

2016

# Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy

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## Recommended Citation

Jonathan Blanks, *Thin Blue Lies: How Pretextual Stops Undermine Police Legitimacy*, 66 Case W. Res. L. Rev. 931 (2016)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol66/iss4/5>

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# THIN BLUE LIES: HOW PRETEXTUAL STOPS UNDERMINE POLICE LEGITIMACY

*Jonathan Blanks*<sup>†</sup>

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## INTRODUCTION

Henry Hart wrote that the criminal law serves as “the foundation of a free society’s effort to build up each individual’s sense of responsibility as a guide and stimulus to the constructive development of his capacity for effectual and fruitful decision.”<sup>1</sup> Police officers are the most emblematic and visible representatives of the criminal law that the average, law-abiding citizen encounters. If Hart’s assertion is correct, then the police force must serve a prominent role in the quality of that foundation for individuals in a community. And if the legitimacy of that force is compromised by unequal enforcement of law, unwarranted criminal suspicion, and erosion of constitutional rights, the community suffers both from the inequity of law and an attack on the moral underpinnings of the community.

Recent Black Lives Matter and similar protests in Baltimore, Maryland; Ferguson, Missouri; New York City, New York and many other municipalities demonstrate that many police departments are lacking

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1. Henry M. Hart Jr., *The Aims of the Criminal Law*, in *IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW”* 1, 10 (Timothy Lynch ed., Cato Institute 2009).

legitimacy in the eyes of many people they are sworn to protect and serve. This is particularly true for African Americans. Some of the underlying conflict is no doubt historical, as police and communities of color have been in tension as long as they have coexisted. To this day, African Americans continue to have lower trust in law enforcement<sup>2</sup> and report more negative traffic stop experiences with police (relative to population) than white Americans.<sup>3</sup> It would be simpler to attribute these phenomena to individual racism—whether they are due to overt discrimination or implicit race bias—than to deal with them as systemic problems because, in theory anyway, getting rid of a few officers is easier than revamping the way a police organization operates.

*Whren v. United States*<sup>4</sup> clarified the Supreme Court's support of the practice of pretextual stops—using minor traffic violations as a reason to stop a person in order to investigate suspicious activity. However, a tactic's legality does not make it inherently ethical, just, or effective. The following essay considers the role of pretextual stops in relation to police departments' relationship with minority communities, particularly black communities. I argue that pretextual stops are one part of a larger and deeply troubling *mélange* of legal fictions, intentional deception of the innocent, and perverse incentives that undermine the perceptions of legitimacy of law enforcement, particularly for black Americans. As a partial remedy to the larger problem of police legitimacy in black communities, I contend the use of pretextual stops ought to be severely curtailed or eliminated outright in order to improve police relationships with African Americans.

## I. THE ROLE OF POLICE LEGITIMACY

Compliance with the law is a voluntary exercise in a free society, and governments have limited capability to increase that compliance.

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2. Jeffery M. Jones, *Urban Blacks in U.S. Have Little Confidence in Police*, GALLUP (Dec. 8, 2014), <http://www.gallup.com/poll/179909/urban-blacks-little-confidence-police.aspx> [<https://perma.cc/PRJ8-RE3H>].

3. On author observed:

[P]olice stops also divide Americans into two groups. On the one side are people for whom police stops are the signal form of surveillance and legal racial subordination. This group is populated largely by African Americans and other racial minorities. On the other side are people for whom police stops are annoyances that, at worst, yield expensive traffic tickets, but which also reaffirm the driver's place as a full citizen in a rule-regulated society. This group is populated largely by whites.

CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD P. HAIDER-MARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 150 (John M. Conley & Lynn Mather eds., 2014).

4. 517 U.S. 806 (1996).

That said, in a functional and lawful society, most people follow most of the laws most of the time. The two dominant methods the government can use to encourage compliance with the law are deterrence through fear and cooperation through legitimacy. Very basically summarized, the former assumes individuals fear punishment for violating the law; the latter relies on an individual's acceptance of the legitimacy of the government or its agents that create and enforce those laws.<sup>5</sup>

Deterrence plays a role in policing, but that role may currently be too large relative to its effectiveness<sup>6</sup> in many cities. For the purposes of this essay, assume that aggressive enforcement of the law through traffic and pedestrian stops is, in part, a stratagem for deterring crime and the carrying of contraband and that there is a positive effect on crime reduction. But heavy enforcement in areas that have been and continue to suffer high crime strongly suggests that such deterrence-through-enforcement has its limits.<sup>7</sup> This deterrence may also have unintended costs by sowing or reifying mistrust—thereby undercutting the legitimacy—of the police in black communities. Taking the findings further then, if the presence of legitimacy *increases* compliance with the law, the absence or diminishment of legitimacy may *decrease* compliance with the law. Aggressive policing that undermines police legitimacy may have negative effects on public safety and crime rates. Thus, improving police legitimacy may be just as important to the communities as it is to the relationship between those communities and the police.

