13-3088-cv(L),
13-3461-cv(CON), 13-3524-cv(CON)

United States Court of Appeals

for the

Second Circuit

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, DAVID OURLICHT,
Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF NEW YORK,

Defendant-Appellant,

SERGEANTS BENEVOLENT ASSOCIATION,

Proposed Intervenor-Appellant,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume 7 of 88 (Pages A-1549 to A-1785)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, and DAVID OURLICHT, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

THE CITY OF NEW YORK, *et al.*,

Defendants.

OPINION AND ORDER

08 Civ. 1034 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Police officers are permitted to briefly stop any individual, but only upon reasonable suspicion that he is committing a crime.[1] The source of that limitation is the Fourth Amendment to the United States Constitution, which guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Supreme Court has explained that this "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the

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[1] *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

homeowner closeted in his study to dispose of his secret affairs."[2] The right to physical liberty has long been at the core of our nation's commitment to respecting the autonomy and dignity of each person: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[3] Safeguarding this right is quintessentially the role of the judicial branch.

No less central to the courts' role is ensuring that the administration of law comports with the Fourteenth Amendment, which "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."[4]

On over 2.8 million occasions between 2004 and 2009, New York City police officers stopped residents and visitors, restraining their freedom, even

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[2] *Terry*, 392 U.S. at 9.

[3] *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

[4] *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886) (citation and quotation omitted). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373-74.

if only briefly.[5] Over fifty percent of those stops were of Black people and thirty percent were of Hispanics, while only ten percent were of Whites. The question presented by this lawsuit is whether the New York City Police Department ("NYPD") has complied with the laws and Constitutions of the United States and the State of New York. Specifically, the four named plaintiffs allege, on behalf of themselves and a putative class, that defendants have engaged in a policy and/or practice of unlawfully stopping and frisking people in violation of their Fourth Amendment right to be free from unlawful searches and seizures and their Fourteenth Amendment right to freedom from discrimination on the basis of race.

To support their claims, plaintiffs have enlisted the support of Jeffrey Fagan, a professor of criminology at Columbia Law School, who has submitted an extensive report analyzing the NYPD's practices.[6] The City of New York ("City") and the other defendants object to the introduction of Fagan's opinions, arguing that he lacks the qualifications to make the assessments that he makes, that his methodologies are fatally flawed, and that many of his opinions constitute

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[5] As the Supreme Court has explained, being stopped and frisked "must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 292 U.S. at 25.

[6] *See* Report of Jeffrey Fagan ("Report") and Supplemental Report of Jeffrey Fagan ("Supp. Rep.") [Docket No. 132].

inadmissible conclusions of law.[7]

NYPD officers are required to fill out a detailed worksheet describing the events before and during every stop that they perform. All of these records are compiled in a database – a database that now contains a wealth of information about millions of interactions between police officers and civilians. The information is both incredibly rich and inevitably incomplete: rich because the dozens of boxes on the worksheet are designed to solicit the very information – who, when, where, why and how – that courts (and the NYPD itself) use to evaluate whether a stop was lawful; incomplete because a fill-in-the-blank document can never fully capture the nuances of a human interaction, because these worksheets capture only the quick responses of police officers rather than of the civilians who have been stopped, and because police officers do not always fill them out perfectly.

How should a jury evaluate the NYPD's stop-and-frisk policy? What should attorneys and witnesses be permitted to tell the jury about the 2.8 million interactions between officers and the people they have stopped? And what should the Court tell those jurors? Both parties agree that the database contains valuable

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[7] *See* Memorandum of Law in Support of Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan ("Def. Mem.").

and relevant information. But they disagree vehemently over how to accurately summarize the information and how to fairly describe it to the jury. Defendants' motion to exclude the opinions of Professor Fagan therefore presents this Court with important questions regarding expert testimony and trial management.

With one important exception, Fagan's report is methodologically sound and, under the Federal Rules of Evidence, admissible. I will permit Fagan's generalizations where they are reasonable interpretations of the data and I will prohibit them where I find that they are inaccurate or have little probative value. For the reasons below, defendants' motion is granted in part and denied in part.

II. THE FAGAN REPORT

A. Professor Fagan's Qualifications

Fagan is the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School; director of the school's Center for Crime, Community, and Law; a Senior Research Scholar at Yale Law School; and a Fellow of the American Society of Criminology.[8] He has published dozens of refereed journal articles and chapters on an array of topics in criminology including issues related to juveniles,

[8] *See* Declaration of Jeffrey Fagan in Support of Plaintiffs' Opposition to Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan ("Fagan Decl.") ¶ 1.

deterrence, capital punishment, race, and New York City.[9] He has been studying and writing about the policies at issue in this case for over a decade.[10] Perhaps most prominently, in 1999 Fagan conducted a study for the Civil Rights Bureau of the New York State Office of the Attorney General, statistically analyzing the NYPD's data on approximately 175,000 stops and frisks and "focusing specifically on racial disparities in stop rates and the extent to which stops complied with the Fourth Amendment."[11] The results of his analysis were published that year in *The*

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[9] *See* Curriculum Vitae ("CV"), Appendix A to Fagan Decl., at 3-10. Fagan has served as an expert witness in over a dozen cases, has received numerous awards and honors, and has written technical reports for the United States Department of Justice, the Centers for Disease Control, and the National Institutes of Health, among other organizations. He serves on the editorial boards of at least six criminology journals and has taught extensively in the fields of criminology, law, and qualitative and quantitative research methods. *See id*. at 16-23.

[10] *See* Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. Empirical Legal Stud. 591 (2010); Jeffrey Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City* in Race, Ethnicity, and Policing: New and Essential Readings (Stephen Rice & Michael White eds., 2009); Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the NYPD's Stop-and-Frisk Policy in the Context of Claims of Racial Bias*, 102 J. Am. Statistical Ass'n 813 (2007); Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York* in Guns, Crime, and Punishment in America (Bernard Harcourt ed., 2003); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows:* Terry*, Race and Disorder in New York City*, 28 Fordham Urb. L.J. 457 (2000).

[11] Fagan Decl. ¶ 6.

New York Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General.[12]

As defendants point out, however, Fagan is not a lawyer and has never taken courses at a law school.[13] His graduate degrees are in industrial and civil engineering, with a focus on policy science and criminal justice.[14] Furthermore, Fagan "has never worked in a law enforcement field, has never completed a [stop and frisk] form, never conducted a Stop, Question & Frisk ("SQF") and never observed more than a few SQFs or gone for a ride along with a NYPD officer to even observe a SQF."[15]

B. Fagan's Data Sources

After conducting a stop, NYPD officers are required to fill out a "Stop, Question and Frisk Report Worksheet," which is a two-sided form commonly known as a UF-250.[16] Approximately 2.8 million of these worksheets

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[12] *See* Ex. 117 to Declaration of Darius Charney, plaintiffs' counsel, in Opposition to Defendants' Motion for Summary Judgment.

[13] *See* Def. Mem. at 2 n.5.

[14] *See* CV at 1.

[15] Def. Mem. at 2 n.5.

[16] *See* Ex. B to Fagan Decl. Because the form is central to this case and this motion, it is reproduced at the end of this opinion as Appendix 1. I use the terms UF-250, worksheet, and form interchangeably. The NYPD's use of a revised UF-250 form was agreed to as part of the settlement in *Daniels v. City of*

were filled out between 2004 and 2009 and the NYPD entered the information from each of the worksheets into a database and produced it to plaintiffs and Fagan as electronic files.[17] Each UF-250 includes information about the suspect's demographic characteristics (age, gender, race/ethnicity); the date, time, duration, location, and outcome of the stop (*e.g.*, frisk, search, type of weapon seized if any, type of other contraband found if any, summons issued, arrest); the suspected crime for which the person was stopped; and whether and what kind of physical force was used. Because the suspected crimes were recorded "using individualized and often idiosyncratic notation," Fagan coded the notations into a set of 131 specific criminal charges and then distributed each "suspected crime" into one of twenty aggregate crime categories (*e.g.*, violent crime, minor violent crime, fraud, drugs).[18]

On each UF-250, there are twenty boxes that can be checked by police officers regarding the factors – or as Fagan calls them, the "indicia of suspicion" – that motivated the stop. There are ten indicia on Side 1 of the worksheet ("circumstances of stop" or "stop circumstances") and ten more on Side 2

New York, 99 Civ. 1695, a class action similar to this one that was litigated by some of the same attorneys.

[17] *See* Report at 6.

[18] *Id.*

("additional factors"). The worksheet also contains nine checkboxes regarding the indicia of suspicion that motivated any frisk that took place and four checkboxes regarding the indicia of suspicion that motivated any search.

Fagan's report relied on detailed demographic information, organized by police precinct and census tract, which he compiled from a variety of resources including the United States Census, the federal government's American Community Survey, and a commercial database called ESRI. Fagan used police precincts as his principal unit of analysis because "precincts are the units where police patrol resources are aggregated, allocated, supervised and monitored" and because "precinct crime rates are the metrics for managing and evaluating police performance."[19] The demographic data he collected includes information on race, ethnicity, age, income, unemployment, housing vacancy, residential mobility, and physical disorder.[20] The City provided him with data on crime complaints from 2004-2009. This data specifies the location of a complaint and type of alleged crime; Fagan categorized the alleged crimes using the same categories that he used to analyze the UF-250s, which "provided a foundation for benchmarking the types and rates of suspected crimes in the stops with the observed rates of reported

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[19] *Id.* at 7.

[20] *See id.* at 7-9.

specific crimes in each police precinct."[21] The City also provided Fagan with "patrol strength data" regarding the allocation of police resources to particular neighborhoods. Finally, Fagan included in his analysis information about the location of public housing (where there is often a large police presence) and population density (which impacts the likelihood of police-civilian interactions).[22]

C. Fagan's Analysis Regarding Plaintiffs' 14th Amendment Equal Protection Claims and Defendants' Criticism of That Analysis

In order to test plaintiffs' 14th Amendment claim that defendants' stop-and-frisk practices treat Blacks and Hispanics differently than they treat Whites, Fagan designed and ran regressions that sought to determine the impact of a person's race on outcomes such as being stopped, being frisked, being subjected to force during an arrest, etc.[23] Fagan's regressions compared the influence of race on these outcomes with the influence of non-race factors such as residency in a poor or high crime neighborhood. These analyses control for the fact that in New York City, as a general matter, Blacks and Hispanics live in higher crime

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21 *Id.* at 9.

22 *See id.* at 10-11.

23 *See id.* at 12.

neighborhoods than do Whites.[24]

Fagan created a benchmark against which "to determine if police are selectively, on the basis of race or another prohibited factor, singling out persons for stops, questioning, frisk or search."[25] Police officers may lawfully stop an individual only when they have reasonable suspicion to believe that the person has committed, is committing, or is about to commit a crime. The rates at which different groups of people engage in behavior that raises such reasonable suspicion is therefore relevant to the determination of whether the police are treating people equally. According to Fagan, "a valid benchmark requires estimates of the supply of individuals of each racial or ethnic group who are engaged in the targeted behaviors and who are available to the police as potential targets for the exercise of their stop authority."[26] Fagan used two variables in constructing a benchmark that would fulfill these requirements: the local rate of crime and the racial distribution

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[24] Fagan makes a helpful comparison to the employment context: in order to properly test for disparate treatment on the basis of race, an analysis should compare the hiring rates of the racial groups in question while controlling for plausible non-race factors such as education and experience. Because these factors may be correlated with race, a proper regression will differentiate between (lawful) differences in treatment based on relevant work experience and education and (unlawful) differences in treatment based on race.

[25] *Id.* at 15.

[26] *Id.* at 16.

of the local population.[27] This benchmark was designed, in part, "to test the extent to which the racial composition of a precinct, neighborhood, or census tract – separate and apart from its crime rate – predicts the stop-and-frisk rate in that precinct, neighborhood, or census tract."[28]

Based on his statistical analyses, Fagan reached the following conclusions regarding disparate treatment:

> The racial composition of a precinct, neighborhood, and census tract is a statistically significant, strong and robust predictor of NYPD stop-and-frisk patterns even after controlling for the simultaneous influences of crime, social conditions, and allocation of police resources.
>
> NYPD stops-and-frisks are significantly more frequent for Black and Hispanic residents than they are for White residents, even after adjusting for local crime rates, racial composition of the local population, police patrol strength, and other social and economic factors predictive of police enforcement activity.
>
> Blacks and Latinos are significantly more likely to be stopped by NYPD officers than are Whites even in areas where there are low crime rates and where residential populations are racially heterogenous or predominately White.
>
> Black and Hispanic individuals are treated more harshly during stop-and-frisk encounters with NYPD officers than Whites who are stopped on suspicion of the same or similar crimes.[29]

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27 *See id.* at 18.

28 Fagan Decl. ¶ 23.

29 *Id.* ¶ 4(a)-(d).

Notably, Fagan did not include in his benchmark the rates of criminal activity by race. This decision constitutes the parties' central disagreement regarding Fagan's analysis of disparate treatment. Defendants believe that crime rates by race, as reflected in the complaints of crime victims and in the NYPD's arrest data, is the best benchmark: "In an analysis concerned with *whom* the police are stopping, a reliable benchmark must take into account *who* is committing the crime."[30] Defendants argue that "Blacks and Hispanics comprise a majority of violent crime suspects in all precincts except one in the City, and in most precincts are the overwhelming majority of suspects."[31] Defendants point out that Fagan has used arrest data in at least two previous studies, even though arrest data was less complete at the time of those studies than it is today.[32]

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[30] Def. Mem. at 12.

[31] Declaration of Robert Smith ("Smith Decl."), defendants' testifying expert, ¶ 13. "As an illustration of the omitted variable bias manifest in Fagan's model, I note that NYPD stops are not proportionally correlated with the gender of local populations. 93% of all stops in 2009 were of males while only 7% were of females, who constitute 52.5% of the population . . . If an analyst were to conduct a regression analysis using Fagan's model design but including gender (rather than race) as an independent ("explanatory") variable, stop rates of men would appear disproportionately large. Without taking into account data on the radically different contributions by men and women to commission of crime, an analyst would be left to conclude erroneously that police are targeting people for stops because they are male." *Id.* ¶ 17.

[32] *See* Reply Declaration of Robert Smith ("Smith Reply Decl.") ¶ 23 (pointing out that Fagan used arrest data to assess racial discrimination in his

Fagan explains that he chose not to use data from arrests and suspect identifications here because that data is incomplete; imputing the characteristics of the known data to the missing data, Fagan believes, would raise serious risks of selection bias.[33] Because suspect race is only known in fifty to sixty percent of cases, extrapolation of that known racial distribution to the remaining forty or fifty percent of cases may not be appropriate, Fagan argues, particularly if the suspect crimes that animate a large share of stops (such as drug possession) do not correlate well to crime reports that identify the race of a suspect (such as assault). In the years since his earlier reports were written, Fagan explains, "the weight of opinion among researchers who were doing this kind of work" is that his current benchmark is an improvement on his earlier benchmarks.[34]

D. Fagan's Analysis Regarding Plaintiffs' Fourth Amendment Reasonable Suspicion Claim and Defendants' Criticism of That Analysis

In order to assess plaintiffs' claim that defendants have engaged in a practice of stopping and frisking New Yorkers without reasonable suspicion and in violation of the Fourth Amendment, Fagan analyzed the combinations of boxes

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article in the Journal of the American Statistical Association and in the Attorney General's report).

[33] *See* 3/8/12 Hearing Transcript ("Tr.") at 72-73.

[34] *Id.* at 90:8-9.

that officers checked on the UF-250s. He did this in two ways. *First*, he assumed that the forms had been filled out accurately and completely and sought to determine whether reasonable suspicion existed in any given stop based on the boxes that were checked off on the worksheet. *Second*, by searching for patterns in the worksheet data from across the City and over the 2004-2009 period, Fagan sought to determine whether the data on the forms is accurate and whether the NYPD's use of the forms is an effective way to ensure that officers are complying with the law.[35]

1. Analysis and Findings Regarding UF-250s, Assuming Their Veracity and Completeness

Because there are ten "stop circumstances" on Side 1 of the form and ten "additional factors" on Side 2, and because officers are not limited in the number of boxes they can check (although they are required to check at least one Side 1 stop circumstance), there are an enormous number of potential combinations of boxes that can be checked. Fagan created the following system for determining whether or not a stop was lawful: *First*, he categorized the stop factors on Side 1 as either "justified" or "conditionally justified." *Second*, he defined a stop itself as "justified," "unjustified," or "indeterminate" based on which boxes had been checked. He did this by analyzing case law, as described in Appendix D of his

[35] *See id.* 74-77.

report. The following is a summary of Fagan's algorithm and categorization scheme:

Category 1: Stops are **justified** if one or more of the following three "justified" stop circumstances on Side 1 are checked off: (1) "Actions Indicative Of 'Casing' Victims Or Location"; (2) "Actions Indicative Of Engaging In Drug Transaction"; (3) "Actions Indicative Of Engaging In Violent Crimes."

Category 2: Stops are **justified** if at least one of the following six "conditionally justified" stop circumstances on Side 1 are checked off *and* at least one of the additional circumstances on Side 2 are checked off. The conditionally justified stop circumstances are (1) "Carrying Objects In Plain View Used In Commission Of Crime *e.g.*, Slim Jim/Pry Bar, etc."; (2) "Suspicions Bulge/Object (Describe)"; (3) "Actions Indicative Of Acting As A Lookout"; (4) "Fits Description"; (5) "Furtive Movements"; (6) "Wearing Clothes/Disguises Commonly Used In Commission Of Crime."

Category 3: Stops are **unjustified** if no stop circumstances on Side 1 are checked off, even if one or more additional circumstances on Side 2 are checked off.

Category 4: Stops are **unjustified** if only one conditionally justified stop circumstance on Side 1 is checked off and no additional circumstances on

Side 2 are checked off.

Category 5: Stops are **justified** if two or more conditionally justified stop circumstances on Side 1 are checked off.

Category 6: Stops are **indeterminate** if "Other Reasonable Suspicion Of Criminal Activity (Specify)" is the only stop circumstance checked off on Side 1, regardless of whether one or more additional circumstances on Side 2 are checked off and regardless of what is written in the blank space under the "Other" box.

Based on this classification system, Fagan concluded the following about the stops conducted by the NYPD:

> More than 170,000 stops, or 6.41% of all stops (6.71% of non-radio run stops, and 5.26% of radio runs), recorded by NYPD officers between 2004 and 2009 were Unjustified.
>
> For more than 400,000 stops, or approximately 15%, the corresponding UF250 forms do not provide sufficient detail to determine the stops' legality.[36]

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[36] Fagan Decl. ¶ 4(e)-(f). Fagan's report contained a few statements that incorrectly described his algorithm but did not affect his results. *See* Def. Mem. at 6; Fagan Decl. ¶¶ 15-16. Fagan's report also contained what he and plaintiffs acknowledge was one substantive error: he coded Category 5 stops – in which two or more conditionally justified circumstances had been checked – as Indeterminate when they should have been coded as Justified. This improperly increased the percentage of stops that were of "Indeterminate" legality from 15.4% to 24.4% and decreased the number of justified stops from 78.2% to 68.9%. *See* Def. Mem. at 5-6; Fagan Decl. ¶ 17.

Defendants level many criticisms at Fagan's classification system,[37] including the following: *First*, the legality of a given stop cannot be determined based solely on the information on the UF-250, since the worksheet is simply a summary of the events and cannot substitute for a proper evaluation of the totality of the circumstances. *Second*, Fagan's descriptions of stops as justified, unjustified, or indeterminate constitute inadmissible legal conclusions. *Third*, Fagan did not incorporate into his analysis the handwritten notes on the worksheets that are made when the box marked "Other" is checked (Category 6), even when those notes provided an explanation of why reasonable suspicion existed. *Fourth*, Fagan classified Category 3 stops as unjustified even when multiple Side 2 circumstances were checked and Category 6 stops as indeterminate even when the "Other" box was coupled with multiple Side 2 circumstances; these decisions are not supported by the caselaw, which permits some stops that fall into those categories. *Fifth*, Fagan classified Category 4 stops as unjustified even though courts have permitted stops on the basis of only one "Conditionally Justified" factor. *Sixth*, Fagan failed to incorporate the location of a stop in determining whether it took place in a high crime area, relying instead on whether the Side 2 high crime area box had been checked, and he failed to incorporate descriptive

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[37] *See* Def. Mem. at 2-7.

information about the person stopped (such as height, weight, etc.) that might explain why an individual fit the description of a perpetrator of a crime.

2. Analysis of the Accuracy and Effectiveness of the UF-250s and the Stop-and-Frisk Policy

Fagan also sought to determine the extent to which the information on the UF-250s was accurate and complete. This analysis was largely independent of the justified/unjustified classification model described above. The most important elements of Fagan's analysis involved the trends in the usage of various stop factors and the rates at which stops yielded arrests, summonses, and seizures of weapons and contraband (what he calls the "hit rate").

For example, Fagan found that police officers check the Side 2 box "Area Has High Incidence of Reported Offense Of Type Under Investigation" in approximately fifty-five percent of all stops, regardless of whether the stop takes place in a precinct or census tract with average, high, or low crime.[38] Relatedly, the Side 1 box "Furtive Movements" is checked in over forty-two percent of stops; in 2009 it was checked off in nearly sixty percent of stops.[39] However, the arrest

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[38] *See* Report at 52-55; Fagan Decl. ¶ 19. The parties have generally referred to this factor as "High Crime Area" and I do the same, although everyone agrees that the abbreviation is not a perfect reflection of the description on the worksheet.

[39] *See* Supp. Rep. at 41.

rates in stops where the high crime area or furtive movement boxes are checked off is actually below average.[40]

Fagan has found that over the study period, "the percentage of stops whose suspected crime is uninterpretable has grown dramatically from 1.12% in 2004 to 35.9% in 2009."[41] Fagan calculates that "5.37 percent of all stops result in an arrest," that [s]ummonses are issued at a slightly higher rate: 6.26 percent overall," and that "[s]eizures of weapons or contraband are extremely rare. Overall, guns are seized in less than one percent of all stops: 0.15 percent . . . . Contraband, which may include weapons but also includes drugs or stolen property, is seized in 1.75 percent of all stops."[42]

Defendants respond to these findings and conclusions with a number of different criticisms. For example, they argue that the reliance on hit rates "ignores deterrence as an outcome of a stop, which is perhaps the most successful

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[40] *See* Report at 52.

[41] Supp. Report at 39. This "uninterpretable" category covers the worksheets for which the box "Specify Which Felony/P.L. Misdemeanor Suspected" is empty, filled in with "fel," "felony," "misd," "misdemeanor," or contains a text string that does not describe a crime or violation. *See id.*

[42] Report at 63. To determine whether these "hit rates" are low, Fagan compares them to those at roadway check points where cars are stopped at random intervals and concludes that "the NYPD stop and frisk tactics produce rates of seizures of guns or other contraband that are no greater than would be produced simply by chance." *Id.* at 65.

outcome" and "conflates the legal standards required for stops [*i.e.*, reasonable suspicion] and arrests [*i.e.*, probable cause]."[43] Furthermore, "Fagan has no basis and is unqualified to render an opinion as to what might be the appropriate frequency for officers to conduct stops based in part on observed 'furtive movements' or on presence in a 'high crime area' or under which circumstances it would be proper for an officer to check off these boxes."[44] Finally, Fagan's "groundless, highly speculative exposition insinuates that NYPD officers routinely do not adhere to the requisite legal standard of [reasonable suspicion],"[45] supplants the role of the jury by reaching ultimate legal conclusions, and is "tantamount to an impermissible credibility assessment."[46]

III. LEGAL STANDARDS

A. Expert Evidence in General

The proponent of expert evidence bears the initial burden of establishing admissibility by a "preponderance of proof."[47] Rule 702 of the

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[43] Def. Mem. at 9.

[44] *Id.* at 8.

[45] *Id.* at 7.

[46] *Id.* at 10.

[47] *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987) (discussing Rule 104(a) of the Federal Rules of Evidence). *Accord Daubert v. Merrell Dow Pharm.* 509 U.S. 579, 592 (1993).

Federal Rules of Evidence states the following requirements for the admission of expert testimony:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under Rule 702 and *Daubert*, the district court must determine whether the proposed expert testimony "both rests on a reliable foundation and is relevant to the task at hand."[48] The district court must act as "'a gatekeeper to exclude invalid and unreliable expert testimony.'"[49] However, "the Federal Rules of Evidence favor the admissibility of expert testimony, and [the court's] role as gatekeeper is not intended to serve as a replacement for the adversary system."[50] In serving its gatekeeping function, the court's focus must be on the principles and methodologies underlying the expert's conclusions, rather than on the conclusions

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[48] 509 U.S. at 597. *Accord Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999).

[49] *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 449 (2d Cir. 1999) (quoting *Hollander v. American Cyanamid Co.*, 172 F.3d 192, 202 (2d Cir. 1999)).

[50] *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 562 (S.D.N.Y. 2007) (citation and quotation marks omitted).

themselves.[51] In assessing an expert's methodology, courts may consider (1) "whether [the method or theory] can be (and has been) tested," (2) "whether [it] has been subjected to peer review and publication," (3) "the known or potential rate of error [associated with the technique] and the existence and maintenance of standards controlling the technique's operation," and (4) whether the method has achieved "general acceptance" with the relevant community.[52]

The courts' gatekeeping function under *Daubert* applies not only to "scientific" evidence, but also to proffers of "technical, or other specialized knowledge" under Rule 702.[53] The objective of this function is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[54] However, recognizing that "there are many different kinds of experts, and many different kinds of expertise," the Supreme Court has emphasized that the reliability inquiry "is a flexible one."[55] Accordingly, the factors "identified in *Daubert* may or may

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[51] *See Daubert*, 509 U.S. at 595.

[52] *Id.* at 592-95.

[53] *See Kumho Tire*, 526 U.S. at 141.

[54] *Id.* at 152.

[55] *Id.* at 150.

not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."[56] Ultimately, the inquiry "depends upon the particular circumstances of the particular case at issue."[57] In sum, the trial court has "the same kind of latitude in deciding *how* to test an expert's reliability . . . as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable."[58]

In addition, Rule 403 of the Federal Rules of Evidence states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses."[59] Generally, "the rejection of expert testimony is the exception rather than the rule."[60] "The admission of expert

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[56] *Id.* (quotations omitted).

[57] *Id.*

[58] *Id.* at 152.

[59] *Id.* (quotation marks omitted).

[60] Advisory Committee Notes to the 2000 Amendment to Fed. R. Evid. 702.

testimony is committed to the broad discretion of the District Court and will not be disturbed on review unless found to be 'manifestly erroneous.'"[61]

B. Expert Evidence Regarding Mixed Questions of Fact and Law

As a general matter, experts may not testify as to conclusions of law.[62] Doing so would usurp the role of the court in determining the applicable legal standards.[63] Although Federal Rule of Evidence 704 says that "[a]n opinion is not objectionable just because it embraces an ultimate issue,"[64] the Second Circuit has held that Rule 704 "was not intended to allow experts to offer opinions embodying legal conclusions."[65] However, the Circuit has also explained that "experts may

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[61] *United States v. Wexler*, 522 F.3d 194, 204 (2d Cir. 2008).

[62] *See United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

[63] *See United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir. 1999).

[64] "The reasoning behind Rule 704(a) is that if a witness (especially an expert) provides a solid foundation and explanation on an issue for which the fact-finder needs assistance, the factfinder might be left hanging if the witness cannot cap off the testimony with a conclusion about the ultimate issue to which the expert is testifying. Testimony is a narrative, and jurors can be upset and confused if a witness leaves them with testimony that is less than a full narrative – it is like the joke without the punchline, the mystery without the last page." 3 Stephen Saltzburg et al., Federal Rules of Evidence Manual § 704.02[1] at 704-3 (10th ed. 2011).

[65] *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988), *rev'd in part on other grounds*, 856 F.2d 5 (2d Cir. 1988).

testify on questions of fact as well as mixed questions of fact and law."[66] In *United States v. Scop*, the impermissible testimony "deliberately tracked the language of the relevant regulations and statutes [and] was not couched in even conclusory factual statements" whereas in *Fiataruolo v. United States*, the permissible legal conclusions were accompanied by detailed factual background and explanation that gave the jury "helpful information beyond a simple statement on how its verdict should read."[67] This was true even though the expert shared his legal conclusions regarding the ultimate issue that was presented to the jury. The trial court admonished the jury that the expert's opinions were "not binding" and that warning, in combination with the factual support that the expert provided, made his testimony admissible.[68]

C. Reasonable Suspicion to Conduct A Stop

"'[T]he police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot, even if the officer lacks probable cause.'"[69]

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66 *Fiataruolo v. United States*, 8 F.3d 930, 941 (2d Cir. 1993).

67 *Id.* at 942.

68 *See id.*

69 *United States v. Swindle*, 407 F.3d 562, 566 (2d Cir. 2005) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). Under New York law, the

This form of investigative detention has become known as a *Terry* stop.[70] "While 'reasonable suspicion' is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop."[71] "'The officer [making a *Terry* stop] . . . must be able to articulate something more than an inchoate and unparticularized suspicion or hunch.'"[72] "Reasonable suspicion is an objective standard; hence, the subjective intentions or motives of the officer making the stop are irrelevant."[73]

It is sometimes the case that a police officer may observe, "a series of acts, each of them perhaps innocent in itself, but which taken together warrant[] further investigation."[74] "An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized

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justifications required for different levels of police intrusion were established in *People v. DeBour*, 40 N.Y.2d 210 (1976).

[70] *See Terry*, 392 U.S. 1.

[71] *Illinois v. Wardlow,* 528 U.S. 119, 123 (2000).

[72] *Alabama v. White*, 496 U.S. 325, 329 (1990) (quoting *Sokolow*, 490 U.S. at 7).

[73] *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000).

[74] *Terry*, 392 U.S. at 22.

suspicion that the person is committing a crime."[75] However, "the fact that the stop occurred in a 'high crime area' [may be] among the relevant contextual considerations in a *Terry* analysis."[76] A court "must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing."[77] "[T]he proper inquiry is not whether each fact considered in isolation denotes unlawful behavior, but whether all the facts taken together support a reasonable suspicion of wrongdoing."[78]

IV. DISCUSSION

A. Fagan's Disparate Treatment Analysis Is Admissible

Defendants make one central critique of Fagan's disparate treatment model: that it uses the wrong benchmark to measure bias. Fagan's benchmark relies on local demographic characteristics and local rates of crime. According to defendants and their expert,

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[75] *Wardlow,* 528 U.S. at 124 (citing *Brown v. Texas*, 443 U.S. 47 (1979)).

[76] *Id.*

[77] *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quotation marks and citation omitted).

[78] *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990).

> the most logical and reliable method to assess the question of whether police are stopping individuals based on race or on [reasonable articulable suspicion] is to use a benchmark of rates of criminal participation by race. . . . Fagan's choice of local crime rate as a benchmark to measure possible evidence of bias in NYPD stop-and-frisk activity is a fundamental methodological flaw which robs his analysis of any probative value.[79]

The Supreme Court has explained that "[n]ormally, failure to include variables will affect the [regression] analysis' probativeness, not its admissibility" but that "[t]here may, of course, be some regressions so incomplete as to be inadmissible as irrelevant."[80] The question, then, is whether Fagan's analysis is so incomplete as to be irrelevant or so misleading as to be unhelpful to the jury. It is neither.

Fagan explains that he has used the current benchmark in four published studies, including two that were peer reviewed, and in the study for the Attorney General's office.[81] One major reason for his use of this benchmark is that

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[79] Def. Mem. at 11.

[80] *Bazemore v. Friday*, 478 U.S. 385, 400 & n.10 (1986). *See Bickerstaff*, 196 F.3d at 449 (affirming the exclusion of a regression analysis not because it included "less than all the relevant variables" but because "it omitted the major variables").

[81] *See* Fagan Decl. ¶ 21 (citing articles in the Journal of Empirical Legal Studies, the Journal of the American Statistical Association, the Fordham Urban Law Journal, and in the book Race, Ethnicity, and Policing: New and Essential Readings). As the Supreme Court explained in *Daubert*, "publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive,

he believes there are no better alternatives: suspect race data, which defendants argue is the appropriate benchmark, is only known for sixty-two percent of crimes from 2009 and 2010 (and for fewer crimes before 2009), and the extrapolation of that data to the thirty-eight percent of unknown suspects "would result in sample selection bias."[82] Although he has used suspect data in previous studies, "the weight of opinion among researchers who were doing this kind of work" is that his current benchmark is an improvement on his earlier benchmarks. Furthermore, he used this benchmark "to test the extent to which the racial composition of a precinct, neighborhood, or census tract – separate and apart from its crime rate – predicts the stop-and-frisk rate in that precinct, neighborhood, or census tract."[83] Defendants' proposed benchmark would not permit Fagan to conduct such an analysis.

Defendants point to *Wards Cove Packing Co. v. Atonio*[84] to support their argument that because Fagan's analysis ignores data on who is committing

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consideration in assessing the scientific validity of a particular technique or methodology." 509 U.S. at 594.

[82] Fagan Decl. ¶ 27. In 2010, when Fagan produced his report, suspect data was known for an even smaller number of crimes. Updated data was provided to him by defendants in late 2011, nearly a year later. *See id.* ¶ 25.

[83] *Id.* ¶ 23.

[84] 490 U.S. 642 (1989).

crimes, it "fails to capture the information necessary to support a valid causal inference of racial discrimination."[85] Indeed, the Supreme Court did hold in *Wards Cove* that the "proper comparison is between the racial composition of the at-issue jobs and the racial composition of the qualified . . . population in the relevant labor market."[86] But *Wards Cove* did not hold that the statistical evidence at issue should not have been admitted; it held only that a prima facie case of discrimination could not be based "solely on respondents' statistics"[87] showing that Whites were generally hired for high-skilled jobs and non-Whites were hired for low-skilled jobs. The question here is not whether Fagan's analysis, standing alone, would suffice to establish a claim of disparate treatment; it is simply whether Fagan's analysis will be helpful to the jury in assessing such a claim.[88]

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[85] Def. Mem. at 12.

[86] 490 U.S. at 650.

[87] *Id.*

[88] In addition to these statistics, plaintiffs plan to introduce evidence purporting to show that defendants have failed to comply with the terms of the *Daniels* settlement; failed to adopt the recommendations made by the RAND Corporation in a study that the City solicited; failed to implement several provisions of the NYPD's own written Policy Against Racial Profiling; and failed to supervise, train, monitor, and discipline police officers so as to prevent the use of race as a determinative factor in the decision to stop a suspect. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Pl. SJ Mem.") at 13-25.

Furthermore, Fagan *has* designed his benchmark in order to capture the underlying rate at which New Yorkers of different races and ethnicities engage in behavior that raises reasonable suspicion that crime is afoot – the population equivalent to what in *Wards Cove* was called "the racial composition of the qualified population." He has simply done so using a method that defendants find inadequate.[89]

Fagan's conclusions do not misrepresent his methodology. He does not claim that Blacks and Hispanics are stopped more frequently than Whites, even controlling for rates of criminal participation by race. Instead, he concludes that (1) the racial composition of a local area is a significant, strong, and robust predictor of stop-and-frisk patterns even after controlling for crime, social conditions, and police resources; (2) Blacks and Latinos are more likely to be stopped by NYPD officers, even in low-crime and racially heterogeneous neighborhoods and when controlling for neighborhood crime rates and police

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[89] The majority in *Wards Cove* recognized that when the data of interest – *i.e.*, the racial makeup of the pool of qualified job applicants or, in this case, the racial makeup of the population of New Yorkers engaged in activity that gives rise to reasonable suspicion – is difficult to ascertain, other statistics (including in some instances the racial distribution of the local population) may be "equally probative." *See* 490 U.S. at 651 & n.6. It is also worth noting that the *Wards Cove* disparate impact framework was "flatly repudiated" by Congress when it passed the Civil Rights Act of 1991. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, ___, 129 S. Ct. 2343, 2356 (2009) (Stevens, J., dissenting).

patrol strength; and (3) Blacks and Hispanics are treated more harshly during stop-and-frisk encounters with NYPD officers than Whites who are stopped on suspicion of the same or similar crimes.[90] These are the conclusions of an expert criminologist, based on his methodologically sound analyses. At trial, defendants will be permitted to present evidence and argument that the rates of criminal participation explain Fagan's findings and that the NYPD is not discriminating on the basis of race or ethnicity. When they cross-examine Fagan, defendants will surely challenge his opinions vigorously. But they may not prevent plaintiffs from presenting those opinions in the first place.

B. Fagan's Reasonable Suspicion Analysis Is Largely Admissible

1. As a General Matter, Paperwork Is Admissible and Probative

Defendants begin their critique of Fagan's Fourth Amendment analysis by arguing that the UF-250 database cannot be used to establish the existence of a policy or practice of suspicionless stops:

> [A]n analysis of check-boxes on a UF250 form cannot be used to establish that a particular stop was not justified. That determination depends on an analysis of the totality of the circumstances of the stop, a fact-intensive inquiry that amounts to far more than whether a box is checked or not. What cannot be done based on a single form cannot be done in the aggregate,

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[90] *See* Fagan Decl. ¶ 4(a)-(d).

either.[91]

Defendants are correct that as a general matter, courts do not rely solely on police paperwork to determine whether a stop was lawful. Paperwork offers only a limited summary of the events preceding a stop and only from the perspective of the police officer. Faced with suppression motions or section 1983 claims, judges and juries listen to live testimony from officers, suspects, and witnesses with first-hand knowledge of the stop. But courts also review the paperwork. Sometimes paperwork corroborates the officer's testimony; sometimes it undercuts that testimony. Even the absence of paperwork can be probative and admissible.[92] In short, while courts rarely, if ever, rely solely on paperwork, courts almost always consider it.

Plaintiffs allege a practice of unconstitutional policing that spans half a decade and 2.8 million stops. Taking live testimony on each of these stops is impossible; taking live testimony on some small sample of the stops would present more problems than it would solve, because there would be no way to confidently generalize from the sample to the entire population. Neither party disagrees with this reality. But in the face of this challenge, the parties offer radically different

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[91] Defendants' 3/14/12 Letter at 3.

[92] *See Lloyd v. City of New York*, 11 Civ. 756, 2/8/12 Transcript at 19:1-9 [Docket No. 36].

solutions: plaintiffs seek to use the database to make general statements about the number of "justified" and "unjustified" stops; defendants seek to exclude the database entirely from the analysis of how often stops are constitutional or unconstitutional.

Defendants are correct that it would be improper to declare certain stops "unjustified" and others "justified" on the basis of paperwork alone without offering any qualifications: a perfectly lawful stop cannot be made unlawful because the arresting officer has done a poor job filling out the post-arrest paperwork; nor can an egregiously unlawful stop be cured by fabrication of the paperwork. Indeed, Fagan has presented evidence – entirely independent of his classification system – that would permit a reasonable juror to conclude that a large number of the UF-250s include incorrect information.

