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## NOTES

### POLICING THE POLICE: REEXAMINING THE CONSTITUTIONAL IMPLICATIONS OF TRAFFIC STOPS

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#### INTRODUCTION

On July 10, 2015, Texas State Trooper Brian Encinia pulled over driver Sandra Bland, in Waller County, Texas, for a minor traffic infraction.<sup>1</sup> The traffic stop was recorded from three vantage points: Encinia's squad car dash-cam, Bland's cell phone, and a bystander's cell phone.<sup>2</sup> During the stop, tensions escalated when Bland refused the trooper's order for her to put out her cigarette; the video evidence also suggests that Encinia ordered either Bland or the bystander, or possibly both, to stop recording.<sup>3</sup> Ultimately, this "routine" traffic stop ended in a physical altercation outside the vehicle, leading to the subsequent arrest of Bland.<sup>4</sup> Initially, video footage of the encounter sparked some national attention, but both professional and social media coverage grew exponentially after Bland was found dead in her jail cell days later, the result of an apparent suicide.<sup>5</sup> Much of the attention has turned into a broader question: after lawfully

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1. Danny Cevallos, *Was the Sandra Bland Traffic Stop Legal—and Fair?*, CNN (July 23, 2015), <http://www.cnn.com/2015/07/23/opinions/cevallos-sandra-bland-traffic-stop/index.html> [<http://perma.cc/R4QP-CN5M>].

2. Ray Sanchez, *What We Know About the Controversy in Sandra Bland's Death*, CNN (July 22, 2015), <http://www.cnn.com/2015/07/21/us/texas-sandra-bland-jail-death-explain/index.html> [<http://perma.cc/45JG-9BR6>].

3. *Id.*

4. Brian T. Encinia, *Affidavit and Complaint for Warrant of Arrest and Detention*, (July 10, 2015), <http://www.click2houston.com/blob/view/-/34278084/data/1/-/12ecbc7/-/Bland-Affidavit.pdf> [<http://perma.cc/UT2BRHPP>].

5. Ray Sanchez, *Who Was Sandra Bland?*, CNN (July 23, 2015), <http://www.cnn.com/2015/07/22/us/sandra-bland/> [<http://perma.cc/ZA6E-XANW>].

detaining a vehicle's occupants, what boundaries limit police officers in ordering drivers and passengers to act or to provide information?

The Bland incident is not an outlier in the realm of police-citizen encounters through traffic stops; rather, it is one instance which, due to video evidence and a tragic post-arrest outcome, has garnered national attention sufficient to raise many long-standing, fundamental questions.<sup>6</sup> Some of these questions carry broad constitutional import; this Note is limited in scope to those constitutional considerations falling under Fourth Amendment jurisprudence. However, because driving is a daily necessity for many Americans, such questions also more directly impact people's day-to-day lives. Answers to these questions could effectively redefine the proper relationship between police officers and citizens, limit or expand the powers and rights of either party, and further clarify the protections and duties of bystanders.

Recent events, such as the Bland incident and numerous others, have renewed the need for proactive measures governing law enforcement behavior during traffic stop situations.<sup>7</sup> Traffic stops are daily occurrences, and nearly all Americans become subject to them.<sup>8</sup> As such, these typically brief detentions have received substantial critical attention from media outlets, scholars, legislatures, attorneys, judges, and the public.<sup>9</sup> However, because traffic stops tend to raise acutely fact-intensive questions of law and policy, neither public criticism nor legal theory has satisfactorily outlined the scope of proper police-citizen interaction.<sup>10</sup> Traffic stops can escalate rapidly, often becoming intensely stressful, both for police officers and for vehicle occupants alike.<sup>11</sup>

Due to the inherent potential for injury—be it to the finances, freedom, or health of any party involved—the issue deserves more detailed attention. This is particularly true today, given the many recent tragedies stemming from seemingly routine traffic stops and the accompanying surge in tensions between police forces and the people they serve. Delineating proper boundaries for police conduct and questioning will enhance protections for detained drivers and passengers.<sup>12</sup> In addition, clarifying the scope of justifiable police actions will

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6. See Sanchez, *supra* note 2.

7. See, e.g., K.K. Rebecca Lai et al., *Assessing the Legality of Sandra Bland's Arrest*, N.Y. TIMES (July 22, 2015), [http://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html?\\_r=0](http://www.nytimes.com/interactive/2015/07/20/us/sandra-bland-arrest-death-videos-maps.html?_r=0) [<http://perma.cc/PC9V-KXTN>].

8. *Traffic Stops*, BUREAU OF JUST. STATS. (2011), <http://www.bjs.gov/index.cfm?ty=tp&tid=702> [<http://perma.cc/GFR6-WDLK>].

9. See generally Cevallos, *supra* note 1; Sanchez, *supra* note 2.

10. See Cevallos, *supra* note 1; see also *United States v. Johnson*, 58 F.3d 356 (8th Cir. 1995).

11. Ruben Rosario, *Despite Police Training, 'Routine' Stops Can Go Awry in an Instant*, TWIN CITIES PIONEER PRESS (Aug. 7, 2014), [http://www.twincities.com/localnews/ci\\_26296892/despote-police-training-routine-stops-can-go-awry](http://www.twincities.com/localnews/ci_26296892/despote-police-training-routine-stops-can-go-awry) [<http://perma.cc/9VJD-G64W>].

12. Chief Joel F. Shults, Ed.D., *What's It Like to Lead Today's Cops? 3 Chiefs Speak Out*, POLICEONE.COM (Oct. 27, 2015), <http://www.policeone.com/pulse-of-policing/articles/27735006-Whats-it-like-to-lead-todays-cops-3-chiefs-speak-out/> [<https://perma.cc/QC3P-Y9KQ>].

further officers' understandings of their roles, thus enabling all members of law enforcement agencies to better fulfill their duties to the public within the bounds of the law.<sup>13</sup>

This Note advocates for specific police regulation in dual forms—departmental policies and state legislative provisions. Such regulations must bear in mind society's desire for effective law enforcement, police officers' interest in clear guidance, and the myriad rights of individuals who may find themselves subject to traffic-based detention. Although the boundaries of police behavior are necessarily dictated on a somewhat case-by-case basis, such limitations would restrict officers from turning otherwise routine stops into time-consuming, costly, and painful ordeals.

Regarding departmental policy, this Note recommends requiring two officers for all traffic stops. Alternatively, where departmental logistics or structure prevent such policies, it calls for two officers on scene prior to the pursuit of any investigative activities beyond standard citation issuances. Further internal policy guidelines would specifically address factors that may complicate the unfolding of traffic stops, such as cell phones, cigarettes, audio and video devices, and language barriers between officers and occupants. In essence, this Note argues that agencies must generally limit their officers' commands and questions to those reasonably connected to the stop's underlying justification or to the officers' reasonable safety precautions.

Suggested legislative provisions seek to reinforce the recommended departmental policies and to specify societal and individual remedies when officials intentionally or negligently violate reasonable guidelines. These reforms will be based upon the nature of a stop, and will serve as a fallback in case departments fail or are unable to enact reasonable policies. Legislative provisions would include specialized procedures and enforcement methods for minor traffic infractions, such as limitations against physical arrests for unlicensed or suspended drivers who can prove residence within that jurisdiction. Other legislative recommendations would provide remedies for police misconduct, i.e., exclusion of evidence stemming from prohibited arrests, heightened government proof standards for exigent circumstances leading to prohibited arrests, and mandatory corrective legal training for violating officers.

