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# The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk"

Jeffrey Bellin

*William & Mary Law School*, [jbellen@wm.edu](mailto:jbellen@wm.edu)

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## ARTICLES

### THE INVERSE RELATIONSHIP BETWEEN THE CONSTITUTIONALITY AND EFFECTIVENESS OF NEW YORK CITY “STOP AND FRISK”

JEFFREY BELLIN\*

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*New York City sits at the epicenter of an extraordinary criminal justice phenomenon. While employing aggressive policing tactics, such as “stop and frisk,” on an unprecedented scale, the City dramatically reduced both violent crime and incarceration – with the connections between these developments (if any) hotly disputed. Further clouding the picture, in August 2013, a federal district court ruled the City’s heavy reliance on “stop and frisk” unconstitutional. Popular and academic commentary generally highlights isolated pieces of this complex story, constructing an incomplete vision of the lessons to be drawn from the New York experience. This Article brings together all of the strands – falling crime, reduced incarceration, and*

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\* Associate Professor, William & Mary Law School. I would like to thank Josh Bowers, Bennett Capers, Jack Chin, Adam Gershowitz, Lisa Griffin, Darrell Jackson, Alli Larson, Kay Levine, Paul Marcus, John Pfaff, Sharon Rush, and the participants in the Neighborhood Criminal Justice Conference at Duke Law School for helpful comments on earlier drafts of this paper. The project benefited immeasurably from the research support of Fred Dingley and Marko Hananel.

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*aggressive policing – analyzing the hazy historical and empirical connections between them, and evaluating the legal implications of a crime-fighting policy that might “work” to reduce both crime and incarceration precisely because of the factors that render it unconstitutional.*

#### INTRODUCTION

Two distinct narratives dominate the academic commentary on New York City’s fight against crime. One narrative rails against the aggressive, degrading, and “outright racist” tactics of the New York City Police Department (“NYPD”).<sup>1</sup> In this narrative, New York City epitomizes everything that is wrong with criminal justice policy. Its police force exploits and, at times, violates permissive Fourth Amendment case law and places the burden of crime control squarely on the backs of poor, minority youths.<sup>2</sup> The second narrative, by contrast, holds the city out as a “beacon of hope” for a national criminal justice system otherwise reliant on mass incarceration; it is the one major American jurisdiction that “reduced crime while also reducing the number of residents sent to prison.”<sup>3</sup> Empirical evidence supports both

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<sup>1</sup> Bob Herbert, Op-Ed., *The Shame of New York*, N.Y. TIMES, Oct. 29, 2010, at A23 (calling for the end of “the city’s degrading, unlawful and outright racist stop-and-frisk policy”).

<sup>2</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 133 (2010) (highlighting that “African Americans were stopped six times more frequently than whites” in New York City but “stops of African Americans were less likely to result in arrests than stops of whites”); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1634 (2012) (arguing that “New York’s stopping and frisking of hundreds of thousands of people, disproportionately minorities, with little to show in the way of arrests or evidence, exemplifies the problem” of ineffective Fourth Amendment remedies); Robert J. Cottrol & Raymond T. Diamond, *In The Civic Republic: Crime, the Inner City, and the Democracy of Arms – Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1631 (2013) (citing NYC’s “stop and frisk policy” as evidence that “Fourth Amendment search and seizure protections in these contexts have become a constitutional fiction”); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 813-14 (1999) (suggesting that New York’s turn to aggressive policing in the late 1990s embodied a “racist social meaning” and “reinforced pernicious norms within the police department”); Brando Simeo Starkey, *A Failure of the Fourth Amendment & Equal Protection’s Promise: How the Equal Protection Clause Can Change Discriminatory Stop and Frisk Policies*, 18 MICH. J. RACE & L. 131, 147 (2012) (“New York City’s stop and frisk tactics are what columnist Bob Herbert harshly labeled ‘Jim Crow Policing.’”); cf. Editorial, *To Make a Safe City Safer*, N.Y. TIMES, July 22, 2013, at A18 (arguing that the “needless[]” “stop-and-frisk program” has “infuriated and humiliated hundreds of thousands of innocent New Yorkers”).

<sup>3</sup> James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*,

narratives. Over the last two decades, crime in New York City dropped precipitously. While the City's population grew, homicides (the most reliable crime statistic) cratered, falling from a record high of 2,245 in 1990 to a record low of 419 in 2012.<sup>4</sup> A few cities like San Diego and Dallas experienced homicide drops almost as steep as the drop in New York City, but cities in California and Texas reduced crime while contributing to skyrocketing state prison populations.<sup>5</sup> As crime fell in New York, the number of people the City sent to prison dropped too.<sup>6</sup>

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87 N.Y.U. L. REV. 21, 65 (2012); Paul Butler, Op-Ed., *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 17, 2013, at A21; see also Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1311 (2012); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 12 (1999); JAMES AUSTIN & MICHAEL JACOBSON, BRENNAN CTR. FOR JUSTICE, HOW NEW YORK CITY REDUCED MASS INCARCERATION: A MODEL FOR CHANGE? 4 (2013), archived at <http://perma.cc/BU5V-JDXU>.

<sup>4</sup> See *UCR Table Generator*, BUREAU OF JUSTICE STATISTICS, archived at <http://perma.cc/RP6A-26LZ> (murders and non-negligent manslaughter); *infra* Part II.A; *infra* note 111.

<sup>5</sup> See *supra* note 4. In 1996, New York had 69,709 inmates in prison; California had 146,049; and Texas had 132,383. DARRELL K. GILLIARD & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1997 (1998), available at <http://www.bjs.gov/content/pub/pdf/p97.pdf>, archived at <http://perma.cc/C279-Q82B>. By 2008, California's prison population swelled to 173,670; Texas's exploded to 172,506; and New York's dropped to 60,347. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2009 app. at 15 tbl.1 (2010), available at <http://www.bjs.gov/content/pub/pdf/p09.pdf>, archived at <http://perma.cc/DUT7-XXEP>. Since 2008, prison populations in California (in response to court and legislative directives) and Texas have declined. As of 2011, California prisons held 147,578 inmates; Texas prisons held 141,353; New York prisons held 55,196. E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 app. at 31 tbl.14 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>, archived at <http://perma.cc/7SS6-54QB>. The rate of incarceration in New York (283 per 100,000 residents) continues to be much lower than in California (393) and Texas (633). E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 - ADVANCE COUNTS 9 tbl.8 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>, archived at <http://perma.cc/X44Q-ECZY>; see also FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE 75 (2012) (stating that over the past twenty years, New York City made "huge strides in crime reduction without increasing investment in confinement"); Mary Beth Pfeiffer, *Prison Population Falls 22 Percent in 11 Years; Drug Convicts Down 62 Percent*, POUGHKEEPSIE J., Oct. 15, 2011, at APJ1 ("Among the 50 states, New York charted the biggest drop in its prison rolls from 2000 to 2010, a decade when 37 state prison systems had double-digit population hikes.").

<sup>6</sup> See *infra* Part II.B.

Just as there are strong numbers to support New York's crime-fighting prowess, there are powerful statistics to condemn the tactics the City employed. Over the past two decades, the NYPD engaged in a steadily escalating number of coercive encounters with its citizenry.<sup>7</sup> This pattern crested in 2011 when the department recorded almost 700,000 "stops" as part of a citywide effort to stop and frisk suspicious persons, ostensibly to find guns and deter gun-carrying.<sup>8</sup> Almost all of those stopped (90%) were minority males,<sup>9</sup> and the vast majority of the stops (88%) uncovered no evidence of wrongdoing.<sup>10</sup> Given these numbers, it is not surprising that, in August 2013, a federal judge ruled that the NYPD's use of mass stop-and-frisk ("NYC Stop and Frisk") tactics violated the Constitution.<sup>11</sup>

The confluence of New York's singularly aggressive policing strategies, unparalleled crime reductions, and shrinking prison population will occupy social scientists for decades.<sup>12</sup> Still, preliminary evidence suggests that the

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<sup>7</sup> See *infra* Part I.A.

<sup>8</sup> RAYMOND W. KELLY, NYPD, REASONABLE SUSPICION STOPS: PRECINCT BASED COMPARISON BY STOP AND SUSPECT DESCRIPTION 4 (2011) [hereinafter REASONABLE SUSPICION STOPS] (reporting 685,724 stop-and-frisk subjects in 2011); *infra* Part I.A.; see also RAYMOND W. KELLY, NYPD, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 15 (2012) [hereinafter CRIME AND ENFORCEMENT 2012] (reporting 540,543 stop-and-frisk subjects in 2012); *Stop-and-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited May 15, 2014), archived at <http://perma.cc/H5CX-EQG9>.

<sup>9</sup> REASONABLE SUSPICION STOPS, *supra* note 8, at 4 (reporting that 53.1% of stopped individuals were black; 33.9% Hispanic; 3.6% Asian or Pacific Islander; and 9.4% white); see also Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 821 (2007) (concluding that "for violent crimes and weapons offenses, blacks and Hispanics are stopped about twice as often as whites" and "for the less common stops for property and drug crimes, whites and Hispanics are stopped more often than blacks, in comparison to the arrest rate for each ethnic group"); N.Y. ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 93-94 (1999) [hereinafter AG REPORT] (reporting empirical analysis that minorities are stopped at rates higher than their population rate across precincts). See *infra* note 82 for gender data.

<sup>10</sup> *Stop-and-Frisk Data*, *supra* note 8.

<sup>11</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that the City's stop and frisk policy violated plaintiffs' Fourth and Fourteenth Amendment Rights). A Second Circuit panel stayed the ruling pending appeal and removed the judge from the case. *Ligon v. City of New York*, 736 F.3d 118, 123 (2d Cir. 2013) (summarizing procedural history which led to the stay and reassignment).

<sup>12</sup> See, e.g., Clifford Krauss, *New York's Violent Crime Rate Drops to Lows of Early 1970's*, N.Y. TIMES, Dec. 31, 1995, at 1 (quoting Jeffrey Fagan's characterization of New York's plunge in violent crime as a "miracle"); John Tierney, *Prison Population Can Shrink When Police Crowd Streets*, N.Y. TIMES, Jan. 26, 2013, at A1 (quoting a criminologist,

three phenomena – aggressive policing, crime reductions, and decreased incarceration – may be related.<sup>13</sup> This Article explores that relationship, canvassing the existing historical and empirical evidence on the miracle and nightmare that is New York City’s fight against crime and analyzing the resulting legal implications.

The question of how to reduce violent crime without increasing incarceration may be the most pressing dilemma facing American policymakers; New York City’s experience hints invitingly at an answer. At the same time, if that answer requires a form of policing exemplified by the City’s programmatic embrace of “stop and frisk,” it may only be a cruel illusion. New York’s aggressive policing tactics exacted a societal toll that is proving increasingly morally unacceptable to New Yorkers and politically unpalatable to legislators.<sup>14</sup> In addition, if, as a federal district court recently found, New York City’s reliance on mass “stop and frisk” is unconstitutional, the program’s efficacy becomes immaterial.<sup>15</sup> This is particularly the case if the success of New York’s strategy of deterring public gun possession and thus gun violence through widespread stop-and-frisk hinges on the very aspects of the practice that render it unconstitutional. If the effectiveness of NYC Stop and Frisk depends on its unconstitutionality, “reforming” the program – the task of a court-appointed “monitor,” “facilitator,” and “Academic Advisory Board,” a legislatively created “inspector general,” and a newly elected mayor and (new-old) police chief<sup>16</sup> – is a futile endeavor. Instead, the goal should be

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stating that “precise causes of New York’s crime decline will be debated by social scientists until the Sun hits the Earth”).

<sup>13</sup> See AUSTIN & JACOBSON, *supra* note 3, at 3 (asking rhetorically if “these three shifts” are connected); *infra* Part II.A.

<sup>14</sup> Jim Dwyer, *Vowing to Slay the (Already Subdued) Stop-and-Frisk Dragon*, N.Y. TIMES, Dec. 6, 2013, at A27; Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. TIMES, Sept. 19, 2013, at A1 (“The stop-and-frisk tactic, once the linchpin of the police’s efforts to get guns off the streets, is in a steep decline; it has been rejected by the City Council, a federal judge and, most recently, the Democratic voters who supported the mayoral candidacy of Bill de Blasio.”).

<sup>15</sup> *Floyd*, 959 F. Supp. 2d at 546 (“The enshrinement of constitutional rights necessarily takes certain policy choices off the table.”) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)).

<sup>16</sup> See *id.* at 563; Daniel Beekman, *Ivy League Law Professors to Help Implement Stop-and-Frisk Reforms*, N.Y. DAILY NEWS (Sept. 19, 2013, 2:26 AM), archived at <http://perma.cc/5NYY-Y7E8>; Erin Durkin, *New York City Council Overrides Mayor Bloomberg’s Vetoes, Passes Bills to Rein in Aggressive Policing*, N.Y. DAILY NEWS, Aug. 22, 2013, archived at <http://perma.cc/7MT7-TPJF>; Pervaiz Shallwani & Sean Gardiner, *Key Challenge Will Be Overhaul of Stop and Frisk*, WALL ST. J., Dec. 5, 2013, at A21 (quoting incoming Commissioner Bratton as stating that “stop and frisk is essential to every police department in America, but it’s also essential that it be done constitutionally” and Mayor-elect de Blasio as stating “that police would continue stopping people but wouldn’t have

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replacing NYC Stop and Frisk with an analogous means of deterring unlawful gun possession (e.g., remote gun-detecting technology) or, failing that, simply winding NYC Stop and Frisk down to the non-programmatic levels originally envisioned in the Supreme Court opinion from which the practice arose.<sup>17</sup>

This Article proceeds in three parts. Part I provides a historical account of the surprisingly murky rise and evolution of NYC Stop and Frisk and isolates the ostensible crime fighting theory behind the “program”: deterring unlawful public gun carrying. Part II explores empirical evidence that (tentatively) suggests that NYC Stop and Frisk may, in fact, be achieving some form of deterrence and thereby reducing gun violence. Part III analyzes the constitutionality of NYC Stop and Frisk in light of the preceding discussion. It explains that whatever success NYC Stop and Frisk achieves towards its deterrence goal relies to a significant degree on the very factors that render it unconstitutional. As a policing strategy, NYC Stop and Frisk violates the Fourth Amendment because deterring gun-carrying (an easily concealed activity) depends, to a large extent, on the unavoidability, i.e., arbitrariness, of stop-and-frisks.<sup>18</sup> It violates the Fourteenth Amendment because inescapable resource constraints dictate reliance on demographic profiles, including (impermissibly) race, to narrow the program’s scope.<sup>19</sup> As a result, while isolated “stop and frisks” will always be available to individual police officers as a crime-fighting *tactic*, crime-deterring *strategies* based on massive applications of stops and frisks cannot lawfully be sustained in New York or any American jurisdiction, at least absent dramatic shifts in longstanding constitutional doctrine. As explained below, a program of aggressive policing designed to deter unlawful gun carrying like that employed in New York City can be either effective or constitutional, but not both.

#### I. A HISTORICAL ACCOUNT OF NYC STOP AND FRISK

Any analysis of NYC Stop and Frisk should begin by determining what the program consists of, how it came into being, and what it is supposed to accomplish. Given the attention the policing phenomenon has received, the existing literature contains surprisingly little help in this regard. There is, in fact, no clear narrative of the evolution of New York City’s unprecedented embrace of “stop and frisk.” Consequently, a description of the program, its evolution, and a theory of how it (may) work to prevent crime is provided below.

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stop quotas and wouldn’t target innocent minority men”).

<sup>17</sup> Terry v. Ohio, 392 U.S. 1, 30 (1968).

<sup>18</sup> See *infra* Part III.A.

<sup>19</sup> See *infra* Part III.B.

The voluminous scholarly literature and media reports critiquing NYC Stop and Frisk,<sup>20</sup> the much-cited New York Attorney General's 1999 "Stop and Frisk" report,<sup>21</sup> the 200-page opinion invalidating the program by Judge Shira Scheindlin, and NYPD Police Commissioner William Bratton's memoir, *Turnaround*, all share a curious omission. On the question of what exactly New York City's "stop and frisk" program is, and how it came into being, the accounts are conclusory and full of gaps. The elusive nature of NYC Stop and Frisk is perhaps best illustrated by the fact that Judge Scheindlin's recent ruling did not invalidate any tangible NYPD policy or procedure. Rather, the judge targeted the NYPD's "unwritten policy" of conducting race-conscious stops; "pressure" from senior NYPD officials to increase enforcement activity, including stops; and the NYPD's "deliberate indifference" to "constitutional deprivations caused by its employees."<sup>22</sup>

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<sup>20</sup> See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER* 49-50 (2001) (locating the beginning of stop-and-frisk with Bratton, but stating that Bratton's successor, Howard Safir, "promoted a more aggressive stop-and-frisk policy" and citing AG REPORT, *supra* note 9); Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 747 (2002) (asserting that "[s]tarting in 1994, the New York City Police Department conducted an aggressive stop-and-frisk campaign with the explicit purpose of removing guns from the streets and discouraging New Yorkers from carrying them," but citing only Police Strategy No. 1, which does not mention "stop and frisk"); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 322-23 (2010) (highlighting Bratton's 1994 hiring and "emphasis on aggressive stop-and-frisk tactics" as general support for rise of stop and frisk, but citing only AG REPORT, *supra* note 9). Harcourt's reference to stops and frisks under Bratton also cites "Operation Juggernaut, a strategy of flooding drug-infested neighborhoods with large numbers of police officers carrying out buy-and-bust operations, quality-of-life enforcement, and stops and frisks." HARCOURT *supra*, at 49 (emphasis added). The portion of Bratton's book cited for this proposition, however, does not mention "stops and frisks" and explains that Operation Juggernaut was not implemented due to political considerations, although a smaller version did go forward fifteen months later in a portion of Brooklyn. WILLIAM BRATTON, *TURNAROUND* 272-78 (1998); see also JACK MAPLE, *THE CRIME FIGHTER* 200 (1999) (providing an account of Operation Juggernaut in a book authored by one of Bratton's key deputies and the driving force behind Compstat).

<sup>21</sup> See AG REPORT, *supra* note 9, at 52-53 (citing Police Strategy No. 1 and a policy paper by a think-tank to support narrative leap from "order maintenance" to NYC Stop and Frisk).

<sup>22</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 560-61, 590 (finding that seven-fold increase in stop and frisks "was achieved by pressuring commanders at Compstat meetings to increase the number of stops"; "commanders, in turn, pressured mid-level managers and line officers . . . by rewarding high stoppers and denigrating or punishing those with lower numbers of stops"); cf. *Connick v. Thompson*, 131 S. Ct. 1350, 1359-60 (2011) (explaining that "[o]fficial municipal policy includes . . . practices so persistent and widespread as to practically have the force of law," and liability can also attach when policymakers are



The most powerful explanation for the skeletal nature of the existing narratives of NYC Stop and Frisk is that the notorious program is not a “program” at all, but rather a widespread reaction of individual officers and midlevel supervisors to a variety of incentives.<sup>23</sup> What came to be known as NYC Stop and Frisk appears to have grown idiosyncratically in ways perhaps never intended, and was only gradually and incidentally endorsed by high-level officials as a coherent (if unconstitutional) citywide approach to violent crime suppression.<sup>24</sup>

The task of understanding NYC Stop and Frisk begins with *Terry v. Ohio*,<sup>25</sup> the 1968 Supreme Court case that endorsed brief seizures (“stops”) and cursory searches (“frisks”) based only upon “reasonable suspicion” – a lower standard than the traditional “probable cause” standard required for an arrest.<sup>26</sup> Specifically, *Terry* authorizes an officer to “conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot.”<sup>27</sup> A frisk may follow if there is reasonable suspicion to believe the person is armed and dangerous.<sup>28</sup> There is, however, no direct connection

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“deliberately indifferent” to constitutional violations committed by their employees); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that municipal Section 1983 liability must be based on “execution of a government’s policy or custom”).

<sup>23</sup> See GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES 8-10 (2007) (evaluating reasons for the apparently high number of NYC stops in 2006, but not suggesting any coordinated policy); *infra* Part I.A.

<sup>24</sup> Cf. HARCOURT, *supra* note 20, at 50 (positing that what may have started as “broken windows” became justified on other grounds over the years, including “as a type of gun-oriented policing”); *NYPD – Frequently Asked Questions*, NYC.GOV (last visited May 16, 2014), archived at <http://perma.cc/YF6H-CH2R> (“When a police officer reasonably suspects that a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor, the officer is authorized by NYS Criminal Procedure law 140.50 to stop, question and possibly frisk that individual.”).

