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SUSPECT FITS DESCRIPTION: RESPONSES TO RACIAL PROFILING IN NEW YORK CITY

*A panel discussion with Darius Charney, Jesus Gonzalez,
David Kennedy, Noel Leader, and Robert Perry. September 29, 2010*

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ANDREA MCARDLE: I want to thank all the student organizations that helped organize this panel and welcome all of our panelists. Tonight's discussion addresses a problem of serious proportions in New York City. It is the corrosive effects of the NYPD's racially disparate stop-and-frisk policy. In 2009 alone, it resulted in over 575,000 stops of individuals.¹ Of those who were stopped, 88% were totally innocent of any crime or offense.² Fifty-four percent were black, 31% were Latino, and 9% were white.³ In the face of these disturbing numbers, the panel will discuss a range of responses to the problem: litigation, legislation, community activism, oversight and review mechanisms, and the possibility of change within police organizational culture, such as through an embrace of community-oriented policing; and it will assess the impact of some of these strategies, considered individually and more holistically in the aggregate, for effectively challenging stop-and-frisk practices.

Now, when preparing for this evening's program, it prompted my reflection on the fact that the need for this important conversation unfortunately isn't new. Some of the audience may recall that in the 1990s the administration of Mayor Rudolph Giuliani had famously identified itself with twin policing initiatives, enforcing low-level quality of life codes that had the effect of dislodging immigrant vendors and many homeless persons from midtown locations that tended to cater to shoppers and tourists.⁴ At the same time, the city was aggressively waging a stop-and-frisk campaign by

¹ *NYPD Stop-and-Frisk Statistics*, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/files/CCR_Stop_and_Frisk_Fact_Sheet.pdf (last visited August 17, 2011).

² See Jennifer Trone, *The New York City Police Department's Stop and Frisk Policies: Are They Effective? Fair? Appropriate?* JOHN JAY COLL. OF CRIMINAL JUSTICE CTR. ON RACE CRIME & JUSTICE 6 (2010), http://www.jjay.cuny.edu/forum/SQF_forum_summary_FINALJUNE28.pdf (noting the incremental increase in stops from 2002 to 2009).

³ CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 1.

⁴ Jeffrey Rosen, *Excessive Force: Why Patrick Dorismond Didn't Have to Die*, NEW REPUBLIC, Apr. 10, 2000, at 24.

the now-defunct Street Crimes Unit whose effects were experienced with particular harshness, then as now, among black and Latino men and youth in the city's more economically marginalized communities.⁵

The responses to these campaigns at the time included an upsurge of complaints brought before the Civilian Complaint Review Board,⁶ five governmental investigations,⁷ and a lawsuit, *Daniels v. City of New York*,⁸ litigated by the Center for Constitutional Rights, that among other things, sought to enjoin stop-and-frisks without a showing of reasonable suspicion and to enjoin Street Crimes Unit officers from basing stops on race or national origin.⁹ Among the governmental inquiries, a report issued in 1999 by the New York Attorney General's Office compiled data demonstrating that blacks in New York City were stopped for weapons searches six times as often and Latinos four times as often as whites.¹⁰ The next year, a report of the US Commission of Civil Rights pointed to NYPD data that, to use its terms, strongly suggested that the NYPD used racial profiling in stops, frisks, and searches.¹¹

Along with those official inquiries, and there were others going on in the city—an investigation in the Department of Justice as well¹²—community-based groups including Parents Against Police Brutality,¹³ the National Congress of Puerto Rican Rights,¹⁴ and the

⁵ *Id.*

⁶ From 2002 to 2006, complaints to the Civilian Complaint Review Board increased by 66%. N.Y.C. CIVILIAN COMPLAINT REVIEW Bd., STATUS REPORT JANUARY–JUNE 2007 11 (2007), available at http://www.nyc.gov/html/ccrb/pdf/ccrbsemi_2007_Jan_June.pdf; Adam Carlis, *The Illegality of Vertical Patrols*, 109 COLUM. L. REV. 2002, 2036 (2009).

⁷ See, e.g., *infra* notes 10–12 and accompanying text.

⁸ *Daniels v. City of New York*, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 23, 2003), available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

⁹ See *id.* at 1–2.

¹⁰ N.Y. STATE OFFICE OF THE ATTORNEY GEN., THE N.Y.C. POLICE DEP'T'S "STOP AND FRISK" PRACTICES 95 (1999), available at http://www.ag.ny.gov/bureaus/civil_rights/pdfs/stp_frsk.pdf ("Thus, blacks were over six times more likely to be 'stopped' than whites in New York City, while Hispanics were over four times more likely to be 'stopped' than whites in New York City.").

¹¹ U.S. COMM'N ON CIVIL RIGHTS, POLICE PRACTICES AND CIVIL RIGHTS IN NEW YORK CITY, ch. 5 (Aug. 2000), available at <http://www.usccr.gov/pubs/nypolice/main.htm> ("The NYPD's data strongly suggest that racial profiling plays some role in the stop and frisk practices of the overall department, and particularly in the [Street Crime Unit].").

¹² Press Release, U.S. Dep't of Justice, Statement by Deputy Attorney General Eric Holder on the Amadou Diallo Meeting (Mar. 2, 2000), available at <http://www.justice.gov/opa/pr/2000/March/094dag.htm>.

¹³ *The Parents Against Police Brutality*, REVOLUTIONARY WORKER (Jan. 26, 1997), <http://revcom.us/a/firstvol/890-899/891/papb.htm>. Parents Against Police Brutality

Committee Against Anti-Asian Violence¹⁵ galvanized a powerful grassroots anti-police brutality movement that gained momentum in 1999 and 2000 after four Street Crimes Unit officers fired 41 shots and killed an unarmed street vendor from Guinea, West Africa named Amadou Diallo in front of his apartment building in the Bronx.¹⁶ In the aftermath of that incident, and as a result of continuing community mobilization by grassroots groups, this critical scrutiny of NYPD policies and practices drew extensive media coverage,¹⁷ and as commentator Andy Hsiao has written, the grassroots movement had, for that moment, gone mainstream, as it became for many almost a badge of honor to be arrested at the daily protests that were being held in front of One Police Plaza.¹⁸

Now as we consider the historical context of the current discussions about racially disparate stop-and-frisks, and especially the frayed relations between the NYPD and many New York communities, we should point out that the racial polarization during the Giuliani mayoralty is itself only one point along a timeline that stretches back for decades. It was in 1966 that Giuliani's predecessor as mayor, the newly elected John Lindsay, sought to respond to deep distrust of the NYPD by the City's communities of colors and

was formed on July 7, 1995 by Margarita Rosario and Carmen Vega in memory of their sons Anthony Rosario and Hilton Vega, who were shot and killed by NYPD officers on January 12, 1995. *Id.*

¹⁴ Interview by Blanca Vasquez with Richie Perez, Founder, Nat'l Cong. of P.R. Rights & The Justice Committee (2004), *available at* <http://www.andersongoldfilms.com/everymothersson/resources/Richieperez.pdf> (explaining the purpose of the National Congress of Puerto Rican Rights as a mass-membership, activist, grassroots organization dedicated to securing full equality and an end to discrimination against Puerto Ricans).

¹⁵ CAAAV, <http://caav.org/about-us> (last visited Aug. 17, 2011). CAAAV works to build grassroots community power across diverse poor and working class Asian immigrant and refugee communities in New York City. *Id.* Through an organizing model constituted by five core elements—base building, leadership development, campaigns, alliances, and organizational development—CAAAV organizes communities to fight for institutional change and participates in a broader movement towards racial, gender, and economic justice. *Id.*

¹⁶ Michael Cooper, *Officer in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. TIMES, Feb. 5, 1999, at A1.

¹⁷ See, e.g., Jane Fritsch, *The Diallo Verdict: The Overview; 4 Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1; John Harris, *Addressing Diallo Case, First Lady Criticizes Mayor's Leadership*, WASH. POST, Mar. 5, 2000, at A6; Betty Ann Browser, *After the Verdict*, PBS HOME (Mar. 3, 2000) http://www.pbs.org/newshour/bb/law/jan-june00/diallo_3-3.html.

¹⁸ See Andy Hsiao, *Mothers of Invention: The Families of Police-Brutality Victims and the Movement They've Built*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 179, 190–91 (Andrea McArdle & Tanya Erzen eds., 2001). See also Dan Barry, *Daily Protesters in Handcuffs Keep Focus on Diallo Killing*, N.Y. TIMES, Mar. 19, 1999, at A1.

prevent unrest that had roiled many cities in the mid-60s.¹⁹ His solution was to revamp an existing, all-police civilian complaint review board and create a mixed civilian-police review board.²⁰ The measure was accomplished by a general order signed by the police commissioner at the time, in May of 1966.²¹ It stirred up intense opposition by the police establishment that played on fears of crime.²²

The opposition developed into an organizing effort by the Patrolman's Benevolent Association and the Conservative Party in New York to remove the new board by a ballot initiative.²³ The contest became a bitterly divisive referendum between the advocates of crime control and civil liberties advocates.²⁴ In the contest, the supporters of the referendum to oust the board argued that the hands of law enforcement would be tied by the very existence of the CCRB, and that argument succeeded by a vote of 63% to 37%, that was largely along racially divided lines.²⁵ The measure to dismantle the Board was passed, and it wasn't until 1993 that New York City

¹⁹ See Reehah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 480 nn.84-85 (2001). See also Tamar Jacoby, *The Uncivil History of the Civilian Review Board*, CITY JOURNAL, Winter 1993, at 56, available at <http://www.city-journal.org/article01.php?aid=1151>.

²⁰ See Kim, *supra* note 19, at 476-82.

²¹ VINCENT J. CANNATO, *THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK* 167 (2001).

²² See *id.* at 168-69.

²³ *Id.*

²⁴ *Id.* at 167-69.

²⁵ See *History of the CCRB*, NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, <http://www.nyc.gov/html/ccrb/html/history.html> (last visited Aug. 17, 2011).

In 1993, after extensive debate and public comment, Mayor David Dinkins and the New York City Council created the Civilian Complaint Review Board in its current, all-civilian form. The agency was granted subpoena power (one issue cited in the Tompkins Square Park report by the police department's CCRB was that without subpoena power, it could not obtain filmed footage from local media outlets) and authority to recommend discipline in cases that the board substantiated. However, the agency was underfunded at its inception, leaving it unable to cope with the large number of complaints it received.

After the Abner Louima incident in 1997, the CCRB's budget was steadily increased, allowing the agency to hire dozens more investigators and experienced managers who oversee investigations. The new civilian investigators, led by the managers, have dramatically improved the agency performance. Now the largest civilian oversight agency in the country, the CCRB has investigated thousands of complaints, leading to discipline for hundreds of police officers. The CCRB remains dedicated to its core mission of thoroughly and impartially investigating all complaints it receives.

Id.

was ready to undertake Civilian Review, as it adopted for the first time an all-civilian board.²⁶ So just a little history to provide some perspective here.

The role of the CCRB in creating a mechanism for registering and investigating complaints against NYPD officers will be addressed this evening in the panel, as it explores strategies including new lawsuits that challenge the practice of racially disparate stop-and-frisk policies, and also recent legislation that prohibits electronic data compilation concerning the innocent targets of stops.²⁷ So some will say that some progress has been made. But all of this suggests still, the extent to which past is prologue, the persistence, the seeming intransigence of this problem, the need to look to a variety of responses and a range of allies, and to continue to imagine the possibilities of strategies yet untried and perhaps not even thought about.

So with that I will turn to our screen. We see here a map of Brownsville in Brooklyn; and the colored-in portions reflect where there has been intense stop-and-frisk activity.²⁸ So you can get sort of a geographic sense of where that's happening in just one section of Brooklyn. And now we're going to show a video clip that's going to give you a sense of the effects of these stops on those that experience them on a daily basis; some youth who are living in Brownsville.²⁹ Thank you.

[VIDEO CLIP—*Voices from Brooklyn: Racial Profiling's Part of Everyday Life Here*]³⁰

BABE HOWELL: The first question is going to be: from the particular perspective of your organization, what are the harms of the aggressive stop-and-frisk policies and practices that we have in New York City. Darius?

²⁶ See *id.*

²⁷ See Assemb. B. A1117-A, 233d Leg. Assemb., Reg. Sess. (N.Y. 2010); S. B. 2277, 233d Leg. Assemb., Reg. Sess. (N.Y. 2010).

²⁸ Matthew Bloch, Ford Fessenden & Janet Roberts, *Stop, Question and Frisk in New York Neighborhoods*, N.Y. TIMES, July 11, 2010, <http://www.nytimes.com/interactive/2010/07/11/nyregion/20100711-stop-and-frisk.html?ref=NYregion> (online interactive map of New York City stop-and-frisks).

²⁹ The 73rd precinct, which includes Brownsville, has the highest reported violent crime rate, as well as the highest rate of stop-and frisks per 1,000 residents in New York City.

³⁰ See Naima Ramos-Chapman, *Voices from Brooklyn: Racial Profiling's Part of Everyday Life Here*, COLOR LINES: NEWS FOR ACTION (Aug. 2, 2010, 1:00 PM), http://colorlines.com/archives/2010/08/voices_from_brooklyn_racial_profiling_part_of_everyday_life_here.html.

DARIUS CHARNEY:³¹ Well, I think, right away most obviously, and I'm the lawyer on the panel so in some ways this will probably be the least interesting perspective, or maybe most interesting perspective to some of you. Obviously, right up front when you're talking about aggressive and what I would characterize as illegal stop-and-frisk practices, you have a constitutional violation; everybody knows about the Fourth Amendment³² and *Terry*³³ and all that stuff. So I'm not going to spend too much time on that.

I think what I would say first of all, and I think one of the video clips we saw reminded me of it, is stop-and-frisk for a lot of people becomes the entrée into the criminal justice system. It's one of the most widely used police-civilian interactions,³⁴ it's kind of the most low-level in that police don't really need a reason to stop you in the streets³⁵ so it happens a lot,³⁶ and it happens repeatedly to people a lot of times, especially if you're a certain color and you live in a certain neighborhood.³⁷ So, I think it's an entrée into that system and one man in the video talked about how when he was unjustifiably stopped, illegally stopped, the situation escalated.³⁸ He was beaten, he was arrested, he spent 14 days in jail,³⁹ and that unfortunately is a very common consequence of this kind of practice, because when you stop people for reasons they don't understand and for reasons they perceive as being unjustified or illegal, they are going to be mad about it.