But it would be an injustice to prevent the jury from hearing about the extremely rich and informative material contained in the 2.8 million forms and the 56 million boxes on Sides 1 and 2 of the UF-250s. Thousands of New York City police officers have spent an enormous amount of time documenting, in significant detail, the circumstances that led to the stops at issue in this lawsuit; the NYPD has invested tremendous time, money, and energy in compiling, reviewing, and analyzing that data. Although by no means perfect, this information can surely

help the jury to evaluate the parties' claims and defenses.[93] The data will not be presented in a vacuum – it will be accompanied by the testimony of numerous witnesses and the presentation of much other documentary evidence.[94] Plaintiffs will not be asking the jury to find a pattern of suspicionless stops on the basis of the UF-250 database alone; just as during the adjudication of a single stop, they will present "the paperwork" alongside much other evidence. The purpose of the Federal Rules of Evidence is to help courts "administer every proceeding fairly . . . to the end of ascertaining the truth and securing a just determination."[95] I have no doubt that those purposes are best served by permitting plaintiffs to present this evidence to the jury. The remaining question, therefore, is how to ensure that the presentation is accurate. The short answer is that I will permit generalizations where they are reasonable interpretations of the data and I will prohibit them where they are inaccurate and thus have little or no probative value. During trial, Fagan

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[93] It is worth noting that the defendants are challenging the accuracy and the utility of a form that they helped create and that their officers fill out.

[94] Perhaps most significantly, plaintiffs intend to show that there exists a widespread custom or practice of imposing quotas on officer activity such as stops and frisks and the issuance of summons, and to argue that these quotas are a driving force behind the rates of unlawful stops and frisks. *See* Pl. SJ Mem. at 12-13. Plaintiffs intend to produce audio recordings and testimony from commanders and supervisors from multiple precincts and boroughs to support these claims. *See id.*

[95] Federal Rule of Evidence 102.

(and defendants' witnesses) will be required to acknowledge the limitations and shortcomings of the data.

2. Fagan's Classification System Is Largely Admissible But Must Be Modified Before Being Presented to the Jury

Defendants raise numerous concerns with Fagan's classification system. I address each of them in turn. My conclusions require plaintiffs to make some limited modifications to the way that Fagan's opinions are presented to the jury.

a. Expert Legal Opinions

Defendants believe that the use of Fagan's classification system constitutes an inadmissible legal conclusion.[96] They cite to *Bilzerian* for the proposition that expert testimony "must be carefully circumscribed to assure that the expert does not usurp the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it."[97] Fagan will not be permitted to do either of those things.

First, the Court, and not he, will instruct the jury on the law of reasonable suspicion. Fagan will be permitted to describe his analysis of the 2.8 million UF-250s in light of the legal criteria articulated in this Opinion and Order

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[96] *See* Def. Mem. at 2-3.

[97] 926 F.2d at 1294 (quotation and citation omitted).

and in any other pre-trial instructions that I give to the parties.[98] Any statements he makes regarding reasonable suspicion will have to "'be phrased in terms of adequately explored legal criteria.'"[99] As described below in Part IV.B.2.d, he has misinterpreted the relevant caselaw in one important respect and his findings will need to be revised. In addition, his use of the phrase "Indeterminate" with respect to an entire category of stops will not be permitted. His statistical analysis, as revised, is nonetheless admissible.

Second, Fagan's testimony will not usurp the role of the jury: the ultimate question at issue in this suit is whether defendants have a policy and/or practice of conducting suspicionless stops. Although Fagan's testimony will be helpful to the jury in resolving that question – as it must be to be admissible – Fagan does not seek and will not be allowed to express an opinion on that question.

Defendants cite to *Cameron v. City of New York*, in which the Second

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[98] *See Pereira v. Cogan*, 281 B.R. 194, 199 (S.D.N.Y. 2002) (permitting expert to discuss the "principles and rules" guiding corporate governance because they were taken directly from previous opinions in the case).

[99] *In re MTBE Litig.*, 2008 WL 1971538, at *13 (S.D.N.Y. May 7, 2008) (quoting Fed. R. Evid. 704 Advisory Committee Note (giving the example that "the question 'Did T have capacity to make a will?' would be excluded, while the question 'Did T have sufficient mental capacity to know the nature and extent of his property and to know the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed.")).

Circuit explained that in a malicious prosecution suit against police officers, it was clear error to allow prosecutors "to testify to the officers' credibility and to the existence of probable cause" and that such testimony "violated bedrock principles of evidence law that prohibit witnesses . . . from testifying in the form of legal conclusions."[100] In *Cameron*, the prosecutors testified that the arresting police officers were credible. They also testified that they believed, based on the totality of the circumstances, that probable cause had in fact existed to arrest Cameron. The Second Circuit held that such testimony was highly prejudicial.[101] *Cameron* thus would preclude Fagan from expressing his opinion about whether defendants' stop-and-frisks of David Floyd or Lalit Clarkson were lawful and from opining about the credibility of another witness. But plaintiffs do not seek to solicit such testimony. Instead, they seek to solicit testimony that will help a jury of lay people understand the significance of 2.8 million stops and the 56 million boxes describing the indicia of suspicion that led to those stops.

b. Use of the Terms "Justified" and "Unjustified"

For the reasons discussed in Part IV.B.1 above, Fagan's use of the

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[100] 598 F.3d 50, 54, 65 (2d Cir. 2010).

[101] *See id.* at 54. Similarly, in *Rizzo v. Edison Inc.*, 419 F. Supp. 2d 338 (W.D.N.Y. 2005), the court held that an expert could not testify as to whether the police, in a specific case, had probable cause to make an arrest.

terms "justified" and "unjustified" may improperly suggest that the (il)legality of a stop can be conclusively determined on the basis of paperwork alone. But this danger can be prevented by a limiting instruction to the jury at trial clarifying that the database is necessarily an incomplete reflection of the totality of the circumstances leading to each stop. Fagan will be permitted to explain that *if* the forms are assumed to be accurate *and* complete, a certain percentage contain information sufficient to suggest that the stop was lawful and a certain percentage do not contain sufficient information to make such a generalization. The parties will be permitted to introduce evidence and make arguments about when and whether those assumptions regarding accuracy and completeness are appropriate. The parties will inevitably use shorthand to describe these categories – perhaps using phrases such as "apparently justified based on reasonable suspicion" and "apparently unjustified based on the lack of reasonable suspicion" – and it will be the responsibility of the Court and the skilled litigators involved in this case to ensure that the jury is not being presented with misinformation. But the complexity involved in describing the relationship between the worksheets and the stops that they summarize is not a reason to exclude all generalizations about the information that the worksheets contain.

c. Classification of "Other" Stops

Professor Fagan classified as "Indeterminate" the UF-250s on which "Other Reasonable Suspicion Of Criminal Activity (Specify)" was the only stop circumstance checked off on Side 1, regardless of whether one or more additional circumstances on Side 2 were checked and regardless of what was written in the blank space underneath the "Other" option. More than 400,000 stops, or approximately fifteen percent of all stops, fall into this category.[102] According to defendants, in approximately 99.8 percent of the UF-250s on which police officers checked off the "Other" box on Side 1, they also wrote something in the narrative field.[103] Fagan chose not to use that narrative information, however, because "what was specified was not something that was usable to us in making a systematic analysis."[104] Fagan explained that many of the narratives were either gibberish (such as the letter X or NA) or uninterpretable abbreviations;[105] others listed a crime such as "trespass" or an activity such as "hanging out in the hallway" but, according to Fagan, "that didn't help us ascertain what the basis of suspicion was

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[102] *See* Fagan Decl. ¶ 4(f).

[103] 3/14/12 Letter at 1.

[104] Tr. at 62:11-13.

[105] Defendants state that at least some of these abbreviations were defined in the "ReadMe" file that accompanied their production of the database. *See* 3/14/12 Letter at 2 n.2.

for that stop."[106] He explains that trying to classify the narratives "would invite a host of potential biases and errors, and would render any conclusions statistically meaningless."[107]

At the Court's request, Fagan submitted a random sample of 1,000 handwritten entries corresponding to the "Other" stop circumstance that he had evaluated.[108] The first page of the Narrative List, which contains forty-one entries, is attached to this opinion as Appendix 2. Standing alone, perhaps a dozen of those forty-one narratives suggest that there was reasonable suspicion to make a stop – these include narratives such as "inside bak [sic] w/no pass code (set off alarm)," "appeared to be smoking marij," "no headlights," and "person stopped by store manager for suspicion of petit larceny." Many of the other narratives, however, do not explain why the officer had reasonable suspicion to believe that a crime had occurred, was occurring, or was about to occur. These include narratives such as "hanging out in lobby," "TAP building," "waistband," "crim tress," "cell phone," "deft observed in NYCHA building," "proximty [sic] to crime location." Although some of these narratives might help establish reasonable suspicion when combined

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106 Tr. at 61:15-62:8.

107 Fagan Decl. ¶ 13.

108 *See* Fagan Supplemental Declaration, Ex. A ("Narrative List").

with other factors, standing alone they do not.

Particularly noteworthy is the narrative "keyless entry," which appears four times in the first forty-one narratives and which defendants say appears, in one form or another, approximately 52,500 times throughout the database.[109] According to the City, approximately 50,000 of these narratives were completed by a "housing officer," which I presume means that they are related to patrols in or around New York City Housing Authority buildings.[110] Defendants argue that "Fagan did not account for the significance of this ["keyless entry"] narrative on its own, in conjunction with the place of the stop or in combination with any [additional circumstances] on Side 2, all of which may be sufficient to qualify the stop as Justified."[111] To support this claim, they point to *United States v. Pitre*, in which Judge Michael Mukasey held that reasonable suspicion existed based on "defendant's entry into the lobby by catching what otherwise would have been a locked door, and his nervous and confused response when asked whether he lived

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[109] 3/14/12 Letter at 2 n.3. This suggests that "keyless entry" constitutes approximately twelve percent of all "Other" stops and nearly two percent of all stops.

[110] This specific aspect of the NYPD's stop-and-frisk program is the basis of at least one putative class action suit. *See Davis v. City of New York*, 10 Civ. 699. *See also Ligon v. City of New York*, 12 Civ. 2274 (addressing stops and frisks in private buildings that are part of Operation Clean Halls.)

[111] 3/14/12 Letter at 2 n.3.

in the building and where he was going."[112] Defendants are mistaken that the narrative *keyless entry* "on its own" may be sufficient to qualify the stop as justified. As Judge Mukasey explained very clearly, standing on its own a keyless entry is not suspicious behavior:

> Pitre claims his keyless entry just behind the unidentified woman was not suspicious behavior because he could easily have been a resident of the building walking just behind another resident, and did not want to let the door close and then stand out in the cold – this was mid-December – fumbling for his keys. *True enough*, but there was more to the encounter before Pitre was stopped within the meaning of *Terry*.[113]

It was only after Pitre was unable to clearly answer the police officers' question "where are you going?" and he repeatedly touched the pocket of his jacket and his right side as if feeling for contraband, that the police had reasonable suspicion to stop him. This all occurred in the lobby of a building that the police officers knew was the site of frequent drug and firearms activity. By no means did a keyless entry alone, or even keyless entry plus high crime area, raise reasonable suspicion.

Also noteworthy is the narrative "Loitering," which appears ten times in the first eighty-five narratives. Some of these narratives describe the loitering as

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[112] No. 05 Cr. 78, 2006 WL 1582086, at *4 (S.D.N.Y. June 6, 2006).

[113] *Id.* (emphasis added).

happening "in lobby," "in halls," or "in hallway," but others contain only that single word. Although parts of New York State's prohibition on loitering remain good law,[114] and some of the narratives might plausibly refer to those genuine violations, the NYPD's misuse of this statute has a long and ugly history: "[t]he City of New York, operating principally through the [NYPD], has continuously enforced three unconstitutional loitering statutes for *decades* following judicial invalidation of those laws and despite numerous court orders to the contrary . . . . The human toll, of course, has been borne by the tens of thousands of individuals who have, at once, had their constitutional rights violated and been swept into the penal system."[115] Although "loitering" may at times be an officer's shorthand way of describing criminal trespass, its use is often more probative of an unlawful stop

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[114] *See, e.g.*, *Church of the Am. Knights of the Klu Klux Klan v. Kerik*, 356 F.3d 197 (2d Cir. 2004) (upholding loitering statute's ban on public congregations of masked people, except in connection with "a masquerade party or like entertainment," against a First Amendment challenge); N.Y. Penal L. § 240.35(2) (loitering for the purpose of gambling).

[115] *Casale v. Kelly*, 710 F. Supp. 2d 347, 347 (S.D.N.Y. 2010). Close cousins to the statutes prohibiting loitering were those that outlawed vagrancy. Until the law was struck down in 1967, New York State made it a crime, punishable by six months in jail, to be "a person who, not having visible means to maintain himself, lives without employment." *See Fenster v. Leary*, 20 N.Y.2d 309, 311 (1967). *See also* Michelle Alexander, The New Jim Crow (2010) at 28-32 (describing the adoption of criminal vagrancy laws by the Southern states after the Civil War, and then again after Reconstruction, as a mechanism for creating a new pool of cheap and free Black laborers – this time labeled "convicts" and leased out to landowners – to replace the freed slaves).

than a lawful one. Furthermore, merely naming a penal code violation does not constitute reasonable suspicion.

In short, the narratives accompanying the "Other" stop circumstance are extremely difficult to summarize and Professor Fagan is correct that they cannot be uniformly placed into either his "justified" or "unjustified" categories. However, at least to the extent that other groups of checked boxes are probative of a stop's (il)legality, it is misleading to say, as he does, that for all 400,000 of these "Other" stops, "the corresponding UF250 forms do not provide sufficient detail to determine the stops' legality"[116] and that these stops are therefore "Indeterminate." That is to say, many of these forms *do* provide as much or more detail than the ones that Fagan classifies as "justified." If the jury assumes that it was filled out accurately, a form that contains the narrative "smoking cigarette strong smell of marijuana"[117] would be strong evidence of reasonable suspicion. In contrast, if the jury assumes that it was filled out completely, a UF-250 containing no circumstances beyond the "Other" narrative "licking rolling paper" would be strong evidence that no reasonable suspicion existed.[118]

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[116] Fagan Decl. ¶ 4(f).

[117] Narrative List at 2.

[118] *Id.* at 8. I do not know if other boxes were checked off on this particular UF-250 and use it only as a hypothetical.

The UF-250s containing only "Other" on Side 1 are thus not properly described as "Indeterminate." It is most accurate to say that one cannot fairly generalize about them. In many individual instances, when reviewing a particular UF-250, one can make certain determinations – or at least make determinations with the same or more confidence than one could as to other UF-250s. But one cannot make such determinations in a systematic or general way.

This distinction matters because plaintiffs seek to use the fifteen percent of forms that Fagan calls "Indeterminate" as evidence for their claim that the City is liable for a failure to monitor and supervise. Plaintiffs claim that "[t]he NYPD's reliance on information provided by officers on UF-250 forms to assess whether stops are based on reasonable articulable suspicion is an ineffective way to regulate the constitutionality of officer stop-and-frisk practices."[119]

Fagan may not opine that *all* 400,000 of the UF-250s on which the only box checked on Side 1 is "Other" are "Indeterminate." Instead, he may testify that his classification system does not permit him to draw general conclusions about this group of UF-250s. Similarly, defendants cannot make wholesale generalizations about these forms. However, the parties will be permitted to introduce a number of "Other" UF-250s and make arguments to the jury about

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[119] Fagan Decl. ¶ 4(g). *See* First Amended Complaint ¶¶ 97-107.

what conclusions it should or should not draw from those forms; determining the form and scope of that evidence and argument will be a matter of trial management.

d. Forms Containing Multiple Side 2 Circumstances

Defendants' fourth criticism of Fagan's reasonable suspicion analysis addresses his classification of some of the UF-250 forms in which two or more Side 2 circumstances are checked off. Fagan labeled Category 3 stops (those with no Side 1 circumstances checked off) as unjustified even when two or more Side 2 circumstances were checked off. He also labeled Category 6 stops (those with only "Other" checked off on Side 1) as indeterminate even when two or more Side 2 circumstances were checked off. Defendants argue that this was improper because "caselaw holds that any number and combination of these 'additional circumstances' could support a finding of [reasonable suspicion]."[120]

Defendants point to a number of cases in which they argue that only Side 2 circumstances existed but that courts nonetheless found reasonable suspicion for a stop.[121] Most of the cases, however, do not support defendants'

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[120] Def. Mem. at 5.

[121] *See* Defendants' Case Summaries, Ex. A to Declaration of Heidi Grossman ("Grossman Decl."), defendants' counsel, in Support of Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan at 10-14.

argument because they presented circumstances that are captured by the boxes on Side 1.[122] Two of defendants' cases do, however, lend some support to their argument. In *United States v. McCargo*, the Second Circuit found that reasonable suspicion existed when officers responded to a 911 call for an attempted burglary at 1:00 am and observed the defendant walking alone in a high crime area 200 feet from the crime scene.[123] Defendants point out that all of the circumstances that clearly fit this fact pattern are on Side 2 – "Report From Victim/Witness," "Proximity to Crime Location," "High Crime Area," and "Time of Day . . . Corresponding to Reports of Criminal Activity." Plaintiffs argue that the Side 1 circumstance "Furtive Movement" is also applicable, since the court found that the defendant had been staring so intently at one police car that was at the scene of the crime that he did not notice a second police car pulling up along side him.[124] Because a Side 1 box is applicable, they argue, *McCargo* does not undercut

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[122] *See, e.g.*, *United States v. Simmons*, 560 F.3d 98 (2d Cir. 2009) (defendant matched a witness's description of the suspect); *United States v. Muhammad*, 463 F.3d 115 (2d Cir. 2006) (same); *People v. Sierra*, 83 N.Y.2d 928 (1994) (police saw defendant engaged in actions indicative of a drug transaction).

[123] 464 F.3d 192 (2d Cir. 2006).

[124] *See* Corrections to Summaries of Cases Listed in Grossman Declaration ("Pl. Case Summaries"), Ex. D to Declaration of Darius Charney ("Charney Decl."), plaintiffs' counsel, in Support of Plaintiffs' Motion in Opposition to Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan at 7.

Fagan's classification of Category 3 worksheets as "unjustified." This is a rare instance in which plaintiffs – whose expert strongly criticizes the NYPD's use of "furtive movement" to justify stops and (perhaps fairly) derides the term as so ambiguous as to be "almost meaningless"[125] – are seeking to describe what might arguably be considered an innocent action as furtive and suspicious. Like Judge Richard Posner, I am skeptical that staring intently can constitute suspicious behavior,[126] but I recognize that the Second Circuit considered McCargo's staring in its reasonable suspicion analysis. Although the Circuit never used the term "furtive," McCargo's stare could only be classified on the UF-250 under either the "Furtive Movement" box or under one of the two "Other" boxes. This case therefore arguably supports defendants' criticism of Fagan's Category 3.

The second case cited by defendants that arguably supports their claim that two or more Side 2 factors can indicate reasonable suspicion even in the

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[125] *See* Report at 52.

[126] "Gilding the lily, the officer testified that he was additionally suspicious because when he drove by Broomfield in his squad car before turning around and accosting him he noticed that Broomfield was 'star[ing] straight ahead.' Had Broomfield instead glanced around him, the officer would doubtless have testified that Broomfield seemed nervous or, the preferred term because of its vagueness, 'furtive.' Whether you stand still or move, drive above, below or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, J.).

absence of a Side 1 factor is *Sutton v. Duguid*, in which Judge Joseph Bianco of the Eastern District of New York found that reasonable suspicion existed to stop Sutton "based on: (1) the observed narcotics activity in a high crime area; (2) plaintiff's proximity to the individual identified as involved in the sale of narcotics; and (3) plaintiff's effort to walk away from the commotion as soon as it broke out."[127] As defendants point out, "High Crime Area," "Proximity to Crime Location," and "Changing Direction at Sight of Officer/Flight" are all Side 2 circumstances. Plaintiffs again argue that Sutton's sudden movement away from the commotion could be characterized as a Furtive Movement on Side 1. Again, I am skeptical of the argument, although it is plausible.

Illinois v. Wardlow, however, is more problematic for Fagan's Category 3 than any of the cases cited by defendants. There, the Supreme Court held that a defendant's "presence in an area of heavy narcotics trafficking" and "unprovoked flight upon noticing the police" were together sufficient to raise reasonable suspicion and justify a stop.[128] These two factors align most closely with the Side 2 circumstances "High Crime Area" and "Changing Direction at Sight of Officer/Flight." The Supreme Court did not base its decision on any other

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[127] No. 05 Civ. 1215, 2007 WL 1456222, at *7 (E.D.N.Y. May 16, 2007).

[128] *See Wardlow,* 528 U.S. at 124.

indicia of suspicion, although it did note that headlong flight is the "consummate act" of nervous, evasive behavior. Again, a police officer might in this instance check the Side 1 "Furtive Movement" box, although the far more appropriate boxes would be the ones on Side 2.

In combination, *McCargo*, *Sutton*, and *Wardlow* suggest that stops may be lawful even if they are based only on factors described on Side 2 of the UF-250s. It is also clear, however, that some combinations of Side 2 factors would be insufficient to establish reasonable suspicion. The two most frequent Side 2 factors were "High Crime Area" and "Time of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity," which were checked off on 55.4% and 34.1% of all worksheets.[129] Reasonable articulable suspicion does not exist merely on the basis of those two factors: many people live in high crime areas and many crimes occur at night; simply being in a high crime area at night is not suspicious behavior.[130] It is very difficult to generalize, therefore, about UF-250s

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[129] *See* Fagan Report at 51.

[130] *See United States v. McCrae*, No. 07 Cr. 772, 2008 WL 115383 (E.D.N.Y. Jan. 11, 2008) (Gleeson, J.) (suppressing a gun seized during a stop that took place at around 3:00 a.m. in a high crime area because there were no additional factors giving rise to reasonable suspicion); *United States v. Doughty*, No. 08 Cr. 375, 2008 WL 4308123 (S.D.N.Y. Sept. 19, 2008) (Patterson, J.) (suppressing a gun seized during a stop that took place after 10:00 p.m. three blocks from a high crime building, even though the defendant engaged in a readjustment of his waistband that suggested the presence of a weapon to the

that contain two or more Side 2 factors but no Side 1 factors.

The importance of this complexity is mitigated in part because, as plaintiffs point out, police officers have marked very few UF-250s with no Side 1 factors and two or more Side 2 factors. Of the 2.8 million worksheets, only 7,295 – or approximately 0.26% – fit this description.[131] "Thus Fagan's inclusion of these stops in this category, even if erroneous, had no meaningful impact on the overall results of his analysis, and therefore would not warrant exclusion."[132] At trial, these few stops will be included in the category of stops for which generalization is impossible.

The larger problem, however, relates to stops in Category 6 in which only the "Other" circumstance was checked on Side 1 and two or more circumstances were checked on Side 2. There are 161,130 of these stops, which make up 5.7% of all stops. Fagan marked them as "Indeterminate." As I discussed above, the narratives on the first page of Fagan's random sample exemplify the

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police). For two of the many pieces of scholarship criticizing the "high crime area" doctrines, see Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 Fla. L. Rev. 391, 405 (2003) and David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659, 677-78 (1994). And for a trenchant critique of the state of Fourth Amendment jurisprudence in the War on Drugs, see Alexander at 61-73.

131 *See* Pl. Mem. at 7-8 and Defendants' 3/14/12 Letter.

132 Pl. Mem. at 7.

reason why categorization of these stops is difficult. One narrative reads "dismatling [sic] 95 Honda DLJ6727."[133] Without more, this information would not raise reasonable suspicion – mechanics and car owners regularly dismantle cars. However, if the car's alarm was going off and the individual was unable to give a clear answer to the officers' questions, then the two additional circumstances – best categorized by the Side 2 boxes "Sights and Sounds of Criminal Activity, *e.g.*, Bloodstains, Ringing Alarms" and "Evasive, False or Inconsistent Response To Officer's Questions" – in combination with the "Other" narrative likely would give rise to reasonable suspicion.[134] Or, to take another example, "Evasive, False or Inconsistent Response To Officer's Questions" and "Changing Direction At Sight Of Officer/Flight" might sufficiently contextualize one of the many "keyless entry" notations to suggest that reasonable suspicion existed in that case as well.[135]

Some of the "Other" narratives, however, probably would not suggest reasonable suspicion even when combined with two Side 2 factors. I doubt that the narrative "loitering" indicates reasonable suspicion, even when combined with

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[133] Narrative List at 1.

[134] "Sights and Sounds" was checked off in 1.8% of all stops and "Evasive Response" was checked off in 16% of stops. *See* Report at 51.

[135] "Changing Direction" was checked off in 24.7% of stops. *See id*.

"High Crime Area" and "Time of Day," the two most common Side 2 factors. The same could be said for the many "keyless entry" narratives – as Judge Mukasey noted in *Pitre*, the fact that the defendant entered a building lobby in a high crime area without a key on a cold December night was not in itself suspicious behavior.[136]

In short, it is very difficult to generalize about the worksheets that contain only an "Other" factor on Side 1, even if two or more "additional circumstances" are checked off on Side 2. Defendants will surely be able to present to the jury many individual forms in this category that do appear to indicate that reasonable suspicion existed; plaintiffs will likely be able to present many that suggest that no reasonable suspicion existed. I find that admitting expert testimony that makes generalizations about the level of reasonable suspicion indicated by the forms in this group would mislead the jury. The parties' experts will be permitted to testify about verifiable aspects of these forms (*e.g.*, how often certain Side 2 boxes are checked or how often the phrase "keyless entry" or "loitering" appears) and counsel will be able to make arguments about what inferences and conclusions the jury should draw from this data.

e. Forms Containing Only One "Conditionally Justified" Factor

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[136] 2006 WL 1582086, at *4.

Defendants point to a number of cases in which, they argue, courts have found stops lawful even though only one Side 1 "conditionally justified" indicia of suspicion was present. Over 137,000 worksheets were filled out with only one of these factors and they constitute the large majority of the stops in Fagan's "unjustified" category. Defendants' reading of the caselaw, however, is incorrect.

Plaintiffs have properly identified the components of the various courts' decisions that were excluded from defendants' case summaries and that, if reflected on the arresting officer's UF-250, would have placed the stops in Fagan's "justified" category.[137] Even *People v. Fernandez*, which plaintiffs appear willing to concede *arguendo* because it would impact the classification of very few worksheets, does not support defendants' argument.[138] In *Fernandez*, the New York Court of Appeals held that a police officer could lawfully stop a person for carrying what the officer had reason to believe was a "gravity knife" based on the "identifiable characteristics of the knife."[139] The possession of such knives is *per se* illegal because of the ease with which they can be used for violence.

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[137] *See* Pl. Case Summaries at 1-3, responding to the cases in Defendants' Case Summaries at 1-5.

[138] 16 N.Y.3d 596 (2011). *See* Pl. Mem. at 8.

[139] 16 N.Y.3d at 599.

Defendants argue that *Fernandez* therefore justifies stops solely on the basis of the Side 1 box "Carrying Objects In Plain View Used in Commission of Crime, *e.g.*, Slim Jim/Pry Bar, etc.," which Fagan deemed "Conditionally Justified," not "Justified." But unlike gravity knives, it is not *per se* illegal to possess slim jims or pry bars. Possession of those items is not in itself suspicious behavior that justifies a stop because there are many lawful uses of those items. An officer who observes what he believes to be an illegal weapon should also check the boxes "Suspicious Bulge/Object," "Actions Indicative Of Engaging In Violent Crimes," and/or "Other Reasonable Suspicion." *Fernandez* does not support the argument that a person can be stopped based solely on the fact that he is carrying a pry bar or a slim jim.

f. Location and Time of Stops

Defendants' final criticism of Fagan's classification system is that it fails to incorporate the location of the stop and other writings on the form (beyond those in the line under the circumstance "Other"). Officers are required to note on the worksheet the address or intersection where the stop takes place and defendants argue that this information may support a finding of reasonable suspicion if the location is in a high crime area; this is the case, they argue, even if the officer did not check off "High Crime Area" on the worksheet.[140] During certain years, the

[140] *See* Def. Mem. at 4.

entirety of the 73rd and 75th Precincts were classified as high crime "impact zones." Defendants argue that "High Crime Area" should be imputed to all stops from those precincts during those years, converting approximately 33,000 stops from "unjustified" to "justified."[141] That number would grow significantly if stops in other impact zones were treated similarly.

Professor Fagan provides a reasonable explanation of why he chose not to impute that category onto worksheets on the basis of location:

> [W]e assumed and based our decision on the fact that officers were trained to check all [boxes] that applied. And we assumed that if, in fact, the stop took place in a high crime area, they would have checked the box accordingly. So we really didn't want to second guess the decision of the officer.
>
> Second, we didn't want to impose our decision or criteria about what's a high crime area versus a low crime area. I think as you can see from some of our charts, crime distributes very widely across the city from very low crime rates in some places to high crime rates in other places. We didn't know what the cut-off was. We couldn't say how officers are trained to think about high crime area. Was it very high in the last month or week? What constitutes high? Three [] robberies [? T]en total felony crimes? Does it include felonies plus misdemeanors?[142]

Fagan's explanation is certainly reasonable. Rather than try to

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[141] *See* Reply Memorandum of Law in Further Support of Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan ("Reply Mem.") at 3.

[142] Tr. at 82:18-83:7.

develop his own complex formula for determining what is or is not a high crime area for the purpose of reasonable suspicion, he deferred to the police officers' simple binary decision to check or not to check the "High Crime Area" box. When evaluating reasonable suspicion in an individual suppression hearing or Section 1983 case, such blind deference is inappropriate and officers should be required to support their claims with evidence.[143] But when trying to generalize about 2.8 million stops, Fagan's choice was reasonable. Defendants correctly note some of the drawbacks of that methodological decision but, at best, their arguments impact the weight of Fagan's opinion, not its admissibility. The same is true of his decision not to use the time of a stop as a substitute for the Side 2 circumstance "Time of Day, Day of Week, Season Corresponding To Reports Of Criminal Activity" and his decision not substitute any notation about a suspect's height/weight/tattoos in place of the Side 1 circumstance "Fits Description."[144] If police officers chose not to check those boxes, it was reasonable of Fagan not to second guess that choice.

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[143] "The citing of an area as 'high-crime' requires careful examination by the court, because such a description, unless properly limited and factually based, can easily serve as a proxy for race or ethnicity. District courts must carefully examine the testimony of police officers in cases such as this, and make a fair and forthright evaluation of the evidence they offer, regardless of the consequences." *United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000).

[144] *See* Defendants' 3/14/12 Letter at 2.

3. Fagan's Opinions Regarding the Results of the Stop-and-Frisk Policy Are Admissible

Finally, defendants argue that Fagan makes speculative and conjectural opinions about the process by which officers complete the UF-250 and about the outcomes of the stops. Specifically, defendants object to Fagan's hypotheses regarding the frequent use of "high crime area" and "furtive movements" on the UF-250s and his use of a "hit rate" in assessing the effectiveness and legality of the NYPD's stop-and-frisk policy. Neither argument has merit.

Fagan notes that officers check the "High Crime Area" box in approximately fifty-five percent of all stops, regardless of whether the stop takes place in a precinct or census tract with average, high, or low crime.[145] Defendants believe that this analysis is "misleading" because there are high crime pockets even in low crime precincts and "it is not unreasonable for officers to check this box when a stop occurs" in such an area.[146] Fagan rebuts defendants' argument by noting that his analysis is true at the census tract level as well, and plaintiffs

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[145] Report at 52-55; Fagan Decl. ¶ 19. The fact that Fagan assumed the veracity of forms (including the officers' use of "high crime area") for one part of his analysis does not preclude him from then testing and critiquing that assumption in another part of his analysis. When lawyers do this, they frequently use the term *arguendo*.

[146] Def. Mem. at 8-9.

correctly note that this is simply a disagreement over the expert's conclusions, not his methodology.[147] The same is true for Fagan's observation that when the "High Crime Area" and "Furtive Movement" boxes are checked off, police officers are less likely to make an arrest than when those boxes are not checked off.[148] Fagan hypothesizes that this result may occur because officers are marking these two "broad and subjective" boxes after conducting stops for which they actually did not have objective reasons to be suspicious. Or, as retired NYPD officer Peter Mancuso said at a 2010 New York City Bar Association forum, "[f]urtive movements . . . tells me that the cops are out there winging it a bit . . . they're really not looking for individuals."[149] Defendants object to this hypothesis because

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[147] Pl. Mem. at 11.

[148] *See* Report at 52. Fagan believes that "[t]he broad and indiscriminate use of *furtive movement* or *high crime area* – the two most commonly cited factors – and the loss of crime detection efficiency in cases where either are checked off – raises doubts about whether stops based on these factors are valid markers of [reasonable suspicion]. Recall that the stop factors are entered onto the UF-250 form *after* the stop is completed. If the initial basis for suspicion leading to the stop was thin, then adding on either of these subjective and ill-defined factors, both of which are constitutionally problematic, provides a post hoc justification to a stop that was most likely erroneous with respect to whether crime was afoot, and might have been based on a threshold of suspicion that otherwise would have been legally insufficient to justify the stop." *Id.* at 53-55.

[149] *Id.* at 53 (quoting John Jay College of Criminal Justice, The New York Police Department's Stop and Frisk Policies (transcript) at 40-41 (Mar. 9, 2010)).

"[e]xpert testimony offering 'interpretations of conduct or views as to the motivation of parties' has been excluded on the grounds that it invades the province of the jury and addresses matters that jurors are capable of understanding on their own" and that it constitutes "an impermissible credibility assessment" of the police officers who fill out the forms.[150] But the testimony excluded in *Rezulin* was (a) the opinion of an "expert" on what he believed constituted ethical medical behavior[151] and (b) speculation about the motivations of individual defendants on the basis of what those defendants had said and written.[152] This is entirely different from Fagan's proposed testimony, in which he offers hypotheses regarding the causes of trends that he has observed by performing statistical analyses of complicated data sets. Unlike in *Rezulin*, the expert's testimony will not address "'lay matters which a jury is capable of understanding and deciding without the expert's help.'"[153] Fagan is indisputably a criminology expert who is qualified to

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[150] Def. Mem. at 9-10 (quoting *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004)).

[151] *See Rezulin*, 309 F. Supp. 2d at 543.

[152] *See id.* at 545-46.

[153] *Id.* at 546 (quoting *Andrews v. Metro North Commuter R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989)). Fagan's observation that over the study period, "the percentage of stops whose suspected crime is uninterpretable has grown dramatically from 1.12% in 2004 to 35.9% in 2009" is similarly unproblematic. Supp. Report at 39.

offer opinions about trends that he observes in the interactions between the police and civilians; he is not passing judgment about the credibility of any one witness but is instead offering theories about what kinds of behavior might lead to certain results that are evident in the data. Defendants may dispute these conclusions but they may not prevent their admission.

Defendants also object to Fagan's reliance on "hit rates." He calculates that "5.37 percent of all stops result in an arrest," that [s]ummonses are issued at a slightly higher rate: 6.26 percent overall," and that "[s]eizures of weapons or contraband are extremely rare. Overall, guns are seized in less than one percent of all stops: 0.15 percent . . . Contraband, which may include weapons but also includes drugs or stolen property, is seized in 1.75 percent of all stops."[154]

Defendants argue that Fagan "conflates the legal standards required for stops [*i.e.*, reasonable suspicion] and arrests [*i.e.*, probable cause]."[155] While of course it is true that "'reasonable suspicion' is a less demanding standard than

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[154] Report at 63. To determine whether these "hit rates" are low, Fagan compares them to those at roadway check points where cars are stopped at random intervals and concludes that "the NYPD stop and frisk tactics produce rates of seizures of guns or other contraband that are no greater than would be produced simply by chance." *Id.* at 65.

[155] Def. Mem. at 9.

probable cause,"[156] the requisite level of confidence that officers must have in either event relates to the same question: whether or not crime is afoot. If the underlying data is reliable, arrest or "hit rates" are probative – although perhaps not dispositive – of whether or not officers are making stops and arrests on the basis of reasonable suspicion and/or probable cause. This analysis is properly facilitated by comparing the hit rates based on "reasonable suspicion" to hit rates based on random stops.[157]

The City argues that the use of hit rates "ignores deterrence as an outcome of a stop, which is perhaps the most successful outcome," and posits as its example of such deterrence a scenario in which an officer "stops a person for casing an individual or property, before such person has an opportunity to commit an offense" and thereby prevents the commission of a crime.[158] However, in such a scenario, where the suspect has already taken significant steps towards the

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[156] *Wardlow*, 528 U.S. at 123.

[157] *See United States v. McCrae*, No. 07 Cr. 772, 2008 WL 115383 (E.D.N.Y. Jan. 11, 2008) ("I am mindful that reasonable suspicion cannot be captured solely by resort to probabilities . . . [but] I find it quite significant that [the police officer's] methodology for generating 'suspicion' demonstrated at best a success rate of approximately 3.33%, well below the success rate of the suspicionless roadblocks in *Edmond*). *See also City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Edmond v. Goldsmith*, 183 F.3d 659, 666 (7th Cir. 1999).

[158] Def. Mem. at 9 & n.16.

commission of a crime, there would in fact be probable cause to arrest that suspect for an "attempt" crime. It is notable that the City acknowledges that "deterrence" is a goal of its stop-and-frisk policy. Deterrence is of course a crucial aspect of law enforcement (and criminal justice policy in general) and it may lawfully be pursued in many different ways – more cops walking their beats, better detective work, etc. But it may not be accomplished through the use of unlawful stops.[159] A *Terry* stop may *only* be used when the police have reasonable suspicion that a crime has taken, is taking, or is about to take place.

Plaintiffs have submitted a sworn affidavit from New York State Senator Eric Adams, who retired as a police captain after more than twenty years of service in the NYPD. Senator Adams says that in July 2010 he met with Defendant Police Commissioner Raymond Kelly to discuss proposed legislation regarding stop and frisk practices and that during the meeting

> Commissioner Kelly stated that the NYPD targets its stop-and-frisk activity at young black and Latino men because it wants to instill the belief in members of these two populations that they could be stopped and frisked every time they leave their homes so that they are less

[159] *See Brown v. Texas*, 443 U.S. 47, 52 (1979) ("The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.").

likely to carry weapons.[160]

Commissioner Kelly denies Senator Adams' claim:

> At that meeting I did not, nor would I ever, state or suggest that the New York City Police Department targets young black and Latino men for stop and frisk activity. That has not been nor is it now the policy or practice of the NYPD. Furthermore, I said nothing at the meeting to indicate or imply that such activity is based on anything but reasonable suspicion. At the meeting, I did discuss my view that stops serve as a deterrent to criminal activity, which includes the criminal possession of a weapon.[161]

Although by no means dispositive of the question, Fagan's finding that guns are seized in approximately 0.15% of all stops is at least relevant to an assessment of Commissioner Kelly's claim that the NYPD's policy is a deterrent to the illegal possession of weapons. Fagan's findings related to seizure of other contraband and to the arrest and summons rates are also admissible, even if defendants object strenuously to the conclusions that plaintiffs will ask the jury to draw from those statistical observations.

