PEN Award

I am deeply humbled that you have selected me as the winner of the Adelle Foley Award from Pen Oakland as part of the Josephine Miles Literary Awards I note that the program says this is the first such award "given to a work, not fiction or poetry, that has done much to improve the relations between people in American society." How proud I am that you have chosen me for this award. I am only sorry I can't be with you today – December 3, 2016 -- to accept the award in person. That would have been a great honor and pleasure for me. Nonetheless, I am deeply honored to accept your award in absentia and am thrilled that it is being accepted on my behalf by Attorney Howard Moore, Jr., a very important and well recognized civil rights lawyer.

This country has come a long way when it comes to race relations – but we still have a long way to go. There is no place in America for the racist presidential campaign we just witnessed that thankfully ended successfully just a month ago. And there is no place in America for the shooting of innocent African-Americans and Hispanics by police officers that we have witnessed in unprecedented numbers (and violence) during the past few years beginning in Ferguson, Missouri and most recently in Charlotte, North Carolina! There is also

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no place in America for the police to stop and search people on the streets, or in their housing projects or their apartment buildings, based on little more information than their race or the neighborhood in which they live. The last I read, our Constitution and our Bill of Rights apply to all Americans – not just white Americans. According to the Declaration of Independence all of us are created equal and endowed by our creator with certain inalienable rights – including life, liberty and the pursuit of happiness. I believe in the Declaration of Independence, our Constitution and our Bill of Rights and I hope you do too.

It is easy to lose faith in our rich heritage of equality when we have watched our sons – and it is far more often our sons than our daughters – picked up by the police with little or no basis, and ending up in jail all too often for the most minor infractions. And because our courts deny bail to poor people who cannot afford to post a bond, many innocent people languish in jail for months if not years, waiting for a trial that somehow is never scheduled. Our prison population is the largest in the civilized world and is overwhelmingly made up of African-Americans and Hispanics. This is a disgrace and there are many good people who are working hard to change this. We have seen the imposition of the death penalty – often terribly botched — which no other civilized country imposes. This, too, is

a disgrace and must stop. We have seen too many prisoners in solitary confinement for far too long a period. This is another disgrace and must stop. Our criminal justice system is in need of reform and, once again, there are decent people trying to implement sensible reforms. The former Attorney General of the United States – Eric Holder – has taken important steps in that direction as has the current Attorney General, Loretta Lynch. The outrageous disparity between sentences for possession and distribution of crack cocaine versus powder cocaine – which tended to target minorities – has largely been reduced if not eliminated. Mandatory minimum sentences for drug crimes have been drastically reduced. These steps should help to reduce our bloated prison population.

I think it is appropriate for me to spend just a few minutes describing the opinion in *Floyd v. City of New York*, which is the reason that you have selected me for this award. The gist of the ruling was that the New York City Police Department ("NYPD") was making an enormous number of street stops (and sometimes frisks) of people who turned out to be absolutely innocent. The statistical evidence, analyzing more than four million stops, showed that Blacks and Hispanics were disproportionately stopped. I found that this was a result of implicit racial bias. Putting it another way, the stops were not based on reasonable

suspicion that "criminal activity was afoot" a phrase drawn from *Terry v. Ohio*, the leading Supreme Court case. As a result, these stops violated both the 4th Amendment prohibition against unreasonable search and seizure and the 14th Amendment guarantee of equal protection under the law.

My findings were built on four forms of proof: (1) the uncontested statistical evidence; (2) the testimony of experts who analyzed more than 4.4 million stops to determine whether there was racial bias; (3) institutional evidence of deliberate indifference (including the unconscious racial biases or indirect racial profiling exhibited by police officers) and (4) the examples of individual stops by selected plaintiffs who were members of the *Floyd* class.

Here are the most relevant uncontested facts. Between January 2004 and June 2012, the NYPD conducted over 4.4 million *Terry* stops.

- Of the 4.4 million stops, 52% were black, 31% Hispanic, and 10% white. In 2010, New York's population was 23% black, 29% Hispanic, and 33% white.
- The number of stops rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.

