

LAW & UNDERSTANDING
BIAS-FREE POLICING



***Law
Enforcement
Dimensions LLC***
policing with perspective

LAW & UNDERSTANDING BIAS-FREE POLICING

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Bias-Free Professional Policing

BIAS-FREE PROFESSIONAL POLICING

The public is given a right to bias-free professional policing. The law defines bias-free policing, requires officers to comply with this standard, and allows the Attorney General or a citizen harmed by biased policing to bring a lawsuit.

Bias-free policing defined by 6E, § 1.

- A police officer's decisions and conduct shall not be influenced by a person's:
 - Race,
 - Ethnicity,
 - Sex,
 - Gender identity,
 - Sexual orientation,
 - Religion,
 - Mental or physical disability,
 - Immigration status, or
 - Socioeconomic or professional level.
- A police officer's decisions and conduct may only be influenced by these characteristics when:
 - There is a non-discriminatory reason; or
 - A valid basis for different treatment; or
 - They are an element of a crime.

Police bias is a basis for decertification, suspension, or retraining. If the Peace Officer Standards & Training (POST) Commission finds by *clear and convincing evidence* that an officer was biased against one of the protected classes mentioned above, POST may decertify or suspend the officer. 6E, § 10(b)(ii). Upon a lesser finding of *substantial evidence* that an officer was biased, POST may order retraining. 6E, § 10(d).

Bias is a basis for a state civil rights lawsuit. 12, § 11H(b) declares: "All persons shall have the right to bias-free professional policing," which makes this a civil right. When a law enforcement officer is biased and, as a result, decertified, the officer is no longer entitled to the protection of "qualified immunity." The officer is open to a civil rights lawsuit.

UNDERSTANDING & RESPONDING TO ALLEGATIONS OF POLICE BIAS

Commonwealth v. Long makes it easier for defendants to challenge traffic stops on the basis that they were motivated by bias. See *Comm. v. Long*, 485 Mass. 711 (2020).¹

- **What happened on the street.** Two Boston Police officers assigned to the Youth Violence Strike Force were patrolling in an unmarked car. They turned onto a residential street just behind a Mercedes SUV driven by, as they had seen, a black man. An MDT check of the registration showed the vehicle's inspection sticker had expired. The officers stopped the car.

Edward Long presented a learner's permit, but officers learned that his right to drive was suspended. He had outstanding warrants too.

Officers decided to tow Long's "high end" vehicle because they did not want to leave it parked in a location plagued by vandalism and theft — especially since Long was not the registered owner. During the pre-tow inventory, officers found a handgun protruding from a bag in the passenger compartment. Long had no license to carry. He was arrested and charged.

- **What happened in court.** Long's attorney argued that the police stopped Long mainly because he was black. In support, an expert statistician researched seven years of data and concluded:
 - Field Investigation and Observation (FIO) reports by these two Boston officers for vehicles in that neighborhood involved 80% black drivers — even though the motorist population was only 44% black; and
 - These officers gave 56% of their traffic citations to black motorists — even though only 24% of motorists in the city were black.

The chance of these patterns being random, according to the expert, was less than 1 in 100,000.

In rebuttal, the prosecutor presented:

- Testimony from the officers that Long's race had nothing to do with their decision to stop his vehicle; and
- The theory that black drivers may have been stopped more often because they committed more traffic offenses — although no studies were provided to support this claim.

The motion judge found that the stop and statistics did not prove, by a preponderance of the evidence, that Boston officers were motivated by racial bias. This was the standard under *Comm. v. Lora*, 451 Mass. 425 (2008).


¹ This citation is to the "slip opinion," which is the version that appears on the SJC website when a case initially comes out.

On appeal, the SJC rejected the judge's reasoning and adopted a new procedure for evaluating allegations of police bias. The high court felt that Long showed his vehicle stop was, at least in part, motivated by intentional or implicit bias.

MV STOP: ALLEGED OFFICER BIAS

Commonwealth v. Long

- ***Defendant must raise reasonable inference of racial profiling in motion by specific facts***
 - Member of protected group (race, ethnicity, nationality)
 - Enforcement patterns by officer
 - Traffic stop data may be used, but is not required
 - Officer's assignment/duties
 - Specialized units more suspect since traffic enforcement not a primary duty
 - Sequence of events prior to stop (e.g., following)
 - Manner in which stop conducted
 - Safety interests in enforcing MV violation (e.g. OUI, OTE)
 - Agency policy and procedures for traffic stops




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From now on, if a defendant files a motion claiming police bias, the burden shifts to the prosecutor to disprove the allegation.

- **Step 1:** Defendant raises a reasonable inference of bias. In a written motion based on “the totality of the circumstances,” defense counsel must raise a reasonable inference of biased policing. To do so, counsel may address:
 - *The officer's regular assignment* — e.g., Does the officer engage in general traffic patrol where repeated stops for all sorts of vehicle offenses might be expected? Or is the officer in a drug or gang unit where traffic stops are not the primary function?
 - *The officer's enforcement patterns.* Citation or other data may be presented for this purpose, but statistical proof is not required. In any case, the SJC expects that police departments will generally provide relevant data and policies to defendants during the discovery process.
 - *The sequence of events prior to the stop* — e.g., Did the officer follow the suspect vehicle for a long period of time? Could the officer see the operator (and thus be aware of his or her race or ethnicity) before the stop?
 - *The way the officer conducted the stop* — e.g., What did the officer say? What was his tone of voice? What was the basis for any exit orders, frisks, consent requests, evidentiary searches?
 - *The public safety interests at stake in enforcing the violation* — e.g., dangerous or impaired operation is less dependent on officer discretion than a technical equipment defect.
 - *The specific agency policies and procedures regarding traffic stops.*

- **Step 2: Burden on prosecutor to rebut the inference.** If the prosecutor fails to rebut, the judge will typically suppress the evidence. It is legally insufficient to simply assert that an actual traffic violation occurred. There must be more proof than that.
- The author suggests that prosecutors have police officers testify to the same factors listed above — with some additional points of emphasis — to disprove the allegations. This approach makes sense because judges tend to organize their findings based on the framework provided by the SJC in the leading case on the issue at stake.²

MV STOP:
ALLEGED OFFICER BIAS *Continued*



- **Prosecutor must rebut the inference**
 - Need more than fact that traffic violation occurred
 - Need proof that stop not racially motivated
 - Because of “implicit bias,” officer denial insufficient
 - If fail, court may suppress evidence
- **LED recommendations to officers**
 - Officer vantage point: If cannot see driver, can’t be motivated by race for stop
 - Deny “explicit bias” (“That is not what I do!”)
 - Receive training in “implicit bias”
 - Define it; acknowledge it affects people if unaware
 - You are aware & ask question: “If this person were not ____, would I be doing what I’m doing?”
 - Rely on “neutral behavior clues”
 - Always a public safety officer, even though assigned to specialized unit, and also aware that sometimes secondary crimes revealed during stops (e.g., warrants, drug transportation, guns, etc.)

