

8-2021

## Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity

Amanda Charbonneau

Jack Glaser

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

### Recommended Citation

Amanda Charbonneau & Jack Glaser, *Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity*, 11 U.C. IRVINE L. REV. 1327 (2021).

Available at: <https://scholarship.law.uci.edu/ucilr/vol11/iss5/6>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

# Suspicion and Discretion in Policing: How Laws and Policies Contribute to Inequity

Amanda Charbonneau\* and Jack Glaser\*\*

Introduction.....	1327
I. Police Stops and Searches .....	1328
A. The Reasonable Suspicion Standard .....	1328
B. Police Department Policies .....	1331
II. Human Judgment and Disparate Treatment.....	1334
A. California Law Enforcement Agencies.....	1338
B. New York City Police Department.....	1342
C. United States Customs .....	1344
D. Discussion and Limitations .....	1345
IV. Reimagining Discretionary Policing.....	1346

## INTRODUCTION

Police officers in the United States are empowered to, among other things, detain and search civilians, and these decisions affect individual liberties, public safety, and police-community relations. The Bureau of Justice Statistics estimates that police officers initiated contact with 28.9 million residents in 2018.<sup>1</sup> In this Article, we argue that data-informed changes to routine, discretionary policing practices could increase public safety and improve relationships between law enforcement agencies and the communities they serve.

Four parts follow this introduction. In Part I, we provide a brief overview of the policy landscape for police detentions and searches. We argue that the vagueness of the legal standards can be compounded by a lack of specificity in written department policies, providing officers with broad discretion. These conditions

---

\* RAND Corporation.

\*\* Goldman School of Public Policy, University of California, Berkeley.

1. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP'T JUST., NCJ 255730, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018 – STATISTICAL TABLES, at 3–4 (Dec. 2020), <https://www.bjs.gov/content/pub/pdf/cbpp18st.pdf> [<https://perma.cc/6FV2-BZLC>].

often lead officers to conduct stops and searches, which have serious impact on citizens' lives, based on highly ambiguous information and with considerable uncertainty. In Part II, we link the inherent ambiguity of policing decisions to psychological research, which has shown that judgments made under these conditions are vulnerable to biases. Because police, like most people, tend to hold stereotypes associating Black Americans with crime, the high discretion and ambiguity associated with most stop and search decisions contribute to racial disparities in law enforcement outcomes. In Part III, we describe three situations where restrictions on discretion are associated with increases in efficiency and reductions in disparities. In Part IV, we discuss the benefits and costs of police stops and searches in addition to recent policy changes that limit officer discretion in some states and agencies.

## I. POLICE STOPS AND SEARCHES<sup>2</sup>

### A. *The Reasonable Suspicion Standard*

To consider the implications of officer discretion in policing decisions, we must review the evolution and current state of the most relevant legal construct—*reasonable suspicion*. Many, but not all, of officers' decisions to stop, question, and search civilians are subject to constitutional protections against unreasonable searches and seizures. In relation to the Fourth Amendment, police-civilian contact typically falls into one of three categories: encounters that are not seizures and therefore are not subject to its protections, limited stops and searches that are held to the *reasonable suspicion* standard, and arrests with incident searches that are held to the *probable cause* standard.<sup>3</sup> Although we do not review the case law in its entirety in this Article, several legal distinctions are germane to the research findings presented in subsequent parts.

First, any encounter or search conducted with the civilian's consent does not trigger Fourth Amendment protection.<sup>4</sup> "Stops" (triggering Fourth Amendment protections) are distinguished from "encounters" by an assessment of whether a reasonable person would feel free to leave or ignore an officer's questions.<sup>5</sup> Generally, a stop becomes an arrest when a person is forced to move to a custodial area.<sup>6</sup>

---

2. This Part is drawn, in part, from the first author's dissertation: Amanda K. Charbonneau, *The Law and Psychology of Suspicion and Police Decision-Making* (2018) (Ph.D. dissertation, University of California, Berkeley) (ProQuest).

3. *United States v. Bueno*, 21 F.3d 120, 123 (6th Cir. 1994) (summarizing the "three types of permissible encounters between the police and citizens").

4. *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

5. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

6. *See Florida v. Royer*, 460 U.S. 491, 494, 502–03 (1983).

A limited search (i.e., a “frisk” or a pat-down) incident to a stop requires reasonable suspicion that a person may be armed and dangerous, as articulated in *Terry v. Ohio*, and cannot be conducted only to obtain evidence.<sup>7</sup> Subsequent cases established an essentially automatic justification of frisks based on reasonable suspicion of violent crime<sup>8</sup> or distribution of drugs.<sup>9</sup> Under these definitions of police-civilian contact, a large subset of policing practices is subject to the *reasonable suspicion* standard.

The *reasonable suspicion* standard established in *Terry* was based, in part, on a state statute. In affirming the trial court’s denial of Terry’s motion to suppress the gun discovered by the officer, Ohio’s court of appeals cited several laws from other states. These included New York’s “stop-and-frisk” statute, which formed the backdrop of two companion cases to *Terry* and permitted an officer to stop anyone “he reasonably suspects is committing, has committed or is about to commit a felony” or a specified set of other crimes.<sup>10</sup> When an officer “reasonably suspects that he is in danger” after stopping an individual, the statute also permits the officer to search the person for a dangerous weapon.<sup>11</sup>

The Supreme Court decided that statutory discretion did not preclude challenges under the Fourth Amendment and proceeded to consider, in all three cases, the reasonableness of the stop and search by “balancing the need to search [or seize] against the invasion which the search [or seizure] entails.”<sup>12</sup> In *Terry*, the Court held that the stop was justified by the state’s interest in preventing crime, which was legitimate under a totality of the circumstances assessment of the officer’s observations of the three suspects and, to a lesser degree, the officer’s expertise.<sup>13</sup> Terry argued that the search required probable cause, but the Justices permitted a limited search based on the officer’s suspicion that Terry was armed and on the immediate need to protect the officer’s safety as an exigent circumstance.<sup>14</sup>

The courts define standards of proof relative to one another and in broad terms. The reasonable-suspicion and probable-cause analyses are similar in that both consider the totality of the circumstances<sup>15</sup> and allow for some mistakes in

---

7. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

8. *Adams v. Williams*, 407 U.S. 143, 147–48 (1972).

9. *United States v. Sokolow*, 490 U.S. 1, 7–10 (1989).

10. *Sibron v. New York*, 392 U.S. 40, 43, 88 S. Ct. 1889, 1892 (1968) (citing N.Y. CODE CRIM. PROC. § 180-a (Supp. 1964)).

11. CRIM. PROC. § 180-a.

12. *Terry*, 392 U.S. at 21 (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 537 (1967)).

13. *Id.* at 20–27.

14. *Id.* at 24–27.

