Decriminalization, Police Authority, and Routine Traffic Stops

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ABSTRACT

Although there is no universal definition of “decriminalization,” approaches to decriminalization largely focus on modifying how conduct is sanctioned or punished. This Article argues that there is a need to broaden approaches to decriminalization beyond sanctions and give more consideration to the other ways in which criminalization fosters state control over civilians—including police authority and discretion. Decriminalization should restrict opportunities and methods for the state to control civilians in ways that (1) facilitate their entry into, or continued contact with, the criminal justice system, and (2) leave them vulnerable to state-imposed privacy, liberty, dignitary, and physical harms that arise from contact with the criminal justice system and actors. These goals are undermined when decriminalization does not capture police authority and discretion.

To illustrate these points, this Article focuses on the most common form of civilian interaction with the police—the routine traffic stop. Through original research, this Article shows that since 1970 twenty-two states have decriminalized minor traffic violations by removing criminal sanctions, reclassifying the violations as noncriminal offenses, and streamlining their adjudication to the administrative realm. These decriminalization reforms have centered on modifying sanctions and have rarely restricted police authority and discretion in routine traffic stop settings.

This Article then exposes and examines an asymmetry in the criminal justice process that emerges from sanction-focused approaches to decriminalization, and appears in traffic decriminalization trends. Specifically, the focus on sanctions in traffic decriminalization reforms has enabled states to retain access to an expanding set of crime-fighting tools via the policing of decriminalized traffic violations to further their crime-control policies (such as drug law enforcement). This access, however, comes at the expense of funneling drivers and passengers into the criminal justice system, and making all drivers—whether innocent or guilty of nontraffic crime—more vulnerable to privacy, liberty, dignitary, and physical harms that stem from policing in traffic settings. These results, which advocates of decriminalization should seek to avoid, especially affect people of color and other minority communities that are more vulnerable to concentrated police surveillance and pretextual traffic stops.
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INTRODUCTION

There is no consensus about the meaning of “decriminalization.” Approaches to decriminalization among scholars and criminal justice actors (for example, legislatures, courts, prosecutors, and law enforcement) largely focus on how conduct is sanctioned or punished. Yet even when no sanction or punishment results, police interactions can have many significant consequences for civilians. Consider the following traffic stop that lasted forty-five minutes but never resulted in a citation.

At 1:40 a.m., Kesner—a Black male—was acting as the designated driver for his two friends—a Black and a Latino male. To his knowledge, Kesner was obeying all traffic laws. An officer was stopped at a red light and “followed [Kesner] with his eyes” as he drove past. The officer then turned on the police car lights without the siren, made a U-turn, and started to follow Kesner. Suspecting that the officer might be attempting to pull him over, Kesner soon pulled into a parking lot and parked. The officer followed Kesner into the parking lot at a high speed.

Approaching Kesner’s car with his hand on his gun, the officer ordered the three men to put their hands up and out of the car window. The men complied. The officer then asked for Kesner’s driver’s license and registration, which Kesner provided. Kesner asked why he had been pulled over. The officer accused Kesner of attempting to evade his patrol car, which Kesner denied. Immediately, the officer requested a DMV check and officer backup, which soon arrived. The first officer at the scene described Kesner as

3. These facts are taken from Liberal v. Estrada, 632 F.3d 1064, 1067–70 (9th Cir. 2011).
4. Id. at 1068.
“verbally confrontational” for repeatedly stating that he had been stopped “for no reason.”

Eventually, Kesner was ordered out of his car. As he stepped out, an officer grabbed him by the wrist, pulled him out of the car, spun him around, and pushed him against the rear door of the car. He was handcuffed and led to sit on the front bumper of the police car. The officer then did the same to one of the passengers. Both men were handcuffed for twenty-five to thirty minutes, during which time the officer yelled at them and demanded to know why they tried to evade him. Kesner denied the accusations, commented that the traffic stop was motivated by his race, and said that he was going to contact his lawyer. The officer then partially read Kesner his Miranda rights, leading Kesner to believe that he was under arrest.

Kesner saw multiple officers searching the area around his car. After uncuffing him, the officer grabbed Kesner’s arm, led him to his car, and asked him whether the officers could search it. Kesner responded yes. Kesner was then put in the backseat of the patrol car. The officers searched his car thoroughly, “turning everything upside down.” The search uncovered only a lawfully possessed, unloaded pellet handgun. Throughout the stop, two officers questioned Kesner about how much he had to drink that night. Kesner answered “probably two beers.” He was given two different sobriety tests—each indicated that he was not intoxicated. At the end of the stop, the three men were lined up in front of four officers. The officer then said, “I wish you were drunk so I had a reason to take you in.” The officer said to the three men that if they had made a wrong move, he would have “busted a cap” right between their eyes, and that he and his partner liked to go on “night target practice.” The men were then permitted to leave. Kesner was never told why the officer initially pulled him over, and he never received a traffic citation.

As this example illustrates, the criminal justice process entails much more than sanctioning wrongdoing. A long line of sociological and criminal justice literature describes the criminal justice process along a spectrum involving complementary institutions of social control (for example, police, courts, and corrections) including the following stages: crime is detected or
reported, police investigate and arrest suspects, suspects make court appearances, claims of innocence and guilt are adjudicated, and the guilty are punished (the so-called “sanctioning” stage).\textsuperscript{11} Even though sanctioning is only one stage in this progression, it dominates discussions about decriminalization.

If decriminalization proponents take their normative commitments seriously, then modifying sanctions should represent only the beginning of the decriminalization process. Sanction-focused approaches to decriminalization fail to capture the harms to civilians and to the state that formal institutions of social control impose at earlier stages of the criminal justice process. This Article focuses on one formal institution of social control with a central role in the criminal justice process: law enforcement.\textsuperscript{12} I argue that decriminalization ought to involve not only modifying the sanctions that attach to particular kinds of conduct but also modifying the ways law enforcement entities police that conduct.

Sanction-focused approaches to decriminalization have perpetuated the idea that the chief goal of decriminalization is to reduce or to eliminate punishment. But this view is much too narrow. Advocates of decriminalization should expand their view and attend to the multitude of ways in which diffusing different types of social control—including punishment—might be made possible. From this broader perspective, decriminalization’s goals should be to restrict opportunities and methods for the state to control civilians in ways that (1) facilitate their entry into, or continued contact with, the criminal justice system, and (2) leave them vulnerable to state-imposed privacy, liberty, dignitary, and physical harms that arise from contact with the criminal justice system and actors. From this broader framework, decriminal-

\begin{itemize}
\item \textsuperscript{11} For the sake of simplicity, the stages referenced throughout this Article include sanctioning as the last stage of the criminal justice process. Describing the process in more detail, however, we might well include release from prison and parole—or other forms of state or community supervision—as a stage that occurs after sanctioning. \textit{See, e.g.}, ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS 2 (2010) (explaining that “it is not easy to define” the criminal process, but providing a general definition as “the processes and procedures whereby the system deals with potential suspects, suspects and defendants”).
\item \textsuperscript{12} DONALD BLACK, THE MANNERS AND CUSTOMS OF THE POLICE 1 (1980) (describing policing as a “kind of social control, a system of authority that defines and responds to deviant behavior”).
\end{itemize}
ization requires restricting opportunities and methods for the state to control, stigmatize, and harm civilians through both the sanctioning and the policing of specific conduct. ¹³

Criminalization not only makes criminal punishment possible but also gives law enforcement access to a range of policing tools—some created by legislatures and others by courts—that assist police officers in detecting, preventing, and responding to crime. ¹⁴ Although this toolbox’s contents vary across jurisdictions, they shape the circumstances under which police officers can lawfully act and conduct searches and seizures in different investigatory settings. ¹⁵ Sanction–focused approaches to decriminalization have enabled law enforcement to access these crime-fighting tools even when police officers target conduct that has purportedly been removed from the criminal framework. ¹⁶ Expanding conceptions of decriminalization to include restrictions on police authority would shield civilians from tactics that should only be available to the police when they target criminalized activity.

Broadening the spectrum of the criminal process that decriminalization captures prompts important questions about the types of police activity should be permissible in criminal contexts but be unavailable in noncriminal contexts. These questions are challenging because the rapid expansion of

¹³ Relevant here is Christopher Slobogin’s argument that the state’s desire to maintain the allegiance of its citizenry involves avoiding unnecessary searches and seizures. He defends the view that (1) civilians—whether innocent or guilty—are entitled to protection against unjustified government infringement of “privacy” and “autonomy”; (2) civilians, whether innocent or guilty, have an interest in avoiding government action designed to harass; and (3) the innocent have “an interest in avoiding the stigma, embarrassment, and inconvenience of a mistaken investigation.” Christopher Slobogin, The World Without a Fourth Amendment, 39 UCLA L. REV. 1, 5–7 (1991) (quoting the “privacy” and “autonomy” concepts and the attempts to define it in works such as H. LATIN, PRIVACY: A SELECTED BIBLIOGRAPHY AND TOPICAL INDEX OF SOCIAL SCIENCE MATERIALS (1976)).

¹⁴ Carol S. Steiker, Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration, in The Boundaries of the Criminal Law 27, 28 (R.A. Duff. et al. eds., 2010) (stressing that “the actual shape of the criminal law is cut from the cloth of the substantive law that legislatures enact by the tailoring decisions of discretionary actors that may include police”).

¹⁵ Wayne A. Logan, Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights, 51 WM. & MARY L. REV. 143, 146 (2009) (“Police authority to search and seize individuals, regulated by the Fourth Amendment, hinges on state and local decisions to criminalize particular behaviors, which themselves can be variously defined.”).

¹⁶ As discussed infra Part III.B.1.a, an important example of this phenomenon is the bleeding of Terry v. Ohio’s “reasonable suspicion” standard—a judicial creation typically associated with police suspicions of crime—into the context of decriminalized traffic violations. See Terry v. Ohio, 392 U.S. 1, 27 (1968).
federal and state criminal codes over the past few decades has blurred the line between the criminal and the civil realms. It also prompts significant questions about which criminal justice actors should set the rules by which police conduct is deemed legitimate in criminal contexts. In many instances, this broader account of decriminalization may require lawmaking bodies to reevaluate how statutes and ordinances should govern police authority. Courts may also have to reconsider how they approach constitutional issues involving policing matters.

These questions are far too broad and complex to address fully in a single article. This Article, however, advances the conversation by demonstrating the problems, conceptual gaps, and practical consequences of approaching decriminalization in a narrow, sanction-focused way. It does so primarily through an analysis of the most common form of civilian interaction with the police: the routine traffic stop.

Since 1970, twenty-two state legislatures have decriminalized minor traffic offenses by removing them from the criminal framework and


20. Traffic Stops, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=702 (last updated Oct. 4, 2014) (reporting that "the most common reason for contact with the police is being a driver in a traffic stop").
eliminating the criminal sanctions that once attached to them. More states may follow. These reforms have largely focused on the harms of imposing criminal sanctions for traffic violations and have attended far less to the harms of policing traffic violations. This is the case even though statistics report that only half of the tens of millions of routine traffic stops conducted each year result in a traffic ticket. In addition, the proportion of traffic stops that lead to the search of the driver, the vehicle, or both is far from trivial: 5 percent of stopped drivers are searched.

As this Article explains, the history behind considerations of police authority in statewide traffic decriminalization efforts is complex. The bulk of traffic decriminalization occurred between 1970 and the mid-1980s—before the rise of the now decades-old “war on drugs” that has fuelled police departments’ use of routine traffic stops as a major tool for drug enforcement. During this earlier period, sanctions dominated discussions about traffic decriminalization and there was a corresponding lack of attention to policing among state legislators and other proponents of decriminalization. Surprisingly, this omission was not always the result of key players embracing police authority in routine traffic stop settings for crime-control purposes.

Regardless of whether this omission was intentional in the past—and might be in the future—this Article calls attention to an asymmetry in the criminal justice process that has emerged from the sanction-focused nature of traffic decriminalization and is apparent in the traffic context. From a typical sanction-focused perspective, an asymmetry is not easily apparent. Rather, traffic decriminalization seems to be a boon for both civilians and the state.
Traffic violators can avoid criminal sanctions and admit fault more conveniently by paying a traffic ticket without having to appear in court.29 In addition, states significantly reduce the costs of handling traffic matters inside the criminal framework by creating separate administrative regimes to adjudicate traffic matters more quickly and cheaply.30

But an asymmetry appears when decriminalization is conceptualized to include limitations on policing. There has been a growing legislative and doctrinal trend over the past few decades giving police officers increased authority and discretion in routine traffic stop settings through the power to question, seize, and search.31 The focus on sanctions alone in traffic decriminalization efforts has enabled states at the front end of the criminal justice process to retain access to this expanding set of crime-fighting tools in traffic settings to further crime-control goals (such as drug law enforcement)—even when the stops are based on decriminalized traffic violations.32 This access, however, comes at the expense of funneling drivers and passengers into the criminal justice system, and makes all drivers—whether innocent or guilty of crime—more vulnerable to the privacy, liberty, dignitary, and physical harms that can stem from policing in routine traffic stop settings. People of color and other minorities vulnerable to concentrated police surveillance and pretextual traffic stops especially bear the brunt of this asymmetry.33 While traffic decriminalization may benefit the state, then, its always results in benefits to civilians at the back end of the criminal justice process, in spite of intentions underlying decriminalization to be less punitive at this later stage of the process. As Alexandra Natapoff has recently described, decriminalization in many instances has maintained the collateral consequences of a criminal conviction—such as damage to a violator’s employment, education, and immigration status; and ultimately left violators vulnerable to contempt charges and incarceration for failure to pay penalties attached to decriminalized offenses. See id. at *4–5. Nevertheless, as explained, traffic decriminalization was intended to and has provided important benefits for both civilians and the state at the back end of the criminal justice process (the sanctioning stage). See infra Part III.A.

29. See infra Part III.A.
30. See infra Part III.A.
31. See infra Part III.B.
32. See infra Part III.B.
33. Elizabeth Joh, Discretionless Policing: Technology and the Fourth Amendment, 95 CAL. 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”). There is a breadth of scholarship on the intersection of race and routine traffic stops. For examples, see generally CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP (2014); Devon W. Carbado, (E)Racing the Fourth Amendment, 100 MICH. L. REV. 946 (2002); Devon W. Carbado & Cheryl I. Harris, Undocumented Criminal Procedure, 58 UCLA L. REV. 1543 (2011); Angela Y. Davis, Race, Caps 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 (2003); David A. Harris,
apparent benefit to citizens may prove illusory: Despite an absence of criminal sanctions, drivers remain vulnerable to the coercive power of the state. Only by broadening conceptions of decriminalization beyond sanctions is it possible to examine whether decriminalization has meaningfully reduced objectionable forms of social control in the entire criminal process and the ramifications when it does not.

Given the difficulties of regulating police behavior, exposing this asymmetry in the criminal process prompts the question of how to address and to move beyond it. There are at least four distinct, yet overlapping, layers of problems that are implicated by overlooking police authority and discretion in decriminalization efforts. The first layer involves the fairness of how police officers exercise their authority and discretion in decriminalized traffic settings, and the disproportionate impact that this exercise has on people of color and other over-policed minority communities. The second layer involves a different fairness consideration regarding the mismatch between a known wrong that police officers initially target (the decriminalized infraction), which officers then leverage to discover evidence of an unknown criminal wrong (for example, drugs or weapons offenses). The third layer involves the empirical question of whether enabling police officers to capitalize on the enforcement of decriminalized violations for crime-control purposes gets society any closer to effective crime-control. The fourth layer is a separate empirical question about the consequences of extensive policing in settings involving decriminalized conduct on public confidence in the police, other legal institutions, and the law more generally. Although this Article offers some preliminary insights on possible reforms, its primary purpose is to expose and to evaluate the extent of the problems that emerge from the gap


34. See generally Harmon, supra note 19, at 766 (describing the complexities of regulating police behavior).

35. I thank Jennifer Mnookin for discussions on this point.

36. For the sake of simplicity, this Article uses the term “known” here. But police authority and discretion have expanded in the traffic domain to such an extent that in many jurisdictions police officers need only suspect, as opposed to observe, that a decriminalized traffic violation occurred. See infra Part III.B.1.a.
between decriminalization and police authority. It is particularly concerned with the first and second layers.

The Article proceeds as follows. Part I draws on nontraffic examples to illustrate that approaches to decriminalization focus primarily on sanctions, rather than policing. The Article then turns to traffic stops to explore the conceptual gaps and practical consequences of this narrow approach. Part II offers a survey of traffic decriminalization across the United States. Part III then sets out the asymmetry in the criminal justice process that is enabled by sanction-focused approaches to traffic decriminalization. Part IV examines the counterproductive effects of this asymmetry on the goals that decriminalization should achieve. Part V discusses concerns about broadening decriminalization to include restrictions on police authority, and briefly touches on possible reforms to address the examined asymmetry in the traffic stop context.

I. THE GAP BETWEEN DECRIMINALIZATION AND POLICING

Generally, criminal justice actors have approached decriminalization in four ways: (1) substitution, (2) de facto decriminalization, (3) pure decriminalization, and (4) reclassification. The analysis below draws on different nontraffic examples to show how different approaches to decriminalization have centered on the costs and harms of imposing criminal sanctions. There is much less attention to the costs and harms of how decriminalized conduct is policed.

A. Substitution

Legislatures sometimes replace criminal sanctions with nonpunitive responses because of harm-reduction principles and judgments that criminalized conduct should be treated as a public health issue as opposed to a criminal matter. But rather than limiting authority or opportunities for police to become involved with decriminalized conduct, substitution regimes frequently rely on police officers to detect wrongdoing so that they can filter

37. AARONSON, DIENES & MUSHENO, supra note 2, at 154.
38. See James A. Inciardi & Lana D. Harrison, Introduction: The Concept of Harm Reduction, in HARM REDUCTION: NATIONAL AND INTERNATIONAL PERSPECTIVES, at vii, x (2000) (“[H]arm reduction is a pragmatic policy aimed at minimizing the damage that drug users do to themselves, others, and society at large.”).
cases into those regimes. This is a reflection of a sanction-focused viewpoint. Police maintain broad authority to effectuate searches and seizures—regardless of their costs and harms—so long as those tactics filter civilians into substitution regimes.

To demonstrate these points, consider the example of drug courts, of which there are over 2500 in the United States today. Many scholars, legislators, and prosecutors have praised drug courts as an important tool to reduce mass incarceration by diverting nonviolent drug-dependent users into treatment rather than incarceration. Former Attorney General Eric Holder has praised drug courts as a “promising solution to the devastating effect of drugs on American communities.”

A more careful look at the front end of the criminal justice process reveals that drug courts have no bearing on how police approach drug enforcement. This is the case because drug court diversion does not occur until after individuals are arrested. As a result, drug court diversion does not reduce opportunities for police officers to stigmatize and harm civilians,

40. See, e.g., David E. Aaronson, C. Thomas Dienes & Michael C. Musheno, Improving Police Rationality in Handling Public Inebriates, 29 ADMIN. L. REV. 447, 448–49 (1977) (studying decriminalization substitution regimes for public drunkenness and affirming that “[j]urisdictions providing therapeutic modes of disposition for public drunkards may actually increase the discretionary choices available to the police officer”); Patricia G. Erickson, Harm Reduction. An Examination of Emerging Concepts, Methodologies, and Critiques, 34 SUBSTANCE USE & MISUSE, 1, 2–3 (1999) (noting that in the 1990s, police ideally became partners in substitution regimes in the UK, the Netherlands, and Australia to address the transmission of HIV through the sharing of contaminated needles and syringes); Barry Goetz & Roger E. Mitchell, Pre-arrest/Booking Drug Control Strategies: Diversion to Treatment, Harm Reduction and Police Involvement, 33 CONTEMP. DRUG PROBS. 473, 475 (2006) (evaluating the use of pre-arrest/booking strategies in the United States “designed to minimize the use of ‘traditional criminal justice pathways’ to gain access to [drug] treatment services, while at the same time placing the police (as opposed to the courts) at the center of the decision-making process”).


44. Sevigny, Pollack & Reuter, supra note 42, at 191 (“The typical drug court operates by initially screening recent arrestees for program eligibility.”).
especially drug-dependent users, through the power to question, search, and arrest.

Racial and ethnic minorities are especially affected by the lag time between policing and drug court diversion. A disproportionate amount of drug enforcement and drug-related arrests occur within economically disadvantaged communities with high representations of racial and ethnic minorities.\textsuperscript{45} Notably, these disadvantaged targets do not necessarily reap the benefit of drug court diversion. Overpolicing fuels their entry into the criminal justice system for other offenses, making them ineligible to participate in drug courts on account of their criminal histories.\textsuperscript{46}

But even when members of overpoliced minority communities are eligible and participate in drug courts, a closer look at the back end of the criminal justice process reveals that they do not necessarily avoid criminal sanctions. In most U.S. drug courts, diversion to outpatient treatment programs does not occur until after individuals enter guilty pleas.\textsuperscript{47} As Josh Bowers has explained, drug courts rely on a mixture of rewards and punishments that often set their target populations up for failure.\textsuperscript{48} If participants complete treatment, then either their guilty pleas are withdrawn and the underlying charges are dismissed, or they simply avoid punishment and may have the option to have their convictions expunged.\textsuperscript{49} But if participants

\begin{itemize}
\item \textsuperscript{45} Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America 104–07 (1995); Tracey Meares, Charting Race and Class Differences in Attitudes Towards Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law, 1 BUFF. CRIM. L. REV. 137 (1997); Sevigny, Pollack & Reuter, supra note 42, at 191 (“Arrests for drug offenses remain highly concentrated in urban African American and Hispanic communities beset with high poverty rates and other forms of concentrated disadvantage.”).
\item \textsuperscript{46} Michael M. O’Hear, Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice, 20 STAN. L. & POL’Y REV. 463, 479 (2009) (discussing the effects of drug courts on incarceration rates for black drug offenders and stating that “by disqualifying those who face distribution charges or who have serious criminal histories [drug courts] tend to screen out the prison-bound”).
\item \textsuperscript{47} West Huddleston & Douglas B. Marlow, Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States 1 (2011) (noting that as of December 31, 2009, 58 percent of adult drug courts in the United States followed a post-plea model). Diversion to drug courts can occur at three different points of the criminal justice process: (1) pre-plea/pre-adjudication, (2) post-plea/pre-adjudication, and (3) post-adjudication. Alex Kreit, The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?, U. CHI. LEGAL F. 299, 307 (2010).
\item \textsuperscript{48} Josh Bowers, Contraindicated Drug Courts, 55 UCLA L. REV. 783, 786 (2008).
\item \textsuperscript{49} Here, the crucial factor is whether or not drug court participants enter conditional pleas or not prior to diversion. See Kreit, supra note 47, at 307–08.
\end{itemize}
fail—a likely result given the difficulty of overcoming drug dependency—then they receive graduated sanctions until they ultimately receive an alternative termination sentence. Thus, police officers play a critical role in filtering drug-dependent users into substitution regimes that encourage the exact outcome that decriminalization is typically intended to avoid—the imposition of criminal sanctions.