<sup>25</sup> 392 U.S. 1 (1968).

<sup>26</sup> See *id.* at 20-21; see also *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (explaining that “[i]n *Terry*, we held that an officer may . . . conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot,” and that this is “a less demanding standard than probable cause”); *Adams v. Williams*, 407 U.S. 143, 146 (1972) (endorsing “[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information”); *Sibron v. New York*, 392 U.S. 40, 62-64 (1968) (elaborating on *Terry* in companion case challenging search by NYPD officer); cf. *NYPD – Frequently Asked Questions*, NYC.GOV (last visited May 16, 2014), archived at <http://perma.cc/3SYA-79MM> (addressing the question: “What is a Stop, Question and Frisk encounter?”).

<sup>27</sup> *Wardlow*, 528 U.S. at 123.

<sup>28</sup> *Terry*, 392 U.S. at 27 (holding that “there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual”).

between the spur of the moment “swift action” blessed by the Warren Court in *Terry*<sup>29</sup> (and the New York courts in *People v. De Bour*<sup>30</sup>) and the citywide efforts of thousands of NYPD officers to routinely stop and frisk pedestrians for the purpose of finding guns and discouraging gun carrying. The evolution of the relatively modest *Terry* stop into a core NYPD crime-fighting strategy is shrouded in mystery.

The origins of NYC Stop and Frisk can be traced to an epic crime wave that crested in New York City in the early 1990s. In 1990, the City hosted 2,245 homicides, a “record high.”<sup>31</sup> News accounts chronicled the populace’s fear. New Yorkers claimed to be afraid to wear jewelry in public, and some citizens reported sprinting to subway exits when train doors opened to avoid victimization.<sup>32</sup> In 1993, nearly half of the City’s residents said they had been victimized by crime in the past year.<sup>33</sup> The NYPD’s own publications reflected the public mood: “Whatever we are doing to reduce violent—especially handgun related—crime is not working.”<sup>34</sup>

Homicides peaked in 1990, but the initial reductions were too modest and came too late for Mayor David Dinkins, who lost the November 1993 election to former prosecutor Rudolph Giuliani. As one of his first acts, Giuliani appointed William Bratton police commissioner.<sup>35</sup> Bratton had garnered attention as NYC Transit Police Commissioner by embracing the increasingly popular Broken Windows theory of policing: pouring resources into arresting

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<sup>29</sup> *Id.* at 20 (describing the approved police conduct as “necessarily swift action predicated upon the on-the-spot observations of officers on the beat”).

<sup>30</sup> 352 N.E.2d 562, 565 (N.Y. 1976).

<sup>31</sup> George James, *New York Killings Set a Record, While Other Crimes Fell in 1990*, N.Y. TIMES, Apr. 23, 1991, at A1, archived at <http://perma.cc/PM78-HSGZ>; *UCR Table Generator*, *supra* note 4 (providing statistics for “murder and nonnegligent manslaughter”).

<sup>32</sup> H. Eric Semler, *Crime Reports Scare Subway Riders*, N.Y. TIMES, June 15, 1989, at B3 (quoting a subway rider as stating that “[i]f there’s no one around when I get off the train, I run like hell for the exit,” and describing how “[p]eople who regularly ride the subways say they have been extra cautious lately” with “[m]any say[ing] they no longer carry more than \$20 or wear expensive jewelry” while “[o]thers wear outfits that hide their valuable belongings.”). See also Todd S. Purdum, *Politics of Police Strength: New York City’s Demands for More Officers Raise Questions About How to Use Them*, N.Y. TIMES, Sept. 13, 1990, at A1, archived at <http://perma.cc/SRF8-4EBK> (highlighting a substantial rise in violent crime since 1970 and related push to hire more police officers).

<sup>33</sup> Clay F. Richards, *Fears About Crime Jump Poll: Almost Half Have Been Victims*, NEWSDAY, Dec. 16, 1993, at 5 (“Concern about crime dominates the worries of New Yorkers in a new poll that indicates 42 percent of city residents have been crime victims in the past year.”).

<sup>34</sup> NYPD, POLICE STRATEGY NO. 1: GETTING GUNS OFF THE STREETS OF NEW YORK 6 (1994) [hereinafter POLICE STRATEGY NO. 1].

<sup>35</sup> *Id.* at 195.

minor offenders, like subway fare evaders, in the hope that a decrease in low-level “disorder” would lead to fewer serious crimes.<sup>36</sup>

Commentators often explain the emergence of “stop and frisk” in New York City as a simple emanation, guided by Bratton, of Broken Windows policing from the subways to the streets.<sup>37</sup> But this explanation misses most of the real story. Broken Windows as policing theory and the “order maintenance” policies designed to implement it are conceptually distinct from the NYPD’s programmatic use of stop-and-frisk to detect and deter public gun-carrying. “Order maintenance” dictates that officers arrest subway fare evaders, graffiti artists, illegal vendors, prostitutes, and other minor offenders, to reassure the public that the authorities control the streets.<sup>38</sup> As described in George Kelling and James Q. Wilson’s seminal article, “Broken Windows,” the apparent “order” that results assuages residents’ fears (an important development in itself) and immunizes the area from further “urban decay” and “criminal invasion.”<sup>39</sup> Programmatic stop and frisk is a different approach.<sup>40</sup> According

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<sup>36</sup> See BRATTON, *supra* note 20, at 152-53 (citing James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1, 1982); Eric Pooley & Elaine Rivera, *One Good Apple*, TIME, Jan. 15, 1996, at 53, 55 (quoting Giuliani, “I chose Bill Bratton, because he agreed with the Broken Windows theory”); Wilson & Kelling, *supra*, at 29.

<sup>37</sup> Brett G. Stoudt et al., *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L. SCH. L. REV. 1331, 1333 (2011/2012) (“NYPD’s version of broken windows rests upon a policing strategy known as ‘stop, question and frisk.’”); Jesse Alejandro Cottrell, *‘Stop and Frisk’ May Be Working – But Is It Racist?*, ATLANTIC (Jan. 23, 2013, 10:24 AM), archived at <http://perma.cc/A6EU-W3H5> (“Introduced by former mayor Rudolph Giuliani, Stop and Frisk was a response to the city’s [high] crime rates in the 1980s and early 90s.”); Colleen Long, *Big-City Police Frisk 1 Million a Year; Results Are Disputed*, VA. PILOT AND LEDGER-STAR, Oct. 9, 2009, at 9 (“In the mid-1990s, then-Mayor Rudy Giuliani and NYPD Commissioner William Bratton made stop-and-frisk an integral part of the city’s law enforcement, relying on the ‘broken windows’ theory that targeting low-level offenses helps prevent bigger ones.”); Shallwani & Gardiner, *supra* note 16 (“Bratton is more associated with a policing theory known as ‘broken windows,’ in which small crimes are targeted in hopes of preventing more serious crimes. Stop and frisk is part of that larger strategy.”); cf. AG REPORT, *supra* note 9, at 49, 52 (“[T]he new Commissioner . . . made order maintenance policing the NYPD’s primary strategy for reducing fear and fighting serious crime.”).

<sup>38</sup> See HARCOURT, *supra* note 20, at 23-27, 43-45; ANDREW KARMEN, *NEW YORK MURDER MYSTERY* 113-14 (2000).

<sup>39</sup> See Wilson & Kelling, *supra* note 36, at 29-30 (explaining how “a neighborhood [can] be ‘safer’ when the crime rate has not gone down – in fact, may have gone up”). See also BRATTON, *supra* note 20, at 152 (indicating that “[p]eople needed good news in a bad way” in explaining the impetus for Broken Windows policing); MAPLE, *supra* note 20, at 153-54 (criticizing Broken Windows theory as analogous to “giving a face lift to a cancer patient”; the “patient may look better and even feel better, but the killer disease hasn’t been arrested”); Benjamin Bowling, *The Rise and Fall of New York Murder: Zero Tolerance or*

to city officials, the NYPD uses stop-and-frisk to find guns and deter gun-carrying, a goal that is theoretically forwarded when people are stopped and searched regardless of whether they are committing any breach of public order. Indeed, NYC Stop and Frisk seems strikingly unconcerned with the neighborhood perception of order that is so central to Broken Windows theory. If anything, the program creates disorder where there was peace, with police stopping and searching people who most often turn out to be neither carrying a gun nor engaged in criminal activity.<sup>41</sup> A program of mass “stop and frisk” is not geared toward reversing neighborhood perceptions of disorder, but instead aims to decrease actual incidents of gun-carrying and resulting violence citywide.<sup>42</sup> Bernard Harcourt uses this subtle, but important, distinction to critique the oft-made claim that New York City’s “spectacular drop in crime” demonstrates the effectiveness of Broken Windows.<sup>43</sup> Harcourt explains that “the primary mechanism” of any aggressive-policing-based crime decrease in New York City “is probably not the broken windows theory,” but is instead “a policy of aggressive stops and frisks and misdemeanor arrests” – something quite distinct.<sup>44</sup>

While Bratton and his successors never explicitly embraced mass stop-and-frisk as a crime-fighting strategy in the 1990s, their general approach to policing, including a rhetorical embrace of Broken Windows, created the conditions under which stop-and-frisk would eventually thrive.<sup>45</sup> First, Bratton

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*Crack’s Decline?*, 39 BRIT. J. CRIMINOLOGY 531, 544-45 (1999) (quoting NYPD precinct commander articulating analogue to Broken Windows theory in 1977).

<sup>40</sup> Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 471-72, 496 (2000) (emphasizing that NYPD’s aggressive policing style is inconsistent with Broken Windows theory because “disorder policing was used not to disrupt the developmental sequence of disorder and crime, but instead disorder offenses became opportunities to remove weapons and wanted criminals from the streets”).

<sup>41</sup> *Floyd v. City of New York*, 959 F. Supp. 2d. 540, 558-59 (S.D.N.Y. 2013) (finding that “88% of the 4.4 million stops [between 2004 and 2012] resulted in no further law enforcement action”).

<sup>42</sup> *Cf.* MAPLE, *supra* note 20, at 155 (asserting that quality of life enforcement works “because it allows the cops to catch crooks when the crooks are off-duty”).

<sup>43</sup> HARCOURT, *supra* note 20, at 9.

<sup>44</sup> *Id.* at 10-11; Fagan & Davies, *supra* note 40, at 482 (stating that the NYPD implemented a “reconstructed Broken Windows theory” that emphasized “social disorder, or person-focused tactics,” over “physical disorder, or place-based tactics”).

<sup>45</sup> *See* KARMEN, *supra* note 38, at 113 (quoting Safir as explicitly endorsing the “Broken Windows theory” in 1997); Howard Safir, *Goal-Oriented Community Policing: The NYPD Approach*, POLICE CHIEF, Dec. 1997, at 31 (endorsing Broken Windows theory’s focus on “quality-of-life issues” as articulated in Wilson and Kelling’s 1982 article); Fagan & Davies, *supra* note 40, at 475 (“The importance of stop and frisk interventions to crime fighting was never formally acknowledged in official documents . . .”); *cf.* Josh Bowers &

and his successors called for putting large numbers of officers on the streets, interacting directly with civilians.<sup>46</sup> Second, Broken Windows theory endorsed low-level interdictions, often without formal arrest or prosecution, intended to prevent serious crimes before they occurred.<sup>47</sup> Third, Bratton and his successors championed a data-driven approach to crime fighting, popularly referred to as “Compstat.”<sup>48</sup> Compstat entailed methodically gathering and computerizing data so that administrators could view crime trends and identify high-crime locations.<sup>49</sup> Armed with this data, the Commissioner and his staff conducted twice-weekly, citywide sessions where precinct commanders were called to account for persistent crime in their jurisdiction.<sup>50</sup> Accountability came with independence. Precinct commanders could address crime in whatever way they chose so long as the results were reflected in subsequent Compstat maps.<sup>51</sup> Bratton explained, “I encouraged the precinct commanders

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Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 229-30 (2012) (arguing that “stop-and-frisk practices and order-maintenance policing are related, because a department that prioritizes public order will often come to rely heavily on stop and frisk”).

<sup>46</sup> BRATTON, *supra* note 20, at 198-99 (stating that this effort was aided by the hiring of 2,000 new police officers, made possible by Mayor Dinkins, but emphasizing that officers alone would not reduce crime); Wilson & Kelling, *supra* note 36, at 29 (emphasizing superiority of foot patrols over motorized patrols).

<sup>47</sup> BRATTON, *supra* note 20, at 154 (explaining an “unanticipated by-product” of the fare evader sweeps was that many of those stopped for fare evasion were wanted on warrants or carrying unlawful weapons); GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 23 (1996) (explaining that “arrest would only be resorted to when other approaches failed”); George L. Kelling & William J. Bratton, *Declining Crime Rates: Insiders’ Views of the New York City Story*, 88 J. CRIM. L. & CRIMINOLOGY 1217, 1230 (1998) (reporting favorably that city officials countrywide have “rediscovered policing, as opposed to law enforcement, and prevention, as opposed to case processing”); Wilson & Kelling, *supra* note 36, at 31 (highlighting “informal or extralegal” actions taken by patrol officer and recommending that in many cases “enforcement need involve nothing more than ejecting the offender”).

<sup>48</sup> BRATTON, *supra* note 20, at 233-39 (describing the genesis and operation of “computer-statistics meetings, or Compstat”); MAPLE, *supra* note 20, at 33 (stating that “Compstat” or “Comstat” was short for “computer statistics” or “comparative statistics,” “nobody can be sure which”); Safir, *supra* note 45, at 35-36 (defining Compstat as “Computerized Statistics”).

<sup>49</sup> BRATTON, *supra* note 20, at 232-33.

<sup>50</sup> *Id.*; Safir, *supra* note 36, at 39 (describing the management culture at NYPD as “placing the responsibility for problem-solving squarely on the shoulders of middle managers and the commanders of operation units,” as opposed to administrators or line officers, and ensuring “[a]ccountability . . . in large measure through the CompStat process”).

<sup>51</sup> BRATTON, *supra* note 20, at 237 (emphasizing independence and accountability as hallmarks of Compstat).

to use their own initiative, and I told them I would judge them on their results.”<sup>52</sup>

The most direct connection between Bratton’s approach to policing and NYC Stop and Frisk, however, has nothing to do with Broken Windows. Instead, it arose from a shared goal of eradicating unlawful public gun possession. Early in his tenure, Bratton seized upon statistics that revealed that the primary driver of the City’s crime wave was surging gun crime.<sup>53</sup> In one of the first policy documents issued by Bratton’s NYPD, *Police Strategy No. 1: Getting Guns off the Streets of New York*, the Department announced a series of initiatives aimed at reducing gun violence. The document emphasized that between 1960 and 1992, the number of murders committed in New York City with a handgun increased by almost *two thousand percent*, growing from one-quarter to three-quarters of all murders.<sup>54</sup> Tough restrictions on gun purchases seemed largely irrelevant to this problem, since “90% of the illegal guns [came] into the city from other states.”<sup>55</sup> Residents are “afraid for a reason,” the document warned, “and that reason has mainly to do with handguns.”<sup>56</sup>

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<sup>52</sup> *Id.* at 230.

<sup>53</sup> *Id.* at 218 (describing finding out that 5,861 people were shot in NYC in 1993 and concluding that this statistic represented “the size of the problem” he confronted as police chief); Jeffrey Fagan, *Policing Guns and Youth Violence*, FUTURE CHILD., Summer/Fall 2002, at 133, 142 (acknowledging that crime numbers necessitated the “NYPD focus[] on guns”).

<sup>54</sup> POLICE STRATEGY NO. 1, *supra* note 34, at 3 (“In 1960, there were 75 homicides committed in the city with handguns, representing a quarter of the total number of murders for the year. In 1992, there were 1,500 homicides . . . committed with handguns, representing three quarters of the total number of murders.”). For 2011, FBI data show that of the 12,664 murders in the United States, almost seventy percent (8,583) involved firearms. See *Expanded Homicide Data Table 11: Murder Circumstances*, FBI (last visited May 21, 2014), archived at <http://perma.cc/BZ99-HTCG>. For data over time, see ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STAT., DEP’T OF JUSTICE, NCJ 236018 HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008, at 17 (2011); see also Fagan & Davies, *supra* note 40, at 470 (“Homicide trends in New York City since 1985 provided strong empirical support for emphasizing gun violence in enforcement policy.”).

<sup>55</sup> POLICE STRATEGY NO. 1, *supra* note 34, at 3; *Confronting Crime – Illegal Guns*, NYC (last visited May 21, 2014), archived at <http://perma.cc/8679-EDMT> (indicating that “85% of guns recovered in crimes in New York City [were] originally sold out of state”); cf. Daniel W. Webster et al., *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URB. HEALTH 525, 530 (2009) (concluding that New York City, a city in a state with relatively stringent gun sale regulations, was among American cities with the lowest levels of intrastate gun trafficking). A license from the NYPD is required to lawfully carry a concealed handgun in New York City. To obtain a license, the applicant must demonstrate “proper cause,” such as that the applicant is in “extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun.” R.C.N.Y. Tit. 38, § 5-03; *Sanchez v. Kelly*, No. 106464/04, 2004 WL 2812968, at \*2 (N.Y. Sup. Ct.) (describing NYPD’s “[e]xtraordinary power” in issuing

Although *Police Strategy No. 1* does not refer to “stop and frisk” or related approaches to finding guns, it does announce the expansion of the elite “Street Crime Unit” (“SCU”) and its deployment “in a concentrated approach” to high-crime areas to “increase firearms-related arrests.”<sup>57</sup> As controversy engulfed the SCU in 1999, it came to light that the unit relied heavily on stop-and-frisks as part of its mission to find guns – at least 18,000 stops in 1997 and 27,000 in 1998.<sup>58</sup> Although the precise directives SCU officers received are unclear,<sup>59</sup> it appears that the unit was under pressure to generate gun arrests (perhaps including monthly quotas), and turned to *Terry* stop-and-frisks as a last-ditch means for finding guns when other tactics came up empty.<sup>60</sup>

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concealed carry permits); *Goldstein v. Brown*, 189 A.D.2d 649, 651 (N.Y. App. Div. 1992) (reviewing concealed carry permit denial and describing broad discretion provided to NYPD). As a result of this standard, and the discretion provided to the NYPD, concealed carry licenses are rare in the City. See Editorial, *A Revealing Move on Concealed Carry: New York Provides a Model*, CHI. TRIB., Apr. 17, 2013, at 22 (proclaiming that “[i]n New York City, most applicants [for concealed carry permits] are denied”); John Marzulli, *Gun Permits KOD: NYPD Shoots Down 55% Of Renewals*, N.Y. DAILY NEWS, May 4, 1999, at 5.

<sup>56</sup> POLICE STRATEGY NO. 1, *supra* note 34, at 5.

<sup>57</sup> *Id.* at 16. See also Nat’l Cong. for Puerto Rican Rights v. City of New York, 75 F. Supp. 2d 154, 158 (S.D.N.Y. 1999) (describing complaint that “alleged constitutional violations by . . . the Street Crime Unit,” an “elite squad of police officers whose purported mission is to interdict violent crime . . . and, in particular, remove illegal firearms from the streets”); David Kocieniewski, *Success of Elite Police Unit Exact a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1, archived at <http://perma.cc/T4G9-FFUX> (describing SCU and its relative obscurity prior to Bratton and the tripling of its size under Safir in 1997).

<sup>58</sup> Kocieniewski, *supra* note 57, at A1 (explaining that Safir tripled the size of SCU in 1997 from 138 to 380 officers); William K. Rashbaum & Al Baker, *Police Commissioner Closing Controversial Street Crime Unit*, N.Y. TIMES, Apr. 10, 2002, at B1 (describing the firestorm that arose from SCU’s killing of an unarmed man, Amadou Diallo, and the gradual elimination of the SCU in response).

<sup>59</sup> See KARMEN, *supra* note 38, at 119 (observing SCU’s reliance on “stop and frisk” and stating that “[a]pparently, NYPD officers had been given the green light” to use *Terry* stops and frisks to find guns); Kocieniewski, *supra* note 57 (reporting on SCU and describing the unit as “prowl[ing] the streets in search of criminals”).

