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Brenda E. Cooke
New York City Law Department
Office of the Corporation Counsel

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

Analysis of Issues and Arguments in Stop and Frisk Litigation

Overview of the *Floyd Case*

- Filed in 2008 by four named plaintiffs, on behalf of themselves and a class of similarly-situated persons
- Alleges a widespread pattern and practice of illegal *Terry* stops, without reasonable suspicion and on the basis of race

Key Elements of Plaintiffs' Case

- Anecdotal incidents alleged by named plaintiffs and class member witnesses
- Statistical evidence – analysis of UF-250 database by expert, Professor Fagan
- Quota allegations – performance goals and "pressure" to make illegal stops
- Deliberate indifference – analysis of NYPD training, supervision, monitoring, discipline

Cases Filed Related to *Floyd* – Trespass Arrests

Davis v. City

- Filed in 2010
- Alleges illegal stops and arrests for trespass in NYCHA public housing buildings

Ligon v. City

- Filed in 2012
- Alleges illegal stops and arrests for trespass in TAP or "Clean Halls" privately-owned buildings

Floyd: Key Issues and Decisions

- Pattern or practice, given 4.4 million stops over 8 years
- Application of “free to leave” standard
- Use of UF-250 database to establish widespread pattern or practice
- Use of crime suspect data to inform deployment decisions
- Deliberate indifference and causation
- Class certification and injunctive relief

1. Pattern or Practice?

- 4.4 million stops in 8 years, documented on UF-250 forms in UF-250 database
- Plaintiffs presented 12 witnesses at trial – four named plaintiffs plus eight class member witnesses – who testified about 19 stops and frisks
- Judge Scheindlin's findings:
  - 10 of 19 stops justified
  - 9 of 19 stops and frisks not justified
  - 5 additional frisks not justified
  - 5 of 19 stops and frisks entirely justified
  - 1 of 19 stops based on race

1. Pattern or Practice? How Many Anecdotes?

- *Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003): Class action alleging that ACS had blanket policy of removal based on domestic violence in home; plaintiffs presented evidence of 10 removals, where there were 80 removals per year.
- *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807 (2d Cir. 1983): 6 out of 66 class members, plus demonstrated "chilling" effect on other applicants, sufficient to illustrate unlawful patter.
- *Int'l Bhd. Of Teamsters v. United States*, 431 U.S. 324 (1977): in employment discrimination context, 40 instances of discriminatory treatment, representing approximately 1 in 8 class members, a "significant" number, plus substantial statistical evidence, is enough to establish pattern.
- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011): 120 affidavits, representing 1 for every 12,500 class members, is a number that could not support an inference that such a large employer, making "literally millions" of employment decision each year, operated under a "general policy of discrimination."

1. Pattern or Practice?

- Judge Scheindlin's ruling:
  - Pattern or practice of unlawful stops and frisks based on anecdotal evidence, plus inferences drawn from expert analysis of UF-250 database, plus hit rate.
  - Also relies on analysis of quota evidence, plus analysis of deficiencies in training, supervision, monitoring and discipline. (Some of this also goes to deliberate indifference and causation.)

1. Pattern or Practice? "Hit Rate"

- NYC stop-and-frisk statistics – focus on hit rate:
  - 4.4 million *Terry* stops 2004-2012
  - 52% of all stops followed by frisk; weapon found in 1.5% of these frisks
  - 8% of all stops involve search for weapon or contraband; weapon or contraband found in 23% of these searches
  - 6% of all stops result in arrest, and 6% result in a summons

2. "Free to Leave"

- *Terry v. Ohio*, 392 U.S. 1 (1968) – permits brief investigatory detention based on specific, articulable facts that establish reasonable suspicion, plus frisk if reasonable suspicion to believe armed and dangerous
- Standard for detention or seizure: Whether a reasonable person under the objective facts presented would feel free to terminate the encounter. *Florida v. Bostick,* 501 U.S. 429 (1999).