15. *Navarette v. California*, 572 U.S. 393, 397 (2014) (“[R]easonable suspicion’ . . . takes into account ‘the totality of the circumstances . . . .’”); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“The probable-cause standard . . . depends on the totality of the circumstances.”).

judgment.<sup>16</sup> The two standards differ primarily in the degree of proof required. Probable cause requires a “fair probability” of an individual’s guilt,<sup>17</sup> which is less than the “more likely than not” (or greater than fifty percent) needed to meet the preponderance-of-the-evidence threshold.<sup>18</sup> Reasonable suspicion requires more proof than a “hunch” or “unparticularized suspicion,” but less than the amount that would meet the probable-cause threshold, and the Court has avoided quantifying either standard except as can be inferred by their ordering below the greater-than-fifty-percent, or preponderance-of-the-evidence, standard.<sup>19</sup>

The *Terry* doctrine has been criticized for subjecting policing practices to a vaguely defined and permissive standard of proof. Practitioners<sup>20</sup> and legal scholars<sup>21</sup> have argued that the definition of reasonable suspicion is too vague to be of practical import, and the Supreme Court has acknowledged that the standard lacks a precise legal definition.<sup>22</sup>

Related in part to a lack of clarity, *Terry* and subsequent cases have also been criticized for exacerbating racial disparities. The courts explicitly exclude officers’ intentions and motivations from reasonable suspicion analyses,<sup>23</sup> focusing instead on suspicion of criminal activity and fear of violence.<sup>24</sup> Psychology and law scholars point out that these psychological experiences, in particular, are likely to be influenced by racial stereotypes (see further discussion in Part II, below), especially in the context of criminal law enforcement and the detection of firearms.<sup>25</sup> Courts

---

16. See *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014).

17. See *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (citing *Illinois v. Gates*, 462 U.S. 213, 246 (1983)) (“[P]robable cause means ‘fair probability,’ not certainty or even a preponderance of the evidence.”).

18. See *Lian v. Ashcroft*, 379 F.3d 457, 461 (7th Cir. 2004) (defining the preponderance standard as “more likely than not”).

19. *Terry*, 392 U.S. at 27; *United States v. Cortez*, 449 U.S. 411, 418 (1981). However, in *United States v. Winsor*, 846 F.2d 1569, 1571–72 (1988) (en banc), the Ninth Circuit Court of Appeals suggested that an approximately one-in-forty chance of finding suspects in a hotel room did not meet the probable cause threshold but would be enough to establish reasonable suspicion.

20. Devallis Rutledge, *Probable Cause and Reasonable Suspicion*, POLICE MAG. (June 7, 2011), <https://www.policemag.com/340550/probable-cause-and-reasonable-suspicion> [https://perma.cc/RV7V-RTVG].

21. Robert Berkley Harper, *Has the Replacement of “Probable Cause” with “Reasonable Suspicion” Resulted in the Creation of the Best of All Possible Worlds?*, 22 AKRON L. REV. 13, 23–26 (1988); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 405, 434 (2006).

22. *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

23. See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) (“[C]ases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.”).

24. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 119 (2000) (“[P]resence in a ‘high crime area’ . . . [is] relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation . . . .”); *United States v. Andrade*, 551 F.3d 103, 112 (1st Cir. 2008) (holding that the trial court did not err in crediting the officer’s “subjective feeling that he was in danger” when evaluating whether there was reasonable suspicion to conduct a stop and frisk).

25. See generally L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion*

have also permitted police contact explicitly motivated by race.<sup>26</sup> Even in the absence of psychological biases, allowing criteria such as a “high-crime neighborhood” and “known criminal record” in assessments of reasonable suspicion may disproportionately affect people of color. Indeed, racially disparate impact contributed to a U.S. District Court declaring the New York Police Department’s (NYPD’s) stop-and-frisk practices, which had become a systematic program and policy, to be unconstitutional.<sup>27</sup>

Several scholars have proposed using quantitative measures of efficiency to inform or replace reasonable-suspicion analyses.<sup>28</sup> The details of the proposed solutions vary, but they share the basic principle that using the rates of arrest or discovery of contraband as a proxy for accuracy could help determine whether stops and searches are, in fact, reasonable. How this would inform and affect rulings on the application of the standard remains unclear.

### B. Police Department Policies

Vague constitutional standards leave regulation of policing overwhelmingly to local actors, contributing to substantial variation across law enforcement agencies in policies, trainings, and priorities. While there are some state and national norms and institutions, each department has its own unique duty manual (or “general orders”). Academy and continuing training is, for the most part, also local and idiosyncratic, although some agencies share academies and outsource some training.<sup>29</sup> Finally, policing priorities (e.g., crime categories to emphasize, community relations, equity) and the incentives used to pursue them vary over time, department, unit, beat, and even officer.<sup>30</sup> Much of new officer effective training occurs during the probationary field training period, where the individual experiences of field training officers are influential.<sup>31</sup>

---

*Heuristic*, 98 IOWA L. REV. 293 (2012); L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012) [hereinafter Richardson, *Police Efficiency*]; JACK GLASER, *SUSPECT RACE: CAUSES AND CONSEQUENCES OF RACIAL PROFILING* (2015).

26. See *United States v. Taylor*, 956 F.2d 572, 582 (6th Cir. 1992) (Keith, J., dissenting) (rejecting the majority’s finding of reasonable suspicion because the record showed that the agent singled out the defendant and “stopped him solely because he was an African-American male”).

27. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

28. Richardson, *Police Efficiency*, *supra* note 25, at 1165–66; *Floyd*, 959 F. Supp. 2d at 660; Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365 (2016).

29. See BRIAN A. REAVES, U.S. DEP’T OF JUST., NCJ 249784, STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 (2016) (detailing variation among state and local law enforcement academies).

30. See, e.g., Gregory J. DeAngelo, R. Kaj Gittings & Amanda Ross, *Police Incentives, Policy Spillovers, and the Enforcement of Drug Crimes*, 14 REV. L. & ECON., 2018, at 1, 1–4.

31. See Ryan M. Getty, John L. Worrall & Robert G. Morris, *How Far from the Tree Does the Apple Fall? Field Training Officers, Their Trainees, and Allegations of Misconduct*, 62 CRIME & DELINQ. 821 (2016).

In our review of formal policies at six police departments, we found considerable variation in the clarity and prescriptiveness of language regarding stops.<sup>32</sup> Most of the policies we reviewed simply instructed officers to adhere to constitutional standards.<sup>33</sup> The excerpts below illustrate the range of specificity in formal policies and the priorities they convey.<sup>34</sup> Department 1's General Order titled "Field Interviews; Stop/Frisk" offers separate descriptions for each type of encounter (only stops are included here), outlining practical examples and details. In contrast, Department 2's policy and procedure manual appeals to fundamental principles and values in sections "5-103 Use of Discretion" and "5-104 Impartial Policing."

Department 1:

Stop—The detention of a subject for a brief period of time. In order to make the stop, the officer must have reasonable suspicion to believe that criminal activity is afoot and that the person to be stopped is involved. A stop is investigative detention. The following characteristics may, under the circumstances, give rise to reasonable suspicion for a stop.

