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Stop and Frisk City: How the NYPD Can Police Itself and Improve a Troubled Policy

Kaitlyn Fallon

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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.” The “stop and frisk” policy employed by the New York City Police Department (“NYPD”) challenges our understanding of those constitutional rights.

Since 1968, the Supreme Court has condoned the practice of stop and frisk. 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. 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%).” 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.
4 See Terry, 392 U.S. at 27.
frisk may be racially motivated. 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 “violate[e] the plaintiffs’ Fourth and Fourteenth Amendment rights,” the NYPD should update its stop and frisk policy to limit the discretion given to individual officers. “[E]xcessive or unnecessary discretion can and should be eliminated, and . . . necessary discretion should be properly controlled.”

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. 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.” 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 crime and the number of guns in New York City. 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).


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

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.).

See generally id.


“Reducing crime is a worthy goal, but along with decreases in crime may come other, less desirable consequences,” such as due process violations. 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.

Moreover, given the depressed economy, severe lack of resources that plague New York City, and recent stop and frisk decision in federal court, the City and the NYPD must update the department’s stop and frisk policies. 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.

One way for the NYPD to update its stop and frisk policy is through the use of internal rulemaking. 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.

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).
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,\textsuperscript{22} (2) eliminating the quota system,\textsuperscript{23} (3) amending the NYPD Unified Form 250 ("UF-250") that officers are required to fill out following any stop and frisk encounter,\textsuperscript{24} (4) increasing the responsibility of middle management,\textsuperscript{25} and (5) revising the reprimand system.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{29}

The NYPD stop and frisk policy must be continually addressed for it to stay up-to-date and relevant.\textsuperscript{30} Because the NYPD has received little guidance from the courts prior to \textit{Floyd v. City of New York} in 2013, the police department has had tremendous discretion as to how to update its policy.\textsuperscript{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 . . . .”\textsuperscript{32}

\textsuperscript{22} See infra Part IV.A.
\textsuperscript{23} See infra Part IV.B.
\textsuperscript{24} See infra Part IV.C.
\textsuperscript{25} See infra Part IV.D.
\textsuperscript{26} See infra Part IV.E.
\textsuperscript{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).
\textsuperscript{28} DAVID E. AARONSON ET AL., PUBLIC POLICY AND POLICE DISCRETION 405 (1984).
\textsuperscript{29} Id.
\textsuperscript{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.”).
\textsuperscript{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) . . . .”).
\textsuperscript{32} DAVIS, supra note 9, at 125-26 (quoting Judge Carl McGowan, \textit{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. \textit{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.
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.”

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*. 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.” 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.” 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.” As a result, the Court held:

Where 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.

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.

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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 York49 and Peters v. New York50—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

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.
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.\textsuperscript{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.”\textsuperscript{53}

Though the United States Constitution sets the floor for individual rights, states may add more protective provisions under their individual state constitutions.\textsuperscript{54} As such, in response to the \textit{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.\textsuperscript{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.”\textsuperscript{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]
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 JUDEe 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.”)).
61 See Sack, supra note 54, at 513.
62 Id. 547-48.
issued a summons or arrested.” A supervisor then reviews the details. 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.”

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.” This bill, Introduction Number 1080, adds “age, gender, housing status and sexual orientation” to “the definition of bias-based profiling.” 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.” 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.”

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

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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.


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. 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.” Given the infrequency of meaningful judicial review of stop and frisk procedures, however, the exclusionary rule does not often apply. 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. As a result, an individual officer may never learn from his or her abuse of discretion. 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 . . . .” 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.

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 CERNO, supra note 15, at 5.
73 Kabakova, supra note 60, at 549.
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

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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).
84 See generally Clarke, supra note 75.
86 Id.
limited resources. As a result, “[t]he CCRB...gradually transformed... into an agency that investigates fewer complaints and is more deferential to the police.”

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. Consequently, these measures have little deterrent effect on officers. 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. Alternatively, if a commanding officer sees fit, the subject officer could be required to undergo further training at the Police Academy. 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.” 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.

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...
steps to update its teaching policies. 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. Though it appears these updated teaching policies are contributing to a reduction in the number of stop and frisks in New York, 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 . . . .” 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.

