

**Unit Goal: Racial profiling and the law**

**6.1. Identify the legislative requirements placed upon peace officers and law enforcement agencies regarding racial profiling.**

**Instructor Note: Refer to the current Texas Criminal Law Manual.**

Code of Criminal Procedure

- 3.05
- 2.131
- 2.132
- 2.133
- 2.134
- 2.136
- 2.137
- 2.138
- 2.1385

Education Code

- 96.641(a)(k)

Occupations Code

- 1701.253(c)(h)
- 1701.402(e)

Transportation Code

- 543.202(a)

**6.2. Write the adopted department policy on racial profiling.**

- Written departmental policies:
  - Definition of what constitutes racial profiling.
  - Prohibition of racial profiling
  - Complaint process
  - Public education
  - Corrective action
  - Collection of traffic-stop statistics
  - Annual reports
- Not prima facie evidence
- Feasibility of use of video equipment
- Data does not identify officer.
- Copy of complaint-related video evidence to officer in question
- Vehicle stop report:
  - Physical description of detainees: gender, race, or ethnicity
  - Alleged violation
  - Consent to search
  - Contraband
  - Facts supporting probable cause.

- Arrest
- Warning or citation issued.
- Compilation and analysis of data
- Officer non-liability
- Funding
- Training in racial profiling:
  - Police chiefs
  - All holders of intermediate certificate

**Instructor Note:** Share, review, and discuss the following information with the students.

- Appendix A: Sample General Order (Texas Police Chiefs Association Best Practices)

**Note:** Please have students review the format of their agency's Racial Profiling Report. This data has been required for all traffic stops as of January 1, 2021. The new report can be found in the agency's TCLEDDS account.

### **6.3. Explain Supreme Court decisions and other court decisions regarding traffic stops and prohibited racial profiling.**

- Supreme court cases
  - Whren v. United States, 517 U.S. 806, 116 S. Ct. 1769 (1996)
  - Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968)
- Other cases
  - Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330 (1977)
  - Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882 (1997)
  - Graham v. State, 119 Md. App 444, 705 A.2d 82 (1998)
  - Pryor v. State, 122 Md. App. 671 (1997), cert. denied 352 Md. 312, 721 A.2d 990 (1998) (other citations omitted)
  - Ferris v. State, 355 Md. 356, 735 A.2d 491 (1999)
  - New York v. Belton, 453 U.S. 454 (1981)
- Recent cases
  - Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400 (2007)
  - Virginia v. Moore, 553 U.S. 164, 128 S. Ct. 1598 (2008)
  - Arizona v. Johnson, 555 U.S. 323, 129 S. Ct. 781 (2009)

**Instructor Note:** Review select court decisions on traffic stops. Review rule, read facts, discuss issue, and interpret conclusion. You can find resource on LexisNexis.

### **Unit Goal: Racial Profiling and the community.**

#### **6.4. Explain the legal, ethical, and moral responsibilities against racial profiling.**

- Declaration of Independence
- Fourth Amendment
- U.S. Constitution Preamble
- Pledge of Allegiance

- Texas Constitution (Article 1. Bill of Rights, Section 9. Search and Seizure)
- Bible

### 6.5. Identify logical and social arguments against racial profiling.

- There are appropriate reasons for unusual traffic stops (suspicious behavior, the officer's intuition etc.), but police work must stop short of cultural stereotyping and racism.
- Racial profiling would result in criminal arrests, but only because it would target all members of a race randomly—the minor benefits would be far outweighed by the distrust and anger towards law enforcement by minorities and the public as a whole.
- Racial profiling is self-fulfilling bad logic: if you believe that minorities committed more crimes, then you might look for more minority criminals, and find them in disproportionate numbers.
- Inappropriate traffic stops generate suspicion and antagonism towards officers and make future stops more volatile—a racially-based stop today can throw suspicion on tomorrow's legitimate stop.
- By focusing on race, you would not only be harassing innocent citizens, but overlooking criminals of all races and backgrounds—it is a waste of law enforcement resources.