1. Officer has knowledge that the person has a criminal record.
2. A person fits the description of a wanted notice.
3. A person has exhibited furtive conduct such as fleeing from the presence of an officer or attempting to conceal an object from the officer's view.

---

32. JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, BIRMINGHAM POLICE DEPARTMENT POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors); JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, FORT WORTH POLICE DEPARTMENT POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors); JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, GARY POLICE DEPARTMENT POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors); JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, MINNEAPOLIS POLICE DEPARTMENT POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors); JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, STOCKTON POLICE DEPARTMENT POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors); JOSEPH BROADUS, AMANDA CHARBONNEAU, RAYNA SARON, PHILLIP ATIBA GOFF & JACK GLASER, CTR. FOR POLICING EQUITY NAT'L JUST. DATABASE, PITTSBURGH BUREAU OF POLICE POLICY REVIEW (2019) (submitted to the National Initiative for Building Community Trust & Justice) (on file with authors).

33. See sources cited *supra* note 32.

34. Excerpted police department manuals are on file with the authors. We have kept the department names anonymous because our goal is not to call out specific departments but to illustrate general approaches taken by police departments.

4. The appearance, behavior, or actions of the suspect suggest that he is committing a crime.
5. The time of day or night is inappropriate for the suspect's presence in a particular area.
6. The officer observes a vehicle that is similar to that of a broadcast description for a known offense.
7. A person exhibits unusual behavior, such as staggering or appearing to be in need of medical attention.
8. The suspect is in a place proximate in time and location to an alleged crime.
9. Hearsay information is acceptable. In order for the information to be credible, the officer must have some means to gauge the reliability of the informant's knowledge.
10. The suspect is carrying an unusual object, or his clothing bulges in a manner consistent with concealing a weapon.

Department 2:

**5-103 USE OF DISCRETION . . .**

The police profession is one that requires officers to use considerable judgment and discretion in the performance of their daily duties. Officers have a large body of knowledge from Department policies and procedures, training, their own professional police experience and the experiences of their fellow officers to guide them in exercising proper judgment and discretion in situations not specifically addressed by Department rules and regulations. In addition, officers must always adhere to the following principles in the course of their employment with the . . . Police Department:

- **POLICE ACTION - LEGALLY JUSTIFIED:** Officers must act within the limits of their authority as defined by law and judicial interpretation, thereby ensuring that the constitutional rights of individuals and the public are protected. All investigative detentions, pedestrian and vehicle stops, arrests, searches and seizures of property by officers will be based on a standard of reasonable suspicion or probable cause in accordance with the Fourth Amendment of the U.S. Constitution and statutory authority. Officers must be able to articulate specific facts, circumstances and conclusions that support reasonable suspicion or probable cause.
- **EQUALITY OF ENFORCEMENT:** Officers shall provide fair and impartial law enforcement to all citizens.
- **LOYALTY:** Officers shall be faithful to their oath of office, strive to uphold the principles of professional police service, and advance the mission of the Department.

**5-104 IMPARTIAL POLICING . . .**

- A. The [Police Department] is committed to unbiased policing and to reinforcing procedures that ensure that police service and law enforcement is provided in a fair and equitable manner to all.
- B. No person shall be singled out or treated differently as a consequence of his/her race, ethnicity, national origin, gender, sexual orientation or religion.
- C. Except as provided below, officers shall not consider race, ethnicity, national origin, gender, sexual orientation or religion in establishing either reasonable suspicion or probable cause:

Officers may take into account the reported race, ethnicity, gender or national origin of a specific suspect or suspects on credible, reliable, recent, locally-based information that links specific suspected unlawful or suspicious activity to a particular individual or group of individuals of a particular race, ethnicity, gender or nationality. This information may be used in the same way officers use specific information regarding age, height, weight, etc. about specific suspects.

It is difficult to evaluate the effects of formal policies on policing practices directly, but these examples indicate that interpretations of the law and emphasis on certain dimensions in policy documents will vary across departments, as will the rigor of training programs, priorities, and organizational culture. It should also be noted that department duty manuals tend to be lengthy and dense,<sup>35</sup> and there is reason for skepticism that the specific text of policies is well-known or understood by officers. The manner, duration, and frequency of training on and articulation of policies may be just as influential or potentially more influential than the substantive content of the duty manual in guiding officer judgment and decision-making.

## II. HUMAN JUDGMENT AND DISPARATE TREATMENT

Human judgment, particularly with respect to inferring others' intentions and behaviors, is far from perfect and is therefore vulnerable to the influence of biases such as prejudice and stereotypes.<sup>36</sup> This is as true for police officers as for anyone else, and the specific stereotypes that associate minorities, particularly Black

---

35. See, e.g., SAN JOSE POLICE DEP'T, DM2020 052220, SAN JOSE POLICE DEP'T DUTY MANUAL (2020), (spanning 838 pages despite redacting "Security Procedures" material per California Government Code Section 6254(f)).

36. We have written about the implications for policing of research on human judgment: Katherine B. Spencer, Amanda K. Charbonneau & Jack Glaser, *Implicit Bias and Policing*, 10 SOC. & PERSONALITY PSYCH. COMPASS 50 (2016).

Americans, with crime and aggression will affect how police officers disambiguate what they observe.<sup>37</sup>

Focusing here on individual judgment, we would nevertheless be remiss if we did not acknowledge the profound role that structural factors play in causing disparate outcomes. Most prominently, historical inequities, including the legacies of slavery and Jim Crow, have put Black Americans at a structural disadvantage in terms of wealth and access to mechanisms of upward mobility such as education and bank loans.<sup>38</sup> Historically disparate law enforcement has set in motion a vicious cycle where having a criminal record undermines employment and social services access.<sup>39</sup> “Hot spot” policing that deploys more officers to neighborhoods with higher reported crime rates will necessarily exacerbate disparities regardless of actual rates of offending.<sup>40</sup> The focus of this Article is on the situational and psychological factors that are likely to cause individual agents to impose disparate treatment, but we recognize that the individual biases and the structural inequities are mutually reinforcing, to the extent that the inequities feed the biased perceptions and the biased perceptions cause treatment that perpetuates the inequities.

Central to the notion of human judgment is the role of uncertainty, and it is under uncertainty that biases will be most influential.<sup>41</sup> The more information we have about an object of judgment (a used car, a restaurant, or an observed civilian during police patrol), the more likely the judgment is to be correct (assuming the information is correct). It is, however, rarely if ever the case that one has complete information about the object of judgment, and this is necessarily true for judgments of people, especially with respect to their unobservable thoughts, feelings, goals, and behavioral tendencies. In fact, social psychologists have provided evidence that there are significant limits to people’s abilities to accurately identify their *own* thoughts,<sup>42</sup> let alone those of others.

