

## COMMENTARY

### Stops and Frisks, Race, and the Constitution

*Paul J. Larkin, Jr.\**

#### ABSTRACT

*For more than a decade, the New York City Police Department (“NYPD”) has pursued an aggressive strategy to reduce street crime. Among the steps that the NYPD has taken is to stop and frisk anyone suspected of having committed, committing, or being about to commit a crime, such as the illegal possession of a firearm. New York City Mayor Michael Bloomberg and NYPD Police Commissioner Ray Kelly have touted the NYPD’s stop-and-frisk practice as being responsible for the reduction in crime, particularly homicides, that New York City has witnessed over the past decade. The practice is controversial, however, because the vast majority of individuals stopped are African American or Hispanic. This controversy eventually made its way into court. Nineteen parties who had been stopped by the NYPD brought suit against the City in *Floyd v. City of New York*. After a trial, the federal district court ruled that the NYPD’s stop-and-frisk practice violated the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court, however, applied the wrong legal analysis to the plaintiffs’ Fourth Amendment claims. The court relied on a statistical analysis of the NYPD’s stop-and-frisk practice as a whole, but the Fourth Amendment requires each stop or frisk to be examined individually. By contrast, the district court may have been correct in its equal protection ruling. The court was troubled by evidence in the record that the NYPD cared only about the number of stops, not their legality, as well as evidence of bigotry. That*

---

\* Senior Legal Fellow and Manager, Overcriminalization Project, The Heritage Foundation; M.P.P., The George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington and Lee University, 1977. The views expressed in this article are the author’s own and should not be construed as representing any official position of The Heritage Foundation. In the interest of full disclosure, I was counsel for the United States in two cases mentioned below: *United States v. Sokolow*, 490 U.S. 1 (1989), and *Michigan v. Chesternut*, 486 U.S. 567 (1988).

evidence may be sufficient to support the court's ruling.

## INTRODUCTION

In August 2013, federal district court Judge Shira Scheindlin issued a 195-page opinion in *Floyd v. City of New York*<sup>1</sup> holding unconstitutional the longstanding New York City Police Department (“NYPD”) stop-and-frisk practice used to question persons suspected of criminal activity.<sup>2</sup> The NYPD has used that practice to implement the “Broken Windows” theory of policing first made famous by a 1982 article in *The Atlantic*, written by James Q. Wilson and George L. Kelling, entitled *Broken Windows: The Police and Neighborhood Safety*.<sup>3</sup> The “Broken Windows” theory posits that aggressive police enforcement of low-level infractions deters wrongdoing and enhances community safety by arresting offenders on the cusp of committing a serious crime.<sup>4</sup>

In 1968, the U.S. Supreme Court in *Terry v. Ohio*<sup>5</sup> approved both the brief stop for questioning of a person suspected of criminal activity and the frisk of a stopped party reasonably believed to be armed and dangerous.<sup>6</sup> The NYPD used that practice on more than 4.4 million occasions from January 2004 to June 2012.<sup>7</sup> Troubled—as many people would be—by the fact that more than eighty percent of the parties stopped and frisked were African American or Hispanic,<sup>8</sup> Judge Scheindlin held that the NYPD practice violates the Fourth Amendment<sup>9</sup> and the Equal Protection Clause of the Fourteenth Amendment.<sup>10</sup>

Various parties have already weighed in on one side or the other of the court's decision. So far, the parties have taken opposing sides in a “great taste, less filling” debate—the judge was clearly right or plainly wrong on both issues.<sup>11</sup> This Commentary advances a slightly different view: the

---

<sup>1</sup> *Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013).

<sup>2</sup> *Id.* at \*7.

<sup>3</sup> See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, at 29.

<sup>4</sup> See *id.* at 31–34.

<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>6</sup> *Id.* at 30–31.

<sup>7</sup> *Floyd*, 2013 WL 4046209, at \*3.

<sup>8</sup> *Id.* at \*1.

<sup>9</sup> 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 . . .”).

<sup>10</sup> U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>11</sup> Compare, e.g., Terry Eastland, *Don't Stop Frisking*, WKLY. STANDARD, Aug. 26,

judge is likely wrong about the Fourth Amendment, but she may be right about the Equal Protection Clause, although the latter question is a close one.

