CIVIL RIGHTS LITIGATION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Good Stop/Bad Stop (and Frisk)

By O. Andrew F. Wilson

While the query presented by the March 2014 *ABA Journal* cover, "Has 'Stop and Frisk' Been Stopped?" readily frames the debate between its advocates and critics, this dichotomy may preclude progress in the development of stop-and-frisk policy. The police practice of "stopping and frisking" to reduce crime has led to an increasingly polarized national discussion of the balance between civil liberty and effective law enforcement. But the answer to critics of stop-and-frisk is not to "stop it"; nor can proponents of stop-and-frisk be satisfied with what appears to reign as a racially biased status quo. To advance this discussion, the question is not whether to stop-and-frisk, but *whom* to stop-and-frisk. In the end, the only viable stop-and-frisk policy is a constitutional one, which, as the data suggests, may also be the most effective.

Stop-and-Frisk in Theory: *Terry* and *Feeney*

In theory, the police practice of stop-and-frisk is perfectly constitutional. In *Terry v. Ohio*, 392 US 1, 30 (1968), the Supreme Court determined that an officer is justified in stopping citizens where the officer has a reasonable suspicion that criminal activity "may be afoot." Given that citizens are protected from "unreasonable searches and seizures" by the Fourth Amendment, the touchstone for constitutionality is the reasonableness of the stop. Since *Terry*, the Supreme Court has explained that police may make a so-called *Terry* stop "when the officer has reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity." *United States v. Place*, 462 U.S. 696, 702 (1983). Not every reason, however, is reasonable. A law-enforcement stop that is made "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," violates the Fourteenth Amendment's prohibition on discrimination. *Personnel Adm'r of Mass. v. Feeney*, 442 US 256, 279 (1979). Following a reasonable stop, "a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." *Ybarra v. Ill.*, 444 U.S. 85, 93 (1979) (citation omitted).

With this blessing from the Supreme Court, law enforcement has used the practice of stop-and-frisk to routinely detain and search individuals for the last four decades. Along the stop-and-frisk road from *Terry*, however, officer prejudice has begun to undermine both the practice's constitutional basis and its practical effectiveness.

Stop-and-Frisk in Practice: *Floyd v. City of New York*

With seismic impact on the stop-and-frisk discussion, on August 12, 2013, District Judge Shira Scheindlin found in *Floyd v. New York*,959 F Supp 2d 540 (S.D.N.Y. 2013) that use of stop-and-frisk by the New York City's Police Department (NYPD) in the period between January 2004 and June 2012 amounted to "indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data." In its 193-page opinion, the district court held that,

when the relevant factors were considered together, in New York, "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites."

The district court based its conclusion in *Floyd* that the NYPD's use of stop-and-frisk was unconstitutional on largely uncontested data drawn from the NYPD's 4.4 million stops from 2004 to 2012. For example, the data demonstrated that police stopped a disproportionate number of minorities as compared to their representation by population. In 52 percent of the stops, the person stopped was black, in 31 percent the person was Hispanic, and in 10 percent the person was white. By comparison, in 2010, New York City's resident population was roughly 23 percent black, 29 percent Hispanic, and 33 percent white. While these statistics contribute to minority perceptions that they are being disproportionately stopped, the more damning statistic for the NYPD was the percentage of those stops that led to arrests. Of the 4.4 million stops, only 6 percent resulted in an arrest, and 6 percent more resulted in a summons. The vast majority of the NYPD stops—88 percent of the 4.4 million—resulted in no further law-enforcement action. And, the court noted, this corresponding 12 percent "hit rate" "likely overstates the percentage of stops in which an officer's suspicions turn out to be well-founded," given factors such as summons issued for charges unrelated to the suspicion that led to the stop and post-stop summons dismissals.

One important finding in *Floyd* for evaluating future stop-and-frisk policies was the court's determination of the appropriate "benchmark" to evaluate whether the rate of stops in any given geographic area is race-neutral. The best method, the court found, involves "the use of local population data [to] reflect[] who is available to be stopped in an area (assuming, as the evidence shows, that the overwhelming majority of stops are not of criminals), [together with] . . . local crime rates [which] reflect[] the fact that stops are more likely to take place in areas with higher crime rates" (given relatedly higher rates of police deployment). Once established, this benchmark is the best measure of whether the demographics of a given set of stops are race-neutral, or not. "A police department," the *Floyd* court cautioned, "may not target a racially defined group for stops *in general*—that is, for stops based on suspicions of general criminal wrongdoing—simply because members of that group appear frequently in the police department's suspect data."