## II. THE SOCIAL IMPACTS OF PRETEXTUAL STOPS

Research by Professor Charles Epp and others from the University of Kansas suggests that traffic stops have no effect on drivers' trust in police from drivers who get caught speeding when they believe they were treated fairly, regardless of race.<sup>8</sup> Epp's research suggests that despite generally higher levels of distrust that blacks feel toward police, being stopped for unambiguously running afoul of the law has no effect

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5. See Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 656–59 (2009) (discussing deterrence theory versus legitimacy theory).
  6. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 59 (1990) (noting that the results of one empirical experiment that showed the influence of legitimacy was about five times greater on compliance than deterrence).
  7. See Jeffery Fagan & Tom R. Tyler, *Policing, Order Maintenance and Legitimacy*, in POLICING IN CENTRAL AND EASTERN EUROPE: DILEMMAS OF CONTEMPORARY CRIMINAL JUSTICE 39, 39 (Gorazd Mesko, Milan Pagon, & Bojan Dobovsek eds., 2004), <https://www.ncjrs.gov/pdffiles1/nij/Mesko/207975.pdf> (“While there is evidence that deterrence works, the same body of research evidence points to difficulties with deterrence strategies that lead them to be far from optimal approaches to social order maintenance.”).
  8. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 143.

on trust (and, consequently, legitimacy) of law enforcement. Although black drivers were more likely to receive tickets than white drivers, that difference was not found to be statistically significant.<sup>9</sup> And while blacks were more likely than whites to be placed in handcuffs or be arrested as a result of a traffic safety stop at a statistically significant difference,<sup>10</sup> the traffic safety stops did not produce racially disparate impact in the trust of police.<sup>11</sup> Moreover, researchers found that whites were more likely to be stopped for excessive speeding and other traffic safety reasons, but blacks were far more likely to be stopped for investigatory stops or given no reason at all for being pulled over.<sup>12</sup>

The Kansas researchers also found that pretextual investigatory stops—such as those condoned by *Whren*—contributed heavily to police mistrust and ill-will by African Americans.<sup>13</sup> Their data, taken from a sample of traffic stops in Kansas City and published in their book *Pulled Over*, showed that white and black drivers generally felt the traffic safety stops were legitimate because they knew they were pulled over for speeding and were most often treated in a way they viewed was fair.<sup>14</sup> However, when the stop was for a minor infraction and led to the officer asking prying questions and requesting to search the vehicle, the stops engendered hostility and resentment among all races, but particularly among African Americans and Latinos—who were stopped much more often for investigatory purposes—whether or not the officer was polite and respectful.<sup>15</sup>

In those encounters, the drivers were kept for up to an hour—sometimes in handcuffs or standing in front of their car as the police searched and as traffic drove by.<sup>16</sup> Given that the people most often subjected to these denigrating investigative searches—both in pedestrian stops<sup>17</sup> and

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9. *Id.* at 81 fig.4.1.

10. *Id.* at 83.

11. *Id.*

12. *Id.* at 61 fig.3.1.

13. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 143.

14. *Id.*

15. *Id.* at 6 (“What makes inquisitive police stops so offensive to so many African Americans and Latinos is not that the officers carrying them out are impolite or even frankly bigoted, but that these stops are common, repeated, routine, and event scripted.”).

16. *Id.* at 24.

17. *See, e.g., Stop and Frisk Data*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited May 9, 2016) [<https://perma.cc/3C3Y-PQPM>] (showing that African Americans and Latinos are stopped far more often—both in percentage of population and real numbers—than whites for pedestrian investigatory stops and frisks).

traffic stops<sup>18</sup>—are black, if African Americans trust police less, it should surprise no one.

### III. PRETEXTUAL STOPS REST ON LEGAL FICTIONS

A still larger percentage of black drivers Epp surveyed knew someone or had their own personal negative experiences dealing with police officers relative to white populations, which is consistent with other studies.<sup>19</sup> Many of those invasive and unpleasant stops are legal under existing case law,<sup>20</sup> thereby leaving the subjects of those stops with no recourse in court. Many black people who are stopped understand or believe that the potential cost of saying no to an officer could result in officer agitation—resulting in the previously mentioned hour in handcuffs or worse—and a belief the officer may end up searching the car anyway.<sup>21</sup> Under these circumstances, while consent is “voluntarily given” in the eyes of the law, it does not feel that way to those people giving it.

