

**POLICE TRAFFIC STOPS  
AND RACIAL PROFILING**



# POLICE TRAFFIC STOPS AND RACIAL PROFILING

Resolving Management, Labor  
and Civil Rights Conflicts

*By*

**JAMES T. O'REILLY**

*University of Cincinnati College of Law  
Cincinnati, Ohio*



**Charles C Thomas**

PUBLISHER • LTD.

SPRINGFIELD • ILLINOIS • U.S.A.

*Published and Distributed Throughout the World by*

CHARLES C THOMAS • PUBLISHER, LTD.  
2600 South First Street  
Springfield, Illinois 62704

This book is protected by copyright. No part of  
it may be reproduced in any manner without  
written permission from the publisher.

©2002 by CHARLES C THOMAS • PUBLISHER, LTD.

ISBN 0-398-07295-7 (hard)  
ISBN 0-398-07296-5 (paper)

Library of Congress Catalog Card Number: 2002019784

*With THOMAS BOOKS careful attention is given to all details of manufacturing and design. It is the Publisher's desire to present books that are satisfactory as to their physical qualities and artistic possibilities and appropriate for their particular use. THOMAS BOOKS will be true to those laws of quality that assure a good name and good will.*

*Printed in the United States of America  
CR-R-3*

**Library of Congress Cataloging-in-Publication Data**

O'Reilly, James T., 1947-  
Police traffic stops and racial profiling: resolving management, labor and  
civil rights conflicts /c by James T. O'Reilly.  
p. cm.  
Includes bibliographical references and index.  
ISBN 0-398-07295-7 -- ISBN 0-398-0796-5 9pbk.)  
1. Racial profiling in law enforcement--United States. 2. Discrimination  
in law enforcement--United States 3. Traffic violations--United States  
I. Title.

HV8141 .074 2002  
363.2'3'08900973--dc21

2002019784

*This book is dedicated to the memory of the late  
Jerry Casey, Chicago Police Department,  
with respect and appreciation.*



## PREFACE

Walking a straight line is a standard roadside test for possibly impaired drivers who are stopped by police. One who tries to discuss the controversial topic of police and racial profiling has a similar challenge: can I walk a straight and fact-based line through a controversial topic? The test is whether each reader can come away with some affirmative learning from the book's many parts. Because this text will be read by such divergent audiences as civil libertarians and veteran street cops, the text goes to lengths to balance the constitutional, statutory, policy and normative issues that make up this topic's coverage.

As a veteran labor arbitrator for police labor disputes, I was startled to find otherwise reasonable public officials respond to critics of the police with the glib comment that cops who select too many drivers of a certain race would be immediately fired for that offense. I realize the elected officials of a Midwestern city aren't always in tune with criteria applied in labor settings, but this promise to fire police officers without a bright-line standard of conduct was appalling. The more I looked into what the test for termination might be, the more I realized that the "offense" of driver selection statistics is fraught with definitional and policy problems. The educational efforts directed to elected officials, police managers and unions are a reflection of my experiences in this difficult field.

As a teacher in this field I learn from my students every semester, and I welcome readers to offer their feedback, dissent or constructive critiques to make subsequent editions of this text more useful to the reader. I appreciate the able assistance of Don Blair of the University of Cincinnati Law Library and Adam Breeden '02 for their capable research help.

Prof. James O'Reilly





## ACKNOWLEDGMENTS

The author expresses sincere appreciation for the support of the College of Law, University of Cincinnati, especially the work of Research Librarian Don Blair and Adam Breeden '03, in the research of this text. For reasons related to the political sensitivity of the topic, many of those interviewed as background sources spoke without attribution. Their assistance was invaluable.

Quotes from the work of Ms. Heather MacDonald in the *City Journal* are used by permission; Copyright 2001 by the Manhattan Institute.

Comments and suggestions for future editions of this text are welcomed. The views expressed are those of the author (or of the source cited in footnoted materials) and no representation is made that the views reflect official policy of any institution or organization.

