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JUSTICE INITIATIVE

EXAMPLES OF STRUCTURAL REMEDIES AND REFORMS

RESEARCH PREPARED IN THE CONTECT OF THE CLASS ACTION BROUGHT ON JULY 22, 2021 BEFORE THE COUNCIL OF STATE, FRANCE

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INTRODUCTION

1. In order to assist the *Conseil d'État* in considering the plaintiffs' request for remedies, the first part of this document details a selection of "structural remedies" which have been requested, negotiated and/or granted in legal proceedings in the United States of America. It is intended as a non-exhaustive list of examples.

2. "Structural remedies" are non-damages/compensation remedies which require defendants to make changes to relevant systems through, for example, reform of laws, policies and practices.

3. The examples set out below draw from both "special litigation" by the Department of Justice and civil litigation by individuals/groups and illustrate a comprehensive approach to the systemic problem of police discrimination, including:

   a) the formulation of full packages of structural remedies, including provisions on: policies; data collection and sharing (including to measure change); disciplinary/accountability processes; and training;

   b) community engagement throughout the remedy process, recognising the importance of responding to the needs of affected communities and rebuilding trust in the police; and

   c) continuing oversight of measurable objectives, with expert input and recourse to court in the event of non-compliance. For example, "monitors" have been appointed in both types of litigation to assess "substantial compliance" and report to court. This involves consideration not only whether the reforms have been put into place but also whether they are being correctly implemented.[1] As such, impact assessment is built into the process, helping to ensure that the remedies are effective.

4. In some cases, frameworks for immediately identifiable reforms were put in place initially, on the basis that the details of these and further reforms would be identified and approved during longer-term processes.

5. The second part of this document summarises highlights from an independent review commissioned by the Government of Ontario and led by Justice Tulloch. In keeping with the examples set out in the first part of this document, Justice Tulloch recommended a comprehensive set of reforms, also covering (*inter alia*) policies and procedures, training, data collection, monitoring and sanctions.

I. LEGAL PROCEEDINGS IN THE UNITED STATES

SPECIAL LITIGATION BY THE DEPARTMENT OF JUSTICE

[1] See, for example, Peter L. Zimroth, "Eleventh Report of the Independent Monitor," 28 October 2020, setting out milestones for "substantial compliance" and analysing data and compliance, available at: https://ccrjustice.org/sites/default/files/attach/2020/10/Floyd%20Monitor%2011th%20Status%20Report.pdf

6. This section sets out the legislative background upon which the Department of Justice has pursued "special litigation" and summarises select examples of "consent decrees" and similar orders or settlements, with a particular focus on the approach adopted during the Obama administration, including in the town of East Haven.

Legal background

Police pattern and practice litigation

7. Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 ("1994 Statute") provided federal government with a cause of action in respect of any:

> "pattern or practice of conduct by law enforcement officers… that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States."[2]

8. The Civil Rights Division of the Department of Justice has undertaken a number of investigations under this provision. It can bring actions on the basis that there has been a pattern or practice violation of (for example) the Fourth Amendment of the Constitution, which provides a right against unreasonable search and seizure.[3] The Department of Justice may sue for declaratory and equitable relief to eliminate the pattern or practice.[4]

9. Under the Obama administration, the investigation stage included identifying the pattern of violation as well as the systemic cause.[5] This was followed by the issuing of a Findings Letter or Report, which set out the facts and any rights violations.[6] A court order known as a "consent decree" was subsequently agreed (where possible) between the parties and sanctioned by the court, with a "monitor" appointed to track progress and report back to the court.[7]

Title VI litigation

10. The Civil Rights Division also brings cases under Title VI of the Civil Rights Act of 1964 ("Title VI"), which provides that no-one shall on the ground of race/colour "be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[8]

United States of America v Town of East Haven and the East Haven Board of Police Commissioners ("East Haven case")

11. This is an example of a "special litigation" case brought by the Department of Justice.

12. In September 2009, the Department of Justice began investigating the East Haven Police for racial profiling and harassment of Latinos following the arrest of a priest who

[2] Formerly cited as 42 U.S.C., section 14141, now recodified and in force as 34 U.S.C., section 12601.
[3] The Fourth Amendment states, "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." U.S. CONST. amend. IV.
[4] Formerly 42 U.S.C., section 14141(2), now recodified as now recodified and in force as 34 U.S.C., section 12601(2) (civil action by the Attorney General).
[5] Jonathan M. Smith, Michigan Journal of Race & Law, (Spring 2016), "Closing the Gap between What is Lawful and What is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions," ("Smith Article"), page 338.
[6] Smith Article, page 341.
[7] "In communities where there is a pattern of unconstitutional conduct by police, an investigation and a consent decree, or in appropriate circumstances, an out-of-court settlement, can fix the problem…the Obama Justice Department has prioritized comprehensive court-enforceable agreements and has invested significant staff time in ensuring that these agreements are enforced." Smith Article, page 338.
[8] 42 U.S.C., section 2000D et seq.

was videotaping officers' conduct.[9] The investigation was brought under (*inter alia*) the 1994 Statute and Title VI.[10]

13. The Department of Justice issued a Letter of Findings in December 2011, concluding that the East Haven Police Department ("EHPD") had engaged in a pattern or practice of biased policing against Latinos, a violation of the Constitution and federal law.[11]

14. Specifically, "the investigation found that EHPD intentionally targets Latinos for traffic enforcement and treats Latino drivers more harshly after traffic stops in violation of the Fourteenth Amendment, Title VI and the Safe Streets Act."[12] The investigation further found that EHPD "willfully enabled discrimination by failing to put in place basic law enforcement practices and procedures used by law enforcement agencies across the country to prevent discrimination."[13]

15. On 20 November 2012, the Department of Justice sued the Town of East Haven and the East Haven Board of Police Commissioners under Section 14141 of the 1994 Statute, seeking a declaration that the defendants had violated the Constitution and the 1994 Statute, as well as an injunctive order that the defendants refrain from engaging in such practices, adopt and implement policies, procedures and practices to remedy the pattern of unlawful conduct, and adopt systems that identify, correct, and prevent such conduct.[14] A comprehensive settlement agreement was filed on the same day, seeking the court's approval and continued jurisdiction to enforce its terms.[15]

16. In 2017, it was announced that the terms of the "Consent Decree" had been met, with the termination of the agreement being granted on 13 December that year.[16]

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[9] NBC Connecticut, "Priest Turns Tables on Police," 26 and 27 March 2009, available at: https://www.nbcconnecticut.com/news/local/priest-turns-tables-on-police/1865625/

[10] Letter from US Department of Justice to the Mayor, Town of East Haven, dated 19 December 2011, page 1, available at: https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0007.pdf

[11] Letter from US Department of Justice to the Mayor, Town of East Haven, dated 19 December 2011, page 2 to 3.

[12] Department of Justice, "Department of Justice Releases Investigative Findings on the East Haven, Connecticut, Police Department," 19 December 2011, available at: https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-east-haven-connecticut-police-department The Safe Streets Act 42 U.S.C., section 3789d as amended prohibited recipients who receive federal funding from discriminating on the basis of race, color, religion, national origin or sex (now transferred to 34 U.S.C., section 10227).

