The Law and Social Science of Stop and Frisk

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Abstract

In 1968, almost 50 years ago, the Supreme Court validated, in a case called *Terry v. Ohio* (1968), a common police practice known as stop and frisk, so long as an officer could justify the action on the basis of a newly developed standard: reasonable suspicion. Today, policing agencies use stop and frisk prophylactically, stopping in some cities tens or even hundreds of thousands of people annually. These developments and the litigation around the strategy in New York City and elsewhere provide an opportunity to revisit *Terry* and to consider recent research in law and social science regarding stop and frisk. This review focuses on three issues: the evolution of legal doctrine pertaining to stop and frisk, arguments regarding the effectiveness of stop and frisk as a mechanism to control and reduce crime, and a delineation of the relevance of the theory of procedural justice to our understanding of the interleaving of the law and social science of stop and frisk.

INTRODUCTION

In 1968, almost 50 years ago, the Supreme Court validated, in a case called *Terry v. Ohio* (1968), the common police practice of patting down a stopped suspect's outer clothing, so long as the police officer possesses a reasonable and articulable suspicion both that criminal activity is afoot and that the person with whom the officer was dealing is armed and dangerous (Stern 1967, Barrett 1998). In coming to this conclusion, the Court disagreed both with the petitioner, John Terry, who argued that even a limited pat down during a so-called field interrogation should be treated in the same way as any search—therefore requiring justification by probable cause—and with the respondent, the State of Ohio, which argued that a limited pat down was not a search at all and thus presented no Fourth Amendment issue (e.g., *California v. Greenwood* 1988).

Saltzburg (2012) has called the balance the Court struck in *Terry* "practically perfect"—a standard neither so strict that necessary police work becomes unlawful nor so weak that individual autonomy and privacy are unprotected. Stops, as seizures of short duration, are less intrusive than arrests, and pat downs are less intrusive than full searches. If the *Terry* Court had required police officers to show probable cause to justify a stop and frisk, as the petitioner requested, police would have no reason to prefer a frisk to a full-blown search. By demanding less of officers to justify engaging in these activities as contrasted with full arrests or searches, the Court effectively incented police officers to choose these less-intrusive actions.

Such an outcome might appear, at least at first glance, to be the clear liberty-enhancing outcome. Yet, although the doctrine appears to express a preference for less-intrusive police activities, it is also true that encouraging a less stringent standard for stops and frisks might well lead to a greater number of intrusions than would otherwise occur if police were indifferent as between arrests and stops. And, it seems inevitable that lowering the quantum of evidence required for legal police action will increase the number of people innocent of any crime who are forced to interact with authorities. Reflecting on the *Terry* Court's decision, one must wonder whether the 4.4 million stops citizens of New York City have experienced between January 2004 and June 2012 would have occurred had *Terry* come out in the petitioner's favor. Clearly, *Terry* and its progeny endorse a view that a greater number of broad prophylactic law enforcement encounters may well be preferable to fewer deeper reactive ones.

The prophylactic nature of the stop and frisk sets the stage for this review article. When *Terry* was decided, it is unlikely that the Court could have predicted today's widespread use of the tactic as a crime control device. During the 1960s, the conventional wisdom among scholars and law enforcement practitioners alike was that policing could not really make a dent in crime rates because the seeds of crime were rooted in poverty and deprivation—factors over which law enforcement agencies have little control (Bayley 1994, Gottfredson 1990). The primary job of police, then, was to be first responders for justice reasons as opposed to crime control.[1] Today, however, that assumption has been upended. Now the question is not whether police make a difference in crime but instead how much.

[1]Consider this quote from a report of the President's Commission on Law Enforcement and the Administration of Justice (1967, p. 92):

> [T]he fact that the police deal daily with crime does not mean that they have unlimited power to prevent it, or reduce it, or deter it. The police did not create and cannot resolve the social conditions that stimulate crime. They did not start and cannot stop the convulsive social changes that are taking place in America. They do not enact the laws that they are required to enforce, nor do they dispose of the criminals they arrest. The police are only one part of the criminal justice system; the criminal justice system is only one part of the government; and the government is only one part of society. Insofar as crime is a social phenomenon, crime prevention is the responsibility of every part of society. The criminal process is limited to case by case operations, one criminal or one crime at a time.

Between 1991 and 2000, violent crime rates dropped about a third across the country (Weisburd et al. 2014). Even more dramatic, New York City's crime counts plummeted 80% during the same period. Because New York's highly publicized change in policing strategy coincided with the declines, scholars and others have focused attention on the extent to which policing has played a significant role in producing the decline. Analyses increasingly suggest that policing activity can take some of the credit (Zimring 2012, Weisburd et al. 2014). Under the leadership of William Bratton in the late 1990s, the New York City Police Department (NYPD) reinvented itself, establishing the department as a leader in innovative policing strategies such as COMPSTAT and order maintenance policing (White 2014). Although Bratton conceived of and brought the order maintenance approach to the NYPD, Commissioner Raymond Kelly deepened and expanded it, relying on stop, question, and frisk (SQF) as its engine. Hundreds of thousands of New Yorkers, the majority of whom are people of color, have been subjected to SQF on the streets of the City. Whereas the NYPD and the City's former mayor, along with their supporters, have claimed that the practice is responsible for making the city safe, detractors claim that the strategy has resulted in massive numbers of civil rights violations.

The controversy surrounding SQF in New York and similar approaches elsewhere provides an opportunity to revisit *Terry v. Ohio* (1968) and to consider recent research in law and social science regarding stop and frisk. The research is varied and large, and it is growing. It has many facets, ranging from the sociological dynamics of crime in urban communities to the social psychology of procedural justice. The legal doctrine governing the practice also is complex. And, perhaps most critically, there has been a great deal written regarding the concerns of many with respect to the racial dynamics of policing relying on this procedure. This review focuses primarily on three issues: the evolution of legal doctrine pertaining to stop and frisk, arguments regarding the effectiveness of stop and frisk as a mechanism to control and reduce crime, and a delineation of the relevance of the theory of procedural justice to our understanding of the interleaving of the law and social science of stop and frisk.

