

The Civil Rights Implications of 'Broken Windows' Policing in NYC and General NYPD Accountability to the Public



A Briefing Report of the
New York Advisory Committee to
the U.S. Commission on Civil Rights

March 2018

Advisory Committees to the U.S. Commission on Civil Rights

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**New York Advisory Committee to the
U.S. Commission on Civil Rights**

The New York Advisory Committee (Committee) submits this report, “The Civil Rights Implications of “Broken Windows” Policing in NYC and General NYPD Accountability to the Public,” as part of its responsibility to advise the Commission on Civil Rights issues within New York State.

Beginning in Fall 2016, the Committee set out to review the effects of New York Police Department (the “NYPD”) low level offense enforcement practices on individuals of color, with a particular emphasis on youth, as well as the accountability structures and oversight mechanisms governing the NYPD. The Committee held two days of public briefings on these issues in New York City on March 20 and March 21, 2017. Testimony was provided to the Committee by 27 persons on 11 panels. The presenters were academics, government officials and advocates with particular expertise on the matters covered by this report. The Committee also held interviews with senior leadership of the NYPD on February 13, February 15 and December 19, 2017 to garner the NYPD’s perspective.

This report summarizes important information from the presenters’ testimony, written submissions, publicly available information, and interviews with senior leadership of the NYPD. The report provides recommendations based on the information received. The Advisory Committee trusts the Commission and the public will find the material in this report informative.

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Preface

On March 20 and 21, 2017, the New York State Advisory Committee to the United States Commission on Civil Rights (the “Committee”) held a briefing (the “Briefing”) on “broken windows” policing in New York City (“NYC” or the “City”), as well as the accountability structures and oversight mechanisms governing the New York City Police Department (the “NYPD”). The Committee focused its inquiry on whether low-level NYPD enforcement disproportionately affects communities of color in NYC, and particularly the youth in those communities. At the same time, the Committee invited comment on the accountability structures and mechanisms of the NYPD and how they affect both police officer behavior and the public’s perception of the NYPD. The Committee invited academics, advocates and government officials to participate in and testify at the Briefing.¹ The presenters who chose to testify included representatives from various agencies and institutions in NYC and the State of New York, as well as community advocates, lawyers and scholars.

At the Briefing, the presenters discussed (a) the history, use and effects of “broken windows” policing in NYC, (b) the presence and effect of police officers and school safety officers in NYC schools, and (c) the current framework of police accountability structures, and their efficacy in holding NYPD wrongdoers accountable for their actions and promoting trust within NYC communities. The presenters also proposed recommendations to address some of the issues that currently affect the relationship between the NYPD and the greater NYC community – especially the relationship between the NYPD and communities of color.

In addition to the Briefing, on February 13 and 15, 2017, the NYPD provided the Committee with unprecedented access to many of its senior leadership for interview sessions, and on December 19, 2017 held a follow-up meeting with the Committee. The Briefing and the NYPD interviews each were supplemented by written submissions. The access to the NYPD senior leadership allowed the Committee to understand (a) the purpose and intent of certain policing practices that have been scrutinized by community advocates, academics, courts, and public interest lawyers and (b) the reforms that the NYPD has put into place in an attempt to

¹ See Annex A for the list of invitees and their responses.

improve its policing and decrease the potentially disparate effects of some of its policing practices.

The report aggregates and synthesizes presenters' comments made during the Briefing, comments made by the NYPD during the February and December interview sessions, publicly available documentation, as well as follow-up conversations and written comments received by the Committee. While the report reflects the various views expressed by those who testified and were interviewed as well as certain publicly available information, it does not purport to be comprehensive. The matters and entities covered by this report are complex and multifaceted, and the Committee did not have the opportunity to hear from each person who has a considered view on the topics covered. Moreover, the landscape is continuously changing. It is the hope, however, that the report sheds an important light on the debate that persists with respect to low-level police enforcement in NYC and on questions regarding NYPD accountability, and that its recommendations will be accorded due consideration.

Executive Summary

“Broken Windows” Policing

In March of 1982, *The Atlantic* published an article that introduced “broken windows” policing and changed the direction of police strategy in the United States.² Arguing that “disorder and crime are usually inextricably linked,” authors James Q. Wilson, a political scientist, and George L. Kelling, a criminologist, theorized that reducing such disorder would lower rates of serious crime.³ Wilson and Kelling argued that strict enforcement of low-level crimes – known as “quality-of-life” offenses – would put the “real” criminals on notice that they were being watched and that their actions would have consequences.⁴

Starting in the early 1990s, under the direction of Mayor Rudolph Giuliani and NYPD Police Commissioner William Bratton, the NYPD implemented “broken windows” policing in NYC.⁵ The NYPD, as a matter of policy, would no longer ignore the “little things” but would instead treat them as seriously and enforce them as vigorously as it did serious crimes because serious crime was more likely to happen in a lawless environment, and because serious criminals committed petty offenses as well.⁶ The approach, originally applied in the subway system and later across the NYPD, encouraged officers to issue summonses to or arrest individuals engaged in violations, misdemeanors and other low-level crimes, such as hopping a subway turnstile, smoking marijuana, riding bicycles on sidewalks, disorderly conduct, urinating in public,

² George L. Kelling & James Q. Wilson, *Broken Windows*, *The Atlantic* (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465>; see also Bruce Weber, *James Q. Wilson Dies at 80; Originated ‘Broken Windows’ Policing Strategy*, *N.Y. Times* (Mar. 2, 2012), <http://www.nytimes.com/2012/03/03/nyregion/james-q-wilson-dies-at-80-originated-broken-windows-policing-strategy.html?mtrref=www.google.com&gwh=AD1D0EA8E004A4317181C46F5129DC22&gwt=pay>.

³ *Id.*

⁴ *Id.*

⁵ See Shankar Vedantam, *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, *NPR.org* (Nov. 1, 2016), <http://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong> (noting that while “broken windows” policing was implemented in the NYC subways in 1990, it was not implemented in the NYPD until 1994).

⁶ See William J. Bratton, *Broken Windows and Quality-of-Life Policing in New York City* (2015) at 1, http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf.

consuming alcohol in public, or loitering in the park, with the aim of decreasing the occurrence of more serious crimes.⁷

As a result of “broken windows” policing, misdemeanor arrests in NYC increased drastically – from 187,385 per year in 1994, the year in which NYPD Commissioner Bratton instituted “broken windows” policing in the NYPD, to 292,219 per year in 2010.⁸ The NYPD claims “broken windows” policing was responsible in large part for NYC going from a city that in 1990 had 9.6% of the nation’s homicides to a city that in 2013 had 2.4% of the nation’s homicides.⁹ According to the NYPD, the increase in misdemeanor arrests helped to facilitate a reduction in the number of felony arrests because the “broken windows” strategy was preventing crime.¹⁰ “By applying summonses to violations and arrests to misdemeanor crimes, rather than looking the other way because these offenses are ‘too insignificant,’ officers were correcting conditions early,” the NYPD reported in 2015, noting that there were 60,000 fewer felony arrests in 2014 than there were twenty years earlier.¹¹

The NYPD argues that policing quality-of-life offenses decreases the incidences of more serious crime in at least four ways: (a) recidivist criminals may be removed from circulation for a period of time since more than half of misdemeanor arrestees in NYC in recent years have had

⁷ *Id.*; see also *Misdemeanor Offenses*, NYPD Historical N.Y. City Crime Data, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/misdemeanor-offenses-2000-2016.pdf (noting that under New York law, a “violation” means an offense, other than a traffic infraction, for which a term of imprisonment in excess of fifteen days cannot be imposed); see also N.Y. Penal Law § 10.00 (noting that a violation is not a “crime” under the New York Penal Code, as a crime is defined as either a misdemeanor or a felony).

⁸ Bratton, *supra* note 6 at 12; see also N.Y. State Division of Criminal Justice Services, *Adult Arrests by County*, <https://data.ny.gov/Public-Safety/Adult-Arrests-by-County-Beginning-1970/rikd-mt35/data>; see also N.Y. City Department of Investigation, Office of the Inspector General for the NYPD, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (June 22, 2016) at 3, <http://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf>; see also <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf>; see also Testimony of Steven Zeidman, Briefing Before the U.S. Comm’n on Civil Rights, transcript at 118-19 (hereinafter cited as *March 20 Briefing Transcript*); *Misdemeanor Offenses*, NYPD Historical N.Y. City Crime Data, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/misdemeanor-offenses-2000-2016.pdf. Note that the NYPD did not report the number of misdemeanor offenses in 1990 but the New York State Division of Criminal Justice reported 118,670 misdemeanor arrests of adults in NYC in 1990 and 250,579 misdemeanor arrests of adults in NYC in 2010. The difference between the NYPD and New York State Division of Criminal Justice, a state agency which keeps records of criminal history in the State of New York, numbers is probably explained by the fact that the Division of Criminal Justice Services is confining their statistics to adults.

⁹ Bratton, *supra* note 6 at 1.

¹⁰ *Id.* at 3.

¹¹ *Id.*

prior felony arrests; (b) breaking up “rowdy” groups forestalls intoxicated altercations that lead to the commission of more serious crimes; (c) it suppresses spikes of crime in particular areas and by particular violent individuals; and (d) it permits the gathering of information on more serious crimes from individuals arrested for the minor crimes.¹² In addition, the NYPD argues that “broken windows” policing remains a viable police strategy because, it says, arrests for low-level crimes often lead officers to discover guns or other weapons that might have otherwise gone undetected.¹³

Critics of “broken windows” policing argue that there is no statistical correlation between quality-of-life enforcement and serious crime reduction – a point of view supported by the NYC Office of the Inspector General for the NYPD (“OIG”) in a report issued in 2016.¹⁴ The OIG report, while noting that it did not challenge the validity of “broken windows” theory, stated that the decrease in quality-of-life enforcement rates (which the OIG defined narrowly as quality-of-life criminal summonses and misdemeanor arrests¹⁵) by the NYPD between 2010 and 2015, particularly in the issuance of summonses, did not prompt an increase in felony crime, and concluded that, while it was not possible to know conclusively whether low-level enforcement affects violent crime, there was no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity by the NYPD and a related drop in felony crime.¹⁶

Critics also argue that “broken windows” policing disproportionately affects communities of color – that NYPD officers are more likely to issue low-level summonses and make arrests in

¹² William J. Bratton, *Broken Windows is Not Broken: The NYPD Response to the Inspector General’s Report on Quality-of-Life Enforcement*, at 16-18,

http://www1.nyc.gov/assets/nypd/downloads/pdf/broken_windows_is_not_broken.pdf.

¹³ *Id.* at 15. Although the NYPD argues that “broken windows” policing often leads to the discovery of guns or other weapons, stop-and-frisk data obtained by the NYCLU through FOIL requests shows that the NYPD recovered 397 guns during 191,851 stops in 2013 and, at the peak of the NYPD stops in 2011, the police seized 819 guns in 685,724 stops. During the 11-year period for which gun-recovery figures are available, the gun-recovery rate was 0.16%; *see also Stop-and-Frisk during the Bloomberg Administration 2002-2013*, NYCLU (Aug. 19, 2014) at 13, <https://www.nyclu.org/publications/report-stop-and-frisk-during-bloomberg-administration-2002-2013-2014>.

¹⁴ Mark G. Peters & Philip K. Eure, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (June 22, 2016) at 3,

<http://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf>.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3.

predominantly black or Hispanic¹⁷ neighborhoods than in predominantly white neighborhoods – and therefore “broken windows” cannot be defended, even if it were proved that the policy reduces serious crimes.¹⁸ The NYPD, however, maintains that “broken windows” policing does not target people of color or low-income communities, and that the “correlation of race to enforcement is not as clear as some quality-of-life critics believe.”¹⁹ They assert that the disparities between the demographics of the NYC population and that of individuals arrested or issued summonses is merely reflective of the make-up of the population that commits the crimes, and of those that report them.²⁰

Today, the NYPD states that it has “recalibrated” “broken windows” policing partially in response to dramatically improved crime conditions.²¹ It argues that the “peace dividend” that permits such a recalibration is a function, among other things, of years of “broken windows” policing.²² In a recent report, the NYPD noted that NYC is currently experiencing unprecedented levels of safety: in 2017, NYC achieved the lowest per-capita murder rate since 1951, experienced the fewest shootings in the modern era, and saw robberies drop to their lowest levels since 1965.²³ The number of misdemeanor arrests made by the NYPD has decreased in each year since 2010, from a high of 292,219 per year in 2010 to a low of 179,438 per year in 2016.²⁴ The number of criminal summonses filed annually by the NYPD also decreased from 577,664 to 296,290 during the same time period, according to data from the Criminal Court of

¹⁷ Government data reporting uses the term “Hispanic.” As a result, this report generally uses the term rather than Latin. All references in this report to “white” refer to non-Hispanic whites.

¹⁸ Testimony of Kang, Briefing Before the U.S. Comm’n on Civil Rights March 20 Briefing Transcript at 67-70 (hereinafter cited as *March 20 Briefing Transcript*); see also Sarah Ryley, *Racial Disparities in Summons in ‘Broken Windows’ Policing*, N.Y. News (Aug. 4, 2014), <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

¹⁹ Bratton, *supra* note 6, at 33.

²⁰ Written submission from Lawrence Byrne, NYPD Deputy Comm’r (Jan. 2018).

²¹ Bratton, *supra* note 12, at 31.

²² Bratton, *supra* note 6, at 5.

²³ NYPD, *The Police Commissioner’s Report* (Jan. 2018) at 7, <http://www1.nyc.gov/assets/nypd/reports/2018pcpreport/index.html>.

