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Stop-and-Frisk: Its Effect on African American Communities—A Tale of Three Cities

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Stop-and-Frisk: Its Effect on African American Communities—A Tale of Three Cities

Cover Page Footnote

I am thankful for the many comments that I received on this paper from colleagues and students.

STOP-AND-FRISK: ITS EFFECT ON AFRICAN AMERICAN COMMUNITIES—A TALE OF THREE CITIES

Russell L. Jones*

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Stop-and-frisk and the enmity that it has caused between police and African American communities did not begin with the Warren Court's ruling in *Terry v. Ohio*. Police officers have historically mistreated African Americans when conducting pre-arrest investigations.¹ However, *Terry* and its progeny have exacerbated what has become a major problem with policing in African American communities, and as noted by several scholars, the countless failures of *Terry v. Ohio* have contributed to consistent erosion of

* Jesse N. Stone, Jr., Endowed Professor of Law, Southern University Law Center. I am thankful for the many comments that I received on this paper from colleagues and students.

¹ See Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN.COM (July 27, 2017), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/>. See also Brief for the NAACP Legal Defense and Education Fund, Inc. as Amicus Curiae Supporting Petitioner at 62, *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67), 1967 WL 113672, at *62 ("It is no accident that many major riots suffered since 1964 have been sparked by a public confrontation between the police and Negroes. Regardless of the underlying factors which set the stage for riot or increase its likelihood, it is plain that police-community encounters have triggered outbreaks of group hostility"); HOWARD RAHTZ, RACE, RIOTS, AND THE POLICE 51 (Lynne Rienner Publishers, Inc. 2016); U.S. DEP'T OF JUST., PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE POLICE 184 (1967), <http://www.ncjrs.gov/pdffiles1/Digitization/147374NCJRS.pdf> ("Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street").

the Fourth Amendment.²

In "*Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling*," I criticized the *Terry* Court's failure to clearly define what constitutes a stop and how that failure has led to subsequent abuses of the *Terry* decision.³ This Article examines the other progeny of *Terry* and stop-and-frisk. It will demonstrate how the *Terry* Court's failure to place restrictions on police officers when implementing stop-and-frisks has given the officers unfettered authority to choose where and against whom the tactics will be used. This Article will scrutinize stop-and-frisk in three major cities: New York City, Philadelphia, and Chicago. It will illustrate how escalation of stop-and-frisk is a major factor that contributes to deepening distrust and dissension between African American communities and the police. This quandary poses the question of what can be done to improve police integrity among African Americans while simultaneously permitting police officers to constitutionally engage in pre-arrest investigations.

I. INTRODUCTION

Before the *Terry* decision, police officers believed that their efforts to deter criminal activity had been impeded by the exclusionary rule implemented in *Mapp v. Ohio*.⁴ In response to *Mapp*, police agencies increased their use of a pre-arrest field interrogation technique known as stop-question-and-search.⁵ They asserted that these interrogations were not arrests and that they did not violate the Fourth Amendment right against unreasonable searches and seizures.⁶ They argued that protecting society from potential crime is an essential component of police work.⁷ They also argued that when an officer acts within constitutional limits, he has the duty to investigate whenever the circumstances indicate to him that there are reasonable grounds requiring him to do so.⁸ The proponents of stop-question-

² See Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 427 (2004). See also Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1278 (1998).

³ See Russell L. Jones, *Terry v. Ohio: Its Failure, Immoral Progeny, and Racial Profiling*, 54 IDAHO L. REV. 511, 514 (2018).

⁴ 367 U.S. 643, 657 (1961).

⁵ PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-84 (1967), <https://www.ncjrs.gov/pdffiles1/Digitization/147374NCJRS.pdf>; see also LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 10-17 (1967); Wayne R. LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39, 42-43 (1968).

⁶ See Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320 (1942).

⁷ *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

⁸ Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio 10-11, *Terry v. Ohio* 392 U.S. 1 (1968) (No. 67), 1967 WL 113685, at *10-11. See also Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 433, 434 (1967) ("[T]he proponents claim that the power to forcibly stop and to search for self-protection, a power long and widely exercised by police, is necessary to prevent crime in a period of frighteningly rising crime rates and civil disorders; further, that the invasion of personal liberty entailed by such a detention and search is relatively minor, is constitutional because reasonable, and can be controlled by the courts and by effective

and-search further asserted that “[a] founded suspicion is all that is necessary, some basis from which the courts can determine that detention was not arbitrary or harassing.”⁹ It was their belief that a cursory frisk of the outer clothing is only a minor inconvenience and a petty intrusion upon the rights guaranteed by the Fourth Amendment.¹⁰ On the other hand, opponents believed that the full force of the Fourth Amendment was required to prevent the aggressive police tactics that were a major source of distrust and resentment of the police in minority communities.¹¹

The *Terry* Court had the difficult task of addressing whether probable cause should be the standard for temporary investigatory police detentions.¹² The Court’s solution had to balance law enforcement’s purported need for a mechanism less than probable cause, which could be used in temporary investigative stops, against citizens’ right to be free from abusive, unreasonable searches and seizures.¹³ More importantly, if stop-and-frisk was going to be allowed, a decision that would enhance minority citizens’ confidence in policing and the judicial system was imperative. Otherwise, police legitimacy would remain questionable, and crime detection and prevention would remain nominal in minority communities.

The Court chose to adopt a standard requiring reasonable suspicion for temporary investigatory searches and seizures.¹⁴ The standard required less proof for a search or seizure than the traditional probable cause requirement.¹⁵ Using the Reasonableness Clause of the Fourth Amendment, the Court held that a police officer, reasonably believing that criminal activity was afoot, could stop an individual for questioning, and if circumstances suggested that the person was armed and dangerous, the officer could conduct a cursory search for weapons.¹⁶ *Terry v. Ohio* and its progeny have become the catalyst for an uncontrolled use of stop-and-frisk to combat crime with little attention given to police abuse and its racist application. Stop-and-frisk cases following *Terry* have given police officers almost unfettered discretion

police administration. Opponents, on the other hand, dispute the need, the mildness of the affront, and the susceptibility to judicial control of such practices; they point to the evidence that such police tactics produce minority group resentment and hostility. Additionally, they deplore the abandonment of probable cause, the traditional constitutional standard necessary to deprive a person of his liberty, in favor of reasonable suspicion, which they find too vague.”).

⁹ Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio, *supra* note 8, at *16.

¹⁰ *Id.* at *16–17.

¹¹ See Brief for NAACP, *supra* note 1, at 61–62 (“We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk.”).

¹² See *Terry*, 392 U.S. at 4.

¹³ See *id.* at 9–11.

¹⁴ *Id.* at 21–22.

¹⁵ *Id.* at 22.

¹⁶ *Id.* at 30.

to stop, question, and frisk minority citizens.¹⁷

II. UNCONTROLLABLE ABUSE OF THE *TERRY* DECISION

In *Adams v. Williams*, the Court found that uncorroborated information from an informant that a person was in a “high crime area” at 2:15 a.m., was armed, and had drugs was a sufficient reason for the officer to fear for his safety.¹⁸ The *Adams* Court held that there were “enough indicia of reliability to justify the [police] officer’s forcible” search and seizure.¹⁹ Traditionally, locale alone is not enough for an officer to seize a person.²⁰ It appears that the Court in *Adams* took the position that “high crime area” combined with any information, whether verified or not, is enough reasonable suspicion for a *Terry* stop.²¹

In *United States v. Cortez*, the Court enunciated a two-part test to determine whether a stop met *Terry*’s reasonableness requirement.²² First, the totality of the circumstances known to the officer at the time of the encounter, including any inferences and deductions that a trained officer can draw from those circumstances, must be assessed.²³ This process is based on probabilities and is analyzed in terms “understood by those versed in the field of law enforcement.”²⁴ Second, considering the particularity requirement of *Terry*, the *Cortez* Court stated that the above process “must raise a suspicion that the particular individual being stopped is engaged in wrongdoing.”²⁵ Consequently, the Court’s decision gave little guidance to lower courts in determining the reasonableness of a stop. It erred in favor of police discretion. This has led to lower courts giving unusual deference to police discretion in stop-and-frisk cases and has further muddled the waters on reasonable suspicion.²⁶

The Court further lowered the threshold for reasonable suspicion in *Illinois v. Wardlow* when it held that unprovoked flight in a “high crime area”

¹⁷ See Erwin Chemerinsky, *Transcript of Keynote Speech: Terry v. Ohio at 50: The Past, Present, & Future of Stop and Frisk*, 54 IDAHO L. REV. 287, 287 (2018).

¹⁸ 407 U.S. 143, 147–48 (1972).

¹⁹ *Id.* at 144–45. In *Adams*, a police officer patrolling a “high crime area” at 2:15 a.m. was told by a source that a person in a nearby truck had narcotics and a gun. *Id.* When investigating the tip, the officer tapped on the window of the truck and asked the occupant to step outside of the truck. *Id.* at 145. As the occupant rolled the window down, the officer reached inside and retrieved a loaded revolver from his waistband. *Id.*

²⁰ *Brown v. Texas*, 443 U.S. 47, 52 (1979).

²¹ See *Adams*, 407 U.S. at 147–48. See also *U.S. v. Trullo*, 809 F.2d 108, 112 (1st Cir. 1987). In *Trullo*, Officers observed the appellant in a high crime area speak briefly on three separate occasions with a different man inside of his car. *Id.* at 109–10. The court held that there was reasonable suspicion for the officer’s stop of the appellant. *Id.* at 114. It found that in the officers’ judgment was that an illegal transaction was occurring, and it would defer to the officers’ judgment. *Id.*

²² 449 U.S. 411, 418 (1981).

²³ *Id.* at 418.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to Support Terry Stops*, 62 U. CHI. L. REV. 1161, 1183–84 (1995).

is reasonable suspicion for a stop.²⁷ These derogations of *Terry*'s reasonable suspicion requirement confirmed the fear of Justice Brennan "that the mere fact of our affirmance in [*Terry*] will be taken by the police all over the country as our license to them to carry on, indeed widely expand, present 'aggressive surveillance' techniques."²⁸ The Court gave police departments a powerful tool with little guidance on how it should be constitutionally applied.