HISTORY AND LEGAL DOCTRINE

The facts of *Terry v. Ohio* (1968) are well known to most lawyers, but it is useful to summarize them here. Officer McFadden, a 39-year veteran of the Cincinnati police force, observed John Terry and two companions walking back and forth on the sidewalk outside a jewelry store. McFadden suspected that the men were "casing the joint" in preparation for a robbery, so he also suspected that they were armed. He approached the men, identified himself, and asked them what they were doing. Receiving a mumbled response, McFadden grabbed Terry, spun him around, and then patted down his outer clothing. McFadden found a pistol inside Terry's coat pocket. It is important to note that Officer McFadden was engaged in an investigatory tactic in the context of what he suspected to be a crime in progress. I shall return to this point later in this review.

Terry was decided at a pivotal time in history. Crime had spiked to levels the country had not seen since crime was regularly recorded by the government. Moreover, African Americans' roughly decade-long struggle for civil rights was changing in character—transforming from nonviolent protest and acts of civil disobedience to riots in central cities caused by, some hypothesized, conditions in slum living (Gunther et al. 1975, Kerner Comm. 1968). The conditions against which residents raged were not confined to poor housing, schools, and jobs, however. The Kerner Commission (1968), charged with investigating urban riots, fingered as a prime cause of *every* riot during the period tensions between police and residents of so-called racial ghettos in city after city. The Commission noted specifically that public confrontations between law enforcement personnel and residents of segregated urban neighborhoods sparked many riots (Kerner Comm.

1968). A separate presidential commission convened to study crime during the same period also reached a similar conclusion (Pres. Comm. Law Enforc. Adm. Justice 1967).

Writing to the *Terry* Court via an amicus curiae brief, the NAACP Legal Defense Fund (the Defense Fund) drew on the National Crime Commission's work and relied on its findings as it exhorted the Court to limit the practice of stop and frisk:

> We are gravely concerned by the dangers of legitimating stop and frisk, and thus encouraging, and increasing the frequency of occasions for, police-citizen aggressions. Speaking bluntly, we believe that what the ghetto does *not* need is more stop and frisk. (Gunther et al. 1975, emphasis in original)

The Defense Fund reasoned that holding police to the high probable cause standard could actually curb the practice. Given the Court's active role in developing a more muscular constitutional law of criminal procedure during the decade preceding *Terry*, the Defense Fund's approach made sense.

After extending the exclusionary rule as a remedy for Fourth Amendment violations to the states, the Supreme Court ramped up federal regulation of state criminal justice practices. Although the Fourth Amendment's proscriptions against unreasonable searches had been made applicable to the states before the 1950s in *Wolf v. Colorado* (1949), the Court did not prescribe any particular remedy for state-level violations. *Mapp v. Ohio* (1961) gave teeth to court decisions finding police actions unconstitutional, in that evidence obtained in violation of the US Constitution was required to be excluded from trial, often precluding conviction in such cases.[2] Thus, John Terry's lawyers sought to exclude the evidence that Officer McFadden obtained through his frisk of John Terry in order to deter officers from liberally using their discretion to stop and frisk people.[3] Although the Defense Fund did not argue this point explicitly in its brief, it seems likely that the Court's determination to regulate state practices through the creation of a constitutional code of criminal procedure was an effort to combat the poisonous influence of institutionalized racism on state criminal justice system operation. Nearly every important constitutional criminal procedure decision between 1960 and the early 1970s arose from this context (Kahan & Meares 1997).

Perhaps acknowledging the Defense Fund's warning, the *Terry* Court noted poor police–community relations as a factor to consider in its decision, stating in a footnote that members of minority groups complained of "wholesale harassment by certain elements of the police community" and that a component of this harassment was due to "misuse of field interrogations [in which] police adopt 'aggressive patrol,' routinely stop[ping] and question[ing] persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." However, despite recognizing this pressing problem, the *Terry* Court rejected the Defense Fund's argument and upheld the stop and frisk practice on the basis of reasonable suspicion rather than probable cause. The Court's solution provided some oversight of the police practice because

[2] Note, however, that stops and frisks typically do not result in arrest, let alone conviction or seizures of evidence, rendering anemic the exclusionary rule as a remedy to deter unlawful practices. Civil damages remedies are a possibility in noncriminal cases, of course, but few litigants appear to seek such damages in cases involving stops and frisks as compared to other types of Fourth Amendment violations. In a study of approximately 1,300 published federal appellate decisions between 2005 and 2009 discussing a Fourth Amendment issue, Professor Nancy Leong (2012) found that 95% of *Terry* claims were litigated in the criminal context. This was in contrast to claims involving arrest warrants, where 46% were criminal. Leong (2012) also showed that although the government is successful 90% of the time in criminal cases, its success rate drops to 52% in civil cases.

[3] Interestingly, because the exclusionary rule was the only remedy of note available to Terry, the Court ended up focusing upon the consequences of the frisk as opposed to the force McFadden used in his initial contact with him. William Stuntz (1998a) has argued that this was likely a grave oversight by the Court.

stop and frisk was deemed to be subject to Fourth Amendment regulation. However, by justifying the practice on the basis of reasonable suspicion as opposed to probable cause, the Court gave police more free reign than the petitioner desired. In threading the needle, the Court worried explicitly about the toll that unchecked crime could take if the police were not allowed more discretion to stop and frisk on less than probable cause (*Terry v. Ohio* 1968, p. 15).