²⁴ N.Y. State Division of Criminal Justice Services, *Adult Arrests 2007-2016*, <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf>; see also *Misdemeanor Offenses*, NYPD Historical N.Y. City Crime Data, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/misdemeanor-offenses-2000-2016.pdf. The number of misdemeanor offenses reported during the period went from 383,108 to 314,925. *Id.*

The City of New York.²⁵ Unpublished statistics from the NYPD suggest that the dramatic decrease in the trend continued in 2017, with arrests down another 9.1% and summonses down 38.5% in 2017.²⁶

The “recalibration” comes at a time when the NYPD is the subject of sweeping court-mandated changes stemming from the landmark ruling in *Floyd v. City of New York*, which found the stop-and-frisk policies of the NYPD unconstitutional.²⁷ The recalibration also comes amidst the *Ligon* and *Davis* cases, which successfully challenged other aspects of NYPD stops,²⁸ and the *Stinson* case, which stemmed from NYPD officers issuing thousands of summonses that were later dismissed for legal insufficiency, and eventually led to a \$75 million class-action settlement.²⁹

As a function of court mandates, political pressure from advocates and elected officials and internally generated changes, the NYPD has recently instituted a series of reforms under current NYPD Commissioner James O’Neill, who has directed the NYPD towards a neighborhood policing model, precision policing, remaking the NYPD’s patrol and investigative models, training program, and performance evaluation system, and, it says, shifting its low-level enforcement focus to non-criminal sanctions to the extent possible.³⁰ Through neighborhood

²⁵ Lisa Lindsay, Esq., *Criminal Court of The City of New York Annual Report 2016*, <http://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf> (noting that the number of summonses issued represents the total number of summonses issued in NYC in a given year. Certain government agencies other than the NYPD, such as the Amtrak Police Department and the NYC Department of Health, have the ability to issue summonses. In 2016, there were only 438 summons trials.)

²⁶ Byrne, *supra* note 20.

²⁷ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

²⁸ In *Ligon*, the plaintiffs successfully challenged Operation Clean Halls, part of the NYPD’s stop-and-frisk program that allowed the NYPD to patrol private apartment buildings enrolled in the program, particularly in high-crime areas. *Ligon v. City of New York* No. 12 Civ. 2274, 2013 (S.D.N.Y., Feb. 14, 2013). The *Davis* case similarly challenged the constitutionality of the NYPD’s stops and arrests of residents of New York Public Housing Authority residences and their visitors. *Davis v. City of New York*, 10 Civ. 0699.

²⁹ *Stinson v. City of New York*, No. 10 Civ. 4228 (RWS), 2017 WL 2544831 at 287 (S.D.N.Y. June 12, 2017); see also Marc Santora, *Mayor de Blasio Announces Retraining of New York Police*, N.Y. TIMES (Dec. 4, 2014), <https://www.nytimes.com/2014/12/05/nyregion/mayor-bill-de-blasio-retraining-new-york-police-dept-eric-garner.html>; see also Colby Hamilton & Brendan Cheney, *Stop-and-frisk Declines, But Question is By How Much*, POLITICO (Jan. 5, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/01/stop-and-frisk-declines-even-as-reports-question-just-how-much-108473>.

³⁰ Bratton, *supra* note 6, at 4; Rocco Parascandola, *NYPD Boss James O’Neill Unveils Community-based Policing Campaign*, NY Daily News (Oct. 11, 2016), <http://www.nydailynews.com/new-york/nypd-boss-james-o-neill-unveils-community-based-policing-campaign-article-1.2826901>; Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Deputy Comm’r Susan Herman, NYPD Deputy Comm’r of Collaborative

policing, officers are directed to engage with members of the community to solve problems, rather than to serve exclusively in an enforcement capacity.³¹ While some commentators hail the reform and the NYPD says that it is finding increasing appreciation by community members of it, others note that neighborhood policing needs to be accompanied by a cultural shift that emphasizes officer accountability in order to be truly effective.³² The NYPD says that it has reformed officer evaluation metrics to reflect police officers' new roles in the community; it says that officers are no longer evaluated by the number of arrests they make, but rather on their ability to solve problems creatively without resorting to traditional enforcement mechanisms.³³ In addition, officers are now given discretion to issue civil summonses for offenses that could otherwise result in criminal summonses.³⁴

The NYPD has also introduced "precision policing," which it says is aimed at tracking individual criminals and guns and targeting its investigations, rather than emphasizing street stops, and at lessening the impact of policing on communities.³⁵ The NYPD's precision policing-model has drawn praise from certain quarters, such as Vanessa Gibson, the New York City Council Member representing the Bronx's 16th Council District, who testified that precision policing allows the NYPD to target repeat violent offenders and avoid targeting people "because of the color of their skin."³⁶ Other commentators have criticized the NYPD's use of precision policing to target gangs in NYC because, they assert, the NYPD's use of social media surveillance to populate and maintain an NYPD database that tracks gang affiliation has the effect of criminalizing innocent individuals who are associated with gangs for reasons unrelated

Policing, in N.Y. (Feb. 15, 2017); *see also* Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Lawrence Byrne, NYPD Deputy Comm'r of Legal Matters, in N.Y. (Feb. 13, 2017); Byrne, *supra* note 20.

³¹ Byrne Interview (Feb. 13, 2017), *supra* note 30. The NYPD recently began running advertisements citywide about neighborhood policing.

³² Kang, March 20 Briefing Transcript at 98-99; *see also* Testimony of Charney, Briefing Before the U.S. Comm'n on Civil Rights, transcript at 25 (hereinafter cited as *March 21 Briefing Transcript*); Byrne, *supra* note 20.

³³ Interview by the N.Y. State Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Terence Monahan, then NYPD Chief of Patrol and now NYPD Chief of Dep't, in N.Y. (Feb. 15, 2017).

³⁴ Byrne Interview (Feb. 13, 2017), *supra* note 30; *see also* *Mayor de Blasio Signs the Criminal Justice Reform Act* (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

³⁵ Byrne Interview (Feb. 13, 2017), *supra* note 30.

³⁶ Gibson, March 20 Briefing Transcript at 458.

to crime.³⁷ The NYPD contends that its surveillance is targeted and narrow; that it no longer seeks to simply identify individual members of a gang for surveillance purposes and that it observes strict legal standards that must be met before an individual may be surveilled online.³⁸ It says that, whereas previous tactics involved surveilling individuals suspected to be in gangs or in areas with high criminal activity, current NYPD practice has been reshaped to hone in on the most dangerous members of society and those likely to perpetrate violent crimes.³⁹

The NYPD says it is also substantially revamping officer training to address implicit bias and to improve officers' problem-solving and communication skills.⁴⁰ Furthermore, the NYPD states it has updated its use-of-force training, with the aim of encouraging officers to de-escalate situations instead of using force to restrain members of the public, and has implemented Crisis Intervention Training ("CIT"), "which trains police officers in how to interact with, and manage, people with mental illnesses."⁴¹

Some commentators argue, however, that the improvements in training have not yet translated into improved relations with the community because NYPD officers are not held to the standards imparted upon them in training.⁴² One example is the NYPD's recent implementation of CIT. While the OIG found in a recent report that the NYPD's CIT trainings are executed "very well" by NYPD trainers, it also found that the current forms used to document interactions with individuals in crisis situations do not contain fields specific to CIT techniques, and the NYPD therefore cannot adequately assess the efficacy of its CIT training in the field.⁴³ In

³⁷ Brotherton, March 21 Briefing Transcript at 335-38; *see also* K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. Denv. Crim. L. Rev. 1, 26 (2015) (stating that the number of gang offenses attributed to gang violence has been consistently low in New York relative to Chicago and Los Angeles).

³⁸ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017); Byrne, *supra* note 20.

³⁹ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, NYPD Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁴⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with Tracie Keese, then NYPD Deputy Comm'r, Training, and now NYPD Deputy Comm'r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁴¹ Byrne Interview (Feb. 13, 2017), *supra* note 30; NYPD Annual Use-of-Force Report 2016, at 13, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/reports-landing.page> (hereinafter cited as *Use of Force Report*); NYPD, *The Police Commissioner's Report* (Jan. 2018), <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>, at 64.

⁴² Kang, March 20 Briefing Transcript at 71-72; *see also* Agostini, March 21 Briefing Transcript at 227.

⁴³ N.Y. Police Department of Investigation, *Putting Training Into Practice* (Jan. 2017), at 2-4, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/CIT_Report_01192017.pdf.

addition to the need to monitor the implementation of training, NYPD Deputy Commissioner Keesee noted that in order to integrate the new training and ensure it has an effect on rank-and-file officers, the NYPD's senior management needs to constantly reinforce the message of the new training procedures.⁴⁴ She stated that one issue the NYPD faces is resistance from some officers who may never fully "buy in" to the updated training and policing strategies.⁴⁵

These NYPD improvements come at a time when numerous community advocates and scholars maintain that low-level enforcement "over-policing" disproportionately impacts communities of color in NYC.⁴⁶ In 2015, over 90% of the approximately 315,000 people arraigned in NYC's criminal courts were black or Hispanic, and roughly 80% of the total arraignments were for misdemeanors or violations.⁴⁷ Data from 2016 shows that for each misdemeanor category on which the NYPD reports statistics, such as misdemeanor assault and related offenses, blacks and Hispanics made up 75.6-83% of those arrested.⁴⁸ Moreover, according to the most recent demographic breakdown of criminal and civil summonses released by the NYPD, during the fourth quarter of 2017, at least 61% of criminal summonses issued in NYC to individuals were issued to people who were either black or Hispanic and at least 67% of criminal summonses issued to individuals were issued to people of color, while only 11.2% were issued to whites, with the remaining 21.6% being issued to persons of "unknown" race.⁴⁹ During the same period, approximately 69% of civil summonses issued to individuals were issued to people of color, while 19% were issued to whites, with the remaining 11.6% being issued to

⁴⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm'r, Training, and now NYPD Deputy Comm'r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁴⁵ *Id.*

⁴⁶ Zeidman, March 20 Briefing Transcript at 119; *see also* Gangi, March 20 Briefing Transcript at 36; *see also* Borchetta, March 20 Briefing Transcript at 139-40.

⁴⁷ Zeidman, March 20 Briefing Transcript at 119; *see also* Criminal Court of The City of New York, Annual Report 2015 at 25, https://www.nycourts.gov/COURTS/nyc/criminal/2015_crim_crt_ann_rpt_%20062316_fnl2.pdf. Under New York law, a "violation" means an offense, other than a traffic infraction, for which a term of imprisonment in excess of fifteen days cannot be imposed. N.Y. Penal Law § 10.00 (McKinney). A violation is not a "crime" under the New York Penal Code, as a crime is defined as either a misdemeanor or a felony.

⁴⁸ In three of the six misdemeanor categories reported by the NYPD, more than 80% of those arrested were black or Hispanic: misdemeanor sex crimes, misdemeanor assault and related offenses, and drug misdemeanor arrests. Crime and Enforcement Activity in New York City,

https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf.

⁴⁹ Data is from the fourth quarter of 2017, the most recent data made available by the NYPD. Disclosure of this data was mandated by the Criminal Justice Reform Act of 2016. *Criminal and Civil Court Summons Reports*, NYPD, <http://www1.nyc.gov/site/nypd/stats/reports-analysis/c-summons.page>.

persons of “unknown” race.⁵⁰ These statistics are similar to those reported in the third quarter of 2017, in which at least 62.5% of criminal summonses issued in NYC to individuals were issued to people who were either black or Hispanic and at least 69% of criminal summonses issued to individuals were issued to people of color, while only 10.6% of criminal summonses were issued to whites, with the remaining 20.4% being issued to persons of “unknown” race.⁵¹ Similarly, in the third quarter of 2017, 62% of civil summonses issued to individuals were issued to people of color, while 14% were issued to whites, with the remaining 23.4% being issued to persons of “unknown” race.⁵² And, approximately 85% of the 700,000 individuals arrested for low-level possession of marijuana between 1997 and 2016, were black or Hispanic, at a time when there is substantial evidence that whites’ usage of marijuana is at least equal to, if not greater than, marijuana usage by people of color.⁵³ According to 2016 estimated Census data, the population of NYC is 32% white, 29% Hispanic, 22% black, and 14% Asian.⁵⁴ The NYPD maintains that not only does the data reflect the make-up of the population that commits the crimes, and is based on those that report them, but that it is an entirely false narrative to imply that the disproportionality in the statistics demonstrates that the NYPD’s methods of enforcement are in any way discriminatory or amount to “a system of oppression and social control in minority neighborhoods” that the advocates’ and academics’ “echo chamber” would make one believe exists.⁵⁵

While the NYPD says that in a departmental directive in 2017 it has made clear that quotas (*i.e.*, a minimum level of arrests or summonses required of each NYPD officer) are

⁵⁰ *Id.*

⁵¹ Data is from the third quarter of 2017, the first data made available by the NYPD. NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49.

⁵² *Id.*

⁵³ Levine, March 21 Briefing Transcript at 326-27; *see also* Frederique, March 21 Briefing Transcript at 243-4; *see also* Harry Levine & Loren Siegel, *80 Marijuana Possession Arrests a Day is More of the Same*, Marijuana Arrest Research Project, 2014, <http://marijuana-arrests.com/docs/MORE-OF-THE-SAME--NYC-Marijuana-Arrests-June2014.pdf>; *see also* Gangi, March 20 Briefing Transcript at 35-36. Note that these statistics mirror 2016 statistics in that in 2016 alone, 85% of individuals arrest for low-level marijuana crimes were black or Hispanic. Harry Levine, Submitted Testimony of Harry Levine, The U.S. Comm’n on Civil Rights, New York State Advisory Board Public Briefing Event, “Police Practices and Accountability in New York City” 16, http://marijuana-arrests.com/docs/Testimony--NYC_1.5million_arrest_warrants--Harry_Levine--US_Civil_Rights_Commission_March2017.pdf.