Before proceeding, two disclaimers are necessary. First, there is a subject that is practically implicit in any academic consideration of traffic stop legalities, but which is generally beyond the scope of this Note—racial profiling. Although it is a worthy and important topic in and of itself, substantial work has already been devoted to the subject, and it would be a disservice to readers to attempt to address both topics here. Second, there are various research issues attached to this Note's focus on police-citizen interactions during traffic stops. The "blue wall of silence,"<sup>14</sup> the semi-confidential nature of police work, and the lacking uniformity

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13. *Id.*

14. See, e.g., *Code of Silence*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/police/uspo27.htm#TopOfPage> [<http://perma.cc/6Q65-K3SP>] ("The Christopher Commission, writing on the LAPD, found that 'perhaps the greatest single barrier to the effective

amongst departmental reporting systems are just a few of the oft-cited obstacles of police-centric topics. Every attempt has been made to cite relevant authorities, documentation, and statistics where possible; however, these hurdles are somewhat unique to law enforcement and are seldom overcome by academics, reporters, and the like. As such, this Note contains some claims and statements based generally on the author's personal experience as an officer with the Memphis Police Department.

This topic is important for several reasons. It is one of great significance for most Americans because most Americans drive, and, at some point, will likely encounter police officers.<sup>15</sup> Because traffic stops are frequently the basis for arrests and subsequent legal proceedings,<sup>16</sup> clarification of this topic will prove valuable for both prosecutors and defense attorneys, as well as attorneys in related civil practice fields. Traffic stops also necessarily implicate Fourth Amendment considerations; proactive, deliberate consideration could not only prevent unnecessary conflicts but also preempt unnecessary constitutional developments.<sup>17</sup> Such forethought would afford police greater clarity in doing their jobs, provide more discernable protections for people, and ease one of the many burdens on our judicial system. Finally, given the several widely publicized and nationally divisive events regarding citizen-police encounters of various kinds over recent years,<sup>18</sup> this topic will likely garner renewed attention by both attorneys and judges in the legal proceedings that will inevitably follow.

This Note advocates for legal cures to one of the many symptoms of current conflicts between the police and the public: overreaching. In so doing, the necessary first step is to glean from the Supreme Court's broad, often complicated, Fourth Amendment jurisprudence a workable system for analyzing police authorities during traffic stops. Second, this Note will test that system of reasoning in relevant, but unanswered, contexts—more simply, to demonstrate its logic through application. The third and final part of the process is to develop realistic, workable methods for implementation at the lowest effective levels—state legislatures and police departments themselves. This Note proposes a solution that is grounded in both law and logic, and can be adopted and applied in a reasonably direct manner.

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investigation and adjudication of complaints is the officers' unwritten 'code of silence' . . . [the principle that] an officer does not provide adverse information against a fellow officer.'").

15. *Police-Public Contact Survey*, BUREAU OF JUST. STATS. (2011), <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=251> [<https://perma.cc/SJ7T-KW23>].

16. *Traffic Stops*, *supra* note 8.

17. Shults, *supra* note 12.

18. For a recent overview, see John Lewis, *Michael Brown, Eric Garner, and the "Other America,"* ATLANTIC (Dec. 15, 2014), <http://www.theatlantic.com/politics/archive/2014/12/michael-brown-eric-garner-other-america-john-lewis/383750/> [<http://perma.cc/PJ3G-WVNP>]. For further examples of national media attention on police-citizen interactions and incidents, one need only conduct an online search by name (Eric Garner, Freddie Gray, Michael Brown, Sandra Bland, etc.) or for general terms such as "police incidents in national media," although this is by no means intended as an exhaustive list.

The second section of this Note will address questions concerning police orders that are commonly issued during traffic stops—turning down music, extinguishing cigarettes, hanging up phones—orders the legalities of which have been neither judicially nor legislatively determined with sufficient clarity. In other words, what can a police officer legally order a driver or passenger to do once the officer has lawfully stopped the vehicle? What information can the officer demand from drivers? What about from passengers? Finally, what additional circumstances of a stop might affect—either limit or extend—the officer’s legal authorities? Although some such questions have been answered either in broad strokes or within narrowly confined holdings, technological and other developments have left many people to guess at how the Court might actually rule in more specific, fact-intensive scenarios.

There is a bigger question remaining: what should and can be done? The third section will examine the possible consequences, both positive and negative, of certain police actions. For example, what officer actions or commands might constitute a search or seizure? What evidentiary results might or should follow when an officer exceeds the scope of his authority in this regard? By delineating a system of reasoning, which should apply to the majority of these types of orders, it will be easier to stipulate generally what authorities police should or should not have in traffic stop situations.

The fourth section will conclude with suggested solutions to the ongoing, open-ended problems of “routine” traffic stops and closely intertwined conflicts with the autonomy, dignity, and privacy of the very people such stops are designed to protect. This section will also consider some exceptional circumstances to determine how police authorities ought to adjust in scope under inherently dynamic conditions. The purpose of this section will be to examine the general guidelines already proposed, and to highlight by comparison the exigencies and factual distinctions upon which the suggested boundaries should contract or expand according to the needs and safety of officers and the people.

## I. DANGEROUS FREEDOM, PEACEFUL SLAVERY

### A. *The Most Dangerous and Necessary Game*

Statistically, the traffic stop scenario is one of the most dangerous activities a uniformed police officer undertakes.<sup>19</sup> “There is no such thing as a routine [traffic] stop,”<sup>20</sup> but each year approximately half, or more, of all encounters

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19. *In the Line of the Duty Report: 2013 Law Enforcement Officers Killed & Assaulted*, FBI (Nov. 24, 2014), <https://www.fbi.gov/news/stories/2014/november/in-the-line-of-duty-2013-leoka-report-released/in-the-line-of-duty-2013-leoka-report-released> [http://perma.cc/ZYZ5-LRLC] [hereinafter *In the Line of the Duty Report*].

20. Rosario, *supra* note 11 (quoting Officer Scott Patrick, a police officer of the Mendota Heights Police Department who was shot and killed during a traffic stop in July of 2014 in West St. Paul, Minnesota).

between police officers and the public occur during so-called “routine” stops.<sup>21</sup> The July 2015 Sandra Bland incident highlights how stopping a vehicle for even the most minor of infractions can quickly spiral out of control, creating dangers for occupants and officers alike.<sup>22</sup>

Although the favored methods of policing have changed over time, the central mission remains the same—crime control.<sup>23</sup> Just a few decades ago, police forces were focused generally on reactive police work, such as investigations and call response.<sup>24</sup> Today, however, leaders have placed added emphasis on largely proactive policing designed to ferret out or prevent crime before it occurs.<sup>25</sup> Regardless of the means, the goal of combatting crime is one that society has long recognized as sufficiently important to warrant its own professional workforce.<sup>26</sup>

### *B. The Dangers of Abuse*

Society places requirements and restrictions—both implicit and express—on those it charges with enforcing the law. Essentially, communities of all sizes expect their law enforcement officers to protect life and property, in that order.<sup>27</sup> Indeed, citizens imbue their police officers with great power in exchange for an implicit promise that those officers exercise that power while maintaining fundamental principles of democracy, accountability, integrity, and professionalism.<sup>28</sup> The power given to police officers is subject to such limitations as the American people, through their government, place on it.<sup>29</sup> This quid pro quo mitigation of police powers is deeply rooted in the American conscience, and is perhaps best summarized by Thomas Jefferson’s famous use of the Latin phrase: *Malo periculosam, libertatem quam quietam servitutem* (I prefer dangerous freedom over peaceful slavery).<sup>30</sup>

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21. See *Traffic Stops*, *supra* note 8.