The Court had a legitimate basis for its concern. Violent crime rates continued to climb another 50% over the decade following the *Terry* decision, and policy makers actively sought solutions. As Epp and colleagues (2014) explain, there was a concerted effort by policing scholars to push for more proactive law enforcement measures centered around police stops and designed to reduce violent crime. One of the earliest scholarly pieces to call for such a strategy was an article by the late James Q. Wilson and Barbara Boland in 1978 urging police to shift from random police patrol to a more aggressive style aimed at maximizing the number of interactions with and observations of a relevant community (Wilson & Boland 1978). Wilson & Boland (1978) based their recommendation on an analysis of the robbery rates of 35 cities. Specifically, they found that cities with high levels of traffic citations had fewer robberies than those with low levels. In 1994, Wilson (1994) followed up the 1978 piece with a provocative journalistic version of the argument in which he explicitly called for police to "Just Take Away Their Guns" by utilizing street frisks under *Terry v. Ohio* (see also Kleck 1991). And shortly thereafter, The Kansas City Gun Experiment led by Lawrence Sherman seemed to confirm Wilson's hypothesis (Sherman & Rogan 1995).

Focusing on one police beat in Kansas City, Sherman & Rogan (1995) conducted for 29 weeks a quasi-experiment in which beat officers attempted three strategies designed to increase gun seizures, including field interrogation, for the purpose of reducing violent crime. At the experiment's end, gun seizures were up by 65%, triple the number prior to the experiment's commencement in the same area and much higher than the rate of seizure in the matched control district. Gun crime went down precipitously in the treatment district—a decline of 49%—whereas there was almost no change in the comparison district. Additionally Sherman and Rogan found little evidence of crime displacement away from the area of intensive treatment. Sherman's empirical endorsement of gun-based hot-spot policing combined with another new approach strategy called broken windows policing after the celebrated article of the same name by George Kelling and James Q. Wilson (1982) revolutionized the policing of street crime (Meares & Kahan 1998).

Scores of cities rushed to follow the Kansas City model, including perhaps most famously, New York City (Schwartz 1995). The New York City strategic initiative, entitled Getting Guns Off the Streets, directed police to follow up assiduously on every gun-related offense and every lead related to gun sources (Smith & Bratton 2001). This same strategic initiative directed officers, as an order maintenance approach to get guns off the streets, to employ SQF. Between 2003 and 2009 in New York City, the number of SQF police encounters with citizens tripled from 160,851 to 575,996. In an analysis of stops and arrests related to marijuana possession, Geller & Fagan (2010) assert that the NYPD made more than 32,000 marijuana arrests out of 506,000 stops in 2006, "including 64,166 stops of black males between the ages of 15 and 19, or an average stop rate of 77 stops for every 100 such persons. [F]ewer than one half of 1% revealed a weapon." In a different analysis, Fagan and colleagues (2009) estimate that in the highest crime areas of New York City, nearly 80% of young African American men between the ages of 18 and 24 were stopped at least once by police during 2006. The concentrated impact of the NYPD's SQF tactic upon people of color generally and young African American males in particular became highly controversial and resulted in the filing of two civil rights class action lawsuits, *Daniels v. City of New York* (2003) in 1999 and *Floyd v. City of New York* (2013) in 2008, both brought by the Center for Constitutional Rights. Thus, just 40 years after *Terry v. Ohio* (1968) was decided, the issues that

the NAACP Defense Fund laid squarely on the table became the subject of a national discussion regarding the legitimacy and efficacy of stop and frisk as a crime control mechanism, as New York City stopped millions in the name of bringing crime down in the city.

It turns out that the intellectual architects of the aggressive approach were not blind to these consequences. Even while he extolled the potential benefits of the Kansas City Gun Experiment, Sherman also worried that intensified police patrol would irritate police–community relations generally, stating, "Most worrisome is the possibility that field interrogations could provoke more crime by making young men subjected to traffic stops more defiant toward conventional society and thus commit more crimes" (Sherman & Rogan 1995, p. 692). Sherman's own important theoretical work on the potential for overly harsh criminal sanctions to increase crime among certain groups provided a strong basis for his concern (Sherman 1993). Wilson (1994), too, acknowledged the potential for his proffered strategy to antagonize because "[y]oung and black and Hispanic men will probably be stopped more often than older white Anglo males or women of any race." But, he ultimately concluded that the potential for violent crime reduction was worth placing a bet on more aggressive police practice. His wager was called on August 12, 2013, when federal district court judge Shira Scheindlin issued a ruling in *Floyd v. City of New York* (2013), finding that the NYPD had engaged in a pattern and practice of unconstitutional stops and frisks.

The *Floyd* litigation demonstrates in bold relief that the issues the *Terry* Court struggled with over 40 years ago have not changed, although they are presented at a vastly different scale. Recall that Officer McFadden's stop and frisk of Terry occurred in an investigative context. That is, Officer McFadden happened to observe Terry and his companions in what could be described as a one-off situation that appeared suspicious to the officer. By contrast, the *Floyd* litigation presents a situation in which thousands of NYPD officers have stopped hundreds of thousands of New Yorkers as part of a planned and concerted effort to drive crime down rather than intervening in crimes in progress.

The *Floyd* plaintiffs alleged that the NYPD stopped hundreds of thousands of predominantly African American and Latino New York City residents without justification under the Fourth Amendment and in a racially discriminatory manner in violation of the Fourteenth Amendment's Equal Protection Clause. Defendants responded that the stops were consistent with the law and that the large number of stops and frisks in the City—especially in higher crime areas—was necessary to keep crime down. Fourth Amendment case law post *Terry* developed in such a way that a suspect's presence in a high crime area had become a legitimate factor, although not the sole factor, on which a law enforcement agent could rely in coming to a conclusion about whether she believes there is reasonable suspicion to stop that suspect (e.g., *Florida v. J.L.* 2000, *Illinois v. Wardlow* 2000; see also Ferguson 2007).[4]

Judge Scheindlin's Fourth and Fourteenth Amendment liability findings are importantly intertwined because racial disproportion in stops and frisks alone does not provide a foundation for a Fourteenth Amendment violation. A Fourteenth Amendment violation requires discriminatory purpose on the part of the state, not just disparate impact resulting from state action. Indeed, given

[4]It is important to note that the doctrine on this point is hardly clear. The Supreme Court has not specified a test for assessing just how high the level of crime in a particular place ought to be in order to justify a finding of reasonable suspicion, so the lower courts have developed their own, not entirely consistent, approaches to the problem. See, for example, *United States v. Wright* (2007, pp. 53–54) (setting out a three-factor test requiring a nexus between the crime suspected in the case and the crime most prevalent in the area, limited geographical boundaries, and temporal proximity between evidence of heightened criminal activity and the date of the stop); *United States v. Caruthers* (2006, pp. 467–68) (same); *United States v. Patton* (2013, pp. 734, 738) (same). But most courts rarely require law enforcement agents to provide objective, verifiable, or empirical data to back up their claims, allowing the state simply to rely upon local media reports. Scholars have challenged the term "high crime area" as leading to race- or class-based discrimination (Harris 1993, Slobogin 2003).

