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Four cases and the Fourth Amendment

Not all vehicle stops by police are the same. Some are examples of effective law enforcement. Yet others have lasting, detrimental effects on neighborhoods and individuals. Understanding the difference between these stops is the goal of "Pulled over: How police stops define race and citizenship" by Charles R. Epp, Steven Maynard-Moody and Donald Haider-Markel.

Four U.S. Supreme Court cases provide the foundation for police tactics in vehicle stops:

- *U.S. v. Robinson* allows a complete search of the person pursuant to a custodial arrest for any offense (414 U.S. 218 (1973)).
- *Atwater v. City of Lago Vista* holds that no offense can be too minor to allow for a custodial arrest (532 U.S. 318 (2001)).
- *Terry v. Ohio* allows a stop and frisk merely on reasonable suspicion (392 U.S. 1 (1968)).
- *Whren v. U.S.* provides that any subjective racism on the part of the police in making any of these decisions is irrelevant under the Fourth Amendment (517 U.S. 806 (1996)).

Together, this powerful quartet of cases holds that it is constitutional for police to arrest a person and search him regardless of how minor the offense as long as probable cause exists.

Even if there is no probable cause, police may temporarily stop and frisk as long as reasonable suspicion of any crime exists. And it is irrelevant for Fourth Amendment purposes whether or not race played a role in any of these decisions.

The result is that over the last few decades police began to use these powers not in a reactive manner of responding to what they perceived as a dangerous situation; rather, they started to use them in a proactive sense to investigate people they simply had a hunch could be offenders. The goal is to find the most minor offense to objectively justify an arrest or a *Terry* stop

and then "see what develops."

"Pulled Over" (Chicago, 2014) provides a vivid account of how this works in vehicle stops. It contends that racial profiling *per se* does not explain the real problem that exists in the encounters minority drivers have with police on the nation's highways.

Rather, the book differentiates between two very different kinds of vehicle stops: "traffic safety stops" and "investigatory stops." The validity of the former can be seen in the name itself: A traffic safety stop is made with the purpose of enforcing those rules of the road that protect the lives of drivers, passengers and pedestrians.

It is the investigatory stop that creates problems. Investigatory stops are "aimed not at enforcing a law but checking whether a person is up to no good." When police departments encourage investigatory stops, "this necessarily translates into an expectation (that police officers will) make stops on the basis of inchoate suspicions."

It also results in a large number of stops of completely innocent people because, as an officer observed to journalist Gary Webb, "You've got to kiss a lot of frogs before you find that one prince."

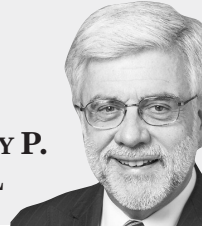
"Pulled Over" offers a rough distinction between these two kinds of stops. Traffic safety stops can be justified as a means to that stated end. They include stops for speeding at seven or more mph over the limit; suspicion of driving under the influence of drugs or alcohol; running a red light; reckless driving; and random roadblock checks for driving under the influence.

Investigatory stops, on the other hand, are based on pretexts such as failure to signal a turn or lane change; a malfunctioning light; driving too slowly; stopping too long; expired license tag; or a random license check not done at a roadblock.

The reason this distinction is

CRIMINAL PROCEDURE

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so critical is that white drivers mainly experience traffic safety stops, while racial minorities — especially African-Americans — are generally the targets of investigatory stops. Statistics show that racial disparity does not show up in the enforcement of traffic safety laws; whether a driver gets pulled over for speeding depends on whether he was indeed speeding.

But in investigatory stops, "the most important influence is not what you do but who you are: Young black men are by far the most likely to be stopped." In fact, African-Americans are 2.7 times more likely than whites to be involved in investigatory stops.

Statistics show that "A young African-American man driving an old, rundown domestic luxury car is especially vulnerable to an investigatory stop."

Racial disparity also shows up within the category of investigatory stops. For example, during traffic safety stops, black drivers are as likely as whites to be questioned or searched. But during investigatory stops, black drivers are far more likely to be questioned or searched than white drivers.

Police decide how far to pursue an investigatory stop based not on what the driver did,

but rather who the driver is. And statistics show that the most intensive investigatory stops tend to involve young African-American males.

In fact, during investigatory stops African-American drivers are *five times more likely* than white drivers to be subjected to searches of their cars. Yet only 11 percent of these searches of African-American vehicles produce contraband, compared with 27 percent of the searches of vehicles driven by whites.

Clearly, the police are using much looser standards in deciding to search African-Americans. The authors bluntly assert, "Were we able to wave a magic wand and turn African-Americans' investigatory stops into traffic safety stops, the racial gap in evaluations of stops would shrink dramatically."

The book concludes by asserting that it is time to realize that the *Robinson-Atwater-Terry-Whren* quartet provides no meaningful limitation on officers' authority to make stops. It then proposes three remedial steps that could be implemented immediately.

First, police departments must promulgate a policy of utilizing traffic stops only where real safety issues are involved. *Whren* need not be overruled; it can be simply ignored.

Second, departments must adopt internal guidelines and systems of oversight to monitor police officers' decisions to stop a vehicle.

The book labels the third step as the most essential.

Police departments must stop relying on "consent searches" instead of probable cause. True "consent" in these situations is a myth. It is time to accept the fact that the use of consent searches is counterproductive for both law enforcement and police/community relations.

"Pulled Over" is essential reading for everyone concerned about the fairness of policing in 21st century America.