

# Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident

Tracey L. Meares<sup>†</sup>

*This Essay takes seriously the relevance of law enforcement effectiveness and the role of empiricism in understanding the constitutionality of the police practices at issue in the Floyd case and urban police practices more generally; it also recasts the debate a bit. A critical but obscured issue is the mismatch between the level of analysis at which the Supreme Court articulated the relevant test for constitutional justification of a stop-and-frisk in Terry v Ohio and the scale at which police today (and historically) engage in stop-and-frisk as a practice. To put this more succinctly, while the Court in Terry authorized police intervention in an individual incident—when the police officer possesses probable cause to believe that an armed individual is involved in a crime—in reality, stop-and-frisk typically is carried out by a police force en masse as a program. Although the constitutional framework is based on a one-off investigative incident, many of those who are stopped—the majority of them young men of color—do not experience the stops as one-off incidents. They experience them as a program to police them as a group, which is, of course, the reality. That is exactly what police agencies are doing. Fourth Amendment reasonableness must take this fact into account. I make an argument here about how we should approach this issue.*

## INTRODUCTION

For just under a decade, the NYPD engaged in a deliberate program of stopping and frisking individuals throughout the city, concentrated in certain areas, for the stated purpose of suppressing crime. Throughout this period of aggressive policing, the number of police stops increased from 160,851 in 2003 to a peak of 685,724 in 2011.<sup>1</sup> The program came to a screeching

---

<sup>†</sup> Walton Hale Hamilton Professor of Law, Yale Law School. I am grateful to David Sklansky, Ben Justice, James Forman, Bennett Capers, Miriam Gohara, Jeff Fagan, Issa Kohler-Hausmann, Tom Tyler, and participants at the 2014 University of Chicago Law Review Symposium for comments on an earlier draft. Matt Specht provided research assistance. All errors are my own.

<sup>1</sup> *Stop-and-Frisk Data* (New York Civil Liberties Union, 2014), archived at <http://perma.cc/Z5XK-FXFR>. Note that these counts are of stops, not of particular individuals stopped. Analysis indicates that some New Yorkers necessarily were stopped multiple times in a year. See Report of Jeffrey Fagan, PhD, *Floyd v City of New York*, 08 Civ 01034 (SAS), \*22 (SDNY filed Oct 15, 2010) (“Fagan Report”) (indicating that, of the

halt on August 12, 2013, when Judge Shira Scheindlin issued a ruling in *Floyd v City of New York*,<sup>2</sup> holding that the NYPD had engaged in a practice of unconstitutional stops and frisks.<sup>3</sup> By the end of 2013, the NYPD posted fewer than 200,000 stops, down from more than half a million the year prior.<sup>4</sup> Between 2011 and 2013, New York City's homicide count declined by 35 percent.<sup>5</sup>

The relationship between the NYPD's program and the city's astonishing decline in crime was a focal point in the national debate about the Stop, Question, and Frisk (SQF) strategy, even though as a legal matter the issue remained on the sidelines.<sup>6</sup> The NYPD and former New York City mayor Michael Bloomberg claimed that SQF was a good policy choice because it reduced violent crime by deterring people from carrying guns.<sup>7</sup> The *Floyd* plaintiffs alleged that the stops and frisks were part of a policy and practice that violated the Fourth and Fourteenth Amendments of the US Constitution.<sup>8</sup> Those supporting the defendants responded that the stops were consistent with the law and that the high number of stops and frisks—especially those in the city's higher-crime areas—kept crime low, largely benefiting the very people who were complaining.<sup>9</sup>

This back and forth raises a question: Is there a way to understand the relevance of SQF's effectiveness to the policy's constitutionality? Some argue that taking this question seriously would result in the flagrant disregard of individual rights. Suppose that the law promoted a thoroughgoing commitment to ensuring effective criminal-law enforcement no matter the constitutional constraint by disengaging the exclusionary rule in every

---

people stopped between 2004 and 2009, 89 percent were male, 49 percent were under the age of 25, and 52 percent were African American).

<sup>2</sup> 959 F Supp 2d 540 (SDNY 2013).

<sup>3</sup> Id at 562. Scheindlin held that the NYPD program violated thousands of individuals' rights under the Fourth and Fourteenth Amendments of the US Constitution. Id.

<sup>4</sup> See Joe Coscarelli, *Stop-and-Frisk Problem 'More or Less Solved,' Says Bratton* (NY Magazine, Jan 16, 2014), archived at <http://perma.cc/5SSC-XA6D>.

<sup>5</sup> See generally *Index Crimes Reported to Police by Region: 2004–2013* (New York State Division of Criminal Justice Services, Nov 4, 2014), archived at <http://perma.cc/K9KD-EP29>.

<sup>6</sup> See text accompanying notes 17, 36–37.

<sup>7</sup> See generally mikebloomberg, *Mike Bloomberg Delivers Address on Public Safety to NYPD Leadership* (Apr 30, 2013), online at <https://www.youtube.com/watch?v=vi98Afym1Y0> (visited Nov 15, 2014).

<sup>8</sup> *Floyd*, 959 F Supp 2d at 556.

<sup>9</sup> See Barry Paddock, *Kelly: Stop-and-Frisk Saves Lives by Taking Guns off the Street* (NY Daily News, Apr 4, 2014), archived at <http://perma.cc/Q2J4-YRZR>.

case in which there was overwhelming evidence of the defendant's guilt. The likely result would be the erosion of constitutional rights even if law enforcement effectiveness would increase at the individual level.<sup>10</sup> Erosion of rights is obviously a bad outcome. Yet it is also true that the Fourth Amendment in particular calls for a reasonable balance between liberty and order, seemingly an explicit invitation to consider law enforcement effectiveness.<sup>11</sup> An assessment of this balancing of effectiveness invites an empirical approach to determining the scope of constitutional law in this area.<sup>12</sup>

Empiricism was star of the show in *Floyd* in the sense that the case was largely driven by big data. The NYPD's ability to track its productivity by looking to the forms that officers used to document their stops (called UF-250s) was the foundation of its claim that more stops meant less crime.<sup>13</sup> The UF-250s were critical to the plaintiffs' case as well.<sup>14</sup> Through close analysis of the forms that the NYPD used to track stops, the Center for Constitutional Rights ("the Center") was able to show that a critical percentage of the stops did not meet Fourth Amendment standards, even though the majority of the stops did.<sup>15</sup> Moreover, the Center used the same data to construct its argument that

---

<sup>10</sup> See *Mapp v Ohio*, 367 US 643, 657–60 (1961) (adopting the exclusionary rule and explaining that "[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest"). But see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U Ill L Rev 363, 368–90 (explaining through behavioral and motivational theory why the exclusionary rule is a structurally flawed method to deter individual wrongdoing); Randy E. Barnett, *Resolving the Dilemma of the Exclusionary Rule: An Application of Restitutive Principles of Justice*, 32 Emory L J 937, 941–44 (1983) (critiquing the exclusionary rule and offering an alternative).

