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Stop and Frisk City

HOW THE NYPD CAN POLICE ITSELF AND IMPROVE A TROUBLED POLICY

INTRODUCTION

The Fourth Amendment to the United States Constitution provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹ The “stop and frisk”² policy employed by the New York City Police Department (“NYPD”)³ challenges our understanding of those constitutional rights.

Since 1968, the Supreme Court has condoned the practice of stop and frisk.⁴ But lower courts have “eroded the force” of the original Terry standard in such a way that police departments have little idea of what a sound stop and frisk policy should look like.⁵ As a result, there are few checks on the tremendous discretion given to the NYPD in the stop and frisk context. In 2012 alone, “New Yorkers were stopped by the police 532,911 times. 473,644 were totally innocent (89%), 284,229 were Black (55%), 165,140 were Latino (32%), [and] 50,366 were White (10%).”⁶ These statistics suggest that some incidents of stop and

¹ U.S. CONST. amend. IV.

² “Stop and frisk” is a practice that permits a police officer to stop any individual if the officer has reason to believe “criminal activity may be afoot.” Terry v. Ohio, 392 U.S. 1, 30-31 (1968). Further, a police officer may frisk that individual if the officer has reason to believe “that the persons with whom [the officer] is dealing may be armed and presently dangerous.” *Id.*

³ The NYPD formally refers to its use of “stop and frisk” as “Stop, Question, and Frisk” These two terms are used interchangeably herein. See NYPD, *The Stop, Question and Frisk*, NYC.GOV, http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml (last visited Sept. 15, 2013).

⁴ See *Terry*, 392 U.S. at 27.

⁵ See David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975, 976 (1998).

⁶ *Stop-and-Frisk Data*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/content/stop-and-frisk-data> (last visited Aug. 28, 2013). For further statistics on stop

frisk may be racially motivated.⁷ By updating the policy that controls an individual officer's discretion and disclosing that policy to the public, the NYPD could make a good faith effort to eliminate the disparate racial impact that the stop and frisk policy has had in New York City. Further, given the recent opinion by U.S. District Court Judge Scheindlin that the NYPD's stop and frisk policies "violat[e] the plaintiffs' Fourth and Fourteenth Amendment rights,"⁸ the NYPD should update its stop and frisk policy to limit the discretion given to individual officers.⁹ "[E]xcessive or unnecessary discretion can and should be eliminated, and . . . necessary discretion should be properly controlled."¹⁰

To appropriately regulate officer discretion, the NYPD should adopt and implement clear police policies and procedures so officers can enforce the law without infringing upon citizens' constitutional rights.¹¹ The need for setting clear standards within the department is only heightened by the ambiguous standards set forth by the courts. The current NYPD stop and frisk standard "perpetuates the morally ambiguous nature of police work in its literal sense—that which line police officers do."¹² The consequences of this ambiguity spread throughout the entirety of the police force, for if the upper ranks of the NYPD are unclear as to how to apply discretion, then it is likely that officers implementing the procedures will also be unsure as to how to legally utilize stop and frisk discretion.

The NYPD has stated that the purpose of stop and frisk is to reduce crime¹³ and the number of guns in New York City.¹⁴

and frisk in New York City, see Judge Scheindlin's findings in *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *3-4 (S.D.N.Y. Aug. 12, 2013).

⁷ *Stop-and-Frisk Campaign: About the Issue*, N.Y. CIV. LIBERTIES UNION, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Sept. 15, 2013). For further information on Stop and Frisk in New York City, see Judge Scheindlin's findings in *Floyd* 2013 WL 4046209, at *3-7.

⁸ See *Floyd*, 2013 WL 4046209; *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013).

⁹ See generally KENNETH CULP DAVIS, *POLICE DISCRETION* (1975).

¹⁰ *Id.* at 141 (Though the author does not explicitly address Stop and Frisk in his book, the same logic regarding controlled discretion applies to the NYPD's Stop and Frisk policy as well.).

¹¹ See generally *id.*

¹² GEORGE L. KELLING, "BROKEN WINDOWS" AND POLICE DISCRETION 15 (1999) (citation omitted).

¹³ See Nate Raymond, *Judge Limits "Stop and Frisk" Searches in New York's Bronx*, REUTERS, Jan. 8, 2013, available at <http://www.reuters.com/article/2013/01/08/us-newyork-stopfrisk-ruling-idUSBRE9070SR20130108>.

¹⁴ See Ailsa Chang, *Map: NYPD Finds Most Guns Outside Stop-and-Frisk Hotspots*, WNYC NEWS (July 16, 2012), <http://www.wnyc.org/articles/wnyc-news/2012/jul/16/wnyc-map-police-find-guns-where-they-stop-and-frisk-less/>; see generally *NYPD's Stop and Frisk Practice: Unfair and Unjust*, CENTER FOR CONST. RTS., <http://ccrjustice.org/stopandfrisk> (last visited Nov. 3, 2012). Based on the UF-250 Form data, the Center for Constitutional rights determined the following: "In 2011, 88

“Reducing crime is a worthy goal, but along with decreases in crime may come other, less desirable consequences,” such as due process violations.¹⁵ The Department’s failure to set forth a clear policy has damaged the NYPD’s reputation and could open the city up to extensive litigation for violations of constitutional rights.¹⁶

Moreover, given the depressed economy, severe lack of resources that plague New York City,¹⁷ and recent stop and frisk decision in federal court,¹⁸ the City and the NYPD must update the department’s stop and frisk policies.¹⁹ Because “[t]he police are among the most important policy-makers of our entire society[,] [a]nd . . . make far more discretionary determinations in individual cases than any other class of administrators,” the NYPD must take the initiative to update its policies.²⁰

One way for the NYPD to update its stop and frisk policy is through the use of internal rulemaking.²¹ The NYPD should adopt rules that include: (1) updating the stop and frisk

percent of all stops did not result in an arrest or a summons being given. Contraband was found in only 2 percent of all stops. The NYPD claims their stop and frisk policy keeps weapons off the street—but weapons were recovered in only one percent of all stops. These numbers clearly contradict that claim.” *Id.*

¹⁵ JOHN ETERNO, POLICING WITHIN THE LAW: A CASE STUDY OF THE NEW YORK CITY POLICE DEPARTMENT 17 (2003).

¹⁶ “When failing to wrestle with the complex moral and legal issues of social policies, departments risk litigation, the outcome of which can seriously jeopardize current and future departmental efforts to deal with serious problems.” KELLING, *supra* note 12, at 15 (citations omitted).

¹⁷ See *New Budget Cuts for NYC Agencies*, NBC N.Y. (Sept. 14, 2012, 3:42 PM), <http://www.nbcnewyork.com/news/local/New-York-City-Budget-Cuts-NYPD-FDNY-Education-169812076.html> (“City agencies must cut spending over the next two years to meet a projected \$2.5 million budget gap.”).

¹⁸ *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); see also Joseph Goldstein, *Police Stop-and-Frisk Program in Bronx Is Ruled Unconstitutional*, N.Y. TIMES (Jan. 8, 2013), <http://www.nytimes.com/2013/01/09/nyregion/judge-limits-nypd-stop-and-frisk-program-in-bronx.html>. The Second Circuit stayed Judge Scheindlin’s order pending the City’s appeal. Jake Pearson, *NYC Moves to Vacate Judge’s Stop-Frisk Decisions*, ASSOCIATED PRESS, Nov. 1, 2013, http://hosted.ap.org/dynamic/stories/U/US_STOP_AND_FRISK?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2013-10-31-16-16-00.

