

License and Registration, Please

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In 2015, Texas state trooper Brian Encinia ordered 28-year-old Sandra Bland out of her vehicle after pulling her over for failure to signal a lane change. He then forcefully restrained her and brought her to jail, where she was detained on a \$5,000 bond and placed in solitary confinement. Three days later, she was found dead in her cell in an apparent suicide.

Bland's death led to an outcry about how she was treated. It also raised questions about the powers of police officers during traffic stops. Attorneys and other experts who reviewed the legality of Encinia's actions for the *New York Times* came to mixed conclusions. On the one hand, Encinia was indicted for perjury; he said that he had ordered Bland from the car because she was threatening him, but video evidence showed this wasn't true. (The perjury charge was later dropped in exchange for his leaving the police force.) On the other hand, many of Encinia's actions were within legal bounds. After a minor traffic stop, the *Times* experts said, police have "almost complete discretion" to order a person from a vehicle and to apply "proportionate" use of force if he or she fails to comply. Police also have discretion in deciding whether there is "probable cause" to pat a person down and search the vehicle after a traffic stop.

In *Policing the Open Road: How Cars Transformed American Freedom*, Sarah Seo, an associate professor at the University of Iowa College of Law who focuses on the history of criminal Law and procedure in the United States, opens by discussing what happened to Sandra Bland. Seo then raises a crucial

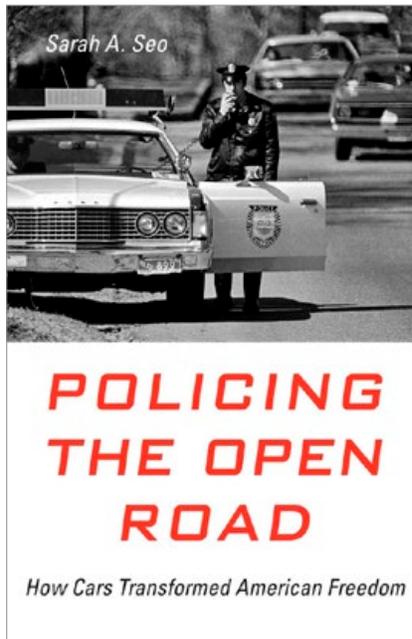
question: how did the police come to have so much discretionary power?

Seo makes the case that the rise of the modern police force in the United States is closely tied to the rise of the automobile. In the face of this potentially dangerous new technology—cars—twentieth-century courts yielded more and more ground to police discretion. This shift, Seo argues, “profoundly altered the relationship between citizens and the police,” with widespread consequences, particularly for people of color who have long been disproportionately targeted by police.

Policing the Open Road interweaves historical narrative with legal scholarship, and includes analysis of case law spanning nearly a century, which Seo makes accessible to nonspecialists. But her account is also of interest beyond the discussion of court decisions: she packs the book with details on the rise of the car, including portraits of those people who grappled with how to handle the onslaught of drivers, from police chiefs to Supreme Court justices. And the key questions that the book digs into are important for anyone thinking about the role of police in society—particularly as society confronts new technologies (such as facial recognition) that could yield even greater power to law enforcement.

Going back to the early days of the car, Seo paints a picture of how Americans embraced their newfound freedom. It became much easier to travel: a 1909 *Harper's Weekly* article marveled at the “ability to go where and when one wills.” Car production ramped up, from 80,000 cars produced in 1909 to over four million in 1923.

As city streets became crowded with vehicles, death rates also skyrocketed. Seo cites data from the National Safety Council showing that death rates from car crashes increased 500% between 1913 and 1932. In major metropolitan areas such as New York City, just crossing the street became extremely dangerous. Cities and states began to pass new traffic laws, including laws on speed limits. In the face of widespread



Policing the Open Road: How Cars Transformed American Freedom

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failure of drivers to obey the new laws, government agencies launched education campaigns, and community groups formed “vigilance committees” to report on traffic offenders. But as traffic deaths kept rising, it became clear that these methods weren’t working well enough. In 1930, President Herbert Hoover said that “laws are of little value if they are not or cannot be properly enforced.”

Prior to the twentieth century, police officers played a relatively small role in society, Seo writes, mainly dealing with those on the “margins of society” such as “beggars, drunks, and those who seemed out of place.” But in the early 1900s, police forces grew as more officers were hired to enforce traffic laws. Cities from New York City to Minneapolis to Los Angeles expanded their police forces, and arrests for traffic offenses increased dramatically. Many states also adopted state police forces, and through the 1930s and 1940s their responsibilities expanded beyond traffic enforcement

to investigating crimes more generally. Though difficult to say precisely how much the growth of the police force was influenced by the need to enforce traffic laws, Seo writes, it was clearly a “dominant factor.”

As police forces grew, so did the urgency of questions about the scope of their authority over drivers. The Fourth Amendment of the US Constitution affirmed that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” But how the Fourth Amendment applied to automobiles was unclear. Did officers have to obtain a court-ordered warrant to arrest drivers and to conduct a lawful search, as they needed (with rare exceptions) when searching a private home?

