

Eliminating Racial Profiling & Securing Impartial Juries that Reflect a Fair Cross Section of the Community

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Racial Profiling in the News—2018

- Former White House Staffer, an African American, Moving into his Apartment--911 Call for Armed Robbery;
- Yale graduate student, African American, who fell asleep in Residential College Commons—Campus Police Called;
- Two African-American businessmen waiting for a third person in a Starbucks—police called and men arrested for trespassing;
- African American family barbecuing in public park—police called;
- African American male baby-sitter, picking up and driving two white children—stalked and police called;
- “Shopping while black”—Nordstrom’s Rack and Old Navy Incidents
- Two Black men, one an 8-year member, the other with a guest pass, kicked out of fitness club in New Jersey

Racial Profiling and Traffic Stops— “Driving While Black”

- **Studies showing racial disparities in traffic stops**
 - **Scott County (Black drivers pulled over nearly three times as often as White drivers);**
 - **Waterloo, Iowa (African Americans make up just 15.3% of the population but nearly 38% of the traffic stops 1/1/15 -11/15/17;**
 - **Iowa City, Iowa (minority drivers made up roughly 10% of city drivers, yet accounted for as much as 19% of traffic stops)**
 - **State of Illinois 2016 Report: minority drivers 38% more likely to be stopped than whites**

Police Stop of Montray Little and Jared Clinton in Des Moines—Summer 2018



Justice Sotomayor's Dissent in *Utah v. Strieff*, 136 S.Ct. 2056, 2069-71 (2016)

- “Writing only for myself, and drawing on my professional experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Justice Sotomayor Dissent in *Strieff*, continued

“Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). That justification must provide specific reasons why the officer suspected you were breaking the law, *Terry*, 392 U.S., at 21, 88 S.Ct. 1868 but it may factor in your ethnicity, [Citation Omitted], where you live, [Citation Omitted], what you were wearing, [Citation Omitted], and how you behaved, [Citation Omitted]. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. [Citations Omitted]

Justice Sotomayor Dissent in *Strieff*, continued

- “The indignity of the stop is not limited to an officer telling you that you look like a criminal. See *Epp, Pulled Over*, at 5. The officer may next ask for your “consent” to inspect your bag or purse without telling you that you can decline. See *Florida v. Bostick*, 501 U.S. 429, 438, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). Regardless of your answer, he may order you to stand “helpless, perhaps facing a wall with [your] hands raised.” *Terry*, 392 U.S., at 17, 88 S.Ct. 1868. If the officer thinks you might be dangerous, he may then “frisk” you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may “feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.” *Id.*, at 17, n. 13, 88 S.Ct. 1868.

Justice Sotomayor Dissent in *Strieff*, continued

- “The officer’s control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or “driving [your] pickup truck ... with [your] 3-year-old son and 5-year-old daughter ... without [your] seatbelt fastened.” [Citation Omitted] At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to “shower with a delousing agent” while you “lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.” [Citations Omitted] Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the “civil death” of discrimination by employers, landlords, and whoever else conducts a background check. [Citations Omitted] And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you “arrestable on sight” in the future. A. Goffman, *On the Run* 196 (2014).

Justice Sotomayor Dissent in *Strieff*, continued

- “This case involves a suspicionless stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, *supra*, at 2068 – 2069, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone’s dignity can be violated in this manner. See M. Gottschalk, *Caught* 119–138 (2015). But it is no secret that people of color are disproportionate victims of this type of scrutiny. See M. Alexander, *The New Jim Crow* 95–136 (2010). For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. See, e.g., W.E.B. Du Bois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015).”

Consequences of Racial Profiling and Traffic Stops

- Humiliation and Degradation
- Fear of police—“the talk”;
- Police fear
- Actual Physical Harm
- Request to Consent to Search
- Search
- Arrest
- Prosecution
- Warning

What Is “Racial Profiling”?

- “The use of race or ethnicity as grounds for believing or suspecting someone of having committed an offense.”
- Nebraska Rev.Stat. § 20-503(3): “Racial profiling means detaining an individual or conducting a motor vehicle stop based upon disparate treatment of an individual.”
 - “Disparate treatment means differential treatment of persons on the basis of race, color, or national origin.” § 20-503(1)

“Disparate Treatment”

- “Based upon”—
 - Exclusively?
 - Motivating factor?
- What grounds for “differential treatment” should be recognized as prohibited?
 - Race, color, and national origin;
 - Religion?
 - Sexual orientation or gender identity? Other?
 - Pretextual stops?