³¹ Darius Charney is a staff attorney on the Racial Justice / Government Misconduct Docket at the Center for Constitutional Rights. He is currently lead counsel on *Floyd v. City of New York*, a federal civil rights class action lawsuit challenging the New York City Police Department's unconstitutional and racially discriminatory stop-and-frisk practices, as well as *Vulcan Society Inc. v. the City of New York*, a Title VII class action lawsuit on behalf of African-American applicants to the New York City Fire Department which challenges the racially discriminatory hiring practices of the FDNY. Prior to coming to CCR in 2008, Darius spent two-and-a-half years as an associate at the New York law firm of Lansner & Kubitschek, where he litigated federal civil rights cases challenging various aspects of New York City and New York State's child welfare and foster care systems. Darius received his J.D. and M.S.W. degrees from the University of California, Berkeley in 2001. From 2003–2005, he was law clerk to the Honorable Deborah A. Batts, United States District Judge for the Southern District of New York.

³² U.S. CONST. amend IV.

³³ *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁴ See CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 1.

³⁵ See, e.g., *Terry*, 392 U.S. at 22; *People v. De Bour*, 40 N.Y.2d 210, 213 (1976).

³⁶ See Trone, *supra* note 2, at 2–3 (noting the incremental increase in stops from 2003 to 2009).

³⁷ See *Stop and Frisk Fact Sheet*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1598> (last visited Aug. 17, 2011).

³⁸ See Ramos-Chapman, *supra* note 30.

³⁹ See *id.*

And once you get into the criminal justice system, everybody knows the terrible collateral consequences that it has. If you don't, you should read *The New Jim Crow*,⁴⁰ which I think explains it pretty clearly. So this is something that, when you talk about harm, maybe the stop itself, the first stop, is not in and of itself that much of a harm, but what it represents and what it leads to is pretty serious. And the last thing I will say about it is that in terms of the entré into the criminal justice system, it is, I think, and you know about this from some of the other panelists, it really is harmful and really damaging to police-community relations, and these communities—communities where they use this practice so much—are the communities that police really need to rely on for help in getting the bad guys. And if you don't have community trust, you're not going to be able to get the real bad guys, and what ends up happening is you're stopping 600,000 innocent people a year.

DAVID KENNEDY:⁴¹ I usually talk about this stuff extemporaneously and we were primed for this question and I have so many things I think are harms that I had to make a list. So I'm going to go through this really fast and try to get it into three minutes. So what we're talking about is wrong, period. A particular segment of America should not be treated in a grossly disproportionate way, and if you are born in certain places, because you are born in certain places and look a certain way, you should not bear an entirely different weight of the use of state power, and that is what is going on, and it's wrong.

It would be wrong even if it were legal, but a lot of it's not, and I have not only done street work in New York City. I do street work all over the country. I have not been any place where there is a lot of street action of this kind, where a lot of it was not transparently, inherently, flagrantly illegal. Down the entire chain, from the way

⁴⁰ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press, New York, 2010).

⁴¹ David M. Kennedy is the director of the Center for Crime Prevention and Control and professor of criminal justice at John Jay College of Criminal Justice in New York City. From 1993 through 2004, he was a senior researcher and adjunct professor at the Program in Criminal Justice Policy and Management, Kennedy School of Government, Harvard University. His work focuses on strategies for assisting troubled communities. He has written and consulted extensively in the area of community and problem solving policing, policy corruption, and neighborhood revitalization. He has performed field work in police departments and troubled communities in many American cities, as well as London, Sydney, and throughout Puerto Rico. He is the co-author of a seminal work on community policing, *Beyond 911: A New Era for Policing*, and author of numerous articles on police management, illicit markets for drugs and firearms, youth violence, and deterrence theory.

people are selected to stop to the way they are treated after they are stopped. Because of all of that, it undercuts the legitimacy, especially of the police in these communities and the alternative to having a legitimate law enforcement presence in the community is community self-help. And that is part of the reason that in these communities we are seeing the growth of a “stop snitching” and vendetta culture, because people feel that they have no recourse to law and order to deal with their personal and social problems.

We are creating a lack of civil society in these communities. It silences the community when the chief representatives saying “one should not do bad and illegal things” lack legitimacy. Then people do not stand up and stand by them, and lend community norms to the informal control of bad behavior and that means that, although these norms are there, they are not expressed as they ought to be, which gives the small number of people who do real damage in these communities room to move that they should not have. It is an arithmetic dead end. This is a purely technical problem. Fifteen years ago in New York, when there was a lot of crime and lot of people carrying guns and other weapons,⁴² and you did a certain volume of stops, you would get a certain volume of weapons and contraband. Today, when street crime is dramatically reduced,⁴³ and the police department is correctly committed to further advancing crime control,⁴⁴ in order to get an equal number of guns off the street you must stop a vastly inflated number of people.⁴⁵ So as a technique, stop-and-frisk gets you on a hamster wheel you cannot get off.

It plays into drastically damaging narratives in the communities where this actually goes on. So these are my neighborhoods. It is a common, if not dominant, community narrative that the police

⁴² See generally Jeffrey Fagan, Franklin E. Zimring & June Kim, *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277 (1998) (analyzing competing explanations for New York City’s falling crime rates during the 1990s).

⁴³ Amy Traub, *New York’s Hidden Crime Wave*, DMI BLOG (Jan. 29, 2010, 3:05 PM), http://www.dmiblog.com/archives/2010/01/new_yorks_hidden_crime_wave.html.

⁴⁴ *Crime Prevention*, NYPD, http://www.nyc.gov/html/nypd/html/crime_prevention/crime_prevention_section.shtml (last visited Aug. 17, 2011). See generally ELI B. SILVERMAN, *NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING* (Northeastern University Press 1999).

⁴⁵ See Expert Report of Jeffrey Fagan, Ph.D. at 4, *Floyd v. City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. filed Apr. 16, 2008) 08 Civ. 01034 (SAS), available at http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf. See also DAVID COLE, *NO EQUAL JUSTICE* 43–45 (New Press 1999) (discussing how “stop-and-frisk” policies have been held constitutional based on the “reasonable suspicion” that police officers have to stop people in “high-crime areas,” which tend to be low-income and heavily populated by blacks and Hispanics).

are there and law is there and drug and gun enforcement are there as an excuse by the outside to continue historical oppression of the community by other means. And that is not true; this is not a governmental conspiracy. But we could not act more as if it were true if we tried. And so we continue to strengthen genuinely toxic community narratives that further undercut social control of crime and further undercut legitimacy.

And last if not least, there are better ways to do things. So we have a basic strategic choice here: one can engage with everybody in the community under color of law to try to control crime, or one can engage directly with the small number of dire people in communities to try to control crime, with the community's support. And in Hempstead Village, Long Island, the worst drug market on Long Island was shut down two years ago through joint police-community action and direct contact with identified drug dealers.⁴⁶ They ran 150 drug arrests going back fifteen years, 150 a year, as long as anybody can remember.⁴⁷ Last calendar year, in this same drug market, there were two drug arrests.⁴⁸ It's gone and the community is keeping it gone; there are better ways to do this stuff.

NOEL LEADER:⁴⁹ My name is Noel Leader. As was stated, I

⁴⁶ See DAVID M. KENNEDY & SUE-LIN WONG, U.S. DEP'T OF JUSTICE, THE HIGH POINT DRUG MARKET INTERVENTION STRATEGY v-vi (2004), available at http://www.highpointnc.gov/police/docs/The_High_Point_Drug_Market_Intervention_Strategy.pdf (explaining the strategies that were successful in Highpoint, NC, Hempstead, NY and elsewhere in eliminating known street drug markets); Bruce Lambert, *Street Known for Drug Crime is Getting Clean*, N.Y. TIMES, Jan. 18, 2009, at L11.

⁴⁷ JOHN JAY COLL. OF CRIMINAL JUSTICE, *John Jay College Launches "National Network for Safe Communities,"* <http://www.jjay.cuny.edu/2666.php> (last visited Mar. 14, 2011) (noting an 87% drop in arrests in Hempstead, New York).

⁴⁸ *Id.*

⁴⁹ Noel Leader is a retired law enforcement officer and co-founder of 100 Blacks in Law Enforcement Who Care. He was born and raised in the neighborhood of Jamaica in Queens, New York. Sworn into the New York City Police Academy on January 9, 1986, Noel made improving the relationship between members of law enforcement and communities of color a personal and professional goal. He was assigned to a number of specialized units including Division Topac, 28th Precinct Anti-Crime, Community Affairs, Domestic Violence and the Community Policing Unit, and has received medals for exceptional police duty, unit citations and meritorious duty as well as numerous community awards and letters of commendation. On October 7, 1997 he was promoted to sergeant. Noel also has served as a delegate and trustee for the NYPD Guardians Association, a delegate to the Grand Council of Guardians, a member of the National Organization of Black Law Enforcement Executives and a co-founder of 100 Blacks in Law Enforcement Who Care. Noel has testified before members of Congress, the New York City Human Rights Commission, the U.S. Department of Justice, the New York City Council and has worked closely with grassroots organizations such as the NYCLU, Amnesty International, NAACP, the Faith Based Coalition for Neighborhood-Police Partnership and the Center for Constitutional Rights.

am a retired sergeant from the New York City Police Department. I belong to an organization, 100 Blacks in Law Enforcement who Care.⁵⁰ We have been very vocal in our outrage over some of the illegal practices of the New York City Police Department. We are a pro-law enforcement group. I believe in enforcement. I have locked up many individuals, and I scanned the room, I don't think anyone in here. We're anti-crime. We're not anti-police, but we are anti so many of the abuses that police officers do commit.

The question was asked, what are some of the harms? The greatest harm is that these illegal stops are illegal; they are against the law. And for police officers to be violating the law is preposterous. Racial profiling and illegal stops that violate the Constitution of the United States of America are crimes.⁵¹ And as we said in our personal conversation, you don't stop crime by committing crimes. So the greatest harm—and I look at the harm that affects not only the community but the police officer, because as police officers, though we're not attorneys, we get a brief synopsis of what's legal, what's illegal, we know our department policy, when we should make a stop, when we shouldn't make a stop. So when police officers know they are violating the law, that corrupts the oath that they take to protect and serve.

And those of you who know anything about police corruption know that it starts with abuse. That when you can violate someone's rights and get away with it, and when you do it more and more, then it only starts there, but it works up to physical abuse and other types of abuse.

And not only are the stops illegal and a crime—we have many instances of cops committing crimes, which is ridiculous. But don't forget when a police makes an illegal stop, which progresses to an illegal search, and then he finds contraband, now what does he have to do? He has to perjure himself, because when he goes to court, and stands before a district attorney, he's not going to say, "By the way, I conducted an illegal stop but I came up with these drugs." Good idea, good stop, we got this off the street. No, he's going to lie: he's going to say, "at the time and place of occurrence, I observed suspects driving or walking down 125th Street, and by

⁵⁰ See 100 BLACKS IN LAW ENFORCEMENT WHO CARE, <http://blacksnlaw.tripod.com/> (last visited Aug. 17, 2011).

⁵¹ See *Daniels v. City of New York*, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 23, 2003), available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf (stipulation of settlement acknowledging the illegality of racial profiling and race-based stops); *Floyd v. City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. filed Apr. 16, 2008) (08 Civ. 01034 (SAS)) (challenging racial profiling).

the way, crack cocaine fell out of his pocket.”⁵² Or he’s going to make up some other story. So now you have police officers, by the hundreds of thousands, and it’s not just these few little eggs, or these few officers that so many people convince themselves we are talking about. When we talk about 575,000 stops—and don’t forget under Giuliani there was the Street Crimes Unit, and that was 92,000 stops under mean Giuliani⁵³—But under nice Bloomberg, we’re up to 575,000, so you tell me the reality.⁵⁴ But not only do these officers, in a blue uniform, nice uniform, uphold the law, they commit so many illegal stops. But once again, then they have to perjure themselves, because once they come up with contraband, make an arrest, they have to justify the illegal stop. So now you have this police officer being corrupted, and I had a very difficult time, so many years of my life, time on the job, wondering how these officers lived with themselves. As I stated, I am pro-law enforcement, anti-criminal and crime, but that goes for police officers and civilians.

How does it hurt the civilian population? First of all, we do workshops, we do so many workshops, and you’d be surprised at how many individuals in black and Latino communities hate cops. When we ask them, “How many of y’all hate police officers,” 99.9% of them raise their hands, “I hate police officers.”⁵⁵ And they don’t really hate police officers, they hate abusive police officers, they hate disrespectful police officers, they hate racist police officers. Because if an officer comes to your house and there’s a fire and he gets you out, or your little sister is lost and you call the police and they find her, or your mother is sick and they give first aid, they appreciate that and they respect that, but what they hate is the disrespect, the abuse, the racism that exists and is pervasive.

JESUS GONZALEZ:⁵⁶ For a long period of time in my life, al-

⁵² See, e.g., *People v. McMurty*, 314 N.Y.S.2d 194, 196 (N.Y. Crim. Ct., 1970) (discussing the high likelihood that “at least in some of these [“dropsy”] cases the police are lying.”).

⁵³ See, e.g., N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 10, at v (analyzing the approximately 175,000 stop-and-frisks reported in 1998 and the first quarter of 1999).

⁵⁴ Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. TIMES, May 13, 2010, at A1; Editorial, *Lingering Questions About ‘Stop-and-Frisk,’* N.Y. TIMES, Feb. 19, 2010, at A26.

⁵⁵ Cf. Carol A. Brook, *Racial Disparity Under the Federal Sentencing Guidelines*, 35 LITIG. 15, 15 (2008) (“Every fall I teach constitutional law to high school students from the Chicago Public Schools. The students are mostly African-American and Hispanic. When I ask them whether they believe the criminal justice system is fair to people of color, they mostly say no. My clients, also mostly African-American and Hispanic, say the same thing.”).

