

Staff Memorandum 2022-12
Traffic Enforcement and Assignment of Counsel:
Updates on Staff Research and Preliminary Proposals

At its September 2022 meeting, the Committee heard from panelists and discussed traffic enforcement and assignment of counsel. This memorandum presents brief research updates and proposals for further discussion on those topics.

Summary Updates on Staff Research

The Committee directed staff to research a number of topics, as indicated below:

1. Effectiveness of advising of the right to refuse a consent search

Data reported to RIPA in 2020 showed that nearly 95% of people consented to a search when asked by an officer.¹ Unless agency-specific policies exist, police officers are not required to explain to a person that they have the right to refuse or limit a consent search.² Some law enforcement agencies, including the Los Angeles Police Department, have adopted reforms that require a person be given a *Miranda*-like warning before consenting to a search.³ Research has suggested that these warnings, and even requiring written consent to search, are ineffective because they do not mitigate the coercive nature of the request or increase the person's understanding of their rights.⁴ In its 2022 report, the RIPA Board concluded that advisal of rights and written waivers do not address the root problems of consent searches, and that limiting or eliminating consent searches are better solutions.⁵

2. Effect of traffic stop reforms in jurisdictions that have implemented them

There is limited data on the impact of the various traffic stop reforms implemented throughout the country, due in part to the recency of the reforms. Data provided to the Committee by Lizabeth Rhodes shows that in the three months after the Los Angeles Police Department pretext stop policy was implemented, the proportion of stops made for non-moving and equipment violations was 10% lower than it was during the same three-month period in the

¹ Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 100.

² See *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

³ See e.g., Los Angeles Police Department, *Field Officer's Notebook, Form 15.03.00* (Nov. 20, 2020).

⁴ See Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 108-108; Roseanna Sommers and Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. 1962 (2019); See also Nancy Leong and Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 Wis. L. Rev. 751, 782-283, 788-789 (2013).

⁵ Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 113.

preceding year.⁶ However, as Ms. Rhodes noted during the Committee meeting, the number of traffic stops, and proportion of traffic stops made for non-moving and equipment violations had been in decline for a number of years, and the decline may not have been caused by this policy change.

A police agency in Hartford, Connecticut strategically enforced defective lighting and other low-level traffic violations in an effort to suppress DUI driving in a college district.⁷ Data indicated that in one year, nearly 40% of traffic stops made by the agency were for defective lighting violations, but only 1 of the 1,608 stops made for defective lighting had resulted in a DUI charge, and there were racial disparities in stop rates.⁸ Relying on this data, the police agency altered their DUI enforcement strategy to focus on objective signs of impaired driving, and after making the change, disparities were reduced and the number of DUI arrests increased.⁹

3. Geographical differences in traffic stop rates

Analyses of traffic stop rates within specific jurisdictions have shown wide variation in the number of stops by geographical area:

- The LAPD Office of the Inspector General's (OIG) report on stops made in 2019 found that the patrol division that conducted the most stops made four times as many stops as the division with least amount of stops, and that the five geographic areas with the largest number of stops also had the highest proportion of Black people stopped.¹⁰ The OIG concluded that the differences in stop rates were due in large part to officer deployment patterns to areas with the highest reported levels of violent crime.¹¹ Areas with high stop rates were also associated with increased transit-related activities and higher numbers of people experiencing unsheltered homelessness.¹²

⁶ See Written Submission of Lizabeth Rhodes to Committee on Revision of the Penal Code, September 2, 2022.

⁷ *Id.* at 9-10.

⁸ *Id.*

⁹ *Id.*

¹⁰ Los Angeles Police Commission, Office of the Inspector General, *Review of Stops Conducted by the Los Angeles Police Department in 2019*, 14, 21-23 (2020). These areas also had higher proportions of Black residents compared to other areas of the city. As Judge Henderson suggested at the September 2022 Committee meeting, the highest number of stops occurred in the Central division. *Id.* at 14.

¹¹ *Id.* at 15.