⁵⁴ American Fact Finder, United States Census Bureau, https://factfinder.census.gov/faces/nav/jsf/pages/guided_search.xhtml.

⁵⁵ Byrne, *supra* note 20.

against NYPD policy, and that any supervisor found to be enforcing quotas will “face discipline,”⁵⁶ critics allege that there is reason to believe that the NYPD historically employed a quota system and continues to employ a de facto quota system, particularly in communities of color, a contention the NYPD vehemently denies.⁵⁷ Some experts claim that officers are incentivized to make arrests or issue summonses solely for the purpose of creating a paper trail of their active participation on duty.⁵⁸ Others claim that there is little that deters officers from making unsubstantiated arrests: officers receive “credit” for arrests made even if the arrest is later found to lack probable cause or otherwise be improper.⁵⁹ There are also claims that officers make unnecessary arrests in order to receive overtime pay.⁶⁰ Moreover, while the NYPD says it no longer evaluates officers on the basis of quotas and has made clear that rewarding or punishing officers on the basis of quotas is a serious offense, critics note that the NYPD’s officer evaluation system still tracks the quantity of officers’ arrest and summons activity.⁶¹

The cumulative effect of the perceived disparate enforcement of “broken windows” exacerbates mistrust between the NYPD and communities of color, community advocates and academics assert.⁶² Moreover, experts testified that “broken windows” policing has long-lasting negative impacts on members of NYC’s youth because of the frequency with which police-youth encounters lead to incidents of police misconduct.⁶³ Some commentators say that “broken windows” enforcement not only forces families to deal with psychological costs but also creates

⁵⁶ See Andre Keshner & Thomas Tracy, *NYPD Chief James O’Neill Pledges Wrath Against Quota-chasing Cops*, N.Y. DAILY NEWS (May 12, 2017), <http://www.nydailynews.com/new-york/nypd-chief-james-o-neill-pledges-wrath-quota-chasing-cops-article-1.3159425>; see also Byrne, *supra* note 20.

⁵⁷ See Gangi, March 20 Briefing Transcript at 101-2; see also Levine, March 21 Briefing Transcript at 341. Byrne, *supra* note 20.

⁵⁸ Levine, March 21 Briefing Transcript at 340-41.

⁵⁹ See Gangi, March 20 Briefing Transcript at 40.

⁶⁰ See Levine, March 21 Briefing Transcript at 334-335; see also Alan Feuer & Joseph Goldstein, *The Arrest Was a Bust. The Officers Got Overtime Anyway*, N.Y. Times (Feb. 19, 2018), <https://www.nytimes.com/2018/02/19/nyregion/new-york-police-overtime-pay-trial.html>.

⁶¹ Charney, March 21 Briefing Transcript at 31; see also Sarah Wallace, *I-Team: NYPD Lieutenant Latest Cop to Say Department Enforces Quota*, NBC N.Y. (Apr. 1, 2016), <http://www.nbcnewyork.com/investigations/NYPD-Lieutenant-Says-There-Are-Quotas-I-Team-Wallace-374307721.html>.

⁶² See, e.g., Stoudt, March 20 Briefing Transcript at 131-32.

⁶³ Malik, March 21 Briefing Transcript at 118-20. It is worth noting that the NYPD, in a December 2017 report on the NYPD’s use of force in 2016, presents statistics which suggest that officers’ use of force has decreased over time. Use of Force Report, Foreword and at 3 (suggesting that officers now use less force than in years past, with officers employing force in only 1.3% of arrests in 2016, the lowest percentage since the NYPD began tracking this information).

a *racial* tax: costs that are disproportionately borne by communities of color.⁶⁴ Critics argue that summonses represent financial sanctions often inflicted on the very communities that cannot afford to pay them.⁶⁵ Others contend that in addition to these costs and the stigma and costs associated with being arrested, the enforcement of quality-of-life crimes leads to further financial and other tangible consequences: individuals arrested often end up spending time in jail, among other reasons because they cannot afford bail, and are forced to make multiple court appearances.⁶⁶ Moreover, they say, individuals who have been issued criminal summonses often plead guilty to avoid the costs associated with being prosecuted.⁶⁷ And, when an individual does not appear for a court date resulting from the issuance of a criminal summons, an arrest warrant for the individual may be issued.⁶⁸ In the past, it is estimated that between 40% and 50% of individuals who were issued summonses for low-level, nonviolent offenses missed their court dates, resulting in an estimated 1.5 million open criminal arrest warrants in New York City in 2017 – a number which represents approximately one in every six New Yorkers.⁶⁹ Critics of “broken windows” policing, such as Professor Brett Stoudt of John Jay College of Criminal Justice, believe that the NYPD needs to completely reimagine the role of policing in NYC, and that NYC needs to divest more responsibility for enforcement of low-level offenses from the NYPD and instead invest in programs aimed at improving the lives of New Yorkers.⁷⁰

In 2016, in an attempt to divert low-level, nonviolent offenders from the criminal justice system, the New York City Council enacted the Criminal Justice Reform Act of 2016 (the “Criminal Justice Reform Act”).⁷¹ Among other things, the Criminal Justice Reform Act reduces

⁶⁴ Fagan, March 21 Briefing Transcript at 105.

⁶⁵ Flores, March 20 Briefing Transcript at 26.

⁶⁶ Fagan, March 21 Briefing Transcript at 107. In an attempt to mitigate the financial consequences associated with being arrested, Manhattan District Attorney Cyrus Vance and Brooklyn District Attorney Eric Gonzalez announced on Jan. 9, 2018 that their offices would no longer seek bail in misdemeanor arrest cases. Press Release of District Attorney Cyrus R. Vance, Jr., Manhattan District Attorney, *Manhattan and Brooklyn District Attorney’s Offices End Requests for Bail in Most Misdemeanor Cases* (Jan. 9, 2018), <http://manhattanda.org/node/6849/>. For a further discussion of this policy, see Chapter 1, Section B.

⁶⁷ *Id.* at 108.

⁶⁸ Krever, March 20 Briefing Transcript at 56.

⁶⁹ N.Y. City Council, *Criminal Justice Reform Act*, <https://council.nyc.gov/legislation/criminal-justice-reform/>; Levine, March 21 Briefing Transcript at 318.

⁷⁰ Stoudt, March 20 Briefing Transcript at 152-53.

⁷¹ The Criminal Justice Reform Act covers the following low-level non-violent offenses: littering, consumption of alcohol in public, public urination, being in a park after hours, walking on park grass, disobeying park signage and

penalties for certain low-level, nonviolent offenses; the default approach under the Criminal Justice Reform Act is for officers to issue civil (rather than criminal) summonses for an offense covered by the Criminal Justice Reform Act.⁷² Certain community advocates believe that the Criminal Justice Reform Act does not go far enough in terms of the offenses covered and in recognizing the societal costs associated with summonses.⁷³ The Criminal Justice Reform Act also requires improved transparency into NYPD summons practices by requiring the NYPD to provide to the Mayor and to the New York City Council, and post to the NYPD website, quarterly reports detailing the total number of summonses issued, as well as the breakdown of summonses issued by offense, race, gender, age, and borough.⁷⁴ The first of these quarterly reports was released in November 2017, and the second was released in early 2018.⁷⁵ The Criminal Justice Reform Act's reporting and disclosure requirements, according to the NYCLU, should help improve transparency into the impact of police practices on the NYC community.⁷⁶

Another piece of legislation aimed at minimizing the effects of historical over-policing is the Right to Know Act, which consists of two bills enacted into law by the New York City Council in January 2018.⁷⁷ The Right to Know Act (a) requires NYPD officers to provide their

unreasonable noise. *Mayor de Blasio Signs the Criminal Justice Reform Act* (June 13, 2016),

<http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

⁷² J. David Goodman, *New York Council Approves Bills to Divert Minor Offenders From Court System*, N.Y. Times (May 25, 2016); *see also* Gibson, March 20 Briefing Transcript at 451; *see also* N.Y. City Council, *supra* note 69.

⁷³ *See* Written Comments of Youth Represent N.Y. City Council Hearing of the Comm. on Public Safety Re:

Criminal Justice Reform Act of 2016 (Jan. 25, 2016),

http://changethenypd.org/sites/default/files/docs/yr_crim_justice_reform_act_1.25.16_final.pdf (arguing that the Criminal Justice Reform Act does not adequately address the racial disparity in low-level enforcement nor the trust gap between the NYPD and communities of color in NYC).

⁷⁴ *See* N.Y. City Council, Int. No. 639-B, Sess. 2015 (N.Y. City 2016); *Mayor de Blasio Signs the Criminal Justice Reform Act* (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

⁷⁵ *See* NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49. A more detailed discussion on the Criminal Justice Reform Act and the first two quarterly reports is in Chapter 1 “Broken Windows” Policing, C. NYPD Policing Tactics and Their Reforms, 1. Legislative Reforms: The Criminal Justice Reform Act and The Right To Know Act.

⁷⁶ Testimony of the NYCLU Before New York City Council Public Safety Comm. Regarding the Criminal Justice Reform Act, <https://www.nyclu.org/en/publications/testimony-regarding-criminal-justice-act>.

⁷⁷ J. David Goodman, *City Council Passes Bills on Police Behavior Amid Outcry on Both Sides*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/2017/12/19/nyregion/new-york-city-council-police-reform.html>. The New York City Council passed the two bills in December 2017 and sent the bills to the Mayor to sign. The Mayor returned the bills unsigned to the New York City Council in January 2018, which automatically allowed the bills to become law. *Id.*; *see also* Letter from the Council of The City of New York to Mayor de Blasio (Jan. 23, 2018), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1681129&GUID=F650527A-AA60-49DB-8A02-97E9C4A0CBDE>; N.Y. City Council, “Legislation” <https://council.nyc.gov/legislation/>.

full name, rank, and command, as well as the specific reason for their police activity, when they stop, question, or search a member of the public for many types of stops⁷⁸ and (b) requires that police officers convey to individuals subject to a “consent search”⁷⁹ that they have the right to refuse consent and to prohibit the officer from conducting a search without a warrant.⁸⁰ The Right to Know Act also mandates that officers obtaining consent to search make a record of such consent, through the use of body-worn camera recordings if available, and record the race, ethnicity, and age of the person searched.⁸¹ Lastly, the Right to Know Act requires the NYPD to submit quarterly reports to the New York City Council regarding the aggregate number of stops made by race, ethnicity, gender and age of the person stopped.⁸² While the initial drafts of the Right to Know Act enjoyed substantial support from advocates and NYC City Council members, many objected to the portion of the implemented version of the Right to Know Act that requires police officers to provide identification and reasons for certain stops because they claimed it left out many common street encounters, including certain car stops and questioning by officers in the absence of any reasonable suspicion of a crime.⁸³

“Broken Windows” Policing in NYC Schools

“Broken windows” policing is not confined to the streets of NYC. Currently, the NYC Department of Education (“DOE”) allocates approximately \$357 million to the NYPD School Safety Division to pay for the employment of approximately 5,300 School Safety Officers (“SSOs”), unarmed law enforcement employees, 94% of whom are non-white and 68% of whom are female, and who, together with 87 full-time NYPD officers, monitor approximately

⁷⁸ These stops consist of: (a) noncustodial questioning of individuals suspected of criminal activity; (b) pedestrian stops where an officer has an individualized, reasonable suspicion that the person stopped has committed, is committing, or is about to commit a crime and where a reasonable person would not feel free to end the encounter at will; (c) frisks; (d) searches of persons or property, including vehicles; (e) roadblock or checkpoint stops, but not including planned security checks of vehicles at sensitive locations or street closures for public events or emergencies; (f) home searches; and (g) investigatory questioning of victims of or witnesses to crimes. However, exceptions exist for among other activities, undercover activity or when an officer is conducting a security search of a person or property, including a consent search or identification check where such search or identification check is predicated upon entrance to a public building. N.Y. City Council, Int. No. 541-C, Sess. 2014 (N.Y. City 2018) (hereinafter cited as Int. No. 541-C).

⁷⁹ A consent search is a search which requires the consent of the person searched.

⁸⁰ Goodman, *supra* note 77; *see also* Int. No. 541-C.

⁸¹ *See* Int. 0541-2014 Sections (a)(2) and (b)(1).

⁸² *See* Int. 0541-2014 Section (f)(1).

⁸³ Goodman, *supra* note 77.

