

# ACROSS THE HUDSON: TAKING THE STOP AND FRISK DEBATE BEYOND NEW YORK CITY

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*This article presents the results of a survey conducted by the author of 56 police departments across the country concerning the practice of data collection on stop and frisk practices of those police departments. These results are discussed against the backdrop of the debate on stop and frisk, examined in this article through a review of the legal basis for the practice and its use by police departments. The article then argues that greater data collection efforts in places other than New York City, where such efforts have been more robust than elsewhere, could broaden and deepen the debate on stop and frisk and better inform the larger debates over the impact of race on criminal justice, particularly with respect to the question of whether stop and frisk necessarily has a disparate impact on racial and ethnic minorities, as New York City data indicates.*

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## INTRODUCTION

Going back to the 1990s, there has been heated debate over the stop and frisk practices of the New York Police Department (NYPD). In the mid-1990s the NYPD began to use stops and frisks intensively as part of the “broken windows” policing philosophy.<sup>1</sup> After the death of Amadou Diallo in a hail of police bullets in 1999, a study<sup>2</sup> ordered by New York’s Attorney General of the NYPD’s stop and frisk practices provided the first comprehensive empirical analysis of the use of stops and frisks in New York.

The data for the study on the stops and frisks came directly from the police, because NYPD officers were required to record data on every stop and frisk on a form, and then to submit the forms to their superiors.<sup>3</sup> These data included the nature of the subject’s suspicious behavior, the subject’s identity, including race or ethnic group, whether or not any contraband (chiefly guns or drugs) was found, and whether an enforcement action resulted: an arrest, issuance of a summons, or the like.

Between the release of the 1999 study and the present, the NYPD has actually increased its intensive use of stops and frisks: in 2002, the NYPD conducted 97,000 stops and frisks; by 2011, the total had increased to nearly 700,000.<sup>4</sup> The disproportionate racial impact of these stops and frisks has also continued: over eighty percent of the stops and frisks in the years 2002 through 2011 were people of color.<sup>5</sup> This led to the filing of a federal class action case, *Floyd v. City of New York*,<sup>6</sup> challenging the NYPD’s stop and frisk practices. Trial pro-

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1. See *infra* note 42 and accompanying text.

2. N.Y. STATE OFFICE OF THE ATTORNEY 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 (1999) [hereinafter STOP AND FRISK PRACTICES REPORT], available at [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil\\_rights/stp\\_frsk.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf).

3. See *infra* notes 46–47 and accompanying text.

4. 2011 NYPD Stop and Frisk Statistics, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/files/CCR-Stop-and-Frisk-Fact-Sheet-2011.pdf> (last visited Jul. 22, 2013) (showing 685,724 stops in 2011).

5. DELORES JONES-BROWN ET AL., CTR. ON RACE, CRIME & JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY: A PRIMER 19 (2010), available at [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf).

6. No. 08 Civ. 01034 (SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013).

ceedings in *Floyd* began on March 18, 2013 in U.S. District Court; Judge Shira Scheindlin issued an opinion on August 12 finding the defendants liable for violations of the Fourth and Fourteenth Amendments. She appointed an independent monitor to oversee the implementation of changes she ordered in policy, practice, and training on stop and frisk, along with other significant remedies.<sup>7</sup> All of this has meant that the stop and frisk battle has been very much a New York story for more than fifteen years; after the decision in *Floyd*, this became more true than ever.<sup>8</sup> And the NYPD has made its position clear: intensive use of stops and frisks has successfully suppressed violent crime.<sup>9</sup>

The decision in the *Floyd* case will have great national impact. According to Samuel Walker, professor emeritus of criminology at the University of Nebraska and one of the country's foremost experts on police accountability, the size and renown of the NYPD will give the case "enormous national ramifications" in American police departments.<sup>10</sup>

It is important to note that the NYPD is not the only municipal law enforcement agency in the U.S. that makes a regular practice of

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7. As this article went to press, the *Floyd* litigation remained in a state of flux. On October 31, the U.S. Court of Appeals for the Second Circuit stayed Judge Scheindlin's order pending appeal, and removed her from the case because she violated the judiciary's code of conduct by compromising the "appearance of impartiality surrounding this litigation." *Ligon v. City of New York*, Nos. 13-3123, 13-3088, 2013 WL 5835441, at \*1 (2d Cir. Oct. 31), *clarified sub nom. by In re Reassignment of Cases*, 2013 WL 5998139 (2d Cir. Nov. 13, 2013) (per curiam); see also Joseph Goldstein, *Court Blocks Stop-and-Frisk Changes for New York Police*, N.Y. TIMES (Oct. 31, 2013), [http://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html?\\_r=1&](http://www.nytimes.com/2013/11/01/nyregion/court-blocks-stop-and-frisk-changes-for-new-york-police.html?_r=1&).

8. Following the decision in *Floyd*, a flood of news stories reported on various aspects of Judge Scheindlin's opinion. A basic Google search found references to seventy-five stories in news publications during the first thirty days after the decision; many of these stories were reprinted dozens of times in other publications across the country and on web sites.

9. See Shane Dixon Kavanaugh, *Commissioner Kelly Says Almost 75% of Violent Crime Committed by African-Americans*, N.Y. DAILY NEWS, May 2, 2013, <http://www.nydailynews.com/new-york/commissioner-kelly-defends-stop-and-frisk-targeting-african-americans-article-1.1332840#ixzz2UiHaXcKt> (citing Kelly stating that black New Yorkers are actually "understopped" and benefit most from stop and frisk); Leo Eisenstein & Laura Gottesdiener, *Why Michael Bloomberg is Wrong About Stop-and-Frisk*, ROLLING STONE, May 22, 2013, <http://www.rollingstone.com/politics/news/why-michael-bloomberg-is-wrong-about-stop-and-frisk-20130522> ("Mayor Michael Bloomberg and Police Commissioner Ray Kelly have dismissed these concerns, claiming that stop-and-frisk has dramatically reduced the city's murder rate.").

10. Adam Klasfeld, *'Remedy' Witness Takes Stand in Street Stop Case*, COURTHOUSE NEWS SERVICE (May 15, 2013, 6:17 PM), <http://www.courthousenews.com/2013/05/15/57678.htm>. Professor Walker was a witness for the plaintiffs in the case.

using stop and frisk tactics. On the contrary, police in the U.S. have long used stops and frisks in every city in America, both before and since the U.S. Supreme Court's 1968 decision in *Terry v. Ohio*<sup>11</sup> which formally legalized this longstanding practice.<sup>12</sup> But until recently, there has been little chance of understanding the prevalence of this tactic outside of New York, and no chance of measuring it: no other police departments collected data on the stop and frisk activity.

When the New York Attorney General's Office released its 1999 report on stop and frisk activity, it highlighted (without intending to) a little-noticed fact: the NYPD seemed to be the only police agency in the U.S. regularly collecting comprehensive data on its stop and frisk activity. New York seemed to be the one place where police, citizens, and researchers could measure stop and frisk. But that may be about to change. New York, it seems, is no longer the only city in the U.S. where we might get an accurate picture of the use of stop and frisk activity. For this article, I conducted a survey in 2011 and 2012 of fifty-five of the largest police departments in the U.S. The objective was to find out how many of these departments other than the NYPD created records of stops and frisks; if so, what data those records included; how systematically the data were kept; and how accessible to the public the collected data were. The survey revealed that the received wisdom—that the NYPD, alone, collects stop and frisk data—no longer holds. According to the survey, more than twenty of the police departments surveyed record some data on stops and frisks.<sup>13</sup> Some of these jurisdictions record data in ways that could allow analysts to draw the kind of detailed analysis we have seen in New York; a smaller number still make these data publicly available.

Thus, in the near future the empirical discussion of stop and frisk as a regular police practice can now take into account a wider variety of jurisdictions and contexts than just the NYPD. And it is high time that this broader discussion should take place. It may be that some of these other jurisdictions use the tactic differently: perhaps more successfully (in terms of percentage of stops and frisks which produced evidence seized or arrests made) or not so intensively as the NYPD does. Perhaps most importantly, since there is no reason to expect po-

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11. 392 U.S. 1 (1968).