James T. O'Reilly



# CONTENTS

	<i>Page</i>
<i>Preface</i> .....	vii

## PART 1: THE TRAFFIC STOP

### *Chapter*

1. INTRODUCTION .....	5
2. TRAFFIC STOPS AND POLICE INVESTIGATIONS .....	7
2.1 The Fourth Amendment and Traffic Stops .....	7
2.2 Policing in a Mobile Society .....	7
2.3 Can Traffic Stops be a Pretext Reason for Investigations? .....	8
2.4 The Value of Traffic Stops .....	8
2.5 The Five Phases of the Traffic Stop .....	8
3. PHASE 1 OF THE TRAFFIC STOP: SELECTION OF DRIVERS TO STOP .....	11
3.1 Discretion .....	11
3.2 Traffic Violations Justify Stops .....	12
3.3 Driver Selection Difficulties .....	13
3.4 Radar .....	13
3.5 Policies .....	14
4: PHASE 2: DRIVER INQUIRIES AND CHECKS .....	17
4.1 Inquiries .....	17
4.2 Delays and Checks under the Constitution .....	18
4.3 Reliance on Computer Checks .....	19
4.4 When Does Delay Amount to an Arrest? .....	19
4.5 State-specific Limitations .....	20
4.6 Officer Safety Considerations .....	20

5. PHASE 3: SEARCHES OF THE STOPPED VEHICLE	23
5.1 Vehicle Searches and the Constitution	23
5.2 What is a “Search”?	24
5.3 Search of the Occupants of the Vehicle	24
5.4 When is Consent to Search Required?	25
5.5 Forms of Consent	26
5.6 Exigent Circumstances	26
5.7 Methods of Search	27
5.8 When Consent is Not Needed	27
5.9 Remedies Against Illegal Searches	28
6. PHASE 4: SUPPRESSION OF EVIDENCE	31
6.1 “Fruits” of the Traffic Stop	31
6.2 Suppression Hearings	32
6.3 Advocates’ Views	32
6.4 Suppression Debates	33
6.5 Suppression and Section 1983	34
7. PHASE 5: CIVIL RIGHTS CLAIMS BASED ON STOPS	36
7.1 Section 1983 Actions	36
7.2 Who Can Be Sued?	37
7.3 Criteria for Recovery of Damages	38
7.4 What Will Plaintiffs’ Lawyers Seek?	39
7.5 Damages Need Not Follow State Remedy Requirements	40
7.6 The Defense of Qualified Immunity	40
7.7 Other Defenses	41
7.8 State Immunity	42
7.9 Why Do Governments Settle?	42

## **PART II: RACIAL PROFILING**

8. HISTORY OF THE RACIAL PROFILING CHALLENGES	47
8.1 Background	47
8.2 Subcategories of Concerns	48
8.3 The Campaign Begins	49
8.4 How the Campaign Developed	50
8.5 Importance of Statistically Valid Comparisons	52
8.6 Influences on the New Jersey Cases	53
8.7 The ACLU and NAACP Efforts	53

