

Probabilities, Perceptions, Consequences and “Discrimination”: One Puzzle about Controversial “Stop and Frisk”

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I. INTRODUCTION

A troubling aspect of the practice of “stop and frisk” in New York and other cities is the evidence that this police tactic is employed predominantly against young men in racial minorities. On August 12, 2013, the federal district court ruled in *Floyd v. City of New York* that New York’s practices and policies regarding stop and frisk violated the Equal Protection Clause of the Fourteenth Amendment and its Due Process Clause, which makes the Fourth Amendment ban on “unreasonable searches and seizures” applicable against the states.¹ Judge Shira A. Scheindlin found that a number of specific stops and subsequent frisks did not meet the requirement of “reasonable suspicion” and that a careful evaluation of police records indicated that this failure was not infrequent.² She also determined that “the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data.”³ This amounted to “intentional discrimination based on race.”⁴ She ordered the appointment of an independent monitor for the New York Police Department (NYPD) and required immediate changes to end constitutional violations.⁵ These included the Department’s adopting formal written policies specifying the limited circumstances for justifiable stops and requiring that they be made only when based on “*individualized* reasonable suspicion.”⁶ The Department must also improve its relevant training and supervision of officers, and institute a pilot

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¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

² *Id.* at 559–60.

³ *Id.* at 562.

⁴ *Id.* at 558.

⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 679–84 (S.D.N.Y. 2013). The implementation of these requirements has been stayed by the Second Circuit Court of Appeals for the purpose of supervising settlement discussions and remanded to the district court. *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014).

⁶ *Floyd*, 959 F. Supp. 2d 540, 559–60 (emphasis added).

project in which officers would wear body cameras.⁷ The order to this effect was stayed by the Second Circuit Court of Appeals;⁸ the newly elected mayor of New York, Bill de Blasio, promised to drop the appeal and carry out the district court's instructions.⁹

II. RACIAL CRITERIA AND STOP AND FRISK

This essay is addressed to one central question about police making stops and frisks. How should police use of a person's racial identity in deciding whether to make a stop be understood?¹⁰ The practical questions about appropriate actions concern what is morally acceptable, what is wise in our society, and what is constitutionally permissible. In respect to terminology, the inappropriate use of racial criteria is commonly cast as "racial discrimination"; thus, the practical issues are closely tied to what should be seen as such "discrimination" in this context. In exploring the core question about the use of racial criteria, I do not attempt to delve into many of the nuances about exactly what are present police practices and how they should be reformed. I also do not undertake a constitutional analysis that explores the various implications of existing cases. Although I do indicate my own tentative conclusions, the essay's primary objective is to clarify how we should be thinking about a very important question. If lawyers and citizens try to assess fairly what has taken place and what should occur in the future, it helps to reflect on just how complex is the concept of "discrimination." That understanding does not itself answer how far, if at all, the police have been overstepping constitutional boundaries and whether each of Judge Scheindlin's responses is warranted. However, it allows us to address those questions without relying heavily on a conclusory label such as "discrimination" or "profiling" for which the range of application is murky and contested.

Another theme of this essay is that comparisons with uses of other group-related criteria in both private and official practices can help reveal what is similar

⁷ *Id.* at 563.

⁸ *Ligon*, 743 F.3d at 365. The implementation of these requirements was stayed by the Second Circuit Court of Appeals "for the purpose of supervising settlement discussions and remanded to the district court." *Id.* The court also ruled that Judge Scheindlin be removed from the case. *Ligon v. City of New York*, 736 F.3d 118, 129–30 (2d Cir. 2014) ("We have made no findings that Judge Scheindlin has engaged in judicial misconduct.").

⁹ Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, (Jan. 30, 2014), www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html.

¹⁰ For illumination on the use of racial criteria, see Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004) (treating the topic in depth); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002).

and what is different about police uses of race. This understanding can contribute to a thoughtful conclusion about what is acceptable and desirable.