III. STOP-AND-FRISK INCREASES AS VIOLENT CRIMES RISE

By the mid-2000s, crime in America became increasingly violent.²⁹ Urban areas in large cities particularly saw a rise in murders and other violent crimes that involved drugs, gang activity, and guns.³⁰ In response to the demand from politicians and community leaders to reduce crime, urban police departments implemented community-policing models and intensified the use of stop-and-frisk.³¹ For the most part, police departments concentrated their stop-and-frisk efforts in criminal "hot spots."³² These "hot spots," also referred to as "high crime areas," were densely populated minority and poor communities—in particular, urban African American neighborhoods.³³ The theory behind this strategy is that most crime is centrally located in small pockets of certain communities, and when police focus resources in those areas, crime prevention is a measurable occurrence.³⁴ This crime fighting strategy, combined with the powers given to police by *Terry*, through *Adams*, *Cortez*, and *Wardlow*, resulted in a disproportionate increase in African Americans being stopped and frisked.³⁵

²⁷ 528 U.S. 119, 124 (2000).

²⁸ John Q. Barrett, "Stop and Frisk" in 1968: *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court's Conference*, 72 ST. JOHN'S L. REV. 749, 825 (1998).

²⁹ See Fox Butterfield, *U.S. Crime Rate Rose 2% in 2001 After 10 Years of Decreases*, N.Y. TIMES (Oct. 29, 2002), <https://www.nytimes.com/2002/10/29/us/us-crime-rate-rose-2-in-2001-after-10-years-of-decreases.html>. See also NATHAN JAMES, CONG. RES. SERV., RECENT VIOLENT CRIME TRENDS IN THE U.S. 1 (2018), <https://fas.org/spp/crs/misc/R45236.pdf>.

³⁰ See Butterfield, *supra* note 29.

³¹ See Dennis C. Smith, *Stop and Frisk Has Lowered Crime in Other Cities*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/stop-and-frisk-has-lowered-crime-in-other-cities> (last updated July 19, 2012, 2:03 PM).

³² See Lawrence W. Sherman & David Weisburd, *General Deterrent Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial*, 12 JUST. Q. 625, 630 (1995). See also Anthony Braga, Andrew Papachristos & David Hureau, *Hot Spots Policing Effects on Crime*, 8 CAMPBELL SYSTEMATIC REVIEWS 1, 8 (2012), <https://onlinelibrary.wiley.com/doi/pdf/10.4073/csr.2012.8>.

³³ Sherman and Weisburd, *supra* note 32, at 630; see Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 480, 481 (2004).

³⁴ *Id.* at 629.

³⁵ See generally 528 U.S. 119 (2000); 449 U.S. 411 (1981); 407 U.S. 143 (1972); 392 U.S. 1 (1968). See also *Cortez*, 449 U.S. at 417–18 (holding that the reasonable suspicion assessment is based on "all of the circumstances."). In *Cortez*, the Court stated:

The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person. . . . Finally, the evidence thus collected must be seen and weighed

A. New York City

The foremost exploitation of stop-and-frisk is best documented in New York City. Like most urban areas, New York City saw an increase in violent crimes in the late 1980s.³⁶ For example, “[i]n 1980 the [national homicide] rate peaked at 10.2 per 100,000 [people] and subsequently fell to 7.9 per 100,000 [people] in 1984.”³⁷ However, in the late 1980s and early 1990s, the national homicide rate rose again with “another peak in 1991 of 9.8 [homicides] per 100,000 [people].”³⁸ National homicide rates “reached an all-time high of 24,703 homicides in 1991.”³⁹ For comparison, in 1989, New York City reported 1,905 murders, and “a 22 percent increase in the homicide rate in the first three months of 1990.”⁴⁰

The violent crime problem was attributed mainly to the ready availability of powerful handguns, drugs (particularly crack cocaine), and gangs.⁴¹ In a 1982 article published in the *Atlantic*, criminologists George Kelling and James Wilson found that social “disorder and crime are usually inextricably linked.”⁴² Their research indicated that neighborhoods that are “uncared for” are havens for criminal conduct.⁴³ It suggested that addressing small social problems, such as graffiti, public drunkenness, illegal drug use, prostitution, and loitering could eventually prevent greater crimes.⁴⁴

As New York City began experiencing increased crime and disorder in its subway system, William Bratton was appointed chief of the New York Transit Authority.⁴⁵ Chief Bratton sought the assistance of George Kelling to help him develop an enforcement strategy to combat crime in the subway. The two developed a policing system based on Kelling’s “broken windows” theory.⁴⁶ As arrests for low-level crimes, such as turnstile jumping, increased in the subway system, the number of violent crimes decreased.⁴⁷

not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Id. at 418 (emphasis added).

³⁶ See Michael D. Hinds, *Number of Killings Soars in Big Cities Across U.S.*, N.Y. TIMES (July 18, 1990), <https://www.nytimes.com/1990/07/18/us/number-of-killings-soars-in-big-cities-across-us.html>.

³⁷ U.S. DEP’T. OF JUST., OFF. OF JUST. PROGRAMS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008 2 (2011) <https://www.bjs.gov/content/pub/pdf/htus8008.pdf>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Hinds, *supra* note 36.

⁴¹ See Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 306, 313–15, 323 (2010).

⁴² George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465/?single_page=true.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Henry F. Fradella & Michael D. White, *Reforming Stop-and-Frisk*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y. 45, 49 (2017).

⁴⁶ *Id.* The “broken windows” criminological theory stands for the idea that if signs of crime or other anti-social behavior (e.g., broken windows) are visible and left unattended in a particular area, then that will lead to more serious crimes occurring in that area. See Kelling & James, *supra* note 42.

⁴⁷ Fradella & White, *supra* note 45.

In 1993, Rudy Giuliani was elected mayor of New York City, and he appointed Bratton as commissioner of the police department.⁴⁸ Bratton designed two policy initiatives that defined New York Police Department's crime fighting efforts.⁴⁹ The first initiative, "Reclaiming the Public Spaces of New York," was based on the "broken windows" strategy that he and Kelling had developed for the New York City subway system.⁵⁰ Second, "Getting Guns Off the Streets of New York" was an initiative designed to reduce violent crimes by taking illegal guns out of the hands of those most likely to commit crimes.⁵¹ Additionally, Bratton created a data-driven performance measurement system to track crime statistics and to have officers respond to those statistics.⁵² The system became known as Compstat.⁵³

The Compstat data focused the department's enforcement efforts on statistical "hot spots," invariably New York City's African American communities.⁵⁴ These provinces supposedly exhibited significant variables related to the "broken windows" theory.⁵⁵ The new initiatives "tasked the [New York Police Department's (NYPD)] Street Crimes Unit [(SCU)] with gun removal in high crime areas and instructed it to use stop[-]and[-]frisk liberally in the search for weapons."⁵⁶ Under these new policies, there was an exponential increase in the number of minorities who were stopped to investigate minor drug and public-order offenses.⁵⁷ The stops were aggressive and statistics suggested that police officers targeted African

⁴⁸ Alison Mitchell, *Giuliani Appoints Bostonian to Run New York's Police*, N.Y. TIMES (Dec. 3, 1993), <https://www.nytimes.com/1993/12/03/nyregion/giuliani-appoints-bostonian-to-run-new-york-s-police.html>.

⁴⁹ ELIOT SPITZER, N.Y. ST. OFF. OF THE ATT'Y. GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 52–53 (1999), https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/stp_frisk.pdf.

⁵⁰ See CITY OF N.Y. POLICE DEP'T, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 4–5 (1994), <http://marijuana-arrests.com/docs/Bratton-blueprint-1994--Reclaiming-the-public-spaces-of-NY.pdf>. See also Michael D. White, *The New York City Police Department, Its Crime Control Strategies and Organizational Changes, 1970-2009*, 16–24 (Aug. 2011), <http://johnjay.jjay.cuny.edu/files/White.pdf>.

⁵¹ See SPITZER, *supra* note 49, at 52–53.

⁵² BUREAU OF JUST. ASSISTANCE, POLICE EXECUTIVE RES. FORUM, COMPSTAT: ITS ORIGIN, EVOLUTION AND FUTURE IN LAW ENFORCEMENT AGENCIES 3 (2013), <https://www.bja.gov/publications/perf-compstat.pdf>.

⁵³ *Id.* at 2 ("Compstat emphasizes information-sharing, responsibility and accountability, and improving effectiveness. It includes four generally recognized core components: (1) Timely and accurate information or intelligence; (2) Rapid deployment of resources; (3) Effective tactics; and (4) Relentless follow-up.").

⁵⁴ See *id.* at 24.

⁵⁵ See Lauren Kirchner, *Breaking Down the Broken Windows Theory: As Rudy Giuliani's Old Police Commissioner William Bratton Returns to New York City, New Research Still Fuels a Debate over their Pet Policy*, PACIFIC STANDARD (Jan. 7, 2014), <https://psmag.com/news/breaking-broken-windows-theory-72310>.

⁵⁶ Colin Lubelczyk, *Crime Control, Civil Liberties, and Policy Implementation: An Analysis of the New York City Police Department's Stop and Frisk Program 1994-2013* (Apr. 23, 2014) (unpublished B.A. thesis, Haverford College) (on file with the author and the University of Dayton Law Review).

⁵⁷ See David Keenan & Tina M. Thomas, *An Offense-Severity Model for Stop-And-Frisks*, 123 YALE L.J. 1448, 1459–60 (2014).

