

NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of *Terry v Ohio*:  
A Content Analysis of *Floyd, et al. v City of New York*\*

By

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**Abstract**

The New York City Police Department (NYPD) implementation of its Stop, Question, and Frisk program under Mayor Bloomberg and NYPD Commissioner Kelly has been a subject of controversy for decades. It was a strategy that dates back to 1964. After five years of litigation a federal district court held that the use of Stop, Question, and Frisk under Bloomberg and Kelly was implemented in violation of the Fourteenth and Fourth Amendments because those who were stopped were stopped based on their race. Bloomberg and Kelly declared that not only would they continue the program but that the city would appeal the court decision. The election of 2013 effectively ended the appeal and the program with election of a new mayor. This article reviews the opinion of *Floyd, et al. v City of New York* (2013) and its finding that the NYPD engaged in indirect racial profiling. This article will also seek to put the program in a more historical perspective of why African American males and other people of color are seen as dangerous and need to be controlled. This historical perspective links race and crime together and because of this historical perspective within the American social, political, and legal psyche, there should be no surprise that the NYPD program was been implemented in the first place.

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*Of all the preposterous assumptions of humanity, nothing exceeds the criticisms made of the habits of the poor by the well-housed, well-warmed, and well-fed.<sup>1</sup>*

*I went by the field of the lazy man, and by the vineyard of the man devoid of understanding; And there it was, all overgrown with thorns; its surface was covered with nettles; Its stone wall was broken down. When I saw it, I considered it well; I looked on it and received instruction [that] He who has a slack hand becomes poor [and] much food is in the fallow ground of the poor.<sup>2</sup>*

## Introduction

Perceptions of truth matter and sometimes they matter regardless of actual truth. In 2013 a federal court asserted that the NYPD had engaged in indirect racial profiling in the implementation of its crime suppression technique of stop-question-frisk. The court rejected the assertion made by the city, in court, and by the Mayor and Police Commissioner, in public, that the disproportionate impact of the policy on young black males was the result of disproportionate criminality. It will be proposed in this article that not only was the court correct that the policy was unconstitutional due to the use of race as the underlying assumption in the implementation of the policy, but also that the policy was in violation of *Terry v Ohio* and the justification that the Supreme Court ratified in allowing the police to stop a person on less than probable cause and that such stops had to be specific to the individual. It will be proposed that the NYPD policy

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<sup>1</sup> Herman Melville, *Poor Man's Pudding*, in GREAT SHORT WORKS OF HERMAN MELVILLE 165, 173 (1854).

<sup>2</sup> Proverbs 24:30-34, Proverbs 10:4 and Proverbs 13:23 (New King James) respectively.

of stop-question-frisk was based on crime data, not individual behavior. Thus, people were stopped because of race rather than criminality. Subsequently, this article will conclude with placing the stop-question-frisk policy in context with a historical and social perception within the United States that black males are more criminogenic than other people, and thus, it is to be expected that they are disproportionately arrested and incarcerated.

Part One will provide a detailed review of the federal district court opinion and the defenses of the NYPD stop-question-frisk policy made by the city both in court and in public. Part Two will provide a social context for the NYPD policy. Some final conclusions will be provided in Part Three.

**Part One**  
**Floyd v City of New York**  
**The Federal Court and NYPD Stop, Question and Frisk Policy**

**1. The Decision of the District Court**

**a. The Ruling of the Court**

On January 31, 2008 David Floyd and Lalit Clarkson filed suit against the City of New York (“NYC”), the NYC Police Department (“NYPD”) Commissioner Ray Kelly, the Mayor of New York Michael Bloomberg and two NYPD police officers for violation of their Fourth Amendment, Fourteenth Amendment Equal Protection Clause, and statutory civil rights by (1) being subjected to stops and frisks without specific reasonable articulated suspicion, and (2) that the stops and frisks were conducted by the two police officers because they were engaged in “implemment[ing] and are continuing to enforce, encourage and sanction a policy, practice and/or custom of unconstitutional stops and frisks of city residents by the New York City Police Department (“NYPD”).”<sup>3</sup> The Complaint asserted that “NYPD officers, in violation of the Equal

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<sup>3</sup> Complaint Demand for Jury Trial at 1-2, *Floyd and Clarkson v. City of N.Y.*, 959 F. Supp. 540 (2013) (No. 08 Civ. 1034 (SAS)).

protection Clause of the Fourteenth Amendment, often have used, and continue to use, race and/or national origin – not reasonable suspicion – as the determinative factors in deciding to stop and frisk individuals.”<sup>4</sup> The actions of the NYPD are the “result of, and are directly and proximately caused by, policies, practices and/or customs devised, implemented and enforced by the city, Kelly and Bloomberg.”<sup>5</sup> The civil suit sought injunctive relief to end the asserted unconstitutional policies as well as compensatory damages, punitive damages and attorney’s fees.<sup>6</sup> In subsequent filings in the litigation, the plaintiffs withdrew claims for damages, dismissed their claims against the individual officers, dropped subsequent petitions for relief under state law and certified the case as a class action asserting federal civil rights violations (fourth and fourteenth amendments) seeking only injunctive relief.<sup>7</sup>

Five years later, and after a nine week bench trial (March 18 through May 20, 2013), District Judge Shira A. Scheindlin of the U.S. District Court Southern District of New York ruled that “[b]ased on the preponderance of the credible evidence”,<sup>8</sup> the plaintiffs had established that

“(1) The NYPD carries out more stops where there are more blacks and Hispanic residents, even when other relevant variables are held constant. . . .

(2) Blacks and Hispanics are more likely than whites to be stopped within precincts and census tracts, even after controlling for other relevant variables. . . .

(3) For the period 2004 through 2009, when any law enforcement action was taken following a stop, blacks were 30% more likely to be arrested (as supposed to receiving a summons) than whites, for the same suspected crime.

(4) For the period 2004 through 2009, after controlling for suspected crime and precinct characteristics, blacks who were stopped were about 14% more likely – and Hispanics 9% more likely – than whites to be subjected to the use of force.

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<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 10-11.

<sup>7</sup> *Floyd, et al v. City of N.Y.*, 959 F. Supp. 2d 540, 557, 572 fn 100 (S.D.N.Y. 2013), *appeal dismissed* (Sept. 25, 2013).

<sup>8</sup> *See id.* at 565, 572 n.101.

(5) For the period 2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8% *lower* if the person stopped was black than if the person stopped was white. In addition, the greater the black population in a precinct, the less likely that a stop would result in a sanction.”

[(6) “78% of stops during the class period were self-initiated.”]<sup>9</sup>

The court concluded that “[t]ogether, these results show that blacks are likely targeted for stops based on a lesser degree of objectivity founded suspicion than whites.”<sup>10</sup> As discussed below, the city asserted that police attention and deployment in black and Hispanic neighborhoods were not done due to race but was done due to crime patterns within neighborhoods and that race concentration in stops and frisks is an unfortunate fact of crime patterns in those neighborhoods with high rates of crime. The Court was not convinced.

“I reject the testimony of the City’s experts that the race of crime suspects is the appropriate benchmark for measuring racial bias in stops. The City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population.”<sup>11</sup>

The key difference between the Court and the plaintiffs in opposition of the implementation of stop-question-frisk, in contrast to the Mayor and Police Commissioner who supported stop and frisk, is that the logic of the latter, as the Court observed, “is flawed because the stopped population is overwhelmingly innocent – not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area.”<sup>12</sup> Even more importantly, there is no basis at all for assuming that

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<sup>9</sup> *Floyd*, 959 F. Supp. 2d at 560; 574-575, n.121.

<sup>10</sup> *See Id.* at 560.

<sup>11</sup> *Id.* at 560.

<sup>12</sup> *Id.*; To the contrary, the RAND Corporation 2007 evaluation of the NYPD stop and frisk program asserted that:

[R]esidential census data—that is, the racial distribution of the general population in New York—possibly provide an estimate of the racial distribution of those exposed to police but do not reflect rates of criminal participation. As a result, external benchmarks based on the census have been widely discredited. The racial distribution of arrestees has been proposed as a more reliable benchmark. A more promising external benchmark is the racial distribution of individuals identified in crime-suspect descriptions, though this benchmark also has serious pitfalls.

the innocent blacks and Hispanics who share the same neighborhood as black and Hispanic criminals share the same characteristics or behaviors. It's the criminal behavior that should be the defining factor not race. As discussed below, it is that distinction – behavior – that defines the constitutional right of police to conduct a stop and frisk.

The Court further held that, “the NYPD has an unwritten policy of targeting ‘the right people’ for stops. In practice, the policy encourages the targeting of young black and Hispanic men based on their prevalence in local crime complaints.”<sup>13</sup> The Court concluded that one of the alleged nineteen incidents was not a *Terry* stop at all, of the remaining eighteen incidents, ten were unconstitutional stops and eight were constitutional stops, and of the fifteen involving frisks, nine were unconstitutional and six were constitutional.<sup>14</sup> Thus, the Court found 72% of the named plaintiffs suffered a constitutional violation (thirteen suffered an unconstitutional stop and/or frisk and five suffered no constitutional violations out of the eighteen total incidents). The Court concluded that the

City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately indifferent, the NYPD's unconstitutional practices were

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The RAND report concluded that:

Evaluating racial disparities in pedestrian stops using external benchmarks is highly sensitive to the choice of benchmark. Therefore, analyses based on any of the external benchmarks developed to date are questionable.

Benchmarks based on crime-suspect descriptions may provide a good measure of the rates of participation in certain types of crimes by race, but being a valid benchmark requires that suspects, regardless of race, are equally exposed to police officers.

We found that black pedestrians were stopped at a rate that is 20 to 30 percent lower than their representation in crime-suspect descriptions. Hispanic pedestrians were stopped disproportionately more, by 5 to 10 percent, than their representation among crime-suspect descriptions would predict.

Greg Ridgeway, RAND, *Analysis of Racial Disparities in The New York Police Department's Stop, Question, and Frisk Practices*, xi-xii (2007) [hereafter RAND Report].

<sup>13</sup> *Floyd*, 959 F. Supp. 2d at 561

<sup>14</sup> *Id.* at 561-562.

sufficiently widespread as to have the force of law. In addition, the City adopted a policy of indirect racial profiling by targeting defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause. Both statistical and anecdotal evidence showed that minorities are indeed treated differently than white. For example, once a stop is made, blacks and Hispanics are more likely to be subjected to the use of force than whites, despite the fact that whites are more likely to be found with weapons or contraband. I also conclude that the City's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting "the right people" is racially discriminatory and therefore violates the United States Constitution. One NYPD official has even suggested that it is permissible to stop racially defined groups just to instill fear in them that they are subject to being stopped at any time for any reason — in the hope that this fear will deter them from carrying guns in the streets. The goal of deterring crime is laudable, but this method of doing so is unconstitutional.

I recognize that the police will deploy their limited resources to high crime areas. This benefits the communities where the need for policing is greatest. But the police are not permitted to target people for stops based on their race. . . . [T]he Equal Protection Clause prohibits the practices described in *this* case. A police department may not target a racially defined group for stops *in general* — that is, for stops based on suspicions of general criminal wrongdoing — simply because members of that group appear frequently in the police department's suspect data. The Equal Protection Clause does not permit the police to target a racially defined group as a whole because of the misdeeds of some of its members.<sup>15</sup>

The Court held that it would order various remedies, including (1) a change in the policies for stop and frisk, (2) a trial program for body-worn cameras in one precinct per borough, (3) a court-appointed facilitator to aid in a community-based remedial process and (4) the appointment of an independent monitor to ensure the use of stop and frisks comply with the Constitution and the "principles enunciated in this Opinion, and to monitor the NYPD's compliance with the ordered remedies."<sup>16</sup>

The Court issued a 195-page opinion and it would be unrealistic to review every aspect of the opinion in this article. Rather, Part One, section 1b below discusses the approach the Court

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<sup>15</sup> *Id.* at 562-63.

<sup>16</sup> *Id.* at 563.

used in addressing the issue of race and crime. The court made clear that under Constitution and Fourth Amendment only individual behavior that rises to specific articulable reasonable suspicion that a crime has and/or is being committed justifies conducting a stop and frisk. The court rejected the assertion of the city that the use of criminal statistics – suspect descriptive data – provides a justification for focusing police attention on individuals of a racial group in specific neighborhoods.

## **b. The Court, the Fourth Amendment and Why Race Does Not Matter**

### **i. The Purpose and Origin of Stop and Frisk**

The NYPD has a long history with stop and frisk dating back to the 1964 state statute and the Supreme Court decision in *Sibron v New York*, the companion case to *Terry v Ohio*, which held the statute was constitutional.<sup>17</sup>

In 1968 the Supreme Court held in the landmark case, *Terry v Ohio*, that the police are authorized to stop a person on the street and intrude upon his/her liberty without a warrant if the police have,

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion [a]nd in making that assessment it is

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<sup>17</sup> See NY CLS CPL § 140.50; see *Sibron v. New York*, 392 U.S. 40 (1968); see also Complaint Demand for Jury Trial, *supra* note 3, at 9; see also John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court Conference*, 72 ST. JOHN'S LAW REVIEW 749 (1998). NYPD officers are governed by state law which defines stop and frisk. In *People v. DeBour*, 40 N.Y. 2d 210 (1976), the city asserted that:

[t]he Court was also misguided in its belief that New York's *DeBour* standards provide a lesser degree of protection than federal law (SPA68; see A7094-95). In *DeBour*, the New York Court of Appeals set forth a four-tiered framework for evaluating street encounters: (1) the "request for information," requiring some objective, credible reason not necessarily indicative of criminality; (2) the "common-law right of inquiry," requiring a "founded suspicion that criminal activity is afoot;" (3) the "forcible stop and detention," requiring RAS [reasonable articulable suspicion]; and (4) arrest, which demands probable cause. *DeBour*, 40 N.Y. 2d at 222-23.

Notably, the third level of *DeBour* tracks *Terry* in all respects. *David Floyd, Lalit Clarkson, Deon Dennis, David Ourlicht v City of New York, et al*, Defendant – Appellants Merits Brief, Appeal to the U.S. Court of Appeals Second Circuit, 13-3088-cv (L), 13-3461-cv(CON) and 13-1352-cv(CON) (December 10, 2013) at 78.



imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate? *Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches*, a result this Court has consistently refused to sanction.<sup>18</sup>

More importantly, the Court made clear what that the law enforcement purpose of stop and frisk.

One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for *purposes of investigating possibly criminal behavior* even though there is no probable cause to make an arrest. It was this legitimate *investigative function* Officer McFadden was discharging when he decided to approach petitioner and his companions.<sup>19</sup>

Stop and frisk is an investigatory tool based on specific behavior, “a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation.”<sup>20</sup> Stop and frisk, under the Fourth Amendment, is not a tool of police deterrence; it is an investigatory tool to determine if otherwise innocent behavior is actually criminal behavior. As discussed below, the NYPD was using stop and frisk as a crime suppression tool in general and specifically a tool to reduce gun violence.

The Court then proceeded to discuss the second aspect of the tool, frisk. Here the Court focused on the issue of police safety as primary to the right to be free from government having physical contact with one’s person without consent.

We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties.

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<sup>18</sup> Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (internal citation omitted) (emphasis added).

<sup>19</sup> *Id.* at 22 (emphasis added).

<sup>20</sup> *Id.*

[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.<sup>21</sup>

But the Court was clear to explain that although it recognized that the police in making a reasonable stop based on articulable facts that rise to reasonable suspicion have a right to protect themselves from the possibility of the presence of a weapon, that right of protection does not authorize an unlimited right to conduct a search. Because “[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”<sup>22</sup>

The Court concluded that

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; *the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.*<sup>23</sup>

As with the standard to make the stop, the Court held that “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”<sup>24</sup>

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<sup>21</sup> *Id.* at 24.

<sup>22</sup> *Id.* at 24-25.

<sup>23</sup> *Id.* at 27 (emphasis added).

<sup>24</sup> *Terry*, 392 U.S. at 27.

In the *Terry* case, the officer watched Terry and his companions, and their actions were indicative of possible robbery.<sup>25</sup> The officer's suspicions did not rise to the level of probable cause, but their actions were such that "[i]t would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further."<sup>26</sup> As to the frisk, the Court held

We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.<sup>27</sup>

Again, focus on the justification of the stop and the frisk – investigation of possible criminal activity. “Inventive imagination” or acts of “harassment” do not authorize individual stops; and neither does objective crime pattern statistics, as the District Court made clear in *Floyd*.

To conclude, a stop and frisk is an investigatory tool of law enforcement not a tool of crime deterrence. The tool is justified under the following dynamics as summarized by the Court in *Terry*. The Court said,

We merely hold today that [1]where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot [2] and that the persons with whom he is dealing may be armed and presently dangerous, [3] where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, [4] he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>28</sup>

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<sup>25</sup> *Id.* at 28.

<sup>26</sup> *Id.* at 23.

<sup>27</sup> “The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Id.* at 29.

<sup>28</sup> *Id.* at 30.

The Court also made clear that how the search is conducted is equally constitutionally important as the limited justification of the search.

[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.

...

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.<sup>29</sup>

## ii. The District Court Decision in *Floyd*

The Court in *Floyd* held that the police use of stop-question-frisk was in violation of the Fourth Amendment and the principles of *Terry v Ohio* which defined the legality of a police stop and frisk short of probable cause and in the absence of a warrant. As previously discussed, stop and frisk is an investigatory tool not one of deterrence and *Terry* requires articulable and specific individualized reasonable suspicion of the possibility of a crime and articulable and specific individualized reasonable suspicion of the possibility of a weapon. Under *Terry*, a legitimate stop does not establish the right to frisk. The totality of the facts must justify each separately; a nuance that was lost on the NYPD. The Court, in *Floyd*, correctly found that the NYPD had a policy and custom of using crime pattern statistics to justify stop and frisks rather than articulable and specific individualized reasonable suspicion.

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<sup>29</sup> *Id.* at 18-19, 29-30 (internal citation omitted).

## 1. Post *Terry* Fourth Amendment Law

The District Court began its discussion of the NYPD stop-question-frisk program by defining how the federal courts have defined what a stop and frisk is subsequent to *Terry*. The court explained that a stop occurs when a reasonable person, under the totality of the circumstance, would believe that the police have communicated that he was not at liberty to ignore the police and go about his business.<sup>30</sup> The court explained that the Fourth Amendment governs when the individual is not “free to terminate the encounter.”<sup>31</sup> This standard applies even when the police have no basis for suspecting an individual but nonetheless ask questions of that individual, ask for identification or make requests for permission to conduct searches of the person and/or his/her property.<sup>32</sup> The court made clear that the Supreme Court has defined a situation as a coercive stop if the police show of authority requires compliance or the police convey a message that compliance is required.<sup>33</sup> The display of force, physically securing the property of a person, the display of weapons, the number of police officers, the type of force displayed by the police, police request for an individual to move or otherwise accompany the police to a different location, and the language used or the tone of voice of the police officer are

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<sup>30</sup> *Floyd*, 959 F. Supp. 2d at 565-566 (citing *Florida v. Bostick*, 501 U.S. 429 (1991) and *Michigan v. Chestnut* 486 U.S. 567 (1988)).

<sup>31</sup> *Id.* at 565 (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991).); *See also*, *Brendlin v. California*, 551 U.S. 249, 254 (2007).

<sup>32</sup> *Id.* at 565.

<sup>33</sup> *Floyd*, 959 F. Supp. 2d at 566 n.55. As the court explained

These cases confirm that the *manner* and *context* of police conduct are relevant to the inquiry into whether a reasonable person would have felt free to terminate the encounter. As the Second Circuit has noted, this inquiry is essentially “an objective assessment of the overall coercive effect of the police conduct.” *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990) (citing *Chestnut*, 486 U.S. at 573–74).

*See also* *Florida v. Bostick*, 501 U.S. 429 (1991); *INS v. Delgado*, 466 U.S. 210, 216 (1984) (“[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation . . . [u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded.” (emphasis added)).

all factors that establish the inability of a person to disregard the police which under the Fourth Amendment proves the person has been seized.<sup>34</sup>

The court explained that for a search to proceed from a stop, “the police officer must reasonably suspect that the person stopped is armed and dangerous,”<sup>35</sup> a standard that provides more protection than New York State law.<sup>36</sup> On this point of definition and legal authority the court made clear that the law under *Terry* and its progeny prevails, not the state statute.

I note that the New York stop and frisk statute authorizes an officer to conduct a frisk whenever, after a stop, he “reasonably suspects that he is in danger of physical injury.” CPL § 140.50(3). This standard is not the constitutional standard. It would allow an officer to conduct a frisk even when she lacks reasonable suspicion that the stopped person is armed and dangerous. As the Supreme Court has made clear, New York “may not . . . authorize police conduct which trenches upon Fourth Amendment rights.” *Sibron v. New York*, 392 U.S. 40, 61 (1968). The Fourth Amendment, and not New York law, establishes the requirements for a constitutional frisk in this case.<sup>37</sup>

...  
The NYPD’s training materials place great importance on the New York state common law of stops, as articulated in *People v. DeBour* and its progeny. Because *DeBour* and the Fourth Amendment draw the line between permissible and impermissible police encounters in different ways, *DeBour* is in some respects more protective of liberty from governmental intrusion than the Fourth Amendment, and in other respects less. The Supreme Court has held that although states may impose greater restrictions on police conduct than those established by the Fourth Amendment, a state “may not . . . authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct.” Thus, even where a police encounter would be permissible under *DeBour*, it remains unlawful if it violates the Fourth Amendment.<sup>38</sup>

The court concluded by making clear that while the police have the authority to conduct a frisk if they reasonably believe that the person may be armed and upon such a search if the object felt is

<sup>34</sup> *Floyd*, 959 F. Supp. 2d at 566-567.

<sup>35</sup> *Id.* at 558 (citing *United States v. Lopez*, 321 Fed. App’x 65, 67 (2d Cir. 2009) quoting *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009)).

<sup>36</sup> See CPL § 140.50 (See *Supra* note 17 and city assertion that New York State Law does provide *Terry* level protection.)

<sup>37</sup> *Floyd*, 959 F. Supp. 2d at 568 n.74.

<sup>38</sup> *Id.* at 569-70 (citing *People v. DeBour*, 352 N.E.2d 562 (1976) and *Davis v City of N.Y.*, 959 F. Supp. 2d 324, 342, n.75 (S.D.N.Y. 2013)); See also, *Sibron v. New York*, 392 U.S. 40, 61 (1968) (in which the Supreme Court, the district court explained, “revers[ed] [the] conviction for failure to suppress evidence seized in an unlawful stop.” *Id.* at 570 fn 83 ).

immediately apparent to be a weapon they have the authority to secure the weapon or contraband, this authority in no way permits a generalized and customary search for weapons upon a stop. Additionally, the “intrusion must be temporary and last no longer than is necessary to effectuate the purpose of the stop and the officer should employ the least intrusive means available to dispel the officer’s suspicion in a timely fashion.”<sup>39</sup> The authority to conduct a stop does not permit or authorize generalized and customary searches for weapons upon a stop. The court made clear that the use of handcuffs during a stop and frisk is lawful, *per se*, but to do so “substantially aggravates the intrusiveness of an otherwise routine investigatory detention” and it is unconstitutional if the police fail to justify the *Terry* stop and frisk in the first place.<sup>40</sup>

The court concluded the survey of the governing law subsequent to *Terry* by making clear that under the Equal Protection Clause of the Fourteenth Amendment, the police are not allowed to intentionally treat similarly situated people differently based on race although the Equal Protection Clause does not prohibit police actions that have a disproportionate racial impact.<sup>41</sup> On the issue of proof of an equal protection violation, the court explained that the law

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<sup>39</sup> *Floyd*, 959 F. Supp. 2d at 627 n.447 (quoting *United States v. Jones*, 269 F.3d 919, 924 (8th Cir. 2001)).

<sup>40</sup> *Id.* at 630 n.476 (internal citation omitted). The court explained that the requirement for the least intrusive means:

The Supreme Court held that the Fourth Amendment does not require police to use the least intrusive means possible to verify their suspicions, reasoning that such a rule would “unduly hamper the police’s ability to make swift, on-the-spot decisions.” [*United States v.*] *Sokolow*, 490 U.S. at 10-11. However, this deference only applies when the suspicion to be verified is sufficient to justify a *Terry* stop. *See id.* at 10 (holding that the circumstances gave rise to reasonable suspicion that the suspect was smuggling drugs, and only then turning to whether police were required to use least intrusive means possible to investigate); *see also El-Ghazzawy v. Berthiaume*, 636 F.3d at 457–58 [(8th Cir. 2011)].

*Id.* at 645 n.620.

*See El-Ghazzawy*, 636 F.3d at 457–58 (investigative stop unconstitutional where there was no indication that plaintiff was armed and dangerous, and officer “failed to conduct even the most basic investigation into the facts prior to handcuffing and frisking”); [*Washington v.*] *Lambert*, 98 F.3d at 1188 [(9<sup>th</sup> Cir 1996)] (stating that “handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention”) (quotations omitted). *Id.* at 630 n.476.

