NEW YORK CITY BAR ASSOCIATION

REPORT ON THE NYPD'S STOP-AND-FRISK POLICY

INTRODUCTION

The New York Police Department's (NYPD) "stop, question and frisk" policy has been a major, highly controversial feature of policing under the Administration of Mayor Michael Bloomberg. The exponential growth in the use of this tactic during the first decade of Bloomberg's mayoralty has resulted in nearly five million stops, a stark increase from its prior use. The number of reported stops grew from 97,296 in 2002 to 685,724 in 2011, before dropping to 533,042 in 2012.

Mayor Michael Bloomberg and Police Commissioner Raymond Kelly laud the stop-and-frisk policy as a significant component of the City's successful effort to reduce violent crime, a means of keeping guns off the street and improving the quality of life in the neighborhoods most affected by crime. Indeed, through a variety of strategies, the crime rate in the City has been reduced substantially over the past 20 years. Indeed, the police must be able to stop and frisk individuals as a crime-fighting strategy, within the limits set by law.

However, the stop and frisk policy has raised a number of important concerns:

- Only approximately 6% of the stops have resulted in arrests and approximately 2% in the recovery of weapons. Thus, the overwhelming majority of stops result in no discovery of wrongdoing. This is the case even though the law permits the police to make such stops only if they "reasonably suspect" that the person is committing, has committed, or is about to commit a crime, and may only frisk a person who has already been stopped legally if they reasonably believe that the person is armed. These data, plus extensive anecdotal evidence, suggest that many stops may not be justified under federal and state constitutional protection from unreasonable searches and seizures. In addition, many of the arrests occur under questionable circumstances, such as when people are asked to remove marijuana from their pockets and then arrested for possessing marijuana "in public view."

- Eighty-five percent of those stopped are black and Latino, and are overwhelmingly male. While the NYPD asserts that is understandable because most of the criminal activity is in neighborhoods with predominantly black and Latino populations, the data suggest that even controlling for neighborhood demographics, black and Latino individuals are stopped more often. The policy has engendered substantial opposition, with those opposed saying it not only violates the rights of many of those stopped but also stigmatizes a substantial segment of the population and further

alienates and marginalizes young black and Latino men who face ever more difficult hurdles in progressing within society. In addition, the policy engenders distrust in the affected communities, and the mutual disrespect between the police and the younger generation in those communities undermines confidence in how the police go about their vital work.

Given the nature of most of these encounters — stops and searches without arrest or other consequence — the City's stop-and-frisk policy has over the years eluded judicial scrutiny, leaving many to believe they were illegally detained without any effective remedy.

In recent years, however, a number of class action lawsuits have been filed against the City on behalf of individuals who have been subject to the policy: lawsuits which seek to challenge the legality of the searches on a mass scale. As discussed further below, these litigations ultimately will address whether the practices at issue comply with the law. In this Report, the City Bar does not take a position on the merits of the claims and defenses in those lawsuits, or otherwise seek to influence the outcome of those proceedings.

On the other hand, given that these practices are having negative impacts on many communities in our City, and the resulting ill will that is generated toward the police and law enforcement, we believe it would be imprudent for the City to await a court-determined outcome of the lawsuits before making changes to avoid the destructive social consequences of these stops. Indeed, recent measures taken by the Police Commissioner suggest that the NYPD itself acknowledges the need to better administer its stop-and-frisk policy.

To this end, this report reviews the historical background of the City's stop-and-frisk procedures, the legal principles that apply, the justifications for the policy, the concerns that have been articulated about the effect of the stops on individuals and communities, and recent steps the NYPD has taken in an effort to increase public confidence in the policy. We then set forth a number of specific recommendations that would help ensure that a better balance is struck between the NYPD's law enforcement objectives and the need to protect civil liberties and avoid further alienating communities of color, as follows: (1) improving training of NYPD officers as to the law governing stops and frisks and how to operate in accordance with that law; (2) changing NYPD performance incentives from solely measuring numbers of stops to considering the results of the stops; (3) better enforcing the requirement that officers completing the UF-250 forms documenting stops and frisks, as required by law, and also improving the procedure for internal NYPD scrutiny of those forms; (4) amending the Penal Law to make possession of marijuana in a public place a violation rather than a misdemeanor; (5) considering a pilot program testing the use of audio or visual recording of stops and frisks; and (6) establishing an oversight monitor. We also believe more progress can be made through dialogue between officials responsible for implementing the policy and the communities most affected.

BACKGROUND

Stop-and-frisk policies in New York date from the Supreme Court case of *Terry v. Ohio*,[1] a landmark case dealing with the constitutional limitations of police to stop and search individuals in street encounters (*Terry* will be further discussed in the following section.). Following *Terry*, the New York State Legislature included a provision in the Criminal Procedure Law, effective September 1, 1971, authorizing police to stop, question and frisk individuals.[2] Along with the enactment of this provision, the NYPD created a standard form — the "UF-250" — that police officers are required to fill out in connection with "reasonable suspicion" stops in order to document the basis for the stop.[3] Organized stop-and-frisk practices were initially implemented by the NYPD's "Street Crime Unit" (SCU), a plain-clothes "City Wide Anti-Crime Unit" formed in 1971. The SCU was made up of 60 to 100 members dispatched into the highest crime neighborhoods with a primary goal of recovering guns.[4]

Stop-and-frisk tactics gained greater traction with the implementation of CompStat as a policing tool in the 1990s and the expansion of the SCU.[5] Notably, the expansion of the SCU brought two accompanying problems still apparent in the implementation of the stop-and-frisk policy today: decreased training and supervision and an increased emphasis on number of stops. Prior to expansion, each SCU applicant received intensive screening and, because of the small size of the unit and low turnover, experienced officers acted as mentors for recruits and worked

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[1] 392 U.S. 1 (1968).

[2] C.P.L. § 140.50, titled "Temporary questioning of persons in public places; search for weapons," permits a police officer to stop a person in a public place "when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor" and "may demand of him his name, address and an explanation of his conduct," and, when "he reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or instrument . . . ." C.P.L. § 140.50(1), (3). Shortly after enactment of C.P.L. § 140.50, the New York Court of Appeals decided *People v. De Bour*, 40 N.Y.2d 210 (1976), in which the Court established guidelines for analyzing interactions between police and citizens that is discussed below.

[3] NYPD, 2011 Reasonable Suspicion Stops: Precinct Based Comparison by Stop and Suspect Description, at 3, http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2011_reasonable_ suspicion_encounters.pdf. The original UF-250 form included a narrative section requiring the officer to detail the basis for the stop. According to NYPD policy as set forth in the NYPD Patrol Guide, officers are also supposed to document, in narrative form, the details of each stop-and-frisk they do in their Activity Logs, or "memo-books," so they can refresh their recollection about a particular stop if asked about it later, whether by their supervisor or when testifying in court in a criminal case.

[4] See U.S. Civil Rights Commission, Police Practices and Civil Rights in New York City (August 2000), Chapter 5, *available at* http://www.usccr.gov/pubs/nypolice/exsum.htm.

[5] CompStat (short for Computer Statistics or Comparative Statistics) is the name given to the NYPD's accountability process adopted by Police Commissioner William Bratton in 1994. CompStat employs Geographic Information Systems and was intended to map crime and identify problems. In weekly meetings, ranking NYPD executives meet with local precinct commanders from one of the patrol boroughs to discuss problems. They devise strategies and tactics to solve problems, reduce crime, and ultimately improve quality of life in their assigned area. CompStat has also been targeted as the cause for a reduction of reports/arrests for the seven major felony crimes while increasing arrests for minor offenses.

alongside them each day.[6] As staffing was increased, the influx of new recruits made it impossible for every new SCU officer to be sent out with a more experienced partner.[7] Some SCU officers also said they were pressured by the NYPD's emphasis on crime statistics, and that they were forced to adhere to an unwritten quota system that demanded that each officer seize at least one gun a month.[8] The SCU was disbanded in 2002 as a result of the settlement of a federal lawsuit.[9] The settlement also required the NYPD to revise the UF-250 form to remove the narrative boxes and replace them with check boxes concerning the basis for the officer's stop, including "Fits Description," "Furtive Movements," "Suspicious Bulge/Object," "Wearing Clothes/Disguises Commonly Used in Commission of Crime," "Sights and Sounds of Criminal Activity," and "Area Has High Incidence of Reported Offense of Type Under Investigation" (high-crime area). With the settlement, and in response to charges of racial profiling, the NYPD also created a digital database to record police stops.[10]

Once the SCU was disbanded, the implementation of the stop-and-frisk policy became a widespread official practice of the entire NYPD, and the number of reported stops increased more than 600%, from 97,296 in 2002 to 685,724 stops in 2011.[11] In 2012, the police reported

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[6] David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets,* N.Y. Times, Feb. 15, 1999, *available at* http://www.soc.umn.edu/~samaha/cases/diallo_commandos.html.