⁵⁶ Jesus Gonzalez was born, raised and still resides in Bushwick, Brooklyn.

though at a young age, I started exploring the injustices in my community in Bushwick, Brooklyn. Bushwick had, at one point, in the 83rd precinct, the highest rate of stop-and-frisks in New York City.⁵⁷ It's one of the largest communities in New York City. But, day-to-day, although I work on this issue, I'm not exempt from the same treatment that officers apply to other young people in my neighborhood. And I think that the harmful effect is the undeniable trauma that young people and the community members have from their interactions with the NYPD. It's something that we can't ignore.

The fundamental reasons why stop-and-frisks are disproportionate in poor communities—the justifications are just ridiculous. There's no justification for it, but one of the reasons I've heard was the way you dress.⁵⁸ If it's not in season and you're wearing a hoodie, you're up for a stop-and-frisk. When I was at Hofstra University, people were wearing shorts in the wintertime. I thought that was strange, but they weren't getting stopped and frisked.

So I think that we need to be honest with ourselves on the inter-historical context of what kind of relationship police have had with low-income, poor neighborhoods, and communities of color specifically, in New York City.⁵⁹ And once we're honest about the profit behind it;⁶⁰ once we're honest about the disconnect that

Bushwick has one of the higher number of stop-and-frisk incidents in all of New York City. Jesus is the co-founder of the Youth Power Project at Make the Road New York. With over 7,000 members citywide, Make the Road New York is currently the largest community organizing organization in New York City. The Youth Power Project has gained international recognition as one of the most influential and effective youth organizing groups in the U.S.

⁵⁷ *Stop and Frisk Campaign: Stop and Frisk Charts*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1597> (last visited Aug. 17, 2011).

⁵⁸ *See, e.g., State v. Miglavs*, 90 P.3d 607, 613 (Or. 2004) (“a particular style of attire may be a circumstance that, when considered in the overall context or totality of the circumstances of a police-citizen contact, contributes to the reasonableness of an officer's safety assessment”). *See also* Christopher Dunn, *Civil Rights and Civil Liberties*, N.Y. L.J., Feb. 27, 2007 (reporting that New York's stop-and-frisk data reveals many stops based on individuals' street attire).

⁵⁹ *See* DENNIS DELEON ET AL., N.Y.C. COMM'N ON HUMAN RIGHTS, BREAKING THE “US VERSUS THEM” BARRIER I, (1993), *available at* http://www.nyc.gov/html/cchr/pdf/breaking_the_us_vs_them_barrier-a_report_on_police-community_relations_by_the_nyc_cchr.pdf.

⁶⁰ *See* HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007 18–20 (2008) (discussing the opportunities for “easy” overtime and even career enhancement that results when NYPD officers make low-level marijuana and other misdemeanor arrests). *Cf.* Chris Weaver and Will Purcell, *The Prison Industrial Complex: A Modern Justification for African Enslavement?*, 41 *How. L.J.* 349, 349 (1998) (“These private prisons usually require prisoners to labor in order to cover costs or make a profit for the prison. This

many officers have with our communities we can start building. And I think that interactions with officers that are disconnected will have an outcome of escalated situations, where the person being stopped and frisked is going to be most likely assaulted, physically abused, or verbally abused, or arrested or given a phony ticket. There were some high school students from our organization that did some surveying where they surveyed a bunch of community members and seven out of ten people in Bushwick who were given trespass tickets were at their home,⁶¹ many of which resulted in arrest.

So this numbers game, this CompStat game, is unjustifiable. Although there are some weapons that are found—and they love to write about that—I think that the approach is proven to not be effective. The number of stop-and-frisks has increased by 13 percent.⁶² And the number of arrests has not risen comparably, and neither has the amount of contraband recovered.⁶³ The distrust from the community continues to be the same.⁶⁴ I think that the approach is kind of like an arrogant Mayor Giuliani approach. The broken window theory is bullshit. I think we need a new approach. I'll leave it at that. Thank you.

ROBERT PERRY:⁶⁵ Let me begin with a preliminary observa-

promise of future profits has created the prison industrial complex, a system where government bureaucrats, private industry, and politicians work together to expand the criminal justice system.”)

⁶¹ See *Federal Trespass Affidavit Program (F.T.A.P.)*, BROOKLYNIAN, <http://www.brooklynian.com/forum/brooklyn-and-beyond/federal-trespass-affidavit-program-ftap> (last visited Aug. 17, 2011) (compiling comments from community members regarding threats of arrests by the NYPD to legitimate visitors or tenants of buildings).

⁶² See *Stop and Frisk Practices*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Aug. 17, 2011) (531,159 stop-and-frisks reported in 2008 compared to 601,055 in 2010).

⁶³ See *id.* (88% and 86% of stop-and-frisks did not lead to an arrest or citation in 2008 and 2010, respectively).

⁶⁴ *Stop and Frisk Does Not Reduce Crime*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/stop-and-frisk-does-not-reduce-crime> (last visited Aug. 17, 2011). See also, e.g., Kami Shavis Simmons, *New Governance and the New Paradigm of Police Accountability: A Democratic Approach to Police Reform*, 59 CATH. U. L. REV. 373 (2010).

⁶⁵ Robert Perry has worked with the NYCLU as legislative director and is the NYCLU's principal lobbyist. In this capacity he advocates on behalf of proposed legislation implicating civil rights and civil liberties; and he has testified on these issues frequently at hearings conducted by state and city legislative committees. Robert has held both staff and consulting attorney positions with the NYCLU since 1991. That year, he earned a Revson Foundation grant to undertake a national study for the NYCLU that analyzed civilian agencies charged with oversight of policing. Robert was involved in the NYCLU's efforts to create an independent Civilian Complaint Review Board (CCRB) by amendment to the New York City Charter, and he has written extensively on the CCRB's performance since the all-civilian agency came into existence

tion, then I'll go to the harm issue. That observation is this: I think language in this context is fundamentally important, and that perhaps we need a new rhetoric to capture the phenomenon of race-, class-based policing, in this so-called modern era, the era of broken windows policing⁶⁶ and mass incarceration⁶⁷ as strategies for maintaining social order. The term "racial profiling," to my ears, sounds oddly polite and restrained and academic in light of what's going on in certain areas of our city. And I'm talking about this aggressive, track-and-control tactic that's being used in entire neighborhoods and communities.

To put a finer point on it, regarding broken windows policing, I'll just cite—give a gloss on—an article by Jeff Fagan and Garth Davies in which they observe that

[p]atterns of "stop and frisk" activity by police across New York City neighborhoods reflect competing theories of aggressive policing. "Broken Windows" theory suggest [sic] that neighborhoods with greater concentration of physical and social disorder should evidence higher stop and frisk activity, especially for, "quality of life" crimes.⁶⁸

The thesis put forward by Professor Fagan here is that "[o]ur empirical evidence suggests that policing is not about disorderly places, nor about improving the quality of life, but about policing

in 1993. As a litigation associate with Michael Shen & Associates in the years 2000–2003, Robert practiced in the areas of police misconduct and employment discrimination. Before joining Shen & Associates, he was public policy counsel with the Alliance for Consumer Rights, a project of the New York State Trial Lawyers Association, where he drafted and advocated on behalf of legislative proposals to ensure access to the civil justice system. Before he was a lawyer, Robert was a freelance writer and editor whose assignments included reproductive rights, juvenile justice and child poverty. Robert was the Stanford University Law School's Mills Fellow in 2000. The fellowship program invites lawyers to mentor students interested in public interest legal careers. He is a graduate of the City University of New York Law School and the University of Massachusetts, Amherst. He also attended the graduate program at New York University's Tisch School of the Arts.

⁶⁶ See George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, March 1982, at 31.

⁶⁷ See JAMES AUSTIN ET AL., UNLOCKING AMERICA 3–6 (2007) (explaining excessive rates and periods of incarceration to be the result of harsh war-on-crime policies, including mandatory punishments, promoted by conservative politicians in the 1960s, 70s, and 80s as necessary to control crime); Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration, Poverty, Prejudiced, and Punishment*, in DOING RACE: 21 ESSAYS FOR THE 21ST CENTURY 322, 324 (Hazel Rose Markus & Paula M.L. Moya eds., (2010), available at <http://www.wjh.harvard.edu/soc/faculty/bobo/pdf%20documents/RacMassInc.pdf>).

⁶⁸ Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000).

poor people in poor places.”⁶⁹ That thesis I find persuasive based on my experience. I’ve litigated many of these cases and I’ve been involved with NYCLU on this issue for almost twenty years now.

Let me go to the harm. Actually, let me offer an anecdote. I have to, I think, share this. It occurred to me as I walked in, I was in this room just after the verdict had come down in the case involving the cops who had beat up Rodney King in L.A.⁷⁰ And then-dean of the law school Haywood Burns,⁷¹ who I dearly wish was still with us, convened the school to talk about the issue because people were deeply upset about the outcome of that verdict, and the issue that gave rise to that case. And as Haywood tried to talk us through the issues, he said, “I’d like everyone in the room who has been stopped by the police to stand up.” Now, I had not been paying close attention to the discussion, and I jumped up—I thought, perhaps there had been some structural damage to the building. And I looked around, and every black and Latino male had stood up. Intellectually, I understood that, but to see that play out with your friends and colleagues in those numbers. Every white person, of course, was sitting in his or her seat. That’s the phenomenon we can’t fully understand unless we live in those communities, like Brownsville.⁷²

By the way, let me put a little gloss on this data. From January 2006 to March 2010, there were 52,000 stops—one stop for each of the 14,000 residents of that eight-block area.⁷³ Less than one in nine fit a description that was provided to the cops.⁷⁴ One percent of the stops resulted in arrest.⁷⁵ One in four stops resulted in the use of force, and that is citywide for all stop-and-frisks.⁷⁶ Twenty-five percent of those stop-and-frisks result in the use of force.⁷⁷ Fifty

⁶⁹ *Id.*

⁷⁰ *United States v. Koon*, 833 F. Supp. 769 (C.D. Cal. 1993), *aff’d in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994).

⁷¹ See Karen W. Arenson, *W. Haywood Burns, 55, Dies; Law Dean and Rights Worker*, N.Y. TIMES, Apr. 4, 1996, at D21.

⁷² See Bloch, Fessenden & Roberts, *supra* note 28 (showing that the 73rd precinct, which includes Brownsville, has both the highest rate of violent crime and stop-and-frisks per 1,000 population in New York City).

⁷³ Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 11, 2010, at A1.

⁷⁴ *Id.* (“[T]he data show that fewer than 9 percent of stops were made based on ‘fit description.’”).

⁷⁵ *Id.*

⁷⁶ *Racial Disparity in NYPD Stops-and-Frisks*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/racial-disparity-nypd-stops-and-frisks> (last visited August 2011).

⁷⁷ *Id.*

thousand stops resulted in four gun seizures.⁷⁸ Now, when you add those kinds of data, all around the city, you begin to get a sense of what track-and-control policing is about.

Let me speak just quickly to the harm, before I lose my time. As a civil liberties matter, clearly, this is the routine and systemic suspension of fundamental rights. Associational rights, due process rights, speech rights. I can't tell you how many kids I've sat down with who say—black and Latino kids—“You know, it's just so difficult to get to the subway, I just stay in the house.” That's a common, common statement I hear.

Stop-and-frisk, as I said, results in force in 25% of the cases.⁷⁹ Now, we're talking about pushed up against the wall; we're talking about a club to the head, and worse. By the way, it's not just stop-and-frisk; we're talking about vertical patrols, marijuana arrests—low-level prosecution of low-level nonviolent offenses.⁸⁰ All of these are part of this phenomenon that Harry Levine, who analyzes the marijuana data, calls a “Head Start for Prison” program.⁸¹

Finally, as it was suggested before—perhaps we can speak about it at greater length—this fundamentally corrupts the criminal justice system. Milt Mollen, who did a report, the Mollen Commission Report, on a panel in 1990, made the observation that

[i]n the last few years . . . there has been case after case where there is strong testimony, but it is a police officer's testimony. The jurors are skeptical and they don't trust the police. That is a very unfortunate impact arising from the fact that, at times, police officers do use brutality or are corrupt. It causes cynicism about the criminal justice system, and our society suffers as a result⁸²

BABE HOWELL: What are you or your organizations doing to challenge stop-and-frisk or what are you proposing as alternative ways to respond to this problem?

DARIUS CHARNEY: Well I'll start with a disclaimer that I'm

⁷⁸ Rivera, Baker & Roberts, *supra* note 73 (“In the more than 50,000 stops since 2006, the police recovered 25 guns.”).

⁷⁹ See MARC KRUPANSKI ET AL., CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS: THE CENTER FOR CONSTITUTIONAL RIGHTS PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008 (2009), available at http://www.ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_1.pdf (“The percentage of stops resulting in the use of physical force by an officer was 25 percent in 2005; 20 percent in 2006; 23 percent in 2007; and, 24 percent in the first half of 2008.”).

⁸⁰ See generally LEVINE & SMALL, *supra* note 60, at 38–42.

⁸¹ *Id.* at 50–52.

⁸² Hon. Milton Mollen, *Police Violence: Causes and Cures*, 7 J.L. & POL'Y 93, 100 (1998).

going to talk about litigation, and my disclaimer is that I'm not advocating that litigation is the most effective or even an effective way of doing this, at least not all the time, and I also would say that if you're going to use litigation, you always have to coordinate it with other kinds of non-litigation strategies and a lot of the folks on this panel are experts in those other strategies and have been very effective at them and you'll probably hear about that, so that's my disclaimer.

As was mentioned in the intro, CCR's work on this issue goes back at least to the late nineties. We did bring the *Daniels v. City of New York* case, which was the case that came out of the murder of Amadou Diallo.⁸³ It was a case challenging the stop-and-frisk practices of the Street Crimes Unit, which was a unit at the time that had been around, I think since the seventies.⁸⁴ It was supposedly disbanded in 2002 but we know it still exists under a different name, which is the Anticrime Unit.⁸⁵ But that case was very limited to just what was going on with the Street Crimes Unit. But what we've seen in the decades since that case, the stop-and-frisk problem, or the illegal stop-and-frisk practices have multiplied by a factor of six.⁸⁶ I think in 2002 we had 92,000 stops we're now up to, you know, we're on pace for 600,000.⁸⁷ That's a six hundred percent increase in eight years and I believe that the crime rate has gone down or leveled off.⁸⁸ So if you're talking about stopping crime, it doesn't seem to correlate.