12. *See, e.g., id.* at 13 n.9, 14 n.11 (citing L. TIFFANY ET AL., DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT 18–56 (1967); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967) (“In many communities, field interrogations are a major source of friction between the police and minority groups.”)).

13. *See infra* notes 65–80 and accompanying text.

lice to abandon stop and frisk as an enforcement tactic, we may learn whether police agencies other than the NYPD make use of stops and frisks without having the disparate impact on communities of color that the NYPD data has consistently showed. All of this could inform the debate to an important degree. At this point, everything we know comes from just the NYPD: a large and important jurisdiction, to be sure, but one that is not necessarily representative of policing everywhere in the country. As an added benefit, the recognition that many of the leading police departments are already recording their stop and frisk activity should encourage other jurisdictions to begin to do this as well. All of this would give us a fuller picture from which to draw stronger conclusions and make better law enforcement policy judgments.

Stop and frisk is not a New-York-only tactic, and therefore it should not be a New-York-only story. In the bargain, those concerned with these police practices in other cities not now collecting data can begin to make the argument that collecting these data is not something just for New York anymore. A shift toward data collection on stop and frisk practices will enable us to better understand our police departments, their effectiveness, and the impacts that their enforcement choices have—on everyone, but particularly on communities of color.

This article will begin with an examination of stop and frisk, the law that governs the tactic and its place in American law enforcement. This is followed by a discussion of the survey I conducted of fifty-five large American police departments and what it reveals: a still-small but growing number of U.S. law enforcement agencies in large cities have begun data collection on stop and frisk activity by their police officers. Thus we may be in a position to have a much richer, and less New York-centric, picture of how police in the U.S. use this venerable tactic. The survey material itself appears in two appendices. The article then moves to a brief discussion of the possible implications of the survey results for specific criminal justice and police reforms.

## I.

### THE LEGAL STANDARD IN THE U.S.: THE SUPREME COURT'S DECISION IN *TERRY V. OHIO*

The U.S. Supreme Court sets constitutional limits on what American police departments may do in the courses of criminal investigations through its interpretation of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution in cases it decides. The Supreme Court's decisions on these three Amendments lay down constitutional minimum standards for how police carry out arrests and seizures,

search for evidence, interrogate suspects, and conduct pretrial identification procedures. These decisions set down the broad parameters for what police can and cannot do: for example, even when they have probable cause to believe a crime has been committed, they must have a warrant to search a home,<sup>14</sup> but they do not need a warrant to search a vehicle.<sup>15</sup>

While police in the U.S. have used stop and frisk tactics for years, only in 1968 did the American justice system formally acknowledge these methods and bring them within the legal and constitutional system. The U.S. Supreme Court did this in *Terry v. Ohio*,<sup>16</sup> a case that still stands today.

In *Terry*, a police officer on foot patrol saw a pair of men standing near a jewelry store. Taking turns, each man walked away from the spot near the store while the other remained, and took a slow walk back and forth in front of the store, looking in the window. Both men then stood together and talked, and then the other member of the pair would depart for a walk in front of the store window.<sup>17</sup> The police officer who saw this felt that the men “didn’t look right to me.”<sup>18</sup> The activity the officer saw made him suspicious that the men were “casing” the jewelry store for a robbery, even though he had not yet witnessed any criminal act.<sup>19</sup> He therefore approached the men, who by that point had joined with a third man, and asked them what they were doing. When the men did not give a satisfactory explanation, the officer took them into custody and did a cursory search of each by patting down their outer clothing with his hands. When the officer felt guns on two of the men while performing this “pat down” search, he confiscated the weapons, and arrested the men.<sup>20</sup>

The *Terry* case gave the Supreme Court the opportunity to speak to the constitutionality of the practice of stop and frisk, and to specify how these interactions between police and citizens could be carried

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14. *Payton v. New York*, 445 U.S. 573, 590 (1980).

15. *Carroll v. United States*, 267 U.S. 132, 147 (1925); *see also California v. Carney*, 471 U.S. 386, 390 (1985).

16. 392 U.S. 1, 16 (1968). The police “stop and frisk” practice is not outside the purview of the Fourth Amendment, which governs “seizures” of the person not eventuating in “arrests” in traditional terminology; whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person, and a careful exploration of the outer surfaces of a person’s clothing all over his body in an attempt to find weapons is a “search,” a serious intrusion upon the sanctity of the person, which is not to be undertaken lightly. *See id.* at 16–17.

17. *Id.* at 5–6.

18. *Id.* at 5.

19. *Id.* at 6.

20. *Id.* at 7.

out legally. In so doing, the Court acknowledged that stops and frisks had sometimes been abused in deliberate efforts to control and assert power over black communities.<sup>21</sup> The Court's articulation of this last point was the first time (and it remains one of the few times) that the Court admitted that an existing and common police tactic had been used in a racially discriminatory way.<sup>22</sup>

The Court then explained how stops and frisks should work in practice in order to comport with the Fourth Amendment. First, the Court acknowledged that the police officer who stopped the two men did not have enough evidence of wrongdoing by them to establish "probable cause" for police action.<sup>23</sup> Probable cause had, until that time, been the bottom line legal requirement for a police search or seizure—the most common type of seizure being an arrest.<sup>24</sup> But in *Terry*, the Court held that the police could conduct a stop (a temporary detention for investigation) and frisk (a cursory pat down of the outer clothing for the purpose of detecting weapons) with less evidence than probable cause: the police officer observing the suspect(s) need only have reasonable suspicion to suspect that crime was afoot and that the suspect was involved with it.<sup>25</sup> This meant that police could perform stops and frisks with less evidence than would be necessary for a full arrest.

Reasonable suspicion, the Court said, means more than just a mere hunch, a gut feeling, or intuition that a suspect is up to no good. Rather, the suspicion must be reasoned, in the sense that an officer could articulate the factual basis for his or her suspicion.<sup>26</sup> While the officer need not observe outright criminal conduct to have reasonable suspicion, he or she had to have articulable reasons based on facts, not just feelings. Second, the suspicion had to be particularized: it had to be grounded in the actions and context surrounding the particular suspect involved.<sup>27</sup> It would not be sufficient to observe that other, similar people acted suspiciously; the officer had to have reasons to suspect the person individually, not just because the person fit into a

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21. *Id.* at 14.

22. It is important to say, however, that even as the Court took notice of "the wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain," the Court dismissed the ability of the Fourth Amendment exclusionary rule to help the situation, explaining in the same sentence that this harassment "will not be stopped by the exclusion of any evidence from a criminal trial." *Id.*

23. *Id.* at 22.

24. *See id.* at 19–20.

25. *Id.* at 26–27.

26. *See id.* at 27.

27. *Id.*

category of people. These two ideas—reasonable, articulable suspicion, and particularized individual suspicion—help to ground what might otherwise be a vague concept requiring little evidence.

The *Terry* case contained one other idea that is generally less understood and frequently overlooked. The *Terry* standard for stops and frisks actually requires that the police make not one judgment, but two. First, is there reasonable suspicion that would give the police justification to believe that the suspect is involved in a crime that is afoot? This would constitute a sufficient basis for a stop.<sup>28</sup> Second, is there reasonable suspicion that a weapon is involved, which would allow them to frisk? The frisk, the Court said, is allowed in order to discover weapons that might be used to harm the officer conducting the stop; its purpose is not the discovery of evidence, but assuring officer safety.<sup>29</sup> Thus, the frisk requires reasonable suspicion that the suspect is not just involved in a crime, but also that the suspect is armed and dangerous.<sup>30</sup> The source of the suspicion that the suspect may be armed and dangerous can be either 1) suspicion of involvement in a crime that, by its nature, requires weapons or at least the threat of violence, or 2) the observation of something that creates reasonable suspicion of the presence of a weapon—a bulge under the waistband of one's clothing, where weapons are often carried, for example—regardless of whether the crime suspected usually includes a weapon or violence. An example of the former would be the facts in the *Terry* case itself: two men conducting reconnaissance in preparation for a daylight robbery of a jewelry store, which by its nature would almost certainly include the threatened use of a weapon.<sup>31</sup> An example of the latter might be a person suspected of shoplifting or auto theft—not normally a crime accompanied by violence—when the suspect's outer clothing reveals the telltale outline of a firearm. If the crime suspected is a crime using violence or a weapon, or if the officer observes the signs of the presence of a weapon during a crime not associated with violence, the officer can both stop and frisk, and need not wait for any suspicion to be resolved by the stop before perform-

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28. *Id.* at 26–27.