There is much more to be said about drug courts and other substitution regimes. The point, here, is that substitution approaches to decriminalization commonly focus on the benefits of replacing criminal sanctions with nonpunitive responses but often rely on, rather than restrict, police authority to funnel civilians into those regimes.

B. De Facto Decriminalization

Police and prosecutors sometimes desist from enforcing specific criminal laws. With respect to law enforcement, this approach rests on informal policies that call for police officers to exercise discretion not to enforce existing criminal laws; there are no formal restrictions on police authority. Restraint usually stems from policing norms that oppose enforcement on moral grounds or view enforcement as an inefficient use of police resources.

Conceivably, de facto decriminalization should result in less policing of decriminalized conduct in the aggregate. Because conduct remains formally criminalized, however, police authority to initiate searches and seizures

50. Bowers, supra note 48, at 803 (noting that “acutely addicted defendants and defendants from historically disadvantaged groups are far less likely to succeed in drug courts”).

51. Id. at 784–85.

52. For instance, although not central to the analysis above, legal scholars have argued that police diversion of drug users into drug courts is a form of coercion that can have highly punitive effects, especially in terms of incapacitation. See, e.g., Eric J. Miller, Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism, 65 OHIO ST. L.J. 1479 (2004).

53. The discussion below primarily focuses on de facto decriminalization in the policing realm. For a comprehensive discussion of de facto decriminalization in the prosecutorial realm, see generally Erik Luna, Prosecutorial Decriminalization, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012).

54. As Aaronson and Sweeney explain, “[l]aw enforcement decisions relating to the definition and classification of conduct as criminal are almost always made informally, usually have low visibility, and are not published.” Aaronson & Sweeney, supra note 39, at 215.

55. Id. at 217. Some scholars have criticized de facto decriminalization because it entrusts too much moral judgment in the hands of the police. See DOUGLAS N. HUSAK, DRUGS AND RIGHTS 253 (1992) (noting while discussing de facto decriminalization that there “is reason to be apprehensive about entrusting the protection of moral rights to exercises of discretion by police and prosecutors”).
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(including arrests) remains intact under de facto decriminalization regimes. U.S. Supreme Court precedent encourages this result. For instance, consider *Atwater v. City of Lago Vista*, which involved the constitutionality of a motorist’s arrest for not wearing her seatbelt. In Texas, the seatbelt offense falls under the lowest level of misdemeanors and is punishable only by a fine. Many people drive without wearing seatbelts, and police regularly ignore those transgressions. Nevertheless, the Court held that the Fourth Amendment does not forbid a warrantless arrest for a criminal offense, even a minor one such as driving without a seatbelt in Texas.

Given the amount of police discretion built into de facto decriminalization regimes, some scholars have noted that those regimes encourage the inconsistent, selective, and discriminatory enforcement of criminal laws that remain on the books. Consider the following example involving the de facto decriminalization of small amounts of marijuana possession in Dane County, Wisconsin. Dane County is the second largest

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56. Scholars have noted, however, that under an ideal de facto decriminalized regime police officers would wholly refrain from initiating arrests for the conduct in question. See Douglas Husak, *For Drug Legalization, in The Legalization of Drugs* 1, 12 (Douglas Husak & Peter de Marneffe eds., 2005).

57. 532 U.S. 318, 354 (2001) (holding that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender”).

58. Id. at 323.

59. Id. The Court’s holding in *Virginia v. Moore*, 553 U.S. 164 (2008) provides another example of how constitutional doctrine can sustain police authority to initiate searches and seizures under the Fourth Amendment, even when states restrict police authority to engage in specific policing tactics when investigating crime. In *Moore*, the Court upheld the constitutionality of an arrest under the Fourth Amendment based on probable cause of the misdemeanor of driving with a suspended license—even though an arrest for that offense was not authorized under state law. Id. at 176. The majority reasoned that “while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment’s protections.” Id. As a result, the Court subsequently upheld the constitutionality of a police officer’s search incident to arrest on the grounds that “officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence.” Id.

60. Aaronson & Sweeney, supra note 39, at 215 (“The informal process greatly increases the likelihood of unjustified selective or discriminatory enforcement of the penal laws.”); Husak, supra note 56, at 12–13 (“Laws that still exist can be enforced occasionally and selectively. Even sporadic enforcement of these laws is incompatible with decriminalization.”).

county in Wisconsin with an estimated population of more than 500,000 people.\textsuperscript{62} Under state law, mere possession of marijuana is a misdemeanor carrying penalties of up to six months in jail and a $1000 fine.\textsuperscript{63} Citing resource constraints, the District Attorney (DA) for Dane County announced in 2007 that civilians, regardless of criminal history, would no longer face criminal prosecution in the county for possessing less than one ounce of marijuana.\textsuperscript{64} A few jurisdictions within the county, such as Madison, had decriminalization ordinances attaching a civil fine for simple possession of marijuana in public.\textsuperscript{65} Under the de facto policy, police within jurisdictions without a civil marijuana ordinance could refer cases to the county DA’s office so that a civil sanction would apply.\textsuperscript{66}

In spite of these decriminalization trends, statistics from 2010—three years after the DA’s policy change—revealed that Dane County had the third highest racial disparity in arrests for marijuana possession in the state.\textsuperscript{67} African-Americans were six and a half times more likely to be arrested for marijuana possession in the county than white civilians.\textsuperscript{68} As these statistics show, the racialized harms of selective drug enforcement do not disappear


63. WIS. STAT. § 961.41(3g)(e)(c) (2013).
64. A memorandum of the Dane County District Attorney provides more detail on the policy position of the prosecutorial office. See Gary Storck, Text of Dane County DA Memo on New Pot Policy, MADISON NORML (Mar. 9, 2007), http://www.madisonnorml.org/blog/archives/000147.php [hereinafter Dane County DA Memo].
65. In 1977, the Madison City Council passed ordinance 23.20, which removed all penalties for small amounts of marijuana possession in a private place. MADISON, WIS. ORDINANCE § 23.20 (Apr. 18, 1977). The ordinance attached a civil fine of up to $100 for small amounts of marijuana possession in a public place, unless the marijuana was obtained from a valid prescription. Id. § 23.20(5).
66. Dane County DA Memo, supra note 64.
68. Id.
under de facto decriminalization regimes. Notably, in partial response to these racial disparities, the voters of Dane County passed a nonbinding referendum in April 2014 favoring full legalization of small amounts of marijuana possession. 69

C. Pure Decriminalization

Legislatures or courts sometimes formally remove all criminal penalties attached to specific conduct and leave that conduct unregulated by law. In the United States, pure decriminalization is much more commonly enacted by legislatures or voters than by courts.70 This is the case because state and federal constitutional laws place relatively few limits on legislative authority to define crimes and punishments in criminal codes.71

Conceptually, there is a clear connection between pure decriminalization and restrictions on police authority. Removing criminal penalties and leaving conduct unregulated by law should strip the ability of the police to become involved in situations implicating that conduct; no law remains on the books for police to enforce with respect to that conduct.

Yet surprisingly, many discussions of pure decriminalization and policing fail to stress this point. Rather, those accounts stress that in many instances de facto decriminalization by police and prosecutors is a common precursor of pure decriminalization by legislatures and courts.72 In this regard, pure decriminalization is described as a criminal law reform that lags behind more progressive policing norms not to enforce specific criminal laws.


70. Aaronson & Sweeney, *supra* note 39, at 216–17 (noting that decriminalization is “often equated with statutory decriminalization”).


72. See, e.g., Aaronson & Sweeney, *supra* note 39, at 217 (noting that many offenses that are de-criminalized through pure decriminalization “are those which have been de facto decriminalized by the police or prosecutors”); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1542 (2004) (“Lawrence occurred well after public opinion had shifted toward decriminalization of sodomy, and at a time when same-sex sodomy statutes were rarely enforced against consenting adults.”).
This conception fits within a broad literature on the relationship between “law on the books” and “law in action.”73

These accounts may be correct that in many instances pure decriminalization efforts tend to follow de facto policies within the police and prosecutorial realms. Nevertheless, a conceptual limitation with important possible consequences for policing arises from viewing pure decriminalization only in this way. Namely, this view undermines a view of pure decriminalization as a process that can set ex ante restrictions on police involvement with decriminalized conduct, especially when policing norms in a jurisdiction have not risen to the level of de facto decriminalization.74

Overlooking formal restrictions on police authority in pure decriminalization initiatives has significant implications for how police engage with civilians. This is especially the case for over-policed minority communities with historically tense relationships with law enforcement. On these points, consider the following example involving the pure decriminalization of sodomy and the policing of lesbian, gay, bisexual, and transgender (LGBT) communities.

Until the early 1960s, noncommercial consensual sodomy between adults was a felony in all but one U.S. state and carried lengthy terms of imprisonment.75 Police invoked antisodomy laws to regulate same-sex affection and intimacy in both private and public settings, and to harass LGBT people. Then, following Illinois’ lead in 1961, over twenty states adopted the Model Penal Code in its entirety and removed criminal penalties from noncommercial consensual sodomy between adults.76

73. LAURENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 1–2 (1975) (“Almost everyone concedes that law is to some degree a social product; and that law on the books and law in action are not invariably the same.”); Mona Lynch & Marissa Omori, Legal Change and Sentencing Norms in the Wake of Booker: The Impact of Time and Place on Drug Trafficking Cases in Federal Court, 48 LAW & SOC'Y REV. 411, 416 (2014) (stressing that “the question of whether there is a gap between ‘law on the books’ and ‘law in action’ has long ago been asked and answered”).

74. Lending support to this idea, some accounts have described pure decriminalization as having negligible effects on the police handling of cases involving purely decriminalized conduct. See, e.g., Aaronson & Sweeney, supra note 39, at 217 (noting that “pure decriminalization will not usually result in any appreciable change in the processing of cases in the criminal justice system for many times of crimes”). Those accounts view pure decriminalization as simply formalizing already existing, informal policing norms that favor decriminalization. Id.


In 1971, Colorado was the fourth state to follow this approach.\textsuperscript{77} An
important feature of Colorado’s repealed antisodomy law was that it included
a solicitation provision\textsuperscript{78} against oral copulation, which made LGBT civilians
vulnerable to over-policing in public settings.\textsuperscript{79} Through established vice
squads in major police departments (including the Denver Police Department),
police officers conducted concentrated police surveillance, sting operations,
and raids in public places and establishments known to attract LGBT people.
These aggressive tactics not only encouraged police harassment against
LGBT people in public and commercial establishments, but also fuelled their
arrests for solicitation even when no act of oral copulation occurred.\textsuperscript{80}

After Colorado repealed its antisodomy law, one would expect that
police regulation of same-sex affection and intimacy would decline. Yet, it
increased.\textsuperscript{81} One motivating factor for this increase was that when the
Colorado legislature repealed the antisodomy law, it simultaneously passed a
public indecency law that criminalized (1) making a “facility” available to be
used “for or in aid of deviate sexual intercourse,” and (2) “lewd fondling or
care of the body of another person.”\textsuperscript{82} Police invoked these new criminal
provisions to harass LGBT people by raiding gay and lesbian establishments
and arresting clientele simply for holding hands or kissing. As William N.
Eskridge has explained, the effect of the new provisions changed little more than
the technical crime it was that LGBT people were harassed and arrested under.\textsuperscript{83}

In Denver, police harassment against LGBT civilians was so rampant
after the repeal of Colorado’s antisodomy law that hundreds of members of
the main Denver gay and lesbian organization—the Denver Gay Coalition—

\textsuperscript{77} Id. at 177.
\textsuperscript{78} Although solicitation laws are commonly enforced in prostitution contexts today, it is
important to clarify that solicitation here means that a person is requesting another person to
perform or to submit to an act of oral copulation.
\textsuperscript{80} ESKRIDGE, supra note 76, at 96–99 (describing the mass implementation of sodomy and homosexual
solicitation laws through the creation of vice squads and police stakeouts of homosexual hangouts,
decoy or sting operations, and police raids).
\textsuperscript{81} Id. at 178. Although not a focus of this discussion, it is important to note that the concept of
substitution effects in criminal law and enforcement is relevant here. As Neal Kumar Katyal
has explained, “[l]aw enforcement can create substitution effects with respect to different
offenses: If police begin a crackdown on heroin, for example, that may simply induce
individuals to use other drugs for which penalties are not as strongly enforced.” Neal Kumar
\textsuperscript{82} ESKRIDGE, supra note 76, at 178.
protested at Denver City Council meetings. In 1973, the coalition filed a lawsuit against the police department for a pattern of harassment and the selective enforcement of Colorado’s public indecency law, which was settled the following year. In the settlement, the city agreed that Denver police officers (particularly, officers in the department’s vice squad) would stop raiding gay and lesbian establishments and initiating arrests for “kissing, hugging, dancing, [and] holding hands.” Nevertheless, arrests doubled within a year of the settlement. In addition, police regularly stood outside of Denver’s most popular gay and lesbian bar and issued jaywalking tickets to clientele.

This example can be interpreted in at least two ways—the second of which more clearly speaks to the gap between pure decriminalization and policing. On one hand, Colorado’s simultaneous repeal of the antisodomy law and creation of the public indecency crime arguably reflected legislative intent to constrain same-sex affection to the domestic private realm. Some evidence supports this view. For instance, as Eskridge has discussed, the Colorado legislative committee justified the provision aimed at same-sex caressing on the grounds that it considered those acts a “gross flouting of community standards.” Under this view, the legislative reforms did not serve to constrain aggressive policing of LGBT people in the public and commercial realms.

On the other hand, the Colorado reforms illustrate the limits of confining the force of pure decriminalization to the domain of sanctions. Colorado’s pure decriminalization of sodomy eliminated possibilities for the state to punish LGBT people for private consensual sexual conduct. At the same time, the reform failed to capture many significant aspects involving how police used the antisodomy law in practice to harass LGBT populations and to regulate same-sex affection and intimacy in public settings. Therefore, the example further illustrates the high stakes that the gap between pure

84. Id. A recent documentary entitled “Gay Revolt at Denver City Council Oct. 23, 1973 and How It Changed Our World” focuses on the events that led up to the protest, as well as the protest itself. See About the Documentary, DENVER GAY REVOLT!, http://denvergayrevolt.com/home.php (last visited Oct. 6, 2014), for more information about the film.


86. Id. at 180 (quoting Norrn Udevitz, Council Passes Criminal Code on Preliminary Reading, DENVER POST, Nov. 20, 1973, at 3).


88. Id.

89. ESKRIDGE, supra note 76, at 178; id. at 452 n.27 (quoting legislative history).
Decriminalization and police authority involves, especially for over-policed minority communities.

D. Reclassification

States sometimes retain legal prohibitions on conduct, but eliminate or downgrade the associated criminal penalties. Scholars have identified two circumstances under which legislatures tend to follow this approach: (1) when they view criminal sanctions as an ineffective deterrent for specific conduct but still wish to express disapproval of that conduct through less severe sanctions, and (2) as a political compromise to appeal to voters who wish to reduce sanctions for specific conduct while also appealing to voters who wish to keep that conduct illegal. These two circumstances focus on sanctions, with little guidance on whether reclassification should reduce police authority and discretion when officers investigate or respond to reclassified offenses.

As explained in detail infra Part II, the decriminalization of minor traffic offenses has primarily occurred through reclassification. To offer another example showing the gap involving reclassification and policing, revisit the decriminalization of simple possession of marijuana. Several state legislatures have declassified the first-time offense for small amounts of marijuana possession from a felony to a misdemeanor, or from a misdemeanor to an infraction that is a civil offense or a low-level crime. These changes have reduced possible incarceration or resulted in fine-only penalties for the offense.

There are some glimpses of legislatures and courts restricting police authority to initiate searches and seizures—especially arrests—in cases involving simple possession of marijuana, but those restrictions are relatively rare and not uniform across jurisdictions. For instance, in 2011, the highest court of Massachusetts clarified when police officers may order a passenger out of a vehicle for suspicion of marijuana possession after the state decriminalized the possession of less than one ounce of marijuana as a civil

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90. Aaronson & Sweeney, supra note 39, at 217.
infraction. The court held that “to order a passenger in a stopped vehicle to exit based merely on suspicion of an offense, that offense must be criminal.” Based on this view, it concluded that articulable facts must give rise to a reasonable suspicion that a defendant possesses more than one ounce of marijuana—the criminal threshold. In concrete terms, this meant that law enforcement could not rely on the odor of burnt marijuana in a car, or the fact that a suspect was smoking a cigar that is commonly known to mask the odor of marijuana smoke, to give rise to reasonable suspicion of a marijuana possession crime and thus order occupants out of vehicles. It reasoned that “[b]y mandating that possession of such a small quantity of marijuana become a civil violation, not a crime, the voters intended to treat offenders who possess one ounce or less of marijuana differently from perpetrators of drug crimes.”

The Massachusetts court, however, is in the minority on this issue. In many jurisdictions, the reclassification of simple possession of marijuana has not changed the scope of police authority to act or to conduct searches or seizures in cases involving marijuana possession. For instance, police officers in several U.S. jurisdictions that have downgraded penalties for simple possession of marijuana still allow officers to arrest individuals for the offense before they receive a citation—making those individuals vulnerable to searches incident to that arrest. And, in some instances, police departments have expressed their intent to continue arresting people for simple possession of marijuana regardless of decriminalization ordinances.

Nevertheless, the example of a recent ordinance decriminalizing small amounts of marijuana possession in the District of Columbia illustrates the
promise of including restrictions on police authority within reclassification efforts. The ordinance changed the offense from a misdemeanor carrying up to six months in jail to a civil violation with a $25 penalty and no possibility of arrest. In addition, the ordinance provides that the mere fact that someone is smoking marijuana in public does not provide an officer with sufficient justification to search that person; the officer needs independent grounds to conduct a search.

Notably, the sponsor of the bill did not only focus on the government costs of imposing jail time for simple possession of marijuana. His reasons also included the costs and unfairness of authorizing police to search and to arrest individuals for the marijuana offense. The racial disparity of arrests for marijuana possession in the district informed these concerns. Before the bill's proposal, statistics reported that Black civilians were eight times more likely than white civilians to be arrested for marijuana possession in the district.

The analysis to follow further explores the gap involving police authority and reclassification in the traffic context. The point here is that like other forms of decriminalization, reclassification is typically viewed as a means to


103. Specifically, the Councilmember sponsor stressed that “marijuana possession laws have too often been enforced discriminatorily towards minorities and the poor; and the arrests have had harmful, lifelong impacts that disenfranchise individuals, families and communities.” Press Release, This Week: Press Conference and D.C. Council Hearings on Marijuana Decriminalization (Oct. 22, 2013), http://www.drugpolicy.org/news/2013/10/week-press-conference-and-dc-council-hearings-marijuana-decriminalization. He also stated that “the effort to decriminalize marijuana is about removing barriers for individuals—the impact on their education, and their opportunities for employment.” Id. “[T]he bill was carefully worded to ensure that people found in possession of one ounce or less of marijuana would not be subject to the sort of invasive searches that routinely accompany arrest.” COUNCIL OF THE D.C. COMM. ON THE JUDICIARY AND PUB. SAFETY, supra note 102, at 7.

104. AMERICAN CIVIL LIBERTIES UNION, supra note 67, at 49 (using FBI/Uniform Crime Reporting Data from 2010 to report that in the District of Columbia “185 whites per 100,000 are arrested versus 1,489 Blacks”).
modify sanctions attached to conduct, and not as a means of limiting other forms of social control like policing.

II. A Survey of Traffic Violation Decriminalization

Traffic laws vary from state to state. Despite this, there is a dearth of recent sources summarizing which states have decriminalized traffic violations and the types of violations that they decriminalized. It is impossible to have an informed discussion about decriminalization and policing in routine traffic stop settings without this baseline knowledge. Accordingly, this Part provides a survey of traffic decriminalization across the states.

I read through the vehicle and traffic codes of each of the fifty states to identify which states have decriminalized run-of-the-mill traffic violations by removing criminal penalties and reclassifying the violations as noncriminal offenses. I then explored the following three questions pertaining to those

105. The regulation of traffic has been traditionally reserved to the States. See California v. Byers, 402 U.S. 424, 432 (1971) (recognizing “the state police power to regulate use of motor vehicles”); Seth W. Stoughton, Note, Modern Police Practice: Arizona v. Gant’s Illusory Restriction of Vehicle Searches Incident to Arrest, 97 VA. L. REV. 1727, 1746 (2011 (stressing that “jurisdictions categorize traffic offenses differently” and that “[s]ome states categorize traffic offenses as civil infractions rather than criminal violations”).