1.1 million students in the NYC school system.⁸⁴ Community advocates claim that black and Hispanic youth are disproportionately policed while they are in school.⁸⁵ These students, advocates contend, are forced to navigate a world in which they are constantly surveilled and criminalized, both in their neighborhoods and in the classroom.⁸⁶

The presence of SSOs and police officers in NYC schools is governed by a 1998 Memorandum of Understanding (“MOU”) that authorizes the NYPD to enforce DOE rules and regulations relating to school safety while encouraging NYC public school administrators and staff to avail themselves of appropriate law enforcement assistance when students are believed to have committed a crime.⁸⁷ Some advocates believe that, in practice, the MOU encourages school administrators to rely excessively on SSOs for disciplining students who have engaged in “minor violations of school rules” such as “[f]ighting in the hallway” or “swiping a classmate’s pencil case” or “talking back to an [SSO]” or “being late to class.”⁸⁸ Some critics testified that there has been “an overuse” of SSOs carrying out the traditional roles of teachers and school administrators – responding to normative student behavior with summonses and arrests.⁸⁹ The NYPD, however, says that while SSOs are the final arbiters of the criminality of a student’s behavior, SSOs make it “standard practice to confer with school administration in the vast

⁸⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Assistant Chief Brian Conroy, Commanding Officer, School Safety Division, in N.Y. (Feb. 13, 2017); Decataldo, March 20 Briefing Transcript at 420. For NYC public school statistics, see NYC Dep’t of Education, 2016-17 Attendance and Enrollment Statistics, <http://schools.nyc.gov/NR/rdonlyres/B7CC89D2-F7B0-4DFA-92A0-3AA5BBFB597D/207586/201617AttendanceEnrollmentUnauditedbyDistrictAsofD.pdf>; Foster, March 20 Briefing at 301; see also *The \$746 Million a Year School-To-Prison Pipeline*, (Apr. 2017) at 9, Ctr. for Popular Democracy, <https://populardemocracy.org/news/publications/746-million-year-school-prison-pipeline> (in an April 2017 Report, the Center for Popular Democracy estimated the cost to New York City is as much as \$746.8 million a year, allocating an additional \$349.1 million in social costs including \$108 million in lost tax revenue to the total cost).

⁸⁵ NYCLU, *City School Safety Data Shows Handcuffs Used Disproportionately Black and Latino Children* (May 8, 2017), <https://www.nyclu.org/en/press-releases/city-school-safety-data-shows-handcuffs-used-disproportionately-black-and-latino>; NYCLU, *Student Safety Act Reporting: 2016 in Review*, https://www.nyclu.org/sites/default/files/wysiwyg/ssa_2016_annual_factsheet_nyclu.pdf (hereinafter cited as *2016 Student Safety Act Report*).

⁸⁶ See, e.g., Stoudt, March 20 Briefing Transcript at 127-8.

⁸⁷ Decataldo, March 20 Briefing Transcript at 373. The MOU was originally put in place in 1998 and was subsequently renewed in 2003. See NYCLU, *Secret Agreement Between NYPD and DOE Over Police in Schools Yet Another Symptom of Broken System*, (June 17, 2009), <https://www.nyclu.org/en/press-releases/secret-agreement-between-nypd-and-doe-over-police-schools-yet-another-symptom-broken>.

⁸⁸ NYCLU, *Criminalization in the Classroom The Over-Policing of New York City Schools*, (March 2007), at 18, http://www.nesri.org/sites/default/files/ACLU_NYCLU_Criminalizing_the_Classroom.pdf.

⁸⁹ Ginsburg, March 20 Briefing Transcript at 181-82; see also Miller, March 20 Briefing Transcript at 243-45.

majority of incidents,” and rarely make an arrest over the objection of school administrators.⁹⁰ Moreover, it says, many incidents in schools that reach the level of criminality are often treated more leniently in school than out of school.⁹¹ And SSOs, it says, generally do not arrest students for doing things like arguing, writing on desks, or using obscene language.⁹² The NYPD says that the fact that there were 6,854 serious incidents the NYPD tracked in NYC schools during 2016-2017 – as opposed to the over 30,000 incidents recorded in NYC schools by the New York State Education Department – shows that SSOs are actually more often than not de-escalating incidents.⁹³

Critics of school policing believe that police presence in the schools is the first step in the “school to prison pipeline” and therefore SSOs and police should not be in schools.⁹⁴ They contend that the MOU fails to sufficiently define what behaviors constitute “criminal” behaviors requiring police intervention, and fail to delineate the respective roles of SSOs and school faculty members, and that these vague guidelines lead to the “overuse” of police as disciplinarians, carrying out the traditional roles of teachers and school administrators.⁹⁵ In turn, the blurry boundaries of school authority, they argue, create clear and drastic consequences for students, particularly ones of color: studies have shown that an arrest doubles the school dropout rate, a first-time court appearance quadruples those odds, and students staying in school after being arrested often cannot get a job, gain admission to college, or join the military.⁹⁶ An updated MOU is currently the subject of negotiations between the NYPD and the DOE and, according to the NYPD, will be made publicly available, will provide for administrative referrals or

⁹⁰ Byrne, *supra* note 20.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* See note 634 for a discussion on the changes to NYPD reporting of incidents in schools starting in the second half of 2016.

⁹⁴ See, e.g., Foster, March 20 Briefing Transcript at 303.

⁹⁵ See, e.g., Miller, March 20 Briefing Transcript at 243-45; see also Ginsburg, March 20 Briefing Transcript at 182.

⁹⁶ See Justice Policy Institute, *Education Under Arrest: the Case Against Police in Schools* (Nov. 2011) (hereinafter cited as *Education Under Arrest*), at 17

http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf; see also Advance Project, Alliance for Educational Justice, Dignity in Schools Campaign, and NAACP Legal Defense and Education Fund, Inc., *Police in Schools are Not the Answer to the Newtown Shooting* (hereinafter, “*Police in Schools*”) at 10, http://b3cdn.net/advancement/df16da132af1903e5b_zlm6bkclv.pdf; Gary Sweeten, *Who Will Graduate? A Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462 (2006). <http://www.tandfonline.com/doi/full/10.1080/07418820600985313>.

diversionary responses for minor misbehavior and criminal violations, and will include a requirement that the NYPD officers working in schools receive the same training as SSOs.⁹⁷

Statistics show that black and Hispanic youth are disproportionately affected by enforcement activities in schools: black students are nearly four times more likely, and Hispanics twice as likely, than their white counterparts to be suspended by school administrators as a result of an interaction with an SSO.⁹⁸ The data on law enforcement activity in NYC schools, such as the use of handcuffs by SSOs and police officers, follows the same patterns.⁹⁹ According to a report by the NYCLU in 2016, SSOs were more likely to use force in schools containing predominantly black and Hispanic students.¹⁰⁰ Moreover, black and Hispanic students were substantially more likely than white students to be handcuffed in mitigating incidents – where no further actions were taken besides the use of handcuffs.¹⁰¹ Of the 4,260 mitigated incidents reported in 2016, black and Hispanic students accounted for 94.5% of mitigated incidents where handcuffs were used and 89.4% of the incidents where handcuffs were not used.¹⁰² At the same time, approximately 59% of students arrested in 2017 were black, while 5.9% of students arrested in 2017 were white.¹⁰³ Of the students issued summonses in 2017, 89.3% were black or Hispanic.¹⁰⁴

According to critics, the negative effect of police presence in schools is compounded by the fact that SSOs are overseen by the NYPD, and neither school administrators nor the DOE have oversight authority over them.¹⁰⁵ The practical implication of this oversight structure, according to critics, is that (a) there is no mechanism to ensure accountability of individual

⁹⁷ Byrne, *supra* note 20.

⁹⁸ The Mayor's Leadership Team on School Climate and Discipline, *Maintaining the Momentum: A Plan for Safety and Fairness in Schools* (July 2016) (hereinafter cited as *SCLT Report*) at 17, http://www1.nyc.gov/assets/sclt/downloads/pdf/SCLT_Report_7-21-16.pdf.

⁹⁹ 2016 Student Safety Act Report, *supra* note 85.

¹⁰⁰ *Criminalizing the Classroom*, *supra* note 85.

¹⁰¹ <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>.

¹⁰² *Id.* Note that the data on SSO enforcement shows a large increase in enforcement between 2016 and 2017. In 2016, for example, there were only 106 mitigated incidents reported (compared to 4,260 in 2017). The significant increase in reported incidents from 2016 to 2017 is likely due to changes in NYPD's reporting: until the third quarter of 2016, the NYPD reported on mitigations and child-in-crisis incidents only when handcuffs were used. Since the third quarter of 2016, the NYPD reports on all mitigations and child-in-crisis incidents, regardless of whether handcuffs were used. 2016 Student Safety Act Report, *supra* note 84, at 1.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, Miller, March 20 Briefing Transcript at 186.

officer misconduct, and (b) school faculty members have no authority to contest an SSO's decision to arrest or discipline a student.¹⁰⁶ The NYPD points out that SSOs are bound by the NYPD Patrol Guide governing general police officer behavior, and thus subject to its discipline as well.¹⁰⁷ However, critics contend that the only practical way for civilians to lodge complaints against SSOs for abuse of authority is to file a complaint with the NYPD's Internal Affairs Bureau ("IAB"), which keeps such claims confidential but, according to some advocates, is often hostile towards individuals, especially young complainants, filing complaints against officers, a contention the NYPD strongly denies.¹⁰⁸ Johanna Miller, the advocacy director of the NYCLU, testified that she has represented students who have made complaints to the IAB and have had investigators show up unannounced at the students' homes demanding responses to questions about their complaints.¹⁰⁹ Experiences like these prompted Ms. Miller to testify that she would like to see an alternative path for students to bring complaints against SSOs.¹¹⁰

NYPD Accountability

The perception that communities of color are treated disparately in low-level NYPD enforcement is amplified by the perceived shortfalls of the current internal and external mechanisms of NYPD accountability.¹¹¹

While advocates praised the NYPD for their recent progress in compiling data for crucial issues, such as firearms and taser discharges, they lamented that the NYPD historically has not been forthcoming about a number of other issues regarding police behavior and discipline for misbehavior, particularly about use of force and officer disciplinary decisions.¹¹² In fact, perhaps in response to the criticism and in an effort to be more transparent, the NYPD in December of 2017 released its first annual Use of Force Report ("Use of Force Report"), detailing the number and types of uses of force by the NYPD, as well as demographic information on individuals

¹⁰⁶ *Id.* at 199

¹⁰⁷ Byrne, *supra* note 20.

¹⁰⁸ Miller, March 20 Briefing Transcript at 192-93; *see also* Byrne, *supra* note 20.

¹⁰⁹ *See* Miller, March 20 Briefing Transcript at 193.

¹¹⁰ *Id.* at 194.

¹¹¹ *See, e.g.*, Agostini, March 21 Briefing Transcript at 226.

¹¹² *See* Brotherton, March 21 Briefing Transcript at 60; Dunn, March 21 Briefing Transcript at 232.

subject to uses of force and on the officers using force.¹¹³ This comes on the heels of the NYPD's adoption in June 2016 of a new Use-of-Force Policy (in response in part to the recommendations of the Department of Investigation in 2015) aimed, according to the NYPD, at bringing improved oversight, enhanced training, comprehensive reporting, and thorough investigations to all uses of force.¹¹⁴

The NYPD claims that since 2014 they have become increasingly transparent and are now the most transparent municipal police department in the world.¹¹⁵ They point as support to the Use of Force Report and the fact that as of 2016, the NYPD Patrol Guide is posted on their website with limited redactions; the fact that they respond to over 17,000 Freedom of Information Law (“FOIL”) requests each year; the disclosure on their website that is responsive to 20 laws enacted by the City Council and NY State legislature since 2014; the availability on their website since February 2016 of CompStat, which maps major crime statistics by neighborhood; and the millions of data points contributed to the NYC Open Data Portal each year.¹¹⁶

While applauding the recent moves toward transparency, critics contend, however, that there are still a number of areas in which the NYPD could be more forthcoming.¹¹⁷ For example, they claim that there is a complete lack of intersectional data – data collected and analyzed across different sources.¹¹⁸ Nor historically has there been a publicly available demographic breakdown of individuals issued criminal or civil summonses or individuals arrested pursuant to warrants issued due to failures to appear in response to a summons, and the limited availability of information has been insufficient to permit real accountability, according to Professor Levine.¹¹⁹ The NYPD only began making demographic information of individuals receiving

¹¹³ See generally, Use of Force Report; see also Dunn, March 21 Briefing Transcript at 232.

¹¹⁴ See Use of Force Report, Foreword; see also *Third Annual Report*, Office of the Inspector General for the NYPD(2017), at 28,

http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

¹¹⁵ Byrne, *supra* note 20.

¹¹⁶ *Id*; see also *NYPD Statistics*, NYPD, <http://www1.nyc.gov/site/nypd/stats/stats.page>; see also NY Open Data, <https://opendata.cityofnewyork.us/>.

¹¹⁷ See Dunn, March 21 Briefing Transcript at 234; see also, e.g., Charney, March 21 Briefing Transcript at 60.

¹¹⁸ Fagan, March 21 Briefing Transcript at 111-12.

¹¹⁹ Levine, March 21 Briefing Transcript at 320-21.

criminal and civil summons available in late 2017.¹²⁰ Moreover, as noted by the OIG, the NYPD has rejected a number of its recommendations on greater transparency, including: (a) a recommendation that the NYPD should assess the relative effectiveness of quality-of-life summonses, quality-of-life misdemeanor arrests, and other disorder reduction strategies in reducing felony crime; (b) a recommendation that the NYPD should conduct an analysis to determine whether quality-of-life enforcement disproportionately impacts black and Hispanic residents, males aged 15-20, and NYC Housing Authority residents; (c) a recommendation that the NYPD should expand its analysis of the consequences of low-level enforcement beyond its short-term effect on felony crimes, instead analyzing long-term impacts of quality-of-life enforcement; and (d) a recommendation that the NYPD should release incident-level and geographically coded data on summonses and misdemeanor arrests.¹²¹ And, the OIG has criticized certain use-of-force statistics presented in the Use of Force Report, noting in a report issued on February 6, 2018 (the “OIG Force Report”) that an analysis of resisting arrest reports from September to November 2016 shows that officers fail to document uses of force in accordance with NYPD policy in about one third of arrests reviewed, casting doubt on the completeness of the statistics presented in the Use of Force Report.¹²² Moreover, the OIG Force Report found that while officers who have reported that force was used in their arrest reports generally follow department procedure requiring the filing of separate use-of-force forms (*see* the description of TRI Worksheets below), the NYPD lacks sufficient controls to identify uses of force when officers do not report incidents involving police force.¹²³ On February 6, 2018, the NYPD released a statement responding to the OIG Force Report, noting that compliance with the

¹²⁰ After the passage of the Criminal Justice Reform Act, the NYPD was required to disclose the age, race, and gender of individuals receiving criminal and civil summonses. The reports detailing this data for the third quarter of 2017 and the fourth quarter of 2017 were released in November 2017 and early 2018. *See* N.Y. City Council, *supra* note 69; *see also* NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49. The NYPD notes the reason they did not disclose demographic information for criminal summons previously is that until 2016 the New York State Office of Court Administration form the NYPD uses for criminal summons did not provide blanks for demographic information. Byrne, *supra* note 20.