<sup>11</sup> See Tracey L. Meares and Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J Crim L & Crimin 733, 737 (2000), citing T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L J 943, 943 (1987).

<sup>12</sup> See, for example, Meares and Harcourt, 90 J Crim L & Crimin at 763 (cited in note 11) ("There exists research that the Court should have considered and referenced in its opinion that gives some measure of the effectiveness and costs to law enforcement of the *Miranda* warnings. That research is relevant in deciding whether to continue requiring *Miranda* procedures. It informs the balancing-of-interests analysis.").

<sup>13</sup> See *Floyd*, 959 F Supp 2d at 600–01.

<sup>14</sup> See *id* at 559 ("[P]laintiffs' case was based on the imperfect information contained in the NYPD's database of forms ('UF-250s') that officers are required to prepare after each stop.").

<sup>15</sup> See *id* at 582–83. See also *id* at 658 (concluding that the "plaintiffs showed that practices resulting in unconstitutional [with respect to the Fourth Amendment] stops and frisks were sufficiently widespread that they had the force of law").

the NYPD was engaged in a racially discriminatory policy and practice in violation of the Fourteenth Amendment.<sup>16</sup>

In this Essay I want to take seriously the relevance of law enforcement effectiveness and the role of empiricism in understanding the constitutionality of the police practices at issue in *Floyd* and in urban police practices more generally. I also want to recast the debate a bit. While the media debate centered on the relevance of the effectiveness of the NYPD's SQF, with Scheindlin coming down squarely on the "not relevant" side of the ledger,<sup>17</sup> this debate obscured a related but, in my view, more important issue. I believe a more critical issue is the mismatch between the level of analysis at which the Supreme Court articulated the relevant test for constitutional justification of a stop-and-frisk in *Terry v Ohio*<sup>18</sup> and the scale at which police today (and historically) engage in stop-and-frisk as a practice. That is, while the Court in *Terry* authorized police intervention in an individual incident when a police officer possesses less than probable cause to believe that an armed individual is involved in a crime, in reality stop-and-frisk is more typically carried out by a police force en masse as a *program*.

At first glance it might seem that the point that I am trying to make is not as important as I suggest. Is it not the case that a mass of stops and frisks is simply an aggregation of individual incidents? The answer, in short, is *no*. When policing agencies engage in an organizationally determined practice of stopping certain "sorts" of people for the stated purpose of preventing or deterring crime, as the NYPD did, they are engaging in what I call a "program." The stops that flow from these programs are not individual incidents that grow organically—endogenously—out of a collection of individual investigations occurring between an officer and a person that the officer believes to be committing a crime. Rather, programmatic stops are imposed from the top down and are exogenous to the fabric of community-police

---

<sup>16</sup> See *id.* at 572, 583.

<sup>17</sup> In her *Floyd* opinion, Scheindlin cabined the relevance of law enforcement effectiveness from her assessment of the constitutional violations in question. When the defendants attempted to present evidence on the effectiveness of SQF in reducing New York City crime, Scheindlin refused to allow it: "[T]his case is not about the effectiveness of stop and frisk in deterring or combating crime. This Court's mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool. . . . The enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Floyd*, 959 F Supp 2d at 556, quoting *District of Columbia v Heller*, 554 US 570, 636 (2008).

<sup>18</sup> 392 US 1 (1968).

relations. In *Terry*, the Court dictated a framework to assess the constitutionality of police action in the endogenous context, but proactive policing of crime does not fit that model. Because proactive policing is carried out differently from the one-off intervention into a crime in progress that *Terry* concerned, those who are subject to it experience it differently. And it is that reality that fueled the litigation in *Floyd*.

In order to illustrate the point, let us recall the facts of *Terry* itself. Officer Martin McFadden, a thirty-nine-year veteran of the Cincinnati police force, observed John Terry and two companions walking back and forth on the sidewalk outside a store for about ten to twelve minutes.<sup>19</sup> McFadden suspected that the men were “casing a job” in preparation for a robbery, so he also suspected that they were armed.<sup>20</sup> He approached the men, identified himself, and asked for their names.<sup>21</sup> Receiving a mumbled response, McFadden grabbed Terry, spun him around, and then patted down his outer clothing.<sup>22</sup> McFadden found a pistol inside Terry’s coat pocket.<sup>23</sup> The crux of my argument here is that McFadden was engaged in an investigatory tactic in the context of what he suspected to be a crime in progress.<sup>24</sup> When his suspicions became sufficiently aroused as he watched the incident unfold over a fairly long period, he intervened. The question that the Court addressed was whether McFadden’s action was justified even though he did not have probable cause to arrest Terry and his confederates. The Court’s answer was *yes*.<sup>25</sup> McFadden did not need probable cause in order to justify his stop-and-frisk of Terry because reasonable suspicion that Terry was armed and dangerous was constitutionally adequate.<sup>26</sup>

---

<sup>19</sup> *Id.* at 5–6.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Id.* at 6–7.

<sup>22</sup> *Terry*, 392 US at 7.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *id.* at 27–28.

<sup>26</sup> *Terry*, 392 US at 10, 25. In reaching this conclusion, the Court disagreed both with the petitioner, Terry, who argued that even a limited pat down during a so-called field interrogation should be treated in the same way as any search, therefore requiring justification by probable cause, and with the respondent, the State of Ohio, which argued that a limited pat down was not a search at all and thus presented no Fourth Amendment issue. See Brief for Respondent on Writ of Certiorari to the Supreme Court of Ohio, *Terry v State of Ohio*, No 67, \*16–17 (US filed Nov 3, 1967) (available on Westlaw at 1967 WL 113685).