<sup>60</sup> KARMEN, *supra* note 38, at 137 (stating that responding to pressure to obtain gun arrests, members of the SCU “found it necessary to ‘toss’ many innocent young men who fit a crude profile until they caught one with a concealed handgun”); Miles Corwin, *NYPD Blues*, L.A. TIMES, May 28, 2000, at 9 (describing the rise in the mid-1990s of “hard-charging, militaristic methods . . . employed primarily in minority communities,” including “a special unit to ‘stop and frisk’ suspects, confiscate guns and drugs and make arrests”); Kocieniewski, *supra* note 57, at B5 (“Some street crimes officers also said they felt pressured by the department’s emphasis on crime statistics, and that they are forced to adhere to an unwritten quota system that demands that each officer seize at least one gun a month.”).

The SCU's heavy reliance on stop-and-frisk at a time when official pronouncements rarely mentioned the tactic<sup>61</sup> highlights that stop-and-frisk was only a minor component of a larger strategy. This larger strategy was not "order maintenance," but is more accurately characterized through an Ernest Hemingway quote emblazoned on SCU t-shirts to express the unit's perception of its underlying mission: "hunting armed men."<sup>62</sup> One of the authors of "Broken Windows" articulated the role stop-and-frisk could play in such a strategy in an essay in the *New York Times Magazine* in 1994.<sup>63</sup> James Q. Wilson rejected calls for additional gun laws and argued instead that an effective alternative to gun control was "to reduce the number of people who carry guns unlawfully, especially in [public] places"; Wilson argued that "[t]he most effective way to reduce illegal gun-carrying is to encourage the police to take guns away from people who carry them without a permit" by "encouraging the police to make street frisks."<sup>64</sup> Wilson's message appears to have found a receptive audience at the SCU.

The NYPD disbanded the SCU in 2002, reabsorbing its members into other units,<sup>65</sup> but the SCU experience can be viewed as a microcosm of the spread of "stop and frisk" citywide. Bratton and his successors' reliance on Compstat, and their underlying prioritization of gun crime, led to the saturation of high-crime areas, known as "put[ting] cops on dots," with officers generically

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<sup>61</sup> See, e.g., POLICE STRATEGY NO. 1, *supra* note 34 (discussing the need to eliminate guns, but not mentioning stop-and-frisk); MAPLE, *supra* note 20, at 150-177, 215, 218-19 (listing "tools" that police should use to fight crime, but not including "stop and frisk," and only discussing "stops" in general terms, stating that concerns about them are overblown because they are an essential aspect of all police work); Michael Cooper, *Steep Drop in Random Killings Signals Shift in New York Crime*, N.Y. TIMES, Dec. 29, 1996, at 25 ("Commissioner Safir credits the Police Department's crackdown on quality-of-life offenses – like drinking beer in public, fare-beating in the subways and public urination – with discouraging many people from carrying their guns."); Safir, *supra* note 45, at 33-58 (advising "practitioners" that the key to NYC's crime decline is relying on mid-level commanders and Compstat, but making no mention of stop-and-frisk).

<sup>62</sup> Kocieniewski, *supra* note 57, at B5 (reporting that SCU officers "designed and distributed T-shirts among the unit, emblazoned with a quotation from Hemingway: 'Certainly there is no hunting like the hunting of man, and those who have hunted armed men long enough and liked it, never really care for anything else thereafter.'").

<sup>63</sup> James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG., Mar. 20, 1994, at 47 (encouraging the use of police "stop and frisk" to confiscate illegally owned guns).

<sup>64</sup> *Id.*; cf. Press Release, Raymond W. Kelly, NYPD, Statement on Death of John Q. Wilson (March 2, 2012), archived at <http://perma.cc/GQ3A-Y35R> (praising Wilson upon his death).

<sup>65</sup> Transcript of Record at 2795-96, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (2013) (No. 08 CV 1034 (SAS)) (discussing the SCU unit and its post-scandal reabsorption into the NYPD in 2002); Rashbaum & Baker, *supra* note 58, at B1 (discussing the gradual elimination of the SCU).



tasked with taking guns off the street.<sup>66</sup> Directing officers (or units such as the SCU) to crime-plagued areas (“dots”) is only part of the equation, however, since illegal guns do not turn themselves in. With thousands of officers walking the streets but few opportunities to catch gunmen in the act, beat cops predictably turned to (or, in Judge Scheindlin’s view, were pushed towards) relatively mundane approaches to uncover concealed weapons: arresting minor offenders in order to search them and (when minor offenders were not in view) stopping and frisking pedestrians who might be carrying weapons.<sup>67</sup> There was nothing inherently appealing about these tasks; officers embraced this “crap” work either because they believed it reduced crime<sup>68</sup> or because they needed to demonstrate activity to their supervisors (or both).<sup>69</sup> Since the NYPD tabulated “stop and frisks” in its database, commanders could point to increased stop activity (along with arrests) at Compstat meetings to highlight their assertive

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<sup>66</sup> See MAPLE, *supra* note 20, at 128; see also David Weisburd et al., *Could Innovations in Policing Have Contributed to the New York City Crime Drop Even in a Period of Declining Police Strength?*, 31 JUST. Q. 129, 137 (2014) (stating that the City relies on recent police academy graduates who provide “the needed 1,800 officers a year” to allow “saturation foot patrol[s]”); Wendy Rudman, *Number of Frisks Fell in '12, Police Data Shows*, N.Y. TIMES, Feb. 9, 2013, at 17, archived at <http://perma.cc/W2V4-SHYU> (explaining police spokesman’s explanation for decrease in number of stops in 2012, who cited decrease in staffing of “Operation Impact, a program that puts recent graduates of the Police Academy in high-crime neighborhoods with instructions to seek out suspicious behavior”).

<sup>67</sup> See Bowling, *supra* note 39, at 545 (describing, based on officer interviews, how the “shift to aggressive policing” under Bratton included a range of tactics, including misdemeanor arrest and stop-and-frisks); *infra* notes 70-73 (reflecting escalation in stops and misdemeanor arrests).

<sup>68</sup> See Bowling, *supra* note 39, at 545-46 (quoting sergeant who acknowledged low-level interventions as unappealing “crap”); AG REPORT, *supra* note 9, at 70 (documenting officer sentiment that stop and frisk was an effective means of reducing illegal weapon carrying).

<sup>69</sup> Floyd v. City of New York, 959 F. Supp. 2d 540, 591-602 (S.D.N.Y. 2013) (chronicling pressures felt by line officers to conduct stop and frisks and commands by low-level supervisors); JOHN A. ETERNO & ELI B. SILVERMAN, THE CRIME NUMBERS GAME 229 (2012) (asserting that “the NYPD is probably not purposely engaging in racial policing,” but explaining various ills of the department, including “uncontrollable and unimaginably high numbers of forcible stops” as “unexpected side effects” of “the high pressures of Compstat”); Ray Rivera et al., *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 12, 2010, at A1, archived at <http://perma.cc/BP4T-2MU3> (reporting interviews with officers who stated that documenting stops was a way to please demanding supervisors: “Lots of stop-and-frisk reports suggested a vigilant officer”); Dennis C. Smith & Robert Purtell, *Does Stop and Frisk Stop Crime?* 12 (Nov. 2008) (unpublished manuscript) (on file with author) (suggesting that “the systematic reporting and analysis of stops, and the availability of these data to managers, may have had the unintended effect of producing a higher volume of stop activity”).

response to the “dots” in their precincts.<sup>70</sup> Perhaps most important of all, the increased activity generally coincided with decreasing crime, generating support among administrators, precinct commanders and line officers for proactive policing tactics, like stop-and-frisk.

The NYPD’s use of aggressive street-level interventions, such as stops and minor arrests, to find guns and deter crime (as opposed to abate disorder) is reflected best not in NYPD pronouncements, but in the department’s actions. If “order maintenance” was the theory guiding NYPD tactics, arrests for quality-of-life crimes like street prostitution would jump when Bratton became Commissioner and stay high.<sup>71</sup> As Franklin Zimring points out, prostitution arrests peaked in 1991 (before Bratton) and generally declined after that.<sup>72</sup> There is no evidence that this paradigmatic order-maintenance offense was a priority of Bratton’s NYPD. Instead, the minor offense for which arrests did take off under Bratton and beyond – marijuana possession – hints at the NYPD’s real priority. The following table contrasts the sudden escalation of misdemeanor marijuana arrests (which remain at high levels today) with the flat or declining number of prostitution arrests.<sup>73</sup>

Year	Marijuana	Prostitution
1991	774	10,451
1994	3,141	9,980
1997	17,992	7,346
2000	51,267	8,822

The demographics of the arrests reveal why the post-Bratton NYPD appeared to care so much about (public) marijuana possession and so little about prostitution.<sup>74</sup> The demographics of NYPD marijuana arrests (84% black and Hispanic, and 93% male) do not mirror the City’s population or the population of drug users; like stop-and-frisk statistics, marijuana arrests skew toward the

<sup>70</sup> Transcript of Record at 2867-69, 2878, *Floyd*, 959 F. Supp. 2d 540 (No. 08 CV 1034 (SAS)), archived at <http://perma.cc/J4GU-6JNC> (explaining that U-250 forms are included in Compstat statistics and would be part of evaluation of responses to crime at Compstat meetings, and discussing comments at Compstat meetings regarding decreased U-250s).

<sup>71</sup> BRATTON, *supra* note 20, at 228.

<sup>72</sup> ZIMRING, *supra* note 5, at 127.

<sup>73</sup> *Id.* at 121, Figure 5.10 (reporting N.Y.C. Div. Criminal Justice Services); *Arrest Data Analysis Tool*, BUREAU OF JUSTICE STATISTICS, archived at <http://perma.cc/ALN2-LY5C>; ETERNO & SILVERMAN, *supra* note 69, at 217 (showing escalating marijuana arrests).

<sup>74</sup> By law, only *public* possession of marijuana is an arrestable offense in New York. ETERNO & SILVERMAN, *supra* note 69, at 217.

NYPD's demographic profile of violent crime suspects, tipping the NYPD's hand.<sup>75</sup> The mindset of the NYPD does not appear to have been maintaining order or, given the low rate of misdemeanor convictions, cracking down on marijuana; but rather the NYPD more broadly, like the SCU, believed it was "hunting armed men."<sup>76</sup>

Stop documentation, while now readily obtained from the NYPD's own website, was notoriously unreliable until 2003.<sup>77</sup> In that year, the City settled a federal lawsuit that alleged that the SCU had "illegally stopped and searched tens of thousands of people because they were members of minority groups."<sup>78</sup> As part of the settlement, the City agreed to require its officers to document all stops on specified U-250 forms.<sup>79</sup> With the documentation requirement backed by court order, NYPD statistics (summarized in the following table)<sup>80</sup> began to reflect a heavy and escalating reliance on the tactic.

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<sup>75</sup> ZIMRING, *supra* note 5, at 121-23, 125.

<sup>76</sup> *Id.* at 122-23 (positing some of the reasons behind the stop and frisk tactic); Kocieniewski, *supra* note 57 (reporting on mindset of SCU).

<sup>77</sup> The increased reporting of stops occurred in two phases, with the first occurring in 1997. *See* AG REPORT, *supra* note 9, at 65 (explaining that while "[c]ompletion of the UF-250 form has been required since 1986," Safir "declared filing the UF-250's 'a priority'" in 1997 resulting in "filings by the SCU, to cite one example, r[ising] from 140 in 1996 to 18,000 in 1997"); William K. Rashbaum, *Review Board Staff Faults Police on Stop-and-Frisk Reports*, N.Y. TIMES, April 28, 2000, at B1 ("Investigators for the Civilian Complaint Review Board have determined that police officers routinely fail to file the required paperwork after frisking or searching people on New York City's streets.").

<sup>78</sup> Benjamin Weiser, *Lawsuit Seeks to Curb Street Crimes Unit, Alleging Racially Biased Searches*, N.Y. TIMES, March 9, 1999, at B3; *see also* Melanie Lefkowitz, *Kerik Orders Community Meetings*, NEWSDAY, Jan. 16, 2001, at A3 (reporting on reforms being implemented by NYPD including "plans to require officers to fill out explanatory forms when they stop and search people"); Greg B. Smith, *NYPD Yields on Stop-Frisk Will Settle Class-Action Bias Suit*, N.Y. DAILY NEWS, Sept. 18, 2003, at 26 (reporting on settlement of lawsuit whereby "[t]he NYPD will not admit wrongdoing but will agree to document and track stop-and-frisks across the city, making regular audits to detect patterns of racial bias"); *but see* Floyd v. City of New York, 959 F. Supp. 2d 540, 592 n.209 (2013) (rejecting as "speculation" City's claim that increased stop numbers reflect higher rates of stop documentation).

<sup>79</sup> Noah Kupferberg, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 143 (2008) (describing requirement of consent decree entered into in 2003 after litigation that included requirement that all stops be documented); *see also* Ridgeway, *supra* note 23, at 54-55 (providing copy of U-250 form).

<sup>80</sup> DELORES JONES-BROWN ET AL., CENTER ON RACE, CRIME & JUSTICE, STOP, QUESTION & FRISK POLICING PRACTICES IN NEW YORK CITY 4 (2010), *available at* [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf), *archived at* <http://perma.cc/G6GR-79RF>. Stops fell in 2012 and 2013. *See* RAYMOND W. KELLY, NYPD, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 334 (2013), *available at* [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/crime\\_and\\_enforcem](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/crime_and_enforcem)

Year	Stops
2003	160,851
2005	398,191
2007	472,096
2009	575,996
2011	685,724

Like marijuana arrests, the stops have a distinct racial tilt: blacks are stopped at much higher rates than their population, and whites at much lower rates. Specifically, of those stopped in 2011, 53% were black, 34% were Hispanic, 9% were white, and about 4% were Asian.<sup>81</sup> Stop demographics also skew by gender and age: 90% of those stopped were male, and 75% were under twenty-five years of age.<sup>82</sup>

The parallel between marijuana arrests in the late 1990s and stop-and-frisks in subsequent years highlights the interconnectedness of these facets of the NYPD's crime-fighting strategy.<sup>83</sup> From the perspective of officers seeking guns, misdemeanor arrests and stop-and-frisks look very similar. They begin by accosting a pedestrian with the goal of conducting a search. If during the encounter, the officer learns that the person was smoking marijuana (or committing some other crime), the officer can make an arrest and conduct a lawful search for weapons incident to that arrest.<sup>84</sup> If the encounter reveals no basis for arrest, the officer may still be able to lawfully conduct a frisk if she can articulate reasonable suspicion that the person is armed and potentially

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ent\_activity\_jan\_to\_jun\_2013.pdf, archived at <http://perma.cc/XF5E-W59Z> (reflecting just under 100,000 stops in first quarter of 2013); see also *Floyd*, 959 F. Supp. 2d at 546 (stating as uncontested fact that 52% of stops led to frisks).

<sup>81</sup> REASONABLE SUSPICION STOPS, *supra* note 8, at 4. The percentage in the residential population was 12.9% Asian, 23.4% black, 29.4% Hispanic, and 34.3% white. *Id.* In 2009, 54% of persons stopped were black; 31% were Hispanic. JONES-BROWN ET AL., *supra* note 80, at 19 (documenting this disparity).

<sup>82</sup> Report of Jeffrey Fagan at 22, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 1034 (SAS)) (on file with author) (tallying NYPD reports for 2004 to 2009).

<sup>83</sup> See Peter Reuter, *Why Has US Drug Policy Changed So Little Over 30 Years?*, 42 CRIME & JUST. 75, 90-91 (2013) (suggesting that "marijuana enforcement in New York City is not about preventing drug use but is primarily . . . a correlate of the stop and frisk policies").

<sup>84</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *United States v. Robinson*, 414 U.S. 218, 236 (1973) (finding searches incident to arrest constitutional).

dangerous.<sup>85</sup> Either way, the encounter achieves its purpose once the officer obtains lawful (or at least quasi-lawful) grounds to search or determines that a search would be pointless. The distinction between arrest and stop, while certainly important to the individual, is irrelevant to the officer's underlying goal: detecting guns.

While the data reflect that the NYPD's escalating stops (and marijuana arrests) can most easily be explained as part of a quest for guns, there is a further piece to the puzzle. Once the City started documenting its stop-and-frisks, it came face-to-face with an uncomfortable truth. A tactic intended to *find* guns was not finding many guns at all. Critics of "stop and frisk" seized on this fact, and Judge Scheindlin emphasized in her opinion that *only 1.5% of frisks found a weapon*, with an even smaller percentage turning up guns.<sup>86</sup> With "stop and frisk" under fire and the department's own statistics showing that it had become a citywide, crime-fighting behemoth, a justification *other than finding weapons* was needed. Although murky in its early phases,<sup>87</sup> the theory comes into sharp relief over time,<sup>88</sup> with individual NYPD officers

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<sup>85</sup> Terry v. Ohio, 392 U.S. 1, 27 (1967).

<sup>86</sup> Floyd, 959 F. Supp. 2d at 558 (explaining that only 52% of stops resulted in a frisk and only 1.5% of frisks found a weapon); Kate Taylor, *Stop-and-Frisk Policy 'Saves Lives,' Mayor Tells Black Congregation*, N.Y. TIMES, June 11, 2012, at A14 (reporting that "critics have pointed out that, as the number of stops increased, the percentage in which guns were found diminished" and "[l]ast year, the police seized 780 guns, suggesting that guns were recovered in roughly one in 1,000 stops"). Scholars have pointed to "hit rates," and particularly differential hit rates among races, as an empirical test of the effectiveness and race-consciousness of policing policy. See Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1284-85, 1306 (2004) (describing and critiquing literature and emphasizing that the "bottom line for policing is crime rates, not hit rates"); Kocieniewski, *supra* note 57, at A1 (reporting in 1999 on SCU's dependence on stop and frisks to find guns, but noting relatively low arrest rate despite thousands of documented stops).

<sup>87</sup> AG REPORT, *supra* note 9, at 53, 56 (stating that, the "role of 'stop & frisk' in furthering the Department's goals of order maintenance, deterrence, crime prevention, and a direct attack on gun violence," while "clear" is "rarely referenced in publicly-disseminated Departmental strategy documents," and quoting a think tank for the proposition that "[s]topping people on minor infractions made it riskier for criminals to carry guns in public"); Larry Celona & Jesse Angelo, *3,000 'Stop-And-Frisks' Net Only 6 Guns*, N.Y. POST, May 9, 1999, at 3 (reporting NYPD spokeswoman's argument that "stop-and-frisks are not used to boost arrests, but to get guns off the street and protect cops' lives"); Wilson, *supra* note 63, at 46-47 (arguing that police should engage in "street frisks" to take guns off the street).

<sup>88</sup> Bowling, *supra* note 39, at 546 (reporting interviews of police officers who viewed stop-and-frisk as a deterrent to gun carrying); William J. Bratton, NYPD Commissioner, *Cutting Crime and Restoring Order: What America Can Learn from New York's Finest*, in HERITAGE LECTURES, Oct. 1996, at 14, *archived at* <http://perma.cc/3LNT-XR3P> (describing

articulating it as an explanation for the homicide decline as early as 1999, as related by Benjamin Bowling:

In the view of many (but not all) of the police officers I interviewed, the result of persistent stop, frisk and arrests meant that young men thought twice before carrying their guns on their person . . . . That guns were not immediately accessible during routine confrontations was a frequently cited explanation for the reduction in murder in the mid-1990s.<sup>89</sup>

More recently, the deterrence theory of “stop and frisk” has been repeatedly articulated by the City’s highest officials, and echoed in the media.<sup>90</sup> In the recent *Floyd* trial, a state senator related statements he attributed to Commissioner Raymond Kelly from July 2010 that NYC Stop and Frisk worked by instilling a concern in (minority) youths “that they could be stopped and frisked every time they leave their homes so that they are less likely to carry weapons.”<sup>91</sup> Publicly, Mayor Bloomberg echoed this sentiment in a speech defending NYC Stop and Frisk in a Brooklyn church: “By making it ‘too hot to carry,’ the N.Y.P.D. is preventing guns from being carried on our streets. . . . That is our real goal – preventing violence before it occurs, not

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how “pat . . . down[s]” of a “gang of kids drinking on a corner” that find a “gun or knife” prevent serious crimes “two or three hours later when someone who was drunk pulled out the gun or knife”); Jeffrey Rosen, *Excessive Force*, NEW REPUBLIC, April 10, 2000, at 24, 26, *archived at* <http://perma.cc/4K8G-JMK3> (describing NYPD’s evolving view that “[s]topping and frisking numerous ordinary citizens . . . would deter them from carrying guns in the first place”).

<sup>89</sup> Bowling, *supra* note 39, at 546; *cf.* AG REPORT, *supra* note 9, at 70 (“Virtually every [police] interviewee expressed the view that ‘stop & frisk’ is an integral part of the Department’s goal to rid the streets of illegal weapons and violent criminals.”).