[13] Department of Justice, "Department of Justice Releases Investigative Findings on the East Haven, Connecticut, Police Department," 19 December 2011, available at: https://www.justice.gov/opa/pr/department-justice-releases-investigative-findings-east-haven-connecticut-police-department

[14] *United States of America v Town of East Haven and the East Haven Board of Police Commissioners*, Complaint of 20 November 2012, para. 63, available at: https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0001.pdf

[15] See Department of Justice, "Justice Department Enters into Settlement Agreement to Reform the East Haven, Conn., Police Department," 20 November 2012, available at: https://www.justice.gov/opa/pr/justice-department-enters-settlement-agreement-reform-east-haven-conn-police-department and *United States of America v Town of East Haven and the East Haven Board of Police Commissioners*, Settlement Agreement and [Proposed] Order of 20 November 2012, section N, available at: https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0016.pdf

[16] See *United States of America v Town of East Haven and the East Haven Board of Police Commissioners*, Agreement for Effective and Constitutional Policing, 21 December 2012 ("East Haven Agreement"), available at: https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0004.pdf , WSHU, East Haven Police Fulfill Terms Of Consent Decree For Anti-Latino Bias, 18 December 2017, available at http://www.wshu.org/post/east-haven-police-fulfill-terms-consent-decree-anti-latino-bias#stream/0 and University of Michigan Law School, Civil Rights Litigation Clearinghouse, Case profile *United States v East Haven*, available at: https://www.clearinghouse.net/detail.php?id=12817

Content of structural remedies

17. Generally, the Obama administration's Department of Justice special litigation (of which the East Haven case is an example) covered the following topics in consent decrees dealing with police discrimination and misconduct such as excessive force and unlawful stops, with deadlines for implementation.[17]

Policies/processes

18. New and revised policies and processes are key requirements. For example, the East Haven Agreement makes it clear that stops must be based on reasonable suspicion, of which demographic categories cannot form a factor to any extent, and includes obligations to develop and implement comprehensive and agency-wide policies and procedures ensuring consistency with and full implementation of the Agreement within 270 days.[18]

19. The following provision sets out specific details in relation to "Ensuring Bias-Free Policing:"

> "EHPD shall, consistent with this Agreement, develop a comprehensive policy prohibiting discrimination on the basis of demographic category in EHPD police practices. This policy shall have the following elements:
>
> a) EHPD's policy on bias-free policing shall prohibit officers from using demographic category (to any extent or degree) in conducting stops or detentions, or activities following stops or detentions, except when engaging in appropriate suspect-specific activity to identify a particular person or persons.
>
> b) EHPD shall prohibit officer use of proxies for demographic category, including language ability, geographic location, or manner of dress.
>
> c) When officers are seeking one or more specific persons who have been identified or described by their demographic category, or any proxy thereto, officers may rely on these descriptions only when combined with other appropriate identifying factors, and may not give exclusive attention or undue weight to demographic category.
>
> d) Data collection, as set forth in Paragraphs 64(c) and 65 of this Agreement."[19]

20. A separate section requires a comprehensive policy on stops, searches and seizures including:

> a) A requirement that prior to making traffic stops, officers notify dispatch about known information, including the number of occupants of the vehicle, the perceived race or ethnicity of the occupants, and a description of the basis for the stop;
>
> b) A detailed description of the justification necessary for officers to make stops and arrests;

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[17] As acknowledged by the Chief of the Special Litigation Section of the Civil Rights Division of the United States Department of Justice from 2010 to 2015, "[t]he project of 'fixing' policing is complex" and "[n]o single component of reform will be successful alone. The project requires deep and sustained changes inside departments, monitoring, and oversight." Smith Article, pages 335 and 336.

[18] *United States of America v Town of East Haven and East Haven Board of Commissioners*, Agreement for Effective and Constitutional Policing, 21 December 2012 ("East Haven Agreement"), para. 11, and paras. 44 to 48, available at: https://www.clearinghouse.net/chDocs/public/PN-CT-0001-0004.pdf "Demographic category" is defined at para. 9s as "race, color, ethnicity, or national origin." The Agreement states that demographic category cannot be used as a factor to any extent or degree, in establishing reasonable suspicion or probable cause, except as part of an actual and credible description of a specific suspect in an ongoing investigation.

[19] East Haven Agreement, para. 34.

c) A requirement that all stops, searches, and seizures be documented in an Incident Report (see below).[20]

Data collection

21. Data collection is necessary for measurement of progress and compliance with consent decrees.

22. Data provisions in consent decrees can include a requirement that stops are recorded by, for example, the use of stop forms. In this regard, the East Haven Agreement requires the recording of the following details on incident report forms:

    a) the officer's name and badge number;

    b) date, time, and location of the stop;

    c) duration of the stop;

    d) the apparent race, color or ethnicity of the individual, based on the police officer's reasonable observation and perception;

    e) the suspected violation that led to the stop;

    f) whether any contraband or evidence was seized from any individual, and nature of the contraband or evidence;

    g) the post-stop action taken with regard to the violation (including a warning, a citation, an arrest, or a use of force); and

    h) whether any search was conducted, the kind of search conducted, the basis for the search, whether the search was consensual or non-consensual, and the outcome of the search.[21]

Accountability and transparency

23. The former Chief of the Special Litigation Section recognised that "the fundamental reasons that patterns of violations developed and were permitted to continue were a lack of trust between certain communities and the police and a lack of community oversight. Therefore, remedies for sustainable reform must account for mistrust and develop strategies to overcome it…Transparency is critical to building trust."[22]

24. Requirements to make data publicly available can influence the political debate by allowing the public and decision-makers to "know in real time whether policing reflects the values of fairness and dignity and promotes public safety."[23]

25. The East Haven Agreement required EHPD to:

    a) develop a system to collect data on all investigatory stops and searches, allowing for analysis and subject to the review of a Joint Compliance Expert and the Department of Justice, requiring all officers to document all required information;[24]

    b) develop a protocol for comprehensive analysis, on at least a quarterly basis, of the stop and search data collected, subject to the review of the Joint Compliance Expert and Department of Justice and identifying and incorporating appropriate benchmarks for comparison;[25] and

[20] East Haven Agreement, para. 64.
[21] East Haven Agreement, para. 64.
[22] Smith Article, page 340.
[23] Smith Article, page 336.
[24] East Haven Agreement, para. 65.
[25] East Haven Agreement, para. 68.

c) on at least a semi-annual basis, issue a report summarising the stop and search data collected, the analysis of that data, and the steps taken to correct problems and build on successes. The Agreement stipulates that the report shall be publicly available.[26]

26. Accountability also involves holding police officers accountable by disciplining or dismissing them if they do not, for example, comply with the new policies and training including requirements for data collection.

