <https://www.documentcloud.org/documents/274910-justice-department-findings-in-its-investigation> [<https://perma.cc/QYT9-2CHF>].

unique.²¹¹ In fact, researchers have even found that 287(g) agreements increase racial profiling among police working in locations adjacent to jurisdictions with 287(g) agreements, not just among police specifically under 287(g) agreements.²¹²

* * *

Federal agencies, including those whose mission has little to do with crime control, have turned to the traffic stop as a one-size-fits-all enforcement tool. But in the process, they have further embedded the widespread use of traffic stops within the constitution of local policing.

C. Federal Funding

It is well understood that money is a key driver of traffic enforcement.²¹³ Less explored, however, are the ways in which federal policies create financial incentives for police to make traffic stops, including pretextual ones.

1. GRANTS

The federal government provides billions in grant funds to state and local police annually.²¹⁴ Federal funding can turn local police toward federal interests in lieu of local ones.²¹⁵ DOJ's COPS grants, for example, fund local agencies to hire more officers and result in "increas[ed] arrest

211. See, e.g., *Farm Lab. Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 540 (6th Cir. 2002) (discussing plaintiff's allegations that Ohio State Highway Patrol targeted Hispanic drivers).

212. Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L. REV. 463, 501 (2022).

213. See, e.g., Woods, *supra* note 11, at 1511.

214. DOJ administered grants alone account for over \$5 billion. See *Oversight of Department of Justice Grant Programs: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary*, 115th Cong. 3 (2017) (statement of Rep. Sheila Jackson Lee, Ranking Member, H. Comm. on the Judiciary).

215. Harmon, *supra* note 99, at 870 ("Federal public safety programs, however, are designed, implemented, and evaluated without reference to the nonbudgetary costs of policing. When those costs are high, federal programs can make local policing seem cheaper for communities, but actually make it more costly in its impacts and therefore less efficient."); Peter J. Boettke, Liya Palagashvili & Ennio E. Piano, *Federalism and the Police: An Applied Theory of "Fiscal Attention"*, 49 ARIZ. ST. L.J. 907, 907, 932-33 (2017) (arguing that program 1033, civil asset forfeiture, and other direct federal grants shift local police departments' attention to federal goals rather than local community desires, and that if communities want departments to focus on their local needs, they will need to shift funding mechanisms).

rates for disorder-related and other nonviolent crimes.”²¹⁶ Grant requirements are a key mechanism of this influence.²¹⁷ What federal agencies require of grant recipients influences how local police operate. Past reporting requirements for DOJ’s Byrne Justice Assistance Grants (JAG), for example, “sen[t] a powerful signal to states and localities that the federal government desires more arrests, more cocaine busts, and more prosecutions, at the expense of other, more effective activities.”²¹⁸

216. Rick Su, Anthony O’Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. 1197, 1239 (2022) (citing MATTHEW C. SCHEIDER, DEBORAH L. SPENCE & THOMAS C. HAMILTON, CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., ASSESSING THE COPS OFFICE 1–2 (rev. ed. 2021), <https://cops.usdoj.gov/RIC/Publications/cops-w0648-pub.pdf> [<https://perma.cc/6BWU-WDRC>] (embracing the empirical link between COPS grants and increased rates for disorder-related offenses as evidence that the COPS program “has made a difference in American communities” by “result[ing] in higher police arrest productivity”). *See also* Jihong Solomon Zhao, Yang Zhang & Quint Thurman, *Can Additional Resources Lead to Higher Levels of Productivity (Arrests) in Police Agencies?*, 36 CRIM. JUST. REV. 165, 174–75 (2011) (finding one dollar in COPS hiring money correlates to thirty-six more arrests for disorder-related offense, four more arrests for drug offenses, 1.8 more arrests for property offenses, and 0.58 more arrests for violent crimes); David Lilley & Rachel Boba, *A Comparison of Outcomes Associated with Two Key Law-Enforcement Grant Programs*, 19 CRIM. JUST. POL’Y REV. 438, 453–54 (2008) (finding that COPS grants increased per capita arrests for drug and disorder offenses, but that previous block grants to policing agencies produced no such effects).

217. *See* Su, O’Rourke & Binder, *supra* 216, at 1231–32 (emphasizing “the logic of ‘fiscal attention’—how the promise of federal money can lead police agencies to shift their policing priorities to conform to the express interests of the federal government”); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1407–08 (2018) (“In both the context of drug enforcement and immigration enforcement, the threat of receiving or losing federal funding can affect what types of law enforcement actions are taken. It can affect the types of marks created by the criminal justice system in the first place.”); Alexander J. Kasner, *Local Government Design, Mayoral Leadership, and Law Enforcement Reform*, 69 STAN. L. REV. 549, 563 (2017) (“[T]he federal government has increasingly found subtle ways to commandeer local law enforcement, most of which are being used to further increase the number of arrests carried out.”). *But see* Roger Michalski & Stephen Rushin, *Federal (De)Funding of Local Police*, 110 GEO. L.J. ONLINE 54, 54–55 (2021) (suggesting federal grants have limited impact on policing priorities).

218. NICOLE FORTIER & INIMAI CHETTIAR, BRENNAN CTR. FOR JUST., SUCCESS-ORIENTED FUNDING: REFORMING FEDERAL CRIMINAL JUSTICE GRANTS 15 (2014), https://www.brennancenter.org/sites/default/files/publications/SuccessOrientedFunding_ReformingFederalCriminalJusticeGrants.pdf [<https://perma.cc/U5RE-KH8G>]. *See also id.* at 7 fig.1 (evaluating success measures for grant recipients); Alex Kreit, *Drug Truce*, 77 OHIO ST. L.J. 1323, 1353 (2016) (“A 2009 DOJ-funded report on evaluating Multijurisdictional Task Forces listed ‘increases in drug seizures, arrests, etc.’ as the first goal of the programs.” (quoting WILLIAM RHODES, CHRISTINA DYOUS, MEG CHAPMAN, MICHAEL SHIVELY, DANA HUNT & KRISTEN WHEELER, EVALUATION OF THE MULTIJURISDICTIONAL TASK FORCES (MJTFs), PHASE II: MJTF PERFORMANCE MONITORING GUIDE 5 (2009))). DOJ has mitigated this problem in part by changing its

DOJ grants explicitly support the use of traffic stops as a crime-fighting tool. In 2018, for example, DOJ awarded the Kansas City Police Department \$700,000 to conduct “high-visibility proactive policing . . . includ[ing] traffic enforcement, pedestrian checks . . . within an identified high-crime 20 square mile geographic region of Kansas City.”²¹⁹ In 2012, the Mississippi Department of Public Safety received over \$2 million dollars to “increase the capacity of local agencies to address illegal drugs and violent crimes and to reduce crime in Mississippi.”²²⁰ The state agency used the federal funds on “multi-jurisdictional drug task force programs; law enforcement enhancement programs; strategic planning; and highway interdiction programs that investigate, arrest, and prosecute illegal drug activity throughout the State.”²²¹ Port Huron, Michigan, received funding to conduct “[d]irected patrols in identified hotspots”²²² and to “target high crime areas and focus on increasing field contacts, personal investigations and traffic stops of individuals suspected of being involved in illegal behavior.”²²³ In 2009, DOJ provided the Ouachita Parish, Louisiana, Sheriff’s Office with nearly \$100,000 for officer overtime pay “to conduct enforcement efforts through saturation patrols and drug traffic interdiction.”²²⁴ Additional examples abound.²²⁵

reporting requirements. *See id.* at 1347 (“In November 2014, the DOJ announced it would stop using ‘number of arrests’ to measure the success of state and local police who have received federal Byrne Justice Assistance Grants. And in January 2015, then-Attorney General Eric Holder issued an order limiting (at least to some extent) the use of federal forfeiture ‘adoptions,’ a procedure often used by state and local police to circumvent stricter state forfeiture laws.” (footnotes omitted)).

219. *Kansas City Police Department - Operation ICON*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Oct. 1, 2018), <https://bja.ojp.gov/funding/awards/2018-wy-bx-0001> [<https://perma.cc/A3FL-QACA>].

220. *Mississippi FY 2012 Justice Assistance Grant Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (July 11, 2012), <https://bja.ojp.gov/funding/awards/2012-dj-bx-0444> [<https://perma.cc/6YFR-TUY6>].

221. *Id.*

222. *Operation Clean Sweep - Directed Patrols in Identified Hotspots To Proactively Target Offenders.*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 1, 2016), <https://bja.ojp.gov/funding/awards/2016-dj-bx-0663> [<https://perma.cc/R5WM-8RWB>].

223. *City of Port Huron Fiscal Year 2012 JAG*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (July 31, 2012), <https://bja.ojp.gov/funding/awards/2012-dj-bx-0870> [<https://bja.ojp.gov/funding/awards/2012-dj-bx-0870>].

224. *Project Safe Neighborhoods Initiative*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 15, 2009), <https://bja.ojp.gov/funding/awards/2009-gp-bx-0058> [<https://perma.cc/3DE5-8A4G>].

225. *See, e.g., FY 2009 Justice Assistance Grant Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Aug. 10, 2009), <https://bja.ojp.gov/funding/awards/2009-sb-b9-0601> [<https://perma.cc/K28F-H8C7>] (funding for overtime to the Inyo Narcotics Enforcement Team to “work closely with the

DOT is also a key player in funding pretextual traffic enforcement. DOT, through NHTSA, provides hundreds of millions of dollars in annual highway safety funding to state highway safety agencies.²²⁶ Much of this funding is funneled directly to police departments.²²⁷ DOJ also funds traffic enforcement efforts from time to time.²²⁸ Although these NHTSA funds are not marked for pretextual enforcement in particular, NHTSA programs like DDACTS and Conducting Complete Traffic Stops encourage police to rely on traffic enforcement as a crime-fighting tool.²²⁹

California Highway Patrol and local law enforcement agencies to conduct narcotic investigations and traffic interdiction along the Highway 395 corridor in the county and interview arrestees and informants in order to gather information regarding drug trafficking organizations, dealers, and manufacture[r]s of illegal drugs”); *Southern District of Indiana PSN Initiative*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 7, 2011), <https://bja.ojp.gov/funding/awards/2011-gp-bx-0035> [<https://perma.cc/22BV-3UVZ>] (grant to support “targeted, focused, and pro-active enforcement of designated locations,” with agents directed to continue to make “undercover drug purchases, conduct traffic stops, execute search warrants, as well as target violent offenders and locations notorious for open-air drug deals and violent crimes to occur”).

DOJ also awarded a grant to the City of Umatilla, Oregon, “to support officer training on drug awareness and will also provide education on perception and observation techniques used during traffic stops. Additionally, the training will focus on illegal drug activity and enhance collaboration efforts between regional drug enforcement teams, the Department of Transportation, commercial drivers, and other law enforcement agencies.” *Drug and Gang Focused Patrol Enhancement Project*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (June 25, 2009), <https://bja.ojp.gov/funding/awards/2009-sb-b9-1410> [<https://perma.cc/BS3R-ACNP>].

226. Heydari, *supra* note 38, at 26.

227. *Id.* at 27.

228. *See, e.g., FY21 BJA JAG Traffic Enforcement Impact Grant*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Oct. 13, 2021), <https://bja.ojp.gov/funding/awards/15pbja-21-gg-01791-jagx> [<https://perma.cc/E623-GSYP>] (issuing “Traffic Enforcement Impact Grant” to City of Warwick Police Department); *Reduce Property, Violent Crime and Traffic Enforcement*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Oct. 1, 2018), <https://bja.ojp.gov/funding/awards/2018-dj-bx-0261> [<https://perma.cc/BM6N-AJAR>] (issuing “Reduce Property, Violent Crime and Traffic Enforcement” grant to the City of Titusville); *Selective Overtime Initiatives*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Aug. 24, 2008), <https://bja.ojp.gov/funding/awards/2008-dj-bx-0128> [<https://perma.cc/HMQ6-7HKU>] (“The Titusville Police Department . . . will use its Fiscal Year 2008 JAG grant funds of \$11,671.00 to pay overtime to support selective traffic enforcement and career criminal/sexual offender follow-up initiatives.”); *Enhanced Traffic Enforcement Project*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 9, 2010), <https://bja.ojp.gov/funding/awards/2010-dj-bx-1669> [<https://perma.cc/C83A-JF7A>] (“The city of Palmdale will utilize the FY 2010 JAG funds to enhance traffic enforcement. The city . . . will use grant funds to offset the cost of two motorcycle deputies. The motorcycle deputies are utilized to impact traffic problem locations. JAG funds will assist policing efforts, as well as ensure the sustenance of essential services.”).