<sup>41</sup> *Id.* at 570 (internal citations omitted).

under the Second Circuit, intentional discrimination can be established under three different theories.

*First*, '[a] plaintiff could point to a law or policy that 'expressly classifies persons on the basis of race.' *Second*, 'a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner.' *Third*, '[a] plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus.' In none of these three cases is a plaintiff 'obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.'

In order to show intentional discrimination under the second and third models of pleading above, plaintiffs need not prove that the 'challenged action rested solely on racially discriminatory purposes,' or even that a discriminatory purpose 'was the 'dominant' or 'primary' one.' Rather, plaintiffs must prove that 'a discriminatory purpose has been *a* motivating factor' in the challenged action. That is, plaintiffs must show that those who carried out the challenged action 'selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.'<sup>42</sup>

The court concluded that "[o]nce it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race."<sup>43</sup> Thus "if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established."<sup>44</sup>

## 2. The Plaintiffs Case and the Battle Over Statistics

Anytime a NYPD officer conducts a stop he is required to complete a UF-250 form.<sup>45</sup>

The UF-250 is a one page double sided form in which the front gathers basic information including time, address of the stop, type of location, whether it occurred inside a structure or

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<sup>42</sup> *Id.* at 570-71 (internal citations omitted).

<sup>43</sup> *Id.* at 572 (quoting *United States v. City of Yonkers*, 96 F.3d 600, 612 (2d Cir. 1996) and *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987)).

<sup>44</sup> *Id.* (quoting *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1217 (2d Cir. 1987)).

<sup>45</sup> *Id.* at 572.



outside, the name of the officer, duration of the stop, the name and address of the person stopped, identification provided by the person stopped, basic demographic information of the person stopped (age, race, sex, height, weight, etc), level of force used, resolution of stop (whether the person was arrested or given a summons), was the stopped person frisked and whether a reason for the stop was provided.<sup>46</sup> On the back of the form, if the person was frisked the officer is given various choices (boxes) to check to justify the frisk.<sup>47</sup> The same if the person was searched. The officer is also provided a set of choices under “Additional Circumstances/Factors” to justify the stop and/or frisk or search.<sup>48</sup> The officer is also required to record the incident in his activity log (memo books).<sup>49</sup> The data from the compliance of filling out the UF-250s created a database that the parties analyzed to establish the statistical occurrences of stop and frisks conducted by the NYPD.<sup>50</sup>

Both plaintiffs and the NYPD introduced evidence from liability experts<sup>51</sup> on the results of analysis of data available. The court held, in regard to the data, that it was uncontested that

- Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.
- The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.
- 52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.
- 8% of all stops led to a search into the stopped person’s clothing, ostensibly based on the officer feeling an object during the frisk that he suspected to be a weapon, or immediately perceived to be contraband other than a weapon. In 9% of these searches, the felt object was in fact a weapon. 91% of the time, it was not.

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<sup>46</sup> *Id.* at 667.

<sup>47</sup> See, copy of the UF-250 form reproduced as Appendix A.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 607.

<sup>50</sup> *Id.* at 572.

<sup>51</sup> Dr. Jeffrey Fagan for the plaintiffs, Dr. Dennis C. Smith and Dr. Robert M. Purtell for the City and NYPD. *Floyd*, 959 F. Supp. 2d at 573 n.105.

In 14% of these searches, the felt object was in fact contraband. 86% of the time it was not.

- 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.
- In 52% of the 4.4 million stops, the person stopped was black.
- In 31% of the stops, the person stopped was Hispanic.
- In 10% of the stops, the person stopped was white.
- In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white.
- In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.
- Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.
- Contraband other than weapons was seized in 1.8% of the stops of blacks, 1.7% of the stops of Hispanics, and 2.3% of the stops of whites.
- For the years 2004 to 2009, the two most commonly checked boxes indicating the reasons for a stop were "Furtive Movements" and "Area Has Incidence Of Reported Offense Of Type Under Investigation" ("High Crime Area"). Setting aside stops based on radio runs, officers marked "Furtive Movements" as a basis for the stop on 42% of the forms, and "High Crime Area" on 55% of the forms. In 2009, officers indicated "Furtive Movements" as a basis for the stop nearly 60% of the time.
- Both "Furtive Movements" and "High Crime Area" are weak indicators of criminal activity. For the years 2004 to 2009, stops were 22% more likely to result in arrest if "High Crime Area" was not checked, and 18% more likely to result in arrest if "Furtive Movements" was not checked.
- Between 2004 and 2009, as the number of stops per year soared from 314,000 to 576,000, the percentage of UF-250s on which the officer failed to state a specific suspected crime rose from 1% to 36%.<sup>52</sup>

Thus, the data showed that 52% of the stops were black while blacks made up only 23% of the total New York City ("NYC") population. Hispanics accounted for 31% of the stops but

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<sup>52</sup> *Id.* at 558-59.

only 20% of the NYC population and whites accounted for only 10% of the stops while making up 33% of the total population. As discussed later in this article, the main justification for the disproportionate stop and frisk results made by the Mayor and Police Commissioner was that the program reduced the number of gun homicides and other types of gun violence. But the data showed that only 0.1% of stops resulted in gun seizures<sup>53</sup> and more whites (1.4%) were found with weapons during a stop than blacks (1%) or Hispanics (1.1%). More interesting, more contraband was secured from seized whites (2.3%) than Blacks (1.8%) or Hispanics (1.7%). Looking at what explanations were used to justify the *Terry* stops in the first place, not counting radio calls, “Furtive Movements” (sudden movements or suspicious movements) was the basis of 42% of the stops and “High Crime Area” was the basis for 55% of the stops.

Placing this data together suggests that while whites are more likely to be armed and have some type of contraband, blacks and Hispanics are more likely to be stopped and searched. Further, the single most used excuse (outside of furtive movements) is the location of high crime area. But the NYPD, as the Mayor and Police Commission publically assert, focus intensive law enforcement activity in high crime Black and Hispanic communities and specifically target crime in those neighborhoods only. The NYPD asserted that stops were the result of radio calls, it is significant that the 78% of all stops between 2004 and 2009 were self-initiated,<sup>54</sup> in other words stops were not as a result of service calls in which a victim give a description that includes race which can justify a stop using race. This is important because public statements by the Mayor and Police Commissioner would leave a person with the impression that the stops were the result

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<sup>53</sup> *Id.* at 574 n.118.

<sup>54</sup> *Id.* at 574 n.121.

of radio calls or information provided by a victim regarding a specific incident.<sup>55</sup> The data showed that only 22% of the stops resulted from radio calls. Thus it is the perception of the police about the neighborhood and not actual calls for aid that explain the primary use of “Furtive Movements” in a “High Crime Area” to justify a *Terry* stop and frisk.

The NYPD tried to justify the disproportionate stopping of blacks and Hispanics as well as justify the low rate of arrests (6%) and summonses (6%) resulting from stops because, as the former Chief of the Department Joseph Esposito testified, “many stops interrupt a crime from occurring.”<sup>56</sup> The court was not convinced,<sup>57</sup> but what is more important is that stop and frisk is not a preventive tool, it is an investigatory tool to determine if “criminal activity may be afoot.”<sup>58</sup> Stop and frisk is not a crime suppression tool. The reason this is significant is that stop and frisk interferes with an individual’s constitutional right to walk down the street without police obstruction, intimidation, or interference. The constitution allows for the interference when the police have a specific and justifiable reason for that interference. General crime suppression and prevention is not a specific and justifiable reason for that interference. This is all the more significant when “at least 88% of the NYPD’s 4.4 million stops” did not result in any formal police action (arrest or summons).<sup>59</sup> Thus, 3.872 million people had their constitutional right to be left alone interfered with (if not unlawfully violated) on the say so of the police but afterwards were released with nothing to show for the interference.

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<sup>55</sup> *E.g.*, Mayor Michael Bloomberg, Press Release, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012).

<sup>56</sup> *Floyd*, 959 F. Supp. 2d at 575.

<sup>57</sup> “No evidence was offered at trial, however, of a single stop that was: (1) based on reasonable suspicion, and (2) prevented the commission of a crime, but (3) did not result in probable cause for an arrest. While I have no doubt that such a stop has taken place at sometime, it is highly implausible that successful “preventive” stops take place frequently enough to affect the conclusion that in at least 88% of the NYPD’s 4.4 million stops between January 2004 and June 2012, the suspicion giving rise to the stop turned out to be misplaced.” *Id.*

<sup>58</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

<sup>59</sup> *Floyd*, 959 F. Supp. 2d at 575.

The plaintiffs used two approaches to establish the NYPD had violated the Fourth Amendment by systematically conducting stops and frisks without specific individualized reasonable suspicion: statistically, by analyzing the NYPD UF-250 database, and through individual testimony of the named twelve plaintiffs and the corresponding nineteen stops.<sup>60</sup> Space would not allow for a complete review of 70 pages of analysis on these two pillars of the plaintiffs case; such a review would be an article in itself. Rather an overview of the courts' reasoning and conclusions regarding the use of race and crime statistics will be analyzed.

The court first conceded the limits to making conclusions on the NYPD stop-question-frisk program regarding violations of the Fourth Amendment based on the database because "it is impossible to assess individually whether each of the 4.4 million stops at issue in this case was based on an officer's reasonable articulable suspicion."<sup>61</sup> The reason being the database information

[I]s highly flawed . . . (1) Officers do not always prepare a UF-250 . . . (2) A UF-250 is one sided, in that the UF-250 only records the officer's version of the story[,] (3) . . . UF-250s do not provide enough information to determine whether reasonable suspicion existed for a stop [and] (4) Many of the checkboxes on the UF-250 . . . are problematic. "Furtive Movements" is vague and subjective. In fact, an officer's impression of whether a movement was "furtive" may be affected by unconscious racial biases. "Fits Description" is a troubling basis for a stop if the description is so general that it fits a large portion of the population in the area, such as black males between the ages of 18 and 24. "High Crime Area" is also of questionable value when it encompasses a large area or an entire borough, such as Queens or Staten Island.<sup>62</sup>

In addition to these limitations, the court held that Dr. Fagan, plaintiff's expert, who the court found more credible than the experts for the NYPD,<sup>63</sup> used an "extremely conservative"

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<sup>60</sup> *Id.* at 558-589, 624-658

<sup>61</sup> *Id.* at 578.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 580; *See also* Brief for Defendant-Appellants at 43, *Floyd et al. v. City of N.Y.*, No. 13-3088-cv (L) (2d Cir. Dec. 10, 2013) (detailing the attack on Dr. Fagan, the statistical analysis, and conclusions drawn from the UF-250 database). The city, in its appeal, made clear that "it was manifestly erroneous . . . for the District Court to admit Fagan's Fourth Amendment analysis. First, while Fagan is a professor of criminology at Columbia Law School, he

method in analyzing the database in which he found only 6% of the stops in the database as “‘apparently unjustified,’ that is, lacking reasonable suspicion.”<sup>64</sup> The court asserted that although it had doubts as to whether the analysis of Dr. Fagan truly captured the actual percentage of unjustified stops, his 6% figure “represents 200,000 individuals who were stopped without reasonable suspicion. Even this number of wrongful stops produces a significant human toll.”<sup>65</sup>

The court held that the two most used justifications on the UF-250s, “Furtive Movements” and “High Crime Area” are highly suspect in establishing reasonable suspicion because “stops were more likely to result in arrest when Furtive Movements and High Crime Areas were not checked than when they were.”<sup>66</sup> Further, expert witness Dr. Fagan found “that the rate at which officers check High Crime Area in a precinct or census tract is roughly 55%, regardless of the amount of crime in the precinct or census tract as measured by crime complaints.”<sup>67</sup> The point being, police used these two descriptions regardless of the actual factors that led to the actual stop – police scripting.<sup>68</sup>

The court held that even assuming that the furtive movements truly reflects what the officer believes justifies the stop, “Courts have also recognized that furtive movements, standing alone, are a vague and unreliable indicator of criminality”<sup>69</sup> because such movements standing

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is not an attorney and has no formal legal training. Interpretation of legal precedent lies outside of his area of expertise.” Brief for Defendant-Appellants at 43. (The city left aside that its own expert was also without formal legal training.)); *See also Floyd*, 959 F. Supp. 2d at 557.

<sup>64</sup> *Floyd*, 959 F. Supp. 2d at 578. *See also*, 582-583

<sup>65</sup> *Id.* at 579

<sup>66</sup> *Id.* at 580.

<sup>67</sup> *Id.* at 581.

<sup>68</sup> *Id.* at 581 n.162 (explaining “But, as Dr. Fagan noted at trial, *see id.* at 2360–2361, it is simply not plausible that 55% of all stops take place in an “area” whose particular crime characteristics objectively justified checking the High Crime Area box, *regardless* of the crime rate of the census tract or the precinct where the stop takes place. The unvarying rate of checking High Crime Area across locations and times is more likely a product of reflexive box-checking that is unrelated to any defined crime condition.”).

<sup>69</sup> *Id.* at 580.

alone do not establish reasonable suspicion.<sup>70</sup> The reason for the unreliability is that it is very subjective as to whether a behavior is furtive and even if it is furtive, does it evidence criminality or fear of being under police control *per se* regardless of innocence. Add to this, the issue of police prior belief regarding the location and race of the stop further clouds the issue. As the court observed:

Recent psychological research has also provided evidence that officers may be more likely to perceive a movement as indicative of criminality if the officer has been primed to look for signs that ‘crime is afoot.’ As I stated in *Ligon*, ‘[g]iven the nature of their work on patrol, officers may have a systematic tendency to see and report furtive movements where none objectively exist.’

Other recent psychological research has shown that unconscious racial bias continues to play an objectively measurable role in many people’s decision processes. It would not be surprising if many police officers share the latent biases that pervade our society. If so, such biases could provide a further source of unreliability in officers’ rapid, intuitive impressions of whether an individual’s movements are furtive and indicate criminality. Unconscious bias could help explain the otherwise puzzling fact that NYPD officers check ‘Furtive Movements’ in 48% of the stops of blacks and 45% of the stops of Hispanics, but only 40% of the stops of whites. There is no evidence that black people’s movements are objectively more furtive than the movements of white people.<sup>71</sup>

The court concluded that the use of the High Crime Area was suspect because police were known to define entire precincts or boroughs as High Crime Areas.<sup>72</sup>

The real disagreement between the experts for the NYPD and the plaintiffs did not center on the truth of disproportionate stops, but rather was regarding whether they were the result of unlawful racial bias. To prevail on their Fourteenth Amendment Equal Protection Clause complaint the plaintiffs must show, “that blacks and Hispanics are stopped more frequently than they would be if police officers did not discriminate based on race when deciding whom to

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<sup>70</sup> See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

<sup>71</sup> *Floyd*, 959 F. Supp. 2d at 580-81 (internal citations omitted).

<sup>72</sup> *Id.* at 581 n.161.

stop.”<sup>73</sup> In proving this, the dispute between the parties is what “standard, or point of reference” should the “statistics about rates of stops of blacks and Hispanics” be compared to – this is called setting a benchmark.<sup>74</sup> The plaintiffs argued that the benchmark should be both general population and reported crime statistics<sup>75</sup> and the NYPD advocated for the use of “a benchmark consisting of the rates at which various races appear in suspect descriptions from crime victims – in other words, ‘suspect race descriptive data.’”<sup>76</sup> The former approach will capture “who is available to be stopped in an area . . . and . . . local crime rates reflects the fact that stops are more likely to take place in areas with higher crime rates.”<sup>77</sup> The latter approach assumes that “if officers’ stop decisions were racially unbiased, then the racial distribution of stopped pedestrians would be the same as the racial distribution of the criminal suspects in the area.”<sup>78</sup> Put simply, the NYPD benchmark focuses on the percentage of criminals who are black or Hispanic and then looks at who is being stopped. The plaintiff benchmark focuses on the total population the police operate in and looks at the percentage of people stopped compared to the population breakdown of those in the total population. Under the NYPD approach, disproportionate results should occur. Under the plaintiff approach, disproportionate results show racial bias.

As discussed above, 52% of the people stopped were black, while blacks only comprise 23% of the total NYC population. Hispanics account for 31% of the stops but only 20% of the

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<sup>73</sup> *Id.* at 583.

<sup>74</sup> *Id.* As Dr. Fagan explained:

[A] valid benchmark requires estimates of the supply of individuals of each racial or ethnic group who are engaged in the targeted behaviors and who are available to the police as potential targets for the exercise of their stop authority. Since police often target resources to the places where crime rates and risks are highest, and where populations are highest, some measure of population that is conditioned on crime rates is an optimal candidate for inclusion as a benchmark.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 584-85 n.183 (“Crime suspect description data estimates the available pool of *persons exhibiting suspicious behavior* that could be observed by the police — while population merely estimates the potential number of *persons* in a given area.”).

<sup>77</sup> *Id.* at 585.

<sup>78</sup> *Id.* at 584; see also RAND Report discussion of benchmark *infra* note 162.



population, and whites account for only 10% of the stops while making up 33% of the total population. The NYPD asserted that this is to be expected if the correct benchmark is suspect race descriptive data. As the Mayor and the Police Commissioner publicly stated in defense of the program, more than 90% of the victims and perpetrators of gun violence are young men of color. Thus the stops were disproportionately included whites and underrepresented blacks and Hispanics. As discussed below, the Mayor and the Police Commissioner made clear that to end the violence the police should have stopped more blacks and Hispanics than whites. The city asserted in court that there is not constitutional violation – race was not the operative factor in the stops, criminal activity was. The NYPD expert testified, “that the disproportionate stopping of black people can be explained by the disproportionately black composition of the pool of criminals.”<sup>79</sup> The NYPD experts, Drs. Smith and Purtell, were quite blunt on this point at trial.

Obviously, if particular racial or ethnic groups in New York City participate in crime at a rate disproportionate to their share of the population, we would expect officers to conduct *Terry* stops for such groups at rates higher than each groups’ respective share of the City’s population. The benchmark of suspect race description allows us to measure if [the] NYPD’s officers are stopping minorities at a rate *over and above* what could be explained by the racial composition of the criminally active population in New York.<sup>80</sup>

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<sup>79</sup> *Floyd*, 959 F. Supp. 2d at 585. But the Court was not convinced and observed disproportionate criminal activity demonstrated in the database.

*The suspect’s race was unknown in 70% of crime complaints* in 2005 and 2006. Even after merging crime suspect data and arrestee data, the race of the perpetrator is only known for roughly 63% of crimes (using data from 2010 to 2011). In addition, based on this “merged” data, while the suspect’s race is known for a high percentage of certain types of crime — such as felony violent crimes (86%), weapons crimes (98%), and drug offenses (99%) — race is known in only 22% of felony property crimes, which are the basis for 25% of all stops. Dr. Fagan persuasively showed that using data where almost 40% of the information is missing would introduce sample selection bias, and is not a reliable approach to drawing conclusions about the criminal suspect population. (Dr. Smith acknowledging that he had not found any scholarly support for estimating the demographics of crime suspects based on data that is nearly 40% incomplete).

*Id.* at 588 n.193 (Dr. Smith acknowledging that he had not found any scholarly support for estimating the demographics of crime suspects based on data that is nearly 40% incomplete (internal citations omitted, emphasis added)); *see also infra* note 212, 218 (the logical conclusion of the proposition that blacks are criminogenic).

<sup>80</sup> *Id.* at 585 n.184 (emphasis in original).

On appeal, the city asserted that with the proper benchmark, the disproportionally found by Dr. Fagan disappears.

Application of the suspect description benchmark reveals a far closer correlation to stops by race and ethnicity. In 2011 and 2012, 87% of stop subjects were black and Hispanic, as were approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects. Defendants' experts ran several alternate regressions which included suspect race data, and evidence of disproportionate racial impact either disappeared, or the size of the disparity was greatly reduced. Other trial evidence strongly undermined plaintiffs' benchmark as producing an unwarranted inference of discrimination.<sup>81</sup>

The court was not so convinced.

I conclude that Dr. Fagan's benchmark is the better choice. The reason is simple and reveals a serious flaw in the logic applied by the City's experts: there is no basis for assuming that the racial distribution of stopped pedestrians will resemble the racial distribution of the local criminal population if the people stopped are not criminals. The City defends the fact that blacks and Hispanics represent 87% of the persons stopped in 2011 and 2012 by noting that "approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects were Black and Hispanic." *This might be a valid comparison if the people stopped were criminals . . . To the contrary, nearly 90% of the people stopped are released without the officer finding any basis for a summons or arrest and only 13% of stops are based on fitting a specific suspect description.*<sup>82</sup>

The court concluded

There is no reason to believe that the nearly 90% of people who are stopped and then subject to no further enforcement action are criminals. As a result, there is no reason to believe that their racial distribution should resemble that of the local criminal population, as opposed to that of the local population in general. If the police are stopping people in a race-neutral way, then the racial composition of innocent people stopped should more or less mirror the racial composition of the areas where they are stopped, all other things being equal.<sup>83</sup>

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<sup>81</sup> See Brief for Defendant-Appellants, *supra* note 63, at 15. In its post-trial memorandum of law, the city further minimized the statistical findings of Dr. Fagan.

Assuming the accuracy of Fagan's statistics – which the City disputes – Fagan's analysis only purports to show that (1) blacks and Hispanics are more likely to be stopped than whites, and (2) the odds of an increase in stops given a 1% increase in the proportion of black or Hispanic population versus a 1% increase in the white population is a virtual coin toss

Defendant's Post-Trial Memorandum of Law (June 12, 2013) at 20 [hereinafter Defendant Memorandum].

<sup>82</sup> *Floyd*, 959 F. Supp. 2d at 584 (emphasis added).

<sup>83</sup> *Id.* at 584-85.

The NYPD expert countered in court,<sup>84</sup> as did the Mayor and Commissioner in public, with the proposition that stops do prevent crime, regardless of whether the person stopped in fact committed a crime.<sup>85</sup> The cumulative effect of the stops prevents crime from occurring. As to those who are stopped, the expert explained rhetorically, “[H]ow do we know . . . [i]f they were utterly innocent[?]”<sup>86</sup> His point being that a low arrest or hit rate only tells you that the police could not reach the required burden of proof, probable cause, to arrest the person stopped. It does not mean that they were innocent. Thus, the police could have a high hit rate on stopping the guilty and a low rate of proof regarding their guilt. Leaving aside the courts correct retort that the NYPD expert’s “theory that a significant number of these stops resulted in the prevention of the suspected crime is pure speculation and not reliable,”<sup>87</sup> the point is irrelevant.<sup>88</sup> A *Terry* stop is a

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<sup>84</sup> “Dr. Smith’s position, while surprising, is not illogical once his premises are accepted. Dr. Smith apparently does not find it plausible that an officers’ decision to stop a person may be swayed by conscious or unconscious racial bias. If a researcher begins with this premise, he will attempt to find a credible, race-neutral explanation for the NYPD’s stopping of blacks and Hispanics out of proportion to their share of the population. For example, the researcher may seek to explain the disproportionate stopping of minorities as the result of the characteristics of the criminal population. . . . Next, the researcher may analyze the deployment of police to high crime areas or ‘hot spots.’ If these areas happen to be disproportionately minority, then heavy deployment to these areas will provide a race-neutral basis for the disproportionate stopping of minorities . . . In the end, if the researcher cannot think of any relevant race-neutral factors for which Dr. Fagan did not control, the only remaining race-neutral explanation for the NYPD’s stop patterns may be that members of the over-stopped racial groups have a greater tendency to appear suspicious than members of other racial groups, even when they are not breaking the law.” *Id.* at 586-87.

<sup>85</sup> See generally *id.* at 585.

<sup>86</sup> *Id.*; see also, Commissioner Kelly, comments, *infra* notes 203, 205 .

<sup>87</sup> *Id.* at 586 (stating “[c]rime suspect data may serve as a reliable proxy for the pool of *criminals* exhibiting suspicious behavior. But there is no reason to believe that crime suspect data provides a reliable proxy for the pool of *non-criminals* exhibiting suspicious behavior. Because the overwhelming majority of people stopped fell into the latter category, there is no support for the City’s position that crime suspect data provides a reliable proxy for the pool of people exhibiting suspicious behavior. Moreover, given my finding that a significant number of stops were *not* based on reasonable suspicion — and thus were stops drawn from the pool of *noncriminals not* exhibiting suspicious behavior — the use of crime suspect data as a benchmark for the pool of people that would have been stopped in the absence of racial bias is even less appropriate.”).