[7] *Id.*

[8] *Id*

[9] In 1999, following the shooting death of Amadou Diallo, a lawsuit was filed by the Center for Constitutional Rights, *Daniels, et al. v. The City of New York, et al.*, seeking to disband the NYPD's SCU. In 2002, Judge Shira Scheindlin approved a settlement agreement. *Daniels, et al. v. The City of New York, et al*., Stipulation of Settlement, No. 99 Civ. 1695 (SAS), *available at* http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf. The agreement required the NYPD to maintain a written anti-racial profiling policy that complies with the Federal and State Constitutions and is binding on all NYPD officers, and to audit officers who engage in stops and frisks and their supervisors and determine whether and to what extent the stops and frisks are based on reasonable suspicion and whether and to what extent they are being documented. The NYPD was also required to engage in public education efforts, including joint public meetings with class members and representatives on its racial profiling policy, provide workshops at approximately 50 city high schools on the legal rights of those subjected to stops and frisks, and develop handouts on these issues for distribution at these and other events. *Id.*

[10] Although information gathered in UF-250 forms before 2002 was not officially retained, the *Daniels* settlement, *supra*, required the NYPD to create a database that recorded the personal information of a huge section of young black and Latino New Yorkers who were stopped, even if no arrest was made. In 2010, Gov. Paterson changed the NYPD's stop-and-frisk policy by preventing the NYPD from keeping computerized data about people who have not committed any crime; thus the use of stop and frisk to collect data for people not arrested ceased. WNYC News, *Paterson Changes the NYPD's Stop-and-Frisk Policy*, July 16, 2010, http://www.wnyc.org/articles/wnyc-news/2010/jul/16/paterson-changes-nypds-stop-and-frisk-policy/.

[11] Second Supplemental Report of Jeffrey Fagan, Ph.D., in *Floyd v. City of New York,* 08 Civ. 01034 [hereinafter Fagan Second Supplemental Report]. The total number of stops since 2002 is as follows: 97,296 stops in 2002, 160,851 stops in 2003, 313,523 stops in 2004, 398,191 stops in 2005, 506,491 stops in 2006, 472,096 stops in 2007, 540,302 stops in 2008, 581,168 stops in 2009, 601,285 stops in 2010, 685,724 stops in 2011, and 533,042 stops in 2012. NYCLU, *Stop-and-Frisk Data* [hereinafter NYCLU Stop-and-Frisk Data], http://www.nyclu.org/content/stop-and-frisk-data (last visited Apr. 25, 2013).

making 533,042 stops,[12] a 22% reversal of the trend but still multiple times as many as had been conducted a decade before. Yet, as will be discussed below, in at least 90% of stops, no arrest was made and no contraband was recovered. And, as with stops during the previous Administration, the disparate impact continues, only on a much larger scale: of the nearly five million stops since 2002, more than 50% of those stopped were black and more than 30% were Latino, and more than 50% were between 14 and 24 years old.[13]

We are concerned with the enormous increase in stops and frisks over the past decade, the fact that so few lead to arrest or recovery of contraband, and that so much of the impact has been on young black and Latino men.[14] The sheer volume of stops that result in no determination of wrongdoing raise the question of whether police officers are consistently adhering to the constitutional requirement for reasonable suspicion for stops and frisks. We believe a basic understanding of, and adherence to, the legal principles underlying stop-and-frisk law by police officers would enhance the number of constitutionally valid street encounters while diminishing the potentially illegal intrusions on privacy and liberty that disproportionately burden communities of color.

LEGAL PRINCIPLES GOVERNING STREET ENCOUNTERS

Search-and-seizure law provides guidelines for encounters between police and citizens in a public place. Analysis of search-and-seizure law starts with the Fourth Amendment's proscription against "unreasonable searches and seizures." U.S. Const., Amend. IV. The New

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[12] NYCLU Stop-and-Frisk Data, *supra* note 11*;* Thomas Tracy, *NYPD: Stop-and-Frisks Down 22% in 2012*, N.Y. Daily News, Feb. 9, 2013, *available at* http://www.nydailynews.com/new-york/nypd-stop-and-frisks-22-2012-article-1.1259911.

[13] Tabulations of NYPD stop and frisk data from UF-250s going back to 2002 are available at http://www.nyclu.org/content/stop-and-frisk-data. In addition, an analysis of NYPD practices by Columbia University Law Professor Jeffrey Fagan based on the NYPD's 1.7 million stops and frisks from 2004 to 2007 showed that 90% of those stopped were people of color. Bob Hennelly, *Analysis Suggests Racial Profiling in NYPD Stop and Frisk*, WNYC News, May 1, 2009, http://www.wnyc.org/articles/wnyc-news/2009/may/01/analysis-suggests-racial-profiling-in-nypd-stop-and-frisk/. This pattern continued during the period January, 2010 to June, 2012. *See* Fagan Second Supplemental Report, *supra* . Although a 2007 RAND Corporation study found the NYPD's stop-and-frisk program did not engage in racial profiling, that same year City Council Speaker Christine Quinn said the NYPD was not meeting its legal obligation to publicly release all its stop-and-frisk data, and the Center for Constitutional Rights amended its initial complaint to seek class-action status in *Floyd v. City of New York*. Judge Scheindlin ordered the city and the NYPD to turn over all UF-250 (stop-and-frisk) data since 1998. Bob Hennelly, *NYPD Ordered to Turn 'Over Stop and Frisk' Data to NYCLU,* WNYC News, May 30, 2008, *available at* http://www.wnyc.org/articles/wnyc-news/2008/may/30/nypd-ordered-to-turn-over-stop-and-frisk-data-to-nyclu/.

Similarly, a report by The Center for Constitutional Rights found blacks and Latinos were nine times as likely as whites to get stopped and frisked by New York City police in 2009, but they were no more likely to get arrested. WNYC News, *Report: Minorities Much More Likely to Be Frisked by NYPD*, May 13, 2010, http:/www.wnyc.org/articles/wnyc-news/2010/may/13/report-minorities-much-more-likely-to-be-frisked-by-nypd/.

[14] Ninety-one percent of those stopped between January 1, 2010 and June 30, 2012 were male. Fagan Second Supplemental Report, *supra* at 11.

York State Constitution, however, provides additional privacy safeguards that govern the scope of permissible police conduct in the absence of a seizure.[15]

As noted above, in *Terry v. Ohio*, the United States Supreme Court held that police officers who do not possess probable cause to arrest may nonetheless forcibly stop and question a person in a public place if they possess a reasonable suspicion "that criminal activity may be afoot." 392 U.S. at 30. If the police also reasonably suspect that the person is "armed and presently dangerous," and, if the answers to police inquiries do not "dispel" a reasonable fear for the officer's safety, officers may conduct a "carefully limited search," or frisk, of the person's outer clothing to search for weapons. *Id.*

Terry stops and frisks must be justified by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S. at 21. An officer's "inarticulate hunch[]" may not support a *Terry* stop and frisk. *Id.* at 22. In determining the reasonableness of a Fourth Amendment seizure, *Terry* instructs courts to consider "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 19-20. Each case is decided on its facts. *Id.* at 30.

The Fourth Amendment is not implicated in consensual street encounters between citizens and the police. A consensual encounter is one in which a reasonable person would understand that he or she can refuse to cooperate with the police. When the encounter is consensual, the police may ask questions or request to search a bag in the absence of reasonable suspicion. *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *accord Florida v. Bostick*, 501 U.S. 429, 438-39 (1991); *Michigan v. Chesternut*, 486 US 567, 573-74 (1988); *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984). Police pursuit constitutes a seizure under the Fourth Amendment when a fleeing individual is physically restrained or submits to police authority. *Hodari D.*, 499 U.S. at 626.