The central question about stop and frisk that I address is this: if members of minority groups are disproportionately involved in crimes of violence and carrying concealed weapons on the street, is it defensible, and constitutionally acceptable, for a police officer to take account of a person's race in deciding whether to make a "stop," and then whether to engage in a frisk (which is permissible only given a perceivable risk that the person stopped is carrying a weapon)? Between January 2004 and June 2012, New York City officers made over 4.4 million stops¹¹; 52 percent of these were of blacks, 31 percent of Hispanics.¹² Blacks constituted 23 percent of the population; Hispanics 29 percent.¹³ Only 10 percent of the persons stopped were white; whites are 33 percent of the population.¹⁴ Of course, some lack of correlation between stops and the races of the total population would derive from the concentration of the police in high crime areas, a practice everyone accepts. The city, with a written policy that prohibits racial profiling, defended the actual statistics on the basis that they fairly reflected the percentages of criminal suspects.¹⁵ Judge Scheindlin rejected this reasoning.¹⁶ Noting that the police had an unwritten police policy to stop "the right people," and that young blacks and Hispanic males were most frequently stopped, she regarded the city's defense as "flawed because the stopped population is overwhelmingly innocent—not criminal."¹⁷ We have, she urged, no basis to suppose that the innocent members of a racial group will be engaging in suspicious movements.¹⁸ In concluding that the police discriminated against blacks and Hispanics in stops, Judge Scheindlin relied partly on the greater frequency with which force was used against them and the lower percentage of times weapons were seized than when whites were stopped.¹⁹ But, in addition to these particular statistics which she took as suggesting unequal treatment, she noted the absence of "evidence that law-abiding blacks or Hispanics are more likely to behave *objectively* more suspiciously than law-abiding whites . . ."²⁰ Thus, the city's "defense *against* a charge of racial profiling" was really "a defense *of* racial profiling . . . not a race-neutral explanation for racial disparities in

¹¹ *Floyd*, 959 F. Supp. 2d 540, 556.

¹² *Id.* at 559.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *See id.* at 583–89.

¹⁶ *Id.* at 587–88.

¹⁷ *Id.* at 560–61.

¹⁸ *Id.* at 585.

¹⁹ *Id.* at 559.

²⁰ *Id.* at 558.

NYPD stops: it is itself a *racially biased explanation*.”²¹ In her view, “The Equal Protection Clause does not permit race-based suspicion.”²²

A core issue raised by the disagreement between the city and Judge Scheindlin over what could constitute acceptable bases for stops and frisks is whether it is ever acceptable to give weight to someone’s race in circumstances other than when actual suspects of crimes have already been racially identified. Everyone agrees that when a robber has been identified as “black” or “white,” police should rightly treat that as relevant for whom they might stop for committing the robbery. Further, if police are aware that all drug dealers in a particular neighborhood are white, they would not properly stop nonwhites on the suspicion of their selling drugs.

We may pose two questions about circumstances lacking prior identification of the race of someone who has committed a crime. First, is it ever plausible that a person’s race could affect whether the probability of criminal involvement has exceeded the standard for “reasonable suspicion”? Second, if so, should police be able to take aggregate data about race and crime into account in deciding whether to stop and frisk? The main point of this essay is to clarify that these *are* different questions, each of which needs to be carefully considered. My own answers to these questions happen to be “yes” and “no.” That is, although an “objective” basis can exist to take race into account, it is better for our society if law enforcement policies and practices exclude that, and such an exclusion is sensibly seen as constitutionally required. The reasons for this concern are the special status of racial categorization in our culture, the consequences of use of racial criteria, and the message about race that the government’s police practices need to convey.

In addressing what constitutes desirable and constitutionally permissible police practices, one needs to recognize that “discrimination” is a term with subtly different meanings that vary with context. A crucial distinction may exist between much common usage and appropriate legal usage, the latter depending partly on an overall assessment of the appropriateness of behavior. In some talk, whether a person “discriminates” depends on what he actually perceives; in other accounts, the objective factors are determinative. Whether any reliance on race could be objectively warranted depends on the availability of information that is independent of race, and on the degree of probability that would justify someone’s drawing the inference that what she “fears” may be true is sufficiently likely to warrant action. As independent information and the needed probability increase, the conceivable legitimacy of any reliance on a person’s race becomes radically lessened or disappears. One ground for labeling behavior “discrimination” is the consequences persons who may be regarded negatively will suffer. Reflecting on how these various factors may bear on more private uses of race as a criterion and

²¹ *Id.* at 587.