22. See Lai et al., *supra* note 7.

23. Community Relations Service, *Principles of Good Policing: Avoiding Violence Between Police and Citizens*, U.S. DEP’T OF JUST. (Sept. 2003), <http://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> [<http://perma.cc/33QP-JC33>].

24. MARK H. MOORE ET AL., CRIME AND POLICING: PERSPECTIVES ON POLICING NO. 2, NAT’L INST. OF JUST. 1-2 (1988), <https://www.ncjrs.gov/pdffiles1/nij/111460.pdf> [<http://perma.cc/7PH9-UN9U>].

25. Community Relations Service, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Id.*

29. See, e.g., Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 475-76 (2004).

30. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787) (on file with The Thomas Jefferson Papers Series: General Correspondence, 1651-1827, Library of Congress), <http://hdl.loc.gov/loc.mss/mtj.mtjbib002505> [<http://perma.cc/5D6W-CPJ6>].

*C. Security and Autonomy: Striking the Right Balance*

Forty-two U.S.C. § 1983 provides a redress of grievances for citizens whose civil rights have been infringed by governmental agents.<sup>31</sup> Evidentiary exclusions may apply to the benefit of defendants before or during trial when police officers have violated the Fourth Amendment in obtaining evidence.<sup>32</sup> Ostensibly, this makes logical sense: police officers are agents of the government, so courts ought to punish the government when it fails to uphold constitutional mandates.<sup>33</sup> But the exclusionary rule potentially punishes society as a whole in cases where it allows a likely guilty defendant to go free on what many people would deem a technicality.<sup>34</sup> However, the rule's existence tends to reinforce the due process model of criminal justice, which implies that the rights of individuals are more important than society in the abstract or efficiency of the justice system in general.<sup>35</sup> It also works to reaffirm Blackstone's principle that it is "[b]etter that ten guilty persons escape than that one innocent suffer."<sup>36</sup>

Despite the availability of both civil and procedural remedies, there is little redress for the individual who has been harassed or humiliated by law enforcement. Monetary awards under section 1983 claims, if even capable as true remedies here, are highly unlikely because a plaintiff would be required to prove actual damages, most likely under the tort theory of intentional infliction of emotional distress.<sup>37</sup> On the other hand, the exclusionary rule is unlikely to attach based on a police officer's verbal conduct alone.<sup>38</sup> Similarly, the possibility of such an evidentiary advantage in later formal proceedings is unlikely to assuage

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31. 42 U.S.C. § 1983 (2012) provides generally:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

32. See, e.g., Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255 (1961).

33. *Id.*

34. *Id.*

35. RANDALL G. SHELDEN ET AL., CRIME AND CRIMINAL JUSTICE IN AMERICAN SOCIETY 3 (2d ed. 2016).

36. 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

37. *Carey v. Piphus*, 435 U.S. 247, 262-64 (1978).

38. The modern approach to the exclusionary rule's application is generally conservative. Due in large part to fear that broad application of the rule would place an unrealistic burden on the Government, today's courts tend to exclude evidence only in instances of extreme police misconduct, which would essentially violate the defendant's right to due process. This trend away from indiscriminate application of the rule is also evident in the emergence of several exceptions and doctrines related to the exclusionary rule (good faith, attenuation, inevitable discovery, and independent source). See, e.g., *United States v. Leon*, 468 U.S. 897 (1984).

a vehicle occupant who perceives her primary injury as indignity or emotional distress. As the Supreme Court has observed, the exclusionary rule was designed as a preventive measure rather than as a corrective one; put simply, the rule exists to compel respect for constitutional protections by deterring official misconduct.<sup>39</sup>

## II. POLICING AMERICA'S STREETS: HISTORICAL FRAMEWORK

### A. *The Fourth Amendment*

In light of their experience as colonials under an oppressive British monarchy, many of the Framers of the Constitution believed it absolutely necessary to protect people against arbitrary law enforcement.<sup>40</sup> Out of this belief, the Fourth Amendment to the Constitution was born:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>41</sup>

In remarkably few words, the Fourth Amendment has been interpreted countless times to guard against such abuses by mandating warrants or probable cause prior to any governmental intrusion upon a person's privacy.<sup>42</sup>

### B. *Mimms, Wilson, and Terry*

Stemming from a concern for officer safety, the liberal and well-established rule from *Pennsylvania v. Mimms* is that police officers may order any driver out of her vehicle upon initiating a lawful traffic stop.<sup>43</sup> This authority, colloquially known as a "Mimms order," now extends to all vehicle occupants by virtue of *Maryland v. Wilson*.<sup>44</sup> Both Mimms and Wilson orders are based on the rationale that the officer's discretionary positioning of vehicle occupants in traffic stop situations will best protect the officer.<sup>45</sup>

If a police officer has reasonable suspicion—less than probable cause—that an individual may be armed or dangerous, a police officer may temporarily seize that individual and conduct a limited search for weapons.<sup>46</sup> This type of cursory check for weapons is commonly referred to as a pat-down or *Terry* frisk, earning

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39. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

40. See, e.g., *Fourth Amendment History*, JUSTIA, <http://law.justia.com/constitution/us/amendment-04/01-search-and-seizure.html> [<http://perma.cc/APX2-FTXS>] (last visited Nov. 10, 2016).

41. U.S. CONST. amend. IV.

42. See, e.g., *Fourth Amendment History*, *supra* note 40.

43. 434 U.S. 106, 111 (1977).

44. 519 U.S. 408, 415 (1997).

45. *Id.* at 412; *Mimms*, 434 U.S. at 110.

46. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).



its namesake from the seminal Fourth Amendment case of *Terry v. Ohio*.<sup>47</sup> *Terry* also stands for the more general proposition that law enforcement officers may, upon reasonable suspicion that criminal activity is afoot, detain individuals for investigative purposes.<sup>48</sup> Officers may only detain such individuals for as long as is reasonably necessary to confirm or dispel their suspicions.<sup>49</sup> Such detentions, like their search counterparts, are often known as *Terry* stops.<sup>50</sup>

### *C. Pretexts, Profiles, and Probable Cause*

Law enforcement officers often use traffic stops as a pretext to investigating other criminal activities; despite the public's perception, there is nothing constitutionally suspect in this practice.<sup>51</sup> Indeed, pretext stops are a valuable tool for law enforcement.<sup>52</sup> For example, on the morning of April 19, 1995, an Oklahoma State Trooper pulled over a vehicle for driving without a license plate; during this investigative detention, the trooper ordered the driver to exit the vehicle, at which point the trooper noticed a bulge under the driver's jacket.<sup>53</sup> A *Terry* frisk confirmed the trooper's suspicion that the driver was armed, and the driver was taken into custody on weapons and traffic charges.<sup>54</sup>

Shortly thereafter, forensic evidence tied the arrested driver, Timothy McVeigh, to a deadly bombing earlier that morning.<sup>55</sup> McVeigh had orchestrated the attack, and had detonated a rental truck loaded with homemade explosives in front of the federal building in downtown Oklahoma City, killing 168 people and injuring nearly 700.<sup>56</sup> At the time he stopped McVeigh's vehicle, the trooper had no idea that the driver had any connection to the bombing.<sup>57</sup> Rather, the trooper was doing what many police officers do throughout every shift: find reasonable suspicion to stop a vehicle, and use every tool available to investigate its occupants further.<sup>58</sup> McVeigh's traffic stop occurred within ninety minutes of the

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47. *Id.*

48. *Id.* at 30.

49. *Id.*

50. Brian Batterton, *Terry Frisks and the Totality of the Circumstances*, PUB. AGENCY TRAINING COUNCIL, <http://www.patc.com/weeklyarticles/terry-frisks-totality.shtml> [https://perma.cc/SEA7-NT7A] (last visited Nov. 10, 2016).

51. *Whren v. United States*, 517 U.S. 806, 811-13 (1996).

52. Devallis Rutledge, *Investigative Traffic Stops*, POLICE MAG. (Sept. 1, 2005), <http://www.policemag.com/channel/patrol/articles/2005/09/point-of-law.aspx> [http://perma.cc/ZHJ6-T9DF].

53. Ted Ottley, *License Tag Snag*, TRUTV (Apr. 14, 2005), <http://www.webcitation.org/5woveWodn> [http://perma.cc/3CVM-B29G].

54. Rutledge, *supra* note 52.

55. Ottley, *supra* note 53.

56. *Id.*

57. *Id.*

58. Rutledge, *supra* note 52.

attack.<sup>59</sup>

The important point of the McVeigh story is not that pretext stops are always valuable, desirable, or even productive. Rather, pretext stops simply provide a legal, logical means for police officers to conduct their work without expanding suspicionless or arbitrary monitoring of citizens. Admittedly, pretext stops bring to bear their own problems and issues—the wide-net theory of policing, for instance.<sup>60</sup> Ultimately, the question whether pretext stops ought to be further restricted is beyond the scope of this Note; what remains important here is that the Supreme Court has determined them to be the lesser of other similar and necessary evils.<sup>61</sup>

Profiling, too, is a generally legal process that many ordinary citizens either misunderstand or inherently distrust because of implicit assumptions regarding the improper version, racial profiling.<sup>62</sup> Profiling, done properly, simply involves an officer using his professional experience to make snap judgments about whether suspicion of someone or something is warranted. It is what police officers across the country practice, either consciously or subconsciously, in those moments immediately preceding most encounters with members of the general public.<sup>63</sup>

For an example of properly executed profiling, imagine the following hypothetical scenario. An officer, while on routine patrol in his assigned area, hears a building alarm near his location. His dispatcher has not yet received or put out any calls that might be related. He locates the building, an outpatient medical facility for geriatric patients, from which the alarm is emanating. The officer is familiar with most of the employees of the facility, many of whom are middle-aged women. It is 10:00 p.m.—dark—and he knows from experience that this particular establishment should have been closed for several hours. While circling the building, he observes an apparently young, dark-complexioned man running from the building's rear emergency exit toward an idling car, which is occupied by an unknown driver. The officer engages his blue lights and siren to stop the vehicle and investigate.

The officer, in this set of facts, could easily have developed reasonable suspicion on which to initiate this stop. The facility would normally be closed; the man who appears to be running away from the building looks young—too young to be a patient—and the officer does not recognize him as one of the employees; the car is parked (but still running) behind the building, out of sight from the main streets, and its driver appears ready to go as soon as the young man

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59. *Id.*

60. See generally MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014) (providing a more thorough analysis of various theories of policing and their effects on communities).

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

62. Tom R. Tyler et al., *Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority*, 42 *CRIMINOLOGY* 253, 254 (2004).

63. Geoffrey P. Alpert et al., *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 *CRIMINOLOGY* 407, 408 (2005).

returns. Based on these facts, reasonable people, even without any training in policing techniques, would expect this officer to investigate further. Maybe the driver will turn out to be an employee who sent her son inside to retrieve her purse, which she accidentally left at work; even if this is the case, a brief investigative detention is necessary and proper to dispel the officer's suspicion of wrongdoing. In addition, if the officer releases the employee and her son, but the facility reports something missing the following day, any documentation of the officer's encounter will likely help in the theft investigation.

Now consider slightly different facts. Imagine that immediately after hearing the alarm—but before determining precisely which building is its source—the officer observes the same car, occupied by the same two people, driving away from the area at a normal speed. The officer notes that both occupants are dark-complexioned, but he passes the car, locates the building, and sees another apparently young, though this time white, man walking through an alley away from the building. Under these circumstances, the situation is more difficult.

If the officer turns back and chases down the car, he likely lacks any reasonable basis for suspecting that the car is connected to the alarm; therefore, the officer needs to develop a heightened level of suspicion—something closer to probable cause—to pull over the car and question its occupants. If he decides to stop the vehicle (thereby letting the young white man go) solely because its occupants are of a certain race or ethnicity, then he has engaged in racial profiling and violated both the law and his duty. If he makes this discretionary choice based on something more, such as a string of similar burglaries in the area with evidence of a similar getaway car being used, then the issue of racial profiling is diminished, but possibly still questionable.

Concerns about profiling of any type tend to turn on officers' use of discretion in initiating encounters, rather than the methods they employ once those encounters have begun.<sup>64</sup> In other words, the question is *when* and *why* officers investigate individuals, not *how* they do it.<sup>65</sup> Because of this distinction there is usually no reasonable accusation that an officer employed any means of profiling, racial or otherwise, when he responds to a call; those issues arise more often when officers initiate discretionary stops, as is the case with many traffic stops.<sup>66</sup>

To illustrate, return once more to the previous scenarios. This time, assume that the officer's dispatcher has requested that he respond to a recent 911 call from an unknown caller. Depending on the particular information conveyed to the dispatcher, the officer is better able to decide what action to take because the officer is being directed toward this decision, rather than exercising his personal, albeit presumably professional, discretion.

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64. Tracey L. Meares & Peter Neyroud, *New Perspectives in Policing: Rightful Policing*, NAT'L INST. OF JUST. & U.S. DEP'T OF JUST. 2 (Feb. 2015), <https://www.ncjrs.gov/pdffiles1/nij/248411.pdf> [http://perma.cc/H8R6-6PM8].