One might be tempted to believe that if a person’s behavior is carefully observed, their mental state will be reliably discerned. To the contrary, social psychological experiments have demonstrated that observation of behavior (barring the rare circumstances where the behavior is utterly unambiguous) can give rise to

---

37. *Id.*

38. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/K7QL-SFE2>].

39. See generally ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018).

40. See Jack Glaser, *The Efficacy and Effect of Racial Profiling: A Mathematical Simulation Approach*, 25 J. POLY ANALYSIS & MGMT. 395, 413 (2006).

41. See generally Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

42. Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psych. Rev. 231 (1977).

especially biased judgments.<sup>43</sup> Darley and Gross, for example, found that people who observed a girl taking an oral school competency test were more influenced by her ostensible (and randomly manipulated) socioeconomic status than those who rated her without observing the test.<sup>44</sup> In making judgments of others, we seek ways to disambiguate what we perceive. Preconceptions about what people are like can influence this process, and to the extent that, as research has amply demonstrated, there are pervasive stereotypes of various gender, racial, ethnic, and other groups, we are likely to interpret others' ambiguous behavior in a manner that is consistent with stereotypes of the groups to which they belong.<sup>45</sup>

Ambiguity is inherent in many police decision scenarios. This is borne out empirically by the consistently low discovery rates of discretionary searches, which tend to fall in the ten-to-twenty percent range.<sup>46</sup> Given that serious criminal offending is rare (setting aside common violations like speeding and jaywalking, although these are relevant as pretexts for stops on suspicion of other offenses),<sup>47</sup> we should not expect search yield rates to be high, let alone perfect. Even when specific suspect descriptions are available, police sometimes detain the wrong people. So, when officers decide who to surveil, stop, or search, be it for investigatory purposes, traffic safety enforcement, or some combination of the two, they are operating under considerable uncertainty, trying to make discernments about people whose behaviors are ambiguous and mental states are unknowable.

Criminality must be among the most influential dimensions of judgment in police decision-making, and careful experimental research has clearly demonstrated that Americans in general, and police officers in particular, associate Black people with weapons, aggression, and crime. Studies on “shooter bias” by Correll and colleagues have shown that college students, community members, and police officers alike are faster, in a simulation, to indicate a “shoot” response for armed Black men than armed White men, and to choose to not shoot unarmed White men faster than unarmed Black men.<sup>48</sup> Glaser and Knowles found that the strength of this shooter bias was related to the strength of an implicit association between Black

---

43. See John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCH. 20 (1983).

44. *Id.*

45. See *Id.*; Ziva Kunda & Paul Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors*, 103 PSYCH. REV. 284 (1996).

46. See *infra* Figure 2 (showing contraband discovery rates of around 10–20% for discretionary searches across race categories).

47. See, e.g., *Table 1—Crime in the United States, by Volume and Rate per 100,000 Inhabitants, 2000–2019*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-1/table-1.xls#overview> [<https://perma.cc/VAN5-DLBM>] (last visited Feb. 25, 2021) (reporting a violent crime rate of 0.366% in 2019).

48. *Id.*; Joshua Correll, Bernadette Park, Charles M. Judd & Bernd Wittenbrink, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCH. 1002, 1006 (2007).

Americans and weapons.<sup>49</sup> Similarly, Eberhardt, Goff, Purdie, and Davies found that college students were faster to identify objects like guns and knives as “crime-related” after having been exposed to subliminal images of Black faces relative to White faces or race-neutral objects.<sup>50</sup> Eberhardt and colleagues also found that students and police officers alike were faster to spot an object on the side of a computer screen that had the image of a Black (versus White) person’s face after having been subliminally exposed to crime-related objects.<sup>51</sup> In other words, thinking about crime tends to cause people (police officers included) to look at Black people.

The Eberhardt, Goff, Purdie, and Davies study is particularly illustrative because research participants were asked to literally disambiguate objects—to identify whether they were crime-related or not as they became decreasingly pixelated (visually ambiguous).<sup>52</sup> This study is highly relevant to police officer judgments about criminal suspicion in general, and weapon possession in particular, because officers often must identify whether or not a visually ambiguous object is crime-related.

### III. NARROWLY TARGETED SEARCHES: HIGHER YIELD AND SMALLER RACIAL DISPARITIES

Proactive policing is associated with a number of different outcomes, and the scope of these practices has implications for both efficiency and fairness.<sup>53</sup> A few studies suggest that, in combination with other tactics, narrowly targeted stops and searches lead to modest, short-term reductions in firearm crimes.<sup>54</sup> However, police contact is also associated with negative outcomes for the affected civilians, including reduced trust in police and government, symptoms of trauma and anxiety, and delinquent behavior.<sup>55</sup> In addition, the large-scale implementation of

49. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCH. 164 (2008).

50. Jennifer L. Eberhardt, Phillip Atiba Goff, Valerie J. Purdie & Paul G. Davies, *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCH. 876 (2004).

51. *Id.*

52. *Id.*

53. We provide only a few examples. For a more detailed review of the literature, see generally THE NAT’L ACADS. OF SCIS., ENG’G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES (David Weisburd & Malay K. Majmundar eds., 2018).

54. *See, e.g.*, CHRISTOPHER S. KOPER & EVAN MAYO-WILSON, CAMPBELL COLLAB., POLICE STRATEGIES TO REDUCE ILLEGAL POSSESSION AND CARRYING OF FIREARMS: EFFECTS ON GUN CRIME 6 (2012); Richard Rosenfeld, Michael J. Deckard & Emily Blackburn, *The Effects of Directed Patrol and Self-Initiated Enforcement on Firearm Violence: A Randomized Controlled Study of Hot Spot Policing*, 52 CRIMINOLOGY 428, 442 (2014).

55. *See generally, e.g.*, Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321 (2014); AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL (2014); Juan Del Toro, Tracy Lloyd, Kim S. Buchanan, Summer Joi

stop-and-search (or frisk) practices in several cities has been found to have violated Fourth and Fourteenth Amendment protections.<sup>56</sup>

There are many challenges associated with measuring and identifying, with certainty, the specific causes of racial disparities,<sup>57</sup> but there is evidence suggesting that, relative to White civilians, officers detain and search Black civilians at a lower threshold of suspiciousness.<sup>58</sup> These studies circumvent the lack of an appropriate benchmark by examining differences in yield (“hit”) rates (e.g., the proportion of searches that result in the discovery of contraband).<sup>59</sup> Given that an officer has made the subjective decision to conduct a search, contraband is either discovered or not as a relatively objective matter of fact, absent negligent or falsified reporting. For decisions to arrest, on the other hand, there is no indicator of “accuracy” that would be independent of subjective decision-making on the part of the officer or another criminal justice actor.

Narrowing the scope of police stops and searches and providing prescriptive guidance to officers may, by reducing the opportunity for biases to operate under uncertainty, increase yield rates and reduce racial disparities. In this Part, we describe three examples of this phenomenon.

