

## TRAFFIC WITHOUT THE POLICE

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**Abstract.** We are at a watershed moment in which growing national protest and public outcry over police injustice and brutality, especially against people of color, are animating structural police reforms. Traffic stops are the most frequent interaction between police and civilians today and are a persistent source of racial and economic injustice. Black and Latinx motorists in particular are disproportionately stopped as well as questioned, frisked, searched, cited, and arrested during traffic stops. Traffic enforcement is also a common gateway for funneling over-policed and marginalized communities into the criminal justice system.

Piecemeal constitutional and statutory interventions are insufficient to address these systemic problems, which necessitate structural police reform and require a fundamental rethinking of the role of police in the traffic space. Traffic enforcement and policing are so intertwined today, however, that it is difficult to envision a world without police involvement in traffic regulation. Illustrating this point, one of the common critiques being lodged against the growing “defund the police” movement is: “Who would enforce traffic laws?”

This Article offers a different normative vision of our driving system that challenges the conventional wisdom that traffic enforcement is impossible without the police. A new legal framework for traffic enforcement is articulated, which decouples traffic enforcement from the police function. This framework offers a starting point for renewed thinking about the basic structure of traffic enforcement, the role of police in traffic enforcement, and the ways in which law and policy can be used as tools to achieve fairness and equality in traffic enforcement. The Article provides a comprehensive analysis of the important policy benefits of implementing non-police alternatives to traffic enforcement for public safety, policing, and criminal law reform, especially for people of color and other marginalized communities vulnerable to over-policing and over-criminalization in today’s driving regime. The Article concludes by addressing potential objections to removing the police from traffic enforcement.

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## INTRODUCTION

Traffic stops are the most common interaction between police and civilians today,<sup>1</sup> and are a persistent source of racial and economic injustice.<sup>2</sup> Several studies show that Black and Latinx motorists in particular are disproportionately stopped by police for traffic violations and disproportionately questioned, frisked, searched, cited, and arrested during traffic stops.<sup>3</sup> Many of these stops and intrusions are pretextual,<sup>4</sup> enable police mistreatment and abuse,<sup>5</sup> and cause traffic stops to be humiliating and frightening experiences for people of color.<sup>6</sup> Traffic enforcement has historically served and still functions as a gateway for funneling civilians, and especially Black and Latinx motorists, into the criminal

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<sup>1</sup> FRANK R. BAUMGARTNER ET AL., SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 51 (2018) (“[T]raffic stops are the most common type of encounter that Americans have with the police”).

<sup>2</sup> A long line of scholarship documents how traffic stops, and especially pretextual stops, enable racial profiling on roads and highways and disproportionately target people of color as well as the poor. See BAUMGARTNER ET AL., *supra* note 1, at 25-26; CHARLES R. EPP. ET AL., PULLED OVER : HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) [hereinafter Carbado, *From Stopping*]; Devon W. Carbado, (E)Racing the Fourth Amendment, 100 Mich. L. Rev. 946 (2000) [hereinafter, Carbado, (E)Racing]; Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651 (2002); David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Kevin R. Johnson, Essay, *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 (2010); Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 272; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

<sup>3</sup> See, e.g., BAUMGARTNER ET AL., *supra* note 1; PIERSON, ET AL., A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES (May 21, 2020), <https://5harad.com/papers/traffic-stops.pdf>; Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers’ Characteristics During Traffic Stops with Police: Results From a National Survey*, 21 JUST. Q. 49 (2004); Wendy C. Regoeczi & Stephanie Kent, *Race, Poverty, and the Traffic Ticket Cycle*, 37 POLICING: INT’L J. POLICE STRATEGIES & MGMT 190 (2014); Sunghoon Roh & Matthew Robinson, *A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops*, 12 POLICE Q. 137 (2009); Stephen Rushin & Griffin Sims Edwards, *An Empirical Assessment of Pretextual Traffic Stops and Racial Profiling*, 73 STAN. L. REV. (forthcoming 2021).

<sup>4</sup> See Elizabeth Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 209 (2007) (defining pretextual stops as “occasions when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop”); Davis, *supra* note 2, at 427-432 (discussing the discriminatory nature of pretextual traffic stops).

<sup>5</sup> See generally Carbado, *From Stopping*, *supra* note 2 (describing how traffic stops enable police violence against Black motorists).

<sup>6</sup> See BAUMGARTNER ET AL., *supra* note 1, at 26 (describing targeted traffic enforcement as “humiliating, frustrating, and unfair”); Jeannine Bell, *The Violence of Nosy Questions*, 100 B.U. L. REV. 935, 945 (2020) (“For black drivers, the experience of being stopped by the police is one of lasting humiliation.”); Sklansky, *supra* note 2, at 318 (“For many motorists, particularly those who are not white, traffic stops can be not just inconvenient, but frightening, humiliating, and dangerous.”).

justice system.<sup>7</sup> Heavy reliance on traffic ticket revenue to fund state and local budgets, as well as the use of traffic stop rates as a measure of officer performance, only encourage these injustices.<sup>8</sup>

Piecemeal constitutional and statutory interventions that attempt to limit aspects of police authority during traffic stops are insufficient to address systemic racial and economic injustices in traffic policing.<sup>9</sup> Rather, these problems necessitate structural police reform and require a fundamental rethinking of the role of police in the traffic space. Traffic enforcement and policing are so intertwined, however, that it is difficult to imagine a world of traffic without the police.<sup>10</sup> Illustrating this point, one of the common critiques being lodged against the growing “defund the police” movement is: “Who would enforce traffic laws?”<sup>11</sup>

We are at a watershed moment in which growing national protest and public outcry over police injustice and brutality, especially against people of color, are animating structural police reforms.<sup>12</sup> In this environment, there is increasing momentum for rethinking police involvement in the traffic space.<sup>13</sup> In July 2020, the City of Berkeley, California voted in favor of a proposal that would be the first in the country to remove police from conducting traffic stops as part of a comprehensive plan to achieve structural police reform.<sup>14</sup> The proposal directs the city to create a Department of Transportation staffed by unarmed civil servants who would be in charge of enforcing traffic laws instead.<sup>15</sup> Other

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<sup>7</sup> Andrea Roth, “*Spit and Acquit*”: Prosecutors as Surveillance Entrepreneurs, 107 CALIF. L. REV. 405, 429 (2019) (“[T]raffic offenses . . . can be a primary entry point into the criminal justice system for minorities in particular”).

<sup>8</sup> See *infra* Part II.C.2.a.

<sup>9</sup> Rachel A. Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. 1, 1 (2009) (recognizing more generally that “[r]educing police misconduct requires substantial institutional reform in our nation’s police departments”).

<sup>10</sup> Harris, *supra* note 2, at 560 (“[P]olice use traffic regulations to investigate many innocent citizens.”); Wayne R. LaFave, *The “Routine Traffic Stop” From Start to Finish: Too Much “Routine,” Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1847 (2004) (recognizing that “police have co-opted our traffic codes as a weapon to be used in the ‘war on drugs.’”).

<sup>11</sup> See, e.g., Long, *Demonizing Police Isn’t the Answer*, THE ROANOKE TIMES (VA) (June 11, 2020), [https://roanoke.com/long-demonizing-police-isnt-the-answer/article\\_7fad1956-4100-5297-a35a-a2528f139b37.html](https://roanoke.com/long-demonizing-police-isnt-the-answer/article_7fad1956-4100-5297-a35a-a2528f139b37.html) (“Who would enforce traffic regulations?”).

<sup>12</sup> See Farah Stockman & John Eligon, *Cities Ask if It’s Time to Defund Police and “Reimagine Public Safety,”* N.Y. TIMES ONLINE (June 8, 2020), <https://www.nytimes.com/2020/06/05/us/defund-police-floyd-protests.html>.

<sup>13</sup> See Aaron Gordon, *We Don’t Need Cops to Enforce Traffic Laws*, VICE.COM (June 11, 2020: 7:00 AM), [https://www.vice.com/en\\_us/article/g5pvgm/we-dont-need-cops-to-enforce-traffic-laws](https://www.vice.com/en_us/article/g5pvgm/we-dont-need-cops-to-enforce-traffic-laws); Derek Thompson, *Unbundle the Police*, THE ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/>.

<sup>14</sup> Kellen Browning & Jill Cowan, *How Berkeley Could Remove the Police From Traffic Stops*, N.Y. TIMES ONLINE (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/berkeley-ca-police-department-reform.html>; Rachel Sandler, *Berkeley Will Become 1<sup>st</sup> U.S. City to Remove Police From Traffic Stops*, FORBES.COM (July 15, 2020: 8:22 PM), <https://www.forbes.com/sites/rachelsandler/2020/07/14/berkeley-may-become-1st-us-city-to-remove-police-from-traffic-stops/#757f789970fa>.

<sup>15</sup> Browning, *supra* note 14; Sandler, *supra* note 14.

municipalities are considering similar reforms that would remove police from traffic enforcement to varying degrees.<sup>16</sup>

The research in this Article challenges the conventional wisdom that traffic enforcement is impossible without the police, and in so doing, illustrates why major changes in line with the City of Berkeley’s approach should be welcomed. Although legal scholars have identified a need to rethink the role of police in the traffic domain and have discussed specific ideas for reform,<sup>17</sup> this Article makes an important contribution to the literature by articulating a sharpened and comprehensive legal framework for removing the police from traffic enforcement.<sup>18</sup> The analysis provides a starting point for renewed thinking about the basic organization of traffic enforcement, the role of police in traffic enforcement, and the means by which law and policy can be used as tools to achieve fairness and equality in traffic enforcement. As this Article explains, reimagining traffic without the police helps to achieve fairness and equality in traffic enforcement, especially for people of color and other marginalized communities vulnerable to over-policing and over-criminalization in today’s driving regime.<sup>19</sup>

The core ideas in this Article connect to growing public and scholarly debates about the proper role of police and the scope of the police function.<sup>20</sup> As sociologist Alex Vitale describes, “[t]he origins and function of the police are intimately tied to the management of inequality of race and class.”<sup>21</sup> Society currently relies on police to perform a wide range of duties that include conducting criminal investigations, preventing and deterring crime, conducting accident investigations, handling traffic enforcement and control, providing social services, and responding to emergency and non-emergency civilian

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<sup>16</sup> See, e.g., John Moroney, *Cambridge Considers Civilian Traffic Enforcement Amid Calls for Police Reform*, NBC BOSTON (July 29, 2020: 2:38 PM), <https://www.nbcboston.com/news/local/cambridge-officials-consider-civilian-traffic-enforcement/2167946/>; Rebecca Tan, *Should Police Be In Charge of Traffic Enforcement? In a Suburb Beset By Racial Inequalities, Lawmakers Aren’t Sure*, WashingtonPost.com (Aug. 10, 2020: 8:35 A.M. CDT), [https://www.washingtonpost.com/local/md-politics/montgomery-police-bias-traffic-/2020/08/07/818fd860-d72e-11ea-aff6-220dd3a14741\\_story.html](https://www.washingtonpost.com/local/md-politics/montgomery-police-bias-traffic-/2020/08/07/818fd860-d72e-11ea-aff6-220dd3a14741_story.html) (discussing how a Montgomery County council member “has commissioned a study to figure out whether – and how – Montgomery might be able to move certain traffic enforcement functions out of the police and into other government agencies); *Cambridge Proposal, Let Unarmed City Employees Make Traffic Stops Instead of Police*, CBS BOSTON (July 29, 2020: 6:00 PM), <https://boston.cbslocal.com/2020/07/29/cambridge-police-officers-traffic-stops-proposal-city-employees/>.

<sup>17</sup> See, e.g., Joh, *supra* note 4 (discussing automating traffic enforcement); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 754-59 (2015) (discussing potential directions for reform to remove traffic from police); Ekow N. Yankah, *Pretext and Justification: Republicanism, Policing, and Race*, 40 CARDOZO L. REV. 1543, 1625-28 (2019) (discussing the separation of removing traffic monitoring powers from traditional police powers).

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See *infra* Part III.

<sup>20</sup> See, e.g., ALEX S. VITALE, *THE END OF POLICING* 27 (2017) (“[W]hat we really need is to rethink the role of police in society.”); Barry Friedman, *Disaggregating the Police Function*, U. PA. L. REV. (forthcoming).

<sup>21</sup> VITALE, *supra* note 20, at 27.

complaints.<sup>22</sup> More often than not, police spend their time responding to incidents that do not involve violent crime. One recent report revealed that police officers in New Orleans, Sacramento, and Montgomery County, Maryland spend approximately 4% of their time on violent crimes.<sup>23</sup>

Scholars and commentators argue that society has grown to place too much responsibility on the police and vests too much power in officers to perform social functions.<sup>24</sup> In the growing “defund the police” movement, advocates have emphasized that successful police reform not only entails scaling down police budgets, but also reevaluating what exactly police do.<sup>25</sup> Given the centrality of traffic in policing,<sup>26</sup> removing traffic enforcement from the police is a critical part of these conversations.

To summarize the framework articulated in Part II, jurisdictions would redelegate the bulk of traffic enforcement to newly created public agencies (what I call “traffic agencies”). Traffic agencies would operate wholly independent of the police and hire their own public employees (who I call “traffic monitors”) to conduct and oversee traffic enforcement. Traffic monitors would enforce traffic laws through in-person traffic stops<sup>27</sup> and handle all aspects of traffic enforcement that jurisdictions decided to automate.<sup>28</sup> To the extent that exceptions must be made, police would only be allowed to conduct traffic stops for a narrow set of “serious” traffic violations that clearly involve criminality or an actual or imminent threat of harm to others (for instance, driving a stolen vehicle, hit-and-run, or vehicle racing).<sup>29</sup> To achieve fairness and equality in traffic enforcement, the framework includes two additional law and policy reforms: (1) reevaluating the breadth and imprecision of traffic codes so that traffic law and enforcement only focuses on driving behaviors that pose an imminent public safety threat, and (2) reducing financial and professional incentives that contribute to aggressive and biased traffic enforcement (namely,

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<sup>22</sup> See LARRY K. GAINES & ROGER LEROY MILLER, *CRIMINAL JUSTICE IN ACTION: THE CORE* 101 (2018) (identifying “four basic responsibilities of police: (1) to enforce laws; (2) to provide services; (3) to prevent crime; and (4) to preserve the peace”).

<sup>23</sup> See Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time*, N.Y. TIMES ONLINE (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html>.

<sup>24</sup> See *infra* Part III.A.4.

<sup>25</sup> See Rashawn Ray, *What Does “Defund the Police” Mean and Does It Have Merit?* Brookings.edu (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

<sup>26</sup> Harris, *supra* note 2, at 560 (“[P]olice use traffic regulations to investigate many innocent citizens.”); LaFave, *supra* note 10, at 1847 (recognizing that “police have co-opted our traffic codes as a weapon to be used in the ‘war on drugs.’”).

<sup>27</sup> See *infra* Part II.B.2.

<sup>28</sup> See *infra* Part II.B.3. As I explain in this Section, automating traffic enforcement is by no means a required part of the framework.

<sup>29</sup> See *infra* Part II.A.2.

restructuring traffic fines and fees systems and prohibiting traffic ticket issuances as a measure of professional performance).<sup>30</sup>

As Part III explains, removing traffic enforcement from the police has significant potential benefits for public safety, policing, and criminal law reform. Four specific areas of benefits for policing are examined: (1) improving fairness and equality in policing, (2) preventing escalation during police-civilian encounters, (3) improving public perceptions of the police, (4) increasing police effectiveness though limiting the scope of the police function.<sup>31</sup> The analysis also explains how removing the police from traffic enforcement strengthens criminal law reforms designed to address problems associated with the criminalization of traffic offenses.<sup>32</sup> These potential benefits are especially important to address persistent injustices in traffic enforcement and policing that disproportionately harm communities of color and other marginalized communities vulnerable to over-policing and over-criminalization in today's driving regime.<sup>33</sup>

Part IV addresses potential objections. It first addresses substantive criticisms that removing the police from traffic enforcement would undermine traffic safety, criminal investigations, and criminal deterrence.<sup>34</sup> The financial practicalities of removing the police from traffic enforcement are then addressed.<sup>35</sup> Although not entirely without merit, the analysis explains that these concerns are not overpowering in their persuasiveness to keep traffic enforcement in the hands of the police.

This Article proceeds as follows. Part I provides an overview of the state of traffic policing in the United States, which underscores the need for structural police reforms in the area of traffic enforcement. Part II articulates the new legal framework that decouples traffic enforcement from the police. Part III evaluates the benefits of removing the police from traffic enforcement for public safety, policing, and criminal law reform. Part IV discusses potential objections.

## **I. THE STATE OF TRAFFIC POLICING IN THE UNITED STATES**

To lay the groundwork for the arguments to follow, this Part summarizes key problems with traffic policing in the United States. In short, the expansive nature of traffic codes creates a state in which people are likely to violate the law

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<sup>30</sup> See *infra* Part II.C.

<sup>31</sup> See *infra* Part III.A.

<sup>32</sup> See *infra* Part III.B.

<sup>33</sup> See *infra* Part III.

<sup>34</sup> See *infra* Parts IV.A-B.

<sup>35</sup> See *infra* Part IV.C.

once they start driving.<sup>36</sup> Relying on the police to enforce traffic laws therefore places civilians, and especially people of color, at risk for being subjected to an awesome amount of law enforcement activity. Neither the Constitution nor current state law fixes this problem.<sup>37</sup>

To begin, the expansive nature of traffic codes provides seemingly countless opportunities for officers to pull drivers over, especially for pretextual reasons.<sup>38</sup> State traffic codes include a wide range of moving violations (for example, speeding, failing to signal, or failing to stop at a stop sign) and non-moving violations (for example, defective equipment, improper parking, or driving without a valid license or registration).<sup>39</sup> Some traffic violations are open-ended (for instance, erratic or reckless driving) and invite subjective officer judgments.<sup>40</sup> The breadth, and at times imprecision, of traffic laws creates a low bar for officers to justify pulling over any driver.<sup>41</sup>

At the same time, officers have vast discretion to decide when to initiate a traffic stop and what actions to take during the stop.<sup>42</sup> This broad discretion fuels the under-enforcement of traffic laws that advantages some drivers, and the selective and over-enforcement of traffic laws that disadvantages others.<sup>43</sup> Race and class often shape who falls in the former and latter categories.<sup>44</sup>

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<sup>36</sup> Harris, *supra* note 2, at 559 (noting the “true scope of traffic codes” and “the limitless opportunities they give police to make pretextual stops”); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 312 (1999) (“no one can drive for even a few blocks without committing a minor violation”); Joh, *supra* note 4, at 210 (“[T]he vehicle code provides an officer with any reason to stop virtually anyone.”).

<sup>37</sup> Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2019) (“Even as criminal procedure jurisprudence sets the parameters of what police may do under the law, it simultaneously leaves large swaths of American society to see themselves as anomic, subject only to the brute force of the state while excluded from its protection.”).

<sup>38</sup> Harris, *supra* note 2, at 559; Joh, *supra* note 4, at 210.

<sup>39</sup> Joh, *supra* note 4, at 210 (“Traffic offenses encompass not only ‘moving violations’ (e.g., speeding), but also ‘equipment violations’ (broken taillights) that may be ‘almost wildly hypertechnical.’”).

<sup>40</sup> Harris, *supra* note 45, at 560 (“Some of these offenses are not even clearly defined.”). The use of indefinite language in traffic codes is a decades-long practice. See Ben Connolly, *Constitutional Law — Declaring a Statute Unconstitutional Because of Indefinite Terminology*, 11 TEX. L. REV. 212, 216 (1933) (“At the present time there is a noticeable tendency to use indefinite language in legislation dealing with the operation of automobiles.”).

<sup>41</sup> See LaFave, *supra* note 10, at 1847 (noting that courts uphold traffic stops “by broad interpretation of the traffic offenses involved”).

<sup>42</sup> See Maclin, *supra* note 4, at 376 (noting “the substantial discretion officers possess in deciding which vehicles to stop for the myriad of traffic offenses they observe daily”).