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[160] Affidavit of Eric Adams, Ex. 10 to Declaration of Darius Charney in Support of Plaintiffs' Motion for Class Certification, ¶ 5.

[161] Declaration of Raymond W. Kelly, Ex. A to Declaration of Heidi Grossman in Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification, ¶¶ 3-4.

V. CONCLUSION

For the reasons explained above, defendants' motion is granted in part and denied in part. The Clerk of the Court is directed to close this motion [Docket No. 178].

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: April 16, 2012
New York, New York

J = Justified
CJ = Conditionally Justified
I = Indeterminate
AC = Additional Circumstances/
Factors boxes on side 2

SIDE 1

(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ. | Radio Run/Sprint #

Time Of Stop | Period Of Observation Prior To Stop

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Transit | Type Of Location Describe:
☐ Outside ☐ Housing

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

CJ ("Objects") — ☐ Carrying Objects In Plain View Used In Commission Of Crime
CJ ("Description") — ☐ e.g., Slim Jim/Pry Bar, etc. ☐ Fits Description.
J ("Casing") — ☐ Actions Indicative Of "Casing" ☐ Victim Or Location.
CJ ("Lookout") — ☐ Actions Indicative of Acting As A Lookout.
CJ ("Bulge") — ☐ Suspicious Bulge/Object (Describe)
I ("Other") — ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)

☐ Actions Indicative Of Engaging in Drug Transaction. — J ("Drugs")
☐ Furtive Movements. — CJ ("Furtive")
☐ Actions Indicative Of Engaging In Violent Crimes. — J ("Violent")
☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime. — CJ ("Clothing")

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused
☐ Other (Specify)

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age	Height	Weight	Hair	Eyes	Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain If No, Explain:
Reason For Stop

☐ Yes ☐ No

Were Other Persons Stopped? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

Questioned/Frisked?

If Physical Force Was Used, Indicate Type:

☐ Hands On Suspect
☐ Suspect On Ground
☐ Pointing Firearm At Suspect
☐ Handcuffing Suspect
☐ Suspect Against Wall/Car
☐ Drawing Firearm
☐ Baton
☐ Pepper Spray
☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No	Offense	Arrest No.
Was Summons Issued? ☐ Yes ☐ No	Offense	Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

SIDE 2

AC/AF

Was Person Frisked? ☐ Yes ☐ No IF YES, MUST CHECK AT LEAST ONE BOX

☐ Inappropriate Attire - Possibly Concealing Weapon
☐ Furtive Movements
☐ Verbal Threats Of Violence By Suspect
☐ Actions Indicative Of Engaging In Violent Crimes
☐ Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon
☐ Other Reasonable Suspicion of Weapons (Specify)
☐ Refusal To Comply With Officer's Direction(s) Leading To Reasonable Fear For Safety
☐ Violent Crime Suspected
☐ Suspicious Bulge/Object (Describe)

Was Person Searched? ☐ Yes ☐ No IF YES, MUST CHECK AT LEAST ONE BOX ☐ Hard Object ☐ Admission Of Weapons Possession
☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☐ Yes ☐ No If Yes, Describe: ☐ Pistol/Revolver ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument
☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☐ No If Yes, Describe Contraband And Location _____

Demeanor Of Person After Being Stopped _____

Remarks Made By Person Stopped _____

Additional Circumstances/Factors: (Check All That Apply)

☐ Report From Victim/Witness
☐ Area Has High Incidence Of Reported Offense Of Type Under Investigation
☐ Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity
☐ Suspect Is Associating With Persons Known For Their Criminal Activity
☐ Proximity To Crime Location
☐ Other (Describe)
☐ Evasive, False Or Inconsistent Response To Officer's Questions
☐ Changing Direction At Sight Of Officer/Flight
☐ Ongoing Investigations, e.g., Robbery Pattern
☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

Pct. Serial No. _____ Additional Reports Prepared: Complaint Rpt.No. _____ Juvenile Rpt. No. _____ Allied Rpt. No. _____ Other Rpt. (Specify) _____

REPORTED BY: Rank, Name (Last, First, M.I.) _____ Tax# _____
Print _____
Signature _____ Command _____

REVIEWED BY: Rank, Name (Last, First, M.I.) _____ Tax# _____
Print _____
Signature _____ Command _____

APPENDIX 2:
PAGE 1 OF "OTHER" NARRATIVE LIST

MISSING FRONT PLATE
HANGING OUT IN LOBBY
PROS PRONE LOCATION
TAP BUILDING
BURG PATTERN INVESTIGATION
INSIDE BAK W/NO PASS CODE (SET OFF ALARM)
APPEARED TO BE SMOKING MARIJ
NO HEADLIGHTS
LOITERING IN LOBBY
WAISTBAND
XNE
KEYLESS ENTRY
LOITERING ON 2FL HALLWAY
DISMATLING 95 HONDA DLJ6727
CRIM TRESS
KEYLESS ENTRY
WAS NOT OWNER DID NOT KNOW OWNER.
OPEN DOOR 10-11
PLATES DID NOT MATCH VEHICLE
XNE
KEYLESS ENTRY
CELL PHONE
UNREGISTERED VEHICLE
LEANING ON LOBBY HALL
PERSON STOPPED BY STORE MANAGER FOR SUSPICION OF PETIT LARCENY
10-39 LEAVING BUILDING
10-11
REAR ENTRY
REPORT FROM WITNESS
NO FRONT PLATE ON VEHICLE/TRUNK LOCK BROKEN
FORD PROBE PINK ECK 87D2
VENDING ON STREET
CRIM TRES
BANGING OUT OUTSIDE ON BALCONY OF NYCHA BUILDING
DEFT OBSERVED IN NYCHA BUILDING
THROWING TRASH, YELLING
TRESPASS
LOITERING
KEYLESS ENTRY
LOITERING IN HALLS
PROXIMTY TO CRIME LOCATION

- Appearances -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, and DAVID OURLICHT, individually and on behalf of a class of all others similarly situated,

Plaintiffs,

- against -

THE CITY OF NEW YORK; COMMISSIONER RAYMOND KELLY, individually and in his official capacity; MAYOR MICHAEL BLOOMBERG, individually and in his official capacity; NEW YORK CITY POLICE OFFICER RODRIGUEZ, in his official capacity; NEW YORK CITY POLICE OFFICER GOODMAN, in his official capacity; NEW YORK CITY POLICE OFFICER SALMERON, Shield #7116, in her individual capacity; NEW YORK CITY POLICE OFFICER PICHARDO, Shield #00794, in his individual capacity; NEW YORK CITY POLICE SERGEANT KELLY, Shield #92145, in his individual capacity; NEW YORK CITY POLICE OFFICER JOYCE, Shield #31274, in his individual capacity; NEW YORK CITY POLICE OFFICER HERNANDEZ, Shield #15957, in his individual capacity; NEW YORK CITY POLICE OFFICER MORAN, in his individual capacity; and NEW YORK CITY POLICE OFFICERS JOHN AND JANE DOES,

Defendants.

X

OPINION AND ORDER

08 Civ. 1034 (SAS)

SHIRA A. SCHEINDLIN, U.S.D.J.:

I. INTRODUCTION

Police officers are permitted to briefly stop any individual, but only upon reasonable suspicion that he is committing a crime.[1] The source of that limitation is the Fourth Amendment to the United States Constitution, which guarantees that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Supreme Court has explained that this "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs."[2]

The right to physical liberty has long been at the core of our nation's commitment to respecting the autonomy and dignity of each person: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[3] Safeguarding this right is quintessentially the role of the judicial branch.

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1 *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

2 *Id.* at 9.

3 *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

No less central to the courts' role is ensuring that the administration of law comports with the Fourteenth Amendment, which "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights."[4]

On over 2.8 million occasions between 2004 and 2009, New York City police officers stopped residents and visitors, restraining their freedom, even if only briefly.[5] Over fifty percent of those stops were of Black people and thirty percent were of Latinos, while only ten percent were of Whites.[6] The question presented by this lawsuit is whether the New York City Police Department ("NYPD") has complied with the laws and Constitutions of the United States and the State of New York. Specifically, the four named plaintiffs allege, on behalf of themselves and a putative class, that defendants have engaged in a policy and/or

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[4] *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886) (citation and quotation omitted). "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Id.* at 373-74.

[5] As the Supreme Court has explained, being stopped and frisked "must surely be an annoying, frightening, and perhaps humiliating experience." *Terry*, 292 U.S. at 25.

[6] The parties use the terms Hispanic/Latino interchangeably.

practice of unlawfully stopping and frisking people in violation of their Fourth Amendment right to be free from unlawful searches and seizures and their Fourteenth Amendment right to freedom from discrimination on the basis of race.

Plaintiffs David Floyd, Lalit Clarkson, Deon Dennis, and David Ourlicht are Black men who seek to represent a class of similarly situated people in this lawsuit against the City of New York, Police Commissioner Raymond Kelly, Mayor Michael Bloomberg, and named and unnamed police officers. On behalf of the putative class, plaintiffs seek equitable relief in the form of (1) a declaration that defendants' policies, practices, and/or customs violate the Fourth and Fourteenth Amendments, and (2) a class-wide injunction mandating significant changes in those policies, practices, and/or customs.

This case presents an issue of great public concern: the disproportionate number of Blacks and Latinos, as compared to Whites, who become entangled in the criminal justice system. The specific claims raised in this case are narrower but they are raised in the context of the extensively documented racial disparities in the rates of stops, arrests, convictions, and sentences that continue through the present day. Five nonprofit organizations have filed an *amicus* brief with this Court arguing that the NYPD's stop and frisk practices are

harmful, degrading, and demoralizing for too many young people in New York[7] and twenty-seven of the fifty-one members of the New York City Council have filed a second *amicus* brief arguing that the practices are a citywide problem that "reinforce[] negative racial stereotypes" and have created "a growing distrust of the NYPD on the part of Black and Latino residents."[8]

The NYPD's stop and frisk program was first presented to this Court over thirteen years ago, in a class action entitled *Daniels v. City of New York*.[9] That case was resolved in 2003 through a settlement that required the City to adopt several remedial measures intended to reduce racial disparities in stops and frisks. Under the terms of that settlement, the NYPD enacted a Racial Profiling Policy; revised the form that police fill out when they conduct a stop so that the encounters would be more accurately documented; and instituted regular audits of the forms, among other measures.

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[7] "The fact that being stopped is simply a part of life for a young person of color in New York City can only have profound psychological and economic impacts on already disadvantaged communities." *Amicus curiae* Brief of the Bronx Defenders, Brotherhood/Sister Sol, the Justice Committee, Picture the Homeless, and Streetwise and Safe in Support of Plaintiffs' Motion for Class Certification at 8-9.

[8] Brief of *Amicus Curiae* the Black, Latino, and Asian Caucus of the Council of the City of New York in Further Support of Plaintiffs' Motion for Class Certification at 3.

[9] 99 Civ. 1695 (SAS).

In 2008, after the *Daniels* settlement expired, plaintiffs brought this action, alleging that defendants had failed to reform their policies and practices. In 2011, after examining the parties' voluminous submissions, I denied defendants' motion for summary judgment.[10] In April of this year, upon another voluminous record, I granted in part and denied in part defendants' motion to exclude the testimony of Jeffrey Fagan, plaintiffs' statistics and criminology expert.[11] Plaintiffs now move for certification of the following class:

> All persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.[12]

Because plaintiffs satisfy the legal standard for class certification, their motion is granted.

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[10] *See Floyd v. City of New York* ("*Floyd I*"), 813 F. Supp. 2d 417 (S.D.N.Y. 2011), *partial reconsideration granted*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011).

[11] *See Floyd v. City of New York*, No. 08 Civ. 1034, 2012 WL 1344514 (S.D.N.Y. Apr. 14, 2012) ("*Floyd II*").

[12] *See* Memorandum of Law in Support of Plaintiffs' Motion for Class Certification ("Pl. Mem.") at 1.

II. LEGAL STANDARD

A. Rule 23(a)

Rule 23 of the Federal Rules of Civil Procedure permits individuals to sue as representatives of an aggrieved class. To be certified, a putative class must first meet all four prerequisites set forth in Rule 23(a), generally referred to as numerosity, commonality, typicality, and adequacy.[13] "[C]ertification is proper only if the trial court is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[14] This rigorous analysis requires examining the facts of the dispute, not merely the pleadings, and it will frequently "entail some overlap with the merits of the plaintiff's underlying claim."[15]

Even before the Supreme Court clearly articulated this standard in its

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[13] *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201-02 (2d Cir. 2008) ("*Teamsters*"). In full, Rule 23(a) reads: "Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."

[14] *Wal-Mart Stores, Inc. v. Dukes* ("*Wal-Mart*"), 131 S. Ct. 2541, 2551 (2011) (quotation omitted).

[15] *Id.* "Nor is there anything unusual about that consequence: The necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation." *Id.* at 2552.

2011 *Wal-Mart* decision, the Second Circuit had "required district courts 'to assess all of the relevant evidence admitted at the class certification stage'" and to apply "the preponderance of the evidence standard" when resolving factual disputes relevant to each of the Rule 23 requirements.[16] *Wal-Mart* has adopted that standard and it remains the case that at the class certification stage, "a district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."[17] The court's "determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of facts, even if that trier is the class certification judge."[18]

"The numerosity requirement in Rule 23(a)(1) does not mandate that joinder of all parties be impossible – only that the difficulty or inconvenience of joining all members of the class make use of the class action appropriate."[19] Sufficient numerosity can be presumed at a level of forty members or more,[20] and

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[16] *Teamsters*, 546 F.3d at 202 (quoting *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)* ("*IPO*"), 471 F.3d 24, 42 (2d Cir. 2006)).

[17] *Shahriar v. Smith & Wollensky Restaurant Group, Inc.*, 659 F.3d 234, 251 (2d Cir. 2011) (quotation omitted).

[18] *IPO*, 471 F.3d at 41.

[19] *Central States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 244-45 (2d Cir. 2007).

[20] *See Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

courts do not require "evidence of exact class size or identity of class members to satisfy the numerosity requirement."[21]

Commonality requires plaintiffs "to demonstrate that the class members 'have suffered the same injury,'" and the claims "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[22]

In this context, "the commonality and typicality requirements of Rule 23(a) tend to merge."[23] "Typicality 'requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events[] and each class member makes similar legal arguments to prove the defendant's liability.'"[24] Rather than focusing on the precise nature of plaintiffs' injuries, the typicality requirement may be satisfied where "injuries derive from a unitary course of conduct by a single

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[21] *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

[22] *Wal-Mart*, 131 S. Ct. at 2551 (quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)).

[23] *Id.*

[24] *Central States*, 504 F.3d at 245 (quoting *Robinson v. Metro-N. Commuter R.R. Co.*, 267 F.3d 147, 155 (2d Cir. 2001)).

system."[25] A lack of typicality may be found in cases where the named plaintiff "was not harmed by the [conduct] he alleges to have injured the class"[26] or the named plaintiff's claim is subject to "specific factual defenses" atypical of the class.[27]

The question of adequacy "entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."[28]

Some courts have added an "implied requirement of ascertainability"[29] to the express requirements of Rule 23(a) and have refused to certify a class "unless the class description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member."[30] However, because notice is not obligatory and because the relief sought is injunctive rather than compensatory, "it is not clear that the implied requirement of

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[25] *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

[26] *Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57, 64 (S.D.N.Y. 2006).

[27] *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006).

[28] *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000).

[29] *IPO*, 471 F.3d at 30.

[30] *Casale v. Kelly*, 257 F.R.D. 396, 406 (S.D.N.Y. 2009).

definiteness should apply to Rule 23(b)(2) class actions at all."[31] As stated in the Advisory Committee Note to Rule 23(b)(2), it was designed to cover "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration*."[32]

B. Rule 23(b)(2)

If the requirements of Rule 23(a) are met, the court "must next determine whether the class can be maintained under any one of the three subdivisions of Rule 23(b)."[33] Plaintiffs seek certification under Rule 23(b)(2), which applies where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

C. The *Galvan* Doctrine

Under the doctrine established by the Second Circuit's decision in *Galvan v. Levine*, certification of a Rule 23(b)(2) class is unnecessary when

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[31] William B. Rubenstein et al, *Newberg on Class Actions* § 3:7 at 1-172 (2011).

[32] Fed. R. Civ. P. 23 1966 Advisory Committee Note (emphasis added).

[33] *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 222 (2d Cir. 2008).

"prospective relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment."[34]

III. FACTS

At the class certification stage, district courts must engage in a rigorous analysis of the underlying facts in order to determine whether the plaintiffs have satisfied the requirements of Rule 23. The following factual findings, based on a preponderance of the evidence, are made only for the purpose of adjudicating this motion and will not be binding on the jury at trial.[35]

A. The NYPD's Stop and Frisk Program

It is indisputable that the NYPD has an enormous stop and frisk program. There were 2.8 million documented stops between 2004 and 2009. Those stops were made pursuant to a policy that is designed, implemented, and monitored by the NYPD's administration. In support of their motion for summary judgment, defendants cited numerous examples of NYPD policies and practices

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[34] *Berger v. Heckler*, 771 F.2d 1556, 1566 (2d Cir. 1985) (citing *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (Friendly, J.) (affirming denial of certification of a 23(b)(2) class after the government "withdrew the challenged policy" and "stated it did not intend to reinstate the policy")).

[35] *See IPO*, 471 F.3d at 41.

regarding training,[36] monitoring,[37] supervision,[38] and discipline in order to rebut plaintiffs' allegations of municipal liability for widespread constitutional violations during stops and frisks.[39] That evidence shows that the stop and frisk program is centralized and hierarchical.

Decisions about the policy are made at the highest levels of the department.[40] At the regular CompStat[41] meetings involving the NYPD's top

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[36] *See* Defendants' Statement of Undisputed Facts Pursuant to Local Rule 56.1 ("Def. 56.1") ¶¶ 191-246; Plaintiffs' Reply Statement of Undisputed Facts Pursuant to Local Rule 56.1 ("Pl. 56.1") ¶¶ 191-246; Plaintiffs' 56.1 Additional Facts ("PAF") ¶¶ 166-198.

[37] *See* Def. 56.1 ¶¶ 2-59; Pl. 56.1 ¶¶ 2-59; PAF ¶¶ 1-54.

[38] *See* Def. 56.1 ¶¶ 247-301; Pl. 56.1 ¶¶ 247-301; PAF ¶¶ 159-165. *Cf.* PAF ¶¶ 55-100 (presenting facts to support plaintiffs' allegations that top-down pressure to increase enforcement activity and stop/summons/arrest quotas lead to widespread unconstitutional stops).

[39] *See Floyd I*, 813 F. Supp. 2d at 429. The debate at the summary judgment stage centered on whether the NYPD's official policies aimed at ensuring the constitutionality of stops were properly implemented in practice.

[40] *See* 4/29/09 Letter from Police Commissioner Raymond W. Kelly to Christine C. Quinn, Speaker, New York City Council, App'x G to Report of Jeffrey Fagan ("Fagan Report") [Docket No. 132]; 11/23/09 Deposition of Joseph Esposito ("Esposito Dep"), Ex. 11 to Declaration of Darius Charney ("Charney Decl."), plaintiffs' counsel, at 364:10-365:6 (explaining that Commissioner Kelly "has the last word" on the stop and frisk policy).

Plaintiffs have submitted a sworn affidavit from New York State Senator Eric Adams, who retired as a police captain after more than twenty years of service in the NYPD. Senator Adams says that in July 2010 he met with Commissioner Kelly to discuss proposed legislation regarding stop and frisk practices and that during the meeting "Commissioner Kelly stated that the NYPD

officials, "[s]top, question and frisk activity is commonly discussed"[42] in detail and "[t]he process allows top executives to monitor precincts and operational units, evaluate the skills and effectiveness of managers and properly allocate resources."[43] The Chief of Patrol's office discusses stop and frisk activity with the individual borough commanders and precinct commanders.[44]

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targets its stop-and-frisk activity at young black and Latino men because it wants to instill the belief in members of these two populations that they could be stopped and frisked every time they leave their homes so that they are less likely to carry weapons." Affidavit of Eric Adams, Ex. 10 to Charney Decl., ¶ 5. Commissioner Kelly denies Senator Adams' claim: "At that meeting I did not, nor would I ever, state or suggest that the New York City Police Department targets young black and Latino men for stop and frisk activity. That has not been nor is it now the policy or practice of the NYPD. Furthermore, I said nothing at the meeting to indicate or imply that such activity is based on anything but reasonable suspicion. At the meeting, I did discuss my view that stops serve as a deterrent to criminal activity, which includes the criminal possession of a weapon." Declaration of Raymond W. Kelly, Ex. A to Declaration of Heidi Grossman ("Grossman Decl."), Assistant Corporation Counsel, in Support of Defendants' Opposition to Plaintiffs' Motion for Class Certification, ¶¶ 3-4.

[41] "One of the key features of NYPD oversight is the CompStat process. . . . COMPSTAT, which is short for COMPuter STATistics or COMParative STATistics, is the name given to the NYPD's accountability process and has since been replicated in many other departments. CompStat is a multilayered dynamic approach to crime reduction, quality of life improvement, department oversight and personnel and resource management and employs Geographic Information Systems, which map crime and identify high-crime and problematic areas." Def. 56.1 ¶¶ 92-93.

[42] *Id.* ¶ 143.

[43] *Id.* ¶ 114.

[44] *See id.* ¶ 135. *See generally id.* ¶¶ 92-152.

The UF-250 form was designed by the NYPD and must be filled out by officers after every stop. The form is sometimes reviewed at CompStat meetings[45] and "the Chief of Patrol's office reviews UF-250s [from high crime 'Impact Zones'] in order to determine whether the precinct as a whole is properly deploying its resources."[46] The NYPD requires that "[a] supervisor must sign off on every stop, question and frisk UF-250 report."[47]

According to defendants, the NYPD "provides multiple levels of training for officers,"[48] including numerous courses that cover stop and frisk procedure,[49] a 4.5-hour role-playing workshop on stop and frisk,[50] numerous memos and special videos about the law of reasonable suspicion, and ongoing training after graduating from the police academy.[51]

"The NYPD functions through a chain of command."[52] Officers are

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45 *See id.* ¶ 134.

46 *Id.* ¶ 172.

47 *Id.* ¶ 271.

48 *Id.* ¶ 191.

49 *See id.* ¶ 195.

50 *See id.* ¶ 203.

51 *See id.* ¶¶ 207-222.

52 *Id.* ¶ 247.

monitored by their supervisors; supervisors are monitored through inspection teams, integrity control officers, and precinct commanding officers; and the Internal Affairs Bureau monitors police personnel throughout the department and is notified of all complaints alleging excessive force, abuse of authority, discourtesy, or offensive language.[53]

In short, the overwhelming and indisputable evidence shows that the NYPD has a department-wide stop and frisk program; the program has been designed and revised at the highest levels of the department; the implementation of the program is conducted according to uniform and centralized rules; and monitoring of compliance with the program is hierarchical. Defendants acknowledge much of this reality: "To be sure, NYPD's department-wide policies generate from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department-wide policies."[54]

B. The Centralized Use of Performance Standards and Quotas

Hotly contested, however, is whether the NYPD has set quotas governing the number of stops and summonses that NYPD officers must make on a

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[53] *See id.* ¶¶ 281-292, 307-308. "Search and seizure allegations relating to stop and frisk fall under the abuse of authority jurisdiction." *Id.* ¶ 317.

[54] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Def. Mem.") at 8.

monthly basis. New York's Labor Law makes it unlawful for the NYPD to penalize a police officer, expressly or impliedly, for the officer's failure to meet a summons, arrest, or stop quota.[55] Defendants argue that

> [w]hile the NYPD requires performance goals, they are specifically expected to be set by a command's managers and to be met within appropriate legal standards, including stop activity. These performance goals are not necessarily numerical in character and are instead goals to be set and achieved in relation to current crime conditions in an officer's command. Plaintiffs have made no showing that numerical goals for enforcement activity exist and/or are uniform throughout the NYPD.[56]

Whether the "performance goals" are accurately characterized as "quotas" under the New York Labor Law is surely important to the NYPD and to police officers and their union. But at the class certification stage of this lawsuit, the applicability of that legal definition is much less important than the substantive question of whether or not the unlawful stops of putative class members result from a common source: the department's policy of establishing performance standards and demanding increased levels of stops and frisks. The preponderance of the evidence shows that the answer to that question is yes.

To begin with, the scope of the NYPD's stop and frisk program is a

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[55] *See* N.Y. Lab. L. § 215-a. A "quota" is defined as "a specific number of" tickets, summons, or stops. *Id.*

[56] Def. Mem. at 14-15.

result of institutional decisions and directives. Over the fourteen months beginning in January 1998, "NYPD officers documented 174,919 street 'stops' on UF-250 forms."[57] That is equivalent to just under 12,500 stops per month or 150,000 stops per year. In 2004, officers documented over 313,000 stops, and since then the number has increased every year except 2007, rising to over 684,000 in 2011.[58] Given the hierarchical nature of the NYPD, any reasonable observer would conclude simply by looking at the trend that this dramatic increase in the number of stops represents the intentional implementation of a departmental objective. But I need not rely on the overwhelming circumstantial evidence showing that the increase in stops is due to central directives because there is ample direct evidence as well. A small sample of this evidence includes the following:

- In a recent Operations Order, Commissioner Kelly directed all commands that "Department managers can and must set performance goals,"

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[57] The New York Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, Ex. 117 to Declaration of Darius Charney in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Charney SJ Decl.") at 91.

[58] *See* Fagan Report at 19; Sean Gardiner, *Stop-and-Frisks Hit Record in 2011*, Wall St. J., Feb. 14, 2012, at A21. In the first three months of 2012, the NYPD stopped eleven percent more people than it did in the first three months of 2011. *See* Al Baker, *New York Police Release Data Showing Rise in Number of Stops on Streets*, N.Y. Times, May 13, 2012 at A19.

relating to "the issuance of summonses, the stopping and questioning of suspicious individuals, and the arrests of criminals."[59] As part of a weekly review of each police officer, "the squad/unit sergeant will compare the member's current monthly activity as it pertains to the member's daily assignment" and at the end of every month, officers will complete a report "indicating the total activity for the month."[60] The Order states that during performance evaluations, "a high degree of review and consideration will be given to member's daily efforts" and that "[u]niformed members . . . who do not demonstrate activities . . . or who fail to engage in proactive activities . . . will be evaluated accordingly and their assignments re-assessed."[61]

- In response to questions about the major increase in stops in recent years, Deputy Commissioner Paul Browne has made clear that the Department continues to embrace stops as a central part of its crime-fighting strategy: "stops save lives," and "[t]hat is a remarkable achievement—5,628 lives saved—attributable to proactive policing strategies that included stops."[62]

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[59] 10/17/11 Police Officer Performance Objectives Operations Order, Ex. 12 to Charney Decl., at 1.

[60] *Id.* at 3.

[61] *Id.* at 5.

[62] Gardiner, *Stop-and-Frisks Hit Record in 2011.*

• At a CompStat meeting on July 17, 2008, NYPD Chief of Department Joseph Esposito (who is the highest ranking uniformed member of the force) told the executive officer of the 28th Precinct: "Your enf[orcement] numbers are way down . . . As an [executive officer] you have to look at that . . . If you look at raw number of 250s you are down 50 percent."[63] At a CompStat meeting three months later, Esposito and Inspector Dwayne Montgomery, who was the commander of the 28th Precinct from 2005 to 2009, discussed the number of stops that an average officer should perform.[64] At his deposition, Montgomery testified that during those years he expected his officers to conduct a "minimum" of 2.3 UF-250 stops per month and that he used that quota "as a way of just gauging whether or not they were doing their job."[65] He had discussed that precise figure with Chief Esposito.

• From 2006 until 2009, Adhyl Polanco worked as a patrol officer in the 41st Precinct. At his deposition, he testified that his commanding officers announced specific quotas for arrests and summons (quotas that rose dramatically between early 2008 and 2009) and for UF-250s, assigned supervisors to patrol with

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[63] NYC_2_7010-7017, Ex. 47 to Charney SJ Decl. Plaintiff Deon Dennis was stopped by officers from the 28th Precinct.

[64] *See* NYC_2_00007026, Ex. 48 to Charney SJ Decl.; PAF ¶ 56.

[65] 10/14/09 Deposition of Dwayne Montgomery ("Montgomery Dep."), Ex. 6 to Charney SJ Decl., at 202:4, 14-15; 209:4-9.

under-performing officers so as to ensure that quotas were met, threatened to reduce overtime for officers who failed to perform well, and reassigned to less desirable posts officers who failed to meet quotas.[66]

- In September and October of 2009, Polanco made audio recordings of the roll calls in the 41st Precinct, which he provided to the Internal Affairs Bureau and plaintiffs provided to the Court. In those roll call meetings, supervisors established specific quotas for summonses and arrests; a union delegate told officers that the union and the NYPD management agreed on a quota of one arrest and twenty summons per month; and a supervisor told officers that the Bronx Borough Commander was yelled at by the Chief of Patrol and others at NYPD headquarters for low summons activity and that officers in the 41st Precinct were expected to increase their summons numbers.[67]

- In 2008 and 2009, police officer Adrian Schoolcraft recorded roll calls

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[66] *See* Deposition of Adhyl Polanco ("Polanco Dep."), Ex. 76 to Charney SJ Decl., at 22-36.

[67] *See* PAF ¶¶ 64-69 and the evidence cited therein. At his deposition, Polanco testified that he believed the NYPD "absolutely" has a problem with racial profiling: "I work in a minority community and what we do to people in the South Bronx you would never do to people in midtown Manhattan. . . . Illegally searching, illegally stopping, illegally handcuffing, put phoney charges on them, put it through the system." Polanco Dep. 18:7-22. Polanco testified that while he worked at the NYPD, he personally witnessed officers stop and question civilians without having reasonable suspicion "every day." *Id*. at 52:14-18.

in the 81st Precinct; on the tapes, supervisors can be heard repeatedly telling officers to conduct unlawful stops and arrests and explaining that the instructions for higher performance numbers are coming down the chain of command.[68]

In response to this evidence, defendants point to the testimony of numerous police officers who say that they have not been subject to or aware of quotas to make "a certain number" of stops or arrests or issue "a certain number" of summonses. Other officers say that they were not even aware of productivity standards or asked to increase their number of stops, arrests, and summonses. And

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[68] *See* CD Bates-numbered PL000093, Ex. 1 to Affirmation of NYPD Officer Adrian Schoolcraft ("Schoolcraft Aff."), Ex. B to Declaration of Taylor Hoffman, plaintiffs' counsel, in Support of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment. The following is a small sampling of the statements made by supervisors that can be heard on the tapes. Lieutenant Delafuente, July 15, 2008: "I want a couple of 250s out of there please, alright?" Deputy Inspector Mauriello, October 31, 2008 (Halloween night): "And they got any bandanas around their necks, Freddy Krueger masks, I want them stopped, cuffed, alright, brought in here, run for warrants. They're juveniles, we're gonna leave 'em in here 'till their parents come and pick 'em up." Sergeant Stukes, November 23, 2008: "If they're on a corner, make 'em move. They don't wanna move, lock 'em up. You can always articulate [a charge] later." Sergeant Stukes, December 8, 2008: "You're gonna be 120 Chauncey [St.]. You're gonna be [in a?], uh, vehicle out there. Shake everybody up. Anybody moving, anybody coming out of that building – [UF] 250"; "You're gonna be Howard and Chauncey 1900, post one. Same thing. Two, three [inaudible]. Everybody walking around. Stop em. 250-em"; "Anybody walking around, shake 'em up, stop 'em, 250-em, doesn't matter what it takes." Lieutenant Delafuente, January 13, 2009: "Chief [of Transportation Michael] Scagnelli, three star chief, at traffic stat today. . . he says to two commanders 'How many. . . superstars and how many losers? . . . Then he goes down and asks how many summonses per squad?'"

many were never subject to or aware of discipline or rewards relating to quotas or productivity standards.[69] I have no reason, at this juncture, not to credit these officers' testimony as truthful. I accept (for now) defendants' representation that some officers were not subjected to "quotas" and even that some officers were not aware of productivity standards, although there is no dispute that the use of performance standards is departmental policy.[70] Nevertheless, the overwhelming evidence – including the precipitous rise in the number of stops, the policy statements from Commissioner Kelly's office, the many comments of Deputy Commissioner Browne and Chief of Department Esposito, the recordings of roll calls from precincts in the Bronx and Brooklyn, and the testimony of numerous police officers – shows that the dramatic increase in stops since 2004 is a direct consequence of a centralized and city-wide program.

C. Statistical Evidence of Unlawful Stops

NYPD officers are required to fill out a detailed worksheet, called a UF-250, describing the events before and during every stop that they perform. 2.8 million of these forms were filled out between 2004 and 2009 and all of them were

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[69] *See* Reply Declaration of Heidi Grossman in Support of Defendants' Motion for Summary Judgment ¶ 21 [Docket No. 142].

[70] *See* 10/17/11 Police Officer Performance Objectives Operations Order, Ex. 12 to Charney Decl.

compiled in a database – a database that now contains a wealth of information about millions of interactions between police officers and civilians.

Both parties have retained experts to perform extensive statistical analysis of this data. Plaintiffs rely heavily on their expert – Jeffrey Fagan, a Columbia University professor – in order to show that the NYPD has stopped many civilians without reasonable suspicion and unlawfully targets Blacks and Latinos for stops, summonses, arrests, and excessive force.[71] In *Wal-Mart*, the Supreme Court strongly suggested that *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (which governs the admissibility of expert testimony) applies at the certification stage of a class action proceeding.[72] As a result, and in response to defendants' motion to strike plaintiffs' expert, I engaged in a detailed review of Fagan's qualifications and methodology.[73] Because portions of his analysis were deeply intertwined with the law of reasonable suspicion, I conducted a *de novo* review of those portions and ordered adjustments to his findings in the two

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[71] *See* Fagan Report and Supplemental Report of Jeffrey Fagan ("Supp. Rep.") [Docket No. 132].

[72] *See Wal-Mart*, 131 S. Ct. at 2541 (citing *Daubert*, 509 U.S. 579 (1993)).

[73] *See Floyd II*, 2012 WL 1344514.

instances where his report misstated the law.[74] After a rigorous review, I found him qualified and his methodologies reliable, and found much of his report probative and helpful. It is therefore appropriate for me to consider Fagan's conclusions at the class certification stage. In particular, I find that the following factual determinations provide strong evidence regarding the existence of a Fourth Amendment class, and a Fourteenth Amendment subclass, which satisfy the requirements of Rule 23:

1. **Fourth Amendment Class**

- In at least six percent of all documented stops, police officers' stated reasons for conducting the stop were facially insufficient to establish reasonable suspicion. That is to say, according to their own explanations for their actions, NYPD officers conducted at least 170,000 unlawful stops between 2004 and 2009.[75]

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[74] *See id*. at *14-*19.

[75] I say "at least" because a significant number of the 400,000 stops that include only an "Other" indicator of suspicion on Side 1 of their UF-250 are also facially insufficient; these do not include any of the 170,000. *See Floyd II*, 2012 WL 1344514, at *14-*16. However, neither party has yet convincingly explained to the Court how to properly estimate how many of those 400,000 are facially insufficient.

As I discussed at length in my *Daubert* evaluation of Fagan's report, I recognize that the legality of an individual stop cannot be determined on the basis of the corresponding UF-250 alone: a lawful stop is not made unlawful simply because the police officer fails to fill out the paperwork properly and an unlawful

• In over 62,000 of those cases, police officers gave no reason other than "furtive movement" to justify the stop. These facially unlawful stops occurred in every precinct in the City – from a low of fourteen such stops in Central Park's 22nd Precinct and forty-one such stops in Staten Island's 123rd Precinct to a high of over 3,500 in the western Bronx's 46th Precinct and East New York's 73rd and 75th Precincts.[76]

• In over four thousand stops, police officers gave no reason other than "high crime area" to justify the stop. These facially unlawful stops also occurred in every precinct in the City.[77]

• In the 81st Precinct, where Adrian Schoolcraft's recordings document supervisors repeatedly telling officers to conduct unlawful stops, the percentage of stops that were facially unlawful was below the City-wide average.[78] At least according to this metric, stop and frisk conduct in dozens of New York City

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stop is not made lawful because the police officer fills out the paperwork dishonestly or inaccurately. *See Floyd II*, 2012 WL 1344514, at *11-*12. Nevertheless, it is powerful and probative evidence that police officers themselves have justified 170,000 stops on the basis of legally insufficient criteria.

[76] *See* Table 2 to Declaration of Jeffrey Fagan in Support of Plaintiffs' Motion for Class Certification ("Fagan Decl."); *Floyd II*, 2012 WL 1344514, at *17.

[77] *See* Table 2 to Fagan Decl; *Floyd II*, 2012 WL 1344514, at *18 n.130.

[78] *See* Table 1 to Fagan Decl.

precincts was similar to stop and frisk conduct in the 81st Precinct.

- The percentage of documented stops for which police officers failed to list an interpretable "suspected crime" has grown dramatically, from 1.1 percent in 2004 to 35.9 percent in 2009.[79] Overall, in more than half a million documented stops – 18.4 percent of the total – officers listed no coherent suspected crime.[80]

- "High crime area" is listed as a justification for a stop in approximately fifty-five percent of all recorded stops, regardless of whether the stop takes place in a precinct or census tract with average, high, or low crime.[81]

- 5.37 percent of all stops result in an arrest; 6.26 percent of stops result in a summons.[82] In the remaining eighty-eight percent of cases, although they were required by law to have objective reasonable suspicion that crime was afoot when they made the stop, police officers ultimately concluded that there was no probable cause to believe that crime was afoot. That is to say, according to their own records and judgment, officers' "suspicion" was wrong nearly nine times out of

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79 *See Floyd II*, 2012 WL 1344514, at *7 n.41.

80 *See* Fagan Report at 23.

81 *See id.* at 52–55.

82 *See id.* at 63.

ten.[83]

• Guns were seized in 0.15 percent of all stops. This is despite the fact that "suspicious bulge" was cited as a reason for 10.4 percent of all stops.[84] Thus, for every sixty-nine stops that police officers justified specifically on the basis of a suspicious bulge, they found one gun.[85]

2. **Fourteenth Amendment Subclass**

• "The racial composition of a precinct, neighborhood, and census tract is a statistically significant, strong and robust predictor of NYPD stop-and-frisk patterns even after controlling for the simultaneous influences of crime, social conditions, and allocation of police resources."[86]

• Based on Fagan's analysis of the UF-250s, "the search for weapons is

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[83] In addition, approximately seventeen percent of summonses from 2004 and 2009 were thrown out by the New York courts as being facially (*i.e.*, legally) insufficient and more than fifty percent of all summons were dismissed before trial. *See Stinson v. City of New York*, No. 10 Civ. 4228, 2012 WL 1450553 (S.D.N.Y. Apr. 23, 2012).

