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**(NOTES AND APPENDIX TO BE COMPLETED/ADDED)**

## **STOP AND FRISK PRACTICES IN THE US: WHERE ARE WE NOW?**

**PAPER FOR UK/USA ROUNDTABLE ON CURRENT DEBATES, RESEARCH AGENDAS,  
AND STRATEGIES TO ADDRESS RACIAL DISPARITIES IN POLICE-INITIATED  
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In both the United States and the United Kingdom, police officers have the power in certain circumstances to stop pedestrians encountered on the street, and to search them. In the United States, the power to stop and frisk (as it has been known for decades) has been used since time out of mind as an investigatory and order maintenance tool; at times, it has also been used to harass the population, especially racial and ethnic minorities. This paper will examine the use of stop and frisk tactics by police in the U.S. to illuminate how these practices work, the law underpinning them, and what we do and do not know about their impact, with a special focus on the connection of stop and frisk to racial profiling.

### **OVERALL CONTEXT**

Racial and ethnic profiling – defined as the use of racial or ethnic appearance as one factor, among others, to decide which individuals to stop, frisk, or question<sup>1</sup> – became a frequent

subject of public discourse in the U.S. in the late 1990s. Discussion of the issue began with legal actions arising from high-intensity drug interdiction activity utilizing racial profiling conducted by the New Jersey State Police on the New Jersey Turnpike,<sup>2</sup> and by the Maryland State Police on heavily-traveled Interstate Highway 95.<sup>3</sup> In a motion to suppress evidence in sixty criminal cases in New Jersey, and in a civil suit brought in Maryland for a violation of constitutional rights, drivers alleged that they had been singled out because of their racial characteristics, and subjected to illegal search and seizure tactics. Both cases produced statistics on the practice of profiling; in both, the data showed that both police departments stopped African American drivers in numbers far out of proportion to their presence on the respective highways.<sup>4</sup> After years of litigation and vehement denials, the data forced New Jersey's attorney general to concede that racial profiling was "real, not imagined."<sup>5</sup> In Maryland, when lawyers involved in the law suit uncovered a document explicitly instructing state police officers to focus on African Americans,<sup>6</sup> state officials settled the case by agreeing to pay damages, reform their practices, and conduct monitoring of enforcement actions.

These cases stimulated a wide-ranging public discussion of racial and ethnic profiling in the U.S., and resulted in the first legislative proposal on the subject – a bill introduced in the U.S. Congress in 1997 aimed at getting police departments to collect and report data on police officers' traffic stops. The bill did not pass, and different versions of the bill have been introduced in every two-year session of Congress since. But these proposals inspired successful legislative efforts in more than half the states.<sup>7</sup> Much of this state legislation called for the collection of data on traffic stops by police – usually for some defined period of several years, but sometimes on an ongoing basis. Additionally, some number of police departments, on their own and without any legal obligation to do so, began their own efforts to collect data, because

they saw this as the best way to meet public concerns about police stops. By 2000, the issue of racial profiling had become so visible in the U.S. that candidates for president from both parties faced questions about profiling in the presidential debates.<sup>8</sup> By August of 2001, a strong consensus had emerged in the U.S. Polling data indicated that eighty percent of all Americans – not just African Americans and Latinos, who may have experienced profiling themselves, but all Americans of every race and ethnic group – understood what racial profiling by police was, and wanted it stopped.<sup>9</sup>

Note, however, an important characteristic of nearly all of the public discussion in the U.S. on racial and ethnic profiling, and of almost all of the data collection efforts. All have centered on vehicle stops, and (sometimes) the searches that follow the stops. This undoubtedly stems from the fact that the profiling issue in the U.S. arose in the context of the interception of drug couriers in vehicles. Stop and frisk tactics on streets in the U.S. have been in use for much longer than these drug courier interdiction efforts, and there is evidence, going back decades, that police have employed stops and frisks more commonly and with greater intensity against racial and ethnic minorities.<sup>10</sup> But those tactics did not attract the same kind of attention that racial profiling of drivers did in the 1990s. This means that much of the data and analysis on racial and ethnic profiling in the U.S. in the last fifteen years has had little to do with stops and frisks of pedestrians, and is largely confined to vehicle stops.

## **POLITICAL AND SOCIAL CONTEXT**

As mentioned earlier, a strong consensus existed in the U.S. by the summer of 2001, with eighty percent of all Americans opposed to racial profiling. But the terrorist attacks in New York and Washington, D.C., in September of 2001, brought about a change; polling data after

the attacks indicated that a new consensus had emerged. Post-9/11, over sixty percent of all Americans now believed racial or ethnic profiling was a good idea and a good way to assure public safety – as long as the subject was security against terrorism, and profiling was used in airports against those appearing to be Arab or Muslim.<sup>11</sup> The sixty-plus percent consensus covered all Americans, including African Americans and Latinos – those people most likely to have personally encountered profiling themselves at the hands of law enforcement. A context-based split in public opinion had formed. Should police use racial and ethnic profiling to try to catch drug couriers on highways or on airplanes? No, most Americans said; that was wrong and unfair to minorities. Should security personnel use racial and ethnic profiling in airports and on planes to secure us against the possibility of hijacking or other forms of terrorism? Of course, the public said, because this just makes common sense in the fight against blood-thirsty enemies who all come from one recognizable population group. This mindset pervaded not just law enforcement or security personnel, and not just the politically conservative, but every sector of the population. For example, Stanley Crouch – African American academic, novelist, jazz critic, and public intellectual, a winner of the prestigious McArthur Fellowship, wrote about the issue in his nationally syndicated newspaper column. He voiced the feelings of the majority of Americans about Arabs in the U.S. in a column entitled “Wake up: Arabs Should Be Profiled.”<sup>12</sup> Crouch did not mince words. Profiling, he argued, was an absolute necessity if we were to have security from Middle Eastern terrorists. “[I]f pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is the unfortunate cost they must pay to reside in this nation.”<sup>13</sup> Crouch’s statement might have seemed over the top in the world before the 9/11 attacks; his words smack of group punishment for the actions of a tiny minority. Yet he was doing little except speaking aloud the post 9/11 sentiments of many

Americans. What had become unacceptable before the terrorist attacks – placing the burden of public safety on one racial or ethnic group, because of the actions of a very small number of people sharing some of some of the racial or ethnic group’s immutable physical characteristics – now was not just acceptable, but made the kind of common sense that no thinking person should oppose. Thus if profiling began with the drug war in the U.S, the post-9/11 world brought us to a second wave: profiling directed at those appearing to be Arab or Muslim (instead of African American or Latino), in an effort to secure us from terrorism (instead of securing us from the scourge of drug trafficking).

