



Racial Profiling: Constitutional and Statutory Considerations for Congress

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Protests over the death of George Floyd in police custody have prompted [renewed interest](#) in police reform efforts. One particular area of focus has been the issue of racial profiling by state and local police officials, with [some commentators](#) arguing that police departments may disproportionately target people of color for traffic stops, questioning, or search procedures without individualized grounds for suspecting criminal activity. This Sidebar addresses federal law’s constraints on racial profiling, describes existing enforcement actions, and highlights selected proposals for congressional action.

Existing Law

State and local governments have primary responsibility for law enforcement, and [Congress, while having broader authority over federal law enforcement, has relatively limited authority](#) to regulate state and municipal police departments. That said, the Constitution and federal statutes set some rules for police actions, including in the area of racial profiling. Most relevant here, the Fourth Amendment requires individual justification for searches and seizures, and the Equal Protection Clause bars most law-enforcement decisions based on race. In addition, two federal statutes, [34 U.S.C. § 12601](#) and [Title VI of the Civil Rights Act of 1964](#), allow for racial profiling suits against police departments.

Fourth Amendment Constraints on Searches and Seizures

[The Fourth Amendment](#) to the Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” It does not specifically prohibit racial profiling, but courts would not consider stops and searches based solely on a subject’s race to be reasonable seizures because police have identified no individualized reason for suspicion. The Amendment has been interpreted to permit police to detain a person briefly for investigative purposes if an officer has [a reasonable suspicion](#) “that criminal activity may be afoot.” A mere “hunch” or inarticulable suspicion does not meet this standard. And “[law enforcement officers must satisfy escalating legal standards of ‘reasonableness’ for each level of intrusion upon a person—stop, search, seizure, and arrest.](#)”

Courts have held that an officer *cannot* meet the Fourth Amendment standard by relying on a person’s [racial appearance](#), alone, as grounds for reasonable suspicion. By contrast, the officer *may* use race, for

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example, searching for a person matching a suspect's description and part of that description is the suspect's race. That said, an officer's groundless use of race by itself does not violate the Fourth Amendment; it is performing a search or seizure without individualized justification that violates this provision. As long as they [can point to](#) individualized justification, the personal motives of an officer are not a factor in the Fourth Amendment analysis. Police may pull over a driver for a traffic violation, even if they intend to search for drugs. The standard is an objective one. "[T]he [constitutional reasonableness](#)" of stops depends on the circumstances, not on the officers' "[actual motivations](#)."

In practice, some observers, researchers, and judges say it can be hard to tell whether officers' investigatory detentions rely on individual, nonracial factors as the Fourth Amendment jurisprudence requires. Determining reasonable suspicion based on objective standards allows for any [number of justifications](#). The possible factors that could be raised led one judge to assert, "[whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you](#)." As a result, when a police report cites a cause for a particular stop, such as a pedestrian's furtive movements or motorist's erratic driving, critics claim that such explanations could amount to pretext or post-hoc validation. Some police departments accept diverse actions as "[furtive](#)," for example, and records reviews may show that "[time of day](#)"—also cited as justification—can validate stops at all times of day. Police have also used claims that pedestrians are "[milling](#)," "[loitering](#)," or "[wandering](#)" as reasons for a stop. The objective standard and the many ways police can potentially meet Fourth Amendment standards makes it challenging for courts to evaluate whether a stop is based on suspicious circumstances or on race alone.

When courts have found patterns of Fourth Amendment violations, some courts have attributed them to [failure to train](#) officers about constitutional requirements, [loose supervision of](#) officers on the beat, or lax [documentation requirements](#) for stops and searches. In some cases, courts have found that these procedures allow or encourage officers to conduct searches and seizures based on race. In New York, a federal judge concluded that "quotas" or goals for numbers of stops, arrests, or other activities led officers to rely on race instead of individualized suspicion as officers "[increase\[s\] stops without due regard to the constitutionality of those stops](#)." Along the same lines, the Department of Justice concluded, in an investigation of Newark police, that minority communities often "[bear the brunt of the . . . pattern of unconstitutional policing](#)." Newark's "[failure to require its officers to adhere to legal standards for stops facilitate\[d\] impermissible reliance on race](#)." Nonetheless, because of the interpretations of the Fourth Amendment in terms of justifying a stop, it may be difficult to address racial profiling by relying on the Fourth Amendment alone.