- 52% of all stops were followed by a protective frisk for weapons. A weapon was found in only 1.5% of these frisks. No further law enforcement action was taken in 88% of the stops.
- Force was used in 23% of the stops of blacks, 24% of the stops of Hispanics, but only 17% of the stops of whites
- Between 2004 and 2009, the percentage of stops where the officer failed to state a specific suspected crime rose from 1% to 36%.
- For the period 2004 through 2009, when any law enforcement action was taken following a stop, blacks were 30% more likely to be arrested (as opposed to receiving a summons) than whites, for the same suspected crime.
- For the period 2004 through 2009, all else being equal, the odds of a stop resulting in any further enforcement action were 8% *lower* if the person stopped was black than if the person stopped was white. In addition, the greater the black population in a precinct, the less likely that a stop would result in a sanction. Together, these results show that blacks are likely stopped based on less objectively founded suspicion than whites.

The next form of proof was the expert testimony where the following question was addressed: "what would the racial distribution of the stopped pedestrians have been if the officers' stop decisions had been racially unbiased?" The competing experts used different benchmarks in their analyses. The plaintiffs' expert used "both population and reported crime as benchmarks for understanding the racial distribution of police-citizen contacts." He testified that: "Since police often target resources to the places where crime rates and risks are highest, and where populations are highest, some measure of population that is conditioned on crime rates is an optimal candidate for inclusion as a benchmark." By contrast, the defendant's experts used a benchmark consisting of the rates at which various races appear in suspect descriptions from crime victims. His assumption was that if the stop decisions had no racial bias, then the racial distributions of those stopped would approximate the racial distribution of criminal suspects in the area.

I found that the defense expert's benchmark was flawed because there was no basis to assume that the racial distribution of the stopped group should resemble the racial distribution of the local criminal population. The

stopped population were NOT criminals (as 90% were neither arrested nor received a summons). Thus I thought that the stops should reflect the racial composition of the *neighborhood's* population – taking into account that local crime rates must also be considered because stops are more likely to take place in higher crime rate areas.

When cross-examined, the City's expert defended his benchmark by asking "how do we know that those stopped were actually innocent or were not about to commit a crime." Thus, the expert *believed*, without basis, that those stopped were *likely* criminals. This shows that if a researcher has already concluded that an officer's decision as to whether to make a stop is *not* affected by conscious or unconscious racial bias, then he will look for – and find – a race-neutral explanation for the disproportional stopping of minorities.

Because *objectively* there should be no behavioral difference between law abiding minorities and law abiding whites, the remaining explanation is that law abiding minorities *appear* more suspicious than whites *because* that is the racial make-up of the *criminal* population. The only explanation for the close correlation between the racial composition of crime

suspect data (87%) minority, and the racial composition of the stopped population (83%) is that people were stopped *because* they resembled the criminal population. That is racial profiling.

The third form of proof was the institutional evidence of conduct by the police department. The trial evidence showed that the Department created pressure to continually increase the number of stops on the theory that this functioned as a crime prevention tool. This pressure translated to the precinct level in terms of productivity quotas – more stops led to more pay and promotions.

This caused precinct commanders to encourage officers to stop "the right people at the right time in the right place" which translated into racially biased policing. Other institutional failures included ignoring notice of statistics demonstrating racial bias; a failure to discipline officers engaging in racially biased policing; and a failure to review training materials to ensure that they were race neutral. Finally, the evidence revealed a failure of oversight over how stops were conducted and recorded – the documentation of stops was often sloppy and rarely reviewed by any supervisor.