<sup>88</sup> See *id.* at 586 n.186 (stating “[o]f course, if the real purpose of the stops is not to investigate suspected criminal activity based on individualized suspicion, but instead to deter criminals from carrying weapons or contraband by stopping people who fit a general profile of criminal suspects in an area, then criminal suspect data would *in a sense* be the appropriate benchmark for measuring racial disparities in stops. But the City does not make this argument, and if it did, the argument would fail for reasons related to plaintiffs’ Fourth and Fourteenth Amendment claims. *First*, to the extent that such ‘deterrence’ stops were based solely on a person’s resemblance to a general profile of the criminals in an area, the stop would not be based on *individualized* reasonable suspicion of criminal activity.

tool to determine if a crime has or is about to be committed. Put simply, constitutional rules and limitations on police are just that, limitations. Crime investigation and prevention would of course be greatly improved if Fourth Amendment prohibition against unreasonable searches and seizures did not “handcuff” the police.

One last point on the distribution of race and crime statistics should be observed. The NYPD in court and the Mayor and Commissioner in public statements make clear that they don’t believe all blacks and Hispanics are criminal, but blacks and Hispanics are overrepresented in the criminal population. Even if the latter part is true, it does not follow that the majority of those stopped should be people of color. The police should be expected to distill or differentiate the criminals within a race from the law-abiding members of the same race. The failure to do so raises racial bias. It does so because the police, rather than doing the difficult work of being able to tell the criminal from the law abiding, they use a simpler tool of over stopping all members of the race. When the police do this, as the court observed, they prove their detractors case.

Rather than being a defense against the charge of racial profiling, however, this reasoning is a defense of racial profiling. To say that black people in general are somehow more suspicious-looking, or criminal in appearance, than white people is not a race-neutral explanation for racial disparities in NYPD stops: it is itself a racially biased explanation. This explanation is especially troubling because it echoes the stereotype that black men are more likely to engage in criminal conduct than others.

...  
[R]ace alone is not an objective basis for suspicion by the police. Because there is no evidence that law-abiding blacks or Hispanics are more likely to behave objectively more suspiciously than law-abiding whites, Dr. Smith’s — and the City’s — refuge in this unsupported notion is no refuge at all. It is effectively an admission that there is no explanation for the NYPD’s disproportionate stopping of blacks and Hispanics other than the NYPD’s stop practices having become infected, somewhere along the chain of command, by racial bias.

...  
A simple explanation exists: the racial composition of the people stopped by the NYPD resembles what the NYPD perceives to be the racial composition of the

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*Second*, to the extent that ‘the general profile of criminal suspects in an area’ contains a racial description, the use of that description as a basis for stops would constitute racial profiling.”).

criminal population because that is why they were stopped. Evidence discussed later in this Opinion shows that the NYPD has an unwritten policy of targeting racially defined groups for stops, based on the appearance of members of those groups in crime suspect data. A strong correlation between the races of people stopped and the known races of criminal suspects is the natural result.<sup>89</sup>

Having determined that that the NYPD has a “widespread practice of racial profiling based on local criminal suspect data” the court moved to the legal question of “NYPD’s awareness of and response to those unconstitutional stops” or in other words was the City “deliberately indifferent to the violations of the Plaintiff class’s Fourth and Fourteenth Amendment rights.”<sup>90</sup>

### 3. The plaintiffs Case and NYPD Deliberate Indifference

The Plaintiffs filed their liability case using section 1983 of the United States Code, which prohibits states from violating the constitutional rights of citizens by providing tort liability.<sup>91</sup> Section 1983 was passed during reconstruction after the Civil War as a method of protecting former slaves from violence from the Ku Klux Klan as well as from state and local law enforcement that either actively participated with the Klan or failed to protect blacks from the Klan.<sup>92</sup> In 1978 the Supreme Court in *Monell v New York Department of Social Services* held that local governments could be held civilly liable for policies that violated constitutional rights.<sup>93</sup> To establish this liability the plaintiff must prove that the “municipality or other local

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<sup>89</sup> *Id.* at 587-88 (also stating “In short, the correlation highlighted by the City and its experts in their attempt to refute the allegation of racial profiling in fact provides evidence of racial profiling. Rather than revealing a valid race-neutral variable that explains the NYPD’s disproportionate stopping of blacks and Hispanics, the correlation highlighted by the City’s experts suggests how the racial disparities identified by Dr. Fagan might have come about — namely, through a widespread practice of racial profiling based on local criminal suspect data.”)

<sup>90</sup> *Id.* at 589-90.

<sup>91</sup> 42 U.S.C. § 1983 (1996).

<sup>92</sup> See *Monroe v. Pape*, 365 US 167, 171 (1961), *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), *Monell v. Dep’t of Soc. Serv’s N.Y.*, 436 U.S. 658 (1978), *City of Okla. City v. Tuttle*, 471 U.S. 808 (1985) and *Hafer v. Melo*, 502 U.S. 25 (1991).

<sup>93</sup> See, *Monell*, 436 U.S. 658.

government . . . itself “subjects” a person to a deprivation of rights or “causes” a person “to be subjected” to such deprivation, but under § 1983 . . . they are not vicariously liable . . . for their employees’ actions.”<sup>94</sup> Thus, “[p]laintiffs who seek to impose liability on local governments under §1983 must prove that “action pursuant to official municipal policy” caused their injury.”<sup>95</sup> Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and/or practices that are so persistent and widespread as to practically have the force of law. These are “action[s] for which the municipality is actually responsible.”<sup>96</sup>

One method of proving that a custom or policy of a local government was the direct cause of a violation of a constitutional right is to establish deliberate indifference by the agency to violations of constitutional rights committed by its officers due to failure to train or otherwise supervise them.<sup>97</sup> The Supreme Court has held that

‘deliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city’s “policy of inaction” in light of notice that its program will cause constitutional violations “is the functional equivalent of a decision by the city itself to violate the Constitution.” A less stringent standard of fault for a failure-to-train claim “would result in *de facto respondeat superior* liability on municipalities . . .” (“[M]unicipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . .”).<sup>98</sup>

As the district court further elaborated

A municipality may incur *Monell* liability based on deliberate indifference through its training and supervision practices. “[D]eliberate indifference may be inferred where ‘the need for more or better supervision to protect against constitutional violations was obvious,’ but the policymaker ‘fail[ed] to make

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<sup>94</sup> See, *Connick v. Thompson*, 563 U.S. \_\_\_, 131 S.Ct. 1350 (2011).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (internal citations omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (internal citations omitted).

meaningful efforts to address the risk of harm to plaintiffs[.]” Although “[a] municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train,” the Supreme Court has held that “[w]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.”<sup>99</sup>

On this last legal issue of actual or constructive knowledge that policymakers knew that their officers were actively engaged in violation of citizen’s constitutional rights, the court cited the law under the Second Circuit regarding how to establish deliberate indifference.

(1) [the] policymaker knows “to a moral certainty” that its employees will confront a given situation; (2) either [the] situation presents employees with [a] difficult choice that will be made less so by training or supervision, or there is a record of employees mishandling [the] situation; and (3) [a] wrong choice by employees will frequently cause [the] deprivation of constitutional rights. “Where the plaintiff establishes all three elements, then . . . the policymaker should have known that inadequate training or supervision was ‘so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.’” “A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.”<sup>100</sup>

The court proceeded to dedicate 57 pages of its 195-page opinion<sup>101</sup> on the failure of the city to recognize the constitutional violations that the NYPD officers were making as well as the actual policies and customs that the leadership of the NYPD were requiring their officers to carry out, both directly resulting in constitutional violations.<sup>102</sup> The court found that in addition to actual knowledge of violations, the NYPD failed to adequately train their officers in the correct understanding of the requirements of *Terry* and they knew that such failure would result in

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<sup>99</sup> *Floyd*, 959 F. Supp. 2d at 564 (internal citations omitted) (emphasis added).

<sup>100</sup> *Id.* at 564-65 (citing *Walker v. City of N.Y.*, 974 F.2d 293, 29798 (2d Cir. 1992) (subsequent internal citations omitted)).

<sup>101</sup> *Id.* at 589-624.

<sup>102</sup> By contrast, “once a municipal *policy* is established, ‘it requires only one application . . . to satisfy fully *Monell*’s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality’s official policy.” *Id.* at 565 n.45 (internal citations omitted).

constitutional violations.<sup>103</sup> The court concluded that “the NYPD instituted a policy of indirect racial profiling by directing its commanders and officers to focus their stop activity on “the right people” — the demographic groups that appear most often in a precinct’s crime complaints. This policy led inevitably to impermissibly targeting blacks and Hispanics for stops and frisks at a higher rate than similarly situated whites.”<sup>104</sup>

The court found liability on the part of the NYPD because it “has known for more than a decade that its officers were conducting unjustified stops and frisks and were disproportionately stopping blacks and Hispanics [and] it expanded its use of stop and frisk by seven-fold between 2002 and 2011.”<sup>105</sup> The plaintiffs argued in court that in an effort to reduce gun violence<sup>106</sup> during his tenure, Mayor Bloomberg through Commissioner Kelly directed and “pressur[ed] commanders at Compstat meetings [and] commanders, in turn, pressured mid-level managers and line officers to increase stop activity by rewarding high stoppers and denigrating or punishing those with lower numbers of stops.”<sup>107</sup>

The court held that the NYPD was put on official notice that the current stop and frisk program was unconstitutionally implemented when the state Attorney General issued a report in 1999 which found that “15% of the UF-250s contained facts that did not meet the legal test for reasonable suspicion.”<sup>108</sup> More importantly, the report by the Attorney General tested the assertion made then and now that “the apparently disproportionate stopping of blacks and

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<sup>103</sup> “In order to establish *Monell* liability based on the *Walker* test, plaintiffs must also, of course, show that the training or supervision was in fact inadequate and that this inadequacy caused plaintiffs’ constitutional injuries.” *Id.* at 565 n.44 (internal citations omitted).

<sup>104</sup> *Id.* at 590.

<sup>105</sup> *Id.*

<sup>106</sup> See Press Release, Mayor Michael Bloomberg, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012); See Mayor Michael Bloomberg, Press Release, Mayor Bloomberg Delivers Address on Public Safety to NYPD Leadership (April 30, 2013); See Commissioner Ray Kelly, *The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J., July 22, 2013,

<sup>107</sup> *Floyd*, 959 F. Supp. 2d at 590; See also, *infra* notes 112, 114-115,

<sup>108</sup> *Id.* at 591.



Hispanics can be explained on race-neutral grounds by police deployment to high crime areas, and by racial differences in crime rates” to which the report concluded “that blacks and Hispanics were significantly more likely than whites to be ‘stopped’ [even] after controlling for race-specific precinct crime rates and precincts population composition by race.”<sup>109</sup> The NYPD rejected the study and its subsequent recommendations because it did not use suspect description data as its benchmark.<sup>110</sup>

While the Mayor and Commissioner Kelly asserted that the stop and frisk program was effective in reducing the murder rate in the city, the court found that within the culture and administration of the NYPD the “quality of enforcement activity” of the stop and frisk program was measured “in the sense of its *effectiveness* . . . whether enforcement activity was responding to crime conditions in specific places and times [not] the quality of stops in the sense of their *constitutionality*.”<sup>111</sup> Effectiveness was defined at Comstat meetings as the number of stops correlated to crime statistics in specific locations and times.<sup>112</sup> The police leadership used the UF-250s to determine and measure police activity and its utility as measured by the rise or fall of local crime statistics. Even though Chief Michael Marino testified that, “Nobody from the top on

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 591 n. 207. See, *infra* notes 144-146 and accompanying text.

<sup>111</sup> *Id.* at 593 (emphasis in original).

<sup>112</sup> As Chief of Department Joseph Esposito, “who chaired Comstat’s meetings until his retirement earlier this year” *Id.* at 592 testified regarding what “quality” of UF-250’s meant, answered “we talk more about where and when. Does it match up with the crime picture? That’s what is paramount.” *Id.* at 593. Effectiveness, on patrol officer level, was defined by activity. As the court observed,

For example, the following are notes from supervisors on the back of officers’ monthly report forms in the field labeled “Officer’s Impact on Declared Conditions,” which invites supervisors to “[d]escribe in detail why [the officer] was effective/ineffective.” All of the evaluations are from 2012: “Officer showed improvement from last month and was proactive in combating conditions which resulted in 24 summonses to address conditions.” PX 234 (marked “Effective”). “PO . . . was effective for the month with 1 grand larceny . . . arrest and 20 UF- 250s.” *Id.* at \*1255 (marked “Effective”). “PO . . . was effective for the month [with] 1 arrest and 20 UF-250s in target areas.” *Id.* at \*1257 (marked “Effective”).

*Id.* at 601 fn 271; see also, *infra* notes 115-116, 118, 124. The quantity of activity, not the constitutional quality, was the focus of effectiveness.

down ever said they want more numbers for numbers' sake"<sup>113</sup> the *Terry* stops, which the UF-250s represented, were driven by macro-activity not micro or individual criminal activity. The point is the constitution only authorized a *Terry* stop for the latter not the former. The liability of the NYPD is established in part, because the NYPD top commanders never focused on the constitutionality of the stops in determining the quality of the stops.<sup>114</sup>

One impact of this system of "quality" being defined as utility measured by correlation between stops and local crime statistics was the development of a quota system for the line officers. As the court observed, in 2010 the NYPD sent a memo to all patrol commanders with the following instruction, that while

"a requirement that a specific number of summonses be issued or arrests be made over a specific period of time has always been prohibited." The memo then states that "[o]fficers who avoid engaging in enforcement activities . . . can be subjected to adverse consequences." Furthermore, "[a]n obvious way of gauging an officer's activity level is to count the number of enforcement encounters that an officer has over time," and to compare an officer's activity level to that of similarly situated officers. The memo only explicitly prohibits "discussing specific numerical objectives" or linking "the failure to reach a specific numerical goal with an adverse employment consequence."<sup>115</sup>

The court found that the impact of this pressure was to get line police officers to increase UF-250s. But what is significant is not the police were pressured to increase the numbers but the attitude of the police in doing so. The court reviewed surreptitious recordings of roll call meetings at the Bedford Stuyvesant precinct where officers were told to use stops to control the area, reduce crowds of people on the steps or on street corners. The court correctly observed that these recordings made clear that the officers were to set an impression on the community that

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<sup>113</sup> *Id.* at 593 n 217.

<sup>114</sup> *Id.* at 593-94 fn 218, 221 & 224 (surveys conducted in 2008 and 2012 showed an increase in perceived pressure by the top NYPD command on lower level commanders to increase stop and UF-250s) *Id.* at 594-596. See also discussion on how this pressure was imposed on line police officers. *Id.* at 596-602.

<sup>115</sup> *Id.* at 600 (The district court noted that in 2011 it was made clear through directives from headquarters that "supervisors must evaluate officers based on their activity numbers, with particular emphasis on summonses, stops, and arrests, and that officers whose numbers are too low should be subjected to increasingly serious discipline if their low numbers persist." *Id.* at 600 *See also*, 600 fn 264, 601 fn 271.).

“[w]e own the block”<sup>116</sup> and that the officers of the precinct are “not working in Midtown Manhattan where people are walking around smiling and happy. You’re working in Bed-Stuy where everyone’s got a warrant.”<sup>117</sup> As a Sergeant at the precinct instructed his men, “[i]f they’re on a corner, make them move. They don’t want to move, you lock them up. Done deal. *You can always articulate later.*”<sup>118</sup> To add to this problem of motivation, was the fact that in regard to a

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<sup>116</sup> *Id.* at 597. As a Sergeant instructed his officers,

If you see guys walking down the street, move ‘em along. Two or three guys you can move, you can’t move 15, all right? If you want to be a[n] asshole or whatever you want to call it, make a move. If they won’t move, call me over and lock them up [for disorderly conduct]. No big deal. We could leave them there all night. . . . The less people on the street, the easier our job will be . . . . *If you stop them[,] 250, how hard is a 250. I’m not saying make it up but you can always articulate robbery, burglary, whatever the case may be. That’s paperwork . . . It’s still a number. It keeps the hounds off, I’ve been saying that for months.*

*Id.* at 597; *see also, id.* n. 243 (the hounds were the higher precinct commanders and their supervisors); *and see id.* 599 n. 250 (“[T]hey’re looking at those numbers and people are gonna be moved. . . . You get . . . your numbers, and everybody leaves you alone.”); *and see id.* 600 n. 264 (“Lieutenant Rafael Mascol testifying that he would tell an underperforming officer: “Listen, you need to be a little more proactive out there, be a little bit busier about doing your assignments out there, handling the conditions that you have out there, you know, you seem to have fallen off for a few months there, is there something going on?”)

<sup>117</sup> *Id.* at 597.

<sup>118</sup> *Id.* at 598; *see also* 596-98 n. 237, 243 (One Sergeant instructed his officers, “[i]f you see something just do some, uh, 250’s, get all the fucking riff-raff off the corners . . . . Be an asshole. They going to do something, shine a light in their face whatever the occasion, inconvenience them.” “When asked to explain Sergeant Stukes’ statement “[b]e an asshole,” Deputy Inspector Steven Mauriello offered the following interpretation: “It means be a police officer. You have a footpost. You walk your footpost. And be omnipresent.”). This type of attitude was reflected by a Police Deputy Inspector. He made clear to his officers before deployment for Halloween 2008.

Tonight is zero tolerance. It’s New Years Eve all over again. Everybody goes. I don’t care. . . . They’re throwing dice? They all go, promote gambling. I don’t care. Let the DA discuss what they’re going to do tomorrow. . . . They got [bandanas] on and they’re running like nuts down the block, chasing people? Grab them. Fuck it. You’re preventing a robbery. . . . You know that and I know that.

When asked to explain what he meant in these remarks, Deputy Inspector Mauriello testified that throwing dice is a quality of life infraction.

*Id.* at 598. The Deputy Inspector informed his men that:

I’m tired of bandanas on their waist and I’m tired of these beads. Red and black beads mean Bloods. Their bandanas — if they’re walking down the street and they’ve got a bandana sticking out their ass, coming out there — they’ve got to be stopped. A 250 at least. At least.

*Id.* at 599. Sergeant Stukes informed his men that:

police officer's performance measure, "an unconstitutional stop is no less valuable . . . than a constitutional one – because the two are indistinguishable [because] many officers are evaluated almost exclusively based on the number of stops, arrests, and summonses that they carry out. [Thus] 'effective' [is] a euphemism for an acceptable number of stops, arrest, and summonses in targeted locations."<sup>119</sup>

Thus NYPD "officers are routinely subjected to significant pressure to increase their stop numbers, without corresponding pressure to ensure that stops are constitutionally justified. [T]his is a predictable formula for producing unjustified stops."<sup>120</sup> As the court observed, this problem was compounded by a second policy of the NYPD – Target the "right people."<sup>121</sup> The court concluded that the targeting the right people was based on police assumptions based on police statistics, but the court also noted that it received testimony from officers that some stops were based on false pretexts in order to harass individuals.

In 2009, Officer Polanco delivered an anonymous letter to his ICO, reporting that officers were engaging in racial profiling and other misconduct toward minority communities:

[W]e were handcuffing kids for no reason. They would just tell us handcuff them. And boss, why are we handcuffing them? Just handcuff them. We'll make up the charge later.

Some of those kids were not doing anything. Some of those kids were just walking home. Some of those kids were just walking from school.

In his letter, which he believed would be forwarded to IAB, Officer Polanco described the following incident, from 2009:

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This job is so easy. Just keep the hounds off. A parker, a 250, you could book somebody walking down the street. You know what? I stopped and asked — so what? I did a 250. What's the big deal? Let him go. He doesn't want to give you no information, who cares? It's still a 250.

*Id.* at 599.

<sup>119</sup> *Id.* at 601.

<sup>120</sup> *Id.* at 602; *see also supra* notes 112, 116, 118.

<sup>121</sup> *Id.* at 602.

I remember one incident where one kid — and I reported this — they stopped his brother. He was 13. And he was waiting for him from school at the corner to bring him home. When he came to us, the officer — Officer, what’s wrong with my little brother? Was he acting out? He wind[s] up with handcuffs too. For simply asking what was going on with his brother.

Officer Polanco also reported in the letter that on more than one occasion, he was required to drive on patrol with supervisors who directed him to stop individuals without what he believed to be reasonable suspicion. A supervisor would point to a “group of black kids or Hispanic kids on the corner, in the park, or anywhere,” and direct Officer Polanco to “just go grab, go 250 them, go summons them. Sometimes they will ask me to summons them. We will ask the supervisor why. And they will say unlawful assembly or something like that . . . [b]ecause there’s more than three of them on the corner.”<sup>122</sup>

The source of the racial bias and unconstitutional policy, practice, and custom is clear. First, the NYPD patrol officers are instructed to secure members of UF-250s as a tool of crime suppression and police activity, in which the constitutionality of the activity is of no account. Second, the NYPD instructs its officers that since most of the criminals are black, it makes sense that the right people stopped are black. The fact that most blacks stopped are not all criminals is of little account. The district court observed that the “NYPD maintains two different policies related to racial profiling . . . a written policy that prohibits racial profiling . . . and another, unwritten policy that encourages officers to focus their reasonable-suspicion-based stops on ‘the right people, the right time, the right location,’” which in fact focuses police stops on the race of those who they perceive as criminals as a group.<sup>123</sup> The court dedicated eight pages of its opinion on the issue of “the right people” recounting testimony of Chief Esposito as well as recordings of

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<sup>122</sup> *Floyd*, 959 F. Supp. 2d at 621-622; *See also, supra* notes 112-119 and accompanying text. Officer Polanco explained that he wrote the letter anonymously because he feared the same consequences of another officer who reported on NYPD manipulation of crime statistics. After Officer Polanco abandoned his anonymity in a TV interview he was charged with perjury based on an alleged issuance of a summons, of walking a dog without a license, that he knew was false which he claimed he was ordered to issue. *Floyd*, 959 F. Supp. 2d at 621 n. 412, 622 n.417.

<sup>123</sup> *Floyd*, 959 F. Supp. 2d at 603. “NYPD personnel of diverse ranks repeated variations on this phrase throughout the trial. (Chief Esposito agreeing that the NYPD looks for “the right people, at the right place, at the right time.”).” *Id.* at n.280 (internal citation omitted).

a police investigator and the testimony of New York State Senator Eric Adams who testified that Commissioner Kelly said to him in a meeting in the Governor's office that stops focused on blacks and Hispanics, "because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police."<sup>124</sup> As discussed in section two, Commissioner Kelly said as much in his op-ed.<sup>125</sup> As to the credibility of Senator Adams, the court observed that the city "did not object to this out of court statement," which was pure hearsay, and did not "offer any rebuttal evidence regarding Commissioner Kelly's statement at this meeting."<sup>126</sup> In context with a speech that Mayor Bloomberg gave to a meeting of the top NYPD leadership<sup>127</sup> - in which he made clear that stop and frisk was designed to "deter" people from carrying guns and according to crime statistics blacks and Hispanics are disproportionately the perpetrators and victims of crime<sup>128</sup> - who the "right people" are is evident. As the court observed

When these premises are combined — that the purpose of stop and frisk is to deter people from carrying guns and that blacks and Hispanics are a disproportionate source of violent crime — it is only a short leap to the conclusion that blacks and Hispanics should be targeted for stops in order to deter gun violence, regardless of whether they appear objectively suspicious. Commissioner Kelly simply made explicit what is readily inferrable from the City's public positions.<sup>129</sup>

As such,

I find that the NYPD's policy of targeting "the right people" encourages the disproportionate stopping of the members of any racial group that is heavily represented in the NYPD's crime suspect data. This is an indirect form of racial

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<sup>124</sup> *Id.* at 606. *See also, infra* Mayor Bloomberg, note 175 ("By making it 'too hot to carry,' the NYPD is preventing guns from being carried on our streets. That's our goal: preventing violence before it occurs, not responding to victims after the fact."); *and see, infra* note 191 ("Think about police department tactics, that they often announce they're setting up checks for DWI. The goal is deterrence. If you know you're likely to be stopped, you don't drink and drive.")

The city asserted in its appeal that Commissioner Kelly did not make the statement. *See* Brief for Defendant – Appellants, *supra* note 63, at 64-65. A denial that flies in the face of public statements Commissioner Kelly made regarding stop and frisk. *See* Discussion *infra* Part One, Section 2.

<sup>125</sup> Kelly, *supra* note 106.

<sup>126</sup> *Floyd*, 959 F. Supp. 2d at 606 n.297, 606 (emphasis in original).

<sup>127</sup> *See* Discussion, *infra* Part One, Section 2.

<sup>128</sup> *Floyd*, 959 F. Supp. 2d at 606.