But, you know what we did is, as part of the *Daniels* settlement,⁸⁹ which is a whole other issue—there were a lot of problems with that settlement—but one of the good things that came out of

⁸³ See *Daniels v. City of New York*, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 23, 2003), available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

⁸⁴ See David Kocieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. TIMES, Feb. 15, 1999, at A1.

⁸⁵ See William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447, 450 (1995). The author, former commissioner of the NYPD, writes, "[w]e called on all transit police officers, including plain-clothes anti-crime officers, to enforce quality-of-life offenses." *Id.*

⁸⁶ See Trone, *supra* note 2, at 2.

⁸⁷ See *id.*

⁸⁸ See *id.* "In introducing the subject of stop, question, and frisk, Jeremy Travis presented a slide illustrating a dramatic increase in the number of stops annually in New York City—from 160,851 stops in 2003 to 575,996 in 2009, an increase of more than 300 percent in six years." *Id.* While the increase is not quite 300%, the numbers clearly show that there has been a significant increase in the number of stops.

⁸⁹ See *Daniels v. City of New York*, No. 99 Civ. 1695 (SAS) (S.D.N.Y. Sept. 23, 2003), available at http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf.

it was getting a hold of the stop-and-frisk data. We were provided with that data every quarter from 2003 to 2007.⁹⁰ And when we analyzed it and saw that the problem was getting worse we felt that we needed to go back to court because this was a problem that affected the entire police department and it would require a lot broader and a lot more aggressive remedies.

So, in 2008, we filed the *Floyd* case, which challenges the practices of the entire department in this area.⁹¹ We allege and we think we can prove that, in fact, the police department has a pattern and practice of violating the Fourth Amendment when they make these stops because they are not based on reasonable suspicion in a vast majority of the cases; and we also allege that these stops violate the Equal Protection Clause of the 14th Amendment because we believe they are based on race in, again, a vast majority of the cases.⁹²

One of the panelists said that this is not an experience that most white people in this city have and I think that's true. The numbers obviously bear it out.⁹³ I remember—it was probably about a year and a half ago—we had a press conference, it was a cold January day. I think it was the day that the plane landed in the Hudson River.⁹⁴ I remember that New York One did a little “Man on the Street” poll about stop-and-frisk and they stopped all these people randomly to ask them about it downtown and I believe every single black and Latino person they stopped said that either they or someone they knew had been stopped or frisked by the police and none of the white people that they stopped said they had any experience with it.⁹⁵ So it really is, I think, very stark. So I think to call it racial profiling, as Bob said, is being too nice. It's

⁹⁰ See MARC KRUPANSKI ET AL., *supra* note 79 at 6.

⁹¹ *Floyd v. City of New York*, 739 F. Supp. 2d 376 (S.D.N.Y. filed Apr. 16, 2008) (08 Civ. 01034 (SAS)).

⁹² See Compl. and Demand for Jury Trial, *Floyd v. City of New York*, 08 Civ. 01034 (SAS) (S.D.N.Y. Sept. 9, 2008), available at http://cctjustice.org/files/Floyd_Complaint_08.01.31.pdf.

⁹³ CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 1.

⁹⁴ *Airplane Crash-Lands into Hudson River; All Aboard Reported Safe*, CNN, Jan. 15, 2009, http://articles.cnn.com/2009-01-15/us/new.york.plane.crash_1_air-traffic-controllers-bird-strike-pilot?_s=PM:US.

⁹⁵ Roger Clark, *NYPD's Stop and Frisk Data Shows Racial Disparity*, NY1.COM (Jan. 15, 2009, 7:40 PM), <http://www.ny1.com/content/92347/nypd-s-stop-and-frisk-data-shows-racial-disparity>. See also Andrew Gelman, Alex Kiss & Jeffrey Fagan, *An Analysis of the NYPD's Stop-And-Frisk Policy in the Context of Claims of Racial Bias 2* (Columbia Law School Public & Legal Theory Working Paper Group, Paper No. 05-95) (June 16, 2006), available at <http://www.stat.columbia.edu/~gelman/research/unpublished/frisk7.pdf> (discussing the data showing that blacks and Hispanics are “stopped” more often than whites by police).

racism. It's racist policing. And it's unconstitutional policing. And it's a human rights violation so let's call it what it is.

DAVID KENNEDY: So the national community that I am part of in my center at John Jay, we do hands-on operational work on crime and public issues in the most dangerous communities around the country. We work directly on operational strategies with jurisdictions on actual crime control and prevention issues. I think at this point I want talk about an aspect of what that kind of engagement is like. And it's not the whole thing, but it's the grounding on which almost everything else is built. It's about translating between law enforcement and the affected communities. What you find if you have experience on both sides of this is that there are perfectly symmetrical, mirrored, wrong understandings of what's going on.

And so if you go to law enforcement, they have a narrative that says, "in the communities we are talking about, the communities are completely corrupt, everybody's living off drug money." The moral standards that need to be there so that people go to school and take entry-level jobs and such are gone. Nobody cares about the drugs; nobody cares about the violence. Everybody's living off the drug money. And the silence is because people don't care or they are actively complicit.

You go to the community and the community narrative—and I'm simplifying on both sides here but not that much unfortunately—The community narrative is that this is a deliberate plot to do us damage and it is in keeping with the rest of our real history in America. We were in fact deliberately and conspiratorially oppressed under color of law until not that long ago. We finally attained our legal equality and law enforcement and the outside needed a new tool with which to do us damage. They came up with, especially, drug enforcement in order to do it and what we're experiencing now is the same intent under different means and the point is to do us damage, to prevent our success, and put our strong young men in prison and control them.

There are a lot of important things to be said about those narratives but the most important one is that they are both wrong. As a factual, empirical matter they are wrong. So law enforcement is not, today, a deliberate, occupying, conspiratorial, racist force, although, as I said, they certainly make themselves look like it. And the community is not corrupt. Everybody is not living off drug money. The silence is not complicity; the silence is anger and withdrawal.

What that means is that there is common ground that nobody can see because everybody is stuck in these frank misunderstandings. And the common ground turns out to be that none of the parties involved—police, community, criminals—none of them are having a good time and nobody likes what’s happening. Good cops don’t like this. The community hates it. The guys on the corner are scared and getting hurt and they’re not getting rich. This isn’t good for anybody. But our history and our misunderstandings and our unwillingness to do truth telling and reconciliation mean that we can’t see that common ground. And so a lot of what we do is to work with law enforcement and basically say to them, “This is how they see you and it’s wrong. But here’s why it’s credible and here are the ways in which you are playing into this.” We work with communities and say, “This is how they see you and it’s wrong. But here are the ways in which you are playing into their worse understandings of you.” And it turns out that you can actually do that, at which point there is a certain amount of reconciliation that can take place and you can get onto how we’re actually going to the deal with the crime and chaos problems, which turn out to be actually relatively easy to manage.⁹⁶

NOEL LEADER: As an African American former member of the New York City Police Department, I have the advantages of being a black man and being a police officer. And I’ve never seen a contradiction in being a black police officer. But I utilize my blackness and my ability, or my occupation as a police officer, to benefit both communities. One of the things we do, as an organization comprised of African American law enforcement officers—because trust me, racism is a definite problem within law enforcement, a definite problem, a great problem. As a matter of fact, in 2006 over 1400 black and Latino police officers sued the New York City Police Department because of internal racism, successfully—to the tune of 21 million dollars.⁹⁷ Thank you to you taxpayers. And when we talk about solutions, we’re going to talk about that. Thirteen hundred black and Latino police officers sued New York City Police Department because of internal racism, internal racial profiling. And Police Commissioner Kelley didn’t want to go to court so he settled. So part of things that we do, to answer the question, is we

⁹⁶ For a discussion and analysis of the success of David Kennedy’s program in Cincinnati, see John Seabrook, *Don’t Shoot*, NEW YORKER, June 22, 2009, at 32.

⁹⁷ Latino Officers Ass’n City of New York v. City of New York, 209 F.R.D. 79, 80–81 (S.D.N.Y. 2002). See Emily Jane Goodman, *City Settles Discrimination Lawsuit by Black and Latino Officers*, GOTHAM GAZETTE, Feb. 20, 2004, <http://www.gothamgazette.com/print/876>.

expose what's going on because at the core of it, and since we're talking about blacks and Latinos, it's as if they're committing racial profiling throughout the city. No, it's primarily in black and Latino communities. We expose the lie. We expose what's actually going on because we feel, as law enforcement officers and as African Americans and Latinos, that's our responsibility. It's not naïveté. Police Commissioner Kelly lies when he says the reason why X percentage of blacks and Latinos are stopped is because X amount of blacks and Latinos commit X amount of crimes—you see, there's a comparison, et cetera et cetera. But what he doesn't say, and he knows it—this is why I get angry at him. Because if he didn't know, then there would be room for discussion and debate. But when you look at the stop, question and frisk, as Mr. Charney will tell you—and as [Eliot Spitzer], who was an Attorney General and who investigated NYPD practices of stop, question, and frisk⁹⁸—that 90% of them, have no victim.⁹⁹ So it's not as if the police officers are responding to a call for a crime or a report of a crime. Over 90%, when he did a study, but we know that it's more than 90% that have no victim involved, because we work with police officers. Most stops are police-generated, police-initiated; no crime involved.¹⁰⁰ Police officers randomly walking up to individuals to stop, question, and frisk them.

Now, when Police Commissioner Kelly points to crime—because in order to deceive you, he has to talk about crime. And people say, “Okay, yeah, ok there is a crime problem in these communities”—and in many of these communities there are a crime problem. Okay, so let's be real. But, the problem of stop, question, and frisk has nothing to do with that problem. OK? And we know it, Police Commissioner Kelly knows it, and I will debate him anyway because I can snap them fingers and get 2000 stop, question, and frisk reports and I will show you, on the report, where it says “complainant” and it says, “no complainant”—no report of a crime.¹⁰¹ This is a police initiated stop. So part of what we do is we expose it. And, as I said, I'm pro law enforcement. But we feel compelled. Also what we do is we go into the communities and we have workshops. One of them is what to do when stopped by the police. Because there needs to be instruction to young people

⁹⁸ See N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 10.

⁹⁹ Ben Yakas, *NYPD Stop and Frisk Beat Keeps on Keeping On*, GOTHAMIST (Nov. 20, 2009, 3:20 PM), http://gothamist.com/2009/11/20/nypd_stop_and_frisk_beat_keeps_on_k.php.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

and, although that was an excellent film, a lot of these people in the film,¹⁰² were young—you know, hoodie, hat on the side—but there are black men with suit and ties. There are black men with khakis and flip-flops. There are black men who are 50 years old, 60 years old who are being stopped by these police officers.¹⁰³ So it's not only young teenagers. There is a whole gamut of black men, and women, who are being illegally stopped by racist police officers. And that is at the core, by the way.

Part of what we feel responsible for doing is teaching our community, or instructing our community, excuse me, how to respond to police officers because sometimes it can result in just a simple inconvenience of being stopped. But many times it escalates and can ultimately result in the person being arrested.

DARIUS CHARNEY: I just wanted to add one thing to what Noel said, which was a good point about Police Commissioner Kelly lying with the data. The other thing the police don't tell you when they keep quoting this stuff in the papers is that when they look at the crime data and they say that 90% of all crimes are committed by blacks and Hispanics, that's 90% of the crimes where there's a suspect-race description.¹⁰⁴ Seventy percent of all crimes reported to the NYPD don't have any suspect description.¹⁰⁵ So you're talking about, basically, 90% of 30%. So that's a big difference that they don't tell you about.

BABE HOWELL: There are 250,000 misdemeanor arrests in New York and only about 30, 40, 50,000 felony arrests.¹⁰⁶ Even if it were 90%, most of those are going to be drug sales, not violence. So when you're talking about the violent crime number, maybe 10, 15,000 who are arrested?¹⁰⁷ Of course there are violent crimes that aren't solved, but then how do we get to 600,000 people stopped?

¹⁰² See Ramos-Chapman, *supra* note 30. See also *Stop and Frisk Fact Sheet*, NEW YORK CIVIL LIBERTIES UNION, *supra* note 37.

¹⁰³ See Fagan, *supra* note 45, at 20.

¹⁰⁴ See Al Baker, *Lawsuit Challenges Stop-and-Frisk Database*, CITY ROOM BLOG (May 19, 2010, 1:57 PM), <http://cityroom.blogs.nytimes.com/2010/05/19/lawsuit-challenges-stop-and-frisk-database/> ("Jeffrey A. Fagan, a professor of law at Columbia University, who has studied the numbers, said that crime complaints for 2009 show that although blacks made up 15 percent of suspects in all crimes and 32 percent of suspects in all violent crimes, a suspect's race is known only 29 percent of the time.").

¹⁰⁵ See *id.*

¹⁰⁶ There were 251,169 misdemeanor arrests and 92,139 felony arrests in New York City in 2010. See *Adult Arrests 2001-2010*, NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/NewYorkCity.pdf> (last visited Aug. 17, 2011).

¹⁰⁷ 27,122 arrests were for violent felonies. See *id.*

JESUS GONZALEZ: I think that there are several approaches. None of us up here have the absolute answer on how to tackle this issue because if we did, trust me, it would have been happening and the stop-and-frisk issue probably wouldn't be going on right now. But this dilemma exists; this phenomenon exists and is a reality for a lot of families in New York City.

One of my little brothers—he's one of my students, I teach a class in Bushwick¹⁰⁸—he was saying that his mother doesn't want him to go outside. He's 19 years old. His mother does not want him to go outside to the store. She'd rather go herself than send him because the police might stop him. And for me hearing this, I mean at first I smirked at him cause I was like, man, he's like two times bigger than me and I was like, "You're really scared?" And he's like, "Yeah," and she's definitely scared. I think that this is how stop-and-frisk impacts the average family. And this brother is an Honor Roll student.