#### A. California Law Enforcement Agencies

In 2018, law enforcement agencies in California began reporting standardized police-civilian contact data in response to a legislative mandate.<sup>60</sup> Analyses of data on stops and searches conducted by officers in the state’s eight largest agencies<sup>61</sup> indicated that, among low-discretion searches, yield rates were higher and

Robins, Lucy Zheng Bencharit, Meredith Gamson Smiedt, Kavita S. Reddy, Enrique Rodriguez Pouget, Erin M. Kerrison & Phillip Atiba Goff, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PROC. NATL. ACAD. SCI. 8261 (2019); Tom R. Tyler, Jeffrey Fagan & Amanda Geller, *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751 (2014).

56. E.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013); U.S. DEP’T JUST., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT 26 (2011), [https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd\\_report.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf) [<https://perma.cc/2BNR-W8S5>]; U.S. DEP’T JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 24 (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/7YLS-5ET4>].

57. See generally, e.g., Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-Marginality in Outcome Tests for Discrimination*, 11 ANNALS APPLIED STAT. 1193 (2017).

58. John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001); Goel et al., *supra* note 28; Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020).

59. See sources cited *supra* note 58.

60. Racial and Identity Profiling Act, CAL. GOV. CODE § 12525.5 (West 2021).

61. CAL. RACIAL & IDENTITY PROFILING ADVISORY BD., ANN. REP. 2020, at 13 (2020) [hereinafter 2020 RIPA REPORT]. The report analyzed data from California Highway Patrol, Los Angeles County Sheriff’s Department, Los Angeles Police Department, Riverside County Sheriff’s

more consistent across perceived civilian racial categories relative to high-discretion searches.<sup>62</sup> The recently released report on 2019 data from fifteen agencies describes similar patterns.<sup>63</sup>

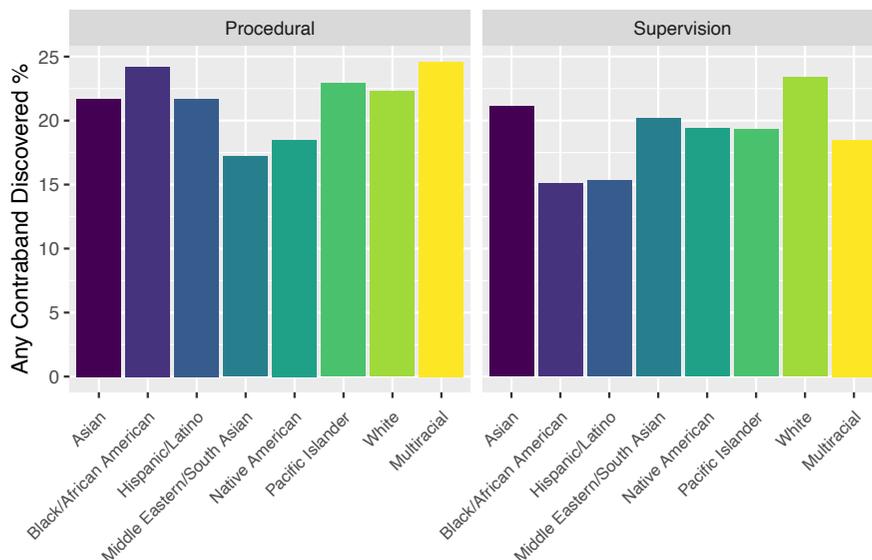


Figure 1: Yield rates for policy-driven searches, by search basis and race

Note: Searches for which multiple bases were indicated (18.1% of all searches) or no basis was indicated (< 0.1%) are excluded. Race is as perceived by officer. All proportions depicted have a denominator greater than twenty.

We analyzed the Racial and Identity Profiling Act (RIPA) data on searches from 2019, focusing on variation in discretion and yield rates by race for searches with one reported basis.<sup>64</sup> We compare yield rates by race for two types of searches in Figure 1: (1) “procedural” searches conducted as the result of a warrant, arrest, or vehicle seizure and (2) “supervision” searches conducted as a condition of parole, probation, post-release community supervision, or mandatory supervision. Among procedural searches, yield rates are lowest for searches of civilians who the officer perceived to be Middle Eastern or South Asian (17.2%) and Native American

---

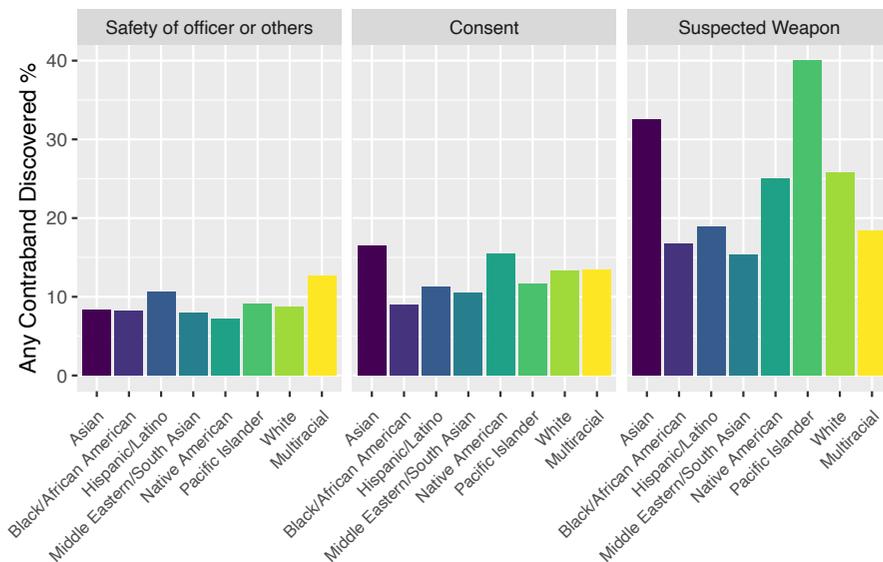
Department, San Bernardino County Sheriff’s Department, San Diego Police Department, and San Francisco Police Department.

62. *Id.* at 39. This is the first wave of data, from the latter half of 2018, reported to California’s Office of the Attorney General under the Racial and Identity Profiling Act; all departments are slated to report data by April 1, 2023.

63. CAL. RACIAL & IDENTITY PROFILING ADVISORY BD., ANN. REP. 2021, at 48–51 (2021) [hereinafter 2021 RIPA REPORT] (using the term “discovery rates” in place of the term “yield rates”).

64. Data available at Cal. Dep’t of Just., *RIPA Stop Data*, OPENJUSTICE, <https://openjustice.doj.ca.gov/exploration/stop-data> [<https://perma.cc/Y2VQ-MCDL>] (last visited May 26, 2021).

(18.5%), and highest for searches of civilians perceived to be Black (24.2%) or multiracial (24.6%). The range of yield rates by race is slightly larger for supervision searches, with the lowest yield rates among searches conducted of civilians perceived to be Black (15.1%) or Latino (15.3%), and the highest yield rates among civilians perceived to be White (23.4%). Both procedural and supervision searches are largely driven by policy, but officers exercise some discretion in the latter, deciding whether to check that a person is under supervision and choosing whether



to exercise their authority to search.