2. "Free to Leave"

- Factors to consider:
  - Threatening presence of several officers
  - Display of weapon
  - Physical touching of person by officer
  - Language or tone indicating that compliance with officer is compulsory
  - Prolonged retention of a person's personal effects, e.g., airplane tickets or ID
  - Request to accompany officer to police station

(*United States v. Glover*, 957 F.2d 1004 (2d Cir. 1992))

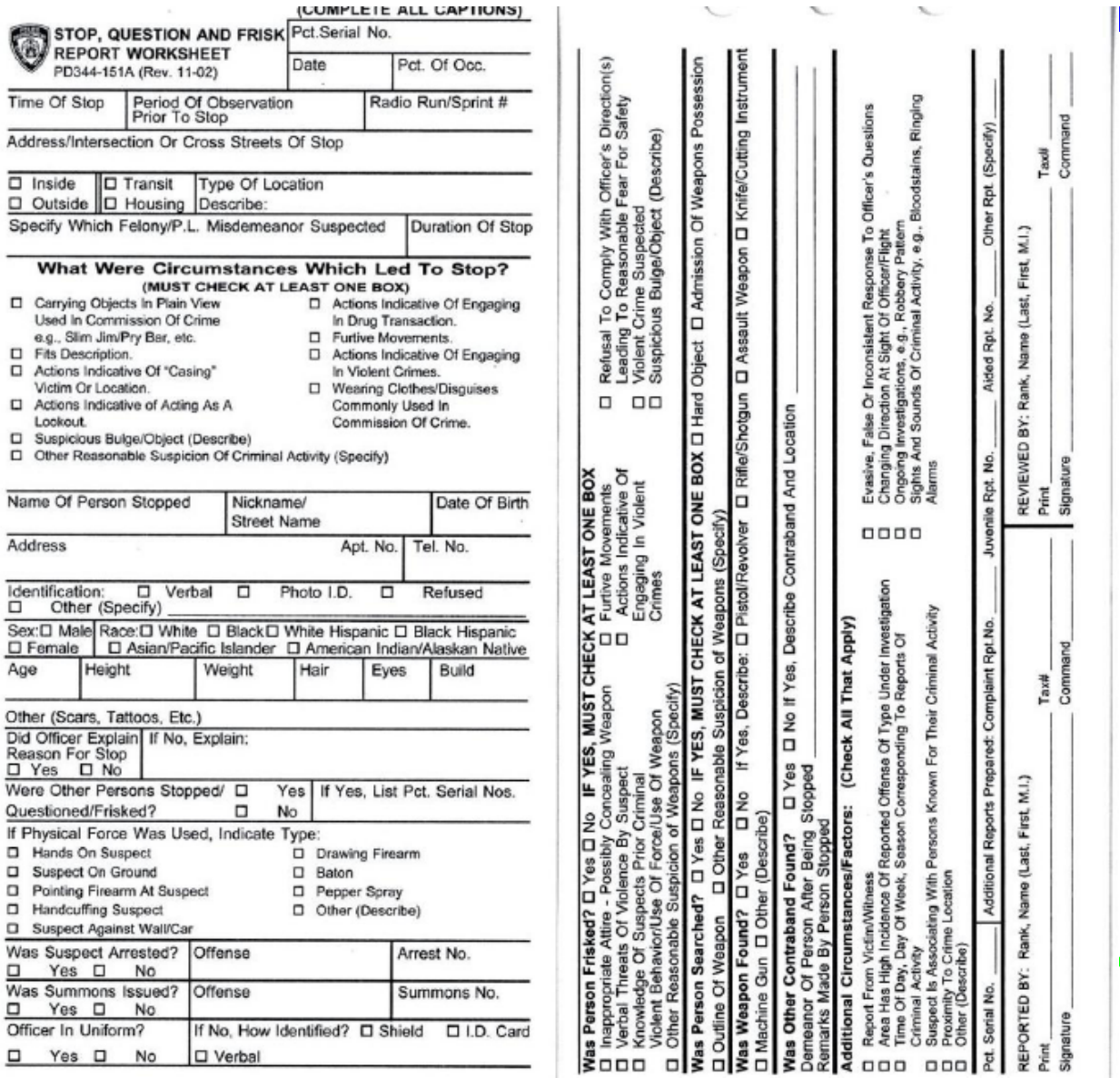
2. "Free to Leave" Accusatory Questions?

- *People v. DeBour*, 40 N.Y.2d 210 (1976)
- Four levels of encounters:
  - *Level 1* – approach based on "objective credible reason"
  - *Level 2* – common law right of inquiry, based on "founded suspicion of criminality"
  - *Level 3* – investigative detention, equivalent to *Terry* stop, based on reasonable suspicion
  - *Level 4* – arrest, based on probable cause
- "Accusatory questions" = Level 2

2. "Free to Leave" Accusatory Questions?