Over the past 40 years, the New York Court of Appeals has taken an independent approach to search-and-seizure law, providing broader protection to its citizens against unreasonable police intrusions than provided by the Fourth Amendment. In 1976, the Court, in *People v. De Bour*, established judicial guidelines comprising a four-tiered graded scale "directly correlat[ing] the degree of objectively credible belief with the permissible scope of interference." 40 N.Y.2d 210, 217, 223 (1976); *accord People v Garcia*, 20 N.Y.3d 317 (2012); *People v. Hollman*, 79 N.Y.2d 181, 184-85 (1992). The *De Bour* guidelines apply only to police engaged in their criminal law enforcement duties. 40 N.Y.2d at 218-19. In conducting a *De Bour* analysis, the court first considers whether the police action is justified "in its inception," and, second, "whether or not it was reasonably related in scope to the circumstances which rendered its initiation permissible." 40 N.Y.2d at 222; *see Terry*, 392 U.S. at 19-20.

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[15] New York did not incorporate an express protection from unreasonable searches and seizures into the State Constitution until 1938, relying instead upon Section 8 of the Civil Rights Law. Section 12 of Article I of the State Constitution contains two paragraphs, the first identical to the Fourth Amendment and the second proscribing the unreasonable interception by the government of telephone and telegraphic communications. N.Y. Const., Art. I § 12.

Significantly, *De Bour* requires all police interference with a citizen's liberty interest in a public place to have an objective basis. Police acting in their criminal law enforcement capacity may not request information on "whim or caprice." *Hollman,* 79 N.Y.2d at 190.

De Bour level one permits a minimal intrusion to request information when police have "some objective credible reason, not necessarily indicative of criminality." 40 N.Y.2d at 223. The level-one request for information is "a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area." *Hollman,* 79 N.Y.2d at 191 (emphasis added). A person accosted by police with only a level-one informational predicate may walk or run away without fear of pursuit. *People v. Holmes,* 81 N.Y.2d 1056, 1058 (1993).

At *De Bour* level two, police with "a founded suspicion that criminal activity is afoot" may ask accusatory questions that would leave an individual reasonably believing he or she was suspected of criminal activity. 40 N.Y.2d at 223 (emphasis added). The level-two intrusion permits officers to conduct a more extended and intrusive questioning. A request to search a bag, no matter how politely asked, is "intrusive and intimidating" and requires at least a founded suspicion of criminal activity. *Hollman,* 79 N.Y.2d at 191.

Police-citizen street encounters at *De Bour* levels one and two are not subject to constitutional scrutiny in and of themselves. Nevertheless, courts determine the validity of informational requests and accusatory questioning under state common law, guided by the "spirit of the Constitution." *Hollman,* 79 N.Y.2d at 195 (quoting *De Bour,* 40 N.Y.2d at 217). Moreover, because police conduct under *De Bour* is evaluated from its inception, violations at levels one and two will invalidate a subsequent arrest and the evidence obtained therefrom.

A *De Bour* level-three stop, like a *Terry* stop, is a constitutionally cognizable limited seizure. Police may not stop a person in the absence of "reasonable suspicion" that the person has committed or is about to commit a misdemeanor or felony. 40 N.Y.2d at 223; see C.P.L. § 140.50(1). As a matter of state constitutional law, an individual has been seized when "a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom." *People v. Bora,* 83 N.Y.2d 531, 535 (1994). Taking into account all of the attendant facts and circumstances of the encounter, the central question is whether the police action interrupted the individual's liberty of movement. *Id.* Officers possessing reasonable suspicion to "stop" an individual may pursue a fleeing suspect. *Holmes,* 81 N.Y.2d at 1057-58. Just as in *Terry,* a *De Bour* level-three frisk requires an independent reasonable suspicion that the person is armed and dangerous or poses a risk to public safety. *People v. Batista,* 88 N.Y.2d 650, 654 (1996); see C.P.L. § 140.50(3). A stop may not be justified by a "subsequently acquired suspicion resulting from the stop." *De Bour,* 40 N.Y.2d at 215-16.

The *De Bour* level-four stop describes a full-blown seizure, or arrest, and requires probable cause. N.Y. Const., Art. I, § 12; see C.P.L. § 140.10. Pursuant to a valid arrest, police may search the person arrested. Inculpatory evidence thereby recovered may be introduced at a subsequent trial.

The fast-paced nature of street encounters and dynamic accrual of information permitting additional action are illustrated by the facts of the eponymous case of *De Bour*, in which the Court, over dissent, determined that an initially suspicionless confrontation escalated into an arrest supported by probable cause. 40 N.Y.2d at 220-21.[16] As Louis De Bour walked down an empty Brooklyn street in a high-drug-activity area at midnight, he approached two officers on patrol. De Bour crossed the street when he was 30 to 40 feet from the officers. They crossed the street to intercept De Bour and asked what he was doing in the neighborhood. De Bour replied he had parked his car and was going to a friend's house. The officers then asked De Bour for identification. When De Bour answered he had none, an officer noticed a waistband bulge, asked De Bour to unzip his coat, and recovered a revolver. *Id.* at 213, 220-21. Thus, what started as a level-one request for information, with no reason to believe that De Bour was doing anything wrong, escalated, through the officers' acquisition of information, into a level-four predicate providing probable cause to justify an arrest.

Just as encounters at *De Bour* levels one and two may legitimately result in information supporting an arrest, violations of privacy rights at levels one and two invalidate a resultant arrest and require suppression of the evidence thereby acquired. In *People v. Saunders*, the companion case to *People v. Hollman, supra,* the Court determined that, because the information possessed by police at the time they accosted defendant permitted no more than a level-one request for information, their request to search defendant's bag was unwarranted, and defendant's consent to the search was invalid. Because the initial illegality tainted the ensuing police action, the resulting arrest was also illegal. 79 N.Y.2d at 194, 196.

The Court of Appeals remains committed to *De Bour*. *See Garcia*, 20 N.Y.3d at 322-24 (applying *De Bour* to traffic stops)*; Hollman*, 76 N.Y.2d at 195 (reaffirming "continued vitality" of *De Bour* as "largely based upon considerations of reasonableness and sound State policy"). The *Hollman* Court expressly rejected the prosecution's request to overrule *De Bour* in light of subsequent Supreme Court cases like *Florida v. Bostick, supra,* which held that the Fourth Amendment is not implicated by police-initiated street encounters that fall short of actual seizures. 79 N.Y.2d at 194.

The current controversy over stop-and-frisk manifests a problem recognized in *De Bour*. The Court observed that the role of the police in crime prevention renders it "highly susceptible to subconstitutional abuses" and therefore requires the greatest judicial scrutiny. 40 N.Y.2d at 220. The Supreme Court in *Terry* also acknowledged the reality that some officers abuse their authority to harass (mostly) members of minority groups during street encounters, and that courts are often powerless to curb such abuse. When potential trial evidence is obtained as the result of an illegal search or seizure, it is excluded from use at trial. Although the exclusionary rule is intended to deter police from violating the Fourth Amendment when evidence is gathered for future prosecution, this judicial remedy cannot deter officers who "are willing to forego successful prosecution in the interest of serving some other goal." *Terry*, 392 U.S. at 14. For this

[16] The dissent argued that the officers had "no reason . . . to confront De Bour." *De Bour*, 40 N.Y.2d at 228 (Fuchsberg and Cooke, J.J., dissenting).

reason, stops and lesser intrusions that do not meet legal requirements historically have been effectively immune from judicial review.

Moreover, many unconstitutional stops and frisks in which contraband is recovered evade judicial review because the cases terminate in adjournments in contemplation of dismissal or guilty pleas, as defendants prefer this disposition, which usually results in no further time served, rather than risk further incarceration and the uncertainty of proceeding with the case. In the absence of a judicial record detailing the circumstances of the encounter, the underlying illegal police conduct remains unremedied and the offending officer is not held accountable for his or her illegal action.[17]

ONGOING FEDERAL LITIGATION

In an effort to obtain judicial review of stop-and-frisk conduct by NYPD officers, three federal lawsuits challenging the NYPD stop-and-frisk policy have been filed in recent years, and are currently pending before Judge Shira Scheindlin in the Southern District of New York. These lawsuits could result in major changes to NYPD's stop-and-frisk program. Although we note that the City Bar takes no position on the merits of any of the lawsuits, the litigation has brought much information about NYPD's stop and frisk program to light.

In 2008, the Center for Constitutional Rights filed *Floyd v. City of New York*, a class action challenging the entirety of the NYPD's current stop-and-frisk practice alleging that, as practiced, many stops violate the Fourth Amendment and are the result of racial profiling.[18] The court has certified a class, and trial commenced in March 2013, before Judge Scheindlin.

In January 2010, the NAACP Legal Defense and Education Fund and The Legal Aid Society filed *Davis v. City of New York*. *Davis* is a putative class action challenging the legality of the NYPD practice of making stops and arrests on suspicion of trespass in buildings operated by the New York City Housing Authority (NYCHA)[19] The plaintiffs claim that the NYPD's

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[17] *See generally* Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 Albany L. Rev. 1187 (April, 2013).