American and Hispanic American youth.⁵⁸

The violent crime rates in New York City dropped after Bratton implemented his policies.⁵⁹ It was reported that there were 1,561 murders in the city in 1994, 400 less than 1993.⁶⁰ In 1998, murders had dropped to a low of 633.⁶¹ Additionally, between 1993 and 1996, there was a 36% reduction in the violent crime rate and a 50% reduction in the homicide rate.⁶² Bratton touted the success of the new stop-and-frisk policies of the NYPD as the major contributor to the reduction in violent crime.⁶³ He lauded that crime was down and that police officers were performing their required duties.⁶⁴ He further commented: “[b]roken-windows, and make no mistake about it, is essential to the safety of this city. It’s a large part of what brought this city back in the first place.”⁶⁵

As stop-and-frisks increased in New York City, so did citizen complaints about the aggressive implementation of the tactics and its overuse in minority communities.⁶⁶ The disparate and aggressive utilization of stop-and-frisk by the NYPD against minorities resulted in two major lawsuits being filed against the City and its police department: *Daniels v. City of New York* and *Floyd v. City of New York*.⁶⁷

In 1999, the Center for Constitutional Rights (“CCR”) filed a class action suit challenging the NYPD’s policy of conducting stop-and-frisk in violation of the Fourth Amendment.⁶⁸ The suit also alleged that officers selectively targeted individuals on the basis of their race and national origin in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶⁹

⁵⁸ See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 574 (S.D.N.Y. 2013); Carol S. Steiker, Terry Unbound, 82 Miss. L.J. 329, 330–31 (2013). See also Wendy Ruderman, *Rude or Polite, City’s Officers Leave Raw Feelings in Stops*, N.Y. TIMES (June 27, 2012), <https://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html>. “Most of the time, the officers swoop in, hornet like, with a command to stop: ‘Yo! You, come here. Get against the wall.’” *Id.* Many of those stopped described aggressive or hostile attitudes by the police. *Id.*

⁵⁹ Albert Samaha, *The Rise and Fall of Crime in New York City: A Timeline*, VILLAGE VOICE (Aug. 7, 2014), <https://www.villagevoice.com/2014/08/07/the-rise-and-fall-of-crime-in-new-york-city-a-time-line/>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² David Brereton, *Zero Tolerance and the NYPD: Has It Worked There and Will It Work Here?*, QUEENSLAND CRIM. JUST. COMM’N 5 (1999), https://www.researchgate.net/publication/237824012_ZERO_TOLERANCE_AND_THE_NYPD_HAS_IT_WORKED_THERE_AND_WILL_IT_WORK_HERE.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Jillian Jorgensen, *Bratton Touts Drop in Crime But Acknowledges Growing Anger at NYPD*, OBSERVER (Dec. 9, 2014, 11:31 AM), <https://observer.com/2014/12/bratton-touts-drop-in-crime-but-acknowledges-growing-anger-at-nypd/>.

⁶⁶ See Delores Jones-Brown et al., *Stop, Question & Frisk Policing Practices in New York City: A Primer* 13 (John Jay C. of Crim. Just., 2010), https://static.prisonpolicy.org/scans/PRIMER_electronic_version.pdf. See also SPITZER, *supra* note 49, at 4.

⁶⁷ See generally 959 F. Supp. 2d 540 (S.D.N.Y. 2013); No. 99 CIV 1695, 2001 U.S. Dist. LEXIS 2312 (S.D.N.Y. Mar. 8, 2001).

⁶⁸ See *Daniels*, 2001 U.S. Dist. LEXIS 2312, at *1–2.

⁶⁹ *Id.*

Of particular concern to the CCR was the killing of Amadou Diallo by four members of the NYPD's SCU, an elite commando unit of about 400 officers.⁷⁰ The death of Diallo ignited citywide rage and demonstrations over aggressive police tactics.⁷¹

The CCR and NYPD reached an agreement in 2003, and the City agreed to settle the case.⁷² A consent decree, approved by Judge Shira A. Scheindlin, required the NYPD to maintain a written policy regarding racial or national/ethnic profiling that complied with the United States and New York State Constitutions.⁷³ The NYPD was also required to provide annual in-service training to all officers on its racial profiling policy.⁷⁴ The consent decree further provided that the NYPD must continue to audit all officers who engage in stop-and-frisks, and their supervisors, to determine whether and to what extent the stop-and-frisks are based on reasonable suspicion.⁷⁵ The settlement also required all stop-and-frisks to be documented.⁷⁶ The results of these audits were to be provided to CCR on a quarterly basis.⁷⁷

After the *Daniels* consent decree, stop-and-frisks in New York City increased, and the disparities that initiated the case still existed.⁷⁸ Minorities were being stopped at a much greater rate than White citizens, and many of the stops produced no contraband or criminal activity.⁷⁹ Disturbed with the failure of *Daniels* to improve the abuse and misuse of stop-and-frisk against minorities, CCR filed another class action suit: *Floyd v. City of New York*.⁸⁰

In *Floyd*, several New York City citizens alleged that the NYPD practiced racial profiling when conducting investigatory detentions in violation of the Fourth and Fourteenth Amendments to the United States Constitution.⁸¹ Judge Scheindlin, who also presided over the *Daniels* suit, in a lengthy and well-developed opinion, found that New York City officials had been deliberately indifferent to an unconstitutional policing policy that (1) permitted stop-and-frisks to be made on less than reasonable suspicion and (2) utilized widespread practices that targeted Blacks and Hispanics for

⁷⁰ See Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES (Feb. 5, 1999), <https://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html>; David Kocieniewski, *The Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES (Feb. 15, 1999), <https://www.nytimes.com/1999/02/15/nyregion/success-of-elite-police-unit-exacts-a-toll-on-the-streets.html>.

⁷¹ See Sources: *Four NYPD Officers Indicted in Diallo Shooting*, CNN (Mar. 25, 1999, 7:14 PM), <http://edition.cnn.com/US/9903/25/diallo.protest.02/index.html>.

⁷² See generally Stipulation of Settlement, *Daniels v. City of New York*, No. 99 CIV 1695, 2001 U.S. Dist. LEXIS 2312 (S.D.N.Y. Mar. 8, 2001) (No. 99 Civ. 169).

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 6.

⁷⁵ *Id.*

⁷⁶ *Id.* at 8.

⁷⁷ *Id.* at 9.

⁷⁸ See SPITZER, *supra* note 49, at 93.

⁷⁹ *Id.* at 117–19.

⁸⁰ See generally 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁸¹ *Id.* at 569–74.

stops.⁸²

Judge Scheindlin's analysis of the evidence revealed that, regardless of the racial composition of a geographic area, Blacks and Hispanics were more likely to be stopped.⁸³ Once stopped, Blacks were 30% more likely than Whites to be arrested.⁸⁴ Minorities were 9 to 14% more likely to be subjected to the use of force.⁸⁵ She also found that the hit rate for Blacks, as measured by the issuance of a summons or an arrest, was 8% lower than for White suspects.⁸⁶ This evidence demonstrates that minorities were targeted for stops based on a lesser degree of suspicion.⁸⁷ Judge Scheindlin also found evidence that officers were encouraged to make stops based on racial characteristics or stereotypes to target young Blacks and Hispanics.⁸⁸

Judge Scheindlin found that NYPD officers used a combination of variables, such as race, "high crime areas," and the suspect's demeanor to justify their stops.⁸⁹ However, it appears that race and factors related to race, such as "high crime areas," were controlling when determining who should be detained.⁹⁰ Officers used these discretionary factors to suggest reasonable suspicion although all other factors in the case were innocent activities.⁹¹

The Aftermath of *Floyd*

Judge Scheindlin opined that the City had illegally detained and frisked minority residents on the streets over many years.⁹² In a "Remedies Opinion" to *Floyd*, she ordered several measures designed to give guidance to New York City police officers when conducting investigatory stops and to improve police and community relations.⁹³ A Second Circuit panel stayed Judge Scheindlin's order pending an appeal by the City.⁹⁴ The panel found

⁸² *Id.* at 658–60.

⁸³ *Id.* at 661.

⁸⁴ *Id.* at 560.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 602–03.

⁸⁹ *Id.* at 603–04.

⁹⁰ *Id.* at 589.

⁹¹ *Id.* at 603–04.

⁹² *Id.* at 562–63.

⁹³ See generally *id.* Among those measures were: (1) she appointed an independent monitor to oversee the reform process; (2) the New York Police Department should revise its policies and training regarding stop and frisk to adhere to constitutional standards; (3) the New York Police Department should revise its policies and training regarding racial profiling to make clear that targeting the "right people" for stops is a form of racial profiling and violates the Constitution; (4) the department will provide standards for what constitutes a stop, when a stop may be conducted, when a frisk may be conducted, and when a search into clothing or into any object found during a search may be conducted; (5) all uniformed officers are required to provide narrative descriptions of stops in their activity logs; (6) the department is to develop an improved system for monitoring, supervision, and discipline officers; and (7) body cameras are to be worn as a part of a pilot program involving at least one precinct in each borough. *Id.*

⁹⁴ *Ligon v. City of New York*, 736 F.3d 118, 130 (2d Cir. 2013).

that Judge Scheindlin had compromised the appearance of impartiality.⁹⁵ The Second Circuit then remanded the case with orders that Judge Scheindlin be removed from the case and a new judge appointed.⁹⁶ Consequently, Bill de Blasio was elected mayor of New York City, and the new administration filed a motion for remand to allow the parties to discuss settlement.⁹⁷ The motion was granted.⁹⁸ After much wrangling in the court, the City and NYPD finally settled and moved forward to institute reform.⁹⁹

The reforms have produced a drop in the rate of unlawful stop-and-frisks.¹⁰⁰ However, despite the decrease in stop-and-frisks, African Americans are still detained more than other groups.¹⁰¹ A quarterly report done by New York Civil Liberties Union revealed that in 2016 the NYPD stopped 12,404 people, approximately 10,000 fewer than 2015.¹⁰² It also revealed that 9,394 of the people stopped were totally innocent (76%), 6,498 were Black (52%), 3,626 were Latino (29%), and 1,270 were White (10%).¹⁰³ In 2017, there were 10,861 stops.¹⁰⁴ Of these stops, 7,301 people were totally innocent, 6,277 were Black (58%), 3,427 were Latino (32%) and 947 were White (9%).¹⁰⁵ In the first half of 2018, 5,064 stops were conducted by the NYPD.¹⁰⁶ Of these stops, 3,465 were innocent, 2,924 were Black (58%), 1,572 were Latino (31%), and 445 were White (9%).¹⁰⁷ The Independent Monitor's Report of Stops in 2013-2015 found that "Blacks and Hispanics were more likely than Whites to be stopped on suspicion of weapons possession, trespass offenses[,] and violent crimes"¹⁰⁸ The Monitor's Report also found that there was a direct correlation between higher stop rates and communities that were either Black or Hispanic.¹⁰⁹ Blacks were also

⁹⁵ *Id.* at 131.

⁹⁶ *Id.* at 128-30.

⁹⁷ Stephanie Francis Ward, *NYC Proposes Settlement in Stop-and-Frisk Cases; Police Union Has 'Serious Concerns'*, ABA JOURNAL (Jan. 30, 2014, 11:28 PM), https://www.abajournal.com/news/article/nyc_says_it_has_proposed_stop-and-frisk_settlement_while_police_union_expre.

⁹⁸ *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014).

⁹⁹ *Mayor de Blasio Announces Agreement in Landmark Stop-And-Frisk Case*, NYC (Jan. 30, 2014), <https://www1.nyc.gov/office-of-the-mayor/news/726-14/mayor-de-blasio-agreement-landmark-stop-and-frisk-case#0>.

