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## **Search and Seizures: Constitutionally Protected or Discretionary Police Work?**

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## Search and Seizures: Constitutionally Protected or Discretionary Police Work?

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## SEARCHES AND SEIZURES: CONSTITUTIONALLY PROTECTED OR DISCRETIONARY POLICE WORK?

### SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

People v. Kennebrew<sup>1</sup>  
(decided May 29, 2013)

#### I. INTRODUCTION

In recent times, a debate has stirred over whether the New York Police Department's ("NYPD") "stop and frisk" practices are unconstitutional.<sup>2</sup> The Supreme Court of the United States has held that the Fourth Amendment protections from unreasonable search and seizure are so vital that "[n]o right is held more sacred, or is more carefully guarded."<sup>3</sup> The Fourth Amendment raises great controversies concerning confrontations between police and criminal suspects, especially when individuals are searched without a warrant.<sup>4</sup> This case note will address the standards police are supposed to uphold when conducting a warrantless search and seizure in the field. More specifically, this case note will explore the issues raised in *People v. Kennebrew*—which circumstances may yield a reasonable suspicion that a citizen poses a danger to a police officer and/or the general public, subsequently permitting a "stop and frisk." In addition to the use of questionable standards in justifying reasonable suspicion, police practices have resulted in concrete evidence of racial profiling.<sup>5</sup>

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<sup>1</sup> 965 N.Y.S.2d 622 (App. Div. 2d Dep't 2013).

<sup>2</sup> See generally Emily J. Sack, *Police Approaches and Inquiries on the Streets of New York: The Aftermath of People v. De Bour*, 66 N.Y.U. L. REV. 512 (1991) (exploring the increased protections for New York citizens since New York's landmark decision in *People v. De Bour* and the conflicting interests between prevention of crime by the police and Fourth Amendment protections).

<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1, 11 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>4</sup> *Id.* at 4.

<sup>5</sup> Sack, *supra* note 2, at 539 (stating that police frequently rely on race as a factor to iden-

Case law suggests that citizens ought to enjoy strict enforcement of the protections under the Fourth Amendment; however, evidence of unconstitutional police practices and, more specifically, the NYPD's 'stop and frisk policy' suggests otherwise.

## II. FACTUAL BACKGROUND OF *PEOPLE V. KENNEBREW*

While driving through a neighborhood in which there were numerous complaints of drug activity, three police officers noticed the defendant standing on a street corner with multiple cigarettes in his hand and subsequently approached him in their vehicle.<sup>6</sup> As the defendant began to walk in the opposite direction, the officers exited the car, called out to him, and approached him on foot.<sup>7</sup> One officer asked the defendant for his name, identification, and whether he was selling cigarettes.<sup>8</sup> The defendant identified himself, explained his reasoning for standing on the street corner, and denied selling cigarettes.<sup>9</sup> Then, the officer asked the defendant whether he was in a gang because the defendant's clothes suggested gang affiliation.<sup>10</sup> The defendant admitted to being in a gang, but when he was asked whether he had a gun on his person, the defendant did not answer.<sup>11</sup> The police then placed the defendant against the wall, conducted a pat-down search, and recovered a handgun from his person.<sup>12</sup> The defendant stated, "I am going to be in a lot of trouble for this."<sup>13</sup> The officers explained that they noticed a bulge on the defendant's waistband, under his clothing, as their reason for conducting the pat-down.<sup>14</sup>

### A. The Court's Analysis of *People v. Kennebrew*

The defendant moved to suppress his statement and the physi-

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tify suspects and "the use of race creates great potential for police abuse, leading to discriminatory intrusions which the fourth amendment was designed to prevent.").

<sup>6</sup> *Kennebrew*, 965 N.Y.S.2d at 623.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 624 (stating that defendant was wearing red and black beads and had a teardrop tattoo below his eye).

<sup>11</sup> *Kennebrew*, 965 N.Y.S.2d at 624.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

cal evidence against him.<sup>15</sup> That motion was granted by the Queens County Supreme Court and affirmed by the Appellate Division, which held that the police officers lacked a reasonable suspicion to justify a stop and frisk.<sup>16</sup>

The Appellate Division primarily relied on the four-level test to evaluate the constitutionality of the encounter between defendant and the police, which was delineated by the New York Court of Appeals in *People v. De Bour*.<sup>17</sup> The test provides that:

[(1)] The minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality. [(2)] The next degree, the common-law right of inquiry, is activated by a founded suspicion that criminal activity is afoot and permits a somewhat greater intrusion in that a policeman is entitled to interfere with a citizen to the extent necessary to gain explanatory information, but short of a forcible seizure . . . [(3)] the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed. [(4)] Finally a police officer may arrest and take into custody a person when he has probable cause to believe that person has committed a crime, or offense in his presence.<sup>18</sup>

In *Kennebrew*, the court's primary concern was the third level of police intrusion because the police officers conducted a "frisk."<sup>19</sup> The court ultimately held that it was not reasonable for the officers to suspect that they were in danger of physical injury.<sup>20</sup> The prosecution contended that the pat-down was justified because of the defendant's failure to answer the officers' inquiry about the defendant possessing a gun and the bulge they noticed in the defendant's waistband.<sup>21</sup> The

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<sup>15</sup> *Id.*

<sup>16</sup> *Kennebrew*, 965 N.Y.S.2d at 624.

<sup>17</sup> *People v. De Bour*, 352 N.E.2d 562 (N.Y. 1976) (internal citations omitted).

<sup>18</sup> *Id.* at 571-72; *see also* *People v. Moore*, 847 N.E.2d 1141, 1144 (N.Y. 2006) ("Innocuous behavior alone will not generate a founded or reasonable suspicion that a crime is at hand.").

<sup>19</sup> *Kennebrew*, 965 N.Y.S.2d at 625.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

court disagreed, relying on *People v. Stevenson*.<sup>22</sup> In *Stevenson*, the court explained that an unidentifiable bulge can be interpreted ambiguously; persons with a bulge in their waistband is just as likely to be innocent as guilty.<sup>23</sup> Additionally, the court in *Stevenson* held that a criminal suspect has the right to refuse to answer a police officer's question.<sup>24</sup> This right is inherent in the nature of the Fifth Amendment of the United States Constitution.<sup>25</sup>

Based on the above referenced case law and the lack of factual evidence to illustrate that the officers reasonably believed to be in danger from defendant's actions, the Appellate Division properly suppressed the evidence obtained against defendant.

### III. UNITED STATES FEDERAL COURT DECISIONS

#### A. United States Supreme Court

In 1968, the Supreme Court delivered the landmark decision of *Terry v. Ohio*,<sup>26</sup> which explored whether a search and seizure in the field of police work is reasonable.<sup>27</sup> The Court defined precisely what constitutes both a "search" and a "seizure" and, subsequently, when there are appropriate circumstances for a police officer to perform both without a search warrant.<sup>28</sup> The Court also alluded to the fact that it is imperative to recognize that the performance of a search and seizure in public is a major confrontation between protections under the Fourth Amendment and the safety of police officers and the general public.<sup>29</sup> Ultimately, the Court emphasized that a two-part responsibility exists between police officers and the courts when considering the search and seizure of private citizens.<sup>30</sup> With regard to police officers, there "is a severe requirement of specific justification

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<sup>22</sup> 779 N.Y.S.2d 498 (App. Div. 2d Dep't 2004).

<sup>23</sup> *Id.* at 499.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. CONST. amend. V.

<sup>26</sup> *Terry*, 392 U.S. at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 10-12.

<sup>29</sup> *Id.* at 10-15 (acknowledging that while public safety and prevention of crime are a legitimate interest, there must be adequate judicial review to balance these interests against Fourth Amendment protections in order to sustain judicial integrity and remain mindful of the growing distrust between law enforcement and minority groups).

<sup>30</sup> *Id.* at 11-13.

for any intrusion upon protected personal security.”<sup>31</sup> The Court further explained that there is required judicial integrity—“a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution.”<sup>32</sup> In reaching its decision, the Court heavily relied on the language of the Fourth Amendment.<sup>33</sup>

The Court held that an analysis of Fourth Amendment protection is necessary when a person has been either searched or seized.<sup>34</sup> “[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person . . . [and a search is] a careful exploration of the outer surfaces of a person’s clothing.”<sup>35</sup> Lower courts have followed the Supreme Court’s lead; for example, the Second Circuit has emphasized that “[a] seizure occurs when (1) a person obeys a police officer’s order to stop or (2) a person that does not submit to an officer’s show of authority is physically restrained.”<sup>36</sup> The Court in *Terry* emphasized that the police must obtain a warrant to conduct a search and seizure whenever it is practicable.<sup>37</sup> Furthermore, a stop may be reasonable, but in order to conduct a permissible frisk, there must be a suspicion of violence.<sup>38</sup> Essentially, the Court limited the scope of frisk to situations in which the intrusion is reasonably believed to yield some kind of weapon or instrument that can be used to harm the police officer.<sup>39</sup> The issue before the Court in *Terry*, however, dealt with situations where a police officer reasonably believed he or she was in imminent danger.<sup>40</sup> The Court held that whether the police officer reasonably believed he or she was in reasonable danger should be judged by an objective standard.<sup>41</sup> This standard is “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or

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<sup>31</sup> *Terry*, 392 U.S. at 11.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; 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.”).