²² *Id.* at 603.

on analogous uses of questions about gender and age can assist a careful assessment in respect to race and stop and frisk. Before proceeding to that, this essay explains a bit more about "reasonable suspicion" and "stop and frisk."

III. STOP AND FRISK AND "REASONABLE SUSPICION"

Stops and frisks must be based on "reasonable suspicion."²³ Developed in the Supreme Court's decision in *Terry v. Ohio*, this standard is more relaxed than the "probable cause" required for arrests and comprehensive searches, because street stops involve less impairment of an individual's privacy and autonomy.²⁴ We should not, of course, suppose the persons subjected to "stops," during which they are not free to move away, suffer nothing at all. Perhaps when we are frisked like everyone else before we board a commercial airplane, we are hardly bothered, but being singled out for a forcible stop on a street is quite different. In 1996, judges on the Ninth Circuit remarked that stops based on race "are humiliating, damaging to the detainees' self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives."²⁵

Although no one has ever pinned down any precise account of what amounts to "reasonable suspicion," we can contrast it with circumstances in which the police act because they are sure of a law violation or because they have probable cause. These contrasts suggest why a person's race *could* make more of a difference for stop and frisk.

Suppose that officers patrolling a highway with a formal speed limit of 70 miles per hour are told that, under normal traffic conditions, they should ticket for speeding all those, and only those, who are driving over 80 miles per hour.²⁶ Since officers possess technical equipment that can measure precise speeds, they have no need or basis to rely on the group membership of any driver. The percentage of minorities, women, and young persons among those stopped will exactly equal the percentage of those actually speeding.

The "probable cause" standard for arrests and seizures is not one of absolute certainty. In actual application by law enforcement officers and judges, the seriousness of the crime and concern about escape from the jurisdiction are likely to play a role in what probability is seen as necessary.²⁷ However, in one standard

²³ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

²⁴ *Id.* at 20–21.

²⁵ *Washington v. Lambert*, 98 F.3d 1181, 1188 (1996), quoted in *Floyd*, 959 F. Supp. 2d 540, 602–03. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999), for a thoughtful treatment of such humiliation.

²⁶ I put aside here whether police should stop a driver for speeding when he is exceeding the formal limit but is really being stopped for suspicion of a different crime.

²⁷ One thinks of the killing of an entire family or the setting of a bomb at the Boston Marathon, and the evidence that someone, who may have been guilty of such crimes, is about to board an airplane flying out of the country.

formulation by the Supreme Court, probable cause for an arrest was present when officers had “knowledge” and “reasonably trustworthy information” of “‘facts and circumstances . . . sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”²⁸ This imprecise language standard suggests a likelihood approximating “more probable than not,” although the Court has specifically stated that probable cause “does not demand any showing that such a belief be correct or more likely true than false.”²⁹

A person’s race, gender, or religion cannot by itself provide a major basis to believe that the probability that he or she committed a criminal act is high enough to meet this somewhat vague standard. In any ordinary investigation, the acquisition of information about a person’s behavior that points toward guilt and is independent of any group characteristic will totally eliminate the relevance of group membership or minimize its importance. We can conceive exceptions to this generalization. If a religious group is known to make use of an illegal drug as the central aspect of its services, the knowledge that a member of the group regularly attends services might establish probable cause that he has used the drug. And, as already noted, if the racial composition and gender of someone who committed a crime is known, police lack a basis to arrest or stop a member of a different race or gender. However, the fundamental point here is that probable cause can be satisfied only by much more individualized information than a person’s group membership.