Although this symposium’s focus is on *Whren*, a case about stopping motorists on pretextual grounds, it is important to remember that it is one case in a larger criminal justice and Fourth Amendment milieu that creates an illusion of consent and antagonizes innocent people in the process. *Terry v. Ohio*<sup>22</sup> is another case that has led to police practices that render consent illusory.<sup>23</sup> The Supreme Court decided *Terry* to provide a rarely used officer-safety exception to the Fourth Amendment, while explicitly warning against the use of police stops as an

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18. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 105–06.
  19. See, e.g., Patricia Y. Warren, *Perceptions of Police Disrespect During Vehicle Stops: A Race-Based Analysis*, 57 CRIME & DELINQ. 356 (2011) (examining the influence of vicarious experiences of police interaction on the public’s perception of police conduct).
  20. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding that an officer’s “factual inferences” drawn under the “totality of the circumstances” of a traffic stop may establish reasonable suspicion of illegal activity); see EPP, MAYNARD-MOODY, & HAIDER-MARKEL, *supra* note 3, at 35 (“[T]he difference between a legal and illegal stop is not *what the officer saw and did* but *how he or she describes it*.”).
  21. An officer often will say, falsely, that they will get a warrant and search a car anyway to encourage a motorist to submit to a search the officer has no legal right to impose without consent. See Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 781 (1997).
  22. 392 U.S. 1 (1968).
  23. See *id.* at 30 (holding that police officers may conduct a “carefully limited search” of people the officer suspects, based on the given circumstances and the officer’s professional experience, may be engaged in criminal activity).

interrogation tactic, particularly in minority communities.<sup>24</sup> Nevertheless, *Terry* morphed into a virtual *carte blanche* for stopping and searching pedestrians in some cities.<sup>25</sup>

In a recent concurrence in the U.S. Court of Appeals for the D.C. Circuit, Judge Janice Rogers Brown wrote about this “fiction of voluntary consent” in Fourth Amendment jurisprudence.<sup>26</sup> The case, *United States v. Gross*,<sup>27</sup> involved patrols of officers called “Gun Recovery Units” in predominantly black and high-crime neighborhoods in the District of Columbia.<sup>28</sup> Officers regularly stop and, with “consent,” search people for firearms.<sup>29</sup> Comparing the usual locales of these patrols with the posh, predominantly white D.C. neighborhood of Georgetown, she wrote:

As a thought experiment, try to imagine this scene in Georgetown. Would residents of that neighborhood maintain there was no pressure to comply, if the District’s police officers patrolled Prospect Street in tactical gear, questioning each person they encountered about whether they were carrying an illegal firearm? Nothing about the Gun Recovery Unit’s modus operandi is designed to convey a message that compliance is *not* required. While viewing such an encounter as consensual is roughly equivalent to finding the latest Sasquatch sighting credible, I submit to the

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24. The *Terry* Court observed:

The President’s Commission on Law Enforcement and Administration of Justice found that “in many communities, field interrogations are a major source of friction between the police and minority groups.” It was reported that the friction caused by “[m]isuse of field interrogations” increases “as more police departments adopt ‘aggressive patrol’ in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.” While frequency with which “frisking” forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation and the particular officer, it cannot help but be a severely exacerbating factor in police-community tensions. *This is particularly true where the “stop and frisk” of youths or minority group members is “motivated by the officers” perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.*

*Id.* at 14 n.11 (emphasis added) (citations omitted).

25. See *Stop and Frisk Data*, *supra* note 17 (documenting, based on age and race, the number of times police officers stop and frisk people in New York).

26. *United States v. Gross*, 784 F.3d 784, 789 (D.C. Cir. 2015).

27. 784 F.3d 784 (D.C. Cir. 2015).

28. *Id.* at 785.

29. *Id.* at 785–86.

prevailing orthodoxy, but I continue to reject its counterintuitive premise.<sup>30</sup>

She goes on to say:

With the guise of voluntary consent stripped away, the reality of the District's regime is revealed. It is a rolling roadblock that sweeps citizens up at random and subjects them to undesired police interactions culminating in a search of their persons and effects. If the Fourth Amendment is intended to offer meaningful protection in the context of *Terry* stops, the voluntary consent exemption cannot be used to engage with members of the public *en masse* and at random to fabricate articulable suspicions for virtually every citizen officers encounter on patrol.<sup>31</sup>

Bound by Supreme Court precedent to uphold the stops, Judge Brown concurred in judgment but her opinion of the socio-economic and—and implicitly racial—double-standard that applies in these situations could hardly be clearer.