By the mid to late 2000s, a new phenomenon had emerged. The U.S. Congress and state governments began to face building public pressure over the presence of unauthorized immigrants in the country, chiefly from Mexico and Central America. This resulted in some efforts to step up federal enforcement of border security, and especially in efforts to bring state and local law enforcement agencies and their personnel into the “fight” against illegal immigration.<sup>14</sup> During the 2006-2008 session of the U.S. Congress, the Bush Administration tried and failed to create a comprehensive legislative solution to the immigration situation. This failure led states, cities and towns, and police agencies to attempt their own efforts.<sup>15</sup> Often, these initiatives relied heavily on police making stops of drivers as a pretext to inquire into citizenship, giving rise to complaints and claims that police had begun to use the profiling of Latinos to address the immigration issue. Thus if racial profiling began as a drug interdiction tool, and in its second wave became a tool for anti-terrorism security, policing immigration constituted a third wave of profiling.

Some might wonder whether the election of Barack Obama as President might signal, or lead to, the end of profiling and the controversies surrounding it and other issues of race and criminal justice. The answer seems to be no. There is nothing to indicate that the election of Obama means that the U.S. has moved past the profiling issue. For example, during July of 2009, an unfortunate incident took place in the city of Cambridge, Massachusetts, the home of Harvard University. The Cambridge police arrested Professor Henry Louis Gates, a well known African American author and public intellectual, at his home.<sup>16</sup> Gates had just returned from a trip abroad and was having difficulty getting into his house; police were summoned by a passerby, who saw Gates and the driver bringing him home from the airport trying to get the door of his residence to open. A verbal confrontation ensued between the police sergeant who arrived to investigate and Gates, and the police arrested Gates for disorderly conduct. The case quickly came to national prominence, given the stature of Professor Gates, and President Obama was asked about it by a reporter at the White House. Obama said that the incident was a reminder of what blacks in the U.S. often encountered, and he called the police actions “stupid.”<sup>17</sup> A firestorm erupted, this time over the President’s comments about the police action; a substantial public backlash against the President forced him to back away from his initial statement and to invite the police officer and Professor Gates to the White House to discuss their differences.<sup>18</sup> The “beer summit,” as it became known, and the Gates incident generally, illustrated the continued volatility of relations between police and black people in the U.S., and showed – yet again – the hazards of taking sides against the police even in a situation in which the police had, at best, overreacted in the way they used their powers in a situation involving a black man. The lesson was hard to miss: the U.S. had not entered any kind of post-racial era; indeed, race remained very much a part of the American drama, particularly in the arena of

criminal justice and police issues. And woe be unto anyone – even the President – who would attempt to weigh in against the police.

## **U.S. LAW ENFORCEMENT’S POSITION ON STOP AND FRISK**

Many leaders of U.S. law enforcement agencies have created policies and strategies utilizing stop and frisk intensively, as part of departmental anti-crime efforts. For those less than familiar with American law enforcement, it may be useful to understand how policing in the U.S. is structured. This will help the reader to see why and how police policies on stop and frisk (and other issues) are formed, and how this has led to the adoption of stop and frisk tactics.

Unlike the many nations that have a relatively small number of police agencies under some degree of central control, law enforcement in the U.S. is highly decentralized. There are more than 17,000 police departments in the U.S.;<sup>19</sup> some are large, but most are relatively small (in terms of numbers of sworn officers and geographic jurisdiction, and sometimes both). Some are also specialized: police departments for a city’s public housing or transportation systems, or for a university, for example. There are national police agencies – the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATFE), and the Secret Service, for example – which are creatures of the national government and have nationwide jurisdiction. But for each of these national agencies, their subject matter jurisdiction is somewhat limited, and they have no say over what more local police departments might do. The most common type of agency by far is the municipal police department, covering one city, town, or county. States also have their own police agencies (e.g., the New Jersey State Police, the Ohio Highway Patrol). Both municipal and state police agencies are created by state law, and – most importantly -- they are completely autonomous. In the regular course of conducting

their business, they answer only to the political leaders and citizens of their individual jurisdictions. The national U.S. Department of Justice, which governs the FBI and the ATF, has no right to command the actions of, or set policy for, state or local police forces. The national government (usually through the Department of Justice) can set law enforcement policy for federal police agencies like the FBI, but that is the limit of its reach.

The U.S. Supreme Court sets constitutional limits on what all police departments, national, state or local, may do in investigating cases, using the Court's broad interpretations of the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. The Supreme Court's decisions on these three Amendments set constitutional minimum standards for how police may or may not conduct arrests and seizures, search for evidence, interrogate suspects, and conduct identification procedures with witnesses. But the Court does not dictate the specifics of enforcement policy, except in these broad constitutional strokes. In New York, Los Angeles and Chicago, in Fort Smith, Arkansas and Annapolis, Maryland, each jurisdiction's own police department is autonomous, limited broadly by the Constitution but specifically by local elected officials and the laws of its jurisdiction. Each agency determines its own law enforcement strategy, tactics, and policy – including the ways they will use stop and frisk on their sidewalks and streets.

Many of those who lead police agencies seem to share the consensus in the field: intensive use of stop and frisk works. Pushing patrol officers to increase their stop and frisk activity makes for effective crime fighting, the argument goes. The intensive use of stop and frisk has become a regular part of enforcement in urban high crime areas; “broken windows” policing<sup>20</sup> (usually identified with New York City, but practiced elsewhere as well) and “hot

spot” policing (in which officers and assets are concentrated in the areas of chronic criminal activity)<sup>21</sup> often feature heavy utilization of stop and frisk practices. Many law enforcement leaders commonly assert, with great confidence, that this heavy reliance on stop and frisk works – it constitutes a productive way of operating, and results in an increased number of arrests and confiscations of contraband. It is, they say, part of an effective crime strategy that proves valuable, day in and day out.

The curious thing, however – especially in light of the fact that a goodly number of police departments now collect data on traffic stops – is that these assertions on the efficacy of intensive use of stops and frisks as a crime-fighting tactic do not seem to be data based. They constitute the accepted wisdom of the profession, to be sure. But, outside of a handful of police departments, there is little to make these assertions anything more than strongly-held beliefs. In other words, these assertions of efficacy are not data based, but faith based. And in the New York Police Department, the one large agency that does collect data on stops and frisks, assertions of the effectiveness of intensives use of stops and frisks sometimes come *in spite of* what the data indicate; that is, the assertions are not only unsupported by data, but actually contradicted by it.

Without data that allows everyone involved to see the real patterns in stop and frisk activity and its actual productivity as a crime-fighting strategy, as opposed to its *assumed* patterns and efficacy, members of the public remained uninformed. Members of the police are uninformed as well (though they do not believe that they are). This leads not to fact-based discussion and discourse, but to anecdotal assertions that reflect what citizens and police *think* is happening. When discussion is not grounded in facts, police just explain away or ignore the

erosion of community support and the low “return” per stop and frisk encounter that often seem to accompany their efforts. These unintended consequences, they say are just the inevitable price we – or at least some of us—must pay for greater public safety.

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

While police in the U.S. have used stop and frisk tactics for years, only in 1968 did the American justice system formally acknowledge these methods and bring them within the legal and constitutional system. The U.S. Supreme Court did this in *Terry v. Ohio*,<sup>22</sup> a case that still stands today.