Figure 2: Yield rates for high discretion searches, by search basis and race

Note: Searches for which multiple bases were selected are excluded. Race is as perceived by officer. For suspected weapon stops, the denominators for searches of individuals perceived to be Native American and Pacific Islander are four and twenty searches, respectively. All others are greater than twenty.

Figure 2 compares three types of searches in which officers have a higher degree of discretion.<sup>65</sup> As described in Part I, an officer has considerable discretion under the *Terry* doctrine to conduct searches due to concern for the officer's or others' safety or because the officer suspects the person is carrying a weapon. Officers exercise even greater discretion in searches conducted only on the basis of civilian consent, which do not require additional justification.<sup>66</sup> The yield rates for searches conducted on the basis of concerns about safety are low overall (7.2–12.7%). Racial disparities in yield rates among the searches conducted on the

65. Data available at Cal. Dep't of Just., *supra* note 64.

66. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

basis of a suspected weapon are striking, with much higher yield rates for searches conducted of civilians perceived to be Asian (32.5%) or White (25.8%) relative to those perceived to be Black (16.8%), Latino (18.9%), or Middle Eastern/South Asian (15.4%).<sup>67</sup> The overall yield rate is also higher among weapon searches relative to safety and consent searches, which could be because weapon searches are more likely to be triggered by an officer's observation of a physical object or signs of an object (e.g., a bulge in a pocket). The higher yield rate may also reflect a practice of selecting "suspected weapon" for the basis of a search *after* a weapon is discovered, but based on these data we cannot determine whether this occurs.

Weapon searches are particularly important because of the race-weapon associations described in Part II, the policing objectives to reduce firearm violence, and the role those objectives have played in shaping laws and statutes regarding police discretion in conducting frisks and searches. Table 1 shows, by race, the proportion of weapon-predicated searches where a firearm, other weapon, or ammunition was discovered, based on the 2019 data.<sup>68</sup> The higher yield rate among searches of White civilians suggests that to be searched, they needed to reach a higher threshold of suspiciousness relative to Black and Latino civilians searched for the same ostensible reason.

	Searches	Yield (%)
Asian	537	25.1
Black or African American	15,399	13.9
Latino or Hispanic	17,762	16.1
Middle Eastern or Southeast Asian	379	22.7
Native American	56	25.0
Pacific Islander	154	24.0
White	4,835	22.9
Multiracial	328	22.9
<i>Total</i>	<i>39,450</i>	<i>16.3</i>

Table 1: Yield rate among weapon searches, by perceived race.

Note: The searches in this table differ from the weapon searches in Figure 2 on two dimensions: (1) if a search included multiple bases for a search and "suspected weapon" is among them, it is included here and excluded from Figure 2, and (2) the yield rate here includes only weapon-related contraband (firearms, other weapons, or ammunition), whereas the yield rates in Figure 2 include all forms of contraband.

Taken together, the analyses of standardized search data from the fifteen largest law enforcement agencies in California suggest that racial disparities in yield rates tend to be greater for high discretion searches and especially searches

67. The denominators are small for civilians perceived to be Native American (n = 4) or Pacific Islander (n = 20) and the yield rates should therefore be interpreted with caution.

68. Data available at Cal. Dep't of Just., *supra* note 64.

conducted under suspicion of a weapon. Cognitive biases in perception, attention, and race-weapon associations may be among the causes of these disparities.

*B. New York City Police Department*

The NYPD has drastically changed its use of discretionary stops and searches over the last two decades and releases data on these encounters, creating an opportunity to understand the changes in yield rates and racial disparities associated with changes in agency-level policies. At the peak of NYPD's "stop, question, and frisk" program in 2011, the department reported 685,724 stops, whereas in 2019, 13,459 stops were reported.<sup>69</sup> During this time period, NYPD's widespread use of stops and searches faced multiple legal challenges, including *Floyd v. City of New York*, which determined that officers conducted stops that violated Fourth and Fourteenth Amendment protections.<sup>70</sup>

In this Article, we are interested in understanding the efficiency and distribution by race of searches conducted and how they vary as rates of stops and searches change over time. Increases in yield rates during periods where officers conduct fewer stops would indicate that officers can, to some degree, target the use of searches toward situations that are more likely to yield contraband. A negative relation between the number of searches and racial disparities in the yield rates of those searches would suggest that officers are more likely to apply a lower threshold of suspicion for Black civilians (or in predominantly Black neighborhoods) when they are making stops with considerable discretionary latitude, as incentives to conduct a large number of searches likely cause.

Previous literature has explored similar questions about the efficiency and racial distribution of NYPD stops. For example, Goel, Rao, and Shroff note that the yield rate among stops predicated on the suspicion of the criminal possession of a weapon (CPW) was roughly three percent in the fourth quarter of 2012, when 33,683 CPW stops were conducted and eleven percent in the fourth quarter of 2013, when 3,985 CPW stops were conducted.<sup>71</sup> Another study finds that disparities in NYPD's stops, as predicted by census tract-level racial composition, and outcomes of stops (including frisks, searches, summonses, arrests, and discoveries of contraband) decreased after the implementation of reforms related to *Floyd*.<sup>72</sup>

We compared yield rates over time by race among NYPD stops, based on the

---

69. *Stop, Question and Frisk Data*, NYPD, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page> [<https://perma.cc/65GR-N3UQ>] (last visited May 26, 2021).

70. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

71. Goel et al., *supra* note 28, at 383.

72. John MacDonald & Anthony A. Braga, *Did Post-Floyd et al. Reforms Reduce Racial Disparities in NYPD Stop, Question, and Frisk Practices? An Exploratory Analysis Using External and Internal Benchmarks*, 36 JUST. Q. 954, 964, 971–73 (2019); *see also* *Floyd*, 959 F. Supp. 2d at 540.

discovery of any contraband and the discovery of a weapon.<sup>73</sup> Figures 3 and 4 display the results. The patterns are similar to those identified in previous research,<sup>74</sup> suggesting that, after the number of stops declined precipitously starting in 2012, yield rates (i.e., efficiency) increased beginning in 2013 and racial and ethnic disparities in yield rates began declining, reaching near parity in 2015.<sup>75</sup>

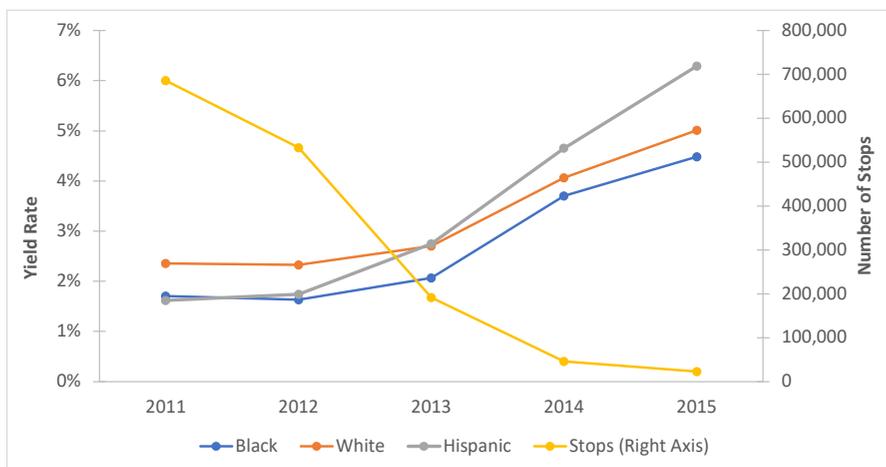


Figure 3: Percentage of NYPD stops resulting in discovery of contraband

Note: The Hispanic category in the figure combines the Hispanic-Black and Hispanic-White perceived racial categories from the NYPD data.