I know, for us, we have simultaneously tackled this issue and other community issues, obviously supporting existing legislation and trying to create legislation and including young people and community members to create legislation that holds police accountable. The last thing that we were looking at was how to—this is not rocket science—we had, young people meet with the public advocate's office, and with the mayor's office around giving the CCRB prosecutorial power as one mode of holding police accountable.¹⁰⁹

Another thing is this: if it's against the law to uphold quotas and illegally stop and frisk folks, come on lawyers, think about this, then why is there no legislation to prosecute officers who are caught enforcing quotas? We sit around thinking about this issue because it plays a role in our day-to-day lives, but as many of you will find out and as some of you know, the legislative process is not only isolating but it's also exhausting. And a lot can happen by the time legislation is actually passed. So we decided to respond to the police harassment, the unlawful stop-and-frisk in the community. We linked up with a coalition called People's Justice Coalition for Community Control and Police Accountability and the main pur-

¹⁰⁸ Bushwick is a community in Brooklyn, New York that has been the target of disproportionate stop-and-frisk encounters. See *Stop and Frisk Practices*, NEW YORK CIVIL LIBERTIES UNION, *supra* note 62 (highlighting stop-and-frisk data recorded from the NYPD's 83rd Precinct in Bushwick).

¹⁰⁹ Dan Garodnick, *Putting Civilian Review Back into the CCRB*, HUFFINGTON POST (Sept. 23, 2009, 11:50 AM) http://www.huffingtonpost.com/dan-garodnick/putting-civilian-review-b_b_296145.html.

pose of it is to conduct Cop Watch in communities like Bushwick. And there are teams across the city who are doing Cop Watch.¹¹⁰

The last time we did Cop Watch was during the Puerto Rican Day parade. In Bushwick, it's the after-parade, and the 83rd Precinct has deemed it necessary to practice anti-riot tactics on that day: horseback, on rooftops, controlling traffic, blocking streets, telling people they can't sit in front of their homes, forcing people indoors, and whooping ass.¹¹¹ And so we decided that we needed to document this stuff, so we have trainings on how to conduct a successful Cop Watch. On that day, we gave out more than 6000 Know Your Rights cards to the community. Another thing we decided to do is have young people engaged in creating murals that let people know their rights, in the community.

So I think that both initiatives are necessary, both on the legislative process—but you lawyers, when you start writing legislation, please include the communities that are directly impacted by these legislations. We have an existing model at Make the Road New York,¹¹² my organization, where we have attorneys on staff, and we have successfully created policy that is moving forward on a state level where our members were the driving force in lobbying it and also the language in the legislation. And that was for workers' rights in the community. So one is Cop Watch, the other one is obviously Know Your Rights trainings in the community to deal with the immediate need of people being aware that this is an issue. And finally it is our legislative approach where we look at legislation that exists and we propose new legislation, but inclusive of the community as directly impacted.

BABE HOWELL: What are you doing, what do you want someone else to do, or what is going on?

ROBERT PERRY: We just spent three hours in our office this very afternoon thinking through how we begin to mobilize at what I think is a political moment where there may be an opportunity. But let me speak to one intervention that we've tried to make work, with not much success. It was alluded to in the opening.

¹¹⁰ Press Release, People's Justice Coalition, People's Justice Launches Outreach and Ad Campaign to Encourage Cop Watch and Education About New Yorkers' Rights (Sept. 23, 2009) available at <http://www.peoplesjustice.org/site/index.php/Cop-Watch-Network>.

¹¹¹ Anemona Hartocollis, *Dispute over Arrest Pattern at the Puerto Rican Parade*, N.Y. TIMES, June 13, 2007, at B5.

¹¹² See MAKE THE ROAD NEW YORK, http://www.maketheroad.org/whoweare_ourhistory.php (last visited Apr. 18, 2011).

The concept of civilian review of policing has been around since the middle of the last century.¹¹³ It actually is a concept that came out of racialized policing. It was a recommendation that was articulated quite eloquently in the Kerner Commission report in 1968.¹¹⁴ That was the report that famously concluded that we are becoming two separate societies, unequal.¹¹⁵ That report suggested that as a result of police abuse, in inner cities in particular, there needed to be some independent entity, and it set out the principals of that entity: it needed to be removed from the police department; it had to be staffed by civilians; civilians needed to have an opportunity to present their claim; they should have legal counsel; there should be a public hearing; there should be a conciliation process; there should be a formal recommendation made to the department including policy and practice recommendations where underlying policies gave rise to misconduct.¹¹⁶

It's a very good model. It's quite like the principles that have been embraced in the New York City Civilian Complaint Review Board.¹¹⁷ In our view, that model has fundamentally failed even though, as I said, the principles are reflected in the model itself. So why the failure? The failure is because the entity over which the civilian complaint review board is meant to have accountability and oversight has essentially co-opted the oversight agency, meaning the police department has essentially made the CCRB a wholly owned subsidiary of the cops. And this is a result of a number of things: elected officials who are fearful of taking on the police department, a mayor who is extraordinarily deferential to the police commissioner, civilians in communities so beat down by the phenomenon they haven't got the capacity or wherewithal to organize in any kind of effective way. That's not to say that the principles and the model are not workable and cannot be effective under any circumstance. We've simply been in a very worst-case scenario for a long time.

And a bit of context regarding New York: we were struggling

¹¹³ See Kim, *supra* note 19, at 479–80.

¹¹⁴ OTTO KERNER, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, SUMMARY OF REPORT 1 (1968), available at <http://eisenhowerfoundation.org/docs/kerner.pdf>.

¹¹⁵ *Id.* (“This is our basic conclusion: Our nation is moving toward two societies, one black, one white—separate but unequal.”).

¹¹⁶ See generally KERNER, *supra* note 114.

¹¹⁷ See *Mission Statement and Rules*, NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, <http://www.nyc.gov/html/ccrb/html/mission.html> (last visited Aug. 17, 2011).

to make this model work in the 1990s; it was created in 1993.¹¹⁸ If things were bad in 2000, after 9/11, concepts of policing became perceived and understood in very different ways. So all of a sudden street stops are seen on a continuum to catching the terrorist who may be in a cell someplace in central Brooklyn. And I'm not being fanciful here, that's an actual, explicit understanding of how policing works. Let me suggest that one of the reasons why the civilian review model has been so provocative and so difficult to make work in New York City—and I was thinking about this today—is based on some principles that I think are the strength of the concept and yet make it untenable in this particular political moment, those principles being human rights principles. They are principles that suggest you need to engage effective communities and stakeholders in reform and accountability. You need to reduce the imbalance of power in negotiating conflict between civilians and the state. You need to respect community norms and interests when establishing and enforcing police practices. All of those run right into the teeth of broken windows, zero-tolerance policing as we know it today, but those are the very principles I think that will inform a reform movement.

Jesus made reference to this idea of organizing; several folks have raised it. Our view—I've worked on reform movements related to the death penalty,¹¹⁹ reform of the Rockefeller drug laws,¹²⁰—is that this will take a movement, it will take a broad-based, coordinated, well thought-through movement to kind of shift the paradigm in which this discussion of policing takes place.

I'll make one final observation regarding the difficulty of trying to shift that narrative that has to do with the corruption of meaning that was demonstrated I think eloquently by the illustration of the so-called witness or suspect-generated stops, which is just nonsense. The data are completely untenable and yet Paul Brown, the police department propagandist, says this over and over

¹¹⁸ See *History of the CCRB*, NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, *supra* note 25.

¹¹⁹ See, e.g., *The Future of Capital Punishment in New York State: Hearing Before Assemb. Comms. on Codes Judiciary and Correction Regarding the Future of Capital Punishment in New York State* (N.Y. 2005) (statement of Robert Perry, Legislative Director of the New York Civil Liberties Union), available at <http://www.nyclu.org/content/future-of-capital-punishment-new-york-state>.

¹²⁰ See, e.g., *Rockefeller Drug Laws Cause Racial Disparities, Huge Taxpayer Burden: Hearing Before Assemb. Comms. on Codes, Judiciary, Correction, Health, Alcoholism and Drug Abuse, and Social Services, regarding The Rockefeller Drug Laws* (N.Y. 2008) (statement of Robert Perry, Legislative Director of the New York Civil Liberties Union), available at http://www.nyclu.org/files/Rockefeller_Testimony_Assembly_05.08.08.pdf.

again. He must have said it a hundred times over the past twenty years. And the Times will print it as soon as he says it,¹²¹ even though it is entirely false. On the floor debate over the stop-and-frisk databank that we got overturned this session, a Republican from upstate New York in Poughkeepsie said, on the floor, “I reject the idea that police simply walk down the street and arbitrarily go ‘You hey, come over here, I wanna to ask you a few questions and frisk you’ . . . I can’t imagine that would be an acceptable practice.”¹²² The point being, this is the narrative that informs so many folks’ perspective of what policing is about, and I think the only way we begin to shift the paradigm is by a movement mobilizing, developing the substantive empirical argument and creating a political mass that simply can’t be resisted.

BABE HOWELL: [The panelists] were addressing essentially the last three questions together: what are we doing, what are the limitations of what we are doing, and what do we think of legislative fixes? [W]hat do we think of federal oversight, which maybe will come up or maybe not, but we’ve gone through the time that was designated for me to pose questions, and it’s more important for me to give you all a chance to ask questions. Steve Zeidman will spend a few moments giving us his thoughts while we collect your questions and get them to me and choose a few to pose when he’s done.

STEVE ZEIDMAN: At the outset I just want to thank the New York City Law Review for getting us all together in the room, and inviting me to participate. I have to say I am humbled and inspired by the work and the remarks of our panelists and being asked to provide some kind of a response or a coda to what they’ve had to say is challenging to say the least. So what I’d like to do, from my notes, is try and identify a couple of themes that people have high-

¹²¹ See, e.g., Baker, *supra* note 54 (“‘These are not unconstitutional,’ Paul J. Browne, the Police Department’s chief spokesman, said of the stops. ‘We are saving lives, and we are preventing crime.’”).

¹²² Transcript of Floor Debate, Assemb. 11177-A, 233d Sess. (N.Y. June 29, 2010) (statement of Assemblyman Joel Miller) (on file with the New York Civil Liberties Union). Assemblyman Miller continued:

This is a personal agenda battle that some people fight. I know that there is profiling. I know that, in some cases, this is not the case, but clearly the police department, a police agency, homeland security, has a vested interest in finding out who people are, where they are and what they are doing. So we may have a vested interest in firearms but we also have a vested interest in people who are committing suspicious acts and doing things that are kind of strange.

Id.

lighted and talked about with great passion and great wisdom. In particular, let me suggest two over-arching principles. One is we have to put the “reasonable” back in reasonable suspicion. The second is we have to put the “community” back in community policing.

Over 40 years ago, the Supreme Court decided in *Terry v. Ohio*,¹²³ the case we know that gave the seal of approval to stop-and-frisk and I’m struck by the fact that Darius, in the first comment said, well you all know *Terry* so I’m going to hop right over that,¹²⁴ and I can’t, I guess it is because, partly it’s because I’m a law teacher, but more importantly it’s because I know that for a lot of you the way you will address stop-and-frisk abuses in your practice will be in court, post-arrest, one client at a time, something that is all too often overlooked, but it’s very much part of what we’re talking about here. We know that the sins of the police department over and over are buried in an avalanche of guilty pleas.¹²⁵

In the Mollen Commission hearings that have already been referenced it was remarkable to sit in those hearings and listen to police officers testify with full knowledge saying, “I know that what I do, I do with impunity because in all my years with the police force I am virtually never called to testify.”¹²⁶ With that in mind just a couple of minutes on *Terry v. Ohio* and to see the way that Supreme Court law is co-opted right in front of our very eyes. Let me give you the short hand version. So stop-and-frisk, it comes to us forty years ago and, in *Terry*, the court was wrestling with what may seem like such a basic, simple question: What can the police do to a citizen when they do not have probable cause to arrest, but they think there might be criminal activity involved?¹²⁷ That was basically the question the court had to deal with.

And the question grew out of an essential truth—that the Fourth Amendment speaks about probable cause but only speaks

¹²³ 392 U.S. 1 (1968).

¹²⁴ See *supra* notes 33 and 35.

¹²⁵ Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003) (noting that in some federal districts, over 99% of convictions are obtained through guilty pleas). “We now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.” *Id.*

¹²⁶ See Comm’n to Investigate Allegations of Police Corruption and the Anti-Corruption Proc. of the Police Dep’t, Comm’n Rep. 1 (July 7, 1994) (Milton Mollen, Chair), 37.

¹²⁷ *Id.* at 10 (“The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.”).

in general terms of reasonableness about what the police can do in situations when they suspect something but do not have probable cause.¹²⁸ And so the court went on to hold that the police do not need probable cause for every police-citizen interaction, but every police-citizen interaction is indeed regulated, or supposed to be regulated, by the Fourth Amendment.¹²⁹ So if police have reasonable suspicion—a new concept, something nowhere in the Constitution—if they have reasonable suspicion, they can conduct a stop-and-frisk.¹³⁰

What then is reasonable suspicion? And therein lies part of the problem, the elasticity, we don't have a definition of reasonable suspicion. We have an idea. The police are supposed to be able to point to objective facts, specific facts that give rise to the reasonable belief that criminal activity is afoot.¹³¹ And in many ways, if you want to reduce it to the bare minimum we know it has to be more than a mere hunch.¹³² And so born out of this in New York City forty something years later we have the stop-and-frisk juggernaut. And the numbers are numbing, you know we can recite them but they're numbing. For me, and let me suggest for you, the most remarkable thing about the numbers—and I think it was Jesus who talked about the escalating numbers—there are panels like this over and over, and it's not only that it doesn't stop the NYPD, they keep moving, look at the numbers in the last six months and we are now up to 320,000.¹³³ No doubt by the end of the year we'll have a new record, and you wonder what is the tipping point? Is there a tipping point? 750,000 stop-and-frisks? A million? When will the NYPD, or the Mayor, of their own accord, kind of look in the mirror and say we think we've actually taken this a little too far?

And you've also heard that about ten percent—and I'm going use that number just because it's an easy number to work with—only about ten percent of those, and I think last year was about 560,000 or so, only about ten percent of the 560,000 stop-and-frisks

¹²⁸ U.S. CONST. amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”)

¹²⁹ *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

¹³⁰ *Id.* at 10–11.

¹³¹ *See id.* at 30–31.