In *Terry*, a police officer on foot patrol saw a pair of men standing near a jewelry store. Taking turns, each man walked away from the spot near the store while the other remained, and took a slow walk back and forth in front of the store, looking in the window. Both men then stood together and talked, and then the other member of the pair would depart for a walk in front of the store window. The police officer who saw this felt that the men “didn’t look right,”<sup>23</sup> though the officer had witnessed no crime. Nevertheless, the officer approached both men, and asked them what they were doing. When the men did not give a satisfactory explanation, the officer took them into temporary custody, and did a cursory search of each by patting down their outer clothing with his hands. When the officer felt a gun while performing this search, he confiscated it, and put the men under arrest.<sup>24</sup>

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

citizens could be carried out legally. In so doing, the Court acknowledged both how common stops and frisks were, and the fact that they had sometimes been abused in deliberate efforts to control and assert power over black communities.<sup>25</sup> The Court's articulation of this last point was the first time (and it remains one of the few times) that the Court admitted that an existing and common police tactic has been used in a racially discriminatory way.

The following points made by the Court in *Terry* are crucial to understanding it and how it works in practice. First, the Court acknowledged that the police officer who stopped the two men did not have enough evidence of wrongdoing by them to establish "probable cause" for police action. Probable cause had, until that time, been the bottom line legal requirement for a police search or seizure – the most common type of seizure being an arrest. Probable cause was not a particularly high legal standard: much less than beyond a reasonable doubt, used in criminal cases (the highest standard of proof in the law), and even less than preponderance of the evidence (the legal standard in a civil case, often described as more than 50 percent of the evidence). Yet probable cause still required some evidence showing a "fair probability" that the suspect had committed a crime.<sup>26</sup> But in *Terry*, the Court held that the police could conduct a stop (a temporary detention for investigation) and frisk (a cursory pat down of the outer clothing for the purpose of detecting weapons) with less evidence than probable cause: the police officer observing the suspect(s) need only have reasonable suspicion to suspect that crime was afoot and that the suspect was involved with it.<sup>27</sup> This meant that police can perform stops and frisks with less evidence than would be necessary for a full arrest.

What, then, did reasonable suspicion mean? In *Terry* and in other stop and frisk cases that followed, the Supreme Court has fleshed out the answer to this question. Reasonable

suspicion, the Court has said, means more than just a mere hunch, a gut feeling, or intuition that a suspect is up to no good. Rather, the suspicion must be reasoned, in the sense that an officer could articulate the factual basis for his or her suspicion.<sup>28</sup> While the officer need not observe outright criminal conduct to have reasonable suspicion, he or she had to have articulable reasons based on facts, not just feelings. Second, the suspicion had to be particularized – that is, it had to be grounded in the actions and context surrounding the particular suspect involved.<sup>29</sup> It would not be sufficient to observe that other, similar people acted suspiciously; the officer had to have reasons to suspect the person individually, not because the person fit into a category of people. These two ideas – reasonable, articulable suspicion, and particularized individual suspicion – go some distance toward grounding what would otherwise be a vague concept requiring little evidence.

The *Terry* case contained one other, less well understood and frequently overlooked, idea. The *Terry* standard for stops and frisks actually requires that the police make not one judgment, but two.<sup>30</sup> First, is there reasonable suspicion that would give the police justification to believe that the suspect is involved in a crime that is afoot? This would constitute a sufficient basis for a stop. Second, is there reasonable suspicion that would allow them to frisk? In other words, the stop – the temporary detention for investigation – requires reasonable suspicion that crime is afoot, and that the person observed is involved. The frisk, the Court said, is allowed for the purpose of discovering weapons that might be used to harm the officer conducting the stop; its purpose is not the discovery of evidence, but assuring officer safety when necessary. Thus, the frisk requires reasonable suspicion that the suspect is not just involved in a crime, but also that the suspect is armed and dangerous. The source of the suspicion that the suspect may be armed and dangerous can be either 1) suspicion of involvement in a crime that, by its nature,

requires weapons or at least the threat of violence, or 2) the observation of something that creates reasonable suspicion of the presence of a weapon – a bulge under the waistband of one’s clothing, where weapons are often carried, for example – regardless of whether the crime suspected usually includes a weapon or violence. An example of the former would be the facts in *Terry* case itself: two men conducting reconnaissance in preparation for an armed robbery, which by its nature includes the threatened use of a weapon. An example of the latter might be a person suspected of shoplifting or auto theft – not normally a crime accompanied by violence – when the suspect’s outer clothing reveals the telltale outline of a firearm. If the crime suspected is a crime using violence or a weapon, or if the officer observes the signs of the presence of a weapon during a crime not associated with violence, the officer can both stop and frisk, and need not wait for any suspicion to be resolved by the stop before performing the frisk. On the other hand, an officer stopping someone for a nonviolent crime, not associated with weapons, cannot frisk unless the outward signs of a weapon are observed. The two-step analysis of *Terry* is not well understood by most police officers, and even most judges tend to fail to give it its due. It is common to hear testimony in American courts by police officers that they suspected the person observed of a particular crime, and upon stopping the person the officer “patted him down for my safety,” without any testimony establishing facts that indicated the presence of a weapon.

Stop and frisk has been, and remains, an extremely common tactic in American police work. Yet *Terry v. Ohio* and other court decisions that have followed remain the only real regulation of these actions. Because these court decisions have served as the source for constitutional rules on stops and frisks for decades, no statutes play a significant role in regulating these practices; this could not be more different than the situation in the U.K., in which stop and search practices are governed by the Police and Criminal Evidence (PACE) Act

of 1984 and associated codes. Police agencies in the U.S. have their own internal rules, regulations, and standard operating procedures, and these could govern search and seizure practices. But these internal rules on search and seizure, where they exist, are almost never public, and do not have the force of law. Thus a member of the public would be in no position to know about them. And even if the public did become aware of these regulations, they cannot serve as the basis for any legal action. Thus these rules may create some modicum of internal administrative control over stop and frisk. But they do not help the public to understand, or to demand accountability for, police actions on the street. And they seldom require any kind of systematic record keeping.

Police officials, meanwhile, have used *Terry v. Ohio* to make intensive use of stop and frisk a key element of crime-fighting strategies in many cities. In the mid 1990s, as Rudolph Giuliani became mayor in New York City and appointed William Bratton to be the city's police commissioner, the New York Police Department (NYPD) proclaimed that an emphasis on stops and frisks would form one of the major pillars of its crime fighting strategy, and the Department put this into its written policy.<sup>31</sup> In 2007, when Michael Nutter ran for mayor of Philadelphia, he promised to bring down crime by relying heavily on stops and frisks. In 2011, Mayor Nutter had to settle a law suit against the city for the overuse of stops and frisks. Philadelphia police officers were, it seemed, overemphasizing stops and frisks, performing them without a legal basis at times, and keeping poor records. But in settling the lawsuit, Mayor Nutter did not sound chastened. The settlement, which required better collection of data on stops and frisks and monitoring by an independent auditor, was explained by the mayor not as an effort to make sure that stops and frisks would be used only when appropriate, but as an opportunity "to make sure that the public has full confidence in this crime-fighting tool." Though one of the chief

grievances the lawsuit alleged was the overuse of stops and frisks against black people, with very little discovery of crime in the bargain, the mayor (who is himself black) dismissed these concerns with a restatement of his belief in the effectiveness of stops and frisks in fighting crime: “Regardless of race, what we’re concerned about is crime,” he said, implying that one could not fight crime without stepping on the toes of some people (who happened to be black).