<sup>34</sup> *Id.* at 9.

<sup>35</sup> *Id.* at 16.

<sup>36</sup> *United States v. Simmons*, 560 F.3d 98, 105 (2d Cir. 2009).

<sup>37</sup> *Terry*, 392 U.S. at 20.

<sup>38</sup> *Id.* at 33 (Harlan, J., dissenting).

<sup>39</sup> *Id.* at 29 (majority opinion).

<sup>40</sup> *Id.* at 20.

<sup>41</sup> *Id.* at 21.

that of others was in danger.”<sup>42</sup> The Court further stressed that “good faith on the part of the arresting officer is not enough . . . [because if this were the case] the protections of the Fourth Amendment would . . . [be] in the discretion of the police.”<sup>43</sup>

### B. United States Court of Appeals

The task of defining the scope of “reasonable suspicion” was further explored by the Second Circuit in *United States v. Freeman*.<sup>44</sup> In *Freeman*, a NYPD dispatcher received two calls from an unidentified caller regarding a Hispanic male with a gun, who was wearing a black hat and a white t-shirt, but the dispatcher was unable to confirm whether the 911 caller actually saw a firearm.<sup>45</sup> Two officers, Joseph Walsh and Ryan Conroy, responded to the call from about eight blocks away.<sup>46</sup> As the officers approached the location, the dispatcher notified them that a new call came in, describing the suspect as a black male wearing a white du-rag, black hat, and a long white t-shirt.<sup>47</sup> Upon surveying the area, the officers noticed Joseph Freeman walking and observed that he fit the most recent description of the suspect.<sup>48</sup> The officers waited for Freeman to approach their vehicle, and once he was in close proximity, Conroy exited the vehicle and attempted to talk to Freeman.<sup>49</sup> Freeman ignored Conroy and continued walking, so Conroy grabbed Freeman’s elbow.<sup>50</sup> Freeman broke Conroy’s grasp and continued walking away and, subsequently, Walsh exited the vehicle and grabbed Freeman’s elbow.<sup>51</sup> Once Freeman shrugged off Walsh, Walsh grabbed Freeman around the waist and eventually tripped him to the ground.<sup>52</sup> After a short struggle, and with the help of two additional officers who arrived at the scene, Freeman was handcuffed, and a gun was found in his waist-

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<sup>42</sup> *Terry*, 392 U.S. at 27.

<sup>43</sup> *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

<sup>44</sup> 735 F.3d 92 (2d Cir. 2013).

<sup>45</sup> *Id.* at 94.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 95.

<sup>48</sup> *Id.*

<sup>49</sup> *Freeman*, 735 F.3d at 95.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*



band.<sup>53</sup> The officers admitted that Freeman never ran off or tried to flee.<sup>54</sup>

The Second Circuit Court of Appeals reviewed whether the evidence against Freeman should have been suppressed due to a lack of reasonable suspicion.<sup>55</sup> The court referred to the holding in *United States v. Bayless*<sup>56</sup> to emphasize that reasonable suspicion is not based on an “inchoate suspicion or mere hunch,” but rather “specific and articulable facts.”<sup>57</sup> Also, the court held that the only facts relevant to justify a stop and frisk are those facts that preceded the actual stop.<sup>58</sup> Thus, the court determined when the officer exercised control to restrain Freeman’s liberty and concluded that Freeman was stopped when Walsh restrained him around his waist.<sup>59</sup> After determining when the stop occurred, the court had to consider the preceding evidence, which included the 911 call, Freeman’s match to the description, and Freeman’s refusal to answer or stop for the officers’ inquiries.<sup>60</sup> The court held that anonymous tips alone are insufficient to justify reasonable suspicion for a valid stop.<sup>61</sup> Also, the court determined that Freeman had a right to refuse the officers’ inquiries and, by the officers’ admission, his actions were not suspicious because he did not attempt to flee.<sup>62</sup> The court took a rigid stance of defining the need to correctly define reasonable suspicion instead of al-

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<sup>53</sup> *Id.*

<sup>54</sup> *Freeman*, 735 F.3d at 95.

<sup>55</sup> *Id.* (reviewing legal decisions *de novo*, but reviewing findings of fact for clear error from the district court’s conviction of a felon in possession with a firearm).