27. For example, the East Haven Agreement requires officers to submit stop documentation to supervisors by the end of their shifts and for supervisors to review reports within 12 hours, documenting (*inter alia*) whether the stops were lawful.[27] The supervisor is obliged to take appropriate action to address all violations or deficiencies, including recommending non-disciplinary corrective action for the involved officer, and/or referring the incident for administrative or criminal investigation.[28]

28. Violations and deficiencies are noted in the officer's performance evaluations and the quality and completeness of supervisory reviews must be taken into account in the supervisor's own performance evaluations, with the EHPD obliged to take appropriate corrective or disciplinary action against supervisors who fail to conduct complete, thorough, and accurate reviews of officers' investigatory detentions and searches.[29]

Training

29. The East Haven Agreement includes numerous provisions on training, including as follows:

> ""Training" shall comport with best practices and include adult-learning methods that incorporate role-playing scenarios and interactive exercises, as well as traditional lecture formats. Training shall also include testing and/or writings that indicate that the officer comprehends the material taught."[30]
>
> "Within 60 days of the Effective Date, EHPD shall ensure that each officer and employee attends a 2-4 hour training on the content of this Agreement and the responsibilities of each officer and employee pursuant to it."[31]
>
> "EHPD shall ensure delivery of the one-time and recurrent in-service training requirements set out throughout this Agreement. As set out herein, EHPD shall provide a minimum of 32 hours of in-service training each year to each officer, in addition to any specialized training for officers in certain units, supervisors, etc., and in addition to the one-time training required by this Agreement."[32]
>
> "EHPD shall provide all officers with 4 hours of comprehensive and interdisciplinary training on bias-free policing within 180 days of the Effective Date, and 2 - 4 hours annually thereafter, based on developments in Connecticut or federal law and EHPD policy. Such training shall emphasize that discriminatory policing, in the form of either selective enforcement or non-enforcement of the law, including the selecting or rejecting of particular policing tactics or strategies, is prohibited by policy and will subject officers to discipline. This training shall address:
>
> a) methods and strategies for more effective policing that relies upon nondiscriminatory factors;

[26] East Haven Agreement, para. 69.
[27] East Haven Agreement, para. 66.
[28] East Haven Agreement, para. 67.
[29] East Haven Agreement, para. 67.
[30] East Haven Agreement, para. 9fff.
[31] East Haven Agreement, para. 24.
[32] East Haven Agreement, para. 26.

b) police and community perspectives related to discriminatory policing;

c) constitutional and other legal requirements related to equal protection and unlawful discrimination, including the requirements of this Agreement;

d) the protection of civil rights as a central part of the police mission and as essential to effective policing;

e) the existence and impact of arbitrary classifications, stereotyping, and implicit bias;

f) instruction in the data collection protocols required by this Agreement;

g) identification of key decision points where prohibited discrimination can take effect at both the incident and strategic-planning levels; and

h) methods, strategies, and techniques to reduce misunderstanding, conflict, and complaints due to perceived bias or discrimination, including problem-oriented policing strategies."[33]

"EHPD shall provide all officers with comprehensive training on stops, searches and arrests, including the requirements of this Agreement, of no fewer than 8 hours within 180 days of the Effective Date and between 4 - 6 hours on an at least an annual basis thereafter. Such training shall be taught by a competent legal instructor with significant experience litigating, or teaching at an accredited law school, Fourth Amendment issues, and shall:

a) address Fourth Amendment and related law; EHPD policies, and requirements in this Agreement regarding searches and seizures;

b) address First Amendment and related law in the context of the rights of individuals to verbally dispute, observe, and record officer conduct;

c) address the difference between various police contacts by the scope and level of police intrusion; between probable cause, reasonable suspicion and mere speculation; and voluntary consent from mere acquiescence to police authority;

d) provide guidance on the facts and circumstances that should be considered in initiating, conducting, terminating, and expanding an investigatory stop or detention;

e) provide guidance on proper and improper use of pretextual stops.

f) provide guidance on the level of permissible intrusion when conducting searches, such as "pat-downs" or "frisks";

g) provide guidance on the legal requirements for conducting searches, with and without a warrant;

h) provide guidance on the nature and scope of searches based on the level of permissible intrusion on an individual's privacy interests, including searches conducted pursuant to probation or parole release provisions;

i) specify the procedures for executing searches, including handling, recording, and taking custody of seized property or evidence;

j) provide guidance on effecting an arrest with and without an arrest warrant; and

k) provide guidance regarding the nature and scope of searches incident to an arrest."[34]

[33] East Haven Agreement, para. 33.
[34] East Haven Agreement, para. 78.

Community engagement

30. Significant emphasis was placed on community engagement during Department of Justice investigations during the Obama administration – "and ongoing engagement [was]… built into the remedies for patterns of violations found during the investigations."[35] This was based on a recognition that "the fundamental reasons that patterns of violations developed and were permitted to continue were a lack of trust between certain communities and the police and a lack of community oversight. Therefore, remedies for sustainable reform must account for mistrust and develop strategies to overcome it."[36]

31. With regard to remedies, the Department of Justice re-engaged with stakeholders to discuss remedies prior to beginning negotiations on consent decrees.[37] Consent decrees have also included ongoing mechanisms to ensure that a) civilians have a meaningful policy role and b) the community has access to information about police practices. These have included the following.

Comprehensive collection and reporting of data

32. Consent decree requirements can include obligations on the police department to make the following documents public:

    a) reports concerning implementation of the consent decree;[38]

    b) department policies and procedures;[39]

    c) other data necessary to "facilitate and ensure transparency and wide public access to information related to…decision making and activities;"[40]

    d) annual reports regarding civilian complaints;[41] and

    e) annual community surveys regarding their experiences with and perceptions of the police department and of public safety.[42]

33. In the East Haven Agreement, for example, it was stated that "EHPD shall… engage the public in the reform process through the dissemination of public information on a regular basis." This included making publicly available all EHPD audits and reports related to the implementation of the agreement "via website and at the Police Department, Town Hall, and other public locations, in English and in Spanish, to the fullest extent permissible under law," as well as collecting and maintaining "all data and records necessary to facilitate and ensure transparency and wide public access to information related to EHPD decision making and activities, as permitted by law."[43]

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[35] Smith Article, page 339.
[36] Smith Article, page 340. See also paras. 179 and 180 of the East Haven Agreement requiring (*inter alia*) the creation of robust community relationships and constructive engagement with the community to ensure collaborative problem-solving, ethical and bias-free policing, and increase community confidence in EHPD. This included a requirement for EHPD to adopt in all of its policing operations the professional police practices of community oriented and problem-solving policing, including robust community partnerships, cooperative strategies, and promoting trust in the community.
[37] Smith Article, page 342.
[38] Amended and restated Consent Decree regarding the New Orleans Police Department of 2 October 2018, ("New Orleans Consent Decree"), para. 427, available at https://www.nola.gov/getattachment/NOPD/NOPD-Consent-Decree/Consent-Decree.pdf/
[39] New Orleans Consent Decree, para. 428.
[40] New Orleans Consent Decree, para. 429.
[41] New Orleans Consent Decree, para. 426.
[42] New Orleans Consent Decree, paras. 230 to 233.
[43] East Haven Agreement, paras. 184 and 185.