<sup>129</sup> *Id.*

profiling. In practice, it leads NYPD officers to stop blacks and Hispanics who would not have been stopped if they were white. There is no question that a person's race, like a person's height or weight, is a permissible consideration where a stop is based on a specific description of a suspect. But it is equally clear that it is impermissible to subject all members of a racially defined group to heightened police enforcement because some members of that group appear more frequently in criminal complaints. The Equal Protection Clause does not permit race-based suspicion.<sup>130</sup>

#### 4. Summary of the Nineteen stops

After concluding that the NYPD was fully aware of the problem of unlawful stops, that the leadership of the NYPD had failed to provide adequate training to officers who conducted stops on the governing law of *Terry*, failed to adequately supervise officers in compliance with policy on maintaining adequate records of stops and failed to assess the constitutionality of reported stops or discipline officers who failed to conduct lawful stops,<sup>131</sup> the court reviewed the nineteen incidents alleged by the twelve plaintiffs in the case.<sup>132</sup> The incidents involved cases which included named officers, while others did not and some cases in which officers testified as to the incident, while others did not.<sup>133</sup> As shown in Table One, of a total of nineteen incidents, the court ruled one incident was not a *Terry* stop at all and of the remaining eighteen incidents, the court ruled ten were unconstitutional stops and eight were constitutional stops.<sup>134</sup> Of the eighteen incidents, fifteen also involved frisks; of which the court ruled nine were unconstitutional and six were constitutional.<sup>135</sup> Thus, the plaintiffs proved that 55% of the stops in the case were unconstitutional and 60% of the frisks in the case were unconstitutional.

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<sup>130</sup> *Id.* at 603 (internal citations omitted).

<sup>131</sup> *Id.* at 607-624

<sup>132</sup> *Id.* at 624-658

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

Table One Court Found Incident Unlawful – In Violation of <i>Terry</i>		
Name of Plaintiff	Stop	Frisk
Dowes	Yes	Yes
Almonor	Yes	Yes
McDonald	Yes	Did not occur
Peart	Yes	Did not occur
Peart	Yes	Yes
Provost	Yes	Yes
Ourlicht	Yes	Yes
Lino and James	Yes & Yes	Yes & No
Clarkson	Yes	Did not occur
Sindayigaza	No	Yes
Floyd	No	Yes
Floyd	No	No
Lino	No	No
Dennis	No	Yes
Peart	No	No
Ourlicht	No	No
Acevendo	Did not occur	Did not occur
Lino	No	No

### c. The NYPD's Legal Response

The NYPD and Mayor Bloomberg, both in court and in public as discussed below, made clear that in their opinion there is no problem with the stop and frisk program and in court they made clear that both in fact and law, the plaintiffs had failed to prove that they suffered individual discrimination based on their race or that the cases presented together in court established a pattern of police officer behavior that involved violation of constitutional rights.<sup>136</sup> The NYPD, agreeing with the court that the UF-250 database had limited utility, attacked the conclusions of Dr. Fagan based on the database.

First of all, the UF250 database simply cannot support the conclusions Fagan tries to draw from it. A UF250 alone provides no basis to conclude here that a stop was impermissible; the form was not designed to support such a finding in a court of law, and no fact-finder would ever rest on a form to conclude that a stop was unlawful. And if a single form does not establish that a stop was unlawful,

<sup>136</sup> Defendant's Post-Trial Memorandum of Law, David Floyd, et al. v. City of New York, (June 12, 2013).



thousands of forms do not establish that thousands of stops were unlawful. Moreover, it cannot be held against any officer-much less tens if not hundreds of thousands of officers in the aggregate-that the form uses conclusory terms to describe a host of possible bases for a stop.<sup>137</sup>

More over,

Even accepting Fagan's reliance on a database full of checkboxes, Fagan's conclusion that only 6% of the 4.43 million stops are apparently unjustified on its face is hardly a widespread pattern. Moreover, Fagan does not link these 6% to the 19 anecdotal stops and cannot, particularly with the John Doe stops or the fact that none of the UF250 stops fall into Fagan's self-made classifications. As for combining the 6% with the approximately 12% of stops that Fagan declares ungeneralizable, this 18% portion of the 4.43 million stops once again is not necessarily a widespread pattern, as Fagan does nothing to link these stops in patterns of similar constitutional violations.<sup>138</sup>

Lastly, "Fagan never purported to calculate how many stops were *both* unsupported by RAS [Reasonable Articulate Suspicion] *and* motivated by race. For that reason alone, the EPC [Equal Protection Clause] claim failed on the merits."<sup>139</sup>

As to Fourth Amendment violations, the city asserted that, "[a] *Monell* claim requires an underlying constitutional violation. Accordingly, at least one of the plaintiffs had to, but did not, prove an impermissibly race-based suspicion-less stop and/or frisk, which includes discriminatory intent. That a stop and/or frisk violated the 4th Am. is not evidence that such stop and/or frisk was racially motivated."<sup>140</sup> "Only intentional discrimination violates equal protection [because] [d]isproportionate impact alone is insufficient to show an EPC violation; such impact must be traced to a purpose to discriminate on the basis of race."<sup>141</sup> The city argued that

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<sup>137</sup> *Id.* at 7.

<sup>138</sup> *Id.* at 8.

<sup>139</sup> Brief for Defendant-Appellant at 53, *Floyd et al. v. City of New York et al.*, 959 F. Supp. 2d (2d Cir. Dec. 10, 2013) (No. 13-3088), *available at* <http://www.ccrjustice.org/files/City's%20Merits%20Brief%2012%2010%202013.pdf>.

<sup>140</sup> Defendant's Post-Trial Memorandum of Law at 17, *David Floyd, et al., v. The City of New York*, 959 F. Supp. 2d (June 12, 2013)(08 CV 1034 (SAS)), *available at* <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1457&context=historical>.

<sup>141</sup> Brief for Defendant-Appellant at 54, *Floyd et al. v. City of New York*, 959 F. Supp. 2d (Dec. 10, 2013) (No. 13-3088), *available at* <http://www.ccrjustice.org/files/City's%20Merits%20Brief%2012%2010%202013.pdf>.

“citywide racial disparities for stops and/or frisks cannot be used to show that a particular individual officer engaged in purposeful discrimination [and] plaintiffs offered nothing more than speculations and subjective beliefs as to why they were stopped.”<sup>142</sup> In a very dismissive and minimizing approach to the issues in the case, the city informed the court that, “a plaintiffs’ subjective belief that he or she was stopped because of his or her race is not probative of discriminatory intent [and] mere rude and/or disrespectful behavior does not constitute evidence of racial animus.”<sup>143</sup>

The city asserted in its appeal that plaintiffs had failed to establish deliberate indifference because “[d]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action . . . nonetheless has caused an employee to do so . . . .”<sup>144</sup> The city rejected that it was on notice that its NYPD officers were engaging in unconstitutional practices because “unsubstantiated reports of constitutional infirmities in its stop-and-frisk practices, be they from members of the public, community groups, press accounts, or pending lawsuits with yet-unproven allegations” do not as a matter of law establish the requirement of notice which in turn is required to establish deliberate indifference.<sup>145</sup> The city argued that the 1999 report and findings of the state Attorney General were invalid due to the debate over appropriate benchmarking and the NYPD commissioned study by the RAND Corporation proved there was no racial bias (they used crime suspect data)

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<sup>142</sup> Defendant’s Post-Trial Memorandum of Law at 19, *Floyd, et al., v. The City of New York*, 959 F. Supp. 2d (June 12, 2013) (No. 08 CV 1034 (SAS)), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1457&context=historical>.

<sup>143</sup> *Id.* at 18. See also Mayor Bloomberg’s dismissive assertion that the only problem with stop-question-and-frisk was that officers were not as courteous as they should be and that the feelings of young black men were hurt when stopped. *Infra* notes 177-179.

<sup>144</sup> *David Floyd, Lalit Clarkson, Deon Dennis, David Ourlicht v City of New York, et al.*, Defendant – Appellants Merits Brief, Appeal to the U.S. Court of Appeals Second Circuit, 13-3088-cv (L), 13-3461-cv(CON) and 13-1352-cv(CON) (December 10, 2013) at 68, available at <http://www.ccrjustice.org/files/City's%20Merits%20Brief%2012%2010%202013.pdf>.

<sup>145</sup> *Id.*

in the implementation of the NYPD stop-question-frisk program.<sup>146</sup> Additionally, since the city had established training programs for all officers throughout the department and within the command hierarchy to prevent racial profiling, the city asserted that plaintiffs had failed to provide lack of training because, “[w]here a municipality has taken steps to prevent a particular constitutional violation, it cannot be held deliberately indifferent to such violations unless those steps were ‘meaningless’ or ‘obviously inadequate’ to address the risk, plainly not the case here.” Moreover, even if the NYPD training was inadequate, “[s]uch inadequacy must reflect a deliberate choice among various alternatives, rather than negligence or bureaucratic inaction.”<sup>147</sup> “In short, the fact that training is “not in the precise form a plaintiff would prefer” cannot establish municipal liability.”<sup>148</sup>

It’s not surprising that the city minimized the plaintiffs and their case, asserting that “the class member anecdotal evidence is equally as slender. These class members cannot establish that any of their officers acted with discriminatory purpose (even assuming individual 4th Am. violations),”<sup>149</sup> and they failed to prove the theory of “a self-fulfilling prophecy indicative of impermissible race motivations [that explain] the racial breakdown of stoppees [which] matches the racial breakdown of known crime suspects [and] that officers assume that minorities are

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<sup>146</sup> *Id.* at 69-70.

<sup>147</sup> *Id.* at 71. (quoting *Reynolds v. Giuliani*, 506 F.3d 183, 193 (2d Cir. 2007))

<sup>148</sup> *Id.* at 76. (*Young v. City of Providence*, 404 F.3d 4, 27 (1<sup>st</sup> Cir. 2005)). The city concluded that:

In this “most tenuous” kind of §1983 claim, decision-makers can “hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights” without notice “that a course of training is deficient *in a particular respect*....” *Connick [v. Thompson]*, 131 S. Ct. at 1359-60 (emphasis added). Broad, generalized suggestions that more or better training would be desirable do not satisfy a plaintiff’s burden. *Id.* at 1363-64. Rather, plaintiffs were obligated to prove that the City was deliberately indifferent to an identified “specific deficiency” in its training program. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004).

*Id.* at 79. See *Floyd*, 959 F. Supp. 2d at 613-617 for court discussion on the inadequacy of the NYPD training.

<sup>149</sup> Defendant’s Post-Trial Memorandum of Law at 20, *Floyd, et al., v. The City of New York*, 959 F. Supp. 2d (June 12, 2013) (No. 08 CV 1034 (SAS)), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1457&context=historical>.

committing crimes and substitute that assumption for reasonable suspicion.”<sup>150</sup> The city proposed that all the plaintiffs proved was the, “undisputed [fact] that the percentage of blacks and Hispanics stopped in the City exceeds their population percentage . . . . [But, proof of] a disproportionate impact [does not prove] the adverse discriminatory impact necessary for 14th Am. Liability.”<sup>151</sup> And even if they could, plaintiffs did not prove “discriminatory purpose.”<sup>152</sup> The city asserted that the “plaintiffs in the present case cannot prove that the City established or maintained its stop and frisk program ‘because of an anticipated racially discriminatory effect.’”<sup>153</sup> In other words, the police did not deploy police to minority neighborhoods in order to create the “discriminatory effect” of disproportionate stops and frisks but rather the stops and frisks resulted from police being deployed due to crime statistics and “because of” disproportionate criminality in minority communities. Thus the disproportionate impact of the stops and frisks occurred “in spite of” police conduct. “Adverse discriminatory impact alone” the city argued, “is insufficient to establish discriminatory purpose.”<sup>154</sup> The city proposed that as long as stops, whether in the aggregate or individually, were based on specific articulable facts that establish reasonable suspicion – racial profiling by definition did not occur, and plaintiffs did not prove otherwise.<sup>155</sup> The court did not agree.

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<sup>150</sup> *Id.* at 21.

<sup>151</sup> *Id.* at 22.

<sup>152</sup> *Id.* at 23.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* “Furthermore, the record establishes the City always has been motivated by law enforcement purposes with respect the establishment of its policies relating to stop and frisk. Any attack by plaintiffs on the efficacy of the City’s law enforcement methods is irrelevant.” *Id.* at 24.

<sup>155</sup> Defendant’s Post-Trial Memorandum of Law at 1-4, 22-24, *Floyd, et al., v. The City of New York*, 959 F. Supp. 2d (June 12, 2013) (No. 08 CV 1034 (SAS)), available at <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1457&context=historical>. The city argued that:

The NYPD stops members of those minority groups in close correlation to [crime suspect data] invalidates any rational conclusion that the stops furthered a policy of targeting racial minorities because of their race.

This position is fundamentally inconsistent with the law of equal protection and represents a particularly disconcerting manifestation of indifference. . . . , the Constitution “prohibits selective enforcement of the law based on considerations such as race.” Thus, plaintiffs’ racial discrimination claim does not depend on proof that stops of blacks and Hispanics are suspicionless. A police department that has a practice of targeting blacks and Hispanics for pedestrian stops cannot defend itself by showing that all the stopped pedestrians were displaying suspicious behavior. Indeed, the targeting of certain races within the universe of suspicious individuals is especially insidious, because it will increase the likelihood of further enforcement actions against members of those races as compared to other races, which will then increase their representation in crime statistics. Given the NYPD’s policy of basing stops on crime data, these races may then be subjected to even more stops and enforcement, resulting in a self-perpetuating cycle.<sup>156</sup>

The hostility towards the district court decision, and the civil suit in general,<sup>157</sup> was well reflected in the papers filed in the Court of Appeals.<sup>158</sup> The city did not relent on its assertion that

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Of course, not every report of a crime is accompanied by a suspect description. Still, the race of the perpetrator is described in roughly 63% of all crimes, as reflected in crime reports and arrest data, climbing sharply to 98% for weapons crimes, 86% for violent felony crimes, and 99% for drug offenses. The fact that this data is incomplete is not a rational reason to disregard it. Indeed, the RAND report commissioned by the City in 2007 to evaluate stop and frisk practices on minorities found it essential to take such data into account, and “found little evidence of pervasive racial profiling in the NYPD’s pedestrian stop and frisk activity.”

Eliminating gender from the statistical picture of suspect data highlights the illogic of the approach sanctioned by the Court. Roughly 90% of NYPD stops focus on male subjects, but that figure hardly evidences invidious discrimination against men; rather, it reflects the fact that the vast majority crime is reportedly perpetrated by men. If women were to embark on a significant crime spree, NYPD data would undoubtedly lead to a gender distribution of stops more closely resembling the general population. Short of that, it makes little sense from a constitutional or policy perspective to require officers to stop women more often. The same is true of racial and ethnic groups.

Memorandum of Law in Support of Motion for a Stay at 8-9, *Floyd, et al., v. The City of New York*, 959 F. Supp. 2d (September 23, 2013) (No. 13-3088). (citations omitted). See also *infra* note 162.

<sup>156</sup> *Floyd*, 959 F. Supp. 2d at 617.

<sup>157</sup> The contempt for the district court decision and even more contempt for the remedies the court ordered was summarized as follows:

Instead of being a pawn for the varying interests of the other branches of government, NYPD should be left to investigate and fight crime as it alone is expert in doing in this metropolis, and continue to be accountable for any legal errors through individual lawsuits for damages - not by a structural injunction crafted in a courtroom, far from the realities of everyday policing. See *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008); see also *Brown v. Plata*, 131 S. Ct. 1910, 1955 (2011) (Scalia, J., dissenting) (“But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge incompetent policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.”).

crime suspect data was the better benchmark<sup>159</sup> and because police deployments and stop and frisk were based on that data; the police deployments and the results of the stop and frisks, by definition, were not racial profiling *per se*.

In light of [*Ashcroft v*] *Iqbal*, the fallacy [of the court's ruling] is apparent: the City's stop-and-frisk activities fall heavily on minorities primarily because contemporaneous suspect data identifies members of racial minorities as being responsible for specified criminal conduct. That is the very definition of a policy undertaken "in spite of," rather than "because of," its effect on these groups.

Thus, since that the 9/11 attacks were perpetrated by Arab Muslims, it is unsurprising that 'a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.' *Iqbal*, 556 U.S. at 682. Under the District Court's approach, the plaintiff in *Iqbal* set forth a compelling equal protection claim, yet the Supreme Court dismissed the complaint on its face. *Id.*

In large part, the District Court reached the contrary conclusion here by dismissing the significance of an unpleasant reality: during the period at issue, approximately 83% of all reported crime suspects were black or Hispanic, as were roughly 90% of all violent crime suspects. Social scientists may differ over the reasons for those overwhelming statistics, but it is uncontested that they are derived from arrest and complaint report data, not racial stereotypes. That the NYPD stops members of those minority groups in close correlation to these rates

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*Id.* at 25. As the Mayor complained

The attacks most often come from those who play no constructive role in keeping our city safe, but rather view their jobs as pointing fingers from the steps of City hall. Some of them scream that they know better than you how to run the Department. Some have even sued the NYPD and demanded a Federal monitor over NYPD operations.

They have also drafted politically driven legislation [and they] argue that the NYPD is targeting people because of their race or ethnicity.

...  
[S]ome in the City Council and some mayoral candidates are supporting legislation [that] would the NYPD from using key information, including gender, are and race to identify suspects.

Mayor Michael Bloomberg, Press Release, Mayor Bloomberg Delivers Address on Public Safety to NYPD Leadership (April 30, 2013).

<sup>158</sup> *David Floyd, et al. v City of New York*, Memorandum of Law in Support of Motion for a Stay, Docket Nos. 13-3088, U.S.C.A. 2<sup>nd</sup> Circuit (September 23, 2013).

<sup>159</sup> Brief for Defendant-Appellant at 68, *Floyd et al. v. City of New York et al*, No. 13-3088 (2<sup>nd</sup> Cir. Dec. 10, 2013), available at <http://www.ccrjustice.org/files/City's%20Merits%20Brief%2012%2010%202013.pdf>.

invalidates any rational conclusion that the stops furthered a policy of targeting racial minorities because of their race.<sup>160</sup>

The city did not relent that racial disparities in stops by the police are the normal result of crime commission disparities within racial groups. The police, the city maintained, should be expected to focus on neighborhoods and on people that data makes clear engage in crime. Mayor Bloomberg and Commissioner Kelly made it clear that it is political correctness to propose otherwise.<sup>161</sup>

#### d. Conclusion

The city fundamentally rejected any negative association to the disproportionate stop and frisk of young men of color. To the NYPD, disproportionate impact is the natural result of effective and determined law enforcement applied to criminal concentrations. There was no selective or indirect racial bias. The city, citing its RAND study, defended the use of suspect data over population data as a benchmark to establish that the stop-question-frisk program was free

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<sup>160</sup> *David Floyd, et al. v. City of New York*, Memorandum of Law in Support of Motion for a Stay, Docket Nos. 13-3088, U.S.C.A. 2<sup>nd</sup> Circuit (September 23, 2013) at 7-8. The City asserted

Puzzlingly, the District Court found crime suspect rates to lack probative value largely because a high percentage of stop subjects prove to be innocent of any crime. It is beyond question that police officers may stop, frisk, and even arrest innocent people without offending the fundamental rights guaranteed by the Fourth Amendment, because the compelling governmental interest in protecting citizens from crime balances the degree of incursion. *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000). Likewise, innocence alone cannot provide a valid equal protection claim. See *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) (targeted stops of young black male subjects were not discriminatory although “[t]he actions of the police were understandably upsetting to the innocent plaintiffs who were stopped...”).

*Id* at 10. What is interesting about the City’s arguments throughout the trial is that they assert that statistics that show disproportionate impact on men of color does not prove that individual officers have engaged in racial profiling and aggregate data of disproportionate police stops does not prove discrimination (“Fagan’s statistics purporting to show citywide racial disparities for stops and/or frisks cannot be used to show that a *particular individual officer* engaged in purposeful discrimination.” Defendant’s Post-Trial Memorandum of Law (June 12, 2013) at 18-19). But the city wholesale defends the use of suspect crime and arrest data to establish that men of color commit crime disproportionately than other men and as such the deployment of police and focus of police on men of color is constitutional (“an unpleasant reality: during the period at issue, approximately 83% of all reported crime suspects were black or Hispanic, as were roughly 90% of all violent crime suspects.” *David Floyd, et al. v. City of New York*, Memorandum of Law in Support of Motion for a Stay (September 23, 2013) at 8).

<sup>161</sup> See, *infra* Part One Section 2.

from racial bias. But even the report by the Rand Corporation observed the following in regard to the choice of benchmarks and what they prove.

Regardless of the external benchmark selected—census, arrests, suspect descriptions, or any other—the *racial composition of the stops involves the interaction of the rates of criminal participation and the racial distribution of the population that the officer encounters*. To put some hypothetical numbers to this, consider an unbiased officer who makes stops only when a pedestrian matches a suspect description. This officer works in a precinct with 40 blacks matching suspect descriptions and 40 whites matching suspect descriptions. If all 40 of the white suspects stay inside, travel only by car, or avoid the specific area in which the officer patrols, then this officer will stop only black pedestrians, deviating substantially from the precinct's suspect description benchmark of 50 percent. Even the less extreme situation, in which 20 of the white suspects are exposed to the officer, results in the officer involving blacks in 67 percent of all of that officer's stops. The *suspect benchmark is valid only if the suspects from the various racial groups are equally exposed to police officers*.<sup>162</sup>

Note the point that RAND makes. Regardless of the benchmark chosen, if the distribution of the pool of suspects within the police field of vision is not equal – the use of suspect data for analysis of the stops is of no value. If the police target a specific area for criminals and they use race as a factor for police attention, it will intentionally avoid like criminals of a difference race in the same area. They will also avoid like criminals, regardless of race, in different areas. The use of suspect description data results in the police focusing and catching only those criminals it chooses to see acting as criminals. Thus the constitutional violation is in the policy choice of picking a specific group by race to be targets of police attention and placing certain criminals within the line of sight of the local police officer on the street. This subtly was lost on the defendants.

Consider this example; assume the following assertion to be true; whites and blacks, by percentage, use marijuana equally but blacks tend to use it publically while whites use it behind doors. The police decide to crack down on marijuana use. The police decide to focus on public

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<sup>162</sup> RAND report, *supra* note 12 at 15 (emphasis added).



users, fully aware that the result will be disproportionate arrests of blacks. They also know that focusing on public use will remove from police attention marijuana use by whites. The resulting police statistics show that suspect race data proves a disproportionate use of marijuana use by blacks which in turn justifies the police deployment in public areas and the resulting arrests of blacks and not whites. The decision to conduct a policy that will result in disproportionate arrests of blacks creates the constitutional violation.

To the NYPD, nothing short of the Commissioner ordering the police to “round up” men of color because they are men of color living in a specific neighborhood and the police saturation of a specific neighborhood for the purpose of enabling the officers to “round up” men of color will establish a constitutional violation. To the NYPD there is no such thing as “indirect bias” or “unconscious bias” and only “explicit bias” is unlawful and establishes civil liability. This simple approach allows the city to bypass the majority of what the plaintiffs alleged and the court found by simply asserting that regardless of disproportionate impact and use of statistics to justify racially based policing strategies – there was no unconstitutional purpose or intent based on race regarding the use of stop and frisk, thus the city is not liable. Fortunately, the law is not that simple or myopic.

As the Plaintiffs answered, “The guarantee of equal protection goes beyond punishing racist men wearing white hoods; because of the harmful, stigmatizing and lingering effect of racial discrimination, the Fourteenth Amendment proscribes governmental policies or pronouncements that are even in part motivated by racial classification, identification or stereotype.”<sup>163</sup> “Likewise, Plaintiffs need not prove that decision-makers exhibited overt racial hostility or antipathy or that police officers candidly admitted their racial bias in order to prove

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<sup>163</sup> Post-Trial Memorandum of Law in Support of Plaintiffs’ claims (June 12, 2013) at 12.

intentional discrimination.”<sup>164</sup> The use of racial stereotypes and the establishment of policy based on those stereotypes established a discriminatory unconstitutional purpose. The fact that crime is disproportionately distributed in minority communities does not mean that people in minority communities are disproportionately criminal. What is surprising in reviewing the NYPD use of *Terry* is the fundamental failure to use this constitutional police tool as an investigatory and not a crime suppression tool. The unconstitutional use of the tool along with the racial motivation in the deployment of police (even taking the motivation of the NYPD on face value) together establish the “deliberate indifference” to the result of the policy in actual implementation. It is clearly foreseeable that the clear and direct public assertions by the Mayor and the Police Commissioner that minority youth commit crime disproportionately within the society as a whole, and as such police are deployed in minority communities to reduce crime, because that is where the perpetrators are, will result in greater stopping of minority youth by line police officers.