Terry's teaching that police must point to indications amounting to reasonable suspicion that crime is afoot or has occurred before stopping someone, one should expect that more stops and frisks would occur in high crime areas when they are being carried out in a manner that comports with the Fourth Amendment. The demographics of New York City are such that the higher crime areas of the City contain a higher proportion of African American and Latino residents than the areas with lower crime rates; thus, one might expect, all other things being equal, that police would stop a number of people of color disproportionate to their representation in the city's population if they chose, as Fourth Amendment doctrine seems to direct, to focus on places where violent crime is most likely to occur. That is, legal policing of the streets of New York most likely would burden African Americans more than other groups.

An expert report Fagan (2010) produced as part of the *Floyd* litigation disturbs one's ability to easily conclude that the NYPD's actions were obviously legal, however. In the report, Fagan analyzed thousands of NYPD UF-250s, administrative forms members of the NYPD must complete every time they stop someone. When filling out UF-250s, NYPD officers are required to tick reasons for stopping a suspect, such as "casing a location," "suspicious bulge," "fits relevant description," or "furtive movement."[5] More than half of the approximately 4 million forms Fagan analyzed indicated "furtive movement" as a justification for a stop, and in a substantial subset of these, only "furtive movement" was checked off. It is hard to imagine a scenario in which a person engaging in a "furtive movement" without any other indication of criminal activity could possibly, even if the suspect is moving in this way in a so-called high crime area, support *Terry v. Ohio's* (1968) clear requirement: "specific, reasonable inferences" that criminal activity is afoot as opposed to "inchoate, unparticularized suspicion or hunch" (see also Meares & Harcourt 1999, pp. 789–92).

If indications of criminality do not adequately explain NYPD police activity, what does? Fagan (2010, pp. 41–60) provides an answer in his expert report: the racial composition of a neighborhood plus patrol strength allocation by place. Looking again to the UF-250 forms, Fagan compared the number of stops in an enforcement area and the race of the people stopped with the number of stops one would expect to occur in a given area based on crime rates, reasoning, as the City asserted, that there should be more stops in areas that exhibit higher rates of crime. However, rather than supporting the City's argument, the statistical analysis is an indictment. Fagan's regressions test for whether crime rates explain the NYPD's stop practices, controlling for population size and race of the relevant area's population net of other factors such as poverty, education level, and the like. His findings consistently reveal that racial composition of an area predicts stop patterns over and above the contribution made by crime. In fact, the level of violent crime in an area, somewhat surprisingly, does not make any additional contribution to explain the level of stops in high crime areas. Moreover, Fagan finds patrol strength to be a strong predictor of the number of stops in any given area, after controlling for both crime and race. To summarize, although the NYPD claimed to engage in a strategy to deter gun crimes by deploying officers to places exhibiting the highest crime rates, statistical analysis indicates that the Department blanketed certain neighborhoods with patrols and directed those officers to "stop the right people," justifying this policy choice by self-referential statistics indicating that large percentages of New Yorkers arrested for gun crimes were black or Hispanic (*Floyd v. City of New York* 2013, p. 10). The policy amounted to stopping large numbers of people of color "in general" for the purpose of preventing crime, in express

[5]Somewhat ironically, the current forms were instated after litigation around unconstitutional practices. The former generation of forms did not provide checkboxes but, rather, an open space for a narrative. Judge Scheindlin recommended a return to the open narrative format as one of her specified remedies in this case.

contravention of *Terry's* specific teachings that each and every individual stop must be based on specific, articulable facts indicative of criminal activity. The Fagan analysis strongly supports a finding that many of the New York stops violated the Fourth Amendment.

The Fourteenth Amendment to the US Constitution is implicated when a plaintiff can show either that a facially neutral state practice is being applied in an intentionally discriminatory manner or that a law or policy expressly classifies persons on the basis of race and that the classification does not survive strict scrutiny (*Washington v. Davis* 1976). Discriminatory intent is notoriously difficult to ascertain, so racially differential impact for unjustified reasons helps to support a plaintiff's equal protection case (Siegel 2013). In *Floyd v. City of New York* (2013, pp. 14–15), the court concluded that the NYPD's decision to "stop the right people" denied minorities in New York City equal protection of the law, writing, "A police department 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." Here, the Fourth Amendment figures prominently, though implicitly, for to the extent that the NYPD was making clearly correct judgments under *Terry*, it would be much more difficult for the judge to conclude that stops were made based on suspicions of general criminal wrongdoing.

EFFECTIVENESS

The NYPD argued that its SQF strategy was a good policy choice in that it effectively deterred violent crime by deterring people from carrying guns. The NYPD also strenuously argued that the effectiveness of the strategy was relevant to an assessment of its constitutionality. Judge Scheindlin ruled to the contrary, stating that the effectiveness of the approach was irrelevant to the policy's constitutionality. This section seeks to analyze SQF as a policy choice. Although I believe Judge Scheindlin correctly concluded that the effectiveness of SQF is not relevant to its constitutionality, the program's efficacy remains an important question. Given the prominence of New York's strategy, it is worth spending some time to review recent analyses of the relationship between SQF and crime reduction. I turn to that analysis following a note on the relationship between the potential effectiveness of the strategy and its constitutionality.