At the outset of the *Floyd* opinion, the court cautioned that its "mandate [wa]s solely to judge the constitutionality of police behavior, not its effectiveness as a law enforcement tool." But at least some of the empirical evidence suggests that racially motivated stops are both unconstitutional and ineffective. For example, the *Floyd* court criticized the city's argument that "blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population," because, the court reasoned, "the stopped population is overwhelmingly innocent—not criminal. There is no basis for assuming that an innocent population shares the same characteristics as the criminal suspect population in the same area." And, perhaps most strikingly, in addition to the fact that 88 percent of the stops in general did not lead to enforcement actions, under the NYPD's policy of disproportionally stopping persons of color, from "2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8% lower if the person stopped was black than if the person stopped was white." Racially motivated stops, it turns out, are as bad for fighting crime as they are unconstitutional.

Stop-and-Frisk Update: New Jersey's 2013 Data
On February 25, 2014, New Jersey's chapter of the American Civil Liberties Union (ACLU) released an analysis of stop-and-frisk data from Newark's police department (New Jersey's largest) for stops made between July and December 2013. Two things stand out about this new evidence: the data itself and its release.

With regard to the data, the ACLU's report identified three important, preliminary observations. First, like New York, Newark's stop-and-frisk policy impacts large numbers of its citizens. During the last six months of 2013, Newark police officers made 91 stops per 1,000 residents. (By comparison, New York's police department made 8 stops per 1,000 residents in the same period and an average of 24 stops per 1,000 for the full year in 2013.) Second, Newark's use of stop-and-frisk disproportionately impacts its minorities. "Although black Newarkers represent 52 percent of the city's population, they make up 75 percent of all stops." (This ratio could be higher, the report noted, because it does not disaggregate Latinos who were stopped who were likely counted as "whites" for the survey.) Finally, also like New York, only a small minority of Newark's stops led to arrests. Of all the persons stopped in the period, 75 percent "including many who face interrogation and a frisk, have been determined by the police to be innocent of any wrongdoing." The ACLU raised concerns about these statistics, but the fact that it had statistics to consider in the first place is also worthy of note.

Newark's police department did not disclose its stop-and-frisk numbers in response to subpoena, but as part of a collaborative effort by the ACLU, Newark's police director, and Newark's mayor. In July 2013, the department committed to disclose the race, gender and age of every person it stops and frisks in monthly reports. Four years earlier, in 2009, New Jersey also became one of a few states to adopt anti-racial profiling legislation. NJ Stat Ann § 52:17B-222 *et seq.* Among other things, the Law Enforcement Professional Standards Act of 2009 created a new office within the New Jersey Attorney General's Department of Law and Public Safety to monitor data on motor-vehicle stops, trooper misconduct, and disciplinary actions. The law also provided that the state comptroller will audit the department's traffic stops, internal affairs, and training, and issue public reports. These reforms support efforts to reduce the abuse of stop-and-frisk and enable a better understanding of its evolving impact and efficacy.

The Future of Stop-and-Frisk
In one of the latest entries into the national dialogue on stop-and-frisk, Daniel Bergner recently published an article in *The Atlantic* entitled "Is Stop-and-Frisk Worth It?" Bergner mounts what appears at first to be an ends-justified defense of current stop-and-frisk policies that draws on a wide array of sources (including his anecdotal observations from driving around with two Newark police officers) to try to correlate stop-and-frisk with overall reduction in crime rates. While critics of Bergner's argument (including Donald Braman who published a rejoinder) will question some of Bergner's reasoning, he identifies what may be the core question to orient the future evaluation of stop-and-frisk. Suggesting it "may sound a little naïve," Bergner asks (apparently without irony): "What if cops were heavily trained to be careful in their judgments, and to do their field inquiries with respect and even a measure of deference?"

Given Bergner's emphasis on outcomes over methods, perhaps his appeal to a kinder, smarter stop-and-frisk is delivered as window dressing for civil-rights advocates. But his quandary about the feasibility of a stop-and-frisk policy supported by "heav[y] train[ing]" in officer judgment coupled with a renewed commitment to professionalism is a place to begin a more substantive discussion of reform. Bergner tentatively concludes that "such a change might be feasible." Proponents of stop-and-frisk depend on it. For, as Judge Scheindlin quoted in *Floyd*, "[t]he enshrinement of the constitutional rights necessarily takes certain policy choices off the table." *District of Columbia v. Heller,* 554 U.S. 570, 636 (2008).

Taking the unconstitutional, racially biased option off the table is good for civil rights and it may also prove best for reducing crime. The way out of the discussion gridlock surrounding stop-and-frisk is to move past arguments that artificially pit pragmatism against idealism. To arrive at a policy that stops the right people for the right reasons, it is necessary to identify the best way to make stop-and-frisk work within the constitutional norms set by the line of cases from *Terry* that now leads through *Floyd.*

Keywords: civil rights litigation, fourth amendment, fourteenth amendment, racial profiling

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