229. *See supra* notes 190–98 and accompanying text.

Moreover, because stops and citations are some of the most easily measured policing activities, federal grant funding of traffic enforcement can become a driver of quota-like behavior.²³⁰ NHTSA, for example, conditions receipt of highway funding on the reporting of three police activity metrics: seat belt citations issued, speeding citations issued, and impaired driving arrests.²³¹ As a result, some police department recipients explicitly impose enforcement quotas on their officers.²³²

2. ASSET FORFEITURE

Another source of federal financial incentives for state and local police to conduct pretextual traffic stops relates to asset forfeitures. In the mid-1980s, the federal government launched the Equitable Sharing program.²³³ This program amended federal asset forfeiture laws to permit “direct transfer of seized assets . . . to the law enforcement agencies that seized the assets.”²³⁴ The program encourages state and local participation in task forces by creating a financial windfall for these agencies. One particularly controversial aspect of the program is how it circumvents state and local prohibitions by allowing police to keep the

230. This dynamic is so well understood that some states that prohibit police quotas provide carve-outs for federal grants. *See* Shaun Ossei-Owusu, *Police Quotas*, 96 N.Y.U. L. REV. 529, 551 (2021) (citing 65 ILL. COMP. STAT. 5/11-1-12 (2019) (“A municipality may not require a police officer to issue a specific number of citations within a designated period of time. This prohibition shall not affect the conditions of any federal or State grants or funds awarded to the municipality and used to fund traffic enforcement programs.”)).

231. JAMES HEDLUND, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., DOT HS 811 025, TRAFFIC SAFETY PERFORMANCE MEASURES FOR STATES AND FEDERAL AGENCIES ii (2008), <https://www.ghsa.org/sites/default/files/publications/files/Perf-Measures-Rpt.pdf> [<https://perma.cc/HLH3-ZFJ6>].

232. Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES, www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html (Nov. 2, 2021) (“[T]he number of traffic stops is a common performance measure. In Arkansas, for instance, the goal was ‘three vehicle stops per hour’ during grant-funded patrols, while in Madison, S.D., officers were required to ‘obtain two citations per grant hour.’ Indiana officials boasted in their 2014 annual report that officers enforcing seatbelt laws averaged 3.26 stops per hour.”).

233. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; U.S. DEP’T OF JUST. & U.S. DEP’T OF THE TREASURY, GUIDE TO EQUITABLE SHARING FOR STATE, LOCAL, AND TRIBAL LAW ENFORCEMENT AGENCIES 1-2 (2018), <https://www.justice.gov/criminal-afmls/file/794696/download> [<https://perma.cc/9UZE-AQGN>]. *See also* Su, O’Rourke & Binder, *supra* note 216, at 1256 (“[F]ederal law incentivizes local police agencies to aggressively seize assets by permitting them to keep assets seized in connection with federal crimes.”); Harmon, *supra* note 99, at 929-36, 929 n.237 (discussing equitable sharing).

234. Tanner Reed Yeldell, “Do You Know Why I Pulled You Over?”: *Pretextual Stops and Their Complications*, 49 S.U. L. REV. 419, 433 (2022).

proceeds of seized assets even if state or local law would otherwise prevent it.²³⁵

The ability to seize assets has been a major driver of pretextual traffic stops, with stark results. Tenaha, Texas for example, “brought in \$1.3 million in seized profits within six months of implementing a drug interdiction program that utilized pretextual stops which targeted mostly out-of-state vehicles.”²³⁶ A town off Interstate 85 in Georgia with a population of 2,600 seized \$2 million worth of cars and cash in just two years.²³⁷ A Louisiana town “seized more than \$6 million in four years stopping cars along its five miles of Interstate 10.”²³⁸ In just the last two decades, federal forfeiture sharing has led to about 62,000 cash seizures.²³⁹

D. Federal Databases and Technology

A fourth way that federal policy supports pretextual traffic stops is by making it easier for local police to identify individuals and vehicles that have open warrants or otherwise are of interest to police. The primary mechanisms here are access to federal databases—which local police can query in real time—and federal funding for license plate readers—which automatically alert when they scan license plates of interest.

1. NCIC AND OTHER DATABASES

Federal law enforcement databases contain troves of information that can trigger stops. The FBI’s National Crime Information Center (NCIC), for example, aggregates criminal records on tens of millions of Americans across the country, as well as information on potential gang associations, sex offender registration status, and even immigration status.²⁴⁰ As of 2018, it contained over 2.4 million open warrants—the

235. See Shawn Kantor, Carl T. Kitchens & Steven Pawlowski, *Civil Asset Forfeiture, Crime, and Police Incentives: Evidence from the Comprehensive Crime Control Act of 1984*, 59 *ECON. INQUIRY* 217, 218–21 (2021).

236. Yeldell, *supra* note 234, at 434.

237. Bascuas, *supra* note 1477, at 762.

238. *Id.*

239. Yeldell, *supra* note 234, at 434.

240. See *National Crime Information Center (NCIC)*, FED. BUREAU OF INVESTIGATION, <https://le.fbi.gov/informational-tools/ncic> [<https://perma.cc/M89E-XVMM>]. See also Bridget A. Fahey, *Data Federalism*, 135 *HARV. L. REV.* 1007, 1022 (2022) (describing NCIC as “[l]ikely the nation’s largest information pooling system . . . anchor[ing] the intergovernmental exchange of information for day-to-day policing” and “support[ing] ‘millions of transactions each day’”); James Jacobs &

vast majority of which were for misdemeanors or mere violations.²⁴¹ NCIC processes “12 million transactions per day, typically from local law enforcement.”²⁴² DHS is also a major player in this space. It operates a biometric identification database (IDENT) that processes more than 400,000 transactions per day from government agencies.²⁴³ DHS also funds and supports the Homeland Security Information Network, which enables interstate facial recognition searches.²⁴⁴ And of course, there are federally operated terror watch lists, which ensnare unknown numbers.²⁴⁵

Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 190–91 (2008) (“Federal criminal records databases rapidly proliferated and expanded with the advent of computer technology. . . . The repercussions, however, for an individual listed in one of these quasi-criminal databases may be the same or similar to the consequences of having a traditional criminal record. In particular, the Immigration Violators File, Violent Gang and Terrorist File, and Protection Order File . . . demonstrate the expanding scope of information included in the federal criminal records system.”).

241. BECKI R. GOGGINS & DENNIS A. DEBACCO, BUREAU OF JUST. STAT., U.S. DEP’T JUST., NO. 255651, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2018, at 5, 31 tbl.4a (2020), <https://www.ojp.gov/pdffiles1/bjs/grants/255651.pdf> [<https://perma.cc/Y87H-D6KU>] [hereinafter BJS 2018]. See also BECKI R. GOGGINS & DENNIS A. DEBACCO, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NO. 251516, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016, at 31 tbl.5a (2018), <https://www.ojp.gov/pdffiles1/bjs/grants/251516.pdf> [<https://perma.cc/2AY4-HT8U>] [hereinafter BJS 2016] (estimating close to 7 million open warrants).

242. WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 1 CRIM. PROC. (4th ed.) *Federal Assistance Programs* § 1.2(h), Westlaw (database updated December 2023).

243. See *DHS/OBIM/PIA-001 Automated Biometric Identification System*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/publication/dhsnppdpia-002-automated-biometric-identification-system> [<https://perma.cc/72FU-6JP5>] (Mar. 31, 2023); *Biometrics*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/biometrics> [<https://perma.cc/NF4Y-YDBS>] (May 5, 2023). DHS cites various immigration and anti-terrorism statutes as the source of authority for IDENT. See U.S. DEP’T OF HOMELAND SEC., DHS/NPPD/PIA-002, PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM (IDENT) 9 (2012), <https://www.dhs.gov/sites/default/files/publications/privacy-pia-nppd-ident-december2012.pdf> [<https://perma.cc/NPH7-FHB9>].

244. See *Homeland Security Information Network (HSIN)*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/homeland-security-information-network-hsin> [<https://perma.cc/7SYH-HRX9>] (Apr. 28, 2023); U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-526, FACIAL RECOGNITION TECHNOLOGY: CURRENT AND PLANNED USES BY FEDERAL AGENCIES 19 (2021), <https://www.gao.gov/assets/gao-21-526.pdf> [<https://perma.cc/4F5R-DUBL>].

245. See generally *DHS/ALL/PIA-027 Watchlist Service*, U.S. DEP’T HOMELAND SEC., <https://www.dhs.gov/publication/dhs-all-pia-027c-watchlist-service-update> [<https://perma.cc/7G9X-MJ25>] (Mar. 31, 2023) (discussing how the DHS receives data from the from U.S. government’s consolidated Terrorist Screening Database); STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., 118TH CONG., MISLABELED AS A THREAT: HOW THE TERRORIST WATCHLIST & GOVERNMENT

The information in these databases can propel pretextual traffic enforcement. Running a driver or license plate through law enforcement databases is now a routine part of traffic enforcement.²⁴⁶ In fact, the opportunity to run a database search may itself incentivize officers to initiate a stop.²⁴⁷ DOJ investigations have documented patterns of police stopping individuals in order to run a warrant check.²⁴⁸ During a stop,

SCREENING PRACTICES IMPACT AMERICANS 6–8 (Comm. Print 2023), https://www.hsgac.senate.gov/wp-content/uploads/Mislabeled-as-a-Threat_Public_Report-2.pdf [<https://perma.cc/E6KG-V6TK>] (finding that terror watchlist records increased from 150,000 in 2004 to 1.8 million in November 2022, and calling for reform).

246. See, e.g., Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 469 (2013) (“Any law enforcement agent in the country can access the NCIC. Officers routinely use the NCIC during common interactions with the public, such as traffic stops, to check whether an individual is listed in its terrorist watch list, among other things.”); Stella Burch Elias, Note, “*Good Reason To Believe*”: *Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting Lopez-Mendoza*, 2008 WIS. L. REV. 1109, 1136 (“Local and state police throughout the United States regularly use the NCIC to run background checks on individuals whom they encounter in the course of their work, including those questioned during routine traffic stops.”).

247. See, e.g., *Roybal v. Schnell*, No. 21-cv-2026, 2022 WL 2609059, at *2 (D. Minn. July 8, 2022) (discussing petitioner’s asserted *Brady* violation because the timing of the NCIC query searches was not disclosed until after the officer’s testimony, and that this evidence could have helped to show that petitioner’s arrest amounted to an illegal pretext for a search of the vehicle); *United States v. Schmid*, No. 06-CR-97, 2007 WL 540788, at *4 (E.D. Tenn. Feb. 15, 2007) (“Finally, the defendants contend, the officers’ behavior at the scene demonstrates that they conducted no realistic investigation into the discovery of the Schmidts as fugitives, but rather merely used the NCIC report to justify a pretextual search of the defendants’ vehicle.”); *Vargas-Rocha v. State*, 891 P.2d 763, 766 (Wyo. 1995) (“[Appellant] further claims that all the evidence derived from the stop of the vehicle should have been suppressed because the patrolman did not have a reasonable suspicion that Appellant was engaged in, or about to become engaged in, criminal activity when he requested that a search of the NCIC data base be made and because the search of the NCIC data base was a ‘prohibited pretext search.’”).