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Testifying to rebut an inference of bias.

- **Agency policy.** All police policies on bias say the same basic thing, and you should be able to articulate these principles in court:
 - *Actual or perceived discrimination in policing is an ineffective and unconstitutional law enforcement strategy;* it hurts the department’s relationship with the community; and it is harmful and unfair.
 - *Officers who engage in this behavior are subject to discipline, including termination.* Supervisors must monitor their officers and intervene in situations where bias policing may be intentionally or unintentionally occurring.
 - *Your agency requires that officers receive training* so they can understand the nature of bias and avoid having it adversely affect their dealings with the public.

² One collateral issue the SJC did not address is that a trial court’s finding that an officer made a traffic stop influenced by the driver’s race will require a “Brady disclosure” to defendants in future cases. It is potentially unfair to use a subjective concept, like implicit bias, to determine the intent of an officer who stopped a vehicle engaged in a demonstrable traffic violation, and then have it shadow his or her entire career.

- **Personal commitment.** It is not enough to know your department's policy. You must be prepared to firmly state your personal and professional commitment to impartial policing³ — e.g., "Counsel, I am personally and professionally committed to treating people fairly. I'm not naive. I understand there are police officers who don't, but that's not me. From my training, experience, and core values, I understand that bias policing is ineffective and unconstitutional, it hurts the community, and it's wrong."

You do not have to say these exact words, but you need to be able to communicate authentically.⁴

- **Assignment.** If you are in uniform and assigned to patrol, emphasize the public safety nature of traffic enforcement, and how and why it is one of your primary functions. Make sure that you are consistent about stopping all motorists for the same type of violations, and consciously avoid falling into patterns.

In *Long*, the SJC was assessing a traffic stop by officers from a specialized unit (Youth Violence Strike Force) in an unmarked car. The SJC implied that traffic stops by specialized units are more prone to abuse because officers may jump on a violator to play their hunches based on that motorist's racial or ethnic background. There are two responses to this point of view depending on the circumstances:

- *First, it is a misconception that specialized units never engage in general traffic enforcement.* Explain how your unit members are assigned to specific areas and expected to engage in traffic enforcement as part of their public safety responsibilities — i.e., that you and your colleagues do make many random stops as a part of your agency's overall strategy. It makes sense, in the wake of *Long*, for departments to adopt a policy which spells out these independent traffic enforcement responsibilities⁵; and
- *Second, unit members may, in fact, strategically look for a traffic violation to justify a legal stop.* There is nothing wrong with having an investigatory interest in stopping a motorist who also commits a traffic violation. It is only wrong if your investigatory interest stems from the racial or ethnic background of the people involved. See, e.g., *Comm. v. Buckley*, 478 Mass. 861 (2018) (detectives saw vehicle occupants enter and leave a multi-unit building in a way that suggested they were drug dealers; police could properly stop their vehicle for speeding and have investigatory motives).

In these cases, explain the suspicious behavior that you observed that was separate from the traffic violation that also supported your stop. I recently spoke to a drug/gang unit detective in Springfield who stopped a vehicle that he and his partner saw idling near a "vigil" for a deceased gang member. As his cruiser approached, the driver conspicuously looked back twice and immediately pulled away from

³ Obviously, you must do more than memorize the words. You have to embrace this mindset and continually reflect on whether you are performing your duties impartially to the best of your ability.

⁴ Again, everyone has their own style, but it seems perfectly reasonable for an officer to express sincere and professional offense — e.g., "Counsel, you are basically calling me a racist and it offends me. I don't target people based on their race."

⁵ In fact, *Long* pointed out that a defendant could argue that a stop in violation of a department's policy suggested bias, and the example the SJC gave was a traffic stop initiated by officers in an unmarked cruiser.

the curb. The driver committed a stop sign violation and, seeing the blue lights, made two quick turns before pulling over. The net result of this traffic stop was the recovery of three guns and the arrest of rival gang members.

A defense attorney might argue, under *Long*, that these specialized investigators made a minor traffic stop, which they normally would not worry about, because they saw young black men in a vehicle.

The prosecutor, through the testimony of this knowledgeable detective, could show how gang vigils, regardless of race and ethnicity, may attract rival gang members seeking revenge. (What better place to get your enemy than at their shrine.) The sudden departure of the suspect vehicle added to the detective's concern so, yes, any legitimate traffic violation would be and should be used as a lawful reason to stop the vehicle and its occupants. Be up front about this strategy and explain the context and "neutral behavior clues" (that have nothing to do with race and ethnicity) that supported your concerns.

- *Use the term "neutral behavior clues" as a way to clearly demonstrate the types of persuasive factors that you and other officers rely on that have nothing to do with race or ethnicity* (e.g., jiggling the door knob of a closed business; backing into a parking space to facilitate a quick getaway with the lights out; the "meaningless ride" consistent with drug deals; etc.).
- **Past patterns.**
 - *Attorneys will be seeking citation data to try to build a case that you have been motivated by bias in your enforcement patterns.*⁶ *Long* was the rare case where the statistical distribution of officers' FIOs and citations suggested such a pattern. A much more common problem involves officers who fail to fill out their citations consistently or properly or, worse, are tempted to manipulate their data because they fear being labeled as racist. This is the worst thing you can do.

Just fill out your citations and reports thoroughly! If you are assigned to a particular area of your community, the court must consider its demographic makeup. See *Comm. v. Lora, supra*.^{7,8}

- *Develop the habit of documenting all your traffic stops with a citation.* You still can and should exercise discretion about whether to impose money fines or warnings.

6 Under legislation enacted in the beginning of 2020, the RMV must collect and organize data provided by citations and transmit it to the Secretary of EOPPS for a public report broken down by police department. Data provided by the RMV may not identify individual motorists or officers. 90, § 63 provides data collection guidelines. Police agencies generally will not be obligated to collect data in addition to what appears on Massachusetts Uniform Citations. The RMV will extract the information from citations — including written warnings — for use by EOPSS. If EOPSS, in consultation with the Attorney General, finds a police agency that "appears to have engaged in racial or gender profiling," then the department may be required: (1) to collect additional data, including on vehicle stops that do not result in completion of a citation, and (2) to participate in "implicit bias training using best practices."