<sup>90</sup> See Rosenthal, *supra* note 20, at 326; Brandon Brice, *Does New York’s Stop and Frisk Policy Reduce Crime?*, WASH. TIMES, May 29, 2013, *archived at* <http://perma.cc/3Z4Z-CZDJ> (“One purpose of stop and frisk is to minimize spur-of-the-moment shootings and conflicts. For example, street gang members avoid carrying firearms in order to avoid a gun possession arrest if they’re stopped.”); Cottrell, *supra* note 37 (“Stop and Frisk aims to reduce violence by arresting those illegally carrying guns and deterring would-be criminals from carrying them in the first place.”); Erica Goode, *Philadelphia Defends Policy on Frisking, With Limits*, N.Y. TIMES, July 11, 2012, at A11, *archived at* <http://perma.cc/S2GH-LR9C> (reporting that New York “increased the use of the stop-and-frisk tactic, arguing that it would help remove guns from the streets and serve as a deterrent”); Rocco Parascandola, *Gangs Recycling Crime Guns*, N.Y. DAILY NEWS, April 23, 2010, at 9 (reporting that Commissioner Kelly “believes the NYPD’s stop-and-frisk initiative also limits the number of guns that make it to New York streets” and quoting Kelly as stating, “Quite frankly, they’ll leave it home”).

<sup>91</sup> Transcript of Record at 1588-89, 1601, *Floyd*, 959 F. Supp. 2d 540 (No. 08 CV 1034 (SAS)), *archived at* <http://perma.cc/U2NJ-FZC2> (relating attorney reading Adams’ deposition testimony); *see Floyd*, 959 F. Supp. 2d at 606 (crediting Adams’ testimony).

responding to the victims after the fact.”<sup>92</sup> Importantly, the deterrence theory validates “stop and frisk” regardless of its hit rate: if stops produce lots of weapons, the NYPD is successfully taking guns off the streets; when stops produce few weapons, the program is working to deter gun possession.<sup>93</sup> As for the disproportionate rate of stops of minorities, the NYPD insists that its officers (a majority of whom are minorities) are not racist.<sup>94</sup> Instead, the City argues, the stop rates track the demographics of suspects in violent crimes.<sup>95</sup> NYPD statistics reflect that suspects in “shootings,” defined as “any crime where [a] victim is struck with [a] bullet,” are 78% black, 19% Hispanic, 2.4% white, and 0.5% Asian.<sup>96</sup> These statistics emboldened Mayor Bloomberg and

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<sup>92</sup> Taylor, *supra* note 86 (quoting Bloomberg’s speech).

<sup>93</sup> KARMEN, *supra* note 38, at 123 (explaining the “win-win situation” for the NYPD); Mayor Michael Bloomberg, Address on Public Safety to NYPD Leadership (April 30, 2013) (transcript archived at <http://perma.cc/X5AE-LTMK>) (“Critics say the fact that we’re ‘only’ finding 800 guns a year through stops of people who fit a description or are engaged in suspicious activity means that we should end stop and frisk. Wrong. That’s the reason we need it – to deter people from carrying guns. We are the First Preventers.”); *see also* K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 290 (2009) (reviewing statistics that suggest “that aggressive misdemeanor policing is not significantly contributing to gun seizures” in New York City, but acknowledging that “the perception that police are policing aggressively” could be “a deterrent to those who would carry weapons”).

<sup>94</sup> *See* Michael R. Bloomberg, Op-Ed., ‘Stop and Frisk’ is not Racial Profiling, WASH. POST, Aug. 18, 2013 (arguing vehemently that NYPD officers are not racist); J. David Goodman, *More Diversity in City’s Police, but Blacks Lag*, N.Y. TIMES, Dec. 26, 2013, at A1 (commenting that minorities have constituted a majority of the police force since 2006, but reporting concern over ebbing numbers of black recruits).

<sup>95</sup> *Floyd*, 959 F. Supp. 2d at 591 (describing the City’s theory, which has remained consistent since at least 1999, that “the apparently disproportionate stopping of blacks and Hispanics can be explained on race-neutral grounds by police deployment to high crime areas, and by racial differences in crime rates”); AG REPORT, *supra* note 9, at 120 n.26 (quoting Police Commissioner Howard Safir: “‘The racial/ethnic distribution of the subjects of ‘stop’ and frisk reports reflects the demographics of known violent crime suspects as reported by crime victims. Similarly, the demographics of arrestees in violent crimes also correspond with the demographics of known violent crime suspects’”); Bloomberg, *supra* note 94 (arguing that “the proportion of stops generally reflects our crime numbers” and interpreting this to mean that police “are stopping people in those communities who fit descriptions of suspects or are engaged in suspicious activity”).

<sup>96</sup> CRIME AND ENFORCEMENT 2012, *supra* note 8, at 11 (reporting racial demographics for over 97% of shootings where race was known). The shooting victims were 74% black, 22% Hispanic, 2.8% white, and 0.5% Asian. *Id.*; *see also* RAYMOND W. KELLY, NYPD, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 11 (2011) (96.4% of known shooting suspects described as black or Hispanic, along with 96% of shooting victims); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 145 (1997) (advising those interested in criminal justice reform to acknowledge the “ugly realit[y]” of the statistical disproportion of blacks

Police Commissioner Kelly to argue that the critics have it backwards, “we disproportionately stop whites too much and minorities too little.”<sup>97</sup>

With crime plummeting and remaining low, the theory behind stop-and-frisk – deterring gun-carrying – gradually crystallized. Having early-on identified gun crimes as the driver of the City’s violent-crime epidemic, and resigned to its inability to keep guns out of the City altogether, city officials came to justify NYC Stop and Frisk as part of an overarching strategy to deter people from unlawfully carrying guns in public. Far from apologizing for overuse of stop-and-frisk, Mayor Bloomberg, Commissioner Kelly and other luminaries warned of dire consequences if it were curtailed, imploring New Yorkers: “Stop-and-frisk works, and it should stay in place.”<sup>98</sup>

The deterrence theory behind NYC Stop and Frisk has theoretical and even, as discussed in the next section, empirical support. On the theoretical side, the approach taps into sociological evidence that a large segment of violent crimes are impulsive and unplanned. Many murders and even robberies result from emotional confrontations and “situational pressures” influenced by drugs, alcohol, and peer pressure.<sup>99</sup> Deterring these crimes can be difficult because

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as both perpetrators and victims of American street crime); *but see* Roberts, *supra* note 2, at 805-06 (discussing ways in which the “myth of Black criminality” can erroneously inflate crime statistics).

<sup>97</sup> Jennifer Fermino, *Mayor Bloomberg On Stop-And-Frisk: It Can Be Argued ‘We Disproportionately Stop Whites Too Much. And Minorities Too Little,’* N.Y. DAILY NEWS, June 28, 2013, available at <http://www.nydailynews.com/new-york/mayor-bloomberg-stop-and-frisk-disproportionately-stop-whites-minorities-article-1.1385410#ixzz2jPXsAcUJ> (“It’s exactly the reverse of what they’re saying . . .”); *see supra* note 95 (elaborating on Mayor Bloomberg’s thoughts on the matter).

<sup>98</sup> *See* George E. Pataki, *Frisks Save Lives New York Can’t Go Back*, Op-Ed., N.Y. POST, July 11, 2012, at 29; *see also* Mayor Michael Bloomberg, Address on Public Safety to NYPD Leadership, *supra* note 93 (“There is no doubt that stops are a vitally important reason why so many fewer gun murders happen in New York than in other major cities – and why we are the safest big city in America.”).

<sup>99</sup> RALPH D. ELLIS & CAROL S. ELLIS, THEORIES OF CRIMINAL JUSTICE 28 (1989) (pointing out that “70% of all murders are what are called ‘sudden murders’” which “usually occur as the result of some very powerful emotion, such as anger, frustration or depression”); Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT 251, 252 (James R. Acker et al. eds., 2003) (describing view of criminologists that “most murders are not premeditated” but instead are “emotionally charged and spontaneous events – ‘acts of passion’”); Lorraine H. Freed et al., *Factors Preventing Gun Acquisition and Carrying Among Incarcerated Adolescent Males*, 155 ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE 335, 335 (2001) (“[M]any incidents of youth violence result from impulsive responses to volatile situations . . .”); Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 282 (2008) (writing that many violent crimes “are impulsive or are committed under the influence of drugs, alcohol, peer influences, powerful emotions, or situational pressures” and difficult to



people are not thinking rationally at the moment they commit them. Deterrence is more easily achieved at earlier moments, such as the moment a person heads out for the night and chooses whether to bring a gun. The NYPD can, theoretically, decrease violent crime by altering this more rational decision-calculus by increasing the danger that anyone who chooses to carry a gun will be caught. People who are unarmed when they later find themselves embroiled in confrontations, pressured by friends, or under the influence of drugs or alcohol would theoretically commit fewer impulsive gun crimes, such as robbery and murder.<sup>100</sup> Thus, by combining New York's severe gun laws<sup>101</sup> with a high probability of detection,<sup>102</sup> the police could indirectly deter violent crime by decreasing the prevalence of gun possession.

Stop-and-frisk overcomes a daunting practical hurdle to implementing the indirect deterrence theory of violent crime suppression described above. It increases the risk of detection for unlawful gun possession. Handguns can be

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influence through legal sanctions).

<sup>100</sup> See David Garland, *Criminology, Crime Control, and "The American Difference,"* 69 U. COLO. L. REV. 1137, 1150 (1998) (articulating theory that aggressive street stops could reduce "casual gun carrying" and thereby make "unplanned violent encounters . . . less lethal" but acknowledging the lack of empirical evidence to support the theory); Lawrence W. Sherman & Dennis P. Rogan, *Effects of Gun Seizures on Gun Violence: "Hot Spots" Patrol in Kansas City*, 12 JUST. Q. 673, 676-77 (1995) (discussing empirical and theoretical groundings for efforts to reduce gun crime by targeting unlawful gun carrying).

<sup>101</sup> Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. TIMES, CITY ROOM (December 2, 2008, 1:13 PM), archived at <http://perma.cc/6J78-2YSC> ("[T]he city has some of the toughest gun laws in the nation . . ."). For example, a conviction for possessing a loaded firearm in public requires a mandatory minimum sentence of three and a half years in prison. N.Y. PENAL LAW § 70.02(1)(b) (McKinney 2009) (deeming violation of 265.03 "a Class C violent felony offense[]"); *Id.* at § 70.02(3)(b) (McKinney 2009) ("For a class C felony, the term must be at least three and one-half years."); *Id.* at § 265.03(c)(3) (McKinney 2009) (prohibiting an unlicensed person from "possess[ing] any loaded firearm" outside of the home or place of business); 6 N.Y. Prac., Criminal Law § 33:11 (3d ed.) (commenting that the crime was added by legislation in 2006). See generally Tina Moore, *Plaxico Burrese Faces Tough Gun Laws in Manhattan*, N.Y. DAILY NEWS, (Dec. 7, 2008, 1:49 PM), <http://www.nydailynews.com/news/crime/plaxico-burrese-faces-tough-gun-laws-manhattan-article-1.354981#ixzz2iNsLBHB>. For a discussion of licensing, see *supra* note 55.

<sup>102</sup> See Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 989 n.165 (explaining that "social scientists have demonstrated that the perceived certainty of punishment – that is, the likelihood of being caught and held responsible for criminal behavior – is the single most important variable in deterring misconduct" and citing studies); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 380 & n.112 (1997) (stating that "empirical studies likewise conclude that certainty of conviction plays a much bigger role in discouraging all manner of crime than does severity of punishment" and citing studies).

easily concealed under clothing or in bags. Stop-and-frisk creates a risk that police will uncover these hidden weapons.

It is important to note that even from the perspective of the police, stop-and-frisk is a clumsy mechanism for both uncovering concealed weapons and creating a perception that unlawful gun carrying will be detected. Apart from the severe personal invasions it necessitates,<sup>103</sup> it also requires a tremendous investment of officer time and resources. To reduce the resource cost, NYPD officers limited the scope of widespread stop and frisk in two ways – geographically and demographically. Geographically, NYC Stop and Frisk targeted so-called “hot spots” – areas of statistically high crime as determined by Compstat.<sup>104</sup> As discussed in Part III.B, the second shortcut NYPD officers employed was “indirect” profiling by age, gender and, most ominously, race.<sup>105</sup> Again, the theory matched the practice. If NYC Stop and Frisk was designed to deter gun violence, officers were acting rationally (the NYPD claimed) by tailoring the limited reservoir of stops to the generic demographic characteristics of gun-crime suspects.

In summary, beginning in the mid- to late 1990s, mass stop-and-frisk first surfaced as a tool employed by one specialized unit (SCU) to find guns, and later served midlevel supervisors citywide in responding to pressure to “do something” about persistent crime in their precincts. As the “program” grew

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<sup>103</sup> For a sampling of the discussion of the harms from this type of policing, see I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 20-29 (2011) (cataloguing harms of policing strategies like “stop and frisk”); Kennedy, *supra* note 96, at 159 (characterizing racial profiling in policing as a “racial tax”); Roberts, *supra* note 2, at 811 (describing harms of racial profiling including “reinforc[ing] the second-class citizenship of . . . people of color”); Stephen J. Schulhofer, Tom R. Tyler, & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 349 (2011) (contending that “the net effect of tough [policing] measures can be” negative “not only because toughness tends to chill voluntary compliance,” but also because “[t]oughness also chills cooperation from the law-abiding community”).

<sup>104</sup> MAPLE, *supra* note 20, at 128 (describing crime-fighting strategy in its most simplified form as “put cops on dots”); Weisburd et al., *supra* note 66, at 131-32, 145 (“Our data strongly support the proposition that SQFs are focused on crime hot spots.”); Press Release, Mayor Michael R. Bloomberg and Police Commissioner Raymond W. Kelly Announce Operation Impact II (Jan. 12, 2004), *archived at* <http://perma.cc/8F54-3HH5> (touting success and expansion of “Operation Impact,” a program by which “the NYPD kept close watch on neighborhoods with high crime rates and flooded them with Police Officers”).

<sup>105</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 589 (S.D.N.Y. 2013) (finding that “blacks and Hispanics are more likely to be stopped than whites” even after controlling for demographic characteristics of the areas in which stops occur); AG REPORT, *supra* note 9, at 93-94; ZIMRING, *supra* note 5, at 122; Bloomberg, *supra* note 94 (suggesting that stopping people in proportion to census numbers “would be a colossal misdirection of resources”).

and obtained disappointing “hit rates,” it became increasingly justified as an effort to deter, rather than detect, gun-carrying. Consistent with this justification, proponents of NYC Stop and Frisk explained its disproportionate racial impact by highlighting the demographics of the group whose behavior the police were trying to deter. Violent crime suspects, the NYPD claimed, happened to be overwhelmingly black and Hispanic; stops designed to deter gun-carrying, and thus violent crimes, the NYPD contended, logically paralleled this demographic.

## II. TESTING THE THEORY: DID NYC STOP AND FRISK REDUCE CRIME AND INCARCERATION?

Building on the preceding discussion of what NYC Stop and Frisk consists of, how it evolved, and its underlying crime-fighting theory, this Part explores its effectiveness. Caveats are in order at the outset. Analysis of crime and crime fighting is complicated by the interplay of countless variables, including many that are ill-defined and difficult to measure. Competing values, such as whether the societal, personal and financial toll exacted outweigh any crime reduction benefits, further complicate the question of what “works” to combat crime.<sup>106</sup> Recognizing these important caveats, this Part analyzes the (meager) empirical evidence implicating the effectiveness of the NYPD’s attempt to combat crime through NYC Stop and Frisk. The task is a difficult one, but its importance dictates efforts to seek answers amidst the uncertainty.

### A. *Falling Crime*

New York City’s “special success in crime reduction” warrants extensive scholarly attention.<sup>107</sup> The decrease in New York City crime rates after 1990 are truly stunning, “well beyond the target magnitude that any serious students of crime would have believed possible before it happened.”<sup>108</sup> As already noted, between 1990 and 2012, while the City’s population grew by almost a million people, the number of homicides dropped from 2,245 to 419.<sup>109</sup> The

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<sup>106</sup> Roberts, *supra* note 2, at 799 (pointing out that the public assesses the desirability of policing strategies based on “moral and political judgments as much as their impact on crime rates”).

<sup>107</sup> ZIMRING, *supra* note 5, at 148-49.

<sup>108</sup> *Id.* at 4; Steven Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six Factors That Do Not*, 18 J. ECON. PERSP. 163, 169-70 (2004) (describing conventional wisdom in mid-1990s that crime in America was poised to skyrocket); Weisburd et al., *supra* note 66, at 134 (discussing “common assumption among criminologists that the police could not be effective crime fighters”).

<sup>109</sup> See ZIMRING, *supra* note 5, at 4; Levitt, *supra* note 108, at 163; Weisburd et al., *supra* note 66, at 130 (stating that between 1990 and 2000, “violent crime in [New York City] dropped about 60.3%”); N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., 2009 CRIMESTAT REPORT (2010), available at <http://www.criminaljustice.ny.gov/pio/annualreport/2009->

NYPD reported that other major crimes like robbery, rape, and auto theft plummeted as well.<sup>110</sup> Crime also fell nationally, but New York City's drops largely outpaced dips in other American cities over the same time period.<sup>111</sup>

There is, of course, a danger that self-reported crime data are inaccurate. The NYPD's comparative advantage could be statistics manipulation, rather than crime fighting. The key rebuttal to this charge is that reported declines across crime types match the decline in the one statistic with the most credibility: homicides. Even the most powerful skeptics of the Department's self-reported crime statistics acknowledge that the homicide numbers are "most likely to be accurate" and in challenging these numbers speculate only as to mechanisms by which homicide reports could be delayed (say from one year to the next), but not made to disappear entirely.<sup>112</sup>

While New York City outperforms its peers in city-to-city comparisons,<sup>113</sup> another geographic comparison that highlights New York City's distinctiveness is a comparison to the rest of New York State. While crime in the City dropped precipitously in the past two decades, crime in the rest of the state held steady. As New York State's Division of Criminal Justice Services grudgingly acknowledged in 2009, "violent crime within New York City has decreased by 74% since 1990 while violent crime outside New York City has

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crimestat-report.pdf, archived at <http://perma.cc/9KNF-7LXU> (providing relevant statistics); *UCR Table Generator*, *supra* note 4 (providing the Large Local Agency Reported Crime database).

<sup>110</sup> See *UCR Table Generator*, *supra* note 4.

<sup>111</sup> ZIMRING, *supra* note 5, at 4, 15-19, 49 (stating that the national trend only "lasted until 2000 and was slightly less than half the magnitude of New York City's decline"); Weisburd et al., *supra* note 66, at 130 (explaining that crime "changes in New York City . . . were even more dramatic than the national trends"; "the crime drop in New York in the 1990s was almost double that of the nation as a whole" and "outpaced that of the rest of the country" in the first decade of the 2000s).

<sup>112</sup> ETERNO & SILVERMAN, *supra* note 69, at 46; see also Bowling, *supra* note 39, at 533-34 (commenting that records of medical examiner and police regarding suspicious deaths while reflecting "slight differences in definitions and numbers" are "broadly similar"); Steven F. Messner et al., *Policing, Drugs, and the Homicide Decline in New York City in the 1990s*, 45 *CRIMINOLOGY* 385, 394 (2007) (acknowledging general agreement among criminologists that "official data on homicide are superior to those for other offenses because homicides are likely to be reported and recorded"). Zimring concludes based on analysis of independent data that statistical manipulation has not magnified the "size of the drop" in crime in NYC. ZIMRING, *supra* note 5, at 233; see also ERIC T. SCHNEIDERMAN, A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 15 (2013) (observing that there was a "substantial downgrading of charges in stop-and-frisk cases as they proceeded from arrest to arraignment to conviction").

<sup>113</sup> See ZIMRING, *supra* note 5, at 15-19 (describing New York City's performance and providing statistics); *UCR Table Generator*, *supra* note 4.

not changed significantly.”<sup>114</sup> It is, of course, possible that New York City manipulates data while the rest of the state does not, but, again, the homicide data suggest that the numbers reflect an underlying reality.<sup>115</sup>

Beyond general crime reductions, empirical and anecdotal data support the notion that the purported goal of NYC Stop and Frisk, reducing public handgun possession, has become a reality. Even those who dispute the success of NYC Stop and Frisk recognize that the practice makes it risky for New Yorkers, and particularly young, black males, to unlawfully carry guns in public.<sup>116</sup> An article discussing the negative impact of NYC Stop and Frisk on minority youths in Harlem supports this view. The young people interviewed, while sharply critical of NYC Stop and Frisk, acknowledged that police practices “deterred many teen-agers from continuing to carry guns”; one student explained to the reporter that people now “keep their guns at home. They don’t want to be arrested.”<sup>117</sup> At a more macro level, the Centers for Disease Control (“CDC”) surveys high-school-aged youth about various dangerous behaviors, including whether they carried a gun in the last thirty

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<sup>114</sup> N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., *supra* note 109, at 2.