¹³² *Id.* at 21–22.

¹³³ *Stop-and-Frisks Surge; NYPD Stops Nearly 320,000 So Far This Year*, NBC NEW YORK (Aug. 11, 2010), <http://www.nbcnewyork.com/news/local/Stop-and-Frinks-Surge-NYPD-Stops-Nearly-320000-So-Far-This-Year-100427669.html>.

yielded an arrest or a ticket.¹³⁴ And the question that I want you to consider is if that's the case, we have to ask both, as lawyers, but also as people who are trying to create that sort of movement, where was the reasonable suspicion in these 560,000 cases? And if there wasn't reasonable suspicion in all or some, what does that mean? What does that mean? And, ironically, constitutional criminal procedure grows out of cases of the guilty. And I use that term loosely. By that I mean if evidence was recovered, we evaluate the constitutionality of the police conduct, in that particular context. But in our criminal procedure casebooks we don't have the cases where no evidence was recovered, where no one was arrested. Those issues just don't appear. There are not any criminal procedure cases like this for us to read.

However, let me suggest we can glean an awful lot from the 560,000 stop-and-frisks. We can even be generous to the NYPD and glean an awful lot about the lack of reasonable suspicion. So let's say, let's take the ten percent who were arrested or given a ticket. 560,000, we'll subtract the ten percent, we then have 500,000 stops and frisks. Was there reasonable suspicion in these half a million cases? Half a million. I'm in a generous mood, I'll say there might have been in fifty percent. Let's say even though there was no arrest, no evidence recovered, maybe they had some basis to believe there was reasonable suspicion. So I'll give the NYPD fifty percent. What does that leave us with? 250,000 stop and frisks on less than reasonable suspicion, and as our panelists have made abundantly clear, and you as law students in particular should understand, an unconstitutional stop and frisk is illegal. It is unlawful. So a quarter of a million times—and believe me it's higher than that—the police in New York City engaged in illegal behavior. What other crime could you imagine going on a quarter of a million times and then there not being a single arrest? Not one. It's incomprehensible.

By putting the reasonable back in reasonable suspicion what that causes us to do, I would hope, is put the focus, with laser-like precision, on the police. As important as it is to see videos and the impact on the victims, what ends up always being missing is the laser-like precision on the particular police officer. Only then when they are held accountable, called to testify, cross-examined, asked what they did and why they are doing what they did. How many

¹³⁴ Steve Zeidman, *Racial Impact of Quality of Life Policing*, 241 N.Y. L.J. 6 (col. 3) (Apr. 2, 2009) (“Consider the 530,000 stops and frisks. If these encounters yielded guns or drugs, then the numbers might reflect lots of crime and effective police work to catch or stop it. However, only 10 percent of the 530,000 were arrested or even given a summons.”).

stop and frisks did you do last week? Last month? Let us go through them case by case. Then the race-based stop-and-frisk rationale will be fully exposed, and hopefully, when police are finally held accountable, when they are finally scrutinized, we might be able to see a couple of changes.

And going back to *Terry v. Ohio* for a moment, to see something remarkable, and I hope it doesn't make you overly cynical, maybe just properly cynical, about the Supreme Court. Chief Justice Earl Warren, the author of the Court's opinion in *Terry* in 1968—he understood very, very well the importance of the case.

He said the following, these are going to be all quotes, “[w]e would be less than candid if we did not acknowledge that this question” meaning the permissibility of stop-and-frisks, “thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity, issues which have never before been squarely presented to this Court.”¹³⁵ He goes on to say—and recognize folks this is a 1968 quote—“[t]he wholesale harassment by certain elements of the police community of which minority groups, particularly Negroes, frequently complain,”¹³⁶—he goes on then to cite a footnote from the president's commission on law enforcement and the administration of justice,¹³⁷ again 1968—“in many communities, field interrogations are a major source of friction between the police and minority groups. . . . It was reported that the friction caused by ‘misuse of field interrogations’ increases ‘as more and more [sic] police departments adopt aggressive patrol in which officers are actually [sic] encouraged, routinely, to stop and question persons on the street.’ ”¹³⁸ Sound familiar? It goes on to conclude “[t]his is particularly true in situations where the stop and frisk of youths or minority group members is motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets.”¹³⁹ It is remarkable if you step back and look at *Terry*. *Terry* was meant to regulate the police—to rein in the police—and yet somehow it is now being used as a source of authority for the police.¹⁴⁰

¹³⁵ *Terry v. Ohio*, 392 U.S. 1, 9–10 (1968).

¹³⁶ *Id.* at 14.

¹³⁷ *Id.* at 14 n.11.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Adams v. Williams*, 407 U.S. 143, 151–52 (1972) (Brennan, J., dissenting) (quoting *Williams v. Adams*, 436 F.2d 30, 38–39 (2d Cir. 1970) (Friendly, J., dissenting) (“[The Fourth Amendment] was meant for the serious cases of imminent danger or

To the extent racial profiling—and I share everyone on the panel’s concern about the term—but to the extent it deals with individualized suspicion based on race, it doesn’t capture the problem; in fact, it minimizes it. Stop and frisk is much more systemic and pernicious than that. It is race profiling. Anyone of a particular race in a particular neighborhood is subject to being stopped and frisked. And in many ways I suggest you think about it and Professor Kennedy can go into much more detail than I can on this, but think of it as new age community policing.¹⁴¹ Not that long ago the NYPD talked about community policing, meaning officers to be actively involved in the community, become a part of the community, endeavor to act as collaborative problem solvers.¹⁴²

But now, indeed, we do have community policing. The NYPD polices certain communities by flooding them with police officers and encouraging, if not demanding, them to make massive amounts of stops-and-frisks. It is a deliberate, intentional approach to certain communities. And when you think about this new style of community policing—meaning efforts by the NYPD to target entire communities—you see how it is being applied in similar ways now.¹⁴³ There are many similarities—although the differences are also important—but as it is being applied now in Muslim neighborhoods and communities across the city and the country.¹⁴⁴ So what new approaches? What new approaches for you? What are the ones that are not yet implemented or even imagined? You’ve heard discussions of truth and reconciliation. You’ve heard the value of the community being involved. All of these are critical.

Let me just mention two things the NYPD tried to do and I say this only partly tongue in cheek. Some of you might have seen the article two days ago: a former NYPD commissioner was talking about the need for police officers to sell the stop.¹⁴⁵ Did anybody

of harm recently perpetrated to persons or property, not the conventional ones of possessory offenses. . . . I greatly fear that if the [contrary view] should be followed, *Terry* will have opened the sluiceways for serious and unintended erosion of the protection of the Fourth Amendment.”).

¹⁴¹ Al Baker & Ray Rivera, *Study Finds Street Stops by N.Y. Police Unjustified*, N.Y. TIMES, Oct. 26, 2010, at A22. See also MARG KRUPANSKI ET AL., *supra* note 79.

¹⁴² See generally Antony M. Pate & Penny Shtull, *Community Policing Grows in Brooklyn: An Inside View of the New York City Police Department’s Model Precinct*, 40 CRIME & DELINQUENCY 384 (1994).

¹⁴³ See Rivera, Baker & Roberts, *supra* note 73; Bloch, Fessenden & Roberts, *supra* note 28.

¹⁴⁴ Henrick Koroliszyn & Samuel Goldsmith, *Qns. Rally vs. Racial Profiling of Muslims*, N.Y. DAILY NEWS, Oct. 11, 2009, at 17.

¹⁴⁵ Al Baker, *Selling the ‘Stop’ in ‘Stop and Frisk’*, N.Y. TIMES, Sept. 16, 2010, <http://cityroom.blogs.nytimes.com/2010/09/16/selling-the-stop-in-stop-and-frisk/>.

see this? It was a remarkable article. It said after you stop and frisk someone the best way to deal with community relations is after you've done it, just explain nicely why you did it.¹⁴⁶ This is true, and in fact the year before the NYPD had also come up with another wonderful idea. They had a card. Does anybody remember this?

It was the stop and frisk card. You explain to someone that you stopped and frisked them and you hand them a card.¹⁴⁷ But here's the problem and this sums it up this is where I'll conclude, perhaps and I'll be generous again, the motivation behind the card may well have been admirable on some level but the language on the card reflects such a profound lack of understanding.¹⁴⁸ Here's what it says on the bottom, after listing the reasons why people are stopped and frisked it says quote "if you have been stopped and were not involved in any criminal activity," as in ninety percent of the cases, "the NYPD regrets any inconvenience."¹⁴⁹ Inconvenience. For me, inconvenience is when I'm walking down the subway and the gates close. Inconvenience is not being spread-eagled on a police car in front of family and friends. So let me suggest to you that maybe that's your ultimate challenge to get those in power to see the actions of the NYPD as pernicious and destructive as they, in fact, are.

BABE HOWELL: We have so many great questions that honestly I would probably spend the next half hour just asking them. What I'm going to do though is pose a question and ask one or two people who feel like they would be best to speak to it, to give a brief answer. And then I will go on to the next one, and will get through to as many of these student questions as possible.

Question number one: "For people who do community organizing, how do you overcome anger and years of not being listened to so that we can actually work with our communities to fight back?"

JESUS GONZALEZ: I think that it could be very exhausting and could put water on your fire. I think that part of it is, there is some satisfaction in having the fire, you know? Because, if at times,

¹⁴⁶ *Id.*

¹⁴⁷ Erica Pearson, Frank Lombardi & Wil Cruz, *Why the Stop & Frisk? Answer's in the Cards*, N.Y. DAILY NEWS, May 1, 2009, at 32.

¹⁴⁸ Wil Cruz, *NYPD's Frisk Card Plan is "Garbage," Cop Group Sez*, DAILY NEWS, May 7, 2009, at 26 ("The NYPD's stop-and-frisk pilot program is 'garbage policy' that allows police to keep personal information of innocent people . . .").

¹⁴⁹ Pearson, Lombardi & Cruz, *supra* note 147.

for example, if somebody who is hungry and there is an issue of hunger and they are fed, they might be less agitated. So if we are not listened to, trust me, they are agitated. You know what I mean? The necessary measures are taken to correct and or change the current system. The fruits of community organizing over the last 11 years is that, I feel like for folks who are directly impacted by it, and who are getting organized, you have no choice but to love your community and to love yourself and I think that, in fact, in turn I've seen some of the coldest gangsters wind up playing a role in making the community safer and also being a watch dog for the community where police are not going to get away with beating on one of our neighbors. But I think that it is important to stay involved. The fruits of community organizing obviously have been historically effective in this country.¹⁵⁰ And it's going to continue to be effective and has to be included in this process.

BABE HOWELL: I think Robert would also like to address how do you overcome frustration, after years of not being listened to, regarding work with communities.

ROBERT PERRY: Let me suggest that there may be sort of a political opening here, and take [the] opportunity to clarify something that I said earlier. I talked about a bill before the legislature this past session that would prohibit the department from maintaining a stop-and-frisk databank.¹⁵¹ What I meant to say was the bill prohibits the department from entering into that databank personal identifiers of folks who have been stopped, frisked, and released without further legal consequence: no reasonable cause, no arrest, no violation, no summons, nothing.¹⁵² That debate, and the databank, I want to make clear, is fundamentally important because that is how we get the demographic data about stops and frisks; it helps us do good analysis of the issues we have been talking about tonight.

But what this debate did was open up in a way I've never seen

¹⁵⁰ See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 461 (2001) ("Movement historians have pointed to its many accomplishments, including the development of skilled community-based leaders and national community organizing networks, the refinement of replicable community organizing models, and numerous successful campaigns that have effectively shifted the balance of power toward disadvantaged communities.").

¹⁵¹ See Assemb. B. A1117-A, 233d Leg. Assemb., Reg. Sess. (N.Y. 2010); S. B. 2277, 233d Leg. Assemb., Reg. Sess. (N.Y. 2010).

¹⁵² Press Release, N.Y. Civil Liberties Union, NYCLU Applauds Gov. Paterson for Signing Stop-and-Frisk Database Bill into Law (July 16, 2010), available at <http://www.nyclu.org/news/nyclu-applauds-gov-paterson-signing-stop-and-frisk-database-bill-law>.

before in the state legislature—it opened up a discussion about police practices in the streets of New York City that took on Ray Kelly and won. That’s never happened in my experience. Mayor Bloomberg was defeated on this issue.¹⁵³ That discussion began in a meeting we had with Congresswoman Yvette Clarke and the black elected officials out in Brooklyn a year and a half ago, when they were trying to figure out just what we are trying to figure out now, is how the hell do we get at this problem that is so pernicious and systemic. And out of that discussion we decided to actually try to shut down the personal identifiers in the databank not because that was going to solve the underlying policy and practice, but because it would drive a debate. And it did drive a debate. We are coming now to the foreseeable end of Mayor Bloomberg’s tenure and maybe Ray Kelly’s. We just had a significant victory in the legislature.¹⁵⁴ My point being, the challenge now is I think to mobilize, to organize, to educate, and to begin to identify some discreet reforms, legislative policy that we can win and that I think we can win. And, I think we can. So I think it is a hopeful moment in the light of a very rough history. That would be my response.

JESUS GONZALEZ: And, real quickly, that anger does not go away, just to answer the question, it should not go away. It should be constructive. It should be transformed into positive changes when you are doing community organizing. If you don’t in fact feel agitated and anger, you shouldn’t be a community organizer.

NOEL LEADER: What was stated as it relates to the legislation, sometimes I feel everyone who addresses this issue should speak to members of 100 Blacks in Law Enforcement Who Care because we like to get into the gristle and the bone and the core of the problem. The legislation that was written to eliminate the electronic database, we consider that legislation inept and misdirected because it does not address the core of the issue. The core of the issue is that illegal stops should not be made in the first place and if they aren’t made, there won’t be any need for a database.¹⁵⁵ Secondly, we know that the legislation does not back up the New York City Police Department demand to eradicate. We know the police department is not going to eradicate the electronic database. Third

¹⁵³ See David Seifman & Amber Sutherland, *Dave’s Frisk-List Imperils NYers: Mike*, N.Y. POST, July 17, 2010, at 2.