29. *Id.* at 29.

30. *Id.* at 27.

31. As the Court observed, “[t]he actions of [the plaintiffs] were consistent with [the officer’s] hypothesis that these men ‘were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons . . . .’” *Id.* at 28.

ing the frisk.<sup>32</sup> On the other hand, an officer stopping someone for a nonviolent crime, not associated with weapons, cannot frisk unless the outward signs of a weapon are observed.<sup>33</sup>

Stop and frisk has been, and remains, an extremely common tactic in American police work. Yet *Terry v. Ohio* and other court decisions that have followed<sup>34</sup> remain the only real regulation of these actions. Because these court decisions have served as the source for constitutional rules on stops and frisks for decades, statutes do not play a significant role in regulating these practices.

Police agencies in the U.S. have their own internal rules, regulations, and standard operating procedures, and these may, in some agencies, govern search and seizure practices. But internal police rules on search and seizure, when they exist at all, are not always public, and they do not have the force of law. Thus a member of the public would be in no position to know about them. And even if the public did become aware of these regulations, they cannot serve as the basis for any legal action. Thus these rules may create some modicum of internal administrative control over stop and frisk, but they do not help the public to understand, or to demand accountability for, police actions on the street.

All in all, the legal structure surrounding stops and frisks has created an unfortunate system. There is almost no legislative regulation of stops and frisks in the U.S. Instead, stops and frisks are regulated only by court decisions, arising in criminal cases pursued after the stops and frisks take place. Police regulation by court decision in criminal cases is by nature reactive; courts can only decide cases that come before them. Unlike legislatures, courts (with the possible exception of the U.S. Supreme Court) have little power to create general solutions to solve problems prospectively. The only way the public can challenge these practices is when a defendant contests the constitutionality of the stop and frisk in an individual criminal case, or through a time-consuming, resource-intensive civil lawsuit, like the

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32. *Id.* at 33 (Harlan, J., concurring) (“Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence.”).

33. *See, e.g., id.* at 32–33 (Harlan, J., concurring) (noting that the right to frisk based on suspicion of a “crime of violence” is “immediate and automatic,” which implies that the same is not true for suspicion of nonviolent crimes in which no outward sign of a weapon is perceived).

34. *See, e.g., Arizona v. Johnson*, 555 U.S. 323, 332 (2009) (standing for the proposition that during a traffic stop, which supplies legitimate grounds for the stop, an officer with reasonable suspicion that the passenger is armed and dangerous may frisk the passenger).

*Floyd* case in New York. Even in the event that plaintiffs in these civil suits win, these actions do not necessarily change either the law or police department policy. Neither of these backward-facing methods makes for good prospective regulation or productive policy-making. Combine this with the common lack of any data and a low legal threshold for police action (in the form of the reasonable suspicion standard), and success in either criminal case suppression motions or civil lawsuits will be rare indeed. This leaves the practice regulated only in a very limited way, with police retaining very great discretion to perform stops and frisks.

## II.

### U.S. LAW ENFORCEMENT'S POSITION ON STOP AND FRISK

Even with the power to shape the law in broad constitutional strokes, the U.S. Supreme Court does not dictate the specifics of local law enforcement policy. In big cities like New York, Los Angeles, and Chicago, and in smaller cities like Fort Smith, Arkansas and Annapolis, Maryland, each jurisdiction's own police department is autonomous. The Constitution supplies broad rules, but specifics—how heavily should the department focus on the enforcement of gun laws? Should police concentrate on undercover investigations?—come from local police officials. Each agency determines its own law enforcement strategy, tactics, and policy—including the ways they will use stop and frisk.

Police officials have used *Terry v. Ohio* to make intensive use of stop and frisk a key element of crime-fighting strategies in many cities. For example, in 1994, when Rudolph Giuliani became mayor in New York City and appointed William Bratton to be the Commissioner of Police, the NYPD proclaimed that an emphasis on “getting guns off the streets of the New York” would form one of the major pillars of its crime fighting strategy, and the Department put this into its written policy;<sup>35</sup> since that point, stops and frisks have been one of the major tools the NYPD has used to implement that policy.<sup>36</sup> In 2007, when Michael Nutter ran for mayor of Philadelphia, he promised to bring down crime by relying heavily on stops and frisks.<sup>37</sup> (In

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35. STOP AND FRISK PRACTICES REPORT, *supra* note 2, at 53.

36. *Id.* at 58. (“[A]s implemented by the NYPD, ‘stop & frisk’ serves the Department’s No. 1 strategic goal—‘getting guns off the streets of New York.’ Notwithstanding its origins as a technique designed to ensure officer safety, ‘stop & frisk’ plainly has been used as a method to detect and seize illegal handguns.” (footnote omitted)).

37. Marcia Gelbart, *Council Airs ‘Stop and Frisk’ Views, The Nutter Crime-Fighting Proposal Got Its First Public-Safety Hearing*, PHILA. INQUIRER, Oct. 25, 2007,

2011, Mayor Nutter had to settle a law suit against the city for the overuse of stops and frisks.<sup>38</sup>)

Despite the diversity of attitudes and approach that this extreme localism brings to American police agencies, it is safe to assume that every American law enforcement agency uses stops and frisks. While the intensity of use may vary, and every department may not make stops and frisks a priority enforcement tactic, it is used everywhere to some degree. According to William Bratton, former NYPD Commissioner and former Chief of Police in Los Angeles, stop and frisk is an everyday reality everywhere in the U.S. . Bratton has long been identified with policing in New York (where he served as police commissioner), and with the NYPD's heavy use of stop and frisk, so when he was hired to advise the struggling Oakland, California, police department, some feared that the Oakland police would begin to use stop and frisk much more than they had in the past. Bratton said, "[t]hose that are advocating that it can be done away with, or representing that it can be done away with, I'm sorry, because you do away with it and you're going to have your cities overrun with crime because it is the basic tool that every police department in America uses."<sup>39</sup> According to Bratton, "any police department in America that tries to function without some form of 'stop-and-frisk,' or whatever terminology they use, is doomed to failure. It's that simple."<sup>40</sup>

Having patrol officers increase their stop and frisk activity makes for effective crime fighting, the argument goes. The intensive use of stop and frisk has become a regular part of enforcement in urban high crime areas; "broken windows" policing<sup>41</sup> (usually identified with New York City, but practiced elsewhere as well) and "hot spot" polic-

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[http://articles.philly.com/2007-10-25/news/25232456\\_1\\_frisk-crime-fighting-proposal-police-cars](http://articles.philly.com/2007-10-25/news/25232456_1_frisk-crime-fighting-proposal-police-cars) ("Nutter's proposal to allow police to stop, question and frisk people suspected of carrying illegal weapons is a chief part of his anticrime strategy.").

38. *Settlement Reached in Philly Stop-and-Frisk Suit*, 6ABC.COM (June 21, 2011), <http://abclocal.go.com/wpvi/story?section=news/local&id=8201528>.

39. Laird Harrison, *Oakland Police Consultant Defends 'Stop, Ask and Frisk,'* KQED NEWS (Feb. 25, 2013, 9:38 AM), <http://blogs.kqed.org/newsfix/2013/02/25/oakland-police-consultant-defends-stop-ask-and-frisk>.

40. Jorge Rivas, *Oakland Hires Former LAPD Chief Who Says Cities Without 'Stop-and-Frisk' are Doomed*, COLORLINES (Jan. 23, 2013, 1:07 PM), [http://colorlines.com/archives/2013/01/oakland\\_hires\\_former\\_lapd\\_chief\\_who\\_says\\_cities\\_without\\_stop-and-frisk\\_are\\_doomed.html](http://colorlines.com/archives/2013/01/oakland_hires_former_lapd_chief_who_says_cities_without_stop-and-frisk_are_doomed.html).