248. See C.R. DIV., U.S. DEP’T. OF JUST. & U.S. ATT’Y’S OFF., DIST. N.J., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 9 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [<https://perma.cc/Y8XK-CMEH>] (describing a pattern of warrant checks for people stopped solely for “milling,” “loitering,” or “being present in high-crime areas” without any indication of criminal activity or suspicion); C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 17 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/T99B-F7FV>] (“Many of the unlawful stops we found appear to have been driven, in part, by an officer’s desire to check whether the subject had a municipal arrest warrant pending.”).

information about an individual—such as one’s immigration status—may cause police to take enforcement actions they otherwise would not.²⁴⁹

Enforcement via database is not without costs.²⁵⁰ Warrant databases have well-documented accuracy issues, which can result in false arrests.²⁵¹ And even accurate, valid warrants do not always further public

249. See, e.g., Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1152–53 (2013) (“[R]outine police activities necessarily become moments that potentially lead to immigration policing and status determinations. The NCIC program, by revealing immigration status to police officers making routine queries, enables the possibility of immigration-related arrests even in the absence of arrest authority, on a pretextual or improper basis. Even if no arrest is made, police officers . . . might take other actions based on that information, such as vehicle or individual searches.”); Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 589 (2009) (“Traffic stops routinely result in deportation orders when an officer learns of a driver’s illegal immigration status. Far from accidental, these types of arrests are part of the ICE’s strategy for identifying illegal immigrants; the strategy, as an article in *The Wall Street Journal* colloquially described it, is to ‘[g]et local police to nab [illegal immigrants] on an unrelated offense, such as a traffic infraction.’” (footnotes omitted)); Jacobs & Crepet, *supra* note 240, at 192 (“The inclusion of the Immigration Violators File in the NCIC encourages state and local enforcement of immigration laws. If a local or state police officer anywhere in the country stops a motorist for speeding, the officer may, using the motorist’s name or driver’s license, electronically search the NCIC database. The police officer will be informed immediately if the driver is wanted for an immigration violation.” (footnotes omitted)); David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 27–30 (2006) (“The federal government, particularly the Department of Justice, wanted all law enforcement agencies arresting illegal immigrants, no matter how ill suited local police might feel for the task The federal government would give them the authority as well as the information [through NCIC] (unreliable though it might be) necessary to carry out this important task.”).

250. See PRINCIPLES OF THE LAW: POLICING § 2.08 cmt. b (AM. L. INST. 2023) (“Many warrants in existing databases either are extremely old or are for minor offenses, such as the failure to appear in court to resolve an outstanding traffic ticket. Warrant databases also are riddled with errors, including misidentified people, erroneous Social Security numbers, and many typographical mistakes. As a result, hundreds of thousands of people are taken into custody each year for very minor offenses—or without any legitimate basis whatsoever.”).

251. See *Herring v. United States*, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting) (“The risk of error stemming from these databases is not slim. . . . Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government’s employment eligibility verification system. Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty.” (footnotes omitted)); Wayne J. Pitts, *Dealing with Outstanding Warrants for Deceased Individuals: A Research Brief*, 30 JUST. SYS. J. 219, 220 (2009) (discussing a range of errors in warrants databases); Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2011-dec-25-la-me-wrong->

safety. Overall, most open warrants are for relatively low-level offenses, such as failure to appear in court, failure to pay fines or fees, or violations of municipal housing codes.²⁵² A 2017 review of open warrants in New York City, for example, found that 1.3 million of the 1.6 million open warrants were for low-level, quality-of-life offenses, such as disorderly conduct and littering.²⁵³ The link between enforcing these warrants and enhancing public safety is far from clear.²⁵⁴ Moreover, the burdens of warrant enforcement will be concentrated in certain communities—often poorer ones and communities of color.²⁵⁵

2. FEDERALLY FUNDED TECHNOLOGY

Federally funded technology also plays an important role in facilitating police traffic stops. Automated license plate readers (ALPRs)

id-20111225-story.html [https://perma.cc/AS5M-2ZF5] (reporting nearly 1,500 instances of wrongful incarcerations based on database errors from 2006 to 2011). *See also* Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 545 (2016) (“While a substantial and still-growing literature exists on the individual liberty and privacy perils associated with large, multi-source data assemblage, known as ‘big data,’ this Article addresses the pitfalls of ‘small’ data (i.e., individual-level, discrete data points) in the criminal justice system. Because small data provides the building blocks for all data-driven systems, enhancing data quality and promoting greater government accountability will have a major positive effect on the criminal justice system as a whole.” (footnote omitted)).

252. *See* PRINCIPLES OF THE LAW: POLICING § 2.08 reporters’ note (AM. L. INST. 2023) (“According to a U.S. Department of Justice count for 2016, there were 3.9 million warrants issued for misdemeanors and 1.07 million warrants issued for ‘other’ conduct, such as traffic issues and ordinance infractions, compared to just 850,000 warrants issued for felonies.” (citing BJS 2016, *supra* 241, at 31 tbl.5a)). *See also* *Warrant Reform*, POLICING PROJECT AT N.Y.U. SCH. L., <https://www.policingproject.org/warrant> [https://perma.cc/2RR6-FZWK] (proposing “a comprehensive approach that addresses the backlog of outstanding warrants, and ensures that going forward, bench warrants are only issued when there is a clear public safety need”); Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 640 (2019).

253. Beth Fertig, *City District Attorneys Purge Almost 645,000 Old Warrants*, WNYC NEWS (Aug. 9, 2017), <https://www.wnyc.org/story/city-district-attorneys-purge-645000-old-warrants/> [https://perma.cc/Z7ZM-UHHW].

254. *See* Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 42 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28600, 2022), https://www.nber.org/system/files/working_papers/w28600/w28600.pdf [https://perma.cc/BJ95-ZJKD] (finding that prosecution for certain non-violent misdemeanor offenses leads to higher rearrest rates, while non-prosecution decreases the likelihood of rearrest).

255. *Utah v. Strieff*, 579 U.S. 232, 259 n.1 (2016) (Kagan, J., dissenting) (noting that warrants “are concentrated in cities, towns, and neighborhoods where stops are most likely to occur”). *See also id.* at 254 (Sotomayor, J., dissenting) (“[I]t is no secret that people of color are disproportionate victims of this type of scrutiny.”).

are camera systems that read and record passing license plates.²⁵⁶ ALPRs can compare the license plates they come across against a database of sought-after plates—commonly referred to as an “alert list” or “hot list.”²⁵⁷ When an ALPR is mounted on a police vehicle (or when a dashboard camera doubles as an ALPR), officers are alerted in real time of any hot-list hits, putting them in position to make a traffic stop after visually confirming the plate match.²⁵⁸

State and local police routinely use federal funds to purchase ALPRs and other traffic enforcement technologies with criminal interdiction as the explicit goal.²⁵⁹ Again, DOJ is a key source of funds. In 2022, Vallejo, California accepted a nearly \$150,000 grant from DOJ, a portion of which would be used “to renew the use of 10 automatic license plate

256. AXON AI & POLICING TECH. ETHICS BD., AUTOMATED LICENSE PLATE READERS 5 (2019), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5dadec937f5c1a2b9d698ba9/1571679380452/Axon_Ethics_Report_2_v2.pdf [<https://perma.cc/35V7-83VA>]; *Automated License Plate Readers*, ELEC. FRONTIER FOUND.: STREET LEVEL SURVEILLANCE, <https://sls.eff.org/technologies/automated-license-plate-readers-alprs> [<https://perma.cc/ANZ7-EF6N>] (Oct. 1, 2023).

257. AXON AI & POLICING TECH. ETHICS BD., *supra* note 256, at 12.

258. *See, e.g., Green v. City and County of San Francisco*, 751 F.3d 1039, 1045 (9th Cir. 2014) (“It is well established by the record that an unconfirmed hit on the ALPR does not, alone, form the reasonable suspicion necessary to support an investigatory detention, and Defendants do not contest this. Instead, the common practice of the SFPD at the time of Green’s seizure required verifying the information supplied by the system by (1) visually confirming that the plate number matches that read by the ALPR system and (2) confirming that the plate number is actually wanted according to the database.”).

259. For examples of other traffic enforcement technologies, see *Hancock County Tennessee Rural Violent Crime Reduction Initiative*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Dec. 2, 2021), <https://bja.ojp.gov/funding/awards/15pbja-21-gg-03916-rura> [<https://perma.cc/QD2C-LFAC>] (describing a funding award to the Hancock County Sheriff’s Office in Sneedville, Tennessee for Stalker Dual Band Radar Units “to conduct traffic enforcement to prevent the amount of illegal drugs that are transported into our community”); *Drug Enforcement Equipment*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Aug. 22, 2013), <https://bja.ojp.gov/funding/awards/2013-dj-bx-1193> [<https://perma.cc/4SDQ-WKC7>] (describing a funding award for “drug enforcement equipment” used “to enhance the detection of drugs during traffic stops”); *Traffic Enforcement Highway Interdiction Equipment Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Aug. 22, 2013), <https://bja.ojp.gov/funding/awards/2013-dj-bx-1075> [<https://perma.cc/WL78-JEYD>] (describing a funding award for “traffic enforcement equipment to conduct traffic stops and vehicle searches” in order to “stop vehicles and detect illegal weapons, drugs and currency on the roadways”); *Justice Assistance Grant Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 8, 2011), <https://bja.ojp.gov/funding/awards/2011-dj-bx-2248> [<https://perma.cc/5Z9N-NM26>] (describing an award for “funds to replace laptop computers in the township patrol vehicles, which will improve access to information when making traffic stops and will help identify potential criminals”).

readers in the city.”²⁶⁰ That same year, Glendale, California received DOJ funding to expand its stationary ALPR program.²⁶¹ DHS also plays a major role in ALPR purchases.²⁶² Data from 2018 through 2020 indicates DHS funds provided under its State Homeland Security Program, Urban Areas Security Initiative, and Operation Stonegarden Grant Program were used by hundreds of agencies across the country to purchase ALPRs.²⁶³ Federal emergency funding from the COVID-related American Rescue Plan have been repurposed to purchase ALPRs—in New Jersey alone, \$10 million went to thirty-four law enforcement agencies.²⁶⁴ Even NHTSA has funded ALPR purchases.²⁶⁵

260. John Glidden, *Vallejo Gets Federal Grant Funds for License Plate Readers*, VALLEJO SUN (Sept. 29, 2022), <https://www.vallejosun.com/vallejo-gets-federal-grant-funds-for-license-plate-readers/> [https://perma.cc/NA8T-8SP8]. Vallejo Police Department appears likely to be under state oversight in the near future. See Geoffrey King & Laurence Du Sault, *Civil Rights Investigation ‘On the Table’ in Vallejo, Bonta Says*, OPEN VALLEJO (May 11, 2023), <https://openvallejo.org/2023/05/11/civil-rights-investigation-on-the-table-in-vallejo-bonta-says/> [https://perma.cc/3E56-3EX4].

261. *Expansion of Flock Automated License Plate Reader (ALPR) Safety Camera Program*, BUREAU JUST. ASSISTANCE, U.S. DEP’T JUST. (Sept. 26, 2022), <https://bja.ojp.gov/funding/awards/15pbja-22-gg-02752-jagx> [https://perma.cc/CL38-6HBW].

262. See, e.g., Kristen Farrah Naem, *Long Beach Police Gets Approval for \$1.2 Million Purchase of New License Plate Recognition Technology*, SIGNAL TRIB. (Feb. 8, 2023), sigtrib.com/long-beach-police-gets-approval-for-1-2-million-purchase-of-new-license-plate-recognition-technology/ [https://perma.cc/JM36-UQE2]; Kade Crockford, *What We Know About License Plate Tracking, What We Don’t, and Our Plan To Find Out More*, ACLU (July 30, 2012), <https://www.aclu.org/news/national-security/what-we-know-about-license-plate-tracking-what-we-dont-and-our-plan> [https://perma.cc/E9AY-6JU8].

263. See Dep’t of Homeland Sec., Response to Freedom of Information Act Request (2023) (unpublished table) (on file with author).