When 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.

Given the recent federal court decision regarding the NYPD’s stop and frisk procedures, the NYPD must reevaluate its current policies. 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.”

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

96 Id.
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 ETENKO, 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:

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.
109 KELLING, supra note 12, at 37.
110 Id.
111 Id. at 34.
Recognize the complexity of police work; acknowledge that police will use discretion; recognize and confirm how police work is conducted; advance a set of values that may be applied to the substantive work issue at hand; put forward existing research, facts, or data about the substantive issue at hand; undergo development by practicing police officers and citizens; undergo public promulgation in a manner clear to officers, the general public, community stakeholders, and the courts; include rules about what officers should not do; emphasize 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; establish accountability standards that identify component and/or excellent performance, violations of organizational rules, and incompetent or uncaring work, including performance within organizational rules; receive recognition as an ongoing continuing process.\footnote{Id.}{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.\footnote{See generally AARONSON ET AL., supra note 28, at 207; see also McGowan, supra note 74, at 674.}{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.”\footnote{AARONSON ET AL., supra note 28, at 425.}{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.\footnote{Id. at 407.}{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.] [If 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

\footnote{Id.}{112} \footnote{See generally AARONSON ET AL., supra note 28, at 207; see also McGowan, supra note 74, at 674.}{113} \footnote{AARONSON ET AL., supra note 28, at 425.}{114} \footnote{Id. at 407.}{115}
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:

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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.
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.
the demeanor of the suspect; the gait and manner of the suspect; any knowledge the officer may have of the suspect’s background and character; whether the suspect is carrying anything and what he is carrying; manner of dress of suspect including bulges in clothing; time of day or night; any overheard conversation of the suspect; the particular streets and areas involved; any information received from third parties; proximity to scene of crime.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{130} Whether or not the quota system is part of a written policy, it is well understood throughout the ranks of the NYPD.\textsuperscript{131} This is problematic for many reasons.

[In 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.

\textsuperscript{128} See infra Part IV.B.
\textsuperscript{129} See AARONSON ET AL., supra note 28, at 207.
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).\textsuperscript{132}

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

\textsuperscript{132} ETERNO, supra note 15, at 17.
\textsuperscript{133} See Goldstein, supra note 18, at 17 (citations omitted).
\textsuperscript{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).
\textsuperscript{135} See Goldstein & Ruderman, supra note 97 (“A police officer in the Bronx said that officers detected a mixed message from the top.”)
\textsuperscript{136} ETERNO, supra note 15, at 17.
\textsuperscript{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.”).
\textsuperscript{138} AARONSON ET AL., supra note 28, at 40.
\textsuperscript{139} Id.
\textsuperscript{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 frisk was reasonable and necessary. 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. “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.”

As described above, discretion can be controlled by frequent conversations and interactions with a supervisor. “[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.”

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. “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

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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 ÉTERNO, supra note 15, at 79.
aggregation.” By putting more responsibility on line officers’ supervisors, individual officers will be held more accountable for any abuse of discretion. 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.” It is particularly important to encourage this step because “[o]ne supposedly powerful influence on officers’ behavior is supervisory messages.”

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. “Because . . . police officers deal directly with citizens in relative autonomy of organizational managers, they . . . have considerable administrative flexibility or discretion to influence legal policy.” 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. 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. 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.”

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

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148 See Sparrow, supra note 103, at 297.
149 See generally id. at 296-301.
150 KELLING, supra note 12, at 44.
151 ETENNO, 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.
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.”

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 practices . . . .

CONCLUSION

Given the significant number of New Yorkers affected by the NYPD stop and frisk program, as well as the recent decision in federal court related to NYPD stop and frisk practices, the NYPD must update its policies. 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 . . . .” 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.’” 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. 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.
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* 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

*Kaitlyn Fallon†*

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.
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.
186 † J.D. Candidate, Brooklyn Law School, 2014; B.A. Middlebury College, 2010. Many thanks to the *Brooklyn Law Review* staff for their editorial support and hard work throughout the note writing process. I would also like to thank Professor Susan Herman for her insights and guidance. Finally, I would like to extend a special thank you to my family and Jamal Davis for their unconditional love and support.