

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 individuals 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 are a number of steps that states can take to shift the incentives around pretextual policing and limit its use. Here we outline a few of the strategies that states can adopt:

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. (In Virginia, this prohibition is backed by the exclusionary rule, which seems essential for removing the incentive to engage in pretextual enforcement.)

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, whether they have drugs in the car, etc.) These sorts of reforms limit the possibility of fishing expeditions, which not only reduces the incentive to make stops, but also can reduce the intrusiveness of the stops that do take place. (Justice Sonia Sotomayor does a really nice job in her dissent in *Utah v. Strieff* of describing the dignitary costs of getting stopped for speeding or jaywalking and then being subjected to prolonged questioning in a manner that telegraphs the officer's suspicions of more serious wrongdoing.)

3. Limit the use of outstanding warrants: One way to diminish the harms of pretextual enforcement, and to 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.

The problem is not with warrant checks per se, but with the fact that warrant checks too often turn up low-level warrants for failure to appear, which then creates 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: Another important step that states can take to address the use of pretextual stops is to require agencies to collect and report demographic data on all stops, citations, and arrests. Our transparency statute includes a comprehensive provision along these lines. The statute requires agencies to report these data to the state AG or an analogous entity, which is then obligated to make the data public in an analyzable format. These data can help researchers and advocates identify jurisdictions that make a disproportionate number of stops, and also to flag jurisdictions in which prevailing enforcement practices produce pronounced racial disparities.