Is “stop and frisk” at all different and, if so, how? Police can stop on the basis of a “reasonable suspicion” that someone is committing a crime or preparing to do so. He may be carrying a concealed weapon or “casing” a store for a possible burglary. Police must act on the basis of what they see and hear, before acquiring more extensive information. What probability is needed? Since few of those who are stopped and frisked, without suffering further negative consequences, will formally challenge what has been done to them, and because assessment of the basis for “suspicion” must rely on what police say they have perceived, only an extremely small percentage of stops are held by courts to violate the constitutional standard. Judge Scheindlin addressed a number of particular stops that were contested, and, relying on careful empirical analysis by Jeffrey Fagan, concluded that the constitutional standard of probability was violated on a substantial number of other occasions.³⁰ She noted that only 12% of stops resulted in arrests or summons, that the charges against some of those arrested and issued summons were dismissed, and that the summons were frequently for crimes that would not have warranted the initial stop.³¹ (Of course, a stop of someone *about* to purchase

²⁸ *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). See also *Illinois v. Gates*, 462 U.S. 213 (1983).

²⁹ *Texas v. Brown*, 460 U.S. 730, 732 (1983). See JOSHUA DRESSLER & ALAN MICHAELS, *UNDERSTANDING CRIMINAL PROCEDURE* 134–45 (6th ed. 2013), for an analysis of probable cause.

³⁰ *Floyd*, 959 F. Supp. 2d 540, 624–67.

³¹ *Id.* at 573–76.

a drug might prevent a criminal action, even if not followed by a summons or arrest.)

Both what the Supreme Court has said and the findings made by Judge Scheindlin suggest that “reasonable suspicion” to stop requires considerably more than a slight chance of criminal behavior. Without being explicit about the needed probability, Supreme Court opinions have explained that “reasonable suspicion” requires “some minimal level of objective justification,”³² but is less demanding than probable cause and requires “considerably less . . . proof of wrongdoing [than] by a preponderance of the evidence.”³³ The way Judge Scheindlin treated the statistics may have reflected a view that police need a more solid basis than a 10% probability. (Although she pointed out that even if a stop is legitimate, a frisk that follows must also be based on “reasonable suspicion” that the person carries a weapon, we may assume that here the probability does not need to be so high. If an officer reasonably senses any genuine risk that a person who is not allowed to move away may be carrying a concealed weapon he might use, a frisk would be justified.)

Were we trying to make a crude estimate of the needed probability for the typical “stop” on the street, perhaps it would be something like 20%, in comparison with the roughly “more probable than not” for most actual arrests. But whatever a sensible estimate may be, the fact that it is lower than “probable cause” and that it governs actions based on more limited information are what make the legitimacy of reference to race more complex.

Just what is at stake in the controversy over stop and frisk can be illuminated by a comparison with private reliance on race and other group characteristics. The following illustrations include similarities—the difficulty of relying on “objective” criteria and discounting prejudices, the problem raised by the absence of independent information, and concern about the message sent to those viewed negatively. But the comparison reveals two crucial differences as well: first, reliance on race is strikingly different in important respects from reliance on gender and age, and second, when government officials are openly engaging in that practice, the message conveyed is more powerful and disturbing.

IV. PRIVATE ACTORS

If one puts aside both the use of “affirmative action” to correct prior discrimination, and purely personal choices, such as who one will marry or date, is it always morally wrong for one person to take another’s race into account? Imagine that Michael, a middle-aged, well-dressed white man, is walking along a city street late at night and sees three noisy, poorly dressed strangers in their early twenties walking toward him. He realizes that the chances are slight, but he

³² *INS v. Delgado*, 466 U.S. 210, 216–17 (1984).

³³ *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

worries that he might possibly be constrained and forced to turn over money. He considers crossing the street to assure his safety. If Michael is aware that the rate of “muggings” made by young black men is three times higher than that by young white men, would it be wrong for him to cross the street if the approaching strangers are black, even if he would not do so if they were white?

If we ask a similar question about gender and age, the answer seems fairly straightforward. Both women and men reasonably fear that men are much more likely to engage in violent confrontations than are women,³⁴ and that men over sixty are much less likely to be violent than those between fifteen and twenty-five. These differences are not simply a matter of physical strength; guns and other weapons can enhance anyone’s ability to force others to do what he or she wants. Were Michael to have crossed the street if approached by noisy young men, but would not have done so if those moving toward him had been equally noisy young women or elderly men, almost no one would say he had engaged in gender or age “discrimination.”