¹⁹ See Henry Goldman, *New York City Council Seeks to Limit Police Stop-and-Frisks*, BUS. WK. (Oct. 10, 2012), <http://www.businessweek.com/printer/articles/341450?type=bloomberg> (“New York spent \$633 million settling and paying judgments on thousands of lawsuits alleging police abuse and civil-rights violations from 2006 to 2011.”); see also *NYPD Lawsuits Rise Dramatically; Lawsuits Against New York City Cost \$550.4 Million in Last Fiscal Year*, HUFFINGTON POST (Dec. 27, 2012, 12:19 PM), http://www.huffingtonpost.com/2012/12/27/nypd-city-lawsuits-rise-70-new-york-city-resident_n_2370111.html (“In the 2011 fiscal year alone, New York City paid out a staggering \$550.4 million—or about \$70 per New York resident—to settle a litany of lawsuits ranging from personal injury claims to medical malpractice. A large chunk of that over half a billion dollar figure—a five percent increase over the year before—stems from lawsuits brought against the New York Police Department. Lawsuits against the NYPD cost city taxpayers \$185 million, more than any other city agency.”).

²⁰ KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969); see also Goldstein, *supra* note 18.

²¹ See generally DAVIS, *supra* note 9.

section of the NYPD manual,²² (2) eliminating the quota system,²³ (3) amending the NYPD Unified Form 250 (“UF-250”) that officers are required to fill out following any stop and frisk encounter,²⁴ (4) increasing the responsibility of middle management,²⁵ and (5) revising the reprimand system.²⁶ Using proactive administrative tools would allow the NYPD to make clear to the public and individual police officers the specific purpose of the NYPD’s stop and frisk policy.²⁷ “Proponents of rule making assert that in the absence of rule making, subordinates at or near the bottom of the organization reformulate and refine public policy goals—and that street-level officers make policy on the basis of intuition and superficial guesswork rather than studies and investigations by qualified specialists.”²⁸ By utilizing this opportunity to update its stop and frisk policy, the NYPD can limit such sporadic policy making by controlling the discretion given to individual officers. Implementing these restrictions is important, because “much [of] police policy making is of such low visibility that it is exempt from review both within and outside the organization.”²⁹

The NYPD stop and frisk policy must be continually addressed for it to stay up-to-date and relevant.³⁰ Because the NYPD has received little guidance from the courts prior to *Floyd v. City of New York* in 2013, the police department has had tremendous discretion as to how to update its policy.³¹ “[G]reater participation by the police in the making of rules for their own guidance . . . embraces the prospect . . . of progressively higher elevations in the quality of police performance . . .”³²

²² See *infra* Part IV.A.

²³ See *infra* Part IV.B.

²⁴ See *infra* Part IV.C.

²⁵ See *infra* Part IV.D.

²⁶ See *infra* Part IV.E.

²⁷ See generally GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES 9-10 (Richard A. Brody et al. eds., 1987) (citations omitted).

²⁸ DAVID E. AARONSON ET AL., PUBLIC POLICY AND POLICE DISCRETION 405 (1984).

²⁹ *Id.*

³⁰ See KELLING, *supra* note 12, at 45 (“Policy development is ongoing. It is a repetitive, never-ending aspect of police work. . . . Changing conditions, laws, traditions, and standards require continual updating of police guidelines.”).

³¹ See AARONSON ET AL., *supra* note 28, at 49 (“[P]olice chiefs and their administrative staffs have considerable discretion to ‘redefine’ or alter the intent of a policy through: (1) their direct access to policy formulators [and] (2) their control over the formal networks of organizational communication (e.g., police general orders, content of training manuals, reward structure) . . .”).

³² DAVIS, *supra* note 9, at 125-26 (quoting Judge Carl McGowan, *Rule-Making and the Police* 70 MICH. L. REV. 659, 674 (1972)). In fact, Judge Scheindlin is requiring the NYPD’s participation in the development of remedies to ensure that its stop and frisk policies are constitutional. See generally *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013).

Therefore, the process of defining the practices and limits of stop and frisk should not simply be left to the NYPD's legal staff. Top officials, individual officers, and community members alike need to participate in this development to ensure that everyone affected understands the updated policy.³³

This note details the history of stop and frisk and argues that the NYPD should internally amend its stop and frisk policy to better limit the discretion given to individual officers. Part I outlines a brief history of stop and frisk. Part II examines the inadequacy of the current remedies available to those who feel their Fourth Amendment rights have been violated by stop and frisk. Part III contends that the NYPD needs to update its stop and frisk policy. Finally, Part IV outlines administrative solutions the NYPD should implement in order to reduce constitutional violations of individual rights. These updates are incredibly important both for the NYPD and the citizens of New York City, who have increasingly pressured the City to change its procedures.³⁴ Given the uproar in New York City and around the country over stop and frisk, as well as the recent decision declaring the NYPD's stop and frisk tactics unconstitutional, the NYPD should be receptive to updating its policy.³⁵

I. THE HISTORY OF STOP AND FRISK

Generally, when police officers conduct searches or seizures, they must do so with a search warrant, founded on probable cause and consisting of the requisite particularity.³⁶ Stop and frisk, however, has created a major exception to the warrant requirement.³⁷ Under stop and frisk, police officers need only "specific and articulable facts" to stop an individual.³⁸ Consequently, by significantly decreasing the standard required by the Fourth Amendment from probable cause to reasonableness, the

³³ See generally AARONSON ET AL., *supra* note 28, at 207; see also *Floyd*, 2013 WL 4046217, at *12-14.

³⁴ See Goldman, *supra* note 19.

³⁵ Judge Scheindlin's decision in *Floyd v. City of New York* requires changes to the NYPD's stop and frisk policy. Though the NYPD has appealed the decision, for now, her decision remains the law. See Chris Kokenes & Chelsea J. Carter, *New York City Appealing Stop-and-Frisk Ruling*, CNN (Aug. 16, 2013, 7:50 PM), <http://www.cnn.com/2013/08/16/us/ny-stop-and-frisk>.

³⁶ U.S. CONST. amend. IV.

³⁷ See *Terry*, 392 U.S. at 21.

³⁸ *Id.*

Supreme Court “radically changed the standard for allowing searches and seizures.”³⁹

The U.S. Supreme Court first authorized this departure from the text of the Fourth Amendment when it declared stop and frisk constitutional over 40 years ago in *Terry v. Ohio*.⁴⁰ In its decision, the Court noted that in order for a police officer to stop an individual on the street without probable cause, which is required under the text of the Fourth Amendment, the officer must have reason to believe “in light of his experience that criminal activity may be afoot.”⁴¹ In order to then conduct a frisk, it must be apparent that “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”⁴² The Court, anticipating the need to limit the discretion given to individual police officers and to give lower courts guidance in their evaluation of police discretion, explained that “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”⁴³ As a result, the Court held:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.⁴⁴

By outlining such a vague stop and frisk standard, the Court significantly reduced the individual protections laid out in the Fourth Amendment and simultaneously expanded police power.

³⁹ Justin S. Conroy, “*Show Me Your Papers*”: *Race and Street Encounters*, 19 NAT’L BLACK L.J. 149, 159 (2005/2006).

⁴⁰ 392 U.S. 1, 27 (1968).

⁴¹ *Id.* at 30.

⁴² *Id.* at 27.

⁴³ *Id.*

⁴⁴ *Id.* at 30-31.

That expansion of police power is furthered by the limited role of judicial review in overseeing police conduct. In most circumstances, a court could review police officers'

administrative decisions...for abuse of discretion, which is commonly measured by whether officials have (1) considered something they should not have considered, (2) not considered something they should have considered, (3) given improper weight to something they should have considered, or (4) decided without sufficient evidence. These criteria suggest both that a court may not substitute its own judgment on what the right decision would be for that of the official exercising discretion and that the official decision-maker is subject to a check on the basic fairness and reasonableness of the way he or she went about making the decision.⁴⁵

Because of the immediacy of decision-making during a stop and frisk, however, these commonly considered factors are not as applicable.⁴⁶ While it may be that the Court tried to create an applicable standard of review in stop and frisk cases, applying the "reasonably prudent" standard⁴⁷ has proven to be difficult for lower courts and police forces alike.⁴⁸ Moreover, because the officer only needs to show that he had a reasonable suspicion, judicial review is not the most effective means to protect Fourth Amendment rights.