Such disparities are hardly limited to the District of Columbia. A 2006 study showed that 18-19 year old black men in New York City had nearly an 80 percent chance of being stopped by New York City Police in a given year; that figure dips to 50-70 percent when the age group expanded to 18-to-24 year olds within the same racial demographic.<sup>32</sup> For whites in these age groups, the percentages were 10 and 13 percent, respectively.<sup>33</sup> This is patently unequal treatment before the law.

#### IV. PROCEDURAL JUSTICE AS LEGITIMACY TOOL

There is a growing body of research<sup>34</sup> that suggests that what is known as “procedural justice” can mitigate some of the rancor elicited

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30. *Id.* at 790 (Brown, J., concurring).

31. *Id.* at 791 (Brown, J., concurring).

32. Meares, *supra* note 5, at 654 (citing Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in RACE, ETHNICITY, AND POLICING 309, 336 tbls.13.4A & 13.4B (Michael White & Steven Rice eds., 2010)).

33. *Id.*

34. See e.g., Tom R. Tyler, Jonathan Jackson & Ben Bradford, *Procedural Justice and Cooperation*, in ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE 4011, 4011–24 (Gerben Bruinsma & David Weisburd eds., 2014); *Comprehensive Law Enforcement Review: Procedural Justice and Legitimacy: Summary*, CMTY. ORIENTED POLICING SERVS. U.S. DEPT. OF JUSTICE, <http://www.cops.usdoj.gov/pdf/taskforce/Procedural-Justice-and-Legitimacy-LE-Review-Summary.pdf> [<https://perma.cc/5HM2-AL4X>] (last visited Mar. 18, 2016).

by police encounters and enhance police legitimacy, whether in traffic or pedestrian stops.<sup>35</sup> Broadly, if a police officer treats the subject with respect and fairness, the person who is stopped will more likely accept the legitimacy of the stop regardless of outcome—even if that outcome is ticketing or arrest. But it is very important that procedural justice is considered for the whole of the stop, not just whether the police officer was friendly or polite after pulling someone over. An overemphasis on kindness and courteousness<sup>36</sup> may discount the impact of the decision-making that led to the initial contact or encounter with police in the first place.

Social Psychologists Tom R. Tyler and E. Allan Lind suggest that there are three conceptual components police must satisfy with an individual to establish legitimacy and thus provide adequate procedural justice: trust, standing, and neutrality.<sup>37</sup> *Trust* is the amount of belief a person has that an authority figure will act fairly and benevolently in the future.<sup>38</sup> *Standing* refers to a person's belief that the authority figure recognizes the inherent value of a person, exemplified by politeness and courteousness in interaction.<sup>39</sup> *Neutrality* refers to a person's perception that he is not being discriminated against because of his membership in a minority group or other nonindividualized category.<sup>40</sup>

One conceptual pitfall when applying procedural justice to a pretextual stop is that the stop itself is based on an officer's hunch that very often has a racial component<sup>41</sup> that may be perceived by the person

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35. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 4 (“The first assumption [of racial profiling] is that what African Americans find offensive—and what ultimately distinguishes a racially problematic stop from a racially legitimate stop—is primarily officer rudeness and disrespect, not other elements of the stop itself.”); see also Jake Horowitz, *Making Every Encounter Count: Building Trust and Confidence in the Police*, NAT’L INST. FOR JUSTICE (2007), <http://www.nij.gov/journals/256/pages/building-trust.aspx> [<https://perma.cc/Q2ZP-6AD4>] (“If [a person in contact with police] believes that the officer was fair and professional, then that person is more likely to have positive impressions of future encounters with police.”).
36. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 48–51 (discussing police response to complaints of racial bias by instructing officers to be more polite and professional).
37. Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 115, 158–59 (1992).
38. Meares, *supra* note 5, at 659.
39. *Id.*
40. *Id.*
41. See EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 41–48 (discussing the “cognitive monster” of individual and systemic race bias in policing and explaining that many American police departments made a concerted effort to address racism within the ranks but focused heavily on

stopped. Thus, before the officer has a chance to establish standing through courtesy—laying the groundwork for trust in the future—the neutrality component will be negated and adequate procedural justice will be rendered practically impossible. Some examples follow.

Sometimes the area where a person is stopped is a predominantly black neighborhood with high drug activity or violence, as in the case Judge Brown wrote about. Yet, most people who live in those neighborhoods are not, in fact, drug or other criminal offenders. But their proximity to drug trade makes them targets for these pretextual stops, undermining the expectation of individualized suspicion that our Fourth Amendment is supposed to protect. Most people who are stopped with pretext are innocent and there is no consensus that pretextual stops or disorder-driven ‘broken-windows’ style policing reduce crime.<sup>42</sup> As a result, such aggressive policing can make innocent people feel they are treated like criminals in their own neighborhoods, without making that neighborhood demonstrably safer from crime.