7 The *Long* decision did not change *Lora's* fundamental requirement that statistical evidence must take into account the racial and ethnic makeup of the driving population in the area where the police action occurred.

8 Given the likelihood of more motions to suppress on this issue, it may be cost-effective for police agencies to gather their own data regarding the racial composition of their motoring population.

The point is — by documenting all your stops — you adopt a transparent approach to public safety. Testify about your practice — e.g., “Counsel, every vehicle stop I make is documented on a citation or in an incident report. Sometimes both. I do it to be completely transparent about when, where, why, and how I conduct any traffic stop with a member of the public. In most cases, my citation is written within minutes of my interaction with the motorist.”

- **Events prior to stop.** This is critical information that prosecutors and officers must present. Consider these issues:
 - ***Vantage point prior to the stop.*** It is impossible for officers to engage in biased decision making when they cannot see the driver or passengers before the stop. Most stops begin with officers driving behind the offending motorist’s vehicle, unable to see more than the back of the driver’s head. Many stops occur at night.⁹ Officers should note these facts in their incident report. *Comm. v. Caudle*, 2019 WL 5092608 (Appeals Court) (the bicyclist’s race was irrelevant because the trooper credibly testified that he could not see the race or ethnicity of the cyclist before this nighttime stop).
 - ***Running plates.*** Officers may check the status of registrations at any time, as long as they are not motivated by racial or ethnic bias. *Comm. v. Starr*, 55 Mass. App. Ct. 590 (2002). Police officers should testify that this is a legitimate, proactive strategy: “Your Honor, my department encourages us to constantly check registrations for public safety purposes. We discover unlicensed drivers, unregistered and uninsured vehicles, unsafe vehicles with invalid or expired inspection stickers, stolen vehicles, and motorists with outstanding arrest or default warrants.”

When challenged, see if your department can issue you a “run list” from the particular shift where you stopped the defendant or, also persuasive, from other shifts. If the run list shows that you check multiple plates during a shift on vehicles with occupants from different demographics, you rebut the inference that you ran the defendant’s plate for a discriminatory reason.

- ***Nature of the violation.*** *Long* emphasized that the more obvious the public safety risk, the less likely a court will be to draw an inference of officer bias. In other words, a stop for driving on the sidewalk is different from one for a defective plate cover.

At the same time, whatever the violation, emphasize that it occurred and should serve as the basis for a legal stop. Often, you have independent proof (e.g., the certified copy from the registry for the suspended license) or an admission from the defendant at the scene.

Always explain the public safety basis for traffic enforcement. In other words, how is the violation dangerous or potentially dangerous? — e.g., invalid inspection sticker means the vehicle is probably unsafe; following too closely is the leading cause of rear end collisions; vehicles without plate lights are virtually impossible

⁹ In the *Long* case, the SJC mentioned a nationwide study, which found that black motorists formed a smaller percentage of all motorists stopped at night, when officers presumably had a harder time seeing the race of the motorists. This study suggests that once officers know a driver’s race, it may become a factor in making a stop.

for people to identify when they become involved in accidents or criminal behavior. You should be able to articulate good reasons for every motor vehicle violation you enforce and why you make these stops whenever you are on duty.

- **Following.** Most minority motorists convincingly provide accounts of times they were followed and improperly stopped by an officer — so this can be a “red flag” to a reviewing court. It goes without saying that officers should not consciously engage in this behavior. They should also reflect on whether they could be unconsciously falling into this pattern so they can stop it. See “implicit bias” discussion below.

Of course, randomly following a motorist because of their race or ethnicity is far different from having neutral behavior concerns about a vehicle (the gang vigil example mentioned previously). And, it bears repeating, when an officer was not in position to see who was in the car in the first place, it is hard to claim the stop was propelled by bias.

Officers can guard against this line of attack if they routinely initiate their stops as soon as they safely can after seeing a violation.

- **During the stop.** Naturally, a reviewing court is also going to consider your behavior during the traffic stop. It goes without saying that biased comments have no place in professional policing. See, e.g., *Comm. v. Palacios*, 66 Mass. App. Ct. 13 (2006) (after defendant was arrested, officer alleged to have stated to female passenger: “What’s a nice girl like you doing with a Spanish kid”).
 - *Officers must even avoid comments likely to be perceived as biased.* For example, asking a minority motorist, “Do you know why I stopped you?” will often seem biased because, in the past, it was used as a cover for discriminatory enforcement.
 - *A good approach with all motorists, but especially those from minority groups, is to identify yourself fully and explain the exact nature of the violation at the beginning of the stop* — e.g., “Good evening. I am Officer John Maxwell of the Waltham Police. I stopped you because I saw your car make a turn onto Prospect Street without signaling.” Clear identification of the officer and violation have been found to go a long way toward diffusing suspicion.
 - *Of course, officers will also need to communicate appropriately when the nature of the stop changes* — e.g., exit orders become necessary, or frisks, or consent requests, or motor vehicle exception searches, or pre-tow inventories.
- **Implicit bias.** The *Long* case opened the door for defense attorneys to challenge police stops on the basis that they were motivated by “implicit bias.” It is important for officers to be trained in “implicit bias” and to understand how they can work to overcome it.
 - **Definition.** According to the Kirwan Institute at Ohio State University, “implicit bias” refers to the attitudes or stereotypes that affect our actions and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated without an individual’s awareness or intentional control. They cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These

associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages.

- Implicit biases are pervasive. Everyone possesses them.
 - The implicit associations we hold do not necessarily align with our declared beliefs.
 - We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
 - Implicit biases can be modified. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of techniques.¹⁰
- **Street test.** Given that “implicit bias” is a psychological phenomenon, it is probably unrealistic to think that officers, or any other human being, can overcome it through some technique. However, there is a practical, on-street mindset that will help officers counteract the influence of “implicit bias.”¹¹

When engaging in any law enforcement function — whether it is a traffic stop, detention, frisk, consent request, etc. — ask yourself one question: “Would I be doing this if this person were not _____ [fill in the perceived race, ethnicity, religion, sexual orientation, etc.]?” If, in your mind, the answer is “no” or “I’m not sure,” then stop, because there is a good chance that bias is pulling you in the wrong direction.