Indeed, the Court has been unable to create a clear stop and frisk standard. On the same day that the Court decided *Terry*, it decided two similar stop and frisk cases—*Sibron v. New York*⁴⁹ and *Peters v. New York*⁵⁰—but came to different conclusions in each case. The Court held in *Sibron* that the police violated Sibron's Fourth Amendment rights by seizing drugs on his person without any articulable facts as to why the police officer believed he was armed and dangerous.⁵¹ The Court held differently in *Peters* and found that the officer had reason to believe that Peters was armed and dangerous, thereby permitting

⁴⁵ HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 503 (David H. Rosenbloom & Richard D. Schwartz eds., 1994).

⁴⁶ It is difficult for courts to review stop and frisk incidents under these common factors because of the inherent nature of stops. Stops are intended to occur on the move, as a result of an officer's belief that criminal activity is afoot. The unplanned and high-stakes nature of stops, therefore, makes it difficult to apply a common set of factors to evaluate an officer's judgment. Further, because each incident is fact specific, with the potential for post hoc rationalizations by officers, judicial review is difficult.

⁴⁷ *Terry*, 392 U.S. at 27.

⁴⁸ See Harris, *supra* note 5, at 975-76.

⁴⁹ *Sibron v. New York*, 392 U.S. 40 (1968).

⁵⁰ *Peters v. New York*, 392 U.S. 40 (1968).

⁵¹ *Sibron*, 392 U.S. at 64; see also Conroy, *supra* note 39, at 161-62 (citations omitted).

the officer to search Peters for weapons.⁵² It appears that the Court has not yet “develop[ed] a standard that can be consistently applied by lower [courts] in stop and frisk cases.”⁵³

Though the United States Constitution sets the floor for individual rights, states may add more protective provisions under their individual state constitutions.⁵⁴ As such, in response to the *Terry* standard, the New York Court of Appeals declared its own four-level stop and frisk standard, in hopes of creating a clearer guide for both courts and police forces.⁵⁵ The lowest two levels of intrusion which do not reflect standards required on the federal level, consist of the following:

The most minimal police intrusion regulated by the court is a request for information, which can involve “basic, nonthreatening questions regarding, for instance, identity, address or destination.” To justify this conduct, the police must possess “some objective credible reason for [the] interference not necessarily indicative of criminality.” The next level of police intrusion is a common-law right to inquire. The Court of Appeals has determined that police contact ceases being a request for information and transforms into a common-law inquiry once an officer asks “more pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing and is the focus of the officer’s investigation.” In order to conduct the common-law right to inquire, the police must have a “founded suspicion that criminal activity is afoot.”⁵⁶

Levels three and four of the New York stop and frisk model reflect the federal constitutional requirements. Under “the third level, police may make a ‘forcible stop and detention’ of a person when they possess ‘reasonable suspicion that [that]

⁵² *Peters*, 392 U.S. at 66; see also Conroy, *supra* note 39, at 161-62 (citations omitted).

⁵³ Conroy, *supra* note 39, at 161-62 (citations omitted).

⁵⁴ Emily J. Sack, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. De Bour*, 66 N.Y.U. L. REV. 512, 518 (1991).

⁵⁵ See *People v. De Bour*, 40 N.Y.2d 210 (1976). New York later codified these standards in its Criminal Procedure Law at CPL § 140.50(1), declaring that: “A police officer may stop a person in a public place located within the geographical area of such officer’s employment when he reasonably suspects that such person is committing, has committed or is about to commit either (a) a felony or (b) a misdemeanor defined in the penal law, and may demand of him his name, address and an explanation of his conduct.” N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2010). Moreover, “[w]hen upon stopping a person under circumstances prescribed in subdivisions one and two a police officer or court officer, as the case may be, reasonably suspects that he is in danger of physical injury, he may search such person for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. If he finds such a weapon or instrument, or any other property possession of which he reasonably believes may constitute the commission of a crime, he may take it and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.” *Id.* § 140.50(3).

⁵⁶ Priyamvada Sinha, *Police Use of Race in Suspect Descriptions: Constitutional Considerations*, 31 N.Y.U. REV. L. & SOC. CHANGE 131, 165-66 (2006) (citations omitted).

particular person has committed, is committing or is about to commit a felony or misdemeanor.”⁵⁷ Lastly, under level four “an officer may arrest and take into custody a person when he has ‘probable cause to believe that person has committed a crime, or offense in his presence.’”⁵⁸ Though the New York standard is considerably more specific than the federal stop and frisk standard, it still allows for a great deal of police discretion.⁵⁹

II. INADEQUACY OF REMEDIES FOR STOP AND FRISK VIOLATIONS

By stopping an individual when no justifiable purpose exists, police officers violate citizens’ Fourth Amendment rights. Such violations, however, are difficult to prove. Given that the nature of stop and frisk does not typically result in “the recovery of evidence, and because the qualified immunity doctrine shields most police action from scrutiny, few stop and frisks are ever reviewed by courts.”⁶⁰ Further, because these encounters are rarely reviewed and the nature of the encounters reflects a quick and ongoing exchange with likely limited witnesses, abuse of police discretion in stop and frisks is rarely discovered.⁶¹ The NYPD has adopted a number of policies in an attempt to control abuse of citizens’ constitutional rights, but most of these procedures are inadequate.

A. *UF-250 Forms*

According to NYPD policy, when a police officer has conducted a stop and frisk, he or she is required to complete a UF-250 Form.⁶² The UF-250 Form requires an officer to detail “the timing and location of the stop, descriptive and identifying characteristics of the person stopped, the reason for the stop, whether the person was frisked, and whether the person was

⁵⁷ Sack, *supra* note 54, at 522 (citations omitted) (alterations in original).

⁵⁸ *Id.*

⁵⁹ See ETERNO, *supra* note 15, at 62 (quoting JUDGE HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 40-41 (1996) (“The problem is, the law is so muddy that the police can’t find out what they are allowed to do even if they wanted to. If a street cop took a sabbatical and holed himself up in a library for six months doing nothing but studying the law on search and seizure, he wouldn’t know any more than he did before he started. The law is totally confusing, yet we expect cops to always know at every moment what the proper action is.”)).

⁶⁰ See Dasha Kabakova, *The Lack of Accountability for the new York Police Department’s Investigative Stops*, 10 CARDOZO PUB. L., POL’Y, & ETHICS J. 539, 574 (2012).

⁶¹ See Sack, *supra* note 54, at 513.

⁶² *Id.* 547-48.

issued a summons or arrested.”⁶³ A supervisor then reviews the details.⁶⁴

The form is problematic for a number of reasons, including the opportunity, after the incident occurred, for an officer to create justifiable reasons for a stop. Because the form consists of boxes for an officer to check that could justify the stop, the form has taken the accountability away from the officer. Theoretically, an officer is supposed to detail his or her reasons for stopping an individual. “In practice, however, officers do not in fact record the factors justifying a stop . . . and supervisors do not address this deficiency.”⁶⁵

B. *State and Federal Civil Rights Actions*

Recently the New York City Council attempted to right the wrongs in the NYPD’s stop and frisk policy by passing a bill that “expand[s] New Yorkers’ ability to sue over racial profiling by officers.”⁶⁶ This bill, Introduction Number 1080, adds “age, gender, housing status and sexual orientation” to “the definition of bias-based profiling.”⁶⁷ This bill, therefore, “allow[s] individuals to sue the Police Department in state court . . . for policies that disproportionately affect people in any protected categories without serving a significant law enforcement goal.”⁶⁸ Additionally, those “[i]ndividuals who are arrested and whose criminal charges are later dismissed, as well as those who are stopped but not arrested, [can seek monetary damages by suing] the NYPD [in federal court] under 42 U.S.C. § 1983 for violations of their federal civil rights.”⁶⁹

But there is no certainty that litigation would have a significant impact in remedying these issues.⁷⁰ Plaintiffs in stop

⁶³ *Id.*

⁶⁴ Once the supervisor reviews the UF-250 Form, it is “entered into a log in the precinct station house and assigned a serial number. Later, the data from the form are entered into the computerized database by an officer assigned to administrative duties or by a civilian precinct employee.” *Id.* at 548.