<sup>56</sup> 201 F.3d 116 (2d Cir. 2000) (holding that reasonable suspicion is judged against an objective standard and, therefore, subjective intentions or motives are irrelevant).

<sup>57</sup> *Freeman*, 735 F.3d at 96 (quoting *Bayless*, 201 F.3d at 132-33).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (rejecting the government’s argument that a stop only occurred once the officers put handcuffs on the suspect).

<sup>60</sup> *Id.* at 97 (noting that the recovered gun or any suspicious movements by Freeman were irrelevant in determining whether the officers had reasonable suspicion at the time of the initial stop).

<sup>61</sup> *Id.* at 98; see *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (holding that even an anonymous tip that is proven to be completely accurate in its location and description of the suspect is insufficient to justify a stop); see also *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (vacating structured tests for probable cause and holding that a “totality of the circumstances” approach on a case-by-case basis will better serve both the public and private interests).

<sup>62</sup> *Freeman*, 735 F.3d at 102. See *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. And any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.”).

lowing governmental abuse.<sup>63</sup> Relying on *Freeman*, the court in *Bayless* explained that “district court[s] must not merely defer to [a] police officer’s judgment.”<sup>64</sup> Instead, courts should focus on how a reasonable officer, an officer who has been trained in and has knowledge of the applicable law, should have acted in that situation.<sup>65</sup> In sum, the corroborated circumstances must provide sufficient grounds for the officer to suspect the actual legal wrongdoing.<sup>66</sup>

#### IV. NEW YORK JUDICIAL HISTORY

##### A. Evaluating a Justifiable Frisk

In *People v. De Bour*,<sup>67</sup> the New York Court of Appeals developed a four-level test to evaluate police conduct when faced with a street encounter with a suspected criminal.<sup>68</sup> To determine the constitutionality of a frisk conducted by a police officer, a level-three intrusion must be examined.<sup>69</sup> In *De Bour*, while police officers patrolled an empty street after midnight, they saw a man, the defendant, walking towards them on the same side of the sidewalk.<sup>70</sup> When the defendant was within thirty or forty feet of the officers, he crossed the street and the police officers did the same.<sup>71</sup> When the officers reached the defendant, they asked him what he was doing, and the defendant nervously responded that he was going to a friend’s house.<sup>72</sup> The officers then asked the defendant for identification, but the de-

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<sup>63</sup> *Freeman*, 735 F.3d at 102 (explaining that reasonable suspicion does not mean simply accepting whatever circumstances are offered by the government as necessarily demonstrating sufficient grounds to suspect legal wrongdoing).

<sup>64</sup> *Bayless*, 201 F.3d at 133 (clarifying that courts must adhere to the objective standard applied as a reasonable officer when assessing such factors).

<sup>65</sup> *Simms v. Village of Albion*, 115 F.3d 1098, 1106 (2d Cir. 1997).

<sup>66</sup> *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (clarifying that although certain acts may be deemed innocent when evaluated separately, the factors can raise a reasonable suspicion when corroborated and judged against a “reasonable officer” standard).

<sup>67</sup> 352 N.E.2d 562 (N.Y. 1976).

<sup>68</sup> *Id.* at 571-72.

<sup>69</sup> John H. Wilson, *Legal Standards for Police Interaction with the Public*, N.Y.L.J. (September 23, 2013), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202620154543&thepage=2> (connecting the holding in *De Bour* with the holding in *Terry* to show that a level-three intrusion from the decision in *De Bour* is equivalent to what the Court determined to be a “stop” in *Terry*).

<sup>70</sup> *De Bour*, 352 N.E.2d at 565.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

fendant had none.<sup>73</sup> One officer noticed a slight bulge in the defendant's jacket and asked him to unzip his jacket.<sup>74</sup> The defendant complied, and the officers observed and recovered a loaded revolver from defendant's waistband and placed him under arrest.<sup>75</sup> The court held that this intrusion was reasonable under the circumstances because the intrusion was minimal and limited in scope.<sup>76</sup> The evidence may have been suppressed if the police forcefully detained the defendant before actually seeing the revolver; however, the police were justified in their initial inquiry because of the time, place, and defendant's suspicious actions of crossing the street.<sup>77</sup> Lastly, defendant voluntarily revealed his weapon when he unzipped his jacket, which showed minimal intrusion and justified the frisk and ensuing arrest.<sup>78</sup>