Community outreach and public information programme

34. Examples of such programmes include semi-annual meetings in each public district, a community-based restorative justice project to help remedy mistrust and Police-Community Advisory Boards.[44]

Collaborative agreement

35. In Cincinnati, in addition to an out-of-court settlement, the Police Department entered into a collaborative agreement with the community.[45] This agreement required the implementation of a policing strategy of community problem oriented policing and "also gave the community representatives an active voice in the development of policies and training and in measuring success."[46]

Community oversight bodies

36. Consent decrees have also included measures relating to community oversight bodies, such as the:

a) creation of a Community Police Commission to review the monitor's reports, issue its own reports in compliance and participate in policy development;[47] and

b) establishment of a Civilian Police Oversight Agency with a role in police officer discipline, as well as the right to obtain records, meet with personnel and issue policy recommendations – with a requirement that the Police Chief issue a written report explaining why any such recommendations are not followed.[48]

Oversight

37. In the East Haven case, the Court retained jurisdiction of the action in order to ensure that the requirements of the Agreement were properly and timely implemented, until such time as the Town achieved full and effective compliance with the Agreement and maintained such compliance for no less than two years.[49]

CIVIL LITIGATION

Legal background

38. The federal Civil Rights Act 1871, numbered 42 U.S.C., section 1983 ("Section 1983"), allows action against the government in circumstances where a person:

"under color of any statute,… regulation… of any State.. subjects… any citizen…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

[44] These measures were included in the New Orleans consent decree (paras. 433 to 435, 439, 436 to 438). There was a pre-existing Police-Community Advisory Board but the original consent decree provided it with an enhanced role, to assist with its mission of providing feedback to department leadership.
[45] In re Cincinnati Policing, Collaborative Agreement, Case No. C-1-99-317 ("Collaborative Agreement"), available at: https://www.cincinnati-oh.gov/police/department-references/collaborative-agreement/collaborative-agreement1/
[46] Smith Article, page 345, referencing pages 7 to 11 of the Collaborative Agreement.
[47] See Smith Article, page 343 and *United States of America v City of Seattle*, Settlement Agreement and Stipulated [Proposed] Order of Resolution, Civil Action No. 12-CV- 1282, para. 6, available at https://www.justice.gov/sites/default/files/crt/legacy/2012/07/31/spd_consentdecree_7-27-12.pdf
[48] See Smith Article, page 344 and pages 82 to 87 of *United States of America v City of Albuquerque* of 31 October 2014, history and settlement agreement available here: https://www.justice.gov/usao-nm/apd
[49] East Haven Agreement, para. 225.

It has been commonly invoked in cases of police discrimination, including in cases where comprehensive sets of reforms have been ordered by courts to put an end to discriminatory "stop and frisk" practices by the police.

The "*New York case*"

39. "The New York case" is an example of private class action civil litigation. It comprises three different cases, all of which challenged New York City's implementation of "stop and frisk" policies by the New York City Police Department ("NYPD"). "Stop and frisk" is a police tactic that "allows officers to briefly stop and question somebody based on reasonable suspicion that the person is committing or is about to commit a crime. If the officer reasonably believes that person has a dangerous weapon, and the officer fears for his or her safety, the officer may pat the suspect down to search for the weapon."[50]

40. The cases are known as "*Floyd*," "*Ligon*" and "*Davis*." As set out in a judgment in *Davis*:

> "A brief history is in order. *Daniels v. City of New York* was filed in 1999. That case resulted in the entry of a Stipulation of Settlement, in which the City agreed to maintain a written anti-racial profiling policy that complies with the U.S. and New York State Constitutions, to audit officers who engage in stop and frisks, and to provide the results of these audits to plaintiffs' attorneys. This Court retained jurisdiction over the performance of the Stipulation for four years. Near the end of that period, the *Daniels* plaintiffs alleged that the City was not complying with the Stipulation. Their complaint could have been heard as a contempt proceeding or as a new and related lawsuit challenging the City's compliance with this Court's order in *Daniels*. The latter course was chosen and *Floyd* was filed in 2008. *Davis* was filed two years later in 2010 and *Ligon* two years after that in 2012. All three cases challenged the City's allegedly unconstitutional implementation of stop and frisk policies by the New York City Police Department. *Floyd* and *Ligon* were resolved after a trial and a preliminary injunction hearing respectively, in which certain remedies were ordered. These remedies are now known as the "Joint Remedial Process." The City initially appealed the cases reassigned to a new judge. While the appeals were pending the Court of Appeals ordered the cases reassigned to a new judge. While the appellate court suggested that the cases were improperly accepted as related to Daniels, it nonetheless reassigned the two cases in tandem. The City announced its intent to withdraw its appeals when a new [de Blasio] administration took office in January 2014. When the withdrawal of the appeals was finalized, the Joint Remedial Process began."[51]

Floyd

41. By way of summary, the *Floyd* case is a class action brought by named plaintiffs who were of black and Hispanic ethnicity and stopped by NYPD in separate incidents. They argued that NYPD's use of stop and frisk was unconstitutional both during these incidents and more widely, with NYPD engaging in a pattern and practice of using race and/or national origin rather than reasonable suspicion in deciding whether to stop and frisk individuals.[52] They sought to rely on:

a) the Fourth Amendment; and

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[50] See ACLU New Jersey, "Stop-and-frisk: the Facts," available at https://www.aclu-nj.org/theissues/policepractices/newark-stop-and-frisk-data/stop-and-frisk-facts and *Terry v. Ohio*, Judgment of 10 June 1968, 392 U.S. 1.

[51] *Davis v City of New York*, Memorandum Opinion and Order of 28 April 2015, 10 Civ. 0699 (SAS) available at: https://www.clearinghouse.net/chDocs/public/PN-NY-0013-0017.pdf

[52] *Floyd v. City of New York*, Opinion and Order of 31 August 2011, 813 F.Supp.2d 417, page 423.

b) the Fourteenth Amendment (which contains the right to equal protection of the laws, known as the "Equal Protection Clause").[53]

42. The case was brought against the City of New York and others, with reference to (*inter alia*) Section 1983.[54]

43. On 12 August 2013, the US District Court (Southern District of New York) found the City liable for violations of the above rights because:

a) of deliberate indifference to unconstitutional stops, frisks, and searches;[55]

b) the practices were so persistent and widespread as to practically have the force of law;[56]

c) of a policy of indirect racial profiling resulting in the disproportionate and discriminatory stopping of blacks and Hispanics;[57] and

d) deliberate indifference to that policy.[58]

44. In *Floyd*, a permanent injunction was granted, along with the following structural remedies:

"Immediate Reforms"

45. The Court found that "ending the constitutional violations inherent in the NYPD's current use of stop and frisk will require reforms to a number of NYPD policies and practices" and held that these reforms would be developed in two stages.[59]

46. The Court named the first stage "Immediate Reforms," an initial set of reforms to be developed by a court-appointed monitor, in consultation with the parties, to the NYPD's policies, training, supervision, monitoring, and discipline regarding stop and frisk.[60] The Court ordered these reforms to be developed and submitted to the Court as soon as practicable, and implemented when they are approved.[61]

47. The Judge specified that the Immediate Reforms must cover the following elements:

a) Revisions to Policies and Training Materials Relating to Stop and Frisk and to Racial Profiling[62]