264. Jay Edwards, *34 Law Enforcement Agencies To Receive Grants To Fund Automated License Plate Reader Technology*, WRNJ RADIO (Apr. 29, 2023), wrnradio.com/34-law-enforcement-agencies-to-receive-grants-to-fund-automated-license-plate-reader-technology/ [https://perma.cc/VTZ7-RYZ4]. See also Anastasia Valeeva, Weihua Li & Susie Cagle, *Rifles, Tasers and Jails: How Cities and States Spent Billions of COVID-19 Relief*, MARSHALL PROJECT (Sept. 7, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/09/07/how-federal-covid-relief-flows-to-the-criminal-justice-system> [https://perma.cc/P9P8-JQ5M] (“President Biden’s signature American Rescue Plan Act gave local governments \$350 billion to recover from COVID-19. They spent much of it on police, prisons and the courts.”).

265. Bennett Stein, *U.S. Department of Transportation Funding License Plate Readers, Documents Reveal*, ACLU (July 20, 2015), <https://www.aclu.org/news/privacy-technology/us-department-transportation-funding-license-plate-readers> [https://perma.cc/ZR5Z-QQG7] (“The NHTSA is funding license plate readers for highway safety purposes only, but it’s far from clear how law enforcement agencies are interpreting this and whether they are using the funding to buy license plate readers for non-safety uses.”).

Depending on the reason that a license plate is hot listed, an ALPR-initiated stop can be pretextual. Although ALPR stops often target particular vehicles for open warrants, police sometimes hot list license plates without a legally sufficient basis to stop the vehicle, thereby encouraging police to find a pretextual reason for the stop.²⁶⁶ In Chicago, for example, the police department’s Gang Violence Reduction Strategy directed commanders to conduct “Targeted Vehicle Enforcement” missions against gang members, including through the use of ALPRs.²⁶⁷ Reading between the lines, police are encouraged to hot list license plates they suspect as being associated with supposed gang members, and then use pretext stops to target the vehicle. There is little public information about the scope of this use of ALPRs, but it is common enough that ALPR vendors have created hot list categories such as “gang member,” “suspect,” “person of interest,” and “violent person.”²⁶⁸

* * *

The federal government has long played a complex and critical role in promoting the widespread use of traffic stops as a crime-fighting tactic. It has done so with little transparency, inadequate study of benefits, and no systematic consideration of the social harms. As a result, it is difficult to quantify the impact of the federal policies discussed above. We know that many pretextual traffic stops by state and local police are attributable

266. See, e.g., Richard Bilton, *Camera Grid To Log Number Plates*, BBC Two, http://news.bbc.co.uk/2/hi/programmes/whos_watching_you/8064333.stm [<https://perma.cc/FN4M-FVTZ>] (May 22, 2009, 6:00 PM) (“John Catt found himself on the wrong side of the ANPR system. He regularly attends anti-war demonstrations outside a factory in Brighton, his home town. It was at one of these protests that Sussex police put a ‘marker’ on his car. That meant he was added to a ‘hotlist’. This is a system meant for criminals but John Catt has not been convicted of anything and on a trip to London, the pensioner found himself pulled over by an anti-terror unit.”).

267. CITY OF CHI. OFF. OF INSPECTOR GEN., REVIEW OF THE CHICAGO POLICE DEPARTMENT’S “GANG DATABASE” 61–62 (2019), <https://igchicago.org/wp-content/uploads/2019/04/OIG-CPD-Gang-Database-Review.pdf> [<https://perma.cc/GL4R-E88P>].

268. AXON, ALPR HOTLISTS IN AXON EVIDENCE - FLEET 3, at 5–6 (2024), <https://my.axon.com/apex/MyAxonArticlePDF?Id=ka0Do00000QPVDIA4> [<https://perma.cc/67BD-EP5Y>]. See also L.A. PORT POLICE, TRAINING BULLETIN NO. 20-003, AUTOMATED LICENSE PLATE READERS (ALPRs) 1–2, 15 (2020), <https://kentico.portoflosangeles.org/getmedia/f17bc265-c668-4de8-ad51-417fecc16b9f/20-003-ALPR-Training-Bulletin-093020> [<https://perma.cc/VKH4-32UY>] (discussing how ALPRs allow officers to create custom hotlist entries and listing as an example a vehicle flagged as “Suspicious” and stating, “This Vehicle seen each Friday evening at Approximately 7:00PM near 7-11 on 5th Street”).

directly to federal intervention.²⁶⁹ Federal training and incentives have helped make the pretextual stop one of policing's central tactics. The proof of public safety benefits is patchy—traffic stops no doubt result in arrests and seizures, but there is insufficient evidence that the tactic is effective when deployed widely.²⁷⁰ And yet, there is evidence of acute harms: stops that spiral into uses of force;²⁷¹ discriminatory and illegal stops, like those conducted under the 287(g) program;²⁷² the perpetuation of racial stereotypes, such as through Operation Pipeline and its progeny;²⁷³ policing for profit, reinforced by the Equitable Sharing program;²⁷⁴ and the diversion of resources away from non-policing solutions, like NHTSA's turn away from vehicle regulation.²⁷⁵

In light of all this, the next Part turns to possible interventions to correct the federal government's course.

III. AN AGENDA FOR REFORMING RELIANCE ON WIDESPREAD PRETEXTUAL TRAFFIC STOPS

The federal government walks a fine line when it comes to policing. On the one hand, it operates an enormous, well-funded law enforcement apparatus entrusted with enforcing a growing list of federal crimes. It also relies on state and local police to achieve its law enforcement objectives. On the other hand, the federal government has an obligation to protect civil rights, a special role in preserving privacy, and unique authority to intervene to correct patterns of injustice.²⁷⁶

Recognizing this dual role, this Part sets out an agenda for the federal government to pare back the ways that it induces state and local law enforcement to use widespread pretextual traffic stops as a crime-fighting tactic. This agenda begins with restricting the use of pretextual

269. Whisper stops and police grant funding are direct examples. *See supra* Sections II.A.3, II.C.1 and accompanying text. But data indicates spikes in stops when jurisdictions implement NHTSA's DDACTS program. *See supra* notes 193–97 and accompanying text.

270. *See supra* Section I.B.1.

271. *See supra* Section I.B.2.

272. *See supra* Section II.B.3.

273. *See supra* Section II.B.1.

274. *See supra* Section II.C.2.

275. *See supra* Section II.B.2.

276. *See* Barry Friedman, Rachel Harmon & Farhang Heydari, *The Federal Government's Role in Local Policing*, 109 VA. L. REV. 1527, 1536 (2023); Rachel E. Barkow & Mark Osler, *Designed To Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 392 (2017) (noting the inherent conflict within DOJ).

stops by federal law enforcement officers.²⁷⁷ It then turns to creating mechanisms to review federal training, funding, and other support provided to state and local police.²⁷⁸ Section III.C then suggests a way to systematically compare enforcement programs that rely on traffic stops—a “cost of a traffic stop.” Finally, Section III.D discusses the need for renewed federal leadership in traffic safety, one that reorganizes NHTSA and does not prioritize enforcement-based solutions.

Before diving in, I note two underlying assumptions, both grounded in the political realities of near-term federal police reform: First, the federal government will continue to remain involved in state and local policing. Although many commentators have argued for more limited federal involvement,²⁷⁹ recent trends indicate the opposite, with the federal government becoming *more* involved in policing over time.²⁸⁰

277. See *infra* Section III.A.

278. See *infra* Section III.B.

279. See, e.g., Trevor George Gardner, *Immigrant Sanctuary as the “Old Normal”: A Brief History of Police Federalism*, 119 COLUM. L. REV. 1, 83 (2019) (“This Article introduces two concepts to the literature—police federalism and field theory—in an effort to situate contemporary immigration enforcement and the practice of immigrant sanctuary in historical context. Police federalism frames the relationship between the executive branch of the federal government and state and local police. Field theory, in turn, guides the inquiry into the history of police federalism. It ultimately reveals this history as well aligned with the practice of immigrant sanctuary and in profound tension with an immigration-enforcement apparatus predicated upon the subordination of all police departments to the federal government.”); Trevor George Gardner, *Right at Home: Modeling Sub-Federal Resistance as Criminal Justice Reform*, 46 FLA. ST. U. L. REV. 527, 527 (2019) (“Over the past two decades, state and local governments have crippled the federal war on marijuana as well as a series of federal initiatives designed to enforce federal immigration law through city and county police departments. This Article characterizes these and similar events as sub-federal government resistance in service of criminal justice reform.”); Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101, 101 (2014) (“In this Article, I examine Secure Communities from the perspective of state and local governments and individuals seeking to defy mandatory program participation. . . . I conclude that the Secure Communities mandate overlooks constitutional, statutory, and practical considerations and that the sharing requirement should be voluntary rather than compulsory.”); Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901, 903 (2011) (“The purpose of this essay . . . is to serve as a preliminary examination of an emerging regulatory framework and its potential consequences on immigration regulation and local policing.”); Michael M. O’Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 787–88 (2004) (“[T]he present Article addresses two related questions, one empirical and the other normative. First, the Article considers how best to characterize the *current* federal role in national drug policy. . . . Turning from the empirical to the normative, the Article next considers how federal-state relations *ought* to be structured.”).

280. See Press Release, White House, FACT SHEET: President Biden’s Budget Invests in Reducing Gun Crime to Make Our Communities Safer (Mar. 28, 2022), <https://www.whitehouse.gov/omb/briefing-room/2022/03/28/fact-sheet-president-bidens-budget-invests-in-reducing-gun-crime-to-make-our-communities-safer/>

Reasonable minds can differ on the merits of federal intervention on particular law enforcement issues, but as a general matter, there are distinct benefits of federal involvement. For example, the federal government is in a unique position to collect nationwide information, coordinate, and provide resources in ways that state and local governments simply cannot.²⁸¹

Second, there is no plausible scenario under which the federal government will ban the use of pretextual traffic stops. Leaving aside questions of legal authority, there are myriad reasons why the federal government is unlikely to embrace such a dramatic position: As a legal matter, the Supreme Court has blessed the practice under the Fourth Amendment.²⁸² On a cultural level, the traffic stop is deeply ingrained in policing and viewed by police as one of their most effective tools.²⁸³ And there is evidence that the targeted use of stops can have some deterrent effect on crime (though again, as discussed above, this evidence has shortcomings, particularly when it comes to assessing social harms).²⁸⁴ Finally, perhaps most importantly, the political realities of police reform make radical change difficult.²⁸⁵

While understanding these practical constraints, it remains imperative that law enforcement rely on tactics that are both effective and equitable.²⁸⁶ A key step in this direction would be reducing reliance on

[<https://perma.cc/Q5NM-RVBP>] (“Specifically, the resources requested as part of the President’s FY23 Budget will mean: Funding the Police, Including by Putting More Police Officers on the Beat. The Budget provides \$1.97 billion in discretionary funding to support state and local law enforcement, an increase of 12% over the FY22 enacted level.”); Juhohn Lee, *America Has Spent over a Trillion Dollars Fighting the War on Drugs. 50 Years Later, Drug Use in the U.S. Is Climbing Again.*, CNBC, <https://www.cnn.com/2021/06/17/the-us-has-spent-over-a-trillion-dollars-fighting-war-on-drugs.html> [<https://perma.cc/G4UG-4SLG>] (June 17, 2021, 1:15 PM) (“[T]he federal government is spending more money than ever to enforce drug policies.”).

281. See Friedman, Harmon & Heydari, *supra* note 276, at 1556–63.

282. See *supra* notes 25–28 and accompanying text.

283. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 8, at 10, 27.

284. See *supra* Section I.B.2.

285. See David Nakamura, Mark Berman & Annie Linskey, *Why Biden’s Executive Order on Policing Is Still Up in the Air*, WASH. POST (Apr. 7, 2022, 5:00 AM), <https://www.washingtonpost.com/national-security/2022/04/07/biden-police-executive-order/> [<https://perma.cc/3LNK-7Q9M>] (“The Biden White House is struggling to reshape an executive order on police accountability three months after a leaked draft drew sharp opposition from law enforcement groups, putting the initiative at risk at time when violent crime is rising and civil rights groups have expressed frustration over the pace of reform.”).