Is race different? Historically, attitudes of members of the dominant white race about blacks have been more pervasively negative than attitudes of men about women. Age discrimination has not typically involved similar perceptions about a collection of undesirable qualities, the primary concern being that older persons will be disfavored in various ways. Although Michael will not know exactly how much less dangerous women and older men are than young men, his estimates of gender and age are likely to be more dispassionate than about race. Of course, none of us are capable, in making such personal decisions, of being *completely* objective. We are moved partly by non-rational and irrational feelings; this is especially true if we are experiencing strong emotional feelings such as physical fear, and if we possess deep-seated prejudices we cannot put aside. When it comes to race, not only is our cultural heritage a problem, the closest we can come to objective evaluation is itself based on statistics about crimes. Especially with respect to crimes that do not involve violence against victims who then report what has happened, these statistics are affected by whom the police suspect, investigate, and arrest.³⁵ If the police overestimate the dangerousness of members of a race, and concentrate enforcement efforts on them, the ensuing statistics about crimes will not accurately reflect how many crimes were actually committed by members of various races. One might possibly conclude that the problems of misinformation and residual prejudicial feelings are so great that people should try as hard as they can to avoid taking race into account at all, even if the crime rate is definitely higher among members of one race than another.

The actual consequences of the cultural setting provide another conceivable ground for such a conclusion. When members of a minority recognize that they

³⁴ Women, of course, have the particular fear of rape, but any person could conceivably be sexually assaulted by someone else of the same gender.

³⁵ Harcourt, *supra* note 10, at 1361–71 (demonstrating such a discrepancy between actual criminal behavior and arrests in respect to use of illegal drugs).

are being treated differently based on negative judgments about their qualities, they commonly feel put down and insulted, as clearly revealed by President Obama's remarks after George Zimmerman was acquitted for shooting Trayvon Martin.³⁶ Suppose Michael's crossing of the street is perceived by the approaching three young blacks as almost certainly designed to avoid contact with them, and they rightly guess he would not have done so had they been white. They might well experience a kind of symbolic "put-down" that makes them feel a bit like alienated outsiders. This concern could affect Michael's basic choice, if he grasps that he could not cross the street without their noticing.

These various concerns do not themselves yield the conclusion that a private person like Michael is doing something immoral or engaging in racial discrimination *if* he crosses the street. If challenged that he had done wrong, Michael might respond, "I didn't know the precise chance of being stopped by black youths as compared with white ones, but the danger, slight as it was, was sufficiently greater to justify my crossing. I tried to act on the basis of what was objectively true, and I had no opportunity, unlike an employer deciding whom to hire, to acquire more individualized information."

Michael's response illustrates, how in various usages, a number of factors can figure in what people call "discrimination." The term is *sometimes* applied to wholly appropriate differentiations, such as colleges favoring applicants with high academic records. But we usually think of discrimination as involving the intentional disadvantaging of members of one group without a genuine and sufficiently strong objective basis for doing so. Does it matter if the actor believes he is relying only on objective facts? Sometimes "discriminate" refers to behavior that is self-consciously based on simple antagonism or prejudice, but it may also be said about a person who mistakenly believes he has an objective basis, "He may not realize it, but he is actually discriminating against members of this group."

As Michael's response suggests, another crucial aspect about claimed reliance on objective facts is the availability of more precise information. From the standpoints of common speech and moral judgment, an employer aware that the percentage of Presbyterians who turn out to work effectively is slightly higher than the percentage of Roman Catholics, would be engaging in outright discrimination if she hires only Presbyterians, rather than examining individual qualifications. Although limits exist to how searching the individual examination needs to be, the employer should never rely exclusively on an applicant's religion, race, or gender.³⁷

A chance to acquire individual information ties to the probability of harm that justifies a response. For some decisions, we are not morally justified in acting until we are nearly certain that a person is doing a wrong. A man should not fire a

³⁶ A young man subject to behavior that reflects such judgments may feel he is being treated as a presumptive criminal.

³⁷ For some positions, such as nude dancer, professional football player, or Baptist minister, people may be *unqualified* because of gender or religion.

gun in “self-defense” unless he has a powerful basis to conclude that he is being attacked; an employer should not dismiss a worker for stealing valuable goods unless his evidence is overwhelming. For assessments like these, race, gender, and age become irrelevant. Most members of all groups are not trying to kill or steal valuable goods from their employers.³⁸ In deciding whether any individual is actually doing so, his or her group membership is typically of no help.