## I. THE FOURTH AMENDMENT

New York City Mayor Michael Bloomberg and NYPD Police Commissioner Ray Kelly have defended the NYPD stop-and-frisk practice by repeating the mantra that it deters crime and saves lives.<sup>12</sup> That defense is relevant to the plaintiffs' Fourteenth Amendment claim that the NYPD's stop-and-frisk practice is bigoted<sup>13</sup> because it supports the argument that the City intended not to discriminate, but to protect potential victims in minority communities against violent assault. But that defense is irrelevant to the plaintiffs' Fourth Amendment claim. Arresting people on a whim or at random might also be an effective practice—in fact, the East German Stasi did just that—but today that practice would be patently illegal. The police cannot retroactively justify an unlawful search or seizure on the ground that they found evidence of a crime.<sup>14</sup>

The district court also pursued the wrong approach in determining the constitutionality of the NYPD's stop-and-frisk practice under the Fourth Amendment. Judge Scheindlin admitted that it would be impossible for any judge to review the constitutionality of 4.4 million individual *Terry* stops and frisks, even by devoting a career to that task.<sup>15</sup> Instead, she relied

---

2013, at 8 (same), Richard Cohen, Op-Ed., *What Opponents of 'Stop and Frisk,' Gun Control Share*, WASH. POST (Aug. 19, 2013), [http://www.washingtonpost.com/opinions/richard-cohen-bloombergs-crusades-mean-more-people-will-die/2013/08/19/9a97836e-08f8-11e3-9941-6711ed662e71\\_story.html](http://www.washingtonpost.com/opinions/richard-cohen-bloombergs-crusades-mean-more-people-will-die/2013/08/19/9a97836e-08f8-11e3-9941-6711ed662e71_story.html) (concluding that the judge was wrong on both counts), and Editorial, *Stop-and-Frisk Is Fair*, NAT'L REV. ONLINE (Aug. 13, 2013, 4:00 PM), <http://www.nationalreview.com/article/355689/stop-and-frisk-fair-editors> (same), with John Cassidy, *The Statistical Debate Behind the Stop-and-Frisk Verdict*, NEW YORKER (Aug. 13, 2013), <http://www.newyorker.com/online/blogs/johncassidy/2013/08/scheindlin-stop-and-frisk-verdict-new-york-statistical-debate.html> (concluding that the judge was right on both counts), and Delores Jones-Brown, *Stop & Frisk Ruling: A Victory for American Values*, CRIME REP. (Aug. 15, 2013, 1:10 AM), <http://www.thecrimereport.org/viewpoints/2013-08-stop-frisk-ruling-a-victory-for-american-values> (same).

<sup>12</sup> See, e.g., Michael R. Bloomberg, *'Stop and Frisk' Is Not Racial Profiling*, WASH. POST, Aug. 19, 2013, at A19.

<sup>13</sup> See *Floyd*, 2013 WL 4046209, at \*19.

<sup>14</sup> See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 484 (1963) (noting the “essential vice” in “a proposition we have consistently rejected—that a search unlawful at its inception may be validated by what it turns up”); *Byars v. United States*, 273 U.S. 28, 29 (1927) (“A search prosecuted in violation of the Constitution is not made lawful by what it brings to light . . .”).

<sup>15</sup> *Floyd*, 2013 WL 4046209, at \*4, \*16.

heavily on a statistical analysis of that practice.<sup>16</sup> But it is a mistake to decide the constitutionality of *Terry* stops based on statistics. Stops are not like vitamins; each one differs from the other. Pharmaceutical firms conduct quality control by inspecting a sample of each batch of drugs because, if the manufacturing process is working properly, each batch and each drug should be the same as the others. That is not true for *Terry* stops, in which the facts of each stop are distinct from one another and each stop must be independently examined.<sup>17</sup> True, the district court analyzed a sample of nineteen stop-and-frisk cases,<sup>18</sup> but it is not obvious that those cases, chosen by plaintiffs' counsel, are a *representative* sample. That is like evaluating the fairness of the entire New York City criminal trial process by analyzing nineteen trials chosen by defendants.

Judge Scheindlin was troubled by the NYPD's reports indicating that roughly 200,000 (at least) of the 4.4 million *Terry* stops, or about five percent, were unjustified.<sup>19</sup> Apparently, she believed that a ninety-five percent success rate meant that the NYPD had often violated the Fourth Amendment. As noted, however, that wholesale-level approach is mistaken because each case must be individually reviewed. What is more, if it were appropriate to use wholesale-level percentages to decide whether the NYPD regularly has acted lawfully, a ninety-five percent success rate should prove that it has not. The law does not require certainty that crime is afoot before a police officer can make a *Terry* stop, nor does the law demand that an officer know that it is more likely than not that crime is afoot. A police officer needs only "reasonable suspicion," and that standard of proof is even less demanding than the "probable cause" standard necessary

---

<sup>16</sup> See *id.* at \*15–20.