Moreover, the legal standards for stops and frisks set by the Supreme Court have been softened by lower court decisions, allowing police ever more discretion. Take, for example, the idea that reasonable suspicion must be “particularized” – that is, particular to *this* suspect, in the context of the observed facts. Lower courts have continually watered down this standard, by creating and applying categorical rules for certain types of cases.<sup>32</sup> For example, several courts said that in any *major* drug dealing case, weapons were likely to be involved, and therefore police could always frisk; they need not look for particularized suspicion. This was followed by a wave of cases in which courts said that *any* case involving drug sales, whether of large or small amounts, would likely involve a weapon, and the need for particularized suspicion therefore did not apply. Then, a third group of cases applied this reasoning to *any* drug case, whether or not the case involved any sales at all. This had the effect of greatly enlarging police discretion to perform stops and frisks.<sup>33</sup>

In several of its cases, the Supreme Court has overruled decisions of lower courts which created these kinds of categorical rules for police actions other than stops and frisks. For example, in *Richards v. Wisconsin*,<sup>34</sup> the Wisconsin Supreme Court had ruled that any time police were seeking to enter a residence, and drugs might be involved, officers could always assume that there a firearm might be present and act accordingly.<sup>35</sup> The U.S. Supreme Court

refused to let this rule stand, stating that each case must stand or fall on its own facts; categorical judgments concerning the danger present were not appropriate, and would only tend to expand police discretion in illegitimate and undesirable ways.<sup>36</sup> This reasoning is consistent with the Court's demand for reasonable suspicion particularized to the suspect and the circumstances. Yet, in the stop and frisk cases, the Court has not overruled the categorical judgments of lower courts.

All in all, this creates an unfortunate system from the point of view of the public. There is no legislative regulation of stops and frisks in the U.S. Instead, stops and frisks are regulated only by court decisions arising in criminal cases. Regulation by court decision in criminal cases is by its nature reactive; courts can only decide cases that come before them, and unlike legislatures, they have no power to create general solutions to solve problems. The rules these criminal cases may generate do apply prospectively, but these decisions turn not so much on what makes sense looking forward to the whole universe of such cases as on the resolution of the case at hand. The only way the public can challenge these practices is when a defendant contests the constitutionality of the stop and frisk in an individual criminal, or through a time-consuming, resource-intensive civil lawsuit, and these lawsuits do not necessarily change either the law or police department policy in the event that the plaintiffs win. Neither of these backward-facing methods makes for good prospective regulation or a productive policy-making method. Combine this with the common lack of any data, and a low legal threshold for police action (in the form of the reasonable suspicion standard), and success in either criminal case suppression motions or civil lawsuits will be rare indeed. This leaves the practice regulated in a very hands-off way, with police discretion to perform these stops and frisks great and growing wider with time.

## **RELATED LEGAL REGIME: VEHICLE STOPS**

In the U.S., much of the public attention on police stops in the last dozen years has focused not on stops and frisks of pedestrians, but on stops of vehicles. Various reasons for this were discussed earlier; the important point to note is that vehicle stops have played a much larger role in the U.S. consideration of search and seizure tactics and how they impact citizens than have stops and frisks. Thus the mission of this set of papers and the conference for which they are prepared is not just timely, but long overdue. Nevertheless, some understanding of how vehicle stops and the law governing them work in the U.S. will assist the inquiry into stops and frisks.

In the U.S., police began to focus on vehicle stops as a way to interdict the transportation of drugs as far back as the early to mid 1980s. Some drug traffickers had begun to move their products by vehicle over the interstate highway system, and the federal Drug Enforcement Administration, along with a few American police departments, began to use “drug courier profiles” on highways to help police officers spot offenders.<sup>37</sup> By the late 1980s, the federal government had established a wide-ranging effort to teach “profiling” to state and local police officers across the country. Called “Operation Pipeline,” this effort of the U.S. Department of Justice (of which the Drug Enforcement Administration is a part) poured millions of dollars into developing training, curricula, and materials, in order to spread the gospel of profiling among police departments across the U.S.<sup>38</sup> By the 1990s, these efforts had borne fruit: drug interdiction task forces existed in almost every state. According to those involved in Operation Pipeline, these profiles did not involve race or ethnic appearance, but this claim is, at best, unsupported by the facts.<sup>39</sup>

Beyond the federal government's interest and willingness to spend money on the project, what made drug interdiction using "drug courier profiling" possible in the U.S. was a series of U.S. Supreme Court decisions. For decades, since the time of the legal prohibition of alcohol in the 1920s, police have not need search warrants to search vehicles when they had probable cause to believe that the vehicles contained contraband.<sup>40</sup> But in a series of more recent decisions, the Court decided that people in vehicles, and the vehicles themselves, had a less protection under the Constitution than was true in most other settings. These cases allowed a greater degree of police intrusion, with less legal justification. This trend reached its high point in 1996, with the case of *Whren v. U.S.*<sup>41</sup> By the time *Whren* was decided, police at every level in the U.S. were regularly using stops of vehicles to search for drugs. These stops were not based not on intelligence police had that gave them probable cause, or because the police could see that the driver or passengers possessed narcotics. Rather, police would follow the vehicle and wait for the driver to commit a traffic offense, pull the car over ostensibly for the traffic offense, and then begin to question the driver about drugs. The goal was to obtain the driver's permission to search the vehicle for drugs. Traffic offenses were actually of no interest to the police; rather, the police used them as a pretext to stop the car and begin a drug investigation, which usually led to a thorough search of the vehicle.<sup>42</sup> A few courts had prohibited this practice, saying it violated the Constitution; most other courts had allowed it.<sup>43</sup> In *Whren*, the Supreme Court ruled on this common practice. The Court said that the use of pretext traffic enforcement did not offend the Constitution; police officers were free to stop any driver committing a traffic offense, even if that was not the actual reason for the stop. The officer's real motivation did not matter in any legal sense.<sup>44</sup> Since traffic codes in the U.S. regulate both driving and vehicles in almost breathtaking detail, the universe of possible offenses is vast. Thus any police officer with almost any level of

experience could always observe an offense after just a few blocks of following a car. Thus the *Whren* decision gave police almost complete discretion to stop any vehicle, any time, and to commence an investigation, even though no evidence existed pointing to drug use or drug trafficking.