¹² *Id.*

- Advancement Project California's 2021 report on stops conducted by the LAPD found that traffic stop rates in the County are positively correlated with neighborhood poverty rates.¹³
- A study of policing in San Diego County that analyzed stop rates by police beat found that stop rates differed substantially by beat.¹⁴ For example, the stop rate in one beat was twenty-eight times higher than that of the median beat.¹⁵ There was also significant variation in the extent of racial disparities in stop rates by police beat, but Black people were stopped at higher rates than white people in 106 (85%) of the 125 beats.¹⁶

4. Use of ruses to obtain consent to search

The use of a ruse to obtain consent is just one factor to be considered in determining whether a person's consent was valid.¹⁷ For consent to be valid, the totality of the circumstances must indicate that the person's consent was free and voluntary and not a submission to an unlawful claim of authority or the result of coercion or duress.¹⁸ The United States Supreme Court has held that consent was involuntary where officers falsely announced that they had a warrant to search a home before obtaining consent.¹⁹ California courts have also held that "[w]here the circumstances indicate that a suspect consents because he believes resistance to be futile, or if any suggestion is made to the suspect that 'it would be unwise or fruitless to resist,' the search cannot stand."²⁰

Preliminary Staff Proposals

After witness testimony at the September 2022 meeting, the Committee discussed several areas in which to make proposals to revise the Penal Code. Presented below are three preliminary proposals from staff for further discussion and analysis by the Committee.

1. Prohibit traffic stops for non-safety-related traffic offenses.

Summary Staff Proposal

Prevent law enforcement from stopping vehicles for specified non-moving and equipment violations that do not endanger public safety.

¹³ Advancement Project California, *Reimagining Traffic Safety & Bold Political Leadership in Los Angeles* (2021).

¹⁴ Samuel Sinyangwe, *Evaluating Policing in San Diego*, 3-5, Police Scorecard.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *People v. Avalos*, 47 Cal.App.4th 1569, 1577-1580 (1996).

¹⁸ *Schneckloth v. Bustamonte*, 412 U.S. 218, 233-234 (1973).

¹⁹ See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

²⁰ See *People v. Valenzuela*, 28 Cal.App.4th 817, 832 (1994).

Current Law

Police officers can stop people for any observed traffic infraction, no matter how minor the violation.

Background

California police officers reported making nearly 2.5 million traffic stops in 2020, and data indicate that the rate at which people are stopped, and the type of infractions they are stopped for varies significantly by race. As RIPA Board Co-Chair Steven Raphael explained to the Committee, local law enforcement agencies make stops for non-moving and equipment violations more frequently than CHP, and racial disparities are more pronounced in stops for these offenses than they are in stops for moving violations. (Committee staff is working with Professor Raphael to gather data on disparities in specific non-moving violations.)

While there are several explanations for the observed differences in stop rates,²¹ one factor is the use of pretext stops — stops for minor traffic offenses that are used to investigate crimes for which an officer would not otherwise have legal justification to stop a person. During the September 2022 meeting, Lizabeth Rhodes, Director of the Los Angeles Police Department Office of Constitutional Policing, told the Committee that pretext stops are a useful policing tool. But to address concerns around stops for non-safety-related traffic offenses the LAPD recently implemented a pretext stop policy which limits traffic stops by requiring that officers have a public safety justification for stopping a person. Data shared by Ms. Rhodes showed a reduced number of traffic stops and a greater proportion made for moving violations after the change in policy.²²

Other experts who appeared before the Committee described the ways in which disproportionate traffic policing negatively impacts public safety. Jordan Woods, Professor of Law at the University of Arizona, explained that disproportionate traffic stops have played a role in labeling people of color as suspicious and dangerous, and highlighted recent cases demonstrating that routine traffic stops for minor offenses have the potential to escalate into police killings. Chauncey Smith, Senior Manager of Criminal Justice at Advancement Project California, shared research findings indicating that while traffic stops do not reduce the number of motor vehicle fatalities, disproportionate traffic policing can lead to increased trauma and anxiety for individuals who are stopped by police.²³ Other

²¹ See Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California (Oct. 2021) (noting that many factors contribute to whether an officer stops a person and to their subsequent actions).