41. The term and the philosophy behind it come from George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1, 1982, at 29, available at <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> (arguing that maintaining order by taking action on the small things—someone breaking a window—would prevent the slide toward more serious and frequent crime).

ing (in which officers and assets are concentrated in the areas of chronic criminal activity)<sup>42</sup> often feature heavy utilization of stop and frisk practices. Many law enforcement leaders commonly assert, with great confidence, that heavy reliance on stop and frisk constitutes a productive way of operating, and results in an increased number of arrests and confiscations of contraband. It is, they say, part of an effective crime-fighting strategy that proves valuable, day in and day out.<sup>43</sup>

The curious thing, however, is that until now, these assertions of the efficacy of intensive use of stops and frisks as a crime-fighting tactic have usually not been based on data. They constitute the accepted wisdom, to be sure. But without data that allows everyone involved to see the real patterns in stop and frisk activity and its actual productivity as a crime-fighting strategy, as opposed to its *assumed* efficacy, members of the public have remained uninformed. Members of the police are uninformed as well (though they may not believe that they are). This leads not to fact-based discussion and discourse, but to anecdotal assertions that reflect what citizens and police *think* is happening. When discussion is not grounded in facts, police assert that what they are doing obviously works; citizens who experience these actions as personal intrusions or assaults on their dignity assert, with equal certainty, that the police are engaged in racial profiling. And there the discussion remains: stalemated.

### III.

#### DATA COLLECTION ON STOP AND FRISK

Given all of the above, one can readily understand how important it would be to have a solid, fact-based picture on stop and frisk activity in the U.S. And the only way to have such a picture is through the consistent, accurate collection of data on this practice. Since stop and frisk has been part of the police arsenal for even longer than the four-plus decades that the practice has been regulated through the 1968

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42. "Hot spot" policing is a more recent idea than the broken windows theory, but a popular one. See, e.g., Anthony A. Braga et al., *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta Analysis*, JUSTICE Q. (May 16, 2012), available at <http://www.tandfonline.com/doi/abs/10.1080/07418825.2012.673632#.UkCFw8ash8H>; *Hot Spot Policing Can Reduce Crime*, NAT'L INST. OF JUSTICE (Oct. 14, 2009), <http://nij.gov/topics/law-enforcement/strategies/hot-spot-policing/>; *Hot Spot Policing to Reduce Violent Crime*, PUB. HEALTH LAW RESEARCH, <http://publichealthlawresearch.org/public-health-topics/violence-prevention/evidence-brief/hot-spot-policing-reduce-violent-crime> (last visited Sep. 23, 2013).

43. See Ray Kelly, Opinion, *Ray Kelly: The NYPD: Guilty of Saving 7,383 Lives*, WALL ST. J. (July 22, 2013, 7:14 PM), [http://online.wsj.com/article/SB10001424127887324448104578616333588719320.html?mod=WSJ\\_Opinion\\_LEADTop](http://online.wsj.com/article/SB10001424127887324448104578616333588719320.html?mod=WSJ_Opinion_LEADTop).

*Terry v. Ohio* case, one might imagine that data on this regular and accepted police activity would be plentiful.

But in point of fact, data collection on stops and frisks in the U.S. has been relatively rare. To be more precise, while police in some departments sometimes collected some limited data on their individual stops and frisks—for example, filling out so-called field interrogation cards and turning them in at the end of each shift<sup>44</sup>—little of this has happened within any comprehensive system, and most of it has been used for internal tracking purposes. All in all, in most police departments there has been virtually no systematic, organized effort to collect information on the practice in a way that gives big-picture insight into what police are doing. What is more, what data there is has usually not been available to the public in any form.

For some years, the great exception to this rule has been the New York Police Department. The NYPD has long required its officers to record information about each stop and frisk performed.<sup>45</sup> The required information, collected on a standard form called the UF-250, included the time and place of the stop and frisk, identifying information on the suspect (name, address, and the like, as well as the suspect's race or ethnic group, as perceived by the officer), the facts observed by the officer that support the officer's reasonable suspicion, the date, time and location of the incident, whether any contraband or weapon was recovered, and whether an arrest was made or a citation issued.<sup>46</sup> In 1999, when the killing of an unarmed civilian named Amadou Diallo by NYPD officers ignited weeks of protests,<sup>47</sup> the Attorney General of the State of New York ordered the NYPD to turn over stop and frisk reports for all of 1998 and the first quarter of 1999. It was the existence of the stop and frisk data collected on the UF-250 forms that made this possible. The Attorney General's report analyz-

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44. See, e.g., MICHAEL F. BROWN, *CRIMINAL INVESTIGATION: LAW AND PRACTICE* 118 (2d ed. 2001) ("Every investigative detention should be documented with a field interrogation report . . .").

45. See STOP AND FRISK PRACTICES REPORT, *supra* note 2, at 59 n.48 ("In 1986, the Department implemented a policy requiring officers, in certain specified circumstances, to document 'stop & frisk' street encounters on the UF-250 form.")

46. JONES-BROWN ET AL., *supra* note 5, at 9.

47. See Patrick Cole, *Daily Protests of NY Shooting Keep Political Heat on Giuliani*, CHI. TRIB., Mar. 30, 1999, at 3, available at [http://articles.chicagotribune.com/1999-03-30/news/9903300080\\_1\\_diallo-shooting-amadou-diallo-mayor-rudolph-giuliani](http://articles.chicagotribune.com/1999-03-30/news/9903300080_1_diallo-shooting-amadou-diallo-mayor-rudolph-giuliani); Rachel L. Swarns, *The Diallo Shooting: The Protesters; Unlikely Protesters: Diallo Case Draws Diverse Group*, N.Y. TIMES, Mar. 27, 1999, at B1, available at <http://www.nytimes.com/1999/03/27/nyregion/diallo-shooting-protesters-unlikely-protesters-diallo-case-draws-diverse-group.html?pagewanted=all&src=pm>; *More than 200 arrested in protest of New York City police shooting*, CNN.COM (Mar. 24, 1999, 5:12 PM), <http://www.cnn.com/US/9903/24/diallo.protest/index.html>.

ing stop and frisk data, released by the Attorney General in December of 1999,<sup>48</sup> revealed that the rate at which police officers “hit”—made an arrest, recovered evidence, or the like—was in the low teens. The hit rate for blacks and Latinos (10.6 and 11.6 percent, respectively) was lower than the hit rate for whites (12.6 percent).<sup>49</sup> The fact that almost ninety percent of stops and frisks produced nothing showed just how ineffective the tactic was.

In the years since the release of the Attorney General’s 1999 report, the NYPD has continued to release yearly stop and frisk data, and a remarkable trend shows up in these numbers. While crime in New York (and elsewhere, for that matter) has continued to drop during the last decade, the use of stops and frisks in New York City has *increased* substantially. In 2003, NYPD officers stopped and frisked 160,000 people; by 2009, that number increased to more than 575,000—an increase of more than 350 percent.<sup>50</sup> In 2011, the first year of the survey discussed in this article, the NYPD said it stopped more than 685,000 people.<sup>51</sup>

Patterns of racial disparity have continued as well. From 2003 through 2009, “Blacks and Hispanics [made] up a substantial majority of persons stopped.”<sup>52</sup> In 2011, just over 50 percent of all of those stopped were black; thirty-three percent were Hispanic, and less than ten percent were white<sup>53</sup>—almost the same ratios seen in the 1999 Attorney General’s report.<sup>54</sup> Another fact that has not changed is that stops and frisks are not particularly good at ferreting out crime; hit rates remained low in 2011, with just twelve percent resulting in charges or arrests.<sup>55</sup>

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48. STOP AND FRISK PRACTICES REPORT, *supra* note 2.

49. *See id.* at ix. I have written about this elsewhere. *See, e.g.,* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 81–82 (2002).

50. JONES-BROWN ET AL., *supra* note 5, at 4.

51. 2011 NYPD Stop and Frisk Statistics, *supra* note 4.

52. JONES-BROWN ET AL., *supra* note 5, at 14.

53. *See* 2011 NYPD Stop and Frisk Statistics, *supra* note 4.

