

Addressing Pretext: Potential Legislative Approaches

One of the longstanding problems in policing has been the pretextual use of low-level traffic and pedestrian stops as a strategy to address more serious crime. Although there may be some limited role for pretextual enforcement to investigate specific serious crimes, there is a fair bit of evidence to suggest that its over-use has exacerbated racial disparities in policing, unnecessarily pulled people into the criminal justice system for very minor misconduct, generated a great deal of distrust between police and communities, and done very little to actually address serious violent crime.

Although it may be difficult to prohibit pretextual policing outright, there is a fair bit that states can do to shift the incentives around pretextual policing and limit its use. Here we outline a few of the strategies we are considering:

1. Prohibit stops for certain equipment and low-level traffic violations: One strategy to address pretextual stops is to prohibit officers from making stops solely to enforce certain low-level infractions. Some states already do this around seatbelt or texting laws, and Virginia recently has revised its vehicle code to prohibit stops for a number of other infractions as well. Violations can still be enforced—but only if the officer has some other reason for making the stop.

2. Limit what officers can do during stops: A number of states prohibit the use of consent searches during traffic stops, or require officers to have reasonable suspicion of some other offense in order to ask for consent to search. Some state courts also have interpreted their states' Fourth Amendments to prohibit officers from asking questions during a traffic stop that go beyond the scope of the stop. (I.e. if someone is stopped for an equipment violation, officers cannot use that as an opportunity to question the driver about where they're going, what they're doing, etc.) These sorts of reforms limit the possibility of fishing expeditions which not only reduces the incentive to make stops, but also can perhaps improve the experience of those stopped. (Sotomayor does a really nice job in *Strieff* of describing the dignitary costs of getting pulled over for a broken tail light and then subjected to prolonged questioning in a manner that telegraphs the officer's suspicions of more serious wrongdoing.) One thing that is on our list but needs further thought is the use of consensual frisks. They are shockingly common, and not remotely consensual in any meaningful sense.

3. Limit the Use of Outstanding Warrants: One way to diminish the harms of pretextual enforcement (and perhaps also discourage its use) is to reduce the prevalence of outstanding warrants. The possibility of finding an outstanding warrant (and thereby generating an arrest, conducting a search, etc.) creates an incentive for officers to make additional stops, and also increases the potential intrusiveness of the stops that do take place.

Although we have discussed the possibility of limiting warrant checks during stops, the objection to doing so is that if an officer happens upon someone wanted for a serious offense, we want that person immediately arrested (and for the officer to have access to this information as early in the stop as possible for the officer's safety).

The problem is not with warrant checks per se, but rather with the fact that warrant checks too often turn up low-level warrants for failure to appear, which then create a basis for a custodial arrest, a search incident, and a potential downward spiral of criminal justice consequences.

There are a number of things that states can do to reduce reliance on warrants, including:

- Limit or prohibit the use of warrants for unpaid tickets, fines, and other low-level offenses: States can prohibit the use of warrants to compel attendance, or require multiple notices and opportunities to appear before a warrant is ultimately issued. States that prohibit the use of warrants entirely can compel attendance through other means—e.g. by conditioning certain discretionary services/licenses (hunting permits, gun licenses, etc.) on resolution of the underlying claim.
- Prohibit the issuance of a warrant for an initial failure to appear: States also can require officials to take additional steps to secure a defendant's appearance in court before a warrant is issued. Some automatically schedule a second court date 30 days out and send notice to the defendant of the new date (and how to adjust it if need be). Others require pre-trial services to reach out to the defendant and attempt to reschedule the court date. States can establish different tracks based on the seriousness of the underlying offense.
- Establish automated reminder systems: Studies suggest that automated calls or texts reminding individuals of upcoming court dates can significantly improve appearance rates.
- Create a comprehensive state warrant management system that individuals can easily access to reschedule court dates, manage outstanding warrants, and pay outstanding fines.

4. Data collection: Yet another way to get at pretextual stops is to mandate robust data collection on all stops and enforcement actions. We already have a stop and arrest data collection and reporting provision as part of our transparency statute, but are thinking about ways that provision might be tailored or further beefed up to get at pretext concerns. (In the pretext context in particular it may be particularly important to track whether an officer ran a warrant check, asked individuals to step out of the car, etc.)