Expert’s analysis highlights ‘stop and frisk’ forum

“Stop and frisk” – the controversial policing technique that became a key issue in New York City’s recent mayoral campaign – received a critical examination at a Law School forum that asked whether the practice amounts to racial profiling.

The Feb. 20 presentation featured a keynote address by John Jay College of Criminal Justice emeritus professor Eli B. Silverman, an expert on the issue and co-author of The Crime Numbers Game: Management by Manipulation. It was sponsored by the Black Law Students Association, the Latin American Law Students Association, the Asian Pacific American Law Students Association and the Federalist Society. Silverman’s address was followed by responses from H. McCarthy Gibson, former police commissioner of the City of Buffalo; City Court Judge E. Jeanette Ogden ‘83; and Associate Professors Anthony O’Rourke and Anjana Malhotra.

Silverman gave a brief overview of the law governing stop and frisks, in which police officers briefly detain and search individuals as a crime prevention measure. The seminal case, he said, was 1968’s Terry v. Ohio, in which the U.S. Supreme Court held that an officer conducting a stop and frisk doesn’t violate the Fourth Amendment’s prohibition against unreasonable searches and seizures if the officer has a reasonable suspicion that the person has committed or is about to commit a crime.

Then, in an August 2013 landmark case in which Silverman’s testimony and research was cited, U.S. District Court Judge Shira Scheindlin ruled that the New York Police Department had instituted a policy of indirect racial profiling by directing officers to focus their activity on “the right people” – the demographic groups that appear most often in a precinct’s crime complaints. The judge ruled that such a policy had led police to impermissibly target blacks and Hispanics for stop and frisk at higher rates than whites.

“The judge did not say that the tactic of stop and frisk was illegal,” Silverman noted. “What she ruled was that the way it was practiced was discriminatory.”

Silverman noted that most stops are for two reasons: the target’s presence in a so-called high-crime neighborhood, and ill-defined “furtive behavior.” The upshot is that consistently about 87 percent of stop and frisks in New York City target African-Americans and Latinos.

Among the respondents, the Law School professors addressed their remarks to Scheindlin’s ruling, which O’Rourke called “an incredible, innovative opinion.” He noted that the judge’s analysis of the issue was remarkable in its use of Fourth Amendment doctrine to address subconscious racial bias.

Malhotra noted that Scheindlin’s ruling “said something very powerful that I think could make this sustainable under equal protection,” asserting that officers were making an express classification based on race.

For his part, Gibson said much racial profiling happens not as overt discrimination, but because of ingrained attitudes. “We are all products of our upbringing and the way that we are raised,” he said. He himself, said Gibson, has been pulled over for “driving while black.” The officer’s first question, he said, is typically, “What are you doing out here?” “Wrong place, wrong neighborhood, wrong time,” he said. “It happens to so many people.”

Ogden noted that in the execution of the criminal justice system “there is a lot of discretion among the stakeholders in every phase of that process,” thus allowing for the influence of racial attitudes.

To the future lawyers in the audience she said, “You have to be prepared at all times, because racial profiling is going to exist. But it is up to you to work toward evening that playing field for your client. If you have just one person, if you’re willing to stand up and follow the law and distinguish between facts and fallacy, then you will make that difference.”