73. Data available at *Stop, Question and Frisk Data*, *supra* note 69.

74. Note that the yield rates reported here differ from those reported by Goel, Rao, and Shroff, *supra* note 28, because they focused specifically on criminal possession of a weapon, whereas Figures 3 and 4 describe all stops and searches.

75. As yield rates increase, absolute percentage point differences between groups reflect smaller disparities and yield rate ratios decline. For contraband (Figure 3), yield ratios of Whites to Hispanics and Blacks began to converge in 2013. For weapons (Figure 4), the White/Hispanic yield rate ratios began declining immediately, whereas the White/Black ratios remained at approximately 2-to-1 until 2015, when they converged.

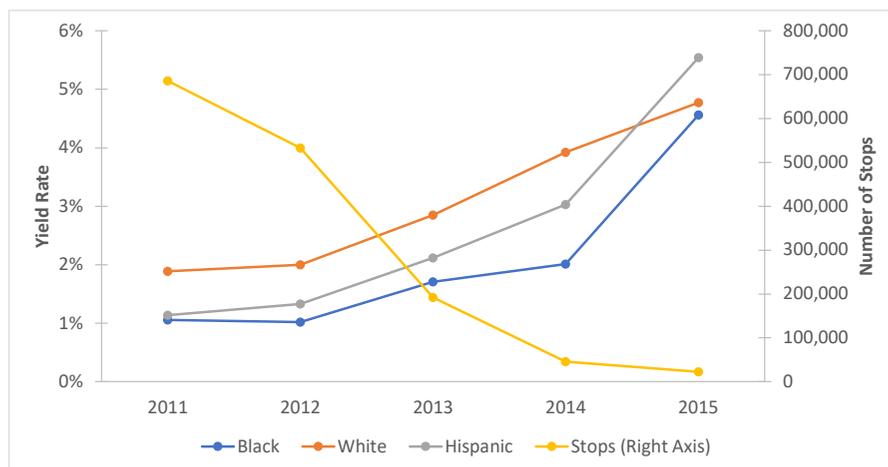


Figure 4: Percentage of NYPD stops resulting in discovery of a weapon

Note: The Hispanic category in the figure combines the Hispanic-Black and Hispanic-White perceived racial categories from the NYPD data.

Consistent with the notion that stops and searches conducted with lower discretionary latitude will be less vulnerable to error (including racial stereotype-driven mistakes), as NYPD pedestrian stops declined with the phasing out of the “stop, question, and frisk” program, yield rates increased manifold, and racial disparities in yield rates all but disappeared.

### C. United States Customs

United States Customs and Border Protection is a federal law enforcement agency that, among other responsibilities, manages the movement of goods and people into the country.<sup>76</sup> In carrying out these responsibilities, Customs inspectors have the legal authority to conduct searches of arriving international airline passengers for weapons or illegal drugs.<sup>77</sup> Here, we focus on changes to policies and practices in 1999, when the agency responsible for these searches was known as the U.S. Customs Service.<sup>78</sup> At the time, agency policies permitted inspectors to conduct a limited pat-down when they could articulate at least one fact supporting their suspicion; more intrusive searches, including strip searches, required “reasonable suspicion” based on “specific, articulable facts.”<sup>79</sup> In general terms, this meant that Customs inspectors could conduct more intrusive searches at the level of suspicion

76. *About CBP*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/about> [https://perma.cc/9PED-TYFR] (last updated Dec. 18, 2020).

77. 19 C.F.R. § 162.6 (2020).

78. U.S. CUSTOMS SERV., GAO/GGD-00-38, BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 1 (2000).

79. *Id.* at 4.

required of a local patrol officer conducting a limited pat-down.

When, in 1999, U.S. Customs inspectors were instructed to rely on six categories of information to trigger searches instead of forty-three factors,<sup>80</sup> yield rates (i.e., contraband discoveries) quadrupled, and previously dramatic ethnic disparities in search and yield rates nearly disappeared.<sup>81</sup> Table 2, adapted from Ramirez, Hoopes, and Quinlan's report, shows the number and yield rate of searches, by race, in the years immediately before and after this policy change.<sup>82</sup> The higher yield rate and reduced racial disparities suggest that Customs officers focused on behavioral indicators that were more likely to result in the discovery of contraband and were less likely to be influenced by ethnic stereotypes.

	1998			2000		
	Searches	Yield	Yield Rate	Searches	Yield	Yield Rate
White	11,765	677	5.8%	2,931	462	15.8%
Black	6,141	365	5.9%	2,437	384	15.8%
Latino	14,951	209	1.4%	2,731	358	13.1%
<i>Total</i>	<i>32,857</i>	<i>1,251</i>	<i>3.8%</i>	<i>8,099</i>	<i>1,204</i>	<i>14.9%</i>

Table 2: Yield rates by race for Customs searches before and after 1999<sup>83</sup>

The dramatic results observed in the U.S. Customs case represent a triple win: reduced intrusion, increased efficiency without loss of enforcement, and increased equity. Such a perfect outcome should not be generally expected from constraints on discretionary searches, but it does serve as a real-world illustration of an extreme version of both wasteful discretion and the potential benefits of prescriptive guidance as an alternative.

#### *D. Discussion and Limitations*

The analyses of searches conducted by law enforcement agencies in California, the NYPD, and U.S. Customs suggest that yield rates are higher and racial disparities are smaller when searches are narrowly targeted. Although uncertainty and ambiguity are inherent to proactive policing practices, it appears that officers do

80. *Id.* at 16 and 5-6. The six categories are behavioral analysis (e.g., signs of nervousness), observational techniques (e.g., discrepancies such as bulges in clothing and an unnatural gait), inconsistencies identified in interviews or documentation, intelligence from another officer or an automated system, canine alerts, and a seizure or arrest (e.g., discovery of contraband in belongings could trigger a search of the person).

81. Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1213-14 (2003).