While the individual, incident-level analysis in *Terry* may be suitable (enough) for assessing whether evidence should be introduced in a criminal case should an individual defendant challenge it, I believe that the individual-level analysis is unsuitable for assessing the nature of violations like those presented in *Floyd*. This matters because *Floyd* lays bare the reality of urban policing: stop-and-frisk is carried out systematically, deliberately, and with great frequency. If a court had analyzed any one of the stops carried out as part of the NYPD program, or as part of a similar program in another city,<sup>27</sup> the court likely would have found that police appear to abide by *Terry*'s strictures most of the time.<sup>28</sup> Further, if that court had analyzed each stop-and-frisk individually, the court might have assumed that, because police get it right most of the time, it would be a good idea to give police a great deal of discretion to intervene in criminal incidents that unfold before them in order to keep the public safe. Nevertheless, despite the fact that most stops likely are constitutional when measured individually under *Terry*, when a mass of stops are considered in the aggregate, the data make clear that police are not investigating people that they suspect to be committing particular crimes in progress but are instead proactively policing people that they suspect *could* be offenders.<sup>29</sup> The data show that the "suspects" that police encounter the vast majority of the time do not possess guns or contraband, are never arrested, and are very rarely processed criminally.<sup>30</sup> Yet, because the Fourth Amendment does not allow police to engage a person and interfere with her rights of privacy and autonomy unless that officer has reason to believe that she is engaged in crime, the observing public may assume that those who are

---

<sup>27</sup> For example, 2009 data indicate that the Philadelphia Police Department made 253,333 pedestrian stops. Robert Moran, *NY Mayor Takes Shot at Philly over Stop-and-Frisk* (Philadelphia Inquirer, May 25, 2012), archived at <http://perma.cc/K885-YEQU>. Given Philadelphia's population, these numbers yield an even higher per capita encounter rate than New York City's. See *id.*

<sup>28</sup> It is critical, of course, to understand that the ability to make this determination will depend on the account of the justification for the stop that is being reviewed. In *Floyd*, the account of what justified the stops came from forms containing boxes supplying predetermined reasons that officers could check off, and there is reason to question the credibility of those accounts. See Fagan Report at \*55 (cited in note 1) (concluding that at least 68.9 percent of stops, and as many as 93.3 percent, were legally justified).

<sup>29</sup> See generally Jeffrey Fagan, Greg Conyers, and Ian Ayres, *No Runs, Few Hits and Many Errors: Street Stops, Bias and Proactive Policing* (unpublished conference draft, 2014) (on file with author) (noting, in an analysis of the New York data, that there are factors that police officers are more likely to use for blacks than for whites).

<sup>30</sup> See *Floyd*, F Supp 2d at 573–75 (detailing hit rates).

stopped by police are committing or are about to commit a criminal offense.<sup>31</sup> Although the constitutional framework is based on a one-off investigative incident, many of those who are stopped—the majority of them young men of color—do not experience the stops as one-off incidents. Young men of color experience the stops as a program to police them as a group, which is, of course, the reality.<sup>32</sup> Fourth Amendment reasonableness must account for this fact.<sup>33</sup>

### I. SYSTEMATIC STOP, QUESTION, AND FRISK

It is important to understand why the NYPD engaged in a strategy of making several hundred thousand stops yearly for almost a decade starting in the early 2000s. It seems almost unimaginable now, but in 1990 the homicide rate for New York City was 30.7 per 100,000.<sup>34</sup> The sharp decline in crime had certainly already begun by the mid-1990s when William Bratton, the NYPD's celebrated commissioner, reinvented the department as a leader in innovative policing strategies such as COMPSTAT and order-maintenance policing.<sup>35</sup> Bratton, and later, Commissioner Raymond Kelly, brought an aggressive policing style to the city, and SQF was the engine.<sup>36</sup> The NYPD

---

<sup>31</sup> See Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 Colum L Rev 1456, 1524–25 (1996) (discussing the role of public perception of the guilty in the Fourth Amendment context generally).

<sup>32</sup> See Carmen Solis, Eduardo L. Portillos, and Rod K. Brunson, *Latino Youths' Experiences with and Perceptions of Involuntary Police Encounters*, 623 Annals Am Acad Polit & Soc Sci 39, 47 (2009):

Many of us . . . are afraid of the police because even when we are citizens and many of us go through so much to get citizenship, the police just continue to stop us and not respect us and so many people end up in jail . . . . It's like what we worked so hard for is second class citizenship.

<sup>33</sup> See Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 St John's L Rev 1097, 1123–24 (1998) (noting that “issues of race . . . should be addressed in a comprehensive framework of constitutional reasonableness”). See also *Terry*, 392 US at 17 n 14 (“[T]he degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security.”).

<sup>34</sup> Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J Econ Persp 163, 168 (2004). Washington, DC, just a year later, posted a homicide rate—certainly unimaginable today—of 80.6 per 100,000. *Id.*

<sup>35</sup> See Michael D. White, *The New York City Police Department, Its Crime Control Strategies and Organizational Changes, 1970–2009*, 31 Just Q 74, 80–83 (2014).

<sup>36</sup> The policing style is sometimes referred to as “broken windows” following James Q. Wilson and George Kelling's celebrated *Atlantic Monthly* article of the same name. See generally James Q. Wilson and George L. Kelling, *Broken Windows*, *Atlantic*

argued that its SQF strategy was a good policy choice in that it effectively deterred violent crime by deterring people from carrying guns.<sup>37</sup> It turns out that this argument has a decades-long history that precedes even *Terry*.

As Professor David Sklansky notes, the 1950s saw the rise of the “second wave” of police professionalism, rooted in “good government managerialism.”<sup>38</sup> In cities across the country, local governments turned to ideas of professionalism, and at least some officials used police professionalism to disentangle urban policing agencies from graft politics.<sup>39</sup> The theory driving this wave of professionalism was supplied by an earlier generation of criminal justice theorists including Professor August Vollmer.<sup>40</sup> Vollmer’s student, professor and policing-professionalism advocate O.W. Wilson, started to emphasize a concrete but limited role for police agencies. Wilson and his followers believed that policing agencies could do little about the root causes of crime, such as poverty and mental illness. But Wilson argued that police *could* deter criminal activity by increasing the likelihood that offenders would be caught or by reducing the opportunities for offenders to commit crime.<sup>41</sup> A key plank of the professionalization agenda arose from these ideas. Police should seek out offenders rather than wait for victims to report crime. They should engage in “systematic,”<sup>42</sup> preventive (rather than responsive) patrol.<sup>43</sup>

---

Monthly 29 (Mar 1982). As Professor Jeffrey Bellin makes clear, aggressive SQF does not really fit the broken-windows theory. See Jeffrey Bellin, *The Inverse Relationship between the Constitutionality and Effectiveness of New York City “Stop and Frisk”*, 94 BU L Rev 1495, 1503–08 (2014).