The NYPD attempted in the *Floyd v. City of New York* (2013) litigation to justify its policy of stopping hundreds of thousands of mostly young people of color by claiming that the approach was responsible for saving lives. The City's argument actually has a constitutional provenance. One of the most notable features of the constitutionalization of criminal procedure in the 1960s was the Supreme Court's focus on the realities of street policing, investigation, and the impact of such activities on individual freedoms. Judicial decisions of that era routinely centered on empirical issues surrounding the effectiveness of police practices and their impact on liberty interests. As the Court recognized and embraced real world experience, it rejected the formalism of nineteenth-century Fourth Amendment doctrine. In so doing, the Court began to describe constitutional criminal procedure rights as guaranteeing a balance between liberty and order (Meares & Harcourt 1999). Importantly, the Court did not call for balancing in every particular case. If it had, the NYPD's argument would have rested on surer footing. Instead, the Court balanced at a higher level, for example choosing reasonable suspicion rather than probable cause to justify stop and frisk encounters as in *Terry v. Ohio* (1968) or eschewing a requirement that an individual must be told explicitly that she has a right to refuse a search in a consensual search context (*Schneckloth v. Bustamonte* 1973). The reasonable suspicion justificatory standard is itself a result of balancing interests of liberty and order in assessing reasonableness under the Fourth Amendment (*Camara v. Municipal Court* 1967). To take account of the potential efficacy of any particular stop and frisk program would constitute dangerous double counting. Still, because the

strategy's proponents, as well as the public, are so heavily invested in its efficacy, it is worth assessing.

The genesis of the New York strategy and its progeny can be traced to Wilson & Boland's (1978) *Law and Society Review* article referenced above. Their argument was quite simple. Proactive and aggressive police activity, what they called "legalistic" policing, focusing on the issuance of many citations and the questioning of disorderly people at high rates reduces overall crime. The idea was a bold one at the time: Police could actually affect crime rates. Wilson and Boland hypothesized that the aggressive patrol approach could work for one of two reasons or both. First, aggressive policing could affect crime rates indirectly by increasing the risk of weapons detection. Second, stopping and frisking activity could impact crime directly by changing potential offenders' perceptions about their risk of apprehension, as the activity is a visible indicator of police presence. In a key move, Wilson and Boland attempted theoretically to disengage stopping and frisking from actual crime detection and prosecution. Their claim was that the effect of aggressive patrol could occur even if the practice did not lead to a higher rate of solved crimes. That meant police alone could make a difference. Further work seemed to solidify the Wilson and Boland hypothesis. In a replication and theoretical extension of Wilson and Boland's work 10 years later, Robert Sampson and Jacqueline Cohen (1988) found proactive policing to have a direct inverse effect on robbery rates in over 170 American cities in 1980, holding important determinants of crime such a poverty, inequality, and family disruption constant. Although the authors found significant and strong effects of proactive policing, especially upon adult African American robbery rates, they cautioned that "restrictions on freedom entailed by an aggressive policing policy also are an important concern" (Sampson & Cohen 1988, p. 186).

Twenty years later, a new set of scholars reexamined the field, armed with improved statistical tools and more refined data. Unlike the older studies, the newer studies focused on one city: New York. A key contention of the SQF program's supporters was that there was a strong relationship between SQF and declining crime rates in New York City. Given the paucity of positive empirical assessments of this claim, the new group of scholars sought to determine its validity. When Judge Scheindlin issued her order in *Floyd*, there was a single unpublished study by Dennis Smith and Robert Purtell providing some support for the NYPD's assertions regarding the efficacy of its approach, but the support was weak because the study is methodologically problematic (it fails to control for basic factors related to crime, such as poverty) and the results are mixed (it finds some impact on only two crime categories: robbery and burglary). Rosenfeld & Fornango (2014) recently published a subsequent analysis of New York's SQF approach in *Justice Quarterly* with the goal of correcting some of these weaknesses.

Rosenfeld & Fornango (2014) begin with a basic observation: Juxtaposing the rise in SQF rate in New York City between 2003 and 2010 and the dramatic drop in crime rate raises the question of whether SQF is responsible in some way for crime reduction. Even the fact that so few arrests are made after stops—an average of 6% during the observation period—does not undermine this hypothesis, despite arguments to the contrary. This is because small numbers of arrests could constitute evidence of the fact that would-be offenders are deterred from carrying weapons and contraband, just as Wilson & Boland (1978) hypothesized. Focusing on the crime categories for which Smith and Purtell obtained their strongest results, robbery and burglary, Rosenfeld & Fornango (2014) found few significant effects of several SQF measures (rate of total stops; stops of black, Hispanic, and white suspects; and stops resulting in arrest) on precinct robbery and burglary rates. However, the authors acknowledge that a weakness of their study was their use of annual measurements of SQF, which could mask subannual effects of the strategy on crime. The authors did not conclude that SQF had no impact on crime, however. They noted, "[I]f there is an impact, it is so localized and dissipates so rapidly that it fails to register in annual precinct crime rates,

much less the decade-long citywide crime reductions that public officials have attributed to the policy."

Noting the difficulty of isolating the specific effect of SQF, Weisburd and colleagues (2014) set for themselves the more modest goal of exploring the potential impact of police innovation on declining crime to assess the potential contribution of the NYPD on the City's crime drop. The authors first point out that crime declined in New York City as the number of police declined, undermining the more police, less crime thesis, but the authors hypothesize that fewer police officers could have been concentrating their energies in targeted spots. Was New York City doing more with less? To answer that question, Weisburd et al. (2014) establish that SQFs are concentrated geographically—the majority of the stops and the frisks that attend them occur in just 5% of intersections or street segments. Crime, too, is concentrated, as in other cities (Braga et al. 2010, Weisburd 2012). Finally, they report a strong correlation between SQF areas and crime hot-spot areas. Relying on these analyses, the authors assert that police innovation was a "likely factor in the crime drop in New York and elsewhere" (Weisburd et al. 2014, p. 152). However, they conclude that there is no clear answer to whether police contributed significantly to the City's crime decline, primarily because of the NYPD's resistance to opening up the department to research and researchers who could document particular strategies with specificity in order to make appropriate correlations and causal assessments.