[18] The plaintiffs seek declaratory relief and an injunction prohibiting the NYPD from imposing any quotas or productivity standards for stops and frisks, improved training, oversight and discipline regarding suspicionless stops and frisks, and increased monitoring of NYPD's stop and frisk activity. In 2011, the court denied the City's motion for summary judgment. *Floyd v. City of New York*, 813 F.Supp.2d 417 (S.D.N.Y. 2011), and *Floyd v. City of New York*, 813 F.Supp.2d 457 (S.D.N.Y. 2011) (on reconsideration). On May 16, 2012, the court certified two classes: (1) all persons who since January 31, 2005 have been, or in the future will be, subjected to the NYPD's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment; and (2) all persons who since January 31, 2005 have been, or in the future will be, stopped or stopped and frisked on the basis of being black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment. *Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012). The Center for Constitutional Rights has been supported in their lawsuit by the 27-member black, Latino, and Asian Caucus of the Council of the City of New York, which has filed an amicus brief in the case.

[19] According to a study by Reuters, the NYPD made almost 600,000 stops in or around NYCHA buildings in the past six years, with suspicion of trespass as the most common reason. Chris Francescani, Janet Roberts &

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aggressive vertical patrols and stops on suspicion of trespass violate the Fourth Amendment, the Equal Protection clause of the Fourteenth Amendment, the Fair Housing Act as well as the right of public housing tenants to have guests.[20] The plaintiffs' claims regarding their individual stops largely survived the first motion for summary judgment, where the court held that NYCHA's loitering prohibition was unconstitutionally vague and that there were material issues of fact regarding the constitutionality of each stop and all but one arrest.[21] Summary judgment motions regarding the pattern and practice claims are currently pending.

In March 2012, the New York Civil Liberties Union (NYCLU), Latino Justice, and the Bronx Defenders brought a putative class action, *Ligon v. City of New York*, challenging NYPD's practice of stopping people in or near buildings enrolled in the Trespass Affidavit Program (TAP) in the Bronx.[22] The plaintiffs moved for a preliminary injunction and, after a three-week hearing, the court found that "plaintiffs have succeeded in showing a clear likelihood that they will be able to prove that the City of New York and its agents displayed deliberate indifference toward the violation of the constitutional rights of hundreds and more likely thousands of individuals prior to 2012."[23] The Court found that that "a very large number of [Fourth Amendment] violations took place outside TAP buildings in the Bronx in 2011," and that "plaintiffs have succeeded in showing a clear likelihood that they will be able to prove that the City of New York and its agents displayed deliberate indifference toward the violation of the constitutional rights of hundreds and more likely thousands of individuals prior to 2012."[24] The court stayed the injunction until a hearing on the scope of injunctive relief, which will occur at the same time as the remedy phase of the trial in *Floyd*.[25]

DISCUSSION

The NYPD has defended the expansion of its stop-and-frisk policy on the ground that most stops are conducted most stops in high-crime neighborhoods with high concentrations of people of color who are both victims and perpetrators of violent crime.[26] In addition, the NYPD

Melanie Hicken , *Under Siege: Stop And Frisk Polarizes New York*, Reuters, July 3, 2012, http://www.reuters.com/article/2012/07/03/us-usa-newyork-stopandfrisk-idUSBRE86205Q20120703.

[20] The plaintiffs claim that police officers seize tenants and their guests solely based on their presence in common areas of NYCHA buildings and seek an end to these stops, a revision of NYCHA's trespass policy, and increased monitoring and training. Nine of the original 16 plaintiffs have accepted offers of judgment under Fed. R. Civ. P. 68.

[21] *Davis v. City of New York*, No. 10 Civ. 0699, 2012 WL 4813837 (S.D.N.Y., Oct. 9, 2012).

[22] *Ligon v. City of New York*, No. 12 Civ. 2274, 2013 WL 628534 (S.D.N.Y., Feb. 14, 2013). TAP allows police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City. *Id.* at *2.

[23] *Id.* at *34.

[24] *Id.*

[25] *Ligon v. City of New York*, No. 12 Civ. 2274, 2013 WL 227654, at *1 (S.D.N.Y., Jan. 22, 2013).

[26] The highest numbers of stops and frisks stem from officers in "Impact Zones" where CompStat identifies the highest levels of crime. Yet, high-crime area is not the most commonly used check box in UF-250 forms.

has maintained that fewer guns are recovered during stop-and-frisk encounters because fewer people are carrying them for fear of being stopped.

Mayor Bloomberg, in a speech on June 9, 2012, defended the stop-and-frisk policy, saying it is a strategy "that we know saves lives."[27] He said the city would not "deny reality" in order to stop different groups according to their relative proportions in the population." "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." "At the same time," Mayor Bloomberg said, "we owe it to New Yorkers to ensure that stops are properly conducted and carried out in a respectful way."[28] In a column in the New York Daily News, Police Commissioner Kelly wrote, "[t]he statistics reinforce what crime numbers have shown for decades: that blacks in this city were disproportionately the victims of violent crime, followed by Hispanics. Their assailants were disproportionately black and Hispanic too .... [the NYPD] must continue to fight crime where it finds it, and use those tactics that have proven successful."[29]

Clearly, the NYPD has been effective in reducing crime in New York City. Crime rates in the City dropped sharply in major crime categories between 1990 and 2009, far more than the national average.[30] Nevertheless, the stop-and-frisk policy, regardless of whether it has had an effect on curbing crime, must be examined relative to existing law and other public interests.

As a preliminary matter, we note three points regarding the crime-fighting effectiveness of the policy. First, the reduction in violent crime in the City has not necessarily correlated with the number of stops made. For example, the increase of 100,000 stops between 2008 and 2011 did not correspond to an appreciable change in the violent crime rate, which then dropped again in 2012 even as the number of stops fell by 150,000.[31]

Second, though an articulated purpose of the stop-and-frisk policy is to reduce gun use, available data for the years 2008-11 show that, despite a 27% increase in stops and frisks, shootings had not gone down, and indeed in 2011, a year with nearly 686,000 stops, the number of shootings actually rose.[32] In 2012, shootings were down approximately 10% from 2011; however, that coincided with a 22% decrease in stops during 2012.

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[27] 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.

[28] *Id.*

[29] Raymond W. Kelly, *The NYPD vs. Minorities? No Way*, N.Y. Daily News, May 21, 2012 [hereinafter Kelly, No Way], *available at* http://www.nydailynews.com/opinion/nypd-minorities-article-1.1080920?pgno=1.

[30] *See* Franklin E. Zimring, *The City that Became Safe: New York and the Future of Crime Control* (Sept. 2, 2010).

[31] NYPD, Seven Major Felony Offenses (chart), http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/seven_major_felony_offenses_2000_2011.pdf.

[32]

Year	2008	2009	2010	2011	2012
Shootings[32]	1806	1729	1775	1821	1624

(continued on next page)

Third, the stop-and-frisk policy is just one of the crime-fighting tools the NYPD employs, and it is difficult to isolate the effectiveness of any one policy. In his Daily News column, Commissioner Kelly touted various strategies employed within minority communities:

> The NYPD's policy of engagement, including the establishment of impact zones, the use of police stops in precincts citywide and the application of advanced technology was supplemented from the pulpit, where pastors used information provided by the department to update parishioners, to reach out to gang members and to otherwise engage the community in an all-out effort to reduce the bloodshed.[33]

As noted, these strategies include methods that are strongly supported in minority communities, in contrast to the controversy generated by the stop-and-frisk policy.

Ensnaring Large Numbers of People

The overwhelming number of stops that do not result in an arrest, the issuance of a summons, or the recovery of weapons or other contraband calls into question whether a substantial percentage of the stops are being conducted in accordance with law. Approximately nine of ten people stopped are not found to have broken the law. Arguably, as the stops should be based on reasonable suspicion that a crime is being, has been or is about to be committed, the two main reasons for police stops should be to remove guns and other weapons from the streets and arrest those guilty of committing a crime. But this actually occurs in a very low percentage stops and frisks. The high percentage of stops with no resulting arrest or violation raises the question of whether the federal and state constitutional standard of reasonable suspicion is being met for a substantial number of those stops.