<sup>37</sup> See Bellin, 94 BU L Rev at 1515 (cited in note 36).

<sup>38</sup> David Alan Sklansky, *Democracy and the Police* 35–36 (Stanford 2008) (quotation marks omitted).

<sup>39</sup> See Christopher Lowen Agee, *The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950–1972* 32 (Chicago 2014).

<sup>40</sup> See O.W. Wilson, *August Vollmer*, 44 J Crim L & Crimin 91, 101 (1953).

<sup>41</sup> See O.W. Wilson and Roy Clinton McLaren, *Police Administration* 320–21 (McGraw-Hill 4th ed 1977). This text explains that patrol has four purposes: to repress crime by reducing the opportunity for it; to prevent crime by engaging with potential offenders and redirecting them to more positive behaviors; to investigate potential crimes; and, finally, to be available for noncriminal services such as resolving family arguments. See *id.* The situation presented in *Terry* fits in the third category, while most SQF falls more easily into the first two categories.

<sup>42</sup> *Id.* at 347:

Another fundamental technique is the systematic use of field interrogation. Patrol officers should talk to as many people as possible during routine patrol activities, and in particular they should contact as many potential offenders as they can. In situations in which “stop and frisk” action would be permissible,



Thomas Cahill, the longest-serving police chief in San Francisco's history, took seriously this principle of professional policing. Cahill believed that preventing crime was more important than clearing cases. "[C]learing a case," he said, "will not bring back the victim."<sup>44</sup> Accordingly, in the 1950s, a full decade before *Terry* was decided, Cahill launched "Operation S" on the streets of San Francisco. "S" stood for *saturation*, and the program called for flooding San Francisco's high crime areas with roughly fifty officers who stopped, questioned, frisked, and arrested on vagrancy charges suspicious characters who police believed were about to break the law.<sup>45</sup> In situations that did not result in arrest, police were instructed to fill out identification cards, which the *San Francisco Chronicle* later approvingly reported could be used to generate suspect lists for crimes occurring in the area.<sup>46</sup> The number of stops that Operation S generated was prodigious for the times. Historian Robert Fogelson reported that, in its first year, Operation S tallied twenty thousand stops, most of which were of young black men.<sup>47</sup> Does this program sound familiar?

By the time that the late Professors James Q. Wilson and Barbara Boland wrote *The Effect of the Police on Crime* in 1978, post-*Terry*, they were not writing on a blank slate.<sup>48</sup> Based on an analysis of the robbery rates of thirty-five cities, Wilson and Boland urged police to shift from random police patrol to a more aggressive and "legalistic" style of policing aimed at maximizing the number of interactions with and observations of a relevant community.<sup>49</sup> The authors' analysis included data consistent with the argument that cities with high levels of traffic citations

---

officers should obtain information from persons which can be filed for future reference.

<sup>43</sup> Agee, *The Streets of San Francisco* at 35–36 (cited in note 39).

<sup>44</sup> *Hearings before the United States Commission on Civil Rights*, 86th Cong, 2d Sess 758 (1960).

<sup>45</sup> See Agee, *The Streets of San Francisco* at 36 (cited in note 39); Robert M. Fogelson, *Big-City Police* 187 (Harvard 1977).

<sup>46</sup> See Agee, *The Streets of San Francisco* at 36 (cited in note 39).

<sup>47</sup> Fogelson, *Big-City Police* at 187–88 (cited in note 45).

<sup>48</sup> See generally James Q. Wilson and Barbara Boland, *The Effect of the Police on Crime*, 12 L & Society Rev 367 (1978). This was one of the earliest scholarly articles to call for a strategy of stop-and-frisk to address violent crimes in cities. Interestingly, nowhere in their piece do the authors refer to their intellectual predecessor, O.W. Wilson, nor do they note Cahill's role in San Francisco.

<sup>49</sup> *Id* at 371, 383, 385 (describing a policing style heavily reliant on traffic stops and street stops as aggressive and legalistic patrol).

had fewer robberies than those with low levels.<sup>50</sup> A few cities followed their recommendation, but the approach did not achieve real national penetration until Professor Lawrence Sherman's "The Kansas City Gun Experiment" seemed to confirm James Q. Wilson's hypothesis.<sup>51</sup>

Focusing on one police beat in Kansas City, Sherman and his research team conducted a quasi experiment for twenty-nine weeks in which beat officers attempted three strategies—including field interrogation—designed to increase gun seizures for the purpose of reducing violent crime.<sup>52</sup> At the experiment's end, total gun seizures were up by 65 percent, and the number of guns found in car checks was triple the number seized prior to the experiment's commencement in the same area.<sup>53</sup> Additionally, the rate of guns seized in the experimental district was much higher than the rate of seizure in the matched control district.<sup>54</sup> Gun crime went down precipitously in the treatment district—declining by 49 percent—while there was almost no change in the control district.<sup>55</sup> Additionally, Sherman and his coauthors found little evidence of crime displacement away from the area of intensive treatment.<sup>56</sup> Scores of cities rushed to follow the Kansas City model, including, perhaps most famously, New York City.<sup>57</sup>

It is critical to understand that the strategy that James Q. Wilson and Boland envisioned—and the strategy that was actually carried out in Kansas City—is a *program*. In other words, stop-and-frisk under this approach is not simply a tool on the officer's belt to be used when the situation is right, such as intervening in a crime in progress, which was the factual scenario presented in *Terry*. Rather, good policing is articulated from the top down throughout the entire agency to include aggressive,

---

<sup>50</sup> See *id.* at 375–76.

<sup>51</sup> See Lawrence W. Sherman and Dennis P. Rogan, *Effects of Gun Seizures on Gun Violence: "Hot Spots" Patrol in Kansas City*, 12 *Just Q* 673, 675–76 (1995). It is also likely that Wilson's own later, popular work on the topic stoked the fire. See, for example, James Q. Wilson, *Just Take Away Their Guns*, *NY Times Magazine* 46 (Mar 20, 1994).

<sup>52</sup> Sherman and Rogan, 12 *Just Q* at 677–78 (cited in note 51).

<sup>53</sup> *Id.* at 683–84.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 685.

<sup>56</sup> Sherman and Rogan, 12 *Just Q* at 686–87 (cited in note 51).