Racial profiling is wrong and will not be tolerated: Racial profiling sends the dehumanizing message to citizens that they are judged by the color of their skin and harms the criminal justice system by eviscerating the trust necessary for law enforcement to effectively protect communities. Police cannot ascribe certain behavior traits to a person, or a group merely based on their race or ethnic background. If police action is taken, it must be because the person in question has violated a law, not because he or she is of a particular race, ethnicity, or gender. Police can only intervene based on what people do, not on what they look like.

**SCENARIO:** A police officer parked on the side of a highway notices that nearly all vehicles are exceeding the posted speed limit. The officer's attention is immediately drawn to an older SUV travelling slower than the other vehicles on the highway yet at the posted speed limit. Contained within this SUV are 4 young bearded Middle Eastern men each wearing a "Keffiyeh" (Arabic headdress). The officer initiates a traffic stop based on only a "feeling" as a pretext to further investigate. Would this situation be considered, "racial profiling?"

**Instructor Note:** Student must articulate that in connection with an initiative to prevent terrorist activity, law enforcement authorities may not target members of any race or religion as suspects based on a generalized assumption that members of that race or religion are more likely than non-members to be involved in such activity.

**Instructor Note:** Display one (or both) of the following TEDx Talks videos on YouTube as applicable.

- How Racial Profiling Hurts Everyone, Including the Police (10:37) [https://www.youtube.com/watch?v=LCX\\_Th-ljjE](https://www.youtube.com/watch?v=LCX_Th-ljjE)
- Policing the Bridge (8:32) <https://www.youtube.com/watch?v=Iz7fva4OQzo>

### Unit Goal: Racial profiling versus reasonable suspicion

#### 6.6. Identify elements of typical racially motivated traffic stops.

- Definition
  - Racial Profiling: a law enforcement-initiated action based solely on an individual's race, ethnicity, and/or national origin, rather than on the individual's behavior and/or information tending to identify the individual as having engaged in criminal activity.
- Examples of racial profiling include, but are not limited to, the following:
  - Citing a driver who is speeding in a stream of traffic where most other drivers are speeding, solely because of the cited driver's race, ethnicity, or national origin.
  - Stopping or detaining the driver of a vehicle solely based on the determination that a person of that race, ethnicity, or national origin is unlikely to own or possess that specific make or model of vehicle.
  - Stopping or detaining a person solely based on the determination that a person of that race, ethnicity, or national origin does not belong in a specific geographic area or a specific place.
- A typical traffic stop resulting from racial profiling:
  - The vehicle is stopped based on a minor or contrived traffic violation which is used as a pretext for closer inspection of the vehicle, driver, and passengers.
  - The driver and passengers are questioned about things that do not relate to the traffic violation.
  - The driver and passengers are ordered out of the vehicle.
  - The officers visually check all observable parts of the vehicle.
  - The officers proceed on the assumption that drug courier work is involved by detaining the driver and passengers by the roadside.
  - The driver is asked to consent to a vehicle search—if the driver refuses, the officers use other procedures (waiting on a canine unit, criminal record checks, license-plate checks, etc.), and intimidate the driver (with the threat of detaining him/her, obtaining a warrant, etc.).

#### 6.7. List the elements of legal contact with drivers and occupants of vehicles.

- Voluntary encounter: no suspicion
- Temporary detention "Terry Stop": Reasonable suspicion required
  - Theories for stop
    - Traffic Violations
    - "Pretext" Stops
    - Community Caretaking
    - Citizen Calls
    - Roadblocks/checkpoints
  - Temporary detention options
    - Detain individual for a reasonable period of time to satisfactorily account for his activity.
    - Interview (No "Miranda Warning" is required)