[84] *See* Fagan Report at 51, 63.

[85] I recognize that officers may occasionally have some other reason to cite "suspicious bulge," but guns are surely the most obvious. In addition, I presume that guns are sometimes recovered in instances when "suspicious bulge" is not checked on the UF-250 form.

[86] Declaration of Jeffrey Fagan in Support of Plaintiffs' Opposition to Defendants' Motion to Exclude Plaintiffs' Proposed Expert Reports, Opinions and Testimony of Jeffrey Fagan ("Fagan *Daubert* Decl.") ¶ 4(a).

(a) unrelated to crime, (b) takes place primarily where weapons offenses are less frequent than other crimes, and (c) is targeted at places where the Black and Hispanic populations are highest . . . . [T]he search for drug offenders is (a) negatively related to rates of crime or drug offenses specifically, and is (b) concentrated in neighborhoods with high proportions of Black and Hispanic residents."[87]

- "NYPD stops-and-frisks are significantly more frequent for Black and Hispanic residents than they are for White residents, even after adjusting for local crime rates, racial composition of the local population, police patrol strength, and other social and economic factors predictive of police enforcement activity."[88]

- "Black and Hispanic individuals are treated more harshly during stop-and-frisk encounters with NYPD officers than Whites who are stopped on suspicion of the same or similar crimes."[89]

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[87] Fagan Report at 34.

[88] Fagan *Daubert* Decl. ¶4(b). This particular aspect of Fagan's report has been criticized vehemently by defendants, who argue that it fails to account for *who* is engaging in crime and, relatedly, *who* is engaging in suspicious behavior that justifies a stop. *See Floyd II*, 2012 WL 1344514, at *4, *10-*11. There are good arguments on both sides of this debate. I do not know if this evidence, standing alone, would be sufficient to certify a Fourteenth Amendment subclass. However, in combination with Fagan's other findings and plaintiffs' qualitative proof, the preponderance of the evidence clearly supports certification.

[89] Fagan *Daubert* Decl. ¶4(d).

- Police officers are more likely to list no suspected crime category (or an incoherent one) when stopping Blacks and Latinos than when stopping Whites.[90]

- Police officers are more likely to list the stop justification "furtive movement," which is a highly nebulous and not particularly probative of crime, when stopping Blacks and Latinos than when stopping Whites.[91]

IV. DISCUSSION

A. Plaintiffs Have Standing to Seek Injunctive Relief

Article III of the Constitution requires that a federal court entertain a lawsuit only if the plaintiff has standing to pursue the relief that she seeks. Concrete injury is a prerequisite to standing and a "plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."[92]

The Supreme Court emphasized this requirement in *City of Los*

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[90] This occurred in 19.68 percent of stops of Blacks, 18.27 percent of stops of Latinos, and 16.66 percent of stops of Whites. *See* Report at 23.

[91] Officers list "furtive movement" in 45.5 percent of stops of Blacks, 42.2 percent of stops of Latinos, and 37.4 percent of stops of Whites. *See* Fagan Report App'x Table D1. *See also Floyd II*, 2012 WL 1344514, at *17.

[92] *Deshawn v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983)).

Angeles v. Lyons, when it held that Lyons, who had been subjected to a dangerous chokehold by a Los Angeles police officer, did not have standing to pursue an injunction against the police department's practice of using chokeholds because his past injury "does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."[93]

Defendants argue that plaintiffs Clarkson, Dennis, and Floyd lack standing to seek injunctive relief.[94] Clarkson and Dennis allege that they were each stopped improperly only once between 2004 and 2009 and Dennis and Floyd no longer live in New York (although Dennis regularly visits his friends and family here and intends to move back in the future and Floyd intends to move back to the City after he finishes medical school).[95] Accordingly, defendants argue, "[plaintiffs'] assertion that they will again be stopped and deprived of their constitutional rights is wholly speculative."[96]

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[93] *Lyons*, 461 U.S. at 105.

[94] *See* Def. Mem. at 20-21.

[95] *See* Declarations of Lalit Clarkson, Deon Dennis, David Floyd, and David Ourlicht ("Plaintiffs' Declarations"), Exs. 2-5 to Charney Decl.

[96] Def. Mem. at 20-21.

The simplest way to address defendants' concern is by noting that David Ourlicht, the fourth plaintiff, indisputably does have standing and that "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."[97] *First*, unlike Lyons, who alleged only one past instance of unconstitutional police behavior, Ourlicht was stopped by NYPD officers three times in 2008 and once again in 2010, after this lawsuit was filed.[98] "The possibility of recurring injury ceases to be speculative when actual repeated incidents are documented."[99] *Second*, unlike the plaintiffs in *Lyons* and *Shaine v. Ellison*,[100] Ourlicht's risk of future injury does not depend on his being arrested for unlawful conduct and so he cannot avoid that injury by following the law. The risk of injury is not based on a string of unlikely contingencies: according to his sworn affidavit, Ourlicht was stopped and frisked while going about his daily life –

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[97] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).

[98] *See* Affidavit of David Ourlicht, Ex. 5 to Charney Decl., ¶¶ 6-18.

[99] *Nicacio v. United States Immigration & Naturalization Serv.*, 768 F.2d 1133, 1136 (9th Cir. 1985). *Accord Aguilar v. Immigration & Customs Enforcement Div. of the United States Dep't of Homeland Sec.*, 811 F. Supp. 2d 803, 828 (S.D.N.Y. 2011) (finding standing in a case where one set of plaintiffs had allegedly been subject to two unlawful searches and other plaintiffs feared repeat injury because the searches were part of defendants' "condoned, widespread, and ongoing" practice).

[100] 356 F.3d 211 (2d Cir. 2004).

walking down the sidewalk, sitting on a bench, getting into a car.[101]

Finally, as I explained in the *Daniels* litigation, the frequency of alleged injuries inflicted by the practices at issue here creates a likelihood of future injury sufficient to address any standing concerns.[102] In *Lyons*, the police department's challenged policies were responsible for ten deaths; here, the police department has conducted over 2.8 million stops over six years and its paperwork indicates that, *at the very least*, 60,000 of the stops were unconstitutional (because they were based on nothing more than a person's "furtive movement"). Every day, the NYPD conducted 1200 stops; every day, the NYPD conducted nearly thirty facially unlawful stops based on nothing more than "subjective, promiscuous appeals to an ineffable intuition."[103] In the face of these widespread practices, Ourlicht's risk of future injury is "'real and immediate,' not 'conjectural' or

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[101] *See Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041-42 (9th Cir. 1999) (*en banc*) (stating that the Supreme Court in *Spencer v. Kemna*, 523 U.S. 1, 15 (1998) "characterized the denial of Article III standing in *Lyons* as having been based on the plaintiff's ability to avoid engaging in illegal conduct")).

[102] *See National Congress for Puerto Rican Rights by Perez v. City of New York*, 75 F. Supp. 2d 154, 161 (S.D.N.Y. 1999) (later renamed *Daniels*).

[103] *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) (Posner, *J.*) (criticizing the use of the vague term "furtive" and opining that "[w]hether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited.").

'hypothetical,'"[104] and he satisfies Article III's standing requirements. Because Ourlicht has standing, I need not consider the standing of the other plaintiffs.[105] I nevertheless note that Dennis and Floyd have each been stopped by the NYPD more than once (although two of Dennis' three stops occurred many years ago). Even Clarkson's single stop, in light of the tens of thousands of facially unlawful stops, would likely confer standing.[106]

B. Plaintiffs Satisfy the Four Prerequisites of Rule 23(a)

1. Ascertainability

Defendants argue that the "description of the class must be 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'"[107] Defendants believe that plaintiffs' proposed class definition – all persons who have been or in the future will be unlawfully stopped in violation of the Fourth Amendment, including all

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[104] *Lyons*, 461 U.S. at 102.

[105] *See Forum for Academic and Institutional Rights, Inc.*, 547 U.S. at 53 n.2.

[106] "[T]here is no per se rule requiring more than one past act, or any prior act, for that matter, as a basis for finding a likelihood of future injury." *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001).

[107] Def. Mem. at 16 (quoting 7A Wright, Miller & Kane, *Federal Practice and Procedure* § 1760).

persons stopped on the basis of being Black or Latino in violation of the Fourteenth Amendment – is impremissibly indefinite because "an individualized inquiry must be made into the facts and circumstances surrounding [each] stop" and the "analysis is highly specific and unique in every case."[108]

The NYPD repeats this argument despite its unsurprising lack of success for over three decades. In 1979, Judge Charles Haight of this Court was presented with a motion for class certification in the landmark *Handschu* litigation that sought to curtail unconstitutional behavior by the NYPD, including the surveillance of left wing political groups. Plaintiffs sought to certify a class of "[a]ll individuals . . . who are physically present in the City of New York . . . who engage in or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities, have been, are now or hereafter may be subjected to or threatened by" surveillance or violence by the NYPD.[109] The defendants' "strenuously pressed arguments against certification" focused on the indefinite nature of the class definition. Judge Haight rejected those arguments: "Where, as here, the 23(b)(2) class action seeks equitable relief as opposed to money damages, obviating the need for notice to class members,

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[108] *Id*.

[109] *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203, 1979 U.S. Dist. Lexis 12148, at *3 (S.D.N.Y. May 25, 1979).

precise delineation of the class has been held unnecessary."[110]

Rule 23 does not demand ascertainability. The requirement is a judicial creation meant to ensure that class definitions are workable when members of the class will be entitled to damages or require notice for another reason.[111] In contrast, as Judge Haight noted, the drafters of the Rule specifically envisioned the use of (b)(2) classes "in the civil-rights field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration*."[112] The most prominent treatise on class actions notes that because of the absence of individual damages, "it is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all."[113]

Defendants repeated their ascertainability argument twenty years after

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[110] *Id.* at *10.

[111] *See IPO*, 471 F.3d at 30. Defendants cite to *Forman v. Data Transfer*, 164 F.R.D. 400, 403 (E.D. Pa. 1995) for support, but that decision concerned a proposed (b)(3) class that sought individual damages. The need for ascertainability in (b)(1) or (b)(3) cases – or in (b)(2) cases that, pre-*Wal-Mart*, sought individual damages – has no bearing on the need for such ascertainability in (b)(2) cases seeking only injunctive relief for the class.

[112] Fed. R. Civ. P. 23 1966 Advisory Committee Note (emphasis added).

[113] William B. Rubenstein et al., *Newberg on Class Actions* § 3:7 at 1-172 (2011).

Handschu, in the *Daniels* case, which sought certification of a nearly identical class to the one sought here. As I explained then, "[b]ecause 'general class descriptions based on the harm allegedly suffered by plaintiffs are acceptable in class actions seeking only declaratory and injunctive relief under Rule 23(b)(2),' plaintiffs' proposed class is sufficiently definite to warrant certification."[114]

Both the Second Circuit and numerous district courts in the circuit have approved of class definitions without precise ascertainability under Rule 23(b)(2).[115] Other circuits agree with this approach. The Tenth Circuit has made

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[114] *Daniels*, 198 F.R.D. at 415 (quoting *Wanstrath v. Time Warner Entm't Co.*, No. 93 Civ. 8538, 1997 WL 122815 (S.D.N.Y. Mar. 17, 1997)). Defendants argue that *Daniels* was more narrow in scope because it addressed only the stop and frisk practices of one unit of the NYPD. *See* Def. Mem. at 17-18. But the smaller number of people stopped by the Street Crimes Unit (18,000 in 1997) has no impact on the ascertainability question. The court cannot (and need not) determine which of the class members' stops were lawful, whether the number in question is 18,000 or 2.8 million.

[115] *See Marisol v. Giuliani*, 126 F.3d 372 (2d Cir. 1997) (certifying a class of children who "are or will be at risk of neglect or abuse and whose status is or should be known to" a City agency). *See also, e.g., Biediger v. Quinnipiac Univ.*, No. 09 Civ. 621, 2010 WL 2017773, at *7 (D. Conn. May 20, 2010) (certifying a class of all present and future female students who "want to end Quinnipiac University's sex discrimination" even though ascertaining who will be a future student and what these students will want is of course impossible); *Mental Disability Law Clinic v. Hogan*, No. 06 Civ. 6320, 2008 WL 4104460, at *18 (E.D.N.Y. Aug. 26, 2008) (certifying a class of "all individuals who (1) suffer from mental illness . . ." and explaining that "because only declaratory and injunctive relief is sought, individual assessments of disability need not be made"); *Finch v. New York State Office of Children & Family Servs.*, 252 F.R.D. 192, 203 (S.D.N.Y. 2008) ("Rule 23(b)(2) classes need not be precisely defined").

clear that "while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2)."[116] Similarly, the First Circuit has said that ascertainability is unnecessary when "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists."[117]

It would be illogical to require precise ascertainability in a suit that seeks no class damages. The general demarcations of the proposed class are clear – those people unlawfully stopped or who may be stopped by the NYPD – and that definition makes the class sufficiently ascertainable for the purpose of Rule 23(b)(2).

2. Numerosity

Rule 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." In the Second Circuit, "numerosity is presumed at a

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[116] *Shook v. El Paso County*, 386 F.3d 963, 972 (10th Cir. 2004).

[117] *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) ("notice to the members of a (b)(2) class is not required and the actual membership of the class need not therefore be precisely delimited"). *Accord Baby Neal v. Casey*, 43 F.3d 48, 54 (3d Cir. 1995) (certifying the entirely unascertainable class of "all children in Philadelphia who have been abused or neglected and are known or should be known to the Philadelphia Department of Human Services").

level of 40 members."[118] Defendants argue here that "in the absence of ascertainability plaintiffs cannot establish numerosity,"[119] but they cite no law for that proposition.[120] Again, the language of the Rule's drafters is helpful: (b)(2) is meant for classes "whose members are incapable of specific enumeration."[121] The preponderance of the evidence indicates that the proposed class and subclass easily exceed forty members. Indeed, the size of the class is likely to be well over one hundred thousand.

3. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." This requires plaintiffs "to demonstrate that the class members 'have suffered the same injury.'"[122] In *Wal-Mart*, plaintiffs sought to certify a class of approximately 1.5 million female employees of the retail giant, alleging that "the discretion exercised by their local supervisors over pay and promotion violates

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[118] *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

[119] Def. Mem. at 18.

[120] *See Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement.").

[121] Fed. R. Civ. P. 23 1966 Advisory Committee Note.

[122] *Wal-Mart*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157).

Title VII by discriminating against women."[123] The Supreme Court found that the plaintiffs had failed to satisfy commonality because the putative class members were subjected to an enormous array of *different* employment practices:

> [P]ay and promotion decisions at Wal-Mart are generally committed to the local managers' broad discretion . . . [who may make employment decisions] with only limited corporate oversight[124] . . . . Wal-Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard[125] . . . . Other than the bare existence of delegated discretion, respondents have identified no 'specific employment practice' – much less one that ties all their 1.5 million claims together.[126]

Judge Richard Posner recently applied the *Wal-Mart* decision to the claims of Black Merrill Lynch brokers alleging racial discrimination. This was his summary of the *Wal-Mart* holding:

> *Wal-Mart* holds that if employment discrimination is practiced by the employing company's local managers, exercising discretion granted them by top management . . . rather than implementing a uniform policy established by top management to govern the local managers, a class action by more than a million current and

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123 *Id.* at 2547.

124 *Id.*

125 *Id.* at 2553.

126 *Id.* at 2555.

> former employees is unmanageable.[127]

Merrill Lynch had a policy of permitting brokers in the same office to form work teams of their choosing and a policy of giving the accounts of departed brokers to existing brokers on the basis of various performance formula. Plaintiffs alleged that the "fraternity" nature of the teaming policy and the rich-get-richer nature of the accounts policy had a disparate impact on Black brokers. Reversing the lower court and granting certification, Judge Posner explained that the two policies

> are practices of Merrill Lynch, rather than practices that local managers can choose or not at their whim. Therefore challenging those policies in a class action is not forbidden by the *Wal-Mart* decision; rather that decision helps (as the district judge sensed) to show on which side of the line that separates a company-wide practice from an exercise of discretion by local managers this case falls.[128]

The court determined that "the plaintiffs' claim of disparate impact is most efficiently determined on a class-wide basis rather than in 700 individual lawsuits"[129] because, unlike in *Wal-Mart*, there were two company-wide policies at issue and a class action would be the best mechanism for determining the impact that those policies had on the earnings of Merrill Lynch's brokers. Thus, Judge

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[127] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (7th Cir. 2012).

[128] *Id.* at 490.

[129] *Id.*

Posner's opinion stands for the proposition that even after *Wal-Mart*, Rule 23(b)(2) suits remain appropriate mechanisms for obtaining injunctive relief in cases where a centralized policy is alleged to impact a large class of plaintiffs, even when the magnitude (and existence) of the impact may vary by class member.

This has long been the Second Circuit's standard.[130] In *Marisol A.*, the Court of Appeals affirmed the certification of a class of all children challenging many different aspects of the child welfare system that implicated different statutory, constitutional, and regulatory schemes. Finding that the district court's characterization of the claims "stretches the notions of commonality and typicality," the court nevertheless affirmed because defendants' actions were alleged to "derive from a unitary course of conduct by a single system."[131] More recently, the Second Circuit has reiterated the rule that "where plaintiffs were 'allegedly aggrieved by a single policy of the defendants,' and there is 'strong commonality of the violation and the harm,' this 'is precisely the type of situation for which the class action device is suited.'"[132]

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[130] *See* Pl. Mem. at 12.

[131] *Marisol A.*, 126 F.3d at 377.

[132] *Brown v. Kelly*, 609 F.3d 467, 468 (2d Cir. 2010) (quoting *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 146 (2d Cir. 2001)). *Accord Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 156 (S.D.N.Y. 2008) ("Commonality does not mean that all issues must be identical as to each member,

As documented above, there can be no dispute that the NYPD has a single stop and frisk program. Defendants concede that the "NYPD's department-wide policies generate from a centralized source and NYPD employs a hierarchical supervisory structure to effect and reinforce its department-wide policies."[133] The stop and frisk program is far more centralized and hierarchical than even the employment policies in *Merrill Lynch*. Precinct commanders are not given leeway to conduct stops and frisks if, when, and how they choose; instead, they are required to use the tactic as a central part of the Department's pro-active policing strategy. They are required to monitor, document, and report their stop and frisk activity to headquarters using a uniform system; all officers are subject to centralized stop and frisk training; performance standards are obligatory and a recognized part of productivity evaluations in all precincts. Since *Wal-Mart*, at least three district courts have granted class certification in cases alleging Fourth and Fourteenth Amendment violations due to a police department's policy and/or practice of making unlawful stops and arrests; all of these courts have rejected the

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but it does require that plaintiffs identify some unifying thread among the members' claims that warrant[s] class treatment.") (quotation omitted); *Daniels*, 198 F.R.D. at 417; *D.S. v. New York City Dep't of Educ.*, 255 F.R.D. 59, 71 (E.D.N.Y. 2008).

[133] Def. Mem. at 8.

notion that the individual circumstances of a stop defeat commonality.[134] Defendants argue that "individual officers' decisions to make stops are akin to the Wal-Mart 'policy' of allowing discretion to supervisors over employment matters,"

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[134] Three weeks ago Judge Robert Sweet of this court certified a class of 620,000 people who were issued summonses by the NYPD between 2004 and 2009 and who had those summonses dismissed for being facially insufficient. *See Stinson*, 2012 WL 1450553. In *Stinson*, like in this case and unlike in *Wal-Mart*, plaintiffs allege "a specific policy promulgated by defendants" (namely that NYPD officers issue summonses without probable cause in order to meet their quotas). *See also Morrow v. City of Tenaha*, No. 08 Civ. 288, 2011 WL 3847985, at *192-94 (E.D. Tex. Aug. 29, 2011) (certifying class of Latinos who were stopped for alleged traffic violations and finding commonality in light of statistical evidence showing significant increases in the number of minorities stopped after the adoption of a new police policy); *Ortega-Melendres v. Arpaio*, No. 07 Civ. 2513, 2011 WL 6740711, at *19 (D. Ariz. Dec. 23, 2011) (certifying class of Latino motorists alleging racial profiling and finding that differences in subjective motivations of officers do not defeat commonality or typicality when there is evidence of a departmental policy of violating constitutional rights). Four weeks ago, Judge Katherine Forrest denied plaintiffs' motion to certify a class of all Latinos in the New York area who have been or will be subject to a home raid operation by Immigration and Customs Enforcement. *See Aguilar v. Immigration and Customs Enforcement Div. of U.S. Dept. of Homeland Sec.*, No. 07 Civ. 8224, 2012 WL 1344417 (S.D.N.Y. Apr. 16, 2012). Judge Forrest placed significant emphasis on the fact that defendants' raids on the named plaintiffs' homes took place in 2007 and that there was "no evidence in the record" to suggest that defendants' practices in 2012 shared commonality with the practices in 2007. *Id.* at *9. She therefore deemed injunctive relief inappropriate. Here, in contrast, there is ample evidence to show that stop and frisk practices have not changed since the 2004 to 2009 period, except that the numbers of stops have continued to rise. It is also worth noting that Judge Forrest did not emphasize that the lack of commonality in *Wal-Mart* was based on the company's de-centralized approach to employment decisions. As the courts in *Stinson*, *Morrow*, and *Ortega-Melendres* explained, Wal-Mart's structure is worlds away from centralized and hierarchical policing practices.

and so the NYPD has "essentially a policy against having a uniform practice."[135] This is belied by the 437 paragraphs of facts that defendants submitted, in support of their motion for summary judgment, showing just how centralized and hierarchical the NYPD's policies and practices are.[136] Moreover, defendants confuse the exercise of judgment in implementing a centralized *policy* with the exercise of discretion in formulating a local store policy or practice.[137]

Plaintiffs allege that their Fourth and Fourteenth Amendment rights are violated as a result of the NYPD's policies and practices. As they argue, these claims raise "central and core questions of fact and law that, when answered, will

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[135] Def. Mem. at 8 n.9.

[136] Some of this material was submitted in order to show that the NYPD was not liable for failure to train, supervise, monitor, and discipline because it in fact has a robust system of training, supervision, monitoring and discipline. I denied summary judgment on this claim because there exist material disputes of fact about the "constitutional sufficiency" of this system, not about its existence. *Floyd I*, 813 F. Supp. 2d at 429.

[137] I also note that plaintiffs' level of proof here is particularly strong: if plaintiffs in *Wal-Mart* had produced sixty thousand human resource forms, including forms from every Wal-Mart store in the country, in which supervisors gave facially unlawful reasons for denying women employees raises or promotions, the Supreme Court's commonality determination may well have been different. As the *Wal-Mart* Court explained, plaintiffs could establish commonality even in the absence of a centralized employment system by showing "'significant proof' that Wal-Mart 'operated under a general policy of discrimination.'" *Wal-Mart*, 131 S. Ct. at 2553 (quoting *Falcon*, 457 U.S. at 159).

resolve all class members' *Monell* claims against the City."[138] In the terminology of *Wal-Mart*, a class wide proceeding here will "generate common answers" to these questions that are "apt to drive the resolution of the litigation."[139]

4. Typicality and Adequacy

Defendants make overlapping objections on the basis of typicality and adequacy, and so I address these two Rule 23(a) prerequisites in tandem.[140] "Typicality 'requires that the claims of the class representatives be typical of those of the class, and is satisfied when each class member's claim arises from the same course of events[] and each class member makes similar legal arguments to prove

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[138] Pl. Mem. at 12. Plaintiffs list four such questions: (1) Whether New York City has a Policy and/or Practice of conducting stops and frisks without reasonable suspicion? (2) Whether the City has a Policy and/or Practice of stopping and frisking Black and Latino persons on the basis of race rather than reasonable suspicion? (3) Whether the NYPD's department-wide auditing and command self-inspection protocols and procedures demonstrate a deliberate indifference to the need to monitor officers adequately to prevent a widespread pattern of suspicionless and race-based stops? (4) Whether the NYPD's Policy and/or Practice of imposing productivity standards and/or quotas on the stop-and-frisk, summons, and other enforcement activity of officers is a moving force behind widespread suspicionless stops by NYPD officers?

[139] 131 S. Ct. at 2551.

[140] Adequacy requires both that the plaintiffs themselves be adequate representatives of the class and that the plaintiffs' counsel be qualified, experienced, and able to conduct the litigation. Defendants do not challenge the second prong and there is no doubt that plaintiffs are in excellent hands. *See* Charney Decl. ¶¶ 3-12. Defendants' challenge to plaintiffs' Article III standing, discussed above, was also framed as a problem of adequacy.

the defendant's liability.'"[141] Rather than focusing on the precise nature of plaintiffs' injuries, the typicality requirement may be satisfied where "injuries derive from a unitary course of conduct by a single system."[142]

The purpose of typicality is to ensure that class representatives "have the incentive to prove all the elements of the cause of action which would be presented by the individual members of the class were they initiating individualized actions."[143] Similarly, "[a]dequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members."[144] As defendants acknowledge, in order to defeat a motion for certification, any such conflicts must be "fundamental."[145]

Here, the four named plaintiffs' stops arise from the same course of conduct – *i.e.*, the NYPD's centralized program of stops and frisks – and their legal arguments are precisely the typical ones that are made by others who bring or

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[141] *Central States*, 504 F.3d at 245 (quoting *Robinson*, 267 F.3d at 155).

[142] *Marisol A.*, 126 F.3d at 377.

[143] *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 510 (S.D.N.Y. 1996).

[144] *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006).

[145] *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009).

could bring claims for Fourth and Fourteenth Amendment violations by defendants. The named plaintiffs are vigorously pursuing their claims[146] and defendants have failed to identify any ways in which plaintiffs' interests are antagonistic to those of other class members.[147]

Defendants' argument is twofold: *First*, "the Court would be required to assess any unique defenses of the defendants before determining liability, which could include a fact-intensive qualified immunity defense" and "the claims of putative class members who cannot identify an NYPD officer involved in the stop will be subject to unique defenses" that threaten to engulf the litigation.[148] *Second*, because none of the named representatives are Latino, "they cannot represent the alleged Latino class members who make race-based claims."[149] Neither argument is persuasive.

First, courts and juries must *always* consider defendants' individual

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[146] *See* Plaintiffs' Declarations.

[147] "An order requiring defendants to comply with federal and state law in order to remedy the systemic failures that are the source of plaintiffs' claims constitutes relief that would serve the entire putative class." *Marisol A. v. Giuliani*, 929 F. Supp. 662, 692 (S.D.N.Y. 1996).

[148] Def. Mem. at 14; *see id.* at 21-23.

[149] *Id.* at 19.

defenses before determining liability. That is no bar at the certification stage.[150] "In practice, courts in this Circuit . . . [refuse] certification only when confronted with a sufficiently clear showing" that a defense unique to the representative plaintiff's claims will in fact defeat those claims.[151]

It is true that the parties have not been able to identify the police officers involved in five of the plaintiffs' eight alleged stops.[152] At trial, defendants will argue that plaintiffs cannot establish liability for those stops; the jury may or may not agree. But defendants already moved for summary judgment on the claims of two of the four plaintiffs, including those of David Ourlicht, who was unable to identify the police officers who stopped him. Summary judgment was

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[150] The court "should not assess any aspect of the merits unrelated to a Rule 23 requirement" and must ensure "that a class certification motion does not become a pretext for a partial trial of the merits." *IPO*, 471 F.3d at 41. "'The unique defense rule, however, is not rigidly applied in this Circuit, and is intended to protect plaintiff class – not to shield defendants from a potentially meritorious suit.'" *Duling v. Gristede's Operating Corp.*, 267 F.R.D. 86, 97 (S.D.N.Y. 2010) (quoting *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 71 (S.D.N.Y. 2009)). *Accord Sirota v. Solitron Devise, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982) ("If [] defendants were arguing that a district court must determine whether the named plaintiffs have a meritorious claim before they can be certified as class representatives, they would plainly be wrong.").

[151] *In re Omnicom Group, Inc. Sec. Litig.*, No. 02 Civ. 4483, 2007 WL 1280640, at *4 (S.D.N.Y. Apr. 30, 2007) (explaining that the court "need not deny certification merely because of the presence of a colorable unique defense").

[152] *See* Plaintiffs' Declarations.

denied because I found that if a juror were to credit Ourlicht's testimony, she could find that he was stopped in the absence of objective reasonable suspicion that crime was afoot.[153] That is to say, defendants failed to show that the John Doe defense will defeat plaintiffs' claims.

This issue does not create a "fundamental" conflict between named plaintiffs and unnamed class members: Indeed, it may be that officers often fail to complete the required UF-250 when they conduct a quick stop and frisk.[154] In addition, three of the named plaintiffs allege stops involving identified police officers and at least two of those stops came from precincts in which commanding officers have acknowledged the use of performance standards or quotas.[155] The

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[153] *See Floyd I*, 813 F. Supp. 2d 417.

[154] At a recent conference regarding a related action, one Assistant Corporation Counsel informed me that "the UF-250s, they're not always, you know, made or written . . . . I suspect for many of the incidents in the complaint, there would not be UF-250s," although a second Assistant Corporation Counsel said that "that's not the case. When there's a stop based on a penal law violation or misdemeanor, there will be a UF-250." 4/17/12 Transcript at 10:7-25 [Docket No. 15], *Ligon v. City of New York*, No. 12 Civ. 2274.

[155] Defendant Officer Luis Pichardo, who stopped plaintiff Deon Dennis in the 28th Precinct in January 2008, testified that his supervisors imposed a five summons-per-tour quota on the officers working his tour when he stopped Dennis. Dwayne Montgomery, who was commander of the 28th Precinct at the time, testified that he imposed monthly stop and frisk and summons requirements on all officers and disciplined officers who failed to meet those quotas. *See* Pichardo Dep., Ex. 68 to Charney SJ Decl., at 218-219 and PAF ¶ 58. Plaintiff David Floyd was stopped by officers from the 43rd precinct. Chief Esposito told the

issues involved in these stops go to the core of plaintiffs' claims.

The doctrine of unique defenses is intended to protect absent members of the plaintiff class by ensuring the presence of a typical plaintiff. The doctrine is not meant to protect defendants by permitting them to defeat certification because the facts raised by the claims of the representative plaintiffs are not *identical* to the facts raised by the claims of all putative class members. Because the named plaintiffs' claims arise from the same policy or practice and the same general set of facts as do the claims of the putative class members, the typicality prong is satisfied.[156]

Defendants' contention regarding qualified immunity is similarly unavailing: the NYPD routinely argues that its officers are protected by qualified immunity. That defense is common to innumerable *Terry* stops and frisks; it cannot defeat typicality at the class certification stage.

Second, defendants' claim that the named plaintiffs cannot represent Latinos is likewise unconvincing. The cases that defendants cite denied certification because the named plaintiffs fell outside the subclass that they sought

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commander of the 43rd, Charles Ortiz, that his officers did not have enough stops and summonses and Ortiz frequently conveyed that message to his subordinates. *See* PAF ¶¶ 80-82.

[156] *See Central* States, 504 F.3d at 245; *Daniels*, 198 F.R.D. at 419.

to represent.[157] Plaintiffs seek certification of a Fourteenth Amendment subclass of Blacks and Latinos stopped because of their race; plaintiffs clearly fall inside that definition.[158]

Plaintiffs' complaints are typical of those of the class and they will fairly and adequately protect the interests of the class. All four prerequisites of Rule 23(a) are met.

B. Class Certification Is Proper Under Rule 23(b)(2)

To certify a class under Rule 23(b)(2), plaintiffs must show that defendants "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." As the Supreme Court explained in *Wal-Mart*, Rule 23(b)(2) is intended to cover cases such as this one:

> When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute.

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[157] *See Norman v. Connecticut State Bd. of Parole*, 458 F.2d 497, 499 (2d Cir. 1972); *Kenavan v. Empire Blue Cross & Blue Shield*, No. 91 Civ. 2393, 1996 WL 14446 (S.D.N.Y. Jan. 16, 1996).

[158] *See, e.g., Leonard v. Southtec, LLC*, No. 04 Civ. 72, 2005 WL 2177013 (M.D. Tenn. Sept. 8, 2005) (certifying Black named plaintiffs to represent Blacks and Latinos).

Predominance and superiority are self-evident.[159]

Defendants argue that certification under (b)(2) is inappropriate because they have not "acted or refused to act on grounds generally applicable to the class" and because plaintiffs "fail to identify an official policy, or its equivalent, and seek a broad-based structural injunction."[160] Again, these arguments do not withstand the overwhelming evidence that there in fact exists a centralized stop and frisk program that has led to thousands of unlawful stops. The vast majority of New Yorkers who are unlawfully stopped will never bring suit to vindicate their rights.[161] It is precisely for cases such as this that Rule 23(b)(2) was designed.[162]

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[159] 131 S. Ct. at 2558. *See also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions).

[160] Def. Mem. at 23-24.

[161] *See* James Forman, Jr. *Criminal Law: Community Policing and Youth As Assets*, 95 J. Crim. L. & Criminology 1, at n.47 (2004) (citing the scholarship of Professors Charles Ogletree, Angela Davis, Pamela Karlan and others who document that the vast majority of people who are unconstitutionally stopped and not charged with any crime will never bring civil actions in court).

[162] Under the doctrine established in *Galvan*, 490 F.2d 1255, district courts *may* decline to certify a class if doing so would not further the implementation of the judgment. *See Davis v. Smith*, 607 F.2d 535 (2d Cir. 1978). As plaintiffs note, the doctrine is only applicable when a defendant affirmatively states that it will apply any remedy across the board. Here, defendants have offered to apply any remedy to "all persons similarly situated to the named plaintiffs" but simultaneously argue that the alleged class members *are not* similarly situated to the named plaintiffs. "It is plainly inconsistent for Defendants

Defendants close their argument regarding the applicability of Rule 23 with this disturbing statement:

> [E]ven if [plaintiffs] prove a widespread practice of suspicionless stops and *Monell* causation, it is not at all clear that an injunction would be a useful remedy. Certainly, no injunction could guarantee that suspicionless stops would never occur or would only occur in a certain percentage of encounters . . . . Here, plaintiffs essentially seek an injunction guaranteeing that the Fourth Amendment will not be violated when NYPD investigates crime. If a court could fashion an injunction that would have this effect, then it is likely that lawmakers would have already passed laws to the same effect . . . . An injunction here is exactly the kind of judicial intrusion into a social institution that is disfavored . . .

Three points must be made in response. *First*, suspicionless stops should never occur. Defendants' cavalier attitude towards the prospect of a "widespread practice of suspicionless stops" displays a deeply troubling apathy towards New Yorkers' most fundamental constitutional rights.

Second, it is not readily apparent that if an injunction preventing such widespread practices could be fashioned, it would already have been passed by lawmakers. The twenty-seven members of the Black, Latino and Asian Caucus of

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to argue that any relief granted in connection with this action will be applied to benefit every member of the class, while at the same time they contest the existence of commonality and typicality." *Bishop v. New York City Dep't of Hous. Pres. and Dev.*, 141 F.R.D. 229, 241 (S.D.N.Y. 1992). In addition, because potentially complex City-wide injunctive relief would be more appropriate as a remedy in the context of a class action, there are collateral consequences to denying certification and the *Galvan* doctrine is inapplicable.

the Council of the City of New York who submitted an *amicus* brief in support of plaintiffs "disagree[] strongly with this assertion."[163] It is rather audacious of the NYPD to argue that if it were possible to protect "the right of the people to be secure in their persons" from unlawful searches and seizures *by the NYPD*, then the legislature would already have done so and judicial intervention would therefore be futile. Indeed, it is precisely when the political branches violate the individual rights of minorities that "more searching judicial enquiry" is appropriate.[164]

Third, if the NYPD is engaging in a widespread practice of unlawful stops, then an injunction seeking to curb that practice is not a "judicial intrusion into a social institution" but a vindication of the Constitution and an exercise of the courts' most important function: protecting individual rights in the face of the government's malfeasance.

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[163] Brief of *Amicus Curiae* The Black, Latino and Asian Caucus of the Council of the City of New York in Further Support of Plaintiffs' Motion for Class Certification at 8.

[164] *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). "If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776)." *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724, 730 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *aff'd*, 462 U.S. 324 (1983).

V. CONCLUSION

Because plaintiffs have satisfied the requirements of Rule 23, their motion for class certification is granted. The clerk is directed to close this motion [Docket No. 165]. A status conference is scheduled for May 29, 2012 at 4:30 p.m.

SO ORDERED:

Shira A. Scheindlin
U.S.D.J.

Dated: May 16, 2012
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.*,	:	
Plaintiffs,	:	08 Civ. 01034 (SAS)
-against-	:	ECF CASE
THE CITY OF NEW YORK, *et al.*,	:	**NOTICE OF MOTION TO EXCLUDE CERTAIN OPINIONS OF DEFENDANTS' PROPOSED EXPERT, DENNIS SMITH**
Defendants.	:	

PLEASE TAKE NOTICE THAT, upon the accompanying Declaration of Darius Charney and Supporting Exhibits, the accompanying Memorandum of Law in Support of Plaintiffs' Motion to Exclude Certain Opinions of Defendants' Proposed Expert, Dennis Smith, and all prior pleadings and proceedings had herein, Plaintiffs will move this Court at the United States Courthouse, 500 Pearl Street, New York, New York, as soon as counsel may be heard, for an order, pursuant to Rules 702 and 403 of the Federal Rules of Evidence, granting Plaintiffs' Motion.

PLEASE TAKE FURTHER NOTICE, that Defendants' response, if any, must be served on the undersigned no later than July 24, 2012; and

PLEASE TAKE FURTHER NOTICE, that Plaintiffs' reply must be served no later than August 7, 2012.

Dated: New York, New York
June 26, 2012

By: Gretchen Hoff Varner
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.*,	:	
Plaintiffs,	:	08 Civ. 01034 (SAS)
-against-	:	ECF CASE
THE CITY OF NEW YORK, *et al.*,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO EXCLUDE CERTAIN OPINIONS OF DEFENDANTS' PROPOSED EXPERT, DENNIS SMITH

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I. INTRODUCTION

Plaintiffs submit this memorandum of law in support of their motion under Federal Rules of Evidence 702 and 403 to preclude Defendants' expert, Dennis Smith ("Smith"), from testifying to certain of his opinions at trial in this case.

As described herein, Smith is not qualified to offer statistical critiques of the multiple regression analyses performed by Plaintiffs' expert Jeffrey Fagan in support of Plaintiffs' Fourteenth Amendment claims or to conduct his own "alternative" version of such analyses. His attempt to compensate for his lack of expertise by simply acting as a conduit for the opinions of others with more statistical training and experience is clearly prohibited by the Federal Rules of Evidence. His opinions concerning his own statistical analyses of racial disparities in the New York Police Department's ("NYPD") stop-and-frisk data, produced more than a year after the deadline to submit his Expert Report and more than nine months after his deposition, also lack sufficient information to establish the reliability of his methods and violate the expert disclosure requirements of Fed. R. Civ. P. 26(a)(2).

