

# BRINGING THE GAVEL DOWN ON STOPS AND FRISKS: THE EQUITABLE REGULATION OF POLICE POWER

William A. Margeson\*

## INTRODUCTION

There are times when the old bunk about an independent and fearless judiciary means a good deal.

—Judge Learned Hand<sup>1</sup>

On August 12, 2013, Judge Shira Scheindlin of the United States District Court for the Southern District of New York handed down a pair of rulings holding New York City liable for violating the Fourth and Fourteenth Amendment rights of black and Hispanic citizens<sup>2</sup> and ordering an extraordinary panoply of injunctive remedies to compel the New York Police Department (“NYPD”) to conform its conduct of stops and frisks to the requirements of the Constitution.<sup>3</sup>

Just over two months later, the Second Circuit rebuked Judge Scheindlin for her rulings in that case, *Floyd v. City of New York*.<sup>4</sup> While the Second Circuit’s order did not expressly examine the merits of the liability holding, the order stayed the injunctive relief, and—in the coup de grace—decreed Judge Scheindlin removed from the case “in the interest, and appearance, of fair and impartial administration of justice.”<sup>5</sup>

Judge Scheindlin, according to the Second Circuit, had abused a judicial rule permitting plaintiffs to select a particular judge to preside over their case, who, on the date of filing, is presiding over a related case.<sup>6</sup> Although this particular objection was not once raised by the City’s attorneys during the years of litigation preceding her removal, it was raised by Mayor Michael Bloomberg in the days

---

\* J.D. Candidate, Georgetown Law, Class of 2015. The author is grateful he has had the opportunity to learn and receive help on this note from Professors David Cole and Pamela Harris. The author also wishes to memorialize his gratitude for the invaluable editorial advisement of Gerard Fowke III and the editorial support of Rail Seoane and Grant Margeson. Finally, the author extends the balance of his gratitude to Erica Werner, and Olive and Lucy. © 2014, William A. Margeson.

1. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 155 (1994).

2. *Floyd v. City of New York (Floyd Liability Opinion)*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013), *appeal dismissed*, (Sept. 25, 2013).

3. *Floyd v. City of New York (Floyd Remedy Order)*, No. 08 Civ. 1034 SAS, 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013), *appeal dismissed*, (Sept. 25, 2013).

4. *Ligon v. City of New York*, No. 13-3123, 2013 WL 5835441, at \*1 (2d Cir. Oct. 31, 2013), *superseded in part by Ligon v. City of New York*, 736 F.3d 118 (2d Cir. 2013) (Judge Scheindlin issued a single order to remedy the constitutional violations found in both *Ligon* and *Floyd* because both implicated the NYPD’s stop and frisk practices).

5. *Id.* at \*1.

6. *Id.* at \*1 n.1.

after the liability opinion was issued in an op-ed condemning Judge Scheindlin for her “brazen activism” in “offer[ing] strategic advice to the plaintiffs.”<sup>7</sup> The Second Circuit also scolded Judge Scheindlin for failing to “avoid . . . the appearance of impropriety” by giving interviews to three journalists in which she had “purport[ed] to respond publicly to criticism” of her management of the case.<sup>8</sup> The district judge who had taken New York City to task for biased policing was in turn taken to task for biased judging.

At issue in the *Floyd* litigation was the NYPD’s conduct of investigative street stops—known as *Terry* stops after the eponymous Supreme Court opinion enshrining their constitutionality<sup>9</sup>—in which officers detain for investigative purposes individuals whose behavior arouses an inference of criminality. Under the watch of Mayor Michael Bloomberg, the annual number of these stops exploded from 314,000 in 2004 to 686,000 in 2011.<sup>10</sup> Between 2004 and 2012, the NYPD reported conducting 4.4 million stops.<sup>11</sup> While the number of stops surged, the grounds for making stops became increasingly tenuous. In the time spanning 2004 and 2009, “the percentage of stops where the officer failed to state a specific suspected crime rose from one percent to thirty-six percent.”<sup>12</sup> Simultaneously, officers became increasingly reliant on “inherently subjective and vague” catchwords to articulate their suspicion.<sup>13</sup> By 2009, nearly sixty percent of stops were based in part on suspicion arising from “furtive movements,”<sup>14</sup> notwithstanding the evidence that officers “very broad[ly]” interpreted the factor to signify a multitude of enabling meanings.<sup>15</sup>

Scanning the statistical portrait of the NYPD’s use of stop and frisk tactics that formed the basis for the opinion in *Floyd*, the racial disparities are as unmistakable as they are staggering. Of the 4.4 million stop and frisks that NYPD officers reported conducting between 2004 and 2012, eighty-three percent targeted either blacks or Hispanics and just ten percent targeted whites.<sup>16</sup> Yet during the relevant time period, New York’s population was around twenty-three percent black, twenty-nine percent Hispanic, and thirty-three percent white in 2010.<sup>17</sup> Stated

---

7. Michael R. Bloomberg, Op-Ed., ‘*Stop and Frisk*’ Is Not Racial Profiling, WASH. POST, Aug. 18, 2013, [http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84\\_print.html](http://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aaf5a5f84_print.html).

8. *Ligon*, 2013 WL 5835441, at \*1 n.2.

9. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

10. *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*3 (S.D.N.Y. Aug. 12, 2013).

11. *Id.* Of course, the count of 4.4 million includes neither the *Terry* stops that were not reported nor consensual stops.

12. *Id.* at \*4.

13. *Id.*

14. *Id.* at \*13.

15. *Id.* at \*6.

16. *Id.* at \*4.

17. *Id.*

differently, a black individual was over five times more likely to be stopped than a white individual during much of the past decade in New York.

But raw data can represent an incomplete and misleading picture of reality, given the interaction of innumerable variables other than racial discrimination that might contribute to an explanation of the racial disparities. That a greater percentage of blacks and Hispanics were stopped does not necessarily prove that the police officers conducting the stops are guilty of racial bias. It might be the case that blacks and Hispanics engage in reasonably suspicious behavior at a rate that explains every one of the 8,300 decimal points of racial difference in the data. To account for this possibility, the raw data was processed through a sophisticated statistical algorithm that controlled for potentially confounding variables to estimate the true effect of racial bias on the NYPD's employment of stop and frisk procedures.<sup>18</sup> The analysis revealed that between 2004 and 2009 the NYPD disproportionately targeted blacks and Hispanics and the neighborhoods in which blacks and Hispanics are most likely to live.<sup>19</sup> The analysis also showed that the NYPD was more likely to arrest and to use force against blacks and Hispanics, notwithstanding that stops of blacks were eight percent less likely to result in legal enforcement action.<sup>20</sup> It was the calculations of this analysis that served as the evidentiary basis for the award of the injunction against New York's stop-and-frisk policy.

This policy, in a practical sense, extended officers a license to disregard the discretionary constraints imposed by the constitutional law of criminal procedure.<sup>21</sup> When this license was combined with substantive law placing a preponderant punitive burden on minorities,<sup>22</sup> procedural law conferring nearly impenetrable cover to racially prejudiced policing,<sup>23</sup> police incentives prizing the quantity and cost-efficiency of investigative stops and arrests,<sup>24</sup> and extreme economic inequality,<sup>25</sup> the potential for social injustice was immense.

Despite the potential for injustice that is a natural consequence of the discretion inherent in preemptive policing under *Terry*, the safety of city streets is an im-

---

18. *Id.* at \*20, \*23 (adopting the analysis employed by Dr. Jeffrey Fagan, the expert witness for the plaintiffs, which was inspired by the model developed by Yale Law professor Ian Ayres, who in 2008 published a study on the effect of racial bias on pedestrian and vehicle stops in Los Angeles between July 2003 and June 2004); *see also* IAN AYRES & JONATHAN BOROWSKY, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), available at <http://islandia.law.yale.edu/ayers/Ayres%20LAPD%20Report.pdf>.

19. *Floyd Liability Opinion*, 2013 WL 4046209, at \*23–24.

20. *Id.* at \*24.

21. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 369–70 n.16 (2011); *see also* David Cole, *The Outrage of Stop-and-Frisk Policing*, THE NATION, Jun. 14, 2012, <http://www.thenation.com/article/168389/outrage-stop-and-frisk-policing#>.

22. *See* STUNTZ, *supra* note 21, at 297.

23. *See* DAVID COLE, NO EQUAL JUSTICE 43 (1999).

24. *See* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2022 (2008).

25. *See* Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38(2) POL. & SOC'Y. 152, 155–59 (2010).

portant public good. It is therefore unlikely that the law of criminal procedure will ever rescind the discretion to stop and investigate suspicious individuals before evidence of their criminality is unequivocally manifest. Nor would doing so be likely to cleanse society of the injustice associated with the current system, for as the *Terry* Court pragmatically asserted, the law “is powerless to deter invasions of constitutionally guaranteed rights where the police” are motivated by some objective other than successful prosecution.<sup>26</sup> But the need for a legal mechanism to secure the Fourth Amendment right against “unreasonable search and seizure” and the Fourteenth Amendment right to equal justice is paramount.

*Floyd* underscores the need to bring stop and frisk tactics under a stricter regulatory regime and provides insight into how the entanglement of judicial and legislative powers might alternatively impede and propel social reform. In *Floyd*, the judiciary served to facilitate the political mobilization of an underrepresented minority interest in the reform of public policy. At the same time that the *Floyd* litigation brought the use of stop and frisk practices under the microscope of judicial review, the litigation presented for public review the moral and economic dimensions of the New York regulatory regime. This public review occurred at the right time.<sup>27</sup> The contribution to the political dialogue by the *Floyd* plaintiffs thus bore fruit even prior to the implementation of the equitable order, as the conduct of *Terry* stops declined by sixty percent during 2013.<sup>28</sup> Thus, the *Floyd* litigation demonstrates the judiciary and the democratic process working in tandem toward the achievement of social reform. In the absence of propitious political circumstances, the type of remedy awarded is crucial to the effect of the equitable regulation. The decision in *Floyd* reveals one strategy for crafting a durable equitable regulatory regime that does not depend on the good faith engagement of government actors by focusing on the implementation of process controls to supplement existing remedial structures.

Part I of this Note will provide background and context for understanding the question of the limits of preemptive policing at issue in *Floyd*. Part II will examine how the *Floyd* plaintiffs cleared a series of formidable procedural hurdles to acquire the information necessary to render a compelling argument to the court that the NYPD had a policy of violating the Fourth Amendment rights of black and Hispanic New Yorkers. Part III will explore the *Floyd* court’s Fourteenth Amendment holding that the racial disparities in the raw data were actually the result of

---

26. *Terry v. Ohio*, 392 U.S. 1, 14 (1968).

27. The right time is when the crime rate is not rapidly accelerating. See STUNTZ, *supra* note 21, at 234. In New York, the crime rate is not rapidly accelerating and is already very low. See J. David Goodman, *Bratton to Lead New York Police for Second Time*, N.Y. TIMES, Dec. 5, 2013, <http://www.nytimes.com/2013/12/06/nyregion/william-bratton-new-york-city-police-commissioner.html>.

28. On January 16, 2014, newly appointed NYPD Commissioner Bratton reported that in the past year the number of *Terry* stops declined by sixty percent from 533,000 in 2012 to 194,000 in 2013. Pervaiz Shallwani, *NYPD Stop-and-Frisks Decrease by 60% in Single Year*, WALL ST. J., Jan. 16, 2014, <http://blogs.wsj.com/metropolis/2014/01/16/nypd-stop-and-frisks-decrease-by-60-in-single-year/>.

intentional discrimination by the NYPD. Part IV will analyze the unique qualifications of the 23(b)(2) class action lawsuit as a device for pursuing social reform through litigation. Part V will explore the regulatory scheme promulgated by the *Floyd* court and examine whether and how it might reduce the unconstitutional use of stop and frisk tactics. Because it is inextricable from a consideration of the probable effect of the *Floyd* court's ruling and profoundly relevant to the theoretical justification for the use of the class action lawsuit as a mechanism for social justice, Parts IV and V will focus on the interplay of the judiciary and civil society in litigation that facilitates constitutional argument to achieve sociological objectives.