On the other hand, if your answer is “absolutely yes,” then continue. A “yes” answer should enable you to point to “neutral behavior clues” that justify the police action. This simple test, honestly applied, is a real and practical way for officers to screen against unconscious bias, in the moment, on the street.¹²

- **Police testimony.** If you receive training in implicit bias and sincerely apply the “street test” previously mentioned, you are in a good position to serve fairly. Consider the following potential testimony during a motion hearing under *Long*:

ADA: “Officer Jones, are you familiar with the term ‘implicit bias’?”

Officer: “Yes, absolutely. It is a concept that everyone in our department has been trained on.”

ADA: “What does it mean?”

Officer: “All people, including police officers, have certain unconscious attitudes

10 The information in this “definition” section is an edited excerpt from <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

11 The author began teaching this “street test” to officers in 2007 when Law Enforcement Dimensions was contracted by the Executive Office of Public Safety and Security (EOPSS) to educate supervisors about bias policing.

12 The other way to overcome implicit bias is to have positive interactions with members of historically targeted groups. That is why community policing has been so important in the evolution of officer attitudes towards groups served by their department.

about other people based on age, gender, race, ethnicity, religion, region where they grew up, and so on. Because bias can be unconscious or implicit, it can affect all of us without our awareness."

ADA: "How do we know that your traffic stop of John Defendant in this case, was not the product of your implicit or unconscious bias?"

Officer: "That's the reason my Chief provides training on implicit bias. It is why I know I have to consciously and actively discount racial and ethnic judgments in everything I do.

What helps me, and many police officers in Massachusetts, is sincerely applying a simple test on the street. So, before I engage in a police function, I ask myself — 'If this person were not African American, female, elderly, Hispanic, a teenager, Muslim — whatever characteristics are present — would I be doing what I'm doing?' If the answer is 'no' or I hesitate, I stop myself because I know bias has somehow affected my judgment. On the other hand, if my answer is a strong 'yes,' and I can tell myself the 'neutral behavior clues' calling for my intervention, then I act."

ADA: "Did you apply this mental assessment when you saw John Defendant in his vehicle?"

Officer: "Absolutely."

ADA: "Describe how you did that."

Officer: "It was noon on a sunny day, so I noticed that Mr. Defendant and his male front seat passenger were probably in their 20s and African-American. If that was all I had, I would have kept driving, but I had these neutral behavior clues too. The vehicle was a rental car and the parking lot was next to a closed business. It matched a description of a vehicle"

OR

ADA: "Did you apply this mental assessment when you saw John Defendant's vehicle?"

Officer: "No."

ADA: "Why not?"

Officer: "There was no possibility that any bias would affect my judgment. I saw a vehicle following too closely on a state highway. I make this stop all the time because it is the leading cause of rear end collisions on our roadways. I couldn't see who was driving because the vehicle was in front of me when I first saw it on Route 60."

OR

ADA: "Was it when you approached the vehicle that you first learned the driver, Mr. Defendant, was African-American?"

Officer: "Yes."

ADA: "Did you factor that into your decision to request that Mr. Defendant grant you consent to search his vehicle?"

Officer: "No. I am always on guard against letting implicit bias affect how I treat people. I also recognize that many African-American motorists, based on their

experience and perspective, get nervous when stopped by police. So again, it's my job to actively discount a person's race and nervousness in a situation like this. But, during this stop, there were other things that I call 'neutral behavior clues' that made me believe that Mr. Defendant might be transporting drugs. To begin with, he [explain clues]." See, e.g., *Comm. v. Rosario-Santiago*, 96 Mass. App. Ct. 166 (2019) (Hispanic motorist seemed to make up answers in response to officer's basic questions about the origin of his trip, and he secretly reached toward a package in the back seat by faking a yawn, then denied doing so).

- **Conclusion.** It's understandable to view the SJC's *Long* decision as overbroad. But the author urges you to stay positive and recognize, bottom line, that it attempts to deal with a law enforcement and social problem that does exist. If you can continue to do your best to explain what happened and how you combat against bias policing, you give yourself the best chance of succeeding on the street and in court.

DETENTIONS & FRISKS

Under Article 14, police must consider a suspect's age in deciding whether he is detained. Also, nervousness and flight are entitled to less weight when exhibited by African-Americans. *Comm. v. Evelyn*, 485 Mass. 691 (2020): Following a shooting that mortally wounded a man, Boston officers Abasciano and Garney looked for potential suspects. No description had been provided. One-half mile from the shooting and 13 minutes afterward, the officers saw Tykorie Evelyn, a 17 year old juvenile, walking on Dewitt Street.

It was cold and the officers had seen no other pedestrians. Evelyn walked with his hands in his jacket pockets and seemed to be holding an object about the size of a firearm in his right pocket. Evelyn turned his body away from the officers in a manner that blocked their view of the object. The officers drove alongside and asked if they could talk with him. Evelyn answered, "For what?" and quickened his pace. When Officer Abasciano told Evelyn that something had happened nearby, Evelyn's reply was mumbled. He did not stop or look at the police, but was looking around him.

After driving next to Evelyn for about 100 yards, Officer Garney opened his door. Evelyn then ran with his hands still in his pockets. Eventually Officer Abasciano ordered him at gunpoint to stop. A firearm was found nearby along the route Evelyn ran.

- **The suspect showed he wanted to end the interaction.** When officers asked to talk with Evelyn, he walked faster.
- **The officers showed they intended to stop the suspect.** The officers followed Evelyn for 100 yards in their cruiser, trying to get him to talk with them. When an officer got out of the cruiser, the police demonstrated they were going to talk with Evelyn whether or not he wanted to. Evelyn was seized at that moment.
- **The nearby shooting, the absence of other pedestrians, and a person under 21 seeming to carry and hide a firearm justified the stop.** The case was close, but the officers' credible testimony about their observations were enough to show reasonable suspicion by the time Officer Garvey got out of the cruiser.

Even though this stop was approved, the SJC used the case to announce new rules and refine old ones.

- **Officers must anticipate juveniles will react differently from adults to police authority.** When known (or observable by a reasonable officer), the age of a child should affect an officer's understanding of whether the officer has conveyed the impression that he or she will compel the juvenile to stop. Juveniles view police communication as having more coercive power than do adults. This rule did not apply because the officers could not tell that Evelyn, who is six feet tall and 17 years old, was a juvenile.
- **Nervous or evasive behavior by an African-American during a police encounter may have little connection to a guilty conscience.** An innocent black citizen may have the same motivation to avoid the "danger and indignity" of a police encounter as a guilty person — so evidence of nervousness and evasion by a black person has limited weight in the analysis of reasonable suspicion. *Comm. v. Warren*, 475 Mass. 530 (2016), announced the same concept when an African-American flees a stop.
- **The "high crime" nature of the area is only relevant with "a direct connection [to] the specific location and activity being investigated."** The officers testified to an ongoing feud between gangs in the area. Their incident report included the number of police reports of alleged gang-related crimes in the vicinity in the months prior to the shooting, but dates, precise locations, and alleged perpetrators were not described in their incident report. Without evidence of a direct connection to Evelyn or the shooting, the high crime nature of the area should not have been considered.