107. It is important to justify the focus on state traffic laws given that many states delegate important aspects of traffic regulation to local governments. See, e.g., N.Y. VEH. & TRAF. LAW § 1640 (McKinney 2011 & Supp. 2014) (outlining the scope of authority for local governments to regulate traffic in cities and villages). Both practical and substantive considerations motivated this focus. Practically, attention to local regulation is made difficult by the fact that state delegation of traffic regulation to local governments occurs at varying degrees across states. Further, there are thousands of local jurisdictions nationwide, making a comprehensive national survey at that level infeasible. See Erwin Chemerinsky, Losing Faith: America Without Judicial Review?, 98 MICH. L. REV. 1416, 1426 (2000) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)) (“The nature of the federalist structure of American government is that there are fifty states and tens of thousands of local governments that can violate the Constitution.”). Substantively, although specific rules governing the state preemption of local regulations vary across states, generally local traffic ordinances may conflict with state laws when those ordinances are expressly or impliedly preempted by state traffic laws. The specific traffic circumstances under which state laws expressly authorize such conflict vary across states, and uncertainties about whether specific local traffic ordinances are expressly or implicitly preempted by state traffic laws can be the subject of litigation. See, e.g., Masone v. City of Aventura, Nos. SC12-
states: First, what sanctions attach to the decriminalized traffic violations (for example, fine, jail, or both)? I asked this question because in some states jail time is a potential consequence of a civil matter, as opposed to a violation of a criminal law.\footnote{For instance, in some jurisdictions civil contempt is punishable by fine or by imprisonment, or both. \textit{See} N.C. GEN. STAT. ANN. § 5A-21(b) (2013); TENN. CODE ANN. § 29-9-103 (2012 & Supp. 2014); see also HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 77–78 (2014) (discussing the debate over whether state and local authorities have inherent power to arrest for civil immigration violations).} Second, which traffic violations remain criminalized both within and across those states? Third, are there patterns regarding the length of possible incarceration that attaches to the traffic violations that remain criminalized within and across those states?

Although the line between the civil and the criminal realms is not always clear, in order to explore the gap between decriminalization and policing it made the most sense to focus on states that intended to and took run-of-the-mill traffic violations out of the criminal framework entirely.\footnote{This Article does not argue that when a state labels behavior as “civil” or “criminal” that those labels control in all situations involving criminal procedure. The U.S. Supreme Court has denounced such a rule. \textit{See} Hudson v. United States, 522 U.S. 93, 98–99 (1997) (holding that even when a legislature intends to impose a civil penalty, in determining what process parties are due under the Due Process Clause, the Court will look to other factors to determine whether the scheme is so punitive that it transforms the civil penalty into a criminal one). For further discussion, see \textit{infra} Part V.A.1.} For this reason, I also searched each state’s penal code for its general approach to classifying crimes. This search was necessary to determine whether categories of offenses that were less severe than ordinary misdemeanors—whether labeled as “infractions,” “violations,” or “petty misdemeanors”—were technically low-level crimes, as opposed to noncriminal offenses, in a given state.\footnote{For instance, California treats most minor traffic violations as “infractions” punishable only by fine, unless otherwise provided. \textit{CAL. VEH. CODE} § 40000.1 (West 2014). The California Penal Code, however, defines the scope of criminal offenses to include infractions, misdemeanors, and felonies. \textit{CAL. PENAL CODE} § 16 (West 2014); see also id. § 15 (stating that a “crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it” with the following “punishments” attached: death, imprisonment, or fine among others); People v. Simpson, 167 Cal. Rptr. 3d 396, 398–99 (2014) (“An infraction is a criminal matter subject generally to the provisions applicable to misdemeanors, except for the right to a jury trial, the possibility of confinement as a punishment, and the right to court-appointed counsel if indigent.”). Therefore, although categorically less severe than a misdemeanor, minor traffic violations are still criminalized in the state. \textit{See} People v. McKay, 41 P.3d 59, 69 n.16 (Cal. 2002) (noting that in California “traffic infractions have not been decriminalized”).} I excluded from consideration states that still included traffic

\(^{108}\)1471, SC12-644, 2014 WL 2609201 (Fla. June 12, 2014) (holding that municipal ordinances that allowed city to use automated cameras to catch and fine drivers who ran red lights were preempted by state law).
violations in their criminal framework, even if those violations were categorically less severe than ordinary misdemeanors and punishable only by fine.\footnote{111} Finally, I confirmed that each state that currently classifies minor traffic violations as noncriminal offenses had in fact formerly criminalized those violations.\footnote{112}


\footnote{111. Accordingly, this Article does not focus on states that criminalize traffic infractions, even as minor crimes punishable only by fine. Although this Article takes no position on the issue, the myriad of classifications and crime-severity distinctions in traffic laws across the states might provide a meaningful platform to think about crime-severity distinctions under the Fourth Amendment. For further discussion, see Jeffrey Bellin, Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World, 97 IOWA L. REV. 1 (2011); Christopher Slobogin, Why Crime Severity Analysis Is Not Reasonable, 97 IOWA L. REV. BULL. 1 (2012); William J. Stuntz, O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment, 114 HARV. L. REV. 842, 844 (2001) (discussing “Fourth Amendment law’s inability to distinguish among crimes”); Eugene Volokh, Crime Severity and Constitutional Line-Drawing, 90 VA. L. REV. 1957 (2004).

\footnote{112. To do this, the Article relied on legislative history, government documents, and media reports. See, e.g., MULLEN & DAY, supra note 106, at 1 (explaining that “New York was the first state to develop an administrative system of traffic offense adjudication” in 1970); id. at 10 (noting that in 1980, seven states and the District of Columbia had decriminalized traffic infractions).


Decriminalization and Police Authority

Noncriminal traffic violations are punishable by fine only with no possibility of immediate incarceration. 115

Not all traffic violations, however, are classified as noncriminal offenses in these states. A set of more serious traffic violations is still criminalized as misdemeanors or felonies. Notably, there are rough patterns across the twenty-two states involving the types of traffic violations in this set. Common examples are: (1) driving under the influence, 116 (2) driving without, with a revoked, or with a suspended, driver’s license or vehicle registration, 117 (3) reckless driving, 118 (4) failure to stop at the direction of, or eluding, a police officer, 119 (5) vehicle racing, 120 and (6) excessive speeding.

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115. I include the word “immediate” here because in many jurisdictions, failure to pay traffic tickets can eventually result in incarceration.


119. See ALASKA STAT. § 28.35.182 (2012); COLO. REV. STAT. ANN. § 42-4-1413 (West 2014); FLA. STAT. § 316.1935 (2014); ME. REV. STAT. ANN. tit. 29 § 2414 (2013); MICH. COMP. LAWS ANN. § 257.602a (West 2014); OR. REV. STAT. § 811.540 (2013); VT. STAT. ANN. tit. 23 § 1133 (2007).

120. See ARIZ. REV. STAT. ANN. § 28-693 (2010); COLO. REV. STAT. § 42-4-1105 (2013); MASS. GEN. LAWS ch. 90 § 17B (2013); N.C. GEN. STAT. ANN. § 20-141.3 (West 2013); NEB. REV. STAT. § 60-6,195 (2010); N.Y. VEH. & TRAF. LAW § 1182 (2011); VA. CODE ANN. § 46.2-865 (2014).
III. SANCTION-FOCUSED TRAFFIC DECRIMINALIZATION AND ASYMMETRY IN THE CRIMINAL PROCESS

Presumably proponents of decriminalization should welcome the trend toward traffic decriminalization. But as this Part explains, the sanction-focused nature of traffic decriminalization has encouraged an asymmetry in the criminal justice process that should give those proponents pause. Specifically, the focus on sanctions has enabled states to maintain full access to an expanding set of crime-fighting tools via the policing of traffic violations that have been purportedly removed from the criminal framework. This access comes at the expense of funneling civilians into the criminal justice system and jeopardizing civilian privacy, liberty, dignity, and physical security. People of color and other communities that are more vulnerable to concentrated police surveillance and pretextual traffic stops especially bear the brunt of these harms.

A. State and Civilian Benefits at the Back End of the Criminal Process (Sanctioning)

Traffic decriminalization was intended to offer (and has offered) important benefits for both civilians and states at the back end of the criminal justice process—the sanctioning phase. Accordingly, no asymmetry in who reaps the rewards of decriminalization is easily apparent when decriminalization is narrowly viewed in terms of sanctions.123


122. See supra notes 116–121. Although this article focuses on the difference between noncriminal and criminal traffic offenses, this six-month threshold is noteworthy because it is conforms to the U.S Supreme Court’s threshold of possible incarceration to disqualify a crime from being presumptively “petty.” See Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (holding that offenses for which the maximum period of incarceration is six months or less are presumptively “petty”); Volokh, supra note 111, at 1971–72.

123. To reiterate, the argument here is not that decriminalization always benefits traffic violators. See supra note 28.
The bulk of traffic decriminalization occurred between 1970 and the mid-1980s.\textsuperscript{124} In the early 1970s, the National Highway Safety Advisory Committee recommended that most moving violations be reclassified as noncriminal infractions and receive administrative processing.\textsuperscript{125} Generally, discussions among legislators and other key players about decriminalizing traffic violations fell into two sanction-focused categories. The first category includes evolving sensibilities that minor traffic violations do not warrant the significant penalty of the criminal law, especially in light of their omnipresence and lack of severity.\textsuperscript{126} These sensibilities are sanction-focused because they embody legislative and voter judgments about the unfairness of imposing criminal punishment for minor traffic violations.

The second, and more popular, category of reasons involves the reduction of state costs associated with adjudicating traffic violations inside the criminal framework.\textsuperscript{127} In general, legislatures emphasized three subtypes of costs that decriminalizing traffic violations reduced.\textsuperscript{128} First, traffic cases put a heavy burden on court dockets. In 1973, judges in over half of the then-

\textsuperscript{124} See supra Part II.


\textsuperscript{126} See Pike, supra note 106, at 1544 (explaining that the “chief virtue” of the creation of Michigan’s civil traffic offense system was to institute “a procedure that is simpler and more consistent with public and judicial attitudes toward minor traffic offenses”); NAT’L CTR. FOR STATE COURTS, TRAFFIC ADJUDICATION IN VIRGINIA: REPORT AND RECOMMENDATIONS 14 (1977) (concluding from the results of a survey distributed to judges and police officers in Virginia that the “statutory judgment that all traffic offenses are crimes is not shared by most people”); Statement of the Attorney General [of Oregon] Lee Johnson, Administrative Handling of Traffic Offenses, Committee on Judiciary, Subcommittee on Adjudication, OREGON SECRETARY OF STATE, at ex.F (Jan. 9, 1974), http://arcweb.sos.state.or.us/doc/records/legislative/legislativeminutes/motorvehicle/Adjudication/9JAN74.pdf (“It is totally inappropriate to treat most traffic offenses in the same manner as we treat other crimes. The Criminal Code is designed primarily to deal with anti-social conduct where the deviation from social norms is substantial and where there is a great threat to persons or property.”).

\textsuperscript{127} U.S. DEPARTMENT OF TRANSPORTATION, supra note 125, at 18 (“In the seventies, many States and local political subdivisions began revising their approach to traffic adjudication because it was no longer logistically, economically, or socially feasible to follow the old [criminalized] form.”).

existing 13,221 courts of limited jurisdiction spent over 50 percent of their time handling traffic cases. \(^{129}\) Second, states incurred costs from ensuring the procedural protections required to adjudicate traffic violations in criminal courts. For instance, before traffic violation decriminalization in Michigan, traffic violators were entitled to all procedural safeguards incident to a criminal trial—including the right to counsel—as a result of having their traffic cases heard by criminal court judges. \(^{130}\) Third, enforcing criminal traffic violations burdened police officers because they had to take time on their shift or days off to appear and testify in court for traffic tickets to stick. \(^{131}\)

Underlying these three concerns was a cost-benefit calculus centering on maintaining the infrastructure necessary to impose criminal sanctions. Regarding judicial costs, the idea was that imposing criminal sanctions for minor traffic violations created too great of an institutional burden on courts. With respect to criminal procedural costs, the view was that minor traffic violations did not pose a grave enough public safety threat to warrant vast expenditure of state resources on the procedural protections required to apply criminal sanctions. Finally, with respect to costs to law enforcement, the idea was that removing criminal sanctions from minor traffic violations would enable law enforcement to focus their efforts on “more serious” crime. To the extent that legislators attended to any costs or benefits to drivers, they focused only on how removing sanctions might constitute such a benefit, and not on any of the costs involved in continuing to police traffic violations.

The notion that state legislatures have approached traffic violation decriminalization primarily in terms of sanctions is further illustrated by the specific reforms that state legislatures selected. Decriminalization inspired

\(^{129}\) Mullen & Day, supra note 106, at 1; see also Ward I. Graffam, Minor Traffic Violations: A New Approach, 19 ME. L. REV. 261, 261 n.2 (1967) (reporting statistics that initial hearings for traffic cases totaled 35,328 out of 66,146 cases in Maine's thirteen district courts); NAT'L CTR. FOR STATE COURTS, supra note 126 (reporting that before traffic decriminalization in Virginia, traffic cases accounted for “almost 55% of the transactions in all of the general district courts in the first six months of 1976” and that in some courts “the percentage approached 90%”); U.S. DEPARTMENT OF TRANSPORTATION, supra note 125, at 8 (noting that courts in urban areas bore the brunt of being overwhelmed by traffic cases and that studies reported that “the urban criminal court does not have the resources, time, capability, or judicial interest in processing the traffic infraction violator”).

\(^{130}\) Pike, supra note 106, at 1544.

\(^{131}\) Mullen & Day, supra note 106, at 1 (noting the “time lost by police and motorists in court appearances and the duplication of effort that occurs when both the court and the state’s licensing authority conduct hearings, impose sanctions and maintain case records”); id. at 2 (stating that in 1970, the International Association of Chiefs of Police endorsed administrative adjudication for traffic violations “as an alternative to mandatory court appearance for all moving hazardous violations”).
mostly a streamlining of traffic adjudication to the administrative realm in order to make traffic adjudication more efficient and less costly to civilians and to the state. To demonstrate this point, consider the example of Michigan, which in 1979 decriminalized minor traffic offenses as civil violations punishable only by fine.\textsuperscript{132}

Before decriminalization, all traffic offenses in Michigan carried a maximum penalty of $100 and ninety days imprisonment.\textsuperscript{133} Criminal judges handled all traffic matters, and traffic violators were entitled to all standard criminal procedural safeguards.\textsuperscript{134} Traffic cases congested the courts and resulted in high state expenditures.\textsuperscript{135} Because minor traffic violators usually received a standardized fine for traffic violations,\textsuperscript{136} the Michigan legislature reclassified traffic violations as noncriminal violations and created a new administrative system to handle traffic offenses. Each of these reforms resulted in significant benefits for civilians and the state. This alternative system simplified the adjudication of traffic violations by streamlining the adjudicative process and statutorily removing criminal procedural safeguards for noncriminal traffic violators.\textsuperscript{137} Traffic violators could admit fault without having to go to court, deny fault with fewer court appearances, and have their cases decided in informal or formal hearings in front of a district court magistrate, or a traffic division referee of a municipal court, without counsel present.\textsuperscript{138} Unlike in the criminalized regime, the traffic violator had no right to a jury trial and no right to appointed counsel if indigent, and the violator was determined liable under the civil preponderance of the evidence standard (as opposed to the beyond a reasonable doubt standard required in criminal cases).\textsuperscript{139}

\begin{itemize}
\item \textsuperscript{132} Pike, supra note 106, at 1543.
\item \textsuperscript{133} Id.; see also MICH. COMP. LAWS ANN. § 257.901 (West 1977 & Supp. 1990).
\item \textsuperscript{134} Pike, supra note 106, at 1544. Across the U.S. states more generally, before decriminalization traffic matters were handled by criminal courts and violators were entitled to criminal procedural protections that attached to criminal proceedings. See U.S. DEPARTMENT OF TRANSPORTATION, supra note 125, at 18 (“Up until the beginning of the 1970’s, traffic adjudication throughout the country generally followed a traditional mode. This meant that criminal procedural requirements were followed and contested cases, even minor violations, were prosecuted before judges.”).
\item \textsuperscript{135} Pike, supra note 106, at 1544.
\item \textsuperscript{136} Id. This trend also applied outside of Michigan in the 1970s. See U.S. DEPARTMENT OF TRANSPORTATION, supra note 125, at 8 (“In most States fines and jail sentences are the legally prescribed sanctions, yet it is common knowledge that jail sentences are used in an extremely small percentage of traffic cases.”).
\item \textsuperscript{137} Pike, supra note 106, at 1543.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\end{itemize}
This analysis is not intended to suggest that between 1970 and the mid-1980s—when the bulk of traffic decriminalization occurred—that legislatures never considered police authority and discretion in decriminalized traffic settings. Rather, the point is that those discussions were often not a central focus of traffic decriminalization efforts and much less frequent than discussions about sanctions. Moreover, legislative discussions involving policing in decriminalized traffic settings did not always play out in ways that one might expect today—affirmations of preserving police authority and discretion in routine traffic stop settings to enable police officers to detect and to deter nontraffic crime (for example, drugs and weapons offenses).

The legislative history surrounding traffic decriminalization in Oregon illustrates these points. Oregon decriminalized traffic offenses in 1975, when the legislature extensively revised the state’s motor vehicle code.140 Before this overhaul, there were two years of comprehensive study and discussion in three different state legislative subcommittees.141 Over thirty meetings took place, many of which included state judges, state police administrators, representatives from the Oregon District Attorney’s Office, and members of the Oregon Traffic Safety Commission. At least one police representative was present in every subcommittee meeting and those representatives had active roles in the meetings. Generally, their involvement took the following forms: In many instances, police representatives educated subcommittee members about how police officers went about enforcing specific traffic laws or traffic laws more generally.142 With the goal of traffic safety in mind, police representatives also offered input on whether changing the content of a provision involving a specific traffic offense would make it harder for police officers to detect that traffic wrongdoing.143
Ultimately, Oregon police representatives embraced traffic decriminalization. The Superintendent of the Oregon State Police stated publicly that decriminalizing traffic offenses and moving to an administrative regime would benefit not only the public, but also the police. Specifically, he stressed that Oregon police departments had instituted a new program that resulted in increased arrests for driving while under the influence—an offense that was described in many meetings as carrying a much higher threat to public safety than the minor traffic offenses to be decriminalized. The Superintendent, along with other subcommittee members, stressed the high volume of cases involving minor traffic violations prevented state courts from processing cases involving drunk driving efficiently.

Targeted discussions about restricting police authority to engage in searches and seizures in decriminalized traffic settings occurred in only brief segments of two of the over thirty subcommittee meetings. The scarcity of these conversations illustrates how little consideration was given to police authority in relation to sanctioning. In the first discussion, legislators questioned whether it was necessary to clarify the bounds of police authority during those stops via statute given the lack of then-existing statutory guidance. Some legislators wanted police authority to extend only so far as was necessary for officers to issue citations, thus preventing those stops from resulting in vehicle searches. These statements reflect the exact results that a broader decriminalization approach would encourage. Yet a decision to devise such a statute never materialized in the meeting. Rather, momentum came to a halt after a police lieutenant responded that Oregon police officers did not, and had no legal authority to, search vehicles for a traffic offense without suspicion of another crime. Accordingly, enacting the statute was not viewed as a priority.

The second discussion—which occurred a few months later—reveals that the subcommittee chair, with the intent of combating pretextual searches, nevertheless requested a provision that prohibited police from

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144. See Comments by Holly Holcomb, Superintendent, Oregon State Police, Committee on Judiciary, Subcommittee on Adjudication, Minutes, OREGON SECRETARY OF STATE 18 (Jan. 9, 1974), http://arcweb.sos.state.or.us/doc/records/legislative/legislativeminutes/motorvehicle/Adjudication/9JAN74.pdf.

145. Id.


147. See Committee on Judiciary, Subcommittee on Adjudication, Minutes, OREGON SECRETARY OF STATE 9–11 (July 30, 1974), http://www.sos.state.or.us/archives/doc/records/legislative/legislativeminutes/motorvehicle/Adjudication/30JUL74.pdf.
conducting a full search of a driver or a vehicle for a decriminalized traffic offense. Notably, there was disagreement within the subcommittee about whether case law authorized police officers to conduct such a search. The police lieutenant expressed that he disfavored statutory restrictions on police authority, but perhaps surprisingly his primary concern was that it would add another rule that his police officers would have to learn during training. He failed to argue that preserving this authority to search and seize drivers and passengers was essential for law enforcement purposes or to protect the public from nontraffic crime. Legislators countered that a statute could assist police training by clearly defining police authority in decriminalized traffic settings, especially given the doctrinal disagreements. The police lieutenant acknowledged that he could not disagree. The subcommittee recommended the provision and it was eventually enacted. Therefore, even when traffic decriminalization efforts resulted in statutory restrictions on police authority—an uncommon result—discussions about police authority and discretion were far shallower than one might expect.

Although the trend to decriminalize traffic violations took force in the 1970s, this issue is still relevant to legislatures today—underscoring the contemporary importance of reevaluating police authority and discretion in decriminalized traffic settings. Georgia is one state in which conversations are building to decriminalize traffic violations. Georgia has one of the harshest criminal regimes for traffic violations. Under state law, all traffic violations are criminal offenses and most minor traffic violations are classified as ordinary misdemeanors. Misdemeanors are punishable by up to twelve


149. OR. REV. STAT. § 484.435 (1975) (repealed by Laws 981, c. 818 § 47). As discussed infra notes 319–320 and the accompanying text, a more specific law restricting police authority and discretion in routine traffic stop settings replaced this specific provision.


151. GA. CODE ANN. § 40-6-1 (2014). Georgia classifies a handful of traffic violations—including reckless driving, driving while intoxicated, fleeing or attempting to elude a police officer, and aggressive driving—as serious traffic offenses. Id. §§ 40-6-390 to -397. Some of these more serious violations are classified as high and aggravated misdemeanors. See, e.g., id.
months imprisonment or a fine not exceeding $1000. In 2011 alone, roughly 1.3 million traffic violation cases and 42,000 “serious” traffic violation cases were filed in Georgia municipal courts.

Georgia’s harsher approach to handling traffic violations is consistent with a broader penal trend in the state. During the past two decades alone, Georgia’s prison population has more than doubled, leaving it with the fourth highest incarceration rate in the United States at the end of 2007. Today, Georgia spends more than $1 billion per year on corrections.