### I. A BRIEF HISTORY OF STOP AND FRISK TACTICS

The problem of identifying and preventing criminality predates the Constitution.<sup>29</sup> Long before America declared independence, New York City, for example, was patrolled from dusk until dawn by the “night watch,” property-owning men specifically instructed to “[s]ecure” in the “most prudent way” those perceived to be “disturbing the peace or lurking about.”<sup>30</sup> At the turn of the Nineteenth Century, responsibility for the city's street-level security during the daytime was entrusted to a small force of marshals appointed by the Mayor, who were empowered to apprehend and deposit beyond the city's boundaries “all idle Strollers . . . and disorderly persons whom [they] shall suppose would become chargeable.”<sup>31</sup> Yet the ranks of the marshals and the watchmen proved too meager and ineffectual to satisfy the swelling insecurity of New Yorkers in the dawn of the industrial age. In 1841, the grisly murder of a young woman ignited a frenzy of demagoguery in the press that galvanized the public around the longstanding patrician push for “a force that would *prevent* crime, not just catch criminals after the fact.”<sup>32</sup> The State Legislature responded with a law, signed by Governor William Seward in 1844, authorizing New York City to establish the nation's first professional police force.<sup>33</sup> Consistent with the impulse underlying the origin of the police force and the historical practice in the city, New York entrusted hundreds of newly minted officers with significant discretion over whom to apprehend on their patrols and urged them to chase every hint of criminal activity they observed.<sup>34</sup>

There are disconcerting parallels in the pre-constitutional approach to preemptive policing and the story of LeRoy Downs, a black social worker and named

---

29. See EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 142 (1998).

30. *Id.* at 142–43.

31. *Id.* at 365.

32. *Id.* at 637.

33. *Id.* at 637–38.

34. See *City of Chicago v. Morales*, 527 U.S. 41, 107–08 (1999) (Thomas, J., dissenting); see also CORNELIUS F. CAHALANE, *POLICE PRACTICE AND PROCEDURE* 14–21 (1914) (describing the circumstances in which police officers in New York were encouraged to approach and, if necessary, arrest suspicious individuals).

plaintiff in *Floyd* who, wrapping up a cell phone call outside his Staten Island home after a day at work, was slammed against the fence on which he had been leaning, and aggressively probed for drugs by two white police officers who had spotted Downs while cruising by and suspected him of marijuana use.<sup>35</sup> If nothing more, the parallels between preemptive and pre-constitutional policing underscore the tension between the former and the Fourth Amendment. The equipoise of constitutional values and public security through preemptive policing is elusive and, if attainable, ever-evolving.<sup>36</sup> This tension, and the cases and controversies arising therefrom, requires jurisprudential balancing, for the Supreme Court “cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated.”<sup>37</sup> Under the stewardship of Chief Justice Warren, the Supreme Court formulated what remains the framework for judicial review of street-level preemptive policing in two decisions that stand as bookends to the turbulence of the 1960s.

In 1961, the Court decided *Mapp v. Ohio*, declaring the full protection of the Fourth Amendment enforceable against agents of the federal government should, under the Due Process Clause of the Fourteenth Amendment, be equally applicable against state agents, and thus, municipal police.<sup>38</sup> After *Mapp*, a conviction obtained by state agents in contravention of constitutionally valid criminal procedure would be expunged and, under the exclusionary rule, the criminal thereby convicted might very well have been able to escape prosecution scot-free.

In a decade that bore witness to a spike in violent crime, this fundamental transformation in criminal procedure, perceived as antithetical to law and order, was highly controversial.<sup>39</sup> As an animating force of this liberal movement, the Warren court became a primary target for politicians seeking to win the valuable votes of blue-collar middle-class whites then fleeing to suburbia to escape the violent unrest manifesting itself in urban riots across America.<sup>40</sup> Ronald Reagan<sup>41</sup>

---

35. *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*48 (S.D.N.Y. Aug. 12, 2013).

36. See, e.g., *United States v. Jones*, 123 S. Ct. 945, 957, 565 (2012) (Sotomayor, J., concurring) (observing that expectations of privacy change over time in response to technological innovation).

37. *Haynes v. Washington*, 373 U.S. 503, 515 (1963).

38. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). The road to Fourteenth Amendment incorporation of the full slate of Fourth Amendment protections was a long one. In 1914, the Supreme Court adopted the exclusionary rule to prohibit the admission into evidence of what was obtained in violation of the Fourth Amendment by federal officers but reaffirmed that the Fourth Amendment, and thus the newly formulated exclusionary rule, could not be construed to restrict the conduct of state officers. *Weeks v. United States*, 232 U.S. 383, 398 (1914). More than three decades later, the Court conceded that the Fourteenth Amendment incorporated the right to privacy against “arbitrary intrusion of the police,” which is the touchstone of the Fourth Amendment, but rejected the argument that due process under the Fourteenth Amendment required the application of the exclusionary rule against state actors. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

39. See STUNTZ, *supra* note 21, at 237–38.

40. See *id.* at 238.

41. See *id.* at 237; see also MICHELLE ALEXANDER, *THE NEW JIM CROW* 47–48 (2010).

and Richard Nixon,<sup>42</sup> among others, craftily harnessed this tide of panic in racially coded messages aimed at vivifying the anxiety of white voters concerning the threat of violent crime associated with black urban rioters.

In the latter half of the sixties, the violent turn of the civil rights movement, which had commenced on the streets of Harlem in 1964, intensified.<sup>43</sup> In the weeks after the assassination of Dr. Martin Luther King Jr., hundreds of buildings in Washington were torched and burned by black rioters. When President Lyndon Johnson delivered his State of the Union address in 1968, Congress rose to a standing ovation only once, in response to his declaration that “the American people have had enough of rising crime and lawlessness in this country.”<sup>44</sup> By the 1968 presidential campaign, among domestic issues, law and order was foremost in the minds of voters.<sup>45</sup> One can imagine that when the justices convened to contemplate the constitutional legitimacy of stop and frisks in *Terry v. Ohio*, they could see, even smell, the smoke billowing above the city from their chambers.

In the seminal case of *Terry*, the Court held that the right to privacy must yield to concerns of law and order even before an officer’s visceral hunch has ripened into probable cause.<sup>46</sup> For the probable cause requirement, the *Terry* Court substituted a new standard permitting officers to conduct a less invasive variety of searches and seizures denominated as “stop[s] and frisk[s]”<sup>47</sup> if they could “reasonably conclude in light of [their] experience that criminal activity may be afoot.”<sup>48</sup>

Suspecting that John Terry, a black man, was casing a store in preparation for an armed robbery, Detective McFadden, a thirty-year veteran of the Cleveland Police, pursued Terry.<sup>49</sup> Down the street, McFadden approached Terry, who had then joined a huddle with two suspected accomplices. McFadden then “grabbed . . . Terry, spun him around,” rummaged in the pockets of his coat, and pulled out an incriminating pistol.<sup>50</sup>

Reviewing these facts, Chief Justice Earl Warren held that Detective McFadden had not infringed Terry’s Fourth Amendment rights.<sup>51</sup> Although the stop and subsequent frisk did not rise to the level of a seizure and search that would be subject to the traditional requirement of probable cause, they nonetheless implicated the Fourth Amendment right to be free from the unreasonable “governmental invasion of . . . personal security.”<sup>52</sup> Thence emerged the “reasonable

---

42. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 299 (2010).

43. STUNTZ, *supra* note 21, at 234.

44. STERN & WERMIEL, *supra* note 42, at 299.

45. STUNTZ, *supra* note 21, at 242.

46. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

47. *Id.* at 16.

48. *Id.* at 30.

49. *Id.* at 6.

50. *Id.* at 7.

51. *Id.* at 8.

52. *Id.* at 16–20.

suspicion”<sup>53</sup> standard, the vagueness and uncertainty of which is both the ineluctable companion of preemptive policing and the heart of the controversy over stop and frisk tactics.<sup>54</sup>

The procedural protection of the “reasonable suspicion” standard was hammered out only after the Court had concluded that the procedure itself was constitutional.<sup>55</sup> The Court resolved to uphold Officer McFadden’s frisk prior to contemplating the compatibility of investigative stops with the Fourth Amendment.<sup>56</sup> Warren’s initial draft of the opinion was primarily aimed at addressing the propriety of the frisk.<sup>57</sup> Fearful of the ramifications of upholding the frisk without constraining the circumstances that would justify its use, Justice Brennan, the Court’s “liberal champion,” entreated Warren to condition the preliminary stop on probable cause, a point Brennan had raised during the conference of the justices following the argument of the case.<sup>58</sup> When Warren’s revisions proved unsatisfactory, Brennan replied in the format of a judicial opinion conveying his refusal to acquiesce to an opinion that failed to establish any standard at all against which to measure the constitutional legitimacy of the stop.<sup>59</sup> Brennan turned to the text of the Constitution, urging Warren to anchor the standard in the language of the Fourth Amendment forbidding “unreasonable searches.”<sup>60</sup> Although Brennan had given life to the reasonable suspicion standard, he harbored serious premonitions concerning its potential for abuse. In a private letter to Warren, Brennan confided, “[i]n [the reasonable suspicion standard] lies the terrible risk that police will conjure up ‘suspicious circumstances’ and courts will credit their versions.”<sup>61</sup>

*Terry* remains the touchstone for evaluating the constitutionality of stop and frisks today. The stop and frisk procedures upheld as constitutional in *Terry* permit an officer (1) to stop an individual based on reasonable suspicion of criminal activity and (2) to frisk the individual for the purpose of detecting weapons if the officer has reasonable suspicion that the individual is armed and dangerous.<sup>62</sup>

In the years since *Terry* was decided, judicial construction of “reasonable suspicion” has (1) declared racially discriminatory stops not unreasonable under the Fourth Amendment,<sup>63</sup> (2) produced a socio-economically stacked set of factors

---

53. *Id.* at 37 (Douglas, J., Dissenting).

54. See *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*16–17, \*41 (S.D.N.Y. Aug. 12, 2013) (highlighting the problems created by the vagueness of the standard).

55. See STERN & WERMIEL, *supra* note 42, at 300–01.

56. See *id.*

57. *Id.* at 300.

58. *Id.*

59. *Id.*

60. *Id.* at 300–01.

61. *Id.* at 301.

62. See *Adams v. Williams*, 407 U.S. 143, 145–46 (1972) (citing *Terry v. Ohio*, 392 U.S. 1, 22–24, 30–31 (1968)).

63. See *Whren v. United States*, 517 U.S. 806, 812–14 (1996).

that can be invoked to satisfy the standard,<sup>64</sup> and (3) incorporated so many subjective signifiers of suspicion that police officers can effectively stop anyone.<sup>65</sup> “Reasonable suspicion” thus tolerates and even contributes to a racial and socio-economic skew in the use of stop and frisk tactics.<sup>66</sup>

By insisting that reasonable suspicion is an objective standard,<sup>67</sup> the Supreme Court has left unregulated the degree to which subjectivity can infiltrate the decision to use stop and frisk tactics. As long as an officer can string together a set of observations to support an inference that the subject might have been engaged in some form of criminal activity, the officer’s subjective motivation in executing the stop is irrelevant to judicial review of its constitutionality.<sup>68</sup> The upshot is that evidence of racial profiling is practically worthless with respect to the Fourth Amendment.<sup>69</sup> As Professor David Cole has written, *Whren* “gives a green light to dishonest police work . . . [by] permit[ting] officers who lack . . . reasonable suspicion to manufacture a pretextual basis for intervention.”<sup>70</sup> Thus, if an officer on patrol is stationed at an intersection, and sees two pedestrians, one white and one black, illegally jaywalk against the light, the Fourth Amendment is indifferent to whether the officer, motivated by purpose other than enforcing the law against jaywalking, stops only the black pedestrian out of a subjective belief that black people are more suspicious than white people. Analogously, an officer is shielded by Fourth Amendment jurisprudence in more frequently frisking black people than white people because of a subjective impression that black people are more dangerous than white people. To contest a stop or a frisk as unconstitutionally discriminatory, one must present a Fourteenth Amendment claim,<sup>71</sup> which, as discussed below, is a long shot.