- Make reasonable investigative inquiries, i.e., request identity, reason for being in area, explanation of suspicious conduct.
- Seek consent for pat down or search.
- Transport detainee to possible crime scene.
- Arrest: Probable cause required
  - Reasonable Suspicion/Probable Cause
    - Reasonable Suspicion
      - An officer can briefly detain an individual or make a traffic stop if there is reasonable suspicion a person committed a crime, is currently committing a crime, or plans to engage in criminal activity—based on certain facts or circumstances. Having a gut feeling or a hunch does not qualify as reasonable suspicion.
      - There must be reasonable suspicion in any type of criminal case, including traffic offenses and driving while intoxicated (DWI). Examples of actions that may establish reasonable suspicion to stop someone for DWI who is driving include:
        - Weaving,
        - Frequent braking,
        - Drifting between lanes,
        - Driving without headlights at night
        - Following too closely (tailgating)
        - Slow response to traffic or officer's signals
    - Probable Cause
      - An officer can make an arrest or conduct a search or seizure if probable cause is established. To prove probable cause, law enforcement must demonstrate there are facts or evidence that would lead a reasonable person to believe that a crime has been committed, is being committed, or will be committed in the future.
      - Making an illegal turn, having a taillight out and expired registration are probable cause reasons for a vehicle stop against the transportation code.

A higher standard is required to establish probable cause than reasonable suspicion. It cannot be shown based on an officer's suspicions or guesses. It must be based on facts and hard evidence. In some cases, sufficient probable cause can develop after the police detain someone based on reasonable suspicion. There are many ways that the police can establish probable cause to arrest an individual. Examples include smelling alcohol or drugs on them, seeing evidence, such as a gun, drugs, or stolen property, in plain view, or an admission of guilt.

### **6.8. Describe the various basis for vehicle stops based on the legal standard.**

- Officer's Mistake of Fact/Law Will Not Make Stop Illegal
  - State v. Varley, No. 02-15-00076-CR, 2016 WL 4540491 (Tex. App. Fort Worth 2016)

- Officer's mistaken belief that defendant violated statute by driving with only one functioning brake light was reasonable. Because the mistake of law was "reasonable" it provided sufficient reasonable suspicion to justify the traffic stop.
- Information from Citizen/Police Radio/Anonymous Call
  - *Chrisman v. State*, No. 06-16-00179-CR, 2017 Tex. App. LEXIS 2785, 2017 WL 2118968 (Tex. App. Texarkana 2017)
  - This stop was based solely on a 9-1-1 call from a bartender who stated an intoxicated person had just driven away from the bar after being denied service and who refused to take a cab. The defendant argued the stop was improper based on a conclusory statement made by the bartender. The court properly denied the defendant's motion to suppress even if the statement from the bartender was conclusory it was sufficiently corroborated by other details. For example, when the bartender called 9-1-1, he gave his name, phone number and identified himself as the bartender at the establishment. The court found him to be reliable. Furthermore, the court found the information provided to the dispatcher by the bartender to be sufficiently corroborated by additional details from which the dispatcher could have surmised from the bartender.
- Bad Driving/Conduct Need Not Equal Criminal Offense
  - *Derichsweiler v. State*, 348 S.W.3d 906 (Tex. Crim. App. 2011), S. Ct. cert. denied, Oct. 3, 2011.
  - The defendant was reported to be stopping next to vehicles in parking lots and staring at the occupants of those vehicles. That conduct resulted in a 9-1-1 call which ended with the detention and arrest of the defendant. The issue: was the defendant's non-criminal behavior enough to justify an investigative stop without reasonable suspicion of a particular offense? The Court said yes, pointing out there is no requirement to point to a particular offense, but rather reasonable suspicion he was about to engage in criminal activity.
- "Community Care-Taking Function" (CCF)
  - *Wright v. State*, 7 S.W.3d 148 (Tex. Crim. App. 1999) ref'd on remand, 18 S.W.3d 245 (Tex. App. Austin 2000, pet. ref'd).
  - The case came to the Court of Criminal Appeals when the Austin Court of Appeals failed to apply the "community care-taking function" in holding the stop in this case to be unreasonable. The basis for the stop was the officer observed a passenger in the vehicle vomiting out of a car window. The Court of Appeals did not believe that concept covered a passenger's actions. The Court of Criminal Appeals held the exception could apply to these facts and listed four factors that are relevant in determining when community caretaking provides a sufficient basis for a traffic stop.
    - the nature and level of distress exhibited by the individual
    - the location of the individual
    - whether the individual was alone and/or had access to assistance independent of that offered by the officer; and

- to what extent the individual—if not assisted—presented a danger to himself or others.