<sup>43</sup> For a comprehensive discussion of issues on under-enforcement see Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

<sup>44</sup> See Carbado, (*E*)*Racing*, *supra* note 4, at 1030 (“Because we all commit traffic infractions all the time, and because the police have almost unbridled discretion with respect to deciding whom to stop, traffic stops provide police officers with the perfect opportunity to engage in pretextual, race-based policing.”); Maclin, *supra* note 4, at 342 (discussing connections between police discretion and racial disparities in traffic stops).



Constitutional protections are inadequate to address these problems, and if anything, enable them. Fourth Amendment protections have become so diluted in traffic settings that some scholars question whether the Fourth Amendment provides any meaningful protection to drivers and passengers at all.<sup>45</sup> This critique connects to a robust body of literature that examines how Fourth Amendment doctrine legitimizes racial profiling on roads and highways and creates opportunities for officers to question, seize, search, arrest, and apply force against people of color.<sup>46</sup>

A brief examination of Fourth Amendment precedent illustrates these points.<sup>47</sup> After the U.S. Supreme Court's heavily criticized decision in *Whren v. United States*, the Fourth Amendment does not require that traffic enforcement be the primary motivation for a traffic stop.<sup>48</sup> In certain situations, Fourth Amendment law also leaves room for officers to justify traffic stops based on officers' mistaken interpretations of traffic laws.<sup>49</sup>

During a traffic stop, officers can undertake additional action under their authority connected with the stop without violating the Fourth Amendment. Possibilities include routinely ordering drivers and passengers to exit their

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<sup>45</sup> David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 556 (1998) ("Indeed, it is no exaggeration to say that in cases involving cars, the Fourth Amendment is all but dead."). For a comprehensive analysis of the dilution of Fourth Amendment protections on roads and highways see generally LaFave, *supra* note 10.

<sup>46</sup> See sources cited in *supra* note 4.

<sup>47</sup> Of course, many states have state constitutional counterparts to the Fourth Amendment and state courts can interpret those counterparts as providing more protection than the Fourth Amendment in traffic stop settings. Many state courts, however, interpret their state constitutional counterparts in accordance with Fourth Amendment law or rely on the U.S. Supreme Court's Fourth Amendment jurisprudence when interpreting those counterparts. See Jim Rossi, *Dynamic Incorporation of Federal Law*, 77 OHIO ST. L.J. 457, 459, n.2 (2016).

<sup>48</sup> 517 U.S. 906, 908 (1996) (holding that traffic stops based on a showing of probable cause of a traffic violation do not violate the Fourth Amendment, regardless of the officer's subjective intent in conducting the stop).

<sup>49</sup> See *Heien v. North Carolina*, 574 U.S. 54, 57 (2014) (holding that traffic stops are lawful under the Fourth Amendment when based on an officer's reasonable mistake of law). Scholars have warned that the Court has yet to provide much guidance as to when an officer's mistake of law is reasonable, allowing lower courts to extend reasonable mistake of law doctrine to justify other police activity conduct during traffic stops and typically require probable cause, including arrests and searches. Kit Kinports, *Heien's Mistake of Law*, 68 ALA. L. REV. 121, 157 (2016) (noting that the Court in *Heien* "offered little guidance as to what constitutes a reasonable mistake of law"); *id.* at 155 ("Lower courts have therefore concluded that police who made reasonable mistakes of law nevertheless had probable cause not only to conduct a traffic stop but also to arrest and to search."); Wayne A. Logan, *Cutting Cops Too Much Slack*, 104 GEO. L.J. ONLINE 89, 92 (2015) ("*Heien's* reasoning will likely be applied beyond the context of investigative stops"); see also, e.g., *Rodrigues v. County of Hawaii*, Civ. No. 18-00027 ACK-RLP, 2018 WL 6070336 (D. Haw. 2018), at \*8 ("The Ninth Circuit has recognized, in several unpublished cases, the applicability of *Heien* in the arena of probable cause for arrest.").

vehicles,<sup>50</sup> frisking drivers and passengers,<sup>51</sup> conducting protective searches of certain areas of the vehicle interior,<sup>52</sup> conducting dog sniffs,<sup>53</sup> and making custodial arrests for even minor traffic violations.<sup>54</sup> Even after a stop hits its legal limit, officers can take certain additional action without violating the Fourth Amendment. For instance, officers can ask drivers for consent to search their person or vehicle.<sup>55</sup>

State law does not offer much help to address these problems. Most states do not have laws that ban pretextual traffic stops or consent searches during

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<sup>50</sup> See *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1977) (extending *Mimms* to hold that officers are permitted to routinely order passengers out of vehicles during lawful vehicle stops); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (holding that officers may routinely order drivers out of vehicles during lawful vehicle stops).

<sup>51</sup> See *Arizona v. Johnson*, 555 U.S. 323, 333 (2009) (holding that the Fourth Amendment does not forbid officers from routinely frisking drivers or passengers who are ordered out of vehicles during lawful traffic stops).

<sup>52</sup> See *Michigan v. Long*, 463 U.S. 1032, 1051 (1983) (holding that upon “specific and articulable facts” supporting that a stopped motorist is dangerous and may gain control of weapons, an officer may conduct a protective search of the areas of the vehicle in the detained suspect’s reach).

<sup>53</sup> See *Florida v. Harris*, 568 U.S. 237 (2013) (holding that a positive alert from a properly certified or trained drug-sniffing dog is sufficient to establish probable cause to conduct a search.”); *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding that the Fourth Amendment does not forbid using a drug-sniffing dog to sniff around the exterior of a stopped vehicle during a traffic stop, so long as its use does not prolong the length of a stop).

<sup>54</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a custodial arrest is lawful under the Fourth Amendment if an arrested person commits a criminal offense in the officer’s presence, no matter how minor).

<sup>55</sup> Under current Fourth Amendment law, a person’s consent to a search could be deemed voluntary even if the person being searched did not know or was not informed of their right to refuse consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). In *Bustamonte*, the Court stressed that valid consent under the Fourth Amendment requires that consent be given voluntarily and not the result of duress or coercion. *Id.* It further stressed that a person’s lack of knowledge of the right to refuse consent can be considered as one factor in determining voluntariness, but lack of knowledge itself is not determinative. *Id.* Moreover, ignorance of one’s right to refuse consent does not impair a person’s ability to voluntarily consent to a search under the Fourth Amendment. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). In *Bustamonte*, the Court stressed that valid consent under the Fourth Amendment requires that consent be given voluntarily and not the result of duress or coercion. *Id.* It further stressed that a person’s lack of knowledge of the right to refuse consent can be considered as one factor in determining voluntariness, but lack of knowledge itself is not determinative. *Id.*

traffic stops.<sup>56</sup> Rather, the extent to which state laws address racial profiling in traffic settings largely centers on data collection and dissemination.<sup>57</sup>

If anything, state laws exacerbate these injustices by creating additional justification for police to invoke their authority in traffic stop settings. For instance, failure to obey or comply with a police officer is illegal across states, and typically criminalized as a misdemeanor.<sup>58</sup> “Lawful order” statutes provide justification for law enforcement officers to invoke police powers, including the power to arrest, whenever they view the actions of motorists as merely disobedient.<sup>59</sup>

The facts surrounding the traffic stop and subsequent arrest of Sandra Bland vividly illustrate the various harms that lawful order statutes encourage in traffic

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<sup>56</sup> See NAACP, BORN SUSPECT: STOP-AND-FRISK ABUSES & THE CONTINUED FIGHT TO END RACIAL PROFILING IN AMERICA 1 (2014), [https://www.prisonpolicy.org/scans/naacp/Born\\_Suspect\\_Report\\_final\\_web.pdf](https://www.prisonpolicy.org/scans/naacp/Born_Suspect_Report_final_web.pdf) (noting that 17 states have laws that ban pretextual traffic stops).

Rhode Island provides a meaningful counterexample. In 2004, the Rhode Island enacted sweeping legislative reforms in response to findings from a legislatively-mandated, multi-year traffic study reporting that Black and Hispanic motorists in Rhode Island were stopped, searched, and arrested in disproportionate rates than white motorists. See AMERICAN CIVIL LIBERTIES UNION (ACLU), THE PERSISTENCE OF RACIAL PROFILING IN RHODE ISLAND: A CALL FOR ACTION 5 (2007), <http://riaclu.org/images/uploads/RacialProfilingReportJan07.pdf>; AMY FARRELL ET AL., NE. UNIV. INST. ON RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS ACT FINAL REPORT 8 (2013), <https://repository.library.northeastern.edu/files/neu:344633/fulltext.pdf>. Among other things, the new legislative reforms banned practices of racial profiling and specifically prohibited officers from asking for consent to search a vehicle or conducting dog sniffs without independent reasonable suspicion of non-traffic crime. R.I. GEN. LAWS § 31-21.2 (West 2020) (racial profiling); *id.* at § 31-21.2-5(b) (consent searches); *id.* at § 31-21.2-5(a) (dog sniffs). The legislative reforms also rendered evidence discovered in violation of these new prohibitions as inadmissible in any judicial proceeding. *Id.* at § 31-21.2-5(f).

<sup>57</sup> The Policing Project, *It's Time to Start Collecting Stop Data: A Case for Comprehensive Statewide Legislation* (Sept. 30, 2019), <https://www.policingproject.org/news-main/2019/9/27/its-time-to-start-collecting-stop-data-a-case-for-comprehensive-statewide-legislation> (“Currently there are 19 states that (for the most part) mandate data collection on every law enforcement initiated traffic stop”); *Law Enforcement Overview*, Nat’l Conf. St. Legislatures (June 19, 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx> (“At least 21 states collect demographic information for person’s whose vehicles are stopped by police.”).

<sup>58</sup> See James Mooney, Comment, *The Power of Police Officers to Give “Lawful Orders,”* 129 YALE L.J. 1568, 1574 (2020) (“At least forty-four states and the District of Columbia make it a crime to disobey the police.”). For a comprehensive analysis of variations in current “lawful-order” statutes see *id.* at 1574-1586. In addition to general “lawful order” statutes, many states also have specific statutes against failure to obey or comply with officers that have traffic-related powers. See *id.* at 1578 (“[T]wenty-seven states and the District of Columbia provide that people must obey command from officers with traffic-control powers.”); see *id.* at 1578 & n.46 (documenting state statutes that require civilians to obey officers with traffic-control powers).

<sup>59</sup> Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 306 (2017) (“High numbers of arrests in failure-to-comply and related offenses suggest that the police are arresting people who are not doing anything illegal.”); Margaret Raymond, *The Right to Refuse the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1521 (2007) (“Often police view the failure to comply with their direction—whether authorized or not—as sufficient to justify arrest.”).

stop settings.<sup>60</sup> Bland, a 28-year-old a Black woman, was pulled over in the middle of the day by a male Texas state trooper for failing to signal. The trooper asked Bland for her driver’s license and registration and walked to his patrol car with the documents. Several minutes later, the trooper – intending to give Bland a warning – approached the driver’s window. Sensing that Bland was irritated, the trooper asked if she was okay. Bland responded that she was unhappy about being pulled over. After Bland explained why she was upset, the trooper asked, “are you done,” and then requested she put out her cigarette. Bland responded, “I’m in my car, why do I have to put out my cigarette?”

Irritated that Bland would not comply, the trooper then ordered Bland out of the car. Bland refused, expressing that she did not have to step out. The trooper then opened the driver’s door and tried to pull Bland from the car. Bland refused and did not want to talk to the cop other than to identify herself for the purposes of the traffic ticket. The officer then grabbed Bland, after which she screamed “Don’t touch me, I’m not under arrest.” The trooper then yelled that she was under arrest. Bland asked, “For what?” The trooper continued to order her out of the car, yelling “I will light you up!” while pointing a Taser. Bland yelled, “You’re doing all of this for a failure to signal?” After exiting the car, the trooper put Bland’s hands behind her back, handcuffed her, slammed her head on the ground, and told her that she was being arrested for failure to comply. The trooper told Bland that he was initially going to give her a warning, but was now throwing her in jail. Three days later, Bland was found hanging from a plastic bag in her jail cell in an apparent suicide.

Given these trends in the law, it should be no surprise that a robust body of empirical research documents how people of color are not only disproportionately stopped, but also disproportionately questioned, searched, arrested, and subjected to force during traffic stops.<sup>61</sup> A recent study conducted by researchers affiliated with the Stanford Open Policing Project illustrates the current extent of these problems. The researchers investigated of over 60 million state patrol stops across 20 states between 2011 and 2015.<sup>62</sup> Their findings revealed widespread racial disparities in stop, citation, search, and arrest rates between white and non-white drivers. Specifically, the data showed that Black drivers were stopped more often than white drivers at 1.4 times the rate.<sup>63</sup> Black

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<sup>60</sup> The facts to follow surrounding the traffic stop and subsequent arrest of Sandra Bland were captured on a released dashcam video. *Dashcam Footage of Sandra Bland's Arrest During a Traffic Stop Before Her Death in Police Custody - Video*, GUARDIAN (July 21, 2015, 9:40 PM), <https://www.theguardian.com/us-news/video/2015/jul/22/dash-cam-sandra-bland-arrest-video>. For a critical analysis of issues surrounding “lawful orders” in the Sandra Bland traffic stop see Belen v. Lowrey-Kinberg & Grace Sullivan Buker, *“I’m Giving You a Lawful Order”*: *Dialogic Legitimacy in Sandra Bland’s Traffic Stop*, 51 L. & SOC’Y REV. 379, 400-02 (2017).

<sup>61</sup> See sources cited in *supra* note 3.

<sup>62</sup> PIERSON, ET AL., *supra* note 61, at 1.

<sup>63</sup> *Id.* at 5. The researchers controlled for gender, age, location, and year. Racial disparities in stops did not emerge for Hispanic drivers, who were stopped at 0.7 times the rate of white drivers. *Id.*

drivers had 19% higher odds and Hispanic<sup>64</sup> drivers had 34% higher odds of receiving a traffic ticket than white drivers.<sup>65</sup> Further, Black drivers were searched at 2.1 times the rate and Hispanic drivers were searched at 1.7 times the rate than that of white drivers.<sup>66</sup> Black drivers were also arrested at 1.9 times the rate and Hispanic drivers were arrested at 2.0 times the rate than that of white drivers.<sup>67</sup>

As the researchers recognized, these disparities do not necessarily reflect racial bias in policing.<sup>68</sup> Accordingly, the study used two additional statistical tests to test for racial bias. The first test – the outcome test – focuses on the proportion of searches in which officers find contraband (the “hit rate”).<sup>69</sup> That test revealed that searches of Hispanic drivers were less successful than those of white drivers (22% versus 28%), but that white and black drivers had relatively comparable hit rates (28%).<sup>70</sup> The second test – the threshold test – estimates the evidentiary thresholds at which officers search drivers of specific races.<sup>71</sup> The threshold test “simultaneously estimates race-specific search thresholds and risk distributions that are consistent with the observed search and hit rates across all jurisdictions.”<sup>72</sup> That test revealed that the bar for searching black and Hispanic drivers was lower than the bar for searching white drivers.<sup>73</sup> Specifically, black drivers had a 16% threshold and Hispanic drivers had a 14% threshold, compared to a 20% threshold for white drivers.<sup>74</sup>

Thus, to achieve fairness and equality in traffic enforcement, deeper reforms are needed that reorient the role of police in the traffic space. In line with this goal, the next Part advances a new normative vision of our driving system that illuminates how traffic enforcement is possible without the police.

## II. A NEW FRAMEWORK FOR TRAFFIC ENFORCEMENT

A useful starting point to reimagine the role of police in the traffic domain is to consider the history behind why police became involved in traffic enforcement in the first place. Professor Sarah Seo’s historical work illustrates that police became increasingly involved in traffic law enforcement a century

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<sup>64</sup> The term “Hispanic” is used in the study.

<sup>65</sup> *Id.* at 6. The researchers controlled for driver age, gender, location, year, stop quarter, stop weekday, and stop hour. *Id.*

<sup>66</sup> *Id.* The researchers controlled for stop location, date and time, and driver age and gender.

<sup>67</sup> *Id.* at 7. The researchers controlled for driver age and gender, and stop date, time, and location. *Id.*

<sup>68</sup> *Id.* at 1 (noting that “disparities may stem from a combination of factors—including differences in driving behavior—and are not necessarily the result of bias”).

<sup>69</sup> *Id.* at 8.

<sup>70</sup> *Id.* at 9.

<sup>71</sup> *Id.* For a more comprehensive description of the threshold test and how the researchers applied the test in the study see *id.* at 9-12.

<sup>72</sup> *Id.* at 9.

<sup>73</sup> *Id.* at 11

<sup>74</sup> *Id.*

ago with the rise of the mass production of the automobile.<sup>75</sup> The proliferation of traffic laws as a response to growing public safety concerns invited greater reliance on police to maintain order and public safety on roads and highways.<sup>76</sup>

This historical account demonstrates that police do not have an inherent role in traffic enforcement. Rather, police assumed this role when significant changes in our driving system caused motor vehicles to pose a more probable and widespread public safety threat.<sup>77</sup> This justification for relying on police to enforce traffic laws, however, loses force if traffic enforcement is possible through non-police alternatives.<sup>78</sup>

Consistent with this idea, this Part advances a different normative vision of our driving system in which police-initiated traffic enforcement is replaced with non-police alternatives. To summarize the framework, jurisdictions would redelegate the bulk of traffic enforcement to newly created public agencies (what I call “traffic agencies”).<sup>79</sup> Traffic agencies would operate wholly independent of the police and hire their own public employees (who I call “traffic monitors”) that conduct and oversee traffic enforcement. Traffic monitors would enforce traffic laws through in-person traffic stops<sup>80</sup> and handle aspects of traffic enforcement that jurisdictions decided to automate from start to finish.<sup>81</sup> To the extent that exceptions must be made, police would only be allowed to conduct traffic stops for a narrow set of “serious” traffic violations that clearly involve criminality or an actual or imminent threat of harm to others (for instance, driving a stolen vehicle, hit-and-run, or vehicle racing). To achieve fairness and equality in traffic enforcement, the framework includes two additional law and policy reforms: (1) reevaluating the breadth and imprecision of traffic codes so that traffic law and enforcement only focuses on driving behaviors that pose an imminent public safety threat, and (2) reducing financial and professional incentives that contribute to aggressive and biased traffic enforcement (namely, restructuring traffic fines and fees systems and prohibiting traffic ticket issuances as a measure of professional performance).<sup>82</sup>

This framework provides a model for top-down lawmaking<sup>83</sup> at the state and local levels to remove the police from traffic enforcement. In this regard, the

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<sup>75</sup> See generally SARAH SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM (2019).

<sup>76</sup> *Id.* at 58.

<sup>77</sup> *Id.* at 30.

<sup>78</sup> A more thorough discussion of traffic safety issues will be provided *infra* Part IV.A.

<sup>79</sup> See *infra* Part II.B.1.

<sup>80</sup> See *infra* Part II.B.2.

<sup>81</sup> See *infra* Part II.B.3.

<sup>82</sup> See *infra* Part II.C.

<sup>83</sup> See Keith A. Findley, *Implementing the Lessons From Wrongful Convictions: An Empirical Analysis of Eyewitness Identification Reform Strategies*, 81 MO. L. REV. 377, 384 (2016) (“Top-down approaches typically involve legislation or judicial decisions demanding compliance with best practices and defining for police

framework presumes that the decision to stop or significantly curb police-involvement in traffic enforcement should not be left to the discretion of law enforcement agencies and individual officers.