<sup>115</sup> Specifically, for New York State, homicides dropped from 361 to 265 (26.5%) (excluding New York City), at the same time that New York City homicides dropped from 2,245 to 419 (81%). N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., INDEX CRIMES BY COUNTY AND AGENCY: BEGINNING 1990, available at <https://data.ny.gov/Public-Safety/Index-Crimes-by-County-and-Agency-Beginning-1990/ca8h-8gjq?> archived at <http://perma.cc/M8C-5E95>.

<sup>116</sup> Paul Butler, Op-Ed., *Room for Debate: Don’t Antagonize Those Who Could Help Fight Crime*, N.Y. TIMES, (Sept. 20, 2012), <http://www.nytimes.com/roomfordebate/2012/07/17/does-stop-and-frisk-reduce-crime/dont-antagonize-those-who-could-help-fight-crime> archived at <http://perma.cc/NF8M-8UR6> (“The N.Y.P.D.’s stop and frisk policy has one law enforcement benefit. It almost certainly deters many young African-American and Latino men from carrying guns on the street.”); Fred Kaplan, *NY Continues to See Plunge In Number Of Felonies Homicide, Assault Both Show Drops; Rapes Rise By 9%*, BOS. GLOBE, April 15, 2002, at A3 (“The explosion of misdemeanor arrests, combined with police stop-and-frisk operations, almost certainly explains why fewer people carry guns than before – which means fewer opportunities to use them.”).

<sup>117</sup> Fox Butterfield, *Scared Straight; The Wisdom of Children Who Have Known Too Much*, N.Y. TIMES, June 8, 1997, at E1; see also Natasha Velez et al., *‘Gun-Ring’ Rings Feared a Frisk Wiretap Clue in NYC’s Largest Weapons Bust*, N.Y. POST, Aug. 20, 2013, available at <http://nypost.com/2013/08/20/thugs-stop-and-frisk-fear-revealed-in-biggest-gun-seizure-in-city-history/> archived at <http://perma.cc/EP8M-EPCN> (reporting wiretap conversation where defendant in gun smuggling operation tells his associates that he cannot take the guns to his house because of the prevalence of “stop and frisk” where he lives); cf. Freed et al., *supra* note 99, at 340 (reporting that “[t]he incarcerated youth in this study also reported being aware of and responsive to police efforts to suppress gun carrying” and concluding that this finding is “consistent with recent evaluation studies of police interventions”).

days. The CDC began surveying New York City high schoolers in 1997. In that year, 4.2% answered “yes” to the gun-carrying question; by 2011, only 2.3% answered “yes.”<sup>118</sup> A report put out by the New York City Department of Health and Mental Hygiene highlighted this decrease in at-risk behavior, noting that self-reports by public high school students of carrying a weapon in the past thirty days fell between 1997 and 2011 from 18% to 9% and, as noted above, self-reported gun-carrying dropped in half.<sup>119</sup> The Health Department emphasized that the “prevalence of gun-carrying in New York City was the lowest among 26 other cities” studied.<sup>120</sup> For African American high school students, the drop is even more pronounced. In 1997, 6.6% of black high school students said they carried a gun in the last thirty days; in 2011, the percentage was 2.6%.<sup>121</sup>

In assessing the efficacy of NYC Stop and Frisk, another data point of interest is gunshot injuries. If proactive policing reduces gun possession and thus indirectly reduces gun violence, shootings should be decreasing in the City, as they appear to be. As reported by the New York City Department of Health and Mental Hygiene, between 2000 and 2011 the rate of firearm homicides fell by one-third.<sup>122</sup> The rate of hospitalizations for firearm injuries declined by over 20% over that period, driven by a 21% decrease in firearm assault hospitalizations. The absolute number of shootings fell dramatically over this time period as well, with firearm deaths of all kinds dropping from 524 in 2000 to 366 in 2011,<sup>123</sup> and non-lethal shootings falling as well.<sup>124</sup>

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<sup>118</sup> CDC YOUTH ONLINE (last visited May 21, 2014), *archived at* <http://perma.cc/NV7C-ZFNW>; *see also* Sam Roberts, *Survey on Gun-Carrying Youth Adds Fodder to Stop-and-Frisk Debate*, N.Y. TIMES, CITY ROOM (April 15, 2013, 12:49 PM), *archived at* <http://perma.cc/V784-DQ8X> (discussing survey). The CDC data are ultimately drawn from the New York City Youth Risk Behavior Survey, *infra* note 119.

<sup>119</sup> N.Y.C. DEP’T HEALTH & MENTAL HYGIENE (last visited May 21, 2014), *archived at* <http://perma.cc/ZV2J-R2TQ>.

<sup>120</sup> N.Y.C. DEP’T HEALTH & MENTAL HYGIENE, FIREARM DEATHS AND INJURIES IN NEW YORK CITY 7-8 (2013) *available at* <http://www.nyc.gov/html/doh/downloads/pdf/epi/epiresearch-firearms.pdf>, *archived at* <http://perma.cc/LG9A-MR8S>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 4 (“From 2000 to 2011 in New York City, firearm fatalities have declined 32% . . .”).

<sup>123</sup> *Id.* at 1.

<sup>124</sup> *Id.* at 1-2. The Health Department report primarily states rates as opposed to actual numbers. Raw numbers as reported by New York City hospitals are available from the Department’s website for 2000 to 2009; these data reflect that nonlethal shootings dropped from 1,042 to 805, and total shootings (including lethal shootings resulting in death, i.e., homicides) fell from 1,490 to 1,113. *Data and Statistics*, N.Y.C. DEP’T OF HEALTH & MENTAL HYGIENE (last visited Oct. 29, 2013), *archived at* <http://perma.cc/PTB4-XKFM> (providing data on lethal and non-lethal shootings from 2000 to 2009).

These Health Department data present a challenge to those who claim that the crime rate in New York City was flat after 2000 (as stop-and-frisks escalated), or attribute the City's crime drops to NYPD statistical manipulation.<sup>125</sup>

Another way to test whether policing strategies might be influencing gun-carrying and thus gun crime is to examine trends in non-firearm deaths. If non-firearm-related deaths are dropping in concert with firearm-related ones, deterring gun possession through "stop and frisk" and related policing tactics loses its purchase as an explanation. Two studies assess the causal impact of New York City policing on homicides in precisely this manner, and both conclude that aggressive policing as measured by increased misdemeanor arrests significantly reduced gun-related, *but not non-gun-related* homicides in New York City in the 1990s.<sup>126</sup> The authors of the earlier study emphasized that "[t]he temporal fit between policing changes and gun homicide declines is a good one" because "[g]un homicides begin to decline in the Medical Examiner's count in 1991, but the declines were not large prior to 1994," a year that formed the beginning of "a decline of unprecedented proportions that continued through 1996 and beyond."<sup>127</sup> The later study similarly noted that "when homicides are disaggregated by weapon use, the effect of changes in policing is significant for gun-related, but not for non-gun-related,

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<sup>125</sup> John Eterno and Eli B. Silverman cite data that partially contradict the data reported above, specifically, that emergency room visits from firearm assaults increased between 1999 and 2006 from 224 to 514 and that "another indicator, firearm assault hospitalizations, was unchanged from 1999 to 2006." ETERNO & SILVERMAN, *supra* note 69, at 41-42. The numbers cited by Eterno and Silverman seem internally inconsistent (presumably most, if not all, *firearm* injury hospitalizations are processed through emergency rooms), and Eterno and Silverman cite the same source relied on in the text (N.Y. Department of Health and Mental Hygiene), but instead of an official publication, cite a link on the Department's website. *Id.* The cited link does not provide any relevant data: <http://www.nyc.gov/html/doh/downloads/pdf/survey/survey-2009drugod.pdf>, archived at <http://perma.cc/U7HU-9R9K>. In response to the author's queries regarding the emergency room data, the Health Department indicated that the emergency room data is no longer publicly available as it was based on estimates using a small sample of emergency room charts and is inferior to the publicly reported data described in the text.

<sup>126</sup> Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1319-20 (1998) (reporting that non-gun-related homicides were at a low point *prior* to the NYPD's change in tactics, but that changes in gun-related homicide rates appear to "fit" temporally with changes in police tactics); Messner et al., *supra* note 112, at 402-03 (observing that changes in misdemeanor arrest rates exert "significant effects on gun-related homicides but not on non-gun-related homicides").

<sup>127</sup> Fagan et al., *supra* note 126, at 1313, 1319 (explaining that "marked shifts in policing strategy began in 1994, concurrent with even sharper declines in firearm homicides from 1994-1996").

homicide.”<sup>128</sup> Other research supports the efficacy of aggressive policing such as misdemeanor arrests and stop-and-frisks as a deterrent to some, but not all types of crime, most notably robberies.<sup>129</sup> The most interesting aspect of the reported differential success rates is support for a hypothesis that tactics like stop-and-frisk will most deter crimes that require weapons (e.g., robbery, murder), while having little effect on other crimes.

Completing the extant picture, there is a smattering of evidence from quasi-experiments in other jurisdictions. Specifically, in Kansas City and Pittsburgh, aggressive policing targeting gun carrying (including stop and frisks) resulted in a decrease in gun crime in the targeted areas.<sup>130</sup> The authors of the Kansas City study posited that the results were explained either by “incapacitation through loss of [29] guns” or “[d]eterrence of gun carrying,” with the latter being the more plausible explanation.<sup>131</sup> Researchers in Pittsburgh, where targeted patrols led to a 70% decrease in gunshot injuries, noted that the number of arrests and gun seizures were small, and so hypothesized that the gun crime reductions attributable to the patrols were likely due to “deterred gun carrying or criminal behavior.”<sup>132</sup>

Perhaps the strongest argument that New York City’s aggressive policing strategies (minor arrests and NYC Stop and Frisk) contributed to its plummeting crime rate is the absence of alternative explanations. While

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<sup>128</sup> Messner et al., *supra* note 112, at 405.

<sup>129</sup> Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J. L. & ECON. 235, 252, 255, 257 & n.44 (2005) (finding that increased misdemeanor arrests had “a significant negative effect on robbery, motor vehicle theft, and grand larceny,” as well as murder given “increased lag lengths,” with the effect most pronounced for robbery); Smith & Purtell, *supra* note 69, at 12 (reporting empirical evidence that NYC Stop and Frisk was particularly effective at decreasing robbery, murder, burglary, and vehicle theft, less effective against assault and grand larceny, and ineffective against rape); Anthony M. Destefano, *NYPD Weighs Whether Cut in Stops Affects Crime Stats*, NEWSDAY (June 25, 2014, 8:01 PM), <http://www.newsday.com/news/new-york/nypd-weighs-whether-cut-in-stops-affects-crime-stats-1.8570715> archived at <http://perma.cc/49KZ-F9HR> (referring to unpublished study by Richard Rosenfeld and the John Jay College of Criminal Justice that “suggested that stop-and-frisk activity had a modest effect on robberies, assaults and, possibly, homicides”).

<sup>130</sup> See Sherman & Rogan, *supra* note 100, at 678-80, 683-94 (discussing effects of proactive policing techniques, including *Terry* stops, in Kansas City); see also Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, in EVALUATING GUN POLICY 217, 221 (Jens Ludwig & Philip J. Cook eds., 2003) (describing effects of proactive policing, including *Terry* stops, in Pittsburgh).

<sup>131</sup> Sherman & Rogan, *supra* note 100, at 688, 690, 694.

<sup>132</sup> Cohen & Ludwig, *supra* note 130, at 220, 234; see also Goode, *supra* note 90 (quoting Philadelphia Police Commissioner Charles Ramsey explaining that when Philadelphia increased reliance on stop-and-frisk, gun violence decreased, and when the city stopped relying on it, gun violence went back up).



general theories about the United States' declining crime rates abound, including a decrease in childhood lead exposure,<sup>133</sup> the legalization of abortion,<sup>134</sup> manipulation of statistics,<sup>135</sup> regression to the mean,<sup>136</sup> the waning of the crack cocaine epidemic,<sup>137</sup> and advances in medical science,<sup>138</sup> none of these have the same power as police tactics to explain New York City's distinctive experience over the past two decades. As Franklin Zimring contends in a recent book dedicated to the question, the "circumstantial evidence that some combination of policing variables accounts for much of the New York difference is overwhelming."<sup>139</sup>

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<sup>133</sup> Rick Nevin, *How Lead Exposure Relates to Temporal Changes in IQ, Violent Crime, and Unwed Pregnancy*, 83 ENVTL. RES. 1, 1 (2000) ("[L]ong-term trends in populations exposure to gasoline lead were found to be remarkably consistent with subsequent changes in violent crime and unwed pregnancy."); *but see* Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1, 24 (2002) (highlighting variations in homicide data that are not explained by lead exposure).

<sup>134</sup> John J. Donohue & Steven Levitt, *The Impact of Legalized Abortion on Crime*, 116 Q. J. ECON. 379, at 379 (2001) ("[L]egalized abortion has contributed significantly to recent crime reductions."); *but see* Cook & Laub, *supra* note 133, at 23 (pointing to data that rebut the legalized-abortion theory).

<sup>135</sup> ETERNO & SILVERMAN, *supra* note 69, at 229 (asserting that "the NYPD is probably not purposely engaging in racial policing," but explaining various ills of the department, including "uncontrollable and unimaginably high numbers of forcible stops" as "unexpected side effects" of "the high pressures of Compstat"); DAVID N. KELLEY & SHARON L. MCCARTHY, THE REPORT OF THE CRIME REPORTING REVIEW COMMITTEE TO COMMISSIONER RAYMOND W. KELLY CONCERNING COMPSTAT AUDITING 5-6 (2013), available at [http://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/crime\\_reporting\\_review\\_committee\\_final\\_report\\_2013.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/public_information/crime_reporting_review_committee_final_report_2013.pdf), archived at <http://perma.cc/8ZX3-BEGA> (chronicling and responding to criticism of NYPD data on dropping crime).

<sup>136</sup> Michael D. Maltz, *Which Homicides Decreased? Why?*, 88 J. CRIM. L. & CRIMINOLOGY 1489, 1494 (1998) (describing and criticizing regression-to-mean theory in reference to homicides in NYC); Rosenthal, *supra* note 20, at 329 ("A crime decline of such a magnitude and duration [as the one in the late 1990s and early 2000s in NYC] does not reflect the kind of ordinary variability seen in a regression to the mean.").

<sup>137</sup> ZIMRING, *supra* note 5, at 89-98 (discussing NYC drug use patterns); Levitt, *supra* note 108, at 181 ("Although the research is limited, I nonetheless believe that crack has quite likely played an important role in the decline in homicide in the 1990s . . ."); Messner et al., *supra* note 112, at 389-90 (describing "'crack-cocaine' thesis").

<sup>138</sup> Leo Eisenstein & Laura Gottesdiener, *Why Michael Bloomberg Is Wrong About Stop-and-Frisk*, ROLLING STONE (May 22, 2013, 11:00 AM), <http://www.rollingstone.com/politics/news/why-michael-bloomberg-is-wrong-about-stop-and-frisk-20130522> archived at <http://perma.cc/56D3-H645> (contending that "better medicine" and particularly access to Level 1 Trauma Centers explains the drop in murder rate, not NYC Stop and Frisk); *but see supra* note 124 (discussing drop in non-lethal firearm hospitalizations).

<sup>139</sup> ZIMRING, *supra* note 5, at 101; *see also* Rosenthal, *supra* note 20, at 321 ("No non-

Zimring resists crediting New York's "aggressive street intervention[s]" as a specific cause of the drop in crime, stating only that tactics like "high volumes of stop-and-frisk" should be "at the very top of the priority for rigorous evaluation efforts," since their impact, while unproven, "may be substantial."<sup>140</sup> This caution is understandable. Focusing beyond the general term "policing variables" is difficult for obvious reasons. The overall crime decline coincides with Bratton's installation as Police Commissioner and his subsequent implementation of a host of interrelated tactics (e.g., new managers, Compstat, delegating authority to precinct commanders, increased force size), some or all of which may have contributed to the crime decline.<sup>141</sup>

In fact, in light of the very real uncertainty signaled at the outset of this section, it is important to emphasize that empirical studies of NYC Stop and Frisk are sparse and do not all support its efficacy as a deterrent to gun crime, particularly past a certain saturation point.<sup>142</sup> Richard Rosenfeld and Robert Fornango criticize one of the studies cited earlier and find "few significant effects" of NYC Stop and Frisk or misdemeanor arrests on robbery and burglary rates in the City between 2003 and 2010.<sup>143</sup> Jeffrey Fagan contends in a recent co-authored piece that increased street stops after 1999 showed no

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police explanation for New York's success is apparent . . ."); Dennis C. Smith, Op-Ed., *Room for Debate: Stop and Frisk Has Lowered Crime in Other Cities*, N.Y. TIMES (July 19, 2012, 2:03 PM), archived at <http://perma.cc/T2ZT-ZK8J> ("Research has converged on the conclusion that a shift from reactive to proactive policing by the N.Y.P.D. has played the crucial role in what the criminologist Franklin Zimring called a 'Guinness Book of World Records crime drop.'").

<sup>140</sup> ZIMRING, *supra* note 5, at 144-46, 148-49.

<sup>141</sup> BRATTON, *supra* note 20, at 223-39.

<sup>142</sup> ZIMRING, *supra* note 5, at 227-33 (observing that "there isn't much empirical literature" on "police effects in New York City" and summarizing existing studies); Rachel Harmon, *Why Do We (Still) Lack Data On Policing?*, 96 MARQ. L. REV. 1119, 1123 (2013).

<sup>143</sup> See Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003-2010*, 31 JUSTICE Q. 96, 98, 103-04 (2014) (criticizing Smith and Purtell's methodology and finding no effect over stated time period for aggressive policing on rates of robbery and burglary). Another recent paper purports to find "no evidence that [NYPD] misdemeanor arrests reduced levels of homicide, robbery, or aggravated assaults" during the period studied (1998-2001). David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUSTICE Q. 154, 154 (2014). The study, however, did not measure the effect of "misdemeanor arrests." Instead, the variable it describes with that phrase ("misdemeanor arrests") is defined as the "[percentage] of misdemeanor complaints resulting in arrest." *Id.* at 167 tbl.1 (producing table defining "misarrpct" as one of four law enforcement variables studied); see also *id.* at 165 (referring to "the proportions of reported . . . misdemeanors resulting in an arrest"). Thus, the author's actual findings are that the likelihood that a misdemeanor complaint will result in an arrest has no impact on serious crime in New York City – an interesting finding, perhaps, but one that says nothing about the efficacy of NYC Stop and Frisk.

incremental return in terms of crime reduction; Fagan and his co-authors characterize fluctuations in homicide rates after that time as “random[.]”<sup>144</sup> In short, the data cited above, while provocative, do not refute the notion that other factors (besides aggressive policing tactics like “stop and frisk”) explain NYC’s crime drop. There is, in fact, no scholarly consensus on the critical question of how much credit policing in general, and NYC Stop and Frisk in particular, deserves.<sup>145</sup> In part, this is because the City’s success caught observers off guard and left little in the form of empirical studies in its wake.<sup>146</sup> There are, indeed, plenty of reasons to suspect that other variables are in play.<sup>147</sup> As noted above, crime was falling in the City before NYC Stop and Frisk became the behemoth it is today, and (if the NYPD’s numbers are to be believed) crimes that do not necessarily involve guns, such as auto theft, have fallen dramatically alongside gun-related crime.<sup>148</sup> Still, given the evidence described above, the breadth of the program’s implementation in New York (and not elsewhere),<sup>149</sup> and the strong feelings of NYPD officers and officials,<sup>150</sup> NYC Stop and Frisk and related policies (e.g., pretextual marijuana

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<sup>144</sup> Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited*, in RACE, ETHNICITY AND POLICING 309, 333 (Stephen K. Rice & Michael D. White eds., 2010) (arguing that “homicide rates [in New York City] have remained stable after 1999, rising and falling randomly over an eight-year period”); see also *infra* note 145 (providing examples of arguments that data concerning the link between police tactics and crime in NYC are inconclusive).