When we put these considerations together we can conclude that, in addition to actions based on hostile prejudice, a private actor’s use of racial criteria becomes more properly seen as “discrimination” when he is not relying on objective criteria, when he fails to obtain available information to satisfy a needed degree of probability, and when his behavior causes a genuine disadvantage to those within the group about which he bases his negative judgment. Even if the better moral choice for Michael would be not to cross the street because of what that will “say” to the three approaching youths, most people would hesitate to call his crossing actually immoral or “discrimination.” This leads us to ask: how greatly is the situation different when action of the state is subjecting people to stops and frisks?

V. STOP AND FRISK: PROBABILITIES AND CONCLUSIONS

As we turn from moral assessment of private action based on highly limited information to desirable legal norms for stop and frisk, we need to recognize both the similarities and differences.

One crucial difference is that the standard for evaluating police practice in this context is definitely “objective.” Although the basis for a stop depends on what an officer believes he saw, his subjective view about the probability of criminal behavior is not what counts. Rather, the test is what objectively are the conditions for action.³⁹ In a quote referred to by Judge Scheindlin, the Second Circuit Court of Appeals has said, “[r]easonable suspicion is an objective standard; hence, the subjective intentions or motives of the officer making the stop are irrelevant.”⁴⁰ This is sensible for three reasons. First, it is difficult enough for judges to try to replicate the external circumstances that led to a stop;⁴¹ they have even less capacity to determine if an officer is being honest about exactly what moved him to act. Second, officers, like the rest of us, may often be influenced by factors they do not self-consciously perceive. Finally, the actual calculation of likely harm against likely benefit, which is the central concern about police invasions to solve

³⁸ One may need the qualification of “valuable,” because many people may commit technical theft, such as taking home pens and pencils distributed at work.

³⁹ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013).

⁴⁰ *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000), *quoted in Floyd*, 959 F. Supp. 2d at 558.

⁴¹ See Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN’S L. REV. 1043 (1998) (exploring the severe difficulty experienced by courts assessing the facts accurately in this context).

crimes, is determined overwhelmingly by the objective facts, not an officer's subjective state of mind.

The possible similarity with Michaels's decision concerns objective probabilities. How do police, lacking probable cause in respect to an individual, determine if "reasonable suspicion" exists? That depends on a person's physical appearance, movements, and demeanor. An example of suspicious movements was presented by a case in which Judge Scheindlin believed the original stop was justified.⁴² David Floyd and another black man were using multiple keys to try to open an apartment door.⁴³ It turned out that the second man was locked out of his apartment, and Floyd was trying to help him in with the multiple keys of his godmother owner.⁴⁴ But the officers reasonably thought that in this area, where burglaries had occurred, the two men might be undertaking to commit one.⁴⁵

Judge Scheindlin was highly critical of police use of the category of "Furtive Movements" to justify stops.⁴⁶ The Police Student's Guide account is so general that its "vagueness and overbreadth . . . invites officers to make stops based on 'hunches'" ⁴⁷ That the Department cease to rely on this encompassing formulation was one of the court's mandates about corrective measures.⁴⁸

What this essay will now explore is whether, when suspicious movements and appearances (such as might suggest carrying a concealed weapon or the "casing" of a jewelry store for theft) become adequately refined to avoid vagueness or overbreadth, the membership of someone in a group could make a difference. I suggest that, although no one could properly be stopped primarily because he or she fits into some group category, a person's race or gender could affect the objective probability of criminal behavior, and could do so in a way that would bring the overall likelihood above the threshold needed to justify a stop. However, the percentage of stops would not be likely to track the crime rate among the different groups. Nor would it reflect the degree of suspicious behavior of innocent members of groups. The figures I use here are completely artificial, but they strongly indicate that the likely reality is more subtle than either the city or Judge Scheindlin has acknowledged.