¹⁰⁰ See Azi Paybarah, Brendan Cheney & Colby Hamilton, *De Blasio on Stop-and-Frisk: 'We Changed It Intensely'*, POLITICO (Dec. 8, 2016, 5:36 AM), www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886.

¹⁰¹ *Id.*

¹⁰² *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <https://web.archive.org/web/20181221020410/https://www.nyclu.org/en/stop-and-frisk-data> (last visited July 1, 2020).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Austin Fenner & Shant Shahrigan, *Michael Bloomberg Apologizes for Stop-and-Frisk Policy While He Was NYC Mayor: 'I Was Wrong'*, N.Y. DAILY NEWS (Nov. 17, 2019), <https://www.nydailynews.com/news/politics/ny-michael-bloomberg-brooklyn-church-20191117-trllmkiv6reybkqar55gyt6noe-story.html>.

¹⁰⁷ *Stop-and-Frisk Data*, *supra* note 102.

¹⁰⁸ Peter L. Zimroth, *Analysis of NYPD Stops Reported, 2013-2015 2* (Independent Monitor, Fifth Report, May 30, 2014), <https://ccrjustice.org/sites/default/files/attach/2017/06/Monitor%27s%20%2030%202017%20Report%20to%20Court%20on%202013-15%20SQF%20Data%20Analysis.pdf>.

¹⁰⁹ *Id.* at 4.

subjected to the use of force more often than Whites.¹¹⁰

Some predicted that crime would rise in New York City as stop-and-frisks decreased.¹¹¹ After Judge Scheindlin issued the order to reform New York City's stop-and-frisk policies, Mayor Michael Bloomberg planned to appeal the order.¹¹² He stated that he hoped the appeal would delay the order until he left office "because [he] . . . wouldn't want to be responsible for a lot of people dying."¹¹³ In an op-ed article published in the Wall Street Journal, Ray Kelly, police commissioner during the height of stop-and-frisk, strongly supported the practice and credited it for saving thousands of lives.¹¹⁴ However, as stop-and-frisks declined, murder rates have also declined.¹¹⁵ The largest decline in murders occurred in 2013, "precisely when the number of stops also fell by a large amount."¹¹⁶

B. Philadelphia

Philadelphia, a city with a population of 1.459 million people, had 406 homicides in 2006, making it the highest murder rate per capita among big cities.¹¹⁷ In 2008, Michael Nutter, in his inaugural speech as the new mayor of Philadelphia, set an ambitious goal to lower the city's homicide rate by 30 to 50% within three to five years.¹¹⁸ In his first executive order, Mayor Nutter declared a "Crime Emergency."¹¹⁹ The executive order directed the new police commissioner, Charles H. Ramsey, "to make an immediate inquiry into the situation . . . and present to the Mayor by January 30, 2008 a comprehensive plan to address and alleviate the Crime Emergency."¹²⁰ In response to Mayor Nutter's mandate, Commissioner Ramsey developed the Philadelphia Police Department's ("PPD") Crime Fighting Strategy.¹²¹ The Strategy outlined an Action Plan containing four major objectives or

¹¹⁰ *Id.* at 5.

¹¹¹ See James Cullen, *Ending New York's Stop-and-Frisk Did Not Increase Crime*, BRENNAN CTR. FOR JUST. (Apr. 11, 2016), <https://www.brennancenter.org/blog/ending-new-yorks-stop-and-frisk-did-not-increase-crime>.

¹¹² See Jason Hanna, *Judge Rules NYC Stop-and-Frisk Policy Unconstitutional; City Vows Appeal*, CNN (Aug. 12, 2013, 7:39 PM), <https://www.cnn.com/2013/08/12/justice/new-york-stop-frisk>.

¹¹³ *Id.*

¹¹⁴ Ray Kelly, *Ray Kelly: The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J. (July 22, 2013, 7:14 PM), <https://www.wsj.com/articles/SB10001424127887324448104578616333588719320>.

¹¹⁵ See James Cullen & Ames Grawert, *Fact Sheet: Stop and Frisk's Effect on Crime in New York City*, BRENNAN CTR. FOR JUST. (Oct. 7, 2016), <https://www.brennancenter.org/analysis/fact-sheet-stop-and-frisks-effect-crime-new-york-city>.

¹¹⁶ *Id.*

¹¹⁷ See *Pennsylvania*, U.S. DEP'T OF JUST., 2006 CRIME IN THE U.S., https://www2.fbi.gov/ucr/cius2006/data/table_08_pa.html (last visited July 1, 2020).

¹¹⁸ See *New Philly Mayor: 'We Are Taking' Back City*, NBC NEWS (Jan. 7, 2008, 3:09 PM), http://www.nbcnews.com/id/22542106/ns/us_news-life/t/new-philly-mayor-we-are-taking-back-city/#.XCeuZy2ZNn4.

¹¹⁹ Relating to Declaration of a Crime Emergency, Phila. Exec. Order No. 1-08 (Jan. 7, 2008), https://www.phila.gov/ExecutiveOrders/Executive%20Orders/2008_EO01-08.pdf.

¹²⁰ *Id.*

¹²¹ See generally CHARLES RAMSEY, PHILA. POLICE DEP'T, CRIME FIGHTING STRATEGY (2008), <https://www.phillypolice.com/assets/crime-maps-stats/ppd-cfs.pdf>.

strategies: (1) Intelligent Policing Strategies; (2) Collaboration Strategies; (3) Prevention Strategies; and (4) Continuing Improvement Strategies.¹²² Among many other action plans, the Strategy called for “hot spot” policing in nine districts where violent crime rates were the highest, monitoring of high risk offenders, increasing penalties for gun crimes, and “immediately implement[ing] city wide aggressive, proven tactics, such as, but not limited to; lawful stop[-]and[-]frisk tactics.”¹²³ As a result, more officers were placed in crime “hot spots,” and stop-and-frisk was used to target people suspected of carrying illegal guns.¹²⁴ Two years after the PPD implemented its crime fighting policies, the homicide rate in Philadelphia decreased by approximately 8%: from 333 in 2008; to 305 in 2009; and 306 in 2010.¹²⁵ It was one of the city’s lowest homicide rates since 2002.¹²⁶

However, as stop-and-frisk increased, the harassment and disrespect of citizens in African American neighborhoods increased.¹²⁷ Black men in their own communities became suspects of crime.¹²⁸ They were stopped, questioned, and frisked without any articulable facts that suggested criminal activity—only to be released in humiliation by the incident.¹²⁹ Stop-and-frisk was on the rise in Philadelphia and so were the resentment and disdain of African American communities.¹³⁰ In 2009, Philadelphians were stopped 253,333 times.¹³¹ Of these stops, “over 183,000, or 72.2%, were [] African[] Americans, who make up 44% of the population of Philadelphia. Only 8.4% of the 253,333 stops led to an arrest.”¹³² The racial application of the stop-and-frisk policy prompted a lawsuit that resulted in a consent decree to repair its damaging effect.

Bailey et al. v. The City of Philadelphia

Eight African American males filed suit in the case of *Bailey et al. v. The City of Philadelphia*, claiming that the city’s stop-and-frisk policy was racially motivated.¹³³ The suit alleged that city police officers had illegally

¹²² *Id.* at 11–19.

¹²³ *Id.* at 11.

¹²⁴ *Id.*

¹²⁵ *Philadelphia Homicides 1988-2017*, INQUIRER, <http://data.philly.com/philly/crime/homicides/> (last visited July 1, 2020).

¹²⁶ *Id.*

¹²⁷ See Josh Saul, *America Has a Stop-and-Frisk Problem. Just Look at Philadelphia*, NEWSWEEK (May 18, 2016, 6:00 AM), <https://www.newsweek.com/2016/06/10/stop-and-frisk-philadelphia-crisis-refo-rm-police-460951.html>.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ Lance Hannon, *An Exploratory Multilevel Analysis of Pedestrian Frisks in Philadelphia*, 10 RACE & JUST. 87, 90 (2020).

¹³¹ *ACLU-PA and Civil Rights Firm File Class Action Lawsuit Against Philadelphia Police Department for Racial Profiling*, ACLU PA. (Nov. 4, 2010), <https://www.aclupa.org/news/2010/11/04/aclu-pa-and-civil-rights-firm-file-class-action-lawsuit-against-philadelphia-police-department-for-racial-profiling>.

¹³² *Id.*

¹³³ Complaint at 2–3, 5, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. Nov. 4, 2010),

stopped and searched thousands of African American and Latino males, solely because of their race, in violation of the Fourth and Fourteenth Amendments to the United States Constitution.¹³⁴ Lead plaintiffs in the suit included Pennsylvania Legislator Jewell Williams and attorney Mahari Bailey.¹³⁵

Legislator Jewell Williams, while on his way home from an errand, noticed that three Philadelphia police officers had stopped and searched two elderly African American men.¹³⁶ Money from the pocket of one of the stopped men fluttered in the wind and went into the street, and onlookers raced to pick it up.¹³⁷ Williams yelled at the onlookers to leave the man's money alone.¹³⁸ Angry, the police officers handcuffed the two men and placed them in the back of their cruiser, only to release them a half block from the stop.¹³⁹ Neither of the men were arrested.¹⁴⁰ Williams was ordered to get back into his car.¹⁴¹ When Williams told the police officers that he wanted to speak to their superior, he was handcuffed and shoved into the back of the police car.¹⁴² He was taken to the station and eventually released several hours later without being charged for any crime.¹⁴³

Attorney Mahari Bailey recounts being stopped four times in about eighteen months.¹⁴⁴ In a particular instance, Bailey stated that he was standing outside a home with friends when two plainclothes policemen pulled up and, with guns drawn, told them to put their hands up.¹⁴⁵ He was handcuffed and placed spread-eagle against the police car.¹⁴⁶ He was released without being arrested.¹⁴⁷

It was these and similar stops that initiated the lawsuit in *Bailey*.¹⁴⁸ The parties, in a settlement agreement, "recognize[d] the need for (1) diligent law enforcement in the City of Philadelphia, (2) the proper use and implementation of stop[-]and[-]frisk practices and policies as instrumental in

<https://www.clearinghouse.net/chDocs/public/PN-PA-0013-0001.pdf>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See Saul, *supra* note 127.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Tim Hull, *Class Claims Philadelphia Cops Target Black & Latino Men for Stop & Frisks*, COURTHOUSE NEWS SERV. (Nov. 8, 2010), <https://www.courthousenews.com/class-claims-philadelphia-cops-targetblack-latino-men-for-stop-frisks/>.