<sup>145</sup> See, e.g., Greenberg, *supra* note 143, at 155 (“[T]he research that would pin down the causes of the New York drop definitively has not been done.”); Levitt, *supra* note 108, at 173 (“[W]hile the impact of policing strategies on crime is an issue on which reasonable people might disagree given the lack of hard evidence, my reading of the limited data that are available leads me to the conclusion that the impact of policing strategies on New York City crime are exaggerated . . . .”); Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1623 (2012) (“No scholarly consensus has emerged on either broken windows theories of misconduct or their affiliated policing strategies.”).

<sup>146</sup> Levitt, *supra* note 108, at 173 (pointing out the speed of change in NYC).

<sup>147</sup> ZIMRING, *supra* note 5, at 131-50 (describing efforts to isolate particular causes of New York City’s crime decline).

<sup>148</sup> KELLEY & MCCARTHY, *supra* note 135, at 16 & n.41 (observing potentially relevant change in practice of auto theft investigations).

<sup>149</sup> Rivera et al., *supra* note 69 (citing “law enforcement experts” for proposition that “New York is among several major cities across the country that rely heavily on the stop-and-frisk tactic, but few cities . . . employ it with such intensity”).

<sup>150</sup> ZIMRING, *supra* note 5, at 148 (reporting that “New York City police decision makers believe that [stop and frisks] add[] significantly” to the city’s crime fighting success). When the New York Attorney General released a largely critical report on the program, it included perspectives of police officers interviewed for that report. See AG REPORT, *supra* note 9, at 69. The officers interviewed saw NYC Stop and Frisk as a program “where ‘cops put[] their lives on the line’ to deter, investigate, and solve crime.” *Id.* The Attorney General concluded

arrests) have to be considered a plausible explanation for the City's distinctive violent crime decline, most likely through the mechanism of deterring public gun-carrying.<sup>151</sup>

B. *Reduced Incarceration*

At the same time that its crime rate was plummeting, New York City experienced another noteworthy phenomenon. While prison populations in other American jurisdictions exploded upward, the City incarcerated fewer and fewer people.<sup>152</sup> From 1990 to 1997, New York City mirrored the national trend, incarcerating more and more of its residents.<sup>153</sup> But after 1997, while its police were increasingly initiating coercive encounters with citizens, its incarceration numbers turned around. By 2008 there were 10,000 fewer city residents incarcerated than in 1990.<sup>154</sup> Thus, while New York City's population increased substantially and crime plummeted, the number of people incarcerated in its prisons and jails actually fell. Young minority males who felt the brunt of NYC Stop and Frisk disproportionately benefited from the concurrent drop in incarceration.<sup>155</sup> Between 1990 and 2009, the rate of prison commitments for black and Hispanic males under age twenty-five in New York City dropped by 62%.<sup>156</sup>

Again, it is difficult to isolate one variable that explains why New York incarcerated fewer people. Non-policing factors could, of course, explain New York's incarceration difference, such as an embrace of alternative sentencing (e.g., drug courts) or easing of sentence severity. But there is no clear pattern of the easing of sentencing laws that fits the timing of New York's declining

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that “[v]irtually every [officer-]interviewee expressed the view that ‘stop & frisk’ is an integral part of the Department’s goal to rid the streets of illegal weapons and violent criminals.” *Id.* at 70; *see also* Bowling, *supra* note 39, at 546 (describing the view of some interviewed officers that NYC Stop and Frisk was effective).

<sup>151</sup> The *Floyd* plaintiffs’ expert witness acknowledges that “stop-and-frisk tactics most likely contributed in part to the crime decline in New York City,” noting only that “their precise contribution is contested.” Fagan, *supra* note 53, at 142; *see also* Kahan, *supra* note 102, at 372-73 (articulating the case that it is “plausible to believe that order maintenance has in fact reduced crime in New York” and consequently the City’s policing “strategy definitely merits further study and emulation”).

<sup>152</sup> ZIMRING, *supra* note 5, at 73-74; Pfeiffer, *supra* note 5 (“Among the 50 states, New York charted the biggest drop in its prison rolls from 2000 to 2010, a decade when 37 state prison systems had double-digit population hikes.”).

<sup>153</sup> ZIMRING, *supra* note 5, at 73-74.

<sup>154</sup> *Id.*; *see also* Corman & Mocan, *supra* note 129, at 247 (illustrating variations in levels of incarceration in NYC in the 1990s).

<sup>155</sup> ZIMRING, *supra* note 5, at 207-09 (describing low-income, minority males as “leading beneficiaries” of city’s declining incarceration rate).

<sup>156</sup> *Id.*

prison population.<sup>157</sup> Consistent with the general mood of the country, New York's Sentencing Reform Act of 1995<sup>158</sup> lengthened sentences for a number of crimes, as did laws passed throughout the 2000s.<sup>159</sup> New York did enact legislation to mitigate some of the harsh sentencing consequences of its notorious Rockefeller drug laws,<sup>160</sup> but that legislation took effect in 2004 and 2005, years after New York's prison population began to decline.<sup>161</sup> Indeed, it is significant in itself that the escalation of New York's aggressive policing practices coincided with *dropping* as opposed to *escalating* incarceration rates.

A recent analysis of New York State's dramatic incarceration reversal between 2000 and 2011 highlights the key fact that suggests that City policing strategies – and not statewide reforms (such as moderated sentencing laws) – explain the phenomenon. While the analysis trumpets “*the state's steep prison decline,*” it acknowledges that the entire decline was driven by New York City, while the rest of the state pulled in the other direction.<sup>162</sup> Between 2000 and 2011, the City “charted a 42 percent decline in sentenced inmates” while “inmates from the rest of the state actually increased 17 percent.”<sup>163</sup> The same pattern holds in jails: “the rolls of city jails dropped 16 percent since 2000, while county lockups statewide had a 15 percent hike.”<sup>164</sup> The fact that outside New York City the state's confined population *increased* between 2000 and 2011 strongly suggests that something unique to the City explains the remarkable incarceration decline.

An intriguing possibility for falling incarceration rates is, again, the City's aggressive policing. Broken Windows theory champions increased police-citizen contact, but not necessarily formal action, such as arrest and

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<sup>157</sup> For a catalogue of possible reasons for the incarceration drop in New York City, see JUDITH GREENE & MARC MAUER, *THE SENTENCING PROJECT, DOWNSCALING PRISONS* 5-26 (2010) (discussing possible factors for decrease in incarceration, including a shift in “NYPD enforcement priorities” in 1999, and reforms to early release programs).

<sup>158</sup> 1995 N.Y. Laws 107; *see also* N.Y. STATE COMM'N ON SENTENCING REFORM, *THE FUTURE OF SENTENCING IN NEW YORK STATE: RECOMMENDATIONS FOR REFORM* 20 (2009), available at [http://criminaljustice.state.ny.us/pio/csr\\_report2-2009.pdf](http://criminaljustice.state.ny.us/pio/csr_report2-2009.pdf), archived at <http://perma.cc/3CT2-CLXC> (describing the effects of the Sentencing Reform Act of 1995).

<sup>159</sup> N.Y. STATE COMM'N ON SENTENCING REFORM, *supra* note 158, at 21 (tracing statutory sentencing changes in the 2000s).

<sup>160</sup> *Id.* at VIII-IX (describing the Rockefeller sentencing regime and changes made to it in the 2000s).

<sup>161</sup> GREENE & MAUER, *supra* note 157, at 24 (discussing successful efforts to finally obtain “real reform” of the Rockefeller Drug Laws in 2009); Pfeiffer, *supra* note 5 (reporting that New York State “drug law reforms – in 2004, 2005 and 2009” contributed to the decreasing New York prison population).

<sup>162</sup> Pfeiffer, *supra* note 5 (emphasis added).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

prosecution.<sup>165</sup> Similarly, with NYC Stop and Frisk's exceedingly low "hit rates," police end up hassling lots of people, while arresting few – an acceptable outcome for a police force that is purportedly focused on preventing (rather than punishing) gun possession.<sup>166</sup> Since prosecutions that do result are generally for minor offenses, penalties are correspondingly light.

The numbers support this take on New York policing. Even though stops exploded in the late nineties and escalated throughout the next decade, only a small percentage led to formal proceedings, much less conviction and sentence.<sup>167</sup> In a November 2013 report, the State Attorney General's Office analyzed the 6% of NYC stops that led to arrests and determined that only half of the arrests (or 3% of all stops) led to a conviction for any offense, including non-criminal "violations."<sup>168</sup> Fewer than a quarter of arrests, or 1.5% of all stops, led to a jail or prison sentence (almost always fewer than thirty days).<sup>169</sup> General misdemeanor arrests follow a similar pattern. Overall misdemeanor arrests remained fairly steady between 1985 and 1993, but then they began to climb from a little over 100,000 in 1993 to well over 200,000 by 2010.<sup>170</sup> The

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<sup>165</sup> KELLING & COLES, *supra* note 47, at 23 (emphasizing that under order maintenance theory, "arrest would only be resorted to when other approaches failed"); AG REPORT, *supra* note 9, at 51, 58, 59 (describing "order maintenance approach's emphasis on lesser intrusions (i.e., intrusions short of arrest)" and describing NYC Stop and Frisk as part of a policing model that values "proactive police interventions short of arrest").

<sup>166</sup> Roughly 6% of stops result in the issuance of a summons, and 6% lead to an arrest. See JONES-BROWN et al., *supra* note 80, at 10. Only 1.7% of stops uncover contraband, 0.15% of stops uncover a gun, and 1.09% of stops uncover a knife. See *id.* at 10 fig.6; cf. L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143, 1145, 1165-66 (2012) (highlighting low arrest rates for NYC Stop and Frisk in arguing for a doctrinal shift "to a focus on how proficient the officer conducting the *Terry* stop is at inferring criminality").

<sup>167</sup> Weisburd et al., *supra* note 66, at 12 (finding that fewer than 7% of NYPD stops led to arrests).

<sup>168</sup> CIVIL RIGHTS BUREAU, N.Y. STATE OFFICE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 1-3, 8-9 (2013), available at [http://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](http://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf), archived at <http://perma.cc/EYY5-GGEZ> (analyzing 150,000 arrests from the more than 2.4 million stops between 2009 and 2012).

<sup>169</sup> *Id.* (concluding that less than 1.5% of all stops led to prison sentences and that less than 0.3% of all stops led to sentences of more than 30 days imprisonment).

<sup>170</sup> Corman & Mocan, *supra* note 129, at 243 ("[T]he number of misdemeanor arrests increased somewhat in the early 1980s and then experienced a large, sustained increase around 1994."); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 629 fig.1, 630 (reporting on misdemeanor arrest numbers in NYC and concluding that "[b]etween 1993 and 2010 the number of misdemeanor arrests almost doubled").

rising tide of misdemeanor arrests did not increase incarceration rates, however, because the arrests were increasingly unlikely to result in prosecutions: “As arrests increased,” the “rate at which prosecutors declined to pursue these cases rose dramatically.”<sup>171</sup> Critically, the one policing measure that did not go up is the factor John Pfaff isolates as the key to understanding America’s incarceration binge: felony charges.<sup>172</sup> While stops escalated and misdemeanor arrests climbed, felony arrests in New York City went down, a development consistent both with the preventative policing tactics described above and the background crime decline.<sup>173</sup>

The numbers recounted above highlight a conceptual distinction between mass stop-and-frisk (and Broken Windows) as a form of “proactive” policing and more traditional, “reactive” or “911” policing.<sup>174</sup> In the traditional model, police take action after a crime is committed, and prosecutors attempt to deter future crimes by inflicting severe punishment upon the guilty individual. Reactive policing, thus, minimizes state-citizen coercion on the front end but

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<sup>171</sup> Fagan & Davies, *supra* note 40, at 476; *see also* N.Y. STATE DIV. OF CRIM. JUSTICE SERVS., NEW YORK CITY ADULT ARRESTS DISPOSED 5 fig.4 (2013), *available at* <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf>, *archived at* <http://perma.cc/WUR7-QMCU> [hereinafter NEW YORK ADULT ARRESTS] (reflecting case processing of arrests from 2008 to 2012); Kohler-Hausmann, *supra* note 170, at 642 (reporting marked decline in NYC misdemeanor convictions even as the rate of arrests climbed).

<sup>172</sup> John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106 (2013) (“At least since 1994, it appears that almost all the growth in prison populations has come from prosecutors’ decisions to file felony charges.”).

<sup>173</sup> NEW YORK CITY ADULT ARRESTS DISPOSED, *supra* note 171, at 2 fig.1 (reporting on the decline in total annual felony arrests of nearly 9,000 from 2008 to 2010); GREENE & MAUER, *supra* note 157, at 8 (highlighting the drop in felony arrests in New York City); JAMES AUSTIN & MICHAEL JACOBSON, HOW NEW YORK CITY REDUCED MASS INCARCERATION 6 (2013), *available at* [http://www.brennancenter.org/sites/default/files/publications/How\\_NYC\\_Reduced\\_Mass\\_Incarceration.pdf](http://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf), *archived at* <http://perma.cc/GL7L-N7XA> (proposing an explanation for reduced felony arrests in terms of policing strategy). In 2003, there were about 279,000 NYC arrests: 89,000 felony arrests and 190,000 misdemeanors. The number of arrests increased significantly by 2013; but the entire increase comes from misdemeanor arrests. N.Y. STATE DIV. CRIM. J. SERVS., ADULT ARRESTS: 2004-2013, *available at* <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkCity.pdf>, *archived at* <http://perma.cc/N6S2-EHVW>.

<sup>174</sup> *See* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 358-59 (2012) (“Urban police departments have shifted away from reactive or ‘911 policing,’ in which the primary role of patrol officers is to respond to crisis, and have turned instead to proactive strategies in communities identified as high-crime areas.”); Bratton, *supra* note 88 (contrasting “reactive policing” with NYPD tactics).

maximizes it on the back end, after conviction. By contrast, proactive policing like NYC Stop and Frisk tries to deter crime before unlawful conduct occurs. If successful, NYC Stop and Frisk's low-level interventions minimize subsequent serious offenses (and thus incarceration), while ratcheting up the degree of non-incarcerative coercion applied to innocent civilians.<sup>175</sup>

The contrast between proactive and reactive policing highlighted by NYC Stop and Frisk muddles the traditional academic conceptions of criminal justice policy. In particular, Herbert Packer's classic dichotomy between "due process" and "crime control" models of criminal justice fares poorly here.<sup>176</sup> Proactive mass-"stop and frisk" policing seems to fall squarely under a "crime control" conception of criminal justice. Yet, to the extent NYC Stop and Frisk leads to decreased convictions and incarceration, it elides one of Packer's criteria for success of that model, that "in order to operate successfully," the crime control model "must produce a high rate of apprehension and conviction . . ."<sup>177</sup> In light of its relative disinterest in formal sanctions, NYC Stop and Frisk suggests a third model distinct from "due process" and "crime control," something like "crime suppression" or "population control," that focuses not on punishing the guilty or fair process, but rather on making it so hard to commit crimes in the first place that the formal criminal justice system fades into insignificance.<sup>178</sup>

### C. Summary

The data presented above are alluring and unsettling. The facts suggest, at least tentatively, that mass stop-and-frisk, along with related aggressive policing strategies, while inflicting harmful privacy intrusions on a large swath of innocent citizens, may decrease violent crime and incarceration by deterring

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<sup>175</sup> This dichotomy resonates with Dan Kahan's criticism of "the opposition between [individual] rights and order-maintenance policies" that "yields longer terms of imprisonment" and thus "suggests the short-sightedness of civil libertarian opposition to order maintenance" because "[i]ncreasingly severe prison sentences are not only more expensive and less effective than order-maintenance policies; they are also much more destructive of individual liberty." Kahan, *supra* note 102, at 393-94; see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 4 (1997) (articulating link between enhanced criminal procedure rights and "overcriminalization, and oversentencing").

<sup>176</sup> See generally Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

<sup>177</sup> *Id.* at 10. The traditional reactive approach to policing that focuses on severely punishing the guilty after a serious crime is committed (and leaving everyone else alone), on the other hand, seems tailor-made to a "due process" model. Yet this approach too feels ill-suited to a model that, according to Packer, is characterized by "skepticism about the morality and the utility of the criminal sanction." *Id.* at 20.

<sup>178</sup> See *supra* note 37.



unlawful public gun possession. Given these tradeoffs, policymakers would be hard pressed to ascertain the proper course, as is evident from the acrimonious public debate surrounding the program.<sup>179</sup> While the debate is a robust one, it is unsatisfying because advocates on either side avoid the difficult question of tradeoffs by ignoring the evidence that NYC Stop and Frisk either reduces violent crime (or incarceration) or is applied in an oppressive, race-conscious manner.<sup>180</sup> The intervention of the federal courts introduces another variable. Most basically, if NYC Stop and Frisk is unconstitutional, the difficult policy questions may not need to be answered; in a society that adheres to the rule of law, an unconstitutional program offers only an illusory solution to the problem of crime.<sup>181</sup> As noted earlier, however, the stop-and-frisk tactic cannot itself be unconstitutional – it is, after all, the product of a Supreme Court case. Given the seemingly inviolate status of the 1968 *Terry* decision, the courts can only rule out certain ways of applying the tactic. Thus, it becomes critically

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<sup>179</sup> Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 12, 2013, at A1 (quoting Mayor Bloomberg's claim that enforcement of Judge Scheindlin's decision could lead to "a lot of people dying" and that "the judge did 'not understand how policing works'" and quoting a plaintiff in the lawsuit stating that "the stop-and-frisk policy criminalizes a whole race and community of people"); Harry Bruinius, *Stop-and-Frisk: NYC Council Overrides Bloomberg Vetoes, Curbing Policy*, CHRISTIAN SCI. MONITOR (Aug. 22, 2013), <http://www.csmonitor.com/USA/Politics/2013/0822/Stop-and-frisk-NYC-council-overrides-Bloomberg-vetoes-curbing-policy> archived at <http://perma.cc/8NAA-AD3J> (describing legislation enacted by City Council that establishes a new "inspector general" to monitor the police department and "allows citizens to sue the NYPD in state court if they believe they have been illegally profiled"); Erin Durkin & Adam Edelman, *New York City Police Department Commissioner Ray Kelly Blasts Stop-And-Frisk Ruling, Says Violent Crime Will Spike Under Proposed Reform*, N.Y. DAILY NEWS (Aug. 18, 2013, 9:59 PM), <http://www.nydailynews.com/news/politics/new-york-city-police-department-commissioner-ray-kelly-blasts-stop-and-frisk-ruling-violent-crime-spike-proposed-reforms-article-1.1430144#ixzz2iMwPjANk> (summarizing stop-and-frisk views of mayoral candidates); Heather Mac Donald, *How to Increase the Crime Rate Nationwide*, WALL ST. J. (June 11, 2013, 6:50 PM), archived at <http://perma.cc/83GL-KKM5> (expressing concern that Judge Scheindlin's ruling "could spell an end to a police practice that helped the city achieve an astonishing drop in violent crime").

<sup>180</sup> See, e.g., MAPLE, *supra* note 20, at 218-19 (downplaying harms of stops by analogizing to airline boarding and bookstore backpack checks); Heather Mac Donald, Op-Ed., *Fighting Crime Where the Criminals Are*, N.Y. TIMES, June 25, 2010, at A19 (contending that apparent racial disproportion in stops is explained by demographic characteristics of high crime areas); Scott Pilutik, *Frisk Assessment*, SLATE.COM (Aug. 19, 2013, 5:49 PM), archived at <http://perma.cc/U59B-5YFB> (contending that NYC Stop and Frisk is both unconstitutional and ineffective because police rarely find guns after stops).

<sup>181</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008)) (contending that police practices, if "unconstitutional . . . cannot be used, no matter how effective" since "[t]he enshrinement of constitutional rights necessarily takes certain policy choices off the table").

important to assess the connection (if any) between the effectiveness of NYC Stop and Frisk and its constitutionality. Identifying this connection will allow policymakers to determine whether the use of stop-and-frisk as a crime fighting strategy can be effectively adapted to constitutional parameters. The next Part examines this question.