To illustrate this point, consider recent events in the City of Oakland. In 2016, researchers affiliated with the Stanford Open Policing Project released a report finding that Oakland Police Department officers stopped, searched, handcuffed, and arrested Black motorists at significantly higher rates than white motorists.<sup>84</sup> The Oakland Police Department responded by encouraging officers to significantly reduce traffic stops for minor traffic violations (for instance, rolling through a stop sign or driving with a broken windshield or taillight) that posed no safety threat at the time of occurrence.<sup>85</sup> After the change, the number of traffic stops on black drivers decreased by 61 percent in 2017, another 55 percent in 2018, and another 51 percent as of November 2019.<sup>86</sup> Nonetheless, major disparities in traffic stop and arrest rates between Black and white drivers persisted.<sup>87</sup> In 2018, over 10 times as many Black drivers were stopped in the City of Oakland compared to white drivers (10,874 versus 895), in spite of the department's effort to curb racial disparities in traffic enforcement.<sup>88</sup>

The remainder of this Part sketches what these top-down reforms to traffic enforcement would look like more concretely. Section A first discusses structural reforms that would remove the police from traffic enforcement. Section B explores structural reforms that would create non-police alternatives

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the content of those best practices.”); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 934 (2006) (explaining that “[l]egislation builds law from the top down by creating general principles that cover future disputes.”). This top-down approach mirrors current federal attempts to achieve police reform in local police departments. *See, e.g.*, structures of transparency that promote accountability and cross-jurisdictional learning.”); Kami Chavis Simmons, *New Governance and the "New Paradigm" of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373, 416 (2010) (“The current federal police-reform process is reminiscent of top-down command-and-control regulation as opposed to a bottom-up approach that considers the viewpoints of a wide range of potential stakeholders.”). As scholars have noted, at times top-down approaches may be necessary or useful to achieve police reform. *See, e.g.*, Harmon, *supra* note 9, at 4 (proposing a new approach to 42 U.S.C. § 14141 that “induce[s] departmental reform as well as compel[s] it”); Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 154 (2016) (“Top-down reform, initiated by the federal government, may be necessary to bring about reform in some police departments.”). It is important to note, however, that some scholars have described shortcomings with past top-down approaches to police reform. *See, e.g.*, Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS PUB. L. REV. 57, 66 (2012) (discussing failure of top-down police-reform strategies).

<sup>84</sup> SOCIAL PSYCHOLOGICAL ANSWERS FOR REAL-WORLD QUESTIONS (SPARQ), THE STANFORD REPORTS ON IMPROVING POLICE-COMMUNITY RELATIONS IN OAKLAND CALIFORNIA (2016), <https://stanford.app.box.com/v/OPD-Executive-Summary>.

<sup>85</sup> Rachel Swan, *To Curb Racial Bias, Oakland Police Are Pulling Fewer People Over. Will It Work?*, SAN FRANCISCO CHRONICLE (Nov. 16, 2019, 5:12 PM), <https://www.sfchronicle.com/bayarea/article/To-curb-racial-bias-Oakland-police-are-pulling-14839567.php>.

<sup>86</sup> *Id.*

<sup>87</sup> *See Racial Disparity in Oakland Traffic Stops Remains Despite Police Department Changes*, CBSLocal.com (Nov. 18, 2019, 6:52 PM), <https://sanfrancisco.cbslocal.com/2019/11/18/racial-disparity-in-oakland-traffic-stops-remains-despite-police-department-changes/>.

<sup>88</sup> Swan, *supra* note 85.

for traffic enforcement. Section C then explores additional law and policy reforms to help achieve fairness and equality in traffic enforcement.

## **A. Removing Police from Traffic Enforcement**

This Section sketches what removing the police from traffic enforcement would look like more concretely.

### **1. Which Stops Would Be Prohibited**

#### **a. “Routine” Traffic Stops Based on Minor Traffic Violations**

Police officers would no longer be able to conduct “routine” traffic stops based on minor traffic violations (for instance, speeding, failing to maintain a lane, running a red light, or failing to obey a traffic device).<sup>89</sup> Those traffic violations would be exclusively enforced through non-police agencies and actors instead, as detailed in the next Section.<sup>90</sup> This change would produce a monumental shift in traffic regulation. Most of the tens of millions of traffic stops conducted each year are based on minor traffic violations.<sup>91</sup>

#### **b. Pretextual Traffic Stops**

Removing the police from minor traffic violation enforcement would also mean that law enforcement officers could no longer conduct pretextual vehicle stops based on minor traffic violations. Pretextual traffic stops are an institutionalized practice across U.S. police departments and enable officers to initiate contact with motorists to peruse for evidence of non-traffic crime without reasonable suspicion or probable cause.<sup>92</sup> As discussed later in this Article, eliminating pretextual traffic stops has considerable benefits for policing fairness and equality along the lines of race and class.<sup>93</sup>

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<sup>89</sup> Harris, *supra* note 36, at 311 (listing examples of “minor” traffic violations as “speeding, failing to signal or make a complete stop, touching a lane or center line, or driving with a defective piece of vehicle equipment”).

<sup>90</sup> See *infra* Part III.B.2.a.

<sup>91</sup> See, e.g., BAUMGARTNER ET AL., *supra* note 1, at 52-53 (“In North Carolina alone, millions have been pulled over for minor violations”). Justice Stevens recognized this point in his dissent in *Maryland v. Wilson*. *Maryland v. Wilson*, 519 U.S. 408, 417-18 (1997) (Stevens, J., dissenting) (“Most traffic stops involve otherwise law-abiding citizens who have committed minor traffic offenses”).

<sup>92</sup> Carbado, *From Stopping*, *supra* note 2, at 156 (“*Whren* is problematic not only because it creates an incentive for police officers to engage in pretextual stops, but also because it legalizes those stops, which helps make them an institutional practice”); Harris, *supra* note 2, at 576; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) (discussing how traffic violation stops allow “arrests and searches of suspected drug dealers without any ex ante support for the suspicion, the very thing the probable cause standard is supposed to forbid”).

<sup>93</sup> See *infra* Part III.A.



## 2. Which Stops Would Be Allowed

### a. Outstanding Warrant and Felony Vehicle Stops

Removing police from traffic enforcement would not eliminate all police-initiated vehicle stops. Police would still have authority to pull over vehicles based on knowledge that a driver or passenger had an outstanding warrant. Police could also conduct felony vehicle stops based on sufficient indicia of involvement in non-traffic-related felonies (for instance, robbing a bank, burglarizing a home, etc.).<sup>94</sup> The police, however, could not use minor traffic violations as justification to pull over and initiate contact with felony suspects.

### b. Stops Based on a Narrow Set of “Serious” Traffic Offenses

To the extent that police officers retain any power to conduct stops based on traffic violations and exceptions must be made, that power would be limited to a very narrow set of “serious” traffic violations that more clearly involve criminality, or, an actual or imminent threat of harm to others. Examples include driving a stolen vehicle, hit-and-run offenses, and vehicle racing.

Admittedly, defining this narrow set is not an easy task and jurisdictions might disagree over which “serious” traffic offenses should be included in this set. History, however, holds some important lessons. Many states engaged in a similar endeavor when decriminalizing minor traffic offenses in the 1970s and 1980s.<sup>95</sup> During that period, over twenty states decriminalized minor traffic violations by removing criminal sanctions, reclassifying the violations as noncriminal offenses, and streamlining their adjudication to the administrative realm.<sup>96</sup> In those jurisdictions, certain “serious” traffic violations remained criminalized.<sup>97</sup> Common examples included: (1) driving under the influence, (2) driving without, with a revoked, or with a suspended, driver’s license or vehicle registration, (3) reckless driving, (4) failure to stop at the direction of, or eluding, a police officer, (5) vehicle racing, and (6) excessive speeding (over 30 mph above the speed limit).<sup>98</sup>

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<sup>94</sup> See, e.g., Lexington Police Department, *Traffic Law Enforcement*, G.O. 1992-02G, § IV.D 5 (2016), <https://www.lexingtonky.gov/sites/default/files/2017-02/GO%201992-02G%20Traffic%20Law%20Enforcement.pdf> (describing a “felony stop” as “[a] traffic stop in which an occupant(s) of a vehicle are sought for the commission of a felony offense, or the stopped vehicle accurately matches the description of a suspect vehicle for any serious offense or for being a stolen vehicle.”).

<sup>95</sup> Woods, *supra* note 17, at 696-700 (providing an overview of traffic decriminalization across states).

<sup>96</sup> *Id.* at 696-700 (providing an overview of traffic decriminalization across states).

<sup>97</sup> *Id.* at 699.

<sup>98</sup> *Id.* at 699-700.

To be clear, I am not arguing that these “serious” traffic violations should remain in the hands of the police. As discussed later in this Article, there are growing calls to decriminalize or reduce the criminal consequences that attach to driver’s license offenses (for example, driving with no, without a valid, or with a suspended or revoked, driver’s license) as well as driving under the influence (DUI).<sup>99</sup> That analysis will explain how enforcing both of these “serious” traffic offenses through non-police alternatives could strengthen the underlying goals of these criminal law reforms.<sup>100</sup>

Rather, the key point here is to show that in the past, lawmakers in several states successfully carved out a narrow set of “serious” traffic offenses when executing broader traffic reforms. This lends support to the idea that it would be possible for lawmakers to do the same if exceptions must be made when removing traffic enforcement from the police.

## **B. Non-Police Alternatives to Traffic Enforcement**

This Section sketches how non-police alternatives to enforce traffic laws would unfold under the proposed framework.

### **1. The Creation of “Traffic Agencies” and “Traffic Monitors”**

First, jurisdictions would redelegate traffic enforcement duties to newly created public agencies (what I call “traffic agencies”).<sup>101</sup> These agencies would operate wholly independent of the police and hire their own public employees (who I call “traffic monitors”) to conduct and oversee traffic enforcement. As detailed below, traffic monitors would enforce traffic laws through in-person traffic stops<sup>102</sup> and handle all aspects of traffic enforcement that jurisdictions decided to automate.<sup>103</sup>

The function of traffic monitors would be strictly limited to traffic law enforcement, not criminal investigations. Traffic monitors would not be vested

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<sup>99</sup> See *infra* Parts III.B.2-3.

<sup>100</sup> See *infra* Parts III.B.2-3.

<sup>101</sup> See *infra* Part II.B.1. JELLE HEIDSTRA ET AL., TRAFFIC LAW ENFORCEMENT BY NON-POLICE BODIES (ESCAPE PROJECT) 11 (2000), [http://virtual.vtt.fi/virtual/proj6/escape/escape\\_d4.pdf](http://virtual.vtt.fi/virtual/proj6/escape/escape_d4.pdf). (“Non-police based enforcement may . . . be fully government-controlled”). In theory, governments could also create public-private partnerships under which traffic enforcement tasks are transferred to private organizations. *Id.* at 11 (“Non-police based enforcement may . . . be a public-private conjunction”). I am highly skeptical of these private-public partnerships in light of scholarly and public critiques of the ways in which private-public partnerships in correctional contexts, such as prisons and probation, exacerbate injustices and race- and class-based inequality in the criminal justice system. See, e.g., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005) (discussing privatization and prisons); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1100 (2015) (discussing privatization and probation).

<sup>102</sup> See *infra* Part II.B.2.

<sup>103</sup> See *infra* Part II.B.3.

with typical police powers to search or arrest.<sup>104</sup> They also would not be armed. Rather, their authority would be limited to initiating traffic stops for traffic law violations, requesting documentation, and issuing traffic citations.<sup>105</sup> With regard to documentation, traffic monitors could ask for driver documents (for instance, driver’s licenses, registration, and proof of insurance); run DMV checks to determine the current status of a driver’s license or registration; and inspect the VIN number on the vehicle dash. Traffic monitors would not be authorized, however, to run criminal background checks and traffic agencies would not have access to that information.

## **2. In-Person Traffic Stops**

### **a. “Routine” Traffic Stops Based on Minor Traffic Violations**

Rather than relying on police officers, jurisdictions would rely on traffic monitors to conduct “routine” traffic stops based on minor traffic violations instead. To reiterate, this would mean that non-police actors handled the overwhelming majority of traffic enforcement under this new framework.<sup>106</sup> This reform would also eliminate possibilities for police to initiate pretextual vehicle stops based on minor traffic violations.

### **b. More Difficult Stops That Could Allow Police Collaboration**

Collaboration between traffic monitors and the police during traffic stops would only be allowed in limited circumstances. Typically, those situations would occur when in addition to a minor traffic violation, a traffic monitor is also faced with a more “serious” traffic offense (perhaps, driving a stolen vehicle, driver’s license offenses, or DUI).<sup>107</sup> Traffic monitors would process the minor traffic violations and when necessary, request police assistance to handle the more “serious” traffic offense.<sup>108</sup>

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<sup>104</sup> This is similar to the scope of duties for non-sworn/civilian law enforcement positions in the United States today. JOHN S. DEMPSEY ET AL., AN INTRODUCTION TO POLICING 85 (9th edn. 2019) (“[T]raffic stops are one of the primary tasks of patrol officers.”) (“Nonsworn (civilian) members of police departments are not given traditional police powers and can exercise only the very limited arrest power given to ordinary citizens.”); Ross Wolf & Thomas Bryer, *Applying An Outcomes-Based Categorisation to Non-Warranted/Non-Sworn Volunteers in United States Policing*, 93 POLICE J. 42, 44 (2020).

<sup>105</sup> HEIDSTRA ET AL., *supra* note 101, at 31 (explaining that the “model for parking enforcement could be apt to other (mass) and low contact traffic offences that would allow for a standardized and routine enforcement procedure as well”).

<sup>106</sup> See, e.g., BAUMGARTNER ET AL., *supra* note 1, at 52-53.

<sup>107</sup> HEIDSTRA ET AL., *supra* note 101 (noting that with non-police based enforcement “the police organization may still have an advising, supervising, or otherwise important role in the whole process of enforcement”).

<sup>108</sup> *Id.* at 24 (“In such a multiple offence case, the competence of a non-police authority who detected it, is limited to one of the offences; for processing the other, police assistance must be requested.”)

As noted above, there are growing calls to decriminalize or to reduce the criminal consequences that attach to two types of “serious” traffic violations: (1) driver’s license violations,<sup>109</sup> and (2) driving under the influence (DUI).<sup>110</sup> The next Part will describe how limiting police-initiated traffic stops for both types of “serious” traffic offenses could help to achieve public safety while strengthening the goals of those criminal law reforms.<sup>111</sup> The analysis here merely explains the practicalities of how traffic monitors could be a useful intervention to achieve those goals by serving as first responders to enforce both traffic offenses.

Consider a traffic monitor who pulls over a vehicle for a minor traffic violation (for instance, speeding or running a red light) and after requesting relevant documentation, discovers that the driver does not have a valid driver’s license. The traffic monitor would process the minor traffic violation (i.e., speeding or running a red light) and request police assistance to process the driver’s license violation only if necessary.

Recent legislative reforms lend support to the idea that it would be possible for traffic monitors to enforce many types of driver’s license offenses without police assistance. For instance, in 2018, Idaho decriminalized many driver’s license violations as civil infractions punishable a fine.<sup>112</sup> The new legislation reclassified driving on an expired license as a civil infraction punishable by a maximum \$150 fine on the first offense and a maximum \$300 fine on the second offense.<sup>113</sup> The legislation also reclassified driving on a suspended license for not paying fines or for certain low-level offenses (for instance, a minor in possession of alcohol) as a civil infraction with similar maximum fines for first and second offenses.<sup>114</sup>

If it is possible to reclassify these driver’s license offenses as civil infractions, then it is also possible assign primary responsibility for enforcing those infractions to traffic monitors. Police involvement would only be necessary to remove unlicensed drivers with dangerous driving histories from the road.<sup>115</sup>

Traffic monitors could also be a useful intervention to strengthen reform efforts that intend to address DUI through the administrative process as opposed to the criminal framework. For instance, Canadian provinces have

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<sup>109</sup> See *infra* Part III.B.2.

<sup>110</sup> See *infra* Part III.B.3.

<sup>111</sup> See *infra* Part III.B.

<sup>112</sup> IDAHO CODE ANN. § 18-8001 (West 2020).

<sup>113</sup> *Id.* at § 18-8001(b).

<sup>114</sup> *Id.* Third offense violations remained criminalized a misdemeanor punishable by 6 months in jail and a maximum fine of \$1,000, as did driving on a suspended or a revoked license for other reasons, including DUI and reckless driving. *Id.*

<sup>115</sup> HEIDSTRA ET AL., *supra* note 101, 40 (“The expertise of the police could be best used for violations that definitively require a complex monitoring process and stopping the driver.”).

already instituted reforms that allow officers to impose roadside administrative penalties to first-time offenders caught driving under the influence, as long as the drivers have not caused injury or property damage.<sup>116</sup> The administrative sanctions include a 90-day license restriction, a \$500-\$1,000 fine, required enrollment in a responsible driver and ignition interlock program, and a 30-day vehicle impound.<sup>117</sup>

Through the lens of these reforms, consider a traffic monitor who pulls over a vehicle for a minor traffic violation (for instance, speeding or running a red light) or erratic driving consistent with DUI. After approaching the stopped vehicle, the traffic monitor observes signs of intoxication (for instance, smell of alcohol emanating from inside the vehicle or the driver's breath, slurred speech, glassy eyes, uncoordinated conduct, or open containers inside the vehicle).<sup>118</sup> The traffic monitor could conduct a DUI investigation, or request assistance from traffic monitors with specialized training to conduct DUI investigations. If sufficient evidence of DUI exists, then traffic monitors could issue citations and assign administrative sanctions for eligible DUI offenders. Police assistance would only be necessary for situations involving intoxicated drivers who are ineligible for administrative sanctions (perhaps, repeat DUI offenders).

This approach also makes administrative sense given that most DUI offenses are detected after police initiate a traffic stop based on traffic violations.<sup>119</sup> Moreover, a majority of the approximately 1.5 million arrests for DUI in the United States each year involve first-time offenders.<sup>120</sup>

### c. Stops Involving Non-Traffic Crime

A true normative commitment to remove police from traffic enforcement would mean that traffic monitors could not serve as eyes for the police, or mere substitutes that stand in place of the police, to detect and investigate non-traffic

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<sup>116</sup> See *Should Ontario Overhaul How It Charges Drunk Drivers?*, CBC.ca (Jan. 5, 2018: 9:00 AM), <https://www.cbc.ca/news/canada/ottawa/decriminalize-drunk-driving-madd-ontario-1.4473689> (discussing DUI reforms in British Columbia); Bill Kaufmann, *Alberta to Decriminalize Some Impaired Driving But Issue Stiffer Penalties*, Calgary Herald (June 5, 2020), <https://calgaryherald.com/news/politics/alberta-to-decriminalize-some-impaired-driving-but-issue-stiffer-penalties> (discussing DUI reforms in Alberta).

<sup>117</sup> *Should Ontario Overhaul How It Charges Drunk Drivers?*, *supra* note 116 (discussing DUI reforms in British Columbia); Kaufmann, *supra* note 116 (discussing DUI reforms in Alberta).

<sup>118</sup> Jordan Blair Woods, *Policing, Danger Narratives, and Routine Traffic Stops*, 117 MICH. L. REV. 635, 688 (2019) (listing common cues of intoxication during traffic stops).

<sup>119</sup> See Stephen D. Mastrofski et al., *Expectancy Theory and Police Productivity in DUI Enforcement*, 28 L. & SOC'Y REV. 113, 114 (1994) ("Most DUI offenses are detected as a result of officers' direct observation of suspicious or illegal driving, not reported accident.").

<sup>120</sup> LEANNA FIFTAL ALARID, COMMUNITY BASED CORRECTIONS 135 (11th ed. 2017); see also Minn. Dep't of Pub. Safety, *News Release, Impaired-Related Traffic Deaths Decline in 2014* (Sept. 24, 2015), ("The pattern in recent years is 40 percent of drivers arrested for DWI are repeat offenders and about 60 percent do not have any arrests on record.").

crime.<sup>121</sup> Accordingly, traffic monitors would only be authorized to request police assistance for a very limited subset of non-traffic criminal matters that involve violence or an imminent threat of violence (for instance, kidnapping or aggravated battery or assault). Requesting police assistance for other non-violent, non-traffic offenses (for example, drug offenses) would be beyond the scope of a traffic monitor’s duties and authority. This would be the case even if a traffic monitor sees evidence of non-violent, non-traffic crime in plain view during a traffic stop.