54. STOP AND FRISK PRACTICES REPORT, *supra* note 3, at 94–95 (“[B]lacks comprised 25.6% of the City’s population, yet 50.6% of all persons stopped were black. Hispanics comprised 23.7% of the City’s population, yet 33.0% of all “stops” were of Hispanics. By contrast, whites comprised 43.4% of the City’s population, but accounted for only 12.9% of all stops.”) (internal footnotes and quotation marks omitted); Sean Gardiner, *NYPD Stop-and-Frisk Activity on the Rise*, WALL ST. J. (May 31, 2011, 5:12 PM), <http://blogs.wsj.com/metropolis/2011/05/31/nypd-stop-and-frisk-activity-on-the-rise/>.

55. STOP AND FRISK PRACTICES REPORT, *supra* note 3, at 111 (“[F]or every stop that resulted in an arrest, 9.0 total stops were made[.]” which is a rate of 11.11%) (internal quotation marks omitted); Sean Gardiner, *supra* note 55.

The availability of data on NYPD stop-and-frisk practices has resulted in significant new research. For example, researchers have used the data to demonstrate the poor crime-fighting efficacy of these heavy stop-and-frisk tactics, especially when targeted at minority youth.<sup>56</sup> Researchers have also shown how much of this effort seems targeted at low-level arrests for possession of small amounts of marijuana among black and Latino males.<sup>57</sup> The evidence also shows that in these marijuana cases searches and seizures seem to take place as a pretext for searches for weapons, yet the researchers found “no significant relationship between marijuana enforcement and the likelihood of seizing firearms or other weapons.”<sup>58</sup> Other empirical work on the New York stop and frisk data indicate that order maintenance police activity in New York “is not about disorderly places nor about improving the quality of life, but about policing poor people in poor places” in ways that have a disproportionate impact on racial and ethnic minorities.<sup>59</sup>

Far more important than the gains for enterprising researchers and academics, however, is that these statistics have informed a very pointed public debate over police policy. New York Mayor Michael Bloomberg and Police Commissioner Raymond Kelly have continued to tout their record on public safety, especially the continuing decline in homicides in almost every year since the mid-1990s, and have credited proactive policing that features stops and frisks. But activists and members of the public, especially in communities of color, have for some years seized upon the stop and frisk numbers, especially those that show continuing racial disparities, to explain that the heavy stop and frisk approach has substantial costs, alienating communities of color from the police, and that the gains seem small: only ten percent of the stops and frisks yield anything (contraband, arrest, etc.), and a much smaller percentage yet yield the real quarry: guns. And those opposing heavy stop and frisk activity have been able to mount real legal challenges to police procedure using the statistics; the *Floyd* case is the product of these efforts.

It is worth noting, of course, that the existence of statistics and data on stop and frisk activity themselves does not by itself make any

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56. Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing* (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-242, 2010), available at <http://ssrn.com/abstract=1443441>.

57. *Id.*

58. *Id.*

59. Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 *FORDHAM URB. L. J.* 457, 457 (2000).

particular conclusion inevitable. Even when the parties agree on what the numbers from New York *say*, this does not create any agreement about what the numbers *mean*. For example, the data are clear and consistent: as in other years, only about twelve percent of the stops and frisks produce anything—recovery of contraband such as illegal drugs (usually small amounts of marijuana), recovery of a firearm, or the like—that resulted in an arrest or the issuance of a summons.<sup>60</sup> For advocates seeking a curtailment of stops and frisks, this means that stops and frisks are ineffective and serve largely to control and antagonize those subjected to these procedures over and over.<sup>61</sup> For proponents of the activity, the low hit rate means something else: stops and frisks are an effective deterrence method. Because would-be perps and carriers of guns know that the police continue to carry out an aggressive, proactive policy of stopping and frisking people, they behave themselves generally, and leave their guns at home especially.<sup>62</sup> The overall result, proponents say, is a less violent city in which those who might be tempted are less inclined toward murderous violence.<sup>63</sup>

This brings us to the crux of what the survey conducted for this paper shows us. Although we can get a considerable amount of information concerning stops and frisks from the New York data, researchers, police, municipal administrators and advocates examining stop and frisk practices *outside of New York City* must exercise caution. They must avoid the mistake of assuming that what the data show in New York would also appear in stop and frisk data from other American jurisdictions. Other police departments might approach stop and frisk in very different ways, train their officers differently, or have less faith in the crime control efficacy of the tactic. Other cities may exhibit stronger, or weaker, patterns of racial and ethnic disparity, or they could have policies that discouraged reliance on stops and frisks in the way that New York did. This makes it important to look beyond New York, and to examine what else is available.

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60. 2011 NYPD Stop and Frisk Statistics, *supra* note 4.

61. *E.g.*, Laura Ly, *New York's Stop-and-Frisk Policy Now in the Judge's Hands*, CNN.COM (May 21, 2013, 11:19 AM), <http://www.cnn.com/2013/05/20/justice/new-york-stop-frisk-trial> (stating that according to the plaintiffs in the Floyd case, “over the past eight years, blacks and Latinos constituted 85% of the people stopped, though 90% of those stopped were neither arrested nor given a court summons. Only 1% resulted in the recovery of a weapon and 0.14% resulted in the recovery of a gun,” leading their attorney to argue that “[c]learly the NYPD isn’t stopping the right people to get guns off the street.”).

62. *Id.* (“The police department says that the policy—in which police stop, question and frisk people they consider suspicious—is used to deter crime.”)

63. *Id.* (arguing that the NYPD’s “performance goals”—not quotas—for stops and frisks by officers are needed “to keep the city safe.”).

Yet the problem for researchers on American stop and frisk practices outside of New York has been that, in point of fact, relatively few American police departments have collected data on stops and frisks in ways that would allow study of the tactic. Thus for a long time the best known example of a department emphasizing stop and frisk, the NYPD, has been the only real example in the empirical world. The NYPD may be the best known police department in the world, one of the most frequently noted in news reporting, movies, and television; the Department's crime-fighting efforts may constitute one of the best-known success stories in law enforcement, or in all of municipal governance, in the last thirty years. Nevertheless, it would be an error to assume that a particular crime control tactic that has been used intensively in New York would fit other cities just as well. Those closest to the action in New York City do not even agree on what the data tell us; thus we cannot know whether these data would tell us anything of value to make judgments or policy elsewhere.

That is why the survey discussed here represents a potential step forward. Given the common use of stop and frisk in every city and police department, and especially the impact of the tactic on communities of color, real information about stop and frisk activity in each of these cities can play a valuable role in understanding what local police agencies actually do, and the impact it has on crime and on those who live in these places. This means that the discussion of stop and frisk *must* move across the Hudson and beyond New York City, to inform—or spark—real factual debate about stop and frisk.

#### IV.

##### THE SURVEY: MAJOR AMERICAN POLICE DEPARTMENTS' DATA COLLECTION ON STOP AND FRISK ACTIVITY

In an effort to understand the state of data collection on stops and frisks beyond New York City, I undertook a survey of fifty-five of the largest police departments in the U.S. These departments—or rather, their chiefs—make up the membership of the Major Cities Chiefs, one of the leading law enforcement leadership organizations.<sup>64</sup> A survey

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64. According to its website, the Major Cities Chiefs Police Association (MCC) “is a professional association of Chiefs and Sheriffs representing the largest cities in the United States and Canada. MCC membership is comprised of Chiefs and Sheriffs of the sixty-three largest law enforcement agencies in the United States and seven largest in Canada. They serve over 76.5 million people (68 US - 8.5 Canada) with a sworn workforce of 177,150 (159,300 US, 17,850 Canada) officers and non-sworn personnel.” MAJOR CITIES CHIEFS POLICE ASS’N, <https://www.majorcitieschiefs.com/> (last visited May 23, 2013). MCC has periodically expanded its size, including more cities (and their chiefs) over time. *Id.*

of these departments does *not* examine a true cross-section of American policing; most of the approximately 18,000 police agencies in the U.S. are small, and the agencies queried here are the largest in the country.<sup>65</sup> But these large agencies seemed the most likely 1) to have the inclination to respond to the survey, 2) to have the inclination and the personnel to create a data collection and analysis effort for stops and frisks, and 3) to have a mix of racial and ethnic groups in their populations that would make stop and frisk a likely issue, and therefore worth studying through data collection. In other words, if any police departments in the U.S. had decided to undertake such efforts, it was most likely to be these; if they had not, there is little reason to think that other smaller agencies had, or would in the future. Moreover, if the idea was to find narratives that might compete with or complement the dominant New York story of stop and frisk, data collection in large departments could offer contrasting stories from other big cities.