²² See Written Submission of Lizabeth Rhodes to Committee on Revision of the Penal Code, September 2, 2022.

²³ See Written Submission of Chauncey Smith to Committee on Revision of the Penal Code, September 2, 2022; See also Justin Feldman, *Public Health and the Policing of Black Lives*, Harvard

research indicates that pretext stops are inefficient in recovering illegal contraband and ineffective in reducing crime rates.²⁴

Law enforcement agencies throughout the state have started to develop policies that limit traffic enforcement for low-level offenses.²⁵ Other states, including Oregon²⁶ and Virginia,²⁷ have passed legislation with similar goals. Limiting traffic stops for non-safety-related offenses throughout California would help to alleviate disparities, improve perceptions of the fairness of our criminal legal system, and encourage the development of policing strategies that are more effective and less harmful.

Staff Proposal

The Committee should consider recommending that police officers be prohibited from making stops for non-safety-related traffic infractions, including, the below, which are the most common ones in the RIPA data:

- Vehicle or equipment registration;²⁸
- Positioning or number of license plates;²⁹
- Lighting equipment;³⁰
- Window tints or obstructions,³¹ and;
- Bicycle equipment and operation³²

Public Health Review 7 (2015); RIPA Board Meeting Archives, *DRAFT 2023 RIPA Board Report*, 3 (July 28, 2022)(citing studies).

²⁴ See NYU School of Law Policing Project, *An Assessment of Traffic Stops and Policing Strategies in Nashville*, 3 (2018).

²⁵ See Los Angeles Police Department Manual Section 1/240.06, *Policy — Limitation on Use of Pretextual Stops*; Oakland Police Department, Office of the Chief of Police, *2016-18 Racial Impact Report* (2019); San Francisco Police Department, *Draft General Order 9.01*.

²⁶ Senate Bill 1510, 81st Oregon Legislative Assembly - 2022 Regular Session.

²⁷ Virginia SB 5029 (Lucas), 2020 Special Session I. Legislation reversing the law is currently moving forward in the legislature. Virginia HB 79 (Campbell), 2022 Session.

²⁸ See e.g. Vehicle Code §§ 4000, 5350.

²⁹ See e.g. Vehicle Code §§ 5200, 5201, 5202, 5204.

³⁰ See e.g. Vehicle Code §§ 24252, 24400, 24600, 24601.

³¹ See e.g. Vehicle Code §§ 26708, 26710.

³² See e.g. Vehicle Code §§ 21201, 21212.

2. Limit consent searches during traffic stops.

Summary Staff Proposal

Allow police officers to request a person's consent to search during a traffic stop only when the officer has reasonable suspicion that the search will uncover evidence of a crime.

Current Law

Unless agency-specific policies exist, police officers are permitted to request a person's consent to search their person, vehicle, or property without any facts that support a suspicion of wrongdoing.

Background

While traffic infractions are generally minor offenses that carry a maximum punishment of a fine, they can sometimes lead to searches of people or vehicles. The legal justifications for these searches can vary,³³ but in many instances — 21,000 in 2020 — the only legal basis for the search is the stopped person's consent.³⁴

Consent-based searches are inefficient — California law enforcement reported that only 12% of those conducted in 2020 resulted in the discovery of anything illegal.³⁵ And police officers perform consent-only searches in stops of Black and Hispanic people at disproportionate rates than in stops of white people, despite it being less likely that they would find contraband or evidence.³⁶ Data show that when consent-only searches are performed, the underlying reason for the initial police contact is more likely to be traffic enforcement for people of color than it is for white people.³⁷

At the September 2022 Committee meeting, Professor Steven Raphael presented recent research conducted by the Public Policy Institute of California that examined whether differences in search rates could be explained by circumstances unrelated to racial bias.³⁸ The research applied several regression models to adjust and account for factors like the stopped person's age, the reason

³³ Officers reporting to RIPA can select from 13 different search criteria including, officer safety, search warrant, incident to arrest, and vehicle inventory. Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 133, fn 259.

³⁴ The RIPA Board reported 39,709 total consent-only searches in 2020, 53.4% of which occurred during traffic stops. *Id.* at 102, 105.