¹²¹ Office of the Inspector General for the NYPD, *Third Annual Report* (2017), at 9-11, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

¹²² Officer of the Inspector General for the NYPD, *An Investigation of NYPD’s New Force Reporting System* at 10, (Feb. 2018), http://www1.nyc.gov/assets/doi/press-releases/2018/feb/08Use_of_Force_Report_020618.pdf. The OIG report analyzed 847 resisting arrest reports and found that 580 of such reports did have an accompanying use-of-force report. The OIG found narratives indicating the presence of officer force in 204 of the sample resisting arrest reports. *Id.*

¹²³ *Id.* at 3.

new Use-of-Force Policy is improving and that the OIG report unfairly emphasizes outdated results.¹²⁴

Critics also bemoan the NYPD's failure to make public officer disciplinary records and disciplinary proceeding dispositions, a result of a New York State law that prohibits such disclosure.¹²⁵ New York Civil Rights Law Section 50-A, which requires that police personnel records related to performance evaluations be kept confidential, has been interpreted by the NYC Law Department and the NY courts to require that all police personnel records, including those related to discipline, remain confidential.¹²⁶ This law is said to have prevented the release of the disciplinary records of Daniel Pantaleo, the officer who placed Eric Garner in a chokehold moments before Garner's death.¹²⁷ Some commentators suggest that the lack of public transparency about officer disciplinary issues leads to public mistrust and compounds the public's perception that officers are beyond the reach of the law.¹²⁸

The NYPD notes that they, together with the Mayor's Office and Corporation Counsel, have called for amendments to Section 50-A to make certain disciplinary information about police officers and other uniformed personnel covered under Section 50-A subject to disclosure.¹²⁹ The Mayor's Office states that the legislation should remove confidentiality protections currently applicable to disciplinary records of administrative prosecutions handled by the NYPD's Department Advocates Office (the "DAO") and cases prosecuted by the Civilian Complaint Review Board (the "CCRB"), a move that would subject the disciplinary proceeding

¹²⁴ NYPD Statement Regarding Office of Inspector General's Report on Department Use of Force Data (Feb. 6, 2018), <http://www1.nyc.gov/site/nypd/news/st0206/nypd-regarding-office-inspector-general-s-report-department-use-force-data#0>.

¹²⁵ See Charney, March 21 Briefing at 40.

¹²⁶ N.Y. CLS Civ. R. § 50-a (2017); see *Luongo v. NYPD Records Access Officer*, Civilian Complaint Review Bd., 51 N.Y.S.3d 46 (N.Y. App. Div. 2017); *New York Civil Liberties Union v. New York City Police Dep't*, 50 N.Y.S.3d 365 (N.Y. App. Div. 2017); see also Alan Feuer, *Civil Rights Law Shields Police Personnel Files, Court Finds*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/nyregion/civil-rights-law-section-50-a-police-disciplinary-records.html>.

¹²⁷ *Id.*; see also *New York Civil Liberties Union v. New York City Police Dep't*, 50 N.Y.S.3d 365 (N.Y. App. Div. 2017).

¹²⁸ Charney, March 21 Briefing Transcript at 39.

¹²⁹ City Hall Press Office, *Mayor de Blasio Outlines Core Principles of Legislation to Make the Disciplinary Records of Law Enforcement and Other Uniformed Personnel Subject to Disclosure* (Oct. 14, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/820-16/mayor-de-blasio-outlines-core-principles-legislation-make-disciplinary-records-law>.

record and the final determination by the NYPD Commissioner to public disclosure.¹³⁰ The proposed amendments would also maintain current law restrictions on the use of covered personnel records in litigation, which require a finding that the records being disclosed are relevant to a specific case, and would add a requirement that the judge find that the probative value of the records outweighs the prejudicial effect of disclosure.¹³¹ All other police personnel records related to performance evaluation would remain confidential.

The fact that police officers are rarely criminally prosecuted amplifies the perception that there are insufficient or ineffective mechanisms of accountability for the NYPD.¹³² The law, as written and as applied by courts, has set a high bar for prosecuting a police officer defendant – the prosecutor must show that the officer’s use of force was unreasonable.¹³³ And recent Supreme Court decisions have seemingly given significant deference to an officer’s perspective in deciding that he or she acted reasonably.¹³⁴ The failure of New York prosecutors to successfully prosecute officers alleged to have committed misconduct, including murder, as in the high-profile case of Eric Garner, according to some, sends the message that there is a widespread use-of-force problem and officers are beyond accountability for it, even if that is not necessarily the case.¹³⁵ Some critics believe that the limited enforcement of crimes committed by police officers stems from the inherent conflict of interest between the district attorney and the police.¹³⁶

Moreover, according to critics, individual civil suits alleging police misconduct rarely have a deterrent effect on behavior since, among other things, officers are indemnified by the city.¹³⁷ NYC law provides indemnification to officers only when they act within the scope of their employment and in the discharge of their duties, and in accordance with the rules and

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Agostini, March 21 Briefing Transcript at 227. The NYPD notes, however, that officers are often administratively prosecuted for violations of the NYPD Patrol Guide. Byrne, *supra* note 20.

¹³³ N.Y. CLS Pen. § 35.30(1).

¹³⁴ See, e.g., *City & Cty. San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007).

¹³⁵ Agostini, March 21 Briefing Transcript at 227.

¹³⁶ Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>.

¹³⁷ See N.Y. Gen. Mun. Law § 50-k.

regulations of the NYPD at the time the alleged damages were sustained.¹³⁸ NYC law also does not permit indemnification of officers where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the officer.¹³⁹ Scholars like Joanna Schwartz, Professor of Law at the UCLA School of Law, contend that individual civil litigation not only fails to deter officers from misbehavior, but also fails to properly incentivize supervisory oversight within the NYPD.¹⁴⁰ This failure to deter is compounded, critics claim, by the fact that few, if any, civilians who believe they were mistreated by law enforcement actually take any form of legal action against the offending officer(s).¹⁴¹ The NYPD contends that the reality at the NYPD is otherwise; that civil lawsuits can have many consequences for officers, including increased supervision, failures to be promoted, and entries on officer's permanent records.¹⁴² The Independent Monitor also noted in his most recent report to the *Floyd* Court that there appeared to be “an exaggerated fear of discipline and lawsuits” among NYPD patrol officers, while discussing the reasons for underreporting of stops.¹⁴³ And, significant changes to NYPD policies and practices stemming from *Floyd* and similar cases suggest class action lawsuits have played a significant role in reforming NYPD systems aimed at enhancing officer accountability (see Chapter 1, Section C and Chapter 3, Section H for more information).

The NYPD notes that even though there may be few criminal cases against officers, the NYPD conducts numerous internal administrative prosecutions against officers they believe to have violated NYPD rules, some of which, as in the case of use of force, are much more extensive than those contained in the law.¹⁴⁴ Administrative prosecutions are handled by the DAO: its members prepare and prosecute internal NYPD trials and prosecute CCRB allegations amounting to charges sufficiently serious to merit a CCRB recommendation of “command

¹³⁸ *Id.*

¹³⁹ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890-91, 940 (2014), https://chapman.edu/law/_files/events/SchwartzPaperIndemnification.pdf; N.Y. Gen. Mun. Law § 50-k.

¹⁴⁰ Schwartz, *supra* note 139, at 955.

¹⁴¹ See, e.g., Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863-64 (2012), <http://cardozolawreview.com/Joomla1.5/content/33-3/Schwartz.33-3.pdf> (citing a Bureau of Justice statistics report in support of the conclusion that people who believe they have been mistreated by the police sue only approximately 1% of the time, and offering reasons why this might be the case).

¹⁴² Byrne, *supra* note 20.

¹⁴³ Peter L. Zimroth, *Seventh Report of the Independent Monitor* (2017) at 13, http://nypdmonitor.org/wp-content/uploads/2017/12/2017-12-13-FloydLigonDavis-Monitor-Seventh-Report_EAST_80301353_1.pdf.

¹⁴⁴ Byrne, *supra* note 20.

discipline” with respect to the allegations. According to the CCRB’s website, the Department Advocate’s Office has administratively prosecuted 400 cases, and taken pleas from over 180 members of the NYPD since April 12, 2012.¹⁴⁵

Some experts believe the failure of the criminal and civil courts to hold individual officers accountable has been mirrored by failures of internal oversight mechanisms within the NYPD.¹⁴⁶ They argue that the NYPD Patrol Guide that guides officers on what they can and cannot do is often vague; for instance, they say, its guidance on use of force should set out in understandable form the specific and limited instances in which the use of force is permissible so that officers not only can be guided but also can be held accountable.¹⁴⁷ Ms. Ponomarenko noted that “anyone who is a lawyer can understand precisely why it’s really hard to hold somebody accountable at the back end when the only rule is just reasonableness.”¹⁴⁸ Critics also contend that NYPD supervisors have failed to enforce the rules that do exist, and, therefore, have failed to create a culture of accountability within the organization.¹⁴⁹ After *Floyd*, the NYPD amended its Patrol Guide substantially to include, among other things, an explicit requirement that supervisors assess the constitutionality of each of their subordinates’ stop-and-frisk stops.¹⁵⁰ Nonetheless, a 2016 review of supervisory officers’ oversight revealed that supervisors approved and/or failed to reprimand their subordinate officers for deficiencies, such as failure to articulate reasonable suspicion in stopping individuals.¹⁵¹

The NYPD’s primary external oversight body, the CCRB, a theoretically independent agency of civilians that is tasked with investigating incidents of NYPD police misconduct, appears, according to certain critics, to have limited power to effect change: it can only

¹⁴⁵ See The Administrative Prosecution Unit website, <https://www1.nyc.gov/site/ccrb/prosecution/administrative-prosecution-unit-apu.page>.

¹⁴⁶ See, e.g., Ponomarenko, March 21 Briefing Transcript at 141.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See Charney, March 21 Briefing Transcript at 28-30.

¹⁵⁰ Peter L. Zimroth, *Second Report of the Independent Monitor* (2015) at 38-39, <http://nypdmonitor.org/wp-content/uploads/2016/02/2016-02-16FloydvCityofNY-MonitorsSecondStatusReport.pdf>.

¹⁵¹ *Id.* at 47.

recommend officer discipline, and the NYPD has broad power to deviate from its findings.¹⁵² The worst penalty an NYPD officer faces as a result of a CCRB proceeding is losing his or her job.¹⁵³ Moreover, the CCRB's reconsideration process, which provides a mechanism for the NYPD to ask the CCRB to reconsider its findings and/or discipline recommendations for a previously substantiated allegation, not only decreases the likelihood that an officer will be held accountable for misdeeds but further diminishes its legitimacy with the public, according to critics.¹⁵⁴ The CCRB's data suggests that the reconsideration process had a substantial effect on disciplinary outcomes in 2015 and 2016 but a less substantial effect in the first half of 2017: the CCRB downgraded disciplinary recommendations or findings (*e.g.*, from claims substantiated to exonerated) in 56% of reconsideration cases in 2015, 45% of reconsiderations in 2016 and 13% of reconsideration cases in the first half of 2017.¹⁵⁵ Another issue that affects the perception of accountability, critics say, is the length of time the NYPD takes to challenge the CCRB findings.¹⁵⁶ According to the latest CCRB report, the DAO took an average of 280 days to submit a reconsideration request in the first half of 2017, presenting "a significant difficulty" with respect to the reconsideration process.¹⁵⁷ Moreover, the number of reconsideration requests is on the rise, having more than doubled from the first half of 2016 to the first half of 2017.¹⁵⁸ In addition, the time it takes the CCRB to process a claim, whether or not it has been the subject of

¹⁵² Charney, March 21 Briefing Transcript at 35; *see* NYCLU, *Five Years of Civilian Review, A Mandate Unfulfilled*, 1998 at 4, <https://www.nyclu.org/en/publications/report-five-years-civilian-review-mandate-unfulfilled-1998>; *see also* History, NYC Civilian Complaint Review Board, <http://www1.nyc.gov/site/ccrb/about/history.page>.

¹⁵³ Darche, March 21 Briefing Transcript at 214; *see also* Civilian Complaint Review Board, Annual Report 2016 (hereinafter cited as *2016 CCRB Report*) at pp. 33-36, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2016_annual.pdf; Civilian Complaint Review Board, Bi-Annual Report 2017, (hereinafter cited as *2017 Bi-Annual CCRB Report*) at 30, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/20171206_semi-annual.pdf.

¹⁵⁴ 2016 CCRB Report, *supra* note 153 at 45; *see also* Charney, March 21 Briefing Transcript at 37-39; *see also* Zamani, *supra* note 154; *see also* Benjamin Mueller, *New York Police Challenging More of Review Board's Findings, Study Shows*, N.Y. Times (July 19, 2017) <https://www.nytimes.com/2017/07/19/nyregion/new-york-police-challenging-more-of-review-boards-findings-study-shows.html> (quoting Christopher Dunn, New York Civil Liberties Union associate legal director, as saying "These figures make clear the department is using reconsideration as a tool to thwart the disciplinary process We were very concerned this was going to undermine the independence of the C.C.R.B., and these figures show that's exactly what has happened.").