Arrests

The data consistently show that only about 6% of those stopped by the NYPD are arrested.[34] This is so despite the sixfold increase in stops between 2002 and 2011. Furthermore, it appears that a good number of those arrested were not found to have committed any crime. For

Police Stops[32]	540,302	581,168	601,285	685,724	533,042

The chart is a composite of data released by the NYPD. *See* Crime and Enforcement Activity in New York City, 2008 – 2012 Reports, page 11, on each year's report; http://www.nyc.gov/html/nypd/html/analysis_and_planning/crime,_and_enforcement_activity.shtml; http://www.nyclu.org/content/stop-and-frisk-data, and note 11 *supra*."

Source: Crime and Enforcement Activity in New York City, 2008 – 2012 Reports, page 11, http://www.nyc.gov/html/nypd/html/analysis_and_planning/crime_and_enforcement_activity.shtml.

[33] Kelly, No Way, *supra* note 29.

[34] *See* NYCLU Stop-and-Frisk Data, *supra* note 11.

example, all 13 plaintiffs who had been arrested in *Davis v. City of New York* had their criminal charges dismissed.[35]

As an example, on January 31, 2009, Roman Jackson was sitting with his friend Kristin Johnson in the stairwell of his apartment building when he was confronted by police officers and accused of trespassing. Jackson's identification was in the apartment that he shared with his grandmother. Both he and Johnson were arrested for trespassing even though he lived in the building and Ms. Johnson was his invited guest.[36] After spending six hours in jail they were released and the cases against them were eventually dropped. In 2011, the Bronx District Attorney contacted the NYPD to complain that police officers were making trespass arrests without probable cause in the Bronx and that the DA's office would no longer prosecute the charges absent additional corroboration.[37]

Most of the arrests resulting from stops are for marijuana possession. In both 2010 and 2011 the NYPD arrested approximately 50,000 individuals City-wide (including through stop-and-frisk encounters) for marijuana possession.[38] Those arrested were overwhelmingly black and Latino — 87% of the individuals arrested for marijuana possession from 2002 to 2011. This despite the consistent national survey data among individuals between 18 and 25 years of age that show whites are more likely than either blacks or Latinos to use marijuana.[39] The high number of arrests stems in part from an aspect of the street encounter during stops. Police officers typically ask the individuals subject to these stops whether they have any contraband. In particular, in addition to the frisk for weapons, police will ask the individual if he or she is carrying any marijuana. A positive response to the question usually is followed with a direction to the individual to empty his or her pockets; alternatively, the police officer may empty the individual's pockets.[40] While the marijuana remained concealed in the individual's pocket, that individual was committing a violation (not a crime) under P.L. § 221.05. However, once

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[35] *Davis v .City of New York*, No. 10 Civ. 0699, 2012 WL 4813837, at *8 (S.D.N.Y., Oct. 9, 2012).

[36] *Id*.

[37] *Ligon*, 2013 WL 628534, at *6-*8; Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. Times, Sept. 25, 2012, *available at* http://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html?pagewanted=all.

[38] http://marijuana-arrests.com/graph-mayors-marijuana-two-graphs.html.

[39] Source: U.S. Dept H.H.S., SAMHSA, Office of Applied Studies, National Survey on Drug Use and Health, 2002-2009. This and more data on marijuana arrests are available at http://marijuana-arrests.com/about.html. In 2011, an investigation by WNYC "suggests that some police officers may be violating people's constitutional rights when they are making marijuana arrests." Ailsa Chang, *Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests*, WNYC News, Apr. 26, 2011, http://www.wnyc.org/articles/wnyc-news/2011/apr/26/marijuana-arrests/; *see* Delores Jones-Brown et al., *Stop, Question & Frisk Policing Practices in New York City: A Primer*, Center on Race, Crime and Justice, John Jay College of Criminal Justice at 13 (March 2010) [hereinafter Brown, A Primer] (observing that studies suggest most contraband recovered in stops consists of marijuana).

[40] *See* Alice Brennan and Ryan Devereaux, *New York Police Officers Defy Order to Cut Marijuana Arrests*, The Raw Story, Mar. 30, 2012, http://www.rawstory.com/rs/2012/03/30/new-york-police-officers-defy-order-to-cut-marijuana-arrests/; Testimony of Harry Levine before New York City Council Committee on Public Safety, June 12, 2012, *available at* http://marijuana-arrests.com/docs/Testimony-NYCityCouncil-Marijuana-Arrests--Illegal-Searches--Summons-Court-System-June-2012.pdf.

removed from the pocket, the marijuana is now "in public view," and the individual — at the officers' direction — has committed a class B misdemeanor.[41] The practice was acknowledged by Police Commissioner Raymond Kelly in Operations Order Number 49, issued in September 2011, which directed that an "individual who is requested to or compelled to engage in the behavior that results in the public display of marihuana" be charged with a violation, and that officers "may not charge the individual with [misdemeanor possession]" under those circumstances[42] While marijuana possession arrests decreased in 2012, they only decreased by approximately 20%, to 39,218.[43]

The effect of such arrests is quite serious for those swept up. In addition to the hardships and humiliation that are attendant to an arrest, individuals may also face eviction proceedings (as arrest reports are regularly transmitted to NYCHA), employment jeopardy due to reporting of arrests (particularly if the individual is employed by New York State or New York City), child neglect proceedings initiated by the NYC Administration for Children's Services, and possible deportation for undocumented non-citizens or documented non-citizens with a prior criminal record (as these arrests are often reported to federal immigration authorities).[44] At the very least, they disrupt people's lives and jeopardize their current employment if work shifts are missed.[45] And there is a risk of having a criminal record which may be located through searches, even if later efforts are made to seal the records.

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[41] P.L. § 221.10(1). It is noteworthy that while over 50,000 arrests were made for marijuana possession in 2010, only 8,342 summonses were issued. *See* http://marijuana-arrests.com/docs/NYPD-SUMMONSES-2010-2004.pdf. In June 2012, a class action was brought against the NYPD seeking a declaratory judgment that the practice outlined in this paragraph be declared illegal and an injunction ordering the NYPD to ensure that police officers comply with the law. *Gomez-Garcia v. New York City Police Department*, Index No. 451000/2012 (Supreme Court, N.Y. County).

[42] NYPD Operations Order Number 49 (Sept., 19, 2011) at ¶¶ 2, 4 (emphasis in original).

[43] Drug Policy Alliance (March 2013), http://www.drugpolicy.org/sites/default/files/One_Million_Police_Hours.pdf.

[44] *See Lino v. City of New York*, 101 A.D.3d 552 (1st Dept. 2012), holding that plaintiffs had standing to claim that the NYPD illegally failed to seal their criminal records related to subsequently dismissed stop-and-frisk arrests or summonses; s*ee also* Brent Staples, *The Human Cost of "Zero Tolerance,"* N.Y. Times, Apr. 28, 2012, *available at* http://www.nytimes.com/2012/04/29/opinion/sunday/the-cost-of-zero-tolerance.html.

[45] We note that in his State of the City message on February 13, 2013, Mayor Bloomberg announced that those arrested for marijuana possession will no longer have to spend the night in jail, but will be given desk appearance tickets.
http://www.nyc.gov/portal/site/nycgov/menuitem.c0935b9a57bb4ef3daf2f1c701c789a0/index.jsp?pageID=mayor_press_release&catID=1194&doc_name=http%3A%2F%2Fwww.nyc.gov%2Fhtml%2Fom%2Fhtml%2F2013a%2Fpr063-13.html&cc=unused1978&rc=1194&ndi=1

Contraband

With regard to recovery of contraband, over the past decade guns have been recovered at a rate of little more than one per thousand stops.[46] Data analyzed by Prof. Jeffrey Fagan show that, for the period January 2010 to June 2012, 0.12 percent of stops resulted in a gun seizure, 1.18% resulted in seizure of other weapons and 1.8% resulted in seizure of other contraband (such as drugs). Therefore, even if none of the stops resulted in a seizure in more than one of these categories, which is highly unlikely, contraband was recovered in a maximum of 3% of the stops.[47]

Under-reporting of Stops

That so few of the reported stops lead to recovery of guns or contraband or to arrests would be concern enough. However, the NYPD's database of UF-250s, which is the source of data about its stop-and-frisk practices,[48] most likely underestimates the extent of the use of these practices due to the failure of officers to fill out the forms for each stop. For example, the NYPD was unable to provide the UF-250s for any of the eleven stops at issue in the hearing in the recent federal lawsuit, *Ligon v. City of New York*.[49] Indeed, Judge Scheindlin found that "failures to fill out UF-250 forms likely led to a significant undercounting of both lawful and unlawful stops in Dr. Fagan's analysis."[50] And each year the Civilian Complaint Review Board substantiates a significant number of complaints that officers have failed to fill out UF-250 for stops and/or frisks.[51] Thus, the true number of stops each year by the NYPD is likely higher than the reported number, and to the extent there are legal problems with the reported stops, that problem may be of even greater magnitude than the reported data indicate.