- Preliminary Injunction ruling in *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. January 2013)
- "[I]t is fanciful to say that a reasonable person would as a rule feel free [to terminate an encounter] in the midst of" "aggressive" or "pointed, invasive and accusatory" questioning. (*Id*. at 537)
- "What is most troubling about [NYPD training materials] is not the suggestion that investigative questioning might under certain circumstances lawfully precede reasonable suspicion, but that it should do so as a matter of course, routinely, as the rule rather than the exception." (*Id*. at 538)

3. UF-250 Database
The UF-250 Form (2-sided card)



(COMPLETE ALL CAPTIONS)

STOP, QUESTION AND FRISK REPORT WORKSHEET
PD344-151A (Rev. 11-02)

Pct.Serial No. | Date | Pct. Of Occ.

Time Of Stop | Period Of Observation Prior To Stop | Radio Run/Sprint #

Address/Intersection Or Cross Streets Of Stop

☐ Inside ☐ Outside | ☐ Transit ☐ Housing | Type Of Location Describe:

Specify Which Felony/P.L. Misdemeanor Suspected | Duration Of Stop

What Were Circumstances Which Led To Stop?
(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.
- ☐ Other Reasonable Suspicion Of Criminal Activity (Specify)

Name Of Person Stopped | Nickname/ Street Name | Date Of Birth

Address | Apt. No. | Tel. No.

Identification: ☐ Verbal ☐ Photo I.D. ☐ Refused ☐ Other (Specify)

Sex: ☐ Male ☐ Female | Race: ☐ White ☐ Black ☐ White Hispanic ☐ Black Hispanic ☐ Asian/Pacific Islander ☐ American Indian/Alaskan Native

Age | Height | Weight | Hair | Eyes | Build

Other (Scars, Tattoos, Etc.)

Did Officer Explain Reason For Stop ☐ Yes ☐ No | If No, Explain:

Were Other Persons Stopped/ Questioned/Frisked? ☐ Yes ☐ No | If Yes, List Pct. Serial Nos.

If Physical Force Was Used, Indicate Type:

- ☐ Hands On Suspect
- ☐ Suspect On Ground
- ☐ Pointing Firearm At Suspect
- ☐ Handcuffing Suspect
- ☐ Suspect Against Wall/Car
- ☐ Drawing Firearm
- ☐ Baton
- ☐ Pepper Spray
- ☐ Other (Describe)

Was Suspect Arrested? ☐ Yes ☐ No | Offense | Arrest No.

Was Summons Issued? ☐ Yes ☐ No | Offense | Summons No.

Officer In Uniform? ☐ Yes ☐ No | If No, How Identified? ☐ Shield ☐ I.D. Card ☐ Verbal

Was Person Frisked? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX**

- ☐ Inappropriate Attire - Possibly Concealing Weapon
- ☐ Verbal Threats Of Violence By Suspect
- ☐ Knowledge Of Suspects Prior Criminal Violent Behavior/Use Of Force/Use Of Weapon
- ☐ Other Reasonable Suspicion of Weapons (Specify)
- ☐ Furtive Movements
- ☐ Actions Indicative Of Engaging In Violent Crimes
- ☐ Refusal To Comply With Officer's Direction(s)
- ☐ Leading To Reasonable Fear For Safety
- ☐ Violent Crime Suspected
- ☐ Suspicious Bulge/Object (Describe)

Was Person Searched? ☐ Yes ☐ No **IF YES, MUST CHECK AT LEAST ONE BOX** ☐ Hard Object ☐ Admission Of Weapons Possession ☐ Outline Of Weapon ☐ Other Reasonable Suspicion of Weapons (Specify)

Was Weapon Found? ☐ Yes ☐ No If Yes, Describe: ☐ Pistol/Revolver ☐ Rifle/Shotgun ☐ Assault Weapon ☐ Knife/Cutting Instrument ☐ Machine Gun ☐ Other (Describe)

Was Other Contraband Found? ☐ Yes ☐ No If Yes, Describe Contraband And Location

Demeanor Of Person After Being Stopped

Remarks Made By Person Stopped

Additional Circumstances/Factors: (Check All That Apply)