Equal Protection and Police Activity

Even stops that courts find to be justifiable under the Fourth Amendment can violate the [Equal Protection Clause of the Fourteenth Amendment](#). This is because while the Fourth Amendment protects against unreasonable searches, the Equal Protection Clause also requires that policing, like other government functions, afford all persons the equal protection of the laws. It is the Equal Protection Clause, and not the Fourth Amendment, that forms "[the constitutional basis for objecting to intentionally discriminatory application of laws](#)." Equal-protection violations can be subtle, as when neutral rules are applied "[in an intentionally discriminatory manner](#)" or [have an adverse effect motivated by discriminatory animus](#). The Equal Protection Clause's prohibition on intentional racial discrimination remains true even if members of a given race are responsible for more crimes in a particular neighborhood or commit more crimes of a certain type. One federal judge observed, "[\[t\]he Equal Protection Clause does not permit the police to target a racially defined group as a whole because of the misdeeds of some of its members](#)." And even if the evidence showed that police relied on racial profiling out of a [perhaps ill-conceived notion](#) that it helped fight crime, the Equal Protection Clause [prohibits intentionally relying on race in policing, no matter the underlying rationale](#) for the policy.

But unintentional racial impact does not violate equal protection standards. To make out a constitutional challenge, “plaintiffs must show that those responsible for the profiling did so ‘at least in part “because of,” not merely “in spite of,” its adverse effects upon’ the profiled racial groups.” Such cases are hard to prove. Some argue that an individual person stopped and frisked may not be sure if officers selected him or her because of race, and discriminatory intent is often difficult to determine.

In practice, investigators and courts have in limited cases uncovered express [police policies](#) targeting people of color. One New York police commissioner admitted that he “[focused on young blacks and Hispanics ‘because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.’](#)” A court in Arizona concluded that a local sheriff department had unconstitutionally “[institutionalize\[d\] the systematic consideration of race as one factor among others in forming reasonable suspicion or probable cause in making law enforcement decisions.](#)” That said, a court would usually need to be swayed by an agency’s “official” policies of race neutrality when it evaluates the requisite racial intent. In Maricopa County, Arizona, for example, a court found that police issued some policies “[designed to ‘avoid the perception of racial profiling’](#)” and noted leaders conceded they were “rhetoric.”

In many other cases, plaintiffs have shown some racial disparities but failed to show racial intent. A plaintiff needs more than [statistics alone](#) to prove intentional discrimination. Isolated incidents and innuendo rarely suffice to establish intent. One federal judge rejected plaintiff’s claim that a handful of statements, including an officer “[justif\[ying\] the stop by saying that one can never tell with ‘you people,’](#)” showed racial intent.

Federal Statutes and Racial Profiling

A handful of federal statutes facilitate racial profiling suits. Some statutes, [42 U.S.C. § 1983](#), [34 U.S.C. § 12601 \(Section 12601\)](#), and [18 U.S.C. § 242 \(Section 242\)](#), create causes of action for violations of constitutional rights. Under Section 242, individual officers can face [criminal prosecution](#) for using police authority to “[willfully subject\[\] any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States\[.\]](#)” Under a noncriminal provision, [34 U.S.C. § 12601 \(Section 12601\)](#), the [Department of Justice can investigate](#) and impose reforms on departments engaging in a “[pattern or practice](#)” of constitutional violations.