Among the relevant circumstances that can be aggregated into reasonable suspicion are many that create an inherent bias in the inquiry against blacks and Hispanics in New York. Factors of this type include, for example, “High Crime Area,” “Fits Description,” and “Changing Direction At Sight of Officer.”<sup>72</sup> A stop factor like “Fits Description” renders young black and Hispanic men more suspicious than young white men, particularly if the description provides only a vague sketch of a suspect, because young black and Hispanic men are significantly

---

64. See, e.g., David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 677–78 (1994).

65. See *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.).

66. COLE, *supra* note 23, at 43 (arguing that *Terry* “extend[s] a wide degree of discretion . . . where race and class considerations frequently play a significant role”).

67. See, e.g., *Whren*, 517 U.S. at 812–14.

68. See, e.g., *id.*; see also *Bolton v. Taylor*, 367 F.3d 5, 7 (1st Cir. 2004) (citing *Whren*, 517 U.S. at 813) (“Whether a reasonable suspicion exists is . . . an objective inquiry: the actual motive or thought process of the officer is not plumbed.”).

69. See, e.g., ALEXANDER, *supra* note 41, at 106; COLE, *supra* note 23, at 39–40.

70. COLE, *supra* note 23, at 39.

71. *Whren*, 517 U.S. at 813.

72. See *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*4–6 (S.D.N.Y. Aug. 12, 2013).

more likely to be criminal suspects.<sup>73</sup> Interpolating “High Crime Area” into the equation virtually guarantees that “reasonable suspicion” will attach disproportionately to socio-economically disadvantaged minorities. Empirically, a young minority is much more likely than a young white person to reside in a “High Crime Area” or to be in the “Proximity” of a crime.<sup>74</sup> As Judge Stephen Reinhardt wrote, the “High Crime Area” stop factor, “unless properly limited and factually based, can easily serve as a proxy for race or ethnicity.”<sup>75</sup> Finally, the stop factor regarding evasive behavior and flight disparately impacts minorities because, for a variety of reasons, some legitimate, minorities tend to be more distrustful and fearful of police officers and thus more likely to change directions or even take flight at the sight of an officer.<sup>76</sup> Justice Stevens has expressed sympathy for the view that minorities, in particular, might justifiably believe “that contact with the police can itself be dangerous.”<sup>77</sup> For this population, “unprovoked flight is neither ‘aberrant’ nor ‘abnormal,’”<sup>78</sup> but a logical consequence of their experience.

The third notable ingredient in the illiberal amalgam of stop factors is ambiguity. Quite notoriously, and notwithstanding the Supreme Court’s commandment that the Fourth Amendment inquiry shall be objective,<sup>79</sup> an officer can establish reasonable suspicion by reference to such subjective and ambiguous terms as “Furtive Movement” and “Suspicious Bulge.”<sup>80</sup> Vague terminology which has not been given clear definition by statute, regulation or judicial precedent and is not understood by the police practically invites action on the forbidden basis of an “inchoate . . . hunch.”<sup>81</sup> Despite the sincerest of convictions, psychological research has revealed, snap decisions, such as those made by police officers in the moments leading up to a *Terry* stop, are particularly vulnerable to the corrupting influence of subconscious bias.<sup>82</sup> Because of the prevalence of the stereotype associating non-white males with criminality,<sup>83</sup> the ambiguity in the reasonable suspicion standard opens the exercise of police procedure to an unregulated and

---

73. *Id.* at \*20. In 2011 and 2012 in New York, eighty-three percent of criminal suspects, and ninety percent of those suspected of a violent crime, were either black or Hispanic. *Id.*

74. See Harris, *supra* note 64, at 677–78.

75. United States v. Montero-Camargo, 208 F.3d 1122, 1138 (9th Cir. 2000).

76. See Illinois v. Wardlow, 528 U.S. 119, 132–34 (1999) (Stevens, J., dissenting).

77. *Id.*

78. *Id.* at 132–33.

79. See Whren v. United States, 517 U.S. 806, 813 (1996).

80. *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*4 (S.D.N.Y. Aug. 12, 2013).

81. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

82. See Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79, 100–06 (2007); see also ALEXANDER, *supra* note 41, at 104; Albert W. Alschuler, *The Upside and Downside of Police Hunches and Expertise*, 4 J.L. ECON. POL’Y 115, 125–26 (2007); Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* 27 (Nat’l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206.pdf>. (observing that results of a study finding referees are more likely to penalize black players are applicable to “other contexts involving rapid subjective assessments”).

83. Herbert, *supra* note 82, at 100–06.

unobserved bias that cuts strongly against the Fourth Amendment protections of racial minorities.

## II. FOURTH AMENDMENT LIABILITY

Typically, the inquiry into the constitutionality of a stop and frisk arises on a motion to suppress evidence by criminal defendant.<sup>84</sup> It is generally a fact-intensive hearing featuring conflicting testimony from the officer who conducted the stop and the individual incriminated by the stop.<sup>85</sup> In this setting, a testifying police officer has absolute immunity from monetary damages if their testimony is subsequently revealed to be fallacious,<sup>86</sup> and criminal defendants do not often prevail.<sup>87</sup>

By contrast, the Fourth Amendment claim under review in *Floyd* litigation was spectacularly atypical. Not only was no criminal conviction at stake, the *Floyd* court faced 4.4 million times as many incidences of the use of stop and frisk tactics as are subject to review in an ordinary suppression hearing.<sup>88</sup> Although the *Floyd* court specifically ruled on the legitimacy of nineteen stops, the theory of municipal liability under 18 U.S.C. § 1983 required the court to examine the Fourth Amendment legitimacy of the NYPD stop-and-frisk practice as evidenced by the cumulative data generated over nearly a decade of stops and frisks.<sup>89</sup>

This cumulative data exists in the city's database of UF-250 forms.<sup>90</sup> The UF-250, also called the "Stop, Question and Frisk Report Worksheet," is a paper form that New York City police officers must submit for every *Terry* stop they conduct.<sup>91</sup> In completing the front of the two-sided form, the officer must identify with checkmarks which of ten pre-established factors were present in the circumstances that gave rise to reasonable suspicion ("side one factors").<sup>92</sup> On the back of

---

84. See 3 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 10.1(a)–(b) (3d ed. 2007).

85. See *id.*

86. *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983).

87. Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 915 n.63 (1986) (compiling studies demonstrating the extraordinarily low success rate of motions to suppress physical evidence). A 1994 report commissioned by New York City to root out corruption in the NYPD found that falsification of facts by police officers was sufficiently rampant to merit the coining of a new word: "testilying." Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1377 (2008).

88. *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 \*3 (S.D.N.Y. Aug. 12, 2013).

89. See *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). In a § 1983 suit pursuant to *Monell*, plaintiffs can prove the existence of an "official municipal policy" by, *inter alia*, demonstrating that a municipal custom or practice has the approbation of municipal officials and was so widespread as to have the practical effect of law, or by showing that municipal officials acted with "deliberate indifference" to the demonstrable fact that a municipal policy or practice infringed the constitutional rights of citizens. *Floyd Liability Opinion*, 2013 WL 4046209, at \*8.

90. *Floyd Liability Opinion*, 2013 WL 4046209, at \*25.

91. *Id.* at \*13.

92. *Id.* The stop factors include: "Carrying Objects in Plain View Used In Commission Of Crime"; "Fits Description"; "Actions Indicative of 'Casing' Victim or Location"; "Actions Indicative of Acting As A Lookout"; "Suspicious Bulge/Object"; "Actions Indicative Of Engaging In Drug Transaction"; "Furtive Movements";

the form, the officer must identify which factors justified a frisk, if one was performed (“side two factors”), and has the option of identifying any “[a]dditional circumstances” that reinforced their suspicion.<sup>93</sup>

This wealth of data was enriched by the settlement of a lawsuit, *Daniels v. City of New York*, brought against the NYPD over a decade hence to challenge its use of stop and frisk procedures as racially discriminatory.<sup>94</sup> That litigation was sparked by a report issued by the Attorney General of New York in 1999.<sup>95</sup> Documenting problematic racial disparities in the stop and frisk practices of the NYPD, that report was the product of an investigation launched to palliate public outrage at the death of twenty-three-year-old Guinean immigrant Amadou Diallo, in whom four police officers lodged nineteen of the forty-one bullets they fired pursuant to a *Terry* stop on the mistaken perception that Diallo was wielding a gun rather than a wallet while standing on his doorstep.<sup>96</sup> Under the settlement in *Daniels*, the NYPD pledged to compile and distribute on a quarterly basis all data relating to the NYPD’s stop and frisk activity to the *Daniels* plaintiffs’ attorneys, at least until the stipulation expired on December 31, 2007.<sup>97</sup> When the *Floyd* plaintiffs filed their initial complaint in January of 2008, the backbone of their pleading was the confidential information, still under protective order, that their lawyers had acquired as a result of the settlement in *Daniels*.<sup>98</sup>

Because discovery in the *Floyd* litigation was governed by Rule 26 of the Federal Rules of Civil Procedure, which broadly provides for the discovery of “any non-privileged matter that is relevant to any party’s claim or defense . . .”<sup>99</sup> and not Rule 16 of the Federal Rules of Criminal Procedure, which governs discovery in criminal proceedings,<sup>100</sup> the *Floyd* plaintiffs were able to break through the brick-wall around police department data erected by the Supreme Court in *United States v. Armstrong*.<sup>101</sup> In *Armstrong*, the Court held that Rule 16 of the procedural rules governing criminal cases did not permit defendants to employ discovery as a “sword” to challenge a racially disparate government

---

Actions Indicative Of Engaging In Violent Crimes”; “Wearing Clothes/Disguises Commonly Used In Commission Of Crime”; “Other Reasonable Suspicion of Criminal Activity.” *Id.* at app. A.

93. These factors include, *inter alia*: “Changing Direction At Sight Of Officer/Flight,” “Time of Day” and “Proximity To Crime Location,” and “Area Has High Incidence of Reported Offense Of Type Under Investigation.” *Id.* at app. A.

94. See *Daniels v. City of New York*, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

95. *Floyd Liability Opinion*, 2013 WL 4046209, at \*25.

96. *Id.* at \*25 n.200; see also Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, <http://www.nytimes.com/2000/02/26/nyregion/diallo-verdict-overview-4-officers-diallo-shooting-are-acquitted-all-charges.html?pagewanted=all&src=pm>.