In particular, to ensure adherence to constitutional standards as well as New York state law – including the requirement for *individualized*, reasonable suspicion that the person stopped has committed, is committing, or is about to commit a crime.[63]

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[53] See *Floyd v. City of New York*, Opinion and Order of 31 August 2011, 813 F.Supp.2d 417, page 423.
[54] See *Floyd v. City of New York*, Opinion and Order of 31 August 2011, 813 F. Supp.2d417, page 421.
[55] *Floyd v. City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 540, page 658.
[56] *Floyd v. City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 540, pages 659 and 660.
[57] *Floyd v. City of New York*, Opinion and Order of 12 August 2013, 959 F. Supp. 2d 540, pages 660 to 664.
[58] *Floyd v. City of New York*, Opinion and Order of 12 August 2013, 959 F. Supp. 2d 540, pages 665 to 667.
[59] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 678.
[60] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 678.
[61] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 678.
[62] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 679-681.
[63] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 679. On 7 August 2015, the Monitor submitted to the Court new policies on racial profiling and street encounters for the Judge's approval. The policies were negotiated with all parties to the case and, once approved, became binding on the NYPD. The submissions were approved on 23 August 2015. See Center for

b) Changes to Stop and Frisk Documentation[64]

Specifically, a revised stop and frisk form to be developed to include: a narrative portion; a separate explanation for why a frisk or search was performed; improvements to the checkbox portion of the form; and possibly a tear-off form stating the reason for the stop, badge numbers of stopping officer and how to file a complaint.[65]

In addition, the Judge ordered that the Immediate Reforms include training on the new form and training, supervision and monitoring to address the failure of officers to record stops in their activity logs or provide sufficient detail for a supervisor to meaningfully review the constitutionality of the stop.[66]

c) Supervision, monitoring and discipline

While supervision, monitoring and discipline were included in the Joint Remedial Process (see below) because of the complexity of the issues arising, the Judge encouraged the Monitor to include reforms in the proposed Immediate Reforms to the extent that he could work with the parties to develop those that can be implemented immediately. For example, the Judge stated that the Office of the Chief of Department must begin tracking and investigating complaints it receives related to racial profiling.[67]

d) Notification to every police officer

The Court held that as soon as practicable a message must be transmitted to every police officer a) explaining (*inter alia*) the outcome of the litigation, the need for the reforms, the basic legal standards for stop and frisks, as well as the legal prohibition on racial profiling and b) requiring immediate compliance by all NYPD personnel.[68]

Body-worn cameras

48. A one-year pilot programme of bodyworn cameras was ordered in the precincts with the highest number of stops, with the Judge stating that "[w]hile the logistical difficulties of using body-worn cameras will be greater in a larger police force, the potential for avoiding constitutional violations will be greater as well."[69]

49. In particular, she stated that the video recordings would assist with providing a contemporaneous, objective record of stops and frisks, encourage lawful and respectful interactions on the part of both parties and should alleviate some of the mistrust between the police and affected communities.[70]

Constitutional Rights, "Floyd, et al. v. City of New York, et al.," clickable entry regarding August 24, 2015, available at: https://ccrjustice.org/ourcases/current-cases/floyd-et-al

[64] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 680.

[65] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 681 to 682. On 23 March 2016, the Monitor submitted a new NYPD stop form to the Court for approval. See Center for Constitutional Rights, "Floyd, et al. v. City of New York, et al."

[66] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 681 to 683.

[67] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 683 to 684.

[68] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 683.

[69] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 681 to 686.

[70] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 681 to 685.

"Joint Remedial Process"

50. The Court ordered all parties to participate in a "Joint Remedial Process" to develop proposed remedial measures ("Joint Process Reforms") to supplement the Immediate Reforms.[71]

51. The Joint Remedial Process is overseen by a Facilitator, who consulted with the parties and other stakeholders for a number of years and reported to the Court on 15 May 2018.[72] The Facilitator is a former Judge who was appointed by the Judge overseeing the New York case.[73]

52. The Facilitator's recommendations are focused on greater respect, transparency and greater accountability.[74] For example, that the "Court order the NYPD to prepare and publish a monthly report — without disclosing personal identifying information — chronicling findings of misconduct and the resultant disciplinary outcomes as they relate to unlawful stops and trespass arrests."[75] It was also recommended that the NYPD increase transparency around police disciplinary processes while ensuring that those processes are fair, by being ordered to develop and publish progressive disciplinary standards to be used in cases arising from unconstitutional stops and trespass including in relation to racial profiling allegations.[76]

Ligon

53. This was a class action brought by New York City residents arguing that the NYPD had a widespread practice of making unlawful stops on suspicion of trespass in buildings in the Bronx that are enrolled in the "Trespass Affidavit Program" ("TAP"). This programme allows "police officers to patrol inside and around thousands of private residential apartment buildings throughout New York City."[77]

54. The plaintiffs argued that the NYPD's trespass stops in respect of TAP buildings were often made without reasonable suspicion and thus violated the Fourth Amendment.[78] The complaint noted that residents in TAP buildings were disproportionately black and Latino and NYPD's practice therefore had significant disparate impact.[79]

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[71] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 687.The Judge noted that the Joint Process Reforms must be no broader than necessary to bring the NYPD's use of stop and frisk into compliance with the Fourth and Fourteenth Amendments.
[72] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 686 to 688. Hon. Ariel E. Belen (Ret.), Facilitator, "New York City Joint Remedial Process on NYPD's Stop, Question and Frisk, and Trespass Enforcement Policies, Final Report and Recommendations," 15 May 2018, ("Remedial Process Report") available at: https://ccrjustice.org/sites/default/files/attach/2018/05/Dkt%20593%20-%20JRP%20Final%20Report%205-15-18%20ECF.pdf
[73] Remedial Process Report, page 11.
[74] The report is over 300 pages long and groups recommendations under sub-headings relating to: feedback structures, monthly discipline reports, body-worn cameras, recording police encounters that fall short of a "stop and frisk," accessing stop reports, community engagement, public education campaign, community surveys, youth informants, mental health and disability training, LGBTQ training, trespass enforcement and trauma informed training. It also set out numerous areas for policy consideration.
[75] Remedial Process Report, pages 222 to 223.
[76] Remedial Process Report, pages 223 to 225.
[77] *Ligon v. City of New York*, Opinion of 14 February 2013, 925 F. Supp. 2d 478, page 484 to 485.
[78] *Ligon v. City of New York*, Opinion of 14 February 2013, 925 F. Supp. 2d 478, page 485.
[79] *Ligon v City of New York*, Complaint of 28 March 2012, pages 43 to 46, available at: https://www.nyclu.org/sites/default/files/releases/Clean_Halls_complaint_3.28.12.PDF

55. A preliminary injunction was granted on the basis that the plaintiffs showed a clear likelihood of success on the merits and that they were "likely to suffer irreparable harm in the absence of preliminary relief."[80]