In practice, *Whren* has translated into the power to make vehicle stops with no real suspicion of criminal wrongdoing, based solely on the legal pretext of traffic enforcement. The result has been ever larger numbers of stops of American drivers, without any real limits on police discretion, and the data on these stops has revealed large racial and ethnic disparities.<sup>45</sup> In other words, affording police a way around the requirement that investigation for crime requires some evidence of wrongdoing, by allowing stops based on a pretext almost always available to the police, has given officers unguided and nearly unlimited discretion to stop who they want, when they want, as long as the person is driving a vehicle, and this unlimited discretion has allowed racial and ethnic biases to emerge.

It is important to note that, while *Whren* and associated cases give the police the power to *stop* virtually any driver any time, a *search* of the vehicle requires more. Here is how most officers manage to conduct a search within constitutional constraints. First, the officer is free, without any additional justification, to look into the vehicle and observe anything in it,<sup>46</sup> and to question the driver without administering the famous *Miranda* warnings.<sup>47</sup> If either the outside-the-car observations or the questioning reveals probable cause to believe a crime is being or has been committed (e.g., marijuana cigarette observed in the ashtray, or a weapon protruding from under the seat, etc.) the officer may search the vehicle. This is true whether the person engaged in the potentially criminal behavior is the driver or a passenger. Any time the driver or a

passenger is arrested, the person can be searched, and often some or all parts of the vehicle can be, too.<sup>48</sup> If none of those scenarios apply, the officer can ask for permission to perform a consent search of the car, based on receiving the driver's voluntary consent to search the car.<sup>49</sup> And if that does not work, the officer may summon a drug-sniffing dog to the scene. As long as the dog and his or her handler can do the job within the same time it would take to complete a traffic stop, the officer can walk dog around the outside of the vehicle to sniff for contraband.<sup>50</sup>

### **DATA COLLECTION ON STOP AND FRISK IN THE U.S.**

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

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

For some years, the great exception to this rule has been the New York Police Department. The NYPD has long required its officers to record information about each stop and frisk performed. The required information, collected on a standard form called the UF-250, included: the time and place of the stop and frisk, identifying information on the suspect (name, address, and the like, as well as the suspect's race or ethnic group, as perceived by the officer), the facts observed by the officer that support the officer's reasonable suspicion, the date, time and location of the incident, whether any contraband or weapon was recovered, and whether an arrest was made or a citation issued.<sup>51</sup> As discussed earlier, when Rudolph Giuliani became mayor of New York in 1994, it was decided that, as a matter of police policy, stops and frisks by NYPD officers would increase in order to detect guns and discourage people from carrying them, in the hope of stemming violent crime. In 1999, when the killing of an unarmed civilian by police ignited weeks of protests,<sup>52</sup> the Attorney General of the State of New York ordered the NYPD to turn over all of the stop and frisk reports it had for all of 1998 and the first quarter of 1999. The Attorney General gave the reports to researchers at Columbia University, who did the first in-depth analysis of NYPD stop and frisk data ever performed. The researchers' report, released by the Attorney General in December of 1999,<sup>53</sup> revealed that both blacks and Latinos in New York were "overstopped" relative to their presence in the city's population; the proportion of persons stopped and frisked who were black was twice as large as the proportion of the city's population that was black. Whites, on the other hand, were understopped; they made up 40 percent of the city's populations, but were only about 10 percent of all of those stopped and frisked. According to the researchers, the only factor that could account for these disparities was the race of the suspect; neither the crime rate in any given area, nor the number of police deployed in high-crime areas, nor reports of descriptions of suspects could account for these

differences. In short, the Attorney General's report showed a clear racial disparity in who got stopped and frisked in New York, and no other explanation sufficed to account for it. What's more, the rate at which police officers "hit" – made an arrest, recovered evidence, or the like – was in the teens, and the hit rate for (overstopped) blacks and Latinos (10.6 and 11.6 percent, respectively) was lower than the hit rate for (understopped) whites (12.6 percent). For those opposed to the NYPD policy, fact that almost 90 percent of stops and frisks produced nothing showed just how ineffective the tactic was.

In the years since, the NYPD has continued to release yearly stop and frisk data, and a remarkable trend shows up in these numbers. While crime in New York (and elsewhere, for that matter) continued to drop during the last decade, the use of stops and frisks in New York City *increased* substantially. In 2003, NYPD officers stopped 160,000 people; by 2009, that number increased to more than 575, 000 – more than 350 percent.<sup>54</sup> In just the first three months of 2011, the NYPD said that it had stopped over 183,000 people<sup>55</sup> – more than in the *entire* year of 2003. Assuming that stop and frisk activity continues through the year at the present rate, officers will stop well over 730,000 people during 2011 – more than 450 percent higher than in 2003.

Patterns of racial disparity have continued as well. From 2003 through 2009, "Blacks and Hispanics [made] up a substantial majority of persons stopped."<sup>56</sup> For the first quarter of 2011, just over 50 percent of all of those stopped were black; thirty-three percent were Hispanic, and less than ten percent were white – almost the same ratios seen in the 1999 Attorney General's report.<sup>57</sup> Another fact that has not changed is that stops and frisks are not particularly

good at ferreting out crime; hit rates remain low in 2011, with just twelve percent resulting in charges or arrests.<sup>58</sup>

These data on NYPD stop and frisk practices have been a gold mine for many researchers. They have demonstrated the poor efficacy of these tactics, especially their ineffectiveness when used heavily against minority youths.<sup>59</sup> They have also shown how much of this effort seems targeted at low-level arrests for possession of small amounts of marijuana among black and Latino males.<sup>60</sup> The evidence also shows that these marijuana cases searches and seizures seem to take place as a pretext for searches for weapons, but the statistical analysis showed “no significant relationship between marijuana enforcement and the likelihood of seizing firearms or other weapons.”<sup>61</sup> Other empirical work on the New York stop and frisk data indicate that order maintenance police activity in New York “is not about disorderly places nor about improving the quality of life, but about policing poor people in poor places” in ways that have a disproportionate impact on racial and ethnic minorities.<sup>62</sup>

Although we do get a considerable amount of information concerning stops and frisks from the New York data, we must exercise caution. We must not make the mistake of assuming that what we see in the New York data would also appear in the data from other American cities. Other police departments might approach stop and frisk in very different ways, train their officers differently, or have less faith in the crime control efficacy of the tactic. Other cities may exhibit stronger, or weaker, patterns of racial and ethnic disparity, or they could have policies that discouraged relying on stops and frisks in the way that New York did. This makes it important to look outside of New York, and to examine what else is available.