65. *Id.*

66. *Id.*

## III. THE VAST IMPORT OF MINOR CHANGE

*A. Landmark Cases*

Until 1985, most police departments and officers were generally left to their own discretionary devices when it came to using deadly force.<sup>67</sup> Essentially, the previous understanding was that officers were permitted to use deadly force in order to prevent any fleeing felon from escaping either apprehension or custody.<sup>68</sup> The Court in *Tennessee v. Garner* reasoned that any exercise of deadly force authority was inherently a seizure under the Fourth Amendment.<sup>69</sup> Moreover, because “[t]he intrusiveness of a seizure by means of deadly force is unmatched,” not only would the individual be deprived of due process (and possibly life itself), but also society’s interest in the “judicial determination of guilt and punishment” would be frustrated.<sup>70</sup> The *Garner* decision forced police departments nationwide to reevaluate and rework their use-of-force policies; the effect of that process has been to protect individuals<sup>71</sup> as well as the integrity of police work, investigations, and the independence of judicial oversight in criminal proceedings.<sup>72</sup>

*Terry* implicitly allowed police officers to use their experience and discretion to effect investigative detentions based on reasonable suspicion.<sup>73</sup> Although the Court in *Terry* purported to confine its holding as applicable only in those situations where an officer reasonably believed that a suspect might be armed or dangerous, the simple fact that the officer suspects some criminal activity seems to have extended the decision to all detention-based encounters.<sup>74</sup> As the Supreme Court has recognized, the fact that an encounter occurs in a known “high crime area” logically plays into an officer’s probable cause calculus, and thus, often creates reason for an officer to resort to more intrusive investigative techniques.<sup>75</sup>

*B. The Exclusionary Rule*

Although the exclusionary rule has had significant effects within the criminal justice realm—deterring official misconduct being its primary purpose—the Supreme Court, at least since 1963,<sup>76</sup> has generally been reluctant to extend the

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67. Abraham N. Tennenbaum, *The Influence of the Garner Decision on Police Use of Deadly Force*, 85 J. CRIM. L. & CRIMINOLOGY 241, 257 (1994).

68. Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 74-79 (1980).

69. 471 U.S. 1, 7 (1985).

70. *Id.* at 9.

71. Tennenbaum, *supra* note 67.

72. *Id.*

73. *Terry v. Ohio*, 392 U.S. 1, 31 (1968).

74. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144 (1971)).

75. *Id.*

76. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963).

exclusionary rule further than its current scope.<sup>77</sup> The problem with such extensions of the rule should be fairly obvious—more evidence excluded equates to more guilty defendants set free and likely more crime afflicting society.<sup>78</sup> When applied, the rule is designed to deter future instances of constitutionally violative misconduct by officials rather than to grant a windfall to otherwise guilty defendants.<sup>79</sup> Regardless of the underlying rationale, however, the Court has steadfastly restrained its application of the rule because of the “heavy toll” it tends to exact on society and our legal system.<sup>80</sup> Because of that heavy toll—one that the Supreme Court has been reluctant to allow outside cases of flagrant misconduct<sup>81</sup>—the exclusionary rule is no longer society’s strongest hope for deterring police misconduct in every day traffic stop scenarios.

#### IV. THE NEVER-ENDING STORY: LAW AS WE KNOW IT

##### *A. Sources of Police Regulation*

Although the Supreme Court has supplied the majority of the rules defining the scope of law enforcement authorities, at least with regard to constitutional requirements, there are of course other influences weighing on police authority. Statutory law is likely the most obvious among these; innumerable legislative decisions have shaped our notions of law enforcement power since the first days of our independence. As a result of the traditional police powers independence given to the states, most statutes directly addressing traffic stop situations fall under state legislation or municipal ordinance.<sup>82</sup> This has been the case since our nation’s earliest days: “The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”<sup>83</sup> In a general sense, however, many of these legislative regulations over the police derive in large part from the common law.<sup>84</sup>

Perhaps a less obvious, but extraordinarily significant, source of police regulation is that of departmental policy. Nearly every police department in the

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77. See, e.g., *Segura v. United States*, 468 U.S. 796, 805 (1984); *Nix v. Williams*, 467 U.S. 431, 441-42 (1984).

78. Marjory Everson, *Exclusionary Rule*, CHI. TRIB. (Jan. 31, 1990), [http://articles.chicagotribune.com/1990-01-31/news/9001090277\\_1\\_exclusionary-rule-darryl-james-victims](http://articles.chicagotribune.com/1990-01-31/news/9001090277_1_exclusionary-rule-darryl-james-victims) [<https://perma.cc/B8Q2-8DJ5>].

79. *Davis v. United States*, 131 S. Ct. 2419, 2428-29 (2011).

80. *Id.* at 2426-27.

81. *United States v. Leon*, 468 U.S. 897, 911 (1984).

82. Barnett, *supra* note 29, at 475 (“In addition to the power of *prohibiting wrongful* conduct, the power of states may also properly include the power of *regulating rightful* behavior.”) (emphasis in original).

83. THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

84. Barnett, *supra* note 29, at 475-77.

United States has a policy guide specific to its officers.<sup>85</sup> Often a department will develop its policies and procedures based on its technology, number of officers, jurisdictional size, past experiences, and any number of other relevant factors.<sup>86</sup> Not all departmental policy guides are created equal, though, and as a result there are occasionally conflicts between neighboring departments.<sup>87</sup> Similar conflicts more often transpire between officers who stop travelers, simply passing through their department's jurisdiction but are unaware of the area's differing policies and procedures.<sup>88</sup>

To understand the effects of different policies and procedures, imagine a vacationing city-dweller being pulled over for speeding while driving through an unknown, rural area. If the driver produces an expired license, a simple ticket might have been routine in the city; picture the same driver's surprise when confronted with a twenty-minute detention outside her vehicle in order for the rural officer to verify her identity through dispatch. Such actions may be both constitutionally and statutorily justified in either location, but for some reason—perhaps a difference in the rural department's license-identifying software—the rural officer is essentially bound by policy to detain the driver. Officers will tend to view these policy considerations as binding upon their employment *regardless* of any legal or perceived justification, such as a concern for officer safety in this example.<sup>89</sup> For precisely this reason, departmental policies may be the most important means by which to effect any desired change regarding police conduct.

### *B. The Reasonableness Gold Standard*

All analyses of cases “addressing the reasonableness of a warrantless search, should begin with the basic rule that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and

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85. Although some police departments continue to host their policy and procedure manuals on restricted servers, this is becoming less customary. One can locate and read many such personnel manuals by simply performing an Internet search for “<city> police policy procedure” or some similar combination of search terms.

86. W. DWAYNE ORRICK, INT’L ASS’N OF CHIEFS OF POLICE, BEST PRACTICES GUIDE FOR DEVELOPING A POLICE POLICY-PROCEDURE MANUAL, <http://www.theiacp.org/portals/0/pdfs/BP-PolicyProcedures.pdf> [<http://perma.cc/2LFD-ZPTE>] (last visited Nov. 12, 2016).

87. *Id.*

88. See, e.g., *Standards on Urban Police Function Part IX: Public Understanding & Support*, A.B.A., [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_urbanpolice.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_urbanpolice.html) [<http://perma.cc/LDT9-H7MP>] (last visited Nov. 12, 2016).

