

## 2.8 Beyond Litigation

Police departments, along with individual police officers, enjoy significant discretion in deciding how to monitor and enforce compliance with the law. Law enforcement “polices regarding geographic deployment, enforcement priority, and enforcement tactics determine how the benefits and burdens of policing are distributed.” Nirej S. Sekhon, *Criminal Law: Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1225 (2011). For example, before a patrol officer decides who to approach, police department administrators determine that it is appropriate for that officer to be in that particular location at that particular time. Departmental decisions may play a significant role in determining where to deploy law-enforcement resources.

Responses to police practices that have a racially disparate impact may involve not only challenges in individual cases, but also efforts outside of the courtroom. Examples of different approaches, by community groups, law enforcement officials, and elected leaders, are described here.

In Fayetteville, the Fayetteville City Council issued a moratorium on consent searches in response to complaints from citizens, including a minority lawyer association and the NAACP, that police were using racial profiling to stop and search black drivers three times more often than white drivers. A superior court judge lifted the moratorium, but the Fayetteville Police Department changed its consent search procedure in response to the public’s concerns, requiring officers to use written forms when requesting consent. A driver must affirmatively represent on the form that he or she voluntarily agreed to the search and was not intimidated or coerced into making the decision.

In Durham, the FADE (“Fostering Alternatives to Drug Enforcement”) coalition of residents has organized to address “the interrelated issues of racial profiling, selective enforcement, excessive force, and police harassment in our city.” See FADE Coalition Policy Recommendations to the Durham Human Relations Commission in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training & Resources”). FADE members appeared several times before the Durham Human Relations Commission (HRC), in which they presented their views on the Durham Police Department’s policing practices. For example, FADE presented information that black men comprise 17.4% of the city’s population but account for 65.2% of all people searched during traffic stops; and that Durham police conduct “consent searches” of black motorists at twice the rate of white motorists. *Id.*; see also Durham Police Department Stop-and-Search Data compiled by the Southern Coalition for Social Justice (SCSJ) in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training & Resources”). In light of this data, FADE recommended the following policy proposals:

- (1) mandate that written consent be sought and obtained before any and all consent searches undertaken by DPD officers;
- (2) openly repudiate the department’s current practice of racial profiling and selective enforcement in the context of both traffic stops and drug law enforcement;
- (3) make marijuana enforcement Durham’s lowest law

enforcement priority (LLEP) and increase the availability of pre-trial diversion programs; (4) mandate racial equity training for DPD leadership and rank-and-file officers alike; and (5) create an inclusive task force—one including HRC members, FADE members, PAC [Partners Against Crime] chairs, representatives of the DPD, as well as persons directly affected by police misconduct—to investigate and make formal recommendations regarding best practices for the Durham Civilian Review Board.”

See FADE Coalition Policy Recommendations to the Durham Human Relations Commission in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training and Resources”). In response to information presented by the FADE Coalition and others concerning allegations of racial profiling, the Human Relations Commission voted to recommend the adoption of over 50 measures to the City Council, including requiring officers to document and make public the reasons for each traffic stop and each search, requiring officers to obtain written consent for searches, and creating an independent entity to regularly review traffic-stop data to identify unusual trends. Jim Wise, [Durham panel urges additional training for Durham police](#), NEWS AND OBSERVER (Raleigh), March 11, 2014. With the support of the City Council, City Manager Tom Bonfield ordered the implementation of a new policy, effective October 1, 2014, requiring Durham police officers to receive written consent before conducting consent searches of a vehicle or building. Ray Gronberg, [City adopts written-consent policy for searches](#), THE HERALD SUN (Durham), September 16, 2014. Updates on the efforts of the FADE Coalition can be found at <http://www.southerncoalition.org/>.

Local police civilian review boards provide an avenue for community oversight of and feedback about policing practices. In North Carolina, four cities have civilian police review boards: Charlotte, Durham, Greensboro, and Winston-Salem. Some state lawmakers, including Charlotte-based Representative Rodney Moore, have expressed interest in sponsoring legislation to grant additional authority to police civilian review boards. Trish Williford, [Lawmaker wants to take action after officer-involved fatal shooting](#), WSOC-TV.COM, (Jan. 30, 2014) (reporting that Representative Moore plans to sponsor such reform as part of a comprehensive legislative response to concerns over racial profiling). Charlotte recently went through a process of reforming their civilian police review board. See [Charlotte Police Complaint Review Program](#), CHARMECK.ORG (last visited Sept. 25, 2014). In Durham, the Civilian Police Review Board sometimes holds public hearings to consider suggestions for improvement of the board’s mission, duties, responsibilities, processes, and jurisdiction. See Email Listserv Announcement—Civilian Police Review Board to Hold Public Information and Feedback Session in the Race Materials Bank at [www.ncids.org](http://www.ncids.org) (select “Training & Resources”); see also Ray Gronberg, [Police review board not seeking additional powers](#), THE HERALD SUN (Durham), April 7, 2014. Civilian review boards, because of their potential to facilitate resolution of complaints, increase trust, and improve police practices, are not only of interest to civilians, but may be welcomed by law enforcement organizations as well. When Durham’s Civilian Police Review Board was formed in 1998, former Durham police officer and former N.C. Police Benevolent Association President Andy Miller

supported the formation of the board, stating that “[w]e think that it brings an air of transparency that you often don’t get within the normal channels of the city.” Samiha Khanna, [From the INDY Archives: Durham Civilian Police Review Board](#), INDYWEEK (Jan. 8, 2014). For more information about national efforts to establish and strengthen civilian review of police departments, see [National Association for Civilian Oversight of Law Enforcement](#), NACOLE.ORG (last visited Sept. 25, 2014).