What Is a “Pretextual Stop”?

- “Pretextual stop” means a stop by an officer of a driver or passenger, a bicyclist, or a pedestrian for an alleged violation of the law, to allow the officer to then question and probe for information that might suggest the person has committed some not apparent or yet-to-be identified law violation.”
- There may be probable cause to believe *some* violation has occurred, *e.g.*, failure to signal or eating while driving, but that’s not the actual reason for the stop and very likely no reasonable law enforcement officer would stop the person because of the traffic violation.

Are Pretextual Stops Illegal as Unconstitutional

- The 4th Amendment to the U.S. Constitution and Article 1, Section 8 of the Iowa Constitution require probable cause as protection against an “unreasonable search or seizure;” and “reasonable suspicion” is required to justify a traffic stop;
- By definition, there is no probable cause or reasonable suspicion to stop a person for the officer’s real or subjective thinking or reason;
- Nevertheless, in *Whren v. U.S.*, 517 U.S. 806 (1996), the Supreme Court, per Justice Scalia, held that a traffic stop upon probable cause to believe the motorist had violated traffic laws did not violate the 4th Amendment, even if a reasonable officer would not have stopped the motorist.

States May Hold Otherwise Based upon State Constitutional Law

- State v. Ochoa, 206 P.3d 143 (NM Ct. App. 2008) court must use “totality of circumstances” test and apply subjective - reasonable objectiveness standard);
- Washington v. Ladson, 979 P.2d 833 (Wash. 1999) (En Banc):
 - “We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving. Therefore the reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation.”
- State v. Brown, No. 17-0367 (Iowa Supreme Court), *argued* Sept. 18, 2018, awaiting decision.

Discriminatory Pretextual Stops Do Violate the Constitution

- In *Whren* Justice Scalia wrote, “We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”

What Have the States Done?

- 20-25 have laws banning racial profiling, but as in Nebraska, their clarity and specificity could be improved; that said, data collected show that Nebraska's prohibition of racial profiling has had a demonstrable lowering effect on pretextual stops of racial and other minorities.
- 15 states ban pretextual stops;
- Iowa has no law explicitly prohibiting racial profiling or pretextual stops.

The Iowa NAACP's Anti-Racial and Ethnic Profiling Bill:

- SSB1038, As Amended
- Definitions
- Prohibition and Allowed Policy & Actions
- Establishment of a Community Policing Advisory Board;
- Data Collection, Reporting, and Analysis
- Training
- Enforcement by Iowa Civil Rights Comm'n but statutory remedies not exclusive

Profiling is Prohibited

- Section 5 of the bill, which would be IC 80H.3(1), provides, “An officer shall not engage in profiling in the course of performing law enforcement activities.”
- “Law enforcement activities” is broadly defined and means any of the following: traffic, bicyclist, or pedestrian stops by an officer; and actions during a stop, including asking questions, frisks, consensual and nonconsensual searches, seizing any property, removing occupants from a motor vehicle during a traffic stop, issuing a warning or citation, and making an arrest.” Road blocks, vehicle check points, and security checks where every person is treated the same are excluded.

How Is Profiling Defined?

- “Profiling” means any of the following when an officer is deciding to initiate law enforcement activities, including the use and scope of such activities:
 - a. Consideration or reliance upon actual or perceived race, color, ethnicity, religion, or national origin;
 - b. Disparate treatment of a person;
 - c. Making or conducting a *discriminatory* pretextual stop (emphasis added).
- “Discriminatory pretextual stop” prohibition is consistent with *Whren*.

How Is “Discriminatory Pretextual Stop” Defined in the Bill?

- “Discriminatory pretextual stop” means a stop involving disparate treatment by the officer or a stop for which the person’s race, color, ethnicity, religion, or national origin was considered or relied upon or was a motivating factor in the officer’s decision to make the stop or to take other action during the stop, including a request to consent to a search, or to prolong the stop beyond the amount of time when the law enforcement tasks tied to the alleged infraction are or reasonably should have been completed.” (See In the Matter of Property Seized from Robert Pardee, 872 N.W.2d 384 (Iowa 2015).