Suppose a city has 80,000 young male residents; 20,000 are minority blacks and Hispanics, and 60,000 are white. Among these two groups in a relative time period, the percentage of minorities who commit the kinds of crimes that lead to stops are 6% and the percentage of whites is 2%. Further, when undertaking to commit crimes, half of these in each group, by their movements and demeanor, act

⁴² *Floyd*, 959 F. Supp. 2d at 652.

⁴³ *Id.* at 650.

⁴⁴ *Id.* at 650–51.

⁴⁵ *Id.* at 651–52.

⁴⁶ *Id.* at 559–60.

⁴⁷ *Id.* at 613–14.

⁴⁸ *Floyd v. City of New York*, 959 F. Supp. 2d 668, 683 (S.D.N.Y. 2013).

in ways that are observed and might lead to stops. Among those who are innocent of such crimes, only one in twenty engages in similar movements, and this percentage is the same for innocent minority members and whites. (For purposes of this exercise, I am assuming, unrealistically, that all the individual movements are roughly comparable in their degree of creating suspicion.)

If we add these figures together, it turns out that of the 20,000 members of minorities, 600 guilty ones have displayed such movements and demeanor and 940 innocent ones have done so. Among the 50,000 whites, 500 guilty ones and 2,450 innocent ones have acted similarly. If a police officer sees a young minority male acting in this way, the chances are just under 39% that he is committing or about to be engaging in some crime. For whites the percentage is roughly 17%. If we include together all members of both groups who are stopped, the percentage of those engaging in criminal acts would be about 24.5%. In other words, under an objective measure, the race of a person acting somewhat suspiciously *could* affect the probability of criminal involvement and could, in some circumstances, lift the level of likelihood over a threshold appropriate for a stop. However, if the police treated all suspicious behavior similarly, neither the respective number of stops for the different racial groups nor the comparative likelihood of stopped minorities and whites being actually involved in criminal activity would replicate the respective percentages of those groups whose members were committing the relevant crimes.

A brief reflection on the gender and age analogies can assist our focus on the possible use of race for stops. When we turn to the gender and age, we can be nearly certain that concentrating stops and frisks on relatively young men is warranted, and this is not because they are virtually the only ones whose demeanor independently suggests possible guilt. What if the two persons fiddling with multiple keys had been women or had been men over eighty? One doubts if officers would have constrained them; and any assessment of objective probability would conclude that the chance that a burglary was under way was much diminished.

Does it follow from this analysis that the law should recognize and accept the use of racial criteria as one element of what would justify stops and frisks? The answer is "No." Because of the severe risk of reliance on prejudices and statistical data about crimes that do not objectively reflect actual rates of commission, and because of the destructive consequences for the young members of minorities who suffer the humiliation of stops, police departments would better develop standards that are wholly independent of race; ones that depend completely on actual behavior that suggests criminal activity and such things as bulges in pockets that may contain concealed weapons.⁴⁹ One might believe that such an approach would be desirable without thinking that it is constitutionally required under the Fourteenth Amendment. But, given the difficulty for individuals of knowing just how far they are relying on objective truth rather than personal feelings, the

⁴⁹ The same conclusion about non-reliance would follow about using forms of dress or hairstyles that connects in some way to race, but do not themselves indicate criminal activity.

importance of police training and supervision, and the impossibility of judges assessing just what did move a particular officer to action, the conclusion that the Constitution requires use of nonracial criteria for ordinary “stops” is sound. If one consequence of a bar on using a person’s race as a substantial basis for a stop were to encourage more careful and extended examination of individual behavior, the result could well be a higher percentage of stops preventing criminal activity.⁵⁰

In summary, treating any direct use of racial criteria for typical “stops and frisks” as a form of unjustified discrimination is warranted. But that judgment must rest on a refined evaluation of all the relevant considerations,⁵¹ *not* on any simple notion of what constitutes “discrimination,” nor any assumption that a person’s race could never affect objective probabilities.

⁵⁰ A different concern about concentrating less enforcement efforts on whites could be that this will increase the willingness of some whites to commit the relevant crimes. See Harcourt, *supra* note 10, at 1371–76 (focusing on degrees of elasticity).

⁵¹ See Richman, *supra* note 41.