Perhaps the depth and content of discussions about police authority and discretion in routine traffic stop settings will be different than in the past if and when the issue reaches the Georgia legislature. At the same time, recent discussions about traffic law reform in Georgia appear to mirror the past. In 2011, the Georgia Legislature created the Special Council on Criminal Justice Reform to analyze sentencing and corrections in Georgia, and to propose policy recommendations. In its 2011 report, the Council stressed that minor traffic offenses “clog the court process” and recommended that Georgia decriminalize minor traffic offenses. There was no consideration of the harms and costs of the investigative tactics police use during routine traffic stops. The Chief Justice of the Supreme Court of Georgia praised the proposed decriminalization reform in her 2012 State of Judiciary Address, stressing the institutional burden that traffic cases placed on the Georgia courts. As of the date of publication, the Georgia Legislature had yet to consider the reform, but the Council was expected to release more thorough analysis on the issue soon.

In sum, a cost-benefit calculus that primarily centers on sanctioning has driven traffic decriminalization reforms. When informed by this calculus, traffic decriminalization appears to offer important benefits to both civilians

§ 40-6-397 (aggressive driving); id. § 40-6-395 (fleeing or attempting to elude a police officer).


154. See SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 7 (2011).

155. Id.
156. Id. at 2.
157. Id. at 23. The Council’s recommendation excluded driving under the influence, driving with a suspended driver’s license, and other serious traffic offenses. Id.
158. JUDICIAL COUNCIL OF GEORGIA, supra note 153, at 41.
160. Id.
and the state at the later sanctioning phase of the criminal justice process. No asymmetry is easily apparent.

Although the analysis above raises questions about whether the lack of attention to police authority in prior traffic decriminalization efforts was intentional or not, the nature of policing has since changed with the rise of the “war on drugs,” “broken windows” theory, and the “war on terror.” In future traffic decriminalization efforts, there will be legislators or other key players that favor removing criminal sanctions and streamlining traffic adjudication to the administrative realm, yet believe that restricting police authority and discretion in routine traffic stop settings will undermine the ability of law enforcement to prevent and to deter nontraffic crime. Therefore, this Article now shifts focus to build the normative case from a social control perspective for why it is essential to include restrictions on police authority and discretion in traffic decriminalization efforts—regardless of past or future legislative intentions.

B. State Advantages and Civilian Disadvantages at the Front End of the Criminal Process (Policing)

Broadening the scope of the criminal justice process that decriminalization captures shifts the inquiry beyond sanctions and requires us to consider what other means of social control the state subjects civilians to at the front end of the criminal justice process where police investigation occurs. In traffic contexts, this broadening raises possibilities to consider the circumstances under which police may initiate routine traffic stops for decriminalized traffic violations. It also opens doors to consider when and which types of investigative tactics police should be authorized to use during those stops.

There is a well-established line of legal scholarship discussing how police authority to initiate routine traffic stops and to conduct searches and seizures during those stops has expanded significantly in recent decades. This scholarship has made two particularly important contributions: First, it has highlighted how doctrine, especially U.S. Supreme Court precedent,
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has created a reality in which police officers can essentially pull over anyone for any reason. Second, it has explained the devastating privacy, liberty, dignitary, and physical harms that the expansion of police authority in the traffic realm has had on civilians, especially racial and ethnic minorities. These harms stem from embarrassing and humiliating questioning, intrusive searching, deprivations of property, and applications of police force that become possible once police officers initiate a routine traffic stop. As Justice Stevens described in his dissent in *Maryland v. Wilson*, most of the tens of millions of traffic stops that occur every year involve “otherwise law-abiding citizens who have committed minor traffic offenses. A strong interest in arriving at a destination—to deliver a patient to a hospital, to witness a kickoff, or to get to work on time—will often explain a traffic violation without justifying it.”

Rather than repeating what other scholars have already set out in detail, the purpose of the following analysis is to recast these insights from a decriminalization and social control point of view. Many scholars have characterized the expansion of police authority in routine traffic stop settings as a constitutional problem—and more specifically a Fourth Amendment problem—coinciding with the “war on drugs.” David A. Sklansky has eloquently described the racialized consequences of this expanded authority under the Constitution, stating that “the vehicle stop cases illustrate several ways in which a systematic disregard for the distinctive concerns of racial minorities has become embedded in the structure of Fourth Amendment doctrine and constrains the doctrine’s growth.”

These constitutional critiques are valuable, but other important considerations arise when these policing problems are considered from a decriminalization and social control perspective. Specifically, the Court’s growing constitutional endorsement of expanded police authority in traffic settings coincided with a growing traffic decriminalization movement that is typically viewed as successful for reducing criminal sanctions and making traffic adjudication more efficient. Doctrine endorsing the expansion of

164. Sklansky, supra note 33, at 272 (“For many motorists, particularly those who are not white, traffic stops can be not just inconvenient, but frightening, humiliating, and dangerous.”).
166. See, e.g., LaFave, supra note 162, at 1844.
167. Sklansky, supra note 33, at 274.
police authority in traffic settings developed in spite of the fact that many states had or were purporting to remove minor traffic violations from the criminal framework. Against this constitutional backdrop and without corresponding statutory restrictions on police authority and discretion in decriminalized traffic settings in most jurisdictions, traffic decriminalization had little impact on diminishing the ability of police to control, stigmatize, and harm civilians in routine traffic stop settings—whether through regulating traffic on its own terms or capitalizing on noncriminal traffic enforcement to further crime-control policies of the state (for example, drug enforcement). For this reason, although the expansion of police authority in traffic settings is typically described as pushing the limits of the Constitution, it also pushes the limits of decriminalization as a process—especially when that process is approached narrowly in terms of sanctioning.168

Recasting some of the doctrine involving routine traffic stops from a decriminalization and social control angle is instructive to demonstrate this point. The discussion that follows illustrates some of the means of social control over civilians that states have access to via the expansion of police authority in the traffic realm, in spite of traffic decriminalization. This access encourages a harmful asymmetry in the criminal justice process. It benefits states significantly at the front end of that process by enabling them to further crime-control policies via the policing of decriminalized traffic conduct, which puts civilians at a disadvantage by making them more vulnerable to being funneled into the criminal justice system and subjected to privacy, liberty, dignitary, and physical harms. The discussion below attends to three critical points of the routine traffic stop: (1) its inception, (2) its duration, and (3) its conclusion.

1. The Inception of Routine Traffic Stops

There are at least two developing areas of doctrine regarding police authority and the inception of roving, routine traffic stops—both of which

168. In this regard, recasting these issues through the proposed, broader decriminalization framework fits within an existing body of literature that advocates for police reform without grounding it exclusively on constitutional determinations. See, e.g., Harmon, supra note 19, at 761 (advocating “a new agenda for scholars considering the police, one that asks not how the Constitution constrains the police but how law and public policy can best regulate the police”).
implicate state control via policing in decriminalized traffic settings. The first area involves the quantum of proof necessary for officers to initiate routine traffic stops. The second area involves police authority to conduct pretextual traffic stops.

a. Quantum of Proof

Police discretion to initiate routine traffic stops has expanded to such a degree that it is unclear what quantum of proof police officers need to initiate those stops. Before its 1967 decision in Camara v. Municipal Court, the Court uniformly required the government to satisfy a showing of probable cause to conduct searches and seizures under the Fourth Amendment. This uniform approach began to collapse, however, with Camara’s introduction of a balancing framework into Fourth Amendment jurisprudence that weighed the government interest at stake against the interference with individuals’ Fourth Amendment interests.

One year later, the Court relied on Camara’s balancing framework in its groundbreaking decision in Terry v. Ohio. In Terry, the Court veered from the more demanding and ordinarily-required standard of “probable cause” under the Fourth Amendment to carve an exception permitting police officers to conduct frisks for their personal safety based on a lesser showing of “reasonable suspicion.” Notably, Terry’s holding is commonly interpreted as being limited to situations in which police officers have reasonable

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169. The Article emphasizes “roving” here to clarify that it does not intend for the discussion to apply to suspicionless fixed checkpoints. The Court has addressed the government’s authority under the Fourth Amendment to administer fixed checkpoints without any particularized suspicion that a vehicle or its occupants engaged in illegal activity. See Illinois v. Lidster, 540 U.S. 419 (2004); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

170. See, e.g., LaFave, supra note 162, at 1846–52.


173. The specific interest was “to prevent even the unintentional development of conditions which are hazardous to public health and safety.” Camara, 387 U.S. at 535.

174. Id. at 535–37. For a more comprehensive discussion of Fourth Amendment balancing and its history, see generally Shima Baradaran, Rebalancing the Fourth Amendment, 102 Geo. L.J. 1 (2013).

175. 392 U.S. 1 (1968). In Terry, a police officer suspected that three men he observed on a city street were planning to rob a nearby store. The officer feared that the men had weapons. After identifying himself as a police officer, the officer grabbed Terry, turned him around, patted down his left breast pocket, and discovered a gun. Id. at 6–7.

176. Id. at 30.
suspicion that criminal activity is in progress and that a suspect is armed and dangerous.\textsuperscript{177}

Decided in 1968, \textit{Terry} coincided with the beginning of the traffic decriminalization movement. In later cases (some of which included traffic stops), the Court extended \textit{Terry}'s reasonable suspicion standard to a broader set of situations involving suspicions of criminal wrongdoing.\textsuperscript{178} The Court, however, has never declared a blanket rule that the \textit{Terry} standard applies to police initiations of all routine traffic stops—especially those based on decriminalized traffic offenses.\textsuperscript{179} In 2003, the Court denied certiorari in a case seeking clarification on this very question.\textsuperscript{180} Nevertheless, in spite of traffic decriminalization, courts began to apply, and most courts now use, a lower reasonable suspicion standard to evaluate the state and federal

\textsuperscript{177} Id.; see also L. Song Richardson, \textit{Arrest Efficiency and the Fourth Amendment}, 95 MINN. L. REV. 2035, 2056 (2011) (noting that \textit{Terry} required “suspicion that the individual was armed and engaged in criminal activity”).

\textsuperscript{178} For example, in \textit{United States v. Brignoni-Ponce}, the Court extended \textit{Terry}'s reasonable suspicion standard to a roving vehicle stop of any sort. 422 U.S. 873 (1975). \textit{Brignoni-Ponce} held that the Fourth Amendment does not prohibit U.S. Border Patrol agents from conducting roving vehicle stops near the Mexican border to question occupants about their citizenship and immigration status upon reasonable suspicion that a vehicle contains “illegal aliens.” Id. at 873. In \textit{United States v. Cortez}, the Court held that law enforcement may conduct vehicle stops near the border upon reasonable suspicion that a vehicle or its occupants are engaged in criminal activity other than the offense of whether a vehicle contains “illegal aliens.” 449 U.S. 411 (1981). The Court’s more recent case, \textit{United States v. Arvizu}, arguably contains more conflicting language about whether \textit{Terry}'s reasonable suspicion standard applies to all routine traffic stops. See 534 U.S. 266, 266 (2002). The Court’s formal holding stressed that a “totality of the circumstances” test governs the reasonable suspicion analysis to determine the constitutionality of a U.S. Border Patrol agent’s roving vehicle stop near the border. \textit{Id.} At several points, the Court stressed the connection between a reasonable suspicion standard and criminality. \textit{See id.} at 273–74. At other points, \textit{Arvizu} simply references “wrongdoing” without specifying whether that wrongdoing must be criminal. \textit{See id.} at 273, 277.

\textsuperscript{179} Lower courts have disputed whether the Court’s decision in \textit{Delaware v. Prouse}, 440 U.S. 648 (1979), supports a probable cause or a reasonable suspicion standard for police initiations of routine traffic stops. \textit{Prouse} held that the Fourth Amendment forbids police officers from conducting random “spot checks” without particularized suspicion that a vehicle is operating illegally. \textit{Id.} at 648. On the one hand, \textit{Prouse} appears to favor requiring a reasonable suspicion standard for noncriminal traffic stops because the explicit language of its holding required “at least articulable and reasonable suspicion” that a motorist was unlicensed or a vehicle was unregistered. \textit{Id.} at 663. On the other hand, dicta in the case suggests that the Court did not intend to define the sufficient quantum of proof at reasonable suspicion, but merely rejected the idea that police officers may conduct roving traffic stops without any particularized suspicion—whether reasonable suspicion or probable cause. \textit{Id.} at 661–63; \textit{see also} LaFave, supra note 162, at 1851 (noting that \textit{Prouse} does not discuss “the relative merits of the probable-cause and reasonable suspicion tests in traffic-law enforcement”).

\textsuperscript{180} Colestad v. Wisconsin, 540 U.S. 877 (2003).
constitutionality of police initiations of routine traffic stops—even when the underlying traffic offense is a decriminalized one.¹⁸¹

The intersection of Terry and the inception of routine traffic stops is an important yet undertheorized topic. In mapping the Terry regime onto the civil realm in traffic settings, courts are granting police officers the same increased discretion to conduct searches and seizures against the backdrop of decriminalized violations as the Terry regime affords them against the backdrop of criminal offenses. This lower objective threshold increases possibilities for police officers to rummage for evidence of nontraffic crime in wholly noncriminal traffic settings. The stakes are high for stopped motorists.¹⁸² Those expeditions can be humiliating, frightening, and embarrassing experiences for motorists—many of whom are innocent of any criminal wrongdoing.¹⁸³ When police happen to discover evidence of a nontraffic crime, lengthy incarceration sentences can result.

Although police officers can offer direct evidence of a traffic violation in many cases (for example, a speed reading off of a radar gun), there are closer cases in which requiring a probable cause standard over a reasonable suspicion standard may have meaningful consequences for stopped motorists. In those cases, requiring a probable cause standard for police initiations of routine traffic stops could make a difference in the quantity, reliability, and precision of evidence that must inform police officer suspicions of decriminalized traffic violations. It may also give courts greater legal authority to scrutinize police officers’ accounts of facts involving the underlying decriminalized traffic offenses in criminal cases in which routine traffic stops yield evidence of nontraffic crime.¹⁸⁴

¹⁸¹. LaFave, supra note 162 (noting that most courts have assumed that Terry’s reasonable suspicion standard applies to routine traffic stops). The federal circuits that apply a reasonable suspicion standard to routine traffic stops are the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and D.C. See United States v. Chaney, 584 F.3d 20, 24 (1st Cir. 2009); United States v. Stewart, 551 F.3d 187 (2d Cir. 2009); United States v. Delfin-Colina, 464 F.3d 392 (3d Cir. 2006); United States v. Breeland, 53 F.3d 100, 102 (5th Cir. 1995); United States v. Lewis, 910 F.2d 1367 (7th Cir. 1990); United States v. Martin, 411 F.3d 998 (8th Cir. 2005); United States v. Lopez-Soto, 205 F.3d 1101 (9th Cir. 2000); United States v. Callarman, 273 F.3d 1284 (10th Cir. 2001); United States v. Southerland, 486 F.3d 1355 (D.C. Cir. 2007).

¹⁸². See infra Part IV.

¹⁸³. EPP ET AL., supra note 33, at 1–20 (discussing the sense of indignation that many minority motorists experience during routine traffic stops).

¹⁸⁴. L. Song Richardson, Police Efficiency and the Fourth Amendment, 87 IND. L.J. 1143, 1155 (2012) (identifying one problem with Terry’s reasonable suspicion standard “is that courts often defer to officer judgments of criminality without any criteria for determining whether deference is justifiable”).
The Fourth Circuit’s recent decision in United States v. Sowards is instructive on these points. That case involved a police officer who pulled over a motorist on a North Carolina interstate after visually approximating that he was driving five miles per hour over the speed limit. Before the stop, the police car was parked along the interstate in a way that made it impossible to obtain an accurate radar reading of passing cars. During the traffic stop, a police dog sniffed the exterior of the motorist’s vehicle. After the dog signaled the possible presence of drugs, officers searched the vehicle and discovered cocaine. The motorist was charged with possession of cocaine with intent to distribute, and was sentenced to seventy months of imprisonment.

Before trial, the motorist moved to suppress the evidence of cocaine on the grounds that the officer lacked probable cause to initiate the traffic stop in violation of the Fourth Amendment. The district court denied the motion, and the Fourth Circuit reversed and remanded the case. The Fourth Circuit held that under a probable cause standard, police officers cannot rely on their visual approximations alone to establish that a vehicle was speeding in only slight excess of the speed limit. It reasoned that in those situations, “a speed differential [is] difficult for the naked eye to discern” and that “additional indicia of reliability are necessary to support the reasonableness of the officer’s visual estimate.” It concluded that a probable cause standard requires corroboration from “radar, pacing methods, and other indicia of reliability.”

Compare this example with the following example from a Florida state court involving a motion to suppress evidence of drugs discovered during a routine traffic stop. In that case, the trial court determined that an officer had a reasonable suspicion that a motorist failed to come to a complete stop.

185. 690 F.3d 583 (4th Cir. 2012). There is conflicting support for the probable cause standard in the Fourth Circuit. See infra note 211.
186. Sowards, 690 F.3d at 585.
187. Id.
188. Id.
189. Id.
190. Id. at 585, 587.
191. Id. at 585.
192. Id. at 597.
193. Id.
194. Id. at 592.
195. Id. at 591.
196. Id. at 592.
before a stop-sign—a decriminalized traffic violation in Florida. The trial court made this determination based only on an officer's testimony in which the officer stated that he could not remember observing the traffic violation. Although an appellate court eventually reversed the trial court's determination that the officer's testimony met a lower reasonable suspicion standard, the trial court's initial determination that it did illustrates the vast discretion that the *Terry* regime can afford police officers to initiate routine traffic stops based on decriminalized traffic violations.

Contrary to the example above, some appellate courts in jurisdictions that have decriminalized traffic violations have affirmed the vast discretion that the *Terry* regime affords police officers to initiate routine traffic stops. For instance, the Supreme Court of North Carolina clarified in 2008 that *Terry*'s lower reasonable suspicion standard, as opposed to a higher probable cause standard, governs inquiries involving the federal and state constitutionality of police initiations of routine traffic stops—even for decriminalized traffic offenses. The case involved a motorist's failure to signal before changing lanes—a decriminalized traffic violation in North Carolina that requires the failure to signal to affect the operation of another vehicle on the road. The trial court upheld the validity of the stop on the grounds that the motorist failed to signal before changing lanes when the officer was “immediately” behind him. After stressing the discretionary

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198. *Id.* at 208, *see also supra* Part II.
199. The testimony of the officer included the following exchange:
   Q: Who was driving the [police] vehicle?
   A: Officer [Sikos]
   
   Q: And did you write a report about the events as they unfolded that evening?
   A: Yes, sir.
   Q: All right. And did you personally observe the vehicle run the stop sign?
   A: I don’t recall.
   Q: Okay. Because you’ve read your report, it seems to indicate it was Officer [Sikos] who saw that. Does that refresh your recollection?
   A: I remember the language in the report, sir, but I don’t remember if I put that we observed it or if Officer [Sikos] observed it. I don’t recall.
   Q: So you don’t recall today whether you observed this vehicle run the stop sign, correct?
   A: At this time, no sir, I don’t recall.

   *Carter*, 120 So.3d at 208.
200. *Id.*
203. *Styles*, 665 S.E.2d at 441.
nature of Terry’s reasonable suspicion standard, the Supreme Court of North Carolina affirmed the trial court’s determination, concluding that the stop was valid because “changing lanes immediately in front of another vehicle may affect the operation of the trailing vehicle.”

The dissenting opinion identified several flaws with the majority opinion’s analysis, including its determination that a probable cause rather than a reasonable suspicion standard applied. With respect to the specific facts of the case, the dissent stressed that there was no evidence in the record to support the trial court’s finding that the motorist failed to signal “immediately” in front of the officer. Rather, the trial court made this finding on the simple statement from the police officer’s testimony at the motion to suppress hearing that “upon getting behind the vehicle in question, the defendant had changed lanes and failed to signal.” The dissenting opinion further emphasized that there was no evidence in the record or discussion in the trial court’s order that the motorist’s failure to signal affected or might have affected the operation of the officer’s vehicle. Therefore, the differences between the majority and dissenting opinions demonstrate how adopting a reasonable suspicion over a probable cause standard can diminish courts’ willingness and ability to scrutinize police officers’ accounts about whether a decriminalized traffic violation occurred.

A holistic analysis of the available cases from district courts in the Eleventh Circuit offers additional preliminary insight into the possible effects of requiring a probable cause standard for police to initiate routine traffic stops based on decriminalized traffic violations. Notably, the Eleventh

Specifically, the court relied on U.S. Supreme Court precedent emphasizing that reasonable suspicion was “less demanding than probable cause and requires considerably less than preponderance of the evidence” and is satisfied by “some minimal level of objective justification.”

Id. at 441.

Id. (Brady, J., dissenting).

Id. at 448.

Id.

This Article focuses on district courts because they are responsible for finding facts, applying law to those facts, and making credibility determinations. Its scope is limited to motions to suppress evidence in criminal cases because, in those cases, the district court weighs evidence and makes credibility determinations—as opposed to deferring to a jury on those matters. For this reason, these cases provide more direct insight into how the difference between probable cause and reasonable suspicion can matter in the courts.

To identify cases, the author conducted a search for every publicly available Eleventh Circuit district court order between January 1, 2007, and September 30, 2013, entered on a defendant’s motion to suppress evidence obtained from a traffic stop challenged under the Fourth Amendment. Of course, this sample is far from representative because many district
Circuit is the only federal jurisdiction that appears to require the ordinary and more demanding probable cause standard for routine traffic stops with some uniformity.\textsuperscript{211} The presence of external corroboration of police officer testimony is a major theme that emerges from those cases.\textsuperscript{212} Possible sources of external corroboration include video footage from the police car,\textsuperscript{213} photos,\textsuperscript{214} police reports,\textsuperscript{215} and readings from technological instruments (for example, speed radar\textsuperscript{216} or window tint measuring devices\textsuperscript{217}). This theme suggests that probable cause determinations are not necessarily the result of court judges do not enter written orders on criminal defendants' suppression motions. A broad search on Westlaw using the algorithm ("reasonable suspicion" or "probable cause") /p traffic rendered 440 results; 104 of the 440 results were on point. The author excluded cases:

1. involving claims under 42 U.S.C. § 1983, as opposed to criminal motions to suppress evidence;
2. in which the defendant conceded the initial validity of the stop,
3. the defendant challenged the stop as pretextual, but conceded that a traffic violation occurred; or
4. the government advanced other justifications for the vehicle stop other than a traffic violation.