This question became, as Seo describes it, “one of the most contentious questions in twentieth-century criminal procedure.” And it became all the more pressing when the Eighteenth Amendment criminalized the manufacture, sale, and transportation of alcohol, going into effect in 1920. Prior to Prohibition, Seo explains, it was uncommon for law enforcement (with the exception of border customs agents) to conduct searches. That changed in Prohibition, as federal agents were charged with finding illegal liquor, often transported by car.

Carroll v. United States, decided in 1925, was the Supreme Court’s first car search case and of huge importance to subsequent case law. In 1921, Prohibition agents were “on the prowl” on a country road between Detroit and Grand Rapids, Michigan. An agent spotted George Carroll, a suspected bootlegger, passing by and pulled the car over to conduct a warrantless search. Agents found that Carroll and

an accomplice had concealed dozens of bottles of whiskey in the car. The pair were found guilty by a jury, but they appealed the case all the way to the Supreme Court, arguing that their Fourth Amendment rights had been violated and that the evidence should not be admissible, since the officers didn't have a warrant.

The Supreme Court ruled that the warrantless search in *Carroll* had been within the rights of the officers. The majority opinion stated that the "officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported." Part of the reason given for treating cars differently from houses was that often it was not "practicable" to obtain a warrant for a car (the driver might more easily flee). But the case also centered on the threat to public safety that cars posed: the attorney for the government argued that "as soon as the motor car appeared upon our highways it was recognized as a dangerous instrumentality." Because of the dangers involved, the argument went, officers needed to have leeway in searching vehicles.

Carroll "constitutionally legitimized police discretion," Seo writes, and marked a "turning point in criminal procedure." Rather than merely raise the question of the location of the search (whether in private or public), the court allowed warrantless searches based on an individual officer's opinion of what was probable cause for suspicion of a crime.

From early on, many commentators voiced concerns about this precedent. A Mississippi judge called the decision "erroneous," and argued that the ruling would "make petty tyrants out of policemen" and "speedily become intolerable." These concerns would come to apply to searches of people as well: in a 1968 case (*Terry v. Ohio*), the Supreme Court extended the power of police to stop and frisk people, citing

Carroll and echoing its language of deferring to the police's "reasonable" judgment. The NAACP pushed back, writing that "in the real world ... the reasonableness of theory is paper thin," and that the decision would lend itself to increased racial discrimination and community alienation.

In the 1960s, the Supreme Court responded to concerns of police abuse of power by creating greater protection—and better means of redress—against arbitrary policing. For example, *Mapp v. Ohio* (1961) excluded all evidence obtained by police through illegal searches. (Previously, some states had adopted this "exclusionary rule" but others had not.) And *Gideon v. Wainwright* (1963) provided the right to a lawyer for anyone accused of a crime who couldn't afford an attorney.

But Seo makes the case that what many legal scholars call the "Due Process Revolution" didn't revolutionize much when it came to police discretion in car searches. Case law from *Carroll* onward consistently gave police the right to pull people over for minor traffic offenses, and based on their own judgment of what is reasonable, to subject those parties to invasive and abusive searches in an attempt to find evidence of other crimes. And as commentators had feared, police discretion was (and is) also often discriminatory. When the Drug Enforcement Administration recruited state and local police in the 1980s to aid in the "war on drugs," it specifically instructed them to look for "ethnic groups associated with the drug trade." And systematic research points to widespread racial bias in traffic stops. Seo highlights several studies, including one in New Jersey in the late 1990s, showing that police stopped black drivers at wildly disproportionate rates. (In addition, a recent analysis from the Stanford Open Policing Project drawing on nearly one hundred million records of traffic stops has shown what the researchers called "significant racial disparities" in policing.)

Discriminatory and abusive police behavior on the road has far-reaching consequences, including disproportionately burdening people of color with fines and fees, and contributing to their much higher rates of incarceration than white people for drug possession, despite using drugs at the same rate. Traffic stops also pose the threat of danger to drivers, including fatal shootings, in which a disproportionate number of black Americans are killed by police.

Much of *Policing the Open Road* focuses on the past, but (as Seo lays out in a *New York Review of Books* essay titled "What Cars Can Teach Us About New Policing Technologies") the book raises questions that are deeply important to the future.

Over the course of the twentieth century, courts gave unprecedented power of discretion to police, with disturbing results. In the twenty-first century, society is dealing with many new technologies that have troubling implications for the relationship between citizens and their government. Technologies of concern, many of them used by law enforcement, include facial recognition software, widespread DNA collection (in some states, taken from anyone who is arrested), pervasive surveillance cameras, and statistical tools designed to predict crime (which have the potential to further entrench racial bias).

Seo raises the question of how much power the police should have in society. As policing technologies become more powerful and omnipresent, what degree of privacy and freedom should citizens be willing to give up in the name of public safety? Answering these questions is urgent and, as Seo suggests, may require "defining freedom anew."

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