### III. THE CONSTITUTIONALITY OF NYC STOP AND FRISK AS A CRIME-FIGHTING STRATEGY

After three months of testimony and argument in *Floyd v. City of New York*, Federal District Court Judge Shira Scheindlin ruled in August 2013 that NYC Stop and Frisk violated both the Fourth and Fourteenth Amendments to the United States Constitution.<sup>182</sup> As explained below, although Judge Scheindlin did not consider (or permit any evidence on) the effectiveness of NYC Stop and Frisk, consideration of the crime-fighting theory behind the program greatly strengthens her legal conclusions. In light of its deterrent purpose, NYC Stop and Frisk depends for its effectiveness on two related components that are hallmarks of unconstitutionality – arbitrary stops and “indirect” racial profiling. This important relationship between NYC Stop and Frisk’s effectiveness and its unconstitutionality is explored below. If, as these sections contend, the effectiveness of NYC Stop and Frisk is strongly tethered to its unconstitutionality, there is little hope for salvaging stop-and-frisk as an American policing strategy absent sweeping (and unlikely) changes to longstanding constitutional doctrine.

#### A. Fourth Amendment

The Fourth Amendment requires all police searches and seizures to be “reasonable.”<sup>183</sup> The main Fourth Amendment “reasonableness” hurdle to any deterrence-based crime-fighting strategy (like NYC Stop and Frisk) is the longstanding Supreme Court command that “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”<sup>184</sup> There are, in fact, few principles in Fourth Amendment doctrine as well

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<sup>182</sup> *Id.* at 658, 660.

<sup>183</sup> U.S. CONST. amend. IV; *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (“[T]he ultimate touchstone of the Fourth Amendment,’ we have often said, is ‘reasonableness.’”) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)); *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (“Our cases have recognized that the concept of reasonable suspicion is somewhat abstract.”); Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 37-39 (2011) (emphasizing malleability of Fourth Amendment rules interpreting reasonableness command).

<sup>184</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (stating that “some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure”).

established and widely trumpeted as the requirement of “individualized suspicion.” The phrase “individualized suspicion” dates back only to the 1970s,<sup>185</sup> but the underlying concept of requiring a showing that anyone searched or seized was (prior to the intrusion) reasonably suspected of an offense can be found in the constitutional text as well as in the history that animated it.<sup>186</sup> The Court has even described this concept as “the central teaching” of its “Fourth Amendment jurisprudence.”<sup>187</sup>

Defenders of NYC Stop and Frisk rely, of course, on *Terry*, arguing that a mass stop-and-frisk program can survive constitutional scrutiny if stops are based, as in *Terry* itself, on an officer’s reasonable suspicion that each person stopped is committing a crime (i.e., “individualized suspicion”).<sup>188</sup> Judge Scheindlin accepted the premise that *Terry* could be scaled indefinitely in this manner, but concluded that so many NYPD stops were arbitrary – in the sense that they did not depend on individualized suspicion – that the overall practice

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<sup>185</sup> See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 842-43 (2011) (discussing the birth of the term “individualized suspicion”).

<sup>186</sup> See U.S. CONST. amend. IV (stating that “no Warrants shall issue, but upon probable cause”); *Henry v. United States*, 361 U.S. 98, 104 (1959) (discussing underlying rationale of probable cause requirement); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 585, 632-33 (1995) (arguing that “individualized suspicion” was “considered [an] inherent characteristic[] of reasonable searches and seizures by the framers”).

<sup>187</sup> *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (emphasis removed) (citing *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)). The doctrine has been criticized by scholars and weakened by doctrinal exceptions (described below), but in the context of general crime control, this “central teaching” of Fourth Amendment doctrine is exceedingly well established. Clancy, *supra* note 186, at 549-584 (cataloguing Court’s exceptions to “individualized suspicion” requirement); Harcourt & Meares, *supra* note 185, at 851 (explaining that checkpoints or roadblocks serve as an exception to the individualized suspicion requirement). Harcourt and Meares point out that there is always some baseline suspicion of every human – perhaps as minimal as the capacity to commit crime – rendering “individualized suspicion” more a description of degree than kind. *Id.* at 847. But even if the requirement is viewed more precisely along these lines, it still imparts meaningful content. *Cf.* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE § 9.5(h) (5th ed. 2012) (citation omitted) (stating that “the more the [suspect] description . . . can be said to be particularized, in the sense that it could apply to only a few persons in the relevant universe, the better the chance of having at least sufficient grounds to make a stop”).

<sup>188</sup> Brief of Defendant-Appellant, *Floyd v. City of New York*, (No. 13-3088), 2013 WL 6698324 (2d Cir. Dec. 10, 2013), 1 (arguing in appeal of *Floyd* that the district’s court ruling should be reversed because, “the overwhelming majority of [NYPD] *Terry* stops comport with constitutional principles”); *cf.* Tracey L. Meares, *The Law and Social Science of Stop & Frisk*, 10 ANN. REV. L. & SOC. SCI. (forthcoming Dec. 2014) (stating that “to the extent that the NYPD was making clearly correct judgments under *Terry*, it would be much more difficult for the judge to conclude” that NYC Stop and Frisk was unconstitutional).

exceeded what is permitted under *Terry* and thus the Fourth Amendment. However, as Judge Scheindlin acknowledged, just how arbitrary NYPD stops had become “will almost certainly never be known.”<sup>189</sup> In fact, the limited evidence the district court had before it on this point illustrates one of the key weaknesses of its ruling.

To establish the arbitrariness of NYC Stop and Frisk, the *Floyd* plaintiffs asked Columbia law professor Jeffrey Fagan to analyze the U-250 forms filled out by NYPD officers documenting stops from 2004-2009.<sup>190</sup> Fagan deemed six percent of the documented stops “apparently unjustified.”<sup>191</sup> Judge Scheindlin, perhaps sensing that 6% was not as high as many critics of the program expected, described Fagan’s estimate as “very generous” and characterized it as a “very rough *minimum*” of the number of unconstitutional stops.<sup>192</sup> The judge emphasized that many of the stops that Fagan’s methodology accepted were based on “vague and subjective” grounds, such as “furtive movements,” “fits description,” and “high crime area.”<sup>193</sup>

Judge Scheindlin is surely correct that accepting officers’ stated explanations for stops, and including vague stop justifications under the rubric of reasonable suspicion, likely undercounts the number of unconstitutional stops. Perhaps most significant are the number of stops that were not documented at all.<sup>194</sup> Presumably officers are less likely to document legally shaky stops than legally sound ones. At the same time, Fagan’s methodology also must overcount the number of unconstitutional stops as his own label “*apparently* unjustified” indicates. Some portion of the six percent would likely pass muster if the officers were given an opportunity to fully explain the basis for the stops.<sup>195</sup> The other information available to Judge Scheindlin and researchers comes in the form of anecdotal evidence, including compelling

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<sup>189</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 583 (S.D.N.Y. 2013).

<sup>190</sup> *Id.* at 572 (“Plaintiff’s liability expert, Dr. Jeffrey Fagan, conducted various statistical analyses of UF-250s based on an electronic database containing the information on the forms.”).

<sup>191</sup> *Id.* at 559.

<sup>192</sup> *Id.* at 579.

<sup>193</sup> *Id.* at 578.

<sup>194</sup> *Id.* at 582-583 (“The problems with Dr. Fagan’s Fourth Amendment analysis of the UF-250s result not from analytical failures but from the inadequacy of the NYPD’s systems for identifying unjustified stops when they occur.”); SCHNEIDERMAN, *supra* note 112, at 21 (describing findings of the Civilian Complaint Review Board that in 2012, roughly twenty percent of stops for which the Board received complaints were not documented as required, “up from five percent in 2008”); *but see* Ridgeway, *supra* note 23, at 4, 9 (describing documenting of stops by observed officers and incentives for police documentation created by Compstat).

<sup>195</sup> *Cf.* MAPLE, *supra* note 20, at 116 (discussing variation in ability of officers to explain to courts and citizens the justifications for a stop).

accounts of people who were stopped without proper basis (including some of the plaintiffs in the *Floyd* litigation).<sup>196</sup> The accounts are not all from civilians. Judge Scheindlin gave “great weight” to audio recordings that capture supervisors urging officers to increase stop volume while expressing little regard for constitutional validity.<sup>197</sup> Other accounts in the media are similar: for example, a SCU officer told a reporter, “We frisk 20, maybe 30 people a day. Are they all by the book? Of course not.”<sup>198</sup> These anecdotes only go so far, however, as the NYPD could presumably provide competing anecdotes and testaments to lawful stops based on reasonable suspicion.

Importantly, the inability to pinpoint how many of the hundreds of thousands of NYPD stops were not based on “individualized suspicion” does not alter the symbiotic relationship between arbitrary (i.e., unconstitutional) stops and the efficacy of the mass stop-and-frisk strategy. NYC Stop and Frisk, if conceptualized as a program to deter gun-carrying, necessarily depends on stopping people without individualized suspicion. The theory justifying mass stop-and-frisk is that people will leave their guns at home to keep their weapons from being uncovered by an officer’s frisk. In this scenario, the likelihood of a frisk determines the deterrent effect. If a frisk can be avoided by avoiding criminal activity such as trespassing, public marijuana smoking or public urination, people can comfortably carry guns unlawfully so long as they obey (or think they will obey) other laws while doing so. Thus, a high volume of arbitrary frisks is essential to effectively deterring gun possession. The knowledge that a stop-and-frisk is almost inevitable powerfully deters gun possession.<sup>199</sup> The knowledge that police may stop you if they reasonably

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<sup>196</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 625-658 (S.D.N.Y. 2013) (deeming certain stop-and-frisks unlawful); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 492-510 (S.D.N.Y. 2013) (citing testimony of assistant district attorney, those individuals stopped by police officers, as well as expert witnesses); *Floyd*, 813 F. Supp. 2d at 425 (citing testimony of police officers); AG REPORT, *supra* note 9, at 77-79 (citing personal narratives of individuals stopped by police).

<sup>197</sup> *Floyd*, 959 F. Supp. 2d at 596.

<sup>198</sup> Kocieniewski, *supra* note 57.

<sup>199</sup> See *Floyd*, 959 F. Supp. 2d at 606 (describing testimony that asserts that Commissioner Kelly believed the goal of NYC Stop and Frisk is to instill fear); Fabricant, *supra* note 174, at 386 (reporting conversation with New York City residents who stated that “their oldest son and his friends were ‘thrown against the wall’ by police every time they left the apartment”); Butterfield, *supra* note 117 (reporting that in interviews with a dozen minority youths, all “knew of someone who had been stopped by the police — unfairly they thought — in recent months”); Kocieniewski, *supra* note 57 (quoting community leader who said that the community was grateful for the crime drop but displeased that “people are being stopped for no reason”); cf. Kahan, *supra* note 102, at 390 (drawing on concepts of social influence and social meaning to argue that “rights undermine deterrence”).

suspect you are committing or have committed a crime – the actual *Terry* standard – does not.

Viewing NYC Stop and Frisk as a crime-fighting strategy (as opposed to thousands of unrelated, isolated events) reveals not only its inability to fit within the Fourth Amendment’s “individualized suspicion” framework, but also highlights its similarities to crime-fighting strategies previously rejected by American courts. Perhaps the most recent analogues involve vaguely worded loitering laws that the Supreme Court routinely struck down during the Civil Rights era (and in Chicago more recently) as riding too much on the “the moment-to-moment judgment of [a] policeman on his beat.”<sup>200</sup> Going further back in history, a legal regime that permits widespread, discretionary stops based on demographic characteristics or geographic location bears an unflattering resemblance to the “general warrant” – the primary historical evil targeted by the Fourth Amendment.<sup>201</sup>

A glimmer of hope for proponents of NYC Stop and Frisk resides in the Court’s repeated hedging (“usually,” “ordinarily”) in its recitations of the “individualized suspicion” requirement;<sup>202</sup> these caveats stem from the so-called “special needs” exception, through which government interests beyond normal law enforcement expand the parameters of Fourth Amendment

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<sup>200</sup> *City of Chi. v. Morales*, 527 U.S. 41, 60, 64 (1999) (striking down Chicago street gang ordinance that “affords too much discretion to the police and too little notice to citizens”); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972) (striking down vagrancy statute that provided “unfettered discretion” to the police); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (striking down loitering statute that “does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat”); *Cox v. Louisiana*, 379 U.S. 536, 544-45 (1965) (striking down breach of peace statute as being unconstitutionally broad in scope); *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963) (reversing criminal convictions that “cannot be squared with the Fourteenth Amendment of the United States Constitution”); *Fields v. South Carolina*, 375 U.S. 44 (1963) (remanding case for consideration in light of *Edwards*).

<sup>201</sup> *Henry v. United States*, 361 U.S. 98, 100 (1959) (contrasting “requirement of probable cause” which “has roots that are deep in our history” with “[t]he general warrant, in which the name of the person to be arrested was left blank” and “writs of assistance,” which “both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion”); *see Steagald v. United States*, 451 U.S. 204, 219-20 (1981) (discussing general warrants).

<sup>202</sup> *See City of Indianapolis v. Edmond*, 531 U.S. 32, 87 (2000) (“A search or seizure is *ordinarily* unreasonable in the absence of individualized suspicion of wrongdoing.” (emphasis added)); *United States v. Martinez-Fuerte*, 428 U.S. 542, 560 (1976) (“The defendants note correctly that to accommodate public and private interests some quantum of individualized suspicion is *usually* a prerequisite to a constitutional search or seizure.” (emphasis added)).

“reasonableness.”<sup>203</sup> Given the scale of NYC Stop and Frisk, it is, in fact, tempting to analogize the practice not to a single *Terry* stop, but to programmatic checkpoints approved under the “special needs” rubric. The Supreme Court only approves checkpoints in narrow contexts, however, such as at (or near) international borders<sup>204</sup> or for traffic-related investigations.<sup>205</sup> It is well settled that suspicionless checkpoints “whose primary purpose [is] to detect evidence of ordinary criminal wrongdoing” – such as unlawful gun possession – are unconstitutional.<sup>206</sup> Even the most permissive checkpoint case, *Illinois v. Lidster*,<sup>207</sup> simply highlights this doctrinal exception’s inapplicability to NYC Stop and Frisk. In *Lidster*, the Court rejected a challenge to a vehicle checkpoint intended to investigate a hit-and-run. The Court characterized the checkpoint as an “information-seeking highway stop[,]” analogous to unthreatening police activities like “crowd control” that do not “involve[] suspicion, or lack of suspicion, of the relevant individual,” are “less likely to provoke anxiety” or “to prove intrusive,” and to which stopped “citizens will often react positively.”<sup>208</sup> NYC Stop and Frisk possesses none of these characteristics.

In sum, even if the precise number of unconstitutional stops is uncertain, the disconnect between NYC Stop and Frisk and the Fourth Amendment could not be clearer. Arbitrary stops intended to deter gun carrying maximize the deterrent effect of NYC Stop and Frisk. Such stops also clearly violate “the

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<sup>203</sup> *Edmond*, 531 U.S. at 37. See Capers, *supra* note 103, at 44 (arguing that “non-discretionary, race-free stops” should be permitted under the special needs exception even in routine criminal law enforcement).

<sup>204</sup> See *Martinez-Fuerte*, 428 U.S. at 543 (holding that police may stop a vehicle at a fixed checkpoint near the United States border with Mexico even without a reason to believe the vehicle contains illegal aliens).

<sup>205</sup> See, e.g., *Edmond*, 531 U.S. at 41 (stating that each approved checkpoint program was “designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety”); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453 (1990) (finding that checkpoints that stop every approaching vehicle are “for constitutional purposes indistinguishable from the checkpoint stops” upheld in *Martinez-Fuerte*).

<sup>206</sup> *Edmond*, 531 U.S. at 41.

<sup>207</sup> 540 U.S. 419, 423 (2004) (distinguishing between an unconstitutional checkpoint designed to determine “whether a vehicle’s occupants were committing a crime” and a checkpoint intended to “ask vehicle occupants for their help in providing information about a crime in all likelihood committed by others”).

<sup>208</sup> *Id.* at 420, 424-25; Bar-Gill & Friedman, *supra* note 2, at 1620 (arguing that “[i]t is difficult to reconcile” *Edmond* and *Lidster*); see also *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (ruling that state hospital’s drug tests violated the Fourth Amendment because the “primary purpose” hinged on the use of “the threat of arrest and prosecution in order to force women into [drug] treatment,” and consequently fell outside “the closely guarded category of ‘special needs’”).

general rule that a seizure must be accompanied by some measure of individualized suspicion.”<sup>209</sup> As a result, the effectiveness of NYC Stop and Frisk and its constitutionality are inversely proportional. A widespread practice of stopping people may successfully deter gun possession, but only if stops are perceived as largely unavoidable. Yet, unavoidable pedestrian stops intended to detect (or deter) “ordinary criminal wrongdoing” are unconstitutional under longstanding, deeply rooted Fourth Amendment doctrine.<sup>210</sup>

B. *Fourteenth Amendment*

The NYPD’s use of stop-and-frisk to deter people from carrying weapons runs afoul of another constitutional provision: the Fourteenth Amendment’s Equal Protection Clause.<sup>211</sup> If the NYPD spread stop-and-frisk evenly across demographic groups, it would still violate the Fourth Amendment as described above, but not the Fourteenth Amendment. The evidence reveals that the NYPD does not, however, stop everyone who could be stopped under *Terry*’s “reasonable suspicion” standard. After all, *Terry* applies not only when police possess reasonable suspicion that someone is committing a felony, but also when police reasonably suspect a misdemeanor.<sup>212</sup> (One of the primary crimes used to justify a stop is trespassing.)<sup>213</sup> Combining the vague “reasonable suspicion” standard with the vast panoply of unlawful conduct results in broad police discretion in deciding whom to stop and frisk.<sup>214</sup> As Judge Scheindlin found, the NYPD exercised this discretion by focusing its efforts on stopping and frisking people who fell into certain demographic categories.<sup>215</sup> The finding cannot be a surprise. The NYPD admitted as much.

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<sup>209</sup> *Edmond*, 531 U.S. at 41.

<sup>210</sup> *Id.*

<sup>211</sup> U.S. CONST., amend. XIV, § 1.

<sup>212</sup> N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2014) (stating that a police officer may stop a person when he “reasonably suspects that such person is committing, has committed, or is about to commit either (a) a felony or (b) a misdemeanor”); AG REPORT, *supra* note 9, at 58; RIDGEWAY, *supra* note 23, at 8 (reporting that documented stops range from “minor offenses” such as “scalping tickets” and “riding a bicycle on the sidewalk” to “more serious suspected crimes” such as murder).

<sup>213</sup> Fabricant, *supra* note 174, at 362-63 (describing “widespread pattern of arbitrary arrests for criminal trespass” in NYC); Rivera et al., *supra* note 69 (describing NYPD’s heavy reliance on minor violations to justify stops, particularly violations of rules governing public housing projects).

<sup>214</sup> *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 539 (2001) (stating that “if crime is defined broadly enough, police can stop or arrest whomever they wish” and that quality of life crimes, in particular, “will only rarely be prosecuted, but . . . often serve as a convenient basis for . . . a search”).

<sup>215</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 561 (S.D.N.Y. 2013) (stating that the NYPD had a policy that encouraged “the targeting of young black and Hispanic men



Statistical analysis performed for the *Floyd* trial revealed that “within any area” of New York City, “regardless of its racial composition, blacks and Hispanics are more likely to be stopped than whites.”<sup>216</sup> The City’s response to these statistics was that “the apparently disproportionate stopping of blacks and Hispanics can be explained . . . by racial differences in crime rates.”<sup>217</sup> Judge Scheindlin noted the problematic legal status of that argument given that the overwhelming proportion of *all* demographic populations commit no serious crimes<sup>218</sup> and highlighted the testimony of two senior NYPD officers to reveal what this defense actually entailed. According to the officers, “within the pool of people displaying reasonably suspicious behavior, those who fit the general race, gender, and age profile of the criminal suspects in the area should be particularly targeted for stops.”<sup>219</sup> The officers’ contentions were not gaffes, but flesh out the more generally stated official explanations, described in Part I, that the demographics of stops designed to detect or deter gun violence should logically match the demographics of perpetrators of NYC gun crime, who (the NYPD says) happen to be largely black or Hispanic.<sup>220</sup> Notably missing, however, from the demographic-of-gun-crime explanation for the disproportionate racial impact of NYC Stop and Frisk is any articulation of *the mechanism for how officers achieve this match*. The missing explanation can only be that police factor the relative rate of gun violence among demographic groups into their determination of whom to stop. Looking first at gender, the mechanism seems fairly obvious. If the goal is deterring gun possession to minimize violent crime, and the NYPD cannot stop everyone, stopping males (over 90% of murderers) takes priority over stopping females.<sup>221</sup> Age can play a similar role.<sup>222</sup>

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based on their prevalence in local crime complaints”).