Disparate Impact on Communities of Color

Not all New Yorkers have direct experience with the growing use of street stops as a crime control technique. New York City's communities of color have been the disproportionate focus of the increased use of the stop and frisk tactic under the Bloomberg Aministration. The vast majority — more than 85% — of those stopped and frisked are black or Latino. Though the NYPD responds that this predominance is due to the focus on high-crime neighborhoods largely

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[46] NYCLU data available at http://marijuana-arrests.com/NY-stop&frisk-info.html. *See also* Brown, A Primer, *supra* note 39, at 15.

[47] Fagan Second Supplemental Report, *supra* at 35.

[48] The NYPD's quarterly reports are posted by the NYCLU. *See* NYCLU Stop-and-Frisk Data, *supra* note 11.

[49] *Ligon*, 2013 WL 628534, at *9.

[50] *Id.* at *20.

[51] *See* Civilian Complaint Review Board 2011 Annual Report at 14. In addition to false official statements, the Board also refers cases to the Police Department in which officers failed to document their actions as required by NYPD procedure. There are three major categories of failure to document. The first category is an officer's failure to fill out a stop-and-frisk form. In 2011, the Board referred 120 such allegations, an 18% increase from 2010, and it has referred 464 in the last five years.

populated by people of color,[52] the black and Latino disparity persists even adjusting for precinct crime rates, demographic factors, or other social and economic factors associated with police activity.[53]

In 2011, the last full year in which data are available, the police recorded 685,724 stops; 574,483 of those stopped were black or Latino.[54] NYPD's stop and frisk tactics are especially focused on young black and Latino men. In 2011, the number of stops of young black men exceeded the entire city population of young black men (168,126 compared to 158,406).[55] Further, 90% of the stops of young black and Latino men resulted in no summons or arrest.[56]

By contrast, even though whites made up 44% of New York City's population, they constituted only 9.3% of the stops. These proportions have held roughly constant for the 4,703,053 recorded stop and frisk encounters since 2003.[57] In those ten years, more than 2.4 million black New Yorkers and more than 1.4 million Latino New Yorkers have been detained by police officers, the overwhelming majority of whom had done nothing wrong. And, once stopped, blacks and Latinos are more likely to be frisked than whites are and police officers are more likely to use force.[58] At the same time, stops of whites consistently yield a higher rate of recovery of contraband and weapons.[59]

Stops are concentrated in neighborhoods with higher black and Latino populations. For example, the five precincts that recorded the highest numbers of stops were located in East New York and Ocean Hill-Brownsville in Brooklyn, Concourse-High Bridge and Mott Haven in the Bronx, and Jackson Heights in Queens. And in one eight-block area of Brownsville between January 2006 and March 2010, the NYPD recorded nearly 52,000 stops, nearly one stop per year for each of the area's 14,000 residents.[60]

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[52] *See* Greg Ridgeway, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices,* at xii RAND Corporation (2007); Chris Francescani, et al., *Under Siege: Stop And Frisk Polarizes New York,* Reuters, July 3, 2012, http://www.reuters.com/article/2012/07/03/us-usa-newyork-stopandfrisk-idUSBRE86205Q20120703; *Floyd v. City of New York*, No. 08 Civ. 1034, 2012 WL 3561594, at *4 (S.D.N.Y., Aug. 17, 2012).

[53] This is the conclusion reached by Columbia University Law Professor Jeffrey Fagan after analyzing all of the UF-250s from 2004-2009 as an expert witness in the *Floyd* litigation.

[54] NYCLU, *Stop-And-Frisk 2011* [hereinafter NYCLU Stop-and-Frisk 2011], at 5, *available at* http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

[55] *Id.* at 2.

[56] *Id.*

[57] *See* NYCLU Stop-and-Frisk Data, *supra* note 11.

[58] NYCLU Stop-and-Frisk 2011, *supra* note 54, at 10. Between January, 2010 and June, 2012, force was used in 15% of stops of whites, 21% of stops of blacks and 24% of stops of Latinos. Fagan Second Supplementary Report, *supra* note 11, at 34.

[59] *Id.*; Brown, A Primer, *supra* note 39, at 15.

[60] Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops,* N.Y. Times, July 12, 2010, http://query.nytimes.com/gst/fullpage.html?res=9E01EEDD133AF931A25754C0A9669D8B63.

Similarly, even in neighborhoods with majority white populations, blacks and Latinos are stopped well out of proportion to their population in the neighborhoods. In neighborhoods like Murray Hill or the Upper East Side of Manhattan, where blacks and Latinos make up 7.8% and 9% of the population, they accounted for more than 70% of those stopped by the police.[61]

The NYPD has maintained that the percentage of blacks and Latinos stopped correlates to the number considered crime suspects.[62] However, the sheer volume (far dwarfing the number of arrests or seizures of contraband), frequency, and distribution of NYPD's stop-and-frisk activity has led many people of color to feel under siege.[63] NYPD's aggressive use of stop and frisk in communities of color means that any time black or Latino youth leave their home they could be detained by the police. The feelings of many New Yorkers of color are summed up by one interviewee who said: "[y]ou shouldn't be afraid to come outside and go to the store to get a soda for fear that the police are going to stop you, and you're either going to get a expensive, a high-cost summons or you're going to get arrested."[64]

Beyond consideration of whether the NYPD's focus on minorities is justified by the high percentage of victims and suspects who are people of color, the sheer number of stops when combined with the high frequency with which people of color are stopped by the police also leaves blacks and Latinos with an expectation of harassment that limits their freedom and sends a signal that they are second class citizens. As Al Blount, a minister at a Harlem church, describes "[police officers will] ask, 'Where are you headed?' When you're African-American, you have to have a definite destination. Everyone else can just say, 'Mind your own business.'"[65] The aggressive stopping and frisking of blacks and Latinos led to widespread distrust of police motivation. Almost 80% of blacks and almost 70% of Latinos believe that the NYPD favors whites.[66] The policy itself is favored by only 25% of black voters surveyed in a Quinnipiac 2012 poll, as opposed to 57% of whites and 53% of Latinos.[67]

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[61] NYCLU Stop-and-Frisk 2011, *supra* note 54, at 11.

[62] In *Floyd*, the NYPD presented data showing that blacks and Latinos constituted 81.6% of all non-arrested and arrested crime suspects in 2010 and were 83.9% of those stopped that year. *See* Declaration of Dennis C. Smith, Exhibit C, *Floyd v. City of New York, Document No. 181-3* at 9 (Dec. 20, 2011). We note that these data cannot be compared with the number of black and Latino suspects arrested or the disposition of those arrests. We also note that the number of those arrested was fewer than one in ten of those stopped.

[63] *See e.g.,* Wendy Ruderman, *Rude or Polite, City's Officers Leave Raw Feelings in Stops*, N.Y. Times, June 26, 2012, at A1 [hereinafter Ruderman, Rude or Polite], *available at* http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html?pagewanted=all.

[64] Center for Constitutional Rights, *Stop and Frisk: The Human Impact* at 6 (2012) (interview of Carl W.), *available at* http://stopandfrisk.org/the-human-impact-report/.

[65] Ruderman, Rude or Polite, *supra* note 53.

[66] Michael M. Grynbaum & Marjorie Connelly, *Majority in City See Police as Favoring Whites, Poll Finds*, N.Y. Times, Aug. 20, 2012, *available at* http://www.nytimes.com/2012/08/21/nyregion/64-of-new-yorkers-in-poll-say-police-favor-whites.html?pagewanted=all&_r=0.

[67] USA Today, *Poll: NYC racially divided over stop and frisk*, Aug. 16, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-08-16/stop-and-frisk/57099504/1.

The result is substantial hostility to the police in neighborhoods of color, particularly among those in the group most likely to be stopped, young males. They develop a mistrust of the police which cannot be productive in other ongoing efforts by the NYPD to involve the community in crime reduction efforts. One aspect of this is the widely acknowledged skepticism of the police observed in juries in the Bronx.[68] Compounding the effect of the number of stops is the perception among those stopped that they are treated roughly, unfairly and without respect.