⁶⁵ *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *37 (S.D.N.Y. Aug. 12, 2013). In Judge Scheindlin’s recent opinion, she found “that the NYPD has no meaningful procedures for auditing stop paperwork to monitor the constitutionality of stops.” *Id.* at *38.

⁶⁶ J. David Goodman, *City Council Votes to Increase Oversight of New York Police*, N.Y. TIMES (June 27, 2013), http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html?_r=0.

⁶⁷ *Id.*; N.Y.C. Council 1080-2013 (N.Y.C. 2013).

⁶⁸ Goodman, *supra* note 66.

⁶⁹ Kabakova, *supra* note 60, at 551; *see generally Floyd*, 2013 WL 4046209.

⁷⁰ Though the appeal in this case is pending, Judge Scheindlin recently found that the NYPD’s stop and frisk policy was unconstitutional as it applied to a number of plaintiffs. *See generally Floyd*, 2013 WL 4046209. This ruling lends itself to the idea

and frisk lawsuits could face evidentiary challenges, such as gaining access to the limited paperwork detailing the stops and an officer's justification for the stop or the inability to locate witnesses, should there be any.⁷¹ Moreover, monetary damages could be limited for those whose rights are violated by an improper stop and frisk, but suffered no significant injuries or losses.

C. *The Exclusionary Rule*

Violations of the Fourth Amendment are generally checked by the exclusionary rule, which “simply stated, prevents illegally obtained evidence from being used in court proceedings against a defendant.”⁷² Given the infrequency of meaningful judicial review of stop and frisk procedures, however, the exclusionary rule does not often apply.⁷³ Because the majority of stop and frisks do not reveal contraband or criminal activity, there is simply no evidence to exclude, nor a trial from which to exclude it.

Further, even if a judge reviewed a stop and frisk and suppressed the evidence that was obtained during the encounter, the individual officer who conducted the stop may never know the outcome of the case or why the evidence was suppressed.⁷⁴ As a result, an individual officer may never learn from his or her abuse of discretion.⁷⁵ Consequently, not only does the exclusionary rule have an insignificant effect on an officer, but it also has an insignificant effect on “[p]olice departments [as they] have little incentive [to] discipline officers when evidence is suppressed because it is easy to write off a few lost prosecutions”⁷⁶ This leaves individuals whose rights were violated by an unjustifiable stop and frisk without any real recourse, for any action they take has little impact on the stop and frisk policy or the officers themselves.⁷⁷

that if the NYPD does not engage in efforts to update its policy soon, it might be updated for them. *See* Goldstein, *supra* note 18.

⁷¹ *See supra* Part II (introductory paragraph).

⁷² ETERNO, *supra* note 15, at 5.

⁷³ Kabakova, *supra* note 60, at 549.

⁷⁴ Judge Carl McGowan, *Rule-Making and the Police* 70 MICH. L. REV. 659, 673 (1972).

⁷⁵ Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1, 7 (2009) (citations omitted).

⁷⁶ *Id.*

⁷⁷ *See* McGowan, *supra* note 74, at 673.

D. *The CCRB*

Individuals may seek administrative review of police action by filing a complaint with either “the Civilian Complaint Review Board (CCRB), an independent agency . . . [or] the Internal Affairs Bureau (IAB) of the NYPD.”⁷⁸ The CCRB and the IAB “have different jurisdiction[s]. The CCRB investigates complaints of ‘excessive or unnecessary use of force, abuse of authority, discourtesy, and offensive language,’ while the IAB handles complaints of corruption.”⁷⁹ Though these review boards were based on sound intentions, they have proven to be relatively futile in remedying violations of the Fourth Amendment.⁸⁰

The CCRB has not been effective in disciplining individual police officers, because the Board’s resources to review complaints and conduct research for bettering stop and frisk policy are scarce.⁸¹ First, “[t]he CCRB’s investigations are handled by more than 140 civilian investigators and are reviewed by panels of a 13-member board comprised of mayoral designees, city council designees, and police commissioner designees.”⁸² The board, empowered by the New York City charter, can “receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language.”⁸³ Second, though the CCRB serves a legitimate need, its staff consists of solely civilians, who hold no disciplinary power.⁸⁴ “[T]he ultimate disciplinary power remains with the police chief executive. Civilian review procedures [only] have the power to recommend disciplinary action.”⁸⁵ As a result, the CCRB can only be effective if the chief executive chooses to implement the review board’s recommendations.⁸⁶ Because of its limited resources, the CCRB has been forced to abandon its policy efforts because of their

⁷⁸ Kabakova, *supra* note 60 at 555 (internal citations omitted).

⁷⁹ *Id.* (internal citations omitted).

⁸⁰ See *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *44 (S.D.N.Y. Aug. 12, 2013) (“The DAO’s frequent rejection of the CCRB’s disciplinary recommendations has likely undermined public confidence in the CCRB and discouraged the filing of complaints—many of which may have been meritorious.”). For further discussion on the NYPD reprimand system, see *Floyd*, 2013 WL 4046209, at *42-44.

⁸¹ See Clarke, *supra* note 75, at 30-38.

⁸² Kabakova, *supra* note 60, at 556 (internal citations omitted).

⁸³ N.Y.C., N.Y., CITY CHARTER ch. 18-A, § 440(c)(1) (2009).

⁸⁴ See generally Clarke, *supra* note 75.

⁸⁵ Samuel Walker & Vic W. Bumphus, *The Effectiveness of Civilian Review: Observations on Recent Trends and New Issues Regarding the Civilian Review of the Police*, in LAW ENFORCEMENT OPERATIONS AND MANAGEMENT 363, 379 (Marilyn McShane & Frank P. Williams III eds., 1997) (citations omitted).

⁸⁶ *Id.*

limited resources.⁸⁷ As a result, “[t]he CCRB[] . . . gradually transformed . . . into an agency that investigates fewer complaints and is more deferential to the police.”⁸⁸

Because the CCRB lacks any disciplinary power, it is rare for an officer to suffer any sort of strict punishment due to stop and frisk complaints.⁸⁹ Consequently, these measures have little deterrent effect on officers.⁹⁰ In fact, police officers who are punished as a result of a review of their stop and frisk complaint often receive instructions from a commanding officer about the flaws in the subject officer’s conduct, and what the proper conduct should have been in the given circumstance.⁹¹ Alternatively, if a commanding officer sees fit, the subject officer could be required to undergo further training at the Police Academy.⁹² While instructions may be useful in allowing the officer to learn, such a remedy is insufficient to remedy this department-wide issue.

In response to perceived stop and frisk abuse and because of the concern over the lack of oversight of the NYPD, the New York City Council proposed a bill that would “create an independent inspector general to monitor and review police policy, conduct investigations and recommend changes to the department.”⁹³ But the same issue that plagues the CCRB would similarly affect the inspector general: the inability to implement any of the recommendations suggested to the NYPD.⁹⁴

III. WHY THE NYPD SHOULD IMPLEMENT ADMINISTRATIVE SOLUTIONS TO REDUCE FOURTH AMENDMENT VIOLATIONS

In the absence of effective external checks on police stop and frisk practices, the NYPD must develop and implement its own internal policies to guide individual officers on how to handle stop and frisk situations. Recently, the NYPD has taken

⁸⁷ *Id.* at 34.