³⁵ Racial & Identity Profiling Advisory Board, *Annual Report 2022*, 103, 105.

³⁶ *Id.* at 55.

³⁷ *Id.* at 105-106.

³⁸ Magnus Lofstrom et al., *Racial Disparities in Law Enforcement Stops*, Public Policy Institute of California (Oct. 2021).

for the stop, and differing search rates across law enforcement agencies.³⁹ After adjusting for these differences, researchers concluded that even after accounting for these factors, Black people were still 1.5 times more likely to be searched during a stop than white people.⁴⁰

The Los Angeles Police Department recently introduced a search policy that requires officers to give people a *Miranda*-like advisement when seeking consent to search, and to record their response on a written form that is signed by the person.⁴¹ According to Committee panelist Lizabeth Rhodes, LAPD's Director of Constitutional Policing, this policy serves to educate the public of their rights while emphasizing to police officers that consent must be knowing and voluntary. (Committee staff has asked Ms. Rhodes to provide any data on the effects of this policy.)

While legal experts have called for the development of these type of guidelines for many years,⁴² the RIPA Board concluded in its 2022 report that it would be better to ban consent searches altogether.⁴³ At least one state, Connecticut, has passed legislation that prohibits police officers from asking for consent to search a vehicle during a traffic stop.⁴⁴

In California, unless police officers have consent to search, they need probable cause that a vehicle contains evidence of criminal activity or contraband in order to conduct a warrantless search of a vehicle.⁴⁵ Officers are also allowed to conduct a more limited search of a vehicle when they reasonably suspect that a person is armed and dangerous.⁴⁶ The reasonable suspicion threshold could be extended to consent searches, so that consent-based searches are only undertaken when there is some articulable level of suspicion as opposed to a potentially biased hunch. Though other states, including New York, have legal categories of suspicion with a lower threshold than reasonable suspicion or probable cause, California does not.⁴⁷ Asking California police officers to apply the familiar reasonable suspicion standard to consent searches is less complicated than creating an entirely new tier of suspicion.

³⁹ *Id.* at 12-13.

⁴⁰ *Id.*

⁴¹ See Los Angeles Police Department Field Officer's Notebook, *Form 15.03.00 – Revised; And Consent to Search Verbal Advisement, Form 15.05.00 – Activated.*

⁴² See e.g., Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 1030 (2002); Gerard E. Lynch, *Why Not a Miranda for Searches?*, 5 Ohio. St. J. Crim. L. 233, 245 (2007).

⁴³ Racial & Identity Profiling Advisory Board, Annual Report 2022, 113.

⁴⁴ See Connecticut House Bill No. 6004, July 2020 Special Session, Public Act No. 20-1.

⁴⁵ *U.S. v. Ross*, 456 U.S. 798, 799-800 (1982).

⁴⁶ *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

⁴⁷ See e.g. *People v. Debour*, 40 N.Y. 2d 210 (1976) (articulating two additional, lower levels of suspicion which must be met for police to approach and question a person).

Staff Proposal

The Committee should consider recommending that police officers be allowed to request a person's permission to search during a traffic stop only when the officer has reasonable suspicion that the search will uncover evidence of a crime.

3. Require appointment of counsel within sufficient time to provide meaningful representation at the first court appearance.

Summary Staff Proposal

Require counsel to be appointed for jailed individuals shortly after their booking, and ensure that counsel have access to the individuals and necessary information about them from jails and courts.

Current Law

An arrested person must be taken to court for an arraignment within 48 hours (not including Sundays and holidays), and informed of their right to counsel. Upon determination of eligibility, the court must appoint counsel for people who cannot afford to pay for representation.

