Written by **Bob Adelmann** on August 13, 2013

Judge Rules New York City's "Stop and Frisk" Policy Unconstitutional

In District Court Judge Shira Scheindlin's ruling in *Floyd v. The City of New York* on Monday, there was both good news and bad news. The good news is that Mayor Michael Bloomberg's "stop and frisk" policy, which has the enthusiastic cooperation of his police commissioner Ray Kelly and violates both the Fourth and Fourteenth Amendments, was ruled unconstitutional. The bad news is that, with a little adjusting and tweaking, the policy will be allowed to continue.

According to the *New York Times*, the judge tried to build an invincible case against an appeal in her 198-page ruling, which analyzed in detail 19 individual cases where city residents were subjected to a "stop and frisk" out of more than four million conducted between 2004 and 2012. She cited and affirmed the Supreme Court's controversial ruling by the Warren Court in 1968 — *Terry v. Ohio* — when that court greatly softened the language of the Fourth Amendment from "probable cause" to just "reasonable suspicion" but chastised the city for extending and expanding even that broadened language to unconscionable lengths. According to the *Times*:

> The judge found that the New York police were too quick to deem suspicious behavior that was perfectly innocent, in effect watering down the [*Terry*] legal standard required for a stop.…
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> But the stops were not the end of the problem.… After officers stopped people, they often conducted frisks for weapons, or searched the subjects' pockets for contraband, like drugs, without any legal grounds for doing so.

Also, she found that during police stops, blacks and Hispanics "were more likely to be subjected to the use of force than whites."

Scheindlin's opening remarks set the stage for her ruling:

> This case is about the tension between liberty and public safety in the use of a proactive policing tool called "stop and frisk." The New York City Police Department made 4.4 million stops between January 2004 and June 2012.
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> Over 80% of these 4.4 million stops were of blacks or Hispanics. In each of these stops a person's life was interrupted. The person was detained and questioned, often on a public street. More than half of the time the police subjected the person to a frisk.
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> Plaintiffs [supported by the New York Civil Liberties Union and the Center for Constitutional Rights] argue that the NYPD's use of stop and frisk violated their constitutional rights in two ways: (1) they were stopped without a legal basis in violation of the Fourth Amendment, and (2) they were targeted for stops because of their race in violation of the Fourteenth Amendment.
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> Plaintiffs do not seek to end the use of stop and frisk. Rather, they argue that it must be reformed to comply with constitutional limits.

The judge emphasized that no matter how effective measures such as "stop and frisk" might be in fighting crime — the city claims that violence has been cut in half since the policy was instituted — the real issue in the case is their constitutionality:

> I emphasize at the outset, as I have throughout the litigation that this case is not about the effectiveness of stop and frisk in deterring or combating crime. This Court's mandate is solely to judge the constitutionality of police behavior, not its effectiveness as a law enforcement tool. Many police practices may be useful for fighting crime — preventive detention or coerced confessions, for example — but because they are unconstitutional they cannot be used, no matter how effective.

She reiterated the "legality" of "stop and frisk," often referred to as a "*Terry* frisk," noting that even with the greatly broadened language the Supreme Court used to reinterpret the Founders' intents, the city went beyond it in their zeal:

> The Fourth Amendment protects all individuals against unreasonable searches or seizures. The Supreme Court has held [in its *Terry* ruling] that the Fourth Amendment permits the police to "stop and briefly detain a person for investigative purposes if the officer has a *reasonable suspicion* supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."
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> To proceed from a stop to a frisk, the police officer must *reasonably* suspect that the person stopped is armed and dangerous. [Emphasis added.]

The Fourteenth Amendment also applies in this case, wrote the judge:

> The Equal Protection Clause of the Fourteenth Amendment guarantees to every person the equal protection of the laws. It prohibits intentional discrimination based on race.

Using these two standards, the judge ruled against the city: "At least 200,000 stops were made without reasonable suspicion.... The actual number … was likely far higher."

As to the city's claim that race could be used as a factor in conducting stops and frisks because that's where most of the crime takes place, the judge wrote:

> I reject the testimony of the City's experts that the race of crime suspects is an appropriate benchmark for measuring racial bias in stops. The City and its highest officials believe that blacks and Hispanics should be stopped at the same rate as their proportion of the local criminal suspect population. But this reasoning is flawed because the stopped population is overwhelmingly innocent — not criminal.

She concluded:

> With respect to both the Fourth and Fourteenth Amendment claims, one way to prove that the City has a custom of conducting unconstitutional stops and frisks is to show that it acted with deliberate indifference to constitutional deprivations caused by its employees — here, the NYPD. The evidence at trial revealed significant evidence that the NYPD acted with deliberate indifference....
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> In addition, the evidence at trial revealed that the NYPD has an unwritten policy of targeting "the right people" for stops. In practice, the policy encourages the targeting of young black and Hispanic men based on their prevalence in local crime complaints. This is a form of racial profiling.... The Equal Protection Clause [of the Fourteenth Amendment] does not permit race-based suspicion....

> In conclusion, I find that the City is liable for violating plaintiffs' Fourth and Fourteenth Amendment rights. The City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks….
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> In addition, the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data. This has resulted in the disproportionate and discriminatory stopping of blacks and Hispanics in violation of the Equal Protection Clause….
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> I also conclude that the City's highest officials have turned a blind eye to the evidence that officers are conducting stops in a racially discriminatory manner. In their zeal to defend a policy that they believe to be effective, they have willfully ignored overwhelming proof that the policy of targeting "the right people" is racially discriminatory and therefore violates the United States Constitution.

To rectify the injustice, Judge Scheindlin appointed Peter Zimroth, a former chief assistant district attorney in Manhattan, to develop policies and procedures to insure that such violations are prohibited in the future. In other words, "stop and frisk" is acceptable after all, and no punishment is to be meted out for past indiscretions.

The ruling is likely to have little impact on New York City's policies. Mayor Bloomberg announced immediately following the ruling that the city would appeal while asking for an immediate stay while the appeal is pending.

Police commissioner Ray Kelly was in a state of denial:

> We do not engage in racial profiling. It is prohibited by law. We train our officers that they need reasonable suspicion to make a stop, and I can assure you that race is never a reason to conduct a stop.

Kelly, whose name is on President Obama's short list of potential nominees to replace Janet Napolitano as head of the Department of Homeland Security (DHS), has instituted such egregious policies to try to curb crime that Donna Lieberman, head of the New York City Civil Liberties Union, calls them "hyperagressive," and states that his police force "has taken on the aura of an occupying force."

With Scheindlin's wimpy response to the city's unconstitutional actions over the past decade, there is little chance that anything substantial will change. New Yorkers, black, brown, white, or yellow, will continue to be harassed, harangued, detained, and frisked, all in the name of fighting crime.

In simple terms, in New York City, the end will continue to justify the means while the Constitution will continue to be ignored.

Photo of protest led by Rev. Al Sharpton in New York City to end "stop and frisk" policy: AP Images

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