286. None of this is meant to elevate policing-oriented solutions to crime at the expense of non-police alternatives. These policy choices are beyond the scope of this Article. Rather, the point is simply that law enforcement should focus its efforts on tactics that actually work, while also being equitable and reducing harm.

the widespread use of pretextual traffic stops. This effort is underway in many jurisdictions across the country,²⁸⁷ but federal support is needed. The Sections below provide several ideas in this direction—predominantly focused on what can be achieved through executive action.

A. New Limits on Federal Law Enforcement Agencies

Mitigating the federal government’s embrace on pretextual traffic stops should begin with federal law enforcement agencies. To state the obvious: executive authority is at its apex when it comes to these agencies. In addition, these agencies serve as a model for policing agencies across the nation. And the federal government can hardly hold state and local actors to a higher standard than it holds its own officers.

For federal agencies whose officers have traffic-stop authority, the president should limit their use of pretextual traffic stops to investigate vehicles linked to specific serious crimes. The American Law Institute articulated one potential limit: permitting stops in situations in which officers are “investigating a specific serious offense” and when the officers have “specific facts to support the belief that the target of the pretextual action may have been involved in such offense.”²⁸⁸ These facts need not rise to the level of probable cause. A model statute from the Policing Project limiting pretext stops takes an even more specific approach, permitting a pretext stop only if “the motor vehicle matches the description of a motor vehicle suspected of having been involved in” specific enumerated crimes “or any other crime for which failure to immediately apprehend the suspect is reasonably likely to result in death or serious bodily injury to a person other than the suspect.”²⁸⁹

287. Braman, Fishman, Idowu, Sorensen & Greer et al., *supra* note 36 (manuscript at 29–31) (cataloging efforts in jurisdictions across the country to curb the use of pretextual stops).

288. PRINCIPLES OF THE L.: POLICING § 2.04(c) (AM. L. INST. 2023).

289. AN ACT TO CURTAIL PRETEXTUAL TRAFFIC STOPS § I(2)(d) (POLICING PROJECT, N.Y.U. SCH. OF L.), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/63dc54409f248b0f17a6ae48/1675383884348/Pretext+Model+Statute.pdf> [https://perma.cc/7RWJ-BHRE]. One should not be under any illusions that this is a perfect solution. Bias in “reasonable suspicion” determinations is well documented. *See, e.g.*, GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES xi (2007), https://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf; Eve S. Buzawa & Gerald T. Hotaling, *Impact of Relationship Status, Gender, and Minor Status in the Police Response to Domestic Assaults*, 1 VICTIMS & OFFENDERS 323, 328 (2006). But given how deeply rooted pretext stops are in policing, this limit is a good start.

There is ample precedent for the president mandating policy for federal law enforcement agencies. In a 2022 executive order, for example, President Biden mandated that federal law enforcement agencies update their use of force policies to meet the standards in the recently revised DOJ use of force policy, contribute to the National Law Enforcement Accountability Database regarding instances of police misconduct, limit their use of no-knock entries, and wear body-worn cameras in certain situations.²⁹⁰ Similar presidential action could—and should—limit federal officers’ use of pretextual traffic stops.

Limiting pretext stops in this manner would restore a balance of constitutional protections without unduly hindering law enforcement. In addition to targeted, particularized pretext stops, officers would also still be permitted to stop a vehicle if the officer had reasonable suspicion of a crime.²⁹¹ In 2022, the Los Angeles Police Department implemented a similar limit: The agency barred officers from initiating a pretextual stop unless “acting upon articulable information . . . regarding a serious crime.”²⁹² Importantly, before initiating a pretextual stop, officers are required to articulate and record their suspicions using their body-worn cameras.²⁹³ Federal agencies should adopt this practice as well, incorporating it into their body-worn camera policies.²⁹⁴

Then, to ensure that federal agencies are abiding by these new limits on pretext stops and to provide a model for state and local jurisdictions, the federal government itself should collect and publish stop data. For at least twenty-five years, legislators and other stakeholders have called for federal law enforcement agencies to collect and report data on their stops.²⁹⁵ DOJ’s Civil Rights Division insists on data collection and

290. Exec. Order No. 14074, 87 Fed. Reg. 32945, 32949–55 (May 31, 2022).

291. See, e.g., *United States v. Hensley*, 469 U.S. 221, 223, 232 (1985) (permitting officers to investigate “wanted” status so long as there is reasonable suspicion).

292. L.A. POLICE DEP’T., DEPARTMENT MANUAL VOLUME 1 § 240.06, at 1 (2022), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2022/03/3_9_22_SO_No._3_Policy_Limitation_on_Use_of_Pretextual_Stops_Established.pdf [<https://perma.cc/WJL3-42QZ>].

293. Kevin Rector, *New Limits on ‘Pretextual Stops’ by LAPD Officers Approved, Riling Police Union*, L.A. TIMES (Mar. 1, 2022, 7:32 PM), <https://www.latimes.com/california/story/2022-03-01/new-limits-on-pretextual-stops-by-lapd-to-take-effect-this-summer-after-training> [<https://perma.cc/XEB8-CGYT>].

294. Cf. Exec. Order No. 14074, 87 Fed. Reg. 32945, 32955 (May 31, 2022).

295. See, e.g., HARRIS, *supra* note 153 (calling on Congress to pass the “Traffic Stops Statistics Study Act,” which would require collection of data on each traffic stop, including the race of driver and, if a search was performed, a subsequent study analyzing the data).

transparency when suing local police,²⁹⁶ but federal law enforcement has not lived up to this same standard. President Biden’s executive order on policing created an Equitable Data Working Group to look at data collection issues, but it does not have authority to mandate any data collection.²⁹⁷ Further presidential action should require federal law enforcement to collect and publish stop data.

Finally, to ensure federal law enforcement does not use local police to circumvent these new limits, the executive branch should require that any limits on how federal officers conduct stops apply to actions taken by task forces and by local police acting at the direction of federal officers.²⁹⁸

B. A Review of Federal Training, Funding, and Other Support to State and Local Police

Limiting pretext stops by federal officers is a start, but if Part II made anything clear, it is that the federal government’s reach extends well below the federal level. The training programs, research, grants, and other federal incentives that facilitate pretextual policing by state and local police are myriad. Unwinding these programs is the next step.

The programs detailed in Part II span much of the federal government. They involve federal law enforcement agencies—some usual suspects, such as DOJ and DHS—and some unusual ones, such as

296. *See, e.g.*, Press Release, Dist. of N.J., U.S. Att’y’s Off., Justice Department Reaches Agreement with City of Newark, New Jersey, to Reform Police Department’s Unconstitutional Practices (Mar. 30, 2016), <https://www.justice.gov/usao-nj/pr/justice-department-reaches-agreement-city-newark-new-jersey-reform-police-department-s> [<https://perma.cc/B8JT-E2AG>].

297. CRIM. JUST. STAT. INTERAGENCY WORKING GRP. OF THE NAT’L. SCI. & TECH. COUNCIL, EQUITY AND LAW ENFORCEMENT DATA COLLECTION, USE, AND TRANSPARENCY 16–20 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/05/NSTC-Equity-and-Law-Enforcement-Data.pdf> [<https://perma.cc/FA2E-5YSG>] (“In the absence of a federal reporting requirement, participation in federal data collections remains limited, despite substantial federal efforts to encourage law enforcement agency participation.”).

298. *See* HUM. RTS. WATCH, *supra* note 139, at 64–65 (“The US executive branch should also act to eliminate parallel construction. Human Rights Watch recommends that the Justice Department adopt policies prohibiting the practice and publicly disclose all relevant policies and legal interpretations. The Justice Department should also provide clear and publicly available legal guidance to the FBI, the DEA, and other relevant entities regarding these matters.”).

Legislative action is also an option. *Id.* at 64 (“[W]e recommend that [Congress] adopt laws to require the disclosure to criminal defendants of complete information about the origins of the investigations in their cases, with special procedures as necessary to address classified information or information whose disclosure may jeopardize the lives or safety of identifiable human informants.”).

the Department of the Interior.²⁹⁹ Non-law enforcement agencies also are involved, such as the research arms of DOJ and DOT. This sprawl makes it difficult to comprehend, let alone oversee, what is happening at the federal level.³⁰⁰

To address this, the president should initiate a centralized review of all agencies and programs that influence traffic enforcement. DOJ may view itself as the federal locus of police reform, but it is ill-positioned to review policing policies across the federal government.³⁰¹ DOJ certainly has significant expertise: The Civil Rights Division leads pattern-and-practice investigations into unconstitutional conduct by local police. DOJ's use of force policy served as a model for other federal agencies. But there are two problems with DOJ taking on this role. First, DOJ is home to key law enforcement agencies. DOJ may find it difficult to self-impose limitations on those agencies, running the risk that needed reforms will be watered down.³⁰² Second, it is not clear that DOJ has the authority or ability to superintend the various co-equal federal agencies that influence pretextual policing.

The White House should find an alternative locus of oversight, and it has many models to draw upon. The Executive Office of the President has special advisors that coordinate efforts on a range of topics.³⁰³ Review of some agency action is centralized through the Office of Information and Regulatory Affairs (OIRA). Among other responsibilities, OIRA "reviews significant draft rules from agencies (other than independent

299. U.S. Park Police and the Bureau of Indian Affairs are within the Department of the Interior. *See supra* notes 105, 113.

300. This Article focuses on pretext stops, but this sprawl applies to other law enforcement contexts as well. Consider, for example, the widespread use of facial recognition across federal agencies. *See Facial Recognition Technology: Federal Agencies' Use and Related Privacy Protections*, U.S. GOV'T ACCOUNTABILITY OFF. (June 29, 2022), <https://www.gao.gov/products/gao-22-106100> [<https://perma.cc/4LKQ-LMWE>].

301. Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 51 (2009) ("Effective coordination would promote real efficiencies for the Justice Department by ensuring that the data collected would be useful for assessing departments and improving knowledge."). *See also id.* at 51 n.153 ("This coordination might best be achieved through a policing czar, perhaps in the Associate Attorney General's office or the Deputy Attorney General's office.").

302. *See* Friedman, Harmon & Heydari, *supra* note 276, at 1536 (discussing DOJ's conflicted position when it comes to police reform).

303. *Id.* at 1602 ("President Biden's White House has offices on economics, environmental quality, gender policy, national security, climate policy, intellectual property enforcement, drug control, science and technology, cybersecurity, space, and trade. But no President has developed a coordinated, national effort to promote sound policing." (footnote omitted)). *See also* Noah Weiland, *Biden's Drug Czar Is Leading the Charge for a 'Harm Reduction' Approach*, N.Y. TIMES (July 26, 2022), <https://www.nytimes.com/2022/07/26/us/politics/biden-drug-czar-rahul-gupta.html>.

regulatory agencies) at both the proposed and final rulemaking stages.”³⁰⁴ In the policing context, special advisors to the Domestic Policy Council act on behalf of the White House,³⁰⁵ and although they have the benefit of proximity, these advisors lack direct authority to set policies and practices of federal agencies.³⁰⁶ President Biden’s 2022 executive order created a number of committees to ensure interagency coordination on specific topics, such as use of body camera footage, use of facial recognition tools, and reentry programs.³⁰⁷

Whatever the form, executive action is needed to empower an office or combination of stakeholders with clear authority to review the practices of any federal agency that influence traffic enforcement. Those practices under scrutiny should include the following issues raised in this Article:

Programs that Train Police to Use Traffic Stops as a Generalized Crime-Fighting Strategy. As discussed above, programs that train police to use pretext stops widely or as a blanket crime-fighting strategy have little empirical support.³⁰⁸ Accordingly, the American Law Institute recently adopted the position that “pretextual policing never should be used as a strategy to further a generalized interest in crime detection or as a broader tool to maintain social order.”³⁰⁹ A centralized review of

304. CONG. RSCH. SERV., FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (2011) https://www.everycrsreport.com/files/20110321_RL32397_a87c7bfa21b8c5295a686d5b964c2e410bf1b25c.pdf [<https://perma.cc/HW26-ZJXT>].