Law Enforcement Activities Excluded from “Profiling” Definition and Not Prohibited

- Law enforcement attitude towards pretextual stops;
- The NAACP bill does not make pretextual stops unlawful;
- Section 5 of the bill, which would be IC 80H.3(2) explicitly excludes certain law enforcement activities from the definition of “profiling” and they are not prohibited.

Profiling Does Not Include, and the Following Is Not Prohibited

- *a.* A law enforcement agency's policy allowing the use of information that has been provided by a victim describing the personal identifying characteristics of an alleged perpetrator of a crime in order to seek out persons who match that description.

Profiling Does Not Include, and the Following Is Not Prohibited

- b.* An action by an officer that relies upon any of the following:
 - (1) Personal identifying information or a specific suspect description-based identification. However, a specific suspect description-based identification only provides probable cause or reasonable suspicion to stop a person who reasonably resembles the person described in that identification, and does not allow an officer to stop a person merely because the person is of the same race, color, ethnicity, religion, or national origin as the suspect.
 - (2) A person's observed behavior linking that person or another person to suspected unlawful activity that establishes probable cause or a reasonable suspicion that criminal activity is afoot.
 - (3) Other trustworthy information or circumstances, relevant to the locality and time frame, linking a person to suspected unlawful activity that establishes probable cause or a reasonable suspicion that criminal activity is afoot.

Profiling Does Not Include, and the Following Is Not Prohibited

- c. A traffic stop when directed at the traffic-related mission, namely, checking a driver's license, vehicle registration, insurance or financial responsibility, outstanding warrants, and issuing citations or preparing warnings. However, the authority for a traffic stop ends when the officer's tasks tied to the traffic infraction that is the basis for the stop are or reasonably should have been completed.

Data Collection

- Although more than half the states ban either racial profiling or pretextual stops or both, nearly 2/3 of the states do NOT require data collection on stops and searches;
- Questions
 - Is it necessary? “People know there's racial profiling. Let's focus on what to do about it.”
 - How will data be used? Will it be used?
 - Will data on traffic and other stops be useful? Will it make a difference? Where data has been collected, has it effective in reducing racial profiling?
 - Is data collection too burdensome on law enforcement, of whom we have too few and there is already much to do?
 - Is most of this data already being gathered on TRAxS?

The NAACP Bill Requires Data Collection

- Data collection can reveal racial and ethnic disparities and disproportionality in what it measures, prompting inquiry into evidence of disparate treatment, focusing training, and supporting accountability;
- Prohibiting racial profiling and pretextual stops can lead to measurable reduction;
- NAACP Bill, Section 8, requires each state and local law enforcement agency to submit annually to DPS current policies addressing profiling and also requires collection and compilation of the following data on every stop during the year:

Data Required To Be Collected

- a. The time, date, location, and duration of the stop.
- b. The reason for the stop.
- c. Whether a driver's license or vehicle registration check was run.
- d. Whether an oral or written warning was given or a citation issued.
- e. The offense the person was arrested for, if applicable.
- f. The following identifying characteristics of the person stopped, including perceived race, ethnicity, English language proficiency, sex, and approximate age. The identification of these characteristics shall be based on the observation and perception of the officer making the stop. The officer shall not be required to inquire about race, ethnicity, and English language proficiency of the person stopped. The identifying characteristics of a passenger in a motor vehicle shall also be reported if the stop involved both the passenger and a search reported under paragraph "g".
- g. The following actions taken by an officer during the stop:
 - (1) Whether the officer asked for consent to search the person or vehicle and whether consent was provided.
 - (2) Whether the officer searched the person or any property, and if a search was performed, the basis for the search;
 - (3) Whether the officer seized any property, and if so, a description of the property seized and the basis for seizing the property.
 - (4) Whether the officer used physical force or physical force was used against the officer.
- h. Other information which the officer or law enforcement agency consider appropriate.

Use of Data

- Collected data transferred by Department of Public Safety (DPS) to Division of Criminal and Juvenile Justice Planning (DCJJP);
- Compilation and analysis of data by DCJJP annually;
- DCJJP to transfer compiled data and analysis to DPS, IDOJ, Community Policing Advisory Board, and Iowa Civil Rights Commission;
- Data to be accessible to public on websites of DPS, ICRC, and Dep't of Human Rights

In Closing

- Vast amount of law enforcement activity is indisputably lawful, needed, and positive, and unquestionably contributes to each of our communities;
- But racial disparities in Iowa—in stops, in arrests, in searches, in incarceration—are also undeniable, and are cause for action.