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ARTICLES

TAKING BACK THE STREETS: IMPACT LITIGATION AS MOVEMENT LAW

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This Article aims to reimagine impact litigation as movement law. It does so through a case study of Floyd v. City of New York*, historic litigation which successfully challenged the New York Police Department's aggressive stop and frisk policies. It documents a seminal period in the history of policing and community resistance by providing the first insider's account of how a vibrant police accountability movement sought to leverage class action litigation to destabilize police narratives around Black criminality and significantly curtail the NYPD's systemic program of discriminatory street encounters. It chronicles the multidimensional ways in which the litigation fed the movement and the movement fed the litigation, and how the movement ultimately utilized newfound political power to save the historic litigation outcomes from a hostile federal appellate court.*

This Article proposes a theory of change in which a reimagined impact litigation can advance movement aims beyond the inherently vulnerable pursuit of judicial rights recognition in courts of law and makes an original contribution to the literature

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around movement lawyering by articulating concrete and replicable strategies and tactics through which the novel concept of "impact litigation as movement law" can both challenge the power of dominant political and social institutions and build the power of individuals and movements. The analysis is informed in great part through a process of oral history, drawing on interviews of numerous (but certainly not all) critical stakeholders in the Floyd *process—lawyers and organizers alike—to bring the strategy, intensity, and high stakes of this fifteen-year struggle into the broader theoretical claims I seek to make.*

Specifically, this Article documents how the Floyd *legal team integrated community participation and expertise into the trial to further broader organizing campaigns. And it identifies five critical power-shifting strategies in the litigation that were transformational: the* power of testifying*; the* power of watching*; the* power of evidence*; the* power of judgment*; and the* power of winning*. Finally, this Article is a cautionary tale about the fragility of legal judgments, and a fresh and hopeful narrative about the power of mobilized movements and conscientious lawyers to achieve and protect successful litigation outcomes. Impact litigation as movement law offers a reimagined and replicable model for future efforts to challenge dominant power structures.*

Introduction

In April 2013, nearly two weeks into the epic ten-week trial of *Floyd v. City of New York*, the moral core of a decades-long struggle came into focus. In a packed courtroom, lawyers for the Black and Latino community members challenging the New York Police Department (NYPD) stop and frisk policy played a whistleblower recording of an NYPD Lieutenant exhorting his officers about how to manage Black men gathered on a Bronx street corner:

> So, we've got to keep the corner clear . . . because if you get too big of a crowd there, you know, . . . they're going to think that they own the block. We own the block. They don't own the block. All right[?] They

> might live there but we own the block. All right[?] We own the streets here. You tell them what to do.[1]

To many, including numerous journalists covering the civil rights trial of the young century, the revealed secret made for powerful courtroom drama. To Black and Latino people in attendance, it merely confirmed their communities' daily experiences with the ideology of the NYPD, which manifested as an occupying force seemingly determined to surveil, harass, and demean them.[2] At its 2011 peak, stops of New Yorkers surpassed 685,000 a year;[3] there were more stops of Black youths than there were Black youths throughout the City.[4]

But thanks to fifteen years of organizing by community members most impacted by stop and frisk, and innovative lawyering centering their experiences and demands, the Bronx Lieutenant did not have the last word. The federal judge presiding over the case issued a historic ruling that the NYPD policy of stop and frisk violated New Yorkers' Fourth Amendment rights and constituted a project of racial profiling repugnant to the Constitution's Equal Protection guarantee.[5] The people—in meaningful ways—took back ownership of their streets.

Floyd v. City of New York offers a unique case study of the possibilities of lawyering with and for disfavored communities. In documenting a seminal moment in the history of policing and community resistance in New York City, this Article provides the first insider's account of how the principles, strategies, and tactics of movement lawyering fundamentally shaped an impact litigation[6] that holds a prominent place

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1 Trial Transcript at 1884–85, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 1034), https://ccrjustice.org/files/4_02_13_Floyd_Transcript.pdf [https://perma.cc/R844-JP6Z] [hereinafter Trial Transcript].

2 Ctr. for Const. Rts., *Stop and Frisk: The Human Impact* (Jan. 15, 2009), https://ccrjustice.org/stop-and-frisk-human-impact [https://perma.cc/7JRK-GT8H]. *See also* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. Chi. L. Rev. 159, 164–65 (2015) (arguing that the practice of stop and frisk, while carried out by an officer in an individual incident, is in reality a program of group policing of minority communities en masse); I. Bennett Capers, *Policing, Race, and Place*, 44 Harv. C.R.-C.L. L. Rev. 43, 68–69 (2009) (describing serious offenses to dignity that intrusive police stops produce, including legal alienation and psychological trauma).

3 *Stop-and-Frisk Data*, NYCLU (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data [https://perma.cc/FC47-DEAR].

4 *A Closer Look at Stop-and-Frisk in NYC*, NYCLU (Dec. 12, 2022), https://www.nyclu.org/data/closer-look-stop-and-frisk-nyc [https://perma.cc/AMS2-99BA]; *see also* Sean Gardiner, *Report Finds Stop-and-Frisk Focused on Black Youth*, Wall St. J. (May 9, 2012, 1:12 PM), https://www.wsj.com/articles/BL-METROB-15148 [https://perma.cc/JP82-7AU5].

5 *Floyd*, 959 F. Supp. 2d at 658–67.

6 Also referred to as "law reform litigation," "impact litigation" seeks a judicial order that changes practices or policies of institutional actors (*e.g.*, police, prisons, schools) rather than attempting to mediate a discrete dispute between two private litigants. *See* Robert H.

in the progressive legal imagination. The Article chronicles the many ways in which the litigation fed the movement and the movement fed the litigation. It shows how the *Floyd* legal team[7] integrated movement leadership into a multidimensional fight, and how the litigation became a locus for further movement-building. My analysis is informed in great part through a process of oral history, through interviews of numerous (if not all) critical stakeholders in the *Floyd* process—lawyers and organizers alike—to bring the strategy, intensity, and high stakes of this fifteen-year-long struggle into the broader theoretical claims I seek to make.

This Article also argues that *Floyd*, while not unique among impact litigation cases,[8] provides a conceptual framework for a necessary and even urgent reimagining and reinvigorating of traditional impact litigation *as* movement lawyering. It proposes a theory of change in which a reinvented impact litigation can advance movement aims beyond the inherently vulnerable pursuit of rights-recognition in courts of law. As such, it makes an original contribution to literature around movement lawyering by articulating concrete and replicable ways that impact litigation can shift power dynamics in favor of movements.

Part I provides a theoretical examination of the relationship between traditional impact litigation and movement lawyering. It begins by exploring what we talk about when we talk about movement lawyering, via analogy to a transcendent concept: love. It then situates traditional impact litigation as a mode of lawyering aligned with a great lawyer theory of social change, in which confident lawyers seeking judicial recognition of abstract rights risk becoming disconnected from and unaccountable to the human needs of the communities they represent. Part I further argues that the political vulnerability of rights-recognition strategies should lead social justice lawyers to prioritize attacking harmful power structures. It then explores how my conception of impact litigation as movement lawyering can both *challenge* the power of such institutions and *build* the power of individuals and movements.

Mnookin, In the Interest of Children: Advocacy, Law Reform, and Public Policy 45 (1985).

[7] The Center for Constitutional Rights, where I serve as Legal Director, was lead counsel in the *Floyd* litigation, as well as its predecessor, *Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001). The law firm of Debevoise & Plimpton LLP worked as pro bono counsel on *Daniels*, and Covington & Burling LLP worked as pro bono counsel on *Floyd*. Prominent civil rights attorney, Jonathan Moore, is the only individual attorney who worked on both cases, continuing to work on the post-*Floyd* federal monitorship with his firm, Beldock Levine & Hoffman LLP. I worked directly on the *Floyd* trial, appeal, and subsequent federal monitorship.

[8] *See infra* note 21 (describing other major impact litigation cases CCR has brought that follow movement lawyering principles).

Part II sets the stage for the analysis of *Floyd* by exploring the profound impact of the 1999 killing of Amadou Diallo by the NYPD's notorious Street Crimes Unit[9]—a creature of the NYPD's aggressive Broken Windows policing paradigm. Diallo's death was both a reflection of the legal license the Supreme Court issued for aggressive street policing and a pivot point in the history of modern policing and the police accountability movement. Movement leaders viewed it as the tip of the police-abuse iceberg and sought legal remedies to curtail the increasing police street encounters they believed were driving burgeoning police violence. The resulting litigation, *Daniels v. City of New York*, which settled in 2003, failed to achieve meaningful reform in part because in the politically altered post-9/11 environment, public critiques of policing were comparatively muted. In fact, racially discriminatory stop and frisks soared in the five-year settlement monitoring period and beyond, reaching a peak of over 685,000 stops in 2011 (approximately 2,000 stops per day). Still, the settlement's lawyer-driven shortcomings provided critical lessons on developing a movement-informed and more successful strategy in *Floyd*.

Part III describes the emergence of a revitalized police accountability movement in the aftermath of *Daniels* and the symbiotic relationship between its goals and the *Floyd* legal team's litigation strategy. It emphasizes the creative ways in which lawyers incorporated the experiences and expertise of those most impacted by stop and frisk into their strategy, in ways that concretely affected outcomes, collectively leveraging aspects of the litigation to build movement momentum to broadly challenge policing practices.

Part IV brings us to the landmark *Floyd* trial itself. This Part describes the intentional power-shifting strategies the legal and organizing teams deployed to bring the movement into the courtroom. I identify five critical modes by which the campaign integrated the principles, strategies, and tactics of movement lawyering with the methods of traditional impact litigation—and, especially, how lawyers integrated the movement itself into the litigation. These include the *power of testifying*, wherein community members took the stand to articulate their demands; the *power of watching*, wherein community members who packed the court each day became participants in the trial and helped shift power in police-community dynamics; the *power of evidence*, wherein factual proof of illegality, incompetence, and racism surfaced and was recorded, conclusively supporting movement

[9] Michael Cooper, *Officers in Bronx Fire 41 Shots, and an Unarmed Man Is Killed*, N.Y. Times (Feb. 5, 1999), https://www.nytimes.com/1999/02/05/nyregion/officers-in-bronx-fire-41-shots-and-an-unarmed-man-is-killed.html [https://perma.cc/4TV2-ET9F].

narratives that the police and the general public might otherwise contest; the *power of judgment*, wherein Judge Scheindlin's opinion underscored the real-world harms stop and frisk caused Black and Latino residents subject to a policing regime structurally prone to unlawful aggression and racial discrimination; and the *power of winning*, wherein community members took particular pride and joy in the legal victory because the inclusive litigation strategy gave them meaningful ownership of the win and a forum to participate in devising policing reforms.

Finally, Part V offers a cautionary tale—familiar in movement lawyering literature—about the fragility of legal judgments, while offering a hopeful narrative about the power of a mobilized movement to protect the outcome of a successful litigation. A Second Circuit Court of Appeals panel, expressing remarkable hostility toward Judge Scheindlin, took the extraordinary and explosive step of *sua sponte* removing her from the case and signaled a future reversal on the merits.[10] But as the litigation emboldened the movement, the movement saved the litigation. Having invested in the *Floyd* litigation and its community-oriented outcomes, the movement's leadership successfully demanded that a new mayor drop his predecessor's appeal and proceed on a course to change the NYPD—a remedial process that continues to this day.

Of course, this account should not read like Pollyanna. Police abuses persist despite renewed protest and mobilization in the wake of the killings of George Floyd and too many others, and the *Floyd* remedial process itself has limitations. The authoritarian impulses of various political leaders continue to valorize the raw power of law enforcement above the worth and dignity of minority bodies. Indeed, the narrative of the *Floyd* litigation and the movement of which it was an integral part—but only a part—largely mirrors the arc of most social justice campaigns: Power concedes nothing without persistent demand.[11]

Still, in a fraught political environment, it's a story that allows lawyers and activists alike to observe what impact litigation fused with movement lawyering can do and to learn from and improve upon it in future challenges to unjust power structures.

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[10] Ligon v. City of New York, 736 F.3d 118, 131 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014); *see also* Anil Kalhan, *Stop and Frisk, Judicial Independence, and the Ironies of Improper Appearances*, 27 Geo. J. Legal Ethics 1043, 1086–87 (2014) (cataloguing withering criticism of the seemingly unprecedented removal order).

[11] Frederick Douglass, Speech on West India Emancipation Delivered at Canandaigua (Aug. 4, 1857), *in* Two Speeches, by Frederick Douglass 3, 22 (1857).

I
What Do We Talk About When We Talk About "Movement Lawyering"?

What do we talk about when we talk about "movement lawyering"? Not unlike the multi-dimensional notion of love explored in Raymond Carver's classic short story,[12] movement lawyering has no clearly mapped boundaries. Rather, as with love, one recognizes movement lawyering by the values that drive its pursuit (communication, care, collaboration, hope, accountability) and the features it rejects (disinterest, hierarchy, cooptation). Like love, features of movement lawyering are often described in other ways, such as radical lawyering,[13] political lawyering,[14] community lawyering,[15] and people's lawyering.[16] Both love and movement lawyering are mindful of power dynamics and seek to address vulnerability with empathy and attention as well as to attend to the effects of trauma, including a loss of voice and memory. They offer a space—for expressions of affirmation, solidarity, and a collective imagination of possibility and hope[17]—a space that in law can produce a profound act of resistance.[18] That hopeful possibility can provide comfort and otherwise build the courage and strength to challenge hidebound stereotypes, arbitrariness and repressive power

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[12] *See* Raymond Carver, *What We Talk About When We Talk About Love*, *in* What We Talk About When We Talk About Love, *reprinted in* Collected Stories 310 (2009).

[13] *See* Julia Hernandez & Anne Levesque, *Movement Lawyering and the* Caring Society *Litigation*, 15 J. Hum. Rts. Prac. 395, 404 (2023). The late Michael Ratner, a renowned radical human rights lawyer and former director of the Center for Constitutional Rights, makes this explicit in his four principles of radical lawyering: "1. Do not refuse to take a case just because it has long odds of winning in court. 2. Use cases to publicize a radical critique of U.S. policy and to promote revolutionary transformation. 3. Combine legal work with political advocacy. 4. *Love people*." Michael Steven Smith, *Foreword to* Michael Ratner, Moving the Bar: My Life as a Radical Lawyer 10 (2021) (emphasis added).

[14] *See* Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 Harv. C.R.–C.L. L. Rev. 297, 300–01 (1996); Martha Minow, *Political Lawyering: An Introduction*, 31 Harv. C.R.–C.L. L. Rev. 287, 289–90 (1996).

[15] *See* Charles Elsesser, *Community Lawyering—The Role of Lawyers in the Social Justice Movement*, 14 Loy. J. Pub. Int. L. 375 (2013).

[16] Victor Narro & Dan Gregor, *People's Lawyering on the Bus: How a Small Band of NLG Members Became the Legal Vanguard for Immigrant Freedom Riders*, 63 Guild Prac. 65 (2006).

[17] According to E.E. Cummings: "love is a place / & through this place of / love move / (with brightness of peace) / all places // yes is a world / & in this world of / yes live / (skillfully curled) / all worlds." E.E. Cummings, *love is a place*, *in* Complete Poems, 1904–1962 (George J. Firmage ed., 1994).

[18] "All I have is a voice / To undo the folded lie, / . . . the lie of Authority / Whose buildings grope the sky: / There is no such thing as the State / And no one exists alone; / Hunger allows no choice / To the citizen or the police; / We must love one another or die." W.H. Auden, *September 1, 1939* (1940).

structures.[19] In my experience and as I have explored in writing, lawyering in solidarity with individuals and their collective movements against repressive power does not just resemble features of loving; it can itself embody radical expression of love and produce transformational change.[20]

The organization for which I serve as legal director, the Center for Constitutional Rights (CCR), has embraced its role as a movement-support organization since its creation in 1966, emerging from its founders' support for the civil rights movement in the South.[21] CCR

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[19] David A.J. Richards, Why Love Leads to Justice: Love Across the Boundaries 1, 2 (chronicling LGBTQ love stories that served as powerful forms of resistance against homophobia, heteronormative patriarchy and racism and observing that "boundary-crossing love has often been central to human resistance—central to humanity's ongoing fight against the structural injustice that have afflicted and continue to afflict human kind. . . . So, love and law are, as it were, bedfellows."); W.H. Auden, *Law Like Love*, *in* Collected Poems (Mendelson ed., 1991) (law is "Like Love I say. / Like love we don't know where or why, / Like love we can't compel or fly, / Like love we often weep, / Like love we seldom keep").

[20] Baher Azmy, *Oxymoron*, 4 Yale J.L. & Liberation, https://campuspress.yale.edu/yjll/oxymoron [https://perma.cc/SFZ5-54JK] (exploring "the possibility where lawyering, love, and liberation intersect"); *see also* Betty Huang, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 Clinical L. Rev. 663, 667 (2017) (urging lawyers and activists to work toward solidarity and interconnectedness, so as to "build a powerful, diverse and vibrant movement that is rooted in love and humanity and that can achieve systemic institutional and cultural change"); Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons*, 18 U Ark. Little Rock L. Rev. 69 (1995) (describing a healthy lawyer-client relationship not as paternalism, but as friendship, where a lawyer provides sensitivity and empathy to client concerns, but also engages in moral conversations about the right thing to do).

[21] *See* Arthur Kinoy, Rights on Trial: The Odyssey of a People's Lawyer 209–96 (1983); *see also* Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966) (case brought by CCR on behalf of Fannie Lou Hamer authorizing her class action suit against Mississippi officials denying Blacks the franchise). *See generally* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87 (2022) (describing CCR's movement lawyering legacy in a range of substantive legal areas, including reproductive justice, centering women's interests rather than physicians' and prisoners' rights, and honoring agency and expertise of activists on the inside). CCR's movement-support work also includes developing human rights litigation tools permitting transnational litigation on behalf of global movement actors. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (recognizing cause of action under the Alien Tort Statute for breaches of substantial international human rights norms); Sexual Minorities Uganda v. Lively, 254 F. Supp. 3d 262 (D. Mass. 2017) (granting defendant summary judgment on jurisdictional grounds but only after recognizing that persecution on the basis of sexual orientation/gender identity is cognizable under international law and after finding defendant engaged in conspiratorial acts to further persecution of LGBTQI+ communities in Uganda). It also includes pathbreaking challenges to executive branch abuses in the so-called "war on terror." *See* Rasul v. Bush, 542 U.S. 466 (2004) (recognizing statutory right to challenge the legality of detention in the first habeas case brought on behalf of Guantánamo detainees); Al Shimari v. CACI Premier Tech., Inc., No. 1:08-cv-00827-LMB-JFA, Doc. 1814 (E.D. Va. Nov. 12, 2024) (successful Alien Tort Statute suit on behalf of three Abu Ghraib torture victims against private military contractor who conspired to carry out their torture, resulting in jury award to plaintiffs $3 million each in compensatory and a total of $11 million

leverages legal processes to advance the progressive political goals of movement actors, a practice also referred to as "radical lawyering."[22] Radical movement lawyers believe that, by default, law buttresses dominant structures of power in a society historically connected with settler colonialism, indigenous genocide, white supremacy, and xenophobia.[23] Consequently, radical lawyers understand that meaningful social change cannot come solely from judicial recognition of rights.[24] They reject the faith many vest in a great lawyer theory of change.[25] Instead, they embrace the principle that durable progressive

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in punitive damages); David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law (2016) (describing CCR's leadership role in mobilizing coalitions to limit executive branch abuses in the post 9/11 era); Baher Azmy, *Crisis Lawyering in a Lawless Space: Reflections on Nearly Two Decades of Representing Guantánamo Detainees*, *in* Crisis Lawyering 32 (Ray Brescia & Erik K. Stern eds., NYU Press 2021) (describing CCR's role in mobilizing hundreds of lawyers to represent Guantánamo detainees). CCR's work also includes litigation in partnership with prisoner-activists to end indeterminate solitary confinement in California. *See* Ashker v. Brown, No. 4:09-cv-05796-CW, ECF 445 (N.D. Cal. Oct. 14, 2015) (approving class action settlement agreement).

22 *See* Kinoy, *supra* note 21, at 250–55.

23 *See generally* Ratner, *supra* note 13; *see also* Dean Spade, *For Those Considering Law School*, 6 Unbound: Harv. J. Legal Left 111, 112 (2010) (observing that legal changes in response to radical movements usually maximized status quo preservation); Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. Rev. 405, 435–67 (2018) [hereinafter Akbar, *Radical Imagination*] (describing how criminal law buttresses police forces and a broader capitalist system that entrenches racial inequalities); Bina Ahmad, *The Professionalized Violence of Prosecutorial Power and Misconduct*, 27 CUNY L. Rev. 336, 337–39 (2024) (recounting the author's perspective of law as a white supremacist system); Jennifer Ching, Thomas B. Harvey, Meena Jagannath, Purvi Shah & Blake Strode, *A Few Interventions and Offerings from Five Movement Lawyers to the Access to Justice Movement*, 87 Fordham L. Rev. Online 186 (2018) (calling on lawyers to imagine a broader social justice vision, rather than just improving existing systems). This formulation is, of course, not limited to the United States—law masks power, tyranny, and exploitation globally. As renowned radical lawyer William Kunstler observed, "I suspect that better men . . . have gone to their death through a legal system than through all the illegalities in the history of man. . . . [A]ll tyrants learn that it is far better to do this thing through some semblance of legality than to do it without that pretense." POV, *The Terrible Myth—William Kunstler: Disturbing the Universe*, YouTube (June 24, 2010), https://www.youtube.com/watch?v=Ft8UNDhV2Uc [https://perma.cc/FG4R-XAP8].

24 *See* Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 Denv. L. Rev. 399, 402 (2019); *see also* Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 Fordham Urb. L.J. 603, 605 (2009).

25 *See, e.g.*, Roscoe Pound, *The Great Lawyer in History*, 3 Hastings L.J. 1 (1951). The great lawyer theory of change is akin to the "great man" theory of history, which posits that "greatness" in certain leaders is what leads to historical change. *See, e.g.*, Thomas Carlyle, On Heroes, Hero-Worship, and the Heroic in History 1–2 (1840). Accordingly, movement lawyering is akin to radical history or people's history, which "concentrates not on the traditional subjects of history, not the kings and the presidents and the philosophers, but on ordinary working people, not simply for what they experienced in the past but for their ability to shape the way history happens." Carl Grey Martin & Modhumita Roy, *Narrative Resistance: A Conversation with Historian Marcus Rediker*, 33–34 Work and Days 93, 95 (2016). Developed by New Left historians, such history from below is an overtly political

change comes from the mobilization and demands of movement actors who are proximate to the harms faced by their communities, the most invested in change, and the most capable of articulating the need for action.[26]

Though movement lawyering, like love, eludes exact definition, the pages that follow attempt to surface the key hallmarks that I have observed through decades of practice and that drove much of the *Floyd* campaign. In this Section, I highlight the distinct challenges that lawyers face in using impact litigation to advance social justice—challenges the *Floyd* team sought to address. As *Floyd* shows, law can be a powerful tool for social change when it aims to transform power dynamics rather than pursue judicial recognition of rights for its own sake.