Smith's opinions about the supposed deterrent effects of the NYPD's Operation Impact, a program which Plaintiffs have not challenged in this litigation, and stop-and-frisk are irrelevant to Plaintiffs' claims and will mislead and confuse the trier of fact if introduced at trial. Moreover, his opinion as to the meaning of the low weapons recovery "hit rates" of NYPD stops-and-frisks lacks any empirical support and is purely speculative. Finally, Smith's opinion that NYPD officers do not make stops on the basis of race will improperly usurp the role of the Court and the jury and is not supported by the data upon which it is purportedly based.

Accordingly, Smith should be precluded from offering any of the aforementioned opinions at trial in this case.

II. STATEMENT OF FACTS

The opinions which Professor Smith apparently intends to offer at trial are set forth in his November 15, 2010 Expert Report, *see* Charney Decl., Ex. B (hereinafter "Report," "Smith Report" or "Smith Rpt."), and in two declarations that he submitted in support of Defendants' *Daubert* motion against Plaintiffs' expert Jeffrey Fagan. *See* Declaration of Dennis Smith, dated December 19, 2011 (Dkt # 181); Reply Declaration of Dennis Smith, dated February 16, 2012 (Dkt # 193).[1]

A. Smith's Expert Report

In his expert Report, of which he wrote every word, *see* Charney Decl., Ex. C (Transcript of the March 4, 2011 Deposition of Dennis Smith ("Smith Dep.")) at 213:18-215:9, Smith critiques the statistical methods utilized in (i) Professor Fagan's reasonable suspicion (RAS) analysis of the NYPD's UF250 stop-and-frisk data in support of Plaintiffs' Fourth Amendment *Monell* claims, Smith Rpt. at 9-14; (ii) Fagan's multivariate regression analyses in support of Plaintiff's Fourteenth Amendment claims, *id.* at 15-22, 37-39, 41-63; (iii) Fagan's hit-rate and regression analyses of the outcomes of stop-and-frisk encounters in support of Plaintiffs' Fourth and Fourteenth Amendment claims, *id.* at 20-21, 39, 60; and (iv) Fagan's criticisms of the 2007 RAND Report on the NYPD's stop-and-frisk practices, *id.* at 63-70. Smith also purports to opine, on the basis of two studies he co-authored in 2007 and 2008, respectively, *see* Smith Rep., App. D and E, that the NYPD's Operation Impact program and stop-and-frisk practices have

[1] While Defendants originally identified two testifying experts, Professor Smith and Professor Robert Purtell of SUNY Albany, *see* Declaration of Darius Charney, dated June 26, 2012 ("Charney Decl."), Ex. A, they ultimately chose to only submit an expert report from Smith, thereby precluding Purtell from testifying as an expert at trial. *See* F.R.C.P. 26(a)(2)(A),(B), and (D); *Fund Comm'n Serv., II, Inc. v. Westpac Banking Co.*, No. 93 Civ. 8298(KTD)(RLE), 1996 WL 469660, *4 (S.D.N.Y. Aug. 16, 1996) (precluding "any expert evidence at any stage" of the case where plaintiff failed to produce expert report).

contributed to significant reductions in crime in New York City, and that the crime reduction has disproportionately benefitted black and Latino communities in the City. Smith Rpt. at 5, 17, 33-34, 53-54, Exs. D and E. Finally, Smith opines that "there is no compelling evidence that NYPD officers are making stops based on race or ethnicity but instead are pursuing a strategy and using tactics that prevent crime and benefit the City as a whole, and communities of color in particular." *Id.* at 8, 18.

Smith's critiques of Fagan's RAS analysis, though inaccurate, are not a subject of the this motion because of space constraints and the fact that they have already been addressed at length by this Court in its April 16, 2012 decision on Defendants' *Daubert* motion. *See* Dkt # 201. Smith's remaining critiques and opinions should be excluded.

1. *Smith's Critiques of Fagan's Multivariate Regression Analyses*

Fagan's Fourteenth Amendment multivariate regression analyses provide evidence that the NYPD engages in a pattern and practice of race-based stops-and-frisks. Smith's Report discloses that he would criticize Fagan's analyses in three ways. First, Smith claims that Fagan's analyses are based on an outdated "reactive" theory of policing focused on responding to crime after it is committed rather than the NYPD's current "proactive" policing model of preventing and reducing crime, and that they fail to control for "the impact of evidence-based [police] management practices." Smith Rpt. at 4-5, 15-17. More specifically, Smith contends that Fagan's regression models fail to analyze officer stop activity and crime rates in small enough geographical and temporal units. *Id.* at 5, 18-19, 37-38, 55, 58-59, 62-63; Smith Dep. at 276:4-277:18, 280:22-281:8, 286:11-287:6.

Second, Smith criticizes Fagan for using what he characterizes as the wrong benchmark—precinct-level population racial demographic and crime data—to analyze racial

disparities in NYPD stop-and-frisk patterns. Smith says Fagan should instead have used data on the citywide racial demographics of known criminal suspects. *See* Smith Rpt. at 49-51, 57, 62. Smith does not even suggest that his professed belief in the superiority of the crime suspect benchmark is based on his own prior experience, specialized training, or research. Rather, Smith's opinion that Fagan used the wrong benchmark is based entirely on opinions expressed to him by two outside sources: (i) Professor Robert Purtell ("Purtell"), who does not have a criminology background and has never studied racial disparities in policing or any context, and (ii) an article on benchmarking by the authors of the 2007 RAND study on the NYPD's stop-and-frisk practices. *See* Smith Dep. at 216:9-219:22, Dkt # 193 ¶ 20; Dkt # 180 (December 19, 2011 Declaration of Heidi Grossman), Ex. H; Dkt # 194 (Reply Declaration of Robert Purtell), Ex. A.

Third, Smith would also opine that Fagan: (i) improperly used precinct crime counts instead of crime rates to create his crime benchmark; (ii) used "weak operational definitions" of the race and socioeconomic status (SES) variables; (iii) omitted variables for unemployment, gender, and age; (iv) combined racially-mixed and predominately white precincts in his sensitivity analyses; (v) improperly used a "principle components factor analysis;" and (vi) inaccurately and incompletely presented the results of his regression analyses. Smith Rpt. at 47, 54-62. Importantly, the critiques of the omitted unemployment variable, improper factor analysis, and the presentation of the regression results are not Smith's own opinions but were communicated to him by two SUNY Albany Professors, Erika Martin and Kathleen Doherty, neither of whom has education, or training or experience in criminology or urban policing.[2] *See* Smith Dep. at 60:7-19, 61:17-63:4; 65:12-67:10.

[2] Martin is a professor of epidemiology and Doherty is a professor of public policy with a focus on national security issues. *See* Smith Dep. at 63:5-12, 63:17-18, 85:4-15.

2. *Smith's Critiques of Fagan's Analyses of Stop-and-Frisk Outcomes*

Smith's first professed basis for criticizing Fagan's hit-rate analysis is his own "proactive policing/evidence-based management" argument. He suggests that the low hit-rates for arrests and contraband recovery in NYPD stops do not indicate an absence of reasonable suspicion but, rather, demonstrate that the NYPD's stop-and-frisk practices have successfully caused many would-be criminals to leave their illegal weapons at home. *See* Smith Rpt. at 20, 39; Smith Dep. at 281:22-282:9, 286:11-287:6. Smith does not cite to any data or study providing any empirical support for this conclusion.

Smith also criticizes Fagan's use of a multilevel logistic regression model to analyze the disparate stop outcomes of black, Hispanic, and white pedestrians, opining that, "according to standard statistical practice," Fagan "should have tested alternative specifications, such as relative risk regressions, or probit models." Smith Rpt. at 60. Despite his lack of training and experience using complex statistical methods, *see* Part II(C) *infra*, Smith claims he came up with this critique entirely on his own, *see* Smith Dep. at 293:16-294:10.

3. *Smith's Crime Reduction Opinions*

Attached as Appendix D and repeatedly referenced throughout Smith's Report is a 2007 study that Smith did together with Purtell that expressed the conclusion that the NYPD's Operation Impact Program, an officer deployment strategy that assigns large numbers of rookie NYPD officers to patrol selected high-crime pockets of certain NYPD precincts known as "Impact Zones", contributed to crime reduction in New York City. *See* Smith Rpt., Ex. D, at 20-48. This study, titled "An Empirical Assessment of NYPD's 'Operation Impact': A Targeted Zone Crime Reduction Strategy," has not been published in any peer reviewed or other scholarly journals. It did not examine at all the extent to which NYPD stops are based on reasonable

suspicion and/or race, nor did it examine the extent to which use of stop-and-frisk, as opposed to officer presence, contributed to crime reduction in Impact Zones. *Id.*

Similarly, Exhibit E to Smith's Report is a 2008 statistical study he did with Purtell in which they concluded that the NYPD's aggressive use of stop-and-frisk also contributed to crime reduction, although to a much lesser degree than Operation Impact. *See* Smith Rpt., Ex. E at 49-79. This paper also has not been published in any peer reviewed or other scholarly journal, and it expressly did not examine the extent to which NYPD stops are based on reasonable suspicion and/or race. *Id.*; Smith Dep. at 200:22-201:13.

Throughout his Report, Smith also references NYPD crime statistics that he claims show large decreases in the crime rates in majority black and Hispanic neighborhoods in New York City over the last two decades. Smith Rpt. at 5, 17, 33-34, 53-54.

4. *Smith's Criticism of Fagan's Critiques of the RAND Report*

Like his critique of Fagan's multivariate regression analyses, the basis for Smith's disagreement with Fagan's critiques of RAND's external benchmarking analysis is the opinion that Smith took from Purtell and the RAND study authors that the benchmark used by RAND—citywide known violent crime suspect race data—is superior to Fagan's local population and crime benchmark for the purpose of analyzing racial disparities in NYPD stop-and-frisk patterns. Smith Rpt. at 63-67, 69-70.

5. *Smith's Opinion that NYPD Does Not Conduct Racially-Biased Stops-and-Frisks*

Finally, on the basis of his studies on the supposed crime deterrent effects of Operation Impact and stop-and-frisk and the NYPD data showing reductions in crime over the past twenty years, Smith concludes that NYPD officers are not making race-based stops but are instead "pursuing a strategy and using tactics that prevent crime and benefit the City as a whole, and

communities of color in particular," and that "the central motivating factor in police policy and practice at the street level is crime reduction, not harassment of Blacks and Hispanics." *See* Smith Rpt. at 8, 18.

B. Smith's Declarations

Smith's two declarations in support of Defendants' motion to exclude the testimony of Professor Fagan repeat many of the critiques contained in his Expert Report, but assert some new critiques of Fagan's multiple regression analyses. Dkt # 181 ¶¶11-26, 30-31; Dkt # 193 ¶¶ 20-28.[3]

First, using amended 2009 NYPD arrest-report and crime-complaint data where suspect race is known, which was produced to Plaintiffs more than a year after Professor Fagan submitted his expert report, Smith supposedly (working in collaboration with Purtell, *see* Dkt # 194 ¶ 2) made a table of correlation coefficients which, Smith contends, shows that police stops by race in a given precinct are more highly correlated with the proportion of criminal suspects and arrestees by race in that precinct than with the overall crime rate in that precinct. Smith then uses this table as a basis to again criticize Fagan's choice of the local population-crime benchmark over the crime suspect benchmark. Dkt # 181 ¶ 15, Ex. E. Smith does not, however, provide the equation or even a general description of the statistical model on which these calculations were based. *Id.*

Smith also asserts for the first time in his Declaration that Fagan's choice of independent variables for his multivariate regression models "creates a multicolinearity problem," that Fagan improperly aggregated crime statistics across crime categories in contravention of FBI crime

[3] Smith's declarations also offer new critiques of Fagan's RAS analyses but, for reasons explained above, *see* Part A *supra*, they are not the subject of this motion, although Plaintiffs strenuously disagree with them.

reporting guidelines, and that the NYPD patrol strength data Fagan used for his patrol strength control variable in his regressions were unreliable. Dkt # 181 ¶¶ 21, 24, 25.

This Declaration also states that Smith, supposedly in collaboration with Purtell, "conducted an alternative analysis using Fagan's regression model but adding data on suspect race aggregated from crime complaints and arrest reports" as the independent variable instead of total logged crime complaints by precinct which Fagan used as his independent variable, and found that the correlation between the racial composition of a precinct and its level of stop-and-frisk activity was no longer statistically significant and was in fact negative. *Id.* ¶ 30, Dkt # 181-9; Dkt # 194 ¶ 2. However, in his Reply Declaration, Smith admits that he and Purtell did not use all of the control variables which Fagan had used, and Smith does not specify which control variables, beyond crime suspect race, he and Purtell did use. Dkt # 193 ¶ 22.

C. Smith's Lack of Qualifications

While Smith claims to have studied policing for the last 40 years, *see* Smith Dep. at 37:10-11, his research has focused on analyzing the effectiveness of various police department management practices and law enforcement strategies, *see* Smith Rpt. at 1-2, Ex. A at 2-8. He has never conducted a statistical study to assess the racial bias of stop-and frisk or any other law enforcement program, practice, strategy or tactic, or claims of racial discrimination in any other governmental or private institution. *See* Smith Dep. at 113:6-125:11, 128:8-13, 129:-10, 132:12-134:5. Prior to his work in this case, Smith's "research" of the issue of racially-biased police stops consisted entirely of reading five published studies on the issue—two of Professor Fagan's studies of the NYPD's stop-and-frisk practices, the RAND study, and two studies of police traffic and pedestrian stops in Los Angeles—and attending one conference and a single New York City Council hearing at which Professor Fagan and the author of the RAND study

discussed their analyses. *Id.* at 13:23-21:2, 28:5-31:7.

Smith also admits that he is "not a statistician." Smith Dep. at 129:9-10. He has little to no professional experience with the statistical methods used by Professor Fagan, he has never conducted a study using a multilevel logistic regression, which Fagan used to analyze racial disparities in stop outcomes, nor has he conducted a study using negative binomial or multilevel poisson regressions, which Fagan used to analyze the racial disparities in stop patterns between NYPD precincts and between pedestrians of different racial groups citywide. *Id.* at 126:17-127:7, 128:8-13, 129:5-10. He admits that Purtell, not he, was "the statistician" on their crime reduction studies attached as Appendices D and E to his Report, and that Purtell, not he, "took the lead" in deciding on and running any statistical models used in the two studies. *Id.* at 36:25-37:7, 37:16-37:21, 40:4-12, 128:19-129:4.

Smith has practically no formal education or training in statistics. He does not have a degree in statistics, has not taken a statistics course since he was in graduate school more than 35 years ago, and has never taken courses in any of the advanced statistical methods used by Fagan in this case. See *id.* at 300:17-301:19. His only informal training in statistics has consisted of attending his academic colleagues' job-talks at NYU, referring occasionally to his statistics textbook from graduate school, and reading some statistics-related articles on the Internet. *Id.* at 301:23-302:25.

II. THE LEGAL STANDARD FOR ADMISSIBILITY OF EXPERT TESTIMONY

Under Federal Rule of Evidence 702, a witness "who is qualified as an expert by knowledge, skill, experience, training or education" may offer expert opinion testimony at trial if the testimony will (a) assist the trier of fact to understand the evidence or determine a fact in issue, (b) is based on sufficient facts or data, (c) is the product of reliable principles and methods,

and (d) is the product of a reliable application of the expert's principles and methods to the facts of the case. Fed. R. Evid. 702.

To be admissible under Rule 702, expert testimony must be both reliable and of assistance to the trier of fact. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590-91 (1993); *Nimley v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). While the focus of the reliability inquiry is usually on the "principles and methodology, not on the conclusions they generate," *Daubert*, 509 U.S. at 595, "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *see also* Fed. R. Evid 702 Advisory Committee Notes ("The trial court's gatekeeping function requires more than simply taking the expert's word for it.") (internal quotations and citation omitted). "Thus, when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002).

Rule 702 requires that the expert's testimony will assist the trier of fact. This is primarily a relevance inquiry. *Daubert*, 509 U.S. at 591; *EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383 (LAP), 2010 WL 3466370, *6-7 (S.D.N.Y. Aug. 31 2010). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591 (internal quotations and citation omitted). Moreover, expert testimony that "usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it [] does not aid the jury in making a decision," but instead

"undertakes to tell the jury what result to reach and thus attempts to substitute the expert's judgment for the jury's[.]" *Nimley*, 414 F.3d at 397 (internal quotations and citations omitted).

The admissibility of expert testimony also is subject to Fed. R. Evid. 403 and should be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Nimley*, 414 F.3d at 397 (quoting Fed. R Evid. 403). Because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it[,]" the trial court "in weighing possible prejudice against probative force under Rule 403 [] exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595 (quoting Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991)).

The burden is on the proponent of the proffered expert testimony to establish its admissibility by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987), Fed. R. Evid. 702 Advisory Committee Notes.

III. ARGUMENT

A. Smith Is Not Qualified to Critique Fagan's Multivariate Regression Analyses or to Testify About His "Alternative" Regression Analysis

Given his lack of formal training in or practical experience with the multivariate regression analyses conducted by Professor Fagan, Smith is not qualified to offer critiques of such analyses or to testify about his own "alternative" version of Fagan's regression analysis at trial.

While it is true that "[c]ourts within the Second Circuit have 'liberally construed expert qualification requirements[,]'" *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 691 F. Supp. 2d 448, 457 (S.D.N.Y. 2010) (Scheindlin, J.) (citing cases), "a district court may properly conclude that witnesses are insufficiently qualified

despite the relevance of their testimony because their expertise is too general or too deficient." *Stagl v. Delta Air Lines, Inc.*, 117 F.3d 76, 81 (2d Cir. 1997); *see also Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 642 (S.D.N.Y. 2007) (Scheindlin, J.) ("An expert qualified in one subject matter does not thereby become an expert for all purposes. Testimony on subject matters unrelated to the witness's area of expertise is prohibited[.]"). In addition, while an expert can be qualified based on either formal education and training or practical experience in the relevant subject matter, *see Valentin v. New York City*, No. 94 CV 3911 (CLP), 1997 WL 33323099, *14-15 (E.D.N.Y. Sep. 9, 1997), an expert who lacks both cannot be qualified to testify under Rule 702, *see Mancuso v. Consol. Edison Co. of New York, Inc.*, 967 F. Supp. 1437, 1443-45 (S.D.N.Y. 1997).

Defendants have failed to—and cannot—establish that Smith has formal education or training in the multivariate regression models used by Fagan. Smith admits that he holds no degree in statistics, is "not a statistician," has never taken courses on many of the complex statistical methods and concepts involved in Fagan's analyses, and has not taken a statistics course of any kind since he was in graduate school more than 35 years ago. Smith Dep. at 129:9-10, 300:17-301:19; Smith Rept., App. A. As this Court has noted, "no good faith argument can be made that 30 year-old course study is a sufficient qualification to testify as a statistician." *Malletier*, 525 F. Supp. 2d at 664. The "informal" training Smith claims to have obtained from attending some of his academic colleagues' job-talks, referring to his graduate school statistics textbook, and Internet research, *see* Smith Dep. at 301:23-302:25, did not make him an expert; despite this purported education, he could not identify what a multilevel poisson regression is. *Id.* at 129:5-10; *see also Mancuso*, 967 F. Supp. at 1443-44 (finding that expert was not qualified where, despite his claim that he "had read 40 to 50 articles over the course of fifteen years" and

"subsequently performed approximately 14-15 hours of library research and review" on the chemical about which he would testify, he "was unable to answer critical questions regarding [the chemical]").

Smith also clearly lacks practical experience with the statistical analyses about which he seeks to opine. He has never conducted a statistical study analyzing racial disparities in police stop-and-frisk practices, other law enforcement programs or practices, or, for that matter, any governmental or private sector institution. Smith Dep. at 113:6-125:11, 128:8-13, 129:-10, 132:12-134:5, Smith Rpt., App. A. His only disclosed exposure to such studies is reading a handful of actual statistical scholars' studies on racial disparities in police stops—two of which were conducted by Fagan—and attending one conference and a New York City Council hearing where Fagan's and RAND's studies were discussed. Smith Dep. at 13:23-21:2, 28:5-31:7. He has never conducted a statistical study using any of the three multivariate regression models used by Fagan and had only minimum input into the statistics-related methodological decisions made in the two studies he did with Purtell using general estimating equations. *Id.* at 36:25-37:7, 37:16-21, 40:4-12, 127:3-7, 128:8-13-129:10.

Thus, while "an expert's training need not narrowly match the point of dispute in the case[,]" *Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 73 (S.D.N.Y. 2001) (Scheindlin, J.), Smith's 40 years of experience studying urban policing generally does not qualify him as an expert on the methodological soundness of Fagan's multivariate regression analyses. In *Bazile v. City of New York*, 215 F. Supp. 2d 354 (S.D.N.Y. 2002), the trial court excluded the testimony of plaintiff's expert who, despite his extensive experience in drug enforcement and supervision of law enforcement personnel, lacked the "expertise that would qualify [him] to assess whether discriminatory animus motivated" the NYPD's disciplinary action against the plaintiff NYPD

police officer. *Id.* at 365. Like the expert in *Bazile*, Smith's research on urban policing, which has never addressed issues of racial bias and has not involved the kinds of regression analyses conducted by Fagan, is too far afield from the statistical concepts and questions of racial bias implicated by Fagan's multivariate regression analyses to qualify Smith to offer critiques of those analyses at trial or to testify about the "alternative" version of Fagan's regression model that Smith conducted and summarized vaguely in his December 19, 2011 declaration.

In an attempt to overcome Smith's clear lack of expertise, Defendants submitted a declaration from Purtell in support of their motion to exclude Professor Fagan's testimony. *See* Dkt # 194. It states that Purtell conducted the statistical analyses contained in Smith's Expert Report and two declarations "in collaboration with" Smith. *Id.* ¶ 2. The fact that Smith may have relied on Purtell, who appears to have more statistical knowledge and experience than Smith (although no experience or training in policing or analyzing claims of racial discrimination), to conduct the alternative regression analysis summarized in Smith's December 19, 2011 Declaration does not qualify Smith, who is not qualified to conduct such analysis himself, to testify about Purtell's statistical analysis. As this Court has previously ruled, an expert unqualified to testify about a regression analysis cannot circumvent Rule 702's requirements by simply acting as "a conduit for the opinion of an unproduced expert" who conducted that regression analysis. *Malletier*, 525 F. Supp. 2d at 664-66. While Federal Rule of Evidence 703 does permit an expert "to rely on opinions of other experts to the extent that they are of the type that would be reasonably relied upon by other experts in the field[,]" the testifying expert "must in the end be giving his own opinion[,]" *id.* at 664, and not merely "summar[izing] what other experts have said, without application of his own expertise." *Arista Records LLC v. Lime Grp., LLC*, No. 06 CV 5936 (KMW), 2011 WL 1674796, *10 (S.D.N.Y. May 2, 2011). Because Smith

lacks expertise in conducting the "alternative" Fagan regression analysis described in his Declaration, his testimony about it would not be based on his own expert opinion but would instead necessarily be just a report on the work done by Purtell and his team. This Smith cannot do under Rule 702.

The same holds true for Smith's critiques of Fagan's choice of benchmark, omission of an unemployment variable, factor analysis, and presentation of the results of his regression analyses, all of which Smith bases not on his own training or experience—as he has none—but solely on the opinions of others. *See* Smith Dep. at 60:7-19, 61:17-63:4; 65:12-67:10,216:9-219:22, Dkt # 193 ¶ 20; Dkt # 180 Ex. H. Smith cannot be a conduit for the opinions of Martin, Doherty, and Purtell and cannot relay the contents of an article written by others to the factfinder under the guise of his so-called "expert" testimony. *See Arista Records*, 2011 WL 1674796, at *10; *Wantanabe Realty Corp. v. City of New York*, No. 01 Civ. 10137 (LAK), 2004 WL 188088, *2 (S.D.N.Y. Feb. 2, 2004).

Accordingly, Smith should be precluded from offering at trial his opinions about Fagan's multivariate regression analyses listed in Parts A(1)-(2) and B of the Statement of Facts, *supra*, Fagan's critiques of the RAND Report listed in Part A(4) of the Statement of Facts, *supra*, or his own "alternative" regression analysis discussed in his December 19, 2011 Declaration, February 16, 2012 Reply Declaration and Part B of the Statement of Facts, *supra*.

B. Smith's Correlation Coefficient Calculations and "Alternative" Regression Analysis Are Not Reliable and Violate F.R.C.P. 26(A)(2)

In addition to Smith's lack of qualifications to testify about his "alternative" version of Fagan's regression analysis, Defendants have failed to establish that this analysis or the calculations of the correlation coefficients described in Smith's December 19, 2011 Declaration are reliable, as required by Rule 702. Neither his December 19, 2011 Declaration nor his

February 16, 2012 Reply Declaration specify what other control variables, if any, besides crime suspect race Smith used in his "alternative" Fagan regression analysis. In his December 19 Declaration, Smith claims that he "added" a control variable not included in Fagan's original analysis, but then acknowledges in his Reply Declaration that he did not include all of the control variables which Fagan had used in his analysis. Dkt # 181 ¶ 30; Dkt # 193 ¶ 22. Moreover, in neither declaration does Smith specify whether the "aggregated" 2009 and 2010 crime suspect data that he used pertained to violent crime suspects or suspects from all crime categories, despite the fact that Defendants produced "aggregated" data for both kinds of suspects. Dkt # 181 ¶¶ 12-13, 15, 30, Exs. B-C; Dkt # 193 ¶ 22. As for the correlation coefficient calculations reported in his Declaration, Smith did not provide information on the equation or the statistical methods he used to generate those calculations. *See* Dkt # 181 ¶ 15, Ex. E.

Without the missing information, Plaintiffs cannot replicate either of these two analyses, which weighs heavily against their methodological reliability under *Daubert*. 509 U.S. at 593 ("[A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested."); *see also Maurizio v. Goldsmith*, No. 96 CIV. 4332 (RPP), 2002 WL 535146, *4 (S.D.N.Y. April 9, 2002) (holding that "since [plaintiff's expert's report] does not set forth the data or information upon which the expert bases his opinion, it cannot be tested."); *251 CPW Hous. Ltd. v. Paragon Cable Manhattan*, No. 93 Civ. 0944 (JSM), 1995 WL 70675, *4 (S.D.N.Y. Feb. 21, 1995) (precluding plaintiff's experts from testifying where experts' reports were "so inadequate that it is impossible for defendant to ascertain any of the specifics to which plaintiffs' experts will testify or any of the bases from which they derived their conclusions").

Smith's failure to fully explain in his two Declarations the data and statistical methods he

used also violates Federal Rule of Civil Procedure 26(a)(2). *See* Fed. R. Civ. P. 26(a)(2)(B) (requiring testifying expert to submit a written report that "must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; [and] (ii) the facts or data considered by the witness in forming them[.]"). Finally, because Smith did not disclose these correlation coefficient calculations and "alternative" multiple regression analyses until December 19, 2011, more than a year after the November 15, 2010 deadline set by the Court for Defendants to submit their expert report, and more than nine months after his March 4, 2011 deposition, these two analyses also run afoul of Fed. R. Civ. P. 26(a)(2)(D).

Accordingly, Smith's correlation coefficient calculations and "alternative" multiple regression analysis are inadmissible at trial.

C. Smith's Opinions About the Meaning of Low Stop-and-Frisk Hit Rates Are Not Based on Sufficient Facts or Data

Smith's opinion that the extremely low weapons hit rate of NYPD stops-and-frisks suggest that the NYPD's stop-and-frisk practices have encouraged would-be gun carriers to leave their weapons at home, *see* Smith Rpt. at 39, is not supported by sufficient facts and data as required by Fed. R. Evid. 702(b). Smith does not cite to any data, statistical study, or any other empirical support for his view that aggressive use of street stops deters illegal weapons possession, nor could he. As the National Research Council concluded in its 2004 report surveying more than thirty years of research on policing strategies and practices around the country, the empirical evidence on the crime deterrent effects of street stops is inconclusive at best. *See* Nat'l Research Council, *Fairness and Effectiveness in Policing: The Evidence* 214-16 (Washington, DC 2004). Lacking "a sufficient factual foundation," Smith's opinion is "speculative or conjectural," and therefore inadmissible under Fed. R. Evid. 702. *See Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21-22 (2d Cir. 1996).

D. Smith's Opinions on Crime Reduction Are Not Relevant and Are Highly Prejudicial

Smith's opinions on the crime deterrent effects of the NYPD's Operation Impact and stop-and-frisk programs and their supposed crime reduction effect in black and Latino New York City neighborhoods are not relevant to the legal and factual issues in this case.

To begin with, Plaintiffs are not challenging Operation Impact, which involves the deployment of officers to majority black and Latino neighborhoods, but the conduct of officers once they get to those neighborhoods, i.e., illegal stops-and-frisks, *see* Dkt # 132 (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment) at 14, and Smith acknowledged that his Operation Impact study did *not* assess the unique effect that officer stop activity, separate and apart from officer presence, had on crime reduction in various neighborhoods of New York City. Smith Dep. at 244:10-20.

More importantly, Smith's crime reduction opinions are irrelevant to the questions posed by Plaintiffs' Fourth and Fourteenth Amendment claims: (1) Do NYPD officers conduct stops-and-frisks without reasonable suspicion?; and (2) Do they stop civilians on the basis of their race? As to the first question, the United States Supreme Court and this Court have both stated unequivocally that "even assuming [crime prevention] is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it." *Brown v. Texas*, 443 U.S. 47, 52 (1979); Dkt # 201 at 65 ("Deterrence is of course a crucial aspect of law enforcement (and criminal justice policy in general) and it may lawfully be pursued in many different ways – more cops walking their beats, better detective work, etc. But it may not be accomplished through the use of unlawful stops."). Thus, Smith's crime reduction opinions are irrelevant to Plaintiffs' Fourth Amendment claims, and the defense they would be offered to

support—that Defendants' stop-and-frisk program "works" because it prevents crime—is no defense to those claims as a matter of law but is instead calculated to mislead and confuse the trier of fact.

As to the second question, whether the goal of the NYPD's stop-and-frisk program is crime prevention, the program violates the Equal Protection clause of the Fourteenth Amendment if officers make race-based stops to achieve that goal. Legal scholars, courts and other legal authorities have long recognized that law enforcement tactics targeting particular racial groups, even when undertaken in the name of crime control rather than racial animus, amount to racial profiling. *See*, *e.g.*, Samuel R. Gross, Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002) ("'[R]acial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating."); U.S. Dep't of Justice, Civil Rights Div., *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* 3 (2003) ("Put simply, 'to the extent that race is used as a proxy' for criminality, 'a racial stereotype requiring strict scrutiny is in operation.'") (quoting *Bush v. Vera*, 517 U.S. 952, 968 (1996); *State v. Soto*, 734 A.2d. 350, 361 (N.J. Super. Ct. 1996) (finding *de facto* State Police policy of targeting blacks for investigation and arrest in violation of the Equal Protection Clause and noting that "[t]he eradication of illegal drugs from our State is an obviously worthy goal, but not at the expense of individual rights."). This is so even when the race-based law enforcement tactic at issue has a demonstrable crime control benefit. *See Md. State Conf. of NAACP Branches v. Md. Dep't of State Police*, 72 F. Supp. 2d 560, 564 (D. Md. 1999) ("[F]or a period of time prior to April 1997, the plaintiffs 'clearly have made a reasonable showing that

there was a pattern and practice of stops by the Maryland State Police based upon race'") (quoting Order Granting Mot. for Further Relief, *Wilkins v. Maryland State Police*, CCB-93-468 (D. Md. Apr. 22, 1997)); Samuel R. Gross and Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 660 (2002) (finding in statistical study of Maryland State Police highway stop data that "racial profiling seems to increase the probability of finding large hauls of drugs.")

In other words, determining whether NYPD officers conduct stops-and-frisks to prevent crime, or whether their conduct does prevent crime, will not answer the question of whether they make such stops on the basis of race in violation of the Equal Protection Clause. Thus, Smith's studies and statistics on crime reduction will not assist the trier of fact to resolve Plaintiffs' Fourteenth Amendment claims and should therefore be excluded as irrelevant.

Even if these studies and statistics had any relevance to Plaintiffs' claims, which they do not, their probative value would be far outweighed by the potential prejudicial effect of misleading and distracting jurors to believe that this case is a referendum on whether or not Defendants' stop-and-frisk program makes them safer on the streets of New York, rather than whether that program violates class members' constitutional rights. This, without more, makes it inadmissible. *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995) (noting that federal courts "must therefore exclude proffered [expert testimony] under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury"). Thus, Smith's opinions about the alleged crime-reducing effect of Defendants' stop-and-frisk program, as well as the studies and

statistics on which his opinions are based, are inadmissible under FRE 403.[4]

E. Smith's Opinion that NYPD Stops-and-Frisks Are Not Racially Motivated Would Impermissibly Usurp the Functions of the Court and the Jury and Is Not Supported by the Data Upon Which It Is Based

Smith's opinion that "there is no compelling evidence that NYPD officers are making stops based on race or ethnicity[,] but instead are pursuing a strategy and using tactics that prevent crime and benefit the City as a whole, and communities of color in particular," Smith Rpt. at 8, is inadmissible for two additional reasons.

First, Smith's opinion that crime prevention rather than race or ethnicity is the motivating factor states the answer to *the* ultimate legal issue and improperly tells the jury what conclusion to reach on Plaintiffs' Fourteenth Amendment claims. For that reason, it is inadmissible. While under Federal Rule of Evidence 704 "[a]n opinion is not objectionable just because it embraces an ultimate issue," an expert opinion is inadmissible, however, where, as here it would tell jury how to apply facts to law. *See U.S. v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) ("although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts."); *see also Cameron v. City of New York*, 598 F.3d 50, 62 (2d Cir. 2010) (probable cause testimony excluded because "[s]uch testimony . . . tell[s] the jury what result to reach").

To prove their Fourteenth Amendment claims in this case, Plaintiffs are "required" to provide "[p]roof of racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Whether Defendants' stop-and-frisk

[4] While arguing here that Smith's opinions should be excluded as irrelevant and prejudicial expert testimony under *Daubert* and Rules 702 and 403, Plaintiffs expressly reserve the right to make a *motion in limine* under Federal Rules of Evidence 402 and 403 to exclude any other non-expert evidence, from any source, that Defendants may seek to introduce at trial concerning the crime deterrent effects of the NYPD's stop-and-frisk policies and practices.

conduct is racially motivated is the ultimate legal issue on Plaintiffs' Fourteenth Amendment claims. Smith's opinion is tantamount to an ultimate legal conclusion that Defendants have not violated the class members' Fourteenth Amendment rights. For that reason alone it is inadmissible. *See, e.g.*, *Cameron*, 598 F.3d at 62 (precluding probable cause opinion in false arrest case); *Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (opinion about the justified use of force precluded in excessive force case); *Pereira v. Cogan*, 281 B.R. 194, 198-99 (S.D.N.Y. 2002) (*inter alia* precluding an expert's opinion that a board of directors "failed to discharge its fundamental oversight responsibilities and duty of care").

Plaintiffs' position is entirely consistent with this Court's earlier ruling related to Plaintiffs' expert Jeffrey Fagan. In ruling that he was qualified to testify and that his opinions are admissible in this case, this Court explained that Professor Fagan's expert testimony will "help a jury of lay people understand the significance of 2.8 million stops and the 56 million boxes describing the indicia of suspicion that led to those stops," but that Professor Fagan will not provide any opinions on the meaning of applicable laws or, more importantly here, answer the ultimate legal question of whether Defendants "have a policy and/or practice of conducting suspicionless stops." *See* Dkt. #201, at 38-39. Indeed, this Court specifically said that "Fagan . . . will not be allowed to express an opinion on that [ultimate] question." *Id.* at 38. The same should be true for Professor Smith. Because his opinion that "NYPD officers are [not] making stops based on race or ethnicity but instead are pursuing a strategy and using tactics that prevent crime" answers the Fourteenth Amendment question in this case, it must be excluded. *See* Smith Rep. at 8, 18.

Second, there is "simply too great an analytical gap" between Smith's questionable

evidence that NYPD stops-and-frisks deter crime[5] and his conclusion that such stops cannot be race-based. *Gen. Elec.*, 522 U.S. at 519. As discussed in Point IV *supra,* legal scholars and courts have long recognized that law enforcement agencies often racially profile in the service of crime control. Smith's failure to even consider the very real possibility that NYPD officers are stopping people on the basis of their race and with the goal of deterring crime renders his conclusion unreliable. *See In re Fosamax Prod. Liab. Litig.*, 688 F. Supp. 2d 259, 268 (S.D.N.Y. 2010) ("While an expert need not rule out every potential cause in order to satisfy *Daubert*, the expert's testimony must at least address obvious alternative causes and provide a reasonable explanation for dismissing specific alternate factors identified by the defendant.") (internal quotations and citation omitted); *U.S. Info Sys., Inc. v. Int'l Bhd. of Elec. Workers Union Local No. 3*, 313 F. Supp. 2d 213, 238 (S.D.N.Y. 2004) ("An expert must demonstrate that he has adequately accounted for obvious alternative explanations in order for his testimony to be reliable.").

Smith's conclusion is also based on an overly restrictive understanding of discriminatory intent as equivalent to racial animus. *See* Smith Rpt. at 18 ("[T]he central motivating factor in police policy and practice at the street level is crime reduction, not harassment of Blacks and Hispanics."). But this view is clearly contrary to law. It is well established that governmental actors are liable for Equal Protection violations when taking race-conscious action in the service of benign, and often laudable, public policy goals. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (City's decision to throw out results of fire department promotional civil service exam on which white candidates scored better than blacks in order to avoid liability for disparate impact discrimination against black candidates constituted intentional racial discrimination under Title

[5] As set forth in detail in the December 3, 2010 Supplemental Expert Report of Jeffrey Fagan, there are numerous methodological flaws in Smith and Purtell's statistical analyses in their Operation Impact and Stop-and-Frisk studies which severely undermine the validity of those studies' results. *See* Fagan Supp. Rpt. (Dkt # 132) at 20-34.

VII); *Johnson v. California*, 543 U.S. 499 (2005) (state correctional department policy of segregating all new prison inmates by race for first 60 days of incarceration in order to prevent violence by racial gangs was a suspect racial classification subject to strict scrutiny under the Equal Protection Clause); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (City's "set-aside" plan requiring 30% of dollar amount of all municipal construction contracts to be subcontracted to minority-owned businesses historically underrepresented in City's construction industry violated Equal Protection Clause). Thus, Smith's conclusion, if he is allowed to testify to it, will not assist, but will instead greatly mislead the trier of fact on the question of discriminatory intent that is central to Plaintiffs' Fourteenth Amendment claims. Smith's conclusion is therefore inadmissible under Rules 702 and 403.