⁸⁸ *Id.* at 37.

⁸⁹ See McGowan, *supra* note 74, at 673.

⁹⁰ Clarke, *supra* note 75, at 7 (citations omitted).

⁹¹ *Id.* (internal citations omitted).

⁹² *Id.*

⁹³ Goodman, *supra* note 75; N.Y.C. Council 1079, 2013 (N.Y.C. 2013).

⁹⁴ Michael Howard Saul, *How the NYPD Monitor and Likely IG Will Handle Stop-and-Frisk*, WALL ST. J. (Aug. 14, 2013, 11:40 AM), <http://blogs.wsj.com/metropolis/2013/08/14/how-the-nypd-monitor-and-likely-ig-will-handle-stop-and-frisk/>. In addition to the independent inspector general, Judge Scheindlin has appointed an independent monitor to oversee the implementation of her remedies. See *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at *3-5 (S.D.N.Y. Aug. 12, 2013).

steps to update its teaching policies.⁹⁵ For instance, during training, officers act out hypothetical scenarios and then immediately get feedback from their police instructors about their use of police discretion in light of NYPD guidelines.⁹⁶ Though it appears these updated teaching policies are contributing to a reduction in the number of stop and frisks in New York,⁹⁷ the policies alone are not enough. “Police discretion can best be structured and controlled through the process of administrative rule-making by police agencies. Police administrators should, therefore, give the highest priority to the formulation of administrative rules governing the exercise of discretion”⁹⁸ Officers need guidelines to which they can continually refer, such as an updated policy that will predictably and consistently guide them when they are out in the field protecting the citizenry.⁹⁹

[W]hen laws are written unclearly, officers are influenced by that ambiguity. Slight ambiguity in laws is used by officers to their advantage, meaning more officers will search and/or stop in mildly ambiguous legal situations. When the law is extremely ambiguous . . . it appears that officers will stretch the law to its very limits, taking advantage of every bit of ambiguity left to them.¹⁰⁰

Given the recent federal court decision regarding the NYPD’s stop and frisk procedures, the NYPD must reevaluate its current policies.¹⁰¹ Furthermore, the NYPD should disclose its policy to the public, because “(1) [a]ny public agency, because it is a public agency, should make its policies known [and] (2) [f]airness requires that those affected have a chance to know the enforcement policies.”¹⁰²

Additionally, the NYPD will be better served with a proactive policy rather than solely relying on a reactive review board like the CCRB. However, “the challenge is not to choose, but to balance and integrate the competing demands of

⁹⁵ Jill Colvin, *Inside the NYPD’s New Stop-and-Frisk Training*, DNA INFO (June 21, 2012, 8:01AM), <http://www.dnainfo.com/new-york/20120621/city-island/inside-nypds-new-stop-and-frisk-training>.

⁹⁶ *Id.*

⁹⁷ Joseph Goldstein & Wendy Ruderman, *Street Stops in New York Fall as Unease Over Tactic Grows*, N.Y. TIMES (Aug. 3, 2012), <http://www.nytimes.com/2012/08/04/nyregion/number-of-police-street-stops-falls-34-percent.html>.

⁹⁸ DAVIS, *supra* note 9, at 100-01 (citation omitted).

⁹⁹ For further discussion on the need for updated training, see *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at *6-7 (S.D.N.Y. Aug. 12, 2013).

¹⁰⁰ ETERNO, *supra* note 15, at 101.

¹⁰¹ See generally *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); *Floyd*, 2013 WL 4046217; see also Goldman, *supra* note 19.

¹⁰² DAVIS, *supra* note 9, at 71.

different police functions.”¹⁰³ Therefore, though administrative tools do not suffice as an alternative to the judicially implemented exclusionary rule, administrative policies are sound supplemental procedures.¹⁰⁴ As previously noted, the majority of the repercussions on individual officers consists solely of instructions.¹⁰⁵ Given the expertise of the NYPD and its legal staff, it is far more useful to employ the tools the NYPD already has at its disposal to create a new proactive approach.

Police department “[m]anagement devotes its time to responding to economic and political elites, overseeing budgets, setting broad policy priorities, creating performance measures, and resolving other issues related to supervision.”¹⁰⁶ The NYPD is no different. While the NYPD surely strives to decrease crime and to protect the general public, it could do more to limit abuse of discretion and better inform its officers about the consequences of such abuse.¹⁰⁷ This is certainly no easy task, for “[s]treet-level bureaucrats, such as police officers, must cope with both management’s directives concerning a legal policy and the immediate pressures generated on the street.”¹⁰⁸

An updated policy would address these problems, because the NYPD can “explicitly authorize discretion” in stop and frisk situations.¹⁰⁹ “Such continued restatements are important, despite their redundancy, because citizens, prosecutors, courts, lawyers, and legislatures must clearly understand that the issue is not whether police officers use discretion. The real questions are how officers use discretion and how their use of it is shaped.”¹¹⁰

IV. ADMINISTRATIVE SOLUTIONS TO REDUCE VIOLATIONS OF INDIVIDUAL PRIVACY

In evaluating and promoting general updated policies, the National Institute of Justice, a research and development agency within the Department of Justice, set forth a number of principles that should be considered in “develop[ing] and implement[ing] policies”¹¹¹:

¹⁰³ Malcolm K. Sparrow, *Integrating Distinct Managerial Styles: The Challenge for Police Leadership*, in LAW ENFORCEMENT OPERATIONS AND MANAGEMENT 287, 297 (Marilyn McShane & Frank P. Williams III eds., 1997).

¹⁰⁴ AARONSON ET AL., *supra* note 28, at 433-34.

¹⁰⁵ See *supra* Part II.D.

¹⁰⁶ AARONSON ET AL., *supra* note 28, at 8.

¹⁰⁷ See generally DAVIS, *supra* note 9, at 100-01, 116, 118-19.

¹⁰⁸ AARONSON ET AL., *supra* note 28, at 9.

¹⁰⁹ KELLING, *supra* note 12, at 37.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 34.

Recognize the complexity of police work[;] [a]cknowledge that police will use discretion[;] [r]ecognize and confirm how police work is conducted[;] [a]dvance a set of values that may be applied to the substantive work issue at hand[;] [p]ut forward existing research, facts, or data about the substantive issue at hand[;] [u]ndergo development by practicing police officers and citizens[;] [u]ndergo public promulgation in a manner clear to officers, the general public, community stakeholders, and the courts[;] [i]nclude rules about what officers should not do[;] [e]mphasize police adherence to a process (application of knowledge, skills, and values), rather than any predictable outcome, because outcomes of police interventions are often wildly unpredictable regardless of officers' skills, intent, and values[;] [e]stablish accountability standards that identify component and/or excellent performance, violations of organizational rules, and incompetent or uncaring work, including performance within organizational rules[;] [r]eceive recognition as an ongoing continuing process.¹¹²

All of these principles are important and further highlight the need for experienced officers, new officers, lawyers, politicians, and members of the community to work together to come up with a stop and frisk policy that is useful for officers and simultaneously protects individuals' Fourth Amendment rights.¹¹³ "A police rulemaking process that involves supervisors and line officers as well as higher-level administrators and legal counsel is clearly more open than a process in which rule formulation is accomplished by administrators and legal counsel alone."¹¹⁴ As long as stop and frisk is legal, continuous updating of administrative policies is the best solution because officers can more easily understand administrative rules as opposed to court decisions.¹¹⁵

A. *Update the NYPD Manual*

As it stands today, individual officers are provided with a vague police manual. The Police Manual dictates the following procedure in conducting a stop and frisk:

When a uniformed member of the service reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor: 1. Stop a person and request identification and explanation of conduct . . . [However,] [i]f not in uniform, identify yourself as a police officer[;] 2. Frisk, if you reasonably suspect you or others are in danger of physical injury[;] 3. Search, if frisk reveals object which may be a weapon [(NOTE: Only that portion of the suspect's clothing where object was felt may be

¹¹² *Id.*

¹¹³ See generally AARONSON ET AL., *supra* note 28, at 207; see also McGowan, *supra* note 74, at 674.