Yet the problem for researchers on American stop and frisk practices beyond New York becomes obvious quickly: in point of fact, relatively few American police departments collect data on stops and frisks in ways that would allow study of the tactic; of those that do, fewer still allow public access to the data. The fifty largest police departments in the U.S. and the best information available regarding whether and how they record stop and frisk data, are listed in Appendix A. [FELLOW CONFEREES: AS I WRITE THIS, MY ASSISTANT AND I ARE CONDUCTING A SURVEY OF THE 50 OR SO LARGEST U.S. POLICE DEPARTMENTS FOR THE APPENDIX. MORE INFORMATION IS FORTHCOMING.] A few of these departments, such as those in Los Angeles and Cincinnati, have been required to collect data on stops and frisks as part of agreements with the U.S. government. In Los Angeles and Cincinnati and more than twenty other cities and towns, these agreements, referred to as “consent decrees,” have sometimes required that data on all stops and frisks be collected. In Philadelphia, some data have been collected on stop and frisk practices for more than a decade because of a private lawsuit against the police brought in the 1990s by the American Civil Liberties Union (a non-governmental civil rights organization). The result of this suit was a settlement in which the city and police department agreed to collect data on pedestrian stops and frisks. After renewed complaints of abuse surfaced in 2008, 2009, and 2010, the ACLU filed suit again, and (as explained above) the city settled again in 2011, promising (among other things) to collect more stop and frisk data and to refrain from some troublesome stop and frisk practices.

Outside of these agreed-upon data collection activities, just a handful of the police departments in major U.S. cities have a regular system of data collection on stops and frisks as of mid 2011. Among these are Baltimore County, Maryland, Miami-Dade, Florida, New Orleans, Louisiana, Kansas City, Missouri, Tulsa, Oklahoma, AND Fort Worth Texas. [LIST OTHERS].

Some study and analysis have been performed regarding stops and frisks in Oakland, California, and Portland, Oregon, though it is less than clear whether this is done on an ongoing basis. Police in Chicago apparently keep some kinds of records of stops and frisks, but have refused to release any of the data to the public

The Philadelphia data, collected since between the agreement in the mid 1990s, make an interesting and compelling example. As stated earlier, when he was elected in 2008, Mayor Nutter ordered the police department to increase stop and frisk activity. In the time since, stop and frisk activity has actually been more intense in Philadelphia than in New York: in 2009, police stopped 575,000 people in New York, a city of roughly 8.175 million, a ratio of about one in fourteen. In Philadelphia in the same year, police stopped 250,000 in a city of 1.526 million – a ratio of one in six. The police department had also become sloppy in the record keeping required by the 1990s settlement. Since Mayor Nutter's election, the combination of greater pressure to do stops and frisks, and less thorough (and just plain less) data collection and record keeping, created a difficult situation for black residents of Philadelphia. According to those who analyzed the Philadelphia stop and frisk data, stops and frisks increased two and one-half times between 2005 and 2009, from just over 100,000 to over 250,000. More than seventy percent of all of those stopped in Philadelphia were black, a disparity which exceeds what the data showed in New York City. Stops and frisks resulted in arrests a mere less than eight and one-half percent of the time – not even as high a hit rate as the mediocre twelve percent rate reported most recently in New York.

In all, the U.S. picture on data collection is discouraging. While a considerable number of states and municipal jurisdictions collect data on vehicle stops, a mere handful do this for the

stops and frisks of pedestrians. And in the data we do have, we often see a disproportionate impact on black and Latino communities, with relatively little in terms of arrests of actual perpetrators to show for it.

## **THE BENCHMARKING DISCUSSION IN THE U.S., AND ONE WAY TO MOVE BEYOND IT**

There has been considerable and vigorous debate in the U.S. on the question of the proper benchmark to use to measure racial profiling. The question is how to properly assess the actions of police. If black drivers make up X percent of all of the drivers police stop, how does this compare to what one would expect police to do, given the percentage of blacks in the driving population? Without the proper standard of comparison, one is left unable to tell whether the rate at which any particular police activity occurs for one demographic group as opposed to another is higher, lower, or exactly what one might expect. The use of an improper benchmark can skew the answer to this question, perhaps in ways that make it impossible to know whether the error constitutes an underestimation or overestimation of the possibility of bias in enforcement activity.

In the U.S., this discussion (like so much else under the heading of racial profiling) has arisen in the context of vehicle stops. In the early stages of this discussion, comparisons of the rate of police stops of blacks were almost always made to the population of the area in which the stops occurred. For example, imagine that in the city of Middleburgh, blacks were 54 percent of all of those stopped by the police for traffic violations. Imagine further that blacks constituted 18 percent of Middleburgh's population. Critics would therefore state that blacks were stopped in

Middleburgh at three times the rate one would expect, leading to an inference of police bias against blacks.

But this commonly-used analysis was incorrect. The population at risk of being stopped by the police while driving was not the population of people *living* in any particular place, but the population of people *driving* there. And those two populations could be quite different, and might even change significantly over the course of a day. For example, imagine a major road used by (primarily white) commuters to travel from Middleburgh's suburban areas to the city's downtown business district during morning and evening rush hours. Imagine further that as it traverses the city, the road travels through areas predominately populated by black people. During morning and evening commuting periods, the population of *drivers on the road* would likely have a predominantly white population of commuters from the bedroom communities surrounding the cities: let us say 80 percent white, and 20 percent black. But the resident population in the area through which the road travels would likely have a much higher percentage of minorities: if we think of a highly segregated, minority neighborhood, it might have a black population of 90 percent or more. Thus if the rate at which blacks are stopped on the road during the morning commute—again, let us use 54 percent as our figure in this example—is compared to the population of the area through which the road travels, we make a comparison of 54 percent black stops to a 90 percent black population. This comparison would lead many to think that police on the road are not targeting blacks; in fact, they seem to be *understopping* them relative to their presence in the population. On the other hand, if the 54 percent rate of black stops is compared to the more accurate benchmark – the 20 percent population of black drivers driving on this particular road during commuting time—a much different picture emerges: 54 percent black drivers stopped, compared to 20 percent of black

drivers on the road. This is roughly two and one-half times the number of stops of blacks one would expect.

The use of population statistics for benchmarking purposes has been common since the first days of measuring vehicle stops and race. However, John Lamberth, who did the disparity calculations in the first two groundbreaking legal actions about racial profiling in the U.S., took a markedly different approach. Lamberth compared the percentages of police stops of blacks on a given road not to the population of the area, but to the percentage of blacks in the population of drivers driving on that road.<sup>63</sup> To calculate this much more accurate benchmark, Lamberth used trained teams of observers, on roadsides and in moving vehicles in traffic, to give him an accurate picture. His calculations, not surprisingly, stood up to scrutiny in court, and they sometimes revealed large-scale racial disparities which could only be explained by racial bias.