The most recent and sophisticated studies call into question whether SQF makes sense from a policy standpoint given that it is very difficult to connect the strategy to any crime reduction, let alone reductions that are significant. The ambiguity in the social science evidence about street policing in New York therefore contributes to public ambivalence toward policing strategies. The studies of whether the strategy effectively reduces crime are not the only relevant research pertinent to whether SQF is good policy. Another analysis conducted by the New York State Office of the Attorney General (the OAG Study) finds little connection between the strategy and prosecutions for serious crimes (Schneiderman 2013). The OAG Study documents that just 6% of stops during the observation period from 2009 to 2012 resulted in an arrest. Half of those, or 3%, resulted in a conviction of any kind, whether crime or violation. Less than half of those, about 1.5%, led to jail or prison time, and to the extent that any incarceration resulted from a conviction following a stop, the sentence was for 30 days or less. Just 0.15% of stops during the observation period resulted in a prison sentence, that is, a term for a year or more, which is a rough measure of more serious crime. Numbers such as these call into the question the idea that SQF is a sure or even reasonable method of detecting serious offenders who drive up crime in cities.

On that note, it is also worth considering the yield of guns found pursuant to the NYPD's SQF strategy (**Figure 1**). Between 2004 and 2012, there were just over 2 million stops of African Americans, which resulted in 16,000 seizures, yielding 4,200 guns. By contrast, during the same time period, there were approximately 430,000 stops of whites, also yielding 16,000 seizures, from which 300 guns were obtained. Obviously many, many innocent people are being caught up in the criminal justice system under the auspices of this strategy. Even if the strategy was entirely legal and persuasive evidence existed that the strategy was effective, it would be difficult to conclude, given these numbers, that the strategy was efficient and equitable.

Moreover, none of the dimensions reviewed in this article to this juncture (legality, effectiveness, efficiency, and equity) address another important issue underlying New York's SQF and stopping and frisking generally: the legitimacy of the practice. Public confidence and trust in the police is an important vector against which to measure a police practice, and much evidence suggests today—indeed has suggested since *Terry* was decided—that stopping and frisking is difficult to undertake in a way that promotes rather than undermines this confidence, especially among African Americans.

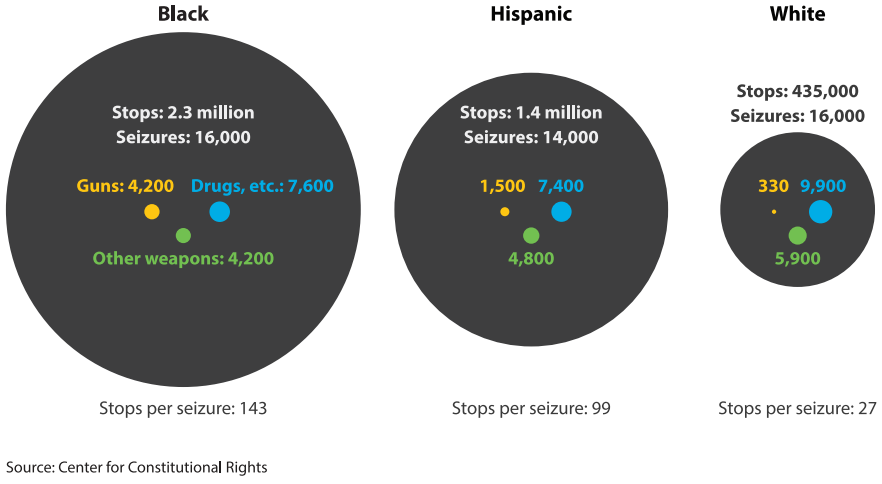

Figure 1

The New York City Police Department's low yield: police stops versus seizures of illicit goods, by race, 2004–2012. Adapted with permission from *Mother Jones*.

Qualitative research assessing people's actual experiences of being stopped makes this point in a particularly compelling way.

QUALITATIVE RESEARCH ON STOPS AND FRISKS

In a recent ethnographic essay, anthropologist Richard Curtis (2012) details his own arrest in New York City following being stopped and questioned when police found him sitting in his car one evening and claimed to smell marijuana. In fact, Curtis had been interviewing a man from a tough neighborhood in Brooklyn, and his interviewee had indeed left a small bag of weed in the backseat of Curtis's car. Curtis recounts depressing and oppressive details of the conditions of NYPD precinct holding cells, along with portraits of the people caught up in the system. Almost to a person, whether young or old, male or female, each was picked up for possession of marijuana. None was a drug dealer, however, and very few people used any other drug except for marijuana. Curtis found this odd because of the NYPD's claim that drugs were a primary driver of crime, violence, and disorder. Yet, Curtis observed, consistent with larger-scale empirical studies, there was very little evidence that drug markets or street-level drug transactions were problematic in the neighborhoods in which people he encountered in his holding cell were stopped (Harcourt & Ludwig 2007, Geller & Fagan 2010).

After waiting for nearly 24 hours, Curtis finally met his lawyer who provided him with the police version of his stop and arrest. Curtis retorted that the police were lying and that they made up a story because they lacked the probable cause to search his car. Then Curtis explained to his lawyer that the gas station video cameras would corroborate his version of the events. What occurred next is worthy of a more extensive quotation:

> She told me that if I wanted to plead "not guilty," I could hire a lawyer and fight it in court, but I would have to hire someone, and it would likely take a number of visits to court going forward. She didn't exactly say that it would be a waste of time and money, but reading between the lines, it was clear that no one that works at the court wants to hear a not guilty plea for this kind of case. I asked, "So, what are

> they offering me?" "ACD," she said. "Adjournment in Contemplation of Dismissal essentially means that you are released immediately after you see the judge, you walk out of the court and don't have to come back, and if you stay out of trouble, the book is closed on the case after 6 months." "I'll take the deal," I said. "To fight the case in court would mean time and money, but more critically, I'd have to get a copy of the video and show that I was in the parking lot with a drug dealer, a dealer whose face would appear on the video, not exactly a good move, if you know what I mean." "I do," she said. Within 30 min of being interviewed by the attorney, I was facing the judge. After giving me an iris scan to make sure that I was the right person, I stood in front of the judge for 30s while the attorneys recited their verses and the judge recited his. I walked out shortly after that and grabbed a taxi for home. (Curtis 2012, pp. 351–52)