OIRA also reviews other “[s]ignificant regulatory action[s],” such as those with “an annual effect on the economy of \$200 million or more . . . or adversely affect in a material way the economy, . . . public health or safety, or State, local, territorial, or tribal governments or communities.” Exec. Order No. 14094, 88 Fed. Reg. 21879, 21879 (Apr. 6, 2023).

305. See Andrew Cohen, *Two Professors Start Tech-Related White House Appointments To Help Shape U.S. Policy*, BERKELEY L. (Jan. 11, 2023), <https://www.law.berkeley.edu/article/crump-wexler-tech-related-white-house-appointments-shape-us-policy/> [<https://perma.cc/6MYZ-YW35>].

306. *Domestic Policy Presidential Directive – 1 (DPPD-1)*, WHITE HOUSE (May 6, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/06/domestic-policy-presidential-directive-1-dppd-1/> [<https://perma.cc/798Q-DMB2>].

307. Exec. Order 14074, 87 Fed. Reg. 32945, 32955 (May 25, 2022) (“[T]he Attorney General, in coordination with the Secretary of HHS and the Director of the Office of Science and Technology Policy (OSTP), shall conduct a study”); *id.* (“The Attorney General, the Secretary of Homeland Security, and the Director of OSTP shall jointly lead an interagency process”); *id.* at 32956–57 (establishing a broad interagency committee, the “Federal Interagency Alternatives and Reentry Committee”).

308. See *supra* notes 40–44, 50–54 and accompanying text.

309. PRINCIPLES OF THE L.: POLICING § 2.04 cmt. c (AM. L. INST. 2023).

federal programs should ensure training and assistance do not violate this principle. Until that time, DDACTS, DIAP, Operation Pipeline, and similar programs should be paused.³¹⁰

Federal Grants that Promote Pretextual or Quota-Like Enforcement. There should be a similar centralized review of federal grant programs to ensure they do not produce widespread use of pretextual stops.³¹¹ Grant requirements should not blindly require police to report enforcement activity, lest they risk encouraging quota-like behavior.³¹² Rather, grants should be used to teach best practices, such as adopting limits on pretext stops, prohibiting certain low-level traffic stops, and requiring robust stop data collection.³¹³ Finally, centralized review of federal grants

310. In February 2024, DOT indicated that it had ended its contractual support for DDACTS. *See supra* note 203 and accompanying text.

311. President Biden’s recent executive order began a review of grant funding to police, but the outcome is far from clear. *See* Exec. Order No. 14074, 87 Fed. Reg. 32954, 32961–62 (May 25, 2022).

Some commentators have called for a legislative overhaul of federal grant funding. *E.g.*, Alexis Karteron, *Tyre Nichols’ Death Prompts Calls for Federal Legislation To Promote Police Reform – but Congress Can’t Do Much About Fixing Local Police*, CONVERSATION, <https://theconversation.com/tyre-nichols-death-prompts-calls-for-federal-legislation-to-promote-police-reform-but-congress-cant-do-much-about-fixing-local-police-159881> [<https://perma.cc/B6R9-W5BG>] (Jan. 30, 2023, 2:27 PM). The George Floyd Justice in Policing Act of 2020, for example, would have imposed grant funding requirements including limits on no-knock warrants in drug cases, chokeholds, and racial profiling. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. §§ 361–63 (2020); NATHAN JAMES, CONG. RSCH. SERV., R46431, POLICING REFORM LEGISLATION: CONDITIONS ON FUNDING AND NEW GRANT AUTHORIZATIONS 2–4 (2021), <https://sgp.fas.org/crs/misc/R46431.pdf> [<https://perma.cc/4G49-VFEX>]. More dramatically, the Center for American Progress has called for congressional action to reorient funding toward “the goals of ending mass incarceration, promoting comprehensive public health and safety, and ensuring accountability in policing.” Mike Crowley & Betsy Pearl, *Reimagining Federal Grants for Public Safety and Criminal Justice Reform*, CTR. FOR AM. PROGRESS (Oct. 7, 2020), <https://www.americanprogress.org/article/reimagining-federal-grants-public-safety-criminal-justice-reform/> [<https://perma.cc/NT2E-LQ34>]. But given the political realities of congressional action on policing, this Article focuses more on potential executive action.

312. *See supra* notes 230–32 and accompanying text. Grant requirements should instead focus on improved outcomes (*e.g.*, improved traffic safety, fewer overdose deaths). FORTIER & CHETTIAR, *supra* note 218, at 2 (“The President should issue an executive order directing federal agencies to review all federal criminal justice grants under their purview. Where these grants encourage harmful practices or have unclear goals, the President should direct federal agencies to recast them in a model called ‘Success-Oriented Funding.’”).

313. Grace E. Leeper, Note, *Conditional Spending and the Need for Data on Lethal Use of Police Force*, 92 N.Y.U. L. REV. 2053, 2053, 2084–90 (2017) (explaining how the “federal government might incentivize data collection without running afoul of

should ensure federal money is not being diverted from its intended purpose (*e.g.*, highway safety funding being used for pretext stops rather than traffic safety).³¹⁴

Restrict Use of Federal Funds for Automated License Plate Readers. A centralized review should also reconsider whether the federal government will continue to subsidize ALPR purchases. Federal funding for surveillance technology is controversial, with some calling for an end to the practice generally.³¹⁵ Absent concrete evidence of benefits, it is unclear why the federal government is funding the acquisition of ALPRs. Should this practice continue, this funding should be contingent on measures that mitigate harms of ALPR use. For example, funding could be contingent on the recipient agency having a policy that forbids hot listing a license plate absent probable cause.³¹⁶ Federal ALPR funds could also require that elected officials from the local jurisdiction approve the purchase in advance.³¹⁷

the law, proposing a legislative scheme for federal collection of law enforcement data that combines national guidelines, conditional spending requirements, and competitive grant funding”).

314. Earlier this year, NHTSA and the DOT issued a notice of proposed rulemaking indicating it may reconsider reporting conditions attached to annual highway safety funding. 23 U.S.C. § 402; Uniform Procedures for State Highway Safety Grant Programs, 88 Fed. Reg. 7780, 7789 (Feb. 6, 2023) (codified at 23 C.F.R. § 1300.11(b)(3)) (“NHTSA intends to convene meetings with stakeholders and to collaborate with GHSA to update the minimum performance measures well in advance of the FY 2027 triennial HSP submission date. NHTSA will draw all of the comments received under this rulemaking into that effort and will seek further input from these and other groups at that time. As we did previously, NHTSA commits to publishing the proposed minimum performance measures in the Federal Register for public inspection and comment.”). The outcome of this proposed rulemaking is critical.

315. *See, e.g.*, Matthew Guariglia, *End Two Federal Programs that Fund Police Surveillance Tech*, ELEC. FRONTIER FOUND. (Jan. 25, 2021), <https://www.eff.org/deeplinks/2021/01/end-two-federal-programs-fund-police-surveillance-tech> [<https://perma.cc/HC3S-R5K4>].

316. This type of policy requirement has precedent in the context of funding for body worn cameras. U.S. DEP’T OF JUST., OMB No. 1121-0329, BJA FY 2022 EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM — LOCAL SOLICITATION 11 (June 22, 2022), <https://bja.ojp.gov/funding/o-bja-2022-171368.pdf> [<https://perma.cc/P4DP-K7MG>] (requiring that any department purchasing body-worn cameras with JAG funds certify that the recipient “has policies and procedures in place related to BWC equipment usage, data storage and access, privacy considerations, and training”).

317. This requirement has precedent both in the provision of surplus military equipment and in some state and local statutes. *See, e.g.*, 10 U.S.C. § 2576a(b)(5) (“[T]he recipient, on an annual basis, and with the authorization of the relevant local governing body or authority, certifies that it has adopted publicly available protocols for

Limit Federal Asset Forfeiture. Any review must address federal asset forfeiture practices that create opportunities for police to profit from traffic enforcement.³¹⁸ Many have long called for an end to the federal Equitable Sharing program.³¹⁹ That said, reforming the program might be more politically viable. Attorney General Eric Holder limited the use of the program for assets seized during investigations conducted entirely by state or local agencies.³²⁰ Scholars have suggested a variety of additional reforms, such as barring seizures from going to a police department unless specifically permitted by state law, restricting forfeitures to cases in which a person has been convicted of a serious crime, barring local police from spending funds absent local government

the appropriate use of controlled property, the supervision of such use, and the evaluation of the effectiveness of such use, including auditing and accountability policies . . .”).

Regarding oversight over surveillance purchases, see, for example, Beryl Lipton, *California Law Enforcement Now Needs Approval for Military-Grade Surveillance Equipment. We'll Be Watching.*, ELEC. FRONTIER FOUND. (May 12, 2022), <https://www.eff.org/deeplinks/2022/05/california-law-enforcement-now-needs-approval-military-grade-surveillance> [<https://perma.cc/LQY9-LWDD>].

318. On the relationship between revenue and police traffic enforcement, see generally Colgan, *supra* note 9.

319. In the 1990s, after widespread reporting on abuses of civil forfeiture laws, Congress passed the Civil Asset Forfeiture Reform Act in 2000. The bill originally contained a provision ending the Equitable Sharing Program, but it was removed after opposition by law enforcement. Robert O'Harrow Jr., Sari Horwitz & Steven Rich, *Holder Limits Seized-Asset Sharing Process That Split Billions with Local, State Police*, WASH. POST (Jan. 16, 2015, 2:15 PM), https://www.washingtonpost.com/investigations/holder-ends-seized-asset-sharingprocess-that-split-billions-with-local-state-police/2015/01/16/0e7ca058-99d4-11e4-bcfb-059ec7a93ddc_story.html?utm_term=.c6db931b4929.

More recently, Congressman Tim Walberg introduced the Fifth Amendment Integrity Restoration Act in 2021. H.R. 2857, 117th Cong. (2021). The bill aims to reform civil asset forfeiture, including eliminating the Equitable Sharing Program. In 2023, Senator Rand Paul reintroduced the bill in the Senate. Press Release, Rand Paul, Sen., Dr. Rand Paul's FAIR Act Restores Respect for 5th Amendment, <https://www.paul.senate.gov/news-dr-rand-pauls-fair-act-restores-respect-5th-amendment/> [<https://perma.cc/HU9K-BPAY>]. See also Jacob Sullum, *Congress Considers Conditions on the Government's License To Steal*, REASON, (June 14, 2023, 12:01 AM), <https://reason.com/2023/06/14/congress-considers-conditions-on-the-governments-license-to-steal> [<https://perma.cc/8B6F-MLVE>].

320. O'Harrow Jr., Horwitz & Rich, *supra* note 319.

In 2017, Attorney General Jeff Sessions reinstated the policy allowing for adoptive forfeitures, “which empower state and local law enforcement to use federal law to bypass more restrictive state laws to seize the proceeds from crimes and to share the profits with federal authorities.” Rebecca R. Ruiz, *Justice Dept. Revives Criticized Policy Allowing Assets To Be Seized*, N.Y. TIMES (July 19, 2017), www.nytimes.com/2017/07/19/us/politics/justice-department-civil-asset-forfeiture.html?smid=pl-share.

sign off, and more.³²¹ Most relevant to the issue of pretext stops, the federal government should eliminate the sharing of seized assets arising from low-level traffic stops.³²²

Refocus NCIC. Although federal databases like NCIC help fill gaps in our fragmented system of law enforcement,³²³ these same databases can drive problematic enforcement.³²⁴ To limit the use of federal databases as a motivator of pretextual stops,³²⁵ a centralized review process should consider two changes: First, limit the open warrants that are viewable to officers making traffic stops. Publicly available information indicates there are millions of low-level warrants in NCIC.³²⁶ Rather than making all of these viewable during every traffic stop, executive action could limit visible warrants to ones that present genuine public safety risks. Second, NCIC should minimize other data that is shared with officers conducting stops that is not essential to their safety and mission. NCIC's immigration violator file is a prime example of

321. See Friedman, Harmon & Heydari, *supra* note 276, at 1614–16.

322. Such a limit would be analogous to prosecutors that refuse to prosecute cases arising from certain low-level stops. See Braman, Fishman, Idowu, Sorensen, Greer et al., *supra* note 36 (manuscript at 33, 50–51) (assessing impact of the Ramsey County District Attorney program declining to prosecute cases arising from pretext stops).