### B. Case Law Defining Reasonable Suspicion

In *People v. Shuler*,<sup>79</sup> the court provided a very detailed definition of what constitutes "reasonable suspicion" when a police officer is contemplating whether to detain a suspect.<sup>80</sup> On its face, reasonable suspicion involves "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious person under the circumstances to believe criminal activity is at hand."<sup>81</sup> The court in *Schuler* held that reasonable suspicion involves corroborated circumstances, based on its interpretation of the Court's holding in *Terry*.<sup>82</sup> Some courts have interpreted *Terry* as holding that "an officer who reasonably suspects that a detainee is armed may conduct a frisk or take other protective measures even in the absence of probable cause."<sup>83</sup> In *Shuler*, however, the court held that "[t]he officer must have knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety."<sup>84</sup> This

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *De Bour*, 352 N.E.2d at 565.

<sup>76</sup> *Id.* at 570.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> 949 N.Y.S.2d 758 (App. Div. 2d Dep't 2012).

<sup>80</sup> *Id.* at 760.

<sup>81</sup> *Id.* (quoting *People v. Martinez*, 606 N.E.2d 951, 953 (N.Y. 1992) (internal quotation marks omitted)).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Schuler*, 949 N.Y.S.2d at 760 (quoting *People v. Batista*, 672 N.E.2d 581, 583 (N.Y.

is a narrow interpretation of reasonable suspicion because the court provided specific factors that can raise a reasonable suspicion of danger, which include “the substance and reliability of the report that brought the officers to the scene, the nature of the crime that the police are investigating, the suspect’s behavior and the shape, size, and location of any bulges in the suspect’s clothing.”<sup>85</sup> The court held that this intrusion was reasonable under the circumstances because it was minimal and limited in scope.<sup>86</sup>

### C. Facts or Circumstances that Support a Reasonable Suspicion

In *People v. Stevenson*, the court held that a noticeable bulge in the suspect’s waistband and the suspect’s refusal to answer the police officer’s questions did not justify a frisk of the suspect.<sup>87</sup> In *Stevenson*, a detective was inside an unmarked vehicle when he noticed the defendant walk by.<sup>88</sup> The detective noticed a bulge in the defendant’s waistband and observed him adjusting the area of his clothing where the bulge was located several times.<sup>89</sup> The detective subsequently detained the defendant and frisked his person.<sup>90</sup>

With exception to the bulge in the suspect’s waistband, the court alluded to the fact that there were no other circumstances to suggest that the suspect posed a threat to the police officer or that criminal activity was afoot.<sup>91</sup> On the other hand, the detective was justified to question the suspect because he noticed the bulge in his clothing.<sup>92</sup> The subsequent frisk, however, was not justified because the suspect had the right to refuse the police officer’s questions.<sup>93</sup> Even though the officer found a gun on the suspect, the evidence was suppressed because there was no reasonable suspicion of dangerous activity.<sup>94</sup>

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1996)); *People v. Davenport*, 939 N.Y.S.2d 473, 475 (App. Div. 2d Dep’t 2004); *Stevenson*, 779 N.Y.S.2d at 499.

<sup>85</sup> *Schuler*, 949 N.Y.S.2d at 760.

<sup>86</sup> *Id.*

<sup>87</sup> *Stevenson*, 779 N.Y.S.2d at 499.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Stevenson*, 779 N.Y.S.2d at 499.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

Although the aforementioned facts of *Stevenson* did not constitute a justifiable frisk, there are many instances where New York courts have upheld the constitutionality of an officer's frisk. It is worth noting, however, that the common circumstance in these cases is that the frisking officer responded to a police call of gun shots or other criminal activity.<sup>95</sup> Courts often require corroborated evidence to justify a police officer's finding of reasonable suspicion in order to conduct a frisk during a street encounter.<sup>96</sup>

For example, in *People v. Davenport*,<sup>97</sup> police officers responded to a reported gun shot at a specific location.<sup>98</sup> The police officers made a timely arrival to the scene and noticed the defendant walking with his hand placed on his waistband.<sup>99</sup> The officers also noted that the defendant looked nervous as he was swiftly looking in multiple directions.<sup>100</sup> After the defendant noticed the officer, he slowly retreated.<sup>101</sup> In response, the officer frisked the defendant's waistband and recovered a loaded firearm.<sup>102</sup> Considering the "totality of the circumstances," the court found that the officer was justified in conducting a limited intrusion of the defendant's person.<sup>103</sup>

A corroboration of evidence involving gunshots and a defendant's suspicious actions occurred in *People v. Warren*.<sup>104</sup> In *Warren*, the officer heard gunshots and investigated the area from which the sounds were coming.<sup>105</sup> The officer observed defendant "tugging on an object in his waistband" and asked defendant to show his hands.<sup>106</sup>