¹⁵⁵ 2016 CCRB Report, *supra* note 153 at 48. Note that in the first half of 2017, the CCRB downgraded disciplinary recommendations or findings in 13% of reconsideration cases, compared to 57% of reconsideration cases in the first half of 2016. 2017 Bi-Annual CCRB Report, *supra* note 153 at 42.

¹⁵⁶ Mueller, *supra* note 154.

¹⁵⁷ 2017 Bi-Annual CCRB Report, *supra* note 153 at 41.

¹⁵⁸ *Id.* at 40. The CCRB reported that there were 38 distinct officers with a substantiated allegation reconsidered in the first half of 2016 and 79 distinct officers in the first half of 2017.

a reconsideration request, has also been criticized both by advocates and the NYPD.¹⁵⁹ In the first half of 2017, closing a case lasted an average of 159 days.¹⁶⁰ The CCRB has stated that it is committed to reducing the time it takes to process claims.¹⁶¹

The NYPD claims that it is subject to myriad levels of independent oversight in addition to the CCRB. Among those are the Independent Monitor with respect to stop-and-frisk; the NYPD Office of Inspector General (housed under the NYC Department of Investigation), which is responsible for examining NYPD policies, practices, and procedures and identifying patterns and trends in policing, and generates reports with respect to such findings that the NYPD is required by law to respond to;¹⁶² the NYC Department of Investigation (“DOI”) which is charged with overseeing the NYPD and other government agency corruption, misconduct, fraud, waste, and abuse, and has the power to issue subpoenas and uncover corruption through its investigations;¹⁶³ the Commission to Combat Police Corruption, created in 1995 to monitor corruption investigations and to determine whether the NYPD appropriately addresses officer misconduct;¹⁶⁴ the Mayor; the City Council; five District Attorneys’ Offices overseeing NYPD criminal conduct; two U.S. Attorneys’ Offices overseeing federal NYPD criminal conduct; and the NYS Attorney General’s Office as an independent special prosecutor in certain limited cases.

Moreover, the NYPD has also recently instituted a more robust oversight infrastructure to investigate use-of-force incidents.¹⁶⁵ As part of that oversight, the NYPD First Deputy

¹⁵⁹ Siegel, March 21 Briefing Transcript at 47; Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Deputy Comm’r Lawrence Byrne, NYPD Deputy Comm’r of Legal Matters, in N.Y. (Feb. 15, 2017).

¹⁶⁰ 2017 Bi-Annual CCRB Report, *supra* note 153 at 3.

¹⁶¹ Darche, March 21 Briefing Transcript at 199.

¹⁶² See *Squad 10/IG-NYPD*, N.Y. City’s Inspector General, <http://www1.nyc.gov/site/doi/offices/oignypd.page>.

¹⁶³ Department of Investigation website, <http://www1.nyc.gov/site/doi/index.page>.

¹⁶⁴ Exec Order No. 18 of Former NYC Mayor Rudolph Giuliani.

¹⁶⁵ NYPD Annual Use-of-Force Report 2016 at 9, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/reports-landing.page>. The NYPD describes several internal divisions with unique oversight responsibility regarding uses of force. First, Borough Investigations Units are charged with investigating instances of non-criminal violations of NYPD rules and certain criminal incidents involving police officers. Second, the Force Investigation Division (FID), a group staffed with 60 investigators, is responsible for investigating Level 3 uses of force that involve firearms discharges, cases in which a subject is seriously injured, and cases in which a subject dies in police custody. Third, the Use of Force Review Board, an oversight mechanism tasked with “maintaining the integrity of the [NYPD’s] use of force policy,” reviews the most serious cases of uses of force and making finding regarding the propriety of officer conduct in such cases. The NYPD Commissioner Report describes another division which analyzes use-of-force incidents: the Risk Management Bureau. The Risk Management Bureau analyzes use-of-force data and uses it in developing strategies for ensuring officer accountability and improving officer safety, confirms

Commissioner holds monthly meetings with, among others, the Risk Management Bureau and Borough adjutants, in which they assess the quality of the Threat, Resistance or Injury Worksheets (“TRI Worksheets”), reports that patrol officers are required to fill out to document the level of force used in connection with certain use-of-force incidents and investigate selected use-of-force incidents.¹⁶⁶ The NYPD also plans to embark on another oversight initiative in 2018: the implementation of its Risk Analysis Information Litigation System (“RAILS”), which will allow commanding officers to better assess their subordinates and identify at-risk officers more effectively.¹⁶⁷ According to Mr. Charney, the NYPD currently maintains a database with early warning indicators, including civilian complaints, lawsuits against officers, uses of force, firearms discharge, bad performance evaluations, and prior disciplinary action penalties, to identify poor performance early.¹⁶⁸ However, Mr. Charney stated that these indicators are “woefully under-inclusive” and that additional indicators should be added to the database when the RAILS system becomes fully operational.¹⁶⁹

Many see the use of police body cameras (“BWCs”), required to be implemented by *Floyd*, as a mechanism that will effect a real change in officer accountability. A 2015 University of South Florida study of the effects of BWCs on officer behavior found that officers who wear BWCs are less likely to be involved in use-of-force incidents and civilian complaints of misconduct.¹⁷⁰ Officers participating in the study also found that the presence of BWCs improved citizen behavior and helped de-escalate confrontations.¹⁷¹ However, an 18-month Washington, D.C. study released in October 2017 found that officers equipped with cameras used force and prompted civilian complaints at about the same rate as those who did not have

that the NYPD is meeting its use-of-force reporting obligations to the Mayor’s Office and the City Council, and audits the NYPD’s crime-reporting, certifying the integrity of crime statistics.

¹⁶⁶ *Id.* at 12.

¹⁶⁷ NYPD, *The Police Commissioner’s Report* (Jan. 2018),

<http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>, at 67.

¹⁶⁸ Charney, March 21 Briefing Transcript at 34; *see also* Charney, March 21 Briefing Transcript at 34; *see also* Peter L. Zimroth, *First Report of the Independent Monitor* (2015), <http://nypdmonitor.org/wp-content/uploads/2015/08/MonitorsFirstReport-AsFiledInFloydDocket.pdf>.

¹⁶⁹ Charney, March 21 Briefing Transcript at 34.

¹⁷⁰ Executive Summary, *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs): The Orlando Police Department (OPD) Experience*, <http://media.cmgdigital.com/shared/news/documents/2015/10/09/OPD-Final-Report-Executive-Summary-10-6-15.pdf>.

¹⁷¹ *See* Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, Huffington Post (Oct. 13, 2015), http://www.huffingtonpost.com/entry/police-body-camera-study_us_561d2eale4b028dd7ea53a56.

them.¹⁷² The NYPD recently began rolling out BWCs to its officers, following a pilot program mandated by *Floyd*; all of the approximately 20,000 officers with patrol responsibilities are expected to have cameras by the end of 2018.¹⁷³ The NYPD's recently released revised BWC policy (the "2017 BWC Policy") requires officers to notify members of the public that an interaction is being recorded "unless notification could compromise the safety of any person or impede an investigation."¹⁷⁴ The 2017 BWC Policy does not require continuous activation, but rather only requires officers to record certain types of interactions (known as "mandatory activation" events), including traffic stops, pedestrian stops or frisks, uses of force, or engaging in summons or arrests; however, officers are afforded some level of discretion to deactivate their BWCs during mandatory activation events other than arrests: the 2017 BWC Policy allows officers to deactivate their BWCs "upon the request of a member of the public if a suspect is not present, and it is safe and advisable to do so after considering all the circumstances, including the requester's desire for privacy or confidentiality."¹⁷⁵ In all recorded interactions, the 2017 BWC Policy requires officers to notify members of the public that an interaction is being recorded "unless notification could compromise the safety of any person or impede an investigation."¹⁷⁶

The ACLU believes that removing officer discretion to deactivate could ensure that officers do not "evade detection while engaging in abuse."¹⁷⁷ However, the ACLU and others expressed concern that continuous recording could transform BWCs from accountability tools to surveillance mechanisms, aggregating data from thousands of hours of footage to create a repository of data for future investigations.¹⁷⁸

¹⁷² See Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior, Study Says*, N.Y. Times (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/police-body-camera-study.html>.

¹⁷³ NYPD, *Body-worn Cameras*, <http://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>; NYPD, *The Police Commissioner's Report* (Jan. 2018), <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

¹⁷⁴ See Appendix B, Section 4, NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 2, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf; see also, NYPD Body-Worn Cameras – Pilot Program II, <https://policingproject.org/wp-content/uploads/2016/06/NYPD-BWC-Draft-Policy.pdf>.

¹⁷⁵ See *id.* at Appendix B, Section 7 and Section 9.

¹⁷⁶ See *id.* Appendix B, Section 4.

¹⁷⁷ Jay Stanley, *Police Officer Discretion in the Use of Body Worn Cameras*, ACLU (Feb. 2, 2015), <https://www.aclu.org/blog/free-future/police-officer-discretion-use-body-worn-cameras>.

¹⁷⁸ Ponomarenko, March 21 Briefing Transcript at 162.

Other accountability issues raised by the 2017 BWC Policy include whether officers should be permitted to review footage from their own BWCs until they have filled out a report describing filmed incidents – particularly when an officer is involved in a use-of-force incident. Despite public opposition, the 2017 BWC Policy, following the policy of many police departments nationwide, allows officers to review recordings of their own encounters before making an initial report or providing an official statement so long as the encounter did not involve an allegation of significant use of force or officer misconduct.¹⁷⁹ Critics suggest that an officer’s ability to review footage before drafting a report might have an effect on the contents of the report, suggesting that officers who review footage may be inclined to tailor their written report to fit objective evidence seen in the video.¹⁸⁰

The 2017 BWC Policy also does not provide a seamless mechanism to compel disclosure of footage; it merely permits the subject of a recording to request footage through a FOIL request, with one exception.¹⁸¹ An individual arrested with a pending criminal case may not request video footage of his or her arrest because the NYPD believes that such an approach would skirt the standard discovery rules in criminal court.¹⁸² The NYPD believes that FOIL requests for BWC footage provide a process that complies with New York law and includes embedded privacy protections.¹⁸³ Certain experts believe disclosure of BWC footage to affected individuals is important so that the individuals can point to an objective record of their interactions when bringing a complaint.¹⁸⁴ Such an objective record, they say, averts the he-said-she-said dynamic that can impede resolution of civilian complaints.¹⁸⁵

¹⁷⁹ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 16-17; *see also NYPD Body Camera Policy Ignores Community Demands for Police Accountability*, NYCLU Press Release (Apr. 7, 2017), <https://www.nyclu.org/en/press-releases/nypd-body-camera-policy-ignores-community-demands-police-accountability>.

¹⁸⁰ Azi Paybarah, *Critics say NYPD rules undermine body camera program*, POLITICO (Apr. 20, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/04/20/critics-say-nypd-rules-undermine-body-camera-program-111403>.

¹⁸¹ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 24.

¹⁸² *Id.*

¹⁸³ *Id.* The NYPD response notes that Public Officers Law § 87 bars disclosure of footage in certain circumstances and therefore FOIL requests are a preferred route for disclosure.

¹⁸⁴ Malik, March 21 Briefing Transcript at 163.

¹⁸⁵ *Id.*

Lastly, the 2017 BWC Policy does not include a mandatory process for the release of BWC footage that has captured high-profile incidents, such as police shootings, to the media.¹⁸⁶ The NYPD, in its response to public comments, noted that “it may be appropriate in some cases to release a recording of an event [involving an officer’s use of deadly force] in an effort to be transparent, answer questions, and ease unrest.”¹⁸⁷ As of the date of this writing, the NYPD has released all three instances of police-involved shootings captured on a BWC.¹⁸⁸ Chuck Wexler, the executive director of the Police Executive Research Forum, lauded the NYPD’s decision to release footage, noting that the decision means that “the public’s right to know supersedes age-old resistance that argued against this transparency.”¹⁸⁹

The 2017 BWC Policy has also been criticized by the Patrolmen’s Benevolent Association (the “PBA”), the NYPD’s union and collective bargaining representative, which believes that the NYPD’s decision to release BWC footage does not comport with the requirements of Section 50-A.¹⁹⁰ The PBA is seeking declaratory and injunctive relief against Mayor de Blasio, NYPD Commissioner O’Neill, and the NYPD with respect to the release of BWC footage in the three separate instances in 2017, arguing that the NYPD’s decision does not comply with the requirements of Section 50-A unless the filming officer consents to such a release or the release is required by court order.¹⁹¹ The court is scheduled to hear the PBA’s motion for a temporary restraining order on May 3, 2018.¹⁹²

¹⁸⁶ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 25-26, noting that “[t]he NYPD is studying the various approaches that other police departments take when releasing video of police shootings.”

¹⁸⁷ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 26.

¹⁸⁸ See Ashley Southall & Joseph Goldstein, *Police Release Body Camera Footage of Shooting Death in Bronx*, N.Y. Times (Sept. 14, 2017), <https://www.nytimes.com/2017/09/14/nyregion/police-body-camera-footage-new-york.html?mcubz=3>; *NYPD Body Camera Footage Shows Officer Shoot Knife-Wielding Man*, NBC NEW YORK (Nov. 27, 2017), <https://www.nbcnewyork.com/news/local/NYPD-Body-Cam-Footage-Police-Shooting-NYC--460415943.html>; *Body Cam Footage Contradicts Witness Claims About Deadly NYPD Shooting*, CBS NEW YORK (Nov. 29, 2017), <http://newyork.cbslocal.com/2017/11/29/bronx-shelter-nypd-shooting-body-cam/>.