¹⁵⁴ Al Baker & Colin Moynihan, *Paterson Signs Bill Limiting Stop-and-Frisk Data*, N.Y. TIMES CITY ROOM BLOG (July 16, 2010, 11:56 AM), <http://cityroom.blogs.nytimes.com/2010/07/16/paterson-signs-bill-limiting-street-stop-data/>.

¹⁵⁵ See Cruz, *supra* note 148 (discussing the vocal opposition of 100 Blacks in Law Enforcement Who Care to the electronic database).

of all, a week after the legislation, or after it was announced about the legislation being passed, Police Commissioner Kelly gave the order to all commanding officers to maintain the physical database; it may not be in the computer, but these stop question and frisk forms, which are documented, are to be maintained in the command, forwarded to the borough command, so they still have the information. So when people think that innocent individuals' information is going to be erased from New York City databases, it is not.

But we felt the emphasis should be on the illegal stops themselves. Real quick, in 10 seconds, I can say the solution to this problem, because it is not really rocket science. If you break the law, you get arrested. Arrest ten cops for illegally stopping individuals and it will slow down and ultimately stop. Keep locking them up if they violate the law. Period. That's the solution. And, that's the only solution. Lock them up and they will stop. That's the only solution, lock them up. Trust me.

BABE HOWELL: Okay. There's so many good questions. Here's one. "How does this phenomenon affect women of color, are there studies that analyze this?" We heard about one mother who was affected, who won't let her son out of the house. David?

DAVID KENNEDY: So, there is actually some very, very interesting scholarship on this question and maybe a slightly bigger one. And what it all boils down to is that in the communities we are talking about people's perceptions about these issues of right and wrong and police conduct and legitimacy and all the rest of it are formed somewhat by their own experience, but very much by the experience of those they know and know of and hear about and the stories that travel; this is a collective community experience. And if the stops are focused on young men of color, which they are, that does not mean that it's only young men of color that experience the broader impact of this but their friends, their younger siblings, their mothers, their parents, and their grandparents get this second hand, third hand, fourth hand, and fifth hand and it generates a community narrative about what's going on and what it means. There is a journal article on this that I recommend to as many people that I can get to read it by Rod Brunson, who to our benefit has just taken a job at Rutgers, across the river.¹⁵⁶ He's done one of the seminal ethnographic studies of this. The article is

¹⁵⁶ See Rutgers School of Criminal Justice, Faculty, <http://www.newark.rutgers.edu/rscj/faculty/RB.html> (last visited Nov. 13, 2011).

called—this will be easy to remember—and it comes from something he heard over and over again, from the people he was talking to. The article is called “Police Don’t Like Black People.”¹⁵⁷

JESUS GONZALEZ: I’m not a statistician but I do know that women of color are the highest have the fastest growing rate of incarceration right now so I’m sure that plays a role in being initially stopped and frisked and police interactions.¹⁵⁸ But I don’t know the numbers right now.

DARIUS CHARNEY: I just want to add real quick, anecdotally, because I am also not a statistician, is some of the folks we have talked to when we have been talking to people about this issue, are young women, teenagers. And one of the ways that this uniquely affects them is that when they are stopped, often times by male police officers, there are some really inappropriate things that happen in the stop beyond just the fact that they are being stopped illegally, and so that’s something to consider that I think is really a terrible consequence of this abusive practice.¹⁵⁹

BABE HOWELL: Thank you. How effective are Know Your Rights trainings in affecting illegal police action or doing anything else in fact?

NOEL LEADER: Since we do so many seminars, the objective of the training sessions is we teach young people how to escape the moment as painlessly as possible. And that’s the objective if the police officer is out of control; there is nothing you can do about it. The police officer is always going to win. You know, if the police officer is violating your rights, we teach our that audience you don’t challenge the police officer. Especially as it relates to a lot of young people, they need to know that, because a lot of times they feel that if they assert their rights while the police officer is violating their rights, if they waive the Constitution, that’s going to back the officers up. So our main objective, in doing our seminar about what to do when being stopped by the police, is to teach our audience that your objective is to survive that moment, [that] the police officer has the authority. He’s going to win. If it results in an arrest or something worse when it goes to court, he’s going to be believe-

¹⁵⁷ See Rod Brunson, *Police Don’t Like Black People: African-American Young Men’s Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL’Y 71 (2007).

¹⁵⁸ Steven Zeidman, *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 229 (Fall 2008).

¹⁵⁹ Alison Roh Park, *Street Harassment of Women and Girls in New York City*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE (Nov. 22, 2010), <http://inciteblog.wordpress.com/2010/11/22/street-harassment-of-women-and-girls-in-new-york-city/>.

able, he is not going to be that same individual you see in the street who might be calling out your name, who might be overly aggressive. So those are the objectives—to that end, they are successful. They are not successful, evidently, in stopping that interaction. But the objective is to teach our audience that your objective has to be, “how do I escape this interaction as painlessly as possible?”

JESUS GONZALEZ: I know for us it really plays a role in post-encounter, like they know, “I’m not sayin’ anything, I’m callin’ Jesus.” They know who to call. They have the organization’s (Make the Road New York) phone number memorized. We have attorneys on staff and we’ll show up at the precinct and give them some advice on how to deal with the situation. It plays a role in that like they don’t criminalize themselves. I’ve seen many situations where, prior to getting Know Your Rights trainings, they have criminalized themselves, and after that, immediately getting a call, because they won’t speak at the precinct and criminalize themselves. Also, the training is necessary on how to just deal with aggressive encounters, including with the police. That’s the way it’s manifested in our situation, and hopefully we get to call on some of you in the near future for some lawsuits against the city to bring this up as an issue. I think that it’s empowering to know when your rights have been violated, as opposed to guessing. And when you’re aware that they’ve been violated, you can take some action on it. But obviously, that’s not addressing the issue.

BABE HOWELL: Ok, so to summarize, it doesn’t stop the stops, but it trains kids to get out without hopefully getting arrested or beaten up as often as possible.

JESUS GONZALEZ: And also not criminalizing themselves, because you know, the police are swift with how they speak, and make you say things that aren’t factual. And you know, everyone here can imagine how that can play out when someone is scared and intimidated and being questioned aggressively.

BABE HOWELL: Right. And just to make that clear on my TWEN site there’s an article about how they elicit totally false confessions.¹⁶⁰ One has to understand that once you’re in there and they’re saying, “we know you did this,” or “somebody else says you did this,” or “we have evidence,” it can be problematic.

NOEL LEADER: Let me quickly say in ten seconds that, it’s a

¹⁶⁰ John Schwartz, *Confessing to Crime, but Innocent*, N.Y. TIMES, Sept. 13, 2010, at A14.

science. We're trained to interview. We're told what color tie to put on. We're told that when you shake hands with the defendant you're standing up and he's sitting down. In the investigation room there's no windows. The chairs don't have wheels so you can't transfer energy. There are no pictures. The table, everything is plastic. And all that is psychological and the Central Park case is the perfect example.¹⁶¹ So there is a science behind this.¹⁶²

BABE HOWELL: And it's easy to be criminalized anyway, because they can just say you resisted. That's the most common: resisted, obstruction of governmental administration, all sorts of things. Let me go to the next question though. What is the relationship between NYPD internal control mechanisms like a quota system, like the quota systems we're reading about—I don't think that's an official internal control system—and this practice of externally controlling whole communities through this aggressive stop-and-frisk?

NOEL LEADER: Well, one of our contentions has always been that I can prove to anyone that racial profiling exists by looking at the information, by looking at the reports, by looking at certain details. And we assisted Center for Constitutional Rights in their lawsuit. There are certain details where officers are told “come back with five stop, question and frisk reports.”¹⁶³ These details, if they were done 50 times by 500 officers, everyone would have five stop-question-and-frisk reports, not six, cause an officer's not going to give you more work—he may give you less, but he's not going to give you more than you ask for—so the quota system is nonexistent in law enforcement, because this would be easily seen.¹⁶⁴

¹⁶¹ *People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002). See also Sharon L. Davies, *The Reality of False Confessions – Lessons of the Central Park Jogger Case*, 30 N.Y.U. REV. L. & SOC. CHANGE 209 (2006).

¹⁶² See Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 438–45 (1998).

¹⁶³ See, e.g., Graham Rayman, *The NYPD Tapes: Inside Bed-Stuy's 81st Precinct*, VILLAGE VOICE, Tuesday, May 5 2010, at 12 (discussing how tapes recovered from a whistleblower in the 81st Precinct “reveal that precinct bosses threaten street cops if they don't make their quotas of arrests and stop-and-frisks, but also tell them not to take certain robbery reports in order to manipulate crime statistics”).

¹⁶⁴ *But see id.* at 15-16.

The NYPD has always claimed that there are no specific numerical targets or quotas. Most recently, police spokesman Paul Browne denied the existence of quotas in early March, but said that “police officers, like others who receive compensation, are provided productivity goals, and they are expected to work.”

The tapes show, however, that, of course, quotas exist.

And if you looked at this detail, Operation IMPACT,¹⁶⁵ over time, Operation Atlas,¹⁶⁶ over time—I can name them. We told the governor, we told the U.S. Attorney General, that we can prove that racial profiling exists. If the police did this detail 500 times over the last 4 years, and you looked at whatever the quota was for a borough—because it varies—every time officers worked this detail, and it happened throughout the city for three or four years, you’ll see that every officer that worked that detail has the same number of stop, question and frisks. And if that detail was performed 50 times in one borough in a one month period, you’ll see that all officers that work that detail have four or five stop, question and frisks, whatever that number was. And you have to begin to draw some conclusions. But my problem is—and I’ll stop—is that the authorities don’t ask because they don’t really want to know. And I know you found this [motions to DARIUS CHARNEY] to be true in your investigation as well.

DARIUS CHARNEY: I think Noel’s absolutely right. It’s not an official written policy, but it’s the reality in a lot of the precincts and boroughs in the city. And I think the connection is that, obviously, if you’re an officer and you’re told, “Look, I’m going to look at your monthly performance report. It’s two days till the end of the month and I want to see 5, 10, or 20 stops, or tickets, or arrests.” You’re going to go out there and you’re going to get that stuff, because it is going to affect your assignment, whether you’ll get promoted, get days off or whether you’ll get all the stuff that you’re trying to get, because this is your job.¹⁶⁷ And then the reality is that these officers go out and do it.

And because that form they fill out is all about “check boxes” and you can just check stuff off without having to really explain why you stopped somebody, you can just stop somebody, you know, for my favorite category, “furtive movements.” You check it off, that’s all you got to do. You don’t have to explain what the furtive movement is. No one is going to ask you about it because the guy who checks your form just wants to make sure you filled it out, he

¹⁶⁵ Al Baker, *City Is Doubling Police Program to Reduce Crime*, N.Y. TIMES, December 27, 2007, at A1.

¹⁶⁶ See R. Valeria Treves, *Operation Atlas: A Case in the Growing Fusion Between National Security and Local Law Enforcement*, 36 MIDDLE STATES GEOGRAPHER 76 (2003).

¹⁶⁷ See, e.g., Rayman, *supra* note 163 (“As a result, the tapes show, the rank-and-file NYPD street cop experiences enormous pressure in a strange catch-22: He or she is expected to maintain high “activity”—including stop-and-frisks—but, paradoxically, to record fewer actual crimes.”).

doesn't care why you stopped the person. And you're good.¹⁶⁸ So, I think there's definitely a connection between these, what the police department likes to call "productivity goals" and illegal stop and frisk.¹⁶⁹

ROBERT PERRY: I want to make a broader systemic point about internal controls and street practices. It has been fairly well documented—including by Professor Silverman, I believe it is, at John Jay—that it is inherent to CompStat models that the statistics start driving the police behavior without any rationale or justification.¹⁷⁰ Because what they're intended to do, by direction from precinct commanders, is improve their year-over-year numbers, or week-over-week numbers, every week or year.¹⁷¹ So, it's a completely artificial set of numbers for police performance, and that's what's driving these kinds of numbers we see in stop-and-frisks.

And then there are more sinister aspects to it as well. We've seen in the Village Voice series how the police precincts are downgrading criminal complaints, or not taking them at all, so as to show that year over year, and month over month, crime is going down.¹⁷² So it becomes an artificial model that is subverting what is good, sound policing.

I need to make one defense of the stop-and-frisk databank bill. We do a lot of work on police surveillance and electronic surveillance, the point being this: when the department has over three million folks whose personal identifiers are in the databank, 90% who are innocent of any wrongdoing, what they've created, is essentially a permanent suspect databank that they use as part of pursuing ongoing criminal investigations. I think it's an important legislative precedent, notwithstanding the limitations that were identified earlier.

BABE HOWELL: Okay. This is a question—I don't know if any

¹⁶⁸ Al Baker, *City Minorities More Likely To Be Frisked*, N.Y. TIMES, May 13, 2010, at A1 ("These stats suggest that racial disparities in who gets stopped has more to do with officer bias and discretion than with crime rates, which is what the Police Department argues," said Darius Charney, a lawyer with the Center for Constitutional Rights.").

¹⁶⁹ See, e.g., *id.* ("While the NYPD can set 'productivity targets,' the department cannot tie those targets to disciplinary action: 'What turns it into an illegal quota is when there is a punishment attached to not achieving, like a transfer or loss of assignment.'") (quoting Al O'Leary, a spokesman for the Patrolmen's Benevolent Association).

¹⁷⁰ See JOHN A. ETERNO & ELI B. SILVERMAN, UNVEILING COMPSTAT: THE GLOBAL POLICING REVOLUTION'S NAKED TRUTHS (CRC Press forthcoming Feb. 2012).

¹⁷¹ See ELI SILVERMAN, NYPD BATTLES CRIME: INNOVATIVE STRATEGIES IN POLICING 6 (Northeastern University Press 1999).

¹⁷² Rayman, *supra* note 163.

of you will have an answer, but, you might. What do you think the effects of community courts—I have an answer, if you don’t—like Midtown and Red Hook¹⁷³ have been on the collateral consequences of the stop-and-frisk policy in New York? And I would also just say—what is the effect, if any, of these community courts on stop-and-frisks, period? Anybody have an answer? I can answer. Alright, I will.