9. THE IDEOLOGICAL CONTEXT ..... 56

    9.1 Racial Profiling and the Drug War ..... 56

    9.2 Criticism of the Supreme Court ..... 57

    9.3 Neighborhood Segregation and Racial Profiling ..... 58

    9.4 Racial Profiling and Police Personnel ..... 58

    9.5 Racial Profiling and Civil Rights Individual Remedies ..... 59

    9.6 Racial Profiling and Community Relations ..... 59

10. RACIAL PROFILING LITIGATION ..... 61

    10.1 Race in Traffic Stop Cases ..... 61

    10.2 Supreme Court Decisions ..... 61

    10.3 Federal Decisions ..... 62

    10.4 Predictions for Future Litigation ..... 63

    10.5 How will Legislation Impact on Litigation? ..... 63

**PART III: EXPERIENCES**

11. THE NEW JERSEY EXPERIENCE WITH RACIAL  
PROFILING REMEDIES ..... 67

    11.1 Introduction ..... 67

    11.2 The New Jersey State Police ..... 68

    11.3 Why Was New Jersey Targeted? ..... 68

    11.4 Incentive Systems ..... 69

    11.5 Criminal Defense Discovery Motions ..... 70

    11.6 Internal Dissenters ..... 70

    11.7 Awareness of Racial Statistics ..... 70

    11.8 The Interim Report ..... 71

    11.9 The Consent Decree ..... 72

    11.10 Legislative Responses ..... 73

    11.11 Consent Decree Impacts ..... 74

    11.12 Effects on Discipline ..... 74

    11.13 Effects on Drug Prosecutions ..... 75

    11.14 Complaints and Damage Payments ..... 75

    11.15 Conclusions ..... 75

12. OTHER STATE AND LOCAL EXPERIENCES ..... 80

    12.1 Maryland ..... 80

    12.2 Illinois ..... 80

    12.3 Ohio ..... 81

    12.4 Los Angeles ..... 82

12.5 New York . . . . .	82
12.6 Minnesota . . . . .	82
13. FEDERAL EXPERIENCE . . . . .	84
13.1 The Federal Role . . . . .	84
13.2 Justice Department Civil Rights Roles . . . . .	85
13.3 Congress . . . . .	85
13.4 Drug Enforcement Agency . . . . .	86
13.5 Federal Bureau of Investigation . . . . .	86
13.6 Immigration & Naturalization Service . . . . .	87
13.7 Other Federal Entities . . . . .	87

#### **PART IV: THE LEGAL ISSUES**

14. THE POLICE “PATTERN OR PRACTICE” STATUTE . . . . .	91
14.1 Understanding the History . . . . .	91
14.2 Early Attempts and Hearings . . . . .	92
14.3 Coverage of Section 14141 . . . . .	93
14.4 Process Features of Section 14141 . . . . .	94
14.5 What 14141 Does Not Do . . . . .	96
14.6 Justice Department Roles . . . . .	97
14.7 Supporters’ Views of 14141 . . . . .	99
14.8 What 14141 Means to the Justice Department . . . . .	99
14.9 Critical Views on 14141 . . . . .	102
14.10 Statistics and Resources . . . . .	102
14.11 Should Police Departments Fear 14141 Litigation? . . . . .	103
14.12 How Will Courts Respond? . . . . .	104
15. POLICE DEFENSES AND SETTLEMENTS . . . . .	105
15.1 Political Realities . . . . .	105
15.2 Steps to Educate Key Decisional Officials . . . . .	106
15.3 Could the Federal Prosecutor Lose? . . . . .	108
15.4 Litigation of the 14141 Case . . . . .	109
15.5 Rebutting the Evidence . . . . .	110
15.6 Risks of a Consent Order . . . . .	113