¹⁸⁹ Southall & Goldstein, *supra* note 188.

¹⁹⁰ Ashley Southall, *New York Police Union Sues to Stop Release of Body Camera Videos*, N.Y. Times (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/nyregion/new-york-police-union-body-camera-lawsuit.html>.

¹⁹¹ See Complaint at 4, *Patrolmen’s Benevolent Ass’n of The City of New York, Inc. v. Bill de Blasio*, Index No. 2018-150181 (N.Y. Sup. Ct., Jan. 9, 2018).

¹⁹² *Patrolmen’s Benevolent Ass’n v. De Blasio, Bill*, Docket No. 150181/2018 (N.Y. Sup Ct. Jan. 09, 2018), Court Docket.

Recommendations

The recommendations of the Committee are:

1. **The Commission should urge New York State, the New York City Mayor, the New York City Council, and the NYPD to completely abandon “broken windows” policing as a policy so that (a) the potential for discriminatory practices against individuals of color is reduced, (b) line officers are not incentivized to punish low-level, nonviolent offenses, and (c) the path to prison for individuals of color is reduced.**
 - *The Commission should recommend to NYC that they fully decriminalize the “quality-of-life” offenses covered by the Criminal Justice Reform Act of 2016 and increase the number of offenses that are covered by the Criminal Justice Reform Act of 2016.*
 - *The Commission should recommend to NYC that they abandon the use of summonses and arrests for first-time offenders of low-level, nonviolent crimes and violations.*
 - *The Commission should recommend to NYC that they use community service or restorative justice programs as alternatives to criminal and civil summonses for all low-level, nonviolent crimes and violations, particularly for youth and those who are not repeat offenders.*
 - *The alternative approaches should minimize interference with work schedules.*
 - *The Commission should recommend to NYC that no person under eighteen be arrested for low-level, nonviolent crimes or violations.*
 - *The Commission should recommend to NYC and the New York State Court System that it attempt to (a) divert low-level offense cases to alternative non-punitive forums for resolution, (b) increase the speed of trials, (c) compensate those who must repeatedly miss work to attend court due to prosecutor or court delay, (d) discourage plea agreements and work to make adjudication a fairer alternative to plea bargaining, (e) use means tests for issuing fines, (f) eliminate bail in a wider range of low-level offense cases, and (g) provide legal assistance to those issued civil summonses.*
 - *The Commission should encourage the New York City Council to amend the Right to Know Act to apply to all stops.*

- *The Commission should encourage NYC and New York State to take steps so that the NYPD ceases to make arrests or issue summonses for possession and public display of small amounts of marijuana.*
 - *If the NYPD's current quality-of-life policing is maintained, the Commission should recommend that the NYPD (a) perform the OIG's Requested Analyses (which include (i) an assessment of the relative effectiveness of quality-of-life summonses and misdemeanor arrests, as compared to other strategies, in reducing the rate of serious crime, (ii) an analysis to assess whether quality-of-life enforcement disproportionately impacts (1) black and Hispanic residents, (2) males aged 15-20, and (3) residents living in New York City public housing) and (b) release geographically coded incident data as requested in the OIG's Third Annual Report.*
- 2. The Commission should encourage the NYPD to ensure that its gang intervention policies are not over-inclusive.**
- *The Commission should encourage the NYPD to create public, narrow, and fair criteria for inclusion in gang databases and develop fair procedures to challenge inclusion.*
 - *The Commission should recommend to the New York City Council that they undertake a public review of NYPD gang policies.*
 - *The Commission should urge the New York City Mayor to continue to invest in Cure Violence initiatives and other evidence-based alternatives to relying on police in order to reduce violence.*
- 3. The Commission should encourage the NYPD to continue to improve training with respect to police officer interactions with individuals of color, including by ensuring that field officers receive the same type and amount of implicit bias, de-escalation, and situational training that recruits currently receive.**
- 4. The Commission should recommend to the NYPD that it rigorously enforce its recent "no quotas" directive, and ensure that neither NYPD commands nor individual supervisors use numerical arrest/summons metrics in performance evaluations. The Commission should also recommend to NYC that the NYC Office of Inspector General for the NYPD assess compliance.**
- 5. The Commission should recommend to the NYC Mayor, the NYPD, and the New York City Department of Education ("DOE") the expeditious adoption of a new Memorandum of Understanding ("MOU") governing police officers and School Safety Officers ("SSOs") in schools that clearly outlines a list of disciplinary infractions and their consequences; that makes clear when SSOs or police officers, rather than school authorities, should be involved; and that**

provides school administrators the sole authority and discretion to address lower-level offenses and normative child and adolescent behavior without the student being arrested, issued a summons, or handcuffed.

- *The MOU and any plan to operationalize the MOU should be publicly available and widely disseminated.*
- *The MOU should implement a means for institutionalizing periodic oversight of the effect of the presence of SSOs and police officers in NYC schools.*

6. The Commission should recommend to the NYC Mayor, the New York City Council, the NYPD, and the DOE that NYC move toward zero criminal enforcement in schools and focus instead on developing training curricula for school administrators, SSOs, and police officers that de-emphasize enforcement and emphasize preventative measures and restorative disciplinary practices, while developing alternative punishments for school-age children.

- *NYC should make more substantial investments in school-based mental health professionals and evidence-based alternatives to policing and other punitive measures.*
- *SSOs and police officers should undergo more extensive training to better equip them to handle issues and challenges unique to school environments, such as juvenile de-escalation exercises with students of diverse backgrounds and special training addressing (a) students with disabilities, (b) children-in-crisis interventions, and (c) adolescent and child development.*
- *SSOs and police officers should not use handcuffs or other restraints in schools unless there is an immediate threat to their physical safety or the physical safety of others.*
- *The NYPD should eliminate the use of criminal summonses in all NYC public schools.*
- *The NYPD should avoid arresting any youth in school except in the most extreme cases.*
- *NYC should develop alternatives to criminal punishment for school-aged children.*
- *To the extent they are involved in any student disciplinary infractions, SSOs should be encouraged to increase their use of warning cards instead of taking punitive action.*

7. **The Commission should recommend to the New York State legislature that it repeal or, at a minimum, amend New York Civil Rights Law Section 50-A so that the public can obtain information about police officers who have engaged in or have been alleged to have engaged in misconduct.**
- *At a bare minimum, the New York State legislature should amend Section 50-A to (a) permit the disclosure of the full record and outcome of NYPD disciplinary trials, a position supported by Mayor De Blasio and the NYPD, (b) permit the disclosure of disciplinary records for officers who are repeat offenders, including those who have had two or more cases substantiated by the CCRB in the last three calendar years or have had numerous complaints filed against them, or have used “excessive force” as that term is used in the Patrol Guide,¹⁹³ and (c) make clear that BWC footage is not “personnel records” under Section 50-A.*
8. **The Commission should recommend to NYC and New York State that they create greater incentives for officers and their supervisors to abide by the laws and rules governing their behavior.**
- *The NYPD should be required to bear at least some of the financial responsibility for litigation costs related to its officers’ misconduct.*
 - *New York State law prohibiting indemnification where the offending conduct is “in violation of any rule or regulation of his agency at the time the alleged damages were sustained” and where the misconduct constituted intentional wrongdoing should be strictly enforced.*
 - *New York’s Governor should expand the scope of Executive Order No. 147 so that the New York State Attorney General acts as a special prosecutor in the investigation and prosecution of all substantiated CCRB cases of serious police misconduct or when there has been an allegation of homicide, serious injury, or sexual assault by an officer.*
 - *The RAILS system (the early warning detection system for officers at risk of poor performance that the NYPD is currently in the process of finalizing for implementation) should incorporate, among other things, data on officers’ (a) level of arrest and summons activity, (b) number of resisting arrest arrests, (c) number of obstruction of governmental administration charges, (d) number of disorderly conduct charges, (e) number of adverse suppression rulings and (f) number of adverse credibility rulings.*

¹⁹³ “Excessive force” is defined as “[u]se of force deemed by the investigating supervisor as greater than that which a reasonable officer, in the same situation, would use under the circumstances that existed and were known to the [officer] at the time force was used.” *NYPD Patrol Guide*, NYPD, <http://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page> Procedure No. 221-01 (hereinafter cited as *Patrol Guide*).

- *The NYPD should (a) incentivize supervising officers to accurately review their subordinates' performance and (b) create clear widely publicized (within the NYPD) punitive consequences for a supervising officers' failure to comply with their supervisory duties.*
 - *The NYPD should implement policies that impose clear and consistent punitive consequences for breaching protocols learned in training, and officers need should be held accountable for deviating from those protocols.*
- 9. The Commission should recommend to the New York State Office of Court Administration that judges be required to attend implicit and structural bias training periodically so that the judicial system, among other things, does not sanction bias when it enforces “reasonable suspicion standards” in cases of police misconduct.**
- 10. The Commission should recommend to NYC that the CCRB be granted increased authority and true independence.**
- *CCRB decisions should be final and not be reviewable by the NYPD.*
 - *If CCRB decisions continue to be reviewable by the NYPD, the NYPD Commissioner should explain to the public his or her decision not to follow the recommendation of the CCRB, the process he or she undertook to revise the recommendation, and the detailed rationale (required to be disclosed to the CCRB) for the decision.*
 - *The CCRB should continue to reduce the processing time for its cases and ensure that all cases are processed within four months of receiving the initial complaint.*
 - *The reconsideration process by which the NYPD can challenge the CCRB's findings should be eliminated.*
 - *The NYPD, the Mayor's Office, and the CCRB should continue to increase community awareness of the CCRB and the role it plays in ensuring the public can file complaints against police for misconduct.*
 - *The New York City Council should codify the existence of the Administrative Prosecution Unit of the CCRB.*
 - *The New York City Council should ensure that a revitalized CCRB be granted oversight of SSOs.*
 - *The CCRB's budget should be sufficient for it to conduct its oversight mission.*

11. The Commission should recommend to the NYPD that the 2017 BWC Policy regarding body-worn cameras be altered in the following ways:

- *The 2017 BWC Policy should implement penalties following an initial grace period for officers who fail to activate their BWC during a mandatory activation event or who deactivate their BWC when deactivation is not permitted.*
- *The 2017 BWC Policy should allow individuals who have been subject to police misconduct to review footage of their interaction with the police officer alleged to have engaged in misconduct.*
- *The 2017 BWC Policy should prohibit officer review of footage prior to their having written their report.*
- *The 2017 BWC Policy should ensure that body camera footage is placed under the control of an independent agency to protect privacy, prevent misuse, and ensure streamlined access for those who appear in it.*
- *The 2017 BWC Policy should provide that any BWC footage the NYPD decides to release to the public should be unedited barring significant confidentiality concerns.*

Chapter 1: “Broken Windows” Policing

For more than a decade, academics and policy analysts have challenged the merits and effectiveness of “broken windows” policing – strict enforcement of low-level crimes, known as “quality-of-life” offenses – would put the “real” criminals on notice that they were being watched and that their actions would have consequences.¹⁹⁴ Beginning in 1990 in the NY subway system and in 1994 across NYC, the NYPD implemented “broken windows” policing in NYC. The NYPD, as a matter of policy, would no longer ignore the “little things” but instead would treat them as seriously and enforce them as vigorously as it did serious crimes because, they argued, serious crime was more likely to happen in a lawless environment and because serious criminals committed petty offenses as well.¹⁹⁵ The approach encouraged officers to issue summonses to or arrest individuals engaged in violations, misdemeanors and low-level crimes such as hopping a subway turnstile, smoking marijuana, riding bicycles on sidewalks, disorderly conduct, consumption of alcohol in public, public urination, or loitering in the park.¹⁹⁶ As a result of “broken windows” policing, misdemeanor arrests in NYC increased drastically – from 187,385 per year in 1994 to 292,219 per year in 2010.¹⁹⁷ The NYPD claims “broken windows” policing was in large part responsible for NYC going from a city that in 1990 had 9.6% of the nation’s homicides to a city that in 2013 had 2.4% of the nation’s homicides.¹⁹⁸ According to the NYPD, more misdemeanor arrests led to fewer felony arrests because the “broken windows” strategy was preventing crime.¹⁹⁹ “By applying summonses to violations and arrests to misdemeanor crimes, rather than looking the other way because these offenses are ‘too insignificant,’ officers

¹⁹⁴ See Bernard E. Harcourt, *Illusion of Order: The False Promise of Broken Windows Policing* (2001). For the seminal writing on “broken windows,” see Kelling & Wilson, *supra* note 2; see also William Bratton & George L. Kelling, *The Assault on ‘Broken Windows’ Policing*, WALL ST. J. (Dec. 18, 2014), <https://www.wsj.com/articles/william-bratton-and-george-kelling-the-assault-on-broken-windows-policing-1418946183> (noting that “[i]n 1993 New York’s murder rate was 26.5 per 100,000 people. Since 1994, when Broken Windows policing was put into practice citywide, crime has fallen further, faster and for longer than anywhere else in the country.”).

¹⁹⁵ Bratton, *supra* note 6.

¹⁹⁶ Vedantum, *supra* note 5.

¹⁹⁷ Bratton, *supra* note 6.

¹⁹⁸ *Id.* Among many other factors that the NYPD states contributed to the murder rate decline were the adoption of the CompStat process which allows the NYPD to look for crime patterns before they become crime waves and otherwise focus on effectively gathering and using data to prevent crime, a “relentless” focus on shootings and the engagement of all the NYPD’s investigative resources. Byrne, *supra* note 20; NYPD, *The Police Commissioner’s Report* (Jan. 2018), <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>, at 18-20.