<sup>17</sup> See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing." (internal quotation marks omitted)); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("[T]he crucial test [for deciding if a person has been 'seized'] is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." (internal quotation marks omitted)); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave . . ."); cf. *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983) ("We cannot agree that the odds that Lyons would not only again be stopped for a traffic violation but would also be subjected to a chokehold without any provocation whatsoever are sufficient to make out a federal case for equitable relief." (citation omitted) (internal quotation marks omitted)).

<sup>18</sup> See *Floyd*, 2013 WL 4046209, at \*2, \*47.

<sup>19</sup> See *id.* at \*4, \*16, \*18, \*71.

to make an arrest.<sup>20</sup> In other words, by not demanding certainty that someone is involved in criminal activity, the Fourth Amendment allows the police to make mistakes. What is more, by requiring *only* reasonable suspicion that a person may be involved in a crime, the *Terry* standard contemplates that the police often will be wrong. Accordingly, proof that the NYPD has been justified ninety-five percent of the time is laudable. Why? Because if macro-level numbers count, that level of success approaches what we would expect if the police had to operate under the “beyond a reasonable doubt” standard necessary for *conviction*.

As a result of those errors, Judge Scheindlin conflated two different inquiries: (1) did the NYPD commit a massive number of unlawful stops and frisks, and, if so, (2) was that number sufficiently large that New York City can be held liable for having encouraged or endorsed it as municipal policy?<sup>21</sup> Statistical evidence cannot substitute for the case-by-case analysis necessary to answer the first question because the Fourth Amendment only outlaws unlawful *individual* searches and seizures, not search and seizure *policies*. In 1968, the Supreme Court, in *Sibron v. New York*,<sup>22</sup> declined to review the facial constitutionality of the then-existing New York stop-and-frisk statute on the ground that the issue should be addressed in a particular factual scenario. In the Court’s words:

The parties on both sides of these two cases have urged that the principal issue before us is the constitutionality of [the New York statute] “on its face.” We decline, however, to be drawn into what we view as the abstract and unproductive exercise of laying the extraordinarily elastic categories of [the New York statute] next to the categories of the Fourth Amendment in an effort to determine whether the two are in some sense compatible. The constitutional validity of a warrantless search is pre-eminently the sort of ques-

---

<sup>20</sup> See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (“[R]easonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence . . . .”); *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

<sup>21</sup> See *Floyd*, 2013 WL 4046209, at \*2, \*70–72 (“This case is also not primarily about the nineteen individual stops that were the subject of testimony at trial. Rather, this case is about whether the City has a *policy* or *custom* of violating the Constitution by making unlawful stops and conducting unlawful frisks.” (footnote omitted) (citing *Monell v. New York City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978))); see also, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011) (“Plaintiffs who seek to impose liability on local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury. Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.” (citation omitted) (internal quotation marks omitted)).

<sup>22</sup> *Sibron v. New York*, 392 U.S. 40 (1968).

tion which can only be decided in the concrete factual context of the individual case.<sup>23</sup>

Judge Scheindlin never explained why *Floyd* differs from *Sibron*. If there were a large number of unlawful stops and frisks, that number could justify the inference that New York City had a policy of encouraging unlawful police practices, but the answer to the latter inquiry is secondary to, and hinges on, the answer to the former.

## II. THE EQUAL PROTECTION CLAUSE

The court's discussion of the Fourth Amendment may turn out to be of little importance. The nonstatistical evidence on which Judge Scheindlin relied—e.g., the gross number of stops of blacks and Hispanics, the pressure from NYPD commanders to increase the number of stops, the NYPD's indifference to the legality of those stops and frisks, and evidence of what the judge termed “indirect racial profiling”<sup>24</sup>—may support the inference that the City violated the Equal Protection Clause regardless of whether the NYPD stop-and-frisk practice violates the Fourth Amendment. The two inquiries are distinct. The latter requires examination of the facts and circumstances of each separate stop and frisk,<sup>25</sup> whereas the former asks whether senior NYPD or City officials adopted a stop-and-frisk policy based on impermissible racial criteria and encouraged police officers to rely on it when confronting people on the street.<sup>26</sup>

A government practice can violate the Equal Protection Clause if it discriminates because of an immutable characteristic, such as race, or if it is the product of discriminatory animus.<sup>27</sup> By contrast, a facially neutral, benignly intended, and evenhandedly applied practice is not unconstitutional even if it has a disparate impact on a minority group. Proof that the decisionmaker acted, at least in part, to achieve that result is necessary.<sup>28</sup>

---

<sup>23</sup> *Id.* at 59; see also Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1036 (2011) (“Congress cannot violate this clause by *authorizing* a search; only the *President* can violate it, and only by *executing* a search.”).