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<sup>95</sup> See, e.g., *People v. Benjamin*, 414 N.E.2d 645, 647 (N.Y. 1980) ("an anonymous tip of 'men with guns', standing alone, does not justify intrusive police action, and certainly does not rise to the level of reasonable suspicion warranting a stop and frisk."); see also *People v. Celaj*, 760 N.Y.S.2d 482 (Sup. Ct. 2003) (holding that an anonymous tip of men with weapons supported by other factors such as temporal proximity, suspect descriptions, and a bulge on the suspect's waistband can justify a frisk); *Davenport*, 939 N.Y.S.2d 475-76 (holding that an officer responding to a report of gunshots may conduct a frisk when he observes articulable facts and makes rational inferences that suggest the suspect is a threat to his or the public's safety).

<sup>96</sup> *People v. Lopez*, 864 N.Y.S.2d 696, 704 (Sup. Ct. 2008).

<sup>97</sup> 939 N.Y.S.2d 473.

<sup>98</sup> *Id.* at 474.

<sup>99</sup> *Id.* at 475.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Davenport*, 939 N.Y.S.2d at 475.

<sup>103</sup> *Id.* at 476.

<sup>104</sup> 613 N.Y.S.2d 375 (App. Div. 1st Dep't 1994).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

The defendant complied after the officer's third request, and the officer proceeded to pat him down.<sup>107</sup> The officer recovered a firearm from the defendant's waistband.<sup>108</sup> The court held that the officer was justified in approaching defendant from his initial observations.<sup>109</sup> Furthermore, given the sound of gun shots and the defendant's suspicious actions, the officer had a valid concern for his safety; therefore, the frisk was justified.<sup>110</sup>

## V. INDIRECT RACIAL PROFILING

The unjustified frisk in *Kennebrew* implicated issues of indirect racial profiling. The police based their suspicions of danger off of the defendant's clothing and tattoo. Studies have been conducted in recent times showing that this type of police work is the product of indirect racial profiling.<sup>111</sup> Most notably, similar issues to the ones raised in *Kennebrew* have been raised in New York City in recent times.

### A. *Floyd v. City of New York*

On August 12, 2013, United States District Court Judge Shira Scheindlin filed a memorandum of her ruling in *Floyd v. City of New York*.<sup>112</sup> *Floyd* involved a class action suit against the city of New York for violations of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>113</sup> This case was monumental for New York City because Judge Scheindlin's ruling declared NYPD's "stop and frisk" practices unconstitutional.<sup>114</sup> Judge Scheindlin indicated that the police force was practicing indirect ra-

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<sup>107</sup> *Id.* at 375-76.

<sup>108</sup> *Id.* at 376.

<sup>109</sup> *Warren*, 613 N.Y.S.2d at 376.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Jeffrey Fagan et al., *An Analysis of the New York City Police Department's "Stop and Frisk" Policy in the Context of Claims of Racial Bias*, 120 J. AM. STATISTICAL ASS'N 813 (Sept. 2007), <http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf>; The New York Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General; Delores Jones-Brown et al., *Stop, Question & Frisk Policing Practices in New York City: A Primer* 9 (2010), available at [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf).

<sup>112</sup> 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

<sup>113</sup> *Id.* at 671.

<sup>114</sup> *Id.*

cial profiling, blatantly disregarding the protections of the Fourth Amendment and that the city's highest officials were ignoring the police force's discriminatory practices.<sup>115</sup>

### B. Statistical Evidence of Unlawful Stops

The plaintiffs in *Floyd* relied heavily on expert testimony from Jeffrey Fagan, a Columbia University professor who conducted a study on the NYPD's stop and frisk practices.<sup>116</sup> Judge Scheindlin, as the fact finder at trial, deemed Fagan's testimony to be credible.<sup>117</sup> In an eight and one half year span, from January 2004 to June 2012, the NYPD recorded over 4.4 million "stops," and more than half of those stops resulted in a subsequent frisk for weapons.<sup>118</sup> Even more surprising than that staggering figure, those 2.3 million frisks resulted in a 98.5% failure rate.<sup>119</sup> In other words, police officers only found a weapon 1.5% of the time they conducted stop and frisks in that time frame.<sup>120</sup> Furthermore, only 12% of those stops resulted in either an arrest or a summons.<sup>121</sup>