#### **PART V: THE CONSENT DECREES**

16. THE JUDICIAL ROLE . . . . .	117
16.1 Judicial Workloads . . . . .	117
16.2 Burden of Proof . . . . .	118

16.3 Federalism and States ..... 118

16.4 Masters ..... 119

16.5 Contempt Roles ..... 119

16.6 Consent Decrees Remain for Years ..... 120

17. MONITORS OVERSEEING POLICE ..... 122

    17.1 Monitor Functions ..... 122

    17.2 Selection of Monitors ..... 122

    17.3 Reports and Responses ..... 123

    17.4 Costs ..... 123

    17.5 Monitor Oversight of Discipline ..... 123

    17.6 Contempt Orders and Monitors ..... 124

18. SURVIVING A CONSENT DECREE ..... 126

    18.1 Intervention by Unions in 14141 Consent Decrees ..... 126

    18.2 Why Would Unions Be Deterred? ..... 127

    18.3 Union Intervention ..... 128

    18.4 Consent Decree Fairness Hearings ..... 129

    18.5 Dissolution of Decrees ..... 130

19. COSTS AND BUDGETS REQUIRED FOR RACIAL  
PROFILING REMEDIAL ACTIONS ..... 132

    19.1 What is the Minimal Change Needed? ..... 132

    19.2 What Can Consent Decrees Require? ..... 133

    19.3 Elements of Budgets ..... 133

    19.4 Ongoing Expenses ..... 135

**PART VI: LITIGATION EFFECTS**

20. INDIVIDUAL SUITS AGAINST POLICE ..... 139

    20.1 Individual Suits ..... 139

    20.2 Stops without Arrest or Physical Restraints ..... 139

    20.3 Tort and Constitutional Claims ..... 140

    20.4 Physical and Property Damage Cases ..... 141

    20.5 Unlawful Detention ..... 141

    20.6 Assault and Battery ..... 142

    20.7 Qualified Immunity ..... 142

21. IMPACTS OF THE REMEDIAL ACTIONS ON  
STREET-LEVEL POLICE CONDUCT ..... 144

    21.1 When will Traffic Stops Occur? ..... 144

    21.2 When will Searches Occur? ..... 145

21.3 What are the Supreme Court Trends? . . . . .	146
21.4 What Additional Limits Will Consent Decrees Impose on Police? . . . . .	146
21.5 Would Consent Decrees Lead to More Suppression of Evidence? . . . . .	147
21.6 How Will Patrol Officers Respond? . . . . .	147

## **PART VII: ROLES**

22. ROLE OF ELECTED OFFICIALS . . . . .	153
22.1 Political Contexts . . . . .	153
22.2 Constitutional Liabilities . . . . .	154
22.3 Governmental Immunity . . . . .	155
22.4 Legislative Roles . . . . .	156
23. ROLE OF POLICE MANAGERS . . . . .	158
23.1 New Challenges . . . . .	158
23.2 The Silence of the Chiefs . . . . .	160
23.3 Civil Rights Liability of Departments . . . . .	161
23.4 Civil Rights Liability of Chiefs . . . . .	162
23.5 Effects of the Consent Orders . . . . .	162
23.6 Union Role in Pre-Decree Negotiations . . . . .	164
23.7 Employer Refusal to Bargain . . . . .	164
23.8 Contrasting Monitor and Union Roles . . . . .	165
23.9 Officer Disengagement and Attrition . . . . .	165
23.10 External Complaint Reviews . . . . .	166
23.11 Conclusions . . . . .	167
24. ROLES OF POLICE UNIONS . . . . .	170
24.1 Public Roles . . . . .	170
24.2 Pragmatic Roles . . . . .	171
24.3 Adoption of New Policies . . . . .	171
24.4 Unions Cannot Be Ignored . . . . .	172
24.5 The Negotiating Opportunity . . . . .	173
24.6 Union Intervention . . . . .	174
24.7 Incentive Programs . . . . .	176
24.8 Learnings from Others' Experience . . . . .	176
24.9 Federal Receptivity . . . . .	176
24.10 Local Politics . . . . .	177
24.11 Consent Decree Effects on Discipline . . . . .	177
24.12 Bargaining Over Discipline Systems . . . . .	178
24.13 Union Civil Liabilities . . . . .	179



24.14 Media Relations . . . . . 179  
24.15 Future Directions for Police Unions . . . . . 180

**PART VIII: CONSEQUENCES OF CONSENT DECREES**

25. DISCIPLINE . . . . . 185  
25.1 Basic Elements . . . . . 185  
25.2 Notice of Violative Conduct . . . . . 186  
25.3 Relationship to Brutality Allegations . . . . . 186  
25.4 Defining the Offense to be Punished . . . . . 186  
25.5 Burden of Proof . . . . . 187  
25.6 Training and Reassignment . . . . . 188  
25.7 Complaint Follow-up . . . . . 189  
25.8 Documentation . . . . . 190  
25.9 Falsification of Records . . . . . 191  
25.10 Insubordination . . . . . 192