¹⁴⁵ Erica Goode, *Philadelphia Defends Policy on Frisking, With Limits*, N.Y. TIMES (July 11, 2012), <https://www.nytimes.com/2012/07/12/us/stop-and-frisk-controls-praised-in-philadelphia.html>.

¹⁴⁶ *Id.*

¹⁴⁷ See *id.*

¹⁴⁸ See Settlement Agreement, Class Certification, and Consent Decree at 1, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. June 21, 2011), <https://www.clearinghouse.net/chDocs/public/PN-PA-0013-0002.pdf>.

legitimate police practices, and (3) compliance with the requirements and mandates of the Fourth and Fourteenth Amendments to the United States Constitution and to Article I, Sections 1 and 8 of the Pennsylvania Constitution.”¹⁴⁹ On June 21, 2011, United States District Court Judge Stewart Dalzell entered an order accepting the settlement agreement and consent decree between the parties and appointed a Monitor.¹⁵⁰ In the consent decree, the City agreed to develop an electronic database that would allow them to access information and analyze the legality of the stops and frisks.¹⁵¹ Further, the City agreed to train PPD officers on their responsibilities to record all relevant information for each stop-and-frisk.¹⁵² The consent decree provided that the Plaintiffs and the City would review current PPD training, supervision, and discipline policies to determine whether stop-and-frisks met the requirements of the law.¹⁵³ The Plaintiffs were to report to the Court the results of periodic reviews of stop data.¹⁵⁴

The Aftermath of the *Bailey* Consent Agreement

There was some progress in the number of stop-and-frisks after the *Bailey* consent decree. The number of pedestrian stops declined from 253,000 in 2009 to 215,000 in 2012.¹⁵⁵ But stop-and-frisks were still relatively numerous in Philadelphia, and African Americans were stopped at a greater rate than any other race or ethnic group.¹⁵⁶ The Plaintiffs’ First Report to the Court and Monitor, filed on February 6, 2012, analyzed stop-and-frisks for the first two quarters of 2011.¹⁵⁷ It showed that over 50% of stop-and-frisks were undertaken without reasonable suspicion.¹⁵⁸ The Second Report filed by the Plaintiffs showed that there was a continued high rate of stop-and-frisks done without reasonable suspicion, with over 40% in each category.¹⁵⁹

The Plaintiffs’ Eighth Report to the Court and Monitor focused on the racial disparities in stop-and-frisk practices from January to June 2017.¹⁶⁰ A regression analysis, conducted by Plaintiffs’ expert Professor David Abrams, found that African Americans experienced a higher rate of stop-and-

¹⁴⁹ *Id.* at 2.

¹⁵⁰ *Id.* at 5.

¹⁵¹ *Id.* at 6.

¹⁵² *Id.* at 4.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See Plaintiff’s Third Report to Court and Monitor on Stop and Frisk Practices at 4, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. Mar. 19, 2013), <https://www.clearinghouse.net/chDocs/public/PN-PA-0013-0008.pdf>.

¹⁵⁶ *Id.* at 4–5, 12.

¹⁵⁷ See *id.* at 1 (citing to Plaintiff’s First Report to the Court and Monitor).

¹⁵⁸ *Id.*

¹⁵⁹ See *id.* at 4–6 (citing to Plaintiff’s Second Report to the Court and Monitor).

¹⁶⁰ See Plaintiff’s Eighth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues at 12–13, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. Dec. 7, 2017), https://www.aclupa.org/sites/default/files/field_documents/bailey_eighth_report_12-7-17_.pdf.

frisks than other races or ethnic groups.¹⁶¹ Controlling for population in police service areas (“PSAs”) did not significantly affect the high rate at which African Americans were stopped.¹⁶² “In *all but five* PSAs, Blacks account for a higher share of stops than they do of the population . . . in several PSA[s], they are stopped at a rate over five times their share of the population.”¹⁶³ Further, after controlling for the effect that crime rates, age, and employment might have on the data collected on stops, it was found that there was no “substantial impact on the race effect.”¹⁶⁴

After controlling for several variables, it was found that the stop-and-frisk rate was significantly higher for minorities.¹⁶⁵ African Americans “are over 75% more likely to be frisked than White[] detainees.”¹⁶⁶ The number of stop-and-frisks made without reasonable suspicion was high for all populations; however, it was highest for minorities.¹⁶⁷ The rate was “49% of Latino frisks and 41% for Blacks, whereas the rate for Whites is still quite high at 38%.”¹⁶⁸ The overall hit rate for guns and drugs was particularly low, as such contraband was found in “about 9% of all frisks.”¹⁶⁹ The Plaintiffs contended that “the data show statistically significant racial disparities that in almost all respects are not explainable by non-racial factors.”¹⁷⁰

The Plaintiffs’ latest Report showed that in the first two quarters of 2018, there were 41,661 total stops, reflecting a continuous decline in pedestrian stops.¹⁷¹ Of the 3,992 stops that were analyzed, 16% were made without reasonable suspicion.¹⁷² That was “an improvement over 2017, where 21% were made without reasonable suspicion.”¹⁷³ Frisks were reported in 740 of the stops and 30% were without reasonable suspicion—no change from 2017.¹⁷⁴ Twenty illegal guns were retrieved during the stops, which was only 0.5% of all stops.¹⁷⁵ Ninety-eight stops produced illegal drugs.¹⁷⁶ The total hit rate for retrieving illegal contraband (guns and drugs) was only

¹⁶¹ *Id.* at 1–2; Plaintiff’s Eighth Report to Court and Monitor on Stop and Frisk Practices: Fourteenth Amendment Issues at 2–3, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. Jan. 5, 2018), https://www.aclupa.org/sites/default/files/field_documents/bailey_eighth_report_racial_analysis_1-5-18.pdf.

¹⁶² Plaintiff’s Eighth Report to Court and Monitor on Stop and Frisk Practices: Fourteenth Amendment Issues, *supra* note 161, at 5.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 7.

¹⁶⁵ *Id.* at 9.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 10.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 11.

¹⁷⁰ *Id.* at 12.

¹⁷¹ See Plaintiff’s Ninth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues at 4, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-SD (E.D. Pa. Nov. 20, 2018), https://www.aclupa.org/sites/default/files/field_documents/bailey_ninth_report_11-20-18.pdf.

¹⁷² *Id.* at 4–5.

¹⁷³ *Id.* at 5.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 23.

¹⁷⁶ *Id.*

4.41%.¹⁷⁷ Minority stops equaled 80.36% of all stops.¹⁷⁸ African Americans were stopped 2,788 times, and 451 of the stops were not based on reasonable suspicion.¹⁷⁹ Of the 740 frisks, African Americans were frisked on 568 occurrences, with 119 being without reasonable suspicion.¹⁸⁰ Contraband was recovered during 4.7% of stops of Black citizens, 2.93% of stops of White citizens, and 5.24% of stops of Latino citizens.¹⁸¹

Attorneys for the Plaintiffs argued that “[t]he report also finds statistically significant racial disparities that cannot be explained by non-racial factors. Racial minorities are stopped far more often than [W]hites . . . [e]ven worse, the quality of stops is worse for racial minorities.”¹⁸² In its response to the racial imbalance reported in the Plaintiffs’ Report of the first two quarters of 2018, the City noted that the “Plaintiffs’ Ninth Report found no evidence of racial bias” in the stop-and-frisk results.¹⁸³ The response accepted the numbers presented by the Plaintiffs’ Report that indicated that African American citizens were stop-and-frisked disproportionately to other racial groups, White citizens in particular.¹⁸⁴ However, it concluded that stops were made in Philadelphia communities with the “highest rates of violence,” which are generally minority communities.¹⁸⁵ The author of the Report surmised that the great discretion that the Court has given police officers to frisk individuals in a “high crime area” will lead to more stop-and-frisks in minority communities.¹⁸⁶ He went on to state: “[b]ased, however, on the statistical evidence, I would expect to see the stop:frisk ratios continue to be concentrated in the areas with the highest levels of violent crime.”¹⁸⁷ In reference to the Plaintiffs’ contention that African Americans are not only stopped at a higher rate in their own communities but also in White communities, the response posited that “out of place” stops are generally conducted in areas that are located closely to “high crime areas.”¹⁸⁸ Hence, stops that occur in a minority community might lead to stops in adjoining communities.¹⁸⁹ Overall, the City’s response found that the number of stops

¹⁷⁷ *Id.* at 20.

¹⁷⁸ *Id.* at 16.

¹⁷⁹ *Id.* at 17.

¹⁸⁰ *Id.* at 19.

¹⁸¹ *Id.* at 20.

¹⁸² *New Report Shows Philadelphia Police Continued Unconstitutional Stops and Frisks in 2015*, ACLU (Mar. 22, 2016), <https://www.aclu.org/news/civil-rights-lawyers-issue-ultimatum-kennedy-administration-fix-stop-and-frisk-practices>.

¹⁸³ See Response to Plaintiff’s Ninth Report to Court and Monitor on Stop and Frisk Practices: Fourteenth Amend. Issues at 2, *Bailey v. City of Philadelphia*, No. 2:10-cv-05952-JP (E.D. Pa. Jan. 11, 2019).

¹⁸⁴ *Id.* at 6–7 (“African Americans represent 71% of those stopped, while [W]hites and Latinos represent 20% and 9%, respectively. With respect to frisks . . . 1 in 5 stops of Black pedestrians result in a frisk; 1 in 5.4 of Latinos results in a frisk; while 1 in 8.4 stops of Whites results in a frisk.”).

¹⁸⁵ *Id.* at 7–8.

¹⁸⁶ See *id.* at 9.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 10.