Other times, the area where a black driver is stopped is an affluent white neighborhood. Here, investigatory stops of black drivers may start off with something like “Where are you going? Why are you around here?”<sup>43</sup> This imposition—and the unsubtle implication that black people do not belong in certain areas—harkens back to a time in America’s not-so-distant past in which blacks were not viewed as full citizens by either law or custom. The United States has destroyed its explicitly racially discriminatory laws, but in some ways, many law enforcement customs maintain the racial divisions within broader society.

Whether an investigatory stop happens in a poor black neighborhood or an affluent white one, pretext for the stop plausibly—studies like Epp’s suggest *implicitly*—has a racial component. This perceived

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courteousness and professionalism without paying much attention to any policies that led to negative encounters).

42. See *Broken Windows Policing*, CTR. FOR EVIDENCE-BASED CRIME POL’Y, <http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/> [<https://perma.cc/PZ5S-NWQJ>] (last visited Feb. 12, 2016) (“There is . . . no consensus on the existence of a link between disorder and crime, and how to properly measure such a link if it does indeed exist. For example, [Wesley G.] Skogan’s (1990) research in six cities did suggest a relationship between disorder and later serious crime, but [Bernard] Harcourt (2001) suggested in a re-analysis of Skogan’s (1990) data that there was no significant relationship between disorder and serious crime. Hence, there is no clear answer as to the link between crime and disorder and whether existing research supports or refutes broken windows theory.”); see also, D.A. Josi., M.E. Donahue & R. Magnus, *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 PRAC. AND RES. 477 (2000) (noting that research showed that increases in targeted enforcement had mixed results).

43. EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 5.

lack of neutrality compounded with a flimsy initial reason for a stop undermines the stop as a legitimate exercise of power<sup>44</sup> and thus detracts from police legitimacy.

V. THE PRETEXTUAL STOP IS A DISHONEST PRACTICE  
INCOMPATIBLE WITH PROCEDURAL JUSTICE

Many officers who conduct pretextual stops have been trained to ask questions that may lead to a search.<sup>45</sup> A given officer has likely also been trained to ask for consent—sometimes in ways that play fast and loose with the truth.<sup>46</sup> Broadly put, courts have determined that a certain amount of deception is legal, so long as it is not to deprive rights of the individual directly.<sup>47</sup> But the person being goaded and deceived is more often than not disinterested in case law.

Professor Christopher Slobogin, relying on the philosophy of Sissela Bok, has written on the ethics—rather than simply the legality—of police lying under different circumstances, particularly during the investigative process. Slobogin concludes that, insofar as police officers should ever lie, it should be done after the person has been arrested or after the police have established they have probable cause to arrest a person<sup>48</sup>—such as to illicit a confession from a murder suspect during interrogation. In such circumstances, a person’s position relative to law enforcement as a putative lawbreaker clarifies the relationship as a potentially antagonistic one and the need for trust is lessened.

Slobogin suggests limiting police dishonesty to people who are deemed to be criminal suspects, such as an officer posing as a door-to-door salesman to investigate a possible kidnapping, rather than using deception as a regular tactic to be used against everyone and anyone<sup>49</sup> to effectively end-run around constitutional protections. Put another way, police should not lie to gain consent for a search that is otherwise

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44. *See id.* at 132–33 (citing data to show that investigatory stops are consistently evaluated negatively, even when the officer is respectful).

45. *Id.* at 38.

46. *Id.*

47. *See, e.g., In re D.A.S.*, 391 A.2d 255 (D.C. 1978) (holding that police deception about the amount of evidence against a defendant did not invalidate voluntary plea under the circumstances of the case); *Frazier v. Cupp*, 394 U.S. 731 (1969) (holding that a voluntary confession was admissible, despite the fact that the defendant’s interrogator falsely told the defendant that a companion had already confessed); *but see Collazo v. Estelle* 940 F.2d 411 (9th Cir. 1991) (holding that, where police deceived a defendant into believing that it would hurt the defendant’s case to demand an attorney, the defendant’s confession was involuntary).

48. Slobogin, *supra* note 21, at 777.

49. *Id.* at 802–03.

not supported by circumstances or available evidence. The late Carl Klockars suggested that the moral justification for police lying relies on “the principle of nonmaleficence”<sup>50</sup>: “[T]he avoidance of harm . . . justifies both the police use of lies and the use of force in pursuit of criminals. Moreover, it is also the source of limits on both force and lies, providing that no more of either be used than is necessary to prevent harm.”<sup>51</sup> If such a limitation is to have any meaning, the harm that a putative lie would be used to mitigate would need to be defined as imminent—not simply the potential, hunch-based suspicion that underlies a pretextual traffic or pedestrian stop.