26. ARBITRATION OF RACIAL PROFILING DISCIPLINE . . . . 194  
26.1 How Racial Profiling Claims Come to Arbitration . . . . . 194  
26.2 Setting Up for Arbitration . . . . . 195  
26.3 Participation . . . . . 196  
26.4 Proving the Violation to the Arbitrator . . . . . 196  
26.5 Police Management Dilemmas . . . . . 197  
26.6 Use of Progressive Step Discipline . . . . . 198  
26.7 Contrasts to Private Sector Discipline . . . . . 199  
26.8 Influence of Monitors . . . . . 200  
26.9 Evidence in the Grievance Arbitration Hearing . . . . . 201  
26.10 Statistical Comparisons . . . . . 202  
26.11 Other Grounds and Motives . . . . . 204  
26.12 Contract Interpretation Grievances . . . . . 204  
26.13 Why Would Employers Lose? . . . . . 205  
26.14 Court Review . . . . . 205  
26.15 Backlash Against Discipline . . . . . 206

27. POLICE-COMMUNITY RELATIONS EFFECTS . . . . . 209  
27.1 Community-Oriented Policing . . . . . 209  
27.2 Advocates' Views . . . . . 210  
27.3 Other Perspectives . . . . . 210  
27.4 Public Relations & Driver Racial Statistics . . . . . 211  
27.5 Statistical Exercises and Disagreements . . . . . 212

28. LONG-TERM EFFECT OF REMEDIES UPON POLICE ADMINISTRATION .....	214
28.1 Forecasting the Future .....	214
28.2 Criminal and Civil Liability .....	215
28.3 Quality of Management .....	215
28.4 Effects On Police Supervisors .....	217
28.5 Effects On Street Level Enforcement .....	218
28.6 Effects On Drug Interdiction .....	219
28.7 Effects On Traffic Enforcement .....	220
28.8 Quality of Prosecutorial Effectiveness .....	221
28.9 Federalizing Police Standards .....	221
29. AVOIDING RACIAL PROFILING CHARGES .....	224
29.1 Community Relations .....	224
29.2 Police Need for Community Assistance .....	225
29.3 Enhancing Police Cultural Awareness .....	226
29.4 Soliciting Comments .....	226
30. THE ROLE OF TRAINING .....	228
30.1 Enhanced Officer Training .....	228
30.2 Quality of Data Collected for Analysis .....	229
30.3 Testers .....	229
31. CONCLUSIONS .....	231
<i>Appendix</i> .....	233
<i>Bibliography</i> .....	275
<i>Index</i> .....	279

**POLICE TRAFFIC STOPS  
AND RACIAL PROFILING**



**Part I**

**THE TRAFFIC STOP**



## Chapter 1

### INTRODUCTION

**R**ace-based selectivity of drivers who are stopped for questioning by police is a practice that unfortunately persists in some police agencies among some police officers. There is something wrong, something contrary to American beliefs, to the asserted presumptions that a Hispanic, Asian, African-American or Near Eastern background predisposes an individual driver to the behavior of a criminal. These racial attitudes are wrong on the facts, wrongly held as attitudes, and contrary to good police work under our Constitution and laws. Exceptionally qualified and experienced police managers have publicly and repeatedly disavowed the use of race as the sole reason why a traffic stop occurs.

“Racial profiling” should be dead as a police strategy and should be universally rejected as a tactical choice. Is that message clear and pervasive enough to reach all police officers and their supervisors? Can the message be accepted by the constituencies whom police serve, for whom traffic stops are a source of anxiety and concern? This is such a hot button political issue that writing a cooler, more analytical assessment has been a challenging task.