As discussed later in more detail, although undermining drug policing is an arguable cost,<sup>122</sup> this committed approach would put a major dent in the ability of the police to use traffic enforcement as a tool in the failed War on Drugs, which facilitates and encourages racial profiling on roads and highways.<sup>123</sup> It would also bring the purpose of traffic stops back to being truly about traffic safety and traffic law enforcement. As Professor David Harris has described, “[t]raffic stops must again become just that — traffic stops.”<sup>124</sup>

### 3. Automated Traffic Enforcement

To the extent that jurisdictions automate aspects of traffic enforcement, non-police alternatives could remove those tasks from the police as well. Automation is by no means required to enforce traffic laws and some scholars have identified several potential objections to automated traffic enforcement.<sup>125</sup> Recognizing its limitations, however, some scholars have hailed the potential of automated traffic enforcement to eliminate pretextual traffic stops and other

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<sup>121</sup> On this issue, important lessons can be learned from scholarship documenting how both the welfare system and the child welfare system have become tools of law enforcement and have exacerbated the criminalization of marginalized groups through collaboration and information sharing between civil servants in those systems and traditional police and criminal justice actors. See KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 52-56 (2011) (discussing how the welfare system has become a tool of law enforcement through information exchange); Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1285 (2004) (“The criminal justice system works with the child welfare system to take custody of an inordinate number of black children, especially in neighborhoods where both systems are concentrated.”).

<sup>122</sup> See *infra* Part IV.B.1.

<sup>123</sup> See *infra* Part IV.B.1; Johnson, *supra* note 4, at 1047 (“Racial profiling of young African-American and Latino men in traffic stops on the American roads and highways emerged as a central law enforcement tool in the “war on drugs.”); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 192 (1998) (“One undisputed consequence of the War on Drugs is the fact that disproportionate numbers of African Americans (poor African Americans in particular) have been convicted and imprisoned for drug offending.”).

<sup>124</sup> Harris, *supra* note 45, at 585.

<sup>125</sup> See, e.g., Joh, *supra* note 4, at 226-33 (discussing potential objections to automated traffic enforcement including (1) the legality of automated law enforcement, (2) the inevitability of discretion, (3) public reliance on partial enforcement, and (4) the political and social values of police discretion). These potential objects fit into a broader scholarly conversation about how sophisticated technology can erode transparency in policing. See generally, Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. (forthcoming 2021).

forms of racial profiling made possible through police-initiated traffic stops.<sup>126</sup> Many municipalities also view automation as a useful tool to enhance traffic safety,<sup>127</sup> and hundreds of municipalities in over 20 states currently use red light or speed cameras to enforce traffic laws.<sup>128</sup>

Automated traffic enforcement, however, is currently used as a secondary enforcement tool of the police to enforce traffic laws.<sup>129</sup> For instance, in some localities, the responsibility for conducting automated traffic citation review and issuing notices of liability lies entirely with sworn or retired officers.<sup>130</sup> To reduce costs and ease police workload, many municipalities currently rely on private third-party vendors or trained civilian (non-sworn) officers to initially review and sort information from red-light or speed radar cameras.<sup>131</sup> The images are

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<sup>126</sup> See I. Bennett Capers, *Techno-Policing*, 15 OHIO ST. J. CRIM. L. 495, 499 (2018) (discussing the possibility that red-light cameras will “lead to a reduction in pretextual stops”); Marco Conner, *Traffic Justice: Achieving Effective and Equitable Traffic Enforcement in the Age of Vision Zero*, 44 FORDHAM URB. L.J. 969, 998 (2017) (“Enforcement cameras wholly avoid interaction between the driver and officer, which can benefit all parties, and they can be operated in ways that eliminate any possibility of racialized bias or targeting.”); Joh, *supra* note 4, at 234 arguing that the introduction of automated highways and automated traffic enforcement systems “provides us with a different potential response to pretextual traffic stops”; Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 14 (2019) (“Camera-driven enforcement can be less likely to be racially biased than traffic stops by police officers.”); Robert J. Eger III et al., *The Policy of Enforcement: Red Light Cameras and Racial Profiling*, 18 POLICE Q. 397, 411 (2015) (“Our research would suggest that, in addition to using red light cameras to mitigate dangerous driving in certain intersections, it might be possible to use the cameras to address complaints of racial profiling behavior in certain neighborhoods or communities.”); Sarah Marx Quintanar, *Man vs. Machine: An Investigation of Speeding Ticket Disparities Based on Gender and Race*, 20 J. APP. ECON. 1, 1 (2017) (presenting study findings showing that “[i]n contrast to the automated cameras, the probability of a ticketed driver being female or black was higher when the ticket was given by a police officer”).

<sup>127</sup> See, e.g., NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY RED LIGHT CAMERA PROGRAM: PROGRAM REVIEW 1994-2017: 2018 REPORT 2 (2018), <https://www1.nyc.gov/html/dot/downloads/pdf/nyc-red-light-camera-program.pdf> (noting that New York City’s red-light camera program “has proven to be a valuable tool for deterring law-breaking and protecting New Yorkers at signalized intersections”).

<sup>128</sup> Governor’s Highway Safety Association (GHSA), *Speed and Red Light Cameras*, <https://www.ghsa.org/state-laws/issues/speed%20and%20red%20light%20cameras> (noting that 19 states and the District of Columbia have laws that permit the use of speed cameras and 21 states and the District of Columbia have laws that permit the use of red-light cameras); Insurance Institute for Highway Safety, U.S. *Communities Using Red Light Cameras*, <https://www.iihs.org/topics/red-light-running/red-light-camera-communities> (noting that as of May 2020, 340 U.S. communities are using red light cameras for traffic enforcement); Insurance Institute for Highway Safety, U.S. *Communities Using Speed Cameras*, <https://www.iihs.org/topics/speed/speed-camera-communities> (noting that as of May 2020, 153 U.S. communities are using speed cameras for traffic enforcement);

<sup>129</sup> See, e.g., *Dayton v. State*, 87 N.E. 176, 184 (2017) (describing that the City of Dayton, Ohio established “cameras as secondary enforcement tools so that the officers do not have to stop every violator”).

<sup>130</sup> See NHTSA, SYSTEM ANALYSIS OF AUTOMATED SPEED ENFORCEMENT IMPLEMENTATION 73 (2016) [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812257\\_systemanalysisase.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/812257_systemanalysisase.pdf) (showing that in 13 of 55 surveyed law enforcement agencies that started automated speed enforcement programs between 2008 and 2011 “all reviews were noted to be completely internal to the ASE [Automated Speed Enforcement] agency”).

<sup>131</sup> *Id.* at 73 (noting that police department supervisors spot-check violations deemed valid by processors in 29 of 55 surveyed law enforcement agencies that started automated speed enforcement programs between 2008 and 2011, and in 10 other agencies, citation reviews are performed by both vendor staff and sworn or retired police officers).

then sent back to law enforcement agencies for officers to determine whether sufficient evidence of a traffic violation exists and whether a traffic citation should be issued.<sup>132</sup>

In the proposed framework, structural reforms to traffic enforcement would go even further to remove the police from automated enforcement. Traffic agencies, which operate wholly independent of the police, would handle automated traffic enforcement entirely. Rather than relying on police (whether active or retired) or third-party vendors, traffic monitors would review footage and handle the entire citation process from initial review to the issuance of a traffic ticket.

Once automated traffic enforcement is delegated to traffic monitors, the process would be very similar to how automated traffic enforcement works today. The technology would detect traffic violations and identify traffic violators. A citation notice would then be mailed to the registered owner of the vehicle with details of the alleged violation along with copies of relevant evidence.<sup>133</sup> The notice would explain how vehicle owners could pay the applicable traffic fine or contest the citation.<sup>134</sup>

### C. Additional Reforms

The non-police alternatives discussed above hold the key benefit of dramatically reducing civilian contact with the police through traffic enforcement. At the same time, these non-police alternatives are not perfect and their shortcomings underscore a need for structural reforms to push even further to achieve fairness and equality in traffic enforcement.

For instance, traffic monitors who conduct in-person traffic stops might harbor their own biases that lead them to conduct traffic stops and issue traffic citations in unequal and biased ways. Redelegating traffic enforcement to traffic agencies might also worsen revenue-generating incentives for traffic monitors to issue tickets as a means of funding state and local budgets, as opposed to ensuring traffic safety.<sup>135</sup> Similar critiques on both fronts have been raised in

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<sup>132</sup> NHTSA, *supra* note 130, 76-77 (showing that in 53 of 55 surveyed law enforcement agencies that started automated speed enforcement programs between 2008 and 2011, police officers had the final responsibility for reviewing automated speed violations).

<sup>133</sup> KIMBERLY ECCLES ET AL., TRANSP. RESEARCH BD. OF THE NAT'L ACADS., NCHRP REPORT 729: AUTOMATED ENFORCEMENT FOR SPEEDING AND RED LIGHT RUNNING 21 (2012), <http://www.trb.org/Publications/Blurbs/167757.aspx> (providing guidelines for automated traffic enforcement systems).

<sup>134</sup> *Id.*

<sup>135</sup> See HEIDSTRA ET AL., *supra* note 101, at 71 (recognizing the concern of “municipalities making traffic safety objectives subordinate to the financial gain that can be generated by enforcement efforts”).



municipalities where non-sworn personnel currently handle parking enforcement.<sup>136</sup>

Automated traffic enforcement has similar shortcomings. Several studies have found that communities of color bear the brunt of current automated traffic enforcement programs.<sup>137</sup> Potential factors driving these unequal outcomes include the disproportionate placement of red light and speed cameras in neighborhoods of color as well as possibilities that camera operators are disproportionately targeting the driving behaviors of people of color for closer scrutiny.<sup>138</sup>

Thus, additional reforms will be needed to prevent non-police alternatives to traffic law enforcement from exacerbating racial and economic injustice in traffic enforcement and broadening the net-widening of the criminal justice system through unpaid traffic debt.<sup>139</sup> This next Section examines two additional law and policy reforms to accomplish these goals: (1) reevaluating the breadth and imprecision of traffic codes so that traffic law and enforcement only focuses on driving behaviors that pose an imminent public safety threat,<sup>140</sup> and (2) reducing financial and professional incentives that contribute to aggressive and biased traffic enforcement (namely, restructuring traffic fines and fees systems and prohibiting traffic ticket issuances as a measure of professional performance).<sup>141</sup>

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<sup>136</sup> See, e.g., Noli Brazil, *The Unequal Spatial Distribution of City Government Fines: The Case of Parking Tickets in Los Angeles*, 56 URB. AFF. REV. 823, 823 (2018) (presenting study findings showing that “the number of parking tickets is higher in neighborhoods with a larger presence of renters, young adults, and Black residents”); *Chicago Parking Enforcement Must be Fair and Equitable to All*, Chicago Sun Times, (June 13, 2019, 5:29 PM), <https://chicago.suntimes.com/2019/6/13/18663020/parking-tickets-city-vehicle-sticker-fees-enforcement-city-clerk> (discussing racial disparities in Chicago’s parking enforcement ticketing practices); Melissa Sanchez & Sandhya Kambhampati, *How Does Chicago Make \$200 Million a Year on Parking Tickets? By Bankrupting Thousands of Drivers*, MOTHER JONES (Feb. 27, 2018), <https://www.motherjones.com/crime-justice/2018/02/how-does-chicago-make-200-million-a-year-on-parking-tickets-by-bankrupting-thousands-of-drivers/>.

<sup>137</sup> See generally William Farrell, PREDOMINATELY BLACK NEIGHBORHOODS IN D.C. BEAR THE BRUNT OF AUTOMATED TRAFFIC ENFORCEMENT (D.C. POLICY CENTER), <https://www.dcpolicycenter.org/publications/predominately-black-neighborhoods-in-d-c-bear-the-brunt-of-automated-traffic-enforcement/> (“automated traffic cameras can be used in ways that unintentionally further racial disparities”); (discussing racial disparities in red light camera enforcement in Washington D.C.); WOODSTOCK INSTITUTE, THE DEBT SPIRAL: HOW CHICAGO’S VEHICLE TICKETING PRACTICES UNFAIRLY BURDEN LOW-INCOME AND MINORITY COMMUNITIES (2018), <https://woodstockinst.org/wp-content/uploads/2018/06/The-Debt-Spiral-How-Chicagos-Vehicle-Ticketing-Practices-Unfairly-Burden-Low-Income-and-Minority-Communities-June-2018.pdf>.

<sup>138</sup> WOODSTOCK INSTITUTE, *supra* note 137, at 7 (identifying “the spatial location of automated red light and speed cameras” as “one factor that could be influencing ticket trends”).

<sup>139</sup> See Natapoff, *supra* note 101, at 1094-1102 (discussing decriminalization and net-widening of the criminal justice system through revenue traps).

<sup>140</sup> See *infra* Part II.C.1.

<sup>141</sup> See *infra* Part II.C.2.

## 1. Reevaluating Traffic Codes

The breadth, and at times imprecision, of traffic laws enables vast police discretion in traffic stop settings that falls hardest on communities of color and economically vulnerable communities.<sup>142</sup> In a world of traffic without the police, traffic codes could be reexamined in two ways to better achieve fairness and equality in traffic enforcement. First, states and localities could trim traffic codes to only include traffic violations that put motorists or pedestrians at risk of imminent danger. Second, traffic codes could limit the circumstances under which traffic laws are enforced to only those situations that put motorists or pedestrians at risk of imminent danger.

To illustrate the value of these potential reforms for fairness and equality in traffic enforcement, consider the following pretextual traffic stop. In September of 2019, Phillip Colbert, a 22-year-old black man, was driving on an Arizona interstate to visit his father.<sup>143</sup> According to Colbert, a sheriff's deputy followed him closely for 10 minutes. At some point before the deputy initiated the traffic stop, Colbert began recording the encounter because he thought that it was strange that he was being followed when he had done nothing wrong. The deputy finally pulled Colbert over for hanging a tree-shaped air freshener from his rear-view mirror, which obstructed his driver's view in violation of state law. The deputy asked Colbert over 10 times if he smoked marijuana or had any cocaine or heroin, which Colbert denied. The deputy then asked Colbert to step out of the car and after Colbert complied, accused him of not being truthful because he appeared nervous. The deputy then asked for Colbert's consent to conduct a field sobriety test and to search his vehicle, which Colbert denied. After 40 minutes, the deputy let Colbert go without citing or arresting him.

Now imagine the same traffic stop through the lens of the two traffic code reforms described above. The first reform would redefine the traffic code to exclude trivial obstruction violations. As a result, the driver would not be violating any traffic laws, eliminating any traffic justification for traffic monitors to stop the driver under the new traffic enforcement approach. There would also be no legal grounds for traffic monitors or automated systems to cite the driver for the trivial obstruction violation. Under the second reform, even if the trivial obstruction violation remained in the traffic code, traffic monitors would

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<sup>142</sup> See *supra* Part I.

<sup>143</sup> The facts of the traffic stop on Phillip Colbert appear at Dave Biscobing, *Man Speaks to ABC15 After Being Pulled Over for "The Little Tree in [His] Car Window,"* ABC15.com (Oct. 9, 2019, 1:09 PM), <https://www.abc15.com/news/local-news/investigations/man-speaks-to-abc15-after-being-pulled-over-for-the-little-tree-in-his-car-window>; John Gutekunst, *Sheriff's Office Investigating Traffic Stop Over an Air Freshener*, ParkerPioneer.net (Nov. 6, 2019), [https://www.parkerpioneer.net/news/article\\_6b32c7bc-00bf-11ea-8425-6f2650642357.html](https://www.parkerpioneer.net/news/article_6b32c7bc-00bf-11ea-8425-6f2650642357.html); Meg O'Connor, *La Paz Cop Who Pulled Over Black Man for Air Freshener is Fired*, PHOENIX NEW TIMES, (Mar. 5, 2020, 1:31 PM), <https://www.phoenixnewtimes.com/news/black-man-pulled-over-driving-with-air-freshener-la-paz-arizona-11453861>.

not be justified in initiating a traffic stop because the placement of the air freshener on the rear view mirror did not pose an imminent threat to drivers or pedestrians. There would also be no legal grounds for traffic monitors or automated systems to cite the driver for the trivial obstruction violation because it did not pose an imminent threat to drivers or pedestrians.

In sum, the current breadth and imprecision of traffic codes enable these types of biased and pretextual traffic stops. Trimming the traffic code and honing the circumstances when traffic laws are allowed to be enforced would help to achieve fairness and equality in traffic enforcement in a world of traffic without the police.<sup>144</sup>

## **2. Reducing Financial and Professional Incentives for Biased and Aggressive Traffic Enforcement**

Structural reforms to traffic enforcement must also consider the financial and professional incentives that encourage aggressive and biased traffic enforcement.

### **a. Financial Incentives**

State and local governments benefit from aggressive and biased traffic enforcement by using traffic ticket revenue, including court fines and fees, to fund their respective budgets.<sup>145</sup> For instance, a recent report revealed that officers in Washington D.C. alone issued over \$1 billion in traffic and parking tickets between 2017 and 2019, which generated hundreds of millions of dollars in revenue.<sup>146</sup> Multiple studies show that traffic ticket practices increase at times when municipal tax revenues are lower or in times of municipal fiscal distress.<sup>147</sup>

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<sup>144</sup> Of course, these reforms could also have benefits for fairness and equality in both traffic enforcement and policing in the current driving regime in which police enforce traffic laws.

<sup>145</sup> Beth Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1552-53 (2020) (“[R]esearchers have linked increased traffic ticketing to both budgetary shortfalls and statutory limitations on other mechanisms for generating revenue such as property tax caps.”); Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J. LAW & ECON. 71, 71 (2009) (concluding based on results from an empirical study that “tickets are used as a revenue-generation tool rather than solely a means to increase public safety”).

<sup>146</sup> Michael O’Connell, *DC Issues Record Number of Traffic, Parking Tickets*, WASHINGTON D.C. PATCH, (Feb. 27, 2020, 5:52 PM EST), <https://patch.com/district-columbia/washingtondc/dc-issues-record-number-traffic-parking-tickets>.

<sup>147</sup> See, e.g., Garrett & Wagner, *supra* note 145, at 86 (finding that “negative changes in local revenue from the previous fiscal year are significantly correlated with the change in the number of tickets issued.”); Michael D. Makowsky & Thomas Stratmann, *More Tickets, Fewer Accidents: How Cash-Strapped Towns Make for Safer Roads*, 54 J.L. & ECON. 863, 865 (2011) (“When towns are in fiscal distress, government officials have an incentive to seek extra revenues not only through an increase in property taxes but also by increasing fines. One potential source of fines is traffic tickets.”); Min Su, *Taxation by Citation? Exploring Local Governments Revenue Motive for Traffic Fines*, 80 PUB. ADMIN. REV. 36 (2020) (finding that “counties increased per capita traffic fines by 40 to 42 cents immediately after a 10 percentage point tax revenue loss in the previous year”).

Communities of color are often targeted and harmed the most by these revenue generating practices. Traffic debt currently traps low income people, and especially low-income communities of color, in a vicious cycle of poverty and criminal justice involvement.<sup>148</sup> Today, the average total cost of a speeding ticket (including court fees) is \$150, although maximum fines for speeding can top \$2,000 in some states.<sup>149</sup> For many people living in poverty, the cost of a single traffic ticket is beyond their living means.<sup>150</sup> In addition to arrest and incarceration, unpaid traffic debt or failure to appear in court for a traffic ticket can result in hundreds of dollars of additional financial penalties, loss of a driver's license, and garnished wages.<sup>151</sup> This perpetuates the harmful cycle because many financially and economically vulnerable people need a driver's license to get to work, and without work, they cannot afford to pay fines, fees, and other traffic debt.<sup>152</sup>

Advocates are currently using both litigation and non-litigation tools to challenge fines, fees, and other economic sanctions that disproportionately harm low-income people.<sup>153</sup> Scholarly conversations and reform efforts have addressed how fines and fees are assessed and collected (for instance, requiring consideration of a defendant's ability to pay and the graduation of economic sanctions) as well as how to reduce the collateral consequences that attach to

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<sup>148</sup> Emily Reina Dindial & Ronald J. Lampard, *When a Traffic Ticket Costs \$13,000*, N.Y. TIMES ONLINE (May 27, 2019) (“The criminal justice system too often produces a self-perpetuating cycle, particularly for the poorest people, who can’t pay fines or hire lawyers to make charges go away.”); Veryl Pow, Comment, *Rebellious Social Movement Lanyering Against Traffic Court Debt*, 64 UCLA L. REV. 1770, 1774 (2017) (“[T]he failure to pay off traffic court debate can result in arrest and incarceration.”).