89. Based upon *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977), typically the officer would retain the discretionary power to determine whether his own safety dictates ordering the driver out of a stopped vehicle; however, there is nothing in the Supreme Court’s decision to negate that a department could usurp that discretionary latitude in favor of a mandate for what it views as the safer of two options.

well-delineated exceptions.”<sup>90</sup> “[E]ven-handed law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.”<sup>91</sup> Fourth Amendment reasonableness does not require employing the least intrusive means: “[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.”<sup>92</sup>

Reasonableness is the gold standard for police officers seeking to work within the boundaries of the Fourth Amendment.<sup>93</sup> The question then becomes whether police actions are objectively reasonable.<sup>94</sup> Was it reasonable for Trooper Encinia to order Sandra Bland to extinguish her cigarette?<sup>95</sup> For such a command to be deemed reasonable, one would imagine that the cigarette would have to logically impede the trooper’s ability to perform his duties during the traffic stop—i.e., the cigarette posed some danger to either party (hardly), impaired Bland’s capacity to hand over her license or sign a ticket (doubtful), or offended the trooper’s senses (maybe). But does mere offensiveness afford a police officer the requisite reasonableness to escalate an officer-initiated traffic stop? If the American people wish to retain any civil liberties at all, an affirmative answer to that proposition treads on dangerous ground.

### *C. Police Authority Today*

So then, what police actions are truly unreasonable? Recently, the Supreme Court reasoned that any traffic stop investigative activity may be *per se* unreasonable under the Fourth Amendment if it (1) prolongs the time of the stop beyond that necessary to address the underlying purpose of the stop, and (2) is directed at a secondary purpose unsupported by reasonable suspicion.<sup>96</sup> In other words, time may be viewed as additional intrusion into a detained individual’s privacy.<sup>97</sup> For example, if an officer pulls over a driver for a broken brake light violation, the officer would be barred from further investigation once he has resolved the violation by issuing a citation. Such further investigation might include requesting paperwork regarding the vehicle, asking more questions of the driver or passengers, or, as was the case before the Court, calling for backup officers to bring a canine to that location to sniff the car.<sup>98</sup>

It is important to note that this case only addresses those investigative measures that an officer might employ *after* issuing a ticket, a warning, or some

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90. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

91. *Horton v. California*, 496 U.S. 128, 138 (1990).

92. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 n.12 (1976).

93. *Horton*, 496 U.S. at 138.

94. *Terry v. Ohio*, 392 U.S. 1, 18-20 (1968).

95. Cevallos, *supra* note 1.

96. *Rodriguez v. United States*, 135 S. Ct. 1609, 1616 (2015).

97. *Id.* at 5-6; *see also Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

98. *Id.*

other form of assurance to the driver that the stop has concluded and the driver is free to leave. The Court cabined its holding to include only inquiries *unrelated* to the initial purpose of the stop.<sup>99</sup> The Court's holding does leave open, however, the idea that where an additional Fourth Amendment justification exists or surfaces after the officer's initial "mission" has been accomplished, the officer may lawfully be able to detain the individual further to investigate on those grounds.<sup>100</sup>

Additionally, many questions remain open as to whether certain other types of police commands and actions are objectively reasonable *during* a traffic stop encounter. For instance, can an officer order a driver to turn down the music in her vehicle? The answer to this question is a resounding *maybe*—if the music is truly interfering with the officer's ability to conduct his business during the stop, then he is probably within the law in ordering the driver to turn down the music.<sup>101</sup> But what if the driver refuses to comply? Is that obstruction of justice (or some other similarly purposed charge)? Many officers might reflexively reach through the driver's open window and turn the volume knob themselves, but that action exposes the officer to increased risk of injury, which in turn exposes the driver to the same.<sup>102</sup> In their ability to clarify the scope of an officer's authority regarding such common facets of traffic stop scenarios, departmental leaders appear to be best situated to address this sort of issue.

As for cell phones and similar devices, many states have already enacted laws banning or limiting their use in conjunction with the active operation of a motorized vehicle.<sup>103</sup> Although these legislative measures have countenanced the use of traffic stops to combat the hazards created by inattentive drivers, they deal primarily with the use of such devices while *driving* rather than while *detained*.<sup>104</sup> A recurring problem for police officers during stops is what to do when a driver

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99. *Rodriguez*, 135 S. Ct. at 1614-15; *see also* *Arizona v. Johnson*, 555 U.S. 323, 333 (2009); *Delaware v. Prouse*, 440 U.S. 648, 658-60 (1979).

100. *Rodriguez*, 135 S. Ct. at 1615.

101. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968) ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

102. For those who struggle to understand the potential harm that might result from "knee-jerk" police reactions such as reaching into a stopped vehicle, *see, e.g.*, *Dashcam Catches Police Officer Being Dragged by Car*, CNN (Jan. 5, 2015), <http://www.cnn.com/videos/us/2015/01/11/dnt-fl-police-officer-dragged-by-car.wala/video/playlists/caught-on-dashcam/> [<http://perma.cc/7KWZ-CGKG>], documenting Gulf Breeze Police Department Sergeant Kerstan Tatro being dragged by a vehicle after attempting to reach into it during a traffic stop. Similar stories are widely available in various news sources.

103. *See generally* *State Distracted Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Jan. 2016), [http://www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html) [<http://perma.cc/JTW3-E4RD>].

104. *Id.*



or passenger begins recording the stop on his cell phone or other device.<sup>105</sup> By now, most large departments know better than to leave their officers in the dark as to how to respond to video recording: the general rule is to allow the recording to continue so long as it does not significantly interfere with an investigation.<sup>106</sup> One caveat should be noted to such cell phone policies: recording what might reasonably be construed as evidence may make such devices seizable as the same.<sup>107</sup>

#### *D. The Gray Area*

Traditionally, police officers treat policy and legal changes as inherently suspect.<sup>108</sup> Moreover, many officers feel that they are treated as easy-access scapegoats when societal issues cause or exacerbate tensions.<sup>109</sup> Despite the significant prevalence of the topic of police culture in popular media, academic treatment is relatively sparse; even less abundant are positive proposals on whether and how to effect change within this subculture. The most obvious proposal is rooted in trickle-down or organizational theory: start at the top of the power structure, and the bottom will follow that lead.<sup>110</sup> In practice this would most likely be a change in departmental policy.<sup>111</sup> Although this approach is generally workable, one problem arises from the fact that police supervisors do not necessarily want the same things as citizens.<sup>112</sup>

The end games of both are systemically different, if not directly in conflict. Citizens typically want not to be bothered by either police or criminals. Police

105. Saki Knafo, *It's Perfectly Legal to Film the Cops*, HUFFINGTON POST POLITICS (Aug. 14, 2014), [http://www.huffingtonpost.com/2014/08/13/filming-police-officers\\_n\\_5676940.html](http://www.huffingtonpost.com/2014/08/13/filming-police-officers_n_5676940.html) [<https://perma.cc/Y3S2-6CJL>].

106. See, e.g., MEMPHIS POLICE DEP'T, POLICY & PROCEDURE MANUAL UPDATE SERIAL 37-13 (Dec. 17, 2013), <https://assets.documentcloud.org/documents/964020/memphis-police-public-recordings-policy.pdf> [<https://perma.cc/HFU3-LVDJ>]; see also Sophia Cope, *Police Must Respect the Right of Citizens to Record Them*, ELECTRONIC FRONTIER FOUND. (Apr. 16, 2015), <https://www.eff.org/deeplinks/2015/04/police-must-respect-right-citizens-record-them> [<http://perma.cc/R794-AYGW>].