IDENTIFICATIONS

FAIR IDENTIFICATION PROCESS

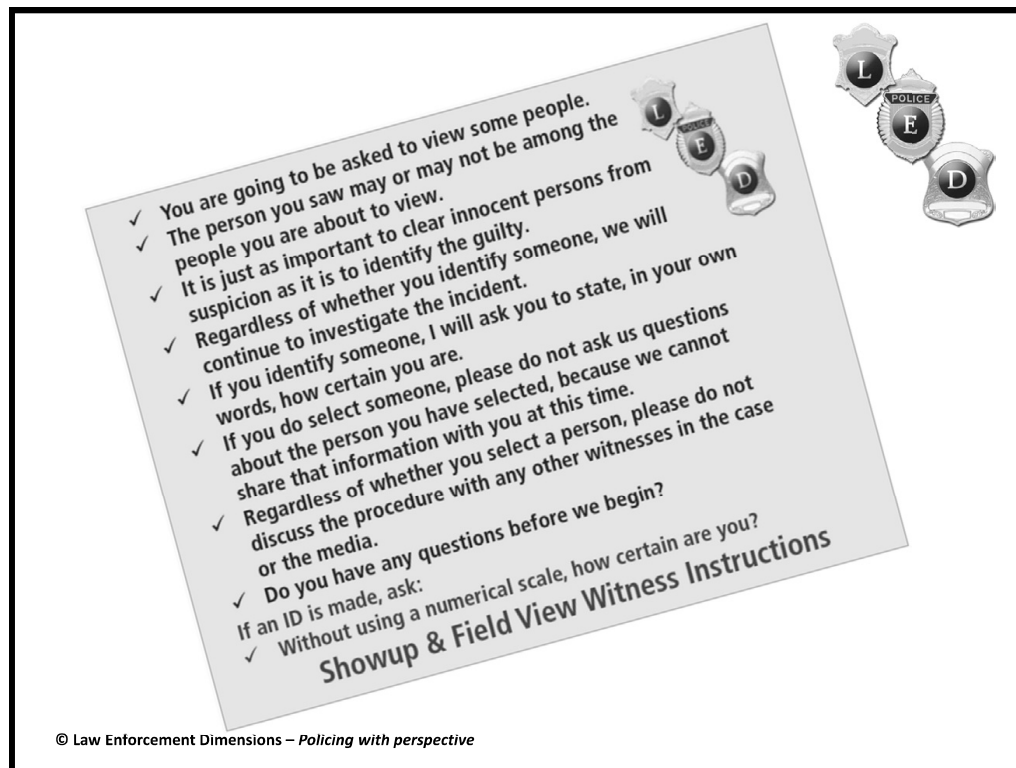


Did I properly do it?

- | | |
|----------------|--------------------------|
| • DESCRIPTION | Pre-selection interview |
| • INSTRUCTIONS | LED card or signed paper |
| • PROCEDURE | Suspect fairly presented |
| • DOCUMENT | Police report |

Tell citizens not to research on the web.

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Reasonably detailed description created reasonable suspicion and avoided claims of police bias. *Comm. v. Staley*, 98 Mass. App. Ct. 189 (2020): When the Citizen's Bank in Harvard Square was robbed, dispatch broadcast the description of the suspect as a tall, thin black male, aged 50 to 70, wearing a hat, sunglasses, and a black jacket.

Cambridge Officer McNeely knew that crime suspects fleeing busy Harvard Square often use public transit to escape, so he entered the MBTA subway at Central Square, the next inbound station on the Red Line. He commanded an inbound train to stop, knowing other trains had been halted at Harvard Square. Joined by Officer Norton, Officer McNeely walked the crowded train from front to back and saw a number of black passengers who did not match the description. In the last car, the officers found a tall, thin black male, between 50 and 70 years old. He had a black jacket draped across his lap.

Officer McNeely saw this man had a thin mustache and goatee. He checked by radio on whether the suspect description included facial hair. He learned the suspect might have had a thin mustache.

Officer McNeely asked Robert Staley to exit the train. He agreed. Speaking calmly throughout, Officer McNeely explained that a bank robbery had occurred nearby and Staley matched the description of the suspect. "If everything is okay, I will release you immediately and you will be on the next train to leave," he said.

On the platform, the officers told Staley he would be frisked, and asked Staley to put his jacket down. During the frisk, Officer Norton picked up the jacket and saw green papers sticking out of a pocket. He felt a bulge and looked into the pocket. It was stuffed full of neat packets of currency. Staley was handcuffed. He volunteered that he had "jumped" someone for the jacket in Harvard Square.

- **The officer's request that Staley step off the subway car was supported by a sufficiently detailed description.** Staley's lack of a hat and sunglasses was insignificant, as these items could have been quickly removed and discarded. In addition, Officer McNeely knew that this was the only train that had left Harvard Square following the robbery.
- **Commentary:** Excellent move by Officer McNeely to check with dispatch whether the suspect description included any facial hair. Also, officer testimony that they saw many African-American passengers on the train rebutted any defense suggestion that they simply stopped the first black male they saw.

Investigators should tell witnesses not to research photos of suspects on the web. Instead, suggest that witnesses only provide new information to police, who can then structure further investigation. *Comm. v. Barros*, 2020 WL 2516861 (Appeals Court): On October 29, Detective Brewster investigated an A&B at the Candy Bar on Tremont Street. The victim described the suspect as a short, Cape Verdean male in his late 20s. The club manager told the detective that the suspect was a regular patron and drove a blue Nissan.

Weeks later, the victim provided Detective Brewster with a photograph from Facebook dated November 19. She stated that this was her assailant. She provided the suspect's name as well.

Detective Brewster used the information to construct a photo lineup using a police photo of the defendant. Detective Brewster arranged a blind photo ID procedure. The victim selected the defendant's photo and said she was 100 percent sure of her identification.

The prosecutor was not permitted to use the photo procedure at trial because it was "unnecessarily suggestive." The victim, also a regular at the Candy Bar, had obtained the defendant's name and photograph from staff or another regular at the club. The victim had only seen the perpetrator at the time of the crime, had provided only a limited description, and participated in the photo procedure 45 days later. This made her viewing of the defendant's Facebook photo, after she had been informed by others that he was the perpetrator, highly suggestive and likely to lead to a misidentification.