The city “purpose” and “intent” is further proven by the city’s wholehearted defense of the “suspect race description” benchmark which focuses the policy on race. The use of suspect race data makes the population of criminals within a larger racial population the only point of measurement that matters. Suspect race data defines a minority population into a criminal population. With such a policy, it is clearly foreseeable what line police officers will do with the assumption. “Thus, the City’s policy, at least in part, “expressly incorporate[s] racial bias” in a manner that violates the Fourteenth Amendment.”<sup>165</sup>

The City’s crude presumption actually underscores the ongoing Equal Protection violation in this case. By justifying discriminatory stop and frisk rates on the theory that Blacks and Latinos in general commit more crime, the City affirmatively embraces a racial profile that incentivizes and generates more

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 14.

unlawful stops of Blacks and Latinos, including the innocent Plaintiffs and class members in this case. The City has wound itself into a vicious, discriminatory circle that discards the fundamental constitutional requirement that law enforcement sanction be based on individualized criteria.<sup>166</sup>

Put simply, “Reliance on overbroad generalizations about the propensities of classes of individuals to justify government policy is *per se* unconstitutional.”<sup>167</sup> The city took offense to the conception that the stopping innocent people established constitutional violation. As the city asserted on appeal,

It is beyond question that officers may stop and frisk innocent people without offending the Fourth Amendment, because the compelling governmental interest in protecting citizens from crime balances the limited incursion. [*Illinois v. Wardlow*, 528 U.S. at 126. Indeed, the innocent may be subject to the higher intrusion of arrest, provided probable cause is present. *E.g.*, *Jocks v. Tavernier*, 316 F.3d 128, 135 (2d Cir. 2003). Likewise, innocence, known to police only with the benefit of hindsight, cannot establish a valid EPC claim. *See Brown*, [*v. City of Oneonta*] 221 F.3d at 339 (targeted stops of young black male subjects were constitutional although “understandably upsetting to the innocent plaintiffs who were stopped...”).<sup>168</sup>

Such was the attitude of the city; the stopping of innocent people of color is of little constitutional matter because the “compelling governmental interest in protecting citizens from crime balances the limited incursion” and embarrassment of the men of color stopped.

## 2. The Political Response by the Mayor and the NYPD

Judge Scheindlin at the beginning of her opinion made clear that “this case is not about the effectiveness of stop and frisk in deterring or combating crime. This Court’s mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement

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<sup>166</sup> *Id.* at 15.

<sup>167</sup> *Id.* at 16 (citing *United States v. Virginia*, 518 U.S. 515 (1996)).

<sup>168</sup> Brief for Defendant-Appellant at 68, *Floyd et al. v. City of New York et al*, No. 13-3088 (2d Cir. Dec. 10, 2013), available at <http://www.ccrjustice.org/files/City's%20Merits%20Brief%2012%2010%202013.pdf>.

tool.”<sup>169</sup> While the Court made clear that ends don’t justify the means, Mayor Bloomberg has asserted that the means is the point. Mayor Bloomberg addressed the assertion that the NYPD was racially targeting Black males directly at a community meeting in Brooklyn at the First Baptist Full Gospel Church of Brownsville.<sup>170</sup> At the meeting in June 2012 the Mayor defended the program by asserting that crime statistics don’t follow the census tracks of NYC and that the police can’t stop different groups according to relative population distribution based on census tracks.<sup>171</sup> The Mayor defended the program as a strategy that has reduced crime and specifically rates of murder and the reason for the reduction of murder has been the reduction of “guns . . . being carried on our streets. That is our real goal – preventing violence before it occurs, not responding to victims after the fact.”<sup>172</sup>

The Mayor addressed the disproportionate impact of stop-and-frisk by explaining a “harsh reality” that

The worst, most tragic disparity of all is that young black men are 36 times more likely to be murdered - and young Hispanic men are 12 times more likely to be murdered - than young white men, and sadly, they are also far more likely to commit murder.

I mentioned earlier that 90 percent of all people murdered in our city are black or Hispanic. It’s also true that 96 percent of shooting suspects are black and Hispanic. I don’t have to tell you about the tragedy of black-on-black crime. And I don’t have to tell you that most of the shooters - and victims - are young men.<sup>173</sup>

Although the Mayor acknowledged that he understood why young black men who had been stopped by police officers stated “that their interactions with police officers left them angry

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<sup>169</sup> *Floyd*, 959 F. Supp. 2d at 556 (emphasis in original).

<sup>170</sup> Kate Taylor, *Stop-and-Frisk Policy ‘Saves Lives,’ Mayor Tells Black Congregation*, N.Y. TIMES, June 10, 2012, available at [http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html?\\_r=0](http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html?_r=0).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Press Release, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012).

[e]ither because of disrespectful language or unnecessary force[,] there is no denying that stops take guns off the street and saves lives.”<sup>174</sup>

Last year, those frisks produced 780 guns, and 5,872 knives and 1,572 other dangerous weapons. Just as importantly, it unquestionably deterred many from carrying those weapons in the first place.

By making it ‘Too hot to carry,’ the NYPD is preventing guns from being carried on our streets. That’s our goal: preventing violence before it occurs, not responding to victims after the fact.<sup>175</sup>

The Mayor made clear that he understood the complaint that the stop-and-frisk program was “stopping too many black and Hispanic young men” but he analogized that the stops were due to disproportionate criminal activity by blacks and Hispanics not racial profiling by the police. He argued

Someone might say: It’s unfair that men are stopped more often than women and that young people are stopped more often than old people. I hope we all live to see the day when men commit as few crimes as women and the young commit as few crimes as the old.

But until that day arrives, we are not going to deny reality.

In order to prevent crime, *police officers have to be able to make stops based on crime reports, not census reports*. If we stopped people based on census numbers, we would stop many fewer criminals, recover many fewer weapons and allow many more violent crimes to take place.

We will not do that. We will not bury our heads in the sand. We can’t ever forget who is being killed - and we can’t deny what neighborhoods they are being killed in.

*The reason police officers make stops in Brownsville and East New York is not because of race; it is because of crime*. Brownsville and East New York remain two of the highest-crime areas in our city. We’ve cut crime here over the past 10 years, but not by enough. And we are not going to walk away from a strategy that we know saves lives.<sup>176</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (emphasis added).

The Mayor concluded that the problem with stop and frisk was not that the police were making stops on rationalities less than reasonable suspicion but that the police making the stops may not be doing so “in a respectful way” which results in the person being stopped left “hurt and angry.”<sup>177</sup> Thus he said the program would be “mended, not ended, to ensure that stops are conducted appropriately, with as much courtesy as possible.”<sup>178</sup> To achieve this goal he stated that “we will be putting a new emphasis on Courtesy, Respect, and Professionalism, so that when innocent people are stopped and questioned, the interaction does not leave them hurt and angry.”<sup>179</sup> We will leave alone the fact that innocent people, as a matter of law under *Terry*, are not supposed to be stopped in the first place, much less stopped by police without courtesy, respect, and professionalism.

A year later, the Mayor addressed the NYPD leadership at the main headquarters<sup>180</sup> and defended the stop-and-frisk program. He congratulated his command police officers that murder was down 32 percent compared to the year before and that “if you compare the first-third of this year to when we came into office, it’s down 56 percent. And shootings also are down 22 percent compared to last year’s record low.”<sup>181</sup> In further congratulations of his officers he proclaimed that “by cutting the murder rates to a new record low, we saved 96 lives compared to the year before, and since 2002, we’ve saved 7,364 lives compared to the decade before.”<sup>182</sup> As the Mayor told the Brooklyn congregation the year before, the Mayor defined the NYPD as “First Preventers” not “First Responders” in regard to crime.<sup>183</sup> After recounting that the murder rate in NYC was down while in comparable cities the rate was significantly higher, he also informed his

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Mayor Michael Bloomberg, Press Release, Mayor Bloomberg Delivers Address on Public Safety to NYPD Leadership (April 30, 2013).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

officers that rather than filling the prisons with young people, they were “keeping young people from going to jail and to prison. Unlike in the rest of the country . . . here in New York City we’ve cut crime not by locking more people up, but in locking fewer people up.”<sup>184</sup> This occurred, in part, due to the policy the Mayor had announced in Brooklyn.

That’s one reason why last year, Commissioner Kelly issued an order to clarify that when officers find someone carrying small amounts of marijuana, rather than making an arrest, a summons should be issued - just as if the marijuana was found in the home. Since then, arrests have dropped by a quarter.

Last week Commissioner Kelly and I joined Governor Cuomo in supporting an amendment to State law that would effectively codify the directive Commissioner Kelly has put in place. But no matter what happens in Albany, we are already reducing the number of arrests - and keeping more young people from having negative interactions with the criminal justice system.<sup>185</sup>

While the tone of the Mayor was conciliatory in Brooklyn, he was more hostile to critics of the stop and frisk program when he exhorted his police department.

Even with the excellent record of reducing crime, the Mayor complained that, “the NYPD is under attack.”

The attacks most often come from those who play no constructive role in keeping our city safe, but rather view their jobs as pointing fingers from the steps of City Hall. Some of them scream that they know better than you how to run the Department. Some have even sued the NYPD and demanded a Federal monitor over NYPD operations.

...

As the ongoing Federal court case is now demonstrating for any objective observer to see, the NYPD conducts stops based on seeing something suspicious, or witnesses’ descriptions of suspects, not on any preconceived notions, or on demographic data that would have you stopping old women as often as you stop young men.

...

The second bill before the City Council is being sold as a law that bans racial profiling. Well the fact of the matter is racial profiling is already against the law. In fact, I signed that bill into law, because our Administration has absolutely zero tolerance for racial profiling.

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<sup>184</sup> *Id.*

<sup>185</sup> Press Release, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012).

In addition, under Commissioner Kelly's leadership, we've made the NYPD the most diverse police force in the nation. Critics who claim that police stops are based on race never seem to mention the fact that the majority of the NYPD's patrolling officers are minorities, but that's true. And last year, Commissioner Kelly instituted more rigorous training and quality controls to ensure that officers conduct stops properly and respectfully.<sup>186</sup>

Leaving aside the ridiculous and absurd assertion that the fact that the police department is racially diversified proves that the stop-and-frisk program can't be racially biased because black and Hispanic police officers are participating in the stops, the Mayor was blunt when he addressed why disproportionately blacks and Hispanic males were being stopped and why proposed legislation in the city council to address it was wrong.

The legislation is based on the false allegation that the NYPD disproportionately stops young men of color. But as you know, stops are made based on descriptions of suspects and suspicious activity only. And *the sad reality is on the streets of our city, 90 percent of murder suspects and murder victims are black and Latino. And black and Hispanics are the overwhelming majority of suspects in other violent crimes.*

The truth of the matter is, comparing stops to the general population it just not rational. *Comparing stops to the witnesses' description of suspects and the identification of suspicious activity – which together reflect the racial and ethnic breakdown of criminal activity – is what matters.* And the numbers put the lie to the racist allegations. In fact, the percentage of stops of blacks is less than that of whites and Asians when adjusted for crime reports.<sup>187</sup>

The Mayor, both in this speech and in other statements, asserts that the stops are based on crime patterns within a geographic area and those who commits crimes within that area. If blacks and Hispanics commit the most crimes in the area as a group then the stops should reflect that reality.

The Mayor opposed proposed legislation to prevent racial profiling because “[b]y their own admission, the supporters of these bills say are designed to put pressure on the NYPD to

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<sup>186</sup> Mayor Michael Bloomberg, Press Release, Mayor Bloomberg Delivers Address on Public Safety to NYPD Leadership (April 30, 2013)

<sup>187</sup> *Id.*



make fewer stops . . . .”<sup>188</sup> To which the Mayor responded “Stop playing politics with public safety.”<sup>189</sup> Further, the Mayor asserted that those who attack the stop-and-frisk program are hypocrites because they rage at the injustice done to black and Hispanic males when stopped by the police, but they are nowhere to be heard when a black or Hispanic male is killed in a meaningless drive by shooting. While “about 90 percent of all murder victims in our city are black and Latino . . . there is no outrage from the Center for Constitutional Rights or the NYCLU [and there is] not even a mention . . . in our paper of record, the New York Times, [but] when police stop and ask a 17-year old a question based on reasonable suspicion of a crime, there is outrage. Yet when a 17-year-old is standing on the corner near his home at 8:15 in the evening and gets shot and killed, there is silence.”<sup>190</sup>

As he explained to the community the year before, the Mayor said that the stop-and-frisk program was based on a deterrence model. The police are making stops to prevent people from carrying guns.

Now, critics say that police stops have nothing to do with the reduction in crime we’ve achieved. But think about this: over the past eleven years, stops have taken 8,200 illegal guns off our streets – and murder-by-guns has dropped dramatically.

. . .

Critics say the fact that we’re ‘only’ finding 800 guns a year through stops of people who fit a description or are engaged in suspicious activity means that we should end stop and frisk.

Wrong. That’s the reason we need it – to deter people from carrying guns. We are the First Preventers.

Think about police department tactics, that they often announce they’re setting up checks for DWI. The goal is deterrence. If you know you’re likely to be stopped, you don’t drink and drive.

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<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

If you end DWI stops, more people will get killed in crashes. And if you end stops looking for guns, make no mistake there will be more guns in the hands of young people and more people will be getting killed. It's really that simple.<sup>191</sup>

While the District Court held that the stops are occurring without specific reasonable suspicion, the Mayor assumes the stops are being carried out as such, thus the attacks on the program result from people who want the NYPD to “run according to the standards of political correctness, not public safety.”<sup>192</sup> A concept he, of course, rejects.

Commissioner Kelly in an op-ed a month later<sup>193</sup> stated that “[s]ince 2002, the New York Police Department has taken tens of thousands of weapons off the street through proactive policing strategies. The effect this has had on the murder rate is staggering. In the 11 years before Mayor Michael Bloomberg took office, there were 13,212 murders in New York City. During the 11 years of his administration, there have been 5,849. That’s 7,383 lives saved – and if history is a guide, they are largely the lives of young men of color.”<sup>194</sup> As did the Mayor, Commissioner Kelly rejects the assertion that individual men of color are being racially profiled because “the race of those stopped highly correlates to descriptions provided by victims or

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<sup>191</sup> *Id.* See also, Press Release, Mayor Bloomberg, Police Commissioner Kelly, Special Narcotics Prosecutor Brennan, District Attorneys Vance and Hynes and Criminal Justice Coordinator Feinblatt Announce Largest Seizure of Illegal Guns in City History press conference (August 19, 2013).

At the press conference the Mayor announced that the police had seized 254 illegal guns and indictments of 19 people involved in illegal gun trafficking from North and South Carolina to New York City. The Mayor noted that wiretaps of the suspects revealed that the gun runners had changed their behavior because stop-question-frisk made selling illegal guns more difficult in the city. The Mayor played a taped conversation with one of the gun traffickers. On the tape, Defendant Earl Campbell said,

yeah I’m in Charlotte now. I can’t leave until you come, cause I can’t take them [guns] to my house, to my side of town cause I’m in Brownsville. So we got like, whatchamacallit, stop and frisk.

<sup>192</sup> Press Release, Mayor Bloomberg Speaks to Parishioners of the First Baptist Church of Brownsville About How Crime Can be Driven Down even Further While Continuing to Improve Community Relations (June 10, 2012).

[editor:spacing]<sup>193</sup> Ray Kelly, *Ray Kelly: The NYPD: Guilty of saving 7,383 Lives, Accusations of racial profiling ignore the fact that violent crime overwhelmingly occurs in minority neighborhoods*, THE WALL STREET JOURNAL (Jul. 22, 2013 7:14 P.M.), <http://online.wsj.com/news/articles/SB10001424127887324448104578616333588719320>.

<sup>194</sup> *Id.*

witnesses of crimes.”<sup>195</sup> Put simply, “96% of the individuals who were shot [in 2003] and 90% of those murdered were black and Hispanic [thus] we’ve [developed] a proactive policy of engagement. We stop and question individuals about whom we have reasonable suspicion.”<sup>196</sup> Like the Mayor, Commissioner Kelly said, “[i]t’s understandable that someone who has done nothing wrong will be angry if he is stopped [but] we have to face the reality that New York’s minority communities experience a disproportionate share of violent crime. To ignore that fact, as our critics would have us do, would be a form of discrimination in itself.”<sup>197</sup>

A month later, the District Court issued its opinion of the stop-question-frisk policy holding that it violated the Fourth Amendment because the stops were not conducted on a basis of specific reasonable suspicion but upon “indirect racial profiling.” The Mayor and the Police Commission held a press conference to voice their rejection of the decision.<sup>198</sup> After making similar statements on the utility of the program to prevent crime and specifically the murder rate, the Mayor complained that the “judge made it clear she was not at all interested in the crime reductions . . . nowhere in her 195-page decision does she mention the historic cuts in crime or the number of lives that have been saved.”<sup>199</sup> Aside from this major oversight, the Mayor complained

She ignored the real-world realities of crime, the fact that stops match-up with crime statistics, and the fact that our police officers on patrol – the majority of whom are black, Hispanic, or members of other ethnic or racial minorities – make an average about less than one stop a week.

And even though the plaintiff’s own expert found that about 90 percent of stops have been conducted appropriately and lawfully, and another 5 percent may well

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Press Release, Transcript of Statements of Mayor Bloomberg and Commissioner Kelly on Federal Court Ruling (Aug. 12, 2013) <http://www1.nyc.gov/office-of-the-mayor/news/275-13/statements-mayor-bloomberg-commissioner-kelly-federal-court-ruling>

<sup>199</sup> *Id.*

have been conducted appropriately and lawfully, the judge still wants to put the NYPD into receivership based on the flimsiest of evidence in a handful of cases.

After claiming that the judge was biased from the beginning in favor of the plaintiffs<sup>200</sup> the Mayor made clear that stop-question-frisk is a key tool in law enforcement and “we have to give the members of our Police Department the tools they need to do their jobs without being micro-managed and second-guessed every day by a judge or a monitor.”<sup>201</sup> Commissioner Kelly was just as incensed by the decision, taking particular umbrage to the assertion that the NYPD engages in racial profiling.<sup>202</sup> But more importantly, he continued to justify the program on a deterrence theory.

Police stops are just one component of multiple efforts by the Department that have saved lives and driven the murder rate to record lows. In the first 11 years of Mayor Bloomberg’s tenure there were 7,363 fewer murders in New York City compared to the 11 years prior to the Mayor taking office. And if history is any guide, those lives saved were overwhelmingly the lives of young men of color.

Now, this didn’t happen by accident, it was a result of proactive policing supported by this Mayor. There’s little question that police stops in this case continue to be deeply misunderstood.

The fact that they often do not lead to arrests or summonses misses the point. When a police officer stops and makes inquiry of an individual about to

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<sup>200</sup> “Given the judge’s public comments and media interviews throughout the case, this decision was certainly not a surprise. From even before the start of the case, when she offered some strategic advice to the plaintiffs that would allow her to hear the case, the judge clearly telegraphed her intentions. And she conveyed a disturbing disregard for the good intentions of our police officers, who form the most diverse Police Department in the country, and who put their lives on the line for us every single day. Throughout the case, we didn’t believe that we were getting a fair trial. This decision confirms that suspicion, and we will be presenting evidence of that unfairness to the Appeals Court.” *Id.*

The Second Circuit would find salience with this attack on the Judge and the Court removed Judge Scheindlin from case when it granted a stay of her ruling pending appeal by the City. See, *Ligon, et al. v. City of New York* (13-3123) and *David Floyd, et al. v. City of New York* (13-3088) U.S. Court of Appeals 2<sup>nd</sup> Cir (October 31, 2013), *David Floyd, et al. v. City of New York Plaintiffs Declaration in Support of Motion to Vacate the District Court Order* (13-2088(L)) (Nov. 9, 2013), *In re Motion of District Judge*, \_\_\_ F.3d \_\_\_, Nos 13-3123, 13-3088 (2d Cir. Nov. 13, 2013) and *In re Reassignment of Cases*, \_\_\_ F3d \_\_\_, Nos. 13-3123, 13-3088 (2d Cir. Nov. 13, 2013), and *Ligon, et al. v. City of New York* (13-3123) and *David Floyd, et al. v. City of New York* (13-3088) U.S. Court of Appeals 2d Cir (Nov. 22, 2013).

<sup>201</sup> Press Release, Mayor Bloomberg and Kelly, *supra* note 198.

<sup>202</sup> *Id.* As previously asserted by the Commissioner, “To that point, last year 97 percent of all shooting victims were black or Hispanic and reside in low-income neighborhoods. Public housing where five percent of the city’s population resides experiences 20 percent of the shootings. There were more stops with suspicious activity in neighborhoods with higher crime because that’s where the crime is.”

burglarize a location the officer has stopped a burglary. When officers stop and make inquiry of young men about to strong-arm a bodega owner as he leaves his store late at night they've stopped a robbery or perhaps worse.

But obviously stops for suspicious behavior do lead to good arrests as well. We've taken about 8,000 guns from individuals over the last decade this way. Something our critics sneer because the number is 'too low' compared to the number of stops, despite the fact that stops average, as the Mayor said, less than one per week per officer on patrol.<sup>203</sup>

The Commissioner ended his rejection of the district court by quoting an article in the *Atlantic Magazine*, "But just as the cost of aggressive crime control are disproportionately borne by the disadvantaged, so too have been the benefits: the reduction in crime is one of the few public goods in New York that is truly progressive, benefiting disproportionately the poor and vulnerable, who need it most."<sup>204</sup>

In an op-ed a few days later<sup>205</sup> the Mayor asserted that statistics on crime should not be viewed from census tracks with a view of finding proportionate results of police interaction. Police activity should be viewed from the perspective of crime activity and those who as a group commit those crimes. Such an approach is not racism but active law enforcement applied to both location and crime perpetrators.

That the proportion of stops generally reflects our crime numbers does not mean, as the judge wrongly concluded, that the police are engaged in racial profiling; it means they are stopping people in those communities who fit descriptions of suspects or are engaged in suspicious activity.<sup>206</sup>

He also complained that the plaintiffs failed to prove their claim of racial profiling.

Amazingly, out of several million stops that have happened over the past decade, the advocates who brought the case could identify only 19 stops that they believe were unjustified — and the judge disagreed with them on a majority of even those handpicked cases, finding that 10 of the 19 stops were in fact justified, even

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<sup>203</sup> *Id.*; but see *supra* notes 87-89.

<sup>204</sup> *Id.*

<sup>205</sup> Michael R. Bloomberg, *Stop and Frisk is not racial profiling*, WP OPINION (Aug. 18, 2013), [http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84_story.html).

<sup>206</sup> *Id.*

though they did not lead to an arrest. By doing so, the judge acknowledged that stops that do not end in arrest are often legitimate; those scoping out a robbery, or lying in wait of a potential victim, can be stopped and deterred even if they cannot be arrested.

Nevertheless, the judge used a questionable analysis of police officers' paperwork, which found that only 6 percent of stops were unjustified, as a basis for imposing a court-appointed monitor to oversee the NYPD's practice of stop-question-frisk, as well as to mandate specific programmatic changes to policing, even though she has no experience in policing.<sup>207</sup>

(We will leave aside the Mayor's misrepresentation of the court's findings – which held that 10 of the 18 stops and 9 out the 15 frisks were in violation of *Terry*.) It is clear that the Mayor and the NYPD view the issue of stop-question-frisk differently than the plaintiffs and the Court. The program to the city is one that reduced crime, prevented crime, and removed guns of the street. They view the disproportionate impact as an inconvenience that is the natural result of blacks and Hispanics committing crime disproportionately to their population. As the Mayor and Commissioner made clear in their public statements, it would make no sense to stop women over men and the old over the young because the women and the old are not the drivers of crime, the young and the men are. Thus it makes logical sense to stop them. By the analogy, it should be expected that the police will stop people of color more than whites. To the claim that they are using a tool that has utility but is unconstitutional, they both made clear that they only stop people based on reasonable suspicion. But as the court observed, the police perceive anyone within the high crime committing group as a possible criminal or at the very least a person to be considered for a stop-question-frisk encounter. The issue of race occurs in the mind of the police before the reasonable suspicion occurs. That is what the court held was “indirect racial profiling” and this is what the city rejects out of hand.

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<sup>207</sup> *Id.*

The perception that blacks are a population to be controlled due to their threat to public peace and law and order is not a recent concept. As discussed in Part Two, blacks and later Hispanics have been the focus of urban criminal justice and a perceived threat to be controlled for more that century. The point being, the attitudes of the Mayor and Commissioner have a social political context outside of the debate between general population or criminal population benchmarking.

**Part Two:  
Historical Perspective  
African Americans and African American Males Perceived as Criminals**

It is axiomatic that the role of criminal justice is to deal with issues of crime. All debate within the profession and academic discipline of criminal justice is about how the system should address the issues of crime. When issues of race, within the American context, are intertwined within questions of crime suppression, the complication only increases.

It is clear that the city, NYPD, the Mayor and Commissioner Kelly start with the premise that violent crime, especially homicide, within NYC is explained within a simple racial context – the majority of victims are people of color and so are the perpetrators. This simple truth leads to the policy of enhanced police activity in neighborhoods in which perpetrators reside. Control these neighborhoods and the people in them and the homicide rate will be reduced. They would argue this simple syllogism is not racially motivated because it is simple honesty and the rejection of political correctness. As broken windows theory asserts, a governing theory in the NYPD from the 1990s, crime can be reduced by direct police action regardless of the social,

political, historical, and economic factors that support chronic criminal behavior in a neighborhood.<sup>208</sup>

Leaving part of this debate aside,<sup>209</sup> the idea that people of color, African Americans specifically, are disproportionately represented in crime because of their own internal social dynamics is a familiar theory and explanation. The Heritage Foundation best explains this theory of personal dysfunction and crime.