<sup>149</sup> Heidi Wallis, *Speeding Tickets: Where Does Your State Rank*, Esurance.com, <https://blog.esurance.com/speeding-tickets-where-does-your-state-rank/> (“The total cost of the average speeding ticket is \$150, but maximum fines for speeding vary by more than \$2,400 between states. Interestingly, some of the states where you’re most likely to receive a ticket also have the highest fines.”).

<sup>150</sup> See LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 2 (2015), <https://lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.20.15.pdf> (“As the fees have gone up, fewer people can afford to pay their tickets.”).

<sup>151</sup> LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., *supra* note 151, at 6 (discussing the various hardships people living in poverty can suffer when their driver’s licenses are suspended for inability to pay a traffic ticket or failure to appear in traffic court); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 271 (2011) (“[U]npaid parking tickets may be enforced through the garnishment of wages”); Pow, *supra* note 148, at 1774 (also noting arrest and incarceration).

<sup>152</sup> LAWYERS’ COMM. FOR CIVIL RIGHTS OF THE S.F. BAY AREA ET AL., *supra* note 151, at 6 (“[M]any who cannot pay lose their jobs because they need a license to work”); *id.* (“When people cannot work, they cannot pay traffic fines.”). For a more comprehensive discussion explaining how “substantive laws and enforcement patterns have criminalized and reproduced poverty in the United States” see Monica Bell et al., *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1479-1496 (2020).

<sup>153</sup> See Brandon L. Garrett et al., *Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463, 1465 (2020) (“Today, constitutional litigation, new policies and rulemaking by state supreme courts and bar association, and legislation have increasingly addressed the problem of fines, fees, and bail as they affect civil and criminal litigations.”); Fines & Fees Justice Center, “The Clearinghouse,” <https://finesandfeesjusticecenter.org/clearinghouse/?sortByDate=true> (listing litigation and legislative efforts to reform fines and fees in the legal system).

unpaid fines and fees (for instance, loss of a driver’s license).<sup>154</sup> Scholars have further explored possibilities of requiring revenue derived from economic sanctions to be redistributed to community-investment programs in over-policed and over-criminalized communities in order to achieve structural criminal justice reform.<sup>155</sup>

Calls for structural police reform involving traffic enforcement must connect to this broader scholarly and public dialogue about the need to reform fines, fees, and other systems of economic sanctions in traffic contexts and beyond.<sup>156</sup>

## b. Professional Incentives

Law and policy reforms are also needed to address professional incentives that encourage aggressive and biased traffic enforcement. Although illegal in several states, most states have not banned traffic ticket quotas.<sup>157</sup> Moreover, evidence suggests that even in states with traffic ticket quota bans, police departments have unspoken directives or use traffic stop and ticket rates as indicators of officer performance.<sup>158</sup>

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<sup>154</sup> Neil L. Sobol, Griffin v. Illinois, *Justice Independent of Wealth?*, 49 STETSON L. REV. 427-29 (2020) (summarizing current reforms involving fines and fees).

<sup>155</sup> See Colgan, *supra* note 145, at 1571-81.

<sup>156</sup> See generally Colgan, *supra* note 145 (using an abolition lens to discuss economic sanctions and structural criminal justice reform); Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 73-101 (2017) (discussing graduation reforms to economic sanctions); HARVARD CRIMINAL JUSTICE POLICY PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM (2016), <http://cipp.law.harvard.edu/assets/Confronting-Crim-Justice-Debt-Guide-to-Policy-Reform-FINAL.pdf>; see also MATTHEW MENENDEZ, ET AL., (BRENNAN CTR. FOR JUSTICE), THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 11-13 (2019), [https://www.brennancenter.org/sites/default/files/2019-11/2019\\_10\\_Fees%26Fines\\_Final5.pdf](https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf) (discussing recommendations for reform to fines and fees structures).

<sup>157</sup> States that have banned traffic ticket quotas include: California, Connecticut, Florida, Illinois, Missouri, Nebraska, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Texas. See CAL. VEH. CODE § 41602 (West 2020); CONN. GEN. STAT. ANN. § 7-282d (West 2020); FLA. STAT. ANN. § 316.640(8)(b) (West 2019); 65 ILCS 5/11-1-12 (West 2019); MO. ANN. STAT. § 575.320.1(6) (Vernon 2019); NEB. REV. STAT. § 48-235 (West 2020); N.J. STAT. ANN. § 40A:14-181.2a (West 2020); N.C. Gen. Stat. § 20-187.3(a) (West 2019); 71 PA. STAT. ANN. § 2001 (West 2020); R.I. GEN. LAWS § 31-27-25 (West 2020); S.C. CODE ANN. 23-1-245 (West 2020); TEX. TRANSP. CODE § 720.002 (West 2020).

<sup>158</sup> See WESLEY G. SKOGAN ET AL., ON THE BEAT: POLICE AND COMMUNITY SOLVING PROBLEM 51 (2019) (“[T]he success of traffic enforcement is usually measured by the number of traffic tickets written.”); Glenn French, *How Ticket Quotas Negatively Impact Police Morale and Public Trust*, POLICEONE (Nov. 21, 2016), <https://www.policeone.com/police-products/traffic-enforcement/articles/how-ticket-quotas-negatively-impact-police-morale-and-public-trust-SwfhCZgpnIIQhi1B/> (“Too often leadership simply places a number on an officer’s monthly performance and requires a certain number of violations to meet the minimum performance goal.”); Garrett & Wagner, *supra* note 145, at 74 (“There is evidence that some jurisdictions have linked police performance and pay to the number of tickets that officers issue.”); George Joseph, *NYPD Commander’s Text Messages Show How the Quota System Persists*, THE APPEAL (Dec. 12, 2018), <https://theappeal.org/nypd-commanders-text-messages-show-how-the-quota-system-persists/>.

In a world of traffic without the police, state or local laws prohibiting traffic agencies from instituting traffic ticket quotas are a good first step. More must be done, however, to discourage traffic agencies or supervisors from using traffic stop and citation rates as indicators of professional performance. In addition to state and local laws, traffic agencies could adopt internal policies and review processes to ensure that traffic stop and citation rates are not used as measures to evaluate an overall agency's or individual traffic monitor's productivity.<sup>159</sup>

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Pushing against the conventional wisdom that police are necessary to enforce traffic laws, the framework articulated above demonstrates that a different approach to traffic enforcement is possible. This remainder of this Article now turns to explore the benefits and drawbacks of embracing non-police alternatives to traffic enforcement in law and policy.

### III. BENEFITS OF TRAFFIC ENFORCEMENT WITHOUT POLICE

This Part explores the potential benefits of removing traffic enforcement from the police for public safety, policing, and criminal law reform. The analysis places primacy on the ways in which these areas of benefits relate to the experiences of Black, Latinx, and other marginalized communities that are vulnerable to over-policing and over-criminalization in today's driving regime. Section A examines four significant areas of benefits for policing (1) improving fairness and equality in policing,<sup>160</sup> (2) preventing escalation of police-civilian encounters,<sup>161</sup> (3) improving public perceptions of the police,<sup>162</sup> and (4) increasing police effectiveness through limiting the scope of the police function.<sup>163</sup> Section B then discusses how removing traffic enforcement from the police strengthens prior and unfolding criminal law reforms surrounding the criminalization of traffic offenses.<sup>164</sup>

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<sup>159</sup> Policing scholars have raised similar points involving the development of law enforcement agency policies to improve fairness in policing. *Cf.* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 812 (2012) (noting that “develop[ing] better policies” is one way that “[p]olice departments and local governments could do more to protect civil rights than they do now.”).

<sup>160</sup> *See infra* Part III.A.1.

<sup>161</sup> *See infra* Part III.A.2.

<sup>162</sup> *See infra* Part III.A.3.

<sup>163</sup> *See infra* Part III.A.4.

<sup>164</sup> *See infra* Part III.B.

## A. Policing

### 1. Fairness and Equality in Policing

First and foremost, removing traffic enforcement from the police would increase fairness and equality in policing along the lines of race and class in powerful ways. Exclusively relying on non-police actors to enforce minor traffic violations would drastically decrease civilian contact with the police through traffic enforcement. As discussed above, an overwhelming majority of the tens of millions of traffic stops conducted each year involves minor traffic violations.<sup>165</sup> Studies show that people of color are disproportionately stopped and subject to additional intrusive police activity through the police power to question, search, cite, arrest, and apply force during traffic stops.<sup>166</sup>

These structural reforms will also eliminate possibilities for police to use traffic violations as pretexts to initiate contact with motorists, and people of color, in order to peruse for evidence of non-traffic crime without reasonable suspicion or probable cause.<sup>167</sup> Put simply, there will be much fewer opportunities for officers to use traffic law enforcement as a pretext to stop vehicles and subsequently question, search, cite, arrest, or apply force during traffic stops. In our current driving regime where traffic enforcement and policing are intertwined, people of color and economically marginalized communities bear the brunt of these injustices.<sup>168</sup>

### 2. Escalation During Police-Civilian Encounters

A second potential benefit of decoupling traffic enforcement from the police involves reducing escalation during police-civilian encounters. When traffic stops escalate, the encounters jeopardize the safety of both stopped motorists and law enforcement officers.<sup>169</sup> The dominant narrative that routine traffic stops are especially dangerous settings for police, especially when combined with issues involving racial threat and anxiety,<sup>170</sup> encourage

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<sup>165</sup> See *supra* Part II.A.1.a.

<sup>166</sup> See sources cited in *supra* note 2.

<sup>167</sup> Harris, *supra* note 2, at 576; Stuntz, *supra* note 92, at 7 (discussing how traffic violation stops allow “arrests and searches of suspected drug dealers without any ex ante support for the suspicion, the very thing the probable cause standard is supposed to forbid”).

<sup>168</sup> See *supra* Part I.

<sup>169</sup> Woods, *supra* note 118, at 642 (noting “danger narrative[s] may instigate avoidable and unnecessary conflicts during routine traffic stops that undermine both officer and civilian safety”).

<sup>170</sup> Zackory T. Burns & Sachiko V. Donley, *Social Evaluative Mechanisms: A Potential Psychological Mechanism Coloring Police-Public Encounters*, 8 U.C. IRVINE L. REV. 1 (2018) (identifying “racial bias, stereotype threat, and racial anxiety” as “among the most highly cited” “psychological mechanisms that contribute to racially biased policing and increased racial violence”); Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2253 (2017) (“In sum, prior to any interaction, racial anxieties can cause officers and people of color to view each other with suspicion. During an interaction, these anxieties can cause each to interpret the other’s ambiguous behaviors through a biased lens.”); L. Song Richardson, *Police*

conditions that lead officers to prematurely use force and take adversarial approaches in traffic stop settings.<sup>171</sup>

Available statistics on officer use of force are a useful starting point to examine these points. Police use of force is a leading cause of death for young men of color, and especially Black men.<sup>172</sup> According to a recent study, Black men face a 1 in 1,000 chance of being killed by police over their life course and are 2.5 times more likely than white men to be killed by a police officer over their life course.<sup>173</sup> National data from the Bureau of Justice Statistics reported that in 2015 (the latest available annual data), 1 million (or 2 percent) of the estimated 53.5 million people in the United States who had contact with the police during the prior 12 months experienced nonfatal threats or use of force.<sup>174</sup> Of the civilians who had contact with the police during the prior 12 months, only 1% of white civilians experienced nonfatal threats or use of force, compared to 3% of both black and Hispanic civilians.<sup>175</sup>

National data from the Bureau of Justice Statistics provides more detailed insight into the extent to which officer force is applied during traffic stops. According to the latest available annual data, 6% of drivers pulled over in traffic stops experience some type of officer force, ranging from shouting to physical force, and 1.5% specifically experienced physical force.<sup>176</sup> Although the data did not break down the data in terms of race, smaller scale studies have found that traffic stops are a common policing context in which officers use force, especially against people of color.<sup>177</sup> Recent high-profile officer killings of several black men during traffic stops, including Philando Castile, Samuel Dubose, and Walter Scott, among many others, illustrate the tragic ways in

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*Racial Violence; Lessons From Social Psychology*, 83 *FORDHAM L. REV.* 2961, 2972 (2015) (“The influence of implicit racial biases, stereotype threat, and masculinity threat on police behavior explains why racial violence is inevitable and overdetermined even in the absence of conscious racial animus.”).

<sup>171</sup> Woods, *supra* note 118, at 637 (“It should be further expected that officers may respond to perceptions of danger during routine traffic stops in hyperaggressive ways that instigate escalation, and as a result, potentially undermine both officer and civilian safety.”).

<sup>172</sup> Frank Edwards et al., *Risk of Being Killed by Police use of Force in the United States by Age, Race-Ethnicity, and Sex*, 116 *PNAS* 16793 (2019) <https://www.pnas.org/content/pnas/116/34/16793.full.pdf>.

<sup>173</sup> *Id.*

<sup>174</sup> DAVIS & WHYDE, *supra* note 293, at 16. It is important to note that researchers have discussed the lack of accurate and comprehensive national data on officer use of force. Joel H. Garner, *Progress Toward National Estimates of Police Use of Force*, 13 *PLoS One* (Feb. 15, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5813980/#pone.0192932.ref007> (discussing limitations of national estimates of police use of force).

<sup>175</sup> DAVIS & WHYDE, *supra* note 293, at 16

<sup>176</sup> LYNN LANGTON & MATTHEW DUROSE, (BUREAU OF JUSTICE STATISTICS), POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 10 (2013), <https://www.bjs.gov/content/pub/pdf/pbtss11.pdf>.

<sup>177</sup> See, e.g., Engel & Calnon, *supra* note 3, at 69 (presenting study findings that “2.7% of white drivers reported having use of force used against them, compared of 6.7% of blacks, 5.4% of Hispanics, and 1.7% of drivers from other races and ethnicities”).



which traffic stops escalate and result in lethal force against black and Latinx drivers and passengers.<sup>178</sup>

Of course, officers also experience violence during traffic stops. For instance, the most recent annual data from the Federal Bureau of Investigation’s Law Enforcement Officers Killed & Assaulted (LEOKA) Program reported that 6 of the 48 law enforcement officers that were feloniously killed in the line of duty in 2019 were conducting traffic violation stops.<sup>179</sup> Beyond statistics, routine traffic stops are commonly described in law enforcement circles, courts, and society at large as especially dangerous encounters for police.<sup>180</sup> For instance, during officer training, police academies use videos of extreme cases of officers being randomly shot during traffic stops that otherwise appear entirely routine in order to stress the importance of not becoming complacent on the scene and hesitating to use force.<sup>181</sup>

Research not only challenges these dominant officer danger narratives, but also offers insight into how escalation relates to the ways in which officers invoke police powers during traffic stops.<sup>182</sup> In other work, I presented findings from an empirical study — which is the most comprehensive empirical study on violence against the police during traffic stops to date — that showed how violence against officers is rare and that incidents that do involve such violence are typically low risk and do not involve weapons.<sup>183</sup> Specifically, using a conservative estimate, “the rate for a felonious killing of an officer during a routine traffic stop was only 1 in every 6.5 million stops, the rate for an assault resulting in serious injury to an officer was only 1 in every 361,111 stops, and the rate for an assault against officers (whether it results in injury or not) was

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<sup>178</sup> Mitch Smith, *Video of Police Killing of Philando Castile is Publicly Released*, N.Y. TIMES (Jun. 20, 2017), <https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html?partner=bloomberg> (discussing fatal traffic stop against Philando Castile); Katie Rogers, *Questions After Unarmed Ohio Man is Killed in Traffic Stop*, N.Y. TIMES (July 22, 2015), <https://www.nytimes.com/2017/06/20/us/police-shooting-castile-trial-video.html?partner=bloomberg> (discussing fatal traffic stop against Samuel Dubose); *The Walter Scott Murder*, N.Y. TIMES (Apr. 8, 2015), <http://www.nytimes.com/2015/04/09/opinion/the-walter-scott-murder.html?partner=bloomberg>.

<sup>179</sup> FBI, 2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED tbl.24 (2020), <https://ucr.fbi.gov/leoka/2019/topic-pages/tables/table-24.xls>. LEOKA data involving non-fatal assaults against officers for 2019 are not yet available, but in 2018, 4,809 (or 8.17 percent) of the 58,866 officers who were assaulted in the line of duty were conducting traffic stops or pursuits. FBI, 2018 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED tbl.84 (2019), <https://ucr.fbi.gov/leoka/2018/topic-pages/tables/table-84.xls>. That statistic, however, captures violence against officers that occurred not only during traffic violation stops, but also during vehicle pursuits for non-traffic crime.

<sup>180</sup> Woods, *supra* note 118, at 637.

<sup>181</sup> *Id.* at 695; Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1397-98 (2018) (discussing “officer survival” videos “which attempt to remind officers of the dangers of complacency by showing officers being brutally attacked, disarmed, or killed”); *id.* at \*1997-98 nn.137-44 (providing examples of “officer survival videos”).

<sup>182</sup> *Id.* at 668-84; see also Illya D. Lichtenberg & Alisa Smith, *How Dangerous Are Routine Police-Citizen Traffic Stops? A Research Note*, 29 J. CRIM. JUST. 419 (2001) (presenting study findings challenging the notion that routine traffic stops are especially dangerous police encounters);

<sup>183</sup> Woods, *supra* note 118, at 635.

only 1 in every 6,959 stops.”<sup>184</sup> The study findings further revealed that a common precursor to traffic stops escalating into violence against officers was the invocation of police authority in some way during the stop beyond asking for basic information, requesting documentation, or running a records check.<sup>185</sup> Common examples included ordering motorists out of vehicles, touching or handcuffing drivers or passengers, reaching inside the vehicles, telling drivers or passengers that they were under arrest, or asking for permission to search the vehicle or occupants.<sup>186</sup>

Traffic monitors would not be vested with authority to take these additional actions that are products of traditional police powers.<sup>187</sup> Perhaps if traffic stops were just about traffic, and not criminal investigations, then these invocations of police authority would no longer be necessary to effectuate the purpose of the stop. In this regard, removing traffic enforcement from the police reduces possibilities for traffic stops to escalate in ways that jeopardize civilian as well as officer safety.

### 3. Public Perceptions of Police

A third potential benefit of decoupling traffic enforcement from the police lies in improving public perceptions of the police. Public attitudes towards the police are important on several levels. They can offer insight into whether civilians trust and view police as legitimate actors, which in turn, can shape how civilians interact with law enforcement and legal institutions more generally.<sup>188</sup> Public attitudes towards police can also provide insight into issues surrounding efficiency, responsibility, and accountability in policing.<sup>189</sup>

A robust body of empirical literature shows that people of color, and Black and Latinx civilians in particular, have more negative attitudes towards law enforcement compared to white civilians.<sup>190</sup> Studies have also found that lower-

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<sup>184</sup> *Id.* at 668-84.

<sup>185</sup> *Id.* at 690.

<sup>186</sup> *Id.*

<sup>187</sup> See *supra* Part II.B.1.

<sup>188</sup> See, e.g., Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 262 (2008) (presenting study findings showing that “legitimacy will influence people’s willingness to cooperate with the police to fight crime in their communities.”).

<sup>189</sup> See, e.g., Jihong Solomon Zhao et al., *Public Satisfaction with Police Control of Disorder Crime: Does the Public Hold Police Accountable?*, 31 JUST. Q. 394, 398-400 (2014) (describing the accountability model of public satisfaction with the police); Justice Tankebe, *Viewing Things Differently: The Dimensions of Public Perceptions of Police Legitimacy*, 51 CRIMINOLOGY 103, 117 (2013) (testing “the hypothesis that the dimensions of public perceptions of police legitimacy comprise perceived police lawfulness, procedural fairness, distributive fairness, and effectiveness”).