The court added that, “as part of his duty to ‘serve and protect’ a police officer may stop and assist an individual whom a reasonable person—given the totality of the circumstances—would believe is in need of help.” The case was remanded back to the Court of Appeals which in 18 S.W.3d 245 (Tex. App. Austin 2000) applied the above-mentioned factors and found the stop to be unreasonable.

**INSTRUCTOR NOTE:** Open this case and review with students the court’s reasoning behind finding the stop unreasonable. <https://caselaw.findlaw.com/tx-court-of-appeals/1495874.html>

- Officer’s Arrest Authority When Outside Jurisdiction

For A Traffic Offense:

- Stops made before 9-01-05 = NO
  - State v. Kurtz, 152 S.W.3d 72 (Tex. Crim. App. 2004) An officer of a municipal police department does not have authority to stop a person for committing a traffic offense when the officer is in another city within the same county.
- Stops made after 9-01-05 = YES
  - CCP Article 14.03 (g) (1). Authorizes a municipal police officer to make a warrantless arrest for a traffic offense that occurs anywhere in the county or counties in which the officer’s municipality is located.

**Note:** This legislative change effectively overrules the Kurtz case listed above.

- Operating Vehicle in Unsafe Condition

- State v. Kloecker, 939 S.W.2d 209 (Tex. App. Houston [1st Dist.] 1997, no pet.)
- Trial judge held there was insufficient basis for the stop. Court of Appeals reversed holding the officer observed the defendant was driving on a tireless metal wheel and knew this constituted the traffic offense of driving a vehicle on a highway in an unsafe condition.

- Rapid Acceleration/Spinning Tires

- YES. Fernandez v. State, 306 S.W.3d 354 (Tex. App. Fort Worth 2010, no pet.)  
Officer heard defendant’s pickup loudly squeal its tires and saw light smoke coming from the tires as the pickup fishtailed about two feet outside its lane of traffic supporting officer’s opinion that what he observed constituted reckless driving and supported the stop. This was so although there were no vehicles directly around defendant’s vehicle though there was testimony there were other vehicles in the area.
- NO. State v. Guzman, 240 S.W.3d 362 (Tex. App. Austin 2007, pet. ref’d).  
The spinning motion of one tire of defendant’s truck as truck began to move from a stop after a traffic light turned green did not alone give police officer reasonable suspicion the defendant was unlawfully exhibiting acceleration in violation of statute pertaining to racing on highways, and thus officer’s stop of defendant’s vehicle on that basis was unlawful.

- Approaching A Vehicle That is Already Stopped

- Murray v. State, No. 07-13-00356-CR, 2015 WL 6937922 (Tex. App. Amarillo 2015)
- At 1:00 a.m. officer saw Defendant's vehicle parked parallel to road, partially on improved road and partially in driveway next to closed fireworks stand which had been the location of a previous burglary. Officer parked behind vehicle and walked up to closed car window and knocked and yelled to get Defendant to wake up. Officer finally got defendant to awake, and encounter led to arrest for DWI. In response to defense argument that this was an illegal stop, Court held this was a voluntary encounter. Even though officer testified the Defendant was not going to be allowed to leave once he approached the car this subjective intent regarding whether he could leave is only relevant when it is in some way communicated to the citizen, which was lacking in this case.

**Instructor Note:** Resource: TDCAA Basis for Vehicle Stop-Legal Standard

<https://www.tdcaa.com/resources/dwi/jessica-fraziers-dwi-case-law/v-basis-for-vehicle-stop-legal-standard/>

**Scenario:** A homeowner in an exclusive small suburban neighborhood noticed a late model maroon Range Rover with an out of state vehicle registration. The vehicle was occupied by two Black males in their early 20's. The homeowner reported this Range Rover as suspicious activity to the local law enforcement agency. This neighborhood is predominately an established one and most of the neighbors know each other. Fear of crime had created a deliberate neighborhood cooperative effort for assertive and proactive crime prevention with the local department. Residents had been encouraged to report even minor suspicious activity to law enforcement.

A nearby officer/deputy responded to this "suspicious" vehicle call and quickly encountered the maroon Range Rover. The officer/deputy did not observe any traffic or other law violations. Should the officer/deputy activate his overhead lights, detain, and identify the vehicle's occupants to ease neighborhood concerns? Discuss the below topics of interest in reference to the scenario above.