Policymakers at last are coming to recognize the connection between the breakdown of American families and various social problems.

....

While this link between illegitimacy and chronic welfare dependency now is better understood, policymakers also need to appreciate another strong and disturbing pattern evident in scholarly studies: the link between illegitimacy and violent crime and between the lack of parental attachment and violent crime. Without an understanding of the root causes of criminal behavior -- how criminals are formed -- Members of Congress and state legislators cannot understand why whole sectors of society, particularly in urban areas, are being torn apart by crime. And without that knowledge, sound policymaking is impossible.

A review of the empirical evidence in the professional literature of the social sciences gives policymakers an insight into the root causes of crime. Consider, for instance:

- Over the past thirty years, the rise in violent crime parallels the rise in families abandoned by fathers.
- High-crime neighborhoods are characterized by high concentrations of families abandoned by fathers.
- State-by-state analysis by Heritage scholars indicates that a 10 percent increase in the percentage of children living in single-parent homes leads typically to a 17 percent increase in juvenile crime.
- The rate of violent teenage crime corresponds with the number of families abandoned by fathers.

<sup>208</sup> See generally James Q. Wilson and George L. Kelling, *Broken Windows*, THE ATLANTIC (Mar. 1, 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>; See also James Q. Wilson and George L. Kelling, *A Quarter Century of Broken Windows*, THE AMERICAN INTEREST (Sept. 1, 2006), <http://www.the-american-interest.com/articles/2006/09/01/a-quarter-century-of-broken-windows/>.

<sup>209</sup> See e.g., Samuel Walker, "Broken Windows" and *Fractured History: The Use and Misuse of History in Recent Police Patrol Analysis*, 1 JUSTICE QUARTERLY 75 (1984) available at <http://www.tandfonline.com/doi/pdf/10.1080/07418828400088041>; compare Bernard E. Harcourt, *Policing Disorder: Can we Reduce Serious Crime by Punishing Petty Offenses?*, BOSTON REVIEW with William J. Bratton, James Q. Wilson, George L. Kelling, Reverend Eugene Rivers and Peter Cove, *This Works: Crime Prevention and the Future of Broken Windows Policing*, 36 MANHATTAN INSTITUTE CIVIC BULLETIN 1 (Apr. 2004).



- The type of aggression and hostility demonstrated by a future criminal often is foreshadowed in unusual aggressiveness as early as age five or six.
- The future criminal tends to be an individual rejected by other children as early as the first grade who goes on to form his own group of friends, often the future delinquent gang.

On the other hand:

- Neighborhoods with a high degree of religious practice are not high-crime neighborhoods.
- Even in high-crime inner-city neighborhoods, well over 90 percent of children from safe, stable homes do not become delinquents. By contrast only 10 percent of children from unsafe, unstable homes in these neighborhoods avoid crime.
- Criminals capable of sustaining marriage gradually move away from a life of crime after they get married.
- The mother's strong affectionate attachment to her child is the child's best buffer against a life of crime.
- The father's authority and involvement in raising his children are also a great buffer against a life of crime.

The scholarly evidence, in short, suggests that at the heart of the explosion of crime in America is the loss of the capacity of fathers and mothers to be responsible in caring for the children they bring into the world. This loss of love and guidance at the intimate levels of marriage and family has broad social consequences for children and for the wider community. The empirical evidence shows that too many young men and women from broken families tend to have a much weaker sense of connection with their neighborhood and are prone to exploit its members to satisfy their unmet needs or desires. This contributes to a loss of a sense of community and to the disintegration of neighborhoods into social chaos and violent crime. If policymakers are to deal with the root causes of crime, therefore, they must deal with the rapid rise of illegitimacy.<sup>210</sup>

Thus if people of color, African Americans specifically, conservatives argue, would get their families together and stop having children out of wedlock, the crime problem would be

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<sup>210</sup> Patrick F. Fagan, *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*, 1026 THE HERITAGE FOUNDATION BACKGROUNDER 1, 1-2 (Mar. 17, 1995), available at <http://www.heritage.org/research/reports/1995/03/bg1026nbsp-the-real-root-causes-of-violent-crime>.

significantly reduced. “There is a widespread belief that race is a major explanatory cause of crime. This belief is anchored in the large disparity in crime rates between whites and blacks.”<sup>211</sup>

Internal family dysfunction as the explanation for African American crime and other social problems has been Republican Party and social conservative orthodoxy since 1965.<sup>212</sup> This orthodoxy is mainstream thought. As Bill O’Reilly editorialized on his show

The reason there is so much violence and chaos in the black precincts is the disintegration of the African-American family. Right now, about 73 percent of all black babies are born out of wedlock. That drives poverty. And the lack of involved fathers leads to young boys growing up resentful and unsupervised.

...

White people don’t force black people to have babies out of wedlock. That’s a personal decision; a decision that has devastated millions of children and led to disaster both socially and economically. So raised without much structure, young black men often reject education and gravitate towards the street culture, drugs, hustling, gangs. Nobody forces them to do that; again, it is a personal decision.

...

The solution to the epidemic of violent crime in poor black neighborhoods is to actively discourage pregnancies out of marriage, to impose strict discipline in the public schools, including mandatory student uniforms, and to create a zero tolerance policy for gun and drug crimes imposing harsh mandatory prison time on the offenders.

[The entertainment industry must stop glorifying youth who can’t “speak proper English” and curse as a matter of normal course of language.] That child will never, never be able to compete in the marketplace of America... never. And it has nothing to do with slavery. It has everything to do with you Hollywood people and you derelict parents. You’re the ones hurting these vulnerable children.

....

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<sup>211</sup> *Id.* at 4. To soften the assertion, Fagan also asserts that, “However, a closer look at the data shows that the real variable is not race but family structure and all that it implies in commitment and love between adults.” *Id.*

<sup>212</sup> See, Daniel Moynihan, *The Negro Family: The Case For National Action* (1965) [hereafter the Moynihan Report]. See also a report by the Republican Majority on the House of Representatives Budget Committee on past presidential pronouncements on poverty. House Budget Committee Majority Staff, *The War on Poverty: 50 Years Later A House Budget Committee Report* (March 3, 2014) at 4 (“the single most important determinant of poverty is family structure. It has been the subject of fierce academic debate since the Moynihan Report—named after its author, then assistant secretary of labor Daniel Patrick Moynihan—was released in 1965. The Moynihan Report identified the breakdown of the family as a key cause of poverty within the black community.”). See also, *Infra* note 224.

In 1964 at his State of the Union Address Lyndon Johnson said, “This administration today, here and now, declares unconditional war on poverty in America” and in 1988 at his State of the Union Address Ronald Reagan said, “My friends, some years ago, the Federal Government declared war on poverty, and poverty won.”

It is now time for the African-American leadership, including President Obama to stop the nonsense. Walk away from the world of victimization and grievance and lead the way out of this mess.<sup>213</sup>

As another social conservative commentator observed:

between 1890 and 1950, blacks had *higher* marriage rates than whites. Until 1970, black women were more likely to get married than white women -- and that was despite the high mortality rates among black men, leaving fewer available for marriage. In three of four decennial years between 1890 and 1920, black men out-married white men. Whatever else may cause illegitimacy and its associated problems, it isn't poverty, discrimination, lack of education, unemployment or slavery. Black Americans had all those handicaps -- and yet they still had strong families and low crime rates from 1890 until the 1960s. But in the '60s, liberals decided it would be a great idea to start subsidizing illegitimacy.

...  
But we know poverty does not cause illegitimacy. The black experience from 1890 to 1960 proves it. It's the reverse, just as Bill O'Reilly said. If African-Americans started marrying again at their pre-Great Society rates, it would wipe out the entire black "culture of poverty."<sup>214</sup>

Although true that it is better for financial, emotional, educational, and structural reasons to be in a married two parent household with a mother and a father caring for children, it is highly

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<sup>213</sup> *The O'Reilly Factor* "President Obama and the race problem" The O'Reilly Factor Talking points (July 22, 2013) (Fox News television broadcast Jul. 22, 2013), available at <http://www.billoreilly.com/b/Bill-O'Reilly:-President-Obama-and-the-race-problem/945823226264545887.html>; see also, *The O'Reilly Factor* Bill O'Reilly, "Are you your brother's keeper?" The O'Reilly Factor Talking points (February 26, 2014) (Fox News television broadcast Feb. 26, 2014), available at <http://www.billoreilly.com/b/Bill-O'Reilly:-Are-you-your-brothers-keeper/-857498054410309943.html> and *The O'Reilly Factor* Bill O'Reilly, "Why I went to the White House today" The O'Reilly Factor Talking points (February 27, 2014) (Fox News television broadcast Feb. 27, 2014), available at <http://www.billoreilly.com/b/Bill-O'Reilly:-Why-I-went-to-the-White-House-today/3176085340168095.html>.

<sup>214</sup> Ann Coulter, *Bill O'Reilly is smarter than Lawrence O'Donnell*, ANN COULTER (Aug. 7, 2013), <http://www.anncoulter.com/columns/2013-08-07.html>. See also Congressman Paul Ryan, who when asked, "a boy has to see a man working doesn't he" answered,

Absolutely, and so, that's the tailspin or spiral that were looking at in our communities. Your buddy Charles Murray or Bob Putman over at Harvard Business, those guys have written books on this. Which is, we have got this tailspin of culture, *in our inner cities in particular*, of men not working and just generations of men not even thinking about working or learning the value and the culture of work, and so there is a real culture problem here that has to be dealt with. Everybody's got to get involved. So this is what we talk about when we talk about civil society. If you're driving from the suburb you know to the sports arena downtown by these blighted neighborhoods, you can't just say, "I'm paying my taxes, government's got to fix that." You need to get involved. You need to get involved yourself, whether through a good mentor program, or some religious charity, whatever it is to make a difference. And that's how we help resuscitate our culture.

*Bill Bennett Morning in America Radio Show* (March 12, 2014) (emphasis added).

simplistic and disingenuous to assert that all of the factors contributing to crime or poverty in a neighborhood can be explained and solved with the single factor of marriage.<sup>215</sup> It is not implied that the presence of a *father* is of little significance in the life of a child, but there are multiple factors that lead to criminality regardless of the presence of a father. Congressman Paul Ryan recently complained that “our communities” were in a tailspin, and “in our inner cities in particular” were “men not working, and just generations of men not even thinking about working or learning the value and the culture of work.”<sup>216</sup> Leaving aside the dog whistle of conflating

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<sup>215</sup> Even Paul Ryan, the point man for conservatives and Republicans on poverty policy, admitted that the causes and policy prescriptions for poverty are multivariate a few months after his discussion with Bill Bennett. As chair of the House Budget Committee, his committee report asserted that

No family can get ahead without a strong economy. But there are many factors that affect upward mobility. On the personal level, growing up in a two-earner household, completing formal education, and developing a habit and a store of savings are all significantly associated with higher rates of upward mobility. In addition, the Brookings Institution has shown that a combination of family conditions and patterns of behavior and achievement is the key to joining to the middle class.

And at the neighborhood level, recent research has shown that areas with more two-parent households, a higher level of civic engagement, and fewer high-school dropouts enjoy higher average rates of upward mobility. Conversely, people who live in more geographically isolated areas, which often suffer from high levels of concentrated poverty and crime, are more likely to experience lower rates of upward mobility—even those who are not poor or do not engage in such activities themselves may be at increased risk of downward mobility.

Poverty is a very complex problem [and poverty is both situational and generational].

House Budget Committee, *Expanding Opportunity in America: A Discussion Draft from the House Budget Committee* (July 2014) at 4-5, 8, 21-23. See *infra* note 224 for similar conclusions.

<sup>216</sup> *Supra* note 214. But see a more nuanced definition of poverty provided by Bob Woodson, President of the Center for Neighborhood Enterprise, who is a conservative African American:

I identify four categories of poor people. The first category of people are just broke. (Laughter.) They lost a job or a bread-winner died or there's a temporary illness, but the person's character is in place. And for them, they use welfare and assistance the way it was intended – as an ambulance service, not as a transportation system.

And then, you've got category two, a person that confronts perverse incentives for maintaining – staying on – welfare. For instance, the single mom in Milwaukee, many years ago, who saved \$5,000 on welfare to send her daughter to college only to be charged with a felony. So she concluded, well, I'll just...Her character is in place, so perverse incentives.

Category three would be someone who's physical or mentally disabled. But category four, that I think concerns most of us, are those who are poor because of the poor choices that they make, the character flaws that they have. They're drug addicts. They have serial out of wedlock births. Just giving money to people like that injures with the helping hand. And so it's important for us to disaggregate this population of the poor.

intergenerational poverty with simple intergenerational laziness and the conflating both to be defined by race (“inner cities” is code for blacks and Hispanics); this kind of one dimensional thinking completely ignores the lack of working class living wage jobs in the urban and rural areas of America. Poverty is a complex mix of societal ecological *structural factors* as well as interpersonal and individual psychological *social factors*. Poverty in America is a combination of how one thinks and where one lives. Returning to Congressman Ryan’s “inner city” statement, considering that unemployment rates are higher if not comparable to rates in rural America, Appalachia and Native American communities – why does he instinctively say “especially in our inner cities” which is predominately black and Hispanic? Are whites who are underemployed, unemployed, poverty stricken, undereducated who live in high alcohol and drug infested rural communities nevertheless crime free in stable married families; while blacks in the same communities are simply criminogenic?

As any freshman level introduction to criminology course, much less advanced study, makes clear – the explanations of why people commit crime is complicated and highly diverse. Crime is the result of individual, social, structural, and life course variables; crime is explained by the complicated interactions between people, among people and between people and society. Neighborhood violence is the result of rational choice, the effects of social learning of

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People on the left tend to look at the poor as if they’re all category one. And people on the right tend to look at the poor as if they’re all category four.

And so it’s very difficult, when we do that, to have a meaningful dialogue, because as Paul proposal identifies, you need a strategy to address poverty to address the needs of each of these groups. . . .

The point is . . . both people on the left and right had myths about the poor. People on the left, when they look at poor people, they see a sea of victims. People on the right see a sea of aliens.

. . . . .

Final point is that also, I think, we have to destroy this false dichotomy that somehow if we spend more, we care more. If we spend less, we care less.

American Enterprise Institute, Expanding Opportunity in America: A Conversation with House Budget Committee Chairman Paul Ryan, Panel discussion July 24, 2014. [http://www.aei.org/files/2014/07/25/-paul-ryan-event\\_175426104263.pdf](http://www.aei.org/files/2014/07/25/-paul-ryan-event_175426104263.pdf)

aggression, crime pattern and crime triangle (routine activities) theory, chronic intergenerational poverty, intergenerational intra-neighborhood gang violence (and vendettas), the allure of violence and drug money, inability of the police to prevent street level violence or open air drug (heroin, cocaine and crack) selling in the 1980s and chronic organized drug and weapons trafficking in rural neighborhoods and urban inner cities. These factors are compounded by the fact that the informal institutions social control (family, church, employment, and schools) and the formal institutions social control (police, courts, and corrections) have failed to provide safety for residents or limit the power of gangs to intimidate and recruit. One of the reasons for the failure to limit the power of gangs is due to the proliferation of independent small violent gangs that replaced larger organized street gangs that were dismantled by law enforcement in the 1980s-1990s. The result of the failure to control these smaller more violent gangs is the creation of an environment that fosters violence and sometimes purposeless violence as a positive norm. Urban violence is surely more complicated than simply the immorality of black culture, lack of fathers in the home and failure to enforce discipline in the schools. But such simplistic social conservative assertions are an example of subtle racism. Since crime and poverty is simply solved by men getting up and going to work, as social conservatives assert, one is can easily look at the inner city and conclude what do you expect; after all, these “coloured folks ain’t supposed to have but so much sense.”<sup>217</sup>

Leaving sociology aside, it is highly *intentionally dishonest* to assert that governmental policy and American sociopolitical and economic history (forget slavery; consider the impact of a century of Jim Crow, segregation, and the imposition of economic impediments on black families to gain and maintain wealth intergenerationally in a capitalist system) or the use of

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<sup>217</sup> See A SOLDIER’S STORY (Columbia Pictures 1984), available at [http://www.script-orama.com/movie\\_scripts/s/soldiers-story-script-transcript-fuller.html](http://www.script-orama.com/movie_scripts/s/soldiers-story-script-transcript-fuller.html)

racial profiling<sup>218</sup> (the political correct<sup>219</sup> version of the belief that blacks are criminogenic)<sup>220</sup> has had no role in explaining the incarceration of people of color. Consider the historical impact

<sup>218</sup> See generally *Floyd*, 959 F. Supp. 2d; see also Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71U. CHI. L. REV. 1275 (2004).

<sup>219</sup> For an example of defending racial profiling and the assertion that African American concerns over it are political sensitivities over the unfortunate truth that blacks are criminogenic, see John Derbyshire who asserts in the leading conservative magazine *National Review*:

At present, Americans are drifting away from the concept of belonging to a single nation. I do not think this drift will be arrested until we can shed the idea that deference to the sensitivities of racial minorities — however overwrought those sensitivities may be, however over-stimulated by unscrupulous mountebanks, however disconnected from reality — trumps every other consideration, including even the maintenance of social order. To shed that idea, we must confront our national hysteria about race, which causes large numbers of otherwise sane people to believe that the hearts of their fellow citizens are filled with malice towards them. So long as we continue to pander to that poisonous, preposterous belief, we shall only wander off deeper into a wilderness of division, mistrust, and institutionalized rancor — that wilderness, the most freshly painted signpost to which bears the legend RACIAL PROFILING.

John Derbyshire, *In Defense of Racial Profiling*, 53 NAT'L REV. 38 (Feb. 19, 2001).

<sup>220</sup> By criminogenic, I mean that blacks are by nature criminals and more criminal than other racial groups. Post 9/11 American conservative think tanks, academics, and politicians' have abandoned fears of being charged as being racists in making such claims. As one report noted in 2005,

This report takes no position on causes of group differences in crime rates, except to point out that the ones that are most commonly proposed—poverty, unemployment, lack of education—are not satisfactory. As for the reality of those differences, the evidence is overwhelming: Blacks are considerably more likely than any other group to commit crimes of virtually all kinds, while Asians are least likely. Whites and Hispanics have intermediate crime rates.

These differences are far greater than some that have given rise to significant public initiatives. Blacks are more than twice as likely as whites to be unemployed, and white household income is 60 percent higher than black household income. Blacks are twice as likely as whites to drop out of high school. Race differences of this kind have led to everything from affirmative action preferences to No Child Left Behind legislation.

Americans are right to be concerned about these differences, but they are, relatively speaking, small. To repeat some of the more substantial differences in crime rates: Blacks are about eight times more likely than whites to commit murder, and 25 times more likely than Asians to do so. Blacks are 15 times more likely than whites to go to prison for robbery, and 50 times more likely than Asians.

*The Color of Crime*, THE NEW CENTURY FOUNDATION 1, 19-20 (2005), <http://colorofcrime.com/colorofcrime2005.html>. The report goes on to assert that because blacks, being criminogenic, are convinced that racism exists in America are more likely to commit violent crime and whites need to know this so as to protect themselves.

Assumptions about police bias are especially common among minority groups that have the most to gain from good relations with the police. Blacks, in particular, are convinced of police "racism." *In extreme cases, this belief leads to murderous rampages* like that of Brian Nichols with which this report begins. *It is not an exaggeration to say that his victims might be alive today if the facts*

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*in this report were widely known.* In countless less severe cases, a belief in police bias leads to suspicion, resentment, and lack of cooperation, all of which make it harder for the police to do their jobs, and more likely that minorities will suffer from crimes that could have been solved or prevented. How often do *assumptions about police—and societal—racism so anger blacks that they go beyond lack of cooperation to crime itself?* It is profoundly destructive for minorities to have exaggerated resentments toward the society in which they live. Uncritical repetition by whites of assertions about police bias only deepens these resentments.

*Id.* at 20 (emphasis added). Although I am loathe to cite a report by authors lacking the courage to assign their names to it (the actual authors of the report are not identified), the report is honest in its logical social and policy conclusions based on using statistics to prove the criminogenic nature of blacks. The report concludes:

Americans do not know the exact statistics, but they know that whites (and Asians) are less likely than blacks to rob them. . . . It is common to oppose publication of crime statistics for fear of creating “negative stereotypes,” but statistical differences are the basis for important policy decisions. *Id.*

What “important policy decisions”? The report answers

If one airline were three times more likely than other airlines to be involved in fatal accidents, would it be reasonable to avoid it? . . . People make choices, and risk affects their choices. If there are different risks associated with different groups of people it is legitimate to investigate and weigh those risks. *Id.*

Brian Nichols was an African American who while on retrial for rape, escaped from police custody in the Fulton County, Georgia Courthouse and assaulted the sheriff deputy who was guarding him in the court house, killed his trial judge, the court reporter, and a federal law enforcement officer before kidnapping a white female, Ashley Smith, in her home on March 11, 2005. Nichols surrendered himself the next day after Smith read him parts of the *Purpose Driven Life* by Rick Warren.

I will leave it to the reader to consider the New Century Foundation conclusion that, “*It is not an exaggeration to say that his victims might be alive today if the facts in this report were widely known*” when the criminal acts of Nichols were blitz and rage attacks. He shot his judge and wanted to shoot his prosecutors (he shot the judge in his courtroom). Race had nothing to do with it. But, in fact, he was black, and according to the New Century Foundation that was enough warning. Such is the problem with racial profiling. *Id.*; see also, *infra* Trayvon Martin note 235. Taylor and Whitney echoed the same logic and conclusions as the New Century Foundation:

When it comes to violent crime, blacks are approximately as much more likely to be arrested than whites, as men are more likely to be arrested than women. The multiples of black v. white arrest rates are very close to the multiples of male v. female arrest rates, suggesting that blacks are as much more dangerous than whites as men are more dangerous than women.

What does this mean? Although most people have no idea what the arrest rate multiples may be, they have an intuitive understanding that men are more violent and dangerous than women. If someone in unfamiliar circumstances is approached by a group of strange men she feels more uneasy than if she is approached by an otherwise similar group of strange women. No one would suggest that this differential uneasiness is “prejudice”. It is common sense, born out by the objective reality that men are more dangerous than women.

In fact, it is just as reasonable to feel more uneasy when approached by blacks than by otherwise similar whites; the difference in danger as reflected by arrest rates is virtually the same. It is rational to fear blacks more than whites, just as it is rational to fear men more than women. Whatever additional precautions a person would take are justified because a potential assailant was male rather than female are, from a statistical point of view, equally justified if a potential assailant is black rather than white.

....



of racial neighborhood exclusions<sup>221</sup> (early 1900s), followed by restrictive covenants<sup>222</sup> (1920-1940s), and followed by red lining<sup>223</sup> of black neighborhoods (1960s-1970s) in major urban cities which resulted in the physical isolation of black neighborhoods. These policies were compounded by government support of the rise of segregated white suburbs and concentrating black populations in the cities, the exclusion of blacks from the benefits of the GI Bill and housing support granted to white servicemen after World War II and the use of blockbusting (forcing whites out of city neighborhoods under the threat of blacks moving in), real estate value manipulation (getting whites to sell their homes at a loss, which were in turn overpriced and resold to blacks) and racial steering (manipulating who moves into neighborhoods based on race and class). The result of these policies is creation of concentrated poverty (political, social and economic) in selected sections of society. Although American has greatly changed from its past, it should be remembered that legal segregation in America only ended in 1968, 192 years after the Declaration of Independence and 103 years after the Civil War. The full political, economic, and social opportunities of America being made available to African Americans is less than 50 years old.

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Everyone knows that young people are more dangerous than old people, and that men are more dangerous than women. We adjust our behavior accordingly and do not apologize for doing so. *Why then must we pretend that blacks are no more dangerous than whites or Asians?* But of course it is no more than pretense. *Everyone knows that blacks are dangerous, and everyone - black and white - takes greater precautions in black neighborhoods or even avoids such neighborhoods entirely.*

Jared Taylor and Glayde Whitney, *Racial profiling: Is there an Empirical Basis?* 42(3) *Mankind Quarterly* 285 at 304, 308-310 (2002) (emphasis added); see also Derbyshire *supra* note 219 at 39 (“A policeman who concentrates a disproportionate amount of his limited time and resources on young black men is going to uncover far more crimes—and therefore be far more successful in his career —than one who biases his attention to, say, middle-aged Asian women.”).

<sup>221</sup> Racial residency laws were technically outlawed by the Supreme Court in *Buchanan v. Warley* 245 U.S. 60 (1917)

<sup>222</sup> Racial covenants were technically outlawed by the Supreme Court in *Shelley v. Kraemer* 334 U.S. 1 (1948)

<sup>223</sup> Redlining was outlawed by the 1968 Fair Housing Act.