Police did nothing wrong in their ID procedure. However, since the victim viewed the defendant's photo initially under highly suggestive circumstances, it meant her later view of the same man's picture in a police ID procedure was tainted.

SOCIAL MEDIA INVESTIGATIONS

Defendants may investigate alleged racial bias in police monitoring of social media accounts. *Comm. v. Dilworth*, 485 Mass. 1001 (2020): Acting in an undercover capacity, Boston Police officers became "friends" with Richard Dilworth on the social media application "Snapchat." On Snapchat they viewed videos of Dilworth with what appeared to be a firearm. In January 2018, officers arrested Dilworth and seized a loaded firearm from his waistband. After Dilworth's release on bail, officers saw him again on Snapchat with another gun. An arrest in May followed.

Dilworth alleged that “the department was using Snapchat as an investigatory tool almost exclusively against black males,” which is known as selective prosecution. He sought discovery that he believed would support his claim. A Rule 17 summons was approved by a superior court judge, requiring Boston Police to present one year’s worth of Snapchat reports resulting in criminal complaints.

The SJC approved. The defendant had shown a sufficient basis to discover whether racial bias determined who was investigated on Snapchat. The court needed to resolve the issue.

PUBLIC ACCOMMODATION & MISUSE OF POLICE AUTHORITY

Enforcement of trespass law may not discriminate. There have been several publicized cases where police have been called to deal with a person who has been ejected from a business for arguably discriminatory reasons. In these difficult situations, officers must remember the “public accommodation” law, 272, § 92A.

Section 92A applies to any owner, proprietor, manager, employee or agent of any public or private, licensed or unlicensed, place of business open to the public. Any of these individuals may not, directly or indirectly, discriminate on the basis of race, color, religion, national origin, sex, gender identity, sexual orientation, deafness, blindness or any physical or mental disability. Discrimination covers the decision to admit and the type of treatment given to a person who has entered. The penalty is defined in 272, § 98: HC NMT 1 year; and/or Fine NMT \$500. Section 98 also declares: “All persons shall have the right to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation . . . subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.”

Suggested police policy to avoid the potential misuse of police authority.¹³ When arriving on scene, officers should:


- **Learn the reason why a manager or others want to eject the suspect.**
- **Listen to the suspect and see whether he is alleging discrimination or some other improper motive.**
- **If it makes sense, attempt to de-escalate and mediate the disturbance between the owner and the suspect.** Officers may use this opportunity to communicate their concerns to the owner or authorized person about a possible misuse of police authority (e.g., discrimination, financial intimidation, etc.). Officers may also suggest to the suspect that if he leaves, it does not prevent him from exploring other legal options. However, officers should refrain from giving specific guidance.
- **Remember in these cases, the motives of the parties may not be obvious.** If it is likely that the owner or authorized person is attempting to misuse police authority, officers may decline to arrest, ideally after consultation with a supervisor. On the other hand, if the owner or other authorized person provides a legitimate basis for enforcement, he or she must communicate to the suspect, in the presence of officers, that the suspect must leave the premises.

¹³ This policy is adapted from the Philadelphia Police Department’s Memorandum (18-02) issued on June 8, 2018.

- **Arrest for trespass under 266, § 120 may occur provided officers document** in their incident report: (1) the reason(s) provided by the owner or authorized person to eject the suspect from the property; (2) the nature of their authority over the property (e.g., owner, manager, employee, security personnel, etc.); (3) witnessing the owner or authorized person's directive to the suspect to leave; (4) the suspect's refusal to leave; (5) the name, address and phone number of the owner or authorized person (i.e., the complainant); and (6) the complainant's promise to appear in court and testify.
- **Other violations.** Despite the decision not to arrest for trespassing, the supervisor and/or officers on scene shall have full discretion to arrest, apply for a complaint, or issue a citation or local ticket for any other applicable offenses.

Attachment

A




Framework for Understanding

Perception	Citizen <u>incorrect</u>: <ul style="list-style-type: none"> – Strategy to get off – Sincere & honest belief
Problem	Citizen <u>correct</u>: <ul style="list-style-type: none"> – Conscious officer strategy – Unconscious officer approach
Good Result	Citizen <u>satisfied</u>: <ul style="list-style-type: none"> – Grudging acceptance – Gratitude & respect: Ripple effect

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POLICING WITH PERSPECTIVE

1



From the Citizen's Perspective


What forms a citizen's perception of the police?

- Their prior experience with police
- Family and friends' prior experience with police
- Media exposure

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POLICING WITH PERSPECTIVE

2




Key Questions for Officers

- How do you tell the difference on the street between a citizen who sincerely believes and one who is "playing the profiling card"?
- What difference does your assessment of a person's motivation make in how you end up dealing with him or her?
- Have you or another officer dealt effectively with an allegation of racial or gender profiling?

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POLICING WITH PERSPECTIVE

3




Dealing with Perceived Bias

Avoid <ul style="list-style-type: none"> • Being defensive!! 	Recommend <ul style="list-style-type: none"> • Prepare to be challenged. <ul style="list-style-type: none"> – Relax! It will happen. – Assume sincerity. Educate the citizen. You have nothing to lose, but much to gain. – Provide name & # to complainant <ul style="list-style-type: none"> • G.L.c. 41, § 98C requires badge and id by name or number • G.L.c. 41, § 98D requires officer show photo id upon lawful request • Always respond. Do not ignore. • Document interaction. Citations & reports.
---	---

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POLICING WITH PERSPECTIVE

4



Dealing with Perceived Bias Continued

<u>Avoid</u>	<u>Recommend</u>
<ul style="list-style-type: none"> • Using "code words" <ul style="list-style-type: none"> – "Where are you from?" – "Are you lost?" 	<ul style="list-style-type: none"> • Explaining basis, asking question about conduct or reason for stop.
<ul style="list-style-type: none"> • Changing your enforcement decision --either more lenient or more severe -- because profiling raised. 	<ul style="list-style-type: none"> • Modifying your communication approach depending on the person(s) & situation.
<ul style="list-style-type: none"> • Seeing an apology as a sign of weakness or liability exposure 	<ul style="list-style-type: none"> • Apologizing if mistaken

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POLICING WITH PERSPECTIVE

5




BIAS-FREE POLICING

- *Decisions & conduct should NOT be influenced:*
 - Race
 - Ethnicity
 - Sex
 - Gender identity
 - Sexual orientation
 - Religion
 - Mental or physical disability
 - Immigration status
 - Socioeconomic or professional level
- *Unless:*
 - Non-discriminatory reason
 - Valid basis for different treatment
 - Element of crime

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Why would a police officer let bias influence his or her judgment?