56. In *Ligon*, the immediate remedies ordered by the Court included policy reforms including a formal written policy specifying the limited circumstances in which it is legally permissible to stop a person outside a TAP building on suspicion of trespass and to send a message to all police officers explaining the revisions.[81] With respect to supervision, the City "was ordered to develop procedures for ensuring that UF-250s [forms] are completed for every trespass stop outside a TAP building in the Bronx" and to develop and implement a system for reviewing the constitutionality of stops outside of TAP buildings in the Bronx.[82] It was also was ordered to make revisions to its training materials and programs.[83]

Davis

57. This was a class action on the basis that NYPD used unlawful stops, searches, and arrests to enforce the prohibition against trespassing in New York City Housing Authority buildings (NYCHA). The plaintiffs argued that there were ongoing violations of (*inter alia*) the Fourth and Fourteenth Amendments to the Constitution.[84] In particular, it was alleged that patrols and arrest practices were focused entirely on communities of colour.[85]

58. In *Davies*, the parties agreed to revisions to NYPD's patrol guide, certain training materials, a revised NYPD Trespass Crime Fact Sheet form to be completed by NYPD officers prior to trespass arrests, revised NYCHA house rules and participation in the *Floyd* court-ordered monitoring process in relation to other changes to the NYPD's trespass enforcement processes involving NYCHA residences, including training, supervision, monitoring and discipline of officers.[86]

59. The case settled and, having found the settlement to be fair, reasonable, and adequate, the Court agreed to transfer it to the same Judge dealing with the *Floyd* and *Ligon* cases, noting that the remedies ordered would benefit the plaintiffs in all three cases, and with all three related cases forming part of one remedial process.[87]

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[80] *Ligon v City of New York*, Opinion and Order of 14 February 2013, 925 F.Supp.2d 478, page 539.
[81] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 33 to 34.
[82] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 35 to 36.
[83] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 36.
[84] *Davis v City of New York*, Complaint of 28 January 2010, para. 182, available at: https://www.clearinghouse.net/chDocs/public/PN-NY-0013-0002.pdf
[85] *Davis v City of New York*, Complaint of 28 January 2010, para. 7.
[86] *Davis v City of New York*, Stipulation of Settlement and Order 4 February 2015, 10 Civ. 0699 (SAS), available at: https://www.clearinghouse.net/chDocs/public/PN-NY-0013-0015.pdf
[87] *Davis v City of New York*, Memorandum Opinion and Order of 28 April 2015, 10 Civ. 0699 (SAS), pages 3 to 4. On 1 August 2019, the parties in *Davis* filed a proposed stipulation and order to incorporate terms of the *Floyd/Ligon* remedial order into the *Davis* settlement (relating to the duties of the Monitor and the Joint Remedial Process) for the purpose of enforcing the Stipulation of Settlement and Order as it pertains to reforms to the NYPD's practices that relate to trespass enforcement in or around NYCHA residences, including training, supervision, monitoring, and discipline of officers, available at: https://www.clearinghouse.net/chDocs/public/PN-NY-0013-0018.pdf

Community engagement

60. Plaintiffs' counsel and judges in civil litigation have drawn from the approach of the Department of Justice and incorporated community engagement as a central element to remedies, recognising that the communities directly impacted by the discriminatory policy or practice must be directly involved in the discussion about how to reform that policy or practice.[88]

61. In the New York case, the Judge required the Facilitator to undertake a substantial community engagement process in drafting (with the parties) the additional Joint Remedial measures, placing those most affected by the NYPD's use of stop and frisk "at the center of the Joint Remedial Process."[89]

62. She specified that the Cincinnati Collaborative Process and subsequent Department of Justice consent decrees and letters of intent could be used as models and ordered the Facilitator to convene "town hall" type meetings in affected boroughs and liaise with (*inter alia*) members of the communities where stops most often take place; representatives of religious, advocacy, and grassroots organizations; and the civil society organisations that submitted briefs including Communities United for Police Reform, and the Black, Latino, and Asian Caucus of the New York City Council.[90]

Oversight, measurable objectives and data

Monitor

63. As with many consent decrees and other orders, the judgments in the New York case set out the framework for reform, with a court-appointed monitor and the parties subsequently working out the details through negotiations.[91]

64. In particular, in line with a recommendation from the Department of Justice following "decades of police reform efforts across the country," as a remedy in *Floyd* the Court appointed an independent monitor (a partner in a law firm) to oversee the reform process.[92] The Judge noted that it would be impractical for the Court to engage in direct oversight of the reforms and that the appointment of a monitor would serve the interests of all stakeholders.[93]

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[88] See *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 686, with the Judge noting the importance of community input in consent decrees and agreements and the landmark Collaborative Agreement as a successful model for other police reform; and finding that "community input is perhaps an even more vital part of a sustainable remedy in this case. The communities most affected by the NYPD's use of stop and frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety."

[89] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 687.

[90] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 687 to 688.

[91] See, for example, *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 677, referring to the role and functions of the Monitor including an initial responsibility of developing, based on consultation with the parties, a set of reforms of the NYPD's policies, training, supervision, monitoring, and discipline regarding stop and frisk and, after the completion of the Joint Remedial Process, working with the Facilitator and the parties to develop any further reforms necessary.

[92] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 676.

[93] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 676.

65. The Monitor's role is focused on the City's compliance with reforming the NYPD's use of stop and frisk and operates in close coordination with the Court, which retains jurisdiction to issue orders as necessary to remedy its constitutional violations.[94]

66. Specifically, the Judge specified that the Monitor's role and functions would include:

a) informing the City of the milestones the City must achieve in order to demonstrate compliance and bring the monitoring process to an end;

b) regularly conducting compliance and progress reviews to assess the extent to which the NYPD has implemented and complied with the Immediate and Joint Process Reforms;

c) issuing public reports every six months detailing the NYPD's compliance with the Immediate and Joint Process Reforms and filing these with the Court;

d) working with the parties to address any barriers to compliance; and

e) requesting the Court to modify the Immediate and Joint Process Reforms, if evidence shows that such modifications are warranted,[95]

with the Monitor's position coming to an end when the City has achieved compliance with the Immediate and Joint Process Reforms.[96]

Data

67. The collection and sharing of data allows racial disparity and the attainment of objectives to be measured. In the *Ligon* case, for example, the NYPD was obliged to maintain all records that document its compliance or non-compliance with all remedies including complaints and disciplinary files and disclose to Class Counsel and the Monitor any information as determined by the Monitor.[97] Data collected by the NYPD under the agreement includes stop forms including demographic information about the individual stopped, such as race, sex, and age.[98]

Court

68. In *Floyd*, for example, the Court retains jurisdiction during the monitorship and subsequently over whether the City of New York has maintained "substantial compliance" for two years after termination of the monitorship.[99]

Wilkins v Maryland State Police

69. *Wilkins v Maryland State Police* ("*Wilkins*") was another class action brought under (*inter alia*) Section 1983.[100] The plaintiffs alleged that Maryland State Police ("MSP") had violated their constitutional rights by stopping their vehicles, detaining and searching them pursuant to a racial profile used as part of their drug interdiction efforts.[101]

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[94] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, page 677.
[95] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 677 to 678.
[96] *Floyd v City of New York*, Opinion and Order of 12 August 2013, 959 F.Supp.2d 668, pages 677 to 678.
[97] *Ligon v City of New York*, Stipulation of Settlement and Order of 19 July 2017, 12 Civ. 2274 (AT), section M, available at: https://www.clearinghouse.net/chDocs/public/PN-NY-0014-0024.pdf
[98] *Ligon v City of New York*, Stipulation of Settlement and Order of 19 July 2017, 12 Civ. 2274 (AT), Section E 1(h).
[99] See *Floyd v City of New York*, Opinion of 31 October 2014, 770 F.3d 1051, page 1056.
[100] *Wilkins v Maryland State Police*, Complaint of 12 February 1993, available at: https://www.clearinghouse.net/chDocs/public/PN-MD-0003-0007.pdf
[101] *Wilkins v Maryland State Police*, Complaint of 12 February 1993, see paras. 1 and 44.