82. *Id.*

83. *Id.*

have some insight into which stops and searches are more likely to yield contraband and, when they focus on these details, they are less likely to be influenced by racial or ethnic stereotypes.

Analyses of stop data are an important source of insight about police practices, but there are several serious limitations of relying on field data alone to inform police decision-making. First, decisions *not* to stop civilians, and therefore false-negative errors (or “misses”) and true negatives (or “correct rejections”), are not observed. Consequently, a complete analysis of the relative odds (e.g., by racial or ethnic group) of being stopped conditional on offending cannot be accomplished. Second, even within the limited set of encounters where stops occurred, it can be difficult to identify the causal determinants of the observed racial disparities given the many unobserved factors. Finally, stop data provide only partial information about decision-making processes. Officers report the reasons for a stop *after* the encounter is complete—in many cases, hours later at the end of their shift—and they face several legal and professional incentives when completing such forms,<sup>84</sup> so it could be problematic to assume that the stop data, particularly civilian demographics, reflect information known to the officer prior to the stop. Similarly, if search basis is logged after the results of a search, it is possible that memory or motivated biases could skew the data.

Yield rates allow for fairly strong inferences about relative suspicion thresholds (i.e., bias), but without information about who is *not* stopped, they provide an incomplete picture of costs (community trust, cooperation) and benefits (deterrence, investigations, information). It is also possible to observe disparities in yield rates that are not driven by the application of differential suspicion thresholds.<sup>85</sup> However, statistical analyses that address this potential issue also find evidence of disparate treatment in data on police stops and searches.<sup>86</sup>

#### IV. REIMAGINING DISCRETIONARY POLICING

America is reimagining public safety and the role of police officers rather than focusing on narrow reform efforts.<sup>87</sup> This includes reconsidering the situations

---

84. Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015).

85. Shamena Anwar & Hanming Fang, *An Alternative Test of Racial Prejudice in Motor Vehicle Searches: Theory and Evidence*, 96 AM. ECON. REV. 127 (2006); Ian Ayres, *Outcome Tests of Racial Disparities in Police Practices*, 4 JUST. RSCH. & POL'Y 131 (2002); Goel et al., *supra* note 28; Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N. 813 (2007).

86. Emma Pierson, Sam Corbett-Davies & Sharad Goel, *Fast Threshold Tests for Detecting Discrimination*, 84 PROC. MACH. LEARNING RSCH. 96 (2018).

87. See, e.g., Ephrat Livni, *How to Reimagine Policing and Public Safety that Works for Everyone*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2020/12/17/business/dealbook/police-reform-debate.html> [https://perma.cc/W7JH-4T78]; Juan R. Thomas, *Reimagining Policing*, ABA

police are expected to handle, the power and tools they can apply in those situations, and accountability for misconduct. Stops and searches constitute a large share of the interactions between police officers and individual community members, so they are a meaningful part of the broader effort to redesign public safety.

Proactive stops do seem to produce modest reductions in crime *when narrowly targeted*.<sup>88</sup> Those reductions need to be considered in light of their potential costs: safety, administrative, community trust and cooperation, and harm to constitutional principles. Some amount of discretionary and proactive policing might be warranted to address serious and specific problems. For example, a high rate of accidents at a particular intersection could warrant proactive traffic enforcement. A high incidence of gun violence could justify additional stops of those suspected of being involved but not a significant proportion of residents in a particular neighborhood; the vast majority of residents will not be carrying weapons or involved in crime and will likely distrust and be less willing to cooperate with police if detained.

The benefits and costs of stops and searches are not always visible and could accrue over a long time period. Deterrence is one potential benefit that is difficult to measure. Opportunity costs are also difficult to measure: an officer conducting a stop could instead be following up on intelligence, for example. Finally, the erosion of trust and cooperation among civilians is a cost that can accrue over many years and erupt in the form of outrage after a critical incident.

Policy makers and agency leaders have an important role in shaping the footprint of policing in public safety. Currently, officers exercise considerable power. It is important to consider the latitude available to officers in deciding how and when to exercise that power and the full scope of short- and long-term benefits associated with policing practices. Particularly with respect to reducing racial disparities in policing, analyses should start from a few core assumptions: ambiguity and uncertainty are a given in human judgment in general, and policing in particular, and cognitive biases are likely to influence behavior under these conditions.<sup>89</sup>

State statutes and constitutional law on police stops and searches do not currently offer clear guidance, leaving much to the interpretation of agency leadership.<sup>90</sup> Law enforcement leaders will also have a more granular view of the costs and benefits of a given practice or strategy. However, many agencies are operating with limited information, leaving important questions unanswered: Which encounters lead to actionable information or the discovery of contraband? Are

---

HUM. RTS. MAG. (Jan. 12, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/reimagining-policing/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/reimagining-policing/) [https://perma.cc/GTJ8-LGSV].

88. See THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 53, at 67.

89. See *supra* Part II.

90. See *supra* Part I.

some officers exceptionally accurate or inaccurate in choosing when to stop and search civilians? How do residents feel about policing practices in their neighborhoods? Systematic collection and analyses of data on these topics can help agencies make meaningful changes to policies and practices; standardized data collection and aggregation across many agencies can help policymakers to understand policing practices in their jurisdiction and craft policies accordingly.

Changes to discretionary policing policies and large-scale data collection and analyses are already underway in some states and agencies. Minnesota, New Jersey, and Rhode Island have imposed limits on discretionary searches.<sup>91</sup> After litigation regarding racial disparities, the California Highway Patrol issued a moratorium on consent searches of vehicles.<sup>92</sup> As described earlier, California is scaling up data collection on stops and searches across the state,<sup>93</sup> and a number of states, including Illinois, North Carolina, and New Jersey, already collect data on traffic stops.<sup>94</sup>

Evaluation and reform of discretionary policing practices is only one component of the effort to reimagine public safety but can have an immediate and lasting impact. It is clear that unnecessary police-civilian contact harms individuals and communities, and there are likely cases in which officers could be engaging in more productive activities. Data-informed approaches to limiting discretion and providing prescriptive guidance to officers could improve the ratio of benefits to costs associated with routine policing practices.

---

91. 2021 RIPA REPORT, *supra* note 63, at 73.

92. Press Release, ACLU, California Highway Patrol Bans Consent Searches (Apr. 20, 2001), <https://www.aclu.org/press-releases/california-highway-patrol-bans-consent-searches> [<https://perma.cc/9RRX-S7PS>].

93. *See supra* Section III.A.

94. *See* OPEN DATA POLICING, <https://opendatapolicing.com> [<https://perma.cc/2WUG-JQC7>] (last visited Feb. 25, 2021) (providing a searchable database to increase accessibility to North Carolina and Illinois' traffic stop data); OFF. L. ENF'T PRO. STANDARDS, N.J. OFF. ATT'Y GEN., FIFTEENTH AGGREGATE REPORT OF TRAFFIC ENFORCEMENT ACTIVITIES OF THE NEW JERSEY POLICE (2018).