\textsuperscript{211} See United States v. Harris, 526 F.3d 1334, 1337 (11th Cir. 2008) ("A traffic stop . . . is constitutional if it is either based upon probable cause to believe a traffic violation has occurred or justified by reasonable suspicion in accordance with Terry."). It does not appear as though the Eleventh Circuit distinguishes between noncriminal traffic violations and criminal traffic violations when applying probable cause. Courts in other jurisdictions have applied a probable cause standard in isolated cases. For instance, whether Terry's reasonable suspicion standard applies to civil traffic violations is also an open legal question in the Sixth Circuit. See, e.g., United States v. Gross, 550 F.3d 578, 583 n.1 (6th Cir. 2008); United States v. Blair, 524 F.3d 740, 748 n.1 (6th Cir. 2008); United States v. Simpson, 520 F.3d 531, 538 (6th Cir. 2008); United States v. Sanford, 476 F.3d 391, 394 (6th Cir. 2007); Gaddis v. Redford Tp., 364 F.3d 763, 770 (6th Cir. 2004). There is also conflicting support for the probable cause standard in the Fourth Circuit. Compare United States v. Johnson, 734 F.3d 270, 275 (4th Cir. 2013) ("A traffic stop is reasonable, and therefore not a violation of the Fourth Amendment, if it is justified by probable cause or reasonable suspicion."). With United States v. Sowards, 690 F.3d 583 (4th Cir. 2012) (applying probable cause to a police officer's visual observation of speeding).

\textsuperscript{212} In almost one-third of the available cases (thirty-one cases), the courts stressed that an evidentiary source confirmed a police officer's suspicion that a traffic violation had occurred.


weighing police officer testimony against defendant testimony—a calculus that on balance will favor the credibility of police officers. It also opens questions for future inquiry about whether requiring a probable cause standard can increase police officer motivations to obtain corroborating evidence of a traffic violation at the scene, and then offer this corroboration in court to show that the traffic stop was justified at its inception.

Admittedly, given the fluidity of the probable cause and reasonable suspicion standards, it is difficult to measure the precise effects of requiring one standard rather than the other in routine traffic stop cases.218 But even if requiring a probable cause standard over a reasonable suspicion standard is outcome-determinative in only a slight proportion of the tens of millions of routine traffic stops that occur every year,219 those stops can still number in the tens of thousands. In addition, those stops are likely to occur at higher rates in areas with populations that are most vulnerable to concentrated police surveillance, aggressive policing tactics, and police mistreatment.

In spite of these uncertainties, it is important to call attention to this mapping of the Terry regime from the criminal onto the civil realm in traffic settings. The recent litigation in Floyd v. City of New York220 has highlighted the ways in which the Terry regime has evolved over time to afford police officers vast discretion via the reasonable suspicion standard to initiate searches and seizures in criminal street investigative encounters. Many scholars have criticized the use of stop-and-frisks221 as a crime-prevention tactic, especially in light of its disproportionate use in communities with high representations of people of color.222 These perspectives highlight how

218. See Bernard E. Harcourt & Tracey L. Meares, Randomization and the Fourth Amendment, 78 U. CHI. L. REV. 809, 817 (2011) (discussing uncertainty over the difference between what reasonable suspicion and probable cause require); see also United States v. Ornelas, 517 U.S. 690, 695 (1996) (acknowledging that “[a]rticulating precisely what ‘reasonable suspicion’ and ‘probable cause’ mean is not possible”).

219. BUREAU OF JUSTICE STATISTICS, supra note 20.

220. 959 F.Supp.2d 540, 562 (S.D.N.Y. 2013) (holding that the NYPD’s stop-question-and-frisk policy is unconstitutional under both the Fourth and Fourteenth Amendments).

221. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1(a) (4th ed. 2004) (describing a “stop and frisk” as a police tactic used to stop suspicious individuals for questioning and searching for dangerous weapons).

222. See, e.g., David Cole, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, 87 GEO. L.J. 1059, 1072 (1999) (“In other settings, the officer’s discretion is subject only to the most deferential oversight, as in ‘stop and frisk’ encounters, which may be predicated on ‘reasonable suspicion,’ a standard that itself defers substantially to the officer’s on-the-scene judgment and experience.”); David A. Harris, Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked, 69 IND. L.J. 659 (1994); David A. Harris, Frisking Every Suspect: The Withering of Terry, 28 U.C. DAVIS L.
criminal justice actors have lost sight of Terry as an exercise of judicial exceptionalism on the streets.

Examining Terry’s development in routine traffic stop settings illustrates that criminal justice actors have also lost sight of Terry as an exercise of judicial exceptionalism on our roads and highways. In addition, doctrine has evolved in ways that challenges the conventional idea that the Terry regime facilitates police authority and discretion only in investigative settings involving officer suspicions of criminal conduct. Rather, in spite of traffic decriminalization, the regime is currently enabling police officers to approach wholly noncriminal traffic situations to further crime-control goals on lesser quanta of proof than the Fourth Amendment would ordinarily require.223

b. Pretextual Stops

Whren v. United States224 is the centerpiece of the Court’s jurisprudence on pretextual traffic stops. From a decriminalization angle, the critical aspect of Whren is that the case involved a routine traffic stop based on a decriminalized traffic violation for failing to signal, during which police officers discovered drugs. The Court held that “[a]s a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”225 The Court rejected the idea that a police officer’s subjective motivation for conducting a traffic stop is relevant under the Fourth Amendment so long as the officer has valid objective grounds for stopping the vehicle (for example, observing a traffic violation).226

Many scholars have criticized Whren from a constitutional angle for encouraging racial profiling in traffic settings.227 Two other significant points emerge when Whren is approached from a decriminalization and social control angle. The first point relates to the above discussion about the

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223. A more detailed discussion of the implications of this point for civilians and the goals of decriminalization more generally is provided infra Part IV.
225. Id. at 810 (emphasis added).
226. Id.
227. See Diana Roberto Donahoe, “Could Have, Would Have: What the Supreme Court Should Have Decided in Whren v. United States, 34 AM. CRIM. L. REV. 1193, 1196–97 (1997); Joh, supra note 33, at 212; Johnson, supra note 33, at 1006 (noting that Whren “effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on the race of the occupants”).
quantum of proof necessary for police officers to initiate a routine traffic stop. Even though \textit{Whren} includes no holding on the issue, many lower courts have construed \textit{Whren} to hold that satisfying a probable cause standard is sufficient, but not necessary, for police officers to initiate routine traffic stops—including those based on decriminalized traffic violations. By interpreting \textit{Whren} in this fashion, courts have justified using \textit{Terry}'s lower reasonable suspicion standard to evaluate the constitutionality of police initiations of pretextual traffic stops. More concretely, this means that after \textit{Whren}, police officers in many jurisdictions can conduct pretextual traffic stops in furtherance of the state’s crime-control policies under a lesser quantum of proof than the Fourth Amendment ordinarily requires. This increases possibilities for officers to conduct pretextual stops on less reliable information or when they are less confident that a driver committed a decriminalized traffic violation.

The second point involving \textit{Whren} and pretextual traffic stops relates to the discussion to follow about expansions of police authority to conduct searches and seizures during the course of routine traffic stops. As Kevin R. Johnson has persuasively summarized, \textit{Whren} “effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on the race of the occupants.” The decision, however, did much more. \textit{Whren} endorsed the routinization of pretextual traffic stops as a crime-control tool regardless of the underlying noncriminal nature of the traffic offense. Therefore, critics of \textit{Whren} should view the decision as undermining not only possible Fourth Amendment protections; they should also view it as in tension with the individual protections that decriminalization reforms can offer.

2. The Duration of Routine Traffic Stops

Since \textit{Terry}, the U.S. Supreme Court has analogized routine traffic stops to stop-and-frisks conducted on the streets. Two ideas have motivated these

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228. \textit{See}, e.g., United States v. Stewart, 551 F.3d 187, 192 (2d Cir. 2009); United States v. Delfin-Colina, 464 F.3d 392, 397 (3d Cir. 2006); United States v. Callarman, 273 F.3d 1284, 1286–87 (10th Cir. 2001); United States v. Lopez-Soto, 205 F.3d 1101, 1104 (9th Cir. 2000).

229. Johnson, supra note 33, at 1007.

comparisons. First, the Court has stressed that both police tactics are less intrusive than a traditional arrest. Second, it has emphasized that both tactics are undertaken in settings that pose dangers to police officer safety. For these reasons, courts have treated routine traffic stops as a kind of limited investigative detention and evaluated their constitutionality under a different two-part test set out in *Terry*. Under that test: (1) The traffic stop must be justified at its inception, and (2) the police officer’s actions must be reasonably related in scope to the circumstances that justified the initiation of the stop.

There is a breadth of scholarship and doctrine addressing when the length of a routine traffic stop and the tactics that police officers may use during those stops are reasonable under prong (2). Depending on the jurisdiction, officers can order drivers and passengers out of vehicles, search them or their vehicles, subject them to invasive and humiliating questioning, handcuff them, and arrest them. To reiterate, most of these stops involve drivers and passengers who are innocent of any criminal wrongdoing. The discussion below addresses two common—but less obvious—investigative tactics that police use during noncriminal traffic stops that not only stigmatize and harm innocent drivers and passengers, but also fuel drivers and passengers’ entry into the criminal justice system: (1) dog sniffs of vehicles, and (2) records checks.

a. Dog Sniffs

In *Illinois v. Caballes*, the U.S. Supreme Court held that the Fourth Amendment does not forbid the use of a drug-sniffing dog during a routine

231. See sources supra note 230.
232. See sources supra note 230.
234. LaFave, supra note 162, at 1862–63.
235. See generally Carbado, supra note 33; Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2268 (2002) (noting how the Court’s use of history illustrates “blindness” and lack of respect toward those pulled over). In *Arizona v. Gant*, the U.S. Supreme Court narrowed the search incident to arrest doctrine, holding that “police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” 556 U.S. 332, 351 (2009). Some scholars have argued, however, that *Gant* does not meaningfully constrain police conduct in traffic settings. See generally Stoughton, supra note 105.
236. EPP ET AL., supra note 33, at 155 (noting that the most obvious serious cost of investigative traffic stops is that they “target innocent people for highly invasive intrusions aimed at catching the few who are serious criminals”).
237. 543 U.S. 405, 420 (2005). When this article went to print, the U.S. Supreme Court granted certiorari in a case, *Rodríguez v. United States*, that raised the question of whether a police
traffic stop, so long as its use does not unreasonably prolong the length of the stop. *Caballes* involved a motorist who was pulled over for speeding on an interstate highway in Illinois. After the officer radioed the department to report the stop, another officer came to the scene with a drug-sniffing dog. While one officer was in the process of writing a warning ticket, the other officer walked around the car with the dog. After the dog reacted near the trunk, the officers searched the truck and found marijuana. The motorist was then arrested, convicted of a narcotics offense, and sentenced to twelve years imprisonment.

The question before the Court was whether the Fourth Amendment requires an articulable, reasonable suspicion of drug activity to justify the use of a drug-sniffing dog during a valid routine traffic stop. It held that the Fourth Amendment does not impose this requirement. Its reasoning turned on the privacy interests of motorists with respect to their vehicles. The Court looked to its prior decision in *United States v. Place*, which held that the use of a drug-sniffing dog at an airport was sui generis because it "discloses only the presence or absence of narcotics." Put differently, a drug-sniffing dog "does not expose noncontraband items that otherwise would remain hidden from public view." Drawing on this logic, the Court in *Caballes* stressed that the use of a drug-sniffing dog during a valid routine traffic stop does not implicate any legitimate privacy interests of motorists because the dog reveals "no information other than the location of a substance that no individual has any right to possess." With no privacy interest implicated, the Court held that the use of a drug-sniffing dog could not on its own terms constitute a "search" under the Fourth Amendment.

Consistent with the Court's logic, much of the scholarly focus on law enforcement's use of drug-sniffing dogs involves the relationship between

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239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 407.
243. *Id.*
244. *Id.*
246. *Id.*
248. *Id.* at 410.
249. *Id.* at 408.
privacy and the Fourth Amendment. The Court’s recent decision in *Florida v. Jardines*\(^{250}\) has only strengthened this focus on privacy matters. Unlike the traffic stop context, the Court in *Jardines* held that the use of a drug-sniffing dog on a homeowner’s porch to investigate the contents of the home constituted a “search” under the Fourth Amendment.\(^{251}\) It reasoned that the porch is part of the “curtilage of the house,” which “enjoys protection as part of the home itself.”\(^{252}\)

Putting these privacy debates aside, from a decriminalization and social control perspective, the use of drug-sniffing dogs during noncriminal traffic stops\(^{253}\) should give us at least two reasons for pause. First, their use is another way in which police investigation against the backdrop of noncriminal traffic conduct can open possibilities for motorists’ entry into the criminal justice system. For instance, the most recent analysis of traffic stops conducted in Arizona—a state that has decriminalized most traffic violations\(^{254}\)—reported that police discovered evidence of contraband in 49 percent of the cases statewide in which an officer searched a vehicle or its occupants after a drug-sniffing dog alert.\(^{255}\)

Second, the use of drug-sniffing dogs when police have no articulable suspicion of drug crime is a prime example of police controlling and stigmatizing innocent civilians in wholly noncriminal traffic situations in the hopes of furthering crime-control goals. When police use drug-sniffing dogs during a noncriminal traffic stop, they communicate the message that the motorist is not simply a noncriminal traffic violator, but also a potential drug criminal. These messages can have humiliating and stigmatizing effects on innocent civilians,\(^{256}\) especially racial minority motorists more commonly

\(^{251}\) *Id.* at 1418.
\(^{252}\) *Id.* at 1414.
\(^{253}\) This Article uses the term “noncriminal traffic stop” to refer to roving traffic stops based on decriminalized traffic violations.
\(^{254}\) *Arizona Dep’t of Public Safety, Traffic Stop Data Analysis Study: Year 3 Final Report* 5 (2009), http://www.azdps.gov/About/Reports/Traffic_Stop/. It is important to note that the data did not specify the degree to which police officers had a suspicion, if any, that a motorist possessed or a vehicle contained contraband after the traffic stop was initiated. In addition, there was wide variation across jurisdictions with respect to the percentage of searches that police discovered evidence of contraband after a drug-sniff alert. *Id.* at xvi. The Arizona study was the result of a class-action settlement agreement entered into in 2006 in which the Arizona Department of Public Safety agreed to collect and evaluate traffic stop data. *Id.*
subjected to drug-sniffs during pretextual traffic stops. In many cases, drug-sniffing dogs never alert officers to possible contraband. But even when drug-sniffing dogs alert officers to the possible presence of contraband, the dogs can have high rates of false alerts or drugs are never found. Innocent civilians are then at risk of being subjected to additional humiliating and invasive searches and seizures (for example, searches of their person or vehicle) based on a procedure with unpredictable and questionable accuracy.

257. For instance, in a recent report the American Civil Liberties Union of Illinois reported that Illinois State Police troopers were “more than twice as likely to dog sniff Hispanic motorists compared to white motorists, yet white motorists [were] 64% more likely than Hispanic motorists to be found with contraband during a trooper’s search based on a dog alert.” AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, RACIAL DISPARITY IN CONSENT SEARCHES AND DOG-SNIFF SEARCHES: AN ANALYSIS OF ILLINOIS TRAFFIC STOP DATA FROM 2013, at 1 (2014), http://www.aclu-il.org/wp-content/uploads/2014/08/ACLU-IL-report-re-ITSSSA-data-in-2013.pdf.


259. For instance, one of the most comprehensive studies on the use of drug-sniffing dogs to date was conducted in Australia between February 2002 and 2004. The dogs alerted police to the possible presence of drugs in 10,211 cases. Police located drugs following a search in only 26 percent of the cases (n=2664). NSW OMBUDSMAN, supra note 256, at 29. Each dog in the study received extensive training. Id. at 45–46. Justice Sotomayor indicated that she was troubled by the results of the Australian study during oral argument in Florida v. Harris. Transcript of Oral Argument at 13, Florida v. Harris, 133 S. Ct. 1053 (2013) (No. 11-817). In Harris, the Court held that a drug-sniffing dog alert during a traffic stop provides probable cause to search the vehicle. Harris, 133 S. Ct. at 1054. More recent data from 2013 in Illinois report that “no contraband was found during 40% of the officer searches performed in response to a dog alert.” AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, supra note 257, at 5. Residue from contraband could account for some false positives. See Dan Hinkel & Joe Mahr, Tribune Analysis: Drug-Sniffing Dogs in Traffic Stops Often Wrong, CHI. TRIB., Jan. 6, 2011, http://articles.chicagotribune.com/2011-01-06/news/ct-met-canine-officers-20110105_1_drug-sniffing-dogs-alex-rothacker-drug-dog (“Experts and trainers agree that residue could be to blame for some false positives.”).

260. See Harris, 133 S. Ct. at 1053 (holding that a drug-sniffing dog alert during a traffic stop provides probable cause to search the vehicle); AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, supra note 257, at 5 (“Full car searches based on false dog alerts are even more frightening and embarrassing.”); id. (“Thousands of innocent motorists are subjected to lengthy, invasive, and humiliating vehicle searches by police officers as a result of erroneous dog alerts.”).
Nevertheless, laws restricting the police use of drug-sniffing dogs during noncriminal traffic stops are rare.\textsuperscript{261} In addition, courts in several states that have decriminalized traffic violations have directly relied on \textit{Caballes}, or advanced similar logic with respect to privacy, to uphold the use of drug-sniffing dogs during noncriminal traffic stops—regardless of any officer suspicion of drug or other criminal activity.\textsuperscript{262} Some courts have even voiced their deference to the state’s interest in crime control when upholding the use of drug-sniffing dogs under these suspicionless circumstances.\textsuperscript{263}

\textbf{b. Records Checks}

During routine traffic stops, police officers in most jurisdictions—including those that have decriminalized traffic violations—have the authority to and regularly do request a search of a variety of government documents other than a driver’s license or vehicle registration, including outstanding warrants, prior convictions, and prior arrests.\textsuperscript{264} For this reason, the records check is one point of the routine traffic stop where a noncriminal traffic situation can quickly turn into a criminal one.

Although a records check is a common feature of routine traffic stops today, this was not always the case. Rather, when the bulk of traffic decriminalization occurred between 1970 and the mid-1980s, state

\textsuperscript{261} In 2004, however, Rhode Island passed a law that required reasonable suspicion of crime for a drug-sniffing dog search during a traffic stop. R.I. GEN. LAWS § 31-21.2-5(a) (2010).

\textsuperscript{262} \textit{See}, e.g., Whitfield v. State, 33 So.3d 787, 790 (Fla. Dist. Ct. App. 2010) (stressing that “[i]t is well established that the use of a narcotics dog to sniff a vehicle does not constitute a search and may be conducted during a consensual encounter or traffic stop” (citing Illinois v. Caballes, 543 U.S. 405, 408–09 (2005))); State v. Arias, 752 N.W.2d 748 (Wis. 2008); State v. Gibson, 886 N.E.2d 639, 641–42 (Ind. Ct. App. 2008); State v. Brimmer, 653 S.E.2d 196, 196 (N.C. Ct. App. 2007). In some cases, courts have somewhat constrained the authority of police use of drug-sniffing dogs when the police complete or abandon the purpose of the traffic stop. \textit{See}, e.g., State v. Aguirre, 112 P.3d 848, 852 (Idaho Ct. App. 2005) (holding that use of drug-sniffing dog after the purpose of the traffic stop was abandoned was an unconstitutional expansion of the traffic stop).

\textsuperscript{263} For instance, in \textit{State v. Gibson}, the Court of Appeals of Indiana affirmed the state and federal constitutionality of the use of a drug-sniffing dog in traffic stop settings under suspicionless circumstances. 886 N.E.2d 639 (Ind. Ct. App. 2008). The court noted that “the trafficking of illegal drugs [is] frequently associated with violence” and stressed that “no simpler method exists for detection of hidden drugs than a dog sniff.” \textit{Id.} at 643.

\textsuperscript{264} \textit{See} WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.3(a) (5th ed. 2012) (“Yet another type of information regularly acquired by a records check following a traffic stop is the driver’s criminal history, that is, information regarding his prior convictions, prior arrests, and the like.”); LAFave, supra note 162, at 1876 (“[I]t [is] common for the officer also to run a check for any outstanding arrest warrants on the driver.”).
governments did not have the computer technology to gather and make government documents accessible so that police officers could request a records check as a matter of course during routine traffic stops. Before this technology became available, gathering the information for a records check could take several days. For this reason, the accepted practice was that a police officer would not request a records check for a driver who merely committed a minor traffic violation. An officer simply stopped the driver and issued a citation. Only if the apprehended driver was acting in a suspicious manner would the officer request a records check—including a criminal background check.

In most jurisdictions today, a warrant and a license check is a standard practice during routine traffic stops—regardless of whether drivers and passengers act suspiciously during the stops. Technological advances encouraged this change in practice. But if a key goal of decriminalization is to halt the funneling of civilians into the criminal justice system, then one might think that traffic decriminalization should include constraints on the types of personal information that police may access during routine traffic stops. This is especially the case once legislatures purportedly remove the bulk of traffic wrongdoings from the criminal framework. Under these circumstances, it is unclear why expediency from technological advances justifies regular police access to personal information in decriminalized traffic settings, but not in other domains of decriminalized activity that foster civilian interactions with the police—such as jaywalking in some jurisdictions.