70. In 1995, the parties reached a settlement agreement.[102] In 1996, the plaintiffs filed a motion to enforce the settlement agreement, alleging that the traffic stop data provided by the MSP showed that the MSP was engaged in a continuing pattern and practice of race discrimination in its drug interdiction activities.[103] The District Court ordered that its jurisdiction over the settlement agreement be extended, as it found that the plaintiffs made a reasonable showing that the MSP was in violation of the agreement.[104]

71. In 1998, the case was consolidated with the related case of *Maryland State Conf. of NAACP Branches v. Maryland Dept of State Police*.[105] This was a Section 1983 class action alleging racial profiling of minority motorists on Interstate 95 in Maryland.[106]

72. In 2003, the parties entered into a consent decree, which formally resolved all disputed issues in the cases and replaced the terms of the settlement agreement.[107]

73. In the *Wilkins* case, structural remedies in the two agreements/consent decrees included:

- a non-discrimination policy on race-based drug-courier profiling;[108]
- training on the new policy;[109]
- computer records of all vehicle stops in which drug-detecting dogs were used;[110]
- the forwarding of data from vehicle stops to the Court and the plaintiffs;[111]
- audio-visual taping of stops;[112]
- adoption/revision of complaints procedures;[113]
- maintenance of statistics regarding complaints;[114]
- development of a Police-Citizen Advisory Committee to promote mutual understanding between the police force and the community;[115] and

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[102] *Wilkins v Maryland State Police*, Settlement Agreement of 6 January 1995, available at: https://www.clearinghouse.net/chDocs/public/PN-MD-0003-0002.pdf
[103] University of Michigan Law School, Civil Rights Litigation Clearinghouse, Case profile *Wilkins v Maryland State Police*, available at: https://www.clearinghouse.net/detail.php?id=1044
[104] *Wilkins v Maryland State Police*, Order of 22 April 1997, available at: https://www.clearinghouse.net/chDocs/public/PN-MD-0003-0009.pdf
[105] University of Michigan Law School, Civil Rights Litigation Clearinghouse, Case profile *Wilkins v Maryland State Police*.
[106] *Maryland State Conference of NAACP Branches v Maryland Dept. of State Police*, Memorandum of 30 September 1999, 72F. Supp. 2d 560, see pages 563 to 564.
[107] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, available at: https://www.clearinghouse.net/chDocs/public/PN-MD-0003-0012.pdf
[108] *Wilkins v Maryland State Police*, Settlement Agreement of 6 January 1995, para. 6.
[109] *Wilkins v Maryland State Police*, Settlement Agreement of 6 January 1995, para. 7 (with training materials to be given to plaintiffs' counsel prior to the commencement of the seminars).
[110] *Wilkins v Maryland State Police*, Settlement Agreement of 6 January 1995, para. 9.
[111] *Wilkins v Maryland State Police*, Settlement Agreement of 6 January 1995, para. 9.
[112] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, pages 5 to 6.
[113] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, pages 6 to 7.
[114] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, page 6.
[115] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, section 6.

- the use of consent forms for vehicle searches.[116]

II. REVIEW BY JUSTICE TULLOCH

Background

74. On June 7, 2017, Justice Tulloch was appointed by the Government of Ontario to lead an independent review of Regulation 58/16 (O. Reg. 58/16) ("Regulation") and its implementation. The Regulation, introduced in 2016, outlines Ontario's rules on the collection of identifying information by police in certain circumstances, a practice that is commonly known as street checks (and sometimes referred to as "carding").

75. In particular, Justice Tulloch was asked to look at whether the Regulation reflected the Canadian government's goal of ensuring that police–public relations are consistent, bias-free and done in a way that promotes public confidence and protects human rights.

76. The Regulation applies to attempts to collect identifying information from individuals by police officers if the attempt is done for the purpose of:

- inquiring into offences that have been or might be committed;
- inquiring into suspicious activities to detect offences; or
- gathering information for intelligence purposes.

77. Justice Tulloch's report was published in 2018 and the full list of recommendations can be found in Appendix A to the report.[117]

78. This section of this document highlights some of the key recommendations that may be of assistance to the *Conseil d'État*.

Grounds for stops

79. Justice Tulloch's review recommends that the Regulation is amended to make clear that (*inter alia*):

a) no police officer should arbitrarily or randomly stop individuals to request their identifying information (Recommendation 5.1);

b) stops must not be conducted if any part of the reason for such a stop is a prohibited ground of discrimination or due to an individual's socioeconomic status (Recommendation 6.1); and

c) officers should be trained and informed that they should have articulable reasons for initial inquiries and gathering of information (Recommendation 6.3).

Interaction during a stop

80. Recommendation 5.11 states that the Regulation should specify that an interaction should take no longer than is reasonably necessary and that police officers should not prolong it in the hope of acquiring reasonable suspicion to detain.

81. Requests for information should be conducted in a professional and civil manner that respects the individual and inspires confidence in the police and their interactions with the public (Recommendation 7.1).

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[116] *Wilkins v Maryland State Police* and *Wilkins v Maryland State Police*, Consent Decree of 22 April 2003, section 8.

[117] The Honourable Michael H. Tulloch, "Report of the Independent Street Checks Review," 2018, available at: https://opcc.bc.ca/wp-content/uploads/2019/06/StreetChecks.pdf

82. Recommendation 7.3 provides that officers should be trained to inform individuals of their rights (as set out below) in a tone and manner that does not convey the message that compliance is required.

Provision of information and consent for data collection

83. Recommendation 7.2 states that police officers should inform individuals of the following:

(a) the reason for the request to provide identifying information;

(b) that, if the individual provides identifying information, the information may be recorded and stored in the police records management system as a record of this interaction;

(c) that participation is voluntary; and

(d) that, if they chose to provide information, some of the identifying information that may be requested, such as the person's religion, is being requested by law to help eliminate systemic racism.

Receipts for stops

84. Under recommendation 7.7, receipts for stops should contain only:

- the name and badge or identification number of the police officer;
- the date, time and location of the regulated interaction; and

include an area for the officer to record the reason for the regulated interaction.

85. The receipt provided to the individual should be a numbered carbon copy or identical copy of what is retained by the police officer (Recommendation 7.8).