¹¹⁴ AARONSON ET AL., *supra* note 28, at 425.

¹¹⁵ *Id.* at 407.

searched[];] 4. Detain suspect while conducting investigation to determine whether there is probable cause to make an arrest.¹¹⁶

The NYPD can better regulate officer discretion by updating the stop and frisk section of the NYPD Manual, which guides officers throughout their duties.¹¹⁷ Moreover, it is imperative that the NYPD also instruct each officer on the limits of discretion within the confines of the Fourth Amendment.¹¹⁸

To effect change, NYPD leaders must declare a clear goal for stop and frisk.¹¹⁹ Merely identifying a vague goal, such as the desire to deter crime or reduce the number of guns on New York City streets, is insufficient.¹²⁰ Identifying goals is essential for the successful application of any updated policy.¹²¹ As such, it is imperative to be specific, rather than merely set forth the standard “reduce crime” mantra.¹²² “There is a need for a deeper understanding of how goals are adjusted and refined in the implementation stage, and how conflicting organizational and self-interest goals place limits on achieving public policy goals.”¹²³ If the NYPD can incorporate its new goals into both the teaching policy as well as the patrol guide, individual officers will be better informed and prepared as they conduct their assignments.¹²⁴

While the exercise of street-level discretion appears upon superficial inspection to be an individualistic process, closer analysis suggests that discretion is not exercised in a random fashion. It is possible to identify factors that prompt shared responses to particular legal norms. These discretionary factors range from the cues police officers receive from the management level concerning the implementation of a particular norm, such as police orders and special training, to how a particular legal norm fits with officers’ conceptualization of their job.¹²⁵

Currently, the Patrol Guide attempts to shed light on the vague court-determined standard of “reasonableness”¹²⁶ by setting forth the following criteria that factor into reasonable suspicion:

¹¹⁶ N.Y.C. POLICE DEP’T, NYPD PATROL GUIDE 212-11 (2003).

¹¹⁷ *See id.*

¹¹⁸ For further discussion on NYPD training, see *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *40-42 (S.D.N.Y. Aug. 12, 2013).

¹¹⁹ *See* AARONSON ET AL., *supra* note 28, at 207.

¹²⁰ *See New Stop-and-Frisk Data: NYPD’s Controversial Policing Tactic Is on the Rise and Still Racist*, ALTER NET, http://www.alternet.org/newsandviews/article/927727/new_stop-and-frisk_data%3A_nypd’s_controversial_policing_tactic_is_on_the_rise_and_still_racist (last visited Nov. 3, 2012).

¹²¹ AARONSON ET AL., *supra* note 28, at 207.

¹²² *See* Raymond, *supra* note 13.

¹²³ AARONSON ET AL., *supra* note 28, at 207.

¹²⁴ *See generally id.*

¹²⁵ *Id.* at 41.

¹²⁶ *See* *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968).

[t]he demeanor of the suspect[;] [t]he gait and manner of the suspect[;] [a]ny knowledge the officer may have of the suspect's background and character[;] [w]hether the suspect is carrying anything and what he is carrying[;] [m]anner of dress of suspect including bulges in clothing[;] [t]ime of day or night[;] [a]ny overheard conversation of the suspect[;] [t]he particular streets and areas involved[;] [a]ny information received from third parties[;] [p]roximity to scene of crime.¹²⁷

Though these factors are helpful, they are not enough to overcome the abuse of discretion that results from officers trying to achieve a quota, a requirement that officers stop a certain number of individuals.¹²⁸ Further, while these factors shed some light on “reasonableness,” they do not paint a full picture of what constitutes a reasonable stop.

Because of the vagaries of the standards set forth in the Patrol Guide do not adequately guide officer behavior, the NYPD should update its police policies by clearly identifying its specific goals in the manual.¹²⁹ Though it is not possible to predict all of the “reasonable” purposes that an officer may have to stop an individual, it would be useful to include examples of both proper and improper stop and frisk scenarios in the manual. This change will help to instruct the officers in specific circumstances and to further emphasize that abuse of discretion will not be tolerated.

B. *Eliminate the Quota System*

The NYPD should eliminate the quota system, which encourages officers and precincts to stop and frisk a minimum number of New Yorkers.¹³⁰ Whether or not the quota system is part of a written policy, it is well understood throughout the ranks of the NYPD.¹³¹ This is problematic for many reasons.

[I]n a crime control environment, the pressure on police officers of every rank is to reduce the number of reported crimes. This pressure may ultimately manifest itself as overzealous enforcement behavior.

¹²⁷ N.Y.C. POLICE DEP'T, NYPD PATROL GUIDE 212-11 (2003).

¹²⁸ See *infra* Part IV.B.

¹²⁹ See AARONSON ET AL., *supra* note 28, at 207.

¹³⁰ *Police Reform Organizing Project*, URBAN JUSTICE CENT., <http://www.urbanjustice.org/ujc/projects/police.html> (last visited Nov. 3, 2012); see also *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *24-33 (S.D.N.Y. Aug. 12, 2013).

¹³¹ See *New Stop-and-Frisk Data: NYPD's Controversial Policing Tactic Is on the Rise and Still Racist*, *supra* note 120; Joe Coscarelli, *Ray Kelly Spells Out Existence of NYPD Quotas in Memo*, N.Y. MAG. (Oct. 26, 2011, 4:13 PM), http://nymag.com/daily/intelligencer/2011/10/ray_kelly_spells_out_existence.html; see also *NYPD Report Confirms Adrian Schoolcraft's Quota and Underreporting Crime Claims*, HUFFINGTON POST (Mar. 8, 2012), http://www.huffingtonpost.com/2012/03/08/nypd-report-confirms-adri_n_1331613.html.

That is, some officers could be reacting to the unyielding stress to reduce crime by abusing their authority (e.g., conducting illegal searches, stops, arrests).¹³²

This quota requirement may encourage officers to stop people that the officer does not reasonably suspect to have committed a crime.¹³³ Additionally, the quota requirement suggests to officers that not only is it okay for them to violate a person's Fourth Amendment rights,¹³⁴ but that this kind of flagrant violation is condoned by the police department.¹³⁵ "This abuse of authority is the antithesis of policing in a democracy."¹³⁶

While the Police Commissioner may not be personally encouraging individual officers to violate Fourth Amendment rights, a message from NYPD headquarters to individual officers to stop a certain number of people can certainly be misunderstood.¹³⁷ "[S]treet-level bureaucrats and administrators use their discretionary powers differently because the former must face the day-to-day demands and needs of the citizenry."¹³⁸ Therefore, "legal policies are implemented" when officers interact with New York City residents, whether it be in responding to emergency situations or conducting stop and frisks.¹³⁹ When the NYPD sets forth a policy to stop a certain number of New Yorkers, not based on reasonable suspicion, but rather on strict adherence to numbers,¹⁴⁰ the ordinary demands on individual officers are left to the wayside.

C. Amend the UF-250 Form

Further, the NYPD should amend its UF-250 Form, as it promotes complacency and the potential to fabricate post hoc justification for stops where no justification existed. By amending the UF-250 Form, each officer would be required to

¹³² ETERNO, *supra* note 15, at 17.

¹³³ See Goldstein, *supra* note 18, at 17 (citations omitted).