Community court is a place where cases don’t get tried. It creates the impunity that Steve [Zeidman] was talking about. It lets the officer make the stop, make the frisk, arrest somebody for drugs, and then some nice judge says, “Oh, we’re gonna help you,” and the lie goes untested. Putting “community” on something does not make it good. Saying that “we’re going to coerce you into treatment in our courts,” when those same treatment programs are not available to your children if you say, “Go to the corner doctor and get treatment”—this is not how we should be giving treatment. Anybody who says community courts are a solution—No!—they are one more institution that feeds on this low-level stuff.

Here’s one that I think maybe could be answered in one word: Could the NYPD use a stop-and-frisk policy to target undocumented immigrants? Have you heard about such practices?

JESUS GONZALEZ: Yes.

BABE HOWELL: Yes. Okay? That’s the whole idea of stop-and-frisk, furtive movements: “I can stop anyone.” If we wanted to target law students, we could just look for big book bags, and just say, “They did a furtive movement.” Right? So the answer is, we can target anyone, we just choose mostly black and brown people. Okay? What about the anti-Muslim stops, frisks, and bag searches?

NOEL LEADER: I think as a strategy, it’s ludicrous to think you’re going to curtail some terrorist acts by these indiscriminate stops. I mean, if I’m a terrorist, regardless of my religious faith, and I see the stops being done at one train station, I’ll go to the far region of the Bronx, ride the train right past, and look at them through the window as they do the stops. It’s a PR campaign. It’s not really a good strategy for stopping terrorists.

BABE HOWELL: Here this is a general one for everyone in the room: what can we do as future public interest and social jus-

¹⁷³ See Onnesha Roychoudhuri, *Good Courts: An Interview with Greg Brennan, Director, Center for Court Innovation*, MOTHER JONES, Jun. 18, 2005, available at <http://motherjones.com/politics/2005/06/good-courts-interview-greg-berman>.

tice attorneys to eliminate racist laws and practices in New York City?

JESUS GONZALEZ: I can answer this a little bit.

BABE HOWELL: You can answer?

JESUS GONZALEZ: Yeah.

BABE HOWELL: Good. Jesus has the answer!

JESUS GONZALEZ: I've spent some time thinking about this.

[Applause]

BABE HOWELL: That's what my minister always said!

JESUS GONZALEZ: So I think that unless you have some tangibles—we can always talk about ideals and stuff—some really tangible steps to tackle some of the limbs of this monster and start working on it and winning. I think that when dealing with the NYPD we have to understand this is one of the biggest bureaucratic monsters in the world right now. It's just the current reality. I think that what needs to happen is trying to springboard local efforts. And if it's working, spread it on a citywide level. And since we are talking about New York, then it can probably work on a state level and it can be a model to be implemented across the U.S.

When we are talking about policing, I think that those are tangible things that we can work on. When we are talking about civilian oversight, when we're talking about the way policing operates in our communities, it's just a mirror reflection of the expectations from the federal government. There's money being pumped from the federal government to almost every precinct, and if the expectations are improved, productivity and the result is creating these unofficial quotas, so that way we can't change it.¹⁷⁴ Because it's unofficial, and people are being arrested, and communities of color are being targeted. I think that it's really the responsibility for some federal oversight in local precincts. And also, start cutting the money. If you bother people's pockets, they listen. They won't meet this criteria that is just crazy. It's really ruining families, it's ruining the relationship between the police officers who come from the community, between the police and community, and just bad overall. So I think really focusing in on local efforts that can be expanded on a macro scale.

¹⁷⁴ *The Council of the City of New York, Finance Division: Hearing of the Fiscal 2010 Executive Budget for the Police Department 3* (May 19, 2009), http://council.nyc.gov/html/budget/PDFs/fy_10_exec_budget_police.pdf (indicating an allocation of \$18 million in federal funding to the NYPD).

NOEL LEADER: I think the question is, “What can they do?” You know, many of you are going to be attorneys, some of you perhaps judges. I mean, you have to be true to your craft. Why do you want to be an attorney, because they make a lot of money? Is that why you want to be an attorney?

DARIUS CHARNEY: Not these guys. This isn’t one of—this is a different kind of law school.¹⁷⁵

NOEL LEADER: So my point is, as police officers, we’re supposed to be protectors of property and people’s persons. I always remain true to my craft. I’m a police—I’m the good guy. So what you can do is when you practice your craft, be honest, have some integrity, there’s going to be certain pressures to get convictions. Whether a person’s innocent or guilty, DAs want convictions. Are you going to be that person who says to your superior, “I don’t think this is a good prosecution; I think the officer is not being honest”? So that’s how you can help and that’s our expectations and our hope for you, future attorneys and future judges.

DARIUS CHARNEY: Yeah, I agree 100%. What I wanted to say is that, I think that there are two ways to look at this problem. It’s such a big, amorphous, almost intractable problem and that is kind of the bad news right? But I think the good news, for folks like you who want to be social justice lawyers, is that there are a lot of places and ways you can plug in to do something about this problem, right? So, you can do what I am doing, you can do civil litigation, impact litigation, you can do criminal defense.

And I would really urge a lot of you, if you are interested in policing issues, to do criminal defense because you’re going to learn firsthand how—sorry to curse—but how fucking corrupt and racist the system is, right? And you’re also going to learn—and this goes to another point, which one of the professors was saying earlier—is talking about holding police accountable. There is no better way to do it and I have the utmost admiration for criminal defense attorneys that can cross-examine a cop and do it well. Because it’s such a hard job, it’s so hard to do it and when it is done

¹⁷⁵ For discussion about the unique ideology and founding principles of CUNY School of Law, see generally John M. Farago, *The Pedagogy of Community: Trust and Responsibility at CUNY Law School*, 10 NOVA L. J. 465 (1986); Howard Lesnick, *The Integration of Responsibility and Values: Legal Education in and Alternative Consciousness of Lawyering and Law*, 10 NOVA L. J. 633 (1986); Ruthann Robson, *The Politics of the Possible: Personal Reflections on a Decade at the City University of New York School of Law*, 3 N.Y. CITY L. REV. 245 (2000).

well it is just the greatest thing to watch, right? You want to catch them in a lie.

The other thing is for people like me to do the civil litigation for false arrest or illegal-malicious prosecution, the people who are getting falsely arrested and falsely prosecuted, have to get acquitted. We have to bring our cases, so really, that is where it starts. We have fantastic, committed, radical criminal defense attorneys, that's one of the most effective ways to, I think, combat this problem. I would like to also say this last thing, it is working with the organizers, doing legal support for groups like Jesus's group, Noel's group, that's a very underappreciated and, I think, very important way for lawyers to be involved in this movement.

BABE HOWELL: I have to say one thing. If you become a defense attorney, though, there are many good people who are defense attorneys who believe that they are providing good defenses, who take pleas, who accept ACDs, who accept disorderly conduct, who don't ask about the stop because, hey, you had the marijuana. If you're going to be that defender, please, just don't be, don't do it.

DAVID KENNEDY: So this is my first time in this room and I like being invited to new places because I need a steady supply of them because I don't get asked back a lot, so with that in mind, I want to say something that may not go over well in a room full of clearly dedicated and aspiring lawyers. The question was about laws and practices and the fact is that those are two different things. And so one way of changing practices is by changing laws and control structures and prosecuting people and the sort of things we've mostly been talking about.

Another way is simply to change practice. And one fact about the stuff that we've been talking about is that it is a bad way to do work. Right? It is not a productive way of doing crime control. And good police officers and good police departments want to be effective. And many of them when presented with a different and better way of doing things will go there. So, one of the projects that my community is involved in—in Cincinnati—has a disastrous record of race relations between the department and its community, I think it's still the last full-fledged race riot that we've had in the United States—I think that's true—in [200]1.¹⁷⁶

And Cincinnati has stopped doing corner jumpouts.¹⁷⁷ The

¹⁷⁶ Francis X. Clines, *Cincinnati Mayor Imposes Curfew to Quell Violence*, N.Y. TIMES, April 13, 2001, at A12.

¹⁷⁷ See Skip Tate, *Polishing the Image*, CINCINNATI MAGAZINE, July 1998, at 55.

group of police officers that was formerly dedicated to clearing corners doesn't do it anymore, because they have realized, in a process that actually didn't take that long—about a year and a half—that it wasn't working. And when presented with stuff that I've alluded to, that makes sense to them, it's good law enforcement, there's a place in this for top notch law enforcement, and doing that in a way that actually respects the street and community dynamics works better than what they were doing. The laws in Cincinnati haven't changed at all but police department conduct has changed dramatically and that's another thing to remember.¹⁷⁸

JESUS GONZALEZ: Just really quickly because I think that this is something essential when you're committed to being an attorney that's making some kind of societal change for social justice, right? I think that what's critical is to make sure—make it's a policy at your firm, that most of your time is outside of your office. If you're going to meet with clients, meet with them at their home. My friend, I was just talking to him, he's a housing attorney. And he goes to people's houses—he doesn't tell them to go to his office—and he sees their ceiling falling and when you can feel it, it is very hard to treat it as, you know, just another case when you see the impact it is having on the people you are representing. So, it's pretty basic but I know when you are crazy busy it is hard to be intentional about doing that.

BABE HOWELL: I can ask this question that was posed but not wait for an answer. I just think it's a little bit important and it's to Robert, David, and Babe. As people who presumably experience life as white people in this city, essentially is there a role of how we work on these problems? I think that can go to everyone; can people who look white—is there a role in this fight for those people who look white?

DAVID KENNEDY: I think the more people who aren't immediately personally subject to this and say that they won't stand for this either—that is hugely, hugely important. And I think it's important to say it—that this is not the experience of white folks. We've been doing little focus groups at John Jay for white guys, quite explicitly, in which we bring in friends who are black and simply ask them to tell their stories. And those of us who do this

¹⁷⁸ Tom McKee, *Ten Years Later: Cincinnati Police/Community Relations Much Improved*, WCPO.COM, (Mar. 6, 2011) (discussing the lower crime rates that are now the reality in Cincinnati as a result of improved communication between the community and police).

kind of street work aren't surprised by any of the things we hear. The guys who—just to second your last comment—get out of your office, go places, they get it by osmosis. In my world we call it ethnography. We leave the office, we go. That's all it is, really. You learn stuff you simply cannot learn any other way, and the veil between folks who don't live this and those who live side by side is gossamer thin and absolutely opaque for most people. And the white guys we've been bringing into these conversations are absolutely astounded by the things that they're hearing and they don't understand what is going on. And the more that the rest of us witness and testify, even in small ways, the more important that becomes.

ROBERT PERRY: May I respond? I have to say I was unnerved by the question, that it would be framed in that manner. A fundamental tenet of constitutional liberties is a recognition that a tyranny can oppress the minorities, the excluded, the marginalized, the disliked, whatever you want to say about them. It is fundamentally important that folks like you step up and engage that debate. Otherwise we don't win it. That's why I was unnerved by the question. Let me just give one—never mind, I'll leave it there.

AUDIENCE: Just say it!

JESUS GONZALEZ: Do it, do it, do it, do it. Tell 'em, tell 'em, tell 'em.

ROBERT PERRY: Well my last comment is related to the question and to what was said earlier. It was the observation that, "look if cops are violating the law, make them accountable."¹⁷⁹ Well that's a very tough prospect under our existing law. Let me give you one example of a law that does exist in the Administrative Code of New York City and see if the lawyers can figure out the problem with this statute.

Racial or Ethnic Profiling Prohibited.

Definitions. . . . "Racial or ethnic profiling" means an act of a member of the force of the police department or other law enforcement officer that relies on race, ethnicity, religion or national origin as the determinative factor in initiating law enforcement action against an individual¹⁸⁰

¹⁷⁹ See *supra* page 27 ("Arrest ten cops for illegally stopping individuals and it will slow down and ultimately stop. Keep locking them up if they violate the law. Period. That's the solution. And, that's the only solution. Lock them up and they will stop. That's the only solution, lock them up. Trust me.").

¹⁸⁰ N.Y.C. Admin. Code § 14-151 (West, Westlaw through Local Law 22 of 2010).

The determinative factor, how do you prove that? Now, this bill—I'll give you a little side of history—was a compromise based on a very good bill drafted by Congressman John Conyers, introduced in the Congress, that had a very *good* definition of racial profiling, that provided for injunctive remedy to put declaratory relief.¹⁸¹ And this bill was the compromise before the New York City Council because Rudolph Giuliani and his commissioner Howard Safir did not want the Conyers Bill to become part of New York law.¹⁸²

Here's where advocates—criminal defense lawyers, community organizers, legislative advocates—could play an important role in getting a real racial profiling bill in law in New York City and I think that's entirely feasible.

NOEL LEADER: I think that personally, I mean we can write laws upon laws and the New York City Police Department and officers—there's enough on the books, this is America, this is the United States of America—there's enough on the books *now* to stop what's going on from going on.

ROBERT PERRY: And district attorneys are going to prosecute cops who falsely fill out complaints?

NOEL LEADER: Well, don't forget, district attorneys—we always accuse them of having incestuous relationships with police officers, you know, they're working together; they work in cahoots.¹⁸³

ROBERT PERRY:

Correct.

NOEL LEADER:

And judges!

¹⁸¹ See H.R. 2074, 107th Cong. (2001).

Racial profiling.—The term “racial profiling” means the practice of a law enforcement agent relying, to any degree, on race, ethnicity, or national origin in selecting which individuals to subject to routine investigatory activities, or in deciding upon the scope and substance of law enforcement activity following the initial routine investigatory activity, except that racial profiling does not include reliance on such criteria in combination with other identifying factors when the law enforcement agent is seeking to apprehend a specific suspect whose race, ethnicity, or national origin is part of the description of the suspect.

Id. at sec. 501(5).

¹⁸² See Letter from Robert A. Perry, ACLU Legislative Director, to Philip Reed, N.Y. City Council Member (June 28, 2004), available at <http://www.nyclu.org/content/letter-nyclu-calls-city-council-racial-profiling-bill-“unenforceable.”>

¹⁸³ Tanyanika Samuels & Wil Cruz, *Black Officers Push Gov to Probe Cop-on-Cop Slay*, DAILY NEWS, Aug. 15, 2009, at 12 (“We’re suspicious of the incestuous relationship of the DA’s office and the NYPD when it comes to conducting fair and impartial investigations in cases like these.”).