The following example from the Supreme Court of Washington—a state that has decriminalized traffic violations—touches on some of these gray areas. In State v. Rife, an officer stopped a pedestrian near a bus stop for jaywalking, obtained his identification, and made a radio check for outstanding warrants. Although it involves pedestrians, jaywalking is a decriminalized traffic infraction in Washington. Accordingly, this example demonstrates the important point that the consequences of enabling police

265. See, e.g., Committee on Judiciary, Tour, supra note 142, at 2 (noting that "to gather and compile information on a records check can take up to eight days").

266. See, e.g., Statement of Chairman George F. Cole, Committee on Judiciary, Subcommittee on Adjudication, Minutes, OREGON SECRETARY OF STATE 7–8 (Nov. 15, 1973), http://www.sos.state.or.us/archives/doc/records/legislative/legislativeminutes/motorvehicle/Adjudication/15NOV73.pdf.

267. Id.

268. Id.

269. See LaFave, supra note 162, at 1876–77.


271. Id. at 268.
officers to use specific investigative tactics against the backdrop of
decriminalized traffic conduct are not necessarily limited to drivers and
passengers on our roads and highways. They can also affect civilians walking
on the streets.

In the case, the warrant check took “five to ten minutes, with verification
taking an additional five to ten minutes.” The pedestrian was not free to
leave during that period. The records check revealed two outstanding
warrants. The officer then arrested the pedestrian, never citing him for the
jaywalking infraction. At the police station, officers discovered heroin in
the pedestrian’s pocket after he was searched incident to arrest on the
outstanding warrants. In the trial court, the pedestrian moved to suppress
evidence of the heroin on the grounds that the officer had no legal authority
to conduct the search, which the judge denied.

Central to the court’s analysis was a Washington statute that defined the
scope of background information that police officers may check during a
noncriminal traffic stop. The statute gave police officers “a reasonable period
of time necessary to identify the person, . . . check the status of the person’s
license, insurance identification card, and the vehicle’s registration, and
complete and issue a notice of traffic infraction.” Unable to reference a
source of legal authority for the warrant check, the police officer
acknowledged before the court that “he was following his own procedure
which was not authorized by any ordinance, statute or regulation.” The
court concluded that the seized heroin must be suppressed because the police
officer had no legal authority to conduct the search. Looking to the
Washington statute, the court stressed that “[t]he Legislature did not grant
central police officers authority to search for outstanding warrants upon making a
stop for a traffic infraction.” Accordingly, the court reversed the pedestrian’s
drug conviction.

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272. Id. at 267.
273. Id.
274. Id.
275. Id.
276. Id.
277. Id. The pedestrian also alleged that the pedestrian traffic stop was pretextual, which the trial
judge also denied. Id.
278. WASH. REV. CODE ANN. § 46.61.021 (West 2012).
279. Rife, 943 P.2d at 270.
280. Id. at 270–71.
281. Id. at 270.
282. Id. at 271.
Notably, the trial and appellate courts decided the case on Fourth Amendment and state constitutional grounds. The Supreme Court of Washington, however, stressed that it need not address the complexities of the constitutional issues because it had a statute at its disposal delineating police authority during civilian detentions based on noncriminal traffic offenses.  Therefore, the court was able to prevent the pedestrian’s noncriminal traffic violation from serving as a gateway into the criminal justice system in light of this existing statute. As explained infra Part V.B, expanding conceptions of decriminalization beyond sanctions to capture police authority might open possibilities for more of these types of restrictions.

Unfortunately, the decision of the Supreme Court of Washington had the opposite effect. After the court’s decision, the Washington Legislature amended the statute to permit officers to “check for outstanding warrants” during stops involving any traffic infraction. After the amendment, courts upheld the authority of police officers to check for outstanding warrants against the backdrop of both noncriminal traffic violations involving vehicles as well as the noncriminal jaywalking violation. Thus, on one hand, the amendment illustrates the unwillingness of some lawmaking bodies to restrict opportunities for police to control civilians through access to personal information in ways that have possible criminal ramifications, in spite of decriminalization efforts. On the other hand, the court’s use of the prior Washington statute in the example above is a promising illustration of how statutory restrictions involving police access to personal information can make a difference in preventing decriminalized traffic settings from serving as gateways into the criminal justice system.

3. The “Conclusion” of Routine Traffic Stops

Even when the duration of a routine traffic stop hits its legal limit, police authority to subject drivers and passengers to means of social control does not end. “Consent searches” are one example—a common tool that police officers use to obtain a driver’s permission to search a vehicle after the legal duration

283. Id. at 268.
284. WASH. REV. CODE ANN. § 46.61.021 (West 2012). The revised statute does not mention criminal history checks.
285. See, e.g., State v. Glossbrener, 49 P.3d 128, 131 (Wash. 2002) (affirming authority of police to request a warrant check after driver was pulled over for a burned out headlight).
of the stop.\textsuperscript{287} Although police officers also commonly use consent searches during the legal duration of a stop, the typical scenario at a stop's conclusion involves a police officer asking a driver for permission to search a vehicle after the officer hands back all documents and issues a traffic citation (if a citation is issued at all).\textsuperscript{288} In effect, the U.S. Supreme Court has endorsed consent searches at the conclusion of routine traffic stops by hinging the determinative constitutional inquiry on the idea that drivers should know when they can say “no” to a police officer’s request and when they are free to leave a policing setting.\textsuperscript{289}

Many scholars have argued that there are constitutional problems with the Court’s consent search jurisprudence and its implications for motorists on streets, roads, and highways.\textsuperscript{290} Specifically, they have stressed that motorists often do not realize that they are free to leave and the Court’s jurisprudence does not require that police officers tell them so.\textsuperscript{291} For these reasons, Tracey Maclin has persuasively summarized that “[c]onsent searches can go forward with no evidence of criminality. A hunch will do. And an officer’s reason for requesting consent—whether it be motivated by bias . . . —does not undermine the validity of any consent given by a person.”\textsuperscript{292}

Putting these constitutional debates aside, from a decriminalization perspective consent searches during routine traffic stops are another way in which police officers can subject motorists who are innocent of any criminal wrongdoing to controlling, humiliating, and invasive police tactics. These

\begin{footnotesize}
\footnotesize{287. LaFave, supra note 162, at 1898 (observing that “[a]ll the officer has to do to obviate any and all time and scope limitations” is to act in such a way that courts will consider the seizure terminated, “even though any person who has been detained for a traffic violation is unlikely to so perceive the situation”); Tracey Maclin, The Good and Bad News About Consent Searches in the Supreme Court, 39 McGeorge L. Rev. 27, 30 (2008) [hereinafter Maclin, Consent Searches]; Tracey Maclin, Police Interrogation During Traffic Stops: More Questions Than Answers, CHAMPION, Nov. 2007, at 34 [hereinafter Maclin, Police Interrogation].

288. LaFave, supra note 162, at 1898; Maclin, Police Interrogation, supra note 287, at 34.

289. See, e.g., Ohio v. Robinette, 519 U.S. 33, 40 (1996) (noting that it is “unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary”); Florida v. Bostick, 501 U.S. 429, 436 (1991) (noting that if “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter,” then no seizure has occurred and no reasonable suspicion is required to justify the officer’s conduct); United States v. Mendenhall, 446 U.S. 544, 554 (1980) (“As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person’s liberty or privacy as would under the Constitution require some particularized and objective justification.”).

290. See, e.g., LaFave, supra note 162, at 1844–45; Maclin, Police Interrogation, supra note 287, at 34.

291. Maclin, Consent Searches, supra note 287, at 34. But see, LaFave, supra note 162, at 1898–99 (“[A] reasonable person would have felt free to decline the officer[s] requests or otherwise terminate the encounter.”).

292. Maclin, Consent Searches, supra note 287, at 27.}
\end{footnotesize}
tactics, like those discussed above, often have significant racialized consequences. For instance, official data from 2013 in Illinois report that Black and Hispanic motorists were far more likely to be subjected to consent searches than white motorists in several jurisdictions throughout the state.293

Moreover, consent searches are another way in which the shape of police investigation during noncriminal traffic stops can funnel motorists into the criminal justice system. To demonstrate the promise that decriminalization reforms can offer to close this gateway, consider the following case from the Supreme Court of Oregon.294 State v. Rodgers involved a police officer who pulled a driver over for having a burned-out license plate light—a decriminalized traffic violation in Oregon.295 After being pulled over, the driver provided the officer with his driver’s license but could not show proof of insurance.296 The driver explained that he was borrowing the vehicle with the owner’s permission.297 While talking, the officer saw a large container of blue liquid on the front passenger floorboard and a white sack containing a square metallic container on the back seat.298 The officer also noticed that the driver had sores on his face, consistent with meth use.299 The officer went back to his patrol car and requested a records check.300

A second officer then arrived.301 The officer at the scene told the second officer that he believed that the driver had items in his car used to produce meth.302 But the officer did not have enough information to arrest the driver, the records check had come back clean, and he had sufficient cause only to issue a traffic citation.303 Nevertheless, one officer approached the driver’s window and questioned him about the blue liquid and the sack in the back seat.304 The officers then asked for consent to search the car.305 The driver agreed,

293. ILLINOIS DEPARTMENT OF TRANSPORTATION, supra note 258, at 11–14 (reporting racial disparities involving consent searches in several police agencies in Illinois, including Aurora, Springfield, Lake County, and Rockford).
295. Rodgers, 227 P.3d at 698; see also OR. REV. STAT. § 816.330 (2014).
296. Rodgers, 227 P.3d at 698.
297. Id.
298. Id.
299. Id.
300. Id.
301. Id.
302. Id.
303. Id.
304. Id.
305. Id.
and the officers found signals of meth manufacturing, including acid, lithium batteries, foil, and cold medicine.\textsuperscript{306} The driver was arrested, charged, and convicted for manufacture of a controlled substance.\textsuperscript{307}

Challenging the consent search, the driver argued that the officer had unconstitutionally extended the scope and duration of the traffic stop by questioning him without reasonable suspicion of any criminality.\textsuperscript{308} The Supreme Court of Oregon sided with the driver. The court’s analysis rested on its interpretation of its state constitution. The noteworthy aspect of the court’s analysis is that the noncriminal nature of the traffic violation served as an important guidepost for the types of police questioning and conduct that it viewed as constitutionally permissible during the routine traffic stop.

In its general discussion, the court stressed that police authority to perform a routine traffic stop arises from specific facts that create probable cause of the noncriminal traffic violation.\textsuperscript{309} It inferred that police authority to detain the motorist dissipates when the investigation reasonably related to the decriminalized traffic infraction is completed or should have been completed.\textsuperscript{310} Based on this view, it stressed that “[o]ther . . . conduct by the police, beyond that reasonably related to the traffic violation, must be justified on some basis other than the traffic violation.”\textsuperscript{311} In simple terms, this meant that for an officer to ask motorists questions or conduct searches involving criminal matters unrelated to the noncriminal traffic violation, the officer needed independent facts giving rise to suspicion of those crimes.\textsuperscript{312}

Applying these general principles to the case, the court reasoned that when the officer returned to the driver’s window, he had all of the information necessary to issue the citation for the burned-out license plate and end the traffic stop.\textsuperscript{313} It further stressed that even though the officer chose not to issue the citation, his authority to detain and question the driver dissipated at the moment that he had the necessary information to issue it.\textsuperscript{314} Accordingly, the court concluded that the officer’s questions regarding the items in the car and the request to search the car occurred after the noncriminal

\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} Id. at 703.
\textsuperscript{310} Id.
\textsuperscript{311} Id.
\textsuperscript{312} Subsequent lower Oregon courts have stressed this principle. See, e.g., State v. Farrar, 287 P.3d 1124, 1127 (Or. Ct. App. 2012).
\textsuperscript{313} Rodgers, 227 P.3d at 704.
\textsuperscript{314} Id.
traffic stop concluded. Because the officers did not have reasonable suspicion of the drug-related crime, it concluded that the consent search was invalid and the evidence was unlawfully seized.

This example illustrates that interpretations of state constitutions are one promising avenue to prohibit police from controlling civilians in ways that transform noncriminal traffic stops into criminal ones through the use of consent searches after the legal duration of a stop. This approach is especially appealing given the current status of Fourth Amendment jurisprudence, which poses an uphill battle for critics of consent searches. A few state courts have already restricted the police use of suspicionless consent searches at the conclusion of routine traffic stops on state constitutional grounds.

The statutory backdrop to the case, however, substantiates another important lesson: that different statutory or doctrinal sources can facilitate the examined asymmetry at the front end of the criminal justice process where policing occurs. Specifically, the case illustrates how state evidentiary laws can undercut the effectiveness of previously enacted statutes that restrict police authority and discretion in decriminalized settings. This corrosive effect enables the asymmetry to continue in unsuspected ways.

Before engaging in its constitutional analysis, the court started its discussion with an Oregon statute that defines police powers in noncriminal traffic stop settings. That statute contains several restrictions on the scope of police authority in traffic stop settings. In this regard, the statute could

315. Id. at 704–05.
316. Id. at 705.
317. See supra notes 289–292 and accompanying text.
318. See, e.g., State v. Fort, 660 N.W. 2d 415, 419 (Minn. 2003); State v. Carty, 790 A.2d 903, 912 (N.J. 2002) (holding that “unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional”).
320. OR. REV. STAT. § 810.410 (2013) provides, in part:
   (2) A police officer may issue a citation to a person for a traffic violation at any place within or outside the jurisdictional authority of the governmental unit by which the police officer is authorized to act:
      (a) When the traffic violation is committed in the police officer’s presence; or
      (b) When the police officer has probable cause to believe an offense has occurred based on a description of the vehicle or other information received from a police officer who observed the traffic violation.
   (3) A police officer:
      (a) Shall not arrest a person for a traffic violation.
arguably serve as a statutory model to restrict police authority in traffic stop settings under the broader proposed approach to decriminalization.

In fact, the court's analysis explicitly noted the force that this law used to have in the judicial realm. The court stressed that before 1997 it had interpreted the statute to describe not only “what an officer could do respecting a traffic stop” but also “what the officer could not do.” In a 1991 decision, the court thoroughly evaluated the legislative history of the statute, and concluded that “we glean that the legislature sought to keep traffic infractions decriminalized and to reduce the attendant law enforcement methods as much as necessary to accomplish that goal.”

Referencing this history, the court explained in the example involving the consent search that “because the statute was intended to limit police activity associated with a traffic stop, [the court had considered] it was also the legislature’s intention that evidence seized in violation of the statutory proscription be suppressed.”

In 1997, the legal terrain in Oregon changed to undermine the ability of the court to construe the statute in this fashion. In that year, the Oregon legislature enacted a new law that prohibited judges from excluding evidence in criminal cases simply because it was obtained in violation of a state statute. Under the new law, courts could exclude the evidence only if

(b) May stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation.

(c) May make an inquiry into circumstances arising during the course of a detention and investigation under paragraph (b) of this subsection that give rise to a reasonable suspicion of criminal activity.

(d) May make an inquiry to ensure the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.

(e) May request consent to search in relation to the circumstances referred to in paragraph (c) of this subsection or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.

(f) May use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons present.

(g) May make an arrest of a person as authorized by ORS 133.310(2) if the person is stopped and detained pursuant to the authority of this section.

Paragraphs (c), (d), (e), and (f) of subsection (3) were amended in 1997. Act of Oct. 4, 1997, ch. 866, §§ 4, 5, 1997 Or. Laws 2559, 2559–60 (codified as amended at OR. REV. STAT. § 810.410 (1997)).

321. Rodgers, 227 P.3d at 701.
323. Rodgers, 227 P.3d at 701.
324. Id. (discussing OR. REV. STAT. § 136.432).
exclusion was required under the federal or state constitutions. Consequently, the court could no longer conclude that it was the legislature's intent to exclude evidence from criminal cases that resulted from situations in which police officers failed to obey the existing statute defining their authority in noncriminal traffic stop settings. In light of this evidentiary reform, the court had to frame its inquiry involving the disputed consent search in terms of what the Oregon state constitution required.

Therefore, this example illustrates more than that even after a noncriminal traffic stop hits its legal duration, the trajectory of police investigation can quickly transform the stop into a criminal one. It also shows that the examined asymmetry involving policing in decriminalized settings can involve complex and interweaving relationships between legislation, judicial interpretations of that legislation, and judicial interpretations of the state and federal constitutions.

IV. HOW THE ASYMMETRY UNDERMINES THE GOALS THAT DECRIMINALIZATION SHOULD ACHIEVE

This Part explains why the criminal justice asymmetry set out above undermines the very goals that decriminalization should achieve. As demonstrated, sanction-focused approaches to traffic decriminalization have overlooked how the policing (as opposed to the sanctioning) of traffic conduct (1) serves as a gateway for filtering traffic violators into the criminal justice system, and (2) encourages privacy, liberty, dignitary, and physical harms against traffic stop targets and the communities to which they belong—especially people of color vulnerable to concentrated police surveillance and pretextual traffic stops.

To lay a foundation for these claims, I revisit William Stuntz's insightful analysis of the criminal lawmaking process as being driven by two kinds of politics. In some respects, the asymmetry set out above demonstrates both kinds of politics in action. The first type of politics is a "surface politics" in which political forces and popular opinion pressure substantive criminal laws to expand, and sometimes to restrict, criminal liability. As discussed previously, legislative efforts to decriminalize traffic violations were largely products of legislative and public judgments that traffic violations: (1) do not pose a serious

325. Id. (discussing OR. REV. STAT. § 136.432).
326. See sources cited supra note 33.
328. Id.
enough threat to warrant the significant penalty of the criminal law; (2) pose
too great of a burden on courts when handled inside the criminal framework;
(3) do not deserve vast expenditure of state resources to provide the necessary
procedural protections to impose criminal sanctions; and (4) pose too great of
a burden on police officers to appear in court so that traffic tickets can stick in
criminal courts.329 A cost-benefit calculus centered on maintaining the infra-
structure necessary to impose criminal sanctions underlies these concerns.330 For
this reason, sanction-focused approaches to traffic decriminalization can be
viewed as a type of “surface” decriminalization—one that does not account for
the full consequences of social control within the criminal justice process
beyond the criminal sanction.

The second type of politics is a “deeper politics” in which authority over
the law’s definition, enforcement, and application is diffused to several
criminal justice actors with different incentives, accountability, and levels of
transparency—including legislatures, police, prosecutors, and judges.331 As
the prevailing narrative in criminal law scholarship goes, legislatures have an
incentive to criminalize as much trivial behavior (for example, public
drunkenness, loitering, vandalism, littering, public urination, and
panhandling) as is politically feasible.332 By expanding criminal liability,
police officers can then conduct searches and seizures based on suspicions of
those minor crimes, in order to increase opportunities of discovering evidence
of more serious crimes without incurring the investigative costs of having to
establish probable cause of those more serious crimes.333 Nevertheless,
governments still incur significant costs from the harmful pipeline to arrest
and incarceration that is set into motion when police officers can initiate
searches and seizures so easily against the backdrop of minor crimes. As
Alexandra Natapoff and other scholars have discussed, this pipeline has its
harshest effects on poor neighborhoods and communities of color more
vulnerable to crackdowns on minor “quality of life” offenses.334

329. For a discussion of these points see supra Part III.A.
330. See supra Part III.A.
331. Stuntz, supra note 327, at 528.
332. See Jeffrey A. 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
Michael D. White eds., 2009); cf. William J. Stuntz, Implicit Bargains, Government Power,
333. See sources supra note 332.
334. See Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors, 66 STAN. L. REV.
611, 635 (2014); Jenny Roberts, Why Misdemeanors Matter: Defining Effective Advocacy in the
Lower Criminal Courts, 45 U.C. DAVIS L. REV. 277 (2011) (explaining the explosion of
Approaching decriminalization in a broader way that captures policing illustrates that this prevailing narrative about overcriminalization in criminal law scholarship is not the entire story, although it is a very important chapter. This pushback against the prevailing narrative resonates with the premise of Darryl K. Brown's comprehensive analysis on decriminalization and democracy.\textsuperscript{335} Contrary to the prevailing view, Brown's analysis illustrates the different ways that legislatures have narrowed criminal statutes and have been unwilling to expand criminal codes.\textsuperscript{336}

The criminal justice asymmetry set out above unravels a different dimension involving policing to this critique. Specifically, even when legislatures purport to remove conduct from the criminal framework by modifying sanctions, police officers can recriminalize that conduct in effect by acting in the exact ways in the name of crime control through the power to question, seize, and search as they would have previously done when that conduct was criminalized. Accordingly, when decriminalization does not capture restrictions on police authority and discretion, then formal criminalization is no longer a requirement (as the prevailing overcriminalization narrative goes) to diffuse authority to define, enforce, and apply criminal laws.\textsuperscript{337}

Under these circumstances, jurisdictions are left with the same policing conditions that drive the costly and harmful pipeline to arrest and incarceration against the backdrop of minor criminality—only this time against the backdrop of decriminalized offenses. Jurisdictions are also left with the same policing conditions that encourage privacy, liberty, dignitary, and physical harms against individuals targeted during police investigation. Decriminalization should avoid these outcomes.

One important aspect that the traffic decriminalization movement was unable to preempt or counteract because of its focus on sanctions was the institutionalization of routine traffic stops as a crime-fighting tool in light of dramatic changes in dominant policing philosophies across U.S. law

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\textsuperscript{335} To stress again, this point is in tension with the prevailing view in criminal law scholarship. \textit{See} e.g., \textit{Stuntz, supra} note 18, at 9 (“Notwithstanding the Constitution’s many restrictions, law enforcement power does not contract as one moves from civil to criminal. On the contrary, it expands.”); \textit{id.} (“So the criminal label brings with it not only special restrictions but also special powers, powers that the government may find valuable and that cannot be used in the civil sphere.”).

\textsuperscript{336} \textit{Id.} at 225.

\textsuperscript{337} \textsuperscript{See} generally Alexandra Natapoff, \textit{Misdemeanors}, 85 S. CAL. L. REV. 1313 (2012).

\textsuperscript{335} Brown, \textit{supra} note 17, at 223–24.