A. Dismantling the Great Lawyer Theory of Change: A Search for Movement Lawyering Principles

Most Americans, and many lawyers, understand legal culture through the lens of the great lawyer theory of social change.[27] The theory's iconic rendering is the story of Thurgood Marshall, the NAACP, and the Supreme Court-focused campaign to overturn the pernicious doctrine of "separate but equal."[28] In this telling, visionary lawyers deploy broad appeals to justice and fairness to convince courts filled with judges of conscience and rectitude to change the world. The narrative of the great

process, concerned with "an egalitarian relationship between historians/intellectuals and movements of working people." Marcus Rediker, *The Poetics of History from Below*, Perspectives on History (Sept. 1, 2010), https://www.historians.org/perspectives-article/the-poetics-of-history-from-below-september-2010 [https://perma.cc/6KTN-LM99]. Jane Jacobs made a similar observation about mobilizing against top-down urban planning models: "There is no logic that can be superimposed on the city; people make it and it is to them, not buildings, that we must fit our plans." Jane Jacobs, *Downtown is for People*, Fortune (1958).

[26] *See, e.g.*, Mark Engler & Paul Engler, This Is an Uprising: How Nonviolent Revolt Is Shaping the Twenty-First Century (2016) (arguing that social change happens through the combination of steady forms of local organizing and large public mobilizations); *see also* Frances Fox Piven & Richard A. Cloward, Poor People's Movements: Why They Succeed, How They Fail (1977) (arguing that social change happens when people take to the streets to disrupt routine public life).

[27] Another conventional variation of the great lawyer theory is the faith in legal liberalism born of post-1950s litigation successes in the Supreme Court. *See* Scott L. Cummings, Movement Lawyering U. Ill. L. Rev. 1645, 1654 (2017); *see also* text accompanying *infra* notes 54–58.

[28] Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality (1975); Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961 (1994). Great lawyer theories of social change surely also have achieved resonance through the iconography of legal luminaries like Clarence Darrow, and numerous movie and television depictions of masterful lawyers saving the day. And, it is surely because great admiration and respect should be given to brilliant, strategic lawyers like Ruth Bader Ginsburg, who have helped to devise strategies to substantively transform the law.

lawyer has historically permeated legal education, leading many creative and conscientious lawyers to prioritize the seemingly impactful work of securing judicial rights-recognizing decrees—an important and often strategic effort.[29] That project is susceptible to embracing and propagating various "myths about law,"[30] including the myth that the operation of law gives legitimacy to the choices of our political institutions and "is the benevolent guarantor of a fair and just society."[31] Indeed, critical theorists suggest that an objective of legal education in the U.S. is to ennoble a profession that students expend tremendous resources to join.[32]

A great lawyer characterization of Marshall is not meant to question his extraordinary vision and brilliance, nor the importance of *Brown v. Board of Education* in the struggle for racial justice, not least because, outside of the conventional narrative about his heroic Supreme Court lawyering, he exhibited a deep commitment to and connection with poor, Black communities in the South. Still, as evidenced by the massive and ongoing resistance to *Brown*'s substantive vision and full implementation, and by contemporary attempts to co-opt *Brown*'s underlying logic and meaning,[33] reliance upon heroic litigation efforts alone will not ensure radical and enduring social change. The long-term success of traditional impact litigation is often undermined by three features of the legal

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[29] *See, e.g.*, Risa Goluboff, Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s (2016) (documenting multifaceted and successful legal campaigns to end discriminatory vagrancy-related laws in the 1960s and 1970s) [hereinafter Goluboff, Vagrant Nation]; Jack Greenberg, Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution (1994) (describing heroic efforts of the NAACP to mount litigation challenges that advanced the cause of civil rights).

[30] Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 Hofstra L. Rev. 11, 13 (2018). Also relevant is Stuart Scheingold's classic exploration of the "*myth of rights*," in which Scheingold renders a law as a figment of our social imagination, which rests on a "*faith in the political efficacy and ethical sufficiency of law as a principle of government*," and on a "direct linking of litigation, rights, and remedies with social change." Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 5, 17 (1974).

[31] Shah, *supra* note 30, at 13; *see also* Akbar, *Radical Imagination*, *supra* note 23, at 444 ("[A] core function of law is to make raced and gendered power distribution and social domination *look* rational, neutral, and just.") (emphasis added); Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 Ann. Rev. L. & Soc. Sci. 149, 156–57 (2014) (articulating critical race theory's neutrality critique); Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373, 1377 (1986) ("[Abstract universality] made maleness the norm of what is human, and did so sub rosa, all in the name of neutrality.").

[32] *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591, 595 (1982); Scheingold *supra* note 30, at 159 (noting that "[o]nce in law school, students learn just why lawyers are so important; more specifically, they come to appreciate the general utility and analytic power of legal skills" and to use this legal paradigm to make order out of the world, albeit in a constrained, legalistic way).

[33] *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Students for Fair Admissions v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

system and of the great lawyer mindset itself: first, the limited discourse of rights; second, the fragility of judicially recognized rights; and third, accountability breakdowns among lawyers, clients, and communities.

1. The Limited Discourse of Rights

Generally, lawyers proceed in legal forums that impose strict procedural, evidentiary, and ethical regimens and constraints, seeking to enforce (increasingly limited) tranches of rights as defined and parsed by courts.[34] This process limits the development of a comprehensive factual record regarding other harms related to issues not technically before the court. Lawyers themselves are active gatekeepers of law development, by driving choices about forum selection, plaintiffs, and claims and making strategic and predictive decisions that can narrow the field of factual or legal development.[35] Ultimately, conceptions of rights are limited, narrow, and technical; dependent as they are on legal forms, rarely do they map fully onto a community's broader demands for accountability or freedom, nor are they designed to fully remedy structural problems of injustice like racialized policing or mass incarceration that implicate poverty, race, and gender. As a legal matter, the *Floyd* case was about the legality of police street encounters—without question a pressing social problem in New York City—but which would not produce direct remediation of a range of other harmful policing practices.[36] These limitations should counsel lawyers to be correspondingly humble when touting the significance of litigation for addressing broad-based community needs and creative in using non-legal advocacy tools to leverage a litigation toward a broader conversation about the contextual injustices contributing to the particular legal problem before the court.

2. The Fragility of Rights

Many conventionally trained lawyers struggle to apprehend what is plain to political scientists: that judicial recognition of "rights"—particularly on behalf of disempowered groups—is inherently vulnerable

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[34] Scheingold explains that limitations on judicial change are structural to the cautious project of lawyering and judicial decisionmaking, resulting in what he calls an "incremental tempo." Scheingold, *supra* note 30, at 108–09.

[35] *See* Risa L. Goluboff, The Lost Promise of Civil Rights (2007) (contending that NAACP lawyers shifted away from an important and promising civil rights agenda related to economic rights of Southern Black workers, in favor of *Brown*'s promise of desegregation, setting a different, lawyer-driven course for civil rights development).

[36] *See generally* Barry Friedman, Unwarranted: Policing Without Permission 117–307 (2017) (describing range of concerning policing practices, including discriminatory searches, searches without warrant, searches without probable cause, surveillance technology, and government databases, which courts and police departments have not fully remediated).

to the tidal pull of politics.[37] This is what Gerald Rosenberg and Scott Cummings refer to as an efficacy problem of social reform through law,[38] and I call the durability problem. Rights are not three-dimensional, tangible forms that are both self-evident and stable.[39] Rather, they form a set of rules or presumptions that are contingent fundamentally on politics.[40] Their precariousness is reflected in Hannah Arendt's conception of "the right to have rights,"[41] where disfavored minority groups struggle to maintain membership in the political community—a necessary antecedent to judicial protection.[42] Conventional litigation that fails to grapple with these super-structural forces is propagating symbolic features of law, conceding its false premise of neutrality, at the expense of achieving material changes in conditions of vulnerable people's lives.[43] Understood this way, litigation can be limited "as a strategy of desperation rather than hope."[44]

History bears out the theoretical insights into the fragility of rights. The Warren Court era and the early 1970s—a period of legal

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[37] *See* Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change 209 (1978); Scheingold, *supra* note 30 at 96; *see also* Kennedy, *supra* note 32, at 598 (observing that discourse of rights is "logically incoherent and manipulable, traditionally individualist, and willfully blind to the realities of substantive inequality").

[38] Cummings, *supra* note 27, at 1655 (identifying concerns about the efficacy of social reform through law); *see also* Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 105 (1991).

[39] Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1364–71 (1984) (critiquing rights as inherently tenuous and politically vulnerable abstractions).

[40] Scheingold, *supra* note 30, at 123 ("Rights are declared as absolutes, but they ripple out into the real world in an exceedingly conditional fashion."). *See also* Akbar, *Radical Imagination*, *supra* note 23, at 445 ("Because power gives access to courts, and courts enforce rights, rights are used against the powerless more than for them"). Alexander Hamilton, political theorist and lawyer, recognized the contingent nature of rights in arguing against the need for a Bill of Rights, which would provide mere "paper guarantees" that can be easily ignored while contending that the push-and-pull of a competitive political arena, constitutionalized through the system of separation of powers, presented the most durable guarantee of political liberty. The Federalist No. 84 (Alexander Hamilton).

[41] Hannah Arendt, The Origins of Totalitarianism 298 (1951).

[42] *Id.* at 296–97; *see also* Malcolm Feeley, *Preface to the Second Edition* of Politics of Rights, at xxxvi (2004) ("[O]nce rights are granted, continued rights claiming becomes ever more culturally suspect. The marginalized are, thus, trapped in a discursive field that gives them a Hobson's choice between acknowledging a deficient identity and accepting the burdens of marginality."); Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 Nw. U. L. Rev. 1684, 1749 (2009); Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 104 Geo. L.J. 1419, 1458–66 (2016).

[43] Scheingold, *supra* note 30 at 95 ("They are misled by the myth of rights toward a fundamental misunderstanding of the politics of change and, more specifically, toward exaggerated expectations about the political impact of judicial decisions.").

[44] *Id*. at 95.

liberalism[45]—produced substantial reforms in criminal justice, free speech, religious liberty, and gender justice.[46] But the conservative movement found success in the courts, which subsequently rolled back many such gains and limited the power of litigation to achieve social justice.[47] In response, critical race scholars and others lodged trenchant critiques of impact litigation and class action lawyers.[48] These lawyers' efforts, critics charged, "diverted attention from the political roots of social problems" and "dissipated collective political energy" by "reframing collective grievances in terms of individual rights."[49] In *Serving Two Masters*, Derrick Bell memorably critiqued the desegregation lawyers' captivation with the complexity and professional prestige of their legal challenges, even as the viability of the fight for integration rights faded and relevant communities wanted to prioritize concrete "educational improvement[s]" over "racial balance."[50]

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45 Cummings, *supra* note 27, at 1666, 1674–75. Laura Kalman defines legal liberalism as a faith subscribing "in the potential of courts, particularly the Supreme Court, to bring about . . . social reforms" that are protective of minority communities. The Strange Career of Legal Liberalism, at 2 (1996) (internal citations omitted). Emma Kaufman, in turn, identifies three "basic tenets" of legal liberalism: that rights are necessary to constrain dangerous state power, that courts are the best institution to articulate and guarantee such rights, and that constitutional rights provide an aspirational vocabulary to vindicate high order collective morality. *The New Legal Liberalism*, 86 U. Chi. L. Rev. 187 (2019).

46 *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (mandating states to appoint attorneys for indigent criminal defendants); New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964) (protecting speech that criticizes the government by requiring a higher burden to prove libel); Engel v. Vitale, 370 U.S. 421, 424 (1962) (prohbiting states from establishing a daily prayer in the public school system); Roe v. Wade, 410 U.S. 113, 164–65 (1973) (recognizing a woman's right to an abortion and creating a framework for evaluating state regulation of this right), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022); *see also The Warren Court, 1953–1969*, Supreme Court Historical Society, https://supremecourthistory.org/history-of-the-courts/warren-court-1953-1969 [https://perma.cc/Y7XT-8W5N] (explaining the history of the Warren Court).

47 Cummings, *supra* note 27, at 1675–76. The Poverty Law movement saw the considerable promise from strategic impact litigation initiated in the 1960s melt away with the ascendance of the Burger Court in the early 1970s. *See* Adam Cohen, Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America 68–69 (2020) (observing that from "1965 to 1974, lawyers from legal services programs, who did much of the nation's anti-poverty litigation, brought 164 cases to the Supreme Court which accepted 119 of them," and quoting Patricia Wald, former legal services lawyer and eventual D.C. Circuit Court judge about the abandonment of federal courts by poverty lawyers as occurring "in Alice in Wonderland fashion . . . got littler and littler until it almost disappeared altogether").

48 Cummings, *supra* note 27, at 1656.

49 Cummings & Rhode, *supra* note 24, at 608.

50 Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 487 (1976) [hereinafter Bell, *Serving Two Masters*]. Bell also famously argued that the *Brown* decision was not a function of simple justice, but of "interest convergence" with the needs of the white establishment eager to burnish its Cold War image among the global South and accelerate economic growth in the comparatively sluggish U.S. South. Derrick A. Bell, Jr., *Brown v. Board of Education and*

In part because of the fragility and political contingency of rights, courts have a limited capacity to transform two-dimensional judicial decrees into the three-dimensional world of political implementation.[51]

3. The Accountability Gap

The great lawyer model also promotes insufficient lawyer accountability to constituencies—magnified by the fact that "civil rights attorney[s] labor[] in a closed setting isolated from most of [their] clients."[52] Indeed, by design lawyers are detached from the injustices they seek to remedy, with important benefits stemming from that dispassion and judgment generally. That distance, however, can exacerbate an obvious and consequential accountability gap, since lawyers are not required to live with the outcomes of the cases they bring.[53]

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the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980). It follows from this critical perspective that when the value to whites of the decision dissipated, so would its force in law. *See also* Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1694 (2004) ("*Brown* did not transform education in the segregated South, much less American race relations."); Michael J. Klarman, *What's So Great about Constitutionalism?*, 93 NW. U. L. REV. 145, 192 (1998) ("Most of the Court's famous individual rights decisions of the past half century involve either the Justices seizing upon a dominant national consensus and imposing it on resisting outliers or intervening on an issue where the nation is narrowly divided and awarding victory to one side or seeking to split the difference.").

[51] ROSENBERG, *supra* note 38, at 15 ("For courts, or any other institution, to effectively produce significant social reform, they must have the ability to develop appropriate policies and the power to implement them. This, in turn, requires a host of tools that courts . . . lack."); *see also* SCHEINGOLD, *supra* note 30, at 116 ("Judicial victories are often isolated triumphs. They may not even be taken up by the entire court system, much less be adopted by the other branches."). Rosenberg's critique of legal liberalism led him to conclude that progressives putting their faith in judicially ordered relief to achieve concrete results on behalf of disfavored communities engage in a "hollow hope." ROSENBERG, *supra* note 38, at 105. I subscribe to his general skepticism, while imagining a strategic role for lawyers to leverage court proceedings to support the power shifting necessary for social change. *See* Azmy, *supra* note 20, at 52–54 (identifying modes of lawyering outside of conventional rights recognition); *see also* Joseph Margulies & Baher Azmy, *The Humanity of Michael Ratner, the Fabrications of Samuel Moyn*, JUST SECURITY (Sept. 13, 2021), https://www.justsecurity.org/78204/the-humanity-of-michael-ratner-the-fabrications-of-samuel-moyn [https://perma.cc/DYY4-57FD] (conceding that the Guantánamo litigation produced lamentable effects like normalization of the Guantánamo detentions under the guise of law, but that the mass mobilization CCR organized to challenge the detentions "transformed Guantánamo into an international symbol of lawlessness and hubris").

[52] Bell, *Serving Two Masters*, *supra* note 50, at 491. Bell suggests that elite lawyers focus on the powerful symbolic value of desegregation and the support received from "middle class blacks and whites who believe fervently in integration," as well as donor-generated path dependency. *Id.* at 489–90; *see also* Cummings, *supra* note 27, at 1654–60.

[53] *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 864–69 (2021); *see also* Akbar, *Radical Imagination*, *supra* note 23, at 425 (accountability to movement actors and impacted community members reflects "a political vision as much as it is an ethical commitment").

In *The New Jim Crow*, Michelle Alexander demonstrated how impact litigators tend to impose a hierarchy in which they control all facets of the litigation and remedy, reducing clients to vessels for lawyer-championed causes.[54] At the same time, Alexander observed, impact lawyers capitalize on the "politics of respectability," which preferences "certain types of Black people" who defy stereotypes, thereby allowing lawyers to "tell[] those stories of racial injustice that will invoke sympathy among whites."[55] Such respectability-motivated selection is colloquially understood as the search for the perfect plaintiff: someone palatable and deemed worthy of judicial remediation.[56] A related critique is that civil rights organizations focus on causes, not people,[57] and that lawyers prefer the class action vehicle because of its complexity and institutional prestige.[58] Moreover, traditional impact lawyers often lack boldness or imagination about how change is possible, especially outside the courtroom.[59]

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[54] Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 224–26 (2010). *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. Rev. L. & Soc. Change 535, 545 n.45 (2017) (because "[c]lients rarely deliberate with the lawyers, as equals, in formulating [impact litigation] goals," the "clients' personal feelings of injury are seldom the primary data that counsel respond to"). Framed here as a problem with accountability, conventional impact litigation can also implicate a related concern about respecting client autonomy, where the technician role of lawyer threatens to devalue or even ignore client views. Alan Chen & Scott Cummings, Public Interest Lawyering: A Contemporary Perspective 286 (2013).

[55] Alexander, *supra* note 54, at 282.

[56] *Id.* at 228–30.

[57] For example, a former director of the ACLU once stated that "[o]ur real client is the Bill of Rights." Comment, *The New Public Interest Lawyers*, 79 Yale L.J. 1069, 1092 (1970) (quoting Melvin Wulf) (by a small group of students). By contrast, Bill Quigley, one of the country's leading practitioners of movement lawyering, rejects the importance of causes of claims, as movement lawyers should "Work for and with Organizations, Not Issues: This is Not Impact Litigation or Law Reform." Bill Quigley, *20 Tools for Movement Lawyering*, Law at the Margins, https://lawatthemargins.com/wp-content/uploads/2016/01/20-Tools-for-Movement-Lawyering.pdf [https://perma.cc/2AMM-6ZGM]. Vince Warren, the Executive Director of the Center for Constitutional Rights (CCR), has emphasized that, despite the organization's name, "the Constitution is not our client; movements are." E-mail from Vince Warren, Exec. Dir., Ctr. for Const. Rts., to Baher Azmy, Legal Dir., Ctr. for Const. Rts. (Jan. 20, 2025, 5:45 PM) (on file with author).

[58] Bell, *Serving Two Masters*, *supra* note 50, at 493; *see also* Council on Legal Education for Professional Responsibility, Inc., Lawyers, Clients & Ethics 101 (M. Bloom ed. 1974) ("Class actions do have the capacity to provide large sources of narcissistic gratification and this may be one of the reasons why they are such a popular form of litigation in legal aid and poverty law clinics.").

[59] *See* Betty Hung, *Essay–Law and Organizing from the Perspective of Organizers: Finding a Shared Theory of Social Change*, 1 L.A. Pub. Int. L.J. 4, 15 (2008) (noting an organizer's half-joking observation that "a lawyer's mantra is 'no se puede'") (internal citations omitted)).

While this Section has sketched the limitations of impact litigation and, more fundamentally, litigation in pursuit of rights-recognition, I do not mean to suggest that litigation is inherently a feckless social justice strategy.[60] The kinetic possibilities of class action litigation can be leveraged in powerful ways to support social change by infusing it with principles and strategies of movement lawyering. Lawyering, like love, is strongest when it is a reciprocal project based on mutual respect and accountability and where it can motivate hope, inspiration and collective action.

The following Section shifts the focus from the limited discourse and durability of lawyer-driven rights recognition strategies to a more expansive notion of rights *as* recognition—of seeing and hearing community demands, and using lawyering as a tool to shift power from elites toward communities harmed by injustice, with their needs at the top of mind.

B. Pursuing Power Over Rights

Critical legal and race scholars have long been dismissive of legal liberalism or great person lawyering, believing that social change strategies should focus on organizing and the possibility of a transformational "shift [of] power away from elites and toward the masses of people."[61] According to Purvi Shah, a movement lawyering educator, the core goal for movement lawyers should be to "concern[] ourselves with the question of power."[62] The power-based framework

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[60] *See* Archer, *supra* note 24, at 420–21 (agreeing that advocates, despite "healthy skepticism" of litigation's capacity for social change, should not "dismiss litigation and its potential for challenging bias and discrimination"); Cummings & Rhode, *supra* note 24, at 611–12 (noting that other forms of advocacy are just as "vulnerable to strategic reinterpretation, deliberate non-enforcement, and political reversals" as is litigation); Lobel, *Participatory Litigation*, *supra* note 21, at 92 (documenting the success of a collaborative class action challenge to California's regime of indeterminate solitary confinement).

[61] Amna Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. 90, 104–05 (2020) [hereinafter Akbar, *Demands*]; *see also* Amanda Alexander, *Nurturing Freedom Dreams: An Approach to Movement Lawyering in the Black Lives Matter Era*, 5 HOW. HUM. & C.R. L. REV. 101, 116 (2021) ("Organizing is so central because it is all about getting to the roots of power imbalance. Organizing builds power."); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803–04 (2021) ("The power lens" focuses on "the power to enact policy or the power to check state actors."); Jeena Shah, *Community Lawyering in Resistance to Neoliberalism*, 120 MICH. L. REV. 1061, 1076 (2022) [hereinafter *Community Lawyering*] ("[L]awyering has a role in struggle, and its purpose is to help redistribute power—in other words, to support transformational change. This gives lawyering a new 'why.'").