107. Jason Kotowski, *Can Police Seize Your Cellphone as Evidence? There's No Easy Answer*, HUFFINGTON POST L.A. (Oct. 12, 2013), [http://www.huffingtonpost.com/2013/08/12/police-seize-cellphone-evidence\\_n\\_3739770.html](http://www.huffingtonpost.com/2013/08/12/police-seize-cellphone-evidence_n_3739770.html) [<http://perma.cc/7FA3-6UW6>].

108. Tennenbaum, *supra* note 67, at 260.

109. *Wanted: Cops with People Skills*, ECONOMIST (Apr. 25, 2015), <http://www.economist.com/news/united-states/21649507-when-law-enforcement-just-about-force-people-are-killed-wanted-cops-people-skills> [<http://perma.cc/W6XQ-P74H>].

110. Janet Chan, *Changing Police Culture*, 36 BRIT. J. CRIMINOLOGY 109, 115-16 (1996).

111. ORRICK, *supra* note 86.

112. This is one basis for the current trend toward community-based policing models. See generally U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE, UNDERSTANDING COMMUNITY POLICING: A FRAMEWORK FOR ACTION (1994), <https://www.ncjrs.gov/pdffiles/commmp.pdf> [<https://perma.cc/68K4-UCVD>] [hereinafter UNDERSTANDING COMMUNITY POLICING].

supervisors want tangible results—proof that subordinate officers are fighting crime: speeders getting tickets, bad guys getting booked into jail, fewer calls for service, lower crime statistics, and more subpoenas hailing officers into court to “finish the job.” The conflict centers on the fact that the results police supervisors desire are ones attained through proactive police work, but proactive policing requires “shaking the trees to see what falls out”—investigating everyone, pursuing every lead.

So what else can be done in addition to departmental policy changes? Focus on training supervisors as well as officers on the street.<sup>113</sup> Organizations like the International Association of Chiefs of Police (IACP)<sup>114</sup> and governmental agencies, like the Department of Justice, can and already do issue regular reports that carry weight and occasionally have effect on these types of solutions.<sup>115</sup> Draw back on militaristic training, and instill officers with respect for others during their time as cadets and rookies.<sup>116</sup>

Another way to view the organizational approach is simply to start even higher up the command chain—mayors, state legislators, etc. Given the federalist preference for police powers being legislated at the state level, state legislatures are given wide berth to dictate and alter policy.<sup>117</sup> In fact, the Court has indicated occasional preference for state legislation (as opposed to constitutional adjudication) because statutes can allow certain powers to “turn on any sort of practical consideration without having to subsume it under a broader principle.”<sup>118</sup> State legislators can more effectively institute sweeping policy changes by mandating state-directed police academies for all officers within their state. Most states have refrained from going quite so far but do require that the various academies meet standardized criteria.<sup>119</sup>

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113. Brian Willis, *Seven Reasons the Police Culture is Broken (and How to Fix It)*, POLICEONE.COM (June 4, 2014), <https://www.policeone.com/chiefs-sheriffs/articles/7258038-7-reasons-the-police-culture-is-broken-and-how-to-fix-it/> [http://perma.cc/RTS3-UCGJ].

114. *Division of State and Provincial Police*, INT’L ASS’N OF CHIEFS OF POLICE, <http://www.theiacp.org/State-and-Provincial-Police-S-P> [http://perma.cc/DL7X-WM49] (last visited Nov. 12, 2016).

115. See generally UNDERSTANDING COMMUNITY POLICING, *supra* note 112.

116. Willis, *supra* note 113.

117. See generally Barnett, *supra* note 29.

118. *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001).

119. See, e.g., *Colorado Peace Officers Standards and Training (“POST”) Certification*, COLORADO POST, <http://www.coloradopost.gov/certification> [https://perma.cc/9SBP-54QM] (last visited Nov. 12, 2016); *General Information on How to Become a Law Enforcement Officer*, MICH. COMMISSION ON LAW ENFORCEMENT STANDARDS, <http://www.michigan.gov/mcoles/0,4607,7-229-41624-150154--,00.html> [http://perma.cc/7DYM-DM5J] (last visited Nov. 12, 2016).

## V. SHEPHERDING THE SHEEPDOGS: THREE COMPETING CONSIDERATIONS

*A. The Police Officer's Interest in Clarity*

Officers who interact with those suspected of violating the law have “an essential interest in readily administrable rules.”<sup>120</sup> Recognizing that police officers often must act swiftly and under stress to conduct arrests, the Supreme Court has traditionally erred toward allowing officers to make rough determinations of probable cause rather than the refined, formalized, and *post facto* judgments available in court.<sup>121</sup> The Court has noted that Fourth Amendment rules “ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged” and not “qualified by all sorts of ifs, ands, and buts.”<sup>122</sup>

*B. Society's Interest in Effective Law Enforcement*

As the *Garner* decision and its subsequent debates have suggested, society is often torn between its interest in preventing crime and seeing justice properly levied against criminals in court.<sup>123</sup> As has already been noted, society has a clear stake in the government's fight against crime, and citizens tend to blame one branch or another of government when it fails to uphold its promises for their safety.<sup>124</sup> In the current political climate of police reform, this is much the reason why other solutions to the problem seem unbecoming. For instance, evidentiary exclusions set criminals free to commit further crimes, but they tend to deter future official misconduct;<sup>125</sup> meanwhile, civil suits against police officers are hard to win, but the threat of them keeps officers in check at least as to flagrant abuses of power.<sup>126</sup> Because federal schemes are insufficient to protect societal interests against police misconduct, and because police culture seems to vary somewhat by jurisdiction, it would appear that federal solutions are inappropriately matched with local problems. Essentially, this is further proof that the organizational (or “trickle down”) theory should not be applied federal-state-local, but rather interdepartmentally, i.e., chief-captains-lieutenants-sergeants-officers.

*C. The Individual's Interest in Privacy and Dignity*

The Supreme Court has long recognized that at the “core of the Fourth

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120. *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1522 (2012) (internal citations omitted).

121. *Atwater*, 532 U.S. at 347.

122. *New York v. Belton*, 453 U.S. 454, 458 (1981).

123. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

124. *Everson*, *supra* note 78.

125. *Id.*

126. *Civil Remedies*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/police/uspo30.htm> [<http://perma.cc/Z684-3NEA>] (last visited Nov. 12, 2016).