¹⁸⁹ *Id.* at 10, 14.

made without reasonable suspicion had declined drastically since the implementation of the new police policies following the *Bailey* consent decree.¹⁹⁰

C. Chicago

In 2015, the American Civil Liberties Union (“ACLU”) released an extensive study of stop-and-frisk in Chicago.¹⁹¹ The study analyzed data retrieved from 250 contact cards filed by police officers.¹⁹² The analysis revealed that from May to August 2014, Blacks were subjected to 72% of all stops, although they constituted only 32% of the city’s population; further, there were more stops per capita in minority neighborhoods.¹⁹³ It also revealed that Blacks were stopped at a higher rate not only in minority neighborhoods but also in majority White neighborhoods.¹⁹⁴ During the time period of the analysis, there were more than 250,000 stops that did not result in arrests.¹⁹⁵ The report concluded that “Black Chicagoans disproportionately bear the highest numbers of stop[-]and[-]frisks, and half of stops are not justified by the officers.”¹⁹⁶ The ACLU also found, unlike other major cities that had recordkeeping systems in place to review their officers’ stop-and-frisk procedures, there was a significant lack of data collection on the part of the Chicago Police Department (“CPD”), making it hard to understand how the procedure was actually carried out in practice.¹⁹⁷

Consequently, in 2015, the ACLU of Illinois and the CPD entered into a consent decree designed to ensure that police investigatory stop-and-frisks met the requirements of the United States Constitution and Illinois

¹⁹⁰ *Id.* at 19.

¹⁹¹ See generally ACLU OF ILL., STOP AND FRISK IN CHICAGO (2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf.

¹⁹² *Id.* at 6.

Chicago police officers are required to record and justify their stops on “contact cards.” However, as discussed in detail in Part IV, the Chicago Police Department’s data collection presents problems with analyzing stops. For example, the CPD does not record stops that lead to arrests or tickets and makes no record of frisks. And prior to April 2014, officers used contact cards to record voluntary interactions with civilians, making it difficult to isolate stops and frisks. This report analyzes a sample of 250 written justifications for stops that occurred in 2012 and 2013. It also analyzes four months of contact card data from 2014, after a CPD policy change limited the use of contact cards to stops and the enforcement of loitering ordinances.

Id.

¹⁹³ *Id.* at 9 (“For example, in the minority district Englewood there were 266 stops per 1000 people, while in the predominately white district Lincoln/Foster there were 43.”).

¹⁹⁴ *Id.* (“In Chicago’s predominantly white police districts—Near North, Town Hall, and Jefferson Park—the disparity between black population and percentage of stops is even starker than city-wide data. For example, . . . although Jefferson Park’s African American population is just 1%, African Americans make up almost 15% of all stops.”).

¹⁹⁵ *Id.* at 3.

¹⁹⁶ *Id.* at 12.

¹⁹⁷ *Id.* at 13.

law.¹⁹⁸ The CPD would also document all stop-and-frisks and all information relating to a stop or a frisk.¹⁹⁹ The Department would also provide all officers with training directed at ensuring that stop-and-frisks are legal, and the Department would perform regular audits of stop-and-frisks.²⁰⁰ Further, federal Magistrate Judge Arlander Keys was appointed to serve as an Independent Monitor to review the CPD's use of stop-and-frisk, and he was to provide a report twice a year detailing compliance with the settlement and his recommendations.²⁰¹ Finally, the CPD was required to provide stop-and-frisk data monthly to the ACLU and Judge Keys.²⁰²

The new policies implemented under the settlement agreement resulted in a significant reduction of stop-and-frisks in Chicago. In the first half of 2016, the CPD made 54,701 stops, approximately an 80% reduction in stops from the 250,000 stops made in a four-month period in 2014.²⁰³ Black non-Hispanics constituted 38,361, or 70.13%, of the total stops, while Hispanics were 11,557 or 21.13% of the stops.²⁰⁴ White citizens were stopped 4,198 times, or 7.67%, of the total stops.²⁰⁵ In the second half of 2016, the report found that 51,538 stops were conducted.²⁰⁶ Black non-Hispanics were stopped 36,451 times, or 70.73%, of the total stops.²⁰⁷ Hispanics were stopped 9,969 times, or 19.34%, of the total stops.²⁰⁸ White citizens were stopped 4,303 times, or 8.35%, of the total stops.²⁰⁹ The Report also revealed that when Whites were stopped, police were two times more likely to find a weapon in comparison to African Americans.²¹⁰ The Monitor's Report found that "[a]mong the three predominant ethno-racial groups, police officers stopped persons identified as BNH [Black non-Hispanic] civilians about 71.85 percent of the time, as compared with 8.48 percent of the time for members of the WNH [White non-Hispanic] group and 19.65 percent of the time for Hispanics."²¹¹ Judge Keys recognized in his Report that significant progress had been made by the CPD to rectify the problems caused by police

¹⁹⁸ See generally ACLU OF ILL., INVESTIGATORY STOP AND PROTECTIVE PAT DOWN SETTLEMENT AGREEMENT (Aug. 6, 2015), <https://www.aclu-il.org/en/campaigns/stop-and-frisk> (follow "Settlement Agreement" hyperlink) [hereinafter *Chicago Settlement Agreement*].

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.* at 3–4.

²⁰¹ *Id.* at 7.

²⁰² *Id.* at 5. See *Chicago Stop-and-Frisk to Be Monitored*, N.Y. TIMES (Aug. 8, 2015), <https://www.nytimes.com/2015/08/09/us/chicago-stop-and-frisk-to-be-monitored.html>.

²⁰³ See ARLANDER KEYS, THE CONSULTANT'S SECOND SEMI-ANNUAL REPORT 9 (2018), https://www.aclu-il.org/sites/default/files/field_documents/the_consultants_second_semi-annual_report.pdf; see also *supra* note 195 and accompanying text.

²⁰⁴ *Id.* at 10.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 9.

²⁰⁷ *Id.* at 10.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 14.

²¹¹ *Id.* at 21.

officers' use of stop-and-frisk.²¹² However, he opined that there was still much work to be done to obtain the goals of the settlement.²¹³

Ironically, contrary to the trends in both New York City and Philadelphia, as stop-and-frisks decreased in Chicago, murder rates increased. In 2016, there was an 80% reduction in stop-and-frisks, and at the same time Chicago suffered 764 murders—279 more victims than the year before the settlement agreement.²¹⁴ In a study done to determine the reason for the spike in murders, Paul Cassell and Richard Fowles stated that the only explanation is the consent agreement between the ACLU and the CPD and the resulting reduction of stop-and-frisks conducted by the CPD.²¹⁵ Cassell and Fowles calculated that the cost of a declining number of stop-and-frisks by the police was 245 additional victims killed and 1,108 additional shootings in Chicago in 2016.²¹⁶ Their research suggested that stop-and-frisk actually saved lives. In their conclusion, Cassell and Fowles asserted that stop-and-frisk must be a part of effective law enforcement response to gun violence.²¹⁷ In an October 2018 speech at a convention for the International Association of Chiefs of Police, President Trump also blamed Chicago's high murder rate on a slow-down in stop-and-frisks.²¹⁸ He opined that increasing the use of stop-and-frisk could straighten out the wave of deadly shootings in Chicago quickly.²¹⁹

Other experts have various opinions about the reasons for the dramatic spike in Chicago's murder rate. For example, a report done by the University of Chicago Crime Lab suggested that crime rates ebb and flow and that a decrease in investigatory stops was not the sole cause for the increase in Chicago's murder rate.²²⁰ The report concluded that other factors not measurable in current data could have played a role, and that Chicago's experience was common among other cities.²²¹ It attributed the increased

²¹² *Id.* at 220.

²¹³ *Id.*

²¹⁴ Max Kapustin et al., *Gun Violence in Chicago, 2016* 5, 24–26 (U. Chi. Crime Lab 2017), <https://urbanlabs.uchicago.edu/attachments/c5b0b0b86b6b6a9309ed88a9f5bbe5bd892d4077/store/82f93d3e7c7cc4c5a29abca0d8bf5892b3a35c0c3253d1d24b3b9d1fa7b8/UChicagoCrimeLab%2BGun%2BViolence%2BIn%2BChicago%2B2016.pdf>.

²¹⁵ See Paul G. Cassell & Richard Fowles, *What Caused the 2016 Homicide Spike? An Empirical Examination of the "ACLU Effect" and the Rule of Stop and Frisks in Preventing Gun Violence*, 18 U. ILL. L. REV. 1581, 1604–08 (2018).

²¹⁶ *Id.* at 1647.

²¹⁷ *Id.* at 1676.

²¹⁸ Phillip Rucker, *Trump Says Chicago Police Should Use 'Stop and Frisk' Tactics to Curb Shootings*, WASH. POST (Oct. 8, 2018, 5:04 PM), https://www.washingtonpost.com/politics/trump-says-chicago-police-should-use-stop-and-frisk-tactics-to-curb-shootings/2018/10/08/a4afaaa0-cb0f-11e8-a3e6-44daa3d35ede_story.html?utm_term=.f995c28e6d04.

²¹⁹ *Id.* "We're going to straighten it out, and we're going to straighten it out fast," Trump said. *Id.* "Let's see whether or not Chicago accepts help. They need it. . . . It works, and it was meant for problems like Chicago: Stop and frisk" *Id.*

²²⁰ See Kapustin et al., *supra* note 214, at 24–26.

²²¹ *Id.* at 7, 26 (emphasizing that "compared to all cities in the U.S., Chicago's homicide rate per 100,000 residents is about in the middle of the pack.").

murder rate entirely to the City's "elevated gun homicide rate."²²²

After the spike in 2016, murders declined by 15% in 2017, and they were down again in 2018.²²³ Those declines occurred as Chicago continued to follow the settlement agreement. It has been pointed out that the limited time frame of Cassell and Fowles's research was not enough to gather sufficient data to predict the effect that the settlement agreement had on the inordinate increase in murders.²²⁴ Other pundits submit that the 2015 release of the dash cam footage showing Officer Jason Van Dyke shooting black teenager Laquan McDonald sixteen times must also be considered as a factor leading to the murder spike.²²⁵ Max Kapustin, Research Director at Urban Labs, was cautious about extrapolating too much from the reduction in stop-and-frisks by police officers.²²⁶ In an interview with the Chicago Maroon he stated: "Even though [police stops] declined quite precipitously between 2015 and 2016, and the timing fits well, other cities have seen remarkable declines in street stops, notably New York [City], without an increase in violence."²²⁷

IV. THE BACKLASH OF POST-*TERRY* STOP-AND-FRISK

A comparison of the effect of the changes initiated by the consent decrees addressing stop-and-frisk policies in the police departments of New York City, Philadelphia, and Chicago reveals three facts: (1) overall unlawful stops and frisks have decreased, but African Americans are still disproportionately stopped and frisked; (2) a large percentage of the stops and frisks of African Americans is done without reasonable suspicion or probable cause; and (3) the overuse of stop-and-frisk in African American communities has led to distrust, fear, and resentment.²²⁸ Considering these facts, the effectiveness of stop-and-frisk is questioned.