Background

At the September 2022, Committee meeting, Paul Heaton, Academic Director of the Quattrone Center for the Administration of Justice, presented empirical evidence that “improving the quality of counsel at first appearance can realize broadly shared goals of reducing bail violations, enhancing public safety, diminishing racial disparity, and reducing the system’s imprint on people’s lives.” But in many California counties, people who cannot afford to hire an attorney before their first court appearance appear before judges without any counsel at all.⁴⁸

As explained to the Committee by Galit Lipa, Executive Director of the Indigent Defense Improvement Division of the Office of the State Public Defender, while some counties have established prompt representation programs, access to counsel during the early stages of a case is inconsistent across the state and nonexistent in many counties. In fact, California has 25 counties without a county public defender office at all.⁴⁹ Ms. Lipa described that in one county without a public defender office, Butte, people who are arrested and held in

⁴⁸ California law requires people who are arrested and held in custody to be taken to court for an arraignment within 48 hours (not including Sundays and holidays). Penal Code §§ 825, 849.

⁴⁹ Legislative Analyst’s Letter to Rep. Arambula, Overview of Indigent Defense Counsel, (September 16, 2020)

custody can spend up to 10 nights in jail before being appointed counsel.⁵⁰ Twenty-seven states, including Illinois, Florida, and New York, require that the state provide counsel at someone's initial appearance.⁵¹

While some sections of California's Penal Code describe a system where it is anticipated that attorneys will begin assisting people before arraignment,⁵² the Penal Code does not specify a timeframe in which counsel must be appointed. In several counties highlighted by Committee panelists, this results in courts regularly accepting guilty pleas from uncounseled people at arraignment.

Public defender offices in a few counties have developed early representation programs that allow attorneys to begin assisting people much earlier in the process and before they see a judge.⁵³ Carlie Ware, who supervises an early representation unit at the Santa Clara County Public Defender's Office, outlined the building blocks of an effective early representation program, including information sharing between county agencies, and access to the people held in custody. Santa Clara County Assistant District Attorney David Angel emphasized that when it comes to early assignment of counsel, the interests of public defenders and district attorneys are often aligned — arrested people are released from custody sooner and with access to more services, improving public safety.

Some public defender offices have incorporated other professionals such as social workers — who may be better suited to the information-gathering and needs-assessments that occur during a first meeting with a client — to assist in the process.⁵⁴

California has recently passed legislation improving the appointment of counsel process in juvenile cases. Assembly Bill 2644 (Holden) requires public defenders to be notified of all juvenile bookings within two hours. Extending similar reforms to the adult system can improve public safety while recognizing that people should be treated equally regardless of how much money they have.

⁵⁰ Written Submission of Galit Lipa to Committee on Revision of the Penal Code, September 2, 2022.

⁵¹ Deason Criminal Justice Reform Center, *Grading Injustice: Initial Appearance Report Cards*, 65 September 2022. Like many other states, California received an "F" grade on its policies around initial court appearances for arrested people. *Id.* at 15.

⁵² See Penal Code §§ 825(b) (specifying that an attorney may visit a person after their arrest), and 1269c (allowing attorneys to request the magistrate set bail lower than schedule before the arraignment).

⁵³ Public defender offices in Contra Costa, Sacramento, Santa Clara, and Santa Cruz have all developed unique early representation programs.

⁵⁴ See e.g. *New Public Defender Program Wins Merit Award*, Sac County News (Nov. 12, 2020) (describing the Sacramento County Public Defender Office's Pretrial Support Project, which uses law students and social workers to conduct needs assessments of arrested individuals within 24 hours of booking, and provide linkage to services and case management.)

Staff Proposal

The Committee should consider the following recommendations:

- Require that counsel be assigned promptly after arrest: either sufficiently before arraignment so they can provide meaningful representation or within 24 hours of booking, whichever is earlier.
- To facilitate this prompt assignment of counsel:
 - Establish a presumption that a detained person is eligible for indigent defense services.
 - Require indigent defense counsel to be notified of individuals who are being held in custody after an arrest.
 - Require local jails and courts to ensure that defense counsel and other members of the defense team, such as social workers, have access to detained individuals prior to formal appointment of counsel, without delaying the initial court appearance.
 - Allow individuals to waive the right to counsel only after they have spoken individually to a defense attorney.

Conclusion

Staff looks forward to discussing with the Committee the research and proposals presented in this memorandum.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

Rick Owen
Senior Staff Counsel