Amendment” is the security of individual privacy against arbitrary governmental intrusion. It is basic to a free society, implicit in the concept of “ordered liberty,” and enforceable against the States through the Due Process Clause.<sup>127</sup>

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication [that] such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.<sup>128</sup>

The Court in *Schmerber v. California* also noted that both the Fifth Amendment and the landmark *Miranda* decision pointed to “one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.”<sup>129</sup>

## VI. SOLUTIONS: TODAY’S GREAT COMPROMISE

### A. Departmental Policy Proposals

The most effective way to establish a balanced and constitutional approach to traffic stops is through department-level change. Although some are more difficult to locate than others, departmental policy and procedure manuals are common throughout most police departments across the nation.<sup>130</sup> Like most people, police officers are often more immediately concerned with their continued employment than with statutes, regulations, and decisions; as such, they will likely acknowledge a direct, appreciable interest in abiding by departmental policies. Moreover, departmental leaders will likely better understand rules in whose creation they have taken a direct part.<sup>131</sup> That sense of responsibility attached to creation will foster stronger desire within such leadership committees to thoroughly communicate and enforce such rules to and amongst subordinate officers.<sup>132</sup>

There are critics who question both whether departmental policies are truly effective and whether their semi-private nature will actually hold the citizens’

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127. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

128. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966).

129. *Id.* at 762.

130. See generally KATHLEEN O’TOOLE, SEATTLE POLICE DEPARTMENT MANUAL, <http://www.seattle.gov/police-manual> [<http://perma.cc/X3D6-QB93>] (last visited Nov. 12, 2016) (displaying the Seattle Police Department Manual); MPD POLICY & PROCEDURE MANUAL, MINNEAPOLISMN.GOV, <http://www.ci.minneapolis.mn.us/police/policy/index.htm> [<http://perma.cc/M3WP-G6Z2>] (last visited Nov. 12, 2016) (displaying the Minneapolis Police Department’s Policy and Procedure Manual).

131. ORRICK, *supra* note 86.

132. *Id.*

best interests at heart.<sup>133</sup> To appease such critics, departmental leaders should take steps to incorporate public concerns into the creation of such policies. For instance, police chiefs might emplace panels consisting of local citizens, officers, politicians, business owners, clergy, and so on as oversight committees.<sup>134</sup> Much like juries, these representative committees could discuss and debate the various problems, needs, and preferences of the community, enhancing each member's understanding and appreciation for policies prior to their implementation.<sup>135</sup> Similarly tasked community panels already exist in one form or another across the country today.<sup>136</sup>

One general recommendation is that, in the interest of transparency, departments make such policy and procedure manuals readily available to the public. While circumstances and confidentiality concerns may require redactions of some text, the public is likely better served, if not more generally pleased, when their sworn protectors avoid the apparent impropriety of hiding information—particularly when that information is neither inherently nor actually sensitive.

Regarding traffic stop policies specifically, many departments already have rough guidelines within their manuals; some have more detailed models.<sup>137</sup> Although more detailed analyses are available for reference, two fundamental concerns are evident when writing policies—(1) effectively combatting crime in order to protect the public, and (2) enabling officers to perform their duties both safely and legally.<sup>138</sup> To satisfy the first requirement, officers must have a certain amount of discretionary latitude. As an established example, it is unrealistic to require that an officer acquire a warrant prior to conducting *any* vehicular search,<sup>139</sup> but officers clearly must meet *some* minimum requirements before they may legally enter and search a vehicle.<sup>140</sup>

The second function of departmental policies—ensuring safety and legality—is more complex. For instance, an officer's safest option during an “unknown” traffic stop (remember, one of the most dangerous activities of

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133. See generally Barry Friedman et al., *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

134. Chris Martin, *Citizens and Cops Dialogue at Community-Police Relations Forum*, THE SHELBY COUNTY PUB. DEFENDER (Aug. 30, 2013), <http://defendshelbyco.org/citizens-and-cops-dialogue-at-community-police-relations-forum/> [<http://perma.cc/L6UJ-HLUZ>].

135. *Id.*

136. *Id.*

137. See, e.g., MD. POLICE TRAINING COMM'N, APPENDIX B—MODEL POLICY APPROVED BY POLICE TRAINING COMMISSION 42-44 (2001), <http://www.mdle.net/traffic/AppendixB-2004.pdf> [<http://perma.cc/GBK6-G2H5>].

138. ORRICK, *supra* note 86.

139. See, e.g., *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (explaining that there are exceptions to the general rule that “searches conducted outside the judicial process . . . are *per se* unreasonable,” including the exception for searches incident to a lawful arrest).

140. *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).

policing<sup>141</sup>) may be to have the driver exit the vehicle and keep his hands in view. Although this is perfectly legal under existing law,<sup>142</sup> problems quickly arise when either drivers or officers do not actually know the law.<sup>143</sup> In this vein, departmental policies can effectively serve not only as training devices but also as quick reference tools for officers in the field. To balance the need for officer safety with that of ensuring legal compliance, departments should institute two-officer policies.

Mandating two officers per patrol car provides both officers with immediately available backup, enhancing their safety in all situations. Furthermore, along the line of two heads being smarter than one, two officers can better document and handle a given scenario than a solo officer. At the same time, a dishonest, ill-intentioned, violent, or otherwise undesirable officer is less likely to act on his illicit tendencies in the presence of both a witness and a fellow officer, meaning greater protection for any person the pair encounters while on duty.

Critics will certainly argue that the infamous “blue wall of silence” might impede this solution’s success. So too might weather, forgetfulness, intentional neglect, or a glare impair the value of evidence from a body camera. Others will suggest that mandating two officers is unrealistic or financially burdensome in sprawling jurisdictions with fewer officers, smaller towns, and the like. Therein lies the functionality of departmental policy solutions: departments can budget according to their own financial abilities and needs. If a department is unable to hire and staff enough officers for two-officer cars, then policies mandating two cars for certain scenarios might be substituted. There are no magical solutions that are at once perfect, realistic, and uniformly applicable. The two-officer policy solution is not a stand-alone panacea to what ails policing on today’s streets; it is merely a logical, safe, and easily implemented standard—one which protects both citizens and officers alike.

### *B. Legislative Proposals*

Although departmental policies are preferable for the myriad reasons listed above, it would be naïve to believe them absolutely effective. Because local and state police officers are the ones that most citizens will likely encounter, state legislatures are best positioned to bring about positive changes in the direction, training, and regulation of those officers. Legislators also possess the unique ability to preempt problems and conflicts between citizens and law enforcement officers.<sup>144</sup> The current political winds against perceived abuses of power by police officers have presented those legislators with a prime opportunity to invest their political capital in a worthy objective with likely a high return.

Enacting statutes designed explicitly to protect the dignity and privacy of individuals during every day, traffic-stop investigative detentions will aid in

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141. *In the Line of the Duty Report*, *supra* note 19.

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

143. *See generally* Lai et al., *supra* note 7.

144. *See, e.g.*, Barnett, *supra* note 29.

preventing future conflict escalations between officers and citizens. Such preventive measures will serve to further protect individuals and to clarify the boundaries of many law enforcement officers in their official capacities. Although subjecting violating officers to liability for civil suits and monetary damages is unrealistic and alienating, legislators can feasibly use their power to employ departmental censures and sanctions against officers who overstep their authorities and violate the public trust. By taking this type of middle ground, legislators would show their constituents, both the everyday drivers and the police officers, that their interests is in bettering society as a whole rather than arbitrarily punishing one group or another. Moreover, by recognizing the problem and working proactively to fix it through reasonable and balanced measures, such legislation will avoid the opposing problems of legal ambiguity driving unfounded claims and “opening the floodgates” of new litigation upon the courts.