RECENT DEVELOPMENTS

Recently, the NYPD has made some changes to stop-and-frisk policies and practices. In a letter dated May 16, 2012, Police Commissioner Kelly responded to comments of City Council Speaker Christine Quinn calling for greater oversight of the NYPD's stop-and-frisk activity.[69] The letter set forth measures to "increase public confidence in Police Department stop, question and frisk procedures," including a re-emphasis on an existing departmental order banning racial profiling. The order was to be incorporated into routine training sessions for officers. Another calls for greater scrutiny of UF-250s whereby the executive officer at each of the city's 76 precincts will be in charge of auditing the forms to ensure stops and frisks are not being used simply to meet productivity goals. Commissioner Kelly said the NYPD was moving to develop a "quantitative mechanism" to pinpoint those officers who were the object of complaints from civilians over street stops.[70]

In addition, the number of stops on a monthly basis started to decrease in mid-2012. After peaking at 203,000 stops for the period January-March, 2012, the number of stops declined substantially to 179,000 for April-June, 2012 and 106,000 for July-September, and 90,000 for October-December. As there have been seasonal variations in stops during prior years, more data are necessary to fully determine the magnitude of the reduction, but police activity in this area has clearly been reduced. Some have attributed the reduction to a decreased emphasis on stop and frisk numbers as a performance incentive as sergeants conducting roll call have apparently stopped emphasizing the need for stop and frisk as top priority.[71] That said, as we have noted, the number of stops in 2012 is still over five times the number of stops in 2002.

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[68] *See, e.g.*, American University Washington College of Law, Criminal Law Brief Blog, *NYPD Misconduct and the Effects on the Bronx Criminal Justice System*, November 14, 2011, http://wclcriminallawbrief.blogspot.com/2011/11/nypd-misconduct-and-effects-on-bronx.html.

[69] Ailsa Chang, *Council Speaker Christine Quinn Demands Greater Oversight of NYPD's Stop-and-Frisks*, Feb. 8, 2012, http://www.wnyc.org/blogs/wnyc-news-blog/2012/feb/08/council-speaker-christine-quinn-says-nypd-stop-and-frisk-policy-has-sown-distrust-among-minorities/.

[70] Al Baker & Joseph Goldstein, *Kelly Reacts after Stop-and-Frisk Ruling*, N.Y. Times, May 17, 2012, *available at* http://www.nytimes.com/2012/05/18/nyregion/commissioner-announces-steps-on-improper-stop-and-frisk-but-critics-are-unmoved.html; Associated Press, *NYPD Planning Changes to Stop-and-Frisk Policy*, May 17, 2012, http://www.wnyc.org/blogs/wnyc-news-blog/2012/may/17/nypd-planning-changes-stop-and-frisk-policy/; Ailsa Chang, *NYPD Orders Commanders to Review Stop-and-Frisk Policy*, May 9, 2012, http://www.wnyc.org/articles/wnyc-news/2012/may/09/nypd-ordered-review-stop-and-frisk-activity/.

[71] Editorial, *Stop-and-Frisk in New York City*, N.Y. Times, Aug. 8, 2012, *available at* http://www.nytimes.com/2012/08/09/opinion/stop-and-frisk-in-new-york-city.html?ref=stopandfrisk&_r=0.

RECOMMENDATIONS

As discussed above, the high volume of stops, the overwhelming number of stops that do not result in an arrest or violation, and the disparate impact of the stops on people of color, all call into question whether a substantial percentage of the stops are being conducted in accordance with law as set forth above. That said, we recognize the impossibility of precisely ascertaining the percentage of legally valid, but fruitless, stops in which police have acted in good faith and with the requisite informational predicate. Because requests for information and the extended accusatory questioning permitted under *De Bour* levels one and two, respectively, are by definition fruitless, we acknowledge that many street encounters do not involve constitutionally suspect police conduct. Our concern is finding ways to ensure that all street encounters are conducted in accordance with the law. To this end, we offer the following practical recommendations to better ensure that officers who are sent out on the street understand the basics of street-encounter law consistent not only with their safety concerns but also with the individual liberty, dignity, and privacy interests of the persons stopped.

1. Improving Training

We recognize that the law governing street encounters, including the constitutional requirements and the levels set forth in *De Bour*, is complicated. We acknowledge the efforts the NYPD is making, as set forth in Commissioner Kelly's letter to Speaker Quinn noted above, to enhance training efforts. However, we are concerned that the training being provided may not be accurate or frequent enough, particularly for the newer officers. Our concerns were articulated by Judge Scheindlin in her recent decision in *Ligon.* For example, Judge Scheindlin found that the training video widely shown in police precincts misstates the law regarding what constitutes a *Terry* stop, for example by not employing the basic concept that the test for a *Terry* stop "is not the use of force: it is whether a 'reasonable person' would feel free "to disregard the police and go about his business."[72]

Training materials need to be improved and training needs to be reinforced, in a framework where officers can seek feedback about how to conduct the stops without disciplinary consequences. In addition, the training should include a sensitivity to community perspectives.

2. Measuring Performance

In recent years, the NYPD has relied increasingly on metrics to guide its activities. We are concerned that some of these metrics pressure officers to produce a high volume of stops without adequate focus on whether such stops are being conducted in a lawful manner. Meeting or exceeding the NYPD's performance goals is extremely important to any police officer's career, yet there do not appear to be any consequences for those whose stops are found to be un-

[72] *Ligon*, 2013 WL 628534, at *36. In addition, Judge Scheindlin opined, regarding a training video developed by the NYPD, that "[t]he Video is incorrect in its more general suggestion that an officer must deploy something resembling physical force or the threat of such force in order for an encounter to constitute a stop." *Id.*

constitutional or whose arrests cannot stand up in court. Although the NYPD has access to the results of all their arrests — such as whether the case was dismissed or, like many trespass cases, the District Attorney's Office declined to prosecute — historically it has not used this information for training or discipline purposes, and officers are not informed that the District Attorney's office would not prosecute their arrest, so that a pattern of inappropriate stops is not identified or employed as a teaching device to change a particular officer's conduct.[73]

NYPD Operations Order Number 52, dated October 17, 2011, expressly spells out a quantitative requirement of "proactive enforcement activities," for officers for each shift, including "the stopping and questioning of suspicious individuals."[74] Officers are required to keep a log of these activities, which is reviewed weekly, and at the end of every month supervisors complete a report "indicating the total activity for the month."[75] During performance evaluations, "a high degree of review and consideration will be given to member's daily efforts" at engaging in proactive enforcement activities in specific locations.[76] And "[u]informed members of the service who remain ineffective, who do not demonstrate activities impacting on identified crime and conditions, or who fail to engage in proactive activities, despite the existence of crime conditions and public safety concerns, will be evaluated accordingly and their assignments re-assessed."[77]

We question whether the number of stops is an appropriate criterion for performance assessment. Rather, we believe that criteria should be developed that measure performance by effectiveness. For example, we believe more focus should be placed on the "hit rate" of the stops, however defined, so that the results of the stops rather than just the number of stops are gauged.[78] Similarly, reprimanding officers for illegal or unlawful stops rather than for failing to meet performance incentives would encourage better policing and fewer constitutional abuses with no compromise in crime-fighting as, despite the high number of stops, only 6% result in an arrest and only 2% in the recovery of a weapon. We will not presume to make specific recommendations in this area,[79] but suspect that other ways can be developed and used to more effectively monitor officer performance and effectiveness.

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[73] We note that Commissioner Kelly, in his May 16, 2012 letter to Speaker Quinn, said "The Department is also in the process of developing a quantitative mechanism to identify officers who receive a baseline number of stop-related complaints in comparison to officers in similar assignments." This is a promising initiative and we urge the NYPD to report on the progress it has made in implementation, and on the approach it is taking.

[74] *See* NYPD Operations Order Number 52, *available at* http://www.nyclu.org/files/releases/NYPD_Operations_Order_52_10.27.11.pdf .

[75] *Id.* at 3.

[76] *Id.* at 5.

[77] *Id.*

[78] For an examination of the utility of using "hit rate" to evaluate police conduct in street encounters, *see* L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 Indiana L.J. 1143 (2012) [hereinafter Richardson, Police Efficiency].

[79] We acknowledge that there are justifications for police stops that do not result in arrests or seizure of contraband. The concern is that measuring the number and not the quality of the stops is an inappropriate emphasis.