323. The U.S. criminal system is highly fragmented: 18,000 policing agencies, thousands of prosecutors, and dozens of corrections systems. DUREN BANKS, JOSHUA HENDRIX, MATTHEW HICKMAN & TRACEY KYCKELHAHN, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 1 (2016), <https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf> [<https://perma.cc/6SD2-HD3D>]; *Prosecutors Offices*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm/content/dcrp/content/data/index.cfm?ty=tp&tid=27> [<https://perma.cc/KD5B-3LSR>]; JASON ZIEDENBERG, NAT'L INST. OF CORR., U.S. DEP'T OF JUST., YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 2 (2011), <https://s3.amazonaws.com/static.nicic.gov/Library/025555.pdf> [<https://perma.cc/6Z4Z-CC88>]. In some ways, this diffusion is a protection of liberty. But it also presents significant challenges—for example, in dealing with crime and criminals that cross jurisdictional boundaries.

324. See *supra* Section II.D.1.

325. This Article focuses on pretextual stops, but there are reforms to NCIC that would mitigate other problems with the database. See, e.g., ELEC. PRIV. INFO. CTR., COMMENTS OF THE ELECTRIC PRIVACY INFORMATION CENTER TO THE DEPARTMENT OF JUSTICE (2019), https://www2.epic.org/apa/comments/EPIC_DOJ_NCIC_Oct2019.pdf [<https://perma.cc/F2WH-4DT9>] (calling for NCIC to be subject to the Privacy Act, which, among other protections, would allow people to view, correct, and appeal incorrect data about themselves).

326. See *supra* note 242 and accompanying text. At present, agencies may upload warrants if the agency would consider extraditing the subject of the warrant from at least one other state. See 28 C.F.R. § 16 (2020); NAT'L CRIM. JUST. REFERENCE SERV., U.S. DEP'T OF JUST., NCIC OPERATING MANUAL pt. 7, at 1 (1982).

information that need not be shared with local police during a routine stop.³²⁷

Provide Explicit Guidance on How DOJ Investigations Will Evaluate Pretextual Traffic Enforcement. To deter state and local police from over-relying on pretextual enforcement, DOJ should explain that widespread, programmatic use of pretextual traffic stops may make local agencies the target of a federal investigation. DOJ has broad discretion in determining which departments to investigate.³²⁸ Many commentators have suggested the need for clearer public criteria regarding the basis for DOJ pattern-and-practice investigations.³²⁹ Tacitly acknowledging that the agency could be more transparent, DOJ has announced its intention to provide more standardized guidance around policing consent decrees.³³⁰ DOJ appears poised to provide some of this guidance through its newly funded Knowledge Lab.³³¹

To aid a transition away from the broad use of pretextual stops as a crime-fighting tool, DOJ should create standards for evaluating when a police department's use of traffic stops becomes abusive, incorporate those standards into pattern-and-practice investigations, and make all of this information public. These standards should cover agency policy on pretextual enforcement; rates of traffic stops for violations that do not implicate traffic safety; racial disparities in stops, searches, and hit rates;

327. This would still allow police to see open criminal warrants. BILL MCALLISTER, U.S. IMMIGR. & CUSTOMS ENF'T, NCIC IMMIGRATION VIOLATOR FILE AND THE WANTED PERSON FILE - ADMINISTRATIVE VS. CRIMINAL WARRANTS, <https://www.waspc.org/assets/docs/april%20article%20-%20immigration.pdf> [https://perma.cc/D2DK-3QTY].

328. See 34 U.S.C. § 12601.

329. Stephen Rushin, *Using Data To Reduce Police Violence*, 57 B.C. L. REV. 117, 117 (2016) ("Congress passed the Death in Custody Reporting Act in 2014, which created a national database on civilian deaths caused by law enforcement. The Federal Bureau of Investigation and the Bureau of Justice Statistics have subsequently also announced new efforts to collect data on the frequency of deadly encounters between law enforcement and civilians. This Article explores how the federal government could use these newly amassed datasets to reduce police violence."); Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3189 (2014) ("DOJ must adopt a more transparent internal case selection process that incentivizes proactive reform in local police agencies.").

330. Off. of the Att'y Gen., U.S. Dep't of Just., Memorandum for Heads of Civil Litigating Components: Review of the Use of Monitors in Civil Settlement Agreements and Consent Decrees Involving State and Local Government Entities (2021), https://www.justice.gov/d9/pages/attachments/2021/09/13/review_of_the_use_of_monitors_in_civil_settlement_agreements_and_consent_decrees_involving_state_and_local_government.pdf [https://perma.cc/H2Y3-PV9L].

331. *Our Work*, L. ENF'T KNOWLEDGE LAB, <https://leknowledgelab.org/our-work/> [https://perma.cc/7V86-66N3].

rates of consent searches; revenue generated from citations, fines, and fees; and number of open warrants and bases for those warrants. DOJ should make clear that an agency's failure to collect the data necessary to assess the agency will create a presumption that the agency is willfully blind to violations.

C. The Social Cost of a Stop

In order to develop an informed policy on traffic enforcement, the federal government needs a method to compare alternative tactics. At present, federal agencies do not conduct a regulatory impact analysis of their pretext stop programs, let alone any sort of cost-benefit analysis.³³² So it is no surprise that there is no standardization in their evaluations. This makes it impossible for agencies to understand the impact of their programs or to determine if there are less harmful alternatives.

To rectify this problem, the White House should initiate an inter-agency process to create a standardized measure of the benefits and costs created by traffic stops.³³³ This measurement then can be incorporated into future guidance across the executive branch. "Costs" should be deliberately broad, including costs to police—such as officer time and injuries—as well as costs to the individuals stopped and to broader communities that are targeted for stops at scale.

As strange as this might sound to those focused on criminal policy, other fields—most notably, environmental justice—have created processes to normalize the way they compare disparate programs. The Social Cost of Carbon (SCC) is the leading example.³³⁴ SCC "is an

332. See MAEVE P. CAREY, CONG. RSCH. SERV., IF12058, COST-BENEFIT ANALYSIS IN FEDERAL AGENCY RULEMAKING (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12058>.

333. Scholars have suggested increased use of cost-benefits analysis to assess policing practices. See, e.g., Maria Ponomarenko & Barry Friedman, *Benefit-Cost Analysis of Public Safety: Facing the Methodological Challenges*, 8 J. BENEFIT-COST ANALYSIS 305, 326 (2017) ("First, it is remarkable, to say the least, given the controversy and uncertainty surrounding various policing practices, that BCA has not been employed significantly in this area. It can and should be. Policing policies, technologies, and tactics, should be subjected to careful BCA. Second, although there are challenges to doing so, these challenges can be overcome with careful methodology."); Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 325 (2004) ("Despite these obstacles, the Article argues that a properly devised, CBA-based decision procedure—one that takes account of distributive and other non-quantifiable, qualitative concerns—is a promising avenue for rationalization and reform of state and federal criminal justice.").

334. See Richard L. Revesz & Max Sarinsky, *The Social Cost of Greenhouse Gases: Legal, Economic, and Institutional Perspective*, 39 YALE J. ON REGUL. 856, 858 & nn.3-4 (2022) ("The social cost of greenhouse gasses is one of the most important

estimate of the cost, in dollars, of the damage done by each additional ton of carbon emissions.”³³⁵ A unified SCC facilitates a cost-benefit calculation, as required under Executive Order 12866, and allows comparison of different programs or alternatives.³³⁶ The SCC is far from perfect, but even many of its critics recognize the need for standardized evaluation of a full set of social impacts.³³⁷

Social cost calculations are not unique to the environmental context and can be used to give a fuller picture of the impact of policy choices. In the United Kingdom, for example, the Home Office calculates the social cost of “serious victim-based offences.”³³⁸ This backward-looking calculation attempts to demonstrate the widespread impact of crime on society, including security expenditures, insurance, financial consequences, and costs to operate the criminal system.³³⁹ There are recommendations to expand its calculations to include separate costs to children, improve estimates for policing expenditures, and increase focus on factors associated with fraud and cybercrime.³⁴⁰ Other studies have attempted to quantify the costs to individuals, government, and society of childhood poverty, including its impact on future earnings, crime, and poor health.³⁴¹ A study of the cost of incarceration estimated that although

valuations in administrative law, yet it remains largely unknown to most of the legal and regulatory community.”).

335. Elijah Asdourian & David Wessel, *What Is the Social Cost of Carbon?*, BROOKINGS (Mar. 14, 2023), <https://www.brookings.edu/articles/what-is-the-social-cost-of-carbon/> [<https://perma.cc/KQ7U-AC6X>].

336. See INTERAGENCY WORKING GRP. ON SOC. COST OF CARBON, TECHNICAL SUPPORT DOCUMENT: - TECHNICAL UPDATE OF THE SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS - UNDER EXECUTIVE ORDER 12866 -, at 3 (2010), https://www.epa.gov/sites/default/files/2016-12/documents/sc_co2_tsd_august_2016.pdf [<https://perma.cc/76F8-MCBR>] (explaining that complying with Executive Order 12866’s mandate to assess both the costs and the benefits of intended regulations requires assessing the social impacts of carbon emissions).

337. See, e.g., Kevin Rennert, Frank Errickson, Brian C. Prest, Lisa Rennels, Richard G. Newell et al., *Comprehensive Evidence Implies a Higher Social Cost of CO₂*, 610 NATURE 687, 687–89 (2022) (calling for a higher estimate of SCC); John C. V. Pezzey, *Why the Social Cost of Carbon Will Always Be Disputed*, WIRES CLIMATE CHANGE, Jan./Feb. 2019, at 1 (suggesting calculating the costs and potential profits for companies per unit of pollution).

338. See MATTHEW HEEKS, SASHA REED, MARIAM TAFSIRI & STUART PRINCE, HOME OFF., THE ECONOMIC AND SOCIAL COSTS OF CRIME: RESEARCH REPORT 99, at 6 (2d ed. 2018), <https://assets.publishing.service.gov.uk/media/5b684f22e5274a14f45342c9/the-economic-and-social-costs-of-crime-horr99.pdf> [<https://perma.cc/GQL6-64GX>].

339. *Id.* at 23, 51.

340. *Id.* at 59.

341. See generally, e.g., HARRY J. HOLZER, DIANE WHITMORE SCHANZENBACH, GREG J. DUNCAN & JENS LUDWIG, CTR. FOR AM. PROGRESS, THE ECONOMIC COSTS OF

direct spending was *only* \$80 billion, a fuller analysis of combined economic and social costs—including costs associated with healthcare, lost wages, divorce, family difficulty, infant mortality, homelessness, and more—showed the total costs of incarceration were \$1 trillion annually.³⁴²

There will be methodological challenges to creating a metric for the social costs of traffic stops. Measuring costs will be one of them. Some of the harms of pretext stops are intangible, such as the feeling of being racially profiled.³⁴³ There are also downstream impacts that are difficult to track, such as the ways that people disengage from civic society when they are targeted by the criminal system.³⁴⁴ But these problems are not insurmountable, and lessons can be drawn from other contexts that deal with similar issues.³⁴⁵

Even if it proves infeasible to develop a single “Cost of a Traffic Stop,” forcing agencies to articulate and weigh the specific benefits and costs of their various traffic stop programs would provide balance to the current calculus.

D. Federal Leadership in Reimagining Traffic Safety

So far, this Part has focused on limiting the ways the federal government uses and promotes traffic stops as a crime-fighting tool. But traffic stops have multiple purposes—traffic safety being another. So long as police traffic enforcement remains a centerpiece of our nation’s traffic safety response, there is a risk these traffic stops will be pretextual.

To guard against this, the federal government should establish itself as a leader in reimagining traffic safety. Other nations have learned that an enforcement-based approach to traffic safety is less effective than “Safe System” alternatives, such as road and vehicle design.³⁴⁶ In some

POVERTY IN THE UNITED STATES: SUBSEQUENT EFFECTS OF CHILDREN GROWING UP POOR (2007).