97. Stipulation of Settlement at 8–9, ¶ 5, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001) (No. 99 Civ. 169).

98. Complaint at 11, ¶ 26, *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013) (No. 08 Civ.1034 (SAS)).

99. FED. R. CIV. P. 26(b)(1).

100. FED. R. CRIM. P. 16(a)(1)(E).

101. *United States v. Armstrong*, 517 U.S. 456 (1996).

practice.<sup>102</sup> While a defendant staring down a criminal indictment cannot access the information necessary, the Floyd plaintiffs were able to leverage the plaintiff-friendly investigative power of Rule 26 to obtain an order compelling the production of the UF-250 data in the possession of the NYPD.<sup>103</sup>

While relying on the data as the primary basis for the Fourth and Fourteenth Amendment holdings, Judge Scheindlin simultaneously dismissed the data as a “highly flawed” gauge of the true quantity of unconstitutional stop and frisks.<sup>104</sup> In addition to noting that the UF-250 represented a “one-sided” account that “only records the officer’s version of the story,” Judge Scheindlin observed that “officers do not always prepare a UF-250,” some of the UF-250 factors are “problematic” because they are “vague and subjective,” and the UF-250 does not convey the information necessary to determine whether an officer’s concern actually rose to the level of reasonable suspicion.<sup>105</sup> However, the *Floyd* plaintiffs understandably embraced, and the *Floyd* court accepted, the inculcating self-reports of the police as a basis for the liability holding on the theory that, in light of the incentive to self-report constitutional conduct, the UF-250 data understated the true number of unconstitutional stops and frisks.<sup>106</sup>

Not only did the *Floyd* court utilize a data set that was theoretically advantageous to the NYPD, the *Floyd* court utilized an “extremely conservative” model for the mass evaluation of the constitutionality of the 4.4 million stops and frisks at issue.<sup>107</sup> Adopting the model specified by plaintiffs’ expert Jeffrey Fagan, a law professor with a doctorate in the mathematical sciences and decades of experience in crunching the numbers on police conduct,<sup>108</sup> the court categorized each stop based on which boxes were checked on the corresponding UF-250 as “apparently justified,” “apparently unjustified,” or “ungeneralizable.”<sup>109</sup>

To illustrate the conservative nature of Dr. Fagan’s assumptions, the *Floyd* court observed that a UF-250 identifying only “Suspicious Bulge” and “Furtive Movement” would be categorized as “apparently justified,” even though such a stop would likely fail to satisfy the minimum requirements for reasonable suspicion if submitted to more searching judicial review.<sup>110</sup> Only two categories of UF-250s

---

102. *Id.* at 462.

103. *Floyd v. City of New York*, 08 Civ. 1034(SAS), 2008 WL 4179210, at \*5 (S.D.N.Y. Sep. 10, 2008) (compelling disclosure of UF-250 data). As a general matter, Rule 26 requires disclosure, upon the request of an adversary, of all “non-privileged matter that is relevant to any party’s claim or defense”; but upon a showing of “good cause,” Rule 26 allows a court to “order discovery of any matter relevant to the subject matter involved.” *See* FED. R. CIV. P. 26(b)(1). Considering that the plaintiffs’ claim hinged on the data recorded in the UF-250s, the discovery order compelling the disclosure of redacted UF-250 data was almost guaranteed.

104. *Floyd Liability Opinion*, 2013 WL 4046209, at \*16.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Floyd v. City of New York*, 861 F. Supp. 2d 274, 279 (S.D.N.Y. 2012).

109. *Floyd Liability Opinion*, 2013 WL 4046209, at \*16.

110. *See id.* at \*17.

were classified as “apparently unjustified”: (1) a UF-250 that identified no side one factor; and (2) a UF-250 that identified merely one “conditionally justified” side one factor, such as “Furtive Movement,” and no side two factor.<sup>111</sup>

Also supporting the conclusion that Dr. Fagan’s analysis understated the true number of unconstitutional stops is the “credible evidence of scripting” among NYPD officers cognizant of the constitutional power of amorphous stop factors.<sup>112</sup> Scripting refers to the practice of routinely marking off certain stop factors to allay any concern regarding the constitutionality of the stop. As the opinion states, “[n]ot only did the average number of stop factors . . . increase, but this increase reflected a growing use of several of the more subjective stop factors, such as Furtive Movements.”<sup>113</sup> For example, one NYPD officer checked “Fits Description, Casing, High Crime Area, and Time of Day” on ninety-nine percent of the UF-250s he submitted.<sup>114</sup> In a footnote, Judge Scheindlin posited that the rise of scripted UF-250s exposes the “fallacy” in the City’s argument that the reduction in the percentage of unjustified stops after 2005 evidences the “steady improvement in NYPD use of ‘*Terry* stops’”: the trend no more proved that the NYPD had adopted a more rigorous and searching reasonable suspicion analysis than it proved that officers had merely developed a facility in filling out the forms to preempt constitutional challenge.<sup>115</sup>

When the final figures were tallied, “apparently unjustified” stops accounted for six percent of the 4.4 million stops evaluated, even notwithstanding the conservative assumptions of the model and the bias of the data.<sup>116</sup> This translated into a finding that over the eight years covered by the analysis, at least 200,000 individuals were stopped without reasonable suspicion in violation of their Fourth Amendment rights.<sup>117</sup> To Judge Scheindlin, “[e]ven this number of wrongful stops produces a significant human toll.”<sup>118</sup> What the City gained from this constitutional sacrifice was the impoundment of 4,400 guns.<sup>119</sup> Considering that just one out of every thousand stop and frisks resulted in the recovery of a firearm,<sup>120</sup> the NYPD, in conducting a stop and frisk, was approximately sixty times more likely

---

111. *Id.*

112. *Id.* at \*18.

113. *Id.*

114. *Id.*

115. *Id.* at \*18 n.163.

116. *Id.* at \*16.

117. Judge Scheindlin notes that 200,000 equals six percent of the stops. *Id.* She must be referring to the stops between 2005 and 2009 and not to the 4.4 million stops between 2005 and 2012. Six percent of 4.4 million is 267,000. Thus, if one assumes that the rate of unconstitutional stops did not decline between 2009 and 2012, then it is likely that the number of constitutional violations is closer to 300,000 than 200,000.

118. *Id.*

119. *See id.* at \*4 (observing that firearms were obtained in 1 out of every 1,000 stops, which would equal roughly 4,400 guns if the calculation is based on 4.4 million stops).

120. *Id.*

to violate an individual's constitutional rights than they were to get a gun.<sup>121</sup> Although six percent of stops resulted in an arrest and six percent of stops resulted in the summons,<sup>122</sup> the *Floyd* court questioned the validity of this "hit rate" as a reliable indicator of whether "an officer's suspicions turn out to be well-founded" because (1) certain "violations" for which summonses are issued do not create reasonable suspicion to make a stop, (2) a substantial percentage of the summons issued were subsequently dismissed,<sup>123</sup> and (3) the offense for which a summons was issued was not always evident prior to the conduct of the stop.<sup>124</sup>

The *Floyd* court held that New York City was liable for the 200,000 Fourth Amendment violations based on two theories. First, the *Floyd* court determined that the NYPD had acted with "deliberate indifference" to the constitutional rights of black and Hispanic New Yorkers.<sup>125</sup> Judge Scheindlin reasoned that New York had been under actual notice that the NYPD's stop and frisk practices were violating the constitutional rights of scores of New Yorkers since at least 1999, when *Daniels* ended in settlement.<sup>126</sup> "Despite this notice," Judge Scheindlin asserted, the NYPD "deliberately . . . escalated policies . . . that predictably resulted in even more widespread Fourth Amendment violations" and "repeatedly turned a blind eye to clear evidence of unconstitutional stops and frisks."<sup>127</sup> Second, the *Floyd* court concluded that the use of unconstitutional stop and frisk tactics was a "practice[] so persistent and widespread as to practically have the force of law."<sup>128</sup> Underscoring the sheer number of constitutional violations that had occurred as a result of the stop and frisks, the *Floyd* court declared that "NYPD's practice of making stops that lack . . . reasonable suspicion ha[d] . . . become not only a party of the NYPD's standard . . . procedure, but a fact of daily life in some New York City neighborhoods."<sup>129</sup>

### III. FOURTEENTH AMENDMENT LIABILITY

Statistical evidence of racial discrimination, however, does not ordinarily prove intent, and in the context of litigation under the Equal Protection Clause to enjoin a

---

121. *See id.* If the police obtained a firearm in 1 out of every 1,000 stops and violated the constitutional rights of six out of every 100 people stopped, then the police were .6 divided by .01, or 60, times more likely to violate an individual's constitutional rights than they were to obtain a gun.

122. *Id.* at \*13. Approximately six percent of the stops resulted in arrest and six percent resulted in a summons. *Id.*

123. *Id.* at \*14 & n.129 (reporting that in 2010 forty-two percent of summonses resulted in either dismissal or adjournment at the prospect of dismissal).

124. *Id.* at \*14.

125. *See id.* at \*5.

126. *Id.* at \*38 (noting that pursuant to the settlement in *Daniels*, the City agreed to conduct regular audits of stops recorded on UF-250s).

127. *Id.* at \*70.

128. *Id.* at \*71; *see also* *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (articulating the standard for municipal liability).

129. *Floyd Liability Opinion*, 2013 WL 4046209, at \*71.

criminal process, intentional discrimination must be adduced to establish liability.<sup>130</sup> The Supreme Court has squarely rejected the proposition that evidence of a racial disparity in the effect of a governmental policy or program suffices to establish a claim under the Equal Protection Clause.<sup>131</sup> Evidence of a disparate impact is “not irrelevant,” the Court established in *Washington v. Davis*, but because it does not demonstrate that the state has acted intentionally, “it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny.”<sup>132</sup> Beyond establishing the existence of an unconstitutional policy or practice that is racial discriminatory in effect, a plaintiff must prove that such policy exists *because* it is racially discriminatory.<sup>133</sup> This doctrine has been critiqued as effectively foreclosing legal challenges to enjoin racially discriminatory criminal procedures.<sup>134</sup>

The requirements for establishing municipal liability under § 1983 and for establishing a Fourteenth Amendment violation are overlapping inasmuch as both require a plaintiff to demonstrate that the policy or practice of constitutional deprivation was intentional. Yet satisfying the standard for liability under *Monell* does not satisfy the standard for establishing an Equal Protection Clause violation,<sup>135</sup> which requires the further showing that the practice of constitutional deprivation that had a disproportionate effect on blacks and Hispanics was not just intentional but intentionally racist.<sup>136</sup>

The *Floyd* court held that the NYPD stop and frisk policy violated the Fourteenth Amendment under two alternative theories, either of which would have sufficed to establish the violation.<sup>137</sup> Under the first theory, the court held that even were it to assume that the stop and frisk policy was not racially discriminatory in design, its implementation was motivated by a discriminatory animus in violation of the Equal Protection Clause.<sup>138</sup> The court based this holding on a conclusion that the policy of “targeting the ‘right people’” was intentionally discriminatory.<sup>139</sup> To the NYPD, the “right people” to stop and frisk could be inferred from crime

---

130. See *McCleskey v. Kemp*, 481 U.S. 279, 291–92 (1987).

131. *Washington v. Davis*, 426 U.S. 229, 238–39 (1976).

132. *Id.* at 242 (citation omitted).

133. *McCleskey*, 481 U.S. at 298.

134. See ALEXANDER, *supra* note 41, at 106–09 (noting that *McCleskey* prevented arguments about racially biased discrimination in the criminal justice system); see also STUNTZ, *supra* note 21, at 121 (noting that *McCleskey* represented a failure to provide equal protection of the law but that its fact pattern could not give rise to a claim under the Equal Protection Clause today).

135. The Fourteenth Amendment showing automatically suffices to establish *Monell* liability. *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at \*71 (S.D.N.Y. Aug. 12, 2013) (noting that the either legal theory supporting the Fourteenth Amendment violation “is adequate under *Monell*”).

136. *Id.* at \*72.