IV. CONCLUSION

Based on the foregoing, this Court should preclude Professor Dennis Smith from testifying as follows:

i. Smith may not critique Fagan's multivariate regression analyses and critique of the RAND study;

ii. Smith may not offer his correlation coefficient calculations and "alternative" regression analysis;

iii. Smith may not opine on the meaning of low stop-and-frisk weapons recovery hit rates;

iv. Smith may not opine on crime reduction in New York City, or otherwise testify about the results of the studies attached as Appendices D and E to his Expert report; and

v. Smith may not opine that NYPD officers do not conduct stops-and-frisks on the basis of race.

Dated: New York, New York
June 26, 2012

By: 
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.*,	:	
Plaintiffs,	:	08 Civ. 01034 (SAS)
-against-	:	ECF CASE
THE CITY OF NEW YORK, *et al.*,	:	**DECLARATION OF DARIUS CHARNEY**
Defendants.	:	

DARIUS CHARNEY declares as follows pursuant to 28 U.S.C. § 1746:

1. I am an attorney duly admitted to practice law in this Court and in the courts of the State of New York.

2. I am a senior staff attorney at the Center for Constitutional Rights ("CCR"), which serves as co-counsel for the Plaintiff class in this action. I have personal knowledge of the matters stated herein, or knowledge based on my review of documents in the possession of CCR.

3. I submit this declaration in support of Plaintiffs' motion to preclude Defendants' expert Dennis Smith from testifying to certain of his opinions at trial.

4. Attached hereto as Exhibit A is a true and correct copy of Defendants' August 3, 2009 letter to Plaintiffs identifying the individuals whom they intended to call as testifying experts at trial.

5. Attached hereto as Exhibit B is a true and correct copy of the November 15, 2010 Expert Report of Dennis Smith, including all Appendices thereto.

6. Attached hereto as Exhibit C is a true and correct copy of excerpts from the

transcript of the March 4, 2011 deposition of Dennis Smith.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 26, 2012, in New York, New York.

DARIUS CHARNEY

EXHIBIT A

MICHAEL A. CARDOZO
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August 3, 2009

BY EMAIL

Darius Charney, Esq.
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Re: David Floyd, et al. v. City of New York, et al., 08 Civ. 01034 (SAS)

Dear Mr. Charney:

In accordance with the Court's Order dated May 26, 2009, defendants identify the following individuals whom defendants intend to call as expert witnesses:

1. Professor Dennis C. Smith
New York University
Robert F. Wagner Graduate School of Public Service
295 Lafayette Street
New York, NY 10012

2. Professor Robert Purtell, PhD
State University of New York
University at Albany
Rockefeller College of Public Affairs & Policy
135 Western Avenue
Albany, NY 12222

Very truly yours,

Jennifer Rossan
Assistant Corporation Counsel

EXHIBIT B
Pt. 1

United States District Court
Southern District of New York
----------x

David Floyd et al.,

Plaintiffs,

-against-

City of New York et al.,

Defendants.
----------x

08 Civ. 01034 (SAS)

Report of

Dennis C. Smith, Ph.D.

Qualifications

I am an Associate Professor of Public Administration at the Robert F. Wagner Graduate School of Public Service at New York University. I have served as the Director of the Program in Public Policy and Management and Associate Dean.

I joined the faculty of NYU in 1973. I have studied urban police policy and management since undertaking studies of police management in the Indianapolis, Indiana, Chicago, Illinois and St. Louis, Missouri metropolitan areas with Professor Elinor Ostrom of Indiana University, recent recipient of the Nobel Prize in Economics. My dissertation was on the subject of police professionalization and performance based on a study of twenty-nine police departments in the St. Louis metropolitan area. I have done police studies with National Science Foundation and National Institute of Justice funding in the Tampa/St.Petersburg, Florida, Rochester, New York, and additional work in the St. Metropolitan areas since coming to NYU. I have been studying the New York City since the late 1970s when I began an analysis of the organizational and performance effects of a twenty-five reduction in the size of the department in the wake of the fiscal crisis, and have studied how well the Police Academy was preparing recruits for community policing, evaluated the effects of command structure reform at the borough level on police performance, the introduction and impact of the Compstat (alone and with William Bratton), assessed the performance effects of Operation Impact, evaluated the management crime integrity efforts of NYPD, analyzed the relationship between crime and economic conditions at the neighborhood level, evaluated the reform of the Internal Affairs Bureau, and assessed the efficacy of stop and frisk practices as crime prevention strategy. I also recently completed an organizational assessment of the

Department of Environmental Protection Police that in charged with protecting the New York City water system. I am currently studying the effects of the adoption of a CompStat approach to policing big cities in New York. I have also studied the adoption of evidence based, outcome oriented management practices in social services, non profit organizations, the Departments of Corrections and Parks. I have been a consultant to the NYC Office of Operations on the Mayor's Management Report, and to United Way of New York and numerous nonprofit organization of the use of performance measurement and management.

My research on police has been published in six books and articles in peer reviewed journals, including the **Public Administration Review, Urban Affairs Quarterly, Journal of Criminal Justice, The Journal of Social Issues, Public Administration and Development**,a nd most recently my case for evidence based, outcome driven performance managed was an invited article in the **Journal of Public Policy Analysis and Management**. I am on the editorial board of the Journal of Comparative Policy Analysis and of Policy, Organization and Society. I have a Ph.D. in Political Science from Indiana University. My curriculum vitae are presented in Appendix A.

Response to the report by Jeffrey Fagan in the case of Floyd v. the City of New York.

Dennis C. Smith

This report will address of the specific allegations, evidence and analysis presented in the report by Professor Jeffrey Fagan on the Stop, Question and Frisk practices of the New York City Police Department (NYPD).

Summary of Issues Addressed

This is a response to two reports, one by Professor Jeffrey Fagan and one by Lou Reiter. The Fagan report addresses two claims of plaintiffs under the Fourth Amendment which alleges that the stop, question and frisk (SQF) behavior of the New

York City Police Department (NYPD) shows a pattern of unconstitutional stops by officers, and a second, Fourteenth Amendment claim that alleges that "the City, through NYPD, has 'often' used race and/or national origin in lieu of reasonable suspicion, as the factors that determine whether officers decide to stop and frisk persons. Plaintiffs claim that this practice violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also claim that Black and Latino males are the population group most affected by the alleged violation." I also respond to Professor Fagan critique of a study done by the Rand Corporation that challenged early work on stop, question and frisk done by Professor Fagan and colleagues that claimed to find evidence of racial and ethnic bias in the pattern of stops. The response presented here also addresses the report of Lou Reiter that criticizes the management practices of the New York City Police Department in its management and supervision of stop, questions, and frisk practices. In this response underlying assumption are identified and the quality of evidence and analysis used to support them are subjected to critical scrutiny.

Additional Evidence Presented

In addition to a direct response to the reports of Professor Fagan and Mr. Reiter I present two empirical studies, one of the Department's Operation Impact strategy of hot spot policing and the other of the effect on crime of police stops based on suspicion, which are directly relevant to one of the claims presented in my response to their critique of NYPD practices, namely that both reports are predicated on models of police practice no longer used by NYPD and that this failure to align their analyses to take into account current police practices disable their efforts to fairly assess the motivation behind and effects on the Black and Hispanic communities of all ages in the City.

Summary of the Response to the Fagan Report

The Fagan Report acknowledges the complexity of the circumstances facing police officers on the street in complying with legal issues when take action upon

observing behavior arousing suspicion that a crime has been committed, is being planned or is about to be committed. Professor Fagan says the actual complexity is too great to fully represent it in the coding scheme he uses to code thousands of stops reported by NYPD. Using his simplified coding scheme he find the 70% by his criteria are "justified" and that 6.7% are not. The remaining 23.3% are found to be of "indeterminate legality." I argue that those which are indeterminate cannot be used as evidence of police misconduct, that if those cases are treated as missing data, or if they a distributed in the same proportion as the ones he is able to code, at least 90% of the stops are "justified." I further argue that the "unjustified" stops cannot be automatically accepted as evidence of racial or ethnic bias without further investigation. This leads me to conclude that this analysis offers no support for a claim that the NYPD is using race or ethnicity, rather than for example, a commitment to protecting the community from crime, in the decision to stop or questions pedestrians,

The Fagan analysis does not explicitly confront the historic shift at NYPD away from a primary mission of responding to crime to a mission of preventing crime through proactive and crime targeted police vigilance. The management innovation brought to NYPD in 1994 includes increased targeting of police vigilance in places where, and at times when violent crime is high. Police managers at the precinct level were challenged to convey to the officers under their commands the expectation that police will intervene in response to suspicious behavior, rather that wait until a crime has occurred to take action.[1]

The Fagan analysis does not ask, and therefore cannot answer, the question of whether police practices are consistent with a pattern of policing by NYPD aimed at crime reduction and increasing public safety. Nor, therefore, does the Fagan Report ask whether the benefits of these efforts are equally distributed or disproportionately

concentrated in Black and Hispanic communities in the City, which is in fact the case. Any credible analysis of the determinants of stop and frisk activity must first control for the impact of evidence-based management practices before trying to parse out any other factors that may or may not have contributed to stop and frisk patterns.

The reactive (fight crime by responding to calls, making arrests) model of policing and the statistical measures implicitly built into the Fagan Report to test his models' assumptions are not the model used by NYPD to effect the most dramatic crime decline achieved by any large city in America.

Another critical flaw found in the model used in the statistical analyses in the Fagan Report is the assumption, repeatedly stated, that police crime pattern analysis and resource deployment are based at the precinct level rather than small areas within precincts. The report misses the major shift in the approach to producing public safety introduced in 2003, Operation Impact, or "hot spot policing." Operation Impact was introduced in 2003, the year before the period analyzed in the Fagan Report. All of Professor Fagan's analyses are based on precinct level of analysis when small areas of violent crime within selected precincts have been the locus of crime fighting efforts during the entire period included in the Fagan statistical tests.

The Fagan Report relies heavily on elaborate statistical analyses to find evidence that police stop Black and Hispanic New Yorkers out of proportion to their share of the population. This is somewhat strange because the fact that police stops do not mirror the characteristics of the general population is regularly conceded by the NYPD in terms not only of race and ethnicity, but also age or genders. The NYPD claims that it, as a problem solving police agency focused on crime reduction, cannot randomly distribute its scarce resources but must concentrate its vigilance and enforcement activities in areas where the preponderance of crime, particularly violent crime occurs, which is in community where a disproportionate share of the Black and Hispanic population reside.

It has to target is scarce patrol resources on current crime patterns, which are created disproportionately by young Black and Hispanic males. Thus, it does not remotely approximate in its stops females or children or senior citizens in proportion to their share of the population. The crime and arrest statistics and victims identification of suspect characteristics would not warrant such a pattern of policing aimed at crime prevention. We examine and find evidence to support the NYPD claim that violent crime is not randomly distributed, and that its stops are concentrated in high crimes areas and that police stops approximate the share of suspects identified by victims across all areas of the City, not just high crime areas or in communities of color. We also find that the approach used by NYPD has produced record levels crime reduction, and that the benefits of this greater public safety are, in human rather than percentage terms, greatest in the Black and Hispanic communities of New York City.

Professor Fagan claims that by introducing control variables in equations used his analysis he is able to adjust for the factors related to crime and economic conditions as an alternative to directly controlling for patterns of suspect identification, but we question on a variety of grounds the variables he includes and ignores in his analysis. We find problems in his operationalization of key variables, a lack of transparency in some of his statistical decisions, and question some the interpretations of findings based on limits in the methods he employs.

Professor Fagan's review of the Rand Analysis is essentially a debate over the use of suspect identification data as a benchmark in assessing the claim of racial bias, which largely eliminates any sign of such bias, and Fagan's claim that the general population distribution provides a more appropriate benchmark. We conclude that the Rand Study is on firmer ground, given the reasonableness of the best use of "best evidence" in making deployment decision and managing police vigilance, especially in the absence

of any provision by Professor of reasons or evidence to believe that the race or ethnic pattern of victimizations where suspect identify is unknown differs in the direction of higher level of crime by whites than is found in the known suspect distribution. After devoting most of the report that addresses the Rand Study to criticizing its methods, Professor Fagan concludes that section of his report identifying and claiming as supportive selected findings from the matched pairs analysis. It appears that the Fagan report cannot have it both ways, either the methods used by Rand in its effort to draw lessons from the behavior from officers who make exceptionally high or low number of stops are flawed and are not reliable, or they are sound and the Rand main findings of no consistent pattern of bias in stops stands. The internal benchmarking study could be viewed as an effort to develop a tool for use by NYPD in managing stops and frisks rather than a test of the general practices of police stops which Rand addressed in it external benchmarking analysis that found no pattern of racial bias.

The response to the Reiter report is that his analysis also is out of date and does not appear to understand the shift in the NYPD to an outcome orientation in which the outcome of crime reduction is the focus, not activities. With respect to his inquiry into management and supervisory practices the Reiter report does not present systemic evidence to support his harsh indictment of the police management and supervisory practices of NYPD. It relies instead on ex cathedra pronouncements about what he claims are standard management practices in properly run departments without citing a single example of another department in the nation that exemplifies his preferred practices and does not provide any operational detail regarding the practices he finds wanting in NYPD. It does not appear to me that the Reiter Report offers any evidence that bears directly on the claims of the plaintiffs of racial bias in its police practices.

We present two rigorous empirical studies that test the proposition that NYPD strategies and practices are contributing significantly to crime reduction and public safety in New York City, and find evidence that both Operation Impact and stop, question and frisk practices are having a positive impact in achieving crime reduction.

Consequently, we conclude that there is no compelling evidence that NYPD officers are making stops based on race or ethnicity but instead are pursuing a strategy and using tactics that prevent crime and benefit the City as a whole, and communities of color in particular. Young Black and Hispanic males especially are being murdered, robbed and assaulted at far lower rates, and are being deterred from committing crime that victimize their communities disproportionately. As a result, far fewer young Black and Hispanic males are committing crimes, being arrested and sent to prison than was the pattern just two decades ago.

The Fagan Report

The Fagan Report addresses three claims regarding police practices and reviews a study that challenges the his approach to assessing police practices:

1. "The Fourth Amendment claim alleges that the City has engaged in a pattern of unconstitutional stops of City residents that are done without requisite reasonable and articulable suspicion required under the Fourth Amendment."
2. "The Fourteenth Amendment claim alleges that the City, through NYPD, has 'often' used race and/or national origin in lieu of reasonable suspicion, as the factors that determine whether officers decide to stop and frisk persons. Plaintiffs claim that this practice violates the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs also claim that Black and Latino males are the population group most affected by the alleged violation."

3. "I also provide evidence that addresses the intersection of the Fourth and Fourteenth Amendments claims. Specifically, I provide evidence that the NYPD has engaged in a pattern of unconstitutional stops of City residents that are more likely to affect Black and Latino citizens" (p.2)

4. Professor Fagan notes that a Rand Report, commissioned by NYPD to examine the charge of "racial profiling," found that police stops did not provide evidence of "racial bias" when appropriate benchmarks are used in the analysis. The Fagan Report states, "I review the Rand Report in detail, and provide an assessment of the social science reliability of the Report and its probative value as additional evidence in the case."

The Response to Professor Fagan's Report

The Fourth Amendment Claim: The Fagan Report repeatedly alleges that the police are engaged in a pattern of "unconstitutional" stops (often referred to as "unjustified" stops) based on an analysis of the official record of police stop activity, the UF250 form completed by officers to document the stop. Professor Fagan implicitly acknowledges the complexity of an officer's decision when he contemplates the challenge of coding the UF 250 form. Officers have ten circumstances on the UF250 list and can check as many as apply, as well as indicate other circumstances from a separate list, and can also list additional circumstances.

After completing the "Specify Which Felony/P.L. Misdemeanor Suspected" by writing in an answer the form lists the following options as potential answers to the question on the form See Appendix A for copy of the double-sided UF 250):

What were the circumstances which led to stop? (Must check at least one box)

- Carrying Objects In Plain View Used In Commission of Crime, e.g., slim jim, pry bar, etc.
- Fits Description
- Actions Indicative of "Casing Victim" or Location
- Actions Indicative of Acting As A Lookout
- Suspicious Bulge/Object (Describe)
- Actions Indicative Of Engaging In Drug Transaction
- Furtive Movements
- Actions Indicative Of Engaging In Violent Crimes
- Wearing Clothes/Disguises Commonly Used In Commission Of Crimes
- Other Reasonable Suspicion of Criminal Activity (Specify)

The first question that might be asked is, which of the behaviors listed on the form should a trained police officer on patrol, charged with crime prevention as well response to crime, ignore? Should the officer attempt to avoid detection by the person arousing suspicion in order to see if an actual crime is committed?[2]

The UF250 also has a section for Additional **Circumstance/ Factors (Check All That Apply):**

- Report From Victim/Witness
- Area Has High Incidence Offense of Type Under Investigation
- Time Of Day, Day Of Week, Seasons Corresponding To Reports Of Criminal Activity

[2] This query is not hypothetical. Well documented in the literature are tensions between the practices of officers on patrol whose modus operandi is to intervene when they observe misconduct and any criminal acts being committed, and officers in other bureaus, such as organized crime and narcotics, who are willing to delay action or even ignore "minor" crimes in the process of building a "major case" or pursuing a "bigger" fish in crime hierarchy.

- Suspect Is Associating With Persons Known For Their Criminal Activity
- Proximity To Crime Location
- Evasive, False Or Inconsistent Response to Officer's Questions
- Changing Direction At Sight Of Officer/Flight
- Ongoing Investigation, e.g. Robbery/Pattern
- Sights And Sounds Of Criminal Activity, e.g.., Bloodstains, Ringing Alarms
- Other (Describe)

For anyone familiar with Operation Impact, the "hot spot policing" crime prevention strategy used by NYPD over the past eight years the reason for some of the items on the "Additional Circumstances" list is quite clear: a team of officers is assigned to a hot spot, an Impact Zone, in precisely those blocks where a violent crime pattern has been found, at the hours of the day and days of the week when the crime pattern occurs, fully briefed on the crimes in the pattern and the information available about known suspects related to those crimes.

Given the salience of Operation Impact in the work of NYPD to maintain the downward trend in violent crime, recognition of factors such as Area Has High Incidence of Reported Offense of Type under Investigation or Time Of Day, Day Of Week, Seasons Corresponding to Reports of Criminal Activity is needed to understand the decisions made by officers on patrol.

By Fagan's count there are, based on the items to be checked on the UF250, 1,024 possible combinations before growing exponentially if the option of providing "additional circumstances" is taken by the officer. Professor Fagan concludes that "The enormous number of combinations of circumstance made an analysis of the legal sufficiency of

individual cases extremely difficult, unwieldy and uninformative. " Difficult and wieldy is clear, but why "uninformative"? He describes his response to the complexity encountered in attempting to crystallize the officers stop decisions as follows:

> Instead, using the analyses of prima facie sufficiency or conditional sufficiency of each stop circumstance discussed in appendix D, stops are classified as justified, unjustified, or indeterminate, according to the following criteria:
>
> 1. Stops are justified if the circumstances provided are considered sufficient as the sole rationale for the stop and need no additional information or qualification (i.e., Casing, Drug Transactions, or Violent Crime)
>
> 2. Stops are justified if the circumstances listed are conditionally justified e.g., carrying a suspicious object, fitting a suspect description, acting as a lookout, wearing clothing indicative of a violent crime, furtive movements, or a suspicious bulge in one's clothing), and an "additional circumstance" is also indicated.
>
> 3. Stops are unjustified if no primary stop circumstances are provided. For example, stops are unjustified if the only listed circumstances is that the suspect was present in a high crime area. Stops that list "Other Stop Factors" only are unjustified.
>
> 4. Stops are of indeterminate legality if the circumstance or circumstances listed are (all) conditionally justified, and no additional circumstances are indicated.
>
> 5. Stops are of indeterminate legality if the only circumstances listed are "other circumstances" or if no additional circumstances are indicated.

In a report that goes to great lengths to analyze potential bias in measures used by others (NYPD, the Rand Study) the only caveat attached to the method used here is to suggest that it may be too generous in justifying stops and says nothing about how the coding used might miss factors that legitimate officer suspicion.

Using this very significant simplification of the complex world of the officer, where the exponentially large combination of circumstances are potentially present, the author classifies all stops. The form, in addition to all the boxes to check, includes a number of open ended questions where the instruction is to "specify." How these further specifications are coded by NYPD or interpreted by Professor Fagan in his own coding

is not described. Imbedded in the simplified coding scheme developed by Professor Fagan is a compound criterion for one of the "justified "categories:

> 2. Stops are justified if the circumstances listed are conditionally e.g., carrying a suspicious object, fitting a suspect description, acting as a lookout, wearing clothing indicative of a violent crime, furtive movement, or a suspicious bulge in one's clothing), and an additional circumstance is also indicated.(emphasis added)

Professor Fagan does not tell us how a U250 that lacks the additional circumstance called for was coded in his tabulation, or even why the second condition is required. In effect, Professor Fagan is substituting his own judgment for that of an informed police officer with substantive knowledge of the circumstances surrounding the stop decision, which may in fact be presented on the form but in a combination too complicated for the coding scheme developed for the Fagan Report, and may be imposing conditions on the validity of a stop that neither the court nor the plaintiffs anticipated when the revised UF250 form was reviewed and approved.

Based on a coding of the records produced by NYPD officers Professor Fagan finds that 70% of the hundreds of thousands of stops made by NYPD are "justified," and 6.7% are "unjustified." The key question is: Are those that are coded "unjustified" by Professor Fagan unconstitutional, even though they have not been subjected to all the legal distinctions elaborated in his review of case law in Appendix D? Does checking "Other Stop Factors" in a situation that Professor Fagan acknowledges is too complicated for him to fully code automatically equal "unjustified" or unconstitutional? Does it matter what the "other stop factors" are? Further, Professor Fagan has chosen in his analysis to combine unjustified and indeterminate stops together, and to analyze the combined category as if they were all unjustified.

Unjustified and indeterminate should not be combined. The report's characterization of the 24.6% of stops that professor Fagan categorized as lacking sufficient information to ascertain justification is per se a problem. However, instead of setting aside these cases as missing data, or distributing the UF 250 reports that Fagan was unable to classify by the proportions that he judges were "justified" and "unjustified" (70/6.7), his analysis combines the unjustified and the three time larger category of unknown (to Fagan) cases, leading to implications in the text and headlines in the media that 30% of the stops have been found, to be unconstitutional stops. That by his own account 70% are justified is reported without any emphasis. The possibility that by using a proportional distribution rule (70/6.7) applied to the undeterminable cases the number of "justified" would reach 90% is not even considered. Accepting for a moment the validity of the coding scheme used by Professor Fagan, but appropriately distributing the undeterminable cases it is reasonable to ask, **If 90% of all police stops are "justified," does not that call into question the claim that the police "often" make stops due to race or ethnicity rather than on the basis of reasonable suspicion?**

Since even that small minority of cases were classified by Professor Fagan as unjustified using less than fully clarified criteria, and the vast majority of classified cases were found to be justified, it does not seem credible to find that the Fagan Report refutes the plaintiff's claim in this case that stops in New York violated the Fourth Amendment rights of New Yorkers.

The Fourteenth Amendment Claim

The analysis of the second, Fourteenth Amendment, claim is does not examine specific stops but instead uses a variety of statistical analyses that mine the data to search for

patterns of stops that are consistent with the Plaintiff's claim that NYPD "has 'often' used race and/or national origin in lieu of reasonable suspicion, as the factors that determine whether officers decide to stop and frisk persons." "Often" is not, of course, a precise standard by which to judge police behavior.

Statistical analysis is a powerful tool but it depends for it.power on the quality of the ideas it tests.[3] Statistical evidence is always indirect due to the long ago discovered limitation facing empiricism that causality cannot be directly observed, it has to be inferred. [4]Social scientists must construct tests that allow them, based on the best evidence available, to rule out explanations that are rival hypotheses to the one that, based on their theory, they want to establish as the most plausible.

Carol Weiss, one of the founders of the field of program evaluation, argues that valid evaluations depend on solid explication of the theory underlying the policy or program being evaluated.[5] Robert Goodman in an article entitled "Principles and Tools for Evaluating Community Based Prevention and Health Promotion Programs," drawing on "common themes in contemporary evaluation literature" lists as "Principle 1: An evaluation of community prevention programs should include an assessment of program theory."[6]

A central contention of this response to the Fagan Report is that the model of policing New York City used in the analysis to test the Plaintiff's hypothesis (the Fourteenth Amendment claim) is fundamentally flawed. The Plaintiff's analysis does not

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[3] Professor Fagan asserts this same point in criticizing the Rand Internal benchmarking study for not explicating the theory underlying the design for matching used in its statistical analyses." "In other words, there should be a theory of bias in stops that should inform the matching process, rather than just employing and actuarial method." (p.82)

[4] David Hume, **An Inquiry Concerning Human Understanding**, 1748.

[5] Carol Weiss, "Nothing is a Practical as Good Theory: Exploring Theory-based Evaluations for Comprehensive Community Based Interventions for Families and Children," In

[6] Robert M. Goodman, Journal of Public Health Management Practices, 1998, 4(2) 37-47, Aspen Publishers, Inc.

address the rival hypothesis that the actions of NYPD over the past fifteen years have been based on a model or theory of crime reduction, rather than giving priority to responding to crimes *after* they have been committed. Further, over the course of the past fifteen year, NYPD has used an evidence-based approach to achieving its mission of improving public safety in the City to refine the model of crime prevention in ways that are even farther removed from the theory of policing underlying the analysis presented in the Fagan Report.

The Fagan analysis does not explicitly confront the historic shift at NYPD away from a primary mission of responding to crime to a mission of preventing crime through proactive and crime targeted police vigilance. The Fagan Report cites William Bratton's book, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* in which he gives his account of the innovation in policing called Compstat, but does not acknowledge the clear statement in the book that a fundamental key to the successful "turnaround" in crime was the replacement of a reactive approach to a proactive one. The management innovation brought to NYPD in 1994 includes increased targeting of police vigilance in places where and at times when violent crime is high. Police managers at the precinct level were challenged to convey to the officers under their command the expectation that police will intervene in response to suspicious behavior, rather that wait until a crime has occurred to take action.[7]

The Fagan analysis does not ask, and therefore cannot answer, the question of whether police practices are consistent with a pattern of policing by NYPD aimed at crime reduction and increasing public safety. Nor, therefore, does the Fagan Report ask whether the benefits of these efforts are equally distributed or disproportionately

[7] The systematic recording of stop, question and frisk by police was not in place in New York during the two years in the mid 1990s when William Bratton was Commissioner, but careful monitoring of stops was included in the Court ordered review of Los Angeles Police Department during his entire tenure as Chief. Christopher Stone, Fogelsong, Cole's study, *Policing Los Angeles Under a Consent Decree: The Dynamics of Change in LAPD*, 2009, found the pedestrian stops doubled under Chief Bratton, and crime declined dramatically, as it did in New York City under proactive policing.

concentrated in Black and Hispanic communities in the City, which is in the fact the case. Any credible analysis of the determinants of stop and frisk activity must first control for the impact of evidence-based management practices before trying to parse out any other factors that may or may not have contributed to stop and frisk patterns.

The reactive (fight crime by responding to calls, making arrests) model of policing and the statistical measures implicitly built into the Fagan Report to test the models' assumptions are not the model used by NYPD to effect the most dramatic crime decline achieved by any large city in America.

Another critical flaw in the model used in the statistical analyses in the Fagan Report is the assumption,rep eatedly stated, that police crime pattern analysis and resource deployment are based at the precinct level rather than small areas within precincts.Th e report misses the major shift in the approach to producing public safety introduced in 2003, Operation Impact, or "hot spot policing." Operation Impact was introduced in 2003, the year before the period analyzed in the Fagan Report. All of Professor Fagan's analyses are based on precinct level of analysis when small areas of violent crime within selected precincts have been the locus of crime fighting efforts during the entire period included in the Fagan statistical tests.

In a report of a task force of national experts on policing that reviewed empirical evidence of what does and does not work to reduce crime," hot spot policing " was one of the few interventions for which powerful findings of efficacy were found.[8] A study of Operation Impact in New York found that hot spot policing contributed significantly to the already existing downward trend in crime.[9]

[8] National Research Council, **Fairness and Effectiveness in Policing: The Evidence**.2003.
[9] Smith and Purtell,

Timing plays a crucial role in efforts to draw causal inference from an analysis of data. If, for example, one wants to test a hypothesis that gentrification caused crime decline in New York City, a finding that the temporal sequence is the opposite of that hypothesis,ie , neighborhood residence patterns changed after crime declined, one can use chronology to help draw conclusions about the logic of an argument. Similarly, for processes that occur over a period of months or even years, the modeling of time is a crucial factor in attempting to know where to look for effects. Statistical analyses often address this by specifying theoretically justifiable "lag times" that are consistent with stated management practices to examine patterns. Are events in the real world simultaneous or are they sequential with some predicted lag between cause and effect? Setting the appropriate lag, and correctly estimating when to expect effects, are crucial aspects of proper modeling. The importance of setting the time dial correctly reveals another critical flaw in the Fagan analyses; the use of crime data from the previous quarter as a means to "control for crime" in analyzing police stop behavior. Three month old crime patterns are virtually ancient history in the tactical management of crime fighting in New York City (or combating the threat of terrorism, for that matter) by NYPD.

Throughout this response to the Fagan Report,I will contend that the central motivating factor in police policy and practice at the street level is crime reduction, not harassment of Black and Hispanics, and that police actions are based on the use of the most recent information available and that actions focus on small response areas. Instead, the statistical models presented in the Fagan Report that include crime, only use it as a control variable, never as a dependent variable as does NYPD-- and as we do in two studies I will present in this report.

NYPD does what it does because it works. In empirical studies of crime and policing in New York done during the past five years my co-author and I tested the

theory that violent crime plateaus would lead to selection of "hot spots," that the introduction of an "impact zone" in a precinct would produce a lagged decline in crime. Therefore, in our study a time lag was used in searching for evidence of crime reduction effects. In a separate but related study, entitled "Does Stop and Frisk Stop Crime" we similarly expected that a spike in violent crime in one month would be followed by a surge in stops by police, followed by a decline in reported crime the next month. In our study of the efficacy of stop and frisk practices, finding significant positive effects on the rate of decline in crime depended on setting the time dial correctly. Our study demonstrated that the impact of stop activity on crime dissipated with time and that with lags of more than two months, there was no statistically-significant impact on crime. We observed that this phenomenon would lead police managers to constantly adapt and innovate. For Professor Fagan's analysis to have been valid, he would have had to conduct a similar sensitivity analysis using lags shorter than three months. The entire sequence of crime increases, stops increase, followed by crime declines included in our empirical study of the crime reduction effects of stop and frisk, would be indistinguishably embedded in the quarterly lags used in the Fagan multiple regression models.

The Compstat based critical shift in NYPD managementto using "timely and accurate" intelligence about crime,and searching for and disseminating effective tactics, combined with the rapid deployment of resources is also missing in the models Professor Fagan used to analyze NYPD practices from 2004 to 2009. In the real time world of NYPD today and for the past fifteen years, data from three month ago would appear in the trend analyses used to track long-term progress, not in rapid deployment decisions.

A key factor in the quality of any statistical analysis is the validity and reliability of measures of variable used in the analysis. The validity question is: Does the measure

used measure what you think it does? The use of "hit rates" in analyzing the "success" of the police stops depend on the meaning of "success."

In the philosophy of police management that was in use during the period of increasing crime in the 1980s, when the NYPD defined its mission as "responding to crime," the finding that over time a decreasing number of stops result in arrest, and that weapons in general and firearms in particular are found in a small and decreasing percentage of stops, might have warranted a charge of lack of efficacy, or at least might have raised a question of cost effectiveness. With the critical shift to a mission of finding crime patterns, deploying police where and when crime is occurring before it occurs,and reducing crime by proactive efforts to stop crime before it happens, ie, preventing crime, the measure of success has changed. In contrast to the definition of success used in the Fagan Report, a downward trend in the number of weapons found,a nd even of arrests, by prevention standards, are evidence of success.

A central goal of proactive policing is to have people leave their weapons at home. In the Fagan Report the fact that a small percent of stops result in arrest is offered as evidence that the stops are unjustified or of questionable efficacy. This seems to convey a confusion of the distinction of stops based on reasonable suspicion and arrests made on the basis of probable cause. If police were omniscient, which they are of course not, and they could intervene 100% of the time just before a crime is committed, crime could be reduced to zero, no constitution rights would be jeopardized and there were would be zero arrests: no crime, no probable cause, no arrest.

Since that is a goal of NYPD, if in the process of making stops based on suspicious behavior, a declining number of weapons are found, that should be read as a positive sign. In addition, given the pattern of crime reduction achieved by NYPD using

proactive policing tactics, the idea of hits has to include its broader preventive effects. Therefore, the finding that there was a "low number of hits" is not evidence of unwarranted or unjustified stops,o r evidence of unconstitutional practice by the police. Rather, it is evidence that proactive policing is succeeding in its goal of making the streets of New York safer for all of its citizens. If the NYC Health Department launched an intervention to reduce cancer in some population in the City, and subsequent screenings found declining incidence of the disease, that would not be viewed as evidence of a failed intervention.

The finding in the Fagan Report that in *only* 20% of stops do officers cite "matches suspect description" as the reason for the stop should not be seen as evidence that the rest of the stops are unjustified. This way of interpreting useful stops appears to be predicated on the ineffective model of policing discarded by NYPD more than fifteen years ago. For there to be a suspect description there has to have been a crime. The extraordinary decline in reported crime, ranging from 60 to 90 percent depending on the category of crime,h as resulted in a commensurate decline in the broadcast by NYPD of specific crime suspect descriptions, just it has resulted in a significant decline in felony arrests, and a 58% decline in the proportion of convicted offenders from New York City entering the New York State prison system. Both of these trends have disproportionately benefited people and communities of color. Would any reasonable persons interpret this by product of crime fighting success in the City as evidence of police failure? Crime prevention policies and practices require definitions of success missing from and antithetical to the Fagan analysis.

In addition to the noted flaws in the models used in the analysis of police practice in the Fagan Report, there are issues with the statistical analysis that must also be raised. Some of the issues are rather esoteric points about which statisticians may disagree but others, like which variable are included in analyses, whether the use of

tools like factor analysis are presented in a sufficiently rigorous and transparent way to allow assessment of their contribution to our understanding of police practices, and how findings are interpreted,a ll have to be addressed to assess the analytic process used in the Fagan Report to draw conclusions about the constitutionality of NYPD crime fighting practices. I will argue that the misspecification of the models used in the Fagan statistical analyses make them incapable of substantiating any finding of racial bias in NYPD practice.

The ambiguity of the evidence used to ascertain whether stops by police violate constitutional standards in connection with the Fourth Amendment claim (Note: Professor Fagan finds that the vast majority of stops do meet the standard he sets), and the anachronistic nature of the statistical analyses used in addressing the Fourteenth Amendment claim, mean there is little basis for expecting any meaningful finding to emerge from the intersection between the two claims.

Patterns of Crime in New York

As a problem-solving community-oriented police department, NYPD for the past two decades has addressed the problem of crime, which peaked in 1990 with 527,257 serious crimes including 2,262 murders, 3,126 rapes,100,280 robberies, 44,122 felony assaults, all in the explicitly violent crime categories, and 122,055 burglary, 108,487 grand larceny, and 146,925 grand larceny automobile victims.

To solve the problem of crime, NYPD had to diagnose crime patterns and develop innovative prevention strategies.[10] The diagnoses produced by NYPD showed

[10] Ideology may block the diagnostic approach described here. In an analysis of how four Western European countries responded to the emergence of HIV AIDS as a health crisis, three of the four countries (West Germany, Italy and the United Kingdom) used a public health, target the at risk population approach, but France, due its commitment to "Egalite" did not and does not now collect health data that distinguishes French subpopulations(in other words, there are no hyphenated French citizens). As a result France did not adopt public health interventions as was done in the other countries that paid special attention to the loci in the population of the problem. The result, involving some other factors, was a more rapid and extensive spread of the disease in France than in the other countries, and

unequivocally that crime, especially violent crime,wa s not randomly distributed across the communities of New York. In 1990,the community of East New York in Brooklyn was afflicted by 109 murders, 133 rapes, 3,452 robberies and 1,789 felonious assaults. A Bronx community in 1990 suffered 89 murders, 90 rapes, 2,187 robberies and 1,640 felonious assaults. By contrast, that same year the Greenwich Village community, reported 7 murders, 10 rapes, 1,433 robberies, and 279 felonious assaults.

NYPD's preventive strategies require accurate and timely intelligence about problems, effective tactics, rapid deployment of personnel and resources, and relentless follow up and evaluation. See Figure 1. Police commanders use evidence-based targeting, with rapid feedback, and adaptive responses to changing conditions, not on an annual or even quarterly time horizon, in deploying resources, but on a real-time basis.[11] The goal is to put vigilant police officers where crime, particularly violent crime, is happening, when it is Happening, and to be on alert for the patterns of crime that analysis has found.

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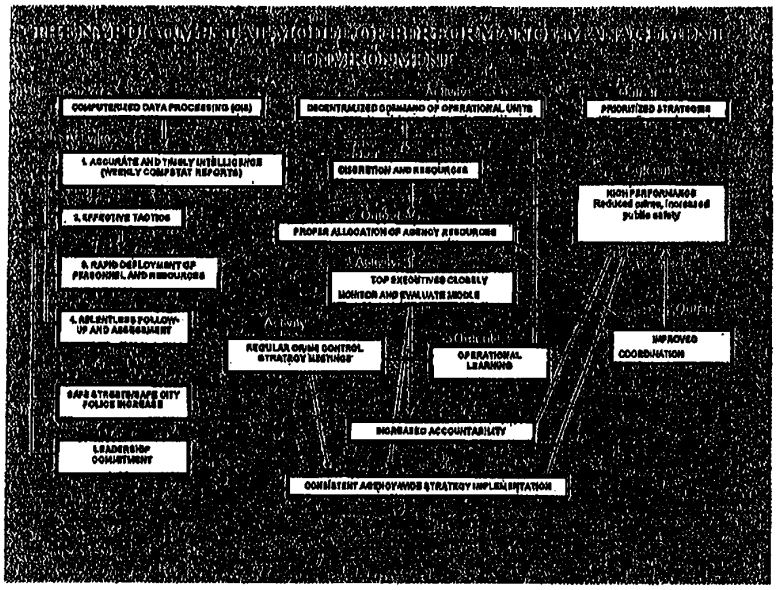
a failure to protect the blood supply used in transfusions. See Steffen, Monika. 2005. "Comparing Complex Policies: Lessons from a Public Health Case. Journal of Comparative Policy Analysis" 7 (4):267-9 To deploy police resources equally across all parts of the City without reference to the evident concentration of the problems of violent crime in some subareas of the City could be seen as an policy based on ideology, not prudent public management.