By definition, police officers only try to gain consent to search a car when the officers lack the probable cause to suspect criminal activity. Therefore, the use of deception to gain that consent must be used against a presumptively innocent person, subverting the principle and spirit of Fourth Amendment protections. The common police motto “To protect and to serve” is in direct conflict with the antagonism inherent in a deceptive approach to gain consent for a search to which the officer is not otherwise entitled.

Moreover, by using trickery and deceit to elicit the cooperation of a driver or person suspected of no crime shifts an officer’s role from protector and public servant in a position of trust to antagonist and interrogator—even if he is doing so politely. Black people who experience these stops, particularly those who experience it repeatedly, recognize the difference and often resent it.<sup>52</sup>

Deception before arrest implies an antagonism with the “potential dupe,”<sup>53</sup> who is any member of the general public who is subject to an investigatory stop—which Epp’s and other data suggests will more than likely be black or Latino. As a tactic employed predominantly against minorities, then, the deception involved in pretextual stops undermines the principles of neutrality and trust needed to ensure procedural justice. A policy that depends on the diminution of minorities’ dignity will

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50. Carl B. Klockars, *Blue Lies and Police Placebos: The Morality of Police Lying*, 27 AM. BEHAV. SCIENTIST 529, 533 (1984).

51. *Id.*

52. One author observed:

In most of these [pretextual] stops, the African American driver described the officer as “polite” or even “nice.” In none was the driver given a ticket. And yet in each case, the driver described to us [the] fear and resentment of the experience. White drivers rarely share these experiences, making police stops a defining aspect of the racial divide in America.

EPP, MAYNARD-MOODY & HAIDER-MARKEL, *supra* note 3, at 2.

53. Slobogin, *supra* note 21, at 811.

undermine police—and therefore, governmental—legitimacy<sup>54</sup> and likely inflict harm upon those communities.<sup>55</sup>

## VI. CHANGING INSTITUTIONAL INCENTIVES

The stops based on racialized suspicion and subsequent deceptions employed to gain consent for searches are, at their core, institutional choices. Pretextual stops, like all traffic or pedestrian stops, are discretionary. That is, police could not stop every person who exceeded the speed limit or whose license plate light burned out, even if they wanted to. While officers are tasked with enforcing our traffic and criminal laws, there is no mandate to use the investigatory stop as a crime-control tactic, and certainly there is no requirement to deceive drivers while doing so. Therefore, it is up to the police departments themselves to reevaluate and perhaps discontinue the use of the pretextual investigatory stop.

Unfortunately, fixing the legitimacy problem is not as simple as weeding racist and prejudiced officers out of police departments—even if doing such a thing were simple. Over time, police officers have become more professionalized and less likely to use profanity or racial epithets that would indicate open racial hostility. Yet there are systemic incentives at play that allow and encourage subtle yet racially problematic behaviors to proliferate. These incentives continue to sow the seeds of distrust between police and minority communities. The effect of these incentives is an erosion of police and criminal law legitimacy—and thus social cohesion—that is essential for a community to thrive and prosper.

These incentives include, first and foremost, the prosecution of the Drug War. Discussing *Whren* in particular, whatever putative utility investigatory stops provide is concentrated heavily fighting the War on Drugs. Contraband seizures look good on arrest reports and big scores look good for cameras. But those busts say nothing about the humiliating experiences of countless innocent people stopped before finding that one car full of drugs and guns out of many fruitless and invasive searches. And because the drug trade is so lucrative—not just for the dealers, but also for the enforcers through asset forfeiture<sup>56</sup> and other

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54. *Id.* at 796 (“[D]eception during . . . searches and seizures . . . diminishes the dignity and autonomy of the dupe.”); see also SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 142 (2d. ed. 1999) (“[W]hen a government is known to practice deception, the results are self-defeating and erosive.”).

55. See HART, *supra* note 1, at 37 (“[T]he community is interested in the defendant’s realization of his potentialities as a human being and in the contributions he can make to community life.”).

56. See generally DICK M. CARPENTER II ET AL., INSTITUTE FOR JUSTICE, POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd->

incentives such as federal grants for drug enforcement task forces<sup>57</sup>—limited police resources are steered toward drug enforcement and away from public safety and crime solving.