[62] Jennifer Ching et al., *A Few Interventions and Offerings from Five Movement Lawyers to the Access to Justice Movement*, 87 FORDHAM L. REV. 186, 187 (2018). Political power, in turn, represents "a capacity composed of active and changing relationships enabling a person, group, or institution to compel others to do things they would not do on their own."

that critical scholars and activists underscore is foundational; one can also see the genetic architecture of this power-shifting strategy as one that looks like a double helix with interlocking and mutually reinforcing components. One thread challenges power—of states, corporations, and elites. The other builds power—of clients, communities, and movements.

1. Challenging Power

As we have seen, radical lawyers reject the premise of the law's neutrality, believing instead that legal institutions reflect and perpetuate extant social and political hierarchies. They also believe that a likelihood of success on the merits should not be the predominant strategic consideration when filing a case. What follows, then?

A critical metric of success for the power-challenging thread of movement lawyering is the extent to which litigation creates venues for contestation, disruption, and narrative shifting. In the United States, for whatever reason, the media takes an arguably outsized interest in lawyers, litigation, and courts.[63] Dragging "politics into the courtroom,"[64] as Jules Lobel has put it, implicates the strategic role of the audience in shifting power.[65] Courts can thus become a productive (and even scintillating) forum to challenge and destabilize power; to charge and document injustice; to accuse and demand reasoned responses;[66] to showcase the incompetence, malfeasance, and hypocrisy of powerful actors; and to weaken those actors' reliance on inertia to sustain malevolent practices otherwise shielded from public scrutiny or perceived as beneficial.[67] Such disruption and mobilization, in turn, promotes an "atmosphere in which [subordinated] people can more readily function, organize, and

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Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 247–48 (2007).

[63] *See* Joel F. Handler, Social Movements and the Legal System: A Theory of Law Reform and Social Change 216–17 (1978). As one astute social commentator observed nearly two hundred years ago, "[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." Alexis de Tocqueville, Democracy in America 300 (Henry Reeve trans., D. Appleton and Company 1899) (1831).

[64] Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. Rev. 477, 483 (2004).

[65] In this view, the adjudication of legal claims are secondary to the question of "how the litigation affects the various actors in the policy arena—whether those actors are the public in general, interest groups, legislative bodies, a group the litigants are seeking to organize, or the defendants whom the plaintiffs are seeking to force to the bargaining table." *Id*. at 490.

[66] *See* White, *supra* note 54, at 545 n.47 (describing litigation on behalf of marginalized persons as providing a moment of "disruption, protest and mobilization").

[67] *See also* Azmy, *supra* note 20, at 45–46, 51–52 (arguing that the Guantánamo litigation successfully demanded recognition for demonized Muslim detainees who were denied basic habeas corpus, mounted resistance to aspects of U.S. foreign policy, and ultimately dismantled the totalizing national security narratives designed to justify the departure from law).

move forward."[68] Power arises not only from disrupting repressive state narratives, it can come from the political performance of marginalized actors in otherwise socially conservative judicial spaces.[69] Indeed, merely filing a lawsuit "on behalf of the poor," Lucie White explains, "announces that the state's policies toward [them] are in violation of society's legal norms . . . [and thus] marks a point of [] tension, that can coincide with a moment of disruption, protest, or mobilization."[70] The ultimate measure of success in this metric looks like what Maggie Blackhawk emphasizes as undoing "the dominant ideology"—i.e., the "taken-for-granted world view"—which is the predicate to any fundamental reform to law and prevailing power structures.[71]

2. Building Power

The other genetic strand of power transformation involves sustainable power building by movement actors. This strand centers the most impacted individuals as leaders in advocacy and co-strategists in litigation. It understands them as the progenitors of the change that the broader movement or community seeks, consistent with the constraints of professional responsibility and narrow strategic decisions that

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[68] Kinoy, *supra* note 21, at 61; *See also* Akbar, *Demands*, *supra* note 61, at 104 (contending that radical "non-reformist" lawyering "seek[s] to delegitimate the underlying systems . . . and develop public consciousness about the possibilities of alternatives"); Michael W. McCann, *How Does Law Matter for Social Movements?*, *in* How Does Law Matter? Fundamental Issues in Law and Society 76, 83–85 (Bryant G. Garth & Austin Sarat eds., 1998) (observing that the public attention on a strategic litigation can reveal the vulnerability of structural arrangements and fuel movement motivation for change).

[69] *See generally* Kenneth W. Mack, *Law and Mass Politics in the Making of the Civil Rights Lawyer, 1931–1941*, 93 J. Am. Hist. 37 (2006) (focusing on the role of courtroom performances by Black civil rights lawyers as crucial sites where race and professional identity was made in front of predominantly white courts which supported a form of mass democratic politics); James Goodman, Stories of Scottsboro (1994) (documenting the strategy of communist party lawyers, and others, to expose entrenched racism and injustice of Southern courtrooms during the Scottsboro trials).

[70] White, *supra* note 54, at 545 n.47. I have explored elsewhere the way in which litigation challenging indefinite detention of so-called "enemy combatants" in Guantánamo presents a powerful model of challenging power; this is because the politically fraught initial filings sought to leverage courts as a forum to demand recognition of Muslim detainees who were denied basic habeas corpus rights by the President, to mount resistance to aspects of U.S. foreign policy, and to dismantle the totalizing national security narratives designed to justify the departure from law. *See* Azmy, *supra* note 20, at 45–46, 51–52. Indeed, the vindication of the Holy Grail of impact lawyering—recognition of constitutional rights, in this case the right to meaningful habeas review protected by the Suspension Clause, see *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008)—produced few releases or other tangible results, as compared to the organizing, advocacy, and narrative shifting the earlier, limited decision in *Rasul v. Bush*, 542 U.S. 466 (2004), unleashed by simply authorizing jurisdiction over habeas challenges.

[71] Maggie Blackhawk, *On the Power and the Law*, McGirt v. Oklahoma, 2020 Sup. Ct. L. Rev. 1, 4–5 & n.17 (2021).

genuinely lie within the litigator's expertise.[72] In this way, community engagement goes beyond mass action, voter registration, and press conferences and supports a more transformational accumulation of power associated with organizing.[73]

Lawyers can put this theory of organizing—the building power part of the transformation equation—into practice in several ways. First, while the pursuit of rights vindication for its own sake is vulnerable and limited, litigation that successfully produces judicial recognition of rights can serve as a political resource, constitutive of power building itself. Producing a recognition of rights for marginalized populations—and structuring litigation around rights consciousness—from a judicial institution that projects political legitimacy can provide a sense of entitlement to those otherwise politically disenfranchised. In this way, rights recognition can blunt feelings of acquiescence or dispossession; that conscious-raising perspective can activate the potential of individuals and movement actors to leverage a newfound legal entitlement into political mobilization, which is at the heart of durable social change.[74]

Second, merely by inviting participation by impacted communities and centering client voices, lawyers can help communities "better understand the workings of dominant institutions," surface demands, and sharpen tactical and coalition-building skills necessary to achieve long-term political goals.[75] On the one hand, failing to engage with relevant community stakeholders can undermine organizing efforts and lawyer-activist collaborations—what Orly Lobel calls "legal cooptation."[76] On the other hand, elevating the expertise of clients has

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[72] *See, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Calif. L. Rev. 1879, 1879–80 (2007) (examining the promise and limitations of progressive lawyering in resistance movements); *see also* Purvi Shah, Founder and Exec. Dir., Movement Law Lab, Movement Lawyering 101 Training at the Center for Constitutional Rights, Bertha Justice Institute (Aug. 2013) (on file with author) ("Sustainable change occurs when directly-impacted individuals take *collective* action, *lead* their own struggles, and gain *power* to change the conditions of oppression.").

[73] Shah, *Community Lawyering*, *supra* note 61, at 1079 (arguing that, "as opposed to merely a *tactic* of change," "organizing is central to the *theory of change*").

[74] *See* Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization 232–85 (1994); Scheingold, *supra* note 30, at 131–41.

[75] *See* White, *supra* note 54, at 540.

[76] Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 Harv. L. Rev. 937, 939 (2007) (cataloging the criticisms of rights strategies). One prominent example of this cooptation was publicized by a Chicago-based activist group, We Charge Genocide, which wrote an "Open Letter" to the ACLU of Illinois expressing "complete dismay and utter disgust" that the ACLU finalized a settlement with the Chicago Police Department providing stop and frisk data to the ACLU but *not* to community leaders and excluded input from "the youth directly impacted by the issue," which the grassroots group said undermined their launch of a city council legislative

a transformational value. It can break down the hierarchy of expertise and invert extant power dynamics,[77] while building the competency and confidence of community actors, regardless of whether a victory ultimately occurs in the courtroom.[78]

Third, litigation that leverages the experience, expertise, and participation of community members to build power should seek *their* perspectives on solutions to *their* problems, as a form of democratic governance and accountability.[79] This aspect of Jules Lobel's theory of participatory litigation "furthers participatory democracy by demanding a communal or collective right to participate in institutional decision-making."[80] Fourth, support for organizing and strengthening community power can come from public or political education.[81] A distinct virtue of litigation is that outputs of discovery can be shared with movement leaders. This information-sharing can illuminate the mechanics of repression; expose the vulnerabilities, inconsistencies, and hypocrisies of elites promoting a dominant—if distorted—social narrative; and offer a path for learning and leadership.[82] Fifth, by leveraging their own considerable power and resources, lawyers can shift pressure from targeted communities to the institutions causing harm and can also support organizers seeking funding.[83] Under certain circumstances,

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campaign We Charge Genocide had been working on for years. *An Open Letter to the ACLU of Illinois Regarding Stop and Frisk*, WeChargeGenocide (Aug. 12, 2015), http://wechargegenocide.org/an-open-letter-to-the-aclu-of-illinois-regarding-stop-frisk [https://perma.cc/9DA3-DURP].

77 *See* Simonson, *supra* note 61, at 854 (by recognizing that directly impacted people have meaningful contributions to our thinking about policing we "begin to reverse the profound power imbalances caused and maintained by policing and the carceral state").

78 *See* Ben Depoorter, Essay, *The Upside of Losing*, 113 Colum. L. Rev. 817, 820 (2013) (arguing the value of litigation regardless of outcome may lie in its ability to generate attention and political support).

79 Simonson, *supra* note 61, at 807–08 (advocating for a "shift in governance and policymaking power down to the populations who have been policed, surveilled, and incarcerated, whose democratic standing has been taken from them"); *see also* Sunita Patel, *Toward Democratic Police Reform: A Vision for 'Community Engagement' Provisions in DOJ Consent Decrees*, 51 Wake Forest L. Rev. 793, 798 (2016) (advocating for moving away from policing experts to democratizing police consent decrees so as to "shift power between the police and the communities they serve").

80 Lobel, *Participatory Litigation*, *supra* note 21, at 94; *see also* Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L.J. 2740, 2749–50 (2014) (developing concept of "demosprudence" whereby "ordinary people" leverage collective action and "find a way to integrate lawyers not as leaders but as fellow advocates" in pursuit of social change).

81 *See* Lobel, *Courts as Forums*, *supra* note 64, at 534 (in political cases lawsuits are "an opportunity to educate the public").

82 *See* Shah, *Community Lawyering*, *supra* note 61, at 1081 ("[L]istening to the community and facilitating Freirean-style popular education to help community members arrive at a radical analysis of their problems is actually the core work of organizing.").

83 *See infra* Section III.B.

and subject to ethics rules, lawyers can also share attorney fees with organizers who have contributed to the litigation effort.[84]

A core metric of success for the Building Power thread of movement lawyering is the extent to which litigation supports participation, learning, and coalition-building among community actors. Effective movement litigation should increase the power and confidence of a mobilized community, and help organizers see themselves not just as part of a subjugated community but as leaders who can change institutions through work extending beyond any particular litigation.[85]

Part I has exposed some shortcomings of a great lawyer theory of social change underpinning traditional impact litigation and revealed the relative merits of movement lawyering's focus on durable power-shifting arrangements rather than on pure rights vindication. As discussed later in Part III, *Floyd* is a paradigmatic example of how impact litigation can successfully incorporate movement lawyering's core power-shifting principles. But *Floyd*'s movement-oriented litigation strategy was rooted in difficult lessons learned from the ultimately unsuccessful efforts to transform a right into meaningful change from a predecessor stop and frisk case, *Daniels v. City of New York*.

Thus, in Part II, I will first set the stage for *Floyd* by situating the tipping point for the policing accountability movement's demand for litigation—the killing of Amadou Diallo in a hail of NYPD bullets—within the aggressive philosophy of "proactive" or "order management" policing of minority communities largely greenlighted by a Supreme Court Fourth Amendment jurisprudence—a green light that shifted power away from Black and Brown communities and toward police. The *Daniels* case was filed in reaction to the Diallo killing, and the *Floyd* strategy was devised in response to the shortcomings of the *Daniels* remedy.

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84 *See* Paul R. Tremblay & Baher Azmy, *Case Study 3: Movement Lawyers and Community Organizers in Litigation: Issues of Finances and Collaboration*, 47 Hofstra L. Rev. 43, 52–53 (2018).

85 According to Jeena Shah, the success of a movement litigation effort should be measured by "whether it builds the base of the organizing project, . . . [and whether] it offers ways for the organized community to exercise the power they have built . . . on an ongoing basis." Shah, *Community Lawyering*, *supra* note 61, at 1081–82 ("[The] process of building power within a subordinated community is to support the community's capacity to protect its victories and continually build upon them."); *see also* Charles Elsesser, *Community Lawyering—the Role of Lawyers in the Social Justice Movement*, 14 Loy. J. Pub. Int. L. 375, 385 (2013) (describing the process of building community lawyering practices which support and center social justice campaigns).

II
The Power of Policing: The Legal License for the NYPD's "Proactive Policing" and Early Efforts to Challenge It

It is tempting to wonder what Amadou Diallo must have thought on February 4, 1999, when he encountered four white officers assigned to NYPD's "elite" Street Crimes Unit (SCU) in the vestibule of his apartment in the predominantly Black Soundview section of the Bronx. A recently arrived immigrant from Guinea,[86] he likely would not have known the SCU both symbolized and operationalized Mayor Guiliani's aggressive "proactive policing" practices which sought to saturate Black neighborhoods with street-level police in order to surveil residents and ferret out gun crimes.[87] He could not know that minutes later these officers would kill him in a hail of forty-one bullets.[88] Nor would he ever know that his death would bring thousands of people into the streets and become a tipping point for the police accountability movement, leading it to demand a major legal challenge to the NYPD's overly-aggressive and discriminatory practices.

If he had a moment to think beyond his confusion and fear, Mr. Diallo must have also wondered, how could this be happening to me, in America?

A. Terry*, the Supreme Court, and the Police-Power Ratchet*

The answer to how this happened to Diallo implicates a range of legal, social, and political factors.[89] High among them is Supreme Court jurisprudence, particularly the landmark 1968 decision in

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[86] Diallo was a "shy-hard working man with a ready smile," who peddled wares in Downtown Manhattan, Michael Cooper, *supra* note 9, at A1, and studied math and computer science at night in his tiny Bronx apartment. Michael Grunwald, *Unarmed Immigrant Killed by N.Y. Police Is Mourned*, Wash. Post, Feb. 13, 1999, at A3.

[87] David Kochieniewski, *Success of Elite Police Unit Exacts a Toll on the Streets*, N.Y. Times (Feb. 15, 1999), https://www.nytimes.com/1999/02/15/nyregion/success-of-elite-police-unit-exacts-a-toll-on-the-streets.html [https://perma.cc/3W45-2GDA]. Much like the NYPD officer, who proclaimed that the NYPD "owns the streets," the SCU proudly proclaimed that it "owned the night." *Id.*

[88] Cooper, *supra* note 9.

[89] *See generally* Khalil Gibran Muhammad, The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America (2010) (documenting historical efforts to equate Blackness with criminality, which has contributed to modern forms of mass incarceration); Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America (2016) (identifying massive federal narrative and financial shifts toward law and order politics and driving heavy policing and mass incarceration at state and local levels); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 Calif. L. Rev. 1781, 1788–802 (2020) (offering a structural account of police violence).

Terry v. Ohio.[90] *Terry* incentivized police departments to experiment with ever increasing modes of "proactive" or "order management" policing mechanisms that dramatically escalated street encounters, particularly in so-called "high crime neighborhoods." The proactive policing concept of stop and frisk was a de facto tool of urban policing for decades before *Terry*.[91] Yet *Terry*—issued amid increasing white American anxiety about "urban" crime and violence[92]—materially changed the legal calculus for police encounters with individuals. Both the quantum of proof and the basis of suspicion required of police were significantly loosened in favor of law enforcement. The level of suspicion need only be "reasonable," not probable. And it could attach not only to assessments of whether someone *had* committed a crime, but also to whether law enforcement had reasonable suspicion to believe "that criminal activity may be afoot"[93] or that a person "*is*, or *is about to be* engaged in criminal activity."[94] *Terry*'s legal license precipitated a shift in the central paradigm of policing from investigation of past crimes to deterrence of potential crimes.[95] For a number of scholars, *Terry* sits within a broader criminal legal jurisprudence that is designed for and

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[90] *See* Terry v. Ohio, 392 U.S. 1 (1968).

[91] *See* Goluboff, Vagrant Nation, *supra* note 29, at 202–04 (describing increased use of stop and frisk, pre-*Terry*, including as authorized by a 1964 New York statute, and connecting the decrease in the use of vague vagrancy laws to increase in stop and frisk post-*Terry* as a tool of social control). As James Baldwin recounted in his powerful 1963 account, "[w]hen I was ten . . . two policemen amused themselves with me by frisking me, making comic (and terrifying) speculations concerning my ancestry and probable sexual prowess, and for good measure, leaving me flat on my back in one of Harlem's empty lots." James Baldwin, The Fire Next Time 32 (Dell Publishing 1985) (1963).

[92] Michael W. Flamm, Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s, at 160–74 (2005).

[93] *Terry*, 392 U.S. at 30.

[94] United States v. Place, 462 U.S. 696, 702 (1983) (emphasis added) (citing *Terry*, 392 U.S. at 22). A *Terry* stop requires that a police officer must "be able to point to specific and articulable facts" suggesting *individualized* suspicion, rather than group characteristics. *Terry*, 392 U.S. at 21. Once a stop has occurred, an officer is permitted to undertake a pat-down of outer clothing—a frisk—in search of weapons "that he reasonably believes or suspects" are on the person. Ybarra v. Illinois, 444 U.S. 85, 93 (1979).

[95] *See* Rachel A. Harmon & Andrew Manns, *Proactive Policing and the Legacy of* Terry, 15 Ohio St. J. Crim. L. 49, 58 (2017) (noting that "*Terry* put a constitutional Good Housekeeping Seal of approval on stops and frisks," a tool "that could be used in a forward-looking way") (citation omitted)); Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. Rev. 1508, 1535 (2017) (observing that with *Terry*, "the writing was on the wall . . . that Fourth Amendment doctrine would develop to embrace and legitimize, rather than repudiate and constrain, the already ubiquitous openly deployed practice of stop-and-question"); Friedman, *supra* note 36, at 73–91 (criticizing the Supreme Court's jurisprudence as consistently over-solicitous of policing interests over and above Fourth Amendment protections for citizens).

constitutive of racial subordination accomplished through sanctioned police violence.[96]

New York City operationalized this legal license so much so as to "epitomize[] the New Policing," whose "core elements" included "'[p]roactivity' in the form of *Terry* stops."[97] Few people popularized proactive policing practices more than Mayor Guiliani and William Bratton, a leading proponent of Broken Windows policing that targeted minor antisocial behavior in order to control broader crime patterns.[98] Broken Windows was described as policing's "Holy Grail of the '90s."[99] In 1993, for example, the NYPD rolled out a "quality of life" initiative which targeted minor misdemeanor offenses like turnstile jumping, graffiti, and public drinking,[100] and escalated street encounters, particularly in so-called "high[] crime areas."[101]

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[96] *See* Butler, *supra* note 42, at 1425 (concluding that the "most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct."); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 129–30 (2017) (arguing that the "Supreme Court's legalization of racial profiling is embedded in the very structure of Fourth Amendment doctrine"); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 390 (1998) (explaining how the Supreme Court's Fourth Amendment jurisprudence authorizes pretextual traffic stops against people of color); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1189–90 (2017) (describing the law of police violence as setting the rules for the (racialized) distribution of state violence); Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 321–23 (2016) (carceral values have been legitimated by Supreme Court jurisprudence so as to systemize and valorize police control and violence against communities of color).

[97] Jeffrey Fagan, *Race and the New Policing*, *in* 2 REFORMING CRIMINAL JUSTICE 83, 87 (Erik Luna ed., 2017).

[98] *See* James Q. Wilson & George L. Kelling, *Broken Windows*, ATL. MONTHLY, at 35 (Mar. 1982), https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf [https://perma.cc/CB3B-CHZD] (detailing a Broken Windows theory of policing).

[99] *See* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk,"* 94 B.U. L. REV. 1495, 1505 (2014) (noting that Bratton and successors "general approach to policing, including a rhetorical embrace of Broken Windows, created the conditions under which stop-and-frisk would eventually thrive").

[100] According to Police Strategy No. 5, a 1994 policy, "[b]y working systemically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which serious crimes seem possible and even permissible." RUDOLPH W. GIULIANI & WILLIAM J. BRATTON, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 7 (1994), https://www.ojp.gov/ncjrs/virtual-library/abstracts/police-strategy-no-5-reclaiming-public-spaces-new-york [https://perma.cc/V4RA-2ZHH].

[101] Tracey L. Meares, *Programming Errors*: *Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 160–67 (2015). Fueling this police practice, courts have permitted vague and capacious understandings of what kind of area constitutes "high crime." *Id.* at 173 n.75. Indeed, the "high crime area" designation "seems to function as 'magic words' with respect to judicial findings of reasonable suspicion." Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1543 (2017).

The media lauded Giuliani and Bratton's supposedly unique and heroic efforts, even as crime decreases were occurring nationwide[102]—focusing on a tenuous empirical connection between pursuing "order" and a decrease in crime—a correlation that likely conflated poverty with crime.[103] Eventually, the dramatic escalation of misdemeanor arrests drove a corresponding surge in complaints of police abuses[104] including the beating and rape of Abner Louima in a Brooklyn police station.[105]

B. Early Efforts to Challenge the Police-Abuse "Iceberg" and the Limited Success of Daniels

In the wake of Diallo's murder, protests targeting the NYPD and Giuliani erupted across the city.[106] "Not since the 1960s tidal wave of protests against the Vietnam War and for black civil rights has there been such massive civil disobedience in New York City," reported The Washington Post in April 1999.[107] Community groups joined together in the Coalition Against Police Brutality (CAPB) to strategize around police killings. Joo-Hyun Kang, director of Communities United for Police Reform, recounted the CAPB's leader, Richie Perez, observing

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102 Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 Mich. L. Rev. 291, 329 (1998) (challenging data pointing to correlation between increased proactive policing and drops in crime in New York City).