3. Changing the UF-250 Forms and Procedure

Recent reports also revealed problems with the check-box UF-250 form that was adopted as part of the 2002 settlement. Police list "furtive movements" as the top reason for stopping and frisking someone. Because the UF-250 form permits officers to check this category without elaborating further, it is difficult to assess whether police had good reason to stop an individual. The New York Times reported that 44% of the time, the NYPD recorded a "furtive movement" as the basis for a stop. The next most commonly checked boxes are "Appears to be 'casing'" (28%) and "Other" (20%). Among the lowest percentage of boxes checked by police are "Apparent drug deal" (9.9%) and "Violent crime indication" (7.4%).[80] We believe that, at the least, police officers should be required to fill in the narrative box on the form to provide a meaningful description as to the reason for the stop, and this requirement should be enforced.[81] The term "furtive movements," for example, is so vague and subjective as to provide no sense at all of the activity on which a police officer acted. A narrative form is more useful in that it requires an officer to articulate exactly what the person did. Such a requirement would deter officers from making stops based on less than reasonable suspicion. In addition, it would make more meaningful the internal review of the UF-250 forms that is conducted by NYPD supervisors, and where relevant would facilitate judicial review. We note that an NYPD memorandum dated March 5, 2013 to "Commanding Officers, all Patrol Boroughs" requires that "the circumstances or factors of suspicion **must be elaborated** on in the **Additional Circumstances/Factors** sections of the '*Stop, Question and Frisk Report'* and *Activity Log* (i.e., if the Furtive Movements caption is checked off, then a description of that movement must be specified)." (emphasis in original).[82] This requirement, if properly supervised and enforced, should accomplish this result.

We commend the NYPD for the initiative stated in its May 16, 2012 letter to Council Speaker Quinn to provide greater scrutiny of the UF-250 forms by supervisors and we believe

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[80] The use of "furtive movements" as the sole criterion for a stop has been called into question by Judge Shira Scheindlin in her recent opinion in *Ligon:*

> [F]urtive movement" is a problematic basis for a trespass stop, especially when it is offered as a stand-alone justification. If an officer is unable to articulate *anything* more specific than that the person displayed "furtive movement," including anything *about* the person's furtive movement that suggested trespass, then the statement that the person displayed "furtive movement" is nothing more than an unparticularized suspicion or hunch, and does not constitute reasonable suspicion.

Ligon, 2013 WL 628534, at *42 (emphasis in original).

We understand that the current check-box UF-250 form was the result of the settlement in *Daniels*, but the plaintiffs in *Floyd* represented by the same organization are seeking to move away from the check-boxes and require officers to detail an articulable basis for their actions in any given stop-and-frisk, as the law requires.

[81] Billy Wharton, *Stop and Frisk Stats Place New York atop Civil Rights Violators,* Feb. 28, 2011, http://www.examiner.com/article/stop-and-frisk-stats-place-new-york-atop-civil-rights-violators.

[82] Memorandum produced in *Floyd v. City of New York* litigation, on file with the Association.

the NYPD should report to the public on its efforts and the results of those efforts. At the least there should be a high level monitor in each precinct to review the forms, plus City-wide analysis and coordination of the reviews.

4. Changing the Law re: Marijuana Possession

As previously noted, the NYPD's Operations Order Number 49 prohibits officers from charging individuals who publicly display small amounts of marijuana with misdemeanor possession when they have produced the marijuana in response to an officer's search or directive (see *supra*, at 13-14). Despite Operations Order Number 49, however, arrests for possession decreased only approximately 20% between 2011 and 2012. The problem should be addressed by amending the Penal Law. In pertinent part, P.L. § 221.10 currently provides that

> A person is guilty of criminal possession of marihuana in the fifth degree when he knowingly and unlawfully possesses: 1. marihuana in a public place, as defined in section 240.00 of this chapter, and such marihuana is burning or open to public view; or 2. one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than twenty-five grams.

We support striking the "or open to public view" provision, leaving the remainder of the section intact. This amendment would effectively end the practice and provide the requisite clarity to officers on the job. We note that Governor Cuomo and Mayor Bloomberg support decriminalizing possession of 25 grams or less of marijuana in public view.[83] The necessary fix would be a change in the law. The City Bar also supports striking subdivision (1) of P.L. § 221.10 entirely as part of a more comprehensive approach to addressing the problems inherent in a marijuana enforcement regime.

5. Consider Video Recording of Policy Stop-and-Frisk Activity

Police departments around the country regularly are videotaping interactions during vehicle stops. Police departments laud the benefits to the departments of this procedure.[84] Thought should be given to videotaping street encounters as well. While we recognize such stops are of a different nature than vehicle stops, the heavy use of patrol cars in making these stops could permit incorporation of video into the procedure as for highway stops. In addition, the technology exists for officers to wear video recording devices.[85] We acknowledge that there

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[83] Freeman Klopott, *Cuomo Seeks Decriminalization of Small Amounts of Marijuana*, June 4, 2012, http://www.bloomberg.com/news/2012-06-04/cuomo-said-to-seek-decriminalization-of-small-amounts-of-pot.html.

[84] Int'l Association of Chiefs of Police, *The Impact of Video Evidence on Modern Policing* (http://www.theiacp.org/LinkClick.aspx?fileticket=5k3IK9SZuz4%3D).

[85] *See* Randall Stross, *Wearing a Badge, and a Video Camera*, N.Y. Times, Apr. 6, 2013, *available a*t http://www.nytimes.com/2013/04/07/business/wearable-video-cameras-for-police-officers.html?_r=0; *see also* Richardson, Police Efficiency, *supra* note 78, n.193.

are operational issues to address, but believe a limited pilot project to test this procedure may be useful to the Department for evidentiary purposes and as a teaching tool. We believe official videotaping is particularly appropriate given the ease with which the public can and does videotape these encounters.

6. Providing Additional Oversight of NYPD

The pattern of stop-and-frisk policing has extended for over a decade and, despite recent changes by the NYPD, we remain concerned by the large numbers of people stopped who are determined to have done nothing wrong, and the racial disparity of stop-and-frisk practices. Similar concerns were raised in the 1990s, and the U.S. Commission on Civil Rights, in its August, 2000 report, recommended that there be established "an independent monitor to monitor the police in New York City…."[86] No such monitor was established at the time and, although the NYPD interacts with many law enforcement agencies, there is no specific monitor to review the workings of the NYPD. We believe this recommendation remains valid today, and even more so since the NYPD has taken on increased surveillance responsibilities — apparently unique among local police departments — in the aftermath of the September 11th attacks.

Two agencies have been established in the past 20 years to review police operations, the Civilian Complaint Review Board and the Commission to Combat Police Corruption. But both have limited responsibilities and cannot provide the extensive oversight and reporting capability of an overall monitor of the NYPD.[87]

We note there is proposed City Council legislation to establish an inspector general for the NYPD.[88] There are models for establishing inspector general or other departmental monitoring entities at the local, state and national levels. While we are not endorsing a particular approach in this report, we believe such a monitor would serve the important role of enhancing public confidence in the City's police force.

The use of an inspector general or other monitor is common in the federal government, as over 70 agencies have inspector generals, including the Departments of Defense, Justice and Homeland Security, and is also widely used at the State level. There is thus much experience to guide implementation. An inspector general or other monitor should have no authority to implement policy or discipline. However, such a monitor should have independent stature and

[86] US Comm. Civ. Rights, *Police Practices and Civil Rights in New York City*, Executive Summary (August 2000), *available at* http://www.usccr.gov/pubs/nypolice/exsum.htm.

[87] The Civilian Complaint Review Board, established in its current all-civilian form in 1993, is responsible for receiving, investigating and making findings regarding complaints of police misconduct involving use of force, abuse of authority, discourtesy or use of offensive language. City Charter Section 440; Rules of the Civilian Complaint Review Board, Section 1-02. The Commission to Combat Police Corruption, established in 1995 by Mayoral Executive Order 18, has a mandate to monitor the efforts of the NYPD "to gather information, investigate allegations, and implement policies designed to deter corruption." Neither has been equipped with the authority to conduct the extensive, systemic investigations that a monitor should undertake.

[88] City Council Intro 0881-2012.

should have reporting responsibilities to the Mayor and City Council and to the public, as well as to the NYPD.

CONCLUSION

The NYPD's stop-and-frisk policy has become one of the most divisive issues in the City. This report has examined the policy, presented the justifications and concerns regarding the policy and made recommendations that we believe will improve its implementation. Beyond those specific recommendations, we believe it essential that there be an ongoing dialogue between the NYPD and the affected communities specifically focused on the stop-and-frisk policy. We believe it is important for all those involved to go beyond the rhetoric and encourage communication, so that policies which balance the legitimate public safety and civil liberties concerns can be forged collectively in this ever-evolving City.[89]

May, 2013

[89] This report was approved by the following committees of the New York City Bar Association: Civil Rights, Criminal Courts, Criminal Justice Operations and Drugs and the Law.