<sup>57</sup> See Lawrence W. Sherman, *In Remembrance: James Wilford Shaw*, *Criminologist*, 20 *Criminologist* 23, 23 (1995) ("A conservative estimate is that over 100 other police agencies adopted a similar program because of Dr. James Shaw's careful work in Kansas City.").

systematic, “legalistic” field interrogations designed to suppress crime.<sup>58</sup> There is a distinct consequence of this approach. In the program context, police on patrol looking to prevent crime do not seek out particular crimes in progress. Instead, they engage in assessments of suspicious characteristics—clothes that are out of season, suspicious bulges in clothing, furtive movements, age, gender, and so on.<sup>59</sup> Ideally, an officer will keep an eye on the person who exhibits enough suspicious characteristics and wait until that person engages in some kind of activity that justifies the officer’s interference. Less ideally, the officer will act simply on the basis of suspicious characteristics, making an assumption that anyone who looks a certain way is someone who *could* be a person about to engage in crime.<sup>60</sup> This logical leap comes very close to the constitutional line; *Terry* and its progeny are quite clear that an officer must be “specific” and “reasonable” in inferring that criminal activity is actually “afoot,” an “inchoate and unparticularized suspicion or ‘hunch’” will not suffice.<sup>61</sup> Of course, when police engage in this kind of policing it is inevitable—at least without randomization—that certain groups will have more contact with police than will other groups.<sup>62</sup> James Q. Wilson himself acknowledged the antagonistic potential of his strategy in a journalistic version of his argument, called *Just Take Away Their Guns*. He wrote there, “Young black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race.”<sup>63</sup>

---

<sup>58</sup> Wilson and Boland, 12 L & Society Rev at 370 (cited in note 48).

<sup>59</sup> See Bernard E. Harcourt and Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U Chi L Rev 809, 818–21 (2011).

<sup>60</sup> Professor David Harris has made a similar observation, noting that courts over time have held constitutional stops based on categorical judgments on the part of police rather than particularized suspicion. See David A. Harris, *Particularized Suspicion, Categorical Judgements: Supreme Court Rhetoric versus Lower Court Reality under Terry v. Ohio*, 72 St John’s L Rev 975, 987–1012 (1998). My argument here is that programmatic stop-and-frisk *drives* categorical judgments. There is, of course, a feedback loop between court judgments and programmatic stop-and-frisk. When courts endorse particular factors as legitimate for officers to consider in an individual case, those factors are folded into a policy and can then be pushed down from the top as factors for officers to consider when carrying out the program. Thus, “high crime areas” and “furtive movements” have become factors justifying reasonable suspicion.

<sup>61</sup> *Terry*, 392 US at 27, 30.

<sup>62</sup> See Harcourt and Meares, 78 U Chi L Rev at 815 (cited in note 59) (“The only way to [search within the group] without injecting bias and prejudice is to randomly search the group, because randomization allows us to select from the group while avoiding illegitimate criteria to discriminate within the group.”).

<sup>63</sup> Wilson, *Just Take Away Their Guns*, NY Times Magazine at 46 (cited in note 51).

## II. MEASURING THE CONSTITUTIONALITY OF THE PROGRAM

Judge Scheindlin noted “the inherent difficulty in making findings and conclusions regarding 4.4 million stops.”<sup>64</sup> It was practically impossible to analyze each stop individually according to the *Terry* standard.<sup>65</sup> Instead, the plaintiffs’ case relied on the information about each stop documented in a form—the UF-250—that NYPD officers were required to fill out after each stop.<sup>66</sup> Despite obvious validity problems with analyzing the forms, Scheindlin relied on the estimate provided by the plaintiffs’ expert witness, Professor Jeffrey Fagan, that at least 6.7 percent—and perhaps as many as 31.1 percent—of the stops were made without reasonable suspicion.<sup>67</sup> This means that 93.3 percent of the stops (a liberal estimate, to be sure) could be considered constitutional. Is that good enough to justify the practice? Is it good enough if the approach is reducing crime? Does it matter whether the approach is really effective or just barely effective? Can we even ask these questions?

It probably matters whether we ask these questions in the context of the Fourth Amendment or the Fourteenth Amendment. In the context of the Fourth Amendment, crime control is obviously relevant because the Amendment authorizes police action in the first place. There should be a close connection between stops and frisks and crime, given that the point of stops and frisks either at the incident or program level is to intervene in or to prevent crime. The job of officers is to act when they acquire enough information to believe that crime is afoot. In the context of the Fourteenth Amendment, the potential relevance of effectiveness at crime reduction is more complicated, because the question is not whether the state has a good reason to act, but instead whether the enforcement that the state has engaged in, whether justified under the Fourth Amendment or not, is based on race. If a court finds that the state has made an

---

<sup>64</sup> *Floyd*, 959 F Supp 2d at 559.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* Two problems should be immediately obvious. First, it is not clear that officers necessarily filled out a form every time that they stopped someone, so the forms likely undercount the number of stops. Second, there is a basic credibility problem: How does one know whether the reasons that an officer checks off on the forms constitute the real reasons that he or she stopped and possibly frisked a suspect? See Fagan Report at \*55 (cited in note 1).

<sup>67</sup> *Floyd*, 959 F Supp 2d at 582. See also generally Jeffrey Fagan and Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U Chi L Rev 51 (2015).

impermissible racial classification, the burden shifts to the state to show that its practice is narrowly tailored and serves a compelling interest. In theory, the city could make an argument that crime reduction is such an interest.

The city did not provide a legal argument as to the relevance of effectiveness because Scheindlin would not allow it, but one can engage in a thought experiment regarding the kind of evidence that the city might have presented with respect to the Fourth Amendment question. Recall that the genesis of the New York strategy and its progeny can be traced to James Q. Wilson and Boland's 1978 *Law and Society* article advocating proactive and aggressive police activity—"legalistic" policing—that focuses on issuing many citations and questioning disorderly people at high rates in order to reduce the overall crime rate.<sup>68</sup> It may come as a surprise that the idea was a bold one at the time: police could actually reduce crime. Although O.W. Wilson and others had made police effectiveness at crime reduction a central plank of police professionalism, there was little empirical evidence at the time that police could actually achieve this goal.<sup>69</sup> By the late 1970s, most police scholars had given up the ghost on this point.<sup>70</sup> James Q. Wilson and Boland were still in the fight, however. They hypothesized that the aggressive-patrol approach could work for two reasons. First, aggressive policing could affect crime rates indirectly by increasing the incidence of weapons detection.<sup>71</sup> Second, stops and frisks could impact crime directly by changing potential offenders' perceptions about their risk of apprehension, as the activity is a visible indicator of police presence.<sup>72</sup> Wilson and Boland's claim was that the effect of aggressive patrol could occur even if the practice did not lead to a higher rate of solved crimes. If they were right, then police alone could make a difference in crime, rather than merely being

---

<sup>68</sup> See text accompanying notes 48–50.