<sup>24</sup> See *Floyd*, 2013 WL 4046209, at \*24–25, \*30, \*34–36, \*42, \*72.

<sup>25</sup> See *supra* text accompanying notes 17, 22–23.

<sup>26</sup> See *infra* text accompanying notes 28–30.

<sup>27</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237–39 (1995) (subjecting a facially discriminatory federal statute to strict scrutiny and remanding for application of that test); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding unconstitutional a facially neutral state constitutional provision enacted for a racially discriminatory purpose).

<sup>28</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 463–67 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 292–93 (1987); *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); Wash-

Moreover, the necessary discriminatory purpose implies more than “volition” or “awareness of consequences”—a state of mind often called “general intent.”<sup>29</sup> Instead, a challenger must prove that the decisionmaker acted with the “specific intent” to discriminate. A party challenging the application of a facially race-neutral policy must prove that the decisionmaker “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>30</sup>

What is quite damaging to the City’s case are three types of evidence that Judge Scheindlin described in detail: (1) NYPD commanders demanded that patrol officers satisfy an implicit quota of stops per month;<sup>31</sup> (2) the NYPD did not seriously review those stops to determine if they were valid;<sup>32</sup> and (3) the NYPD may have relied on macro-level racial numbers (e.g., ninety percent of armed robberies in a particular neighborhood involve black offenders) as a basis for making micro-level stops and frisks (e.g., this black person is likely to be an armed robber).<sup>33</sup> That evidence impeaches the City’s defense that NYPD officers rely on specific and objective evidence of guilt, because it suggests that the City only cared about the *number* of stops, not the number of *lawful* stops.<sup>34</sup> As Judge Scheindlin put it, “[f]or the purposes of performance review, an unconstitutional stop is no less valuable to an officer’s career than a constitutional one—because the two are indistinguishable.”<sup>35</sup>

Judge Scheindlin found one piece of evidence particularly disturbing. At a meeting with former New York Governor David Patterson and a few senior state legislators, NYPD Commissioner Kelly said that “he focused on young blacks and Hispanics because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police.”<sup>36</sup>

---

ington v. Davis, 426 U.S. 229, 242 (1976).

<sup>29</sup> *Feeney*, 442 U.S. at 279; *see also* *United States v. Bailey*, 444 U.S. 394, 403 (1980) (noting that the “venerable distinction” between general and specific intent has caused “a good deal of confusion”); WAYNE R. LAFAYE, *CRIMINAL LAW* § 5.2(e) (5th ed. 2010) (discussing the many different meanings of “general intent” in criminal law).

<sup>30</sup> *Feeney*, 442 U.S. at 279; *see also, e.g., Armstrong*, 517 U.S. at 463–67; *McCleskey*, 481 U.S. at 292–93; *Village of Arlington Heights*, 429 U.S. at 266; *Washington*, 426 U.S. at 242.

<sup>31</sup> *See Floyd v. City of New York*, No. 08 Civ. 1034 (SAS), 2013 WL 4046209, at \*20–21, \*26–33 (S.D.N.Y. Aug. 12, 2013).

<sup>32</sup> *See id.* at \*24–25, \*26–27, \*33, \*37–40, \*42–47.

<sup>33</sup> *See id.* at \*20–21.

<sup>34</sup> *See id.* at \*33 (“In contrast to this detailed review for effectiveness, there is no process for evaluating whether enforcement activities are legally justified.”); *id.* at \*37–40.

<sup>35</sup> *Id.* at \*33.

<sup>36</sup> *Id.* at \*36 (internal quotation marks omitted).

Judge Scheindlin believed that Kelly's statement reflected racial animus.<sup>37</sup> She also found significant the City's failure to have Kelly testify at trial in order to offer a benign explanation for that remark.<sup>38</sup> That tactical decision, which the City may now regret, allowed the judge to draw an adverse inference that Kelly's testimony would have been unfavorable.<sup>39</sup> Those two factors, atop the other evidence in the case, persuaded her that the City had acted with impermissible racial animus.<sup>40</sup>

If a senior New York City official tacitly adopted and directed the NYPD to pursue a racially tainted stop-and-frisk policy, then, given the large number of blacks and Hispanics stopped, it would be reasonable to conclude that impermissible racial considerations affected patrol officers' decisions to conduct a stop and frisk in a nontrivial number of cases. The appropriate remedy would be to forbid reliance on any such policy, to discipline the appropriate city officials—within or outside of the NYPD—who adopted that policy or encouraged it to be used, and to oversee for a limited period of time how the NYPD responds. There would be no need to analyze the constitutionality of each police-citizen encounter under the Fourth Amendment in order to provide relief to the plaintiffs.