\textsuperscript{336} \textit{Id.} at 225.
enforcement agencies. Between the 1920s and 1970s, U.S. police departments adopted a primarily reactive philosophy that was geared toward responding to citizen complaints of crime. During the 1960s and 1970s, rising crime rates and growing civil unrest between law enforcement and minority communities generated skepticism over the effectiveness of reactive policing. Proactive policing strategies became the norm in the 1980s with the rise of two strategic innovations: community policing and problem-oriented policing. Both innovations shifted the focus of policing away from individuals who already committed crime toward individuals who had not yet committed crime, as well as the circumstances that might encourage them to offend.

A key feature of proactive policing philosophies is that they encourage the use of aggressive patrol tactics to identify “suspicious” persons and activities. Informed by these philosophies, routine traffic stops assumed a broader police purpose than mere traffic law compliance. From the perspective of law enforcement, routine traffic stops evolved into a seemingly cost-effective tool for police officers to stop and search “suspicious” persons whom they believed were involved in nontraffic crime. On highways, routine traffic stops became a tool for drugs and weapons interdiction. And in “hot spot” areas of crime, routine traffic stops enabled police officers to stop and search “suspicious” persons for street crime, such as drug-related offenses.

339. *Id.* at 5.
341. Community policing rests on the idea that police officers and individuals within local communities should work together in innovative ways to identify and solve community-specific problems pertaining to crime. ROBERT C. TROJANOWICZ ET AL., *COMMUNITY POLICING: A CONTEMPORARY PERSPECTIVE* 2–3 (2d ed.1998).
344. GEORGE F. COLE & CHRISTOPHER E. SMITH, *CRIMINAL JUSTICE IN AMERICA* 140 (5th ed. 2008) (“Aggressive patrol is a proactive strategy designed to maximize police activity in the community.”).
346. See, e.g., Larry K. Gains, *An Analysis of Traffic Stop Data in Riverside, California*, 9 POLICE Q. 210 (2006) (finding that police traffic stops in Riverside, California congregated in areas with
Proactive policing strategies have focused largely on street crime. Although there are several factors at play, these strategies cannot be disassociated from cultural attitudes toward crime that have shaped priorities in legislatures, police administrations, and the public about which crimes are the most deserving of state condemnation and police resources. Our now four-decades-old “war on crime” has resulted in vast expenditure of police resources on drug, weapons, and immigration offenses. During this “war,” concepts of race and criminality have mutually reinforced each other—so much so that police officers regularly rely on, and courts have constitutionally permitted the use of, race as a factor for police to identify “suspicious” persons and behaviors in their fight against street crime.

Criminologists James Skolnick and James Fyfe have examined how militaristic notions of law enforcement shape public expectations of the police and infiltrate police culture, both in the front line and in police administration.
Police officers essentially “see themselves as soldiers locked in a war” against crime that they are losing, which inspires the use of overaggressive and unjustified tactics based on the idea that everything possible must be done to identify “enemies” in this “war.” In this environment, police officer suspicions of crime and criminals are regularly informed by vague cues and cultural stereotypes, which especially put racial and ethnic minority communities at risk of police abuse.

For these reasons, the extent to which police officers are afforded authority and discretion to engage in investigative tactics in today’s policing climate that prioritizes proactive policing has tangible consequences for civilians and the communities to which they belong. This is especially the case in routine traffic stop settings given that so much is at stake once a police officer initiates a traffic stop. Depending on the jurisdiction, officers can order motorists out of their vehicles, search them or their vehicles, subject the motorists to invasive and humiliating questioning, handcuff them, and potentially arrest them. These frightening possibilities pose serious dignitary and psychological harms to motorists, and especially stigmatize motorists of particular social groups who are identified as “suspicious” based on vague cues, such as their race/ethnicity or the neighborhoods in which they are driving.

These potential harms may be more tolerable when police officers conduct investigative activities against the backdrop of a criminal offense, including criminalized traffic offenses. In these situations, the immediately targeted traffic wrongdoing is considered morally depraved enough to warrant inclusion in the criminal framework. Accordingly, worries about targeting minor traffic crimes to increase opportunities to discover evidence of more serious crimes might be relatively weak, because the government’s

353. SKOLNICK & FYFE, supra note 352, at 132–33.
354. Id. at 114 (“[P]olice officers on American streets too often rely on ambiguous cues and stereotypes in trying to identify the enemies in their war.”); L. Song Richardson & Phillip Atiha Goff, Self-Defense and the Suspicion Heuristic, 98 IOWA L. REV. 293, 310 (2012) (“Use of the suspicion heuristic cannot help but disadvantage Blacks. This is because Blacks serve as our mental prototype (i.e., stereotype) for the violent street criminal.”).
355. See generally Carbado, supra note 33; Andrew E. Taslitz, Stories of Fourth Amendment Disrespect: From Elian to the Internment, 70 FORDHAM L. REV. 2257, 2268 (2002).
356. See Rod K. Brunson & Ronald Weitzer, Police Relations with Black and White Youths in Different Urban Neighborhoods, 44 URBAN AFFAIRS REV. 858, 865 (2009) (“African-American motorists are somewhat more likely to be stopped by police than White motorists in St. Louis and much more likely to be searched following a stop than White motorists”); Leong, supra note 33, at 308 (explaining that for “some racial groups, the traffic stop inhibits the American dream”).
interests involving crime are already triggered. But these possible harms take
on a different contextualized meaning when they occur against the backdrop
of police officer suspicions of wholly noncriminal conduct that voters and
legislatures determined does not carry the type of moral culpability as crimes
do, and that might be afforded weaker substantive and procedural protections
as a result of being adjudicated in the administrative realm.357 There should
be less tolerance for those harms when the government’s interests in crime are
not triggered and individual protections are diluted.

Beyond these concerns, the extent to which legislatures and courts grant
police officers authority and discretion to initiate routine traffic stops goes to
the heart of the costly mass incarceration problem in the United States.
Hundreds of thousands of nonviolent drug offenders are incarcerated in state
and federal jails and prisons nationwide.358 In the federal prison system alone,
half of the 215,000 inmates are serving time for drug offenses.359 The
connection between the U.S. mass incarceration phenomenon and nonviolent
drug offenses is demonstrated by the recent push from former U.S. Attorney
General Eric Holder to eliminate mandatory minimum sentences for
nonviolent drug crimes.360 Mediating this problem, though, requires reform
not only at the later stages of the criminal justice process (the sentencing phase
for nonviolent drug offenses) but also at the early stages (the investigatory
settings in which police officers discover drugs).

Critics may disagree with this specific point that traffic enforcement is
relevant to the mass arrest and incarceration problem in the United States.
Beyond that particular debate, however, the extent to which legislatures and
courts grant police officers authority and discretion in noncriminal traffic stop
settings can spill over to how police approach their job in nontraffic situations.
As an example, revisit courts’ mapping of Terry v. Ohio’s reasonable suspicion
standard onto the noncriminal traffic realm.

In some jurisdictions, courts’ application of the relaxed Terry standard to
evaluate the constitutionality of police initiations of noncriminal traffic stops
has set into motion a body of precedent that has enabled Terry’s relaxed

357. See supra Part III.A.
358. See Douglas A. Berman, Turning Hope-and-Change Talk Into Clemency Action for Nonviolent
Drug Offenders, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59, 71 (2010) (“By
some estimates, there may be tens of thousands of nonviolent drug offenders currently serving
a federal prison term (not to mention possibly hundreds of thousands more such prisoners
serving time in state and local prisons and jails).”).
359. Matt Apuzzo, Holder Endorses Proposal to Reduce Drug Sentences in Latest Sign of Shift, N.Y.
360. Id.
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standard to creep into how police approach a variety of other decriminalized and civil offenses. Consider the development of the doctrine in Wisconsin. In *State v. Krier*, a Wisconsin intermediate appellate court upheld *Terry*'s reasonable suspicion standard to determine the constitutionality of a traffic stop based on an anonymous tip that the driver did not have a license, which Wisconsin decriminalized as a first-time offense. Many Wisconsin courts have relied on *Krier* to extend *Terry*'s reasonable suspicion standard to other civil violations, including public drinking and possession of alcoholic beverages, loitering, and trespass.

This spilling over of *Terry* from noncriminal traffic stops to other decriminalized and civil offenses has significant implications for policing. The development of “broken windows” theory inspired the growth of proactive policing strategies in the 1980s and 1990s, and still shapes order-maintenance policing in the form of the aggressive enforcement of minor “quality of life” offenses. In short, broken windows theory posits that police can reduce serious crime through the elimination of visible cues of public disorder.

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361. 478 N.W.2d 63, 64 (Wis. App. 1991). The Wisconsin court recognized that driving without a license is a civil offense if it is a first offense. *Id.* at 65. It is a criminal offense, though, when it is a repeated offense. *Id.* Because the conduct at issue could have been civil or criminal depending on the driver's history, the Wisconsin court upheld the constitutionality of the stop under *Terry*, reasoning that “[s]uspicious activity justifying an investigative stop is, by its very nature, ambiguous.” *Id.*


that signal to potential offenders that police do not have a strong presence in an area. Notably, these quality of life offenses are the exact types of civil offenses in Wisconsin that Terry's reasonable suspicion standard has infiltrated.

Although scholars have debated various aspects of order-maintenance policing, one particularly contentious issue is the consequences of granting police officers increased discretion to use order-maintenance tactics. Proponents of order-maintenance policing welcome increased police discretion and argue that this discretion is essential to equip officers with the necessary tools to fight public disorder, especially in high-crime areas. Critics, however, have called attention to the systemic inequalities surrounding the processing of minor crimes in the United States, which are often afforded lower procedural protections and generate high-volume arrests and convictions. The level of discretion that police officers are afforded to engage in order-maintenance tactics is a major factor that contributes to the processing of these minor crimes in bulk, which has facilitated the mass incarceration of members of low-income and racial and ethnic minority communities in the United States.

368. Bowers & Robinson, supra note 367, at 229 (noting that broken windows theory "posit that disorder, if tolerated, may foster an environment of more serious crime"); Fagan et al., supra note 332, at 310.

369. Harcourt, supra note 366, at 393.

370. Livingston, supra note 342, at 557 (noting that quality-of-life policing affects the scope of police discretion in street encounters).


372. See generally Kohler-Hausmann, supra note 334, at 613 ("Since the mid 1990s, police departments across the country have adopted tactics that intentionally increase the volume of citations and arrests for low-level offenses, flooding lower criminal courts with sub felony cases. . . [This] upends standard notions of the purposes of criminal procedure . . . and challenges our understandings about the social role of criminal law."); Natapoff, supra note 334 (providing an in-depth analysis of the systemic inequalities surrounding the processing of misdemeanors in the United States); Roberts, supra note 334, at 282 ("The high-volume misdemeanor system is clearly in crisis. . . [Misdemeanor defenders] practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they have just met. Their potential clients often face pressure to waive the right to counsel in order to enter a guilty plea.").

373. Natapoff, supra note 334, at 1319 ("In minority communities where order maintenance policing generates thousands of problematic convictions, the misdemeanor process has become the first formal step in the racialization of crime."). Supporting this view, studies report that police officers in specific regions have used stop-and-frisks and routine traffic stops as part of order-maintenance programs in neighborhoods with greater minority populations in rates that exceed their expected rates of social disorder. See Fagan et al., supra note 332, at 337 ("[S]tops within neighborhoods take place at rates in excess of what would be predicted from the separate and combined effects of population demography, physical and
Decriminalization is supposed to avoid this arrest-to-incarceration pipeline, and decrease the costs to the state and to civilians by shielding civilians from the criminal process. Broadening decriminalization to include restrictions on police authority and discretion moves jurisdictions away from these conditions that undermine the very goals of decriminalization.

V. CLOSING THE GAP BETWEEN DECRIMINALIZATION AND POLICING: CONCERNS AND REFORMS

This Part explores possible concerns and reforms to close the gap between decriminalization and policing, both within and outside of the traffic realm.

A. Possible Concerns

1. Overreliance on Civil-Criminal Classifications

One might argue that broadening decriminalization to capture restrictions on police authority and discretion places too much emphasis on civil-criminal classifications, which the U.S. Supreme Court at times has rejected. For instance, in *Hudson v. United States*, the Court held that in determining the scope of due process protections for conduct subjected only to civil penalties, it will look to factors other than civil-criminal labels to evaluate whether a civil penalty scheme is so punitive that it operates as a criminal one in effect. The increasingly blurry line between the criminal and the civil realms casts further doubt on resting individual protections on civil-criminal classifications.

By advocating for decriminalization approaches that include both formal sanctions and restrictions on police authority, I am not arguing that civil-criminal classifications should categorically govern the scope of statutory or constitutional rights in all contexts. At the same time, accepting the notion that there is no meaningful difference between the criminal and civil realms.

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374. See Roberts, supra note 334.
376. See sources cited supra note 18.
would render decriminalization a meaningless process. Rather than abandoning the entire idea of a civil-criminal line, it makes more sense to engage in deeper conversations about the contexts in which civil-criminal classifications do meaningful work to reduce social control, and the contexts in which they do not (or in which other types of distinctions do more meaningful work). In one insightful attempt to resuscitate the criminal-civil distinction, Carol Steiker has argued that criminal punishment operates as a distinctive “blaming” mechanism. Based on this view, she posits that a special procedural regime for criminal cases is necessary to limit the state’s ability to resort to blaming through punishment, especially against political enemies and minorities in a state.

Expanding conversations about decriminalization to capture restrictions on police authority and discretion in a more coherent way broadens this inquiry to consider how in today’s policing era, “blaming” through punishment is not the only way that the state controls, stigmatizes, and condemns its political enemies or minorities. Rather, police authority and discretion are also key sources of control, stigma, and condemnation. As the previous discussion has highlighted, the harmful and disempowering consequences of police discretion can take force against members of different minority communities regardless of whether criminal punishment is ever applied. For instance, police discretion facilitates and perpetuates stereotypes that put transgender women—especially transgender women of color—at risk of being perceived as sex workers by the police whenever they walk in public. In addition, police discretion during the “war on drugs” over the past few decades, and the more recent “war on terror,” has facilitated and perpetuated stereotypes that force many members of minority communities—especially

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377. In this regard, one might interpret Hudson as a narrower statement from the Court about a particular context in which it was inappropriate to look to legislative civil-criminal classifications in order to determine the scope of due process protections. See Hudson, 522 U.S. at 101 (arguing that the Halper Court incorrectly deviated from the traditional double jeopardy status doctrine by ignoring the threshold question of whether a sanction was a civil or criminal punishment).

378. Steiker, supra note 18, at 800.

379. Id. at 810.

young men of color—to live with the everyday stigma of being perceived as “suspicious” by others.\footnote{See, e.g., Maclin, supra note 222, at 1278 (noting that “the result in Terry provided a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions”); see also Brunson & Weitzer, supra note 356, at 858–59 (stressing that “[m]inority youth in the United States are more likely than Whites to be viewed with suspicion and stopped by the police and to report negative personal experiences with officers”).}

The control, stigma, and condemnation that stems from exercises of police authority and discretion can jeopardize perceptions of personal security in entire communities. These feelings are only exacerbated when police officers have discretion to engage in aggressive policing tactics for any suspected violation of an ordinance or law—civil or criminal. Under such circumstances, civilians who are vulnerable to overpolicing are pressured to negotiate their everyday behavior in public spaces to avoid being subjected to controlling, aggressive, and harmful policing tactics.\footnote{This is not to imply that these negotiations do not happen as a result of the possibilities for police discretion arising from suspicions of criminal violations alone.} For instance, in traffic contexts this might mean that people of color refrain from driving on particular streets at particular times, or refrain from driving at all at particular times, to avoid being subjected to pretextual traffic stops and other demeaning police interactions.\footnote{Harris, supra note 33, at 571 (noting that individuals “restrict their movements; they avoid driving in areas where a black person attracts ‘stares’”).}

Although the civil-criminal divide may not provide the answers in every context, police investigation is a domain where the civil-criminal divide matters because many law enforcement interests hinge on matters involving crime. For instance, in spite of its skepticism toward civil-criminal classifications, the Court has stated that the Terry regime provides latitude for police to detain suspects on a showing less than probable cause in part because of the government’s interest in crime prevention/detection.\footnote{See, e.g., Bailey v. United States, 133 S. Ct. 1031, 1037 (2013) (quoting Michigan v. Summers, 452 U.S. 692 (1981)); Dunaway v. New York, 442 U.S. 200, 209 (1979) (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).} It is unclear which wrongdoings trigger law enforcement’s interests in crime if civil-criminal classifications are meaningless. Committing to this idea would allow states to argue that all legally prohibited conduct—whether noncriminal or criminal—triggers law enforcement’s interests in matters pertaining to crime. For the reasons discussed, this position opens doors for the state to control civilians through policing in ways that undermine basic commitments to decriminalization.\footnote{See supra Part IV.}
2. Discouraging Decriminalization

Another concern is that if decriminalization requires placing restrictions on police authority, then legislatures and courts may be reluctant to decriminalize conduct. Legislatures in particular may be encouraged to recriminalize conduct in order to sustain police authority. As a practical matter, legislative incentives are most likely to shift when the costs of limiting police authority and discretion are perceived as too great. In fairness, these outcomes are possible because legislatures have general police powers, within certain constitutional parameters, to define crimes and criminal sanctions for conduct.

At the same time, the interests of law enforcement do not always prevail in the legislative realm. This is especially the case when legislators or their respective constituencies perceive the social costs or unfairness of authorizing particular forms of police conduct to be greater than the policing costs that stem from limiting police authority and discretion. The recent ordinance in Washington, D.C., which removed both the state’s ability to impose criminal sanctions and a police officer’s ability to arrest and conduct pretextual searches for simple possession of marijuana, exemplifies these points.

The enactment of the Racial Profiling Prevention Act of 2004 in Rhode Island is another promising example that illustrates how racial justice concerns in traffic settings can trump law enforcement interests in jurisdictions that have decriminalized traffic offenses. In 2000, the Rhode Island Legislature passed the Traffic Stops Statistics Act, which mandated “a study of traffic stops by the police to determine whether racial profiling was occurring.” The state contracted with Northeastern University’s Institute on Race and Justice to design and conduct the study, which began in 2002 and lasted two years. Based on an analysis of about 445,500 traffic stops,

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386. Weems v. United States, 217 U.S. 349, 378 (1910) (acknowledging the general power of legislatures to define crimes and punishments “unless that power encounters in its exercise a constitutional prohibition”).


388. Notably, this reform occurred twenty-nine years after Rhode Island decriminalized traffic offenses and established an administrative regime to handle traffic adjudication. See U.S. DEPT OF JUSTICE NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., STATE OF RHODE ISLAND SPECIAL ADJUDICATION FOR ENFORCEMENT (SAFE) VOLUME III: ANALYSIS OF THE ADMINISTRATIVE ADJUDICATION OF TRAFFIC OFFENSES, at v (1978) (noting that Rhode Island decriminalized most traffic offenses through state legislation in 1975).


390. AMY FARRELL ET AL., INSTITUTE ON RACE AND JUSTICE PUBLICATIONS, PAPER 14, NEW CHALLENGES IN CONFRONTING RACIAL PROFILING IN THE 21ST CENTURY:
the study reported that minority motorists were pulled over at higher rates than would be expected in the state’s driving population. It further reported that stopped minority motorists were searched at much higher rates than stopped white motorists, even though the stopped white motorists were more likely to be found carrying contraband. In response, the Rhode Island Legislature enacted a comprehensive law to curtail racial profiling in the state. The law prohibited racial profiling in policing contexts, banned law enforcement from requesting to search a motorist’s vehicle in the absence of probable cause or reasonable suspicion of crime, and required reasonable suspicion of crime before officers could conduct dog sniffs on the exterior of a vehicle.

It is difficult to propose bright-line rules or methodologies about when legislative judgments will weigh in favor of restricting police authority and discretion during decriminalization efforts because of the diversity of contextual factors at play. Limiting police authority and discretion against the backdrop of decriminalized traffic offenses might be viewed as posing qualitatively and quantitatively different harms and costs to civilians and to the state than does restricting police authority and discretion against the backdrop of other decriminalized offenses. Further, even if a cost-benefit analysis weighs in favor of not restricting police authority and discretion in specific contexts, the extent to which cost-benefit paradigms should define the scope of individual protections (whether constitutional or statutory) in policing contexts is debatable. There may be certain civilian harms stemming from policing


392. Specifically, 8.9 percent of nonwhite drivers were searched once stopped, compared to 3.6 percent of white drivers. Id. at 256. Only 4.5 percent of traffic stops resulted in a search of a vehicle occupant. Id.

393. Specifically, 23.5 percent of the white drivers who were searched were found with contraband compared to the 17.8 percent of nonwhite drivers. Id. at 257.


396. Id. § 31-21.2-5(b).


398. See generally Baradaran, supra note 174, at 12–13 (describing the debate over the use of balancing tests to determine the scope of Fourth Amendment rights); Laurence H. Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency?, 98 Harv. L. Rev. 592, 592 (1985) (criticizing the use of cost-benefit analysis to determine fundamental constitutional
that laws and doctrine should not tolerate or encourage, even when that approach is viewed as not cost-efficient (especially to the state).

Regardless of methodological choice, approaching decriminalization as a process that implicates more than criminal sanctions encourages deeper and more systematic conversations about policing costs and fairness in situations involving decriminalized conduct. In focusing on sanctions, narrower accounts of decriminalization do not offer meaningful frameworks to evaluate the full scope of these policing matters, regardless of whether lawmakers and other criminal justice actors ultimately conclude that they weigh in favor of sustaining police authority and discretion.