137. *Id.*

138. *Id.*

139. *Id.*

statistics.<sup>140</sup> Thus the fact that the overwhelming majority of criminal convictions were obtained against black and Hispanic men justified the fact that the overwhelming majority of stop and frisks targeted black and Hispanic men. Accordingly, the policy of targeting the “right people” necessarily entailed consideration of the race of those targeted for the stops. This slipshod logic refused to recognize that the statistical portrait of convicted criminals might just reflect who is stopped and frisked in the first place. It also failed to account for the reality that although most criminal activity was perpetrated by black and Hispanic men, most black and Hispanic men are not criminals.<sup>141</sup> In finding discriminatory intent, the court also relied upon the testimony of a New York State Senator who disclosed that in a meeting with state politicians (including then-Governor David Paterson), Commissioner Raymond Kelly, the head of the NYPD during the Bloomberg administration, declared, speaking about young blacks and Hispanics, that the purpose of the stop and frisk policy was “to instill fear in them, every time they leave their home, they could be stopped by the police.”<sup>142</sup>

Under the second theory, the court held that the stop and frisk policy expressly discriminated against blacks and Hispanics.<sup>143</sup> In so holding, the court concluded that the policy of targeting blacks and Hispanics as the “right people,” which was advocated and reinforced at the managerial level, is one “that depends on express racial classifications” and is therefore subject to strict scrutiny.<sup>144</sup> While a police officer may legitimately consider race as a factor when investigating a specific incident of crime for which a reliable description of the perpetrator is available, the court explained, “a policy of targeting expressly identified racial groups for stops *in general*” cannot withstand strict scrutiny under the Fourteenth Amendment.<sup>145</sup> The fact that blacks and Hispanics were targeted in proportion to their representation in the ranks of convicted criminals was held to be irrelevant, for the NYPD had nonetheless pursued a general policy at the behest of its top brass of making routine stops based on express racial classifications.<sup>146</sup>

#### IV. THE EQUITABLE CLAIM

In seeking a form of relief comparable in terms of breadth and stability to that afforded by a legislative remedy, the plaintiffs in *Floyd* filed a class action. This Part contends that class action jurisprudence confers a democratic legitimacy on the enterprise of the court, reconciling some of the philosophical tension inherent in the concept of equitable regulation. Under Rule 23(a) of the Federal Rules of

---

140. *Id.* at \*73.

141. *Id.*

142. *Id.* at \*7, \*36.

143. *Id.* at \*73.

144. *Id.*

145. *Id.* at \*74.

146. *Id.*

Civil Procedure, to obtain eligibility for certification as a 23(b)(2) class, plaintiffs must satisfy four requirements: (i) numerosity; (ii) commonality; (iii) typicality; and (iv) adequacy.<sup>147</sup> Because this section highlights the elements of the class action that recommend it as a vehicle for social reform, the analysis will focus on the requirements of (A) adequacy, (B) commonality, and (C) 23(b)(2) class certification.

### A. Adequacy

The question of whether the *Floyd* plaintiffs could adequately represent all black and Hispanic individuals subject to unconstitutional stop and frisks raised questions of great complexity not squarely answered by the *Floyd* court.<sup>148</sup> The adequacy requirement<sup>149</sup> demands a two-pronged inquiry into whether the interests of the representative plaintiffs mesh with the interests of the class as a whole and whether the plaintiffs' attorneys are sufficiently experienced and qualified to effectively represent the class.<sup>150</sup> This necessity of this showing flows from the balancing of due process and judicial efficiency.<sup>151</sup> The utility of the class action depends on the binding effect of the judgment on all similarly situated claimants, which stays an avalanche of individual actions. But this utility is constitutionally legitimate only to the extent that the preclusive effect of the judgment does not unfairly deprive any class member of their right to due process.<sup>152</sup> Due process is violated when one group facilitates the class action vehicle to obtain a judgment that is antithetical to the interests of but binding on an absent, unrepresented group.<sup>153</sup> In *Floyd*, the judgment awarding injunctive relief against unconstitutional stops and frisks may have been contrary to the interests of those New Yorkers who prize public safety and regard unconstitutional stops and frisks as critical to that end, but an interest in increased unconstitutional conduct is not remediable through litigation.<sup>154</sup>

The adequacy inquiry also evokes concerns about the democratic legitimacy of injunctive relief against the political branch.<sup>155</sup> In a Rule 23(b)(2) suit for purely injunctive relief, such as *Floyd*, success entails the implementation of what is tantamount to a public policy. Ordinarily, in a democracy, the formulation of public policy is entrusted to individuals elected to represent the dominant interests of those casting votes. Injunctive relief is public policy designed by a non-democratic

---

147. *Floyd v. City of New York (Floyd Class Certification Opinion)*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012).

148. See Note, *Southern District of New York Certifies Class Action Against City Police for Suspicionless Stops and Frisks of Blacks and Latinos*, 126 HARV. L. REV. 826, 829–30 (2013).

149. FED. R. CIV. P. 23(a)(4).

150. *Floyd Class Certification Opinion*, 283 F.R.D. at 161.

151. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 765–66 (4th ed. 2005).

152. 1 WILLIAM RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:51 (5th ed. 2011) [hereinafter NEWBERG I].

153. *Id.*

154. See Note, *supra* note 148, at 831.

155. See *id.* at 832.

institution to serve the interests of those who have pursued the claim. The adequacy requirement thus provides an outlet for individuals unwittingly encompassed by the class definition to intervene and dissent against the judicial lobbying of those pursuing the action, which is acutely important where public policy is concerned.<sup>156</sup>

Opponents of injunctions against police tactics have dwelled on an alleged disconnect between the interests of the communities who suffer the most harm from crime and the representative plaintiffs pursuing an injunction that would create obstacles to police efforts to reduce crime in those communities.<sup>157</sup> From the standpoint of democratic legitimacy, this disconnect is problematic only if the police tactics at issue have the support of the majority of the electorate.<sup>158</sup> To the extent that the legal theory underlying the litigation is anti-democratic, insofar as it seeks to vindicate a fundamental right recognized by the Constitution it is not only morally compelling, it is vital to separation of powers.<sup>159</sup> As the *Floyd* court emphasized, “rights do not cease to exist because a government fails to secure them.”<sup>160</sup> And as the *Floyd* court reaffirmed, “it is precisely when the political branches violate the individual rights of minorities that ‘more searching judicial enquiry’ is appropriate.”<sup>161</sup>

Inasmuch as litigation facilitates a variety of regulatory lobbying for a majority position insulated from dissenting views, it is not countermajoritarian. But it is antidemocratic to the extent that it deprives proponents of a minority position the opportunity meaningfully to dissent.<sup>162</sup> Meaningful dissent is dissent that is officially considered and addressed by the decision-making institution to which it is directed.<sup>163</sup> The opportunity for meaningful dissent arises on two separate

---

156. NEWBERG I, *supra* note 152, §§ 3:64–65.

157. See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1166–67 (1998). Professor Meares has since qualified her views concerning the appropriate role of the judiciary in the regulation of criminal procedure, acknowledging that her focus on political accountability did not sufficiently account for the “distributional consequences of rights as a benefit.” Tracey L. Meares, *The Distribution of Dignity and the Fourth Amendment*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 123, 125 (Michael Klarman et al. eds., 2012). In more recent work, Professor Meares is guided by an aversion to the stigmatizing harm of racial targeting, and thus recommends introducing greater randomization into the conduct of street-level police work. Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 811 (2011).

158. Otherwise the litigants, if successful, would vindicate, not contravene, the choice that would result were the question submitted to the electorate.

159. THE FEDERALIST NO. 51 (James Madison).

160. *Floyd Class Certification Opinion*, 283 F.R.D. 153, 178 n.164 (S.D.N.Y. 2012) (quoting *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 730 (10th Cir. 1980)).

161. *Id.* at 178 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

162. *Cf.* *Roth v. United States*, 354 U.S. 476, 484 (1957) (observing that the Constitution secures the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people”).

163. *Cf.* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (discussing the guarantee of meaningful participation in the regulatory process embedded in the Administrative Procedures Act). The APA provides one conception of an opportunity for meaningful dissent that is consonant with the conception proposed here.

occasions in a class action trial for injunctive relief.<sup>164</sup>

First, in a class action suit, dissenters can intervene to protest the adequacy of the representation of the named plaintiffs and, if successful, to obtain decertification of the class.<sup>165</sup> Contrary to some arguments, therefore, the adequacy doctrine does indeed accommodate dissent, although it does not mandate the consideration of dissent.<sup>166</sup> Just as one must affirmatively act to register dissent with a political institution of government, one must be proactive to register a dissenting view with the judiciary in class action litigation.

Second, a court must also consider dissenting views as a prerequisite to injunctive relief. The argument that the adequacy doctrine should be expanded to promote consideration of dissenting views as a prerequisite to certification<sup>167</sup> is myopic in its failure to consider the democratic virtue of delaying consideration to the remedy stage. Certification allows the litigation to continue. If the litigation continues, more information will be produced about the police tactics at issue than would otherwise be the case.<sup>168</sup> The production of more information will sharpen society's understanding of the constitutional legitimacy and social value of the continued use of the challenged policy, which will, in turn, augment the democratic process. Given that the underlying strategy and aggregate statistics concerning the use of police tactics are not always fully disclosed,<sup>169</sup> litigation serves a valuable fact-finding function that brings transparency to practices of government institutions, thereby enabling better decisionmaking and encouraging good behavior on the part of governmental actors.<sup>170</sup> Second, delaying consideration of dissenting views to the remedy stage of the litigation also allows the court to make

---

164. Opportunity would also arise for meaningful dissent on appeal.

165. See *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 473, 484 (S.D. Cal. 1957) (denying certification where twenty-five percent of a proposed class intervened to voice their dissent to certification); see also *Pratt v. Chi. Hous. Auth.*, 155 F.R.D. 177, 180 (N.D. Ill. 1994) (denying certification when plaintiff dissenters precluded adequate representation).

In *Pratt*, four residents of Chicago's since demolished but still notorious Robert Taylor Homes public housing project brought a lawsuit to enjoin the Chicago Housing Authority from permitting the police to perform warrantless sweeps through apartment units in search of illegal weapons. See *Pratt v. Chi. Hous. Auth.*, 848 F. Supp. 792, 793–94 (N.D. Ill. 1994). Over the protestations of a sizeable faction of Robert Taylor residents, the reviewing court issued an injunction. *Id.* at 796–97. Thereafter, residents supportive of the sweeps successfully intervened to decertify the class on grounds that the named plaintiffs had an interest antagonistic to theirs and thus failed to satisfy the adequacy requirement. *Pratt*, 155 F.R.D. at 180.

166. *Contra* Note, *supra* note 148, at 831.

167. *Id.*

168. See, e.g., *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at \*36 (S.D.N.Y. Aug. 12, 2013). To take one example, a finding that was crucial to the Equal Protection holding came as a result of the testimony of New York State Senator Eric Adams at trial in which Senator Adams reported that NYPD Commissioner Raymond Kelly had described a purpose of the stop and frisk policy as intimidation of young blacks and Hispanics. *Id.*

169. See *id.*

170. Cf. *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (overturned on other grounds) (discussing the importance of transparency in the context of campaign financing).

a determination as to the constitutionality of the police tactics at issue,<sup>171</sup> a factor likely to exert some degree of influence on political sentiment concerning their continued use.

### B. Commonality

The commonality demand posed a formidable barrier to class certification, as it raised the issue of whether all members of the putative *Floyd* class had suffered a violation of their constitutional rights as a consequence of a centralized policy administered by the NYPD.<sup>172</sup> If the court had found that the constitutional violations resulted not from a centralized policy but rather from the exercise of officer autonomy, the holding in *Wal-Mart, Inc. v. Dukes*, if applied, would foreclose a finding of commonality and compel a denial of certification.<sup>173</sup> In *Dukes*, the Supreme Court held that an evaluation of the commonality requirement entails a pre-trial peek into the merits of the underlying action to determine whether the putative class can reasonably be said to have been subjected to a centralized policy.<sup>174</sup> The mere assertion that all class members have suffered a violation of the same provision of law is insufficient.<sup>175</sup> *Dukes* both heightened the plaintiffs' burden to plead common questions with greater specificity and effectively imported the predominance requirement applicable to 23(b)(3) classes, which requires a showing that issues common to all plaintiffs predominate over issues that are unique to individual plaintiffs, into the commonality prong of the 23(a) analysis.<sup>176</sup> Commonality thus implicates the issue of whether the police practice alleged to have caused a constitutional violation was conducted pursuant to a municipal policy or whether the practice was merely the consequence of individual discretion. This, in turn, foreshadows both the § 1983 and Fourteenth Amendment inquiries into the intent and purpose of the state actors.