<sup>216</sup> *Id.* at 589.

<sup>217</sup> *Id.* at 591.

<sup>218</sup> *Id.* at 560; *cf.* *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (rejecting stop based on Mexican ancestry in border area because “[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens”); Roberts, *supra* note 2, at 802 (discussing problems inherent in a legal framework that assumes that police can distinguish *ex ante* between “law-abiders and law breakers”).

<sup>219</sup> *Floyd*, 959 F. Supp. 2d at 605.

<sup>220</sup> *See supra* note 95 (discussing the notion that the demographics of those stopped should match the demographics of those suspected in shootings); *cf. Floyd*, 959 F. Supp. 2d at 603 (explaining that the NYPD’s policy of targeting “the right people” leads to “disproportionate stopping” of young black and Hispanic youths).

<sup>221</sup> *See* NYPD, MURDER IN NEW YORK CITY: 2012, at 9 (indicating that 93% of murder suspects were men), available at [www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/murder\\_in\\_nyc\\_2012.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf), archived at <http://perma.cc/BU9U-ZDD5>. Disproportionate stops by gender could also trigger an Equal Protection challenge. *Cf. Miss. Univ. for Women v. Hogan*, 458 U.S. 718,

Profiling becomes most controversial when applied to race. A policing memoir by one of Bratton's key deputies and the driving force behind Compstat, the late Jack Maple, articulates the prioritization concept in discussing the need for the NYPD to be "selective about who we were arresting for quality-of-life violations":

A bunch of young Wall Street analysts doing Jell-O shots during a pub crawl along Madison Avenue may be just as likely to piss in the street as a crew of robbers drinking malt liquor on a corner in East New York . . . . But only one of those groups is going to include somebody who's . . . carrying a nine in their waistband.<sup>223</sup>

The example may not mention race, but the racial overtones are clear. Over a decade after Maple's account, officers testifying in the *Floyd* trial made the racial component explicit.<sup>224</sup> Given resource constraints, profiling based on gender, age *and* race seemed perfectly logical to the NYPD, and that is presumably why senior officers acknowledged the practice, and officials voiced this rationale in the media: "it's not racism, just statistics."<sup>225</sup> Rhetorically, the argument scored some points, but constitutionally it was an utter failure. In essence, the NYPD confessed to an Equal Protection violation.

Although the ultimate conclusion seems inescapable, laying out the proper application of Equal Protection doctrine to NYC Stop and Frisk is murky both in terms of explaining what existing doctrine is, and what it should be. Broad denouncements of "racial profiling" are easy; articulating precise limits on the use of race in policing is hard.<sup>226</sup> Accordingly, there is little doctrine on the application of the Equal Protection Clause in this context and sparse academic

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723 (1982) (finding Equal Protection violation based on discrimination against males seeking admission to state nursing program).

<sup>222</sup> NYPD *supra* note 221, at 11 (indicating that 79% of murder suspects were between 16 and 37 years old); *see also* Corman & Mocan, *supra* note 129, at 247 n.30 (reporting youth crime statistics); Harcourt, *supra* note 86, at 1308 (using example of age-based profiling to illustrate that "criminal profiling probably 'works'" in increasing "the success rates of searches").

<sup>223</sup> MAPLE, *supra* note 20, at 155. Maple's answer to who has the gun is the latter group. *Id.*

<sup>224</sup> *Floyd*, 969 F. Supp. 2d at 603-04 (citing testimony of NYPD acknowledging that they target blacks and Hispanics).

<sup>225</sup> *See* Harcourt, *supra* note 86, at 1291 (describing economic literature contrasting "statistical discrimination" with "racial animus").

<sup>226</sup> *See* Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 263-64 (2002) (articulating the difficulty of applying Equal Protection analysis to use of race in policing); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2162-63 (2002) (recognizing that assessing the permissible contours of "[r]acial or ethnic profiling" in policing "is, to say the least, hard" and may be "impossible").

commentary.<sup>227</sup> Perhaps the closest Supreme Court decision is *Johnson v. California*,<sup>228</sup> where the Court reviewed a challenge to the California Department of Corrections' "unwritten" policy of temporarily segregating inmates based on race.<sup>229</sup> The Court concluded that such a policy constituted a "racial classification" that triggered "strict scrutiny," the most searching level of judicial review.<sup>230</sup> Rejecting claims that prison rules should be reviewed more deferentially, the Court emphasized that "'all racial classifications,'" even "so-called 'benign' racial classifications" (e.g., affirmative action) must be strictly reviewed by courts to "'smoke out' illegitimate uses of race."<sup>231</sup> In light of the prominent racial component of NYC Stop and Frisk revealed in the statistical analysis and testimony in *Floyd*, the same conclusion is inescapable here. Strict scrutiny applies. The program can only pass constitutional muster if it is "narrowly tailored" to a "compelling interest."<sup>232</sup>

As indicated above, Judge Scheindlin agreed that NYC Stop and Frisk employs a "racial classification" and was consequently subject to strict scrutiny. In a second weakness of the opinion, however, Judge Scheindlin failed to actually apply the standard beyond asserting summarily that NYC Stop and Frisk "cannot withstand strict scrutiny."<sup>233</sup> Judge Scheindlin appeared

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<sup>227</sup> See Alschuler, *supra* note 226, at 266 (criticizing lack of academic writing on the topic and characterizing Supreme Court doctrine in the area "as a federal disaster area"); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1417 (2002) (explaining that "equal protection law in this area is not well developed"); Harcourt, *supra* note 86, at 1279, 1334-35, 1347 (criticizing "courts and many commentators" for failing to address "the hard question of race in policing," and proposing a three part test analogous to the *Batson* framework for determining when using race in policing violates the Constitution); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1362 (2011) (criticizing the Supreme Court's failure to explain Equal Protection analysis in the important context of race and criminal investigations).

<sup>228</sup> 543 U.S. 499 (2005).

<sup>229</sup> *Id.* at 502 (reviewing an unwritten policy of "racially segregating prisoners . . . for up to 60 days each time they enter a new correctional facility").

<sup>230</sup> *Id.* at 509.

<sup>231</sup> *Id.* at 505-06.

<sup>232</sup> *Id.* at 514; *Parents Involved in Community Schs. v. Seattle Sch. District No. 1*, 551 U.S. 701, 720 (2007) ("In order to satisfy [strict scrutiny], the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is 'narrowly tailored' to achieve a 'compelling' government interest.").

<sup>233</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 663 (S.D.N.Y. 2013); see also *Parents Involved*, 551 U.S. at 720 (stating that "when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.").

to either assume incorrectly that strict scrutiny is “strict in theory, but [always] fatal in fact,”<sup>234</sup> or rely on quotations from disproportionate impact cases that short circuit the analysis when a policy is based on racial animus and thus serves no compelling interest whatsoever.<sup>235</sup> A more cynical explanation for the district court’s failure to apply strict scrutiny to NYC Stop and Frisk is that the court may have felt practically precluded from doing so after deeming inadmissible much of the evidence necessary to the determination. Early in the case, Judge Scheindlin emphasized that the Constitution (and particularly the Fourth Amendment) is not concerned with policing efficacy, ruling, “I will not take the crime statistics in this trial. Whether it reduces crime or not is not my concern.”<sup>236</sup> The judge stuck to this ruling throughout the proceedings, insisting repeatedly that “the effectiveness of stop and frisk is not at issue.”<sup>237</sup> These rulings, while sensible in the Fourth Amendment context, largely deprived the City of its opportunity, for Equal Protection purposes, to show, if it could, that NYC Stop and Frisk was narrowly tailored to a compelling interest. Having barred evidence on the program’s effectiveness, the district court placed itself in a difficult position for its own strict scrutiny analysis – a position it may have finessed by omitting the analysis altogether.

The starting point for the omitted strict scrutiny analysis is that New York City can certainly assert a “compelling interest” in preventing gun violence.<sup>238</sup>

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<sup>234</sup> Compare *Floyd*, 959 F. Supp. 2d at 663 (stating without analysis that “the City’s policy of indirect racial profiling cannot withstand strict scrutiny”), with *Johnson*, 543 U.S. at 514 (“Strict scrutiny is not ‘strict in theory, but fatal in fact.’”)

<sup>235</sup> *Floyd*, 959 F. Supp. 2d at 663 (citing *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 1999)). Even if, as Judge Scheindlin ruled in the alternative, the policy was facially neutral but applied in a discriminatory manner, i.e., based on racial stereotypes derived from “criminal suspect data,” that means only that the policy must be subjected to strict scrutiny, not (as Judge Scheindlin suggests) that it simply fails. *Id.* at 660-61 (“Racial profiling constitutes intentional discrimination in violation of the Equal Protection Clause if it involves any of the following: . . . the application of facially neutral criminal laws or law enforcement policies ‘in an intentionally discriminatory manner’ . . .”). Neutral policies applied in a discriminatory manner will often violate the Equal Protection Clause, but they are not subject to a more stringent standard than *express* racial classifications. See *Miller v. Johnson*, 515 U.S. 900, 913-14 (1995) (stating that “statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object”).

<sup>236</sup> See Transcript of Hearing at 58, *Floyd*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (granting plaintiff’s motion to exclude evidence of effectiveness of stop and frisk).

<sup>237</sup> See *Floyd*, 959 F. Supp. 2d at 556 (stating that “this case is not about the effectiveness of stop and frisk”); *id.* at 577 (declaring that “the effectiveness of stop and frisk is not at issue in this case, as I have repeatedly explained”).

<sup>238</sup> See *Johnson*, 543 U.S. at 514 (2004) (suggesting that “prison safety” is a compelling interest); *Terry v. Ohio*, 392 U.S. 1, 22 (1967) (recognizing importance of “general

The harder question is whether the City could demonstrate that its mass stop-and-frisk program was “narrowly tailored” to that interest. Although we do not know exactly what evidence the City might have introduced on this question, the showing likely would not have been any stronger than the empirical data sketched in the preceding sections. Those numbers help the City’s case, but the empirical connections are cloudy and confounded by countless variables; consequently, there is no scholarly consensus as to NYC Stop and Frisk’s contribution to the City’s dramatic violent crime drop. Further, even if some degree of stop-and-frisk is efficacious, that does not mean that the extraordinary volume of stops employed by the NYPD can be justified. There is surely a saturation point at which the practice, and particularly its racial emphasis, reaches diminishing utility, and some evidence that the point has already been reached.<sup>239</sup> Under strict scrutiny analysis, the burden of proof is borne by the proponent of race-conscious policing. Thus, the weight of the empirical uncertainty falls squarely on the City.<sup>240</sup> Absent a far more compelling empirical case, proponents of NYC Stop and Frisk cannot carry their “heavy burden of justification.”<sup>241</sup> The conclusion sketched out above fits well with intuitive notions of what is and is not permitted under the Constitution. If the NYPD’s broad, statistically driven justification for racially tailored stop-and-frisks survived constitutional scrutiny, so too would analogous justifications for racially tailored arrests, prosecutions, and sentences – indisputably *unequal* application of the laws. Given the history of race in America, the bare minimum justification required for any policy along those lines would be ironclad empirical support for the necessity and efficacy of such practices, something that is currently missing for NYC Stop and Frisk and will almost always be absent in analogous circumstances. Thus, Justice Scalia’s dicta in *Whren v. United States*<sup>242</sup> – that the Constitution forbids “selective enforcement of the law based on considerations such as race” – is an incomplete, but effective, shorthand summary of the extraordinary difficulty of establishing the constitutionality of race-conscious policing strategies.<sup>243</sup> The

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interest . . . of effective crime prevention and detection”); Harcourt, *supra* note 86, at 1349 (“Fighting crime—actually reducing crime—would qualify as a compelling state interest.”).

<sup>239</sup> See Fagan et al., *supra* note 144, at 333 (raising the possibility that NYC Stop and Frisk exceeded its “optimal level” well before 2011). In this respect, the NYPD may be a victim of its own success. The City’s dwindling violent crime rate severely undermines the justification for NYC Stop and Frisk.

<sup>240</sup> *Johnson*, 543 U.S. at 505 (“Under strict scrutiny, the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’”).

<sup>241</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

<sup>242</sup> 517 U.S. 806 (1996).

<sup>243</sup> *Id.* at 813; see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (stating that “the decision whether to prosecute may not be based on ‘an unjustifiable standard such as

powerful intuitive appeal of the above-described interpretation of the Equal Protection Clause suggests that it too, like the “individualized suspicion” Fourth Amendment standard, presents an impenetrable constitutional barrier to the crime-fighting strategy underlying NYC Stop and Frisk.

Importantly, the constitutional violation described above is not incidental to, or an unintended byproduct of, NYC Stop and Frisk. Instead, the violation is a critical ingredient of the crime-fighting strategy. In this case, targeting a certain demographic – primarily young, male, black New Yorkers – overcomes the resource constraints that otherwise render any deterrent effect of NYC Stop and Frisk out of reach. Over eight million people live in New York City, and many more stream in from suburbs for work each day.<sup>244</sup> Even with 34,500 officers,<sup>245</sup> the NYPD could never stop and frisk a high enough percentage of this enormous population to create a significant risk of detection for any particular gun-possessing New Yorker on any given trip outside.

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race”); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (invalidating facially neutral law due to its “administration . . . so exclusively against a particular class of persons as to warrant and require the conclusion, that, . . . they are applied by the public authorities . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of . . . equal protection of the laws”); *Marshall v. Columbia Lea Reg’l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) (“Racially selective law enforcement violates this nation’s constitutional values at the most fundamental level . . .”); *cf. Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (implying that successful claims could be made if the plaintiffs had shown that police questioned pursuant to a “regular policy” “all black Oneonta residents . . . whenever a violent crime is reported”); KENNEDY, *supra* note 96, at 161 (arguing that the law should permit “police to engage in racially discriminatory investigative conduct only on atypical, indeed extraordinary, occasions in which the social need is absolutely compelling: weighty, immediate, and incapable of being addressed sensibly by any other means”); Gross & Barnes, *supra* note 20, at 744 (“The use of race as a factor in decisions to stop, search, or arrest is clearly prohibited by the Equal Protection Clause . . .”); Roberts, *supra* note 2, at 821 (stating that “the changed conditions of American social and political life require a constitutional jurisprudence that recognizes how seemingly color blind laws continue to produce glaring racial inequities in the criminal justice system,” particularly “the social influence of police conduct that perpetuates stereotypes of Black criminality”); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 328 (2001) (“Certainly police can consider race where a physical description is provided, but absent that factor, or other self-limiting factors, race cannot be considered in the decision to stop, detain, or search.”); *but see* Harcourt, *supra* note 86, at 1373 (arguing that “[t]he idea that ‘it is plainly unconstitutional to use race as a criterion for choosing who to stop or search’ is an exaggeration”).

<sup>244</sup> *State and County QuickFacts*, U.S. CENSUS BUREAU (last modified July 8, 2014), archived at <http://perma.cc/D6K2-CW2B> (estimating that over eight million people live and work in New York).

<sup>245</sup> *NYPD – Frequently Asked Questions*, *supra* note 24.

One way to overcome this logistical obstacle to achieving the desired deterrent effect is to narrow the target population. Importantly, the narrowing requires some characteristic that officers can discern visually from afar. Gender, age, and – often – race fit these parameters. The other key ingredient is NYPD statistics that purport to show that suspects in the thousand or so yearly City shootings are overwhelmingly black and Hispanic.<sup>246</sup> The apparent statistical correlation between race and New York gun violence presented the NYPD with a workable (if unconstitutional) shortcut to deter many of what it considered to be the “right people” from carrying guns, at a fraction of the resource costs.<sup>247</sup> By primarily stopping blacks and Hispanics, officers could (according to NYPD statistics) create a disincentive to over 90% of the people involved in unlawful shootings while routinely stopping and frisking a mere subset of the City’s enormous population.<sup>248</sup> Thus, the effectiveness of NYC Stop and Frisk as a crime fighting strategy depends on an unconstitutional shortcut, rendering the strategy’s effectiveness, once again, inversely proportional to its constitutionality.

### C. Summary

The NYPD’s embrace of a citywide strategy of mass stop-and-frisk to deter gun possession and thus gun violence can, perhaps, be defended on public policy grounds. But even NYC Stop and Frisk’s most ardent defenders must recognize that the policy necessary to achieve these deterrence goals cannot be reconciled with longstanding and deeply rooted interpretations of basic constitutional rights. NYC Stop and Frisk only deters gun carrying if stops are seen as largely unavoidable by those who seek to unlawfully carry guns. The only way to achieve this perception is for line officers to move beyond what is permitted under *Terry* (in violation of the Fourth Amendment) and, given

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<sup>246</sup> See *supra* note 96 (citing statistics that indicate that the majority of suspects in New York City shootings are black); CRIME AND ENFORCEMENT 2012, *supra* note 8, at 11 (providing statistics showing the same); *supra* note 124 (shootings); *but see* Roberts, *supra* note 2, at 807 (emphasizing that racial profiling fails to acknowledge “that most Blacks do not commit crimes”).

<sup>247</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 603 n.280 (S.D.N.Y. 2013) (“NYPD personnel of diverse ranks repeated variations on this phrase [“right people”] throughout the trial.”); Fagan et al., *supra* note 144, at 336 (providing estimates of the likelihood of young NYC males being stopped each year by race).

<sup>248</sup> See *supra* note 96 and accompanying text (discussing NYPD “shootings” statistics). Focusing on minorities may have also delayed political blowback. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1714 (2010) (stating that “the less affluent urban communities that are typical targets and beneficiaries of order maintenance policing tend to enjoy comparatively less political power”); Jeffrey Rosen, *Excessive Force*, NEW REPUBLIC, April 10, 2000, at 24 (arguing that if the NYPD applied its tactics to the wealthy, protests would erupt on Park Avenue, “which is why it will never happen”).

resource constraints, target stops to certain demographic groups (violating the Equal Protection Clause). In short, a massive stop-and-frisk program implemented to deter gun possession, like that in New York City, can be constitutional or effective, but not both. If effective and constitutional crime control is the goal, NYC Stop and Frisk must be abandoned and replaced with something new.

#### CONCLUSION

Former and current NYPD Commissioner William Bratton provides an anecdote in his memoir of his early days as NYPD Commissioner. Bratton asked around the department for ideas on what could be done to reduce crime. One suggestion emphasized the constitutional constraints that limit the police: ““You give me fifty men and suspend the Constitution, I’ll reduce crime.””<sup>249</sup> Bratton dismisses the suggestion, but the sentiment highlights a central tension in policing: the Constitution is not window dressing, but actually restricts the universe of effective crime fighting strategies.<sup>250</sup> Despite Bratton’s disclaimer, the NYPD may have actually hit upon one of these forbidden practices that, while effective, are off limits.

This is not to say that Bratton or any other NYPD Commissioner consciously chose to make a citywide gun deterrence strategy out of the *Terry* stop-and-frisk. In hindsight, a decentralized evolution of an unconstitutional practice makes more sense than a centralized one. (Lawyers are less prevalent in squad cars than Commissioners’ offices.) But the source of NYC Stop and Frisk is not the issue. Whether or not it benefited from any centralized push, NYC Stop and Frisk became an integral component of the fight against crime in the late 1990s and continues to be a significant, if substantially reduced, part of NYC policing (and policing in other American cities) even after court intervention in the summer of 2013.<sup>251</sup>

Whatever history’s ultimate verdict, with NYC Stop and Frisk falling out of favor with voters, politicians, and courts, the NYPD and other jurisdictions that copied New York’s approach require a new policing strategy. Critical to this reevaluation is the recognition that the widespread use of stop-and-frisk was not an effective program implemented in an unconstitutional manner. Instead,

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<sup>249</sup> BRATTON, *supra* note 20, at 202.

<sup>250</sup> *See, e.g.*, *Henry v. United States*, 361 U.S. 98, 104 (1959) (“Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.”); *United States v. Di Re*, 332 U.S. 581, 595 (1948) (stating that “the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment”).

<sup>251</sup> Dwyer, *supra* note 14 (describing the precipitous decline in reported stops to 3,000 in October 2013).



it was an inherently unconstitutional approach to crime fighting that probably “worked” precisely because of the very aspects that render it unconstitutional. The NYPD brought a taste of prison to the street, putting thousands of innocent New Yorkers through the types of invasive scrutiny one would expect in confinement. It would not be surprising if this practice reduced both crime and incarceration, but it also cannot be surprising that the Constitution, if it prohibits anything, bars policing strategies like NYC Stop and Frisk.