3. Traffic Safety

Another concern, which is specific to the traffic domain, involves whether moving toward a broader decriminalization framework that captures restrictions on police authority would jeopardize public safety on roads and highways. The U.S. Supreme Court has described the state’s interest in traffic safety as “vital,”399 and statistics lend some support to this view. For instance, the latest data from the National Highway Traffic Safety Administration report that in 2011, just over 5.3 million traffic crashes were reported to the police, in which roughly 32,000 people were killed and 2.2 million people were injured.400

These statistics raise questions about when exercises of police authority are necessary or desirable to preserve public safety on roads and highways. An important precursor to engaging with these questions is that the combination of traffic underenforcement or selective enforcement and the use of pretextual traffic stops motivates police officers to (1) commonly ignore traffic violations that threaten public safety on roads and highways, and (2) enforce traffic laws in furtherance of the state’s crime-control policies as opposed to traffic safety.401 These outcomes cast doubt over how much traffic safety the public is actually enjoying under the status quo.
Many of the investigative tactics that can quickly transform a noncriminal traffic stop into a criminal one do not directly further the interest of traffic safety. For instance, dog-sniffs, consent searches, and invasive questioning about the motorist’s travel itinerary, occur after police officers neutralize the public safety threat of the decriminalized traffic violation by pulling the motorist over and beginning the process of issuing a citation. Restricting police authority to engage in those investigative tactics may directly implicate the crime-control interests of the state. Those interests, however, are separate from the interest of traffic safety to the extent that a police officer is not pulling a motorist over for a traffic violation that remains criminalized (for example, driving under the influence in most states).  

For these reasons, altering the quantum of proof required for police officers to initiate a noncriminal traffic stop may intervene at the point of the traffic stop at which the account of decriminalization proposed in this Article implicates traffic safety the most. To reiterate, basic commitments to decriminalization suggest that we should restrict opportunities and methods for the state to control, stigmatize, and harm civilians through the policing of traffic. Under this view, when public safety is implicated to a much greater degree, perhaps it is logical for jurisdictions to grant police officers increased discretion to initiate traffic stops through the criminalization of traffic violations.

One possible approach to drawing the civil/criminal line in the traffic domain appears in dicta in the U.S. Supreme Court’s decision in Delaware v. Prouse. Prouse held that the Fourth Amendment forbids police officers from conducting random “spot checks” for a driver’s license and vehicle registration without any articulable suspicion of traffic wrongdoing. The Court in Prouse appeared to distinguish run-of-the-mill traffic and equipment violations that police officers could readily observe (for example, failing to signal or having a broken taillight), from traffic violations that are difficult, if not impossible to observe (for example, driving without, with a revoked, or with a suspended driver’s license or vehicle registration). Notably, those unobservable traffic violations correlate with the types of traffic violations that remain criminalized in the states that have decriminalized minor traffic violations.

402. See supra Part II for a rough sketch of traffic violations that remain criminalized in states that have decriminalized minor traffic violations.
404. Id. at 663.
405. Id. at 660.
406. See supra Part II.
Nevertheless, embracing this broader view of decriminalization can generate controversial results when states decriminalize traffic violations that are traditionally viewed as more serious. For instance, Wisconsin currently treats the first time offense for driving while under the influence as a civil offense punishable only by a $150 to $300 fine. The Legislatures, courts, and the public might consider drunk-driving a serious enough threat to public safety that they embrace granting police officers increased authority and discretion to pull a motorist over on suspicion of drunk-driving.

In these more difficult cases, the ultimate decriminalization inquiry might then be framed in terms of whether and when the state interest in public safety on roads and highways is unique to justify veering from the norm to reduce police control over civilians in noncriminal traffic stop settings to the greatest extent possible. The asymmetry discussed above, however, presents a strong justification for never granting such exceptions to veer from this norm in settings involving decriminalized conduct—including settings involving decriminalized traffic violations that are typically viewed as more serious. Under this view, criminalization would be a requisite for police officers to have access to this increased authority and discretion. At the same time, the potential inquiry of determining such exceptions turns on the existence of a norm that decriminalization should reduce law enforcement methods as much as possible in routine traffic stop settings to enable police officers to ensure traffic safety. That norm can only exist when decriminalization is viewed as a process that implicates more than sanctions.

B. Preliminary Insights for Reform

Reforms to control police behavior in decriminalized settings can take two major directions. The first direction is through statutory and doctrinal

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408. It is important to note, however, that some scholars have discussed the different ways of conceptualizing risk in the drunk-driving context, and have suggested that driving, even while sober, "is perhaps the act-type in which most of us engage that imposes the greatest risk of serious harm to others." Douglas N. Husak, Reasonable Risk Creation and Overinclusive Legislation, 1 Buff. Crim. L. Rev. 599, 607 (1998).
409. This is not to imply that police officers should have unbridled discretion to pull motorists over for drunk driving, as Justice Scalia's recent dissent in Navarette v. California emphasized. 572 U.S. 1, 10 (2014) (Scalia, J., dissenting) ("Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference."). In Navarette, the Court held that police officers lawfully stopped a vehicle for reasonable suspicion of drunk driving based on an anonymous tip that the car had run the tipster off of the road. Id. at 11 (majority opinion).
reforms that attempt to limit when and whether police may use specific investigative tactics in settings involving decriminalized behavior. The second involves broader structural changes that remove the responsibility to enforce laws regulating decriminalized conduct from the hands of the police. It is important to stress that the purpose of this Subpart is to set out the major advantages and disadvantages of different avenues of reform in order to push for particular types of questions to be asked, not to advocate for specific solutions to the gap between decriminalization and policing. Future empirical research is required to determine whether one, or a hybrid, of different approaches is the key to reform. With that caveat, the analysis below begins by discussing why one specific doctrinal approach that follows the first direction described above is likely an undesirable one. It then turns to two other possible reforms, each of which implicates significant questions that are worthy of future inquiry.

1. Noncriminal Traffic Policing as Administrative Searches and Seizures

One possible doctrinal reform is informed by a growing doctrinal trend since the late-1970s involving searches and seizures in regulatory or administrative settings. In those settings, the U.S. Supreme Court has expanded authority for police officers to conduct warrantless searches and seizures supported by a noncriminal purpose without any showing of particularized suspicion of wrongdoing. For instance, if a police officer arrests a motorist during a routine traffic stop and impounds the vehicle, then, so long as the police department has a standardized inventory procedure, the police may conduct an inventory search of the vehicle as a matter of course. This rule applies

410. This direction fits into a body of existing literature that advocates for shifting specific policing matters within the traditional policing realm to nonpolice actors with no power to engage in crime investigation. For a thorough discussion of restrictions on traditional police authority in the area of public-order policing, see Eric J. Miller, Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,” 94 CAL. L. REV. 617 (2006).

411. Along these lines, future discussions are necessary to evaluate the need for ex ante and ex post monitoring of police actions in routine traffic stop settings and the specific procedures that are best suited to achieve that monitoring. See generally Slobogin, supra note 13, at 8–12 (discussing the need for both ex ante and ex post review of police activity).

412. See generally Eve Brensike Primus, Disentangling Administrative Searches, 111 COLUM. L. REV. 254 (2011) (“Fourth Amendment doctrine required government officials to have probable cause before searching an individual and reasonable, articulable, particularized suspicion before seizing or detaining an individual. . . . [But] administrative searches . . . paved the way for the removal of the requirement of individualized suspicion.”).
regardless of whether the arrest had anything to do with evidence that might be discovered in the vehicle.\footnote{Florida v. Wells, 495 U.S. 1 (1990).}

This trend suggests that there is an alternative way to view the searches and seizures that police initiate during noncriminal traffic stops—namely, as types of administrative or regulatory procedures supported by the noncriminal purpose of traffic safety. There is some appeal to this alternative approach from the perspective of critics who argue that pretextual stops encourage unjust practices of police profiling. Ironically, this support comes from very same decision that put a stamp of approval on pretextual traffic stops—\textit{Whren v. United States}.\footnote{517 U.S. 806 (1996).} Recall that \textit{Whren} held that regardless of their subjective motivations, police officers may initiate a traffic stop based on probable cause of a traffic violation, even if civil.\footnote{\textit{Id}. at 810, 813.} \textit{Whren}, however, recognized an important exception to its holding that a police officer’s subjective motivations are irrelevant to the Fourth Amendment inquiry. Under this exception, a police officer’s pretext during inventory searches or administrative inspections can invalidate an officer’s objectively justifiable behavior under the Fourth Amendment.\footnote{\textit{Id}. at 812.} The idea behind this exception is that administrative or regulatory procedures should not be a “ruse for a general rummaging in order to discover incriminating evidence.”\footnote{\textit{Id}. at 811 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)).}

Extending this defense to apply to noncriminal traffic stops would require two moves. First, it would require conceptualizing those stops as administrative or regulatory in nature. Second, it would require opening possibilities to enable police officers to conduct searches and seizures with less suspicion than the Fourth Amendment may require—both at the inception and during the stops.\footnote{Carbado & Harris, supra note 33, at 1552 (“Fourth Amendment taxonomies cabin certain searches and seizures as regulatory and administrative and thus not subject to ordinary Fourth Amendment requirements.”).} This is the case because \textit{Whren} adopted the view that unlike suspicionless administrative and regulatory procedures, the requirement of probable cause for police to initiate other types of searches and seizures provides civilians with sufficient protection from the harms of officer pretext.\footnote{\textit{Whren}, 517 U.S. at 811–12.} There are at least three reasons to resist this approach. First, and perhaps most importantly, today crime control is so infused with the traffic
domain that routine traffic stops can have criminal ramifications regardless of whether pretext motivates the stops themselves or the use of specific investigative tactics during the stops. Although pretext is an important source of civilian harm and stigma, centering the conversation about reforms on pretext misses significant ways in which the trajectory of police investigation can facilitate social control and transform wholly noncriminal traffic situations into criminal ones when pretext is not present or apparent. For example, revisit the use of drug-sniffing dogs to sniff the exterior of vehicles when police officers have no suspicion that a driver is involved in drug-activity before conducting the stop or immediately before performing the sniff. Moving the terms of the conversation beyond pretext opens possibilities for broader decriminalization reforms so that police have just as much investigatory power as necessary to enforce traffic laws independent of whether pretext exists.

Second, this option includes a tradeoff with high stakes for civilians: Preserving the pretext defense would open further doors for diminishing the quantum of proof required for police officers to initiate noncriminal traffic stops, and searches and seizures during those stops. This tradeoff implicates the question of whether we want to live in a world where the law explicitly endorses police officers pulling civilians over and engaging in investigative tactics with minimal or no suspicion of traffic wrongdoing. Putting aside the possible criminal ramifications of this tradeoff for civilians—which are potentially serious for the reasons discussed—routine traffic stops interfere with people’s freedom of movement to come and go on roads and highways, are inconvenient, and can be embarrassing. The Court stressed these points in Delaware v. Prouse, when it required some level of articulable suspicion before police officers may conduct roving “spot checks” to confirm the validity of a motorist’s driver’s license and vehicle registration.

Third, it is questionable whether stopped motorists would be able to rely effectively on the pretext defense if it were available. Evidence of pretext is generally very difficult to obtain and use in court. The dynamics of routine traffic stops make inquiries involving pretext particularly messy. Traffic violations are ubiquitous and police resources are limited, making the

420. As noted previously, some scholars argue that the current constitutional landscape already endorses this result. See, e.g., LaFave, supra note 162, at 1846–52.


422. Lending additional support to this point, Devon W. Carbado and Cheryl I. Harris identified this as an important obstacle to invoke Whren’s pretext defense in situations where the state uses civil immigration enforcement as a pretext for investigating general crime. Carbado & Harris, supra note 33, at 1583–86.
underenforcement and the selective enforcement of traffic laws highly probable, if not unavoidable.423 Once police officers initiate a traffic stop, the interaction with the motorist can go in several directions depending on what the officer suspects or observes. These different possibilities make it more difficult to identify whether and when pretext exists—especially if police officers can initiate noncriminal traffic stops on less evidence than the Fourth Amendment would ordinarily require in nonadministrative settings. Conversely, pretext inquiries are arguably less messy in the types of suspicionless administrative procedures that the Court has upheld, such as inventory searches. Those administrative procedures are standardized in ways that cabin police discretion, and thus diminish possibilities for civilian harm stemming from police discretion to a greater degree.

2. Two Alternative Directions for Reform

First, statutory and doctrinal reforms could restrict police authority and discretion to use specific investigative tactics at the inception, duration, and conclusion of noncriminal traffic stops. The potential payoff is that those reforms would minimize the amount of social control that police officers can impose on drivers and passengers to the greatest extent possible so that officers can detect the traffic wrongdoing and issue a citation. Statutes and doctrine could prevent exceptional doctrines that arose from settings involving criminalized conduct—such as the Terry regime—from applying to noncriminal traffic settings. Legislatures could require police officers to have probable cause of a decriminalized traffic violation before initiating a stop. Courts could also interpret their state constitutions to require a probable cause standard to evaluate the validity of noncriminal traffic stops at their inception.424 As explained, requiring a probable cause standard for police initiations of noncriminal traffic stops could make a difference in the quantity, reliability, and precision of evidence that must inform police officer suspicions of decriminalized traffic violations.425 It may also give courts greater authority to scrutinize police officers’ accounts of facts about

423. The problem of underenforcement is not confined to the traffic arena. For a comprehensive discussion of the ramifications of underenforcement in other investigative contexts, see Alexandra Natapoff, Underenforcement, 75 FORDHAM L. REV. 1715 (2006).
424. As discussed supra Part III.B.1.a, there is uncertainty over whether the Fourth Amendment requires a probable cause or a reasonable suspicion standard for police officers to initiate traffic stops based on decriminalized traffic violations. The U.S. Supreme Court could have a role in this area by requiring a probable cause standard.
425. See infra Part III.B.1.a.
underlying decriminalized traffic offenses in criminal cases in which noncriminal traffic stops yield evidence of nontraffic crime.\footnote{426}{See infra Part III.B.1.a.}

In addition, statutes and doctrine could restrict police authority and discretion to use a decriminalized traffic violation as grounds to question drivers and passengers about nontraffic crime, to obtain a driver’s consent to search a car, to request a comprehensive personal background check on drivers and passengers, to arrest drivers and passengers (and thus any searches of the person or vehicle incident to arrest), and to use drug-sniffing dogs to search the exterior of vehicles. Independent facts of crime would be a requisite for police officers to have access to these crime-fighting tools. Discussed previously, Rhode Island’s Racial Profiling Prevention Act of 2004 is a salient example. That sweeping reform prohibited racial profiling in policing contexts,\footnote{427}{R.I. GEN. LAWS § 31-21.2-3 (2010).} banned suspicionless consent searches during routine traffic stops,\footnote{428}{Id. § 31-21.2-5(b).} and required reasonable suspicion of crime beyond a decriminalized traffic offense before police officers could conduct dog sniffs on the exterior of a vehicle.\footnote{429}{Cf. id. § 31-21.2-5(a).}

There are significant potential benefits and disadvantages to this direction for reform. One category of benefits stems from its flexibility. This approach gives legislatures and courts more leeway to determine how far they want to take the decriminalization norm to restrict opportunities and methods for police to control, stigmatize, and harm civilians through traffic enforcement. In addition, legislatures and courts can adopt a hodgepodge of individual policing reforms, enabling them to cater reforms to specific types of traffic injustices within their jurisdictions. Moreover, the flexibility of this approach allows legislatures and courts to evaluate the costs that stem from independent policing tactics used during routine traffic stops—such as dog sniffs, pretextual stops, and consent searches. Those evaluations can then drive specific decriminalization reforms.

At the same time, this flexibility makes it possible that legislatures and courts will refrain from adopting reforms to restrict police authority and discretion when it may be needed most. For instance, the outcry against racial injustice might not garner enough popular support within a locality or state to motivate lawmakers to restrict police authority and discretion to conduct pretextual traffic stops or consent searches. In those situations, courts might take on a greater role in decriminalization efforts by determining whether the
use of specific policing methods in decriminalized traffic settings is consistent with the federal or state constitutions. There is no guarantee, however, that courts will assume this role.

Another important drawback is that even if legislatures or courts do adopt reforms, this approach requires law enforcement departments to embrace those reforms and change their policies and practices accordingly. Research conducted in Rhode Island after the enactment of the Racial Profiling Prevention Act of 2004 illustrates the difficulties of motivating police to embrace decriminalization reforms.\(^\text{430}\) One study reported continuing incidents of racial profiling during routine traffic stops.\(^\text{431}\) In spite of data from their jurisdictions suggesting otherwise, some law enforcement agencies were in denial about the existence and prevalence of racial profiling during routine traffic stops.\(^\text{432}\) And, in spite of legal requirements, some law enforcement departments submitted perfunctory reports that provided little to no detail regarding their efforts and progress to address racial profiling in traffic settings.\(^\text{433}\)

Given these obstacles, it might be worthwhile to experiment with a second alternative direction for reform, which moves away from the conventional approach to traffic enforcement in the United States. Under this approach, the bulk of noncriminal traffic enforcement would be removed from the hands of the police. Jurisdictions would create alternative regimes that shift the responsibility to enforce decriminalized traffic violations to state actors without traditional police powers. Some U.S. jurisdictions have partially gone in this direction by removing parking enforcement from the hands of the police. Although no U.S. jurisdiction has gone as far to remove minor traffic enforcement entirely from the hands of traditional police, this approach is not pure fiction: New Zealand followed it between 1936 and 1992.\(^\text{434}\)

This approach has a different set of potentially significant advantages and disadvantages. A prior study comparing traffic control systems in Australia and New Zealand offers some preliminary insight into the possible advantages.\(^\text{435}\)


\(^{431}\) ACLU, supra note 394, at 4.

\(^{432}\) Id. at 8.

\(^{433}\) Id. at 7.

\(^{434}\) DAVID H. BAYLEY, POLICE FOR THE FUTURE 135 (1994).

The purpose of the study was to investigate whether differences in traffic control systems affects relations between the police and the public.436 Similar to the United States, Australia followed a conventional approach in which police handled traffic control, whereas New Zealand separated police from traffic control entirely.437

The study reported several interesting findings. In Australia, motorists reported a significantly lower level of respect for the police than did non-motorists.438 In New Zealand, there was an overall higher level of public respect for the police and an almost negligible disparity in the levels of public respect for police between motorists and nonmotorists.439 In addition, motorists in both countries who spent more time driving on roads and highways had lower levels of respect for the police.440 This trend was more pronounced in Australia, which the investigators concluded “no doubt reflect[ed], among other things, the impact upon heavy road users of an increased exposure to police activity.”441 Further, Australian motorists consistently rated the integrity of the police at lower levels than nonmotorists.442 Some motorists claimed that the police used “unfair methods of questioning suspects, sometimes took bribes, sometimes twisted evidence to win court cases, and sometimes used excessive force to make arrests.”443 There was no similar trend in New Zealand.444 Rather, an opposite trend emerged: New Zealand participants reported greater public respect for the police than for nonpolice traffic control agencies.445

Admittedly, there are methodological issues and cultural and contextual differences that make it impossible to determine whether similar results would apply if U.S. jurisdictions explored or adopted this alternative approach. Nevertheless, the study raises important questions for future inquiry about how to respond to the relationship between police legitimacy, traffic control, and crime-control goals. Several studies have documented that racial

436. Id. at 567. The investigators started from the proposition that traffic control was a major source of tension between law enforcement and the public. Id. (“More people are disgruntled with traffic control than with police effort in any other field; traffic control causes the police more annoyance and subjects them to pressure from a greater number of sources than any other problem.”).

437. Id. at 567–68.

438. Id. at 569.

439. Id.

440. Id.

441. Id.

442. Id. at 569.

443. Id. at 570.

444. Id.

445. Id.
and ethnic minorities who are subjected to traffic stops have significantly lower odds in reporting that the police stopped them fairly or acted justly during the course of the stop than white civilians.\textsuperscript{446} Improving perceptions of police legitimacy is not only important on its own terms but can have important long-term benefits for compliance with the law.\textsuperscript{447} It may encourage greater respect for the institutions of law and police, improve civilian cooperation with the police during criminal investigations, and instill greater trust in civilians to report crimes to the police.\textsuperscript{448} Further, this approach might free limited law enforcement resources so that police officers can focus on more serious crime.\textsuperscript{449}

Traffic safety is another area of possible benefits. Separating the police from traffic control might reduce the underenforcement and selective enforcement of traffic laws, potentially resulting in more traffic safety on roads and highways than under the conventional approach. But it is also possible that nonpolice actors will disproportionately target or insult minority drivers and passengers. These possibilities underscore the need for education, training, and civilian compliant and response systems. Although these harms and disparities are serious matters, an important difference is that in this alternative regime of traffic enforcement those harms and disparities are not perpetuated by actors that society grants vast powers to interfere with the daily lives of civilians and apply force in order to enforce criminal laws.

At the same time, this direction to reform has potential drawbacks. One possible drawback is that it might be too expensive. This appeared to motivate New Zealand’s decision in 1992 to revert back to a conventional system of traffic control.\textsuperscript{450} In addition, this approach could vastly undermine a major crime-fighting tool.\textsuperscript{451} This alternative traffic control system would place the burden on police officers to have a clearly articulable suspicion of

\textsuperscript{446} John Allen & Elizabeth Monk-Turner, \textit{Citizen Perceptions of the Legitimacy of Traffic Stops}, 38 J. OF CRIM. JUST. 589, 593 (2010); \textit{id. at 590} (summarizing existing research on the relationship between the race of motorists and motorists’ perceptions of police legitimacy during routine traffic stops).


\textsuperscript{449} BAYLEY, supra note 434, at 135.

\textsuperscript{450} \textit{Id. at 135} (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).

\textsuperscript{451} \textit{Id. at 136}. 
criminal wrongdoing before they could pull over a vehicle. A traffic offense would no longer do. It is unclear, however, whether the potential disadvantages of making crime-control efforts harder in traffic settings offset the possible long-term benefits for crime reduction that derive from improved perceptions of police legitimacy. These are the exact types of questions that become ripe for investigation when decriminalization captures a greater spectrum of the criminal justice process than sanctioning.

CONCLUSION

From a social control perspective, this Article has demonstrated a need to broaden approaches to decriminalization beyond sanctions. Although sanction-focused approaches to decriminalization can reduce social control that states impose through punishment, this Article’s examination of traffic violation decriminalization has illustrated that those approaches are unsuccessful in diffusing other types of social control that criminalization enables states to impose through police authority and discretion. There are no easy solutions and many more questions to be asked about the gap between decriminalization and policing. Only by broadening the terms of the conversation about decriminalization beyond sanctions is it possible to engage with these questions with an eye toward effective reform.