Commonality requires the plaintiff to demonstrate the existence of at least one question of law or fact that is both universally shared by the class and significant to the claims of most individual members.<sup>177</sup> There are two ways to bridge this “conceptual gap” between one or more individual claims of discrimination and the assertion that there is commonality in the class.<sup>178</sup> The one relevant to *Floyd* requires plaintiffs to present “significant proof” at the certification stage that the defendant operates under “a general policy of discrimination.”<sup>179</sup> In *Dukes*, the Court dismissed the statistical analysis conducted by the plaintiffs' expert witness

---

171. See, e.g., *Floyd Liability Opinion*, 2013 WL 4046209, at \*13.

172. *Floyd Class Certification Opinion*, 283 F.R.D. 153, 173-74 (S.D.N.Y. 2012).

173. See *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2554-57 (2011).

174. *Id.* at 2551.

175. *Id.*

176. NEWBERG I, *supra* note 152, § 3:18.

177. *Id.*

178. *Dukes*, 131 S. Ct. at 2553.

179. *Id.*

that posited a causal link between the gender disparity in employment outcomes and stereotyped thinking adverse to women at Wal-Mart.<sup>180</sup> *Dukes* demonstrates the difficulty of satisfying the burden of proof for commonality: presenting robust statistical evidence of a disparity that adversely affects a protected class without presenting evidence that the disparity was caused by the “implement[ation of] a uniform policy established by top management” does not comport with the commonality requirement.<sup>181</sup> *Dukes* might therefore be invoked to deny certification to plaintiffs challenging the use of police tactics who demonstrate statistical evidence of widespread constitutional violations but who can only establish commonality by reference to the non-existence of a centralized policy, or a policy that merely delegates substantial and unregulated discretion to officers at the bottom of the hierarchy of command.<sup>182</sup>

There are many reasons to believe that the *Dukes* commonality analysis will not have a substantial effect, in practice, on class action litigation, particularly in the context of criminal process.<sup>183</sup> For example, in granting the *Floyd* plaintiffs motion for class certification, the court cited three post-*Dukes* cases in which district courts had found commonality satisfied where the allegation related to a “police . . . practice of making unlawful stops and arrests” in violation of the Fourth or Fourteenth Amendments.<sup>184</sup> This is a logical consequence of the highly structured organization of the typical police department and the fact that police work is a technical enterprise. Police officers are given procedural manuals and training by management on techniques for the proper conduct of stops and frisks, their compliance with which influences their performance evaluations.<sup>185</sup> As the *Floyd* court held, there is a distinction between “the exercise of judgment in implementing a centralized *policy* [and] the exercise of discretion in formulating a local store policy or practice.”<sup>186</sup>

In a suit against the government for injunctive relief, the commonality requirement serves the purpose of focusing the inquiry at the outset on whether what is at issue in the litigation is a government policy. Legislative and regulatory bodies make public policy. When a court makes public policy through class action adjudication, the commonality requirement directs an inquiry akin to the one regulatory and legislative bodies pursue through hearings and notice-and-comment procedures into whether a broad public need, and not merely an isolated private interest, support the intervention of the judiciary.

---

180. *Id.* at 2553–54.

181. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012) (Posner, J.).

182. *Dukes*, 131 S. Ct. at 2554.

183. See NEWBERG I, *supra* note 152, § 3:18 (summarizing four reasons that *Dukes* is an exceptional case).

184. *Floyd Class Certification Opinion*, 283 F.R.D. 153, 174 (S.D.N.Y. 2012).

185. See *id.* at 173–74.

186. *Id.* at 174.

### C. 23(b)(2) Class Certification

Having established each of the four preconditions for class certification, the court then proceeded to examine the merits of the *Floyd* plaintiffs' motion for certification as a 23(b)(2) class. In a suit against a city, certification under 23(b)(2) is granted only if (1) the city has acted or failed to act on grounds generally applicable to the entire class and (2) injunctive or declaratory relief parameterizing the future conduct of the city with respect to the class as a whole is appropriate.<sup>187</sup> Formulated with *Brown v. Board of Education*<sup>188</sup> in mind, Rule 23(b)(2) was intended to foster civil rights litigation for "broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons."<sup>189</sup> Rule 23(b)(2) continues to have immense utility as a vehicle for the vindication of civil rights.<sup>190</sup>

The most significant word recently rendered on 23(b)(2) was delivered by the Supreme Court in *Dukes*. Writing for the majority, and citing a law review article,<sup>191</sup> Justice Scalia emphasized:

The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.<sup>192</sup>

Thus, in suing a city, the central factor in the 23(b)(2) certification inquiry is whether each constituent member of the class has been subject to the same policy. If so, a single equitable remedy fashioned to apply to the entire class is appropriate.

If the appropriate remedy is one that applies to the entire class, "unitary adjudication is not only preferable . . . it is also essential."<sup>193</sup> Because unitary adjudication is essential, if the 23(b)(2) class is certified, opt-out is impossible. This negates the utility of and thus excuses costly notice requirements at the

---

187. See FED. R. CIV. P. 23(b)(2); see also 2 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 4:26 (5th ed. 2011) [hereinafter *NEWBERG II*].

188. 369 U.S. 294 (1955).

189. See *NEWBERG II*, *supra* note 187, § 4:26.

190. *Id.*

191. *Contra* Adam Liptak, *The Lackluster Reviews That Lawyers Love to Hate*, N.Y. TIMES, Oct. 21, 2013, [http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?_r=0&pagewanted=print) (discussing the supposed irrelevance of student run legal journals).

192. *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

193. *NEWBERG II*, *supra* note 187, § 4:26.

certification stage, which are prescribed elsewhere to enable opt-out.<sup>194</sup> In addition, the plaintiffs are not required to demarcate precisely the boundaries of the class and are excused from other demands imposed on plaintiffs who apply for certification under Rules 23(b)(1) or 23(b)(3).<sup>195</sup>

Given the particular circumstances present in *Floyd*, the plaintiffs obtained recognition as a class through 23(b)(2), but in so doing the plaintiffs effectively sacrificed eligibility for individualized monetary damages.<sup>196</sup> This is a consequence of what is not generally at stake in 23(b)(2) class litigation: an individual right to compensation. Where individual rights to pursue monetary relief are concerned, the relaxed notice requirements and the allowance for amorphously defined classes suddenly become problematic from the standpoint of due process. Judicial interpretation of 23(b)(2) thus substantially limits, perhaps practically proscribes, claims for monetary damages by members of a 23(b)(2) class.<sup>197</sup> On this point, the *Dukes* court was unanimous: 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.”<sup>198</sup>

Given the rigor and limitations of 23(b)(2) certification and the seeming non-excludability of the equitable remedies available, one might question why a plaintiff would bother with class certification at all. Why, for example, would David Ourlicht, the plaintiff declared by the court to establish standing for the class,<sup>199</sup> not bring a suit individually, bypassing the requirement of class certification? The simple answer is that without class certification, the injunction might be effectively nullified by resistant municipal policymakers. A single plaintiff can sue only for the redress of injuries she herself has suffered; whereas, as a representative of a class, a single plaintiff can sue for the redress of injuries that are not identical to those she has suffered.<sup>200</sup> Therefore, the issued injunction is likely to be more expansive in scope and effect than an injunction issued to redress the injury of a single claimant. For that reason, a resistant municipality will generally oppose certification, which, in expanding the scope of the injunction available to the plaintiffs,<sup>201</sup> tends to empower the judiciary and retrench municipal autonomy.

In light of the political orientation of City Hall at the time the suit was filed, there was a strategic imperative to bring the suit as a class action, and thereby

---

194. *Id.*

195. *Id.*

196. See *Floyd Class Certification Opinion*, 283 F.R.D. 153, 172 (S.D.N.Y. 2012).

197. See *id.* at 171.

198. *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

199. *Floyd Class Certification Opinion*, 23 F.R.D. at 169. The *Floyd* plaintiffs were able to surmount the standing barrier associated with *City of Los Angeles v. Lyons*, 461 U.S. 95, 106, 111 (1983), because the *Floyd* plaintiffs showed to the satisfaction of the court that at least one member of the plaintiff class, David Ourlicht, was likely to be subject in the future to the practice at issue. *Id.* at 169–70.

200. See NEWBERG I, *supra* note 152, § 2:6.

201. See *id.*

empower to the judiciary to award an expansive injunction. The Bloomberg administration was reactionary in their resistance to the equitable remedy ordered by the court.<sup>202</sup> In an op-ed published five days after the *Floyd* decision was issued, Mayor Bloomberg characterized the injunctive order as an “attack” that would endanger the security of New Yorkers and castigated Judge Scheindlin as “an ideologically driven federal judge who has a history of ruling against the police.”<sup>203</sup>

Yet it can be argued that in *Floyd*, with respect to the scope of the relief, the circumstances did not necessarily dictate the selection of the class action as a vehicle for pursuit of the injunction. If *Floyd* had instead been *Ourlicht*, and not a class action, the alleged injury would nevertheless have been the consequence of what was determined to be the centralized stop and frisk policy of the NYPD and the range of possible remedies would have encompassed the injunction and declaration that ultimately issued. That is, because *Ourlicht*’s claim, described at a sufficient level of generality, implicates the very policy that was at issue in the class litigation, it is hypothetically possible that he would have been able to obtain the same outcome as the class.<sup>204</sup>

But there are other reasons, political and practical in nature, that compel selection of the class action mechanism, even if the injunctive remedy, from a formalistic standpoint, does not strictly require certification. First, class action jurisprudence provides that if at the time of certification at least one member of the class has standing, the action will not be mooted in the event that the plaintiff is no longer subject to the challenged policy, as long as there remains a live controversy between the class as a whole and the party opposing the class.<sup>205</sup> Thus if *Ourlicht* had brought the action independently in 2008, to ensure continued standing, he would have had to remain in New York City until the conclusion of the litigation. Consideration of the dangers and potential for unfairness associated with this aspect of standing, class action certification is a wise choice.

Second, the class action mechanism is politically advantageous in that it effectuates the political mobilization of the entire pool of individuals whose interests are in alignment with those of the named plaintiffs. Political theory predicts the adoption of public policy favorable to beneficiaries where the benefits of the policy are concentrated and the costs are diffused over a much larger population.<sup>206</sup> The public policy at issue in *Floyd*, enhanced regulation of the use of stop and frisk tactics, is of this variety, for the beneficiaries of the policy are concentrated in the sub-populations of black and Hispanic men who, if the policy is adopted and effective, will be less likely to suffer repeated deprivation of their

---

202. See Bloomberg, *supra* note 7.

203. *Id.*

204. See NEWBERG I, *supra* note 152, § 2:6.

205. *Id.* § 2:10.

206. Cf. JAMES Q. WILSON, BUREAUCRACY 76, 79 (1989).

constitutional rights. The cost of implementing the policy, however, is spread among taxpaying New Yorkers. But the assumptions upon which the theoretical predictions rely break down where criminal justice policy is concerned. First, the political viability of reform that can be construed by opponents as injurious to public safety is typically and has historically been very low.<sup>207</sup> Second, the potential beneficiaries of the proposed policy have relatively little, perhaps non-existent, political power,<sup>208</sup> in part because of the very status quo that the policy at issue proposes to supplant.<sup>209</sup> The confluence of social and political factors impeding access among the direct beneficiaries of criminal process reform to the ordinary levers of lawmaking also justifies the class action as a mechanism for giving voice to underrepresented views on social policy. Presuming, as discussed below, that meaningful social reform cannot occur without the support of the political branches, the class action mechanism has a strong democratic justification.