The basic methodology utilized for the survey was not elaborate. Research assistants contacted the designated police agencies to gather information on whether or not the agency collected data on stops and frisks. Email contact would typically be followed as necessary by telephone calls; sometimes, traditional written requests by mail were required as well. Almost always, making contact and finding the right person authorized and informed enough to speak required multiple attempts. Research assistants worked from a list of written questions; that list was formalized in a model written contact letter. The survey was designed to ascertain, among other things, whether or not the department required officers to collect data on stops and frisks, whether or not officers collected certain specific pieces of information (e.g., race or ethnicity, the legal basis for the stop, and whether any contraband was found), whether the data were collected in electronic (i.e., searchable and analyzable) form, and whether department-wide data on stops and frisk were made available to the public.

In all, forty-four of the fifty-five departments responded. A comprehensive listing of the responses and the information is provided in chart form, as Appendix A. The model written contact letter is attached as Appendix B. Of those responding, twenty-three said that they did require officers to collect some specific data on each stop and

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65. *Local Police*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=71> (last visited Jul. 25, 2013) (noting that, of the 18,000 police agencies in the U.S., “about half of local police departments employed fewer than 10 sworn personnel . . .”).

frisk conducted.<sup>66</sup> Eighteen departments said that they did not require any collection of data on stops and frisks;<sup>67</sup> three others said that officers collected data, but that doing so was discretionary.<sup>68</sup>

Twelve police departments never responded to the survey. Of those agencies collecting data, twenty-one said that the data included suspects' race or ethnicity and other identifying information.<sup>69</sup> Thirteen of these departments said that the data were available to the public in some form. As small as these numbers are, the fact that this is being done anywhere, in some of the largest U.S. police departments, represents a big step forward. It was not long ago that few U.S. police departments collected stop and frisk data. The idea of sharing any data with the public would never have occurred to anyone.

A few of these departments, such as those in Los Angeles and Cincinnati, have been required to collect data on stops and frisks as part of police reform agreements with the U.S. government.<sup>70</sup> (In Los Angeles, Cincinnati, and other cities, these agreements, referred to as "consent decrees," have sometimes required that data on all stops and frisks be collected.)<sup>71</sup> A few other departments, such as the Philadelphia Police Department, collect stop and frisk data as a result of the

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66. See app. A (Stop-and-Frisk Data Practices for Major Cities) available at [www.nyujlpp.org](http://www.nyujlpp.org).

67. *Id.*

68. *Id.*

69. *Id.* One department said it did not collect race or ethnicity, but did collect other identifying information; all of the others collected both race or ethnicity and other identifying information.

70. These reform agreements are reached pursuant to the U.S. Department of Justice's authority under 42 U.S.C. § 14141, the so-called "pattern or practice" law, which enables the federal government to investigate police departments for evidence of a "pattern or practice" of police practices that violate constitutional rights. For an overview of this federal authority, carried out by the Department of Justice's Civil Rights Division Special Litigation Section, see *Conduct of Law Enforcement Agencies*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/crt/about/spl/police.php> (last visited June 4, 2013).

71. *Id.*; e.g., Consent Decree at sec. III, para. 105, *United States v. City of Los Angeles*, No. 00-11769 GAF (C.D. Cal. June 15, 2001), available at <http://www.justice.gov/crt/about/spl/documents/laconsentpart4.php> ("By November 1, 2001, the Department shall require LAPD officers to complete a written or electronic report each time an officer conducts a pedestrian stop," specifying in detail what data is to be collected); Settlement Agreement and [Proposed] Order at sec. VI, para. 64, *United States v. Town of East Haven*, No. 3:12-CV-1652 (D. Conn. Nov. 20, 2012), available at [http://www.justice.gov/crt/about/spl/documents/ehpdsettle\\_11-20-12.pdf](http://www.justice.gov/crt/about/spl/documents/ehpdsettle_11-20-12.pdf) (providing, in part, that "EHPD shall, consistent with this Agreement, develop a comprehensive policy on stops, search and seizures. This policy shall have the following elements: . . . (c) A requirement that all stops, searches, and seizures be documented in an Incident Report," and specifying eight different types of information which must be included).

settlement of lawsuits brought by private citizens and non-governmental organizations (e.g., in Philadelphia, the American Civil Liberties Union of Pennsylvania brought the lawsuit).<sup>72</sup> In all, the U.S. picture on data collection is at least a little encouraging: a small but growing number of jurisdictions now collect at least some data on stops and frisks of pedestrians as a routine matter.

The Philadelphia data make an interesting and compelling example of how data on stops and frisks from outside of New York can provide insights and provoke important local debate. Some data have been collected on stop and frisk practices in Philadelphia for more than a decade because of a private lawsuit against the police brought in the 1990s.<sup>73</sup> The result of this suit was a settlement in which the city and police department agreed, among other things, to collect data on pedestrian stops and frisks.

As stated earlier, when he was elected in 2008, Mayor Nutter ordered the police department to increase stop and frisk activity.<sup>74</sup> The Mayor was true to his word: by at least one measure, stop and frisk activity in Philadelphia under Mayor Nutter was actually *more intense than under the NYPD in New York*. In 2009, police stopped 575,000 people in New York, a city of roughly 8.175 million—a ratio of about one in fourteen. In Philadelphia in the same year, police stopped 250,000 in a city of 1.526 million—a ratio of one in six,<sup>75</sup> with a rate of racial disparity which exceeds what the data showed in New York City.<sup>76</sup> Stops and frisks resulted in arrests less than eight and one-half percent of the time—a hit rate not even as high as the mediocre twelve percent rate reported most recently in New York.<sup>77</sup> The police department had also become sloppy in the record keeping required by the 1990s settlement. After renewed complaints of police abuse surfaced in 2008, 2009, and 2010, the American Civil Liberties Union of Pennsylvania filed suit again.<sup>78</sup> The city and the police department settled

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72. Settlement Agreement, Class Certification, & Consent Decree, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. June 21, 2011), available at [http://www.aclupa.org/download\\_file/view\\_inline/744/198/](http://www.aclupa.org/download_file/view_inline/744/198/).

73. *NAACP v. City of Philadelphia*, No. 96-6045 (E.D. Pa. Sept. 4, 1996).

74. See *supra* text accompanying note 38.

75. Patrick Walters, *ACLU Files Lawsuit Challenges 'Stop and Frisk' Searches in Philadelphia*, WASH. POST, Nov. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/04/AR2010110408055.html>.

76. *Id.*

77. *Id.*

78. Complaint, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. Nov. 4, 2010), available at [http://www.aclupa.org/download\\_file/view\\_inline/669/198/](http://www.aclupa.org/download_file/view_inline/669/198/).

again in 2011,<sup>79</sup> promising to collect more stop and frisk data more thoroughly and consistently, and to refrain from some troublesome stop and frisk practices.

## V.

### OPPORTUNITIES FOR REFORM CREATED BY NEW DATA COLLECTION EFFORTS

The efforts to collect data on stop and frisk activity outside of New York are perhaps still too few, and those that do exist may be too limited. Nevertheless, they do raise some possibilities for change, some of which may prove significant.

#### A. *Changing the Narrative: “It’s Not Just New York; In Our City, Stop and Frisk Works Like This.”*

As discussed earlier, for some years the story of stop and frisk in American policing has come almost exclusively out of New York. Former Mayor Rudolph Giuliani and the police force made intensive use of stops and frisks a cornerstone of their “broken windows” policing strategy.<sup>80</sup> Giuliani’s successor Michael Bloomberg, and his police commissioner, Raymond Kelly, have continued this strategy.<sup>81</sup> Combine the NYPD requirement of data collection on all stops and frisks, the public reporting of that data every year, the ongoing federal litigation over that strategy, and the reports that police administrators demanded that each patrol officer meet certain numerical goals (which, of course, are not quotas) for activities like stops and frisks,<sup>82</sup> and then have this occur in a city that remains the center of the media universe, and it becomes easy to understand why stop and frisk has been a New York narrative.