103 *See* Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 Fordham Urb. L.J. 457, 462, 496 (2000) (finding that rates of *Terry* stops confirm that New York City policing was not about monitoring disorderly places, but policing "poor people in poor places"); Harcourt, *supra* note 102 at 302–06 (critiquing the social construction of "disordered" communities as a self-fulfilling prophecy, that selects and associates disordered-related crimes with minority communities, and uses the incidence of such disordered crimes to justify even more policing); Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 373–75 (2001) (critiquing resorts to "localism" in policing practices as a de facto form of zoning regulation that largely reinforces pre-existing presumptions about neighborhood crime rates, municipal resources and social and economic power).

104 Matthew Purdy, *In New York, the Handcuffs Are One-Size-Fits-All*, N.Y. Times (Aug. 24, 1997) at A1, https://www.nytimes.com/1997/08/24/nyregion/in-new-york-the-handcuffs-are-one-size-fits-all.html [https://perma.cc/KS9X-NE8Q]; *see also United States of America: Police Brutality and Excessive Force in the New York City Police Department*, Amnesty Int'l, 10–11 (1996), https://www.amnesty.org/en/documents/amr51/036/1996/en [https://perma.cc/B7VU-R42X] (documenting substantial increase in complaints of abusive police conduct in mid-1990s, three-quarters of which were lodged by Black or Latino residents).

105 *See* Tom Hays, *1 New York City Cop Guilty in Torture Case*, Wash. Post (June 8, 1999), https://www.washingtonpost.com/wp-srv/national/daily/june99/louima08.html [https://perma.cc/8MCX-4KZ6]. Among the young men killed by police shootings in the mid-1990s were Anibal Carrasquillo, Anthony Baez, Nicholas Heyward Jr., Anthony Rosario, and Hilton Vega. Stolen Lives: Killed by Law Enforcement, The Stolen Lives Project 254–56 (1999), https://stolenlives.org/SL2ed2.pdf [https://perma.cc/QN4T-TUEQ].

106 *See* Nat Hentoff, *Giuliani's Lawless Police*, Wash. Post, Apr. 10, 1999, at A21.

107 *Id.*

that high-profile police killings were "just the tip of the iceberg," below which were "the daily abuses, disrespect and human rights violations faced by our communities at the hands of NYPD officers that go unaddressed."[108] Kang recalls Perez stating that "[w]hen we don't deal with these daily abuses, it's no wonder that there's a lack of accountability in high-profile killings."[109]

From CAPB's strategic premise that high-profile police killings were the tip of the iceberg of daily police abuses, emerged the first major legal challenge to NYPD's stop and frisk practices. Soon after the Diallo shooting, the CAPB asked CCR leadership to bring a lawsuit challenging the racial profiling by the Street Crimes Unit it believed to be at the root of Diallo's killing.[110] Just one month later, on March 3, 1999, CCR lawyers and co-counsel filed *Daniels v. City of New York* in the Southern District of New York. Assigned to Judge Shira Scheindlin,[111] the suit challenged systemic racial profiling and unreasonable searches and seizures.[112] The NYPD defended their conduct, as it would in *Floyd*, by suggesting it was for the community's own good. According to the NYPD, "murder statistics that involve dead bodies don't lie and cannot be fudged . . . stop-and-frisks must take place in those [minority] communities."[113]

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108 Joo-Hyun Kang, *Fighting Broken Windows Policing in New York City in the '90s and '00s*, Verso (June 1, 2020) [hereinafter Kang Interview], https://www.versobooks.com/blogs/news/2655-fighting-broken-windows-policing-in-nyc-in-the-90s-and-00s [https://perma.cc/ULX4-96ET]; *see also* Ctr. for Const. Rts., Ten Years Since Floyd Conference Panel 2, YouTube at 2:23:45–:24:15 (Dec. 4, 2023) [hereinafter CCR Floyd Conference], https://www.youtube.com/watch?v=OAR9_1QgL9s [https://perma.cc/DR8X-BBLY] (Joo-Hyun Kang speaking).

109 Kang Interview, *supra* note 108; *see also* Gigi Barsoum, *From the Streets to the Courts to City Hall: A Case Study of a Comprehensive Campaign to Reform Stop-and-Frisk in New York City*, Cmtys. United For Police Reform 5–13 (Oct. 24, 2017) (documenting efforts combating the use of stop-and-frisk in New York City), https://www.atlanticphilanthropies.org/wp-content/uploads/2017/10/CPR_CaseStudy.pdf [https://perma.cc/3ECJ-233Q].

110 Kang Interview, *supra* note 108; *see also* Sunita Patel, *Jumping Hurdles to Sue the Police*, 104 Minn. L. Rev. 2257, 2290–93 (2020) [hereinafter Patel, *Jumping Hurdles*] (discussing litigation brought in response to NYPD practices).

111 The suit was originally captioned *National Congress PR Rights v. City of New York,* but because it was brought on an organizational standing theory, and as part of a "challenging power" movement lawyering strategy, the Congress sought to insert itself directly into the litigation contest against the NYPD. The Court rejected the Puerto Rican Congress's theory of organizational standing as too abstract, leaving named the named class plaintiffs as six Black and Latino men residing in the Bronx and Brooklyn the caption became *Daniels v. City of New York*.

112 Daniels v. City of New York, 198 F.R.D. 409, 411 (S.D.N.Y. 2001).

113 Benjamin Weiser, *Lawsuit Seeks to Curb Street Crimes Unit, Alleging Racially Biased Searches*, N.Y. Times (Mar. 9, 1999), https://www.nytimes.com/1999/03/09/nyregion/lawsuit-seeks-to-curb-street-crimes-unit-alleging-racially-biased-searches.html [https://perma.cc/B9YW-CF5D].

The litigation had the full support of community groups and was buoyed by early victories.[114] Evidence revealing significant racial disparities and unjustified stops substantiated community complaints and supported community organizing.[115] After 9/11, however, community momentum behind *Daniels* dissipated amid dramatically shifting narratives about the role of policing in general and the NYPD in particular. NYPD's image became that of a courageous organization necessary to stem existential threats to New Yorkers. By the time *Daniels* settled in 2003, the once-robust police accountability movement had been neutered amid the lionization of law enforcement[116] and a broader ideological shift toward proactive, deterrence-based forms of policing at the municipal and federal levels.[117]

The *Daniels* settlement achieved reforms that were largely symbolic, including the adoption of a racial profiling policy.[118] However, the agreement included what became a poison pill for the NYPD: the City agreed to share with CCR (and, eventually, the City Council) all the UF-250 forms in the coming years on quarterly basis—forms that revealed putative reasons for every NYPD stop and frisk and the demographic information of individuals stopped.[119] Yet, in retrospect, it became apparent that the lack of long-term community engagement in the reform process and the absence of sustained organizing post-9/11 to pressure the NYPD meant the settlement agreement offered no significant improvements in the material condition of people's

114 *See* Nat'l Cong. PR Rights v. City of New York, 75 F. Supp. 2d 154, 162 (S.D.N.Y. 1999) (concluding that individual plaintiffs had standing); *Daniels*, 198 F.R.D. at 409, 422 (S.D.N.Y. 2001) (granting class certification).

115 *See Police Tactics in Question; 'Stop and Frisk' in New York*, N.Y. Times (Dec. 4, 1999), https://www.nytimes.com/1999/12/04/opinion/police-tactics-in-question-stop-and-frisk-in-new-york.html [https://perma.cc/6VU7-WV83] (reporting on New York Attorney General report documenting substantial racial disparities in stops done by SCU).

116 *See* Barsoum, *supra* note 109, at 21 (describing the change in political environment and agenda post-9/11).

117 *See* Matt Apuzzo & Adam Goldman, *The NYPD Division of Un-American Activities*, N.Y. Mag. (Aug. 23, 2013), https://nymag.com/news/features/nypd-demographics-unit-2013-9 [https://perma.cc/JXT7-7X5E] (recounting the creation of a proactive intelligence division in the NYPD after 9/11).

118 *See generally* Stipulation of Settlement, Daniels v. City of New York, No. 99 Civ. 1695 (S.D.N.Y. Sept. 24, 2003), ECF No. 152, https://ccrjustice.org/sites/default/files/assets/Daniels_StipulationOfSettlement_12_03_0.pdf [https://perma.cc/3ARC-CDCS]. Reflecting on the limitations on the traditional Daniels civil rights settlement process, *Floyd* lead counsel Darius Charney noted that it involved "lawyers around a table and they come up with . . . a contract and it has terms in it . . . then you move on." CCR Floyd Conference, *supra* note 108, at 2:40:01–15 (Darius Charney speaking).

119 *See* Stipulation of Settlement, *supra* note 118, at 8–9.

lives.[120] Indeed, as described below, the number of stop and frisks would climb exponentially in the years following the settlement, while racial disparities became starker.

Still, the visibility the data provided to demonstrate discriminatory and over-policing practices would be critical to a public critique and legal challenge to the NYPD's stop and frisk practices. Thus, when NYPD's stop and frisk practices were challenged ten years later in *Floyd*, lawyers and organizers would be armed with two potent new weapons: (1) 4.4 million UF-250 forms, a trove of data the *Floyd* campaign would leverage inside and outside the courtroom; and (2) strategic lessons learned from the *Daniels* settlement.

III
Floyd and the Reemergent Legal-Organizing Strategy

> [I]t was really a co-learning experience. I think that we learned a lot from the attorneys. . . . I think we also trained some of the attorneys.[121]

A. Filing Floyd *in the Wake of* Daniels

> [The organizers] were actually spending a lot more time building momentum around what the litigation could generate. . . . The output from the litigation becomes input for movement mobilization.[122]

Arguably, the only enduring success of the *Daniels* settlement was the City's agreement to produce stop and frisk data in UF-250 forms on a quarterly basis, during the five-year settlement monitoring period. It required officers to indicate reasons for each stop—including notoriously subjective reasons such as "suspicious bulge," "furtive movement," "high crime area," and, what would become the most striking manifestation of the NYPD's practice of racial profiling: "fits description."[123]

The *Floyd* expert witness, Columbia University Professor Jeffrey Fagan, analyzed the data and found significant increases in stop and

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120 *See* Patel, *Jumping Hurdles*, *supra* note 110 (noting diminished, post-9/11 leverage advocacy groups had in settling *Daniels*).

121 Kang Interview, *supra* note 108.

122 Virtual Interview with Vince Warren, Exec. Dir., Ctr. for Const. Rts. (Jun. 29, 2023) [hereinafter Warren Interview].

123 Floyd v. City of New York, 959 F. Supp. 2d 540, 559–60, 578 (S.D.N.Y. 2013) (No. 08 Civ. 1034); *see also Stop, Question and Frisk Data*, N.Y.P.D., https://www.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page [https://perma.cc/68Y5-QCZJ].

frisks after the 2003 *Daniels* settlement: By 2006, the NYPD had stopped an additional 508,540 people, a nearly 500% increase from 2002.[124] The data also revealed a substantial racial disparity: Black and Latino persons, who represented 52% of the City population, accounted for 83% of total stops. And, by 2006, the post-9/11 political landscape had begun to change. The late-2006 police killing of Sean Bell, a young Black man, outside a nightclub on the eve of his wedding[125] led to renewed community outrage. Members of what had been the CAPB reconstituted as the Coalition for Community Safety.[126] The Coalition met in CCR's offices to engage in strategic consultations about police abuses and would form the foundation for the lead community partner during the *Floyd* trial, Communities United for Police Reform (CPR).[127]

In December 2007, just as the five-year *Daniels* settlement agreement was set to expire, plaintiffs' counsel appeared before Judge Scheindlin, arguing that data demonstrating a de facto policy of racial profiling meant that the Court should extend its jurisdiction to ensure compliance with the settlement agreement.[128] Judge Scheindlin rejected the proposal, requiring the filing of a new case, but suggested that the new case sufficiently overlapped with *Daniels* so that plaintiffs could "mark it as related" under the relevant rules, so that any new case would effectively return to Scheindlin.[129]

On January 31, 2008, the *Daniels* legal team filed *Floyd v. City of New York* based on the data produced in the *Daniels* settlement. Additional litigation pressure mounted on the NYPD as two new stop and frisk cases were filed. In January 2010, a group of plaintiffs represented by the NAACP Legal Defense Fund and The Legal Aid Society filed *Davis v. City of New York*, a class action alleging an

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124 *See* Al Baker & Emily Vasquez, *Number of People Stopped by New York Police Soars*, N.Y. Times (Feb. 3, 2007), https://www.nytimes.com/2007/02/03/nyregion/03frisk.html [https://perma.cc/7YMA-D9Y3] (analyzing stop and frisk data released by the NYPD and quoting Dr. Fagan on the increase).

125 *See* Robert D. McFadden, *Police Kill Man After a Queens Bachelor Party*, N.Y. Times (Nov. 26, 2006), https://www.nytimes.com/2006/11/26/nyregion/26cops.html [https://perma.cc/TYS4-EDTJ] (reporting the killing).

126 *See* Kang Interview, *supra* note 108; *see also* Virtual Interview with Ian Head, Open Records Project Manager, Ctr. for Const. Rts. (CCR) (June 7, 2023) [hereinafter Head Interview].

127 *See* Kang Interview, *supra* note 108.

128 *See* Letter from Andrea Costello, Ctr. for Const. Rts., to Hon. Shira A. Scheindlin, (Dec. 14, 2007), https://www.kalhan.com/wordpress/wp-content/uploads/2014/09/Daniels-v.-City-of-New-York-SDNY-2007-12-CCR-Request-to-Extend.pdf [https://perma.cc/85VB-78BL].

129 Transcript of Hearing at 10–15, Daniels v. City of New York, No. 13-3088 (S.D.N.Y. Dec. 21, 2007), https://www.kalhan.com/wordpress/wp-content/uploads/2014/09/Daniels-v.-City-of-New-York-SDNY-2007-12-Transcript.pdf [https://perma.cc/8AMU-SAWT]; *see also* Kalhan, *supra* note 10, at 1055–57 (calling this related case designation "mundane" under relevant standards).

unconstitutional pattern and practice of stop and frisk used to enforce trespass prohibitions in public housing projects.[130] In 2012, another set of plaintiffs represented by the New York Civil Liberties Union, The Bronx Defenders and LatinoJustice PRLDEF filed *Ligon v. City of New York*, a class action challenging a similar pattern of stop and frisks undertaken outside privately owned residential buildings under the NYPD's Trespass Affidavit Program, which authorized the NYPD to patrol such buildings.[131] Both cases were accepted as related to the *Floyd* case, adding narrative and political pressure—not to mention more robust legal resources from prominent New York civil rights organizations—to challenge stop and frisk.[132]

The court denied the City's motion for summary judgment in August 2011,[133] after which time—presumably mindful that trial was inevitable—police stop numbers finally started dropping.[134] By 2012, it became clear that the NYPD's practices would be put on trial.

B. Communities United for Police Reform and the Foundations for Building Community Power

> [L]itigation. . . itself is not going to change conditions of most people most of the time.[135]

One of the most consequential developments in the long-standing campaign to end aggressive and discriminatory police encounters was the creation of CPR in 2012. Building on the model of the Coalition to End Police Brutality, CPR in 2010 and 2011 began to seek input from legal and organizing stakeholders to develop a "joint plan of action that would transform policing practices over time."[136] Conversations among stakeholders around structure, strategy, and priorities led ultimately

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130 *See* Davis v. City of New York, 959 F. Supp. 2d 324 (S.D.N.Y. 2013).

131 *See* Ligon v. City of New York, 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

132 *See Ligon*, 925 F. Supp. 2d at 483, 483 n.1 (connecting *Ligon* with other stop-and-frisk related cases, including *Floyd* and *Davis*).

133 *See* Floyd v. City of New York, 813 F. Supp. 2d 417 (S.D.N.Y. 2011), *reconsideration granted in part*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011).

134 *See Stop-and-Frisk Data*, N.Y. Civil Liberties Union (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data [https://perma.cc/GH8A-ADPJ] (showing the drop graphically).

135 Kang Interview, *supra* note 108.

136 *See* Barsoum, *supra* note 109, at 25. Atlantic Philanthropies and Open Society Foundation took note of a lack of coordination among various movement and legal actors and brought stakeholders together, allocating substantial funding (approximately $4 million from each) to focus on a targeted, short-term campaign to challenge escalating stop and frisk numbers during the administration of Mayor Michael Bloomberg. Their funding was the principle early support for CPR's development. *Id*. at 22–23.

to the formalized incorporation and funding of CPR, which focused on challenging stop and frisk practices per se and as part of a broader problem of discriminatory proactive policing practices.[137]

CPR's strategic impetus was described a few years after its founding by Joo-Hyun Kang, an extraordinary organizer who was CPR's inaugural director:

> Before 2012, fights against police abuse in New York City were largely in different silos. The legal organizations might have been communicating with each other, . . . and the policy advocates did some work together, but there was very little crossover across sector . . . to develop a coordinated strategy. We've not only developed a coordinated strategy, we also center and prioritize the perspectives and leadership of directly affected communities. That's . . . central to the way we do our work.[138]

CPR's structure included a steering committee, several working groups, time-limited teams, and affinity groups. The Steering Committee is comprised of five organizations representing directly affected communities as well as four legal and policy organizations, including CCR and New York Civil Liberties Union (NYCLU), to coordinate CPR's overall campaign. The several working groups focus on legislative policy priorities. So-called "Time-Limited Teams" focus on particular campaigns, including supporting the ongoing federal stop and frisk lawsuits. Multiple affinity groups coordinate legal efforts, strategic communications and policy research.[139] At that time, CPR's formal membership was made up of over 60 organizations, representing diverse communities[140] and a broad range of expertise.[141]

CPR's "Principles of Unity" required it to put "the voices, vision, and needs of communities most impacted by these policies at the center

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[137] *Id.* at 25–26. CPR quickly triggered conservative ire in New York. *See Cops and Robbers*, New York Post (Feb. 24, 2012), https://nypost.com/2012/02/24/cops-and-robbers [https://perma.cc/Y6JV-397M] (asserting that coalition members "owe their existence to government grants and enjoy special status with the IRS" and are "offended by a police program that has saved unnumbered lives over the years.").

[138] Kang Interview, *supra* note 108. The strategy is largely credited as creative and successful. *See* Gigi Barsoum, Communities United for Police Reform, The Campaign Behind the Reform of Stop-and-Frisk in New York City 12–14 (2017), https://www.atlanticphilanthropies.org/wp-content/uploads/2017/10/CPR_CampaignBrief.pdf [https://perma.cc/FX5V-GTMG] (quoting various CPR stakeholders' assessments).

[139] *See* Barsoum, *supra* note 138, at 9.

[140] Communities represented included Arab American, Asian Pacific Islander, Black, Indigenous, Latina/o, LGBTQI+, immigrant and refugee, Muslim, people with disabilities, people who are unhoused, and youth groups. *Id*. at 8.

[141] Groups brought expertise in areas of community organizing, faith leadership, labor, legal, media, policy, and research. *Id*.

of the work."[142] Structurally, grassroots groups would first meet to come up with strategic priorities to bring to the coalition's legal and policy partners.[143] This organizing philosophy melded with the vision of CCR's Executive Director, Vince Warren, who played a prominent role in shepherding CPR's creation and strategic vision. According to Warren, CCR's role in CPR's Steering Committee would be only as litigation support, which allowed organizers to see a potential value of litigation as a

> support tool for the organizing that they were doing, whereas if we had been involved [in all advocacy aspects] it would tend to disempower the potential power that the community voices had. We were really clear about what our lanes were and we were really clear about what our community accountability was.[144]

Because CPR was designed initially to target the acute problem of street policing, the campaign was expected to last approximately three to five years[145] and given the *Floyd* and *Ligon* victories and substantial legislative achievements—it claimed considerable success within about three years. Still, in part buoyed by the success of the stop-and-frisk campaign, CPR is still playing a central role in the policing accountability movement twelve years later.

C. Building Movement Power: Mobilizing Community to Put the NYPD on Trial

> Law in the hands of community and of organizers is different. It's electric.[146]

Lessons from *Daniels* were prominently on the minds of CPR as it considered whether and how to leverage *Floyd* for broader organizing and public educational purposes. According to Kang, the "intent behind some of the *Floyd* [work] was to repair what didn't happen in *Daniels*." To Kang, "unlike *Daniels*, *Floyd* was just one part of a broader strategy," where the "litigation is something that can be a movement tool, but litigation . . . itself is not going to change conditions of most people most of the time."[147] And that collective effort—through organizing,

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142 *Id.* at 6.

143 *See* Kang Interview, *supra* note 108.

144 *See* Warren Interview, *supra* note 122.

145 *See* Barsoum, *supra* note 109, at 23.

146 CCR Floyd Conference, *supra* note 108, at 2:43:03–09 (Nadia Ben Youseff speaking).

147 Kang Interview, *supra* note 108. The *Daniels* litigation was a "fairly traditional settlement . . . in civil rights litigation. . . . [A lesson of *Daniels* was that] we're going to

strategic communications, and packing-the-court—was designed to project a broader message. That is, it "really [would] be something [so] that community members felt like the NYPD was on trial."[148]

This Section describes how the *Floyd* litigation was leveraged to build the power of the growing and increasingly organized police accountability movement in a manner that recognized the critiques and downsides of traditional impact litigation.

1. Clients and Claims

As described in Part I, a central critique of traditional impact lawyering is the tendency of practitioners to put forward a model plaintiff, preferencing a "politics of respectability" over those who are most marginalized.[149] This dynamic is pronounced in the class action context because a class representative can be seen as a "token" or "decorative figurehead."[150] Indeed, sometimes "counsel finds the client in order to launch its projected class action, not the reverse."[151] An alternative approach pursued by CCR prioritizes working with individuals most directly impacted by a particular harm.[152] This approach advances a principle of lawyer accountability that respects and promotes the expertise of the most impacted persons who know better than most the manifestations of harm and who are entitled to publicly narrate their stories. As Nadia Ben Youssef, the current Advocacy Director of CCR, reflected, it's "not about the perfect plaintiff. It's about the true plaintiff. And the one who also can be part of this movement that we're building."[153]

Two of the plaintiffs in the original January 2008 *Floyd* complaint were Black men active in the police accountability movement. The lead plaintiff Dasaw (formerly known as David) Floyd had been an active

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have to prove the Constitutional violation first . . . but then what do we want." CCR Floyd Conference, *supra* note 108, at 2:39:50–41:22 (Darius Charney speaking).