A private person subjected to unlawful racial profiling may seek remedies under [42 U.S.C. § 1983 \(Section 1983\)](#), which protects persons from “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. A plaintiff may bring a Section 1983 suit against a state or local government official (such as a law enforcement officer), or directly against a municipality or municipal agency (such as a police department). [To succeed](#) in suing a police department, a private party must show injury from a “policy or custom” of the municipality, including a “[deliberate indifference](#)” to the risk of a constitutional or statutory violation. Individual [police officers are liable under Section 1983 only](#) if they violate “clearly established” law. In practice, some argue these rules usually shield police and police departments from liability absent egregious or ongoing violations.

Another statute, [Title VI](#), also reaches racial profiling. Unlike the statutes previously discussed, which enforce constitutional norms, Title VI creates a new cause of action that prohibits discrimination on the basis of race, color, sex, religion, or national origin by the recipients of certain federal funds. Title VI can provide an easier route for bringing a racial profiling claim, at least under DOJ's enforcement authority. For a Title VI claim, DOJ need not show intentional discrimination; it can identify practices that have a disproportionate effect, or "[disparate impact](#)" because of race that is "[unintentional, but avoidable](#)." To prevail, DOJ must [identify a police practice causing a disparate impact](#), and the police department may then defend the practice if it shows that it is [necessary for proper law enforcement](#). Because it is hard to prove that officers or departments *intended* to discriminate, Title VI can sometimes be invoked more easily against race-based enforcement actions.

Private plaintiffs, in contrast, [must prove intentional discrimination in a Title VI claim](#). A statistical disparity is insufficient. It is enough, however, if plaintiffs show that race was "[a motivating factor](#)" in a discrimination claim, even if other factors played a role. In one case, Hispanic plaintiffs stated a valid Title VI claim when they alleged that ethnicity and immigration concerns motivated an Arizona sheriff's office to [target them for stops](#).

Racial Profiling Litigation

To determine whether a police department engages in illicit racial profiling, courts look at metrics such as [how often](#) people of color are subjected to stops and searches relative to their portion of the population; whether [searches frequently turn up contraband](#); and [how often stops lead to an arrest or charges](#). Litigants must generally compile a significant body of [statistical and anecdotal evidence to prevail in a profiling case](#).

A profiling case in Newark shows one of the possible difficulties in bringing profiling cases: acquiring and analyzing large data sets. A [statistician](#), working for a group of private attorneys, counted turnpike drivers, speeders, and traffic stops by race. The researcher reported his study required "[careful design, teams of researchers with binoculars\[,\] and a rolling survey](#)." Ultimately, profiling victims used the study to [exclude improperly obtained evidence](#) and the Department of Justice, learning of the results, [brought its own Section 12601 action](#). Other cases further show the complexity of this type of litigation. A private suit in New York City revealed the jurisdiction conducted over [4.4 million](#) pedestrian stops between 2004 and 2014. Analysis of the stops showed they targeted black and Hispanic residents. A court, finding equal protection violations, held that blacks and Hispanics were also "[more likely to be subjected to the use of force than whites](#)."

Considerations for Congress

Recent legislative proposals have included many provisions related to police reform. The [Justice in Policing Act](#) would define racial profiling as "a law enforcement agent or agency relying, to any degree, on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation" in planning law enforcement activities. Even "spontaneous investigatory activities" would fall under the Act's purview if they have "[a disparate impact](#)" on a covered group. Under the proposed statutory cause of action and in contrast to suits based on an equal-protection analysis, individuals would not have to prove intent; they could prevail by showing only an unjustified, discriminatory effect. The Department of Justice or individual victims would be able to enforce the law in either federal or state court. The bill would require federal law enforcement agencies to revise policies to eliminate profiling; it would also provide funding and training for state and local agencies and require funded agencies to set up [administrative complaint procedures](#) to address profiling allegations. [The Just and Unifying Solutions To Invigorate Communities Everywhere Act of 2020](#) (JUSTICE Act) would also direct training development and would condition funding on [training](#) and [reporting](#), aiming to stem racial profiling. More general

proposals in these comprehensive bills would aim to improve bias awareness, promote hiring diversity, and track officer misconduct to evaluate patterns. Another [Legal Sidebar](#) compares provisions of those comprehensive proposals.

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