<sup>190</sup> Robin Shepard Engel, *Citizens’ Perceptions of Distributive and Procedural Injustice During Traffic Stops With Police*, 42 J. RES. CRIME & DELINQ. 445, 450 (2005) (summarizing prior studies); Jennifer H. Peck, *Minority Perceptions of the Police: A State-of-the-Art Review*, 38 POLICING: INT’L J. POLICE STRATEGIES & MGMT 173 (2015) (providing a literature review summarizing studies on minority perceptions of the police).

income individuals have more negative attitudes towards the police.<sup>191</sup> As the most common interaction between police and civilians today, several studies in this body of research have treated traffic stops as the quintessential police-civilian encounter and used traffic stops as a lens to examine civilian attitudes towards police.<sup>192</sup>

Researchers, however, have reached very different conclusions in explaining which factors that have the largest role in shaping civilian attitudes towards police.<sup>193</sup> At least three major perspectives in the literature can be identified. First, researchers have concluded that individual characteristics, and most notably race and ethnicity, are the strongest predictors of civilian attitudes towards police.<sup>194</sup> Second, researchers have concluded that as opposed to individual characteristics (for instance, race and ethnicity), neighborhood context (for instance, poverty and crime rates) are better predictors of civilian attitudes towards police.<sup>195</sup> Third, rather than placing primacy on individual characteristics or neighborhood context, researchers have concluded that civilian perceptions of fairness surrounding the procedures used during police-civilian encounters has the most influence on civilian attitudes towards the police.<sup>196</sup>

Removing traffic enforcement from the police could potentially improve public perceptions of law enforcement in ways that are relevant to all three perspectives.<sup>197</sup> For instance, researchers who focus on race and ethnicity as predictors of negative attitudes of the police have argued that the extent to which people of color are stopped by the police affects how people of color come to view the police.<sup>198</sup> The structural reforms discussed above would scale back one major source of police-initiated stops.<sup>199</sup> With regard to neighborhood

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<sup>191</sup> See, e.g., Ronald Weitzer & Steven A. Tuch, *Race, Class, and Perceptions of Discrimination by the Police*, 45 CRIME & DELINQ. 494 (1999).

<sup>192</sup> See, e.g., Joselyne L. Chenane, *Traffic Stops, Race, and Perceptions of Fairness*, POLICING & SOC'Y (2019), <https://doi.org/10.1080/10439463.2019.1587436>; Engel, *supra* note 190; Chris L. Gibson et al., *The Impact of Traffic Stops on Calling the Police for Help*, 21 CRIM. JUST. POL'Y REV. 139 (2010).

<sup>193</sup> Engel, *supra* note 190, at 450-53 (summarizing different perspectives on factors that shape civilian perceptions of police).

<sup>194</sup> See, e.g., Vincent J. Webb & Chris E. Marshall, *The Relative Importance of Race and Ethnicity on Citizen Attitudes Towards the Police*, 14 AM. J. POLICE 45 (1995).

<sup>195</sup> Ronald Weitzer, *Citizens' Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819 (1999).

<sup>196</sup> See, e.g., Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & L. 215 (1990).

<sup>197</sup> Daniel P. Mears et al., *Thinking Fast, Not Slow: How Cognitive Biases May Contribute to Racial Disparities in the Use of Force in Police-Citizen Encounters*, 53 J. CRIM. JUST. 12, 20 (2017) ("Efforts to improve interactions with citizens in traffic encounters and everyday contact may hold the potential for altering perceptions about the police as unfair or discriminatory.").

<sup>198</sup> See, e.g., Webb & Marshall, *supra* note 194, at 59 ("Two significant effects on [attitudes towards police] for contact with police were detected, and both of those concerned stops by the police.").

<sup>199</sup> Of course, traffic stops are not the only type of police-initiated stop that falls hardest on communities of color. A robust body of literature describes how people of color have been historically and are still disproportionately subjected to stop-and-frisk tactics. Courts have acknowledged these injustices. See, e.g., Monica B. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 691 (2020) ("In the much-discussed

context, the previous discussion explained how aggressive and discriminatory traffic policing in communities of color and other economically vulnerable communities creates and perpetuates poverty in those communities.<sup>200</sup> The structural reforms discussed above could undercut the ability of traffic policing to contribute to the criminalization of poverty, especially if jurisdictions focus only on enforcing traffic law violations that pose imminent threats to public safety.<sup>201</sup> Finally, with regard to procedural justice, traffic stops enable police discretion and vast police authority in ways that can cause drivers and passengers to view how police act as well as the stops themselves as procedurally unfair.<sup>202</sup> Removing traffic enforcement from the police has the effect of structurally and significantly curbing possibilities for police to exercise discretion and invoke their authority in traffic stop settings.<sup>203</sup>

Although it is difficult to make comparative judgments and future research will be necessary, one prior study lends some support to the notion that delegating traffic enforcement to non-police actors could improve public perceptions of the police. Between the 1936 and 1992, New Zealand created and maintained a non-police governmental agency that was responsible for the bulk of traffic enforcement, including non-moving violations and minor moving violations.<sup>204</sup> Under this new framework, police were primarily concerned with investigating traffic accidents that resulted in injury and enforcing drunk driving laws.<sup>205</sup> One study conducted in the late 1960s compared New Zealand's traffic enforcement approach with Australia's traditional approach in which police

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2013 New York City Police Department (NYPD) case, *Floyd v. City of New York*, the United States District Court for the Southern District of New York held that the NYPD's stop-and-frisk policies and practices violated the Fourth and Fourteenth Amendment rights of Black and Latinx New Yorkers."); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill: Terry v. Ohio's Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1537 (2017) ("*Terry v. Ohio* facilitates the 'wholesale harassment' of African Americans"); Harris, *supra* note 36, 309 ("[T]he Supreme Court [in *Terry*] candidly acknowledged that police had often used stop and frisk tactics to control and harass black communities."); Maclin, *supra* note 4, at 368 ("The *Terry* Court acknowledged the racial impact and tensions caused by stop and frisk practices"); Tracey L. Mears, *The Law and Social Science of Stop and Frisk*, 10 ANN. REV. L. SOC. SCI. 335, 337 (2014) ("[T]here has been a great deal written regarding the concerns of many with respect to the racial dynamics of policing relying on this procedure.").

<sup>200</sup> See *supra* Part I.

<sup>201</sup> See *supra* Part II.C.

<sup>202</sup> Engel, *supra* note 190, at 474 (presenting study findings "suggest[ing] that citizens' perceptions of injustice are not based solely on the favorableness of the outcomes of traffic stops, but rather, are also based on citizens' perceptions of inequalities and unfair procedures disproportionately used by police during traffic stops").

<sup>203</sup> See *supra* Part II.A.

<sup>204</sup> DAVID H. BAYLEY, POLICE FOR THE FUTURE 135 (1994); P.R. Wilson & Duncan Chappell, *The Effects of Police Withdrawal from Traffic Control: A Comparative Study*, 61 J. OF CRIM. L., CRIMINOLOGY, & POLICE SCI. 567, 568 (1970). The reasons why traffic enforcement reverted back to police in New Zealand will be discussed *infra* Part IV.C.

<sup>205</sup> Wilson & Chappell, *supra* note 204, at 568. A key difference between the framework proposed in this Article and New Zealand's approach is that in New Zealand, the police did not lose authority to enforce traffic laws. In practice, however, non-police traffic officers "detected and prosecuted almost all non-moving traffic violations, and the majority of minor moving violations." *Id.*

were exclusively responsible for run-of-the-mill traffic enforcement.<sup>206</sup> The findings supported the conclusion that public respect for the police is adversely affected when police have a more dominant role in traffic enforcement.<sup>207</sup>

#### 4. Scope of the Police Function

A fourth benefit of removing traffic enforcement from the police involves increasing police effectiveness through limiting the scope of the police function. Scholars and commentators have described that society has grown to place too much responsibility on the police and vests too much power in officers to perform social functions.<sup>208</sup> Today, police perform a wide range of duties that include conducting criminal investigations, preventing and deterring crime, conducting accident investigations, handling traffic enforcement and control, providing social services, and responding to emergency and non-emergency civilian complaints.<sup>209</sup>

More often than not, police spend their time responding to incidents that do not involve violent crime. One recent report revealed that police officers in New Orleans, Sacramento, and Montgomery County, Maryland spend approximately 4% of their time on violent crimes.<sup>210</sup> Recent data from several city police departments show that less than 2% of calls for service involve violent crime, with minor and non-criminal incidents (including traffic matters) comprising a much larger percentage of calls.<sup>211</sup>

In the growing “defund the police” movement, advocates have emphasized that successful police reform not only entails scaling down police budgets, but also reevaluating what exactly police do.<sup>212</sup> As sociologist Alex Vitale describes, “[t]he origins and function of the police are intimately tied to the management of inequality of race and class.”<sup>213</sup> Rethinking the role of police in the traffic space is a critical part of these conversations.

Traffic stops typically occur in low-visibility settings where officers have vast discretion to invoke their authority—a combination that too often gives effect

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<sup>206</sup> See generally *id.*

<sup>207</sup> *Id.* at 571.

<sup>208</sup> See *infra* Part III.A.4.

<sup>209</sup> See LARRY K. GAINES & ROGER LEROY MILLER, CRIMINAL JUSTICE IN ACTION: THE CORE 101 (2018) (identifying “four basic responsibilities of police: (1) to enforce laws; (2) to provide services; (3) to prevent crime; and (4) to preserve the peace”).

<sup>210</sup> See Asher & Horwitz, *supra* note 23. The analysis was based on the definition of “violent crime” in the F.B.I.’s Uniform Crime Report, which includes homicide, robbery, rape and aggravated assault. *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> See Rashawn Ray, *What Does “Defund the Police” Mean and Does It Have Merit?* Brookings.edu (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

<sup>213</sup> VITALE, *supra* note 20, at 27.

to officers' conscious and unconscious biases along the lines of race and class.<sup>214</sup> Given the overlap between traffic enforcement and policing today,<sup>215</sup> the stakes are especially high for communities of color and other marginalized communities that are vulnerable to over-policing and over-criminalization on roads and highways.<sup>216</sup> Reimagining public safety through investing in non-police alternatives to enforce traffic laws, and laws involving minor traffic violations in particular, would improve police effectiveness by eliminating a major and unnecessary source of harmful low-visibility policing.<sup>217</sup>

Criticisms of the broad scope of the police function, however, have also been lodged from a law enforcement perspective.<sup>218</sup> Police already worry that society has grown to place too much responsibility on law enforcement.<sup>219</sup> For instance, one police chief recently explained that being an officer “in 2020 means being a part-time therapist, drug addition counselor, landlord-tenant arbitrator, homelessness advocate, private security guard, traffic controller, parking attendant, family counselor and animal control officer.”<sup>220</sup>

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<sup>214</sup> Gross & Barnes, *supra* note 4, at 655 (“Racial profiling depends on police discretion in choosing suspects”); Harris, *supra* note 36, at 302 (“[P]olice have nearly complete discretion to decide who to stop.”); Johnson, *supra* note 4, at 1076 (“[D]iscretion has exacerbated problems with racial profiling in law enforcement”); Maclin, *supra* note 4, at 356 (noting the low-visibility discretion that traffic stops afford officers); *id.* at 376 (noting the substantial discretion officers have in traffic stop settings); P.A.J. Waddington, *Race, and Police Stop and Search*, 44 BRITISH J. CRIMINOLOGY 889, 891 (2004) (“[A]bstention [from stopping and searching] can be selective and create a pattern in which some sections of the population suffer the intrusions of the police more than others.”).

<sup>215</sup> Harris, *supra* note 2, at 560 (“[P]olice use traffic regulations to investigate many innocent citizens.”); LaFave, *supra* note 10, at 1847 (recognizing that “police have co-opted our traffic codes as a weapon to be used in the ‘war on drugs.’”).

<sup>216</sup> Roth, *supra* note 7, at 429 (“[T]raffic offenses . . . can be a primary entry point into the criminal justice system for minorities in particular”).

<sup>217</sup> See Simone Weichselbaum & Nicole Lewis, *Support for Defunding the Police Department is Growing. Here’s Why It’s Not a Silver Bullet*, THE MARSHALL PROJECT (June 9, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/06/09/support-for-defunding-the-police-department-is-growing-here-s-why-it-s-not-a-silver-bullet> (“One of the main ideas [behind defunding the police] is that police departments are often the only agency to respond to problems — even if the problems are not criminal in nature.”); *id.* (“Advocates of defunding the police argue that many of these functions would be better left to other professionals.”).

<sup>218</sup> See sources cited in *supra* note 20; see also Brady Dennis et al., *Dallas Police Chief Says ‘We’re Asking Cops To Do Too Much In This Country,’* WASHINGTONPOST.COM (July 11, 2016, 12:29 AM), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/grief-and-anger-continue-after-dallas-attacks-and-police-shootings-as-debate-rages-over-policing/>; E. Tammy Kim, *What To Do About the Police*, THE NATION (Mar. 28, 2019), <https://www.thenation.com/article/archive/what-to-do-about-the-police/> (noting that “‘the police do too much’ has emerged as a collective creed, the only perspective shared by officers, Black Lives Matter activists, and criminologists alike”).

<sup>219</sup> Tracey L. Meares, *The Path Forward: Improving the Dynamics of Community-Police Relationships to Achieve Effective Law Enforcement Policies*, 117 COLUM. L. REV. 1355, 1365 (2017) (“Police already worry and complain that the public views them as social workers and expects them to respond to every problem that makes life in urban America difficult.”).

<sup>220</sup> Alfonso Morales, *Opinion: I’m Milwaukee’s Police Chief. Where’s What ‘Defunding the Police’ Might Mean*, MILWAUKEE JOURNAL SENTINEL, (Jul. 14, 2020, 9:20 PM), <https://www.jsonline.com/story/news/solutions/2020/07/14/mpd-chief-details-cuts-might-required-defund-police/5421894002/> (quoting Alfonso Morales, Chief of the Milwaukee Police Department).

Law enforcement advocates have argued that the breadth of the police function today places great mental and physical stress on officers, which undermines their ability to make split-second decisions on the job.<sup>221</sup> Many officers do not view traffic enforcement as “real” police work.<sup>222</sup> Moreover, dominant danger narratives that reinforce the contested idea that traffic stops are especially dangerous encounters for police can make traffic stops stressful experiences for officers.<sup>223</sup> Structural reforms that remove the police from traffic enforcement are responsive to these concerns.

## **B. Criminal Law Reform**

Removing traffic enforcement from the police also strengthens prior and unfolding criminal law reforms intended to address injustices that stem from the criminalization of traffic offenses. This Section examines how the structural reforms to traffic enforcement discussed above can strengthen criminal law reforms to decriminalize or reduce the criminal consequences that attach to: (1) minor traffic offenses, (2) driver’s license offenses, and (3) driving under the influence (DUI).

### **1. Decriminalization of Minor Traffic Offenses**

Over the past few decades, many states have decriminalized minor traffic violations as civil traffic violations.<sup>224</sup> These reforms reflected legislative and public judgments that traffic violations did not deserve the significant penalty of the criminal law, especially since most drivers have committed traffic violations at some point.<sup>225</sup> Most traffic decriminalization reforms occurred during the 1970s and 1980s, when over 20 states removed criminal penalties for traffic violations, reclassified the violations as noncriminal offenses, and streamlined

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<sup>221</sup> Leischen Stelter, *Officer Overload: Are Too Many Responsibilities Compromising Officer Safety?*, InPublicSafety.com (Feb. 14, 2017), <https://inpublicsafety.com/2017/02/officer-overload-are-too-many-responsibilities-compromising-officer-safety/> (noting that increasing responsibilities and “high levels of pressure” lead officers to “make poor split-second decisions”).

<sup>222</sup> David Giacompassi & David R. Forde, *Broken Windows, Crumpled Fenders, and Crime*, 28 J. CRIM. JUSTICE 397, 403 (2000) (noting that “[f]rom the perspective of many officers, enforcing traffic laws is not real police work”); P.A.J. WADDINGTON, *POLICING CITIZENS: POLICE, POWER, AND THE STATE* 8 (1999) (“Yet, traffic policing is regarded by police and public alike as a marginal police responsibility, almost a distraction from ‘real police work’”).

<sup>223</sup> Woods, *supra* note 118, at 639 (discussing officer danger narratives surrounding routine traffic stops) (“The narrative that routine traffic stops are fraught with danger to the police is longstanding.”).

<sup>224</sup> Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV 223, 239 (2007) (“Another class of low-level crimes that some legislatures abandoned over the last two decades is minor traffic offenses; several states have rewritten those offenses as civil infractions instead of misdemeanors.”).

<sup>225</sup> *Id.* at 239 (noting that traffic decriminalization “is surely an example of broad (but probably weak) popular support because it involves offenses that most people commit”); Woods, *supra* note 17, at 735 (noting that traffic decriminalization reform was in part, based on judgments that traffic violations “do not pose as serious enough threat to warrant the significant penalty of the criminal law”).

their adjudication to the administrative realm.<sup>226</sup> Proposals to decriminalize minor traffic violations, however, are still being introduced in states today where traffic violations technically constitute low-level crimes.<sup>227</sup>

In a previous Article, I described how traffic decriminalization reform has largely centered on modifying the sanctions that attach to minor traffic violations without restricting police authority and discretion in traffic stop settings.<sup>228</sup> I argued that if a true goal of traffic decriminalization is to prevent traffic violators from being funneled into the criminal justice system, then it is normatively inconsistent to remove criminal sanctions from traffic violations while keeping police authority and discretion in traffic stop settings intact.<sup>229</sup> The state retains access to an expansive set of crime-fighting tools in traffic stop settings through police powers to stop, question, search, and arrest, even when the stops are based on noncriminal traffic conduct.<sup>230</sup> I concluded that effective decriminalization not only requires restricting state power at the end of the criminal process through the imposition of sanctions, but also restricting state power at the early stages of the criminal process in how conduct is policed.<sup>231</sup>

Embracing non-police alternatives to enforce traffic laws would bring traffic enforcement in line with the true purpose of decriminalization in the many states that have decriminalized minor traffic violations. These changes in our driving system would limit the state's access to the expansive set of crime-fighting tools through traffic policing, which as described later in this Article, are neither effective nor efficient in furthering broader crime-control efforts.<sup>232</sup> Even in states where traffic offenses are still technically classified as low-level crimes, removing traffic enforcement from the police would more proportionately reflect the low severity of the offense in the criminal framework. Possibilities of achieving this outcome under our current Fourth Amendment framework are nonexistent given that Fourth Amendment precedent rejects crime-severity distinctions as a means to regulate police conduct.<sup>233</sup>

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<sup>226</sup> Woods, *supra* note 17, at 696-700 (providing an overview of traffic decriminalization in the 1970s-1980s).

<sup>227</sup> See, e.g., Riley Snyder, *Move By Key Democrat to Decriminalize Minor Traffic Violations Opposed By Police, Local Governments*, The Nevada Independent (Apr. 5, 2019, 2:00 AM), <https://thenevadaindependent.com/article/decriminalizing-traffic-tickets-to-civil-violations-standardize-fines-questioned-by-local-governments-courts>.

<sup>228</sup> Woods, *supra* note 17, at 680.

<sup>229</sup> *Id.* at 681.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 682.

<sup>232</sup> See *infra* Part III.B.

<sup>233</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (holding that a custodial arrest is lawful under the Fourth Amendment if an arrested person commits a criminal offense in the officer's presence, no matter how minor). For a more comprehensive discussion of crime-severity distinctions under the Fourth Amendment see generally Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011).