- ☐ Report From Victim/Witness
- ☐ Area Has High Incidence Of Reported Offense Of Type Under Investigation
- ☐ Time Of Day, Day Of Week, Season Corresponding To Reports Of Criminal Activity
- ☐ Suspect Is Associating With Persons Known For Their Criminal Activity
- ☐ Proximity To Crime Location
- ☐ Other (Describe)
- ☐ Evasive, False Or Inconsistent Response To Officer's Questions
- ☐ Changing Direction At Sight Of Officer/Flight
- ☐ Ongoing Investigations, e.g., Robbery Pattern
- ☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

Pct. Serial No. _____ | Additional Reports Prepared: Complaint Rpt.No. _____ Juvenile Rpt. No. _____ Aided Rpt. No. _____ Other Rpt. (Specify) _____

REPORTED BY: Rank, Name (Last, First, M.I.) Tax# Print Signature Command

REVIEWED BY: Rank, Name (Last, First, M.I.) Tax# Print Signature Command

3. UF-250 Database
The UF-250 Form (excerpts)

What Were Circumstances Which Led To Stop?

(MUST CHECK AT LEAST ONE BOX)

- ☐ Carrying Objects In Plain View Used In Commission Of Crime e.g., Slim Jim/Pry Bar, etc.
- ☐ Fits Description.
- ☐ Actions Indicative Of "Casing" Victim Or Location.
- ☐ Actions Indicative of Acting As A Lookout.
- ☐ Suspicious Bulge/Object (Describe)
- ☐ Actions Indicative Of Engaging In Drug Transaction.
- ☐ Furtive Movements.
- ☐ Actions Indicative Of Engaging In Violent Crimes.
- ☐ Wearing Clothes/Disguises Commonly Used In Commission Of Crime.
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Additional Circumstances/Factors: (Check All That Apply)

- ☐ Report From Victim/Witness
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- ☐ Evasive, False Or Inconsistent Response To Officer's Questions
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- ☐ Ongoing Investigations, e.g., Robbery Pattern
- ☐ Sights And Sounds Of Criminal Activity, e.g., Bloodstains, Ringing Alarms

3. The UF-250 Database Plaintiffs' Expert Analysis

- Checkboxes and textstrings are analyzed
- Three "buckets":
  - "Apparently justified"
  - "Apparently unjustified"
  - "Ungeneralizable"
- Bucket depends on data on front and back of form

3. The UF-250 Database Plaintiffs' Expert Analysis

- Results of Analysis:
  - 88% apparently justified
  - 6% apparently unjustified
  - 6% ungeneralizable
- Total number of forms in database:

  4.4 million in 8 years
- Total apparently unjustified:

  200,000

3. The UF-250 Database Totality of the Circumstances

- In determining the legality of a stop, the court must consider "the totality of the circumstances – the whole picture," which cannot be "readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989)
- "[R]igid rules, bright-line tests, and mechanistic inquiries" must be rejected "in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013)

3. The UF-250 Database
Judge Scheindlin's Conclusions

- Plaintiffs' expert's analysis likely understates the number of apparently unjustified stops
- "Furtive movement," "High Crime Area," and "Suspicious Bulge" are inadequate to support reasonable suspicion absent a narrative
- Police officers use these conclusory terms in rote fashion

4. Crime Suspect Data
Benchmark in Regression Analysis?

- Plaintiffs' expert: No, because 63% of all crimes is insufficient for extrapolation

- Judge Scheindlin: No, because 90% of the persons stopped are innocent of any crime

4. Crime Suspect Data

- NYC crime statistics:
  - 83% of all reported crime suspects are black or Hispanic
  - 90% of all reported violent crime suspects are black or Hispanic
  - Race is described in 63% of all crimes; 98% of weapons offenses; 86% of violent felonies; 99% of drug offenses

4. Crime Suspect Data

- NYC stop-and-frisk statistics – focus on race:
  - 4.4 million *Terry* stops 2004-2012
  - 52% of people stopped are black, 31% are Hispanic, and 10% are white
  - Population is roughly 23% black, 29% Hispanic, 33% white
  - In 23% of stops of blacks, and 24% of stops of Hispanics, officer recorded using force; number for whites is 17%
  - Weapons seized in 1% of stops of blacks, 1.1% of stops of Hispanics, 1.4% of stops of whites
  - Contraband seized in 1.8% of stops of blacks, 1.7% of stops of Hispanics, 2.3% of stops of whites