In North Carolina, organizations to address racial disparities in the criminal justice system have been formed both within and beyond the indigent defense community. The recently formed [North Carolina Public Defender Committee on Racial Equity \(NC PDCORE\)](#) is a state-wide organization of defenders focused on the public defender’s unique role in creating a fair, just, and racially-equitable criminal justice system. Public defenders may join NC PDCORE and review weekly updates by visiting the organization’s website. The [North Carolina Commission on Racial and Ethnic Disparities in the Criminal Justice System](#), a collaborative research-based organization whose mission is to identify, document, and address racial and ethnic disparities in the criminal justice system, is comprised of an array of criminal justice system stakeholders, including prosecutors, judges, defense attorneys, and community members. Its current areas of focus include implicit bias training, pretrial release, and juvenile justice.

Collaborative efforts to address concerns over racial profiling have been undertaken in other parts of the country. In 1999, attorneys from the Defender Association in Seattle, Washington founded the Racial Disparity Project (RDP) to address racial bias in the criminal justice system. See Racial Disparity Project Website, [Mission, History, Funding](#), RACIAL DISPARITY PROJECT (last visited July 8, 2014). While the RDP originally focused on selective enforcement litigation addressing racial disparities in street-level drug law enforcement, it eventually developed a community-based, collaborative pre-booking diversion pilot project to steer people accused of low-level drug and prostitution crimes out of the criminal justice system and into treatment. See Racial Disparity Project Website, [Projects](#), RACIAL DISPARITY PROJECT (last visited July 8, 2014). This project aims to reduce the harm caused by drug use, the drug trade, and drug law enforcement practices that produce racial disparities in criminal processing. *Id.* The Law Enforcement Assisted Diversion Program (LEAD) is supported by the RDP, the Seattle City Mayor, the King County Executive, the King County Prosecuting Attorney’s Office, the Seattle City Attorney, the King County Sheriff’s Office, the Seattle Police Department, the Washington State Department of Corrections, Community Advisory Boards representing members of the communities served, and the ACLU of Washington. The program authorizes police officers to exercise their discretion in a manner that may reduce (1) disparities in arrest and incarceration rates, (2) reliance on incarceration for low-level offenses, and (3) barriers to accessing community-based treatment programs. See Law Enforcement Assisted Diversion Website, [Law Enforcement Assisted Diversion](#), LEADKINGCOUNTY.ORG (last visited July 8, 2014). The program, which began in 2011, has been established through the support of foundation grants at no cost to the public; evaluation of its impact will begin shortly. *Id.*

In New York City, stop and frisk litigation by the Center for Constitutional Rights (discussed *supra* in § 2.6D, The Fourth Amendment and *Terry* Stops) led to the formation of Communities United for Police Reform, a group focused on non-litigation strategies to reduce racial profiling in the city. One of the efforts supported by the coalition was the passage of two pieces of legislation aimed at addressing racial profiling: the End Discriminatory Profiling Act and the NYPD Oversight Act. Two additional proposed bills that may be considered by New York's City Council in the future would (1) impose limitations and regulations on consent searches, and (2) require officers to identify and explain their identity and the purpose of their law enforcement activity to all individuals approached. Communities United for Police Reform reports that similar laws governing consent searches exist in Colorado and West Virginia, and that similar laws requiring officers to identify themselves and the purpose of their law enforcement activity exist in Arkansas, Minnesota, and Colorado. *See* Communities United for Police Reform Website, [About the Community Safety Act](#), COMMUNITIES UNITED FOR POLICE REFORM (last visited July 8, 2014); *see supra* § 2.7C, Vehicle Consent Searches.

Community groups and individual community members often become aware of a problematic police practice before attorneys perceive its impact in individual criminal cases. For this reason, defense attorneys may wish to engage in an exchange of information and concerns with community-based groups and individuals in minority communities to learn more about police practices that may be of concern and develop strategies for addressing such practices inside and outside court. For example, the ACLU of North Carolina has asked community members to provide it with information about possible racial profiling practices and locations in North Carolina. Individuals who have information about racial profiling may provide the information to the ACLU using the following link: <https://www.acluofnorthcarolina.org/index.php/English/racial-profiling-complaint-formhtml>. More information, resources, and strategies regarding the potential for community engagement in defenders' efforts to address racial disparities in the criminal justice system can be found in the following resources: ASHLEY NELLIS ET AL., [THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 1](#) (2d ed. 2008); [Communities United for Police Reform](#), CHANGETHENYPD.ORG (last visited Sept. 25, 2014); and the [Racial Disparity Project](#), RDP.DEFENDER.ORG (last visited Sept. 25, 2014).