And patterns in the recorded basis for stops - such as furtive

movements or high crime areas - were accepted without question. A few examples make these points. The first is the perception of what constitutes a "furtive movement" – which is so often used as a basis for a stop. Two officers in the *Floyd* trial testified to their understanding of the term "furtive movements." One explained that "furtive movement is a very broad concept," and could include a person "walking in a certain way," "[a]cting a little suspicious," being "very fidgety," "going in and out of a location," "looking back and forth constantly," "adjusting their hip or their belt," "moving in and out of a car too quickly," "[t]urning a part of their body away from you," "[g]rabbing at a certain pocket or something at their waist," "getting a little nervous, maybe shaking," and "*stutter*[*ing*]." Another officer explained that "usually" a furtive movement is someone "hanging out in front of [a] building, sitting on the benches or something like that" and then making a "quick movement," "going inside the lobby . . . and then quickly coming back out," or "all of a sudden becom[ing] very nervous, very aware." If officers believe that the behavior they described justifies a stop, then it is no surprise that stops so rarely produce evidence of criminal activity.

I found that furtive movements, standing alone, are a vague and unreliable indicator of criminality. As Judge Richard Posner stated: "Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited." In a related case I wrote that "[g]iven the nature of their work on patrol, officers may have a systematic tendency to see and report furtive movements where none *objectively* exist." It is no surprise that many police officers share the latent biases that pervade our society.

The trial evidence also included surreptitious recordings of police talk within certain precincts, which demonstrated the contempt and hostility of supervisors toward the local population. At a roll call on November 8, 2008, in Bedford Stuyvesant in Brooklyn – an overwhelmingly black neighborhood, a Lieutenant stated:

> 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.

At another roll call the same Lieutenant stated that the officers are "not working in Midtown Manhattan where people are walking around smiling and happy. You're working in Bed-Stuy where everyone's probably got a warrant."

A Sergeant in the same precinct made the following comment at a roll call, reflecting an utter disregard for the requirement that a stop only be made based on a reasonable suspicion that crime is afoot:

> If you see guys walking down the street, move 'em along. Two or three guys you can move, you can't move 15, all right? If you want to be a[n] asshole or whatever you want to call it, make a move. If they won't move, call me over and lock them up [for disorderly conduct]. No big deal. We could leave them there all night. . . . The less people on the street, the easier our job will be . . . . *If you stop them[,] [write up a stop & frisk form] a 250, how hard is a 250. I'm not saying make it up but you can always articulate robbery, burglary, whatever the case may be. That's paperwork . . . It's still a number. It keeps the hounds off, I've been saying that for months*.

At another roll call, the same Sergeant also directed his officers to "[s]hake everybody up. Anybody moving, anybody coming out that building."

Because exiting a building — even in a high crime area — is not a sufficient basis for reasonable suspicion, these words are an instruction to stop people without legal justification.

With respect to identifying who to stop, Chief Esposito, the highest ranking uniformed member of the NYPD testified as follows: "[Stops are] based on the totality of, okay, who is committing the – who is getting shot in a certain area . . . Well who is doing those shootings? Well it's young men of color in their late teens, early 20s." A Deputy Inspector gave a virtually identical answer, testifying that: "This is about stopping the right people, the right place, the right location.

"The problem was, what, male blacks. . . . [A]nd I have no problem telling you this, male blacks 14 to 20, 21."

In fact, then-Police Commissioner, Ray Kelly, allegedly said at a meeting that the NYPD focused on stopping young blacks and Hispanics.

"because we wanted to instill fear in them, every time they leave their home, they could be stopped by the police."

This evidence led me to conclude that blacks were targeted for stops in order to deter crime regardless of whether they appeared to be objectively

suspicious!

This brief summary gives you some idea of the issues addressed in the *Floyd* opinion. But where do we go from here? It is important to recognize that we have the power to improve the world around us and shape our communities. It is within our power to make sure our children have what they need to pursue an education, support their families, and lead productive lives. And it is also within our power to step up and help those around us to do the same. If we commit ourselves to that goal we can change the world and make it a better place.

We cannot do it alone, however. We depend on our leaders – our elected officials, the judiciary, and community organizations – like this organization – to support us in our efforts. The fact that you are here today means that each and every one of you is a part of that important effort. Thank you, once again, for selecting me for this singular honor!