<sup>69</sup> The conventional wisdom at the time was that police had no impact on crime whatsoever. See, for example, David H. Bayley, *Police for the Future* 9 (Oxford 1994):

The plain fact is that police actions cannot be shown to reduce the amount of crime. . . . The damning conclusion that the police are not preventing crime rests entirely on a large body of research undertaken for the most part during the 1970s. Try as they might, researchers were unable, often at considerable cost, to show that the number of police, the amount of money spent on police, or the methods police use had any effect on crime. This is still the consensus among experts.

<sup>70</sup> See *id.*

<sup>71</sup> See Wilson and Boland, 12 *L & Society Rev* at 373 (cited in note 48).

<sup>72</sup> See *id.* at 373–74.

conduits to prosecution. Under this theory, more stops means less crime.<sup>73</sup>

One basic problem with the NYPD's reliance on effectiveness to support the constitutionality of its policy is, as I noted above, the fact that two provisions of the Constitution were relevant in the litigation, not one. The *Floyd* plaintiffs alleged violations of the Fourth *and* the Fourteenth Amendments. The Fourth Amendment requires that police possess the requisite amount of information about a suspect before interfering with her privacy and autonomy. *Terry* and its progeny specify that level of information as reasonable suspicion that criminal activity is afoot (to justify a stop) and reasonable suspicion that a person is armed and dangerous (to justify a frisk). The Fourteenth Amendment, by contrast, is concerned with state decisionmaking that produces racially disparate impacts when such decisions are made with discriminatory purpose.

Scheidlin's Fourth and Fourteenth Amendment liability findings are importantly intertwined, because racial disproportion in stops and frisks alone does not provide a foundation for a Fourteenth Amendment violation.<sup>74</sup> *Terry* teaches that police

---

<sup>73</sup> Since 1978, there have been additional studies on this topic. In a replication and theoretical extension of Wilson and Boland's work ten years later, Professors Robert Sampson and Jacqueline Cohen found that proactive policing had a direct inverse effect on robbery rates in over 170 American cities in 1980, holding constant important correlates of crime such as poverty, inequality, and family disruption. See Robert J. Sampson and Jacqueline Cohen, *Deterrent Effects of the Police on Crime: A Replication and Theoretical Extension*, 22 L & Society Rev 163, 176–77 (1988). The authors cautioned, however, that “restrictions on freedom entailed by an aggressive policing policy also are an important concern.” *Id.* at 186. The latest and best study attempting to find a connection between stops and crime shows few significant effects of different SQF measures (rate of total stops; stops of black, Hispanic, and white suspects; and stops resulting in arrest) on precinct robbery and burglary rates (the rates mostly likely to reveal an impact). See Richard Rosenfeld and Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003–2010*, 31 Just Q 96, 116 (2014). The study's authors do not conclude that SQF had no impact on crime, but they note that “if there is an impact, it is so localized and dissipates so rapidly that it fails to register in annual precinct crime rates, much less the decade-long citywide crime reductions that public officials have attributed to the policy.” *Id.* at 117–18. I caution that, despite the fact that this study may be the best analysis of the relationship between stops and the crime decline in New York City, it too suffers from problems of validity. For a summary of the research on effectiveness of SQF, see generally Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 Ann Rev L & Soc Sci 335 (2014).

<sup>74</sup> For an argument regarding the Fourth Amendment's failure to regulate conduct such as that presented in *Floyd* and offering a Fourteenth Amendment solution, see generally 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 (2012) (arguing that courts' interpretation of the Fourth

must show reasonable suspicion that crime is afoot or has occurred before stopping someone. Therefore, one would expect that more stops and frisks would occur in high crime areas when those stops are being carried out in a manner that comports with the Fourth Amendment. Because the demographics of New York City are such that the higher-crime areas contain a higher proportion of African American and Hispanic residents, one would expect, all else equal, that police would stop people of color disproportionately to their representation in the city's population if they chose, as Fourth Amendment doctrine seems to direct, to focus on so-called high crime areas.<sup>75</sup> That is, *legal* policing of the streets of New York most likely would burden African Americans more than other groups because of the connection between race, place, and crime.<sup>76</sup>

Professor Fagan's analysis of millions of NYPD UF-250 forms casts doubt on the conclusion that the NYPD's actions were obviously legal, however. In his expert report, Fagan shows that the racial composition of a neighborhood is a statistically significant predictor of the number of police stops even when controlling for police-reported measures of crime, police-patrol

---

Amendment, which allows categorical exceptions based on the type of crime that is suspected, prevents constraints on stop-and-frisk practices, but that a "Plaintiff-Burdened Deliberate Indifference" standard under the Fourteenth Amendment can present a strong argument against SQF policies). In this Essay, my focus is on the Fourth Amendment, not the Fourteenth.

<sup>75</sup> *Illinois v Wardlow*, 528 US 119, 124–25 (2000) (stating that a location's character as a "high crime area" is relevant to determining whether there is reasonable suspicion). It is important to note that the doctrine on this point is hardly clear. The Supreme Court in *Wardlow* did not specify a test (and has not since) for assessing just how high the level of crime in a particular place must be to justify a finding of reasonable suspicion, so the lower courts have developed their own (not entirely consistent) approaches to the problem. See, for example, *United States v Wright*, 485 F3d 45, 53–54 (1st Cir 2007) (setting out a three-factor test for what constitutes a "high crime area," requiring a nexus between the crime suspected in the case and the crime most prevalent in the area, limited geographical boundaries, and "temporal proximity between evidence of heightened criminal activity and the date of the stop"). See also *United States v Patton*, 705 F3d 734, 738–41 (7th Cir 2013); *United States v Caruthers*, 458 F3d 459, 467–68 (6th Cir 2006). But most courts rarely require law enforcement agents to provide objective, verifiable, or empirical data to back up their claims, allowing the state to rely simply on local media reports. Scholars have challenged the term "high crime area" as leading to race- or class-based discrimination. See, for example, David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind L J 659, 679–81 (1994); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 U Fla L Rev 391, 400–04 (2003).