Perhaps even more concerning than the failure rate of the NYPD's stop and frisks from 2004 through 2012 is the evidence of racial profiling. "In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white."<sup>122</sup> Also, the police records reflect that officers used force in 23% of the stops involving blacks, 24% of the stops involving Hispanics, and 17% of the stops involving whites.<sup>123</sup> One may argue that this disparity can be attributed to more frequent possession of weapons among those minority groups; however, police seized a higher percentage of weapons from stopping whites than blacks or Hispanics.<sup>124</sup> Lastly, it is alarming that "[f]or the period 2004 through 2009, when any law enforcement action was taken following a stop, blacks were 30% more likely to be arrested (as opposed to re-

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<sup>115</sup> *Id.*

<sup>116</sup> *Floyd v. City of New York*, 283 F.R.D. 153, 166 (S.D.N.Y. 2012).

<sup>117</sup> *Id.* at 167.

<sup>118</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (2013).

<sup>119</sup> *Id.* at 558.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 583.

<sup>122</sup> *Id.* at 559.

<sup>123</sup> *Floyd*, 959 F. Supp. 2d at 559.

<sup>124</sup> *Id.*

ceiving a summons) than whites, for the same suspected crime.”<sup>125</sup>

### C. Options and Obstacles for Reform

The overarching question courts are faced with when implementing reform is whether there is a greater duty to protect public safety given the prosecutions resulting from the ‘stop and frisk’ practices or to protect the unalienable rights set forth in the Fourth Amendment. Generally, it is difficult for courts to efficiently review the actions of police officers when dealing with stop and frisks.

Police officers in New York City are required to fill out a “UF-250” form when they conduct a stop and frisk.<sup>126</sup> Before *Floyd*, the UF-250 form required the officer to check off boxes, in reference to the reasons for the stop and frisk.<sup>127</sup> By merely checking off boxes, officers were given opportunities to justify a ‘stop and frisk’ when there was no real legal justification.<sup>128</sup> These boxes contain vague descriptions that can easily be justified in most situations, for example, “Area Has High Incidence of Reported Offenses of Type Under Investigation,” “Furtive Movements,” and “Inappropriate Attire.”<sup>129</sup> To remedy this potential injustice, the court in *Floyd* held that the UF-250 form must be revised to contain a new section in which the officer is required to record, in his or her own words, the legal justification for the stop.<sup>130</sup> This revision of the form will implement stricter requirements for officers to make a stop and the subsequent documentation will allow courts to more accurately evaluate the constitutionality of the stop, should a future issue arise.<sup>131</sup> Susan Hutson, an independent monitor of the New Orleans Police Department, noted that most experts believe that implementing a requirement for officers to provide a detailed narrative would be the most optimal way to gather information for judicial review and, in turn,

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<sup>125</sup> *Id.* at 560.

<sup>126</sup> *Floyd*, 283 F.R.D. at 163.

<sup>127</sup> *Floyd*, 959 F. Supp. 2d at 681.

<sup>128</sup> *Id.*

<sup>129</sup> Steven Zeidman, *Whither the Criminal Court: Confronting Stops and Frisks*, 76 ALB. L. REV. 1187, 1200-01 (2012-2013) (quoting Delores Jones-Brown et al., *Stop, Question, & Frisk Policing Practices in New York City: A Primer* 9 (2010), available at [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf)) (explaining that “furtive movements” and “inappropriate attire” provides very little guidance for constitutional analysis in the courts, while allowing police officers to justify stops).

<sup>130</sup> *Floyd*, 959 F. Supp. 2d at 681

<sup>131</sup> *Id.*



prevent racial biases.<sup>132</sup> Additionally, New York City officials have expressed concern over the discriminatory issues arising out of the City's stop and frisk policy.<sup>133</sup> In fact, twenty-seven of the fifty-one members of the New York City Council filed an amicus brief, which emphasized the rising distrust between minority groups and the NYPD as well as the reinforcement of racial stereotypes.<sup>134</sup>

A huge obstacle to implementing efficient reform is the fact that "frisking" is largely unreviewable, both judicially and administratively.<sup>135</sup> The Civilian Complaint Review Board ("CCRB") is the administrative body to which a civilian may file a complaint of an unlawful stop and frisk.<sup>136</sup> Thirty percent of the claims filed with the CCRB are a result of a claim to unlawful police practices during a stop and frisk.<sup>137</sup> A major problem with this process is that the CCRB dismisses all cases in which the complainant cannot be reached or refused to answer questions, which results in a dismissal of about sixty-five percent of these complaints.<sup>138</sup> Even if the complaint survived as one of the few cases that were substantiated by the CCRB, the complaint is then turned over to the complete discretion of the NYPD Commissioner.<sup>139</sup>