342. Michael McLaughlin, Carrie Pettus-Davis, Derek Brown, Chris Veeh & Tanya Renn, *The Economic Burden of Incarceration in the United States* 3, 9, 16 (Inst. for Just. Rsch. & Dev., Fla. State Univ., Working Paper No. IJR-072016, 2016).

343. Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCI. L. 176, 183–84 (2019).

344. For example, there are studies that look at mental health impacts. *See, e.g.*, Geller, Fagan, Tyler & Link, *supra* note 75, at 2321.

345. *See* Ponomarenko & Friedman, *supra* note 333, at 326 (discussing paths forward on cost benefit analysis for policing issues).

346. *See* INT’L TRANSP. F., ORG. FOR ECON. CO-OPERATION & DEV., ZERO ROAD DEATHS AND SERIOUS INJURIES: LEADING A PARADIGM SHIFT TO A SAFE SYSTEM 5 (2016), https://read.oecd-ilibrary.org/transport/zero-road-deaths-and-serious-injuries_9789282108055-en#page4 [<https://perma.cc/LV8C-K3JR>]; MARTIN

ways, the federal government slowly has begun to move in this direction,³⁴⁷ but it also remains heavily committed to enforcement-based interventions.³⁴⁸

To take the next step, the federal government should coordinate across agencies to fund research and policy experimentation to determine if, when, and how traffic enforcement should play a role in traffic safety. At present, we have so many unanswered questions³⁴⁹: Are there types of traffic enforcement that can be done with minimal social costs? Are there particular guardrails that make a difference? What is the impact of repair voucher programs?³⁵⁰ How effective is an unarmed non-police response?³⁵¹

The executive branch should take immediate steps to answer these critical questions. For example, over the next five years, DOT will dole out \$5 billion to states and cities to create and implement traffic safety plans.³⁵² To date, DOT has not issued any guidance that limits the use of these funds toward enforcement-based approaches. Not only should DOT do so, but it should prioritize funding efforts of jurisdictions that are

FRIEDLAND, MICHAEL TREBILCOCK & KENT ROACH, REGULATING TRAFFIC SAFETY 4–17 (1990).

347. See *What Is a Safe System Approach?*, U.S. DEP'T TRANSP., <https://www.transportation.gov/NRSS/SafeSystem> [https://perma.cc/6VEZ-C5UH] (Oct. 13, 2022); *Implementing the National Roadway Safety Strategy*, U.S. DEP'T TRANSP., <https://www.transportation.gov/NRSS/Implementation> [https://perma.cc/S997-2SQ8].

348. See Uniform Procedures for State Highway Safety Grant Programs, 88 Fed. Reg. 7780, 7782–83 (Feb. 6, 2023) (to be codified at 23 C.F.R. pt. 1300).

349. It is startling how little rigorous evaluation undergirds the programs discussed throughout Part II. The federal government has the research apparatus to do better. NIJ funds research projects meant to develop “more effective justice policy and practices” and then disseminates that research to “give policymakers and practitioners the best available evidence to make decisions.” *About the National Institute of Justice*, NAT'L INST. JUST. (May 2, 2022), <https://nij.ojp.gov/about-nij> [https://perma.cc/NV4Q-V43G]. DOT has a number of research arms as well. U.S. DEP'T OF TRANSP., STRATEGIC PLAN: FISCAL YEARS 2022 – 2026: BUILDING A BETTER TRANSPORTATION FUTURE FOR ALL 7–9 (2022), https://www.transportation.gov/sites/dot.gov/files/2023-01/USDOT%20RDT%20Strategic%20Plan%20FY22-26_010523_508.pdf [https://perma.cc/9VUH-T3ZY] (discussing research conducted by agencies across DOT).

350. Cf. *About*, LIGHTS ON! A PROGRAM OF MICROGRANTS [https://perma.cc/ZQ8P-55PT?type=standard].

351. Cf. Vaughn, *supra* note 11 (Berkeley, California, is exploring the possibility of transferring traffic enforcement to unarmed Department of Transportation employees).

352. *Safe Streets and Roads for All (SS4A) Grant Program*, U.S. DEP'T TRANSP., <https://www.transportation.gov/grants/SS4A> [https://perma.cc/44MH-2Y4D] (Dec. 18, 2023).

experimenting with non-policing alternatives.³⁵³ DOT should act on its own, while supporting legislative efforts to create new sources of funding that promote civilian alternatives.³⁵⁴

The point here is not to prejudge the outcome—either that police must enforce traffic laws or that they never should. The point is that the federal government should foster the research and leadership to answer the question of what role police should play in traffic enforcement. After more than a century of traffic enforcement, there still is so much we need to understand. To date, the federal government’s role has been to reinforce bad habits; moving forward it can do much better.

It is important to consider what role NHTSA should play in this future. As I have detailed elsewhere, and discuss briefly above, NHTSA has strayed from an agency focused on vehicle safety to one whose energies predominantly focus on driver behavior (including police enforcement).³⁵⁵ One result is a serious failure in regulator-enforced vehicle safety in the United States.³⁵⁶

353. See, e.g., Patrick Gaspard, Rashad Robinson & Nicholas Turner, *Opinion: Three Black Leaders Offer One Practical Solution To Reduce Police Assaults on Black Motorists*, CNN: OPINION, <https://www.cnn.com/2023/03/13/opinions/traffic-stops-black-men-police-reform-gaspard-robinson-turner/index.html> [https://perma.cc/N4YP-3UGH] (Mar. 13, 2021, 3:11 PM) (“Transportation Secretary Pete Buttigieg should instruct his department to disburse safety grants to localities that limit low-level traffic stops and rely on traffic enforcement methods other than police, including civilian traffic professionals who can address road safety issues without the intimidation — and possible danger — of a badge and a gun.”); Woods, *supra* note 11, at 1471 (“This Article offers a normative vision of our driving system that challenges the conventional wisdom that traffic enforcement is impossible without the police. It articulates a new legal framework that decouples traffic enforcement from police functions.”).

354. Sarah Holder, *Proposal Would Reward Cities That Take Cops out of Traffic Stops*, BLOOMBERG (Feb. 8, 2023 1:57 PM), <https://www.bloomberg.com/news/articles/2023-02-08/bill-in-congress-rewards-removing-police-from-traffic-stops> (“The proposal, introduced in the House of Representatives by Congressman Ritchie Torres of New York, would create a \$100 million annual grant program to reward cities that transfer traffic enforcement responsibilities to unarmed civilians, or that rely on technology like speed cameras to ticket drivers.”).

355. See *supra* Section II.B.2. See generally Heydari, *supra* note 38 (providing a case study of NHTSA).

356. Many have documented NHTSA and DOT’s failures. See, e.g., ROAD TO ZERO, RECOMMENDATIONS FOR VEHICLE-BASED APPROACHES TO PREVENT SPEEDING 2 (2023), <https://www.ihs.org/media/58eefc7b-1754-4058-9bf9-f7ff5a19e5d3/tjKRLQ/misc/Vehicle-based-speeding-prevention.pdf> [https://perma.cc/8TUG-SAB3] (“[Intelligent Speed Assistance] has been required on new light vehicle types in the European Union since 2022 and will be required on all new models beginning in 2024, but there is no similar mandate in the United States.” (citation omitted)); A.C. Thompson, Kartikay Mehrotra & Julia Ingram, *Trapped Under Trucks*, PROPUBLICA (June 13, 2023, 7:00 AM), <https://www.propublica.org/article/underride->

Perhaps NHTSA should be reorganized. Rather than tasking one agency to focus on both vehicle safety and driver behavior, one could imagine refocusing NHTSA on the former, while tasking another part of DOT with the latter. This change is not without risks. Shrinking the agency's footprint might decrease its clout (in Congress, or within the White House, for example). But these risks must be weighed against the reality that attempts to force NHTSA to act on the regulatory front have been met with repeated failure and delay.³⁵⁷

Although no panacea, dividing NHTSA's responsibilities has potential. At present, the agency's driver-behavior mandate appears to dominate, and recently history gives little reason to expect that NHTSA can self-correct. Quite the opposite, path dependency makes it more likely that NHTSA will continue to over rely on driver behavior solutions

crashes-nhtsa-dot-iihs-safety-cars-trucks [<https://perma.cc/89QP-M6TR>] (“Year after year, federal officials at the National Highway Traffic Safety Administration, the country’s primary roadway safety agency, ignored credible scientific research and failed to take simple steps to limit the hazards of underride crashes.”); Gregory H. Shill, *Regulating the Pedestrian Safety Crisis*, 97 N.Y.U. L. REV. 194, 204 (2022) (“NHTSA’s decision not to act has left pedestrians at the mercy of heavier and taller vehicles. . . . It is not hyperbole to observe that, left by NHTSA to its own devices, the invisible hand is pushing large numbers of pedestrians to their demise.”).

357. See, e.g., David Shepardson, *US Auto Safety Agency Fails To Meet Internal Timelines in Defect Probes, Report Says*, REUTERS (June 2, 2023, 10:57 AM), <https://www.reuters.com/business/autos-transportation/us-auto-safety-agency-fails-meet-internal-timelines-defect-probes-report-2023-06-02/> (“[NHTSA] routinely fails to meet its internal timelines for completing auto safety defect investigations, a [DOT Inspector General] report released on Thursday found, hindering its ability to quickly respond to severe safety risks. . . . The [DOT IG] said that 26 of 27 [NHTSA] investigations in its 2018 to 2019 sample did not meet the agency’s timeliness targets, and faulted other aspects of its review of safety defects.”); David Shepardson, *U.S. House Lawmakers Seek Review of Delayed U.S. Auto Safety Rules*, REUTERS (Sept. 16, 2020, 3:27 PM), <https://www.reuters.com/article/idUSKBN2673DS/> (“Three senior Democrats in the U.S. House of Representatives on Wednesday asked government auditors to study why U.S. auto safety regulators have failed to write dozens of new auto safety regulations.”); David Undercoffler, *Backup Cameras To Be Required in All New Vehicles, Starting in 2018*, L.A. TIMES (Mar. 31, 2014, 2:08 PM), <https://www.latimes.com/business/autos/la-fi-hy-autos-nhtsa-backup-camera-20140331-story.html> [<https://perma.cc/QZ2J-GTB9>] (“After years of delays [following a 2008 bipartisan law] and on the eve of a lawsuit against the government, U.S. safety regulators have announced that backup cameras will be required in all vehicles built in and after May 2018.”).

to traffic safety³⁵⁸ and law enforcement-oriented ones in particular.³⁵⁹ In contrast, splitting the agency's current mandates might reset its current misalignment, refocusing its staff expertise and strategic vision on vehicle design.

CONCLUSION

For too long the federal government has paid lip service to the problem of discriminatory and pretextual traffic stops. It has cast the problem as limited to particular misguided local policing agencies. In fact, behind the scenes, the federal government has long trained and incentivized police to use pretext stops widely, despite a litany of known harms associate with the tactic.

This indictment is also an opportunity. Attention is focused on police reform in ways that it rarely has been. This Article calls on executive officials, legislators, and civil society to develop a new, comprehensive, and coherent approach to traffic enforcement—one that centers public safety and avoids falling into the same harmful and discriminatory patterns.

358. See Tammi S. Etheridge, *What's the Beef? The FDA, USDA, and Cell-Cultured Meat*, 79 WASH. & LEE L. REV. 1729, 1759 (2022) ("Once an agency prioritizes one goal over another, it becomes easier for that agency to continue to privilege that same goal going forward."); Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV'T L. REV. 1, 9 (2009) ("[A]gencies faced with conflicting tasks will systematically overperform on the tasks that are easier to measure and have higher incentives, and underperform on the tasks that are harder to measure and have lower incentives."). Cf. J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005) ("This Article explores the problem of agency reluctance in the face of multiple mandates and explains how and why agencies might resist secondary mandates . . .").

359. Cf. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 312 (2013) (claiming that, in the U.S. Justice Department, "the law enforcement mission will trump all others").