### III. RACE AND LAW ENFORCEMENT

When the government can use race as a legitimate criterion in law enforcement decisionmaking is a tricky issue. It is clear, however, that there are times when the government may do so. For example, the government can use an undercover African American police officer, instead of a Son of the Old Sod, when trying to infiltrate a Jamaican drug posse. The converse is true when investigating the Irish Republican Army. Few would disagree with those propositions. The difficulty arises when the government uses race, not as a basis for selecting law enforcement officers for specialized tasks, but when selecting members of the public for coercive scrutiny.

*Floyd* raises the question of what role, if any, race can play in making the decision to stop or frisk a person. Sometimes it may. Race can be used as one of several identifying factors in deciding whether reasonable suspicion exists to believe that a particular individual has committed, is committing, or is about to commit a crime.<sup>41</sup> On one end of the spectrum, the Fed-

---

<sup>37</sup> *See id.*

<sup>38</sup> *Id.* at \*73.

<sup>39</sup> *See, e.g.,* *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225–26 (1939) (holding that the trier of fact may draw an adverse inference from a party's failure to present testimony from a relevant witness).

<sup>40</sup> *Floyd*, 2013 WL 4046209, at \*5, \*24.

<sup>41</sup> *See, e.g.,* *Brown v. City of Oneonta*, 221 F.3d 329, 337–38 (2d Cir. 2000) (“In act-



eral Law Enforcement Training Center (“FLETC”) teaches federal agents to use the mnemonic device, “Some Robbers Are Happy When Caught,” to remember what factors should be used in order to identify a suspect: sex, race, age, height, weight, and color of hair and eyes.<sup>42</sup> An eyewitness who supplies all of those facts has provided a useful description of a robbery suspect. The police need not ignore the race of a suspect when it is included in that report.<sup>43</sup> At the other end of the spectrum is the scenario in which the only fact that a witness provides is the suspect’s race. The police may keep an eye out for suspects of that race who act in an incriminating manner, but the police cannot use that fact *alone* as a basis for stopping every black male and female in the vicinity.<sup>44</sup> That comes too close for comfort to the forbidden and ignorant syllogism that “All blacks are criminals. John Doe is black. Accordingly, John Doe is a criminal.” That chain of reasoning is wrong and impermissible from the very first step. The facts in *Floyd* fall between those two bookends of the legitimate and illegitimate considerations of race. The question in *Floyd* then is whether those facts are sufficiently close to the illegitimate end of the spectrum to offend the Equal Protection Clause.

#### CONCLUSION

The City has appealed the district court’s decision,<sup>45</sup> so the controversy over the NYPD’s stop-and-frisk practice will not end anytime soon. But it may well be that the parties or the courts will refocus the discussion away from the question of whether the NYPD’s individual stops and frisks were lawful and instead toward whether the City had a policy of relying entirely or too heavily on race as a basis for its stop-and-frisk practice. The Second Circuit, and perhaps the Supreme Court, will weigh in as a matter of constitutional law. If the NYPD’s stop-and-frisk practice does not violate the U.S. Constitution, it will then be up to elected and appointed officials—

---

ing on the description provided by the victim of the assault—a description that included race as one of several elements—defendants did not engage in a suspect racial classification that would draw strict scrutiny.”).

<sup>42</sup> FLETC taught that mnemonic device when the author attended the academy in 1998 as part of FLETC’s Criminal Investigator Training Program (CITP-810).

<sup>43</sup> See *Brown*, 221 F.3d at 337–39.

<sup>44</sup> See, e.g., *United States v. Avery*, 137 F.3d 343, 355 (6th Cir. 1997) (“If law enforcement adopts a policy, employs a practice, or . . . takes steps to initiate an investigation of a citizen based solely upon that citizen’s race, without more, then a violation of the Equal Protection Clause has occurred.”).

<sup>45</sup> Joseph Ax, *NYC Appeals Ruling That NYPD’s Stop-and-Frisk Policy Is Unlawful*, REUTERS (Aug. 16, 2013, 3:09 PM), <http://www.reuters.com/article/2013/08/16/us-usa-newyork-police-appeal-idUSBRE97F0XA20130816>.

and, ultimately, to the public—to decide where to draw the line as a matter of policy.