²²² *Id.* at 9.

²²³ Karen Sheley, *Piercing the Myth of the So Called "ACLU Affect,"* ACLU OF ILL. (Mar. 26, 2018, 10:15 AM), <https://www.aclu-il.org/en/news/piercing-myth-so-called-aclu-effect>. See CHICAGO POLICE DEPARTMENT, 2017 ANNUAL REPORT 14 (2017), <https://home.chicagopolice.org/wp-content/uploads/2019/03/Chicago-Police-Department-Annual-Report-2017.pdf>; CHICAGO POLICE DEPARTMENT, 2018 ANNUAL REPORT 50 (2018), <https://home.chicagopolice.org/wp-content/uploads/2019/07/2018AnnualReport-05July19.pdf>.

²²⁴ Sheley, *supra* note 223.

²²⁵ See Kapustin et al., *supra* note 214, at 24. See also CHI. POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 3 (2016), https://chicagopatf.org/wp-content/uploads/2016/04/PATF_Final_Report_4_13_16-1.pdf; U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF CHICAGO POLICE DEPARTMENT 1 (2017), <https://www.justice.gov/opa/file/925846/download> ("The McDonald incident was widely viewed as a tipping point . . .").

²²⁶ See Lec Harris, *U of C Crime Lab Report Says Surge in Violence Last Year Remains "A Puzzle,"* CHI. MAROON (Jan. 19, 2017), <https://www.chicagomaroon.com/article/2017/1/19/u-c-crime-lab-report-says-surge-violence-last-year/>.

²²⁷ *Id.*

²²⁸ See Fradella & White, *supra* note 45, at 49.

A. Does the Data Support Aggressive Stop-and-Frisk Policies?

Experts are split on the issue of the effectiveness of stop-and-frisk as a valid and necessary tool to curtail violent crimes—in particular, those crimes that involve guns. NYPD commissioner Ray Kelly warned in response to Judge Scheindlin's decision in *Floyd* that the City will see an increase in violent crimes if stop-and-frisk is abandoned.²²⁹ He attacked the method used by the court to determine the unconstitutionality of NYPD's implementation of stop-and-frisk.²³⁰ Kelly suggested that more minorities were stopped, questioned, and frisked because most of the violent crimes occur in minority communities.²³¹ He stated that minority communities would be the losers if the ruling were not overturned.²³² It is his opinion that overregulating stop-and-frisk will result in higher crime rates, especially in African American and Latino neighborhoods.²³³ A similar statement was made by New York City Mayor Bloomberg regarding stop-and-frisk when he said in a weekly radio show: "I think we disproportionately stop [W]hites too much and minorities too little. It's exactly the reverse of what they say."²³⁴

Ironically, the above statements are the sentiment of most proponents of aggressive stop-and-frisk policies. They believe that stop-and-frisk is a proactive approach because it targets areas and individuals who are likely to commit violent crimes.²³⁵ It is suggested that if a goal of the police department is violent crime reduction, then limited resources dictate that the best practice is to focus on crime "hot spots" or "high crime areas."²³⁶ As a result, neighborhoods with a high concentration of minorities who are both victims and perpetrators of crime are targeted.²³⁷

In a statistical analysis of Philadelphia's stop-and-frisks in 2014 and 2015, Lance Hannon, a professor of sociology and criminology at Villanova University, found that mostly Black neighborhoods drew 70% more frisks than non-Black areas.²³⁸ He concluded that the stops were consistent with theories of "neighborhood racial stigma."²³⁹ Hannon further noted that "the

²²⁹ See *NYPD's Ray Kelly: Stop-Frisk Ruling Will Hurt Minorities*, USA TODAY (Aug. 18, 2013, 3:22 PM), <https://www.usatoday.com/story/news/nation/2013/08/18/ray-kelly-stop-frisk-nypd/2668911>.

²³⁰ *Id.*

²³¹ *Id.* "Kelly said Sunday that Scheindlin's ruling rested on mistaken logic: The racial and ethnic makeup of those stopped should be compared to and reliably mirrors that of crime suspects, not the population at large." *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ See Yoav Gonen, *Bloomberg: 'We Disproportionately Stop Whites Too Much and Minorities Too Little' in Stop-Frisk Checks*, N.Y. POST (June 28, 2013, 4:55 PM), <https://nypost.com/2013/06/28/bloomberg-we-disproportionately-stop-whites-too-much-and-minorities-too-little-in-stop-frisk-checks>.

²³⁵ See *NYPD's Ray Kelly: Stop-Frisk Ruling Will Hurt Minorities*, *supra* note 229.

²³⁶ Dina Fine Maron, *Science Says These Police Tactics Reduce Crime*, SCIENTIFIC AMERICAN (Nov. 9, 2017), <https://www.scientificamerican.com/article/science-says-these-police-tactics-reduce-crime/>.

²³⁷ See N.Y.C. B. ASS'N, REPORT ON THE NYPD'S STOP-AND-FRISK POLICY 15–17 (2013), <https://www2.nycbar.org/pdf/report/uploads/20072495-StopFriskReport.pdf>.

²³⁸ Hannon, *supra* note 130, at 102.

²³⁹ *Id.* at 87.

violent crime rate was a significantly weaker predictor of being frisked in Black areas, and, net of a variety of factors at the individual and neighborhood levels, Black citizens and Black places experienced a disproportionate amount of frisks where no contraband was found.”²⁴⁰ Hannon’s research suggests that, although many African American neighborhoods in the city have low crime rates, “urban neighborhoods with a predominance of Black residents are more likely to be vilified as crime ridden regardless of the actual crime rate.”²⁴¹ Lawrence Rosenthal in his comments on the *Floyd* decision argued the following:

The superiority of proactive policing over reactive patrol should be unsurprising. . . . When undertaken with frequency and targeted at hot spots of crime, stop-and-frisk can alter the perceptions of offenders by making apparent the risks of carrying drugs or guns in public. Reactive patrol, by contrast, encourages criminals to intimidate the community so that they do not call police for help.²⁴²

David C. Smith, a professor of public policy at the Robert F. Wagner Graduate School of Public Service at New York University, argues that the central element responsible for the decrease of crime in New York City was the increased use of stop-and-frisk in high crime neighborhoods.²⁴³ He theorizes African Americans and Hispanics benefit the most from the increase in stop-and-frisk because they experience the greatest victimization rates.²⁴⁴ Smith argues that “[t]hey are disproportionately victims and perpetrators of violent crime. As a result of active crime-prevention techniques like stop[-]and[-]frisk, they are being arrested and imprisoned at a drastically lower rate.”²⁴⁵

The violent crime statistics recorded in large cities during periods of aggressive stop-and-frisks by police officers, especially the reduction in gun crimes, seemingly substantiate the argument that the tactic is effective.²⁴⁶ At the height of New York City’s aggressive use of stop-and-frisk, the crime rate in New York City dropped precipitously, outpacing the national decline rate in crimes during the same period.²⁴⁷ Police officers believe that stop-and-

²⁴⁰ *Id.*

²⁴¹ *Id.* at 90.

²⁴² Lawrence Rosenthal, *One Eyed Floyd*, LEGAL STUD. RES. PAPER SERIES (Chapman U., Orange, Cal.), Dec. 10, 2013, at 2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366070.

²⁴³ Dennis C. Smith, *Stop and Frisk Has Lowered Crime in Other Cities*, N.Y. TIMES (July 19, 2012, 2:03 PM), <https://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/stop-and-frisk-has-lowered-crime-in-other-cities>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City “Stop and Frisk,”* 94 B.U. L. REV. 1495, 1525 (2014).

²⁴⁷ *Id.* at 1525–27; see also Lawrence Rosenthal, *Crime Drop Under Stop-and-Frisk, Which Is Worth Remembering in the Rush to Criticize It*, NBC NEWS (Mar. 6, 2020), <https://www.nbcnews.com/think/opinion/crime-dropped-under-stop-frisk-which-worth-remembering-rush-criticize-ncna1151121>.

frisk deters young men who have guns from carrying them on their persons.²⁴⁸

The effectiveness of aggressive stop-and-frisk policies is amorphous at best.²⁴⁹ The data that proponents of the tactic use suggests a slight correlation between increased stop-and-frisk and violent gun crimes.²⁵⁰ As shown above, as stop-and-frisks in New York City decreased, there was no increase in violent crime.²⁵¹ However, Philadelphia's results suggest a somewhat different outcome. Initially, the implementation of the policy changes outlined in the *Bailey* consent decree produced a decline in overall stop-and-frisks, and there was a two-year decline in homicides in Philadelphia.²⁵² As stop-and-frisks have continued to decline, the homicide rates of 2015 to 2018 experienced an increase.²⁵³ Further, the homicide rates of 2017 and 2018 are higher than pre-consent decree years, except for 2007.²⁵⁴ One study of Chicago's stop-and-frisk and homicide rates indicates that a reduction in stop-and-frisk may have resulted in more murders in the city.²⁵⁵ However, the conclusion is made on limited data, and whether officers are accurately reporting stop-and-frisks has been questioned.²⁵⁶ Other experts find that stop-and-frisk might be one variable among many in reducing violent crime.²⁵⁷ They suggest that social factors, geographical statistics, the time of year, etc. must also be considered in any evaluation of reduction of violent crime.²⁵⁸

B. Does the Social Cost of Stop-and-Frisk Outweigh Its Value?

The effectiveness of aggressive stop-and-frisk policies cannot be measured by considering the numbers alone. The social costs that are paid by disproportionately affected minority communities and the police officers' inability to perform their duties must both be considered. The social costs suffered in the three cities studied in this Article have been high. In a 1999 report, New York Attorney General Elliot Spitzer found that stop-and-frisk had been "misused and overused" by the NYPD SCU.²⁵⁹ The report found

²⁴⁸ Bellin, *supra* note 246, at 1515.

²⁴⁹ See, e.g., Kyle Smith, *We Were Wrong About Stop-and-Frisk*, NAT. REV. (Jan. 1, 2018, 9:40 PM), <https://www.nationalreview.com/2018/01/new-york-city-stop-and-frisk-crime-decline-conservatives-wrong/> (admitting the author was wrong about the effect that stop-and-frisk would have on violent crime in New York).

²⁵⁰ See Fradella and White, *supra* note 45, at 49.