148 *See* Kang Interview, *supra* note 108.

149 *See supra* note 49 and accompanying text.

150 *See* Lobel, *Participatory Litigation*, *supra* note 21, at 114; *see also* Jean W. Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 Hastings L.J. 165, 181–82 (1990) (outlining the outsized role played by the class lawyer vis-à-vis the class representative).

151 John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 406 (2000).

152 *See* Lobel, *Participatory Litigation*, *supra* note 21, at 114–15 (explaining CCR and movement criteria for collectively identifying class representatives in challenge to indeterminate solitary confinement, which rejected representatives "who would draw the most sympathetic response from a judge" in favor of leaders of a hunger strike, regardless of crime and who could represent ethnic and racial groups using their campaign against solitary confinement to build racial harmony).

153 CCR Floyd Conference, *supra* note 108, at 2:32:15–28 (Nadia Ben Youseff speaking).

member of Malcolm X Grassroots Movement (MXGM) and, before that, COPWATCH, which organized know-your-rights trainings and the videotaping of police activity. Indeed, the City's cross-examination of Floyd attacked him for his long-term "activism" against the NYPD.[154] Another plaintiff, Lalit Clark, was a union activist and member of MXGM. The two other plaintiffs, Deon Dennis and David Ourlicht, were not comparable activists, but were committed to structural change.[155] Indeed, Ourlicht's participation in *Floyd* later led him to attend law school and become a public defender.

The plaintiff positioning in *Floyd* bore fruit. As described below, the plaintiffs' testimony at trial surfaced dramatic accounts of the fear, humiliation, and lawlessness they experienced at the hands of the NYPD. And their position as movement leaders made credible their demands for a trial outcome that would mandate community respect and engagement.[156]

The structure of the *Floyd* litigation and the relevant claims were in some respects conventional. It proceeded as a class action, with the obvious advantages of broader discovery and broader forms of relief.[157] It sought to hold the City liable under a variety of *Monell* theories, which made relevant the widespread and persistent nature of constitutional violations as well as the manifold ways—through development of a racial profile, ignoring prior admonitions of wrongdoing, failure to train and supervise—the City was "deliberately indifferent" to the constitutional violations afflicted on New Yorkers.[158] Despite the challenges of demonstrating the required element of "intentional discrimination," an equal protection claim was critical to the movement because the plaintiffs were experiencing stop and frisk as a form of racialized occupation.[159] The equal protection claim aided in organizing around the experiences of racism and vindicated community experiences when

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154 *See* Trial Transcript, *supra* note 1, at 186–95.

155 Virtual Interview with Darius Charney, Dir., N.Y.C. Civilian Complaint Rev. Bd. (June 12, 2023) [hereinafter Charney Interview].

156 *See infra* notes 181–82 and accompanying text.

157 *See* Patel, *Jumping Hurdles*, *supra* note 110, at 2296.

158 *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 563–65, 589–90 (S.D.N.Y. 2013) (No. 08 Civ. 1034).

159 *Id.* at 558; *see also* Ctr. for Const. Rts., *Stop and Frisk: The Human Impact* (Jan. 15, 2009), https://ccrjustice.org/stop-and-frisk-human-impact [https://perma.cc/7JRK-GT8H] (outlining the racialized impact of stop and frisk). According to Darius Charney, *Floyd* lawyers were told "why are you bringing a race claim, you're never going to win it." Charney noted that there was no other way—"that's what this case *is* about." CCR Floyd Conference, *supra* note 108, at 2:27:10–17. By contrast, *Ligon v. City of New York* did not include an intentional discrimination claim under the Fourteenth Amendment. *See* 910 F. Supp. 2d 517, 519 (S.D.N.Y. 2012).

community members prevailed. It created judicially ratified connection between the NYPD and racialized violence in their communities.

2. *Sharing Data and Evidence to Support Movement Organizing*

The termination of the *Daniels* settlement in December 2007 jeopardized the settlement's contribution to the police accountability movement: the sharing of stop and frisk (UF-250) data. Nevertheless, recognizing the importance of stop and frisk data to transparency, public education, and advocacy, plaintiffs moved to require continued production of UF-250 data, and to oppose the City's demand for a protective (i.e., confidentiality) order.[160] The Court sided with the plaintiffs and ordered that disclosure in the fall of 2008, which became the cornerstone of the campaign to challenge stop and frisk.[161]

The stop and frisk data disclosed pursuant to the *Daniels* settlement, as reported in Jeffrey Fagan's 2010 analysis,[162] continued to demonstrate astronomical growth in the number of stops and frisks even since the *Daniels* settlement;[163] substantial racial disparities in persons who were stopped;[164] and low "hit rates" produced by stops—that is, arrests or weapons recovery resulting from stops. The last point fed CPR's strategic goal of undermining the NYPD's narrative that the stop and frisk policy was necessary to advance public safety.[165]

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160 *See* Floyd v. City of New York, No. 08 Civ. 1034, 2008 WL 4179210, at *1 (S.D.N.Y. 2008).

161 *Id.* at *5.

162 *See* Expert Report of Jeffrey Fagan, Ph.D. at 2, Floyd v. City of New York (S.D.N.Y. 2010) (No. 08 Civ. 1034), https://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf [https://perma.cc/F3NW-HJSZ]. *See generally Stop-and-Frisk Data*, N.Y. C.L. Union (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data [https://perma.cc/GH8A-ADPJ] (charting the NYPD's use of stop-and-frisks from 2003 to 2023).

163 Between January 2004 and June 2012, the NYPD conducted 4.4 million *Terry* stops, rising from 314,000 in 2004 to a peak of 686,000 in 2011. Floyd v. City of New York, 959 F. Supp. 2d 540, 558 (S.D.N.Y. 2013) (No. 08 Civ. 1034). Notably, only after Plaintiffs won summary judgment and class certification—and perforce when the case was headed to a public trial—did the number of stop and frisks drop. *Id.*

164 83% of stops were of Black or Latino individuals who represented 52% of the population while 10% of stops were of white residents, even though they represented 33% of the City population. *Id.* at 559.

165 Only 6% of stops resulted in an arrest, and another 6% produced civil summonses. Indeed, for a program touted as necessary to take guns off the street, it was wildly untargeted: guns were discovered in only 0.1% of frisks. *Id.* at 558–59, 573–74. That was a hit rate lower than that studied in Indianapolis, which undertook randomized checkpoint searches in search of criminal activity. *See* Indianapolis v. Edmond, 531 U.S. 32, 35 (2000) (referencing randomized checkpoint study that revealed 9% hit rate).

The data and analysis became critical to the movement's organizing efforts.[166] Anecdotal evidence can be potent, but the saliency and clarity of numbers allowed organizers to communicate concretely the systemic nature of police practices that were affecting Black and Brown communities throughout the City. And, as Kang observed, the data held greater credibility both within the community and with elected officials because it stemmed from a federal court process.[167] Even the NYPD recognized the force that the data carried for purposes of organizing and narrative shifting.[168]

3. Strategic Communications

In a media market as hungry as New York City's, it would have been malpractice not to interject the *Floyd* litigation aggressively into public discussions about the legitimacy of the City's escalating stop and frisk practices.[169] In one example, CCR placed a 15-second jumbotron advertisement in Times Square to showcase the escalating and discriminatory stop and frisk numbers in early 2011.[170] *Floyd*'s legal team coordinated their strategic communications efforts with CPR to try to counter the NYPD's potent Communications arm, which consistently promoted narratives about stop and frisk as a creative policing strategy keeping New Yorkers safer than residents of other metropolitan areas[171] that was welcomed by community members in heavily policed

166 Head Interview, *supra* note 126 ("So the [grassroot] groups would ask me to run certain queries for them, like, say about precincts. . . . And that would be helpful to what organizers were doing in presentations and talking points."). CCR staff offered trainings with organizers and public defenders to show how stop and frisk was playing out in locations of the City. *Id.*

167 According to Kang: "It was super, super helpful to be able to get data from CCR and be able to point to it as something that is . . . part of the court mandated process. . . . [T]hat gives an issue more legitimacy." Kang Interview, *supra* note 108.

168 According to NYPD Chief Spokesperson, Paul J. Browne: "They redefined [stop and frisk practices] successfully . . . [b]y using data we're required to produce, the advocates managed to reframe the debate over the stop-and-frisk policy as a numbers-oriented calculation of how often the police interactions resulted in arrests or summonses." J. David Goodman, *As Critics United, Stalled Battle Against Frisking Tactic Took Off*, N.Y. Times (Aug. 14, 2013), https://www.nytimes.com/2013/08/14/nyregion/in-a-crescendo-the-citys-crime-policy-changed.html [https://perma.cc/ECM2-NNTV].

169 *See* Jennifer K. Robbennolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 Law & Hum. Behav. 5, 5 (2003) (suggesting that "news reporting of civil litigation . . . can influence perceptions and outcomes of civil litigation in various ways").

170 *See Stop-and-Frisks of New Yorkers in 2010 Hit All-Time High at 600,601; 87 Percent of Those Stopped Black and Latino*, Ctr. for Const. Rts. (Feb. 24, 2011), https://ccrjustice.org/home/press-center/press-releases/stop-and-frisks-new-yorkers-2010-hit-all-time-high-600601-87 [https://perma.cc/23C8-T9PP].

171 *See, e.g.*, Dylan Matthews, *Ray Kelly Says Stop & Frisk Saves Lives. There's No Good Evidence for That*, Wash. Post (Aug. 20, 2013), https://www.washingtonpost.com/news/

neighborhoods.[172] During trial and after, Police Commissioner Ray Kelly and Mayor Bloomberg were the most aggressive defenders of the practice.[173]

Fagan's findings, publicized by the plaintiffs in *Floyd*,[174] became central to challenging the City's policing narratives, especially as it caused investigative reporters to dig into the numbers and question the value of the program.[175] A key witness for the plaintiffs, Nicholas Peart, a member of a CPR organization, Brotherhood Sister Sol, published an op-ed in the New York Times[176] that Mayor de Blasio later cited when he announced he was dropping the City's appeal of Judge Scheindlin's decision.[177]

In the weeks leading up to the trial the *Floyd* legal team and CPR intentionally coordinated their media outreach. Press releases and press conferences featured the plaintiffs and a member of the CPR coalition "to really place *Floyd* within this larger ecosystem of the struggle

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wonk/wp/2013/08/20/ray-kelly-says-stop-frisk-saves-lives-theres-no-good-evidence-for-that [https://perma.cc/8WML-7ZG2] (quoting NYPD Commissioner Kelly, that "what we're doing—and what we're trying to do—is save lives").

172 *See, e.g.*, Jonathan Topaz, *Kelly Defends Stop-and-frisk*, Politico (Aug. 18, 2013), https://www.politico.com/blogs/politico-now/2013/08/kelly-defends-stop-and-frisk-170736 [https://perma.cc/7747-ASXB] ("Citing that the vast majority of violent crime victims in New York City are minorities, the [NYPD] commissioner made the case that the program benefits the black and Hispanic community.").

173 Police Commissioner Kelly stated: "African Americans are being under stopped in relation to the percentage of people being described as being the perpetrators of violent crime. The stark reality is that a crime happens in communities of color." *NYPD's Controversial Stop-and-Frisk Policy: Racial Profiling or 'Proactive Policing'?*, ABC News (May 1, 2013), https://abcnews.go.com/US/nypds-controversial-stop-frisk-policy-racial-profiling-proactive/story?id=19084229 [https://perma.cc/D4EA-TEY7]; *see also* Bobby Allyn, *Throw Them Against The Wall And Frisk Them: Bloomberg's 2015 Race Talk Stirs Debate*, NPR (Feb. 11, 2020), https://www.npr.org/2020/02/11/804795405/throw-them-against-the-wall-and-frisk-them-bloomberg-s-2015-race-talk-stirs-deba [https://perma.cc/MX2V-W965] (Bloomberg defending NYPD's racial profile of "male minorities 15 to 25," as one "you can just take . . . and Xerox it and pass it out to all the cops").

174 *See* Press Release, Ctr. for Const. Rts., Report: NYPD Stop and Frisk Program Based on Race Not Crime (Oct. 26, 2010), https://ccrjustice.org/home/press-center/press-releases/report-nypd-stop-and-frisk-program-based-race-not-crime [https://perma.cc/DN4Q-PKGP].

175 *See, e.g.*, Ray Rivera, *Pockets of City See Higher Use of Force During Police Stops*, N.Y. Times (Aug. 15, 2012), https://www.nytimes.com/2012/08/16/nyregion/in-police-stop-data-pockets-where-force-is-used-more-often.html [https://perma.cc/2G6W-CBRC].

176 *See* Nicholas K. Peart, *Why is the N.Y.P.D. After Me?*, N.Y. Times (Dec. 17, 2011), https://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html [https://perma.cc/9RSK-BD4R] ("For young people in my neighborhood, getting stopped and frisked is a rite of passage. . . . And we all feel the same way—degraded, harassed, violated and criminalized because we're black or Latino.").

177 *See Transcript: Mayor Bill de Blasio Announces Agreement in Landmark Stop-And-Frisk Case*, N.Y.C. Gov't (Jan. 30, 2014), https://www.nyc.gov/office-of-the-mayor/news/727-14/transcript-mayor-bill-de-blasio-agreement-landmark-stop-and-frisk-case [https://perma.cc/W2FE-S728].

against discriminatory policing in New York."[178] Specifically, CPR sought to showcase stop and frisk as a national "human rights crisis" even when no one was brutalized or killed, and intentionally prioritized individualized stories of the dignitary harm on people.[179] And, as we shall see, CPR's "pack the court" strategy included near-daily lunchtime press conferences by the courthouse by various constituencies harmed by abusive policing beyond the particular harms of stop and frisk.

4. Co-Creating a Community-Based Remedy

As the *Floyd* trial approached, the legal team sought to identify ways in which a proposal for remedy could solicit meaningful input from impacted community members.[180] In addition to producing a remedies expert who would testify about the importance of community engagement to the legitimacy of police reform processes[181] and soliciting witness testimony about the importance of community input,[182] the *Floyd* team researched the emerging practice of consent decrees that included community engagement components. The team ultimately recommended consideration of a remarkable community collaborative process used in Cincinnati following widespread civil unrest in the 1990s, in response to numerous incidents of police shootings, racial profiling, and other abusive treatment of Black residents.[183] Instead of ultimately litigating the case, the parties and other stakeholders in Cincinnati chose to resolve the long-standing controversy through a court-ordered collaborative process to develop community input and creative solutions. The court ordered that the process should "include an opportunity to receive the viewpoints of all persons in the Cincinnati community regarding their goals for police-community relations."[184]

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[178] Charney Interview, *supra* note 155; *see also* Barsoum, *supra* note 109, at 31–35 (describing strategic communications as a central organizing strategy of the CPR campaign).

[179] Kang Interview, *supra* note 108. According to Andrea Richie of CPR member Streetwise and Safe, "[t]he fact that directly-impacted folks were leading the campaign and serving as the primary spokespeople absolutely changed the game. . . . It wasn't a debate anymore between civil rights and public safety advocates; it was a story of the human impact of policing practices in New York City." Barsoum, *supra* note 109, at 31.

[180] *See* Charney Interview, *supra* note 155.

[181] *See* Declaration of Dr. Samuel Walker in Support of Plaintiffs-Appellees' Opposition to Defendant's-Appellant's Motion for Stay at 1, Floyd v. City of New York, No. 13-3088 (2d Cir. Oct. 7, 2013) (plaintiffs-appellees' Exhibit CC, describing declarant's expert testimony on the "development and implementation of reform measures").

[182] *See infra* note 208 and accompanying text.

[183] *See* Charney Interview, *supra* note 155. On the Cincinnati Collaborative Agreement, see generally *The Cincinnati Collaborative Agreement*, ACLU OF OHIO (Feb. 5, 2013), https://www.acluohio.org/en/news/cincinnati-collaborative-agreement [https://perma.cc/XHZ8-NDB9].

[184] *See* Tyehimba v. City of Cincinnati, No. C-1-99-317, 2001 WL 1842470, at *1 (S.D. Ohio May 3, 2001).

In addition to various smaller community meetings to solicit input, in January 2013, three months before the trial's start, the Center for Constitutional Rights (CCR) organized a large convening to discuss possible remedies. CCR invited key Cincinnati stakeholders involved in the 1990 process including activists, lawyers, and police leadership. CCR also brought together all the legal teams challenging stop and frisk, including organizations in the *Davis* and *Ligon* litigation, and many constitutive grassroots members of CPR. Convening participants reviewed the dynamics and expectations for the upcoming *Floyd* trial and heard from Cincinnati stakeholders about how their community collaborative process was structured as well as perceived strengths and limitations.[185] Critically, this discussion expressly highlighted the limitations of the *Daniels* settlement, and proposed that a community engagement process would make any changes emerging from the *Floyd* litigation stronger and more durable.[186] Participants vividly recollect of the moment when CPR Director Joo-Hyun Kang stood next to an easel, Sharpie in hand, listed proposed remedies, and got a vote of consensus from the grassroots organizations that the legal team should demand a community collaborative process to ensure their participation in any reform process.[187]

Accordingly, in a pre-trial filing, the *Floyd* plaintiffs broadly requested, in addition to injunctive demands and an independent monitor, a joint remedial process for "obtaining community input into the development of additional reforms to the NYPD's stop-and-frisk policies and practices to bring them in line with constitutional standards."[188] Critically, CPR would enter the courtroom itself by filing an amicus brief to explain the importance of a community-engagement process:

> The full scope of the NYPD's discriminatory SQF [stop-question-frisk] practices cannot be uncovered or remedied without the involvement of the individuals and communities most directly affected by these practices. These communities are best positioned to provide the Court

[185] According to the Day 1 Agenda, meeting objectives focused on learning about Cincinnati's community-collaborative agreement to help inform proposed remedies for the *Floyd* trial, and in particular what community input process would be necessary to ensure long-term accountability arising from victory in the *Floyd* litigation. Cincinnati-NYC Police Reform Strategy Convening, at 1 (Jan. 14, 2013) (on file with author).

[186] Virtual Interview with Nahal Zamani, Dir. State Campaigns, ACLU (July 17, 2023) [hereinafter Zamani Interview].

[187] According to Darius Charney, "Our goal was, Does this process for developing the forum sound like a good one to folks? . . . we can actually have a seat at the table with the decision makers? What we say will potentially go into an actual court injunction? . . . a lot of people . . . never thought . . . that was even possible." Charney Interview, *supra* note 155.

[188] Memorandum of Law in Support of Plaintiffs' Requested Injunctive Relief at 2–3, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08 Civ. 1034).

> with critical information with respect to the impacts and consequences of these practices, and to identify which reforms will most likely produce meaningful change to their daily interactions with NYPD officers while simultaneously ensuring and increasing public safety.[189]

As evidenced by the Court's ultimate ruling in the case crediting CPR for its status as a critical stakeholder, CPR's interjection of community voices and expertise in the litigation influenced the Court's consideration of the vastness of the harm of stop and frisk and caused the court to order this very community-focused form of relief.

5. *Leveraging Litigation for Legislative Reform: The Parallel Passage of the Community Safety Act*

As part of CPR's policy agenda and coalition building strategy, it pursued comprehensive legislative reforms with the New York City Council to policing street encounters, resulting in what would ultimately be called the Community Safety Act (CSA).[190] By seeking an independent Office of Inspector General[191] and expanding classifications of persons protected from police profiling[192] beyond the Black and Latino class represented in *Floyd* (i.e. including LGBTQ, gender, housing status), CPR consciously incorporated lessons from the ineffectual *Daniels* remedy to seek policing reforms beyond what could be achieved in the litigation. The widely publicized *Floyd* proceedings—and *Floyd*'s status as a complex federal litigation that was going to trial—was critical to underscoring the timeliness and credibility of CPR's CSA advocacy campaign and leveraging the community's power. CPR brought findings from the *Floyd* trial regarding police abuses to City Council members—which carried extra weight because it came from a federal court—and organized for elected officials to attend trial and witness for themselves the severity of policing abuses playing out before community members and the public at large.[193]

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189 Brief for Communities United for Police Reform as Amicus Curiae at 2–3, *Floyd*, 959 F. Supp. 2d 540 (No. 08 Civ. 1034).

190 *The Community Safety Act*, Communities United for Police Reform, https://www.changethenypd.org/community-safety-act [https://perma.cc/F4A6-K5GV].

191 *See* NYPD Oversight Act, Int. 1079-2013 (N.Y.C. City Council 2013) (approved June 26, 2013; veto overridden Aug. 22, 2013).

192 *See id.*; End Discriminatory Profiling Act, Int. 1080-2013 (N.Y.C. City Council 2013) (approved June 26, 2013; veto overridden Aug. 22, 2013); *see also* J. David Goodman, *Council Reverses Bloomberg Veto of Policing Bills*, N.Y. Times (Aug. 22, 2013) [hereinafter Goodman, *Council Reverses Bloomberg*], https://www.nytimes.com/2013/08/23/nyregion/council-overrules-bloomberg-on-police-monitor-and-profiling-suits.html [https://perma.cc/7VJH-43EG].

193 Kang Interview, *supra* note 108.

Not only did the CSA pass, reflecting the enormous community engagement that had arisen around discriminatory policing, the City Council ultimately overrode Mayor Bloomberg's veto, which he tried to exercise just after the *Floyd* trial had concluded, mere weeks before the court's judgment that the NYPD had engaged in a policy of discriminatory policing.[194]

IV
Bringing the Movement into the Courtroom

Impact litigation in pursuit of community recognition, rather than legal rights vindication, is most potent when leveraged to shift power, resources, and narrative force away from institutions perpetuating injustice. The choice to integrate movement stakeholders and their expertise into the *Floyd* trial proceedings enhanced the durability of the traditional legal remedies the case secured. More fundamentally, the strategy emboldened and empowered the broader police accountability movement and changed the dominant narrative surrounding stop and frisk.

A. The Power of Testifying

> You think I'm some young punk kid that's not going to stand up for myself [but] I am, and I will, and I'm going to fight this.[195]

"I want my day in court." This phrase can be shorthand for transcendent social values. It contains a demand for justice—a declaration and judgment—against a wrongdoer, and it carries resonance when a trial pits the weak against the strong, particularly as it connotes that, at long last, there will be a fair and equalized contest. It also captures the basic human quest to tell one's story in a forum intended to adjudicate truth, including speaking truth against the powerful. In *Floyd*, the testimony of victims of stop and frisk, themselves connected to the broader police accountability movement, was transformative. It represented a communal project for systemic change, as opposed to a one-off quest for individual justice akin to a personal injury case.[196]

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194 *See* Goodman, *Council Reverses Bloomberg*, *supra* note 192.