4. Crime Suspect Data

- Annual stop-and-frisk reports published by the NYPD demonstrate that stop rates by precinct correspond closely with crime suspect data in precinct
- For example, where blacks are identified as crime suspects in 80% of reported crimes, blacks represent approximately 80% of persons stopped
- Similarly, where whites are identified as crime suspects in 50% of reported crimes, whites represent approximately 50% of persons stopped

4. Crime Suspect Data *Brown v. Oneonta*

- *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 1999)
  - Victim of crime identified her assailant as a young black man who cut his hand with a knife during their struggle.
  - Police questioned over 200 black males, including students at SUNY Oneonta, over the next several days. No suspects indentified.

4. Crime Suspect Data *Brown v. Oneonta*, cont'd

- Express racial classification? No.
  - Plaintiffs were not questioned solely on the basis of race. Instead, "[t]hey were questioned on the altogether legitimate basis of a physical description given by the victim of a crime." 221 F.3d at 337.
  - Police did not use "an established profile of violent criminals to determine that the suspect must have been black. Nor did they . . . have a regular policy based upon racial stereotypes that all black Oneonta residents be questioned whenever a violent crime is reported." *Id*.

4. Crime Suspect Data
Brown v. Oneonta, cont'd

- Intentional discrimination? No.
  - Disparate impact alone is not enough to establish a Fourteenth Amendment violation.
  - Discriminatory intent is required.
  - "Without additional evidence of discriminatory animus, the disparate impact of an investigation such as the one in this case is insufficient to sustain an equal protection claim." 221 F.3d at 338.

4. Crime Suspect Data Indirect Racial Profiling?

- Equal Protection claim:
  - Intentional discrimination?
  - Express racial classification?
  - Selective enforcement?
- Floyd plaintiffs argue:
  - Intentional discrimination
  - Express racial classification

4. Crime Suspect Data Indirect Racial Profiling?

Discriminatory Intent:

- Targeting “the right people, in the right place, at the right time”
- “Male black, aged 14-21”
- “99% of these people are innocent”

“It is impermissible for a police department to target its general enforcement practices against racially defined groups based on crime suspect data.” (*Floyd,* 959 F. Supp. 2d at 662)

4. Crime Suspect Data Indirect Racial Profiling?

Express Classification:

Targeting “the right people” depends on express racial classifications, and is therefore subject to strict scrutiny, a test that it fails. (*Floyd,* 959 F. Supp. 2d at 662)

“The Equal Protection Clause does not sanction treating similarly situated members of different racial groups differently based on disparities in crime data.” (*Id.* at 664)

Class member witness Cornelio McDonald was stopped, in part, because he fit a general suspect description, and similarly situated whites and Asians were not stopped. (*Id*. at 605)

5. Deliberate Indifference

- "Where a policymaking official exhibits deliberate indifference to constitutional deprivations caused by subordinates, such that the official's inaction constitutes a deliberate choice, that acquiescence may be properly thought of as a city policy or custom that is actionable under § 1983." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011).

- "Stringent standard of fault" that requires proof that the municipality made a "conscious choice" to disregard "a known or obvious consequence of a disputed action." *Id.* at 1360.

5. Deliberate Indifference

- May be inferred where need for more or better supervision to protect against constitutional violations is obvious. *Cash v. City County of Erie,* 654 F.3d 324, 334 (2d Cir. 2011).
- At its "most tenuous where claim turns on a failure to train." *Connick*, 131 S. Ct. at 1359.
- "When City policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Id.*

5. Deliberate Indifference Notice?

- Attorney General's Report 1999
  - Novel statistical analysis of data for 15,000 stops finds evidence of racial profiling, given disparate impact of stops on minorities
- *Daniels v. City* Litigation 1999
  - Private settlement agreement 2003
  - Sunset 2007
- RAND Report 2007
  - Statistical analysis of UF-250 data finds no evidence of racial profiling
- *Floyd v. City* Litigation 2008

5. Deliberate Indifference Systemic Issues?

- Training
- Monitoring
  - QAD Audits
  - Memobook entries
- Supervision
- Discipline
  - IAB Investigations
  - CCRB Complaints

6. Class Certification?

Plaintiffs sought to certify a class under FRCP 23(b)(2):

"All persons who since January 31, 2005 have been, or in the future will be, subjected to the NYPD's policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, including persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment."