- **Police Background – I should . . .**
 - Training
 - Results: Efficient and effective law enforcement
 - Statistically justified
- **Background – I am unaware . . .**
 - Neighborhood
 - Parents, friends
 - Experiences with group

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POLICING WITH PERSPECTIVE

7



Dealing with Conscious Justification


Is different treatment really statistically warranted?

- Study of motorists on I-95 (J. Lamberth, 1997)
 - 28.4% of blacks searched had contraband
 - 28.8% of whites searched had contraband
- U.S. Customs study of airport searches
 - Black (6.3%) and Latino (2.8%) "hit rates" were lower than whites (6.7%)
- The self-fulfilling prophecy: The best interdiction officers aren't profilers!

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POLICING WITH PERSPECTIVE

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Dealing with Conscious Justification

What are the social costs of this strategy?

- Animosity of a large segment of the community
 - Makes interactions and routine situations volatile
 - Stifles police/citizen cooperation at all levels
- Unconstitutional and not allowed in other areas of living -- e.g., insurance rates
- Diverts attention from more creative, community policing approaches

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Dealing with Unconscious Bias

- How do you know what you don't know?
- Easier to acknowledge when it is depersonalized. Less defensive.
- Human beings -- not just law enforcers -- are hard-wired for bias!

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10



Processing of Sensory Perceptions: The Architecture of Bias

LeDoux (1996)

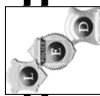
```

graph TD
    TS[THALAMUS] --> C[CORTEX]
    C --> HR[High Road  
Analytic, Reasoning,  
Planning]
    C --> LR[Low Road]
    HR --> FB[Feeling Brain  
AMYGDALA]
    LR --> FB
    FB --> ER[EMOTIONAL RESPONSE]
    ES[EMOTIONAL STIMULUS] --> TS
    
```

Relies on Stereotypes and Binary Distinctions ("Us vs. Them") for speed

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11



Dealing with Unconscious Bias Continued

- Once someone understands, they can make adjustments.
 - Firearms training: "Keep your finger off the trigger!"
 - Anti-bias training: "If this person were not ___, would I be doing what I am doing?"
- Supervisory coaching necessary to avoid patterns of unconscious bias . . . and to avoid discouragement!

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12




MV STOP: ALLEGED OFFICER BIAS

Commonwealth v. Long

- *Defendant must raise reasonable inference of racial profiling in motion by specific facts*
- *Prosecutor must rebut the inference*
 - Need more than fact that traffic violation occurred
 - Need proof that stop not racially motivated
 - Because of “implicit bias,” officer denial insufficient
 - If fail, court may suppress evidence
- **LED recommendations to officers**
 - Officer vantage point: If cannot see driver, can’t be motivated by race for stop
 - Deny “explicit bias” (“That is not what I do!”)
 - Define it
 - You question: “If this person were not ___, would I be doing what I’m doing?”
 - Rely on “neutral behavior clues”

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13




Application to “Suspicious Person” From Dispatch

- **Dispatch:**
 - Get behavioral cues from caller, not just ethnic.
 - Probably will still have to send a unit anyway.
 - Although supervisor may override.
- **Officer:**
 - Pick-up motivation for call from dispatch if no behavioral cues.
 - Go and observe the situation.
 - Approach if necessary, and be honest that you are responding to a call. (*Optional: be totally frank and embarrassed -- very effective sometimes!*)

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Identification Cases

<p>Avoid</p> <ul style="list-style-type: none"> • Generic ethnic descriptions (E.g., 62 year old black man stopped because he “fit” description, but it was for a kid) • Pretext stops -- <i>most blatant profiling</i> • Being hostile when challenged 	<p>Recommend</p> <ul style="list-style-type: none"> • More specific descriptions <ul style="list-style-type: none"> – Improve call taking – Ask for more from dispatch – Field interview techniques – Emphasize other minorities who were not stopped • Explain description (even show notes); apologize if mistaken
---	--

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Police Reports

- Do not refer to race or ethnicity unless it is part of a suspect description.
- Refer to criminal organization (e.g., gang), not racial background of members.
- Be explicit in report or citation when profiling issue is raised, especially about your response.
 - *He who documents bias allegation probably didn’t do it!*

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Misuse of Police Authority

- *Why does property manager want to eject?*
 - Watch out for discrimination in violation of “public accommodation” or financial intimidation
- *Is suspect alleging discrimination or improper motive?*
- *Attempt to de-escalate or mediate*
- *May arrest if document:*
 - Proper reason given by manager & control of property
 - Witness directive to suspect to leave & refusal
 - Phone of manager & promise to testify in court

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Attachment

B

Police Mindset: Communication

<i>Personal Orientation</i>	<i>Professional Orientation</i>
Consistent communication. Vary enforcement as a reaction to the citizen's "attitude" – both escalating and de-escalating the severity of punishment.	Vary communication style in response to citizen attitude. Consistent enforcement that applies discretion reasonably.
Treat people the way I would want to be treated. Subconscious translation: If people aren't like me, I'm justified in not giving them good treatment. In other words, the citizen deserves to be treated based on how they speak and act.	Try to bring out the best in people by taking into account their perspective at the time I deal with them – consistent with my safety and my obligations to society. As a professional, I am responsible for doing all I can to make the interaction as peaceful and effective as possible.
My discretion is a way to make life easier for me. It's my tool to control people.	My discretion is a way to accomplish the purpose of my job in the least intrusive way possible. Circumstances and people are different.
Habitual reaction – a victim of circumstance. Defensive/cynical/resigned	Conscious of the potential to react poorly. Seeks to prepare and learn from interactions – an architect of resolution (Note: we always acknowledge that this is essential in Use of Force, but not in communications training) Educator/open/adaptable
Legal standards (i.e., the rules) are designed to frustrate me in doing what I know is right. The end justifies the means. The bad example overwhelms the good.	Legal standards (i.e., the rules) are necessary in an environment where any human being with this power might be prone to abuse it. The means are as important as the ends. The good should not be denied because of the bad case. Realistic compliance. I know the basic standards and will try to follow them; if a court later rules against my efforts, I won't take it to heart.

Incident Report: Sgt. Robert Robillard, Waltham PD

Introductory Note: This is an actual incident report. The only information changed is the particular location and names of the civilian participants. The fictitious names and information are noted in italics.