The results of the survey show that, for the first time, that narrative need not remain so New York-centric. For the first time, people in a small but growing number of other major cities can get a real, data-based picture of stop and frisk activity in their own municipali-

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79. Settlement Agreement, Class Certification, & Consent Decree, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. June 21, 2011), available at [http://www.aclupa.org/download\\_file/view\\_inline/744/198/](http://www.aclupa.org/download_file/view_inline/744/198/).

80. See *supra* notes 36–37 and accompanying text.

81. See *supra* note 10 and accompanying text.

82. Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy’s 81st Precinct*, VILLAGE VOICE, May 4, 2010, <http://www.villagevoice.com/2010-05-04/news/the-nypd-tapes-inside-bed-stuy-s-81st-precinct>. This article spawned numerous follow up pieces in *The Village Voice*, and countless articles elsewhere; *The Village Voice* follow up pieces can be accessed at <http://www.villagevoice.com/related/to/Adrian+Schoolcraft/>.

ties. They need not take the New York experience as their own; they can know and understand what their own police departments do, how they use stop and frisk activity, and with what effect. They need not simply assume that their own cities look like New York in the use, or abuse, of this often controversial tactic.

The ability to take this kind of localized look at stop and frisk police activity is all to the good. The United States has roughly 17,000 police agencies: large, big city agencies like the NYPD, the Chicago Police Department, and the Los Angeles Police Department; small-town agencies of ten or fewer officers; medium-sized departments such as those in St. Paul, Minnesota or Pittsburgh; and specialty departments (transit authority police, housing department police, university police departments). And size is not the only dimension on which these thousands of agencies may diverge. They police very different areas of the country; they may have widely differing missions; they may have vastly different priorities. Given all of this, we should expect a high degree of variation in the ways that American police departments utilize stops and frisks. Expecting all of them to use stop and frisk the way that New York does, or to make rules and policies for other police departments based on the experience of the NYPD, seems foolish—though it is perhaps understandable, if we lack any other information. The point is that now, in at least some cities in the U.S., that approach is no longer necessary. Any police department that chooses to collect and analyze data on its officers' stop and frisk activity gets a picture of itself from which to work and make judgments.

*B. Does Reliance on Stop and Frisk Always Result in Racially Disproportionate Impacts?*

In New York, one of the central complaints about the NYPD's intensive use of stops and frisks has always been that the burden of these actions falls disproportionately on people of color, particularly young black and Latino men.<sup>83</sup> It may be this complaint, more than

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83. Examples of these complaints are too numerous to summarize. For a recent example, see Ailsa Chang, *For City's Teens, Stop and Frisk is Black and White*, WNYC NEWS (May 29, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/may/29/city-teenagers-say-stop-and-frisk-all-about-race-and-class/> (finding black teens overwhelmingly likely to have experienced a police stop compared to white and Asian teens); New NYCLU Report Finds NYPD Stop-and-Frisk Practices Ineffective, Reveals Depth of Racial Disparities, N.Y. CIVIL LIBERTIES UNION (May 9, 2012), <http://www.nyclu.org/news/new-nyclu-report-finds-nypd-stop-and-frisk-practices-ineffective-reveals-depth-of-racial-dispar> ("Young black and Latino men . . . account for only 4.7 percent of the city's population, [but] black and Latino males between the ages of 14 and 24 accounted for 41.6 percent of stops in 2011. The number of stops of young black men exceeded the entire city population of young black men (168,126 as

anything, that has fueled friction between the NYPD and many of the citizens the department serves in New York.

There is nothing about this that is new. Going back to the *Terry*<sup>84</sup> case itself—the 1968 decision that, once and for all, gave stop and frisk a legal framework and the Supreme Court’s constitutional blessing—one sees the Court discuss race and policing in a candid manner that is still rare today. Discussing the limitations of the exclusionary rule as a way to change police conduct, the Court said that “[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial.”<sup>85</sup> One might agree or disagree with the conclusion presented in this sentence, but the rest of it is at least an oblique acknowledgment of the disproportionate use of stops and frisks on the street to target people of color.

In the 1990s, with crime falling dramatically in New York during the latter half of the decade, communities of color seemed to feel less than appreciative of police efforts that had helped to bring about this positive change. William Bratton, the former commissioner of the NYPD under Giuliani, said that this represented a huge lost opportunity: lowering crime had not raised the level of trust of police in communities of color, largely because of “the controversial ‘stop and frisk’ tactics of New York City’s street crime unit, in which many minority residents felt that they were being harassed by the police.” Bratton quoted Zachary Carter, the former U.S. Attorney for the Eastern District of New York, as describing this lost opportunity as “a love affair that was waiting to happen.”<sup>86</sup> Given that so much of the decrease in the city’s crime had actually come in the highest crime areas, with large minority populations, Bratton found Carter’s words particularly insightful. “I was struck by that comment and thought to myself that it was really a love affair that should have happened but did not.”

We can now get beyond that narrow discussion in the other places that have started collecting data. Do data on stops and frisks in Fort Worth, Texas, and other cities show the same types of racial disparities that we have long seen in New York? If there are disparities,

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compared to 158,406). Ninety percent of young black and Latino men stopped were innocent.”).

84. 392 U.S. 1 (1968).

85. *Id.* at 14–15.

86. Clyde Haberman, *NYC: Police Work; Getting Past Raw Emotion*, N.Y. TIMES, Feb. 25, 2000, <http://www.nytimes.com/2000/02/25/nyregion/nyc-police-work-getting-past-raw-emotion.html>.

do these patterns differ in any way, either big or small? If the data were to show that (unlike in New York) no patterns of racial disparity are apparent in the other jurisdictions, this would be incredibly important because it indicates that there are ways to use the tactic that do not automatically call forth enforcement that has a racially disproportionate impact.

The ability to make comparisons of the racial impact of stops and frisk practices across cities and police departments would provide a helpful tool for crafting and targeting possible criminal justice reform. Given the damage that racially disproportionate targeting (in other words, racial profiling) of persons using stops and frisks might do in terms of the destruction of police/community relations, the ability to use the tactic in ways that avoid this type of racial impact would be crucial. By contrast, if data from different cities seems to confirm the NYPD experience—that is, if we observe that racially disproportionate impact is the rule with stop and frisk, not the exception—this will help point us to creating specific policy changes that perhaps take on racial bias in street level policing in a much more general way. It may even prompt us to argue that the use of stops and frisks must be either more heavily regulated—i.e., it should require more evidence than just reasonable suspicion—or perhaps should only be used in very narrow categories of circumstances, such as when a weapon is present but not when non-violent crime is suspected. Whatever the eventual conclusion, having data from other jurisdictions will enable us to understand the true picture of the use of stops and frisks everywhere, and how we might tackle the central problem of racially disproportionate impacts in appropriate ways. Few issues could be more important.

C. *“If [Names of Other Cities] Can Collect Data on Stops and Frisks, Why Can’t We?”*

The survey shows that there are a small but growing number of the largest police departments in the United States that have taken on the challenge of collecting data on stop and frisk activity. The other side of this observation, of course, is that most of the fifty largest departments have not, or only do so in a way that is not useful for systematic analysis, or do not share the data they collect with the public.

For people living in those jurisdictions, the fact that police in cities other than New York have begun to adopt the practice of data collection may create a new argument to try to persuade their own law enforcement agencies to do this. It is one thing for the NYPD to take on collection of data on stops and frisks, a police chief or other admin-

istrator might say; the NYPD is a huge department with considerable resources they can bring to bear on this task. Besides, the chief might say, collecting data in New York is expected by the public, after all the years in which the NYPD has done it. But we're not the NYPD—not as big, not as resourced, and the like. However, faced with the evidence that this is *not just* a practice of the NYPD—and that a growing number of other police departments, in other areas of the country with differing missions and jurisdictions have decided to move in this direction—the argument that data collection on stops and frisks is neither doable nor necessary outside of New York becomes much less tenable. Thus advocates for police accountability can argue not just that data collection is possible—the NYPD does it, after all—but that it is the better practice and is done in other, similar cities.

*D. Fine Tuning a Stop and Frisk Strategy to Account  
for the Costs it Imposes*

Stop and frisk activity that conforms to the law does not violate the Constitution. But there are some questions police agencies and cities should consider in addition to the legality of police activity. Even if officers may legally use stops and frisks, does this always mean they *should* use them to *the maximum extent possible*? Is heavy reliance on stops and frisks the best way to control crime? Might a more selective use of the tactic do just as much to control crime? Could another overall strategy which emphasizes stop and frisk much less have the same crime control effect, without the cost that heavy stop and frisk activity entails?