The second major incentive is the arrest-as-metric for police success. Whether or not there is an unofficial quota, officers may maximize arrests for arrests' sake because they are easily quantifiable. Again, the Drug War becomes a primary driver of arrests due to America's considerable drug appetite. But even beyond that, aggressive "broken windows"<sup>58</sup> style policing leads to crackdowns on loiterers, grey market tobacco sales, truancy, and other minor offenses—several of which have racist origins dating back to the post-Civil War American South.<sup>59</sup> Aggressive order enforcement has always and continues to fall disproportionately on black Americans.<sup>60</sup> It sometimes manifests itself as harassment, leading to dramatic confrontations like we saw in Staten Island that led to the death of Eric Garner.<sup>61</sup> More broadly, zero-tolerance policing disrupts the lives of minor offenders and adds to their criminal records,<sup>62</sup> making them less employable and less valuable in a

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edition.pdf [<https://perma.cc/6YME-4XJC>] (discussing how civil asset forfeiture laws are used to seize property).

57. DRUG POLICY ALLIANCE, FEDERAL BYRNE GRANTS: DRUG WAR FUNDS AVAILABLE FOR DRUG TREATMENT 1 (Sept. 2010).
58. Also known as "order maintenance" policing, broken windows is the nickname given to aggressive policing of low-level crimes in order to prevent more serious crimes. It is named for the article that is thought to have shifted public strategy. George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/CK38-L2AH>].
59. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (providing a history of the evolution of law enforcement in post-war years, specifically the enforcement of vagrancy and other nuisance laws to deprive freedmen of their liberty).
60. *See generally* KHALIL G. MUHAMMAD, THE CONDEMNATION OF BLACKNESS (2010) (providing a thorough history of the use of criminal statistics and perceptions of black Americans as rationale for social and criminal justice policies).
61. Joseph Goldstein & Nate Schweber, *Man's Death After Chokehold Raises Old Issue for the Police*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/nyregion/staten-island-man-dies-after-he-is-put-in-chokehold-during-arrest.html> [<https://perma.cc/V4ZK-AUVN>].
62. Editorial, *Broken Windows, Broken Lives*, N.Y. TIMES (July 25, 2014), [http://www.nytimes.com/2014/07/26/opinion/broken-windows-broken-lives.html?\\_r=0](http://www.nytimes.com/2014/07/26/opinion/broken-windows-broken-lives.html?_r=0) [<https://perma.cc/23EQ-A2XS>].

market economy.<sup>63</sup> Fewer legal economic opportunities may make re-offending more likely, trapping people in a spiral of petty crime and incarceration.

The third incentive, as the late William Stuntz lamented in his book *The Collapse of American Criminal Justice*, is the political pressure for aggressive policing—the fears of the wider (and whiter) electorate—that results in punitive measures mostly meted out on minority communities.<sup>64</sup> Because whites’ interactions with police are more likely to be traffic-safety stops or responses to calls for assistance rather than dubious pretextual stops and searches, they generally are not exposed to the questionable practices concomitant with aggressive law enforcement. Due to the perceptions of the nature of police interactions based on first- and second-hand knowledge, many white Americans have little reason to doubt the veracity and efficacy of the procedural guarantees in the Constitution and rulings of the Supreme Court. The proposition that legal opinions such as *Whren* and *Terry* effectively undermine the very rights they are supposed to protect when applied in practice<sup>65</sup> is counter-intuitive and thus the police benefit from a popular assumption of fairness. In short, because white Americans are more likely to receive procedural justice, they are less likely to be sensitive to complaints of systemic bias.

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63. See Jonathan Blanks, *Our Criminal Justice System is Making it Really Hard for People to Find Jobs*, WASH. POST (Sept. 30, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/09/30/our-criminal-justice-system-is-making-it-really-hard-for-the-poor-to-find-jobs/> [https://perma.cc/ZX8T-ACKH].

64. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 15–40 (2011) (describing “tough on crime” politics in white suburbia and the subsequent distribution of police resources and tactics in minority enclaves).

65. In dismissing the racial profiling challenge under the Fourth Amendment in *Whren v. United States*, Justice Antonin Scalia wrote, “[w]e of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.” 517 U.S. 806, 813 (1995). The layperson is unlikely to distinguish (or care about) the doctrinal differences between unreasonable searches under the Fourth Amendment and Equal Protection under the Fourteenth Amendment as the officer is rifling through his car looking for drugs that are not there *again*. Though proper legal procedure is necessary for stable jurisprudence, the practical effect of *Whren* is to enable racial profiling by way of technical violation. Because governmental legitimacy relies on perception of the individual or community under its rule, the doctrinal differences are irrelevant to the layperson outside of a courtroom. As for *Terry*, that “stop and frisk” became a gun control and quality of life tactic under then-New York City Mayor Michael Bloomberg runs counter to the Court’s admonition in *Terry*’s footnote 11. *Terry v. Ohio*, 392 U.S. 1, 14 n.11, 17 n.14 (1968). Although *dicta*, the Court clearly warned about such tactical use rather than the officer-safety exception to general Fourth Amendment protection against search and seizure. *Id.*

Taken together, these incentives reward aggressive enforcement, irrespective of justice or public safety. The democratic check against abuse is weak because it is often concentrated in areas that do not feel the direct effects of that enforcement. This is a recipe for ignorance and tolerance of police abuse, such as questionably consensual searches after pretextual stops, under the guise of law.