- Student must be able to ascertain if a civilian's report of suspicious activity creates a reason to detain and identify the Range Rover's occupants? (Not necessarily. The deputy should consider the totality of all objectively reasonable observations. A civilian's suspicion should not be ignored but neither is it a free reason to stop without just legal cause.)
- Student should be able to articulate if there was probable cause for a detention? (No. In this case, no law was broken and unless the deputy sees articulable reasonable suspicions one cannot detain. See CCP 14.03.)
- Student should be able to answer if a traffic stop equates to a consensual and voluntary encounter. (In most cases once overhead emergency lights and equipment are activated it's not a voluntary nor consensual.)
- Student should be able to answer what could the responding officer/deputy do to ensure the requirements of a safe neighborhood and still safeguard the 4th amendment? (The

responding officer/deputy could check the vehicle's registration, video & photograph the vehicle, registration, and possibly occupants; the officer/deputy could maintain a high visibility patrol methodology and even contact the reporter to encourage successful, legal, and continued crime suppression partnerships.)

- Although the maroon Range Rover is suspicious in its appearance, it's not at the standard of CCP 14.03's "reasonable suspicion."

### **6.9. List the valid searches and seizures without warrants.**

- Search Incident to Arrest
- Consent Searches
- Border Searches
- Open Fields
- Plain View and Plain Feel
- Exigent Circumstances
- Inventory Searches
- Automobile Exception

**Instructor note:** Review with students the information provided by the Legal Information Institute <https://www.law.cornell.edu/constitution-conan/amendment-4/valid-searches-and-seizures-without-warrants>

**APPENDIX A: SAMPLE GENERAL ORDER**

	<b>Police Department</b>	
	<b>Section 300: Operations</b>	
	<b>General Order 303: Racial and Bias-based Profiling</b>	
	Effective Date:	Revision Date:
	Issued By:	
	TX Best Practices: 2.01	

**A. Purpose**

The Department is committed to providing law enforcement services to the community with due regard for the racial, cultural, or other differences of those served. It is the policy of this department to provide law enforcement services and to enforce the law equally, fairly and without discrimination toward any individual or group. Race, ethnicity or nationality, religion, sex, sexual orientation, economic status, age, cultural group, disability, or affiliation with any other similar identifiable group shall not be used as the basis for providing differing levels of law enforcement service or the enforcement of the law (Tex. Code of Crim. Pro., Art. 2.131). (*TCPA TBP: 2.01*)

This policy provides guidance to department members and establishes appropriate controls to ensure that employees of the Police Department do not engage in racial- or bias-based profiling or violate any related laws while serving the community.

**B. Definitions**

Racial profiling is a form of discrimination defined by the Texas Code of Criminal Procedure as “law enforcement-initiated action based on an individual’s race, ethnicity or national origin rather than on the individual’s behavior or on information identifying the individual as having engaged in criminal activity.” (*CCP 3.05*) The following are implicit in the definition.

- (1) Racial profiling only becomes an issue as it pertains to contacts with citizens who are viewed as suspects or as potential suspects. It is not relevant as it pertains to witnesses, complainants, or other citizen contacts.
- (2) Racial profiling does not preclude race, ethnicity, or national origin as factors in a detention decision. Race, ethnicity, or national origin may be legitimate factors in a detention decision when used as part of an actual description of a specific suspect for whom an officer is searching. They may not, however, be the only factors in determining whom to detain.
- (3) Detaining an individual and conducting an inquiry into that person’s activities because that person is of a specific race, ethnicity or national origin is racial profiling.

Examples of racial profiling include but are not limited to the following:

- (1) Citing a driver who is speeding in a stream of traffic where most other drivers are speeding because of the driver's race, ethnicity, or national origin.
- (2) Detaining the driver of a vehicle based upon the supposition that a person of that race, ethnicity or national origin is unlikely to own or possess that specific make or model of vehicle.
- (3) Detaining an individual based upon the supposition that a person of that race, ethnicity or national origin does not belong in a specific part of town or in a specific place.