195 Trial Transcript, *supra* note 1, at 4191 (trial testimony of David Ourlicht on Apr. 19, 2013, recounting a conversation with a police officer during one of his three stops).

196 The Plaintiffs decided, close to trial, to forego their individual damages claims and focus on injunctive relief. This had the significant corollary effect to transforming the case from a jury trial, with a singular and potentially opaque judgment, to a bench trial where the court's factual findings would offer a clear record documenting NYPD's systemic constitutional violations. *See infra* Section IV.C.

That reality, combined with organizing happening both inside and outside the courtroom, fostered solidarity and strength.[197] As David Ourlicht put it, referencing his fellow plaintiffs, "we are brothers of the same struggle."[198]

At the same time, the *Floyd* trial was fraught because it was, in part, political. The contest playing out in the courtroom in 2013, mirrored the broader, heated contest about policing and race unfolding across the front pages of newspapers, in the city's streets, and in the impending mayoral election.[199] The trial was heated and breakneck tense. Sometimes it got ugly, as when the City's lawyers used racialized tropes to undermine plaintiffs and witnesses, replicating part of the NYPD's own ideology inside the federal courthouse.[200]

The trial was not just an opportunity for political lawyers to speak for clients in a forum for contestation.[201] It involved real, courageous people who sought to document, under oath, the daily humiliations and dehumanization that police exacted on young people of color.[202] The collaboration between lawyers, seeking to prepare client testimony through sensitivity, trust, and mutual commitment, was powerful.[203] The

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197 White, *supra* note 54, at 552 ("This sense of power happened as the participants came together to speak publicly about a shared experience of injury in a language that they considered their own.").

198 Virtual Interview with David Ourlicht (Aug. 22, 2023) [hereinafter Ourlicht Interview].

199 A prominent NYC commentator described the 2013 mayoral campaign, happening in the midst of the *Floyd* trial, as a "referendum on the legacy and tactics of longtime police commissioner Ray Kelly, especially his controversial use of the crimefighting strategy known as 'stop-and-frisk.'" Adam Howard, *Will 'Stop-and-frisk' be a Factor in the NYC Mayor's Race?*, theGrio.com (May 29, 2013), https://thegrio.com/2013/05/29/will-stop-and-frisk-play-a-major-role-in-the-nyc-mayors-race [https://perma.cc/9M37-G55M]. This was partly by design, as an express objective of the CPR campaign was to make stop-and-frisk a prominent mayoral campaign issue. *See* Barsoum, *supra* note 109, at 36.

200 For example, the City's cross examination of witness Devin Almonar, who at age nineteen, testified to an abusive stop and arrest that occurred when he was thirteen, tried to solicit that, even at age thirteen, Devin was tall and did not wear the glasses he donned in court. Trial Transcript, *supra* note 1, at 143–44 (trial testimony of Devin Almonar on Mar. 18, 2013). This strategy traded on tropes about Black boys seeming bigger and more menacing than their actual age and, therefore, purporting to justify aggressive police action. *See The Adultification of Black Children*, Ctr. for Policing Equity (Jan. 19, 2023), https://policingequity.org/resources/blog/the-adultification-of-black-children [https://perma.cc/DN7L-E5JD]. City lawyers also pressed David Ourlicht about being in three different gangs, even at the same time, which was irrelevant to the validity of the disorderly conduct stops he was contesting. Trial Transcript, *supra* note 1, at 4213–21 (trial testimony of David Ourlicht on Mar. 18, 2013).

201 *See supra* notes 63–71 and accompanying text.

202 *See* Simonson, *supra* note 61, at 846 (observing that "[t]he governance of policing is therefore a central place to interrogate power relationships and look for guarantees that peaceful resistance to state practices is possible").

203 Plaintiff David Ourlicht described how his lawyers helped make him "fe[el] safe up there" because he was talking about "what had happened." CCR Floyd Conference, *supra* note 108, at 2:56:09–23.

testimony demanded recognition of harmed plaintiffs as individuals and also as progenitors of the broader police accountability movement.[204] The courtroom also served as a space to narrate the pain and degradation that communities endured, despite elites' claims of law-enforcement necessity.[205] Witnesses drew the connection between Richie Perez's *Daniels* "tip of the iceberg" strategy to limit police street encounters in order to decrease police killings, including the Diallo killing that triggered the *Daniels* suit.[206] Indeed, the trial offered a forum for the movement to claim ownership of, and safety in, New York's streets.[207] It offered a venue to demand a democratic transformation, giving communities meaningful input into police governance. For example, questioning of David Floyd revealed:

> Q: Based on your experience with the New York police department and stop and frisk, what kind of changes do you want to see implemented within the police department following this lawsuit?
>
> THE COURT: Community input. Do you want to see more participation by the community?
>
> THE WITNESS: Yeah. I think it's necessary. . . And accountability.[208]

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204 *See supra* notes 153–55 and accompanying text.

205 For example, Nicholas Peart, who was part of Brotherhood Sister Sol and the guardian of his young siblings, testified to the terror and humiliation of being stopped repeatedly—including outside of his home. Trial Transcript, *supra* note 1, at 312 (trial testimony of Nicholas Peart on Mar. 19, 2013, stating, "I felt criminalized. I felt degraded."). After a stop and frisk after a happy visit with his grandmother, police officers asked Nicholas if he was okay—on which he reflected in court: "That's not appropriate to ask someone, after they have experienced something like that, are they OK. Of course I'm not going to be OK with that. I was shocked. I had been in a good mood. I had just seen my grandmother and she gave me money, and I was on my way home." *Id.* at 335. Rummaging through his pockets and wallet, the NYPD robbed him of a feeling of peace. They controlled his basic happiness.

206 According to David Floyd, stops made him exceedingly anxious because: "They are carrying guns. . . . And if they're not being responsible, then, you know, to me it's—it just makes for a dangerous situation. . . . [W]hatever it looks like, an irresponsible person with a gun is dangerous." *Id.* at 182 (trial testimony of David Floyd on Mar. 18, 2013).

207 For example, David Floyd was stopped on his block and a second time in front of his home, which led him to protest: "I felt like I was being told that I should not leave my home. . . . whatever it was that I need to *stay in my place*, and my place is in my home." *Id.* (emphasis added). Similarly, after being stopped (and sexually groped) while celebrating his eighteenth birthday with cousins, Nicholas Peart protested: "I was embarrassed, and I felt like I didn't belong on 96th Street and Broadway. . . . I felt criminalized for being in that neighborhood. What am I doing in that neighborhood?" *Id.* at 322, 325 (trial testimony of Nicholas Peart on Mar. 19, 2013); *see also id.* at 4185–86 (trial testimony of David Floyd on Apr. 19, 2013, testifying that "I had just left school and . . . now my hands are above my head, I'm getting pat down around the corner from where I live. It was upsetting . . . I was scared").

208 *Id.* at 183 (trial testimony of David Floyd on Mar. 18, 2013).

The courtroom also served as a dramatic forum for contestation, where witnesses exposed the NYPD, as opposed to the people it targeted, as (constitutional) rule breakers. For example, in an electric moment, witness Leroy Downs, who had suffered a humiliating pretextual stop, took the stand. As the entire courtroom turned to watch, Leroy pointed directly at the two officers who had stopped him, identifying them without doubt.[209] Though the officers denied any involvement, Judge Scheindlin credited Downs's testimony over theirs.[210]

The contestation of the trial also helped vindicate the community's dignitary needs.[211] Throughout his testimony, David Ourlicht underscored that participating in *Floyd* meant more to him than finding legal redress for a particular stop. He sought to hold the City accountable for a regime of racial harassment and testified:

> I have had a lot of incidents like this growing up, and I felt like it was time for me to stand up for myself and for others like me and do something. It's one thing to be victimized and just complain about it, but I think I needed to step up to the plate.[212]

Indeed, Ourlicht had stood up for himself during a January 2008 stop. After receiving an unjustified disorderly conduct ticket, he wrote down Officer Moran's name and badge number and told him: "You think I'm some young punk kid that's not going to stand up for myself. [But] I am. And I will. And I'm going to fight this." According to Ourlicht, Moran replied, "Yeah, yeah, I love it when you guys try to fight. You're not going to win." Six years later, the court found that Officer Moran stopped Ourlicht on that day without justification, violating the Constitution.[213]

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209 *See id.* at 4338 (trial testimony of Leroy Downs on Apr. 22, 2013).

210 *Id.* at 4167–68 (transcript of proceedings on Apr. 19, 2013).

211 According to *Floyd* lead counsel Darius Charney: "There's a lot to be said . . . for allowing young Black men who live in disadvantaged communities in the city to go into a federal courtroom and get to tell their stories to a federal judge. . . . So many of our clients [thanked us for] the opportunity to be able to tell [their] story. Like that exercise in and of itself was incredibly powerful." Virtual Interview with Darius Charney, Director, Racial Profiling and Biased Policing Investigations Unit, N.Y.C. Civilian Complaint Rev. Bd. (June 12, 2023).

212 Trial Transcript, *supra* note 1, at 4211 (trial testimony of David Ourlicht on Apr. 19, 2013).

213 *Floyd*, 959 F. Supp. 2d. at 642.

B. The Power of Watching

> We wanted this to really be something [where] community members felt like the NYPD was on trial.[214]

CPR and police accountability leaders in New York recognized that a highly publicized trial presented a rare opportunity to organize community members around a broader police accountability agenda and shift public perceptions—beyond the limited questions at issue in the *Floyd* trial. The *Floyd* trial was limited in scope to unconstitutional street encounters and could not address root causes, such as racialized segregation, political disenfranchisement, or related NYPD abuses like Muslim surveillance and persistent harassment of queer and trans New Yorkers. Despite these limitations, putting the NYPD publicly on trial in the media capital of the world presented a strategic opportunity.

Broadly speaking, the trial provided a forum for public education, community organizing, and solidarity as New Yorkers bore witness to the fight for legal accountability. On most days, CPR packed the courtroom with community members and activists, necessitating large overflow rooms. CPR ensured that key constituencies harmed by the NYPD would pack the court together on the same day. This had several transformational effects. For one, it expanded the police accountability lens beyond stop and frisk to the broader harms inflicted by NYPD on various groups. On some days, Muslim residents subjected to surveillance and harassment filled the audience.[215] Other days brought together public housing residents; Bronxites exhausted by over-policing and overbroad gang designations;[216] LGBTQI+ youth subject to sexual harassment and violence;[217] family members of those killed

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214 Kang Interview, *supra* note 108.

215 On March 20, 2013 (day three of the trial), in attendance were members of the Arab American Association of New York and of Jews for Racial & Economic Justice—which organized an event on March 27, Seder in the Streets, focusing on the trial and broader social justice issues. Comtys. United for Police Reform, Trial Attendance Schedule (2013) (on file with the author).

216 On March 24, 2013 (day six), in attendance to represent Bronx constituencies and houseless communities were Bronx Defenders, Picture the Homeless, and Morris Heights Project. On April 10, 2013 (day seventeen) representing public housing constituencies were LDF + FUREE, Good Old Lower East Side (GOLES), (MOM), CVH, and Red Hook Initiative. *Id.*

217 On March 28, 2013 (day seven), in attendance were members of FIERCE NYC (a membership-based organization building the leadership and power of LGBTQ youth of color in New York), Streetwise and Safe (representing LGBTQ youth of color standing up to police abuse and criminalization) the Make the Road NY LGBTQ Program, and the NYC Anti-Violence Project. *Id.*

by police;[218] and core demographic constituencies impacted by stop and frisk itself.[219] Typically, these groups held press conferences outside of the courtroom during the lunch break, where they could speak far less circumspectly than the lawyers who operated inside. Their act of witnessing and speaking out served as an embodied reminder of the myriad ways—beyond stop and frisk—that NYPD exercised coercive control over vulnerable citizens.[220]

The pack-the-court strategy also fostered community and solidarity among the broad range of constituencies who gathered to watch. Collectively putting the NYPD on trial had real benefits for witnessing, learning, and long-term organizing.[221] According to Joo-Hyun Kang, CPR chiefly sought to avoid a reality in which "a historic trial happen[ed] and nobody knew about it." She explained that "it wasn't going to be enough to have, like, a story in the *The Times* and *The Daily News*. We wanted this to really be something that community members felt like the NYPD was on trial."[222] This was no small feat as courtrooms are frequently intimidating venues for disenfranchised people, who often experience them as alienating sites of degradation and deprivation of benefits, family, and freedom.[223] Here, community members' presence and communal gaze had a profound and opposite effect: The courtroom became a locus of community empowerment.

As community members watched the lawyers, witnesses, and NYPD officers in the courtroom, they entered a theater for political performance. Before them was a dramatic rendering about power and pain, in which Black and Latino communities had largely experienced

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218 On April 2, 2013 (day eleven), in attendance to highlight police killings were the Malcolm X Grassroots Movement, Justice Committee, and the People's Justice Committee for Community Control and Police Accountability. *Id*.

219 For example, April 1, 2013 (day ten) denominated "Youth Day." In attendance were Latino Justice/PRLDEF + CAAAV Organizing Asian Communities, Youth Ministries for Peace and Justice, Make the Road NY, + *El Puente Bushwick* Leadership Center, and Brotherhood Sister Sol. On April 4, in attendance was the Black Women's Blueprint and on April 10, the Women's Auxiliary. *Id.*

220 CPR also encouraged elected officials to attend court proceedings. The trial, and the many organizing events planned around it, helped build political momentum in the city council for CPR's successful campaign to pass the Community Safety Act because organizers "felt like some council members took them more seriously because there was the trial happening . . . the NYPD [was] actually on trial about this." Kang Interview, *supra* note 108.

221 Zamani Interview, *supra* note 186.

222 Kang Interview, *supra* note 108. Kang further observed: "We saw this as a once in a generation chance to get something on record in a court that was . . . a daily interaction that young people in the city were having with the police," and that CPR "didn't want the NYPD to be able to get away with lying, with nobody there to see that." *Id.*

223 White, *supra* note 54, at 542 ("[T]he very idea of a courtroom, a judge, or 'papers' (i.e., legal pleadings), evoke[s] feelings of terror for many poor people; they associate the courthouse with jail and eviction more often than justice.").

the primary antagonist as an all-powerful, racist actor who in an instant could humiliate, intimidate, or kill them. In court, however, these spectators watched as skilled advocates barraged officers with questions that exposed lies, legal ignorance, and disregard for complaints about community worry and racism. This was, itself, a revelatory form of accountability.[224] At the same time, spectators *watched* brave young men and women of color speak a representative truth about daily humiliating encounters with the NYPD, battle with NYPD counsel, and otherwise demand a better future. Writing about the theatrical features of trials on behalf of unhoused people, Lucie White explains that watching a trial can "suspend[] the social structure of the spectators' everyday world" and "bring[] the audience into an imaginative community where the social patterns are radically different."[225] From my own perspective, midway through the trial, one could *feel* the power shift in the courtroom from the police on the stand to the audience in the pews.

A final, remarkable feature of the community's participation in the political theater of the NYPD-on-trial was its concrete effect on the judge and what she credited as true. About two weeks into the trial, the highest-ranking uniformed NYPD official, Chief Joseph Esposito, took the stand. Full of rectitude, he testified, among other things, that "we don't get complaints" about racial profiling from anyone, including "housing people" and "community people."[226] Due to CPR's strategic brilliance (or perhaps just cosmic coincidence), that day, the courtroom was packed with public housing residents and other activists from community groups, including Community Voices Heard, Mothers on the Move, and Families United for Racial and Economic Equality. Upon hearing Esposito's claim, the audience reacted with incredulous laughter. Judge Scheindlin could not help but notice. Skeptical herself, she leaned in to ask Esposito, "You've never heard complaints from any community organization?" Esposito then qualified his answer, saying that he had heard from the New York Civil Liberties Union and Al Sharpton's group, but he did not consider them part of the "community."[227]

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224 Lead counsel Charney recounted that "having all these police officers have to come in and answer for what they did, because that almost never happens. . . . I think there was also a lot of satisfaction from the community's perspective of seeing us put these officers under withering cross examination." Charney Interview, *supra* note 149. Charney further discussed the importance of getting the police to "first of all, expose the mistakes they made, expose the profiling, [expose] that they engage in bias behavior." *Id.*

225 White, *supra* note 54, at 562.

226 Trial Transcript, *supra* note 1, at 3025–26.

227 *Id.* at 3025–27.

Judge Scheindlin later concluded that Esposito's testimony on this point was not credible.[228] In effect, the community audience had offered their own testimony in this public trial, and Judge Scheindlin credited community testimony over that sworn to by the highest-ranking NYPD officer.[229]

C. The Power of Evidence

> The City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks.[230]

The old saying that the adversarial process is a search for truth is obviously simplistic. Almost 95% of criminal defendants in state proceedings feel pressure to plead guilty rather than face the enormous power of the state.[231] In the civil rights context, few cases get past an array of legal doctrines increasingly hostile to civil rights litigants.[232] Even trials are wildly imperfect approximations of a truth-seeking tribunal given resource limitations and evidentiary and other procedural requirements that regulate the amount, method, or manner of introducing evidence.

However, in the rare event of a fair contest, a trial can be an enormously powerful forum to produce evidence and "prove" the truth. Indeed, because the *Floyd* plaintiffs only sought equitable relief by the time of the trial, civil procedure required the judge—and not a jury—to adjudicate the facts, which resulted in detailed, written judicial findings of fact—a form of truth-telling. Concrete marshaling of evidence that was tested, credited, and conclusive took the case far beyond the competing op-ed pages of the *Times* and the *Post*. It gave lie to the otherwise untestable claims that the NYPD's Broken Windows or order management policing program was somehow scientifically

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228 Floyd v. City of New York, 959 F. Supp. 2d at 540, 621 (S.D.N.Y. 2013) (No. 08 Civ. 1034).

229 Risa Goluboff captures a similar dynamic in her reflection on the jury selection process of one of the Charlottesville white supremacist defendants, where potential jurors narrated the individual horrors they each experienced on those days, such that "*voir dire* functioned as a cathartic testimonial by the potential jurors [which] seemed in some ways to reimpose community norms, to allow for community healing." Risa Goluboff, *"Charlottesville" as Legal History*, 1 J. Am. Const. Hist. 117 (2023).

230 *Floyd*, 959 F. Supp. 2d at 562.

231 Lucian E. Dervan, *Fourteen Principles and a Path Forward for Plea Bargaining Reform*, Crim. Just. Mag., (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/fourteen-principles-path-forward-plea-bargaining-reform [https://perma.cc/Q4TL-DWX2].

232 *See, e.g.*, Joanna Schwartz, Shielded: How the Police Became Untouchable (2023) (explaining how the legal system protects police at the cost of civil rights litigants).

grounded.[233] The actual, tested evidence demonstrated precisely the opposite: NYPD policing methods have very little do with crime, and very much to do with race.

1. Unlawful Stops

Judge Scheindlin ratified portions of Fagan's report[234] that found at least 200,000 unconstitutional stops over an eight year period.[235] And, the so-called "hit" rate following a stop—detection of crime (6% of stops)[236] or discovery of weapons (0.1% of stops)[237]—was ultimately too vanishingly low to correlate with public safety.[238] Additional evidence undermined NYPD talking points about the need for so many stops: For example, Fagan demonstrated that the percentage use of the "high crime area" checkbox to justify a stop was consistent across neighborhoods ranging from the lowest to the highest actual crime rate.[239] One officer testified that he considered the *entire borough of Queens* to be a high crime area—offering him license to stop any of its three million residents.[240] One officer testified that his understanding of a "furtive movement" that might justify a stop included "changing direction," "walking in a certain way," "looking over their shoulder," being "very fidgety," "getting a little nervous, maybe shaking," and "*stutter[ing]*."[241] As Judge Scheindlin observed, with understatement:

> Unconscious bias could help explain the otherwise puzzling fact that NYPD officers check "Furtive Movements" in 48% of the stops of blacks and 45% of the stops of Hispanics, but only 40% of the stops of whites. *There is no evidence that black people's movements are objectively more furtive than the movements of white people*.[242]

2. Intentional Discrimination

In order to prove an equal protection violation under the Constitution, a party bears a taxing burden to show that the government actor engaged in intentional discrimination—that is, that the challenged action was based at least in part on race, not merely correlated with

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233 *See supra* Section II.A.
234 *See Floyd*, 959 F. Supp. 2d at 559.
235 *Id.*
236 *Id.*
237 *Id.*
238 *Id.* at 560.
239 *Id.* at 581.
240 *Id.* at 632–33.
241 *Id.* at 561.
242 *Id.* at 581 (emphasis added).

it.[243] In public narrative and in court, the City attempted to defend its racially disproportionate stop and frisks, which fell 83% of the time on Black and Latino residents comprising only 53% of the City population. The City and its expert argued that there was in fact a tight correlation between the 83% of general, city-wide "crime suspects" who are Black and Latino, and the 83% of pedestrian stops at issue of Black and Latino persons: a premise that assumed those being stopped were criminals. But *Floyd* lawyers, Fagan, and, ultimately, Judge Scheindlin exposed the seemingly race-based assumptions underlying the City's rationale. Recall the 12% hit rate—that only 6% of pedestrian stops led to arrests, and 6% led to summons. Using crime suspect data as a proxy for suspicion might be reasonable if 88% of Black and Latino individuals stopped were engaged in crime; but they are not. Data showed 88% of individuals stopped were doing nothing.[244]

Fagan's analysis controlled for numerous non-racial possibilities driving the stop patterns and concluded that race was ultimately the predominant stop factor.[245] Thus, the judge inferred the likely remaining reason for such disproportionate stops of Black persons is that for the NYPD, they may "have a greater tendency to appear suspicious than members of other racial groups, even when they are not breaking the law."[246] Judge Scheindlin then dismantled the NYPD race-based assumptions directly:

> Because there is no evidence that law-abiding [B]lacks or Hispanics are more likely to behave *objectively* more suspiciously than law-abiding whites . . . the City's [] refuge in this unsupported notion is no refuge at all. It is effectively an admission that there is no explanation for the NYPD's disproportionate stopping of [B]lacks and Hispanics other than the NYPD's stop practices having become infected, somewhere along the chain of command, by racial bias.[247]

Thus, according to Scheindlin, "[r]ather than being a defense *against* the charge of racial profiling, however, this reasoning is a defense *of* racial profiling. To say that black people in general are somehow more suspicious-looking . . . is not a race-neutral explanation for racial disparities in NYPD stops: it is itself a *racially biased explanation*."[248]

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243 *See* Washington v. Davis, 426 U.S. 229, 239 (1976).
244 *Floyd*, 959 F. Supp. 2d at 559.
245 *Id.* at 587.
246 *Id.*
247 *Id.* at 588.
248 *Id.*

3. *Command Pressure to Target the "Right People"*

How is it that stops increased from 97,000 in 2002 to almost 686,000 in 2011—an increase of over 700%—while the crime rate remained constant? The answer, Judge Scheindlin concluded, based on overwhelming evidence, was direct command pressure to collect as many stops as possible—what the City called a "Performance Goal," but which really operated as quotas, designed to target young Black and Latino men. After all, dramatic testimony by current Mayor Eric Adams, a former Police Lieutenant and prominent local elected official, revealed that Police Commissioner Ray Kelly brazenly admitted to Adams that the stop and frisk policy focused on Black and Latino youth "because he wanted to instill fear in them, every time they leave their home, they could be stopped by the police."[249] Under this logic of deterrence there could be no ceiling on stops. Indeed, the evidence revealed a "virulent precinct culture" that encouraged rampant stops for the sake of making "the required numbers,"[250] and exposed shockingly casual attitudes toward stopping people pretextually and "articulat[ing] later" a basis for the stop in a UF-250.[251]

Combined with the pressure to increase stops came a directive to target the "right people." Officer Serrano, a testifying whistleblower, recorded his supervisor to elaborate on what stopping the "right people" meant, to which the supervisor explained, "I have no problem telling you this, male blacks 14 to 20, 21."[252] NYPD Chief of Department Joseph Esposito himself effectively admitted the "right people" to be targeted are "young black and Hispanic youths 14 to 20."[253] Indeed, this racialized profile made it into operation of the UF-250 stop form. NYPD officer testimony revealed that the form's checkbox for "Fits Description" was not understood as an indicator that the person stopped closely resembled a suspect in a recently reported crime but instead merely replicated a search for the "right people," i.e. those who matched "the race, the height, [and] the age" of the people the NYPD viewed as the most likely to commit crimes: young Black and Latino

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249 *Id.* at 606.