<sup>76</sup> See Robert J. Sampson, *Great American City: Chicago and the Enduring Neighborhood Effect* 248–51 (Chicago 2012). See also Tracey L. Meares, *Place and Crime*, 73 Chi Kent L Rev 669, 673–76 (1998).

allocations, and other social conditions in that neighborhood.<sup>77</sup> Fagan's regressions test for whether crime rates explain the NYPD's stop practices after controlling for population size and race of the relevant area's population, net of other factors such as poverty, education level, and the like. If police were attempting to address crime through stop activity, one would expect the level of stops to increase in tandem with crime in any given area, net of other factors. This relationship is clearly what the *Terry* standard directs. However, Fagan's findings consistently reveal that the racial composition of an area predicted stop patterns over and above the contribution made by crime.<sup>78</sup> In fact, the level of violent crime in an area, somewhat surprisingly, did not make *any* contribution to explaining the level of stops in high crime areas. Thus, while the NYPD claimed to engage in a strategy to deter gun crimes by deploying officers to places exhibiting the highest crime rates, statistical analysis indicates that the department blanketed certain neighborhoods with patrol officers and directed those officers to "stop the *right* people," justifying this policy choice with self-perpetuating statistics indicating that large percentages of New Yorkers arrested for gun crimes were black or Hispanic.<sup>79</sup> The policy amounted to stopping large numbers of people of color "in general" for the purpose of preventing crime—in express contravention of *Terry*'s specific teachings that each and every individual stop must be based on specific, articulable facts indicative of criminal activity.<sup>80</sup>

### III. THE MISMATCH

The *Floyd* decision is importantly driven by data, which both sides could use to illustrate the potential public benefits of SQF—crime reduction—as well as the costs to the public in the form of massive numbers of unjustified police encounters. The typical stop-and-frisk case is not data driven. In the typical case, a court, in order to determine whether a police officer complied with the Fourth Amendment, will listen to the officer tell the story of an individual incident and then assess retrospectively whether that officer had enough information to disturb the target's privacy and autonomy. While one might think that this approach makes sense in individual criminal cases (in the

---

<sup>77</sup> See Fagan Report at \*30–33 (cited in note 1).

<sup>78</sup> See *id.* at \*35–39.

<sup>79</sup> *Floyd*, 959 F Supp 2d at 667 & n 782.

<sup>80</sup> *Id.* at 664 (emphasis omitted).



extremely rare case in which a stop results in a prosecution), which constitute over 90 percent of *Terry* claims,<sup>81</sup> the reality of urban policing clearly overwhelms the structure of the rule. Monitoring stops individually through the exclusionary rule attempts to shape policing policy after the fact by addressing decisions of individual officers, rather than those at the management level, where programmatic policing is dictated. This means that a problematic policy that drives a small, but critically important, percentage of stops is unlikely to ever be changed. One hopes that managers are enlightened enough to change these policies on their own without litigation, but clearly litigation like *Floyd* can help. The litigation makes an important contribution by matching, through the innovative use of data, the level of constitutional analysis to the scale of the program. This kind of analysis can highlight the good—apparently officers usually comply with the Constitution—and the bad: in a significant percentage of cases, police do not comply with the Constitution, and when they do not, the burden falls disproportionately on racial minorities. Considering stops as a program reveals something else. Justification of decisionmaking is not the only game in town. The scale of the program matters whether the stops are justified or not. And so does the racial composition of stops, even when they are justified under the Fourth Amendment.

The fact that racial minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels those minorities' perceptions of the illegitimacy of the police.<sup>82</sup> Qualitative research is especially helpful to illustrate this point. Professors Jacinta Gau and Rod Brunson interviewed St. Louis youth in an attempt to uncover their relationship with

---

<sup>81</sup> Nancy Leong, *Making Rights*, 92 BU L Rev 405, 422, 425 (2012). In a study of the approximately 1,300 published federal appellate decisions between 2005 and 2009 that discuss a Fourth Amendment issue, Professor Nancy Leong found that 95 percent of *Terry* claims were litigated in the criminal context. This was in contrast to claims involving arrest warrants, of which 46 percent were criminal. Leong also showed that, although the government is successful 90 percent of the time in Fourth Amendment criminal cases, its success rate drops to 52 percent in civil cases. *Id.* at 426. Importantly, only a tiny fraction of stops are ever litigated because only a few result in an arrest, let alone a trial. See Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 Albany L Rev 1187, 1187–90 (2013) (stating that it is “hardly the case” that “New York courts are immersed in stop-and-frisk litigation” and noting that, while there are no readily available data regarding the number of suppression hearings, they are “few and far between” when compared to the “more than 685,000 street stops in a single city in a single year”).

<sup>82</sup> See Rod K. Brunson, “Police Don’t Like Black People”: African-American Young Men’s Accumulated Police Experiences, 6 Crimin & Pub Pol 71, 85 (2007).

local police.<sup>83</sup> Their analysis revealed that a key driver of the relationship was the youth's perception of widespread stops and frisks. "Respondents felt that their neighborhoods had been besieged by police . . . . Many study participants . . . characterized their involuntary contacts with the police as demeaning and of inordinate frequency."<sup>84</sup> In Gau and Brunson's sample, nearly 78 percent of respondents reported being stopped at least once in their lives, with approximately sixteen as the mean number of times stopped.<sup>85</sup> Although Gau and Brunson's respondents acknowledged the need for police to be involved in crime-control efforts and even to detain "suspicious looking people," they could not understand "why police would target them when they were engaged in clearly lawful activities."<sup>86</sup> Gau and Brunson's work echoes additional qualitative research from New York documenting strained relationships between Latino youth and the NYPD, fueled by harsh treatment during routine stops and frisks without cause or explanation.<sup>87</sup>

#### CONCLUSION

One of the most notable features of the constitutionalization of criminal procedure in the 1960s was the Supreme Court's focus on the realities of street policing and investigation, and the impact of such activities on individual freedoms. Judicial decisions of that era routinely centered on empirical issues surrounding the effectiveness of police practices and their impact on liberty interests. As the Court recognized and embraced real-world experience, it rejected the formalism of nineteenth-century Fourth Amendment doctrine. In so doing, the Court began to describe constitutional criminal procedure rights as guaranteeing a balance between liberty and order. In *Terry*, the Court acknowledged the importance of monitoring effectiveness by requiring "reasonable suspicion" rather than "probable cause" to justify stop-and-frisk encounters. The reasonable suspicion justificatory standard is *itself* a result of balancing liberty and

---

<sup>83</sup> See Jacinta M. Gau and Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy*, 27 *Just Q* 255, 262 (2010).

<sup>84</sup> *Id.* at 266.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 268.