It was within this historical context that Moynihan wrote on the status of the Black family and its pathology. To quote the *Moynihan Report*, including the context of the report that conservatives don't cite, on this point:

1. "At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family"
2. "Three centuries of injustice have brought about deep-seated structural distortions in the life of the Negro American. At this point, the present tangle of pathology is capable of perpetuating itself without assistance from the white world. The cycle can be broken only if these distortions are set right."
3. "[T]he negro community has been forced into a maternal structure . . . out of line with the rest of the American society . . ."
4. "American slavery was profoundly different from . . . ancient or modern [slavery]. . . The [system in South America] accorded the slave a place as a human being . . . In contrast, [the slave system in America] slaves were[] reduced to the status of chattels . . . With the emancipation [the purpose of Jim Crow was] [k]eeping the Negro in his place [and] these events worked against the emergence of a strong father figure. . . In this situation, the Negro Family made little progress toward the middle-class."
5. "That the Negro American has survived at all is extraordinary – a lesser people might simply have died out, as indeed others have. That the Negro community . . . in this political generation has entered national affairs as a moderate, humane, and constructive national force is the highest testament to . . . the creative vitality of the Negro people."<sup>224</sup>

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<sup>224</sup> *The Moynihan Report*, Supra note 212 at 5, 47, 29, 15, and 29 respectively. It's within the historical context of racial slavery and Jim Crow that Moynihan asserted that "at the center of the tangle of pathology is the weakness of the family structure." Id. at 30. As Moynihan observed,

Obviously, not every instance of social pathology afflicting the Negro community can be traced to the weakness of family structure. If, for example, organized crime were not largely controlled by whites, there would be more capital accumulation among Negroes, and therefore probably more Negro business enterprises. If it were not for the hostility and fear many whites exhibit towards Negroes, they in turn would be less afflicted by hostility and fear and so on.

Id. The "effect that three centuries of exploitation have had on the fabric of Negro society" id at 5 is the pathology of financial unemployment of Negro males which has forced on "the Negro Community . . . a matriarchal structure which [is] out of line with the rest of the American society. . . . [I]t is clearly a disadvantage for a minority group to be operating on one principle, while the great majority of the population, and the one with most advantages to begin with, is operating on another." Id at 29.

Moynihan's report concluded that the lack of employment that can support a family, Id at 21, 24, and the use of welfare which requires that the male provider not be in the home, Id at 12, 14, along with societal favoring of black females over black males in education and employment (which includes higher wages for black females) reduces the significance of the black male in the family. This dynamic leads to divorce, abandonment, high illegitimacy rates which results in high levels of female head of households and welfare dependency all of which in turn is linked to the poor performance in school by children, lack of positive socialization and male discipline of children and their higher involvement in delinquency and crime.

The point being, the *Moynihan Report* never blamed black people for the state of the family. It discussed the damage of the family in the context of American history. The problems, the report made clear, were societal and structural – not individually moral. The citation of the first point without the context of the other four is intentionally disingenuous at best and racist at worse.

If these sociopolitical and historical facts have no role in explaining crime, as conservatives assert, then the incarceration of blacks should only be as old as the rise of broken families. If these historical issues had no impact on criminal justice involvement then black disproportionate incarcerations rate should correlate with the late 1950s and 1960s<sup>225</sup> and the rise of the Great Society programs and its support of direct welfare payments to single mothers.<sup>226</sup> As the following data clearly shows, African American disproportionate incarceration *predates* the rise of unmarried mothers, the great society, crack cocaine, enhanced sentences, and the rise of the Great Society, even before World War One.<sup>227</sup>

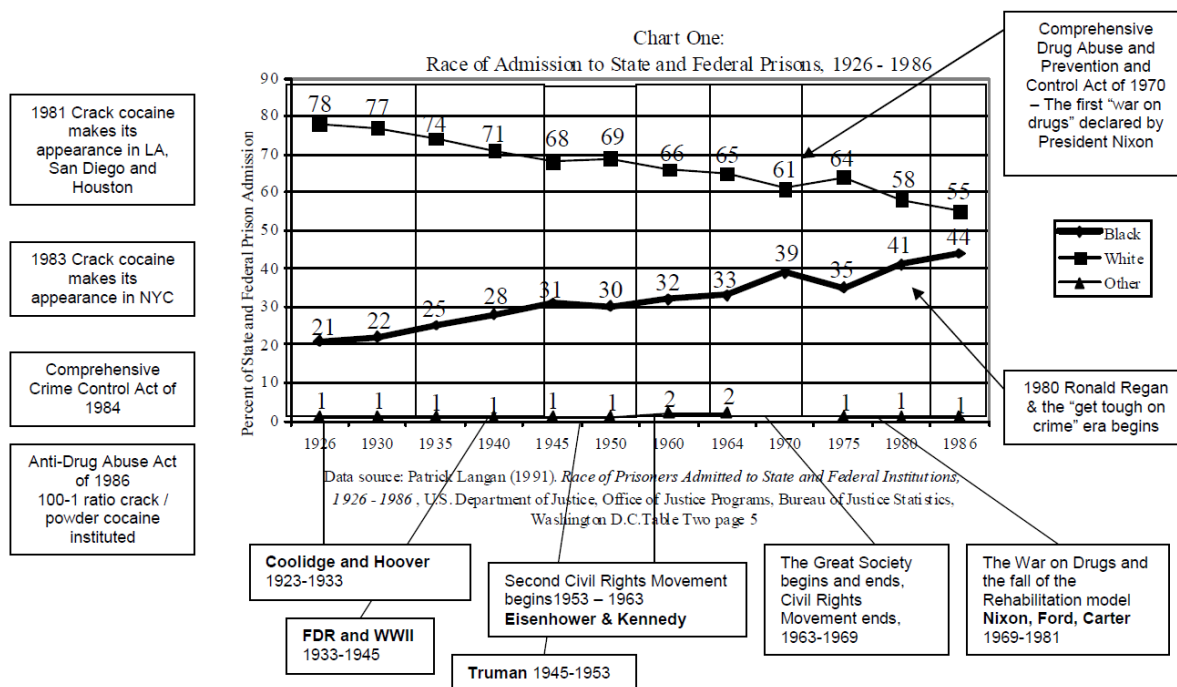
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Moynihan's point was that although the family and the lack of black males not working and supporting the family is at the center of the problem, he made clear that the problem was not due to the lack of moral clarity among blacks but rather it was the result of historical social structural factors imposed on black men and the black family. The pathology, once systematically supported by Jim Crow, is now systemic and is intergenerationally perpetuated without the need for positive law. For political reasons, conservatives pay no attention to the effects of these historical social structure factors but rather focus on the results - the pathology.

<sup>225</sup> *Infra* notes 227-232, 234 and accompanying text.

<sup>226</sup> "Since 1965, welfare spending has increased 800 percent in real terms, while the number of major felonies per capita today is roughly three times the rate before 1960. As Senator Phil Gramm (R-TX) says, 'If social spending stopped crime we would be the safest country in the world.'" Patrick F. Fagan, *The Real Root Causes of Violent Crime: The Breakdown of Marriage, Family, and Community*, 1026 THE HERITAGE FOUNDATION BACKGROUNDER 1, 3 (Mar. 17, 1995), [http://thf\\_media.s3.amazonaws.com/1995/pdf/bg1026.pdf](http://thf_media.s3.amazonaws.com/1995/pdf/bg1026.pdf).

<sup>227</sup> MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S (New York: Columbia University Press, 2005), Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008), Arthur H. Garrison, "Disproportionate Minority Arrests, the Police and Juveniles: A Note on What Has Been Said and How It Fits Together" 23(1) *New England Journal on Criminal and Civil Confinement* 29-61 (1997), Arthur H. Garrison, "Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Has Brought" 11 J. INST. JUST. & INT'L STUD. 87-116 (2011), *Infra* notes 231-232, 234.

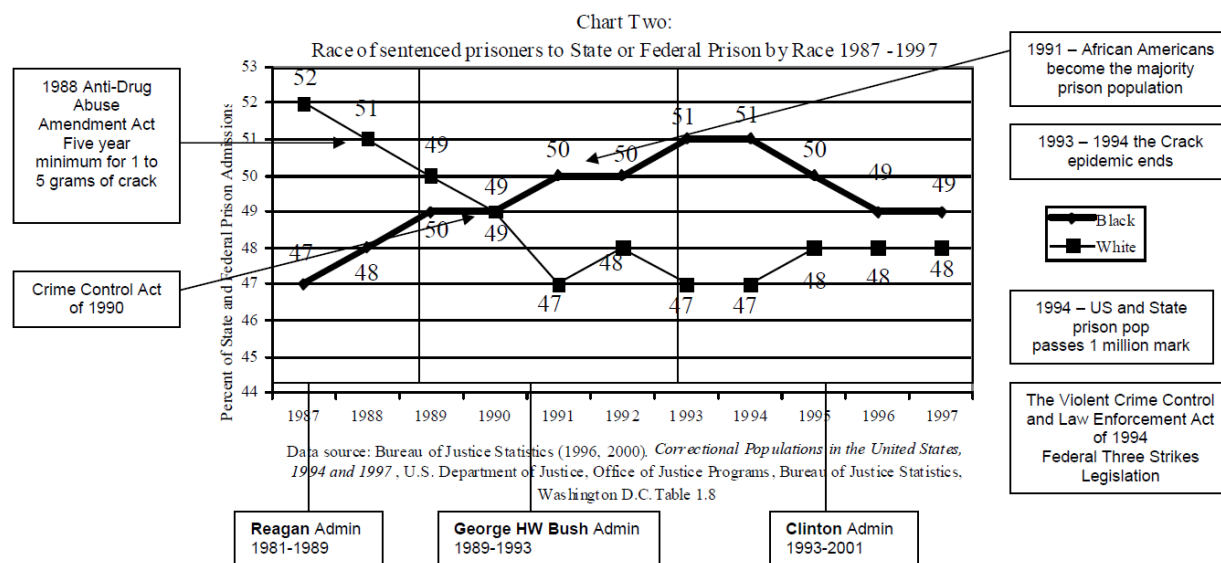


As shown in Chart One,<sup>228</sup> official data from the Department of Justice shows that as early as 1926 African Americans have been incarcerated disproportionately. Regardless of the Great Depression, the need for manpower during World War Two and the Korean War and well before the 1960s and the rise of black families failing to provide for the children. The data shows there was a significant increase in the incarceration of African Americans after World War II. It is not an accident of history that African Americans have been disproportionately incarcerated, nor is it a recent historical occurrence. But more recent history provides a social, political, and historical context for an explanation of why the criminal justice system focused on incarceration of blacks regardless of time period.

During the subsequent twenty-five years after World War II American sociopolitical history includes the rise of the Great Society in 1964 and its fall four years later, the merging in the American mind of social disorder, crime and civil rights – all of which merged crime and

<sup>228</sup> Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Has Brought*, 11 J. INST. JUST. & INT'L STUD. 87 (2011) (Charts presented here are revised and updated from those in my previous 2011 article).

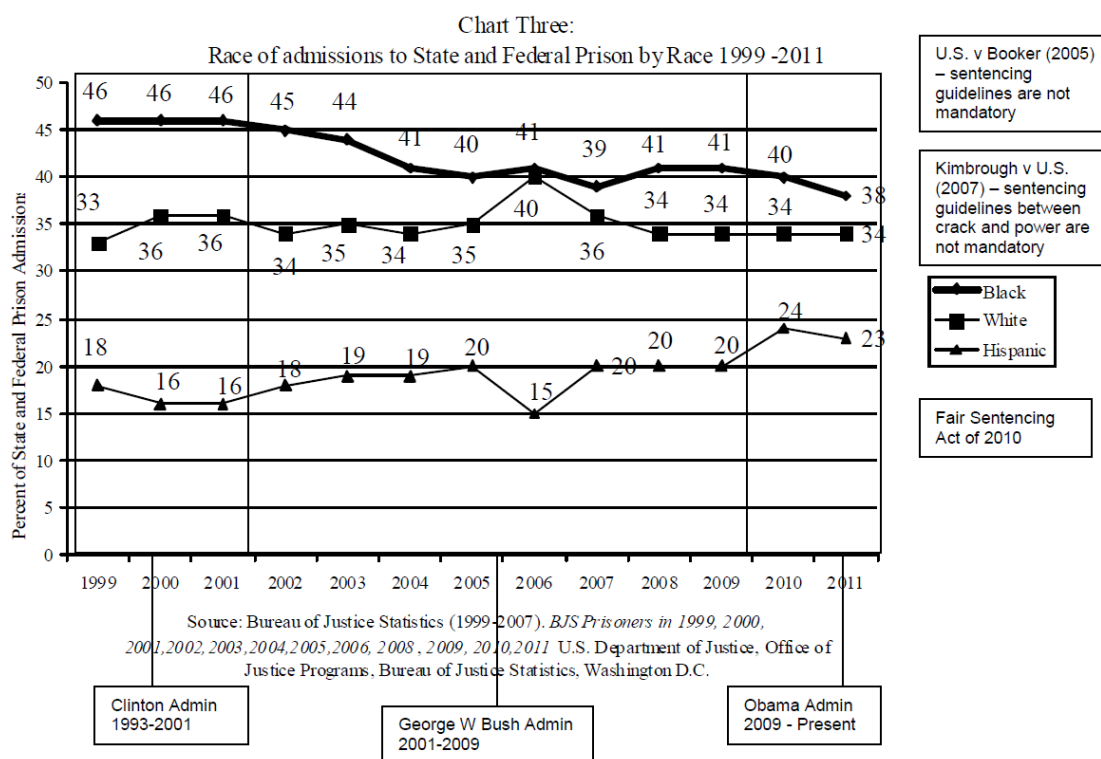
African Americans (especially African American young men) as synonymous. This merging culminated in the ascendancy of the crime control politics of Goldwater (1964), the conservatism of American national politics in 1968, the rise of the silent majority (and the southern strategy) and the presidencies of Nixon (1968) and Reagan in 1980. The disproportionate incarceration of African Americans continued under subsequent presidents and the political ascendancy of American suburban middle class fear of crime in general and specifically urban crime in 1964 was reinforced by the advent of crack cocaine motivated violent urban crime in the 1980s. The crack cocaine epidemic in the urban cities resulted in the “get tough on crime” policies adopted by the federal government and all the fifty states in the 1980s-1990s. These policies included three strikes laws, increased building of prisons (and maximum security prisons), mandatory sentencing laws and truth in sentencing initiatives.



As Chart two shows,<sup>229</sup> by the time of the first President Bush, African Americans who accounted for less than 15% of the total U.S. population accounted for 50% of the total number of

<sup>229</sup> *Id.*

people incarcerated in the United States, a trend that would last from 1991 through 1995. As shown in Chart Three,<sup>230</sup> while the disproportionate rate of incarceration has been steady decreasing from a high of 50% to a low of 38%, the fact that African Americans only account for 15% of the total U.S. population shows that the incarceration of African Americans has a historical development that spans decades before the rise of the Great Society and the 1960s. At the risk of being repetitive, conservatives assert that disproportionate incarceration of people of color is the result of the welfare system and unwed mothers having children which results in crime and violence, all of which began with the 1960s and the programs of the Great Society and the fall of the traditional family and American social values.



<sup>230</sup> *Id.*

The incarceration of African Americans, in general, and African American men, specifically, is a historical constant. This historical constant is the result of social and political policies over time. From 1619 to 1865, these social and political policies included slavery and laws to control the movements of free blacks. Consider the Fugitive Slave Acts (1793 and 1850), the Negro Seaman's Acts (1820s), and the advent of southern slave patrols (the origin of policing in the south) whose single purpose was to enforce slavery by controlling the behavior and movement of blacks.<sup>231</sup> From 1865 to 1965, social and political policies regarding the freed slaves included the black codes and Jim Crow in general, and specifically the use of pig laws, anti-vagrancy statutes, the peonage, the convict lease system, and the criminalization of hiring workers (blacks) under contract (the sharecropping system).<sup>232</sup> During the early 1950s and through the early 1960s it was a combination of the social dynamic of white flight and the rise of the suburbs in response to the second great migration into northern cities (1940-1970) along with the resurgence of states' rights and the rise of the theory of interposition,<sup>233</sup> the modern version of the pre-civil war southern concept of nullification, in response to the civil rights movement of the 1950s and 1960s and forced integration and bussing in the 1970s. During this period (1960s-

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<sup>231</sup> See e.g. ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789-1868 (2006); see also SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS (2001), C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955), *Supra* note 227 and *infra* notes 232, 234.

<sup>232</sup> *Id.* See also, Christopher R. Adamson, *Punishment after Slavery: Southern State Penal Systems, 1865-1890* 30(5) SOCIAL PROBLEMS 555 (June 1983), Earl Smith and Angela J. Hattery, *African American Men and the Prison Industrial Complex*, 34(4) W. J. OF BLACK STUD. 387 (2010), Eric Schosser, *The Prison Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 52, Philip L. Reichel, *Southern Slave Patrols as a Transitional Police*, 7 AM. J. POLICE 51 (1988), Bruce P. Smith, *The Fourth Amendment, 1789-1868: A Strange History*, 5 OHIO ST. J. CRIM. L. 663 (2008), and CAROL A. ARCHIBOLD, POLICING: A TEXT/READER (2013).

<sup>233</sup> Both concepts have been disavowed by history and even serious conservative leaders like Bill Bennett have bowed to the judgment of history. On his radio show a caller asserted that conservatives should be more media savvy and support conservative movements. Specifically, the caller asserted that conservatives should support a group of "black preachers" who had an online petition to "impeach" Attorney General Holder for his support of gay marriage on "states' rights grounds" to which Bennett said that was the wrong argument because "states' rights" was the "justification of slavery" and the "states' rights" argument has been "discredited" and could not be used as an argument for the defense of marriage. He asserted that the defense of traditional marriage is moral, philosophical and religious. He said "states' rights was not the way to go, you have use first principles." *Bill Bennett, Morning In America Radio Show* (Mar. 4, 2014), available at, <http://www.billbennett.com/show-archive/>.

1970s) cities suffered deindustrialization as a result of manufacturing moving into the suburbs and the resulting loss of working class jobs and the victories of the civil rights movement allowed the black middle class to leave (“black flight”) the cities as well. The result being the loss of middle class social, political, economic, and tax base support in many urban areas – leaving many urban areas in structural and social poverty.

From 1964 through 1968, the responsibility for supporting the suppression of urban street crime, if not direct responsibility for doing so, shifted to the national government. This policy change occurred in no small part due to the urban race riots in Harlem (1964), Philadelphia (1964), Watts (1965), Atlanta (1966) and the “long hot summer” riots of 1967, which included the riots in Newark (1967) and Detroit (1967) and the riots of 1968, including Washington D.C., Chicago, and Baltimore. These riots helped in solidifying the linkage between crime and blacks in the American mind as well as linked civil rights and Great Society initiatives with crime and race. This linkage helped establish the rise of conservative politics in 1964 and its ascendancy by 1968-1970. The nationalization of urban crime suppression, as a result of the race riots and conservatives (Republicans) taking control of the national political landscape, culminated in the *Omnibus Crime Control and Safe Streets Act of 1968*. From 1968 to present, this policy shift resulted in various criminal justice policies like the war on drugs (1970s to present), the rise of the nationalization of drug control and the creation of the Drug Enforcement Administration (*the Comprehensive Drug Abuse Prevention and Control Act of 1970*) and the “get tough on crime” policies of the 1980s and 1990s.<sup>234</sup> This modern history has created a context for the social

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<sup>234</sup> *Supra* notes 227, 231-232, Sampson, Robert J., and Janet L. Lauritsen, *Racial and ethnic disparities in crime and criminal justice in the United States*, 21 CRIME AND JUST. 311 (1997), Lincoln Quillian and Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107(3) AM. J. SOCIOLOGY 717 (2001), Robert J Sampson and William Julius Wilson, *Toward a Theory of Race, Crime and Urban Inequality* in RACE, CRIME, AND JUSTICE: A READER 177, (Shaun L. Gabbidon & Helen Taylor Greene eds., 2005), and Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How The Tough on Crime Movement Enabled A New Regime of Race-Influenced Employment Discrimination* 15 (1) BERKELEY J. AFR.-AM. L. & POL’Y 3 (2013).



expectation that blacks are supposed to be under social control. With the fall of systematic legal racism (Jim Crow and legal segregation) in 1968, what remains is systemic racism (racial resentment, the structural results of American social history and the current racial politics about crime). To quote the observations of the *Moynihan Report*, the residue of systematic racism (the “three centuries of injustice . . . deep-seated structural distortions”) is systemic racism (the “pathology [that] is capable of perpetuating itself without assistance from the white world”). The former creates a present social context, which is the latter. The American context about race today is created by the American history of race. The effect of this history is the perception of blacks as criminal and a population to control which creates a social perspective that they are supposed to be disproportionately arrested and incarcerated because they are disproportionately criminal. If not controlled, at the very least, they are to be watched.

It is this social perception that explains why a Trayvon Martin (an eighteen year old African American male) can be innocently walking home, in the rain, in a predominantly white neighborhood and be perceived as a criminal to be observed, reported, and followed by a white Hispanic neighborhood watch captain<sup>235</sup> or why a young black man in Brooklyn or Bedford Stuyvesant can be stopped by a police officer because he exhibited “Furtive Movements” or was otherwise engaged in “Actions Indicative Of Engaging in Violent Crimes” such as “Wearing

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This history does not mean that racism or conservative politics is the sole cause or explanation of the disproportionate incarceration of African Americans. There is such a thing as black crime. The point is black criminality is not the sole explanation of disproportionate incarceration either. For black incarceration predates the popular explanations of disproportionate incarceration of blacks. The explanation is in a complicated mix of black criminality, American class behavior distinctions, individual family dynamics, the effects of poverty (poverty mentality), environmental ecology as well as the culmination of historical events and the American economic, social, political system, and criminal justice institutional operations.

<sup>235</sup> Trayvon Martin was a 17 year old African American male that was walking from a grocery store in the rain and was followed by George Zimmerman, a white Hispanic man, who suspected that Trayvon was a burglar. In an altercation between the two, Zimmerman Shot Trayvon in the chest and killed him. Zimmerman was found not guilty of murder in which he claimed self defense. The case gained national attention, in part, because Zimmerman was accused of racially profiling a young black man who was simply visiting his father in a majority white housing complex located in Florida. The incident occurred on February 26, 2012 and the jury found Zimmerman not guilty on July 13, 2013.

Clothes/Disguises Commonly Used in Commission of Crime” like a sweatshirt with a hood – a hoody.<sup>236</sup> As to what constitutes behavior worthy of criminal suspicion, one NYPD officer explained during the *Floyd* case:

“[U]sually” a furtive movement is someone “hanging out in front of [a] building, sitting on the benches or something like that” and then making a “quick movement,” such as “bending down and quickly standing back up,” “going inside the lobby . . . and then quickly coming back out,” or “all of a sudden becom[ing] very nervous, very aware.”<sup>237</sup>

As evidenced by the testimony of Officer Christopher Moran, who stopped David Ourlicht, a plaintiff in the *Floyd* case, for walking suspiciously with a bulge under his clothing, police stop and frisks were not based on criminal activity as required by *Terry*.

Officer Moran testified that “people acting nervous” could “[o]f course” provide reasonable suspicion for a stop. Officer Moran also explained that “furtive movement is a very broad concept,” and could include “changing direction,” “walking a certain way,” “acting a little suspicious,” “making a movement that is not regular,” being “very fidgety,” “going in and out of his pocket,” “going in and out of a location,” “looking back and forth constantly,” “looking over their shoulder,” “adjusting their hip or their belt,” “moving in and out of a car too quickly,” “[t]urning a part of their body away from you,” “[g]rabbing at a certain pocket or something at their waist,” “[g]etting a little nervous, maybe shaking,” and “stutter[ing].”<sup>238</sup>

As the court explained, “[t]o the extent that Officer Moran views nervousness or fidgeting, standing alone, as an adequate basis for seizing, questioning, and potentially frisking a person under the Fourth Amendment, he is incorrect.”<sup>239</sup> The point being poor training leads to increased interaction between police and young men of color which exasperates the second problem, men of color who show sudden or quick movements or have full pockets are subject to increased rates of being subjected to a stop and search because they are already perceived as

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<sup>236</sup> Factors in a UF-250 that can justify a stop. *See Floyd*, 959 F. Supp. 2d at 668 Appendix A Blank UF-250.

<sup>237</sup> *Id.* at 614 n 358. *See generally* the impact of poor training of police on the meaning of the Fourth Amendment in the court’s opinion. *Id.* at 613-617.

<sup>238</sup> *Id.* at 614.

<sup>239</sup> *Id.*

criminals by the police in the first place. This perception of young black men as being criminal by simply walking with full pockets and looking away from police upon seeing them or simply sitting hanging out in front of a building as Officer Moran explained are examples of systemic racism.