## V. THE RESULT

On the same day the liability opinion was published, the *Floyd* court separately issued an order for equitable relief prescribing what was tantamount to a regulatory overhaul of the process according to which the NYPD would conduct, record, and review stop and frisk procedures. To oversee and aid the process of implementing the regulatory relief, the court delegated authority to an independent monitor to serve as an agent of the court.<sup>210</sup> The specific regulations to be implemented can be divided into two substantive categories: procedural and managerial regulations. Although the ultimate objective of both categories of regulatory relief is to ensure the conformity of the conduct of stops and frisks by the NYPD with the Fourth and Fourteenth Amendments, the first category seeks to augment the legal education of the NYPD and to promote the development of incentives that will encourage

---

207. STUNTZ, *supra* note 21, at 238–41 (discussing the veritable arms-race between Democrats and Republicans to appear tough on crime).

208. *Cf.* LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 253–54 (2008).

Black and Hispanic New Yorkers are more likely to be in poverty and earn less money than non-Hispanic whites. *See* N.Y.C. CTR. FOR ECON. OPPORTUNITY, *THE CEO POVERTY MEASURE 2005–2011*, at 21, 71, 73 (2013), available at [http://www.nyc.gov/html/ceo/downloads/pdf/ceo\\_poverty\\_measure\\_2005\\_2011.pdf](http://www.nyc.gov/html/ceo/downloads/pdf/ceo_poverty_measure_2005_2011.pdf). Moreover, those who become criminal defendants tend to come from situations of poverty. *See* Gerard Fowke, Note, *Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 *Am. Crim. L. Rev.* 575, 578 (2013) (noting “the endemic poverty of criminal defendants”).

Bartels shows that the extent to which one's interests are represented in the democratic process is strongly correlated with one's wealth. BARTELS, *supra*, at 253–54. Indeed, Bartels found in one study that the political interests of those in the bottom one-third of the income distribution were effectively un-represented in the United States Senate. *Id.*

209. *See generally* PETER EDELMAN, *SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA* (2012) (discussing how mass incarceration perpetuates poverty); ALEXANDER, *supra* note 41 (discussing the political consequences of mass incarceration).

210. *Floyd Remedy Order*, No. 08 Civ. 1034 SAS, 2013 WL 4046217, at \*3 (S.D.N.Y. Aug. 12, 2013).

police officers to conduct themselves in the field in accordance with the principles of their legal education. This first category of regulatory relief thus has a managerial orientation.

The managerial elements of the relief include an order to overhaul the NYPD's training material to ensure accuracy in the representation of the requirements of the law,<sup>211</sup> and an order to communicate clearly to officers responsible for conducting stops and frisks that a policy of "targeting the 'right people'" is a species of racial profiling that is intolerable under the Fourteenth Amendment.<sup>212</sup> The court further ordered the NYPD to reexamine the method by which it evaluates the performance of police officers, observing that when an officer's performance rating is a function of the raw number of stops conducted, irrespective of their constitutionality, the officer has an incentive to disregard constitutional constraints.<sup>213</sup> The court held that revelations of substantial non-compliance with an internal NYPD regulation requiring officers to maintain "activity logs" with narrative accounts of stops and frisks necessitated enhanced monitoring, supervision and training.<sup>214</sup> In an overarching directive, the court entreated the NYPD to coordinate with certain stakeholders and the appointed monitor to develop and implement "supervision, monitoring and disciplinary reforms . . . required to bring the NYPD's use of stop and frisk into compliance with the Fourth and Fourteenth Amendments."<sup>215</sup>

The second category of regulations, in contrast, prescribe concrete procedures by which officers are to record each stop and each frisk they conduct to ensure the production of some kind of narrative depiction of the objective and particularized facts giving rise to reasonable suspicion.<sup>216</sup> First, the court ordered the NYPD to immediately reformat the UF-250 form to include a field where officers can compose a narrative version of the circumstances precipitating a stop.<sup>217</sup> This revised UF-250 must also provide a space for officers to record a narrative of a decision to frisk.<sup>218</sup> The court further recommended that the NYPD consider appending a detachable portion to the UF-250 that officers could give to those they have stopped that would divulge the justification for the stop and describe the procedures for lodging a protest.<sup>219</sup>

Second, the court ordered the NYPD to implement a one-year pilot program to evaluate the practicality and efficacy of equipping officers with so-called "body-worn cameras" to facilitate the production of a video record of stops and frisks.<sup>220</sup>

---

211. *Id.* at \*6.

212. *Id.* at \*7.

213. *Id.*

214. *Id.* at \*9.

215. *Id.* at \*10.

216. *Id.* at \*8.

217. *Id.*

218. *Id.*

219. *Id.* at \*9.

220. *Id.* at \*11.

In ordering this remedy, the court cited the example of a fifty-four-member police department in California's San Bernardino County.<sup>221</sup> There, the introduction of body-worn cameras coincided with an eighty-eight percent drop in the number of complaints lodged against the city's police force.<sup>222</sup> As with the narrative requirement, the court projected that body-worn cameras will enhance the accuracy of judicial review.<sup>223</sup>

Whether such equitable regulation is likely to effect the desired reduction in unconstitutional stops and frisks depends not merely on the soundness of the specific remedies but is also a function of the political environment in which implementation is to occur.<sup>224</sup> The probability that the effective implementation of an equitable regulation can occur by judicial order, as opposed to legislative enactment, it is instructive to refer to the predictive model developed by Professor Gerald Rosenberg.<sup>225</sup> Professor Rosenberg identifies three primary obstacles to the achievement of meaningful legal reform through litigation and concludes that none is insurmountable, assuming the existence of certain conditions: (1) the reluctance of the judiciary to interpret the law to provide what the mainstream will not readily accept; (2) the limited authority of the judiciary to enforce its judgments; and (3) the limited scope of constitutional rights.<sup>226</sup> In the case of *Floyd*, the conditions posited as necessary to overcome the first two constraints remain present; the circumstances in New York, however, are so unique as to cast doubt on a conclusion that the success of the *Floyd* plaintiffs could be widely replicated.

The first obstacle follows from the practical observation that the judiciary is not entirely impervious to pressures percolating from the political branch or popular opinion.<sup>227</sup> As a result, it is argued, the possibilities of interpretation are constrained by politics and popular sentiment.<sup>228</sup> Surmounting these constraints, to the extent one credits their existence, is as formidable as judicial independence is doubtful, meaning that the more independent of political pressures a judge considers herself, the more likely she is to render an unconventional interpretation. Realistically, in overcoming this obstacle, advocates are, to some degree, dependent on their luck in the selection of the presiding judge, which occurs either randomly or, as in *Floyd*, by operation of a related-case rule.<sup>229</sup> On this score, it should be acknowledged that the provision of law, since amended, that enabled the

---

221. *Id.* at \*12.

222. *Id.*

223. *Id.* at \*11.

224. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 13–14 (2d ed. 2008).

225. *Id.*

226. *See id.* at 13–14.

227. *See id.*

228. *Id.*

229. The “related case rule” in the Southern District of New York allows the plaintiff to select a particular judge to preside over her case if the judge is, at the time of filing, presiding over a related case. LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, RULES FOR THE

*Floyd* plaintiffs to elect Judge Scheindlin to preside over their case was propitious. Not every plaintiff has the ability to select the judge that they believe will be sympathetic to their argument.

Granting the existence of a judicial tendency to accede to external influence of a political nature does not necessarily ordain an outcome antithetical to liberalism.<sup>230</sup> Although in *Bloomberg*, Judge Scheindlin faced a mayor hostile to judicial intervention in criminal procedure, the confluence of popular support among New Yorkers and federal support from the Department of Justice altered the political calculus in the favor of the *Floyd* plaintiffs. Her decision to publicly counter Mayor Bloomberg's assertions of bias, although bringing her under the censure of the Second Circuit,<sup>231</sup> underscored her capacity for independent decisionmaking. In her resistance to the policy arguments of the Bloomberg administration, Judge Scheindlin was reinforced by the Department of Justice's lack of objection to liability and support for rigorous remedial measures.<sup>232</sup> The significance of this support is evidenced by the remedy opinion's extensive reliance on the brief submitted by the Department of Justice.<sup>233</sup> In addition, the winds of popular opinion in New York, by the time of the decision, favored the court's outcome. By 2013, while still indicating a preference for crime control over reform of stop and frisk tactics, New Yorkers were also becoming increasingly concerned about racial profiling by police,<sup>234</sup> increasingly concerned that the NYPD's use of stop and frisk procedures was "excessive" and not "acceptable,"<sup>235</sup> and did not see the reform of stop and frisk procedures as incompatible with public safety.<sup>236</sup> At the time of the decision, the position of Judge Scheindlin registered

---

DIVISION OF BUSINESS AMONG JUDGES, RULE 13(a) (2013), available at <http://www.nysd.uscourts.gov/rules/rules.pdf>.

230. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

231. See 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>.

232. Statement of Interest of the United States at 1–2, *Floyd Liability Opinion*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Jun. 2013) (No. 08 Civ. 1034 (SAS)), available at [http://www.justice.gov/crt/about/spl/documents/floyd\\_soi\\_6-12-13.pdf](http://www.justice.gov/crt/about/spl/documents/floyd_soi_6-12-13.pdf).

233. *Floyd Remedy Order*, No. 08 Civ. 1034 SAS, 2013 WL 4046217, at \*5 & n.9, \*6 & n.15, \*7 n.17, \*8 n.21 & n.22, \*9 n.27, \*10 & n.29, \*11 & nn.30 & 32, \*21, \*28, \*29 & n.73 (S.D.N.Y. Aug. 12, 2013).

234. See N.Y. TIMES, THE NEW YORK TIMES PUBLIC OPINION POLL 5 (2012) [hereinafter N.Y. TIMES POLL], available at <http://www.nytimes.com/interactive/2012/08/22/nyregion/22nyc-poll.html>. The percentage of New Yorkers convinced that the police favored whites, as compared to blacks, increased from forty-five percent in 2003 to fifty-nine percent in 2012. *Id.*

235. Compare QUINNIPIAC UNIV. POLLING INST., QUINNIPIAC UNIVERSITY POLL 7 (2013) [hereinafter QUINNIPIAC POLL], available at [http://www.quinnipiac.edu/images/polling/nyc/nyc10212013\\_ydn6z13.pdf/](http://www.quinnipiac.edu/images/polling/nyc/nyc10212013_ydn6z13.pdf/) (finding forty-eight percent of New Yorkers thought the use of stop and frisk procedures "excessive" and forty-five percent thought their use "acceptable"), with N.Y. TIMES POLL, *supra* note 234, at 5 (employing the same terminology and finding the reverse).

236. QUINNIPIAC POLL, *supra* note 235, at 8 (finding that a majority of New Yorkers thought the use of stop and frisk procedures could be reformed without an increase in crime); see also N.Y. TIMES POLL, *supra* note 234, at 5 (finding that a majority of New Yorkers thought the use of stop and frisk procedures had "no effect" on crime).

more harmoniously with the democratic will than that of the outgoing mayor. Viewed politically, the sources of support for a finding of liability overwhelmed the admonishments emanating from the Bloomberg administration such that the ultimate decision of the *Floyd* court accelerated the pro-majoritarian political momentum. Announcing his intention to adopt the injunctive order by settlement, De Blasio attributed the ultimate success of the movement to reform stop and frisk procedures to the interactive and mutually reinforcing dynamic of the “democratic process” and the “judicial process,” which, he argued, “bring[s] up the truth of what’s happening in our society, truths that are being ignored.”<sup>237</sup> The judiciary is influenced by the people. The people are influenced by the judiciary. The possibility of harmonization does not depend on the judiciary alone but arises also from the public enlightenment produced by the fact-finding function of litigation.