Curtis details the ordinary, if disheartening, procedures of being stopped and ultimately arrested under the NYPD's hungry SQF regime. Gau & Brunson (2010), through a similar research strategy, interviewed St. Louis youth in an attempt to uncover their relationship with local police (see also Brunson & Miller 2006). The authors' analysis reveals that a key driver of the relationship was the youth's perception of widespread stops and frisks. "Respondents felt that their neighborhoods had been besieged with police. Many study participants characterized their involuntary contacts with police as demeaning and of inordinate frequency" (Gau & Brunson 2010, p. 266). In Gau and Brunson's sample, more than 78% of respondents reported being stopped at least once in their lives, with 15 as the mean number of times stopped. Although Gau and Brunson's respondents acknowledged the need for police to be involved in crime control efforts and even to detain suspicious-looking people, they could not understand why police would target them as they engaged in lawful activities. This work is not an isolated example. Additional qualitative research from New York documents strained relationships between Latino youth and the NYPD, fueled by harsh treatment during routine stops and frisks without cause or explanation (Solis et al. 2009).

Epp and colleagues (2014) document another dynamic at play impacting how people assess their interactions with police officers. The researchers surveyed by telephone a random sample of the driving population in the Kansas City metro area, following up with a number of in-depth interviews. Their primary finding is that to the extent that officers are motivated to make discretionary choices on the basis of race, they do so when making what the authors refer to as "investigatory stops" as opposed to "traffic-safety stops." The distinction turns on the reason provided by the officer making the stops. Epp et al. (2014) show that in Kansas city, police provide speeding or safety-related reasons such as reckless driving or DUI to justify traffic stops, whereas police justify investigatory stops with reference to minor or low-level violations (such as turning too wide or driving too slowly) or for no reason at all. After separating stops into these two types, Epp and colleagues made two major discoveries. First, overall, African Americans in Kansas City were more likely than whites to experience an investigatory stop. Second, when it came to traffic-safety enforcement, Kansas City police officers acted, for the most part, without regard to a driver's race.

Epp et al.'s (2014) qualitative research is consonant with the work reviewed above, in that African Americans in Kansas City tended to describe police officers as acting much more impolitely during an investigatory stop than did whites. By contrast, both white and African American drivers report similar levels of officer friendliness during traffic-based stops. But Epp and colleagues identify a factor, in addition to respectful treatment, motivating respondents' evaluations of their treatment: their ability to recognize the difference between an investigatory stop versus a traffic stop and the feeling that they were stopped for essentially no reason in the former category of encounter.

PROCEDURAL JUSTICE AND STOP AND FRISK

The qualitative accounts reviewed here indicate that people care a great deal about how legal authorities treat them in an encounter. Social psychology speaks to how people tend to understand their interactions with legal authorities. Procedural justice research shows that people systematically focus upon a few dimensions when evaluating police and other state-based actors such as judges and teachers (Lind & Tyler 1988, Tyler & Lind 1992, Blader & Tyler 2003). First, participation is an important element. People report higher levels of satisfaction in encounters with authorities when they have an opportunity to explain their situation and perspective on it (Tyler 2004). Second, people care a great deal about the fairness of decision making by authorities (Tyler 2002, Tyler & Wakslak 2004). That is, they look to indicia of decision-maker neutrality, objectivity and factuality of decision making, consistency in decision making, and transparency. Third, people care a great deal about how they are treated by organization leaders. Specifically, people desire to be treated with dignity, with respect for their rights, and with politeness (Tyler 2002, Tyler & Wakslak 2004). Fourth, in their interactions with authorities, people want to believe that authorities are acting out of a sense of benevolence toward them. That is, to discern *why* authorities are acting a certain way, people assess *how* those authorities are acting. They want to trust that the motivations of the authorities are sincere, benevolent, and well intentioned (Tyler 2002, Tyler & Wakslak 2004). A robust body of social science evidence from around the world shows that people are more likely to voluntarily obey the law when they believe that authorities have the right to tell them what to do (Tyler 2007). Additional social science research supports the conclusion that procedural justice is critical across contexts, from courts to policing to prison, to encourage not only law abidingness but cooperation and trust (Tyler 2011, Meares & Tyler 2014).

Epp et al. (2014) note that law enforcement organizations that defend widespread use of investigatory stops sometimes encourage police to be unfailingly polite and respectful as a palliative to potentially poor community relations, basing their approach on an interpretation of the procedural justice research suggesting that people care more about how they are treated than whether they are stopped. The law enforcement organizations sometimes note that people accord legitimacy to police decisions on the basis of whether they believe a particular decision to be fair, and one way people evaluate fairness is whether they were respectfully treated. Thus, stop and frisk advocates suggest that the most important strategy for police to adopt during a frisk is to be polite. Based on their research, Epp and colleagues raise doubts about this approach. They find that African Americans in Kansas City tend to distinguish between investigatory stops, on one hand, and traffic stops, on the other, when making decisions about the acceptability of police action, not just whether or not the police were polite. As a result, the authors question the strength of the procedural justice thesis, but their conclusion misses a critical aspect of the procedural justice research. Epp and colleagues focus on treatment with dignity and respect, and it is true that much research demonstrates that such treatment is a critical factor for people when they evaluate particular encounters with legal authorities. As noted above, however, there are additional critical factors that actually line up with the group's Kansas City findings. One way of understanding Epp et al.'s (2014) research findings is that respondents were concerned about the basis of officers' decision making, causing the respondents to distrust that the officers' motivations were benevolent. All of this is consistent with the procedural justice research. Indeed for some groups, decision-making fairness actually trumps interpersonal treatment as a predictor of motive-based trust (Tyler 2005, Tyler & Fagan 2008, Meares et al. 2014).