At present, researchers have moved away from population-based benchmarks. Lamberth's method works; other researchers are actively involved in trying to create alternative methods for resolving the benchmarking question. One group has tried measuring police stopping activity during darkness, since police could not ascertain race without the aid of light and would therefore not be able to act on racial or ethnic biases.<sup>64</sup> This method seems to ignore the fact that most roadways are lit well enough to allow drivers to drive safely and police to observe drivers, and also the evidence from racial profiling cases that showed that police developed specific techniques, such as parking on roadsides at angles to the roadway and shining the headlights into passing cars, to allow them to see the race of drivers passing.<sup>65</sup> Others have advocated using the race of drivers victimized by accidents on roads – that is, in two-vehicle accidents, culling racial identification data on the drivers not at fault. The theory is that these

drivers would be involved in accidents on a purely random basis, and would therefore constitute a random snapshot of the road's population of drivers.<sup>66</sup>

Even though the benchmarking issue in the U.S. has come almost entirely in the context of collection and analysis of data on vehicle stops, the same principles should apply in any data collection efforts that concern stops and frisks of pedestrians. The concern is somewhat ameliorated in the stop and frisk context because those stopped and frisked when they are pedestrians are, by definition, the population of those eligible to be stopped and frisked. Nevertheless, tracking of place of stop versus place of residence would make sense, in order to see if a pattern exists in which police focus on residents or non-residents. Questions might also arise concerning whether or not those stopped reside in an area that has relatively low residential rates, but high pedestrian traffic rates, such as a central business or commercial district.

One other way to approach the benchmarking problem is to focus on what happens after the police stop the driver: do the police request consent to search the car? Under U.S. law, as explained briefly above, police are entitled to make such a request without having any evidence of wrong doing, and without having to articulate any fact-based reason for suspicion; a consent-based search is considered constitutional as long as the consent is freely and voluntarily given. By focusing on these consent searches (and excluding searches following arrests or the discovery of existing arrest warrants, both of which types would be mandatory for most police), those interested in the question of whether police are acting based on racial or ethnic biases would have an indicator to rely on that does not involve a benchmarking problem. If the focus is on discretionary consent searches, the benchmark is the group of all persons stopped by police, broken down into demographic groups. The relevant comparison is, first, the percentage of

blacks asked for consent to search, among all blacks stopped; this can then be compared to the percentage of whites asked for consent to search, among all whites stopped. A disparity between the two would give a clear indication of whether police discretion to ask for consent to search was being used differently on these two groups.

### **FEDERAL VERSUS STATE CONSIDERATIONS IN THE U.S.**

The early conversation over racial profiling in the U.S. began with two large legal cases at the state level, in which people stopped by the State Police in New Jersey and in Maryland alleged that they had been stopped by police officers based on their respective races. The outcry about these practices grew, and more lawsuits were brought, again targeting state-level law enforcement. The only major cases in the early going of the discussion of the issue concerning a federal police agency involved the U.S. Customs Service (now called Immigration and Customs Enforcement), the agency charged with screening people entering the country, whether foreign nationals or Americans returning home. In those cases, allegations surfaced that the Customs Service was conducting highly intrusive body searches at international airports of black American women returning to the U.S., in an effort to interdict narcotics.<sup>67</sup> But with this one exception, when these issues have arisen, both in the context of vehicle stops and stops and frisks of pedestrians, they have involved police agencies at the local level (e.g., the New York Police Department) or the state level (e.g., the New Jersey State Police).

This focus on state and local police action is entirely appropriate, and not in any sense unexpected. The vast majority of what one could call street-level law enforcement activity in the U.S. – from traffic enforcement to investigation of serious crime, from patrol of city streets to patrol of high-speed roadways, from questioning of suspects in crimes to investigation of

murders and robberies – is carried out by local and state police agencies. All the federal police agencies, even taken together, represent a very small percentage of all cases filed, and of all of the criminal justice business done in the U.S. As far as which agencies might be involved in racial profiling, the impact of state and local agencies vis a vis federal ones is even greater when one considers that very little of federal law enforcement involves stopping and frisking pedestrians or stopping drivers in routine enforcement actions, which is where racial profiling tends to become an issue. Thus it is not surprising that most of the legal and legislative action that has occurred surrounding racial profiling has come in the states, cities and towns, and not in the U.S. Congress.

The efforts that the federal government has undertaken on racial profiling have been a mixed bag. Despite the fact that each Congress from 1997 forward has seen an anti-profiling bill introduced, neither the Clinton nor the Bush Administrations saw fit to endorse the proposals; neither pushed them forward as a priority. Both Presidents Clinton and Bush stated that they opposed racial profiling, but neither did much in concrete terms to stop it. In his first speech to the U.S. Congress, President Bush famously called racial profiling “wrong” and said that “we will end it in America.”<sup>68</sup> Neither Bush nor his Department of Justice embraced the End Racial Profiling Act, introduced in Congress during that same year. Instead, in 2003, the Department of Justice issued a document it called a “policy guidance”<sup>69</sup> – not an executive order or a federal rule, but simply guidance for federal agencies on the issue of profiling. The guidance made it clear that federal police agencies were not to use racial or ethnic appearance as a factor – not just as the sole factor, but even as one factor among others – in routine law enforcement decisions and actions, such as deciding which drivers to stop, and which pedestrians to stop and frisk. Racial and ethnic appearance, the guidance said, were not appropriate factors upon which to

ground those decisions, and federal law enforcement agencies were instructed to avoid this. Then, another portion of the guidance created an exception to this overall rule in investigations or police actions involving immigration or national security. The effect of this was, in the end, to make the guidance sound strong, but act weak. First, the guidance applied only to federal law enforcement, and (as explained above) the vast majority of the stops and frisks, traffic stops, searches, and the like come during encounters with state and local police, not federal agents. The guidance made no attempt to reach state actors by using the federal spending power, as other federal law had done in the past. Second, to the extent that profiling had become an issue for federal law enforcement agencies, it had emerged after September 11, 2001, in precisely the two areas for which the guidance created exceptions: immigration law and national security. Thus the guidance set up a strong standard for stops and frisks and the like, with which federal law enforcement had little to do, and did not affect these practices in the states, where most profiling occurred, and at the same time exempted the federal government from regulation in the two areas in which profiling by federal agencies had come to light.

With the change of administrations in 2009, one might have anticipated that some of this picture might change. The new Obama Administration seemed likely to approach the profiling controversy differently, and a federal statute could not be long in coming, what with a Democratic President, and Democratic majorities in both houses of the Congress. It also seemed that having the first black president could only enhance the chances for progress on the issue. Perhaps it is surprising, then, the Department of Justice's policy guidance has remained unchanged under President Obama; neither the immigration nor the national security exception has been removed, modified or narrowed. And while the Obama Administration did support the

enactment of the End Racial Profiling Act, it did not make the statute a priority, and by the end of Congress' 2009-2010 session, the bill had not been enacted into law.