The second obstacle to legal reform through litigation arises from the division of powers inherent in the Constitution. Setting aside the issue of whether federal judges wield the expertise necessary to craft a remedy that justifies enforcement,<sup>238</sup> the Constitution did not endow the judiciary with an enforcement arm.<sup>239</sup> The ultimate effect of an equitable regulation therefore hinges on how it is implemented by the governmental body under the judicial order. As Alexander Hamilton explained, the judiciary “has no influence over either the sword or the purse . . . . It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”<sup>240</sup> Accordingly, to overcome this constraint, an equitable regulation must have support among both the general population and those in positions of significant authority.<sup>241</sup>

The overwhelming electoral success of Mayor Bill De Blasio, whose campaign centered on a pledge to adopt promptly the remedies prescribed by the *Floyd* court, signaled that City Hall (and most citizens) would support the implementation of the regulatory scheme promulgated by Judge Scheindlin. After his election, De Blasio made good on his campaign promises to prioritize the reform of stop and frisk practices. In the weeks leading up to his inauguration, De Blasio appointed a Police Commissioner and Corporation Counsel, offices whose support will be essential to the effective implementation of the court-ordered reforms, based on their commitment to and experience in curtailing the abuse of police power.<sup>242</sup> While De Blasio’s decision to return William J. Bratton to the helm of the NYPD

---

237. Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 30, 2014, <http://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html>.

238. ROSENBERG, *supra* note 224, at 20.

239. *Id.* at 15.

240. THE FEDERALIST NO. 78 (Alexander Hamilton).

241. ROSENBERG, *supra* note 224, at 20.

242. See Annie Correal, *De Blasio Names City’s Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. TIMES, Dec. 29, 2013, <http://www.nytimes.com/2013/12/30/nyregion/de-blasio-announces-pick-for-new-york-citys-top-lawyer.html>; Goodman, *supra* note 27.

has caused some to question his continuing fidelity to his campaign pledge to reform stop and frisk, in light of the heavy use of the tactics by the Los Angeles Police Department under his leadership,<sup>243</sup> this concern overlooks that the remedies aim not to end stop and frisks entirely, but to end unreasonable and racially prejudiced stop and frisks. Although a few hurdles to implementation remain, the City, under the direction of De Blasio, has moved to settle the litigation on terms that entail nearly the wholesale adoption of the injunctive remedy ordered by Judge Scheindlin.<sup>244</sup>

In assessing the likelihood that the equitable regulation awarded in *Floyd* will attract sufficient support from governmental actors, and, by extension, civil society, it is important to distinguish between process-oriented and managerial-oriented regulations. The latter require a higher degree of support than the former to be effective, for process-oriented regulations can be flouted by government actors but nevertheless enforced by the judiciary at a motion to suppress. Managerial-oriented regulation, by contrast, depends on the good faith engagement of government actors, which is a function of political support. Because of this distinction, process-oriented regulation is more durable and has more utility in the event that political circumstances are adverse to implementation. Moreover, process-oriented regulation protects against the risk of wrongful deprivation.<sup>245</sup>

The risk of wrongful deprivation under the policy for recording stops and frisks that existed prior to the *Floyd* litigation was unreasonably high. This was emphasized in *Floyd*, which repeatedly excoriated the deficiency of the process governing the use and review of stop and frisk tactics. In discussing the failure of NYPD officers to record a narrative of each stop conducted in their activity logs, Judge Scheindlin noted that the absence of a narrative or an insufficiently detailed narrative would thwart “meaningful[] review [of] the constitutionality of the stop.”<sup>246</sup> Ordering the NYPD to reformat the UF-250 immediately to include a field for officers to record a narrative of the facts and circumstances giving rise to reasonable suspicion, Judge Scheindlin contended that such a requirement was necessary to “create a record for later review of constitutionality.”<sup>247</sup> As the *Floyd* court held, the narrative requirement is necessary for constitutionally adequate review because certain *Terry* factors, most notably “High Crime Area,” “Suspicious Bulge,” and “Furtive Movement,” are so vague that without further description, there is an absence of reviewable content.<sup>248</sup> The system in which content is given to those factors only after the arrest is inadequate. As Judge Scheindlin

---

243. Pervaiz Shallwani & Sean Gardiner, *Stop and Frisk Presents Key Challenge for Bratton*, WALL ST. J., Dec. 5, 2013, <http://online.wsj.com/news/articles/SB10001424052702303997604579240662126625496>.

244. Weiser & Goldstein, *supra* note 237.

245. Cf. *Goldberg v. Kelly*, 397 U.S. 254, 262–63 (1970).

246. *Floyd Remedy Order*, No. 08 Civ. 1034 SAS, 2013 WL 4046217, at \*22 (S.D.N.Y. Aug. 12, 2013).

247. *Id.* at \*19.

248. *Id.* at \*22 & n.54.

argued in delineating her optimism concerning body-worn cameras, without a narrative description recorded at the time of the arrest, courts are “forced to analyze the constitutionality of the stops based on testimony given years after the encounter, at a time when the participants’ memories were likely colored by their interest in the outcome of the case and the passage of time.”<sup>249</sup> A primary virtue of the body-worn camera, according to the *Floyd* court, is that it will enable an “objective record of stops and frisks, allowing for the review of officer conduct by . . . the courts.”<sup>250</sup> Yet the existence of a video record, although it will enhance the accuracy of judicial review, is unlikely to render judicial determinations as to the presence of reasonable suspicion unequivocal. Camera recordings have featured prominently in litigation challenging the conduct of police in forcing an end to high-speed automobile chases.<sup>251</sup> In these disputes, the availability of an objective visual record of the incident has not eliminated the subjectivity of the analysis, as the process of interpreting the video is a subjective exercise, and earnest minds, depending on factors such as race, wealth, and political orientation, draw starkly different conclusions.<sup>252</sup> As compared to the pre-litigation status quo, however, the process-oriented equitable regulations ordered by the court in *Floyd*, once implemented, will reduce the risk of error in decisions made not to suppress a piece of incriminating evidence alleged to have been unconstitutionally seized. Moreover, by increasing the cost of conducting a stop and frisk through the imposition of additional procedural requirements, the number of clearly unwarranted stops and frisks conducted will fall.

The third significant obstacle to judicially driven legal reform is “[t]he bounded nature of constitutional rights.”<sup>253</sup> Not even the most progressive reading of the Constitution can justify judicial intervention wherever injustice is manifest. The tenability of a hope in legal reform by judicial decree depends on whether one can identify a vindicating legal theory nested within the parameters of law. With respect to stops and frisks, interpretive constructions of the Fourth and Fourteenth Amendments constitute an especially formidable barrier to the award of equitable relief. The Fourth Amendment, as established by *Terry*, permits police officers to stop individuals based only on “reasonable suspicion,” the threshold for which can be satisfied in poverty-ridden high-crime neighborhoods by stringing together a few slippery and subjective observations like “suspicious bulge” and “furtive movement.” And as *Whren* illustrates, the Fourth Amendment does not forbid racial profiling as long as some objective basis for police interference can be

---

249. *Id.* at \*26.

250. *Id.*

251. See *Scott v. Harris*, 550 U.S. 372 (2007); see also Transcript of Oral Argument at 12, 19, 21–22, 30, 34, 45, 51, 55, *Plumhoff v. Rickard*, No. 12-1117 (argued Mar. 4, 2014), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/12-1117\\_f2ag.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1117_f2ag.pdf).

252. Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe?* *Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

253. ROSENBERG, *supra* note 224, at 13.

articulated.<sup>254</sup> The Fourteenth Amendment, as *McCleskey* reveals, embraces the right of state actors to execute a policy that has a disproportionate adverse effect on racial minorities as long as such policy is not pursued because of its discriminatory effect.<sup>255</sup>

The legal arguments underlying, while circumspect and carefully structured on controlling precedent, the holdings of the *Floyd* court are not indisputable. The court, for example, roots its determination that the NYPD's stop and frisk tactics violated the Fourth Amendment rights of the *Floyd* plaintiffs in the results of the analysis of the UF-250 forms, the very forms the court cautions in the remedial judgment are unreliable indicators of the constitutionality of stops and frisks.<sup>256</sup> Whether such a fact-intensive, individualized inquiry as the *Terry* analysis can be decided on the basis of such impersonal and vague evidence is not obvious. On the Fourteenth Amendment question, the *Floyd* court's reasoning that targeting black and Hispanic males because black and Hispanic males are statistically more likely to commit crime is less vulnerable to reversal. Although a policy that targets a class of persons on the basis of a characteristic that is not race right people," the target of the stop and frisk tactics, on the basis of race. While the meaning of the Fourteenth Amendment envisioned by liberal theory—that each individual is entitled to “treatment as an equal”<sup>257</sup>—is not shared by the majority of today's Supreme Court, the Fourteenth Amendment does draw the line at deliberate racial discrimination by agents acting under color of state law.

#### CONCLUSION

In affirming the constitutionality of the use of stop and frisk tactics in 1968, the Supreme Court emphasized that the procedure is a “serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”<sup>258</sup> In the half-century that has passed since then, criminal law enforcement has pursued convictions through the use of stop and frisk tactics heedless of the *Terry* court's admonition. Politics, socio-economic inequality, and the accumulation of precedent that has diminished the likelihood of legal redress for Fourth and Fourteenth Amendment violations have effectively deregulated police power to conduct investigative *Terry* stops. The *Floyd* litigation demonstrates the immense value of judicial process to advocates of social reform, especially where the prospective beneficiaries have been underserved by the democratic process. In *Floyd*, the democratic and judicial processes worked in tandem to effect a policy shift in the oversight of police conduct that either branch, acting in isolation, most probably would not have

---

254. *Whren v. United States*, 517 U.S. 806, 812–14 (1996).

255. *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

256. *Floyd Remedies Order*, No. 08 Civ. 1034 SAS, 2013 WL 4046217, at \*18–19 (S.D.N.Y. Aug. 12, 2013).

257. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 237 (1978).

258. *Terry v. Ohio*, 392 U.S. 1, 17 (1968).

achieved. While litigation can amplify the significance of a proposal for social reform, without the engagement of civil society, and the democratic pressure resulting therefrom, the judiciary can do little more than expand and contribute to the political dialogue. But, in the context of criminal justice, where the judiciary does face resistance from the political branch, or utter indifference from civil society, the award of process oriented equitable regulation can be a vital lifeline to the vindication of Fourth Amendment rights.

Due process has long been recognized as fundamental to securing “the dignity and well-being of all persons.”<sup>259</sup> Unconstitutionally seizing and punishing scores of young black and Hispanic men is antithetical to “the dignity and well-being of all persons.” Such punishment intensifies the “societal malaise that may flow from a widespread sense of unjustified frustration and insecurity.”<sup>260</sup> Such punishment also deprives those affected of the opportunity “to participate meaningfully in the life of the community”<sup>261</sup> by perpetuating poverty,<sup>262</sup> rescinding the right to vote,<sup>263</sup> impairing employability,<sup>264</sup> and making it more difficult to obtain affordable housing<sup>265</sup> or a college degree.<sup>266</sup> The aggregation of every injustice resulting from an unconstitutional stop and frisk constitutes not just a grisly stain on the face of American criminal justice but also a macroeconomic calamity. By ensuring that those who suffer the deprivation of a constitutional right are afforded a fair remedial process, process-oriented equitable regulation enhances the deterrent effect and accuracy of existing remedies for constitutional violations.

---

259. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

260. *Id.* at 265.

261. *Id.*

262. EDELMAN, *supra* note 209, at 141–42.

263. ALEXANDER, *supra* note 41, at 140.

264. *Id.*

265. *Id.*

266. *Id.*