“Profiling” without regard to racial characteristics *should* continue, as an inherent part of training and daily life of the street-level law enforcement officer, because criminals whose behavior manifests similar external characteristics should be detected as efficiently as possible. The profile of an armed robber specializing in nighttime attacks on convenience stores is slowly developed over time, the product of many criminal behaviors observed and developed over a career-long experience. A profile is most useful at night; assume that it is 3:30 A.M, warm, dry and quiet. The cruising police car who passes a 24-hour convenience store can apply this kind of mental shortcut to the sight of a nervous teen or young adult, wearing a long raincoat and knit cap on a dry and warm night, looking frenetically in all directions as he walks toward the store’s door, his older model car parked on the side of the convenience store, out of the main lighted area, with the engine running and the lights out. You may select whatever racial component you wish; the profile

of a potential robber is a matrix of behavioral observations of like behaviors in decades of experience. Heavy-set grandparents pushing strollers at 10 A.M. in the rain are unlikely to be categorized in the officer's mental "profile" as potential armed robbers.

Profiling is a coping strategy within human psychology, associating various observed factors with an experience base; we learn it early; after a number of doctor visits, small children profile white-coated adults in a busy office as persons likely to stick the child with a needle. So it is not the fact that profiling exists that is the concern—it is the mistaken shortcut between race and the criminal behaviors.

This book is organized for the benefit of police managers, city and state administrators, attorneys and others, through the use of several parts. Part I explains the phases at which traffic stops occur and how some end up in court. Then Part II explains the racial profiling assertions and how they are presented. Part III then explores the several experiences of police agencies with racial profile controversies. Part IV provides an analysis of the several key legal issues. Part V explores the creation and results of federal civil rights consent decrees. Part VI focuses on litigation issues as they relate to consent decrees. Part VII discusses roles of the chain of command and union in dealing with impacts of the remedies on police service. Part VIII addresses the consequences of the remedies being imposed on police on operations.

Throughout the book, references are made to books and periodicals, the classic reference sources, but the reader will note the increased attention to internet websites. These may change by the time the reader searches them out; change is a part of the internet's rapid turnover cycle. By the time the reader explores this topic, there will be many more website discussions and more data posted, so the reader should do an internet search to find some of the most recent material and, of course, apply reasoned skepticism to the content of internet sites unless the particular source authoring this web article is known and respected by the reader.

Ultimately, the police are a safety service. The aggressive interdiction of criminals aids the safety of the community. But the community wants a professional service for all segments of the community without regard to race and ethnicity. Balancing and achieving acceptance is a significant challenge for the modern public sector management team.



## Chapter 2

# TRAFFIC STOPS AND POLICE INVESTIGATIONS

### 2.1 THE FOURTH AMENDMENT AND TRAFFIC STOPS

The Fourth Amendment to the Constitution protects us from being “seized” or “searched”,<sup>1</sup> and in the context of automobile traffic, this protection is limited by our diminished expectations of personal privacy when we are driving, as contrasted to our homes or businesses.<sup>2</sup> A traffic stop is a form of warrantless “seizure” of the driver for a brief time during investigation of a traffic violation.<sup>3</sup> The Supreme Court has issued dozens of opinions on search and seizure relating to vehicles, and the Court applies a reasonableness standard and draws the exception to the warrant requirements very narrowly.<sup>4</sup>

### 2.2 POLICING IN A MOBILE SOCIETY

Traffic stops are a well-understood, often disliked part of the motorist’s privilege to drive on public highways. The faster and more aggressive drivers seem to attract more traffic stops. The ancient ways of the night watchmen, who could accost those peasants found abroad in the streets after dark making mischief, were the reason for early patriots to build in the Fourth Amendment’s protection against intrusive government apprehension of individuals and their property. We are “secure” in our “persons, houses, papers and effects, against unreasonable searches and seizures.”<sup>5</sup> Police receive due weight for their experienced evaluation of drivers,<sup>6</sup> but they must adhere to Fourth Amendment standards.

Sometimes the police are in hot pursuit or fear that the person whom they have stopped will flee the scene; in these cases a search without a warrant