And make no mistake: there is a cost to aggressive use of stops and frisks. The individuals subjected to this kind of activity may feel alienated from police, victimized, or humiliated. They may be upset, and feel that the way the police have elected to control crime is happening *to them*, and not being done *for them*. And this is not simply a matter of not wanting to offend or to be politically correct. Alienation from law enforcement breeds distrust, creating barriers to communication. And information about what is happening on the street is the lifeblood of successful policing. People who fear the police and distrust them are, quite simply, less likely to supply the crucial information that officers need to solve crimes, and less likely to feel the police and the law itself are legitimate.<sup>87</sup>

Given these costs, the availability of data on stop and frisk activity in more cities creates an opportunity to make stops and frisks better

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87. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

targeted, more likely to produce results, and less likely to produce the harmful costs associated with an aggressive use of the tactic. In other words, to the extent that the story of stop and frisk becomes one not just about New York and its statistics but about many other cities, with many individual crime control strategies, the more likely it is that any city may find ways to adjust its use of stop and frisks and increase its effectiveness.

### *E. Transparency*

The collection of data on stops and frisks in an increasing number of cities outside of New York can, by itself, lead directly to a specific and positive reform. This is because if the effort to collect data is part of a comprehensive effort that also makes the data available to the public, it increases the transparency of police actions and creates an empirical window on the benefits or drawbacks of police policy in action.

One hears the term “transparency” in many contexts these days. The idea is that by making the workings of government open to public scrutiny, the public will better understand what those in charge are doing, and can hold officials accountable in appropriate ways. Because of the prospect of accountability that transparency spawns, officials may do a better job, but more importantly may avoid misbehavior and corruption because of the prospect of being discovered, and then turned out of office and/or prosecuted. This conception of transparency is the same idea expressed by Justice Louis Brandeis when he said that “[s]unlight is said to be the best of disinfectants . . . .”<sup>88</sup> It is no accident that a current non-governmental organization dedicated to transparency calls itself The Sunlight Foundation.<sup>89</sup>

Some—not all—of the police departments outside of New York that have begun to collect data on stop and frisk activity make this data available to the public. Most do not. Even the NYPD does this now only because it is mandated to do so by the settlement agreement in an earlier (2003) lawsuit over stop and frisk. But with a small number of the largest police departments making these data public, other agencies may see that this kind of transparency can benefit them. Allowing the public to know the real nature of police activity, repre-

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88. Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WKLY., Dec. 20, 1913, at 10.

89. Andrew Berger, *Brandeis and the History of Transparency*, SUNLIGHT FOUND. BLOG (May 26, 2009, 10:47 AM), <http://sunlightfoundation.com/blog/2009/05/26/brandeis-and-the-history-of-transparency>.

sented in empirical findings, may help create and build trust between police and those they serve. When the public knows the real facts concerning what their police officers do, this may help to dispel the distrust of police methods. The agency will move from being seen as secretive about its actions to acting as if it has nothing to hide and nothing to fear from the public knowing the facts. Moreover, the open discussion of the data may help police and the public understand each other better. Suppose, for example, that the data in a given city reveal that the police have dramatically increased stop and frisk activity, but only in areas with the highest crime rates. Suppose further that in the same time period, serious crime decreases by a small but measurable amount. When not just the small decrease in serious crime but also the large increase in stop and frisk activity become part of the public discussion, the public can have a serious discussion about the policy choices being made and the desirability of those choices. The question becomes whether or not the decrease in serious crime is worth the substantial increase in stops and frisks. Some may say yes, while others will disagree. But without the stop and frisk data, the discussion is both stilted and insufficiently informed, and all the public knows is that serious crime has decreased because of stops and frisks. And who doesn't want less crime?

#### CONCLUSION

The survey described in this article reveals a new set of opportunities for law enforcement agencies and for those concerned with police policy: the story of stop and frisk by police can now move beyond consideration solely of the use of this tactic by the NYPD. The 2011–12 survey of the fifty-five largest police departments in the U.S. revealed that some of them now collect some data on stop and frisk activity by their officers in a format that could be stored, searched, and analyzed electronically. In some of these departments, enough data is collected to give analysts a reasonably good understanding of how stops and frisks are being used in the agency; in some, these data are made public.

The benefits of these data collection efforts constitute, or can lead to, specific reforms that can have particular impact on the debates over the impact of race on criminal justice. First, the discussion can broaden and deepen, because the narrative will no longer only reflect New York City and its police department; other cities may utilize stop and frisk very differently. Second, we may learn if using stop and frisk must inevitably have a disparate impact on minority racial and ethnic groups, as it seems to in New York, or whether it might be used very

differently in other places, without this impact. The answer to this question might, all by itself, cause policy makers to re-think the wisdom of heavy reliance on stop and frisk. Third, other cities not now collecting stop and frisk data which would have considered the effort something that only a city like New York would or could do might revisit this question. If other cities in other regions of the country choose to do this, maybe others will follow. Fourth, cities that do choose to go ahead with data collection and analysis efforts on stops and frisks could fine tune their efforts, in a way that they could not without the information. This can make for better and more precise crime-fighting efforts, and also allow for adjustment to avoid racially disproportionate impacts of the policy. Last, the collection of data will increase transparency, when accompanied by an effort to make the data available to the public.

## APPENDIX B



## University of Pittsburgh

*School of Law*Barco Law Building  
3900 Forbes Avenue  
Pittsburgh, PA 15260  
412-648-1400

October 24, 2011

Dear Sir or Madam:

My name is David Harris. I am a Professor of Law and Associate Dean for Research at the University of Pittsburgh School of Law. You have been contacted by my Research Assistant, Laura Gomez Martin, who is assisting me with a project concerning the collection of data on stops and frisks. This letter serves as our official request for your help.

I am conducting a survey into data collection on stops and frisks by all the American member police departments of the Major Cities Chiefs organization. The purpose is to find out how many of these leading police agencies collect data systematically on stops and frisks conducted by their officers, what data they collect, and whether and in what form that data is available to researchers and members of the public. Specifically:

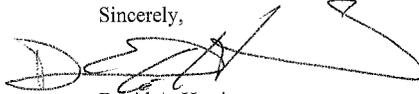
- 1) Does your police department collect data on all stops and frisks performed by your officers?
- 2) If so, how is that data collected (paper forms, electronic submission, etc.), and are officers required to submit data on all stops and frisks by departmental policy or rule?
- 3) Does the data include:
  - a) location;
  - b) date and time of day;
  - c) duration of event;
  - d) description of the reasonable suspicion leading to stop;
  - e) identifying information on subject, such as
    - name, address, DOB;
    - race, ethnicity;
    - gender;
  - f) whether frisk resulted in recovery of contraband;
  - g) nature of contraband recovered, such as
    - weapon
    - marijuana/approx. quantity;
    - cocaine/approx. quantity;
    - heroin/approx. quantity;
    - other contraband (describe);

- h) whether event resulted in
- arrest
  - citation
  - no further action
- i) whether *aggregate* data – not data on individual officers’ activities, but on the department as a whole or on individual districts or precincts -- are available outside the police department, and in what form (by request, on website, in annual report).

The purpose of the survey is to attempt to get a clear picture of what portion of the major police departments in the U.S. collect data on stops and frisks, and if so how much and in what form. It will be used to inform policy makers, police officials, and others concerned with maintaining the effectiveness of American policing. Please note that this project is not sponsored by Major Cities Chiefs; we have simply used their list of agencies as a way of identifying the leading departments in the country.

Please communicate replies and answers to Research Assistant Caitlin Norton. She is available at (936) 229-1862 and by email at [CEN15@pitt.edu](mailto:CEN15@pitt.edu). If you have any questions, please feel free to contact me at (412) 648-9530, or by email at [daharris@pitt.edu](mailto:daharris@pitt.edu).

Sincerely,

A handwritten signature in black ink, appearing to read 'David A. Harris', written over a horizontal line.

David A. Harris

Professor of Law and Associate Dean for Research  
University of Pittsburgh