[11] The process of making evidence based decisions involves different time frames for different levels of decision making. The budgetary process that allocates City resources is an annual process, the selection of Impact Zones operates on a six month cycle, Compstat meetings occur weekly and even though a particular precinct may be reviewed periodically, lessons learned each week relevant to crime reduction are disseminated to all commands and are expected to be used as when they are received. Field command within precincts and in Impact Zones are made on a weekly or even daily basis, subject to review at higher levels of command. See Dennis C. Smith and Robert Purtell, "An Empirical Assessment of Operation Impact: NYPD's Targeted Zone Policing," 2007.

Figure 1. .



Similarly, the diverse population of the City is not randomly distributed. There are predominately affluent and white neighborhoods, like Greenwich Village, largely African American parts of the City, like East New York, and increasingly Hispanic neighborhoods like Washington Heights, which also have higher concentrations of people living below the poverty level.

Crime victimization is also not randomly distributed across the black, Hispanic or Latino, and white population in the City. As shown in Table 1, Black and Hispanics are disproportionately victims of crime.

Table 1. The distribution of crime victimization across Black, White and Hispanic New Yorkers

Victims	Black (24 % of population)	White (35%)	Hispanic (28%)	Total number of victims in these categories- 2009
Murder and non-negligent homicide	57.6%	9.6%	28.9%	453
Rape	40.5	14.7	39.3	1,005
Other felony sex crimes	39.2	15.8	41.1	692
Robbery	31. 0	18.0	38.5	20,642
Felonious Assault	46.7	12.1	35.5	17,035
Grand Larceny	23.8	44.7	20.0	38,877
Shooting Victims	72.8	3.1	23.0	1,729

Source: NYPD, Crime and Enforcement Activity in New York City (Jan 1- December 31, 2009)

As shown in Table 1, in 2009 black New Yorkers were more than twice as likely to be murdered as their share of the population (24%), three times as likely to be shot, significantly more likely to be victims of rape (40.5%) and other felonious sex crimes (39.2%), and assault (46.7%). For Black New Yorkers, the only category in which the share of victimization is slightly less than their population share is grand larceny (23.8%). Robbery victimization among the City's black population, at 31%, is higher than its share of the population but not as dramatically as the other categories of violent crime.

Hispanic or Latino residents of the City, 28% of the population, also experience higher levels of victimization: rape (39.3%), other felonious sex crimes (41.1%) robbery (38.5%) and felonious assault (35.5%). Murder victims in this population are almost

identical to its population share but grand, larceny (20%) and shooting victims (23%) are lower in the Hispanic population than its share.

White New Yorkers are the least likely to be victims of all violent crime except grand larceny. Their disproportionately low share of victimization is most noticeable in the category of shooting victims. Whites are ten time less likely to be victim of a shooting as their share of the City's population. Black New Yorkers, by contrast, are three times more likely to be a shooting victim than their share of the overall population.

Given the patterns of residence in the City these higher rates of victimization for Blacks and Hispanics are not randomly distributed spatially, but concentrated in the specific communities. Almost two third of the murders in 2009 (65%) occurred in three of the City's eight Police Borough commands (Brooklyn North, Brooklyn South, and the Bronx), and less than 3% of all murders in 2009 occurred in Manhattan South. While Manhattan South has a smaller resident population than the boroughs experiencing higher levels of crime, it host on a daily basis a much larger share than other boroughs of the more than 42 million visitors who come to New York annually,[12] as well as at least its share of commuters who come to Manhattan, midtown and south, to work or go to school.

As will be explored more fully later, the ability to determine characteristics of crime perpetrators is not equally distributed across all categories of crime. Burglary and grand larceny automobile are crimes that typically have no information in the complaint filed with the police regarding who committed the offense. For violent crimes, the percent of incidents in 2009 in which the race and ethnicity of victims, suspects (when

[12] From 2004 to 2009 the number of visitors, domestic and international ranged, from 39.9 in 2004, to 45.6 million in 2009, and peaked in 2008 with 47 million. See NYC Statistics at http://www.nycgo.com. The visitors were not merely passing through the airports, stopping over en route to other destinations. The City estimates that visitors annual spending during their visits ranged from a low of $21 billion in 2004 to a high of $32 billion in 2008.

there is a suspect)[13] and arrestee related to the crime varies by category of crime are presented in Table 2.

Table 2. Percent of incidents where race/ethnicity of victim, suspect[14] and arrestee is known 2009

Crime reported	Victim	Suspect	Arrestee	Total
Murder and non-negligent homicide	99.3%	100%	100%	
Rape	95.8	88.5	99.5	
Other felony sex crimes	93.2	75.6	99.2	
Robbery	86.7	82.9	99.4	
Felonious Assault	86.4	68.0	99.2	
Grand Larceny	80.4	52.5	99.2	
Shooting Victims	99.4	65.4	98.4	

Source: NYPD, Crime and Enforcement Activity in New York City (Jan 1- December 31, 2009)

For all violent crime categories, however, except grand larceny, where the theft from a person may occur in a way that does not involve the victim seeing the perpetrator, where there is a suspect, two thirds or more of crime reports provide information about the race/ethnicity of suspects.

[13] The nature of some of the larger volume crime categories, e.g., burglary, happen in ways that often do not yield any "suspect." Violent crimes are more likely produce a suspect, but even in these cases the circumstance surrounding the crime may preclude identifying a suspect on the complaint form.
[14] The denominator for the suspect calculation of "percent known" is the incidents in which there are suspects.

Table 3 shows that the persons committing violent crime in New York City are not representative of the population.

Table 3. Distribution of Distribution of Victims by Race Compared to Suspects in Violent Crime Reports, by Race

Attributed Race of Suspect Compared to Share of Victim Population	Black (24 % of population*)	White (35 %)	Hispanic (28 %)	Total number of crime victims in these categories- 2009
Murder and non-negligent homicide	57.6%/**59.8%**	9.6%/**5.5%**	28.9%/**31.4%**	453
Rape	40.5/ **52.4**	14.7/**7.6**	39.3/**36.6**	1,005
Other felony sex crimes	39.2/**44.8**	15.8/**7.8**	41.1/**46.0**	692
Robbery	31. 0/**70.6**	18.0/**4.3**	38.5/ **23.8**	18,602
Felonious Assault	46.7/**54.3**	12.1/**7.6**	35.5/**33.5**	16,768
Grand Larceny	23.9./**62.4**	44.7/**11.4**	20.0/**23.3**	38,877
Shooting Victims	72.8/**79.8**	3.1/**1.4**	23.0/**18.3**	1,729

Source: Source: NYPD, Crime and Enforcement Activity in New York City (Jan 1- December 31, 2009)

Table 3 shows that both victims and their victimizers are disproportionately concentrated in the black population of the City. Hispanic New Yorkers, victims and suspects, are both higher than their share of the population in all categories except grand larceny, robbery and (even lower) shootings. White New Yorkers, who comprise 35% of the population, are underrepresented in all categories of victimization except grand larceny and even more underrepresented as suspects. Whites are suspects in only 1.4% of shootings, 4.3% of robberies, and 5.5% of murders. The closest Whites approximate their share of the population is in the crime category of grand larceny.

These three maps also show the patterned nature of crime and police responses:

Figure 2.

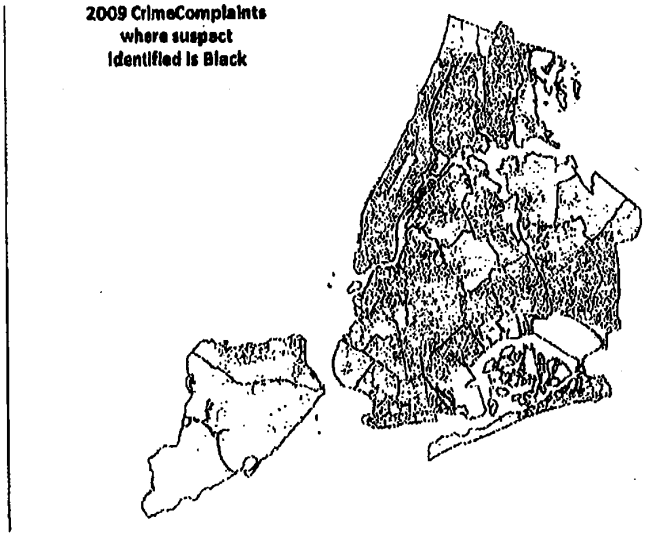


Figure 3.

Figure 4.

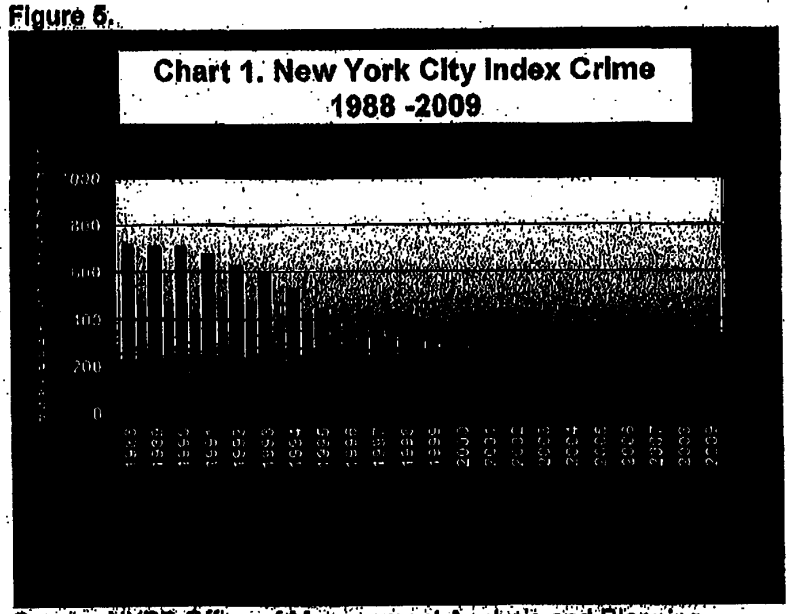
These three maps of show the widespread distribution but also alignment of the pattern of characteristics of those with race attributed to perpetrators by victims, of those stopped and those arrested. Anyone familiar with the City will see that victims identify the suspects as Black in neighborhood that are predominantly Black neighborhoods but also in parts of the City that are predominantly white neighborhoods.

The non-random nature of crime in New York is not only evident in its distribution by race/ethnicity and community. Patterns of crime also vary by gender, with males committing crime vastly out of proportion to their share of the population. Gender is the most dramatic example of the fact that criminal acts are not random. Crime is also not randomly distributed across all ages. Although there is some discussion in the criminology literature of rising crime rates among "elders" and some disputes in the field about when crime propensity is outgrown, there is no dispute that crime is

disproportionately committed by persons starting in the mid teens and persisting at least through the mid-twenties. Even more specifically, males in this age band are disproportionate contributors to the victimization of people *in the communities where they live*. Blacks, males and young combined commit a portion of crime, especially violent crime, very much out of proportion to their share of the population.

The pattern of crime decline in New York is not random either. Since 1990 New York has experienced what University of California Professor Zimring has characterized as a "historic" crime decline.

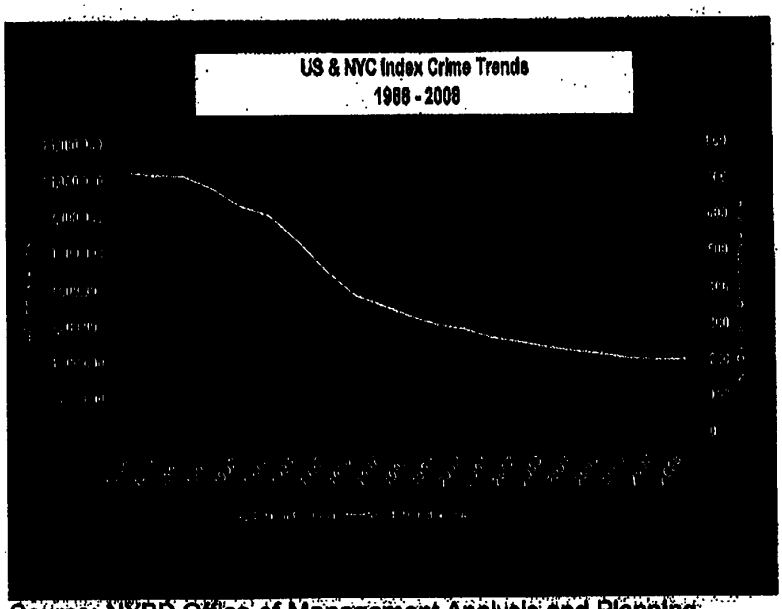
Figure 5.



Source: NYPD Office of Management Analysis and Planning

The crime decline in New York has occurred at a time when crime was declining in many part of the nation, but not consistently in New York State outside of the City. The New York City decline began earlier, declined more steeply and has continued longer that the rest of the country. See Chart 2.

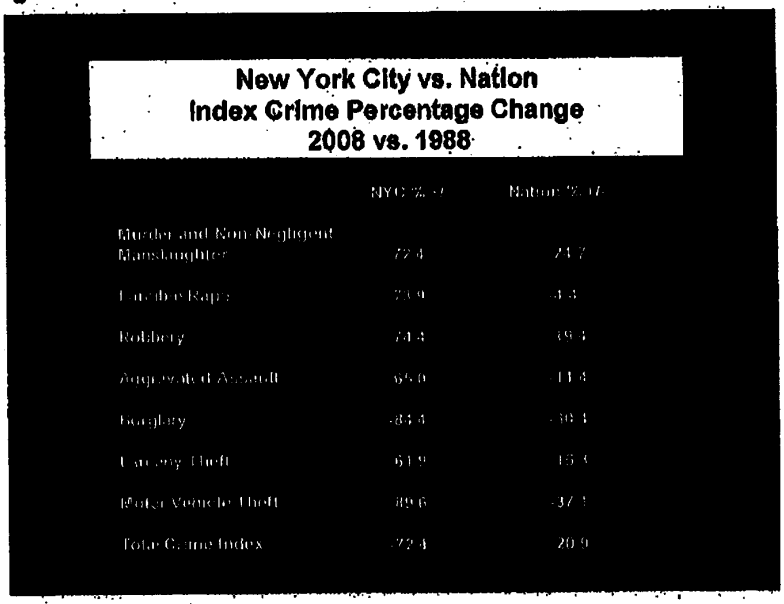
Figure 6.



Source: NYPD Office of Management Analysis and Planning

The success of the NYPD approach to fighting crime is even more dramatically shown in an analysis of specific categories of crime.

Figure 7.



While crime is now down in the nation 20.9%, it is down in New York 72.4%. All categories of major crime show this exceptional performance, but it is especially notable in violent crime. Rape is down 73.9% in New York compared to the nation's 4.4% drop; robbery is down in New York City 74.4% but only 19.4% elsewhere in the United States. Similarly, aggravate assault in the City is down 64.0% compared to 11.4% in the nation.

Given the non-random distribution of crime in the City it should be clear that the beneficiaries of this crime decline are concentrated in the victimized population subgroups. To return to the three neighborhoods cited earlier as examples,crim e is down in East New York, Washington Height and Greenwich Village since 1990. Greenwich Village saw an overall decline of 79.9%, with a decline in murders (1990 to 2009) from 7 to 1, rapes declined 10 to 9, robberies dropped 1,433 to 147, and felonious assaults went down from 279 to 106. East New York's crime declined 75.2%, but that translates into a reduction in murders from 109 to 24, of rapes 133 to 50, robberies 3,452 to 682, and felony assaults 1,789 to 805. Inthe 44th Precinct in the Bronx an 76.8.% overall decline is translates in human terms into a decline in murders from 89 to11 , rapes from 66 to 32, robberies from 2.187 to 408, and a decline in felony assaults from 1,630 to 583. Thus, these comparable percent declines represent hugely positive disproportionate impacts both in terms of the number of lives that were saved and the number of lives that were not disrupted in the communities where they have been achieved. They also show that crime remain a problem in the high crime communities. These examples are not isolated or unrepresentative of the experience in crime reduction in the City. As shown in three maps of crime decline by precinct, the lowest decline in any precinct was 61% and the highest was 87%. Five of the precincts with the lowest crime decline are located in Manhattan where crime was traditionally

lower than in other parts of the City. The most dramatic crime drops occurred in precincts with the largest Black and Hispanic resident populations. Therefore, in both percentage and absolute victimization reduction, people of color shared disproportionately the benefits of greater public safety.

Figure 8.

Figure 9.

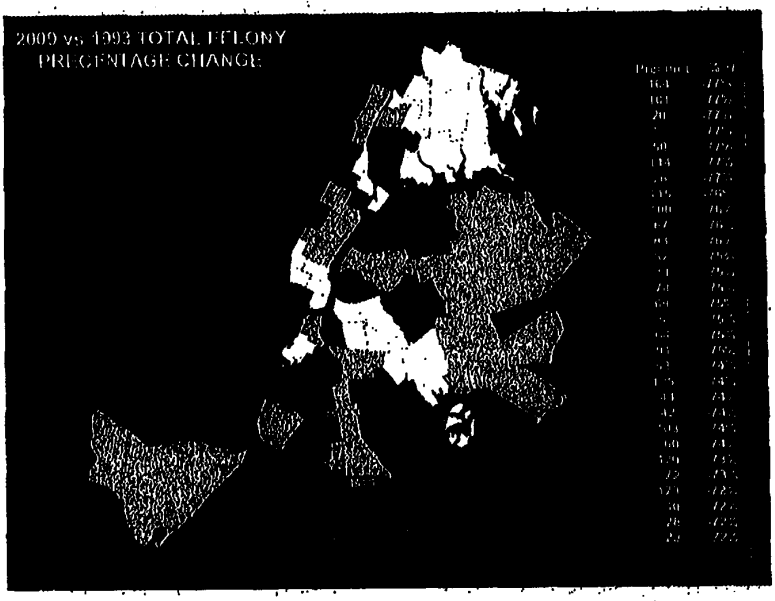


Figure 10

The Revolution in Crime Fighting in New York City

During the 1970s and 1980s period of steady increase in crime American cities and in New York the dominant approach of police departments was random visible patrol and reactive response to 911 emergency service calls dispatched by radio. Police measured their performance in terms of effort, e.g. officer hours on random patrol or outputs, e.g. response time to calls for service, or clearance by arrest rates of crimes known to police. Crime was dutifully recorded throughout this period and presented in annual reports. It was not used as a performance measure but as a reflection of demand for service and a basis for claims in the budgetary process for more resources. The approach of police departments during this period, including NYPD, was validated by leading scholars in the field of police administration from James Q. Wilson who observed in *Varieties of Police Behavior* (1967) that the police administrator "is in the unhappy position of being responsible for an organization that lacks a proven technology for achieving its purpose". Since police cannot prevent crime, Wilson observed, they concentrate on managing response to crime. Another leading student of crime and police, David Bayley who in *The Police for the Future* (1994) claimed, "The Police do not prevent crime. This is one of the best kept secrets of modern life. Experts know it, the police know it, yet the police pretend that they are society's best defense against crime." Bayley further noted that studies of "primary strategies adopted by modern police" found "little or no effect on crime."

The basic premises of the random visible patrol, response to 911 calls, investigative follow up were all the subject of rigorous evaluations in the 1970s and early 1980s. The studies found little or no evidence of their efficacy. These findings, however, had little impact on the practice of police departments across the country, including NYPD.

The widespread assumption among criminologists that police are unable to effectively prevent crime has undergone major revisions in the past fifteen years,

largely as result of what followed the announcement by the Mayor and Police Commissioner of New York early in 1994 that they were setting a target of a crime decline for the year. When the crime decline exceeded that target in 1994 and came down even more the following year, and has continued to decline through 2009, some adjustment was required in the assumptions about police efficacy. Leading scholars have varied in the proportion of the decline they attribute to the work of police but there is wide agreement that the contribution of NYPD's reformed approach to fighting crime, first community policing under Mayor David Dinkins, second the introduction of Compstat in the Giuliani Administration, developed by Commissioner William Bratton and his Deputy Commissioner for Crime Strategies, Jack Maple, and over the past eight years of the Bloomberg Administration the initiative of hot spot policing, Operation Impact, led by Police Commissioner Raymond Kelly. [15]

The Fagan analysis appears to have ignored these development in police management and instead predicates its analyses on the assumption that the production of public safety in New York is based on a strategy of responding to crime after victimizations have occurred rather than the prevention of crime. That assumption is almost two decades out of date and that tactic did not work. The Fagan analysis also assumes that the NYPD crime-fighting strategy is focused and managed solely at the precinct level. [16] That assumption ignores a widely recognized innovation in policing

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[15] Eli Silverman, NYPD Battles Crime: InnovativeStrategies in Fighting Crime (1999), Franklin Zimring, *The Great American Crime Decline* (2007) ,Alfred Blumstein and Joel Waldman, *The Crime Drop in America (2000)*. William Bratton'account of police reform in New York is in Turnaround and Jack Maples's is in Crime Fighter A more scholarly presentation is Dennis C. Smith with William Bratton, "Performance Management in New York City: Compstat and the Revolution in Police Management", from *Quicker, Better, Cheaper? Managing Performance in American Government (2001)*.

[16] The Fagan analysis cites the work of Eli Silverman (1999) in asserting the priority of precincts in the development of crime fighting strategies and police management of resources, including deployment of officers. The initiation of Operation Impact in 2003 explicitly shifted the focus of crime fighting from precincts to "hot spots" within precincts.

New York called Operation Impact that was introduced in 2003. Operation Impact involves an evidence-based selection of small areas called hotspots within precincts where plateaus of a violent crime remain despite extraordinary reduction levels of crime in the city as a whole and in the precincts where the hotspots are found. The Fagan analysis assumes that police crime-fighting tactics are based on a planning model that can use quarters of a year, when "timely intelligence" about crime and "rapid response" have been and remain the central premises of the approach to policing New York since the introduction of Compstat in police management in 1994. Compstat meeting are conducted at NYPD headquarters weekly and the results of those intensive crime pattern review meetings are disseminated within the department immediately. The Department has invested significant resources in the creation of a Real Time Crime Center, another highly specialized unit with NYPD that also focuses on finding crime patterns as they emerge and mobilizing rapid response. For the crime of terrorism, where the NYPD has gained national and international recognition for its preventive approach,h igh level meetings occur daily, not quarterly, with immediate deployment to areas of concern.

To summarize, these fundamental flaws in the Fagan analysis have severe consequences for the appropriateness and efficacy of the models he uses to interpret police practice and their results. The Fagan analysis is silent on the subject of whether NYPD has improved public safety in predominately black and Hispanic neighborhoods. He ignores the evidence that policing strategy is driven by timely information focused on very localized areas. As noted above, the lowest crime reduction result in of the NYPD precincts is more that 60% and some precincts in which a majority of residents are black and Hispanic have experience more than 80% reduction in crime. In the three precincts with more than 75% Black populations noted in the Fagan Report (73, 75, 81) crime declined from 1990 to 2009 by 75.6, 75.2 and 72.0, respectively. One recent

study showed that the level of robbery victimization in low-income neighborhoods by the middle of this decade was substantially lower than it was in high income neighborhoods in 1990.

In the Fagan analysis of "hit rates" in police stops there is no recognition of the fact that the test of success in a proactive, prevention-focused program is not the same as in an assessment of a reactive program. In the Fagan Report,th e fact that few stops result in gun arrests is treated as evidence of the lack of efficacy of these stops. If the goal of NYPD is to pursue practices that convince would be gun carriers to leave their guns at home, why would the fact that over time fewer guns are found in suspicion-based stops be a sign of failure? If in response to concern about safety a frisk is conducted and no weapon is found is this not a positive outcome no weapon is found is this not also a positive outcome. If a public health policy aimed at preventing a particular disease found in subsequent screenings that the incidence of the disease was declining this would not be judged a failure. If the security checks at airports find an infinitesimal number of weapons or bombs would any reasonable person assess this as a failure of this deterrence practice?

Much is made in the media and in the Fagan and Reiter reports about the absolute number of stops (560,000) made annually by NYPD, and the increase in reported stops over the decade.[17] New York is a city of large numbers. Our public

[17] As has been reported elsewhere, and acknowledged in a published study co-authored by Professor Fagan, the process used by NYPD to record police stop activity has been transformed in the past decade. Prior to the revision of the form and currently prescribed practices the UF250 form for recording stops was a paper report with open ended questions, inconsistently completed by officers and collected at the precinct for use by detectives in follow up investigations. The forms were counted monthly and filed. With the introduction of Compstat review meetings and the decentralization of crime data entry in the precincts the counts of UF 250 reports but not the reports themselves were entered in regular reports to headquarters. Following the study completed in 1999 by the office of Attorney General Eliot Spitzer, and the Daniels et al v. City of New York, the police are required to present regularly detailed reports on stop, question and frisk practices. This reporting demand has led to a standardization of the forms and their use. During the decade NYPD has been under both external pressure and internal pressure to achieve consistent submission of UF250 reports and full compliance with the requirement of form completion by officers. Some of the increase in recorded stops is, therefore, not more actual stops, but an increase in *reported* stops.

schools enroll more than a million students. In fact, New York City's under 18 population of 1,940,269 in 2000 is greater than the total population of all but three American cities. The 311 City service call line receives 43,000 calls per day. Between the day it opened for calls in March, 2003, and July, 2007, the City's 311 call center received 50 million calls. New York City's emergency service number, 911, receives on average 38,000 calls a day, or more than 13million a year. The Department dispatches more than 4 million radio runs a year. More than 260,000 noise complaints are forwarded by 311 to the police in a year.

In the Fagan Report,he uses an elaborate construct that compares area precincts and officer staffing with resident population data, adjusted for daytime fluctuations to calculate the exposure of citizens to the probability of police encounters. Another way to calculate the likelihood of a police stop question and frisk occurring to estimate how much police patrol time is devoted to this activity. The fact that NYPD officers are suspicious of citizen behavior sufficiently to make 560,000 stops in one year could appropriately be viewed in the context that the 22,931 police officers, as distinct from sergeants, detectives and other ranks, are on duty a total of approximately 32 million person hours a year. If each stop requires on average twenty minutes of an officer's time, which is an estimate based on the "duration of stop" data in UF 250 reports, and officers are spending less than 1% of their time, less than one minutes out of each hour, while on duty stopping citizens in response to suspicious behavior.[18] A

[18] If all members of the Department of the rank of patrol officer made *one stop a day* the total number of stops would not be 560,000 it would be 5 million. For the percent of patrol time calculation if one uses the lower number of officers in the Rand Study who actually made stops and were included in its analysis, approximately 18,000, the amount of total time available to make stops would be reduced by 22%. And if one further assumes that some stops are made by two officers, for example when they occur in the context of a radio run, the number of hours would be also adjusted downward. None of these alternative scenarios produce a percent of patrol time devoted to stops higher than 3%. In the Rand Study officers were considered "high stoppers" if they made 50 or more stops a year, or less than one per week. As noted above for officers whose explicit assignment is to be vigilant, the message police are given is not, "If you see something, say something." The public's charge to the NYPD is, "If you see something, do something."

question never addressed anywhere in the Fagan Report is the following: If an officer observes suspicious behavior would the plaintiff expect any officer not to take action?

What is the role of stop, question, and frisk activity in the historic crime decline achieved by New York City?

The answer to the question of whether SQF has contributed to crime reduction has to begin with a broader question of the role NYPD has played in this dramatic change in the level of public safety in the City. Rival hypotheses purporting to explain the crime decline include claims that it is largely a myth, that the police "fudge" the statistics,[19] economic recovery, increased levels of incarceration, decline in the use of crack cocaine, among others,[20] and decline in lead poisoning in urban neighborhoods where poverty and crime are concentrated. Professor Fagan at a City Council hearing added gentrification of high crime neighborhoods as leading cause of crime reduction. For some, the fact that crime declined in the 1990s across the United States and in Canada also called into question the role of NYPD reforms (community policing early in the 1990s, the introduction of Compstat (data-driven, crime-reduction focused policing) in the mid 1990s, and the addition of hot spot policing, Operation Impact in the current decade. Over time, evidence has mounted that challenge these rival hypotheses. All of the rival explanations have been seriously challenged elsewhere[21] and will not be those rebuttals will not be rehearsed here except for the claim that crime has not declined as much as reported because the crime reports have been fudged. Since it is part of the critique of the Fagan Report that what NYPD has been doing over the past two decades

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[19] Wayne Barrett, "These Statistics are Crime," in **Rudy! : An Investigative Biography of Rudolph Giuliani**, 2000.

[20] Steven D. Levitt "Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not," *Journal of Economic Perspectives—Volume 18, Number 1—Winter 2004—Pages 163–190.*

[21] Frank Zimring, The City that Became Safe: New York and the Future of Crime Control

is developing successful crime-reduction strategies and practices, it seems useful to establish the validity of the crime data on which that claim is based.

Fudging of crime statistics by NYPD? A study by the author and a colleague compared the data integrity system used by NYPD with practice in the field of urban policing and with professional quality assurance audit standards. We found the combined efforts and procedures of NYPDs Data Integrity and Quality Control units exceed the practices of other departments, and exceed profession association prescribed standards. When audited crime reports were changed based on scrutiny, which a small fraction of reports, increases in seriousness of reports were ten times as frequent as decreases. In addition, NYPD crime reports are highly correlated with the independent annual US Department of Justice National Victimization Survey. To test statistically for evidence of data tampering, we analyzed the stability over time of larceny reports, using the ratio of grand larceny to petty larceny, to see if there were any unexplained shifts in that ratio over time, and found no evidence of any down shifting of larcenies, from grand to petty. To these findings can be added Professor Frank Zimring's report the NYPD murder reports show a .999 correlation with independent medical examiners reports, and almost as high a correlation between police auto theft reports and claims made to auto insurance companies. Thus, all systematic evidence points to the reliability of NYPD crime reports.

Critique of Statistical Analysis of Police Stop, Question and Frisk Practices of NYPD in the Fagan Report

The time available to respond to the use of statistics to address the Fourteenth Amendment claim of disparate impact on Blacks and Hispanics limited the range of tests that were feasible. Professor Fagan has sought and used data from various

sources, such as the NYC Department of City Planning, to add variables of interest, that were not in the original data set I used in several recent studies of the New York Police Department crime fighting programs. In addition, some of the ways variables were operationally defined in the analyses undertaken and reported by Professor Fagan were not explicated sufficiently to replicate the analysis and modify the statistical models in ways that might provide additional insight. The power of doing a replication and comparative statistical analysis is demonstrated in the Rand Report that replicated an earlier analysis presented by Professor Fagan,[22] and added variables based on a different interpretation of the factor at work in policing the City. The Rand approach substantially reduced the Fagan finding of disparate results correlated with race of persons stopped. In this case, modifying Professor Fagan's analysis to include a control for gender of persons stopped might diminish or eliminate his findings that race explains variation in stops. Although Blacks and Hispanics are stopped by NYPD at higher rates than whites, compared to the entire Census counts of these subpopulations, this over-representation is much smaller than the difference in stop rates among males compared to females. Women comprise more than half of the City's population, a fact that most likely persists in all characterizations of the population (resident, daytime/night time, weekend, commuter, visitors (which approximate 44 million annually). As is shown (p.22) in a Table 3. Age, Gender, and Race or Ethnicity of Persons Stopped, 2004-2009 (%) in the Fagan Report, but not used in any of the statistical analyses, *nine of ten persons stopped by NYPD are men: White males (89.02%), Black males (92.2%) and*

[22] Andrew Gelman, Jeffrey Fagan nd Alex Kiss. An Analysis of NYPD Stop-and-Frisk Policy in the Context of Claims of Racial Bias, "Journal of American Statistical Association, 813 (2007)

Hispanic males (92.2). Gender is highly correlated with crime[23] and police stops, and is thus an appropriate candidate for a control variable.

Our analysis of 2009 stop and frisk data show distributions similar to those reported in the Fagan Report.

Table 4

Gender	Stops	%	Arrests	%
Female	38,951	6.76%	11,398	3.49%
Male	529,172	91.81%	311,156	95.16%
Unknown/Unspecified	8,271	1.43%	4,414	1.35%
Total	576,394	100.00%	326,968	100.00%

[23] According to the FBI Crime Report (2009) of total of 357,014 violent crime arrests 289,066 were male, 67,948 were female, In other words, 81.0% of those arrested for violent crimes were male. For murder the males share of arrests was 90.1. for rape the male share was 98.8, and for robbery it was 88.0.

Figure 9

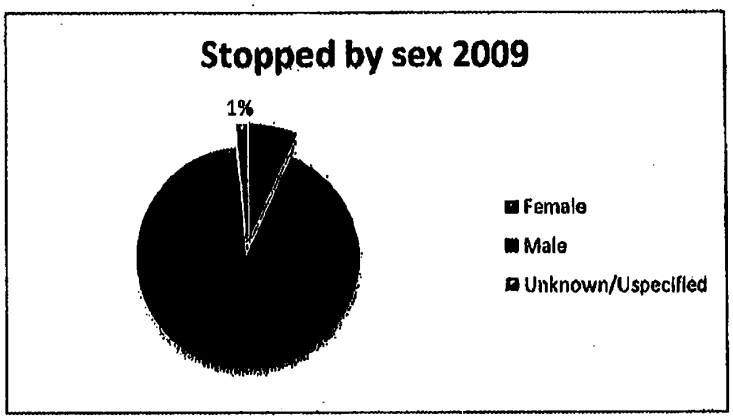
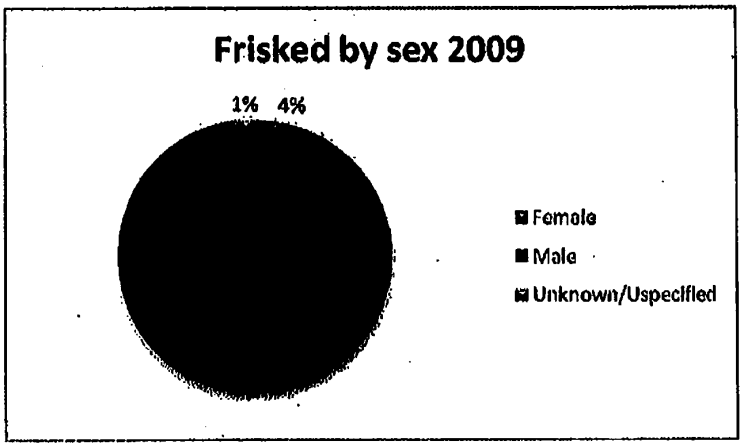


Figure 10



Stops by age are also not randomly distributed, as shown in both Table 3 in the Fagan Report and in our analysis of 2009 stop data. Both show the expected, based on crime pattern analysis, a concentration of stops in the ages 15-24.

Figure 11

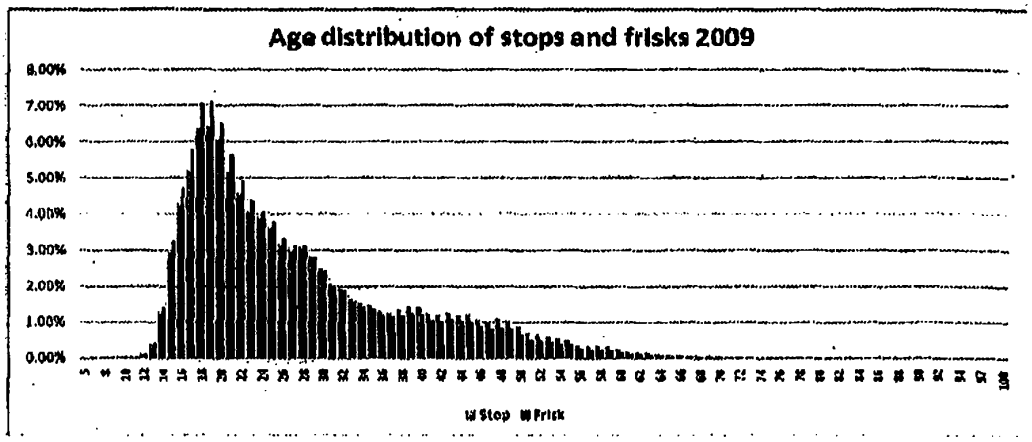
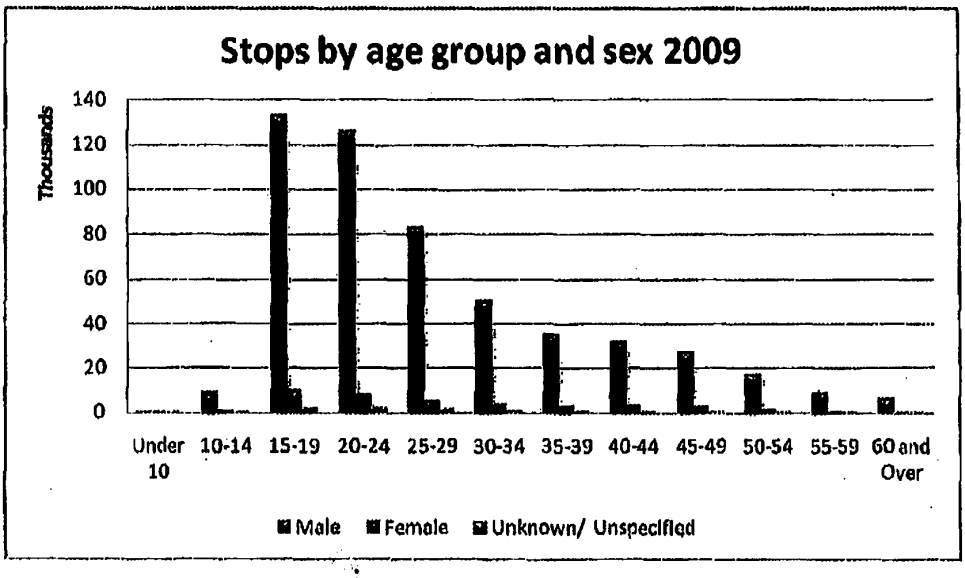


Table 5

Age Category	Stop Count	Stop Percent	Frisk Count	Frisk Percent
Under 10	17	0.0%	6	0.0%
10-14	10,326	1.8%	6,235	1.9%
15-19	144,496	25.1%	90,657	27.8%
20-24	136,021	23.7%	82,777	25.4%
25-29	89,520	15.6%	52,213	16.0%
30-34	54,539	9.5%	29,964	9.2%
35-39	38,719	6.7%	19,657	6.0%
40-44	35,597	6.2%	17,125	5.2%
45-49	30,502	5.3%	13,811	4.2%
50-54	18,667	3.2%	7,760	2.4%
55-59	9,876	1.7%	3,904	1.2%
60 and Over	6,714	1.2%	2,313	0.7%
Total	574,994	100.0%	326,412	100.0%
Missing	1,400		556	

Figure 12



The omission of gender and age in Fagan's analysis, which otherwise argues for using population characteristics to benchmark police stop patterns, biases results. It would have been informative to replicate Professor Fagan's analysis and then include the gender variable in the multiple-regression to test this plausible hypothesis. Similarly, although the Fagan Report estimates the population available to encounter the police, the analysis does not adjust for unemployment patterns, which are notably higher among young, Black, and Hispanic males, who are also often identified as suspects, stopped on suspicion, and arrested by the police. Those who are unemployed have potentially forty additional hours a week to be on the street and to encounter the police on patrol. I will return to the issue of problem of choosing which variables to include in the analysis, but first a review of the problem of a mismatch between the model of policing that informs the statistical analyses in the Fagan Report and model used by NYPD to police the City.