Bias based profiling occurs when enforcement decisions, the decision to render service or aid, or the willingness to engage is based upon the officer's bias either for or against an individual or group because of characteristics, beliefs or values, or legal practices associated with the individual or group.

Bias based profiling is often associated with a person's, race, ethnicity, national origin, religion, age, gender, sexual preference, political affiliation, economic status, cultural group, and/or other identifiers.

### **C. Prohibition**

Racial and/or bias-based profiling is strictly prohibited. Violations of racial and/or bias-based profiling are subject to disciplinary action up to and including termination. Allegations of racial and/or bias based profiling will be investigated consistent with the procedures set forth in 204: Personnel Complaints. (*TCPA TBP: 2.01*)

Nothing in this policy prohibits an officer from using any unique identifier along with other factors that are part of a legitimate description as a reason to detain a possible suspect.

### **D. Responsibilities**

Texas Code of Criminal Procedure Article 2.132 requires law enforcement agencies to collect data from traffic stops in which a ticket, citation, or warning is issued to facilitate the state's reporting requirements. Patrol officers who issue tickets, citations, or warnings are required to collect data on traffic citations to include the race/ethnicity of the detainee; whether a search was conducted, and if so, whether the individual detained signed an acknowledgement or made a recorded verbal statement that the individual consented to the search; whether the peace officer knew the race or ethnicity of the individual before detaining the individual; whether the police officer used physical force that resulted in bodily injury during the stop, and if so, the location and reason for the stop; and whether the citation resulted in a physical arrest. Officers shall ensure the required information is captured on the citation form. All traffic stops shall be audio and video recorded whether a citation was issued or whether a citation was not issued. (*TBP: 2.01*)

Officers detaining a person shall be prepared to articulate sufficient reasonable suspicion to justify a detention, independent of the individual's membership in a protected class. To the extent that written documentation would otherwise be completed (e.g., arrest report, Field Interview (FI) card), the involved officer should include those facts giving rise to the officer's reasonable suspicion or probable cause for the detention, as applicable.

Supervisors shall monitor those individuals under their command for any behavior that may conflict with the purpose of this policy and shall handle any alleged or observed violation of this policy in accordance with the Personnel Complaints Policy. Supervisors will discuss any issues with the involved officer(s) and their supervisor in a timely manner.

Supervisors will review at least three random videos each quarter (3 months) per officer to gain an understanding of that officer's performance and adherence with racial profiling laws (Tex. Code Crim. Pro. Art. 2.132(d)) and this policy. Supervisors will document these reviews in the comments section of the video details section within the video database and make note of the review in the Daily Shift Report. The reviews will encompass all contacts, not just traffic stops [see General Order 602: Body Worn Cameras]. (*TCPA TBP: 2.01*)

In instances where officers record their public contacts, supervisors will review the recordings every 30 days to ensure compliance with racial profiling laws (Tex. Code Crim. Pro. Art. 2.132(d)) and this policy. Supervisors will document these monthly reviews in the Daily Shift Report and are responsible for their log maintenance. The reviews will encompass all contacts, not just traffic stops [see General Order 602: Body Worn Cameras].

All recording will be maintained for 90 days. However, recordings that capture a potential instance of racial- or bias-based profiling will be appropriately retained for administrative investigation purposes. Supervisors shall initiate investigations of any actual or alleged violations of this policy and ensure that no retaliatory action is taken against any member of this department who discloses information concerning racial- or bias-based profiling.

### **E. State Report**

The Police Chief shall submit to the Texas Commission on Law Enforcement (TCOLE) and to City Council an annual report of the information required in Tex. Code of Crim. Pro. Art. 2.132 (b)(6). These reports may not include identifying information about any officer who made a motor vehicle stop or about an individual who was stopped or arrested by any officer (Tex. Code of Crim. Pro. Art. 2.132; Tex. Code of Crim. Pro. Art. 2.134). (*TBP: 2.01*)

### **F. Training**

All sworn members of this department will be scheduled to attend TCOLE-approved training on the subject of racial- and bias-based profiling. Each member of this department undergoing initial TCOLE-approved training will thereafter be required to complete an approved refresher course every five years or sooner if deemed necessary, to keep current with changing racial issues and cultural trends. (*TCPA TBP: 2.01*)