Text of Sergeant Robillard's Report: On _____ at approximately _____ p.m., while patrolling the area of *Main Street* the following occurred.

While turning right onto *Allen Avenue*, I observed the above listed Toyota Camry in front of me. This vehicle completed the right turn, swung wide, and crossed the solid yellow center line. Approximately fifty feet further, the vehicle crossed the line again then swerved back into its own lane. There was on coming traffic. The vehicle then turned left onto *Main Street* without using its left directional.

I stopped this vehicle on *Hill Road* off of *Main Street*. I approached the vehicle, identified myself by name and department and immediately gave the reason for the traffic stop. I then asked the operator, for his license and registration.

The operator was identified as *DALE LAWRENCE*, and he complied immediately.

Immediately after stating my reason for stopping the vehicle the front seat, female passenger began berating, insulting and accusing me of stopping them because they were black. Calling me a "fucking racist."

The operator identified his passenger as his sister. This female was *LINDA LAWRENCE* (dob 11-5-1975). Also present was a third unidentified female, rear seat passenger.

While I was speaking with the operator, *LINDA LAWRENCE* was talking on her cell phone with someone and simultaneously screaming at me. At one point she exited the car and walked into the street -- screaming profanities and accusations at me. I told her she was free to leave but needed to quiet down or she would be subject to arrest.

An older woman exited a nearby apartment and identified herself as the vehicle owner, *SARAH*

LAWRENCE. I explained the situation to Ms. *Lawrence* and asked her to bring her daughter inside. She complied with my request and was able to calm her daughter down and get her inside apartment *7B Main Street*.

Officer DiChiara arrived to assist.

After the two females left, I again explained my reason for the stop to Mr. *Lawrence*. I asked him why he thought I would stop him if he had crossed the solid yellow line. His reply, "In case I was drunk." I told him that was my initial concern when I stopped him.

I then asked him if he felt I was stopping him because of his race. He replied, "No."

Mr. *Lawrence* was issued citation # K0763421: Warning for left of center.

I then approached *LINDA LAWRENCE* and asked if I could speak with her. She was standing outside *7B Main Street* with her mother and Officer DiChiara. She was calm at this point.

I explained to *LINDA* my observations of the vehicle crossing the line and asked her why she thought a police officer might be interested in stopping the car. Her reply, "Because you might be drunk driving."

I agreed with her, telling her that I was concerned that her brother may have been drunk driving.

I further explained to her that due to the numerous stuffed animals on the vehicle's rear window deck, and the dark, rainy conditions present, there was no way for me to tell what race or color the occupants were before I stopped them.

LINDA appeared to be satisfied with my reasoning and apologized for her behavior by stating that she has been stopped before for her race and knows many others who have too.

She shook my hand and we left the area.

Mindset—Interaction—Organizational Support An Antidote to Bias Policing

Prevailing Mindset	Resulting Interaction	Chief/Organizational Support
I know that many people complain about RP because they sincerely believe I am doing it. They just don't know better.	<ul style="list-style-type: none"> • Give citizens the benefit of the doubt; not take it personally. • Empathy. • Try and educate. • Be clearer about when the citizen is really trying to get off, rather than just reacting from past experience or perception. 	<ul style="list-style-type: none"> • Community Outreach & Education seen as a sincere part of the job. <ul style="list-style-type: none"> • Citizen Police Academy • Brochure on Traffic Stops • Articles in Newspaper • Maintain that allegations aren't automatically accepted. • Transparent complaint process. • Acknowledge RP, but explain your commitment to bias free policing.
I am a human being and, like all human beings, I may be motivated by bias in my work.	<ul style="list-style-type: none"> • More conscious about dealing fairly with citizens. • See reflection as valuable. • See dialogue and input from other people, especially those from other backgrounds, as valuable. • Willing to accept the goodwill of others and counsel them 	<ul style="list-style-type: none"> • Give officers training in non-righteous, cultural diversity (just the facts m'am training). • Give officers a chance to interact with different cultures in the community (not just advocates with an agenda) at functions. • Review cases and have open discussions about different ways of promoting public safety.
I am a human being and, like all human beings, I don't like to be criticized unfairly – by people on the street and by the media. But defensiveness is not helpful.	<ul style="list-style-type: none"> • Prepare for the angry reaction. • Professionalism triumphs over reaction. • Familiarity with policy. • Document all significant police interventions. 	<ul style="list-style-type: none"> • Value statistics, but qualify them appropriately. • Insist on simple mandatory requirements (e.g., name, documentation, supervisory input). • Provide scenario based training.
I am going to be clear about the situations where I am most prone to let bias interfere with my judgment.	<ul style="list-style-type: none"> • Honest assessment, willing to talk with colleagues – Open to input • Importance of concrete legal training and confident on-street application. • Continue to refine use of discretion. 	<ul style="list-style-type: none"> • Have a policy that articulates your commitment to bias free policing. • Provide concrete scenario based training for on-street situations. • Expect supervisors to monitor and, even more helpful, coach but not interfere. Tell your officers about your supervision philosophy.
Even though people don't always notice, I achieve good results in many of my interactions. I should not forget that.	<ul style="list-style-type: none"> • Don't let the bad overshadow the good. • Understand the "ripple effect" – good call response brings overall department support. 	<ul style="list-style-type: none"> • Recognize and reward good interactions, not just heroics. • Invite the public to let you know about your officers. • Ride around with your people

*Law Enforcement Dimensions & John Sofis Scheft, Esq.
present*



Sir Robert Peel's 9 Principles of Policing

The essence of policing with perspective — originally developed in 1830.

1. The basic mission for which the police exist is to prevent crime and disorder.
2. The ability of the police to perform their duties is dependent upon public approval of police actions.
3. Police must secure the willing co-operation of the public in voluntary observance of the law to be able to secure and maintain the respect of the public.
4. The degree of cooperation of the public that can be secured diminishes proportionately to the necessity of the use of physical force.
5. Police seek and preserve public favor not by catering to the public opinion but by constantly demonstrating absolute impartial service to the law.
6. Police use physical force to the extent necessary to secure observance of the law or to restore order only when the exercise of persuasion, advice and warning is found to be insufficient.
7. Police, at all times, should maintain a relationship with the public that gives reality to the historic tradition that the police are the public and the public are the police; the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.
8. Police should always direct their action strictly towards their functions and never appear to usurp the powers of the judiciary.
9. The test of police efficiency is the absence of crime and disorder, not the visible evidence of police action in dealing with it.