The legitimacy account's dynamic is inherently social. Rather than being concerned primarily with outcomes and individual maximization of utility, legitimacy-based compliance is centered upon individual identity and is relational. People tend to seek a favorable social identity within the

groups to which they belong. People also seek a favorable social status for their group vis-à-vis other groups. Psychologists Allan Lind and Tom Tyler (1988) explain that people care about procedural justice because it provides them with important informational signals that they view as relevant to their identities. For example, if a police officer treats a person rudely during an encounter, that person will process the treatment as information relevant to how legal authorities tend to view her as well as the group to which she belongs, and her conclusion will be a negative one. According to this view, pride and respect are much more important motivators of behavior than is formal punishment, for loss of status can occur without punishment. Correlatively, status enhancement can occur even in the face of punishment. Tyler & Fagan (2008) demonstrate that the police can give a person a ticket or even arrest them while simultaneously enhancing police legitimacy if they are respectful and fair to the person they are dealing with. By affirming and enhancing a person's status within society, the police give that person something valuable—a positive sense of self and identity—that is more important to them than whether or not an outcome benefits them in the traditional sense. It is not obvious that these process-based considerations would matter more to people than, say, police effectiveness (Meares 2012). Indeed, the public conversation centered upon stop and frisk in New York highlights just this view. But, research consistently demonstrates that indicia of decision-making fairness and interpersonal respect are more powerful predictors of whether people ultimately will place their trust in police officers than are their assessments of the extent to which police are effective crime reducers or even whether police fairly distribute their services across groups (Tyler 2005).

Further research indicates that people's views regarding the legitimacy of the police have real-life consequences. Tyler et al. (2014) find that there is a strong association between the number of police stops that New York City youth see or experience and their sense regarding the legitimacy of the police. Importantly, neither the numbers of stops alone nor the degree of intrusion or force the youth experienced drove their assessments of the acceptability of police actions. Rather, their perceptions of the fairness and lawfulness of police action shaped their ultimate judgments regarding the legitimacy of the NYPD. Several factors worked together to produce perceptions of fairness, however. High levels of intrusiveness during a stop were found to undermine legitimacy judgments, and competency mattered as well. Views concerning general competency in crime fighting as well as the legal propriety of the stop also contributed to perceptions of fairness (but see Meares et al. 2014, demonstrating that public perceptions of legality do not map well onto actual legality). Tyler et al. (2014) found positive interpersonal treatment and the extent to which police exercised their authority fairly to be the most important factors. But these perceptions were found to be fragile. Repeated stop encounters with police appeared to lead people to find police less legitimate over time, and perhaps most critically, those in the study who viewed the police as less legitimate were more likely to engage in criminal conduct (measured by self-report) and also reported themselves as less likely to cooperate with police. In New York City, this finding might be considered the ultimate irony.

IMPLICATIONS AND CONCLUSION

The way that a society polices its members can tell us a great deal about that society. British legal scholar Neil Walker reminds us that "the police are both minders and reminders of community—a producer of significant messages about the kind of place that community is or aspires to be" (Loader & Walker 2007, p. 211). Taking Walker seriously promotes an understanding of the policing enterprise that is different from the usual conception that emphasizes the solution of collective action problems, which in turn emphasizes the role of the police primarily as crime control agents. In the case of stop and frisk, the review of available research should cause us great

unease if the primary argument for its support is its effectiveness at reducing crime. To the extent that there is any benefit at all, that benefit comes at the high cost of many, many intrusions into privacy and autonomy. And the case study of New York should cause us to question whether, even if effective, such a strategy is legal.

Legality is, of course, another way of thinking about the acceptability—the rightfulness—of this approach. Legality has long been used to assess quality police conduct. But, the review above of the history and jurisprudence of stop and frisk demonstrates well that a foundation for assessment built on law is full of fissures. The legality of police action, according to rules developed by experts in the field, typically is assessed at a point in time before an action occurs, but the public, as a group of nonlegally trained ordinary observers, attends to the comportment and demeanor of the legal authorities during an interaction, rather than to the reasons for that engagement in the first place. This means that using lawfulness of police action as the primary yardstick for evaluating good policing will inevitably fail to capture what the public really cares about (Meares et al. 2014). The legitimacy of policing in general as well as of police stops and frisks, therefore, is critical.

Effectiveness as a yardstick can also be problematic. Although it is true that security is a key interest of members of the public, no one believes that there shouldn't be any limits to what the police can do in the name of achieving low crime rates. This is especially true when the rules organizing proper police behavior create a dynamic by which those who are forced to encounter police officers are necessarily viewed as people who have done something wrong. The best and most law-abiding police officer, when deciding to stop someone, must necessarily regard the person to be stopped as suspicious. And that person once stopped in public is also branded as a potential criminal even if it turns out, as will be the case most of the time, no crime is actually afoot. Sherry Colb (1996) of Cornell Law School refers to this dynamic as targeting harm. One critical mission of good street policing, then, is accommodating the public's desire to be secure in their neighborhoods while ensuring that people are free from humiliation or indignity, can avoid the stigma that comes from being publicly identified as a criminal suspect either as an individual or as part of group, and are not subject to police harassment or discrimination (Stuntz 1998b, p. 1273).

A growing body of research demonstrates that public judgments about the acceptability of police action are shaped largely by people's procedural justice evaluations of the interactions that they either have with the police or observe others having. And, we know that people's judgments about these issues have a great deal to do with their evaluations about their own status and the status of the groups to which they belong. Policing is social. Even more than this, policing is constitutive of the communities in which we live. It is not enough for policing to simply solve collective action problems associated with the project of crime reduction. Policing also can and should play a role in the production of positive feelings of self-identity that help to "construct and sustain our 'we-feeling'—our very felt sense of common publicness" (Loader & Walker 2007, p. 154). Legitimacy, then, can be a key driver of a healthy and properly functioning democratic government. Thus, as the most common of police actions, stops and frisks should be employed in ways that enhance good government rather than detract from it.

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