Statistics show that the NYPD Commissioner engaged in suspect practices when reviewing the substantiated cases.<sup>140</sup> "The NYPD is notorious for dismissing substantiated complaints without taking action; in 2009, the NYPD declined to prosecute 30% to 40% of cases referred to it as substantiated by the CCRB."<sup>141</sup> To remedy this apparent injustice, an "Administrative Prosecutions Unit" was created, but the only attorney employed on this unit left his position in 2011 and has not been replaced.<sup>142</sup>

In addition to the administrative obstacles, a complainant is

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<sup>132</sup> *Id.*

<sup>133</sup> *Floyd*, 238 F.R.D. at 159-60.

<sup>134</sup> *Id.*

<sup>135</sup> Dasha Kabakova, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 539, 540-41 (2012) (identifying that stops and frisks often do not result in an arrest which leaves no evidence to be suppressed and most individual civil rights suits are barred by qualified immunity).

<sup>136</sup> *Id.* at 555-56.

<sup>137</sup> *Id.* at 556.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Kabakova, *supra* note 136, at 559.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

also faced with the doctrine of qualified immunity, which serves as a major protection for police officers.<sup>143</sup> Under this doctrine, police officers are immune from liability for money damages in suits brought against them in their individual capacities if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Police officers' actions are evaluated by an objectively reasonable standard, determining whether the officer believed his or her actions to be lawful when the stop and frisk occurred.<sup>144</sup>

Ultimately, when one's Fourth Amendment rights are violated as a result of a stop and frisk, the best remedy one can hope for is the suppression of evidence, granted that some form of evidence was recovered. The suppression of evidence can be remedial at trial, but statistics show that an overwhelming majority of stop and frisks do not result in an arrest.<sup>145</sup> Given the inapplicability of suppressing evidence for many complainants coupled with the obstacles to administrative action, it is unlikely that one can enjoy any remedial measure after being victimized by an unlawful stop and frisk.

## VI. CONCLUSION

The issues arising out of *Kennebrew* and New York City in general are ubiquitous and frequent. Although defendant in *Kennebrew* succeeded in suppressing the evidence against him, the lack of reasonable suspicion implicated evidence of racial profiling. Thousands of New Yorkers are stopped, questioned, and frisked annually. The Attorney General of New York recognized the issues arising out of the stop and frisk policies and even expressed that this is "the most serious civil rights issue . . . facing the city."<sup>146</sup> It is imperative to implement reform in order to avoid racial discrimination within the criminal justice system. As demonstrated in *Kennebrew*, it is unjust to intrude on citizens' rights to privacy based on racial as-

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<sup>143</sup> *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995).

<sup>144</sup> *Id.*

<sup>145</sup> See *Lopez*, 864 N.Y.S.2d at 700 (distinguishing that "[i]t is only in those limited instances where seizures of contraband actually occur that the courts are confronted with having to review the legality of police conduct."), *aff'd*, 886 N.Y.S.2d 894 (App. Div. 2d Dep't 2008).

<sup>146</sup> Richard Pérez-Pena, *Police May Have Understated Street Searches, Spitzer Says*, N.Y. TIMES (Mar. 23, 1999), <http://www.nytimes.com/1999/03/23/nyregion/police-may-have-understated-street-searches-spitzer-says.html>.

sumptions. The fact that defendant had a traditional gang tattoo and wore gang colors may be unsettling for a police officer, but it certainly does not justify an unwarranted frisk. These basic principles are inherent in the Framers' language and intentions in both the United States and New York constitutions. Police officers should be subjected to more intensive training in stop and frisk procedures and they should be held to a higher standard of accountability within the judicial system. Judicial review of this accountability is imperative to give legitimacy to these reforms as well. If substantive changes are not efficiently executed, discriminatory police practices will inevitably continue and there will be injustice, therefore, will continue to plague the criminal justice system. Ultimately, as the *New York Times* effectively conveyed, "[t]he idea of universal suspicion without individual evidence is what Americans find abhorrent and what black men in America must constantly fight. It is pervasive in policing policies—like stop-and-frisk . . . regardless of the collateral damage done to the majority of innocents. It's like burning down a house to rid it of mice."<sup>147</sup>

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<sup>147</sup> Charles M. Blow, *The Whole System Failed Trayvon Martin*, N.Y. TIMES (July 15, 2013), [http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html?\\_r=0](http://www.nytimes.com/2013/07/16/opinion/the-whole-system-failed.html?_r=0).

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