## 2. Driver's License Offenses

Exploring non-police alternatives to traffic enforcement also strengthens currently unfolding criminal law reform efforts involving the criminalization of driver's license offenses (for example, driving with no, without a valid, or with a suspended or revoked, driver's license). Loss of a driver's license is a common collateral consequence of criminal convictions<sup>234</sup> and sanction for failure to pay court or administrative debt (for example, fines, fees, or restitution).<sup>235</sup> Currently, 43 states suspend licenses for unpaid court or administrative debt.<sup>236</sup> More than 7 million people nationwide may have lost their driver's licenses for failure to pay such debt.<sup>237</sup>

Recent studies illustrate the racial and economic injustice surrounding the criminalization of driver's license offenses. A recent study from the State of Michigan reported that traffic offenses accounted for half of the state's criminal court cases in 2018.<sup>238</sup> Driving without a valid license was the third most common offense that led to jail sentences in the state.<sup>239</sup> The study further reported that Black individuals were more likely to go to jail for driving without a valid license than white individuals.<sup>240</sup>

A different report from the State of Florida found that between 2015-2017, more than 3.5 million license suspension notices were issued to Florida drivers for unpaid court debt.<sup>241</sup> 75% of driver's licenses suspended in 2016 remained suspended two years later.<sup>242</sup> Suspension rates were highest in areas with larger populations of people of color and low-income people, and Black drivers in

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<sup>234</sup> See e.g., 23 U.S.C. § 159 (2012) (requiring revocation or suspension of driver's licenses of individuals convicted of drug offenses for states not to lose federal highway funds); see also Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1801 (2012) ("Those convicted of certain crimes may lose the right to drive car.").

<sup>235</sup> *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 7-8 (2018); Mario Salas & Angela Ciolfi, LEGAL AID JUSTICE CTR., DRIVEN BY DOLLARS: A STATE-BY-STATE ANALYSIS OF DRIVER'S LICENSE SUSPENSION LAWS FOR FAILURE TO PAY COURT DEBT 2 (2017), <https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf>.

<sup>236</sup> Salas & Ciolfi, *supra* note 235, at 7-8.

<sup>237</sup> See Justin Wm. Moyer, *More than 7 million people may have lost driver's licenses because of traffic debt*, Washington Post (May 19, 2018), [https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d\\_story.html?noredirect=on&utm\\_term=.cd1af3c9ade5](https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.cd1af3c9ade5).

<sup>238</sup> MICHIGAN JOINT TASK FORCE ON JAIL AND PRETRIAL INCARCERATION, REPORT AND RECOMMENDATIONS 10 (2020), <https://courts.michigan.gov/News-Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf>.

<sup>239</sup> *Id.* at 10.

<sup>240</sup> *Id.* at 8.

<sup>241</sup> FINES & FEES JUSTICE CENTER, DRIVING ON EMPTY: FLORIDA'S COUNTERPRODUCTIVE AND COSTLY DRIVER'S LICENSE SUSPENSION PRACTICES 3 (2019), <https://finesandfeesjusticecenter.org/content/uploads/2019/11/florida-fines-fees-drivers-license-suspension-driving-on-empty.pdf>.

<sup>242</sup> *Id.* at 4.

particular had their license's suspended on average 1.5 times the rate they are represented in the general population.<sup>243</sup> In 2017, law enforcement officers in Florida issued over 232,000 citations for driving with a suspended license.<sup>244</sup>

To address these problems, legislation has been introduced and enacted in several states.<sup>245</sup> For example, legislation in Virginia recently took effect that (1) prohibits state courts from suspending a person's driver's license solely for failure to pay court fines and costs, and (2) renders anyone whose driver's license had been suspended solely for failure to pay court fines and costs eligible to have their driver's license reinstated without owing a reinstatement fee.<sup>246</sup> As noted above, in 2018, Idaho also decriminalized many driver's license offenses as infractions punishable by a fine only for first and second time offenses.<sup>247</sup> Cases are also pending in several states that challenge the constitutionality of driver's license suspensions for failure to pay fines and fees.<sup>248</sup>

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> New legislation or policies have been enacted in California, Illinois, Maine, Mississippi, Montana, Texas, and Virginia. See Cal. Dep't of Motor Veh., *DMV Removes Driving Suspensions for Failure to Pay Fines* (Mar. 15, 2018), <https://www.latimes.com/local/lanow/la-me-ln-driver-license-fees-20170629-story.html>; Dan Petrella, *Illinois to Reinstates 55,000 Driver's Licenses Suspended Over Unpaid Parking Tickets*, Chicago Tribune (Jan. 17, 2020), <https://www.chicagotribune.com/politics/ct-jb-pritzker-license-suspension-unpaid-tickets-20200117-y6gej7q6k5gitcoqre6hut5yuy-story.html>; ACLU Maine, *Legislature Overrides Veto of Bill to End Automatic License Suspensions for Unpaid Fines* (July 9, 2018), <https://www.aclumaine.org/en/press-releases/legislature-overrides-veto-bill-end-automatic-license-suspensions-unpaid-fines>; Southern Poverty Law Center, *SPLC Reaches Agreement With Mississippi to Reinstates Over 100,000 Driver's Licenses Suspended for Non-Payment of Fines* (Dec. 19, 2017), <https://www.splcenter.org/news/2017/12/19/splc-reaches-agreement-mississippi>; ACLU Montana, *Governor Bullock Signs HB 217 Into Law* (May 8, 2019), <https://www.aclumontana.org/en/news/governor-bullock-signs-hb-217-law-0>; Troy Closson, *Texas' Driver Responsibility Program Ends Next Month. Here's What that Means for You*, Texas Tribune.org (Aug. 20, 2019), <https://www.texastribune.org/2019/08/20/Texas-driver-responsibility-program-repeal-what-that-means-explained/>; Justin Wm. Moyer, *Va. Driver's Licenses, Suspended for Unpaid Court Debt, To Be Reinstated July 1*, WashingtonPost.com (June 3, 2019), <https://www.washingtonpost.com/transportation/2019/06/03/va-drivers-licenses-suspended-unpaid-court-debt-be-reinstated-july/>.

Legislation has been introduced in Colorado, Florida, Ohio, Oregon, and West Virginia. See Alex Burness, *Bills Seek to Reduce Colorado Driver's License Suspensions*, DenverPost.com, <https://www.denverpost.com/2020/01/28/colorado-drivers-license-suspension-fines-fees-2/>; Lynn Hulsey, *Changes Sought as Ohio Driver Suspensions Pile Up*, DaytonDailyNews.com (Dec. 3, 2018), <https://www.daytondailynews.com/news/state--regional-govt--politics/changes-sought-driver-suspensions-pile/80GFBrHxmpnP8aY5YqvDEM/>; Mary Ellen Klas, *Bill Would End Florida's Practice of Suspending Licenses for Driving While Broke*, Miami Herald (Jan. 21, 2020), <https://www.miamiherald.com/news/politics-government/state-politics/article239466463.html>; Dirk Vanderhart, *Oregon Considers Ditching Driving Suspensions for Unpaid Tickets*, ORB.org (Feb. 5, 2020), <https://www.opb.org/news/article/driving-suspension-unpaid-ticket-oregon/>; Brittany Ward, *Bill to End Driver's License Suspension for Unpaid Fines*, WVSTN.com (Jan. 31, 2020), <https://www.wvstv.com/top-news/bill-introduce-to-end-drivers-license-suspension-for-unpaid-fines/>.

<sup>246</sup> See Moyer, *supra* note 245.

<sup>247</sup> IDAHO CODE ANN. § 18-8001 (West 2020).

<sup>248</sup> Brandon L. Garrett, *Wealth, Equality Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 429-31 (2019) ("Litigation challenging driver's license suspension for failure to pay fines and fees has been recently brought, or is pending, in a range of states, including California, North Carolina, Michigan, Mississippi, Montana, Oregon, Tennessee, Virginia, and Washington.") For an overview of the constitutional

To date, these criminal law reforms have not focused on curbing police authority to enforce driver’s license laws. Policing, however, is a critical element that contributes to the funneling of drivers into the criminal justice system for driver’s license offenses. To illustrate this point, consider the facts of the U.S. Supreme Court’s heavily criticized decision in *Atwater v. City of Lago Vista*,<sup>249</sup> which held that a custodial arrest is lawful under the Fourth Amendment if an arrested person commits a criminal offense in the officer’s presence, no matter how minor.<sup>250</sup>

*Atwater* involved a traffic stop on Gail Atwater who was driving with her 3-year-old-son and 5-year-old daughter in the front seat.<sup>251</sup> All three were not wearing seatbelts.<sup>252</sup> The officer had previously stopped Atwater for a seatbelt violation involving her son, but ultimately issued a verbal warning after it became clear during the stop that the child was wearing a seat belt.<sup>253</sup> As subsequent descriptions of *Atwater* typically stress, rather than issuing a citation for the seatbelt violation in the subsequent stop at issue in the case, the officer decided to arrest, handcuff, and transport Atwater to the police station instead.<sup>254</sup>

Less of a focus of the case is that before arresting Gail Atwater, the officer also asked to see her driver’s license and insurance documentation.<sup>255</sup> Atwater told the officer that they were in her purse which had been stolen the day before.<sup>256</sup> Atwater, however, was able to produce a checkbook with her driver’s license number and home address on it, and the officer confirmed that Atwater was a licensed driver.<sup>257</sup> Nonetheless, state law required Atwater to carry her

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arguments in pending cases challenging driver’s license suspensions for failure to pay fines and fees see *id.* at 428-37.

<sup>249</sup> 532 U.S. 318 (2001). For critiques of *Atwater* see Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002) (critiquing *Atwater*’s historical analysis); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 331 (2002) (“The decision in *Atwater* has been widely criticized, even by conservatives, and with good reason.”); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 422 (2002) (noting that an important practical effect of *Atwater* was “affording police ‘constitutional carte blanche’ to execute warrantless arrests”).

<sup>250</sup> 532 U.S. at 323.

<sup>251</sup> *Id.* at 323-24.

<sup>252</sup> *Id.* at 324.

<sup>253</sup> *Id.* at 324 n.1.

<sup>254</sup> *Id.* at 324; see e.g., Davies, *supra* note 249, at 266 (“Officer Turek of the Lago Vista police department arrested Gail Atwater for driving without a seat belt (including not having her children in seat belts), put her in handcuffs, and took her to the police station.”); Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1203 (2020) (“In *Atwater*, Officer Turek decided to arrest Gail Atwater for failing to wear a seatbelt and to secure her children in their seatbelts while she was driving”).

<sup>255</sup> 532 U.S. 318 at 234.

<sup>256</sup> *Id.*

<sup>257</sup> *Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (1999) (Wiener, J. dissenting).

driver's license and proof of insurance.<sup>258</sup> Atwater was arrested and charged not only for the seatbelt violations, but also for driving without a license and failure to show proof of insurance.<sup>259</sup> She ultimately pleaded no contest to the seatbelt offenses, paid a \$50 fine, and the other charges, including the driver's license charge, were dismissed.<sup>260</sup> Nonetheless, the driver's license offense was still a basis for the arrest and subsequent charges.<sup>261</sup>

Now reimagine the facts of *Atwater* through the lens of the non-police enforcement alternatives proposed above. The traffic monitor would not have had the authority to arrest Gail Atwater for the driver's license violation or the seatbelt or insurance violations.<sup>262</sup> At most, the traffic monitor would have been authorized to issue citations for the traffic violations.<sup>263</sup> Reimagining *Atwater* in this way shows how limiting police-initiated traffic stops based on certain driver's license offenses, and relying on non-police enforcement alternatives instead, strengthens unfolding criminal law reforms that are intended to reduce the criminal consequences that attach to driver's license offenses.

### 3. Driving Under the Influence (DUI)

Non-police alternatives to traffic enforcement also create space to explore different enforcement approaches to address DUI. Today, every state has criminal laws prohibiting DUI, although those laws vary from state to state.<sup>264</sup> Public safety is the traditional justification for handling DUI within the criminal framework.<sup>265</sup> Lending some support to this view, 10,511 fatalities were caused by alcohol-impaired driving in 2018 (the latest available annual data).<sup>266</sup> This totaled 29 percent of all traffic fatalities that year.<sup>267</sup>

At the same time, scholars have critiqued the effectiveness of criminalizing DUI in deterring drunk driving and achieving public safety.<sup>268</sup> Lending support

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<sup>258</sup> 532 U.S. 318 at 234.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See *supra* Parts II.B.1 and II.B.2.

<sup>263</sup> See *supra* Parts II.B.1 and II.B.2.

<sup>264</sup> Richard J. Stringer, *Policing the Drunk Driving Problem: A Longitudinal Examination of DUI Enforcement and Alcohol Related Crashes in the U.S. (1985-2015)*, 44 AM. J. CRIM. J. 474, 482 (2020) ("state laws related to DUI and traffic safety vary across time and state").

<sup>265</sup> Andrea Roth, *The Uneasy Case for Marijuana as Chemical Impairment Under a Science-Based Jurisprudence of Dangerousness*, 103 CAL. L. REV. 841, 848 (2015).

<sup>266</sup> NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., TRAFFIC SAFETY FACTS: 2018 DATA 1 (2019) <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812864>.

<sup>267</sup> *Id.*

<sup>268</sup> See, e.g., H. Laurence Ross, *Decriminalizing Drunk Driving: A Means to Effective Punishment*, 24 J. APP. BEH. ANALYSIS 89, 89 (1991) (arguing that criminalizing DUI "fails to deliver punishment to drunk drivers with sufficient certainty and swiftness to support the credibility of the deterrent threat"); James D. Stuart, *Deterrence, Desert, and Drunk Driving*, 3 PUB. AFF. Q. 105, 105 (1989) (arguing that "increases in penalties for DWI offenses are not justified from the deterrence perspective").

to this idea, some studies have found no relationship between DUI arrest activity and DUI-related crashes.<sup>269</sup> Scholars have further critiqued criminalizing DUI on retributive grounds.<sup>270</sup> Informed by these critiques, some scholars have advocated for decriminalizing and addressing DUI through administrative procedures and penalties, including immediate driver's license restrictions.<sup>271</sup>

As noted above, jurisdictions outside of the United States are already moving in this direction. In 2010, British Columbia, Canada enacted legislation that gives officers discretion to offer roadside administrative penalties to first-time offenders caught driving under the influence, as long as the drivers have not caused injury or property damage.<sup>272</sup> The administrative sanctions include a 90-day license restriction, \$500 fine, required enrollment in a responsible driver and ignition interlock program, and a 30-day vehicle impound.<sup>273</sup> Researchers found a statistically significant decrease in alcohol-related collisions since the policy took effect, and more specifically, a 40.4% decline in fatal collisions, a 23.4% decline for injury collisions, and a 19.5% decline for property damage only collisions.<sup>274</sup> Similar partial decriminalization reforms, which have even garnered support from the CEO of Mothers Against Drunk Driving in Canada, have been enacted or are being introduced in other Canadian provinces.<sup>275</sup>

Similar to decriminalization reforms involving minor traffic violations, these partial decriminalization reforms involving DUI are sanctioned-focused. Criminal sanctions are replaced with the option of administrative sanctions, while police involvement in DUI enforcement remains the same. As a result, these reforms overlook the extent to which police-initiated stops for suspicion

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Scholars have also called attention to the lack of criminological focus on DUI crime, which prompts meaningful questions about whether evidence-based knowledge supports DUI criminalization. *See, e.g.*, James B. Jacobs, *Researching and Conceptualizing Drunk Driving: An Invitation to Criminologists and Criminal Law Scholars* in *THE CRIMINOLOGY OF CRIMINAL LAW* 53-69 (William S. Laufer & Freda Adler eds. 1999); FRANKLIN E. ZIMRING, FOREWORD TO JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* XX-XII (1989) (discussing the lack of criminological research on DUI).

<sup>269</sup> *See, e.g.*, Chris S. Dula, *Police the Drunk Driver: Measuring Law Enforcement Involvement in Reducing Alcohol-Impaired Driving*, 38 J. SAFETY RES. 267, 267 (2007) (finding “no relationship between the level of DUI arrest activity and DUI-related crashes”); Stringer, *supra* note 264, at 482 (finding that “increases in DUI arrests are related to decreased fatal alcohol crashes during that period” but that “there is a point of diminishing returns where increased arrests are no longer related to reductions in fatalities”).

<sup>270</sup> *See* Stuart, *supra* note 268, at 109 (“[I]t is difficult to show that DWI, from a deserts standpoint, is a serious criminal offense.”); *id.* at 113 (“If we cannot show that DWI is a serious criminal offense, then from a deserts perspective, we cannot justify severe penalties”).

<sup>271</sup> Ross, *supra* note 268, at 89 (arguing that DUI should be decriminalized and that criminal punishment “should be replaced with punishment based on administrative procedures”).

<sup>272</sup> *See Should Ontario Overhaul How It Charges Drunk Drivers?*, *supra* note 116.

<sup>273</sup> *Id.*

<sup>274</sup> *See* Scott Macdonald et al., *The Impact of Alcohol-Related Collisions of the Partial Decriminalization of Impaired Driving in British Columbia, Canada*, 59 ACCIDENT ANALYSIS & PREVENTION 200, 200 (2013).

<sup>275</sup> *See, e.g.*, Leyland Cecco, *One for the Road? Canada Province Considers Decriminalizing Drunk Driving*, *The Guardian* (Mar. 13, 2020, 5:00 PM), <https://www.theguardian.com/world/2020/mar/13/move-to-soften-drink-driving-laws-in-canadas-alberta-province-prompts-debate>; *see also* Kaufmann, *supra* note 116 (discussing DUI reforms in Alberta).

of DUI are sites of police intrusion and gateways for funneling civilians into the criminal justice system.

Many stops for suspicion of DUI never result in a DUI arrest.<sup>276</sup> Nonetheless, stops for DUI suspicion allow police to access a vast set of crime-fighting tools to peruse for evidence of non-DUI crime. The wide latitude that officers have to pull over vehicles for suspicion of DUI enables these problems. For instance, in *Navarette v. California*, the U.S. Supreme Court held that a mere anonymous tip that a driver had recently run the tipster off the road was sufficient under the circumstances to give officers reasonable suspicion to stop the driver for suspicion of DUI.<sup>277</sup>

Non-police enforcement alternatives could reduce these problems and thus serve as useful interventions to strengthen criminal law reforms involving DUI. Rather than relying on police officers, traffic monitors could handle DUI investigations and assign administrative penalties for first-time DUI offenders without having to get the police involved.<sup>278</sup> Police assistance could be requested for situations involving intoxicated drivers who are ineligible for administrative sanctions (for instance, repeat DUI offenders).<sup>279</sup> The benefits for curbing the net-widening of the criminal justice system would be significant given that a majority of the approximately 1.5 million arrests for DUI in the United States each year involve first-time offenders.<sup>280</sup>

#### IV. POTENTIAL OBJECTIONS

This Part addresses potential objections to removing the police from traffic enforcement. Section A discusses potential objections involving traffic safety. Section B examines two potential objections involving policing: (1) undermining criminal investigations, and (2) undermining criminal deterrence. Section C then discusses financial considerations. Although not entirely without merit, the analysis explains why these potential objections are not overpowering in their persuasiveness to keep traffic enforcement and policing intertwined.

##### A. Traffic Safety

Imagining a world of traffic without the police sets up a critical dialogue about whether police-initiated traffic stops are necessary to achieve traffic safety.

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<sup>276</sup> See, e.g., *McKeown v. State*, 16 So. 3d 247, 248 (2009) (discussing police officer testimony that he arrested only half of DUI suspects that he investigates).

<sup>277</sup> 572 U.S. 393, at 404 (2014).

<sup>278</sup> See *supra* Part II.B.2.b.

<sup>279</sup> See *supra* Part II.B.2.b.

<sup>280</sup> ALARID, *supra* note 120, at 135; see also Minn. Dep't of Pub. Safety, *supra* note 120, at 135 ("The pattern in recent years is 40 percent of drivers arrested for DWI are repeat offenders and about 60 percent do not have any arrests on record.").

These questions matter given that traffic safety was a critical reason why the police became involved in traffic enforcement in the first place.<sup>281</sup>

In fairness, several studies have reported an association between increased traffic enforcement and decreases in traffic crashes and injuries from motor vehicle accidents.<sup>282</sup> What is less clear from this research, however, is whether in-person, police-initiated traffic stops are required to obtain the purported public safety benefits of increased traffic enforcement. If traffic safety is the true goal, then states and localities might reap comparable or even better traffic safety benefits through non-police alternatives to traffic enforcement.