250 *Floyd*, 959 F. Supp. 2d at 598–99.

251 According to one Sergeant, who was caught on a whistleblower's recording, "[i]f they're on a corner, make them move. They don't want to move, you lock them up. Done deal. *You can always articulate later*." *Id.* at 598. According to a Deputy Inspector's direction, "if they're walking down the street and they've got a bandana sticking out their ass, coming out there—they've got to be stopped. A [UF]-250 at least. At least." *Id.* at 599. Another supervisor demands officers "crush the fucking city" because anyone who does not make the UF-250 numbers is a "zero" and he "will not fight for a zero." *Id.*

252 *Id.* at 604.

253 *Id.* at 663 n.767.

males.[254] That is to say, all Black and Latino youth fit a description—they were *inherently suspect*—which, under NYPD policy, would justify a stop.[255]

The evidence in court consistently confirmed what the Black and Latino communities had been saying to anyone who would listen for decades. The NYPD sought to exercise dominion over Black and Latino communities for purposes of surveillance and control, and in a manner that used race as a degrading proxy for criminality.

D. The Power of Judgment

> [E]ach stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go about the activities of daily life.[256]

In the law of procedure, a judgment is a technical term used to refer to which party has prevailed in the action, which is distinct from an opinion supporting that judgment. In a colloquial sense, the term connotes much more—reflecting a normative assessment of right versus wrong and offering a measure of moral suasion. Judge Scheindlin not only entered a formal legal judgment, but also, influenced by community experiences and voices, engaged in a morally supportive judgment as well. Judge Scheindlin's decision affirmed the community's aspiration for recognition and dignity. I would not choose to describe Scheindlin as a "movement judge" in the sense developed by Professor Brandon Hasbrouck,[257] since Scheindlin criticized the NYPD's application of an otherwise permissible form of street policing,[258] rather than offer a deeper critique of policing's carceral logic. She only went so far to distinguish herself as a judge—unlike many who come out of the AUSA offices and may be "fearful or [] want a promotion"[259]—as exercising the

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254 *Id.* at 605–06.

255 Cornelio McDonald was stopped based on a "Fits Description" UF-250 designation, based on nothing more than his Black male status in the "High Crime Area" of Queens. "In other words," as Scheindlin explained, "because two black males committed crimes in Queens, all black males in that borough were subjected to heightened police attention." *Id.* at 605.

256 *Floyd*, 959 F. Supp. 2d at 557.

257 *See* Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. Rev. 631, 633 (2022) (describing movement judges as those who fight systemic injustice).

258 Scheindlin stressed she was not questioning the legitimacy or efficacy of stop and frisk writ large, just its unconstitutional application in the cases before her. *Floyd*, 959 F. Supp. 2d at 555.

259 Mark Hamblett, *Stop-and-Frisk Judge Relishes Her Independence*, N.Y.L.J. (May 20, 2013), https://www.law.com/newyorklawjournal/almID/1202600625151 [https://perma.cc/GH7K-VKET]. *See also* Larry Neumeister, *N.Y. 'Frisk' Judge Calls Criticism 'Below-the-Belt'*,

necessary judicial independence to be "not afraid to rule against the government."[260]

Still, Judge Scheindlin expressed a judgment, on the one hand, reflecting empathy toward the pain and humiliation stop and frisk was causing Black and Brown communities in the City, and on the other, showing corresponding impatience with the entitlement and arrogance by which police were acting and the City was defending their actions in light of those harms. Given the Second Circuit's eventual—unprecedented and unsubstantiated—removal of Judge Scheindlin from the case it is fair to ask if the appellate court considered her independence and rejection of carceral assumptions of much of the law too transgressive.[261] But for communities challenging stop and frisk, there was power in Judge Scheindlin's judgment about what is unjust.

First, Judge Scheindlin framed the opening of her opinion with an expression of empathy for the "*human toll* of unconstitutional stops," by recognizing that a stop is "a demeaning and humiliating experience" that interferes with the peace and enjoyment of everyday life.[262]

Second, Judge Scheindlin made repeated judgments about where the truth lay. Lacking a shared reality can be destabilizing for the human mind. The NYPD's response to what was obvious to communities, indeed, felt like a form of gaslighting—suggesting every stop was justified because of perceived danger, that Black youth are more likely to commit crime, that they were responsive to community wants. Yet, Judge Scheindlin sided with the plaintiffs' version of what was true[263]

Associated Press (May 19, 2013), https://apnews.com/general-news-f1f10353832e4f69901f512c841b8ae7 [https://perma.cc/777G-APD2].

260 Jeffrey Toobin, *Rights and Wrongs*, New Yorker (May 20, 2013), https://www.newyorker.com/magazine/2013/05/27/rights-and-wrongs-2 [https://perma.cc/J3VR-7ANP] (quoting a conversation between the author and Judge Scheindlin).

261 *See* Nancy Gertner, *Which Judges Breached the Rules?*, N.Y. Times (Feb. 4, 2016), https://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/which-judges-breached-the-rules [https://perma.cc/6U5W-F22U] (expressing that members of the Second Circuit violated the rules and that Judge Scheindlin did nothing wrong); Deborah Rhode, *Judges Have a First Amendment Right, Too*, N.Y. Times (July 16, 2016, 1:25 PM), https://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/judges-have-a-first-amendment-right-too [https://perma.cc/47H7-W5FD] (expressing that Judge Sheindlin's comments were "ill-considered" but not unethical and that the appellate court's response is disturbing).

262 *Floyd*, 959 F. Supp. 2d at 557. Reflecting back on the testimony of Floyd and Peart, Judge Scheindlin noted, "[s]ome plaintiffs testified that stops make them feel unwelcome in some parts of the City, and distrustful of the police." *Id.*

263 *Id.* at 625 n.431 (finding Downs' testimony "credible despite minor inconsistencies"); *id.* at 634 n.516 (noting "Peart's generally credible trial testimony"); *id.* at 649 n.652 (same regarding Floyd).

and found NYPD officers,[264] including numerous high-level officials,[265] not credible. That all is probative for plaintiffs' affirmative claims, but even more, can be liberating for the truth-teller who seeks to be heard and affirmed.

Indeed, in one of the more dramatic moments of the trial, lawyers for two officers accused of stopping Leroy Downs objected to bringing their clients into court to be identified by Downs. Judge Scheindlin accused counsel of a shameful distrust of Downs:

> THE COURT: Do you expect [Leroy Downs] to lie? Is that what you're really saying? That he is just going to say, they walked in, those must be the guys. That's what you're saying. You don't trust him to tell the truth, clearly.[266]

In so doing, a federal judge trusted the honesty and integrity of a Black man in court, over and above the demands of the police. She ordered the officers to appear the next day. Downs pointed to identify them in open court, and Judge Scheindlin's opinion credited Downs over the denials of the officers.[267]

Third, Judge Scheindlin identified the way racial discrimination was in the circulatory system of NYPD's proactive policing, from design to the predictable implementation by the rank and file. She drew in conceptions of implicit bias to help advance the understanding of racial discrimination at play[268] and discredited the confident but flawed methodology of the City's expert as if it were another form of pseudo-science like racialized phrenology—to show how its circular methodology started and ended with racially biased assumptions.[269] Moreover, Scheindlin brought in national conversations around policing by citing Black scholars and leadership,[270] which revealed a sensitivity

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264 *Id.* at 635 (stating that for a stop of Nicholas Peart, "I do not find credible the assertion that the officers saw any *suspicious* bulges"); *id.* at 650 ("I find that there was no credible basis for believing Floyd was armed and dangerous."); *id.* at 629 nn.463–64 ("I do not find credible that Almonor was walking as if he had a weapon in his waist.").

265 *See id.* at 594 ("There was no credible evidence that Chief [of Patrol James] Hall or his staff perform regular or meaningful reviews of the *constitutionality* of stops before Compstat meetings."); *id.* at 618 (finding the testimony of Deputy Commissioner Schwarz regarding substantiating civilian complaints not credible).

266 Trial Transcript, *supra* note 1, at 4228.

267 *See Floyd*, 959 F. Supp. 2d at 627 (finding testimony that officers did not recall the Downs stop not credible).

268 *See id.* at 580–81 (noting that unconscious racial bias is still common in society and thus likely affects police officers).

269 *Id.* at 586–87.

270 *See id.* at 587 (citing Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010): "There are very few African-American men in this country who haven't had the experience of being followed when they were shopping in a

to features of racial discrimination that are not always cleanly captured by existing—and increasingly rigid—doctrinal categories, in order to register how race really works in this country.

Finally, as described in the next Section, Judge Scheindlin took notice of the heavy community investment and interest in the case, recognizing that they have the entitlement and expertise to change policing in their communities.

E. The Power of Winning

> It felt like everybody's win. Because, at that point, everybody owned Floyd.[271]

The lead plaintiff in the case, Dasaw (f.k.a. David) Floyd, was a leader in the police accountability movement. The case was captioned Floyd *versus* The City of New York. The Court's decision would favor one side over the other. Ultimately, in a sweeping, decisive, and dramatic manner, the Court concluded that it was David Floyd and the community he represented—which had so heavily invested in taking back the streets from the NYPD—that had won. The decision, issued on August 12, 2013, rocked the City—it was front-page news across the City[272] and the country.[273] And it rocked the community too: "[Community] folks thought it was amazing . . . [because] they had never been involved in something where the court validated something that they already knew was true."[274] Judge Scheindlin's 198-page analysis—finding that the world's largest police force had, for years, engaged in a "persistent and widespread" practice of unconstitutional stops and frisks and a similarly widespread and *intentional* practice of racial profiling[275]—was dramatic

department store. That includes me." (Remarks on the Verdict in *State of Florida v. George Zimmerman*, 2 Pub. Papers 824 (July 19, 2013))).

271 Zamani Interview, *supra* note 186.

272 Floyd v. City of New York, 959 F. Supp. 2d 659 (S.D.N.Y. 2013) (No. 08 Civ. 1034). *See, e.g.*, Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. Times (Aug. 12, 2013), https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html [https://perma.cc/9NY5-HN5B].

273 *See, e.g.*, Dylan Matthews, *Here's What You Need to Know About Stop and Frisk—and Why the Courts Shut It Down*, Wash. Post (Aug. 13, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down [https://perma.cc/5GWD-S8XB]; Eliza Gray & Nate Rawlings, *New York 'Stop and Frisk' Ruling: When Violated Rights Lead to Federal Intervention*, TIME (Aug. 13, 2013), https://nation.time.com/2013/08/13/new-york-stop-and-frisk-ruling-when-violated-rights-lead-to-federal-intervention [https://perma.cc/H6XF-S5WX].

274 Kang Interview, *supra* note 108.

275 *Floyd*, 959 F. Supp. 2d at 659–64.

on its own terms, even if subject to reasonable academic criticism.[276] In addition, Scheindlin issued a separate forty-page remedial opinion ordering sweeping reforms to remediate the deep constitutional violations she identified.[277] The judge ordered the appointment of an independent monitor to oversee and publicly report on all aspects of the stop and frisk reform process.[278] The court also prescribed numerous "immediate reforms"—specific areas with detailed guidance based on constitutional shortcomings, including: (1) revisions to the policies and training regarding stop and frisk and prohibitions on racial profiling; (2) revisions to the documents used during encounters, including the development of a new UF-250 form that excluded the notoriously subjective stop categories and introduced a narrative portion, as well as a tear-off form stating the reason for the stop and instructions on filing a complaint; and (3) reforms to training, supervision, monitoring, and discipline of officers.[279]

Significantly, Judge Scheindlin honored the community's request for a process like the Cincinnati collaborative process, directly citing to its success as a model for positive reform. She called it a joint remedial process and identified a number of stakeholders—specifically including CPR and community members—to participate in a broad, facilitated process to identify further reforms beyond those she already identified that would be necessary to improve policing. In so doing, she credited the agency and expertise of the movement that had intentionally been brought into the courtroom:

> *[C]ommunity 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.[280]

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276 *See, e.g.*, Paul J. Larkin Jr., *Stop and Frisks, Race, and the Constitution*, 82 GEO. WASH. L. REV. 1, 5 (2013) (arguing that statistical analysis cannot satisfy Fourth Amendment inquiries which require individualized considerations); *see also* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk*," 94 B.U. L. REV. 1495, 1544–45 (2014) (criticizing Scheindlin's conception of "indirect racial profiling").

277 *Floyd*, 959 F. Supp. 2d at 668.

278 *See id.* at 678.

279 *Id.* at 679, 681, 683.

280 *Id.* at 686 (emphasis added).

Elsewhere, the court recognized the movement's voice and the importance of democratic participation in the institutions that exert power over the public.

> If the reforms to stop and frisk are not perceived as legitimate by those most affected, the reforms are unlikely to be successful. *Neither an independent Monitor, nor a municipal administration, nor this Court can speak for those who have been and will be most affected by the NYPD's use of stop and frisk*.[281]

In that moment, the communities that had been fighting the NYPD in and out of court since even before the killing of Amadou Diallo could now rejoice in this triumph—a landmark step to take back ownership of their streets from an institution that had degraded them for so long.[282] This win justified the elation and deep satisfaction that comes from a collective project of labor and love, even as everyone involved understood that the struggle for community safety would surely continue. David Ourlicht recalls crying with joy when the judgment came down, and then making the decision that he wanted to go to law school and become an attorney; "There's so much undoing that needs to be done, that it's time to get back to work."[283]

V
The Movement's Mobilization Defeats Reactive Judicial Politics

The *Floyd* legal team and the police accountability movement were euphoric in August 2013 following the *Floyd* judgment, passage of the Community Safety Act (over Bloomberg's veto), and the impending election of Bill de Blasio, a mayoral candidate committed to changing stop and frisk. But the legal victory, like any other rights-vindicating judgment on behalf of disenfranchised constituencies, was vulnerable and would soon come under serious threat. The Bloomberg administration heaped contempt on Judge Scheindlin, castigating her decision as the result of anti-policing bias. And a Second Circuit motions panel soon adopted the Bloomberg administration's narrative, signaling a potential reversal of Judge Scheindlin's decision on the merits and

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281 *Id.* at 686–87 (emphasis added).

282 As Joo-Hyun Kang explained, "A lot of people within CPR have been fighting against police violence for years. And *Daniels* was settled and it wasn't a definitive decision the way this was. So I think for a lot of folks, they felt like they finally won." Kang Interview, *supra* note 108.

283 Ourlicht Interview, *supra* note 198.

taking the unprecedented step to *sua sponte* disqualify Judge Scheindlin from the case.

Had *Floyd* proceeded in the classic, lawyer-led, and rights-focused impact litigation form, there would have been little the lawyers could do to prevent the Second Circuit's actions. But, invested in protecting the hard-fought legal victory and its promise of community input, movement actors mobilized quickly, using politics to save the litigation. Leveraging its clout with the new mayor, the movement removed the case from the precarious courts, to once more take back ownership of the streets.

A. Mayor Bloomberg and the Second Circuit Strike Back: The Disqualification of Judge Scheindlin

The Bloomberg administration and the NYPD had mounted an aggressive media campaign to discredit Judge Scheindlin while the trial was still underway. When mounting evidence signaled a likely loss for the City, the N.Y. Daily News reported on an NYPD "study" purportedly showing that Judge Scheindlin was biased against law enforcement in Fourth Amendment suppression hearings.[284] Police Commissioner Ray Kelly also claimed that "the judge is very much in [the plaintiffs'] corner and has been all along through her career."[285] Commentators criticized such attempts to preemptively delegitimize her ruling and undermine public faith in the judicial process that was taking seriously the rights of Black and Brown communities.[286]

Responding to reports of her purported bias, Judge Scheindlin gave a series of interviews. She spoke generally of her approach to adjudication,[287] without discussing the merits of the *Floyd* case.[288] She

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284 *See* Ginger A. Otis & Greg B. Smith, *Federal Judge to Rule on Stop-and-Frisk Case Bias Against Cops: Report*, N.Y. Daily News (May 22, 2013, 9:39 AM), https://www.nydailynews.com/2013/05/22/federal-judge-to-rule-on-stop-and-frisk-case-bias-against-cops-report [https://perma.cc/J3VR-7ANP]; *see also* Toobin, *supra* note 260 (discussing the Bloomberg administration's allegations that "Scheindlin suppresses evidence on the basis of illegal police searches far more than any of her colleagues").

285 James Freeman, Opinion, *The Political War on the NYPD*, Wall St. J. (Apr. 5, 2013, 6:48 PM), https://www.wsj.com/articles/SB10001424127887323501004578388311774675612 [https://perma.cc/CH3J-68RE].

286 *See* Bill de Blasio, *The Bloomberg Administration's Attack on the Judiciary*, Huff. Post (June 3, 2013, 12:09 PM), https://www.huffpost.com/entry/the-bloomberg-administrat_b_3378003 [https://perma.cc/G9YZ-9D9Z] (criticizing the mayor for attacking Scheindlin's independence); *see also* Christopher Dunn, *Suppression Rulings and Views of the Police*, N.Y. L.J., June 6, 2013, at 1 (questioning the accuracy of suppression rulings as evidence of judicial bias).

287 *See* Hamblett, *supra* note 259 ("I like to think of myself as a fair-minded neutral who calls the case outcomes the way that the law and justice require.").

288 *See, e.g.*, Otis & Smith, *supra* note 284; Toobin, *supra* note 260; Hamblett, *supra* note 259.

rejected the NYPD study as flawed and inaccurate,[289] a view shared by some lawyers and academics.[290] But she acknowledged that she was "not afraid to rule against the government" and criticized federal judges who come out of the U.S. attorney's office and "become government judges,"[291] rather than "exercise the independence they should have."[292] Still, in the *Floyd* opinion itself, Scheindlin underscored the distinct challenges that police officers face, offering praise for the challenges of their job.[293]

Nonetheless, the Bloomberg administration redoubled its campaign against Judge Scheindlin.[294] Mayor Bloomberg referred to Scheindlin—who was herself a former federal prosecutor—as "some woman" who knows "[a]bsolutely zero" about policing, and as a result, would usher in a dangerous rise in crime.[295] He repeatedly asserted that Scheindlin's bias against police had led the NYPD to doubt from the get-go "that [they] were getting a fair trial."[296] And for the first time during the five-

289 *See* Otis & Smith, *supra* note 284 ("Scheindlin called the study 'completely misleading' because it includes only written opinions, not rulings from the bench. She said in 'nearly all' of her bench rulings on search-and-seizure, she denies the motions to suppress evidence.").

290 *See, e.g.*, Neumeister, *supra* note 259 (reporting that the New York County Lawyers' Association concluded that the report was "meaningless because it sampled so few Scheindlin rulings"); Dunn, *supra* note 286, at 3 (concluding that "[i]t is difficult . . . to see how these particular rulings reveal a judicial bias against the NYPD").

291 Toobin, *supra* note 260.

292 Hamblett, *supra* note 259 ("[F]ederal judges, who are appointed for life, don't appreciate how much independence they have—many of them are a little cautious, more cautious than they should be.").

293 *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (No. 08 Civ. 1034) ("I respect that police officers have chosen a profession of public service involving dangers and challenges with few parallels in civilian life.").

294 *See, e.g.*, Mark Toor, *Mayor Furious Over Judge's Ruling That Stop-and-Frisk Use is Illegal*, The Chief (Aug. 12, 2013), https://thechiefleader.com/stories/mayor-furious-over-judges-ruling-that-stop-and-frisk-use-is-illegal,24627 [https://perma.cc/2WH7-V3H8] ("In a press conference at City Hall about five hours after the decision was released, Mr. Bloomberg's face reddened as he defended the Police Department."). Criticizing judges for asserted bias was not an uncommon tactic for the Bloomberg administration. *See* Mosi Secret, *City Criticizes Judge in Case of Hiring at Fire Dept.*, N.Y. Times (Jan. 20, 2012), https://www.nytimes.com/2012/01/21/nyregion/city-asks-for-removal-of-judge-in-fire-lawsuit.html [https://perma.cc/8KRF-K4E4] (reporting that, in the wake of a ruling that the FDNY engaged in racially discriminatory hiring, the Bloomberg administration publicly attacked the judge's neutrality and called for him to be removed from the case).