Consider a much more subtle example of systemic racism. On his radio show,<sup>240</sup> Bill Bennett entertained a caller from south Texas whom he welcomed enthusiastically. The caller relayed the story in the *Washington Post*<sup>241</sup> of the Vatican releasing two white doves as a symbolic gesture for peace. Upon the release of the doves a black crow and a seagull attacked the doves in mid-flight. We will leave aside that the seagull was white but the *Washington Post* article specifically identified the crow as black while not identifying that the seagull was white. The caller remarked that *what was newsworthy was that the newspaper article on the incident reported on the rarely reported incidents of black on white crime!* To which Bill Bennett and his producer laughed but said they did not want to get into the Zimmerman case again.

### Part Three Conclusion

When a group of Roman police officers<sup>242</sup> asked John the Baptist what must we do to be saved? John answered, “Do not intimidate anyone or accuse falsely.”<sup>243</sup> It is nothing new in the

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<sup>240</sup> Bill Bennett, *Morning In America Radio Show* (Jan. 28, 2014), available at <http://www.billbennett.com/show-archive/page/2/>.

<sup>241</sup> Charity Brown, *Peace doves come under attack at the Vatican*, WASHINGTON POST (Jan. 27, 2014), [http://www.washingtonpost.com/national/health-science/peace-doves-come-under-attack-at-the-vatican/2014/01/27/bb0362d0-876a-11e3-916e-e01534b1e132\\_story.html](http://www.washingtonpost.com/national/health-science/peace-doves-come-under-attack-at-the-vatican/2014/01/27/bb0362d0-876a-11e3-916e-e01534b1e132_story.html).

<sup>242</sup> Although, the actual wording is “soldiers,” John was probably answering members of the Urban Cohorts. The Urban Cohorts, in the days of ancient Rome, were soldiers with the authority to arrest and enforce Roman law. See P. K. Baillie Reynolds, *The Police in Ancient Rome*, 1 POLICE J. 432 (1928), THE CAMBRIDGE HISTORY OF GREEK AND ROMAN WARFARE: VOLUME II ROME FROM THE LATE REPUBLIC TO THE LATE EMPIRE 217-218 (Philip Sabin, Hans Van Wees & Michael Whitby eds., 2007) and Kelly Martin, *The First Urban Policeman*, 1(1) J. POLICE SCI. & ADMIN. 56 (1973).

history of mankind that the police must be warned not to use their authority to the detriment of those who are socially disadvantaged or incapable of defending themselves within society. Such protection, in the American context, is provided by the Constitution and the courts. In the case of *Floyd, et al. v City of New York* the court held that the NYPD was, as a matter of custom, practice and policy, stopping young men of color based on their race and not – as required by *Terry* and *DeBour* – due to specific individual behavior that would invoke a reasonable person to believe a crime had been or was about to be committed warranting further investigation to determine if in fact if a crime was in progress and was deliberately indifferent to the widespread practice and failed to adequately train and supervise officers to prevent the constitutional violations.<sup>244</sup> The court concluded

The NYPD has directed officers to target young black and Hispanic men because these groups are heavily represented in criminal suspect data – the reliability of which is questionable – in those areas where the NYPD carries out most of its stops. Under the NYPD’s policy, targeting the “right people” means stopping people in part because of their race. Together with Commissioner Kelly’s statement that the NYPD focuses stop and frisks on young blacks and Hispanics in order to instill in them a fear of being stopped, and other explicit references to race. . . ., there is a sufficient basis for inferring discriminatory intent.

The fact that the targeted racial groups were identified based on crime victim complaints does not eliminate the discriminatory intent. Just as it would be impermissible for a public housing agency to adopt a facially race-neutral policy of disfavoring applications from any group that is disproportionately subject to tenant complaints, and then apply this policy to disfavor applications from a racially defined group, so it is impermissible for a police department to target its general enforcement practices against racially defined groups based on crime suspect data.<sup>245</sup>

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<sup>243</sup> Luke 3:14 (New King James Version); *see also*, Luke 3:14 (New Living Translation) (“Don’t extort money or make false accusations”); Luke 3:14 (English Standard Version) (“Do not extort money from anyone by threats or by false accusation”); Luke 3:14 (Easy to Read Version) (“Don’t use force or lies to make people give you money.”)

<sup>244</sup> *Terry v. Ohio*, 392 U.S. 1(1968). *See also*, *People v. DeBour*, 40 N.Y. 2d 210 (1976) and *Floyd*, 959 F. Supp. 2d at 658-667.

<sup>245</sup> *Floyd*, 959 F. Supp. 2d at 662 , (internal citation referring to the liability of criminal suspect data); “The NYPD’s use of local crime suspect data to target racially defined groups for stops is not only a form of racial profiling, it is also a deeply flawed way of identifying the criminal population.” *Id.* at 662 n. 764; *see also id.* at 666 n. 776; and *see supra* Part One, Section 2.

As the court observed, the constitutional error is that, “[t]he policy assumes that *all* members of a racially defined group are “the right people” to target for stops because *some* members of that group committed crimes.”<sup>246</sup> Put simply,

[T]argeting young black and Hispanic men for stops based on the alleged criminal conduct of other young black and Hispanic men violates bedrock principles of equality. . . . [T]he Equal Protection Clause does not sanction treating similarly situated members of a different racial groups differently based on racial disparities in crime data. Indeed, such treatment would eviscerate the core guarantees of the Equal Protection Clause. . . . [I]ndividuals may not be punished or rewarded based on the government’s views regarding their racial group, regardless of the source of those views.<sup>247</sup>

Additionally, the other constitutional error made by the NYPD and the Mayor was viewing stop and frisk as a tool of crime deterrence tool rather than a crime investigatory tool. Constitutionally, stop and frisk is a rule that governs the power of government to obstruct the liberty of person to travel without government interference. The New York Court of Appeals in *People v. DeBour* and the Supreme Court in *Terry v Ohio* and in *Sibron v. New York* held that stop and frisk is not a constitutional tool to create an environment of fear in the hearts of criminals or suppress criminal activity, but rather it was a constitutional rule to allow police to temporarily stop a person to determine if a crime is afoot or has been committed and that the police may frisk such a person if they have reasonable suspicion that the person is armed. Stop and frisk is not designed to prevent crime and reduce gun violence, it is a police investigatory tool to determine if a crime has been or is about to occur by a specific person at a specific time in a specific place. What the NYPD has done is change the purpose of stop and frisk into a tool that creates an environment that criminals are afraid to operate within and justifying the disproportionate impact as the natural result of crime statistic driven policing and crime prevention.

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<sup>246</sup> *Floyd*, 959 F. Supp. 2d, at 663 n767.

<sup>247</sup> *Id.* at 664.

The reason why it matters that the stop and frisk program by the NYPD needs comply with *Terry* is because it is important that under the American constitutional system the government be bound and prevented from violating the rights and freedoms of individuals regardless and despite of the fact that abridging those rights have utility in achieving a legitimate governmental goal – reduction of crime. The constitution established a government, a limited government, with limited powers. That is what makes the American republic a reality. In 1886, Supreme Court Justice Joseph Bradley wrote in that, “[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the [Fourth Amendment] offense; but it is the invasion of his indefeasible right to personal security, personal liberty and private property.”<sup>248</sup> Justice Bradley reminds us more than a century ago that systemic violation of rights begins with small procedural diversions from what the law requires.

It may be that it is the obnoxious thing in its mildest and least repulsive form mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*.<sup>249</sup>

The protection of the freedoms embedded in the Constitution and the enforcement of those freedoms and liberties is not handcuffing the police or allowing loopholes that criminals use to escape justice, because “freedoms are not loopholes in a system of limited government.”<sup>250</sup>

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<sup>248</sup> *Boyd v. United States*, 116 U.S. 616, 630 (1886).

<sup>249</sup> *Id.* at 635.

<sup>250</sup> *A Conspiracy Against Obamacare: The Volokh Conspiracy and the Health Care Case*, THE HERITAGE FOUNDATION (Jan. 7, 2014), <http://www.heritage.org/events/2014/01/conspiracy-against-obamacare>.

As Justice Douglas similarly observed in his dissent in *Terry* (he dissented on allowing a stop or a search on less than probable cause)<sup>251</sup>

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can 'seize' and 'search' him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.<sup>252</sup>

Liberties are only safe in a society when the law protects the poor, the weak and the despised – not the powerful and respected. For the latter have less need for the protection of the law, they have other means.

### Epilogue

*And thou shalt judge in favour of the motherless, and the fatherless, and the humble; so that no longer shall anyone presume to make themselves great upon the earth.*<sup>253</sup>

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<sup>251</sup> Justice Douglas concluded his dissent defending the both the text and the principal of the Fourth Amendment. He wrote:

The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched. *Terry v. Ohio*, 392 U.S. at 38-39 (internal citation omitted).

<sup>252</sup> *Id.* at 39.

<sup>253</sup> Psalm 10:18 (Wycliffe Version). Another translation reads, "To do justice to the fatherless and the oppressed, that the man of the earth may oppress no more." (New King James Version).

*One of the burdens of being a black male [is] bearing the heavy weight of other people's suspicions. . . I never step out of my home without my driver's license . . . When you're black and especially male — in the United States — you have to go to these seemingly overboard, extra lengths in the off-chance they might save your life.*<sup>254</sup>

*This is a part of the war on whites that's being launched by the Democratic Party. And the way in which they're launching this war is by claiming that whites hate everybody else. It's a part of the strategy [of] Barack Obama . . . where he divides us all on race, on sex, [its] class warfare.*<sup>255</sup>

*Anyone who thinks that race does not still, even if inadvertently, skew the application of criminal justice in this country is just not paying close enough attention.*<sup>256</sup>

The change to the NYPD stop and frisk program did not occur due to appellate review by federal courts but by the decision made by New Yorkers themselves in November 2013.

<sup>254</sup> Jonathan Capehart, The Michael Brown Shooting, the 'war on whites' and me, Washington Post op-ed August 11, 2014, <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/08/11/the-michael-brown-shooting-the-war-on-whites-and-me/>

<sup>255</sup> Congressman Mo Brooks (R-Ala.) on the Laura Ingraham Show August 4, 2014. Id. To listen to the full conversation between Congressman Brooks and Ms. Ingraham go to <http://www.lauraingraham.com/pg/jsp/charts/streamingAudioMaster.jsp?dispid=302&headerDest=L3BnL2pzcC9tZWRpYS9mbGFzaHdlbG9vbWUuanNwP3BpZD0xOTA0Nw==>. The context of his statement was the failure of the House of Representatives to pass an immigration bill.

<sup>256</sup> Senator Rand Paul, We Must Demilitarize the Police, op-ed Time Magazine (August 14, 2014) at [http://time.com/3111474/rand-paul-ferguson-police/?utm\\_source=twitterfeed&utm\\_medium=twitter](http://time.com/3111474/rand-paul-ferguson-police/?utm_source=twitterfeed&utm_medium=twitter). Senator Paul wrote in his op-ed on the interaction of race, criminal justice, the use of force by police and the level of force available to the police to use.

If I had been told to get out of the street as a teenager, there would have been a distinct possibility that I might have smarted off. But, I wouldn't have expected to be shot.

.....

Washington has incentivized the militarization of local police precincts by using federal dollars to help municipal governments build what are essentially small armies—where police departments compete to acquire military gear that goes far beyond what most of Americans think of as law enforcement.

.....

When you couple this militarization of law enforcement with an erosion of civil liberties and due process that allows the police to become judge and jury—national security letters, no-knock searches, broad general warrants, pre-conviction forfeiture—we begin to have a very serious problem on our hands.

Given these developments, it is almost impossible for many Americans not to feel like their government is targeting them. Given the racial disparities in our criminal justice system, it is impossible for African-Americans not to feel like their government is particularly targeting them.

This is part of the anguish we are seeing in the tragic events outside of St. Louis, Missouri. It is what the citizens of Ferguson feel when there is an unfortunate and heartbreaking shooting like the incident with Michael Brown.

Anyone who thinks that race does not still, even if inadvertently, skew the application of criminal justice in this country is just not paying close enough attention. Our prisons are full of black and brown men and women who are serving inappropriately long and harsh sentences for non-violent mistakes in their youth.



Elections have consequences to policy. Bill de Blasio was elected Mayor of NYC in November 2013 and during the election he had stated that he would withdraw the appeal and accept the district court's ruling if elected. On December 5, 2013, de Blasio announced that he was appointing Bill Bratton as the new Police Commissioner. During the press conference, de Blasio paraphrased his new police commissioner, who commented on the use of stop and frisk. Mayor de Blasio said that, "stop-and-frisk is like chemotherapy: Used in the right dose, it can save lives; used in the wrong dose, too heavy a dose, it can create its own dangers and problems, it can backfire."<sup>257</sup> At the press conference, Commissioner Bratton, while defending stop and frisk as a law enforcement tool, noted that "stop-and-frisk is essential to every police department in America. But it's also essential that it be done constitutionally and respectfully. And that is my commitment to this mayor and to the city, that it will be done that way."<sup>258</sup>

On December 29, 2013, while announcing the appointment of the new city corporate attorney, de Blasio stated that the city "will drop the appeal on the stop and frisk case because we think the judge was right about the reforms that we need to make."<sup>259</sup> On January 1, 2014, de Blasio stated in his inaugural address that among the things his administration will seek to accomplish, "We will reform a broken stop-and-frisk policy, both to protect the dignity and rights of young men of color, and to give our brave police officers the partnership they need to continue their success in driving down crime."<sup>260</sup> On January 30, 2014, the de Blasio administration filed a motion to have the case returned to the district court in order to facilitate

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<sup>257</sup> Henry Goldman, *de Blasio Taking Office Citing Wealth Gap as Crime Falls*, BLOOMBERG BUSINESS WEEK (Jan. 1, 2014), <http://www.bloomberg.com/news/2013-12-31/de-blasio-taking-office-citing-wealth-gap-as-crime-falls.html>.

<sup>258</sup> Beth DeFalco and Bob Fredericks, *de Blasio names Bill Bratton next NYPD Commissioner*, NEW YORK POST (Dec. 5, 2013), <http://nypost.com/2013/12/05/de-blasio-to-tap-bill-bratton-to-run-nypd/>.

<sup>259</sup> Erin Durkin, *Bill de Blasio Taps Ex-US Attorney Zachary Carter As Next Corporation Counsel*, NY DAILY NEWS (Dec. 29, 2013), <http://www.nydailynews.com/news/politics/de-blasio-announces-zachary-carter-city-top-lawyer-article-1.1561084>.

<sup>260</sup> Bill de Blasio, *Text of Bill de Blasio's Inauguration speech*, NEW YORK TIMES (Jan. 1, 2014), [http://www.nytimes.com/2014/01/02/nyregion/complete-text-of-bill-de-blasios-inauguration-speech.html?\\_r=0](http://www.nytimes.com/2014/01/02/nyregion/complete-text-of-bill-de-blasios-inauguration-speech.html?_r=0).

the settlement of the case.<sup>261</sup> In a press conference announcing the agreement between the city and the plaintiffs, Mayor de Blasio made clear that, “the agreement we’re announcing today accepts the facts and the roadmap laid out in last August’s [sic] landmark Federal court ruling.”<sup>262</sup> The Mayor stated that

Neither the police commissioner nor I believe it is acceptable when 90 percent of the people stopped and frisked are innocent of any crime. And so we are taking significant corrective action to fix what is broken. I am proud to announce today, that the City of New York is taking a major step to resolve the years-long legal battle over stop-and-frisk; and that we have reached accord with the plaintiffs in the landmark Floyd vs. City of New York case. We are doing it through a collective commitment to fix the fundamental problems that enabled stop-and-frisk to grow out of control and violate the rights of innocent New Yorkers. What we are doing here today will increase the quality of policing in New York City.<sup>263</sup>

Noting that, “something that unites us all is we believe in the United States Constitution,” and after citing Commissioner Bratton, that “you cannot break the law to enforce the law,” the Mayor concluded that, “we have to bring our practices fully in line with the foundational document of the republic. I don’t think there’s anything more important you can do.”<sup>264</sup> The Mayor announced a three part settlement in the stop and frisk case. The three factors will include:

[O]ne, a joint and ongoing reform process with direct police-community dialogue, ensuring that policies which are driving police and community apart are raised

<sup>261</sup> Declaration in Support of Motion for Limited Remand to the District Court for the Purpose of Exploring a Resolution, David Floyd, et al v City of New York and Jaenean Ligon, et al v City of New York, No. 13-3088 (2d Cir. Jan. 30, 2014), *available at* <http://www.ccrjustice.org/files/City's%201%2030%202014%20Unopposed%20Motion%20for%20Remand..pdf>.

<sup>262</sup> Mayor Bill de Blasio, Announcement of Agreement in Landmark Stop-And-Frisk Case (Jan.30, 2014) (transcript available at <http://www1.nyc.gov/office-of-the-mayor/news/727-14/transcript-mayor-bill-de-blasio-agreement-landmark-stop-and-frisk-case/>). The NYC Corporation Counsel explained that the agreement between the city and the plaintiffs will seek to comply with Judge Scheindlin’s “order that the New York City Police Department comply with the Constitution, as she interpreted it, with respect to whether – or – the situations in which you can and cannot take race into account when you’re making policing decisions.”

<sup>263</sup> *Id.* Commissioner Bratton was blunt on the need for the change. At the press conference he said:

The Mayor referenced that, in a democracy, the first obligation of government has to be – the first responsibility has to be public safety. Let’s face it, stop, question, and frisk as it’s been practiced in this city for the last several years, has not met that obligation or responsibility. Instead of securing confidence, instead of securing legitimacy and procedural justice in this city for the residents, it instead has raised doubts and concerns about the police force in this city. And to that end, we need to have resolution.

<sup>264</sup> *Id.*

through a direct line of communication with the police leadership. Two, there will be for three years a court-appointed monitor to ensure the Police Department's compliance with the United States Constitution. And that limited period of oversight is contingent upon us meeting our obligations. Three, I want to emphasize as an explanation that this is a shorter window of monitoring than is customary, and that is in part because of our administration's explicit commitment to reform—including the installation of an independent NYPD Inspector General.<sup>265</sup>

Subsequent to the district court affirming the agreement, “the City of New York will officially drop its appeal in this case.”<sup>266</sup> On February 21, 2014 the Court of Appeals for the Second Circuit granted the city's motion to have the case returned to the District Court for purposes of settling the case and to vacate the court stay on the August 2013 decision.<sup>267</sup> Subsequently, the city filed a motion in District Court on April 3, 2014 that it had reached an agreement with the plaintiffs and that it accepts and will comply with the August 2013 Remedial Order enforcing the August 2013 Liability Opinion.<sup>268</sup>

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<sup>265</sup> *Id.* The City Corporate counsel made clear that in the long term,

One thing we have, the very positive change in circumstances that has been institutionalized in New York City – that creation of an independent Inspector General for the Police Department, and so what is envisioned is that what is temporary with respect with respect to the three-year monitorship, those responsibilities will naturally migrate over time to the Inspector General. And obviously that is permanent in reliable external oversight.

<sup>266</sup> *Id.*

<sup>267</sup> *Floyd v. City of New York and Ligon v. City of New York*, Docket Nos. 13 - 3123 - cv, 13 - 3088 - cv, 13 - 3461 - cv (February 21, 2014).

<sup>268</sup> *Floyd v. City of New York and Ligon v. City of New York*, Memorandum of Law in Support of Motion for Modification of Remedial Order 08 Civ.1034 (AT), 12 CIV. 2274 (AT) (April 3, 2014)

# APPENDIX A

## Blank UF-250

(COMPLETE ALL CAPTIONS)

<b>STOP, QUESTION AND FRISK REPORT WORKSHEET</b> PD344-151A (Rev. 11-02)		Pct. Serial No. _____	
		Date _____	Pct. Of Occ. _____
Time Of Stop _____	Period Of Observation Prior To Stop _____	Radio Run/Sprint # _____	
Address/Intersection Or Cross Streets Of Stop _____			
<input type="checkbox"/> Inside	<input type="checkbox"/> Transit	Type Of Location _____	
<input type="checkbox"/> Outside	<input type="checkbox"/> Housing	Describe: _____	
Specify Which Felony/P.L. Misdemeanor Suspected _____		Duration Of Stop _____	
<b>What Were Circumstances Which Led To Stop?</b> (MUST CHECK AT LEAST ONE BOX)			
<input type="checkbox"/> Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc. <input type="checkbox"/> Fits Description. <input type="checkbox"/> Actions Indicative Of "Casing" Victim Or Location. <input type="checkbox"/> Actions Indicative Of Acting As A Lookout. <input type="checkbox"/> Suspicious Bulge/Object (Describe) _____ <input type="checkbox"/> Other Reasonable Suspicion Of Criminal Activity (Specify) _____			
Name Of Person Stopped _____		Nickname/ Street Name _____	Date Of Birth _____
Address _____		Apt. No. _____	Tel. No. _____
Identification: <input type="checkbox"/> Verbal <input type="checkbox"/> Photo I.D. <input type="checkbox"/> Refused <input type="checkbox"/> Other (Specify) _____			
Sex: <input type="checkbox"/> Male <input type="checkbox"/> Female    Race: <input type="checkbox"/> White <input type="checkbox"/> Black <input type="checkbox"/> White Hispanic <input type="checkbox"/> Black Hispanic <input type="checkbox"/> Asian/Pacific Islander <input type="checkbox"/> American Indian/Alaskan Native			
Age _____	Height _____	Weight _____	Hair _____ Eyes _____ Build _____
Other (Scars, Tattoos, Etc.) _____			
Did Officer Explain Reason For Stop? <input type="checkbox"/> Yes <input type="checkbox"/> No    If No, Explain: _____			
Were Other Persons Stopped/ Questioned/Frisked? <input type="checkbox"/> Yes <input type="checkbox"/> No		If Yes, List Pct. Serial Nos. _____	
If Physical Force Was Used, Indicate Type: <input type="checkbox"/> Hands On Suspect <input type="checkbox"/> Drawing Firearm <input type="checkbox"/> Suspect On Ground <input type="checkbox"/> Baton <input type="checkbox"/> Pointing Firearm At Suspect <input type="checkbox"/> Pepper Spray <input type="checkbox"/> Handcuffing Suspect <input type="checkbox"/> Other (Describe) _____ <input type="checkbox"/> Suspect Against Wall/Car			
Was Suspect Arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No	Offense _____	Arrest No. _____	
Was Summons Issued? <input type="checkbox"/> Yes <input type="checkbox"/> No	Offense _____	Summons No. _____	
Officer In Uniform? <input type="checkbox"/> Yes <input type="checkbox"/> No	If No, How Identified? <input type="checkbox"/> Shield <input type="checkbox"/> I.D. Card <input type="checkbox"/> Verbal		

<b>Was Person Frisked?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No <b>IF YES, MUST CHECK AT LEAST ONE BOX</b> <input type="checkbox"/> Inappropriate Attire - Possibly Concealing Weapon <input type="checkbox"/> Furtive Movements <input type="checkbox"/> Verbal Threats Of Violence By Suspect <input type="checkbox"/> Actions Indicative Of Engaging In Violent Crimes <input type="checkbox"/> Knowledge Of Suspects Prior Criminal <input type="checkbox"/> Suspicious Bulge/Object (Describe) _____ <input type="checkbox"/> Violent Behavior/Use Of Force/Use Of Weapon <input type="checkbox"/> Admission Of Weapons Possession <input type="checkbox"/> Other Reasonable Suspicion Of Weapons (Specify) _____	<b>Was Person Searched?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No <b>IF YES, MUST CHECK AT LEAST ONE BOX</b> <input type="checkbox"/> Hard Object <input type="checkbox"/> Admission Of Weapons Possession <input type="checkbox"/> Outline Of Weapon <input type="checkbox"/> Other Reasonable Suspicion Of Weapons (Specify) _____ <b>Was Weapon Found?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No <b>IF YES, Describe:</b> <input type="checkbox"/> Pistol/Revolver <input type="checkbox"/> Rifle/Shotgun <input type="checkbox"/> Assault Weapon <input type="checkbox"/> Knife/Cutting Instrument <input type="checkbox"/> Machine Gun <input type="checkbox"/> Other (Describe) _____
<b>Was Other Contraband Found?</b> <input type="checkbox"/> Yes <input type="checkbox"/> No <b>IF YES, Describe Contraband And Location</b> _____ Misdemeanor Of Person After Being Stopped _____ Remarks Made By Person Stopped _____	<b>Additional Circumstances/Factors: (Check All That Apply)</b> <input type="checkbox"/> Report From Victim/Witness <input type="checkbox"/> Area Has High Incidence Of Reported Offense Of Type Under Investigation <input type="checkbox"/> Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity <input type="checkbox"/> Suspect Is Associating With Persons Known For Their Criminal Activity <input type="checkbox"/> Proximity To Crime Location <input type="checkbox"/> Other (Describe) _____
Pct. Serial No. _____ Additional Reports Prepared: Complaint Rpt. No. _____ Juvenile Rpt. No. _____ Aided Rpt. No. _____ Other Rpt. (Specify) _____	
REPORTED BY: Rank, Name (Last, First, M.I.) _____ Print _____ Tax# _____ Signature _____ Command _____	

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