A strong indicator that it is possible to remove police from traffic enforcement without compromising traffic safety is the fact that New Zealand followed this approach for almost six decades between 1936 and 1992.<sup>283</sup> During that period, New Zealand created and maintained a non-police governmental agency that was responsible for the bulk of traffic enforcement, including non-moving violations and minor moving violations.<sup>284</sup> As Section C will discuss in greater detail, financial considerations, not traffic safety concerns, led to the end of New Zealand's alternative traffic enforcement regime.<sup>285</sup>

Empirical studies and anecdotal evidence on the traffic safety benefits of speed and red light cameras lend some additional support to the idea that traffic safety is not contingent on police-initiated traffic stops. For instance, several studies have found that red light cameras are associated with a reduction in crashes related to red-light running violations (for instance, right angle crashes).<sup>286</sup> Studies have also reported more pronounced reductions across

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<sup>281</sup> SEO, *supra* note 75, at 109.

<sup>282</sup> See, e.g., Gregory DeAngelo & Benjamin Hansen, *Life and Death in the Fast Lane: Police Enforcement and Traffic Fatalities*, 6 AM. ECON. J. 231 (2014) (finding that a decrease in enforcement via traffic citations is associated with a significant increase in injuries and fatalities caused by traffic accidents); James C. Fell et al., *Effects of Enforcement Intensity on Alcohol Impaired Driving Crashes*, 73 ACCIDENT ANALYSIS & PREVENTION 181, 181 (2014) (finding that “a higher DUI arrest rate was associated with a lower driving-driver crash rate”); Dara Lee Luca, *Do Traffic Tickets Reduce Motor Vehicle Accidents? Evidence from a Natural Experiment*, 34 J. POL'Y ANALYSIS & MANAGEMENT 85, 85 (2015) (finding that “tickets significantly reduce accidents and nonfatal injuries”); Makowsky & Stratmann, *supra* note 147, at 866 (finding that issuing tickets reduces the number of car crashes and injuries associated with traffic accidents); Mohammad Mahdi Rezapour Mashhadi et al., *Impact of Traffic Enforcement on Traffic Safety*, 19 INT'L J. POLICE SCI. & MGMT. 238, 238 (2017) (finding that “higher numbers of speeding and seat belt citations reduce the number of crashes significantly”).

<sup>283</sup> BAYLEY *supra* note 204, at 135.

<sup>284</sup> Wilson & Chappell, *supra* note 204, at 568.

<sup>285</sup> See *infra* Part IV.C.

<sup>286</sup> This body of research, however, also suggests that red light cameras are associated with an increase in rear-end crashes. See Charles Goldenbend et al., *Red Light Cameras Revisited. Evidence on Red Light Camera Safety Effects*, 128 ACCIDENT ANALYSIS & PREVENTION 139 (2019) (providing a comprehensive review of 18 studies conducted between 2013 and 2017 on the effects of red light and red light/speed camera on traffic crashes).

different crash types for cameras that combine speed and red-light enforcement.<sup>287</sup>

In sum, there is ample space to explore non-police enforcement alternatives to achieve traffic safety goals.

## **B. Policing**

### **1. Discovering Evidence of Crime and Apprehending Criminal Suspects**

One potential objection to removing police from traffic enforcement is that it could undermine the ability of law enforcement officers to discover evidence of non-traffic crime and apprehend criminal suspects. Justified by our failed War on Drugs and other crime-controlled measures, traffic stops are hailed in law enforcement circles as cost-effective tools to investigate non-traffic crime.<sup>288</sup> Pretextual traffic stops in particular allow officers to use a minor traffic violation as legal justification to stop motorists, and subsequently frisk and search them, for non-traffic crimes about which there is neither probable cause nor reasonable suspicion.<sup>289</sup>

Empirical and anecdotal evidence lend some support to these points. Several high-profile offenders, including serial killer Ted Bundy and Oklahoma City bomber Timothy McVeigh, were initially apprehended during traffic stops.<sup>290</sup> Although data from the Bureau of Justice Statistics shows that only 8.4% of searches of a vehicle, driver, or both during traffic stops lead to evidence of crime (for instance, drugs, illegal weapons, or open containers of alcohol),<sup>291</sup> one could still view those stops as increasing the number of cases in which police discover evidence of crime and apprehend criminal suspects.

At the same time, scholars have argued that traffic stops are an inefficient and ineffective criminal investigatory tool, especially when considering the various harms that traffic stops impose on marginalized and over-policed communities.<sup>292</sup> In 2015 (the most recent available national data), the Bureau of

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<sup>287</sup> *Id.*

<sup>288</sup> Woods, *supra* note 17, at 737.

<sup>289</sup> Harris, *supra* note 2, at 576; Stuntz, *supra* note 92, at 7.

<sup>290</sup> See Dean Scoville, *Killer Stops*, POLICEMAG.COM (June 1, 2006), <https://www.policemag.com/339561/killer-stops> (discussing examples of how traffic officers have helped to apprehend high-profile killers in the United States).

<sup>291</sup> CHRISTINE EITH & MATTHEW R. DUROSE (BUREAU OF JUSTICE STATISTICS), CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, 11 (2011), <https://www.bjs.gov/content/pub/pdf/cpp08.pdf>.

<sup>292</sup> See BAUMGARTNER ET AL., *supra* note 1, at 20 (“[T]he aggressive use of traffic stops as a tool to investigate possible criminal behavior, though justified as part of the war on crime, is surprising inefficient”); Engel & Calnon, *supra* note 3, at 85 (noting “findings from empirical studies that have



Justice Statistics (BJS) reported that about 4% of all traffic stops led to a search or an arrest.<sup>293</sup> This is consistent with BJS nationwide data from 2008, which reported that about 5% of all traffic stops led to a search and 2.6% led to an arrest.<sup>294</sup> Although the BJS did not report these findings for 2015, it reported that in 2008 only 8.4% of searches of a vehicle, driver, or both led to evidence of crime (for instance, drugs, illegal weapons, or open containers of alcohol).<sup>295</sup>

Although undermining drug policing is a potential cost, removing the police from traffic enforcement would bring existing law and policy closer in the direction of ending our decades-long and failed War on Drugs.<sup>296</sup> As scholars have described, police have relied on traffic enforcement as a central tool to further crime-control strategies informed by the War on Drugs.<sup>297</sup> The Constitution and state law has not been very effective in preventing traffic stops from being used as a drug enforcement tool,<sup>298</sup> in spite of data showing that traffic stops are an ineffective and inefficient means of drug interdiction. The more effective path moving ahead is to remove traffic stops from the police toolbox.

## 2. Criminal Deterrence

Undermining criminal deterrence is another potential objection to decoupling traffic enforcement from the police. The idea that traffic enforcement can deter crime is operationalized in policing strategies across law enforcement agencies today. Consider the Data-Driven Approaches to Crime and Traffic Safety (DDACTS) strategy, which is an operational policing model supported through collaboration between the National Highway Traffic Safety Administration and the Department of Justice.<sup>299</sup> The DDACTS uses crime and motor vehicle accident mapping to identify places where there is overlap between the two, and then uses high-visibility traffic enforcement as an attempt to reduce crime, motor vehicle crashes, and traffic violations.<sup>300</sup> Since first

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demonstrated that the generalized targeting of minority drivers, in an effort to disrupt the flow of drug trafficking and/or to confiscate weapons, is an ineffective and inefficient use of police resources”).

<sup>293</sup> ELIZABETH DAVIS & ANTHONY WHYDE (BUREAU OF JUSTICE STATISTICS), CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 12 (2018), <https://www.bjs.gov/content/pub/pdf/cpp15.pdf>.

<sup>294</sup> EITH & DUROSE, *supra* note 291, at 10.

<sup>295</sup> *Id.* at 11.

<sup>296</sup> Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2176 (2016) (noting the “trenchant critiques leveled against the failed War on Drugs”).

<sup>297</sup> Johnson, *supra* note 4, at 1047 (describing pretextual traffic stops “as a central law enforcement tool in the “war on drugs.”).

<sup>298</sup> See *supra* Part I; William J. Stuntz, 111 YALE L.J. 2137, 2140 (2002) (“One cannot read Fourth Amendment cases from the 1980s without sensing judicial attention to the pros and cons of the war on drugs—even when the cases did not involve drug crime.”).

<sup>299</sup> NHTSA, “Data-Driven Approaches to Crime and Traffic Safety (DDACTS),” [https://one.nhtsa.gov/Driving-Safety/Enforcement-&Justice-Services/Data%E2%80%93Driven-Approaches-to-Crime-and-Traffic-Safety-\(DDACTS\)](https://one.nhtsa.gov/Driving-Safety/Enforcement-&Justice-Services/Data%E2%80%93Driven-Approaches-to-Crime-and-Traffic-Safety-(DDACTS)).

<sup>300</sup> Jason Rydberg et al., *A Quasi-Experimental Synthetic Control Evaluation of a Place-Based Police-Directed Patrol Intervention on Violent Crime*, 14 J. EXPERIMENTAL CRIMINOLOGY 83, 85 (2018).

piloted in 2009, hundreds of U.S. law enforcement agencies have adopted the DDACTS model.<sup>301</sup>

Empirical evidence on the connection between police-initiated traffic stops and criminal deterrence, however, is mixed.<sup>302</sup> Some studies have found an association between increased traffic enforcement and lower crime rates, leading researchers to conclude that traffic enforcement increases criminal deterrence by increasing police visibility in communities.<sup>303</sup> Other studies have found an association between increased traffic enforcement and lower rates of specific crime types, including robbery, drunk driving, motor vehicle theft, and gun violence.<sup>304</sup>

Several studies, however, have not found significant relationships between increased traffic enforcement and reductions in general crime rates or rates involving specific crime types.<sup>305</sup> These studies fit into a broader body of literature that questions connections between order-maintenance policing and criminal deterrence.<sup>306</sup> Moreover, a newly emerging body of research has examined whether the decision of law enforcement departments to decrease traffic enforcement after the Department of Justice's scathing report on the Ferguson Police Department had any effect on crime rates. Those studies did not find that reducing traffic stops led to an increase in crime, lending support

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<sup>301</sup> John Coyle & Shannon Purdy (National Law Enforcement Liaison Program), "DDACTS: Traffic Safety by the Numbers," <https://www.nlelp.org/ddacts-cover-story/> ("[S]everal hundred agencies seeking to adopt the model have undergone formal training.").

<sup>302</sup> Xiaoyun Wu & Cynthia Lum, *The Practice of Proactive Traffic Stops*, 43 POLICING: INT'L J. POLICE STRATEGIES & MGMT 229, 231 (2020) (noting the "mixed evidence on the effectiveness of traffic enforcement on crime").

<sup>303</sup> See, e.g., Alexander Weiss & Edmund F. McGarrell, *Traffic Enforcement & Crime: Another Look*, 66 POLICE CHIEF 25 (1999).

<sup>304</sup> Robert J. Sampson & Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L. & SOC'Y REV. 163 (1988) (robbery); Charis Kubrin et al., *Proactive Policing and Robbery Rates Across U.S. Cities*, 48 CRIMINOLOGY 57 (2010) (robbery); James Q. Wilson and Barbara Boland, *The Effects of the Police on Crime: A Response to Jacob and Rich*, 16 L. & SOC'Y REV. 163 (1981) (robbery); Jacqueline Cohen & Jens Ludwig, *Policing Gun Crimes* in EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 217 (Jens Ludwig & Phillip J. Cook eds., 2003) (gun violence); Edward McGarrell et al., *Reducing Firearms Violence Through Directed Police Patrol*, 1 CRIMINOLOGY & PUB. POL'Y 119 (2001) (gun violence); James C. Fell, *The Effects of Increased Traffic Enforcement on Other Crime*. Proceedings from the Australasian Road Safety Research, Policing Education Conference 2013 (2013), <https://trid.trb.org/view/1286890> (drunk driving, burglary, and car theft).

<sup>305</sup> D.A. Josi et al., *Conducting Blue Light Specials or Drilling Holes in the Sky: Are Increased Traffic Stops Better than Routine Patrol in Taking a Bite out of Crime?*, 1 POLICE PRACTICE AND RESEARCH 477 (2000) (finding inconclusive evidence on the link between aggressive traffic enforcement and crime); Alexander Weiss & Sally Freels, *The Effects of Aggressive Policing: The Dayton Traffic Enforcement Experiment*, 15 AM. J. POLICE 45 (1996) (finding no evidence that increased traffic enforcement reduced the incidence of robbery or auto theft offenses).

<sup>306</sup> See generally, e.g., Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

to the idea that traffic is currently over-policed for reasons grounded in crime-control rather than traffic safety.<sup>307</sup>

### C. Financial Considerations

The keenest practical objection to removing the police from traffic enforcement involves financial costs. Critics may argue that keeping traffic enforcement and policing intertwined is more economically efficient. Police leaders have already raised this criticism in response to the City of Berkeley, California's recent decision to remove traffic enforcement duties from the police.<sup>308</sup> The basic critique is that municipalities would have to hire separate public employees (a traffic monitor and a police officer) to handle tasks (traffic enforcement and policing) that could be handled by one police officer. To further support this point, critics might stress that the overwhelming bulk of spending on police goes towards personnel costs.<sup>309</sup> For instance, state and local governments spent \$115 billion on police budgets in 2017 (the latest available year of data on state and local expenditures), and 97% of police spending was dedicated to operational costs, such as salaries and benefits.<sup>310</sup>

Critics might also interpret the end of New Zealand's non-police approach to traffic enforcement as further anecdotal support for the view that removing the police from traffic enforcement is financially impractical. In 1992, financial considerations led the New Zealand government to revert back to having police handle traffic enforcement after six decades of maintaining a non-police government agency that handled those tasks.<sup>311</sup> As scholars describe, this reversion was animated by concerns that the non-police traffic agency did not produce any savings for the New Zealand government.<sup>312</sup> Because the non-

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<sup>307</sup> See, e.g., John A. Shjarback et al., *De-policing and Crime in the Wake of Ferguson: Racialized Changes in the Quantity and Quality of Policing Among Missouri Police Departments*, 50 J. CRIM JUSTICE. 42, 50 (2017) ("For now, we find no support for the de-policing-crime component of the Ferguson Effect argument in our sample of agencies"); Mike Dolan Fliss et al., *Re-prioritizing Traffic Stops to Reduce Motor Vehicle Crash Outcomes and Racial Disparities*, 7 INJURY EPIDEMIOLOGY 3, 13 (2020) ("Conventional logics, such as the Ferguson Effect belief that de-prioritizing investigatory stops is associated with increases in violent crime, may not hold up to critical scrutiny.").

<sup>308</sup> See, e.g., Sandler, *supra* note 14 (quoting Sgt. Ray Kelly, spokesman for the Alameda County Sheriff's Office, as saying "the idea may be too costly for a smaller city like Berkeley").

<sup>309</sup> Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 949 (2015) ("The most significant cost in any police department's budget, often comprising 80% or more of the budget, is personnel costs, including salaries, overtime, wages, and fringe benefits for uniformed officers and uniformed employees").

<sup>310</sup> The Urban Institute, *State and Local Finance Initiative, Police and Corrections Expenditures* (last accessed July 23, 2020), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/police-and-corrections-expenditures>.

<sup>311</sup> BAYLEY *supra* note 204, at 135.

<sup>312</sup> *Id.* (noting that the reversion occurred in 1992 because under the alternative regime there was no savings as its staff was composed of transferred police officers).

police traffic agency was primarily staffed by police officers, the government was simply redirecting resources from one public agency to another.<sup>313</sup>

But in this regard, New Zealand could be viewed as a success story from the perspective of the growing “defund the police” movement. The demise of New Zealand’s alternative traffic enforcement regime stemmed from its perceived inability generate savings.<sup>314</sup> If public safety, and not savings, is the intended goal, then the New Zealand story illustrates that it is possible for a society to reimagine public safety on roads and highways by redirecting resources from police budgets to invest in non-policing solutions.<sup>315</sup> Whether the government ultimately spends the same on personnel costs after this resource diversion is irrelevant, especially given the various benefits that removing the police from traffic enforcement could achieve for racial and economic justice in policing and criminal law reform in the United States.<sup>316</sup>

Reframing traffic enforcement as a transportation safety and not a policing problem also opens space to explore creative ways that transportation law and policy could assist in removing the police from traffic enforcement. In this regard, the burden of embracing a different normative vision of traffic enforcement need not fall on state and localities alone. Transportation groups are increasingly calling on the transportation industry, including transportation agencies at all levels of government, to confront its history in enabling racism and racial subordination.<sup>317</sup> In this regard, removing the police from traffic enforcement could fit within a broader national transportation safety strategy that is informed by an anti-racist lens and that pools resources in a different way.

For instance, federal grants could offer incentives for states to remove police powers from state highway patrols and help states work with local governments and municipalities to implement non-police solutions to traffic enforcement. The President’s Budget requested \$84 billion to fund programs within the Department of Transportation in 2020.<sup>318</sup> \$923.3 million was specifically requested to fund the initiatives of the National Highway Traffic Safety Administration (NHTSA).<sup>319</sup> In 2020, the NHTSA administered over \$663

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<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Beyond the “Defund” Slogan*, THE WASHINGTON POST (July 17, 2020), at A22 [hereinafter, *Beyond the “Defund” Slogan*] (“Budgets reflect community priorities, and where non-policing solutions are chronically underfunded, it makes sense to invest more in those.”).

<sup>316</sup> *See infra* Part III.

<sup>317</sup> *See, e.g.*, National Association of City Transportation Officials, *NACTO Stands in Solidarity and Commitment with the #BlackLivesMatter Movement* (Jun. 1, 2020), <https://nacto.org/2020/06/01/blacklivesmatter/> (“For those of us in the transportation industry, especially those in leadership positions, this moment requires us to take special pause and self-reflection.”).

<sup>318</sup> U.S. DEP’T OF TRANSP., BUDGET HIGHLIGHTS 2020 1 (2019), <https://www.transportation.gov/sites/dot.gov/files/docs/mission/budget/333126/budgethighlightsfinal040519.pdf>.

<sup>319</sup> *Id.* at 47.

million in federal grants to fund programs annually in all 50 states and the District of Columbia.<sup>320</sup> In addition to federal grants, motor fuel taxes and highway toll revenue are major sources of funding for transportation-related spending at the state and local levels.<sup>321</sup>

Reimagining traffic enforcement as a transportation safety problem, rather than a policing problem, could create new opportunities to rely on and expand these funding sources to help states and localities restructure traffic enforcement.

## CONCLUSION

We are at a watershed moment in which growing national protest and public outcry over police injustice and brutality, especially against people of color, are animating structural police reforms.<sup>322</sup> A major obstacle to achieving structural police reform in this important moment for policing is the conventional wisdom that a robust police force is needed to enforce traffic laws. This obstacle is especially problematic given that traffic policing is a persistent source of race- and class-based injustice.<sup>323</sup>

This Article challenged the conventional wisdom that traffic laws cannot be enforced without police. It sketched a new normative vision of our driving system in which traffic enforcement is decoupled from policing. In offering this new framework for traffic enforcement, this Article provided a needed starting point for renewed thinking about the basic organization of traffic enforcement, the role of police in traffic enforcement, and the means by which law and policy can be used as tools to achieve racial and economic fairness and equality in traffic enforcement moving ahead.

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<sup>320</sup> NHTSA, FY 2020 S. 402, 405, 196 AND 154/164 AUTHORIZED GRANT AMOUNTS (Mar. 13, 2020), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fy\\_20\\_full\\_year\\_402\\_405\\_1906\\_154\\_and\\_164\\_allotment\\_summary.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/fy_20_full_year_402_405_1906_154_and_164_allotment_summary.pdf).

<sup>321</sup> *State Highway Patrol Funding and the State Highway Fund*, Nat'l Conf. St. Legislatures (Jan. 2017), <https://www.ncsl.org/research/fiscal-policy/state-highway-patrol-funding-and-the-state-highway-fund.aspx#:~:text=The%20state%20highway%20patrol%20is%20funded%20differently%20in%20each%20state,constitutinally%20created%20state%20highway%20funds.> (summarizing trends in state highway patrol funding); The Urban Institute, *supra* note 310 (“Both state and local governments dedicate motor fuel tax revenue and highway toll revenue to transportation spending”).

<sup>322</sup> See Stockman & Eligon, *supra* note 12.

<sup>323</sup> See sources cited in *supra* note 2.