295 Mara Gay, Greg B. Smith & Daniel Beekman, *You Stink . . . "Woman!"*, N.Y. Daily News, Aug. 17, 2013, at 5.

296 Press Release, Office of the Mayor, City of New York, Statements of Mayor Bloomberg and Commissioner Kelly on Federal Court Ruling (Aug. 12, 2013) [hereinafter Bloomberg & Kelly Statements], https://www.nyc.gov/office-of-the-mayor/news/275-13/statements-mayor-bloomberg-commissioner-kelly-federal-court-ruling [https://perma.cc/K77J-RHXX]; *see also* Michael R. Bloomberg, Opinion, *"Stop and Frisk" Is Not Racial Profiling*, Wash. Post (Aug. 18, 2013), https://www.washingtonpost.com/opinions/michael-bloomberg-stop-and-frisk-keeps-new-york-safe/2013/08/18/8d4cd8c4-06cf-11e3-9259-e2aafe5a5f84_story.html [https://perma.cc/2GQB-GXYU] (calling Judge Scheindlin an "ideologically driven federal

year *Floyd* litigation, the administration suggested that Scheindlin displayed bias when she previously signaled she would accept the *Floyd* case as related to the *Daniels* case.[297] Police Commissioner Kelly, for his part, called her *Floyd* ruling "offensive" and "recklessly untrue," and defended the NYPD as the "most racially and ethnically diverse police department in the world."[298]

These attacks on the *Floyd* judgment appeared to go from the NYPD's mouths to the Second Circuit's ears. Two weeks after the judgment was issued, the City filed a motion with the district court seeking to stay Scheindlin's ruling, pending appellate review. The motion alleged a parade of horribles that would ensue should the NYPD be forced to comply with her order.[299] In response, nearly thirty diverse community groups and their representatives supported the *Floyd* team's opposition to the stay request, filing affidavits documenting the damage that stop and frisk had wrought on their constituencies.[300] These affidavits represented the public's strong investment in the decision. Judge Scheindlin denied the stay request on September 17, 2013, in part because there would be no final judgment until the remedial reforms proposed by the independent monitor and the joint remedial process received court approval.[301]

A week later, the City sought a stay in the Second Circuit. That motion went to a panel composed of Judges Jose Cabranes, John Walker, and Barrington Parker. Oral argument took place on October 29, 2013—one week before the mayoral election de Blasio was expected to win. The motions panel proceeded, without precedent or lawful process, to *sua sponte* disqualify Judge Scheindlin from the case, in a manner that cannot hold up to scrutiny on the merits. Counsel called the disqualification process and decision "a perfect storm of procedural

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judge who has a history of ruling against the police" and who put "brazen activism" over "[b]lind justice").

297 *See* Bloomberg & Kelly Statements, *supra* note 296; *see also* Bloomberg, *supra* note 296 (suggesting that Scheindlin "offered strategic advice to the plaintiffs about how to file [Floyd] in a way that would ensure she heard it, rather than another judge").

298 Bloomberg & Kelly Statements, *supra* note 296.

299 *See* Letter of Heidi Grossman, Assistant Corporations Counsel, City of New York, to Judge Shira Sheindlin at 3, Floyd v. City of New York, 959 F. Supp. 2d 691 (S.D.N.Y. 2013) (No. 08-1034), ECF No. 380 (arguing, inter alia, that the safety of minority communities would be jeopardized if the remedies were not stayed).

300 *See, e.g.*, Declaration of David Ourlicht in Support of Plaintiffs' Opposition to Defendants' Motion for Stay, *Floyd*, 959 F. Supp. 2d 691 (No. 08-1034), ECF No. 385-1; Declaration of Council Member Robert Jackson, *Floyd*, 959 F. Supp. 2d 691 (No. 08-1034), ECF No. 385-4; Declaration of Joo-Hyun Kang in Support of Plaintiffs' Opposition to Defendants' Motion for Stay, *Floyd*, 959 F. Supp. 2d 691 (No. 08-1034), ECF No. 385-5.

301 *See Floyd*, 959 F. Supp. 2d at 694–95 (No. 08 Civ. 1034).

irregularity,"[302] which Professor Anil Kalhan has documented and harshly criticized.[303]

First, at the argument the Second Circuit panel repeatedly signaled its interest in expediting the appeal so that it could be "decided before the end of the year"[304]—that is, on a schedule that would permit the Court to reverse the *Floyd* decision before the new mayor would be inaugurated on January 1, 2014, and could thereafter abandon the Bloomberg administration's appeal of the decision. Even though the City had not even asked for such a consequential and potentially outcome-determinative schedule, it undertook an about-face and requested a briefing schedule so that the cases could be "heard and decided by the end of the year."[305]

Second, at argument Judge Cabranes signaled that he was skeptical of Scheindlin's decision to accept *Floyd* as related to *Daniels*. Because the City had never objected to the related-case designation, the issue was not even in the appellate record nor was any party even given notice that the panel wished to address the related-case question. Nevertheless, with references to the Bloomberg administration's media campaign against Scheindlin's impartiality, and relying almost exclusively on extra-record newspaper reports,[306] Cabranes suggested an argument to the City: that the related-case designation suggested bias.[307] Third, Judge Cabranes criticized Judge Scheindlin for speaking

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302 Plaintiffs-Appellees' Motion for Reconsideration by the En Banc Court of the October 31, 2013 Mandate at 2, Floyd v. City of New York (2d Cir. Nov. 11, 2013) (No. 13-3088), ECF No. 267 [hereinafter Floyd En Banc Petition].

303 *See* Kalhan, *supra* note 10, at 1046.

304 Transcript of Oral Argument on Motion for Stay Pending Appeal at 31–32, Ligon v. City of New York, 538 F. App'x 101 (2d Cir. Oct. 29, 2013) (Nos. 13-3088 & 13-3123) (Cabranes, J.) [hereinafter Floyd/Ligon Oral Argument Transcript].

305 Letter from Michael A. Cardozo, Corporation Counsel, City of New York, to Clerk of the Court at 1, *Floyd*, 959 F. Supp. 2d 691 (2d Cir. Oct. 31, 2013) (No. 13-3088), ECF No. 238; *see also* Letter from Sunita Patel, Center for Constitutional Rights, to Clerk of the Court at 2, *Floyd*, 959 F. Supp. 2d 691 (No. 13-3088), ECF No. 241 (criticizing effort to "manipulate[]" timing of the litigation to enable expedited adjudication as "a crass political move to prevent the remedy from going forward following the election").

306 Cabranes stated the judges had read the "newspaper of record" which reported on the related-case designation. Floyd/Ligon Oral Argument Transcript, *supra* note 304, at 35–36 (Cabranes, J.); *see also* Kalhan, *supra* note 10 at 1084–85 (criticizing appellate panel for basing decision on what it "read in the newspapers"). These newspapers were ultimately some of the only evidence cited in the initial stay order. *See* Ligon v. City of New York, 538 F. App'x 101, nn.1–2 (2d Cir. 2013). Kalhan referred to Cabranes' approach as "adjudication by newspaper." Kalhan, *supra* note 10, at 1072; *see also* Joseph Goldstein, *A Court Rule Directs Cases Over Friskings to One Judge*, N.Y. Times (May 5, 2013), https://www.nytimes.com/2013/05/06/nyregion/a-court-rule-directs-cases-over-friskings-to-one-judge.html [https://perma.cc/25MD-6GJL].

307 Cabranes speculated that it would have been "dangerous" for the City to have "confront[ed] the District judge," who is "all powerful," until, he emphasized, "of course,

to the media in a manner implying she was too critical of the police and the government.[308]

Finally, the panel exhibited skepticism, untethered to the actual findings in the case, about the very project of judicially ordered limitations on policing practices. Judge Walker stated such a multi-faceted remedial order could only be appropriate to "desegregate in the face of overt hostility on the part of its state towards desegregation—an Orval Faubus or a George Wallace standing at the courthouse steps."[309] And, echoing Commissioner Kelly's legally irrelevant talking point, Cabranes suggested that the litigation was misguided because the majority of NYPD officers were minorities.[310]

Two days later, in what Kalhan refers to as a "Halloween order,"[311] Judges Cabranes, Walker, and Barrington issued a shocking, two-page order. The panel not only stayed the remedial order pending appeal, but summarily dismissed Judge Scheindlin from the case. To support this unprecedented order, the panel wrote that Judge Scheindlin had compromised the "appearance of partiality" in the case.[312] The panel pointed first to an asserted violation of the related-case principle, which was never raised by the City, and next to Scheindlin's news interviews,[313] which were not part of the record on appeal and otherwise not ethically compromised, as she didn't discuss the merits of the case.[314] And, having criticized Scheindlin for designating *Floyd* as related to *Daniels*, this motions panel nevertheless ordered that it would displace a normally constituted merits panel, and decide the merits itself—an ominous signal for the viability of the case.[315] Notably, in mirroring the NYPD's attacks upon Judge Scheindlin and summarily disqualifying a judge who boasted of—and acted upon—judicial independence to rule against law

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the District judge is stopped." Floyd/Ligon Oral Argument Transcript, *supra* note 304, at 36, 38 (Cabranes, J.).

308 *See* Kalhan, *supra* note 10, at 1078.

309 Floyd/Ligon Oral Argument Transcript, *supra* note 296, at 25–26 (Walker, J.).

310 Cabranes asked the parties to address only that question on supplemental briefing. *See* Letter from Darius Charney, Center for Constitutional Rights, to Clerk of the Court at 2, *Floyd*, 959 F. Supp. 2d 691 (No. 13-3088), ECF No. 237 (arguing that the NYPD's employment demographics "do[] nothing to undermine the extensive evidence presented at trial that the NYPD has a top-down policy and practice of targeting black and Hispanic people for stops").

311 Kalhan, *supra* note 10, at 1080.

312 Ligon v. City of New York at 2, No. 13-3123 (2d Cir. 2013) ECF No. 171, *depublished by* 538 F. App'x 101. The panel later issued an amended opinion to the original order to state that Judge Scheindlin had "compromised" the "appearance of impartiality." *See Ligon*, 538 F. App'x at 102.

313 *Ligon*, 538 F. App'x at 102–03.

314 Kalhan, *supra* note 10, at 1076–80.

315 *Ligon*, 538 F. App'x at 103; Kalhan, *supra* note 10, at 1081.

enforcement, and despite a thorough and defensible legal analysis, the panel confirmed the radical lawyers' critique of impact litigation: that legal judgments conferring rights to disfavored populations are deeply vulnerable to reactionary politics.[316]

The Second Circuit panel's actions received a thunderclap of criticism[317] as well as a mandamus petition seeking reversal, filed by Judge Scheindlin herself.[318] The City doubled down and attempted to take advantage of the political opportunity the panel provided it: The City filed a motion with the panel stating that the "taint of partiality" mandated an order to immediately vacate all of Judge Scheindlin's rulings in *Floyd* and *Ligon*.[319] In response, the *Floyd* and *Ligon* plaintiffs filed an en banc petition highlighting the procedural irregularities in the panel's actions and calling upon the en banc court to disqualify Cabranes, Walker, and Barrington from adjudicating the merits.[320] In addition, several police unions, anticipating that the new mayor would drop the appeal, sought to intervene in the case to take the place of lawyers for the soon-to-be de Blasio administration.[321]

Fortunately for the plaintiffs, the panel's disqualification order did not carry through on the expedited pre-inauguration briefing schedule

316 *See* discussion *supra* Part I; *see also* Nancy Gertner, Opinion, *Which Judges Breached the Rules?*, N.Y. Times (Nov. 3, 2013), https://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/which-judges-breached-the-rules [https://perma.cc/CWJ5-URVZ] (arguing that Scheindlin was punished for not staying in the lane of conservatizing politics by so brazenly ruling in favor of minority communities against the NYPD).

317 *See, e.g.*, Erwin Chemerinsky, *The Second Circuit Panel Got It Wrong*, N.Y. L.J., https://www.law.com/newyorklawjournal/almID/1202626372491 [https://perma.cc/7HCC-266S] (Nov. 5, 2013) (criticizing the panel's disqualification rationale as "spurious"); David Cole, *How to Uphold Racial Injustice*, N.Y. Rev. Books (Nov. 1, 2013), https://www.nybooks.com/online/2013/11/01/how-uphold-racial-injustice [https://perma.cc/JXV4-5HMY]; Deborah Rhode, Opinion, *Judges Have a First Amendment Right, Too*, N.Y. Times (July 11, 2016), https://nyti.ms/1h1dthc [https://perma.cc/28PE-XXPL].

318 *See* Request for Leave to File Motion to Address Order of Disqualification at 2, Floyd v. City of New York, 959 F. Supp. 2d 691 (2d Cir. Nov. 8, 2013) (No. 13-3088), ECF No. 261 (arguing that the summary order violated the First and Fifth Amendments by failing to provide Scheindlin with notice and an opportunity to be heard).

319 Motion for Modification of the Stay Order Dated October 31, 2013 to the Extent of Vacating the District Court's Orders Dated August 12, 2013 at 5, Floyd v. City of New York, 959 F. Supp. 2d 691 (2d Cir. Nov. 8, 2013) (No. 13-3088), ECF No. 265.

320 *See* Floyd En Banc Petition, *supra* note 302, at 17.

321 *See* Memorandum of Law of Sergeants Benevolent Association in Support of Motion to Intervene Pursuant to Federal Rule of Civil Procedure 24, Floyd v. City of New York, 959 F. Supp. 2d 691 (2d Cir. Nov. 12, 2013) (No. 13-3088), ECF No. 296; Memorandum of Law of the Patrolmen's Benevolent Association, et al. in Support of Motion to Intervene, Floyd v. City of New York, 959 F. Supp. 2d 691 (2d Cir. Nov. 7, 2013) (No. 13-3088), ECF No. 252. Two weeks later, the panel issued an opinion purporting to "explain the basis" for the prior, two-page order. Ligon v. City of New York, 736 F.3d 118 (2d Cir. 2013) (per curiam). *See* Kalhan, *supra* note 10, at 1091 (arguing that, to the extent the judges sought "to retroactively give their initial, law-free decision at least a veneer of legality—their effort fell quite a bit short").

it suggested at oral argument,[322] which would have allowed a reversal on the merits before the new mayor took office. That provided an opportunity for the movement to wield its considerable power.

B. The Movement Saves the Litigation

The proceedings before the court of appeals were frenzied and high-stakes. But what really mattered happened on the streets. In November 2013, Bill de Blasio was elected mayor. He knew that he owed much of his electoral success to the same police accountability movement that supported the *Floyd* litigation. As a new mayor, he would be accountable to their demands. After deliberations with the *Floyd* legal team, CPR decided on the priority demand for the new mayor: drop the appeal.[323] At first glance, the movement's choice to prioritize a litigation goal may seem surprising; rarely does a litigation outcome map onto broader community demands. But this choice was not made in a political vacuum—it reflected CPR's investment in *Floyd* as a win that belonged to the entire community who invested in the litigation. Through the creation and implementation of the joint remedial process—a community demand which Judge Scheindlin honored—the case would provide an opportunity to build the movement's power and leverage its expertise on protecting communities from aggressive policing. Drop the appeal the mayor did,[324] removing it from a hostile court of appeals and sending it back down for the reform process ordered by Judge Scheindlin. Because the remand divested the court of appeals of jurisdiction, there was no longer a forum to challenge Judge Scheindlin's disqualification order.

Conclusion: Toward Impact Litigation as Movement Law

Floyd carved a necessary and unprecedented path for greater police accountability in New York City. It resulted in a legal judgment—supported by overwhelming evidence—that the NYPD had, for years, systematically violated the Fourth and Fourteenth Amendment rights of Black and Latino New Yorkers. And it required the NYPD, under

322 *See* Ligon v. City of New York, 538 F. App'x 101, 102 (2d Cir. 2013).

323 *See* Change the NYPD (@changethenypd), Twitter (Nov. 4, 2013, 2:05 PM), https://x.com/changethenypd/status/397439584595742720?s=42 [https://perma.cc/DRY3-SWKU] (urging the mayor to drop the *Floyd* appeal).

324 *See* Benjamin Weiser & Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times (Jan. 30, 2014) https://www.nytimes.com/2014/01/31/nyregion/de-blasio-stop-and-frisk.html [https://perma.cc/V42P-QJLK] (announcing de Blasio's decision to settle *Floyd* and *Ligon*).

a court-supervised monitorship process, to address systemic policy failures.[325] As a result, the number of stops in the City fell from a peak of 685,724 in 2011 to approximately 24,000 in 2015.[326] The litigation also made the joint remedial process a reality, which led to a years-long community input process resulting in a robust 300-page report documenting and recommending additional community-based reforms.[327]

To be sure, the *Floyd* judgment and the joint remedial process have not fixed the full range of unconstitutional police practices in New York City.[328] Reforms from the litigation itself have also had mixed success on their own terms, an outcome which merits subsequent evaluation and critique.[329] Yet, as a locus of community organizing, *Floyd* still serves as a powerful and replicable model of movement law. On the challenging power dimension, the litigation provided a forum

325 *See Floyd*, 959 F. Supp. 2d at 677, 678–86; First Report of the Monitor, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. July 9, 2015) (No. 09 Civ. 1034), ECF No. 513 (providing the first in a series of reports, as ordered by the Court).

326 NYCLU, *NYC: Stop-and-Frisk Down, Safety Up*, at 2 (Dec. 2015), https://www.nyclu.org/uploads/2016/09/stopfrisk_briefer_FINAL_20151210.pdf [https://perma.cc/Q5T8-M2EC]. Over the ensuing 10 years stops have vacillated around this substantially lower range. *See* Twentieth Report of the Independent Monitor at 7, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. Apr. 11, 2024) (No. 09 Civ. 1034), ECF No. 927-1. David Ourlicht reflected that, despite his continuing frustration with overpolicing by the NYPD, "[t]he fact that there are 100[s of thousands] of New Yorkers, young men of color, that aren't getting stopped at the same rate is an incredible thing." Zoom Interview with David Ourlicht, New York Legal Aid Society (Aug. 22, 2023).

327 *See* Ariel E. Belen, *New York City Joint Remedial Process* (Apr. 5, 2018), https://ccrjustice.org/sites/default/files/attach/2019/12/Joint-Remedial-Process-Final-Report.pdf [https://perma.cc/7CWB-FSCT]; *see also* Comments of Amicus Curiae Communities United for Police Reform on Final Joint Remedial Process Report, Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. July 9, 2018) (No. 09 Civ. 1034), ECF No. 611, https://ccrjustice.org/sites/default/files/attach/2018/07/CPR%20Amicus%20Comment%20on%20Final%20JRP%20Report.7%209%202018.pdf [https://perma.cc/4B2G-ZAZF] (commenting on the remedial process).

328 *See "Kettling" Protesters in the Bronx*, Human Rights Watch (Sep. 30, 2020), https://www.hrw.org/report/2020/09/30/kettling-protesters-bronx/systemic-police-brutality-and-its-costs-united-states [https://perma.cc/JXR9-AFX6] (reporting in-depth on an instance of "kettling" during the 2020 George Floyd protests in the Bronx).

329 Lingering problems, in spite of the remedial process, include persistent racial disparities, *see Civil Rights Attorneys: Racial Disparities Persist in NYPD Stop and Frisk*, Ctr. for Const. Rts. (June 7, 2017), https://ccrjustice.org/home/press-center/press-releases/civil-rights-attorneys-racial-disparities-persist-nypd-stop-and [https://perma.cc/QQQ7-CEKB] (arguing that the drastic decrease in police stops had not fully eliminated racial disparities, as implied by the monitor). Officer underreporting of stops likely masks even greater racial disparities. *See* Twentieth Report of the Independent Monitor, *supra* note 326, at 4. The monitor likewise failed to recommend many reforms highlighted in the joint remedial process. *See* Plaintiffs' Memorandum of Law in Support of Their Motion to Modify the *Floyd* Remedial Order at 3, Floyd v. City of New York, 959 F. Supp. 2d 691 (S.D.N.Y. July 29, 2021) (No. 08-1034), ECF No. 841 (asking the court to implement more reforms recommended by the community). I intend to offer a more detailed assessment of the post-*Floyd* remedial process in subsequent writing.

for contesting core NYPD narratives including the claims that stop and frisk was a race-neutral response to *bona fide* criminality in "high crime neighborhoods" and that increased policing activity was necessary to achieve crime reduction.[330] Put simply, after decades of the dominant ideology of order-management policing in high crime neighborhoods which lionized stop and frisk, the *Floyd* campaign discredited it, even causing Bloomberg and others later to apologize.[331] White elites no longer monopolized New York's politics of crime control. Instead, Black and Latino activists introduced their own counternarratives about the illegitimacy of correlating racialized policing with crime reduction.[332]

The campaign also leveraged litigation to build the power of impacted communities to make their own demands beyond rights recognition. The *Floyd* litigation centered impacted voices to place communities in direct contestation with their perceived oppressors. It prioritized co-learning between lawyers and activists, interjecting CPR's expertise into amici filings and the joint remedial process—expertise the court expressly credited in its remedial order. CPR leveraged the evidence emerging from the landmark federal trial to push for passage of legislative reforms that went beyond what would have been possible from litigation alone. Today, CPR, created during the political crucible of the *Floyd* campaign, continues to function as a leader in the broader police accountability movement.[333]

The *Floyd* campaign transcended conventional impact law. It intentionally embedded the litigation in the movement and the movement in the litigation. The legal team operated with respect, accountability, and love to people suffering systematic harm and humiliation. The campaign collectively sought, by conveying clients' lived experiences and through a shared commitment to community-led governance and hope, to transform social and political arrangements—and more than might otherwise have been possible, they actually did so.

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330 In the years following the abandonment of stop and frisk, and despite Bloomberg's apocalyptic projections about wildly increased crime, after the *Floyd* judgment, crime rates saw zero appreciable effect from the dramatic decrease in stops and frisks. *See* NYCLU, *supra* note 326.

331 *See* Amy Yensi, *Former Mayor Bloomberg on Stop-and-Frisk: 'I Was Wrong'*, Spectrum News NY 1 (Nov. 17, 2019), https://ny1.com/nyc/all-boroughs/news/2019/11/17/former-mayor-bloomberg-on-stop-and-frisk---i-was-wrong-- [https://perma.cc/B8SJ-8JHF] (reporting Bloomberg's 2019 apology). A formerly robust defender of the practice, the N.Y. Daily News, also apologized for its misguided support. German Lopez, *Stop and Frisk's End Didn't Cause a Crime Wave in New York City—A Big Win for Reform*, Vox (Aug. 9, 2016), https://www.vox.com/2016/8/9/12405440/stop-and-frisk-end-new-york-city [https://perma.cc/9PYE-T5VX] (discussing N.Y. Daily News' editorial board's apology).

332 *See* Akbar, *Demands*, *supra* note 61, at 107–08.

333 *See Our Campaign*, Cmtys. United for Police Reform, https://www.changethenypd.org/campaign [https://perma.cc/P85X-ET2Y].