²⁵¹ See Brentin Mock, *How Police are Using Stop-and-Frisk Four Years After Seminal Ruling*, CITYLAB (Aug. 18, 2017), <https://www.citylab.com/equity/2017/08/stop-and-frisk-four-years-after-ruled-unconstitutional/537264/>.

²⁵² *Crime Maps & Stats*, PHILA. POLICE DEP'T, <https://www.phillypolice.com/crime-maps-stats/> (last visited July 1, 2020).

²⁵³ *Id.*

²⁵⁴ *Id.* The consent decree was entered into in 2011. See Settlement Agreement, Class Certification, and Consent Decree, *supra* note 148.

²⁵⁵ Cassell & Fowles, *supra* note 215, at 1676.

²⁵⁶ Kapustin et al., *supra* note 214, at 26.

²⁵⁷ See Hannon, *supra* note 130, at 89–90.

²⁵⁸ See *id.* at 89–90.

²⁵⁹ SPITZER, *supra* note 49, at 8.

that the SCU targeted African Americans more than any other group.²⁶⁰ A second report in 2013 by Attorney General Eric Schneiderman found that similar abuses of stop-and-frisk had been continued after the SCU was abandoned.²⁶¹ Similarly, the Monitor's Report on the progress of Philadelphia's consent decree found "widespread violation of both the consent decree and the rights of thousands of Philadelphians."²⁶² In Philadelphia, African American citizens "are understandably fed up and demand an immediate stop to being treated like second-class citizens."²⁶³

The situation is no better for minority citizens in Chicago. The Independent Monitor's report found that there were violations of the settlement agreement, and Blacks were being stopped and frisked disproportionately.²⁶⁴ African Americans make up only 32% of Chicago's population, yet they are subjected to 72% of all stops.²⁶⁵ Data shows that the highest concentration of stop-and-frisks in Chicago occurs in neighborhoods that are predominantly African American.²⁶⁶ Ed Yohnka of the ACLU of Illinois stated in an interview that "the problem with indiscriminate and overwhelming use of stop-and-frisk in communities of color . . . is that 'people in these neighborhoods don't see Officer Friendly, they see an occupying force that's just throwing kids up against the wall.'"²⁶⁷

It is well documented that aggressive stop-and-frisk in African American communities causes resentment and mistrust of police among the communities' citizens.²⁶⁸ The large disparity in the number of stop-and-frisks of African Americans as compared to White citizens suggests that race is a consideration when many officers decide whom to stop.²⁶⁹ This racial animus has resulted in entire neighborhoods feeling targeted and stigmatized by the

²⁶⁰ See *id.* at 174. See also Kocieniewski, *supra* note 70 (explaining that the SCU is an elite squad of about 400 officers who are placed in "hot spots" to combat crime); Greg B. Smith, *NYPD Hit on Stop-and-Frisk Report: Minorities Targeted*, N.Y. DAILY NEWS (Dec. 1, 1999), <https://www.nydailynews.com/archives/news/nypd-hit-stop-frisk-report-minorities-targeted-article-1.851495>.

²⁶¹ See ERIC T. SCHNEIDERMAN, N.Y. ST. OFF. OF THE ATT'Y. GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 5 (2013), https://ag.ny.gov/pdfs/OAG_REPORT_ON_SF_PRACTICES_NOV_2013.pdf.

²⁶² See *New Report Shows Philadelphia Police Continued Unconstitutional Stops and Frisks in 2015*, *supra* note 182.

²⁶³ *Id.*

²⁶⁴ See Independent Monitoring Report 1 (Amended) at 2–3, *Illinois v. City of Chicago*, No. 1:17-cv-06260 (N.D. Ill. Nov. 18, 2019), https://cpdmonitoringteam.com/wp-content/uploads/2019/11/2019_11_15-Independent-Monitoring-Report-1.pdf.

²⁶⁵ STOP AND FRISK IN CHICAGO, *supra* note 191, at 3.

²⁶⁶ Tanvi Misra, *Where Chicagoans Are Being Stopped and Frisked*, CITYLAB (June 8, 2018), <https://www.citylab.com/equity/2018/06/where-chicagoans-are-being-stopped-and-frisked/562160> (using data from Lucy Parsons Labs).

²⁶⁷ Curtis Black, *Chicago Tried Stop and Frisk. It Didn't Work*, CHI. REP. (Sept. 29, 2016), <https://www.chicagoreporter.com/chicago-tried-stop-and-frisk-it-didnt-work>.

²⁶⁸ Rich Morin & Renee Stepler, *The Racial Confidence Gap in Police Performance*, PEW RES. CTR. (Sept. 29, 2016), <http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance> (indicating that Blacks are about half as likely as Whites to have a positive view of the job that their police are doing).

²⁶⁹ See Harold Stolper & Jeff Jones, *The Enduring Discriminatory Practice of Stop & Frisk*, COMMUNITY SERV. SOC'Y (Apr. 16, 2018), <https://www.cssny.org/news/entry/stop-and-frisk>.

police, and community cooperation in reducing crime is diminished or non-existent.²⁷⁰ As recognized by the United States Department of Justice in a report on Chicago's police misconduct, the "experience of disproportionately being subjected to stops and arrests in violation of the Fourth Amendment shapes [B]lack residents' interactions with [the police], to the detriment of community trust, and makes the job of delivering police services . . . more dangerous and less effective."²⁷¹

The present state of stop-and-frisk defeats police departments' claim that it is a necessary tool in efforts to detect and prevent crime. Stop-and-frisk has only a small impact on crime rate in African American communities where most stop-and-frisks occur.²⁷² For example, in Chicago, a city that some consider as the most violent in the United States, the overall murder rate for the city increased 12% during the four-year period of 2015 to 2019.²⁷³ However, on the south side of Chicago, which includes a high population of African Americans and where 72% of stop-and-frisks occurred, the murder rate has increased by 28% during the same time period.²⁷⁴ The losses suffered by police departments in unsolved crimes in minority neighborhoods and the social stigmatization that citizens in those neighborhoods suffer significantly undermine any effectiveness of aggressive stop-and-frisk policies.

Former Commissioner of Police in New York City, William Bratton, who is a proponent of stop-and-frisk, acknowledged the discord between minority citizens and police because of the racist application of the policy. In his memoir, he states:

There is undeniably great legitimate frustration with the behavior and attitude of some individual cops in minority communities. However, if we reduce crime and disorder, while at the same time walking the streets in a respectful way, we can begin to help society deal with its racial tensions. There is a great amount of work to be done in this area, but the potential for success certainly exists. As police leadership has accepted responsibility for reducing crime and fear, so too must it accept responsibility for dealing with racism, brutality, and inappropriate attitudes in the ranks. The first step is to admit there is a problem. . . . American

²⁷⁰ Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 849 (2015); STOP AND FRISK IN CHICAGO, *supra* note 191, at 12.

²⁷¹ STOP AND FRISK IN CHICAGO, *supra* note 191, at 3.

²⁷² See Reshaad Shirazi, *It's High Time to Dump the High Crime Area Factor*, 21 BERKELEY J. CRIM. L. 76, 109 (2016).

²⁷³ CHI. POLICE DEPT., COMPSTAT CITY WIDE REPORT COVERING THE WEEK OF 10-JUN-19 THROUGH 16-JUN-19 (2019), https://home.chicagopolice.org/wp-content/uploads/2019/06/1_PDFsam_CompStat-Public-2019-Week-24.pdf.

²⁷⁴ CHI. POLICE DEPT., COMPSTAT AREA 2 - SOUTH REPORT COVERING THE WEEK OF 10-JUN-19 THROUGH 16-JUN-19 (2019), https://home.chicagopolice.org/wp-content/uploads/2019/06/3_PDFsam_CompStat-Public-2019-Week-24.pdf.

policing can and must be an essential and significant force in addressing the issues of race and police behavior.²⁷⁵

The effect that aggressive stop-and-frisk programs have in minority communities was noted in Judge Scheindlin's ruling in *Floyd*. She found that the NYPD's aggressive stop-and-frisk policy was discriminatory and showed little regard to the requirement that stops be made on rational grounds.²⁷⁶ Holding that the policy was both a violation of the Fourth and Fourteenth Amendments, she opined the following:

The Supreme Court has recognized that "the degree of community resentment aroused by particular [police] practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security." . . . No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract the unwanted attention. Some plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police. This alienation cannot be good for the police, the community, or its leaders. Fostering trust and confidence between the police and the community would be an improvement for everyone.²⁷⁷

Effective policing requires community involvement.²⁷⁸ Mutual cooperation and trust must exist between the community and the police who are tasked with protecting the community's citizens from crime.²⁷⁹ This cannot occur under the guise of current stop-and-frisk policies that target African Americans and other minorities.

V. CONCLUSION

Terry and its progeny "have given police almost unlimited discretion in their ability to stop individuals."²⁸⁰ This discretion in many instances results in police abuse of power, resulting in the alienation of those who suffer

²⁷⁵ WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC 312 (1998).

²⁷⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 664 (S.D.N.Y. 2013).

²⁷⁷ *Id.* at 556–57.

²⁷⁸ THE NATIONAL ACADEMIES PRESS, PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 42–43 (2019).

²⁷⁹ PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 41 (2015) ("Community policing combines a focus on intervention and prevention through problem solving with building collaborative partnerships between law enforcement agencies and schools, social services, and other stakeholders.").

²⁸⁰ See Chemerinsky, *supra* note 17, at 287.

under heavy-handed use of stop-and-frisk. The costs of alienating African American citizens significantly outweigh the nominal crime prevention benefits of stop-and-frisk. African American men have become automatic suspects without suspicion or cause because of where they live. As one journalist wrote, “[t]he idea of universal suspicion without individual evidence is what Americans find abhorrent and what [B]lack men in America must constantly fight. . . . It’s like burning down a house to rid it of mice.”²⁸¹

Stop-and-frisk is a cornerstone of proactive policing. It is illogical to believe that the Court will overturn it or that police departments will dismantle it. However, the use of harassing approaches to implement an investigatory stop in African American communities diminishes the effectiveness of stop-and-frisk. If the Court will not place constraints on police officers’ use of stop-and-frisk, police departments must embrace policing strategies that include African American citizens and encourage cooperation and partnership.²⁸²

²⁸¹ Charles M. Blow, *The Whole System Failed Trayvon Martin*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html>.

²⁸² See generally CHARLES J. OGLETREE, JR. ET AL., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES 127 (1995).