¹³⁴ In *Ligon v. City of New York*, Judge Scheindlin found that "[t]he evidence . . . strengthen[ed] the conclusion that the NYPD's inaccurate training has taught officers the following lesson: stop and question first, develop reasonable suspicion later." *Ligon v. City of New York*, 925 F. Supp. 2d 478, 538 (S.D.N.Y. 2013).

¹³⁵ See Goldstein & Ruderman, *supra* note 97 ("A police officer in the Bronx said that officers detected a mixed message from the top.")

¹³⁶ ETERNO, *supra* note 15, at 17.

¹³⁷ See Goldstein & Ruderman, *supra* note 97 (Officers and supervisors alike are "unsure whether the political support remains for street stops, long a focal point of Police Commissioner Raymond W. Kelly's crime-fighting strategy.")

¹³⁸ AARONSON ET AL., *supra* note 28, at 40.

¹³⁹ *Id.*

¹⁴⁰ See Coscarelli, *supra* note 131; see also *NYPD Report Confirms Adrian Schoolcraft's Quota and Underreporting Crime Claims*, *supra* note 149; *New Stop-and-Frisk Data: NYPD's Controversial Policing Tactic Is on the Rise and Still Racist*, *supra* note 131.

provide each and every relevant detail as to why the officer concluded that a stop and possibly a frisk¹⁴¹ was reasonable and necessary.¹⁴² Though it may take more time than the current practice, which requires police officers to merely check off boxes such as “citizen had suspicious bulge,” it is more important to take the time to actively provide supporting details. The officer’s immediate supervisor would then review the form with the officer to determine what *exactly* led the officer to reasonably suspect the individual was in some way threatening the officer or others’ safety.¹⁴³ “There is something about the very process of having to write down on paper detailed guidelines for one’s conduct which summons rationality and elevates principle.”¹⁴⁴

As described above, discretion can be controlled by frequent conversations and interactions with a supervisor.¹⁴⁵ “[P]olice patrol work usually ensures a high level of peer interaction and dependency. Partners are influenced by one another and the attitudes of rookie police officers are viewed as being significantly shaped by the beliefs of veteran officers.”¹⁴⁶

D. *Increase the Responsibility of the Middle Management*

An additional solution to address the disconnect between the means and purposes of the NYPD stop and frisk model is to give middle management more responsibility.¹⁴⁷ “The police rank structure, like all tall rank structures, was created in order to enable large tasks to be broken down into smaller pieces, through several intermediate stages of

¹⁴¹ Because an officer needs reason to believe that an individual is “armed and presently dangerous,” a frisk is not likely to occur in every “stop and frisk” encounter. See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

¹⁴² As NYPD policy stands, officers are supposed to fill out a UF-250 Form after every stop and frisk. See *supra* Part II.A.

¹⁴³ As Judge Scheindlin notes in *Floyd v. New York City*, the current policy requires officers to record the specific details of their stops in their memo books. Then, the officers’ supervisors review the officers’ notes for error. In practice, however, this is not always done. See *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *37 (S.D.N.Y. Aug. 12, 2013). As such, the Judge ordered the NYPD to update its UF-250 Forms to “include a narrative section where the officer must record, in her own words, the basis for the stop [and frisk, if applicable]” and ideally “[t]he narrative will enable meaningful supervisory oversight of the officer’s decision to conduct the stop, as well as create a record for a later review of constitutionality.” *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217, at *8-9 (S.D.N.Y. Aug. 12, 2013).

¹⁴⁴ McGowan, *supra* note 74, at 680.

¹⁴⁵ HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW, *supra* note 45, at 409; see *infra* Part IV.D.

¹⁴⁶ AARONSON ET AL., *supra* note 28, at 60; see also ETERNO, *supra* note 15, at 79.

¹⁴⁷ See Sparrow, *supra* note 103, at 296-97; see also *Floyd*, 2013 WL 4046209, at *37-40; *Floyd*, 2013 WL 4046217, at *9-10.

aggregation.”¹⁴⁸ By putting more responsibility on line officers’ supervisors, individual officers will be held more accountable for any abuse of discretion.¹⁴⁹ Because “[s]o little police work is conducted under the eye of supervisors, . . . the only way to oversee most routine police work is for officers to talk about their work with their superiors.”¹⁵⁰ It is particularly important to encourage this step because “[o]ne supposedly powerful influence on officers’ behavior is supervisory messages.”¹⁵¹

Moreover, by requiring NYPD middle management to be more active in guiding and supervising individual officers, the updated stop and frisk policy will become streamlined throughout all of the ranks of the NYPD.¹⁵² “Because . . . police officers deal directly with citizens in relative autonomy of organizational managers, they . . . have considerable administrative flexibility or discretion to influence legal policy.”¹⁵³ If all members on all levels of the NYPD, however, feel a sense of responsibility with respect to the use of their discretion not only to protect citizens and to decrease crime, but also to do so in accordance with the Constitution, individual officer discretion can be controlled and individual rights can be preserved.

By creating more regular and apparent supervision, policy decisions will be made and, consequently, standards will be set by the higher ranks of the NYPD, rather than by individual officers.¹⁵⁴ Thus, putting the responsibility on those higher ranking officers will encourage the creation of clear and straightforward rules outlining the purpose of stop and frisk, detailed examples of successful and unsuccessful uses of police discretion, as well as the constitutional ramifications for violations of the Fourth Amendment. This will help every member of the NYPD, from line officer to Commissioner.¹⁵⁵ Additionally, when law enforcement agencies are proactive about rulemaking, it leads to “more effective and responsive law enforcement, minimization of procedural errors, the centralization of accountability, improved community relations, and uniformity of policy.”¹⁵⁶

Despite this need for more controlled discretion and routine supervision, individual officers cannot and should not

¹⁴⁸ See Sparrow, *supra* note 103, at 297.

¹⁴⁹ See generally *id.* at 296-301.

¹⁵⁰ KELLING, *supra* note 12, at 44.

¹⁵¹ ETERNO, *supra* note 15, at 27.

¹⁵² See AARONSON ET AL., *supra* note 28, at 406.

¹⁵³ *Id.* at 9.

¹⁵⁴ McGowan, *supra* note 74, at 680.

¹⁵⁵ “Rule making seeks to enhance predictability, fairness, and efficiency in daily operations.” AARONSON ET AL., *supra* note 28, at 406.

¹⁵⁶ *Id.*

be supervised at all times.¹⁵⁷ Consequently, there is an overwhelming need for “[g]ood policy statements . . . [that] provide the language that officers [can] use to describe their work for both development of ongoing police knowledge and supervisory purposes.”¹⁵⁸ By creating a clearly defined procedure and incorporating strict supervisory oversight, the NYPD will decrease the occurrence of individual officers making decisions based on personal agendas and beliefs, and could reduce the number of unwarranted stops and frisks.¹⁵⁹

E. Revise the Reprimand System

Because even the best-intentioned policies are insufficient without some means of enforcing them, the NYPD needs to create a more effective reprimand system for those officers who abuse their discretion.¹⁶⁰ As noted above, an officer may never become aware of the results of stop and frisk abuse under the current procedure because the exclusionary rule may not affect an officer’s case until many months after an incident.¹⁶¹ Additionally, the CCRB is not sufficient, given that the Police Commissioner has the sole power to accept or deny the CCRB’s recommendations and reprimand any behavior as he sees fit.¹⁶² This only furthers the concern that an individual officer will not learn from and will not be disciplined for his or her abuse of discretion, as it is highly unlikely that the Police Commissioner will hear about or feel the need to address every instance of discretionary abuse. Currently, if an officer is to be actually reprimanded for an abuse of discretion in a stop and frisk encounter, the officer will likely, at most, receive “instructions” as to why the decision was incorrect and perhaps some suggestions for future encounters.¹⁶³ This kind of reprimand is inadequate, given the existence of the quota requirement. Merely being told that behavior is wrong would likely not motivate an officer to change his behavior.