Stop forms/records

86. Recommendation 7.9 sets out the information that should be recorded by the police officer:

(a) the officer's specific reason for the stop or the attempt to collect identifying information;

(b) whether the individual refused to provide identifying information;

(c) any relevant suspect profile or intelligence report relied upon to make the request for information;

(d) the time, date and duration of the stop;

(e) the location of the stop;

(f) the name and religion of the person stopped, if it is voluntarily provided;

(g) the age group, gender, race and ethnic origin of the person stopped, as perceived by the police officer – if the person stopped voluntarily provides this information, it also should be recorded;

(h) whether the person was requested to provide a document confirming their identity, and if so, why the request was made;

(i) an indication if any frisk or search was conducted and, if so, the reason for the frisk or search and whether the person consented to the frisk or search;

(j) an indication as to whether any force was used and, if so, the reason why force was used;

(k) an indication if any person was injured or any property damaged or confiscated as a result of the regulated interaction and, if so, the reasons;

(l) any further action taken as a result of the regulated interaction, such as a warning or arrest;

(m) an indication as to whether there were any other people accompanying the person stopped and, if so, an indication as to the number of people, their perceived racial or ethnic background and an indication if they also were required to provide identifying information;

(n) an indication if the regulated interaction was successful in obtaining information needed to satisfy the purpose for conducting the regulated interaction;

(o) the officer's name, identification or badge number and unit;

(p) if the individual appears to be under 12 years old, whether the child was asked if a parent or guardian was available to attend and whether the regulated interaction was conducted with a parent or guardian;

(q) whether the individual was informed of the information as required by section 6 of the Regulation or, if informing the individual was not required, the reason why that was not required; and

(r) whether the individual was offered or given the receipt as required by section 7 of the Regulation or, if offering or giving the receipt was not required, the reason why that was not required.

87. For requests for identifying information made from passengers of motor vehicles, the following information should also be recorded:

(a) the traffic violation or other violation precipitating the stop;

(b) the reasons why the passenger was requested to provide identifying information; and

(c) an indication whether the passenger was required to leave the vehicle and, if so, the reason why (Recommendation 7.10).

88. Justice Tulloch also recommended standardized forms for recording street check data (whether physically or electronically), including checkboxes, to record the reasons for making the stop and require commentary in free text to articulate those reasons (Recommendations 7.11 and 7.12).

89. Under Recommendations 11.7 he stated that the potential racial or ethnic groups of those requested to provide identifying information should also be standardised as follows:

- Indigenous including: First Nations (North American Indian), Inuit, Métis
- White
- Black
- Latin American including: Central American, South American, Mexican, Cuban, Puerto Rican, etc.
- East Asian, Southeast Asian including: Chinese, Japanese, Filipino, Korean, Southeast Asian, Vietnamese, Cambodian, Malaysian, Laotian, etc.
- South Asian including: East Indian, Pakistani, Sri Lankan, etc.
- Middle Easterner including: Arab, Iranian, Afghan, etc.
- Other including: Visible minorities not included elsewhere and multi-racialized individuals (Recommendation 11.8).

Special rules for children

90. Recommendation 7.5 sets out special rules for children including asking their age and ensuring that the interaction takes place in the presence of a guardian or parent if available and that no identifying information is requested of an unaccompanied child under the age of 12.

Training

91. There are a number of recommendations about training. Key ones include that training should be standardized, involve realistic real-world scenarios and cover the following topics:

(a) The reason for the Regulation and the legal framework under which requests for information may be made, including the meaning of articulable cause, reasonable suspicion and investigative detention;

(b) How to take proper notes of the reasons for the interaction;

(c) Rights of individuals under the Canadian Charter of Rights and Freedoms and the Ontario Human Rights Code;

(d) The initiation of interactions with members of the public;

(e) The right of an individual not to provide information to a police officer, the limitations on this right and how to ensure that this right is respected;

(f) The right of an individual to discontinue an interaction with a police officer, the limitations on this right and how to avoid unlawfully psychologically detaining an individual;

(g) Bias awareness, including recognizing and avoiding implicit bias, as well as how to avoid bias and discrimination;

(h) Promoting public trust and public confidence by recognizing the social cost of some historic police practices;

(i) Indicating how the use of respectful language, tone and demeanour during regulated interactions benefits the community, individuals, officers and police services;

(j) Strategic disengagement and conflict de-escalation techniques, as well as de-personalization techniques particularly when an individual is disrespectful during a regulated interaction;

(k) Training on the specific communities being served and their particular issues;

(l) Adolescent development as it may relate to a regulated interaction and the specific requirements and limitations related to collecting identifying information from children;

(m) The impact of technology such as mobile phones and body-worn cameras;

(n) The rights that individuals have to access information about themselves that is in the custody or under the control of a police service; and

(o) The Regulation and its application (Recommendations 9.4 and 9.5).

Public awareness and community engagement

92. The report recommends efforts (in collaboration with community and other groups such as school boards) to raise public awareness of the Regulation and the circumstances under which individuals are required to provide identifying information (Recommendation 9.16) as well as regular consultations with the public and members of diverse communities to obtain feedback on police diversity initiatives and to improve police–public relations (Recommendation 12.8).

93. It also recommends community input in relation to eg. training preparation and delivery (Recommendation 9.7).

94. Recommendation 12.4 states that community police officers should serve in community neighbourhoods for a sufficient period of time to form meaningful local relationships.

95. Recommendation 12.1 states that police services should be provided with adequate funding to allow for greater community involvement and to support other models of community policing that enable police officers to spend some time each day in the community, while Recommendation 12.2 provides that police services should increase outreach to and establish meaningful and equitable partnerships with Indigenous communities.

Policies and procedures

96. The report recommends the review of procedures including to ensure that the procedures seek to eliminate interactions based, even in part, on a prohibited ground of discrimination (Recommendation 10.7).

97. It also recommends a systemic review of recruitment and promotional processes, including a focus on examinations, interviews and assessment tools to ensure that they are inclusive and bias-free (Recommendation 12.10)

98. There are also a number of provisions concerning data protection.

Monitoring

99. Recommendations 11.12 and 11.13 require collected, de-identified data to be made publicly available and monitored as it is received to ensure compliance with the Regulation.

100. When determining whether there is a disproportionate number of street checks, the collected data should be compared to the local census data to determine if there is a statistically significant difference (Recommendation 11.10). The number of regulated interactions in each neighbourhood or area should also indicate the age, race and gender of the person stopped compared to the census data for that area (Recommendation 11.11).

101. The report also recommends annual reports listing the number of complaints and requests for information related to regulated interactions (Recommendation 11.3) and an early indication system to identify, correct and warn officers who unintentionally collect identifying information contrary to the Regulation (Recommendation 11.14).

Sanctions

102. It should be considered misconduct for police officers who are not engaged in covert operations to refuse to provide their name and badge number if requested (Recommendation 11.19).

103. An officer who persists in collecting identifying information in breach of the Regulation without reasonable excuse should be subject to discipline (Recommendation 11.17).

CONCLUSION

104. The examples set out above demonstrate comprehensive approaches in addressing the systemic problem of police discrimination including ethnic profiling, through structural remedies including policy reform, training, data collection, monitoring, transparency and continuing oversight mechanisms.