The largest problem from a statistical perspective is that Professor Fagan's explanation of police practice does not reflect the way NYPD currently polices the City, nor the way NYPD policed the City during the period studied (2004 to 2009). The Plaintiff contends and the Fagan analysis portends to support through complex statistical analyses that NYPD officers make decisions to stop, question and frisk persons they encounter on the street because of their Black or white race or their Hispanic or non-Hispanic ethnicity. In contrast, the City and NYPD leaders contend that the police make stops based on a strategic approach to crime reduction that relies heavily on using past crime data to prevent future violent crime. To compare these completing claims, the Fagan analysis should have considered whether the NYPD's careful analysis of crime patterns to focus on violent crime reduction led NYPD to increasing deploy officers in the neighborhoods where the City Black and Hispanic population are concentrated. Without doing so, the results reported by Professor Fagan arguably measure the impact of an evidence-driven crime-reduction strategy rather than race which is highly-correlated with crime and the descriptions of suspects that the police act on. To support his claim, Professor Fagan must separate these two effects and show that after controlling for the impact of all available evidence, racial bias remains. For example, early in effort to reduce crime in the mid 1990s, when Safe Street/Safe City funding enabled NYPD to restore some of the patrol strength lost in the wake of the 1970s fiscal crisis, the SatCom deployment sent more than 4,000 additional officers to one Borough (principally Brooklyn North), to combat drug crime; this deployment represented more officers than most police departments in the country have in their entire department. Crime that year dropped in the area selected for this

deployment.[24] Since 2003, the Operation Impact initiative has used careful weekly statistical monitoring of crime patterns to adapt current deployment strategies in an effort to prevent violent crime. In percentage terms, the reductions in serious crime has been remarkably consistent through all boroughs and precincts. This is not an accident but the result of an approach to crime reductions that focuses on targeting resources where violent crime is most evident. Brooklyn North was not randomly selected for extraordinary anti drug crime enforcement in the mid 1990s. It was selected because at the time, it was the epicenter of drug related violent crime.

The Fagan analysis reflects a very academic rather than practical view of the use of evidence in police decision making. Academics have the luxury of taking the necessary time to ensure that all data required for the planned analyses are available. Police and other public managers have to make decisions on the best available data, rather than wait for ideal data. Professor Fagan questions the use of crime statistics in police decision making because it is well known that not all crime is reported to the police. National crime victimization studies find that the unreported crime of concern to Professor Fagan are highly correlated with the crime reported to NYPD.[25] Even without this evidence, it seems reasonable for the police to use observed crime as an approximation of the whole picture (observed and unobserved crime) to guide the Department's crime fighting effort. The idea of acting on the "best evidence available"

[24] The development of this intense and coordinated attack on drug related crime in Brooklyn North, originally named Operation Juggernaut, and its success in its first year, is recounted in both by William Bratton in Turnaround, and Jack Maple, in Crime Fighter. For an evaluation of SatCom see Dennis C. Smith and Joseph Benning, " An Empirical Assessment of Seven Years of SATCOM: The NYPD Command Structure in Brooklyn North" A paper presented at the 26th Annual Research Conference of the Association for Public Policy Analysis and Management (APPAM) in Atlanta, Georgia November 3-5, 2005.

[25] Despite the 100,000 respondents to the National Crime Victimization Survey New York City is one of the few cities that has a subsample of respondent of sufficient size in the total sample for separate analysis. The finding of a high correlation between victimization patterns found in the survey responses and NYPD reported crime complaints is in Langan, Patrick A., Durose, Matthew R. (2003, December). *The Remarkable Drop in Crime in New York City*. New York: Bureau of Justice Statistics.

also applies to the police use of known suspect patterns to assess whether the patterns of stops by officers manifest evidence of racial or ethnic bias. Known suspect patterns are highly correlated with the population characteristics of victimization and places where victimization are concentrated, as well as with arrest and conviction patterns. Professor Fagan, however, criticizes the mathematics of the Rand report's use of known suspect patterns as a benchmark (e.g., The Rand report's use of 71.10% of robbery complaints where the suspect known are Black):

> In such cases 72.54% of suspects were Black. However, these statistics fail to consider the 45.85 % of violent crime complaints in 2005 and 46.56% in 2006 where race of suspect is missing or unknown. Some simple arithmetic shows that Black were in fact identified as the suspect race in only 38.50% of all violent crime complaints (.7110 x. 54.15) in 2005 the benchmark year for the analyses in Figure 3.1. Information about the 45% of cases where the suspect race was unknown in violent crimes was not incorporated into the analysis, and the analysis proceeds without accounting for the selection bias of racial identification in violent crime complaints....

Professor Fagan continues:

> We cannot know the data generating process by which the large set of non observed cases of the missing suspect race were created, and thus are challenged to make reasonable and testable assumptions about their distribution. Yet the analysis proceeds simply by excluding these cases without accommodation for the potential biasing effects of the characteristics of other violent crimes. The analysis proceeds assuming that the distribution of race in the totality of stops assume (where it is known), or even in this subset of crime complaints, is similar to the distribution of race known cases.[26] There is no basis to that inference, and conclusion based on analyses that ignore this selection process is unreliable.

Is there any reason for the police or analysts of police behavior to believe that whites are disproportionately committing the violent crimes in the cases where the suspects' racial and ethnic identity is unknown, but the pattern of victim race and ethnicity, and the location of cases with unknown suspect characteristics, are the same as crime patterns with known suspects? Are the police to believe, without evidence to even suggest it, that there is an undetected wave of crime by white perpetrators in these communities?

[26] There is something wrong in the construction of this quoted sentence but the author's intended point seems clear.

Without a theory that presents a plausible reason to believe that known and unknown cases differ dramatically, extrapolating patterns from the known to the unknown is consistent with decision-making on the "best available evidence." It must also be noted that the allocation of police resources strategy using this "best available evidence" approach is validated by the continuing success in the, to be sure unfinished, mission of improving public safety in high crime City neighborhoods. There is ample evidence in work I have done with a colleague of the effectiveness of the use of the "best available evidence" in the NYPD's Operation Impact policing initiative in minority neighborhoods throughout the city where crime pattern data were used to deploy additional officers to very-localized areas which evidenced persistently higher levels of crime.

Professor Fagan offers no argument or evidence to support a rival hypothesis that perpetrators of crime in predominantly Black and Hispanic neighborhoods in the City are whites, significantly out of proportion to their residency in those neighborhoods. Without such support, there is no basis for the claim that stop and frisk activity disproportionately targets Blacks and other minorities. Rather, the reasonable conclusion would be that stops are proportional to reports of suspect descriptions and supportive of the argument that they are a proportional response to that information. Certainly, recent commentary by Black religious leaders from Brooklyn do not subscribe to the proposition that whites are entering their communities and victimizing Black families. Recently,a task force comprising 37 members of the clergy from Brooklyn spoke at press conference with Police Commissioner Raymond Kelly and emphasized the importance of addressing Black-on-Black crime[27]:

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[27] Al Baker, "Police Heed Black Clergy and Set Up Crime Panel," New York Times, September 29, 2010. See also Sean Gardiner, "Brooklyn Clergy and NYPD Form Partnership," September 30, 2010: Asked about the current state of police-community relations and especially how the NYPD's "stop, question and frisk" policy is received by locals, Craig said that "quite often" people in his neighborhood don't understand why they're being stopped. Craig said he hopes the task force will make clergy better

Bishop Gerald Seabrooks of Rehoboth Cathedral International, said:

> We, the Brooklyn Clergy-NYPD Task Force would like to commend NYPD's Police Commissioner Kelly and the State of New York's Division of Parole Chairwoman Andrea Evans for coming together with this body. We are here to send a message that we want to stop homicide, violence and shootings of any kind of people, but especially we want to speak out on black-on-black shooting, hurting and harming one another. By working together we realize that we make our city, borough and communities a safer place to live in. We do not want our children going to school in fear. We want to ask the black community to stand with us to denounce all killings of any nature and stand with us in this monumental task. Churches across this city will come together in our efforts to help our young people find Godly principles instead of violence. We thank the many churches who stand with us in our address today and to those that will come abroad. We ask that you stand with us to stop violence against our children, our precious resources. We buried too many children and counseled too many going to school with negative and poor images about our people. This is not our heritage. It is now mothers and grandmothers out-living their children. We have to take a self-assessment at what is going on and deal with four factors: 1) Self-Honesty: We are tired of black-on-black crime, shootings and killings; 2) Self-Image: What is being perceived is not our greatness; 3) Self-Awareness: We are going to become a model and denounce and stop violence in our communities to make it a better place; 4) Self-Responsibilities: We are killing ourselves with black-on-black crime. We cannot blame it on the police or others. Dr. Martin Luther King, Jr. said "Injustice anywhere is a threat to justice everywhere. Thank you and God bless you.

Rev. Dan Craig of Mount Zion Baptist Church of Brownsville said:

> As members of the Clergy, we are increasingly concerned by the amount of crime within our Brooklyn communities. We have come today to strongly and categorically denounce all black-on-black Crime as well as crimes against any person regardless of race, ethnicity, religious beliefs or any other factor. We come reaching out to all segments of our community, asking that they join us in this effort to make our communities safer for all and to work with us to achieve our goal of dramatically reducing crime and violence. We, the members of the Clergy, realize that in order to achieve meaningful and measurable success this must be an all inclusive effort. Therefore, members of the Clergy shall engage in meaningful and continuous dialogue with leaders in various segments of the community, including those who may be engaged in violence or other criminal activity. It is our prayer and firm belief that, working together and being led by The Spirit of God, we can make a difference and the time for making that difference is now.

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positioned to explain why police make those stops — and also to urge police to use caution and care when stopping people in their neighborhoods.

When the Bloomberg administration came into office in 2002, the problem of crime city-wide was dramatically less than under previous administrations. However, because the 1990 peak in violent crime in New York City was so high, even with reductions of two third in some categories, murders down by hundreds, rapes reduced by several thousand, and tens of thousands fewer robberies and assaults, grand larcenies and burglaries, crime still plagued the City. The evidence-based targeting of resources and police vigilance approach that was used in the 1990s was used to refine the crime fighting effort by focusing on local "hot spots" within precincts where plateaus of violent crime remained relatively high. During the entire time studied by Professor Fagan, a major feature of NYPD practice was a focus on very small local area hot spots (some Impact Zones were only several blocks square), which led to disproportionate police presence and vigilance, and thus stops, in specific Impact Zones.

In addition, at the start of the new administration the 9-11 attack had significantly increased pressure on NYPD to guard the City against terrorist attacks. More than a thousand NYPD officers are now deployed in either the Counterterrorism or Intelligence divisions of the Department, but the entire department has been put on a heightened sense of alert. The public has been repeatedly admonished to say something if they see something, but the command to police is they see something, do something.[28]

The analyses conducted and reported by Professor Fagan do not address these realities of the effectiveness of police practice, and do not consider the evidence that shows that Operation Impact significantly accelerated the existing downward trend in reported violent crime in the City. Additionally, Professor Fagan's analysis, which aggregates data to the police precinct level, ignores variation within precincts, such as the existence of one or more Impact Zones. Like the first phases of crime reduction

[28] Christopher Dickey, **Securing the City: Inside America Best Counterterror Force—NYPD**, 2009

under the community policing approach in the early 1990s when the upward trend in violent was finally stopped and the Compstat period introduced in 1994 after which crime trends plummeted, to the current Operation Impact strategy (2003 to the present), the parts of the City that have experienced the greatest relief from crime victimization are the low-income neighborhoods with high Black and Hispanic populations. Robbery rates (a high volume violent crime compared to murder and rape victimizations) in the ten precincts with the highest concentrations of poverty are lower today than they were in the wealthiest precincts in 1990 (in the precincts with the highest mean income).[29] There has been a positive, disproportionate impact in the form of dramatically reduced victimization on Black and Hispanic residents, men, women and children, of the proactive, data driven approach to police during the past decade and a half. As a by product of reduced crime commission fewer young Black and Hispanic males are being arrested for felony offenses, being convicted and imprisoned. The Fagan Report does not address nor test the hypothesis that the pattern of police stops can be explained the crime prevention strategies employed by the NYPD, epitomized by Operation Impact, the City's hot spot policing initiative.

Statistical analysis is a powerful tool and it can be persuasive if properly and carefully used. In addition to the larger issue of the failure to address the rival hypothesis that patterns of violent crime, not race or ethnicity, explains variations in police practice across the City and the people who reside, work and visit here, I will now consider some of the ways Professor Fagan's use and interpretation of statistics are problematic.

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[29] Dennis C. Smith and Robert Purtell, "Crime Reduction and Economic Development in New York City: The Re-distributional Effects of Improving Public Safety " A paper presented at the 27th Annual Research Conference of the Association for Public Policy Analysis and Management (APPAM) in Madison, Wisconsin, November 3-5, 2006.

In a footnote (page 31), Professor Fagan states:

> All models for control for the one calendar quarter lag of logged crime complaints. The log transformation of the actual number of crimes is used. Log transformation is necessary to adjust when distributions are highly skewed and nonlinear. The lag reflects the planning process whereby SQF and other enforcement activity are adjusted to reflect actual crime conditions. Although Compstat meeting occur more often, using a lag that is too short can confuse naturally occurring spikes and declines in crime with reactions to policing. Calendar quarters in effect adjust for those naturally occurring variations.

In this short note, Professor Fagan summarizes a significant part of the problem with his analysis. As is explained here, the use of log transformed crime counts (not crime rates adjusted for population) has the effect of smoothing the "highly skewed and nonlinear" or other non-random occurrences of crime. Quarter lags (rather than the weekly adjustments reported by the NYPD) are used in order to reduce the effects of "naturally occurring spikes and declines in crime" and distinguish them from "reactions to policing." Contemporary police management is predicated precisely on the assumption that crime patterns are "skewed" and spikes in crime are exactly the occurrences, natural or otherwise, that do and should provoke rapid police response. Indeed, the NYPD has explained to me that they adjust their practices based on a weekly review of past crime data. Professor Fagan's note indicates that the analysis was done in a way to deny the possibility that "reactions to policing" might be found to explain police response to an impact on crime. In effect, Professor Fagan's analysis assumes away the real impact that evidence-based policing has had on crime, rather than properly accounting for its impact before attempting to measure what part, if any, race played in police stop decisions. The use of crime counts instead of crime rates is another significant weakness in the analysis and findings reported because of varying populations within precincts. Elsewhere Professor Fagan has gone to some lengths to introduce population estimates in his analysis but in this analysis where it could be significant it is missing.

It is customary in rigorous empirical research to provide clearly stated conceptual and operational definitions of variables (what they mean and how they are measured), but in the Fagan Report those expectations are not consistently met. Without clear definitions and theoretically-based arguments about appropriate control variables, it is difficult to interpret and replicate his findings.

I have noted previously in the discussion of Professor Fagan' coding procedures the difficulty of interpreting the report's claim that some stops are constitutional, unconstitutional, or justified or unjustified, and others are insufficiently documented without clear specification of the operational definitions that enabled the report to characterize hundreds of thousands of decisions made by officers policing the streets of New York City.

One notable example of weak operational definitions is in the coding and description of the race variable, which is a primary variable of interest. Race is obviously a key variable in the report as it is reported crime and suspect-description statistics, but its definition is not consistently defined or applied throughout Fagan analysis. In one place the report combines non-Hispanic Black and Hispanic Black:

> The racial distribution of stops has been discussed widely, both in official reports from the City as well as a variety of secondary analyses by organizations and agencies in New York. Over half the persons stopped - 51.52% - over time were African-American. Table 3 shows that both Hispanic Blacks and Non-Hispanic Blacks are included in this category.

The report does not clarify whether this is the way race is operationalized throughout the report,[30] nor does it address the fact that in other analyses (including the NYPD report on Crime and Enforcement Activity in New York City), the "Black" category explicitly excludes Hispanic Black:

> Black Hispanic and White Hispanic categories have been combined into a single Hispanic category for statistical tables and charts presented in this report.

[30] When numbers are available in the Fagan tables it appears that in fact the definition used is based on the same definition as is used by NYPD, but the point is the need for clarity.

The categories Black and White used in tables and charts presented in this report therefore represent Black Non-Hispanic and White Non-Hispanic.

The definition of race described and presumably used in this analysis by Professor Fagan, and the definition used by NYPD are clearly different. If this is the case such differences pose problems for assessing competing claims about the role of race and ethnicity in policing New York.

A major issue is the likelihood that there are omitted variables in Fagan's analysis. As noted, Fagan does not control for unemployment and known suspect patterns, gender or age. We know that stop question and frisk patterns vary along these dimensions, and are also correlated with crime. Omitting these variables from the model leads to omitted variable bias. An alternative way to describe this is that there is potential "confounding" by known suspect patterns, age and gender. Omitted variable bias (confounding) can distort the observed relationship between the likelihood of observing suspicious behavior by a particular population subgroup and the likelihood of being stopped by an NYPD officer.T he estimated relationship between race and SQF activity may diminish after including these important control variables. Since they are not included in the analysis we can only hypothesize how the results would be altered.

Professor Fagan discusses of the need to include all important explanatory variables in regression analysis. He observes, for example (p.13) that "The goal of specifying these models is to identify the effects of race on outcomes after simultaneously considering factors that may be relevant to race. Failure to do so raises the risk of 'omitted variable bias' which could lead to erroneous conclusions about effects of variables that do appear in a regression test."

Professor Fagan uses an inaccurate technical definition of "omitted variable bias." Two conditions must hold true for omitted-variable bias to exist in linear regression: the omitted variable must be a determinant of the dependent variable (i.e.,

its true regression coefficient is not zero); and the omitted variable must be correlated with one or more of the included independent variables. Omitting variables that meet these two conditions from the model leads to omitted variable bias, which would result in substantive changes to the estimated relationship between the independent and dependent variables.

The Fagan Report addresses the issue of potential exposure to police encounters as an important consideration and includes some control variables that relate to this factor; yet these analyses omit unemployment rates for young Black and Hispanic males, which is likely correlated with both the outcome and the main effect (race). This is another instance where there is reasonable concern about an "omitted variable bias." I have previously noted that Professor Fagan states in his report (p.7)

> Analyses were conducted using police precincts as the principal (sic) unit of analysis. Precincts were used instead of smaller geographical areas (beats sectors, census block groups, census tracts) because precincts are the unit where police patrol resources are aggregated, allocated supervised and monitored. Precinct crime rates are the metric for managing and evaluating police performance and are sensitive to tactical decisions in patrol and enforcement.

The concern with this statement noted earlier is that the characterization of police management appears to be based on two cited books published in 1998 and 1999. This characterization has been out of date at least since the 2003 launch and subsequent success of Operation Impact (hot spot policing). Since 2003, hot spot policing *within* precincts has been solidly established as a central police strategy.

The statistical problems are further compounded by the of the use of precincts as the unit of analysis. This is a problem because precincts are not homogenous with respect to either population or crime patterns. Within precincts, there may be a large difference in racial and socioeconomic characteristics by block or police beat. Fagan acknowledges this in his sensitivity analysis which takes into account public housing

complexes. He also acknowledges it on pg. 30: "Precinct commanders are accountable for precinct-level statistics on crime tends, though they have discretion to allocate officers tactically within precincts to specific beats or sectors." (emphasis added) The use of data aggregated at the precinct level, when the object of a study is to focus on localized effects within a larger unit, is known as "ecological fallacy" and "Simpson's paradox." RAND explains issues with Simpson's paradox when looking at data aggregated across NYC (see RAND pg.41) but there is no consideration of the potential ecological fallacy in Professor Fagan's analysis.[31] Large units of analysis which do not include appropriate controls can distort the observed relationship between patterns of stops and population characteristics, given the evidence of different criminal activity across sub groups, especially when one variable is aggregated at a higher level (precinct) and another variable is at the individual officer behavior level (stop decisions). It is hard to anticipate what the distortion may be.

The sensitivity analysis reported by Professor Fagan combines racially mixed and predominately white precincts (p. 43). These are not homogenous groups with respect to the factor he is trying to isolate for analysis. Lumping these groups likely distorts the effect between the likelihood that the police will encounter different population mixes on the street and the frequency of observing suspicious behavior. There is no conceptual basis for thinking these precincts are similar. When a step such as this appears in statistical analyses, it is typical characterized as a "data fishing exercise," in which the analyst manipulates the data to generate desired results. At a minimum, it suffers from inadequate explanation.

[31] This point was raised specifically in the criticism above of the explanation provided by Professor Fagan of his use of log transformed precinct level crime statistics.

Professor Fagan uses a logistic regression to look at various stop outcomes (page 69). This is certainly appropriate for the outcomes listed in Table 16, because the events in the analysis happen with a relatively high probability. However, the general model framework tends to be very sensitive to specification when the probability is very low—as is the case with weapons, guns, and contraband. Here, according to standard statistical practice, Professor Fagan should have tested alternate specifications, such as relative risk regressions, or probit models. While it is not clear that his results would differ under alternative specifications, a more careful analysis would have included sensitivity analyses to determine how sensitive the results were to the model specification. Again, this issue persists for for all of the outcomes that happen with low probabilities.

Questions must be raised by the claimed use in the Fagan Report of "principle components factor analysis." Principal components analysis (PCA) and factor analysis (FA) are two distinct but related methodological tools. (See Sharma, 1996, *Applied Multivariate Techniques*). In the discussion of the use of factor analysis there was minimal description of the underlying data structure, and the factor loadings which are used to make the larger index. One major criticism of these techniques is that they are empirically (rather than theoretically) derived. That means that the pattern loadings will change across datasets. Subsequent regression results may be heavily impacted by analytic decisions on the factor analysis. In the results, the report does not clearly explain what the "SES Factor" means—does a high value indicate relative wealth or relative poverty?

Standard analysis using this tool presents extensive statistical output that shows various sensitivity analyses, including alternative specifications such as how to rotate the data (e.g. varimax rotation). It would show how these alternative specifications would affect

the regression models, and how that might change interpretations of the statistical model. Typically, analysts using factor analysis would also consider alternative ways to combine the variables into a composite index, such as creating scales that sum the items and would also contain a clear description of the values of the summary variable ("SES Factor") and what high and low values mean.

Some of the interpretations of findings in the Fagan Report are flawed, such as the report's claim (p. 32) that "It is also noteworthy that the size of the coefficients for Percent Black and Percent Hispanic are more than three times greater than the size of the coefficient for the crime rate." It is not meaningful to compare the magnitude of coefficients unless the variables represent data with similar underlying distributions. Coefficients are interpreted in terms of a one-unit increase in the in percent Black is not the same as a one-unit increase in crime rate, but Professor Fagan fails to recognize that the predictor variables have different underlying distributions and measurement scales used. Two ways to compare the magnitude include: (a) using standardized coefficients, or (b) calculating the expected change in Y for a given change in X, and describing the effect in a few sentences.

In all regression tables throughout the report, Fagan does not explicitly discuss the signs, magnitude, and significance of control variables, which makes it impossible to interpret those coefficients. Control covariates that do not have effects consistent with what would be expected based on theory may indicate problems with the model specification. It is difficult to assess Professor Fagan's findings because he does not link the signs and significance of each control variable to what is expected based on theory. Standard practice would be to omit any statistically-insignificant variables that were not justified on a theoretical basis and, at a minimum, to report results with and without those variables. Since parameter estimates in regressions are conditioned both on the data set as well as the variables included in the models, failing to report results with and

without statistically-insignificant variables calls into question both the validity of the results that professor Fagan presents in his report as well as his interpretation of those results. For example, the presentation of the SES Factor variable in Table 5 (pg. 33) should describe how the variable should be interpreted, whether theory would predict a positive or negative sign, and how the regression results compare to what is expected. Professor Fagan, by dropping variables from the analysis, is introducing omitted variable bias, then reporting surprise when his coefficient on race changes, but that is what is expected to happen.

Commentary on the tables (e.g. Table 6, pp. 36-38) should describe whether the coefficients have consistent interpretations across the model specifications. If they don't (which they do not), the commentary would provide text to clarify unexpected results.

The idea that the distribution of police action across subgroups should be compared to their share of the population implicitly assumes that crime is randomly distributed when all evidence is to the contrary. This is exactly the issue that Professor Fagan uses to criticize the Rand study when he faults them for using incomplete data on suspect descriptions. Professor Fagan's failure to control for race as reported in the available data, dismisses the claim that stop and frisk activities are justified by the available evidence without disproving it.

Challenging rival hypothesis is the norm in scientific inquiry. Professor Fagan has expressed his doubts about the distribution of known suspects as an explanation of the pattern of police stops. Controlling for suspect description, at least for violent crime where the proportion is known is appreciable and is the focal point of police strategy, would have been an appropriate way to examine the claim of the NYPD that he contests--- but does not directly test.

The use of crime lagged by past quarter in analyzing the work of a police department that is committed to rapid response to crime surges, further discredits his

analysis. A study in 2008 [32]showed that stop and frisk had a statistically-significant impact on the rate of decline in crime but that the effect dissipated within one month at the longest. This is consistent with my discussions with the police, who reported that they immediately adapt their police deployment based on the prior week's crime data. Further, Professor Fagan erroneously assumes that precinct-level analysis reflects police practice when the focus on small areas within precincts ("hot spot" policing) has been the NYPD's widely noted and effective approach for the past eight years. Finally, the interpretation of a decreasing number of weapons found in stops made by police based on suspicion as a failure when the prevention goal of the police is to remove guns and other weapons used in violent crime from the street reflects the success of stop and frisk activities not its failure.

.All of the statistical issues encountered in the analyses in the Fagan Report and noted above contribute additional weight to the conclusion that neither the Fourth Amendment nor the Fourteenth amendment claims are supported by the evidence presented.

The Fagan Report's analysis of the Rand Report

In the face of charges of racial profiling by NYPD based on a claim that the pattern of stops of Black and Hispanic pedestrians by the police were not proportionate to their share in the population of New York, the NYPD engaged the Rand Corporation, a distinguished public policy research institute, to study and report on the claim that police stopping practices reflect bias. The extensive study, whose primary author is a leading police practice scholar, countered that using population characteristics to benchmark

[32] Dennis C. Smith and Robert Purtell.,"Does Stop and Frisk Stop Crime?—A draft paper prepared for presentation at the Annual Research Conference of the Association of Public Policy and Management, Los Angeles, Ca., November, 2008

patterns of police stops did not meet normal standard of research methods. In a forthcoming book, Ridway and McDonald explore alternative approaches to benchmarking and reflect on the approach used in the 2006 NYPD study[33]:

> The crux of the external benchmarking analysis is to develop a benchmark that estimates the racial distribution of the individuals who would be stopped if the police were racially unbiased and then comparing that benchmark to the observed racial distribution of stopped citizens. The external benchmark can be thought of as the population at risk for official police contact. As we will see, estimating the appropriate population at risk is complicated. Crude approximations of the population at risk for police contact are poor substitutes and can hide evidence o racial bias or lead to exaggerated estimates of racial bias.

> There is a compulsion in media reports on racial disparities in police stops to compare the racial distribution of the stops to the racial distribution for the community's population as estimated by the US Census. For example, in 2006 in New York City, 53% of stops police made of pedestrians involved black pedestrians while according to the US Census they comprise only 24% of the city's residential population. When the two racial distributions do not align, and they seem to do so rarely, such statistics promote the conclusion that there is evidence of racial bias in police decision making. Racial bias could be a factor in generating such disparities, but a basic introductory research methods course in the social sciences would argue that other explanations may be contributing factors.

The Rand study used suspect population distribution as its benchmark in the NYPD study. Ridgway and Hamilton, while finding potential weaknesses in all choices available, observe in their review of benchmarking options that "The criminal suspect benchmark may be more plausible approach than the arrestee benchmark for establishing the population at risk for official police contact. It represents the public's reporting of those involved in suspicious activity and crime and would correspond more closely to racial distribution of criminals on the street." They further observe, "Comparing the police to the public's reporting of suspicious activity at least answers the

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[33] Greg Ridgeway and John MacDonald, **Methods for Assessing Racially Biased Policing: Forthcoming in Race, Ethnicity, and Policing: The Issues, Methods, Research, and Future (Eds. S. Rice & M. White). NY: New York University press.**

question whether the police are finding suspicious individuals with features similar to those the public reports committing or attempting to commit crimes."

The disagreement between Professor Fagan and the Plaintiff with the Rand Report over the appropriateness of using the general census population distribution arises pervasively in this dispute. Throughout the Fagan Report complicated statistics are presented to show that NYPD does not randomly distribute its resources or their vigilance in detecting suspicious behavior in order to prevent crime. This effort by Professor Fagan seems unnecessary, since NYPD readily and consistently admits that it concentrates police resources as precisely as it can,wh ere and when violent crime is observed to be the greatest problem. Since crime is not remotely random, police deployment is not and should not be random. Patrol officers are deployed and they act based on the best evidence available about crime patterns.

Relevant to Professor Fagan's critique of the Rand Report but not presented in that section of his report is his analysis of "a series of graphs showing the basic distribution of stops arrayed across a range of benchmarks based on crime complaints for each calendar quarter. The basic comparison is stop rates per crime complaint. To provide illustrations relevant to the disparate treatment claims in the litigation, the graphs divide the City into quartiles based on percent Black or Hispanic population."

His finding is that "Each of the graphs shows that stop rates per crime complaint are higher, for each crime complaint and crime-specific stop metric in the population with the highest concentration of minority population. ...Although these are places where crime rates are generally higher, the disparity in stops per crime are in some cases quite wide." What constitutes "quite wide" is not specified but Figure 4, the graph for Weapon stops per violent crime complaint by quartile % black appears by far to show the widest gap, with Black stops high above the others. This does not seem

surprising in light of the pattern disparity in the pattern of shootings recorded by NYPD in 2009. Black New Yorkers, with 24% of the population are 72.8% of the victims of shootings in the City and 79.8 % of the suspects in shooting incidents, while white New Yorkers are 31% of the population, but are victims in only 3.1% of shootings, and 1.4% of suspects.

As Professor Fagan notes (p.74) in his critique, "The Rand analysis strongly rejects the exclusive use of residential census information as a benchmark against which to assess racial bias in the decision to stop a citizen." As is reported in the critique most of the findings in the Rand study fail to support the claim that police stop practices are evidence of the kind of racial bias found by Professor Fagan and his colleagues in previous studies using the population census benchmark (e.g.," We found that black pedestrians were stopped at a rate that is 20 to 30 percent lower than there representation in the crime-suspect descriptions. Hispanic pedestrians were stopped disproportionately more than their representation among crime-suspect descriptions would predict." p.72). Part of Professor Fagan's critique of the Rand study is that, in its effort to replicate the earlier study by Gelman and Fagan, was that it did not perfectly follow the previous study in every respect, including some of the variable included in its analysis. Fagan notes that "Even with this uncertainty as to the fealty of the replication Figure .3.1 shows that stops of Blacks and Hispanics were disproportionately high when using a benchmark of weapons arrest in the previous year." (p.75) Of course, we have argued that in a post-Operation Impact study of stop and frisk practices, crime or arrest patterns from a previous year are seriously out of sync with the work of officers in the Department. It is hard to imagine that NYPD's success in reducing crime relied on waiting a year, or even a quarter, to act which is what such a lag structure implicitly assumes.

Professor Fagan's primary criticism of Rand's external benchmarking study is its use of suspect descriptions of violent crime offenders, since less than half of the racial or ethnic identities of the perpetrators are known. Of those victimizations where a suspect was indentified in terms of race and ethnicity, the percentage that were described as Black or Hispanic was far above 50% across all categories of violent crime. A second criticism Professor Fagan leveled at the Rand use of suspect identification in constructing a benchmark was the use of violent crime when it is only a fraction, less than 10% of all crime complaints reported to the police. The fact that giving priority to fighting violent crime is a policy of the City and thus provides the strategic focus that guide the police carries little weight with Professor Fagan. According to Fagan, "The large proportion of crime complaints were suspect race is not observed casts strong doubts on the conclusions based solely on the half of the cases where suspect race is known." As noted above, the police also can document that the locations of victimization is known to be concentrated in the same part of the City, and race of victims is the same, for cases where suspect race is known and unknown.

Professor Fagan devotes even more attention to his critique of the internal benchmarking part of the Rand Report. It is not clear why it deserved this attention because the internal benchmarking exercise seemed mostly useful as a potential tool for police managers to monitor the stop and frisk behavior of individual officers. The design of the internal benchmarking study, despite its elaborate construction, was deemed inadequately complex by Professor Fagan. The Rand Stuy identified of a set of police stops based on a set of stop characteristics matching those in stops made by officers identified as "outliers" (either because they made exceptionally high numbers of stops, or low numbers of stops.) By matching stops based on location, time of day, command, and assignment, the Rand researchers intended to hold constant factors other than the race and ethnicity of the persons stopped to see if officers making a

relatively high number of stops, 50 or more a year,[34] were disproportionately stopping Black and Hispanic pedestrians. This goal is consistent with the desires of the plaintiffs and the stated objectives of NYPD to avoid racial profiling in stop activity. In addition to the design controls built into the comparisons of the matches, a variety of statistical adjustments and controls to further isolate the variables of interest.

Despite this elaborate effort to approximate experimental control conditions to assess police stop practices, Rand methodology was found to be seriously flawed in the judgment of Professor Fagan.T he controls used were too constraining, other controls should have been added even though every match factor included made finding appropriately matched stops that more difficult. If they could not be matched they would have to be dropped from the study.[35] The focus on outliers, despite the disproportionately large share of stops produced by this cohort made the finding, according to Fagan, ungeneralizable to all police stops because the Rand analysis did not include the majority of officers who made fewer stops. Professor Fagan expresses concern that Plaintiffs,wh en they used the software obtained by NYPD Rand to conduct the benchmarking analysis in 2007, were unable to replicate the City's exact results for the 'benchmark percent black' reported in the Rand study. The replication produced a 'benchmark percent black' of .534939 (standard deviation=.2516027) compared to the NYPD run of the 2007 data produced a benchmark percent black of .5349202 (standard deviation +2515774). Unfortunately, the inability of the replication analysis to reproduce exact results is apparently a concern but the significance of that concern is not specified by Professor Fagan.

[34] Given all the attention to the "high number of stops by police in New York City" it may come as a surprise that officers that make 50 stops a year, less than one per week, are outlier, heavy stoppers. Furthermore, in the year of the Rand study there were only 2,756 officers who reached this threshold. The remaining 15,855 who made any stops made fewer than one a week.The following year replicating the study found 2,670 officers making a stop a week.

[35] Given the difficulty Professor Fagan encountered trying to code the complexity of a single stop in his analysis of whether stops were justified one would expect some sympathy facing Rand in its effort to match stops across a number of officers.

Given all of the criticism of the methodology used in the internal benchmarking study reported by Rand, it was surprising that any attention was given to its findings. Perhaps the explanation for attending to the findings, despite the flawed methods allegedly used to produce them is the fact that some differences across race were found. Officers frisked white suspects slightly less frequently than "similarly situated" non whites. In this case the difficulties of fully matching situations is set aside. Police recovered contraband in stops of whites at a slightly higher rate than Blacks or Hispanics. Higher rates of searching nonwhites was found in Staten Island precincts. However, the use of force varied little (15% v.16%) by race among matched stops. While Professor Fagan criticized the Rand Report for its "actuarial" approach to match (time, place, assignment) and not paying sufficient attention to interpersonal and even psychological aspects of police citizen encounters on the street, the Rand Report acknowledges that since the UF250 report does not capture the demeanor of the persons stop it cannot rule out that there are differences among the subgroups stopped cooperated with the officers. If black suspects are more likely to flee or resist, the observed differences in of use of force may not be due to officer bias." (p.41)

NYPD acquire the Rand internal benchmarking tool, used it a second time, found that its identification of small number of underperformers ("outliers") did not provide sufficiently valuable to warrant its routine use.

The Fagan Report devotes almost a third of it space to a review of the Rand Report, and more than half of that to the internal benchmarking study that, given its design, could not speak broadly to either of the Plaintiff's claims of constitutional violations. For all of the issues raised with specific aspects of the Rand analysis of external benchmarking its finding of no significant evidence of racial bias in NYPD practice

stands if you accept as I do its use of victims' attribution of suspects race and ethnicity as information should be used to determine, as Ridgway and Hamilton say, " if the pattern of persons stopped approximate the pattern in terms of race of the people citizens say are victimizing them." Absent a plausible argument for assuming that the victimizations that occurred where the suspects' race is unknown differ significantly from those where it is known,u sing the reports of those who are able to identify the race or ethnicity of their attackers to focus their tactics seems a responsible approach on the part of the police.

The following two recent empirical studies[36] document the effectiveness of crime reduction strategies and practices used by NYPD demonstrate the central claim in his report that crime reduction is the motivating force underlying police action.

Conclusion

The review presented here of the reports of Professor Fagan and Mr. Reiter finds they have failed to make a persuasive, evidence based case that officers of NYPD use race or ethnicity as a reason for or substitute for reasonable suspicion in deciding to stop pedestrians on the streets of New York City, question them, and if justified by concerns about safety, also frisk, which they do less than half the time. The vast majority are by Professor Fagan's estimate "justified" and the remaining cases are all indeterminate with regard to supporting a claim of racial or ethnic bias.

Extensive statistical analysis employed by Professor Fagan offers evidence of a fact not in dispute: NYPD does not make stops proportionate to Black and Hispanic's share of the City's population. NYPD claims and we found evidence to support the claim

[36] A version of Professor Fagan's study on claims of racial profiling and the Smith and Purtell study,(" Does Stop and Frisk Stop Crime?") were presented together on panel at the Association of Public Policy and Management Annual Research Conference in Los Angeles, California, November, 2008.

that police deployment is reasonably proportioned to the problem and distribution of crime, especially violent across areas and population groups in the City. Due to problems in the specification of the model used in his statistical analysis (unit of analysis, variables included or excluded, time frame, interpretation of variables such as "hit rate") the findings do warrant his claim that they demonstrate bias rather than a rationale and proportionate response to the problem of violent crime especially present in Black and Hispanic communities.

A central contention of this response to the Fagan Report is that the model of policing New York City used in the analysis to test the Plaintiff's hypothesis (the Fourteenth Amendment claim) is fundamentally flawed. The Plaintiff's analysis does not address the rival hypothesis that the actions of NYPD over the past fifteen years have been based on a model or theory of crime reduction, rather than giving priority to responding to crimes *after* they have been committed. Further, over the course of the past fifteen year, NYPD has used an evidence-based approach to achieving its mission of improving public safety in the City to refine the model of crime prevention in ways that are even farther removed from the theory of policing underlying the analysis presented in the Fagan Report.

DECLARATION

I have been compensated for this work at the rate of $260 per hour.

Dennis C. Smith, Ph.D.

November 15, 2010