As described earlier, under the federal system of government in the U.S., the national government has no supervisory role over state or local police. It can withhold monies and other benefits in order to influence policies (this is the approach the End Racial Profiling Act would take, if enacted, as other laws have in the past), but it cannot simply order state or local police agency to modify their practices. The one other tool that the federal government can use to compel changes in police practice at the state and local level focuses on whether or not state or local actors are acting in ways that violate the Constitutional rights of their citizens. Under the “pattern or practice” law,<sup>70</sup> the U.S. Department of Justice is empowered to investigate whether a police department is acting in such a way as to exhibit a “pattern or practice” of violating the constitutional rights of its citizens. (This law was the basis for the settlements in Los Angeles and Cincinnati discussed above.) One bad incident does not constitute a pattern or practice; rather, the statute requires more. The law allows the Department of Justice to investigate the practices of the police agency, and, should that investigation reveal a pattern or a practice of acting against the constitutional rights of civilians, the government can either negotiate a settlement agreement with local law enforcement authorities, or go to a federal court and attempt to convince a judge to grant relief in the form of ordering changes to unconstitutional practices. Almost always, if the investigation turns up evidence of a pattern of violations, the U.S. government and the police agency enter into a consent decree that obligates the agency to make significant changes, supervised by an outside monitor, and overseen ultimately by the federal judge. This has been accomplished in a number of American cities besides Los Angeles and Cincinnati, and in some smaller towns as well. In some of these cases, violations of citizens’

rights through illegal use of stops and frisks has been among the pattern of violations addressed. The pattern or practice statute represents the most promising tool available for addressing, and changing, overreaching in stop and frisk practices.

## ENDNOTES:

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- <sup>1</sup> The definition here is mine; I have used it in other research and writing, e.g., [add]
- <sup>2</sup> *State v. Soto*, 324 N.J. Super. 66, 734 A.2d 350 (N.J. Super. Ct. Law Div., 1996).
- <sup>3</sup> *Maryland State Police v. Wilkins*, [Add cite]
- <sup>4</sup> Citation to Lamberth studies here
- <sup>5</sup> New Jersey Attorney General, Interim Report (1999),
- <sup>6</sup> David A. Harris, Profiles in *Injustice: Why Racial Profiling Cannot Work* \_\_ (2002)
- <sup>7</sup> [Northeastern website]
- <sup>8</sup> [press reports on profiling questions in debates, esp. *Gore v. Bradley*]
- <sup>9</sup> Gallup Organization [citation]
- <sup>10</sup> *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (Supreme Court opinion stating that stop and frisk was sometimes used for “wholesale harassment by certain elements of the community, of which minority groups, particularly Negroes, frequently complain...”).
- <sup>11</sup> Gallup Organization, [add title and citation]
- <sup>12</sup> Stanley Crouch, “Wake Up: Arabs Should Be Profiled,” *St. Louis Post Dispatch*, March \_\_, 2002.
- <sup>13</sup> *Id.*
- <sup>14</sup> E.g., [citation to SAFE Act, 2004 Congress]
- <sup>15</sup> E.g., [citations to Hazelton and SB 1070 cases]
- <sup>16</sup> [News articles here]
- <sup>17</sup> [News article and transcript, Obama news conference, July 2009].
- <sup>18</sup> [News story citations]
- <sup>19</sup> [U.S. DOJ web site]
- <sup>20</sup> The term and the philosophy behind it come from George L. Kelling and James Q. Wilson, “Broken Windows: The Police and Neighborhood Safety,” *The Atlantic Magazine*, March, 1982, in which they argued that maintaining order by taking action on the small things—someone breaking a window—would prevent the slide toward more serious and frequent crime.
- <sup>21</sup> “Hot spot” policing or “cops on dots” is a more recent idea than the broken windows theory, but a popular one. See, e.g., [add news article citations].
- <sup>22</sup> *Terry v. Ohio*, 392 U.S. 1, 14 (1968).
- <sup>23</sup> *Id.* at 5.
- <sup>24</sup> *Id.* at 6-7.
- <sup>25</sup> *Id.* at 14.
- <sup>26</sup> See *Illinois v. Gates*, \_\_\_ (1984), in which the Supreme Court uses the phrase “fair probability” to describe probable cause.
- <sup>27</sup> *Terry*, 392 U.S. at 30.
- <sup>28</sup> *Id.* at \_\_\_.
- <sup>29</sup> *U.S. v. Cortez*, 449 U.S. 411 (1981) (explaining need for particularized suspicion).
- <sup>30</sup> This becomes clear upon the analysis of the concurring opinion of Justice Halan. *Terry*, 392 U.S. at 32-33.
- <sup>31</sup> See John Jay Primer
- <sup>32</sup> [citation to DH Davis article]
- <sup>33</sup> DH *supra* at \_\_\_
- <sup>34</sup> [citation]

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<sup>35</sup> [Wisc cite]  
<sup>36</sup> Richards S Ct cite  
<sup>37</sup> DH, Profiles in Injustice (Ch. 3)  
<sup>38</sup> Id.  
<sup>39</sup> Id.  
<sup>40</sup> U.S. v. Carroll (19\_\_)  
<sup>41</sup> Whren v. U.S., 5\_\_ U.S. \_\_\_\_ (1996)  
<sup>42</sup> See, e.g., DH, Car Wars...  
<sup>43</sup> Whren circuit split note.  
<sup>44</sup> Id. at  
<sup>45</sup> PII, Ch. 3  
<sup>46</sup> Plain view case cite  
<sup>47</sup> Berkemer  
<sup>48</sup> Gant.  
<sup>49</sup> Schneckloth  
<sup>50</sup> Caballes  
<sup>51</sup> Jones-Brown, D., Gill, J., and Trone, J. (2010) Stop, Questions & Frisk Policing Practices in New York City: A Primer p. 9.  
<sup>52</sup> [Diallo news articles]  
<sup>53</sup> Spitzer, E., (1999). The New York City Police Department’s “Stop and Frisk” Practices. Office of the New York State Attorney General. [www.oag.state.ny.us/press/reports/stop\\_frisk/stop\\_frisk.html](http://www.oag.state.ny.us/press/reports/stop_frisk/stop_frisk.html).  
<sup>54</sup> Jones-Brown, D., Gill, J., and Trone, J. (2010) Stop, Questions & Frisk Policing Practices in New York City: A Primer p. 4  
<sup>55</sup> “NYPD Stop-and-Frisk Activity on the Rise, Wall Street Journal, WSJ.com, May 31, 2011.  
<sup>56</sup> Jones-Brown, D., Gill, J., and Trone, J. (2010) Stop, Questions & Frisk Policing Practices in New York City: A Primer p. 14.  
  
<sup>57</sup> “NYPD Stop-and-Frisk Activity on the Rise, Wall Street Journal, WSJ.com, May 31, 2011.  
  
<sup>58</sup> Id.  
<sup>59</sup> Geller, A., and Fagan, J. (2010) Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing, Columbia Law School Public Law & Legal Theory Working Paper No. 10-242, [www.ssrn.com/](http://www.ssrn.com/)  
<sup>60</sup> Id.  
<sup>61</sup> Id.  
<sup>62</sup> Fagan, J, and Davies, G. Street Stops and Broken Windows: Terry, Race and Disorder in New York City, 28 Fordham Urban Law Journal 457 (2000).  
<sup>63</sup> Lamberth NJ and MD studies.  
<sup>64</sup> Ridgeway et al.,  
<sup>65</sup> NJ interim report?  
<sup>66</sup> Alpert et al.,  
<sup>67</sup> DH PII  
<sup>68</sup> Bush speech to Congress, Jan 2001.  
<sup>69</sup> DOJ web site  
<sup>70</sup> 42 U.S.C. 14141(1994)