6. Class Certification?

- Key Issues:
  - Common question of law or fact?
  - Ascertainability requirement?
  - Galvan Stipulation?
  - Standing?
  - Appropriateness of class-wide injunctive relief?

6. Class Certification?
Common Question of Law or Fact?

- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011):
  - Common contention must be "of such a nature that it is capable of classwide resolution . . . which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at 2551.

6. Class Certification?
Common Question of Law or Fact?

- *Wal-Mart*, cont'd:
  - "Without some glue holding the alleged reasons for all of those [literally millions of employment] decisions together," examination of all of the class members' claims could not possibly "produce a common answer to the crucial question why was I disfavored." 131 S. Ct. at 2552

6. Class Certification?
Common Question of Law or Fact?

- *Floyd* plaintiffs' common questions:
  - Whether NYPD has policy or practice of conducting stops and frisks without reasonable suspicion?
  - Whether City has policy or practice of stopping and frisking Black and Latino persons on the basis of race rather than reasonable suspicion?
  - Whether NYPD's department-wide auditing and self-inspection protocols and procedures demonstrate a deliberate indifference to the need to monitor officers adequately to prevent a widespread pattern of suspicionless and race-based stops?
  - Whether the NYPD's policy or practice of imposing productivity standards and/or quotas on enforcement activity is a moving force behind widespread suspicionless stops by NYPD officers?

6. Class Certification?
Common Question of Law or Fact?

- Is the NYPD like *Wal-Mart*?
  - Centralized policy-making organization?
  - Individualized discretion to make stops?
- Do plaintiffs' common questions meet the *Wal-Mart* test?
  - Are they central to the validity of each claim?
  - Will they produce a common answer to the question "why was I stopped?"

6. Class Certification? Ascertainability?

- Must members of the class be identified in a 23(b)(2) class, seeking only equitable of injunctive relief?
- Judge Scheindlin said “no.” Ascertainability, in her view, makes a difference only when members will be entitled to damages or require notice.

6. Class Certification? *Galvan* Stipulation

- *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973) (Friendly, J.) – certification is unnecessary when "prospective relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment."

6. Class Certification? *Galvan* Stipulation

- City offered to stipulate that any relief awarded to named plaintiffs would apply to any similarly situated potential class members.
- Plaintiffs sought further concessions re: scope of relief and discovery, and communications with potential class members.
- Judge Scheindlin decided that City-wide injunctive relief would be more appropriate in class context, citing "collateral consequences" to denying class certification. (*Floyd* Class Certification Decision, 283 F.R.D. 153 (S.D.N.Y. 2012))

6. Class Certification? Standing

- None of the named plaintiffs established intentional discrimination at trial
- Only person to establish intentional discrimination was Cornelio McDonald, a class member witness
- Cases to consider:
  - *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)
  - *Cent. States Southeast v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 199 (2d Cir. 2005) (collecting cases)
  - *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)
  - *Whitlock v. Johnson*, 153 F.3d 380, 384 & n.1 (7th Cir. 1998)

6. Class Certification? Class-wide Injunctive Relief?

- *Rahman v. Chertoff*, 530 F.3d 622, 626-27 (7th Cir. 2008) (Easterbrook, J.):
- Certifying class of "all persons who have been, or ever will be, stopped without probable cause" is "an effort to take control of how the police investigate crime and make arrests. Improper arrests are best handled by individual suits for damages (and potentially through the exclusionary rule), not by a structural injunction designed to make every error by the police an occasion for a petition to hold the officer (and perhaps the police department as a whole) in contempt of court."

6. Class Certification? Class-wide Injunctive Relief?

- *Rahman v. Chertoff*, cont'd:
  - Some issues are better suited to resolution by the democratic process than to adjudication (here, how much time travelers returning to U.S. spend "cooling their heels" at the border)
  - Trade off between false-positives and false-negatives should be determined by political actors, not judges, who are immune from political process
  - Judiciary's "modest" role is to decide individual claims and set precedents for future claims