#### VII. LEGAL REFORM AND “LEGITIMACY-BASED LAW ENFORCEMENT POLICY”

Ending the Drug War is the singular macro-policy change that can reduce the harms caused by aggressive antagonistic policing. As this change is unlikely—though marijuana liberalization seems to be proceeding at an increasing pace among the states<sup>66</sup>—the push for wholesale reforms in what is legal and illegal may need to take a backseat to a public reexamination of how police officers go about their jobs. Such a reexamination would include the priority and methods of enforcement of the laws still on the books. A shift toward a more public-safety oriented policing would likely improve perceived legitimacy in our law enforcement system.

At the agency level, professors Cynthia Lum and Daniel Nagin suggest two guiding principles for policing in a democratic society:

1. Crime prevention, not arrests, should be the paramount focus of police organizations and the metric by which they are evaluated.
2. Citizen response to the police and their tactics for preventing crime and disorder matter independent of police effectiveness in these functions.<sup>67</sup>

These two principles get to the heart of police legitimacy: increasing institutional respect for citizens by focusing on keeping them safe and responding to their needs. These principles move toward what Yale law professor Tracey Meares calls “legitimacy-based law enforcement policy.”<sup>68</sup> She writes, “A legitimacy-based program of law enforcement will focus more on persuasion than it will focus on punishment. And to

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66. *See State Policy*, MARIJUANA POLICY PROJECT, <https://www.mpp.org/states/> [<https://perma.cc/XZL6-NHCS>] (last visited Mar. 20, 2016) (noting differences in marijuana policy across the United States).

67. Cynthia Lum & Daniel Nagin, *Reinventing American Policing: A Seven-Point Blueprint for the 21st Century*, CRIME AND JUSTICE: A REVIEW OF RESEARCH (forthcoming 2016); Cynthia Lum & Daniel S. Nagin, *Reinventing American Policing*, THE CRIME REPORT (June 24, 2015), <http://www.thecrimereport.org/news/articles/2015-06-reinventing-american-policing-a-seven-point-blueprin> [<https://perma.cc/C5VJ-QNKN>].

68. Meares, *supra* note 5, at 660.

achieve persuasion, authorities will have to pay attention to the creation of the necessary social capital that engenders trust relationships between governors and the governed.”<sup>69</sup>

In keeping with Lum and Nagin’s two principles, the practice of pretextual investigatory stops should be greatly curtailed, if not ended outright. The evidence that pretextual stops have substantial effects on crime control is, at best, mixed, yet the evidence that they exacerbate community mistrust is considerable and growing. Indeed, a practice that relies on police deception of the legally innocent to waive their constitutional rights is inimical to establishing the “trust relationships” that Meares suggests.

There is no question that pretextual stops ensnare more innocent people than guilty ones. Furthermore, they may alienate police from the public through legal but ethically dubious actions in furtherance of their institutional incentives that are not necessarily congruent with the public interest. The longer-term social costs of pretextual stops far outweigh the fleeting gains from the arrests they enable.

Ending or severely limiting pretextual stops should be part of a broader shift away from unnecessary hostile confrontations with the public and toward more positive everyday interactions with people in those communities. So long as police act as antagonistic agents with the law abiding public, trust will be impossible.

#### CONCLUSION

Ultimately, it is up to the police to establish and protect their legitimacy with the communities they are sworn to protect and serve. Aggressive law enforcement and deterrence may have reduced some crime, but police departments nevertheless suffer trust and legitimacy issues with many American black communities. As a result, African American communities suffer from the effects of crime made easier by the communities’ strained and, at times, antagonistic relationship with the police. Because the courts are unwilling or unable to rein-in police tactics that subvert the spirit of the laws protecting individual dignity, as cases like *Whren* demonstrate, black communities have little hope of judicial redress for abusive policies upheld by legal fictions. Procedural justice may be a partial remedy to heal the relationships between black communities and the police, but police agencies and legislators will need to reorient law enforcement priorities and strategies to better serve the communities that need their protection the most. This will require a new understanding of police efficacy and reorienting the relationships between the police and each of the communities they serve.

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69. *Id.*