<sup>87</sup> See Solis, Portillos, and Brunson, 623 *Annals Am Acad Polit & Soc Sci* at 47 (cited in note 32).

order in assessing reasonableness under the Fourth Amendment.<sup>88</sup> The decision in *Terry* was in line with others, such as that in *Schneckloth v Bustamonte*,<sup>89</sup> in which the Court eschewed a requirement that an individual be told explicitly that she has a right to refuse a search in a consensual-search context.<sup>90</sup> In *Schneckloth*, the Court actually defined the concept of voluntariness as the accommodation of the legitimate need for the search as against the “requirement of assuring the absence of coercion”—a balance between liberty and order.<sup>91</sup>

When *Terry* was decided, crime was on the rise, and the Court was cognizant of the increasing demand for public safety. It made sense for the Court to recognize the need for police officers to intervene in situations that they had carefully observed grow organically before a crime has actually occurred. To do so is just good police work that keeps people safe. If the briefs are evidence of the Court’s thinking regarding factors on which a police officer should rely before engaging a citizen, then the factors offered by the United States as amicus in *Terry* are instructive:

1. The time of day.
2. The place where the suspect is observed.
3. The incidence of crime in the immediate neighborhood.
4. The law enforcement officer’s prior knowledge of the suspect.
5. The appearance of the suspect; *i.e.*, whether he resembles someone whom the police are seeking.
6. The pre-detention conduct of the suspect and his companions.
7. The experience of the law enforcement officer.
8. The seriousness of the suspected offense.
9. The necessity for immediate investigative activity.<sup>92</sup>

A comparison of these factors with the factors on which the NYPD regularly relied to stop people reveals almost no overlap. Specifically, it is clear that, while the United States recommended a set of factors that were focused on investigation of individual offenses, the NYPD’s actions, at least as presented in *Floyd*, seem better characterized as “[s]weeping generalities

---

<sup>88</sup> See *Camara v Municipal Court*, 387 US 523, 536–37 (1967) (“Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”).

<sup>89</sup> 412 US 218 (1973).

<sup>90</sup> *Id.* at 227.

<sup>91</sup> *Id.*

<sup>92</sup> Brief for the United States as Amicus Curiae, *Terry v Ohio*, No 67, \*11–12 (US filed Nov 29, 1967) (available on Westlaw at 1967 WL 93603) (citations omitted).

[that] ought not to be indulged in, [because] the focus should be on the facts of the particular case.”<sup>93</sup> The *Terry* Court cautioned against the generalized practice of stopping certain individuals, particularly members of minority groups, observing in a footnote that stops could be a source of friction between the police and the community, as “[m]isuse of field interrogations increases as more police departments adopt *aggressive patrol* in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident.”<sup>94</sup>

The Court even acknowledged, as I did above, that, in cases of broad misuse of field interrogations, the exclusionary rule would do little to change the practice.<sup>95</sup> The exclusionary rule likely works best in cases in which both the reason for the police officer’s action and his or her explanation for that action are individuated. That is one reason why the decision in *Terry* makes so much sense. The case involved a police officer who was already in a neighborhood engaging in locally legitimate police work and who saw a crime in progress and tried to stop it. Even youths in tough urban neighborhoods recognize the need for this kind of police work, as Gau and Brunson’s interviews show. But, as Fagan’s data analyses make clear, when SQF is a program, street officers’ decisions to stop people do not grow out of investigations in situ, but rather are made exogenously, before police actually get on the ground. The youths that Brunson and Gau interviewed are absolutely correct that there is no legitimacy in such stops except in the most abstract sense, because the cause for police action and the explanation are not really about the individual that the officer has observed. *Terry* was about balancing the rights of police and the rights of citizens in situ, but SQF as a program changes this equation.

A programmatic understanding of stop-and-frisk more accurately reflects reality, because stop-and-frisk generally is implemented as a program. In fact, while it is not clear whether the justices deciding *Terry* appreciated this fact, there is a great deal of evidence indicating that, at least in major cities, programmatic stop-and-frisk was regular police practice before *Terry* was decided.<sup>96</sup> Understanding stop-and-frisk as a program

---

<sup>93</sup> Id at \*11, citing *United States v Bonanno*, 180 F Supp 71, 83 (SDNY 1960).

<sup>94</sup> *Terry*, 392 US at 14 n 11 (emphasis added) (quotation marks omitted).

<sup>95</sup> See id at 14–15.

<sup>96</sup> See text accompanying notes 41–47.

reveals the true costs of stop-and-frisk, because those who experience SQF—primarily young men of color—experience it as a program and not as an individual incident.<sup>97</sup> Moreover, they experience the program as a group, not as individuals, because the program is *suspect* driven, not incident driven.

I have argued that the Fourth Amendment ought to take these considerations into account and that to do this, statistics—rather than stories about stops—are necessary. Today, unlike in 1968, both data and better vehicles for assessing good policing are available. We can use the data to figure out how to enhance public safety and to ensure that the burden of policing is distributed in a way that is not unlawful and that enhances trust and legitimacy in policing.<sup>98</sup> Moreover, we need not wait until there is a constitutional violation to use the data to refine and enhance policing along the dimensions that we care about, which include, among others, public safety, respect for individual rights, and enhanced procedural justice.<sup>99</sup> Newer procedural mechanisms, such as § 14141,<sup>100</sup> can help to shape policing,<sup>101</sup> and there are policy-oriented police executives all over the country who want to get this right by imposing guidelines administratively. This is the new brief for professional policing. We can have both safer streets and more-democratic policing.

---

<sup>97</sup> See notes 82–83 and accompanying text.

<sup>98</sup> I thank David Sklansky for helping me to see this point. See generally David Alan Sklansky, *The Persistent Pull of Police Professionalism*, Executive Session on Policing and Public Safety (National Institute of Justice, Mar 2011), archived at <https://perma.cc/WS5H-QEVL>.

<sup>99</sup> See Tracey L. Meares, *The Good Cop: Knowing the Difference between Lawful or Effective Policing and Rightful Policing—And Why It Matters*, 54 Wm & Mary L Rev 1865, 1883–86 (2013) (calling for evaluation and reform of policing according to popular perceptions of fairness and procedural justice in order to enhance legitimacy).

<sup>100</sup> 42 USC § 14141.

<sup>101</sup> See generally Rachel A. Harmon, *Promoting Civil Rights through Proactive Policing Reform*, 62 Stan L Rev 1 (2009) (discussing the goals of § 14141 as a powerful tool to reduce unconstitutional police abuse and proposing an even more efficient strategy to use § 14141 proactively).