The NYPD will be well-served if it were to implement a detailed incentive and sanction program, for “rule making must be supported by reinforcement devices—a system of incentives

¹⁵⁷ See generally DAVIS, *supra* note 9.

¹⁵⁸ KELLING, *supra* note 12, at 44.

¹⁵⁹ AARONSON ET AL., *supra* note 28, at 406 (citations omitted).

¹⁶⁰ See *supra* Part II.D. For further discussion on the NYPD reprimand system, see *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209, at *42-44 (S.D.N.Y. Aug. 12, 2013).

¹⁶¹ See *supra* Part II.C.

¹⁶² See Clarke, *supra* note 75, at 46 (citations omitted).

¹⁶³ See *supra* Part II.D.

and sanctions—if public policy goals are to be served by administrative rules for the police.”¹⁶⁴ In designing a similar model of incentives and sanctions, the Police Executive Research Forum set forth the following hierarchy of penalties: “(1) counseling; (2) verbal reprimand; (3) letter of reprimand; (4) loss of vacation time; (5) imposition of extra duty; (6) monetary fine; (7) transfer; (8) suspension without pay; (9) loss of promotion opportunity; (10) demotion; (11) discharge from employment; and (12) criminal prosecution.”¹⁶⁵ Creating incentives and sanctions may be the most challenging task for the NYPD to tackle, because the police have few limitations on their discretion.¹⁶⁶ But with an updated policy that details the goals and examples of proper discretion in a stop and frisk setting, the NYPD should be able to create a more distinct bright-line rule and, as a result, clear incentives and sanctions.

If the NYPD adopts a stricter model regarding police discretion, it would be unfair to immediately implement penalties six through twelve, noted above. The NYPD could, however, implement the lower-numbered penalties, such as assigning an officer to desk duty for an extended period of time if counseling, verbal reprimand, or letters of reprimand do not work and the officer were a repeat offender of the policies. Though sanctions are not the ideal solution to this problem, it is important that “[s]anctions are imposed frequently enough to establish credibility of the threat, but . . . withheld as long as violators work hard at coming into compliance.”¹⁶⁷

A hierarchy of incentives could work in a similar fashion. When giving incentives, however, it is important to set the bar high, for the NYPD would be sending the wrong message if it were to reward an officer for merely doing his or her job properly. Thus, the NYPD could reward officers with praise and recognition from a supervisor for not only continuously displaying appropriate use of police discretion in stop and frisk procedures, but also for setting an example within the police command. “When the behavior elicits both recognition by the officer’s supervisors and the approval of his or her peer group, the motivational force is likely to be very strong, and the behavior will be doubly reinforced.”¹⁶⁸

¹⁶⁴ AARONSON ET AL., *supra* note 28, at 436.

¹⁶⁵ *Id.* at 466.

¹⁶⁶ See McGowan, *supra* note 74, at 673 (“In the matter of sanctions, it is important to note that the mode of enforcement of external rules has been almost entirely indirect in its incidence. The erring policeman rarely has had visited upon himself any penalty for his infraction.”).

¹⁶⁷ HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW, *supra* note 45, at 387.

¹⁶⁸ AARONSON ET AL., *supra* note 28, at 465.

In order for an incentive and sanction-based policy to serve its purpose, however, “several factors must usually be present[:] . . . (1) [t]he person usually must be aware of the purpose of the program; (2) the person must know how the program will apply to him or her; and, (3) the person must desire to accomplish the goals established by the program.”¹⁶⁹ This can be achieved by creating a clear policy, not based on quotas, that is enforced throughout all ranks of the NYPD. If such a policy is adopted, there will be

less reluctance by command authorities to punish infractions of rules formulated by those authorities themselves as compared with standards imposed [by the court]. More effective departmental discipline, along with the transfer of policy-making responsibilities to the upper levels of police leadership, should also contribute to the realization of a greater degree of uniformity in law enforcement practices¹⁷⁰

CONCLUSION

Given the significant number of New Yorkers affected by the NYPD stop and frisk program,¹⁷¹ as well as the recent decision in federal court related to NYPD stop and frisk practices,¹⁷² the NYPD must update its policies.¹⁷³ Though NYPD policy does not have the “force of law,” Kenneth Culp Davis, an expert in the field of administrative law, “has concluded that the police do have rule-making powers and that the rules on enforcement policy are legal and constitutional”¹⁷⁴ In fact, Davis opines: “[W]hile not controlling upon the courts, the courts would probably treat the rules at least as ‘interpretive regulations’ that ‘constitute a body of experience resulting from informed judgment to which courts and litigants may properly resort for guidance.’”¹⁷⁵ The effects of an updated NYPD stop and frisk policy could be astounding, given the impact that an updated policy could have not only on the NYPD, but also on the legal system.¹⁷⁶ By accepting the NYPD standards, the court as well as individual line officers could have a better understanding of how

¹⁶⁹ AARONSON ET AL., *supra* note 28, at 459; *see also* ETERNO, *supra* note 15, at 70.

¹⁷⁰ McGowan, *supra* note 74, at 681.

¹⁷¹ *See supra* Introduction.

¹⁷² *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); *Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013).

¹⁷³ *See* Goldstein, *supra* note 18.

¹⁷⁴ AARONSON ET AL., *supra* note 28, at 422-23.

¹⁷⁵ *Id.* at 423.

¹⁷⁶ *Id.*

to apply the “reasonable police officer” standard that has remained unclear since its creation in *Terry*¹⁷⁷ and *De Bour*.¹⁷⁸

The NYPD can utilize different administrative rule-making tactics to limit individual officer discretion and thereby refocus and update its current stop and frisk policy.¹⁷⁹ Discretion is essential for the NYPD’s daily functioning, but that discretion should be controlled.¹⁸⁰ “Bureaucratic discretion is an inescapable characteristic of the administrative process. It cannot be eliminated, but it can be balanced more effectively with our other expectations of the exercise of administrative power.”¹⁸¹ By utilizing this discretion as a whole and revamping its current stop and frisk procedure, instead of deferring to individual officers, the NYPD “can reduce injustice by cutting out unnecessary discretion, which is one of the prime sources of injustice Officers should not have power to determine in each case in accordance with their momentary whims what overall policy they prefer.”¹⁸²

Updating the NYPD stop and frisk policy with administrative rules will help constructively limit the ability of individual officers to make policy decisions.¹⁸³ Doing so will give New Yorkers confidence that their Fourth Amendment rights are respected and that the City is making strides to ensure that those rights are protected. The NYPD should implement administrative rules, such as updating the stop and frisk section of the NYPD manual, eliminating the quota system, increasing the responsibility of middle management, amending the UF-250 Form, and revising the reprimand system.¹⁸⁴ Updating the stop and frisk policy will create a more straightforward system that will not only be useful to each officer, but could also be useful to the courts.¹⁸⁵

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¹⁷⁷ *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

¹⁷⁸ *People v. De Bour*, 40 N.E.2d 562, 571-72 (N.Y. 1976).

¹⁷⁹ See generally DAVIS, *supra* note 9.

¹⁸⁰ See *id.* at 140-41.

¹⁸¹ BRYNER, *supra* note 27, at 209.

¹⁸² DAVIS, *supra* note 9, at 119.

¹⁸³ AARONSON ET AL., *supra* note 28, at 406.

¹⁸⁴ See *supra* Part IV.

¹⁸⁵ “Agencies through rule-making can often move from more vague or absent statutory standards, and then, as experience and understanding develop, to guiding principles and finally, when the subject matter permits, to precise and detailed rules.” BRYNER, *supra* note 27, at 9 (citations omitted); AARONSON ET AL., *supra* note 28, at 423.

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