¹⁹⁹ Bratton, *supra* note 6, at 3.

were correcting conditions early,” the NYPD reported in 2015, noting that there were 60,000 fewer felony arrests in 2014 than there were twenty years earlier.²⁰⁰

Critics maintain that there is no clear evidence that policing quality-of-life offenses reduces serious crime.²⁰¹ Steve Zeidman, Professor of Law and Director of the Criminal Defense Clinic at the CUNY School of Law, testified that “hyper aggressive policing is wholly unnecessary to reduce crime.”²⁰² Noting that crime rates are at a historic low in NYC, yet aggressive policing activity has continued notwithstanding, Jeffrey Fagan, Professor of Law at Columbia Law School, testified that inflated enforcement activity is divorced from crime levels.²⁰³ David Brotherton, Professor of Sociology at John Jay College of Criminal Justice, testified that “broken windows” policing not only is unrelated to felonies but actually *exacerbates* criminal activity; according to him, over-enforcement may actually increase crime via a so-called “deviancy amplification.”²⁰⁴ Simply put, he testified, the wrongful repression, labeling, and criminalization of affected communities may lead people to resort to crime.²⁰⁵

The NYC Office of the Inspector General for the NYPD (“OIG”), while noting that it did not challenge the validity of “broken windows” theory per se, issued a report in June 2016 in which it stated that the decrease in quality-of-life enforcement rates (which they defined narrowly as quality-of-life criminal summonses and misdemeanor arrests) by the NYPD between 2010 and 2015, particularly in the issuance of summonses, did not prompt an increase in felony crime, and concluded that while it was not possible to know conclusively whether low-level enforcement affects violent crime, there was no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity and a related drop in felony crime.²⁰⁶ The OIG report also noted that “the rate of quality-of-life enforcement in precincts citywide was positively correlated with higher proportions of black and Hispanic

²⁰⁰ *Id.*

²⁰¹ See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 at 276 (2006).

²⁰² Zeidman, March 20 Briefing Transcript at 110.

²⁰³ Fagan, March 21 Briefing Transcript at 100-101.

²⁰⁴ Brotherton, March 21 Briefing Transcript at 309.

²⁰⁵ *Id.* at 308-12.

²⁰⁶ N.Y. City Department of Investigation, Office of the Inspector General for the NYPD, *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (June 22, 2016) at 3, <http://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf>.

residents,” and requested that the NYPD release several sets of data regarding the effectiveness of “broken windows” enforcement and its impact on specific demographic groups who are disproportionately affected by such enforcement.²⁰⁷ The requested data sets (the “Requested Analyses”) include (a) an assessment of the relative effectiveness of quality-of-life summonses and misdemeanor arrests, as compared to other strategies, in reducing the rate of serious crime, and (b) an analysis to assess whether quality-of-life enforcement disproportionately impacts (i) black and Hispanic residents, (ii) males aged 15-20, and (iii) residents living in New York City public housing.²⁰⁸ The OIG also recommended that the NYPD release geographically coded data on felony arrests, misdemeanor arrests, and summonses issued to facilitate analyses of the correlation between felony crime and low-level enforcement on a neighborhood-by-neighborhood basis.²⁰⁹ The NYPD did not conduct the OIG’s Recommended Analyses nor did it release the geographically coded incident data, and the OIG has faulted the NYPD for failing to do so.²¹⁰

In a formal response to the OIG report, the NYPD in September 2016 defended “broken windows” policing, faulting the OIG for, among other things, ignoring prior studies on quality-of-life enforcement, failing to conduct field work, and using “faulty statistical methods and inadequate data analysis.”²¹¹ Emphasizing the important role of “broken windows” as “part of a wider strategy to reduce and control felony crime in New York City,”²¹² the NYPD argued in its response that quality-of-life policing decreases the incidences of more serious crime in at least four ways: (a) recidivist criminals may be removed from circulation for a period of time since more than half of misdemeanor arrestees in NYC in recent years have had prior felony arrests; (b) breaking up “rowdy” groups forestalls intoxicated altercations that lead to the commission of more serious crimes; (c) it suppresses spikes of crime in particular areas and by particular violent individuals; and (d) it permits the gathering of information on more serious crimes from

²⁰⁷ *Id.* at 5 and 73.

²⁰⁸ *Id.* at 72-73.

²⁰⁹ Office of the Inspector General for the NYPD, *Third Annual Report* (2017), at 11, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

²¹⁰ *Id.* at 8.

²¹¹ Bratton, *supra* note 12, at 14.

²¹² *Id.* at 5.

individuals arrested for the minor crimes.²¹³ The NYPD also claimed that the OIG report failed to appreciate that “broken windows” is not strictly limited to low-level enforcement and often involves the use of non-punitive actions – such as setting standards of behavior or dispersing a crowd without issuing summonses or making arrests – as part of its policing tactics.²¹⁴ In addition, the NYPD argued that “broken windows” policing remains a viable police tactic because arrests for low-level crimes often lead officers to discover guns or other weapons that might have otherwise gone undetected.²¹⁵

The NYPD also maintains that “broken windows” policing does not target people of color or low-income communities, and that the “correlation of race to enforcement is not as clear as some quality-of-life critics believe.”²¹⁶ Using “crime cloud” data – maps showing the rates of violent crime compared to summons and arrest enforcement – the NYPD acknowledges that more arrests are made and more summonses are issued in areas generally populated by majority black or Hispanic communities but, it says, that that is a natural consequence of high-crime areas being populated by residents of color.²¹⁷ Moreover, the NYPD points to certain majority-minority communities, such as southeastern Queens and northeastern Bronx, where violent crimes – and resulting low-level enforcement – do not occur at a high rate as additional evidence to demonstrate the correlation between low-level enforcement and violent crime, and negate the correlation between low-level enforcement and race.²¹⁸ Simply put, the NYPD contends, the disparities between the demographics of the NYC population and that of individuals arrested or issued summonses is merely reflective of the make-up of the population that commits the crimes, and is based on those that report them.²¹⁹ The NYPD says that most of the NYPD’s quality-of-life offense enforcement is a function of 911 and 311 calls from the public, including from

²¹³ *Id.* at 16 and 18.

²¹⁴ *Id.* at 12.

²¹⁵ *Id.* at 15. The NYPD is not the only organization that has found “broken windows” to be an effective police tactic. In 2015, Anthony Braga, Director of the School of Criminology and Criminal Justice at Northeastern University, found a statistically significant, yet modest, reduction in levels of serious crime associated with order maintenance policing. See Anthony Braga et al., *Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis*, JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY (June 4, 2015); see also NYCLU, *supra* note 13.

²¹⁶ Bratton, *supra* note 6, at 33.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Byrne, *supra* note 20.

members of communities of color, that the NYPD is obligated to respond to; moreover, it says, it demonstrates the NYPD's responsiveness to the communities most affected by these offenses.²²⁰ The NYPD says it remains "totally committed" to "broken windows" policing in a "recalibrated" manner thanks to the dramatically improved crime conditions in NYC today.²²¹ In a recent report, the NYPD noted that NYC is currently experiencing unprecedented levels of safety: in 2017, NYC achieved the lowest per-capita murder rate since 1951, experienced the fewest shootings in the modern era, and saw robberies drop to their lowest levels since 1965.²²² And, it says, that is in part attributable to "broken windows" policing.²²³ Mayor de Blasio also has publicly endorsed "broken windows" policing, stating that "broken windows policing got a bad name in part because it was associated with the Giuliani administration...[b]ut I think the underlying principle was the right principle, which is you address little things that come from big things."²²⁴

A. Consequences of Low-level Enforcement

Many community advocates and scholars maintain that the continued practice of low-level enforcement disproportionately impacts communities of color in NYC.²²⁵ In 2015, over 90% of the approximately 315,000 people arraigned in NYC's criminal courts were black or Hispanic, and roughly 80% of the total arraignments were for misdemeanors or violations.²²⁶ Data from 2016 shows that, for each misdemeanor category on which the NYPD reports statistics, such as misdemeanor assault and related offenses, blacks and Hispanics combined

²²⁰ Byrne Interview (Feb. 13, 2017), *supra* note 30; Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Dermot Shea, Chief of Crime Control Strategies, in N.Y. (Feb. 15, 2017).

²²¹ Bratton, *supra* note 12, at 27; *see also* Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Dermot Shea, Chief of Crime Control Strategies, in N.Y. (Feb. 15, 2017).

²²² NYPD, *The Police Commissioner's Report* (Jan. 2018) at 7-8, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

²²³ Bratton, *supra* note 6, at 5.

²²⁴ Darren Sands, *De Blasio: Broken Windows Policing 'Got a Bad Name,' but it had the Right Underlying Principle*, BUZZFEED (Aug. 8, 2017), https://www.buzzfeed.com/darrensands/de-blasio-broken-windows-policing-got-a-bad-name-but-it-had?utm_term=.ykQMjgPNw#.pclVzbDo2.

²²⁵ *See* Zeidman, March 20 Briefing Transcript at 119; *see also* Gangi, March 20 Briefing Transcript at 36; *see also* Borchetta, March 20 Briefing Transcript at 139-40.

²²⁶ Zeidman, March 20 Briefing Transcript at 119; *see also* Criminal Court of The City of New York, Annual Report 2016, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf. Under New York law, a "violation" means an offense, other than a traffic infraction, for which a term of imprisonment in excess of fifteen days cannot be imposed. N.Y. Penal Law § 10.00. A violation is not a "crime" under the New York Penal Code, as a crime is defined as either a misdemeanor or a felony.

made up 75.6-83% of those arrested.²²⁷ Moreover, according to the most recent demographic breakdown of criminal and civil summonses released by the NYPD, during the fourth quarter of 2017, at least 61% of criminal summonses issued in NYC to individuals were issued to people who were either black or Hispanic and at least 67% of criminal summonses issued to individuals were issued to people of color, while only 11.2% were issued to whites, with the remaining 21.6% being issued to persons of “unknown” race.²²⁸ During the same period, approximately 69% of civil summonses issued to individuals were issued to people of color, while 19% were issued to whites, with the remaining 11.6% being issued to persons of “unknown” race.²²⁹ These statistics are similar to those reported in the third quarter of 2017, in which at least 62% of criminal summonses issued in NYC to individuals were issued to people who were either black or Hispanic and at least 69% of criminal summonses issued to individuals were issued to people of color, while only 10.6% of criminal summonses were issued to whites, with the remaining 20.4% being issued to persons of “unknown” race.²³⁰ Similarly, in the third quarter of 2017, 62% of civil summonses issued to individuals were issued to people of color, while 14% were issued to whites, with the remaining 23.4% being issued to persons of “unknown” race.²³¹ Likewise, according to Robert Gangi, Founder and Director of the Police Reform Organizing Project, 90-92% of individuals ticketed or arrested for subway fare evasion each year are people of color and, according to Harry Levine, Professor of Sociology at Queens College, 85% of individuals arrested for marijuana possession in 2016 (and during the period from 1997 to 2016) were black or Hispanic, despite research showing that white people use marijuana at the same or higher rates than blacks and Hispanics.²³² Blacks are also more likely than whites to be taken

²²⁷ In three of the six misdemeanor categories reported by the NYPD, more than 80% of those arrested were black or Hispanic: misdemeanor sex crimes, misdemeanor assault and related offenses, and drug misdemeanor arrests. Crime and Enforcement Activity in New York City,

https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf.

²²⁸ Data is from the fourth quarter of 2017, the most recent data made available by the NYPD. Disclosure of this data was mandated by the Criminal Justice Reform Act of 2016. NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49.

²²⁹ *Id.*

²³⁰ Data is from the third quarter of 2017, the first data made available by the NYPD. *Id.*

²³¹ *Id.*

²³² Gangi, March 20 Briefing Transcript at 36; *see also* Levine, Submitted Testimony *supra* note 53 at 16; *see also* S. 4841-B, 2017-2018 Reg. Sess. (N.Y. 2017); *see also*, The NYPD reports that 81.7% of drug misdemeanor arrests in 2016 were black or Hispanic. Crime and Enforcement Activity in New York City at 13, [http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf). Note that the percentage of individuals arrested for low-level marijuana violations in 2016 mirrors the data from

into custody rather than being given a desk appearance ticket (“DAT”) for misdemeanor or violation arrests.²³³ In the fourth quarter of 2017, blacks were given DATs rather than being placed into custody for 34% of arrests in which a DAT could have been given, while whites were given DATs in lieu of a custodial arrest for 47% of arrests in which a DAT could have been given.²³⁴

In 2011, before *Floyd*,²³⁵ NYPD officers reported stopping approximately 168,126 black men and children between the ages of 14 and 24.²³⁶ This number, according to the New York Civil Liberties Union (“NYCLU”), exceeded NYC’s population of 158,406 black men in this demographic.²³⁷ By contrast, there were only 61,805 stops of whites of all ages in the same time period.²³⁸ According to 2016 estimated Census data, the population of NYC is 32% white, 29% Hispanic, 22% black, and 14% Asian.²³⁹ And, in its latest biannual report, the CCRB reported that 51% of complaints of police misconduct in the first half of 2017 came from blacks and 26% came from Hispanics, statistics that have remained fairly consistent since 2010.²⁴⁰

The NYPD maintains that not only does the data reflect the make-up of the population that commits the crimes, and is based on those that report them, but that it is an entirely false narrative to imply that the disproportionality in the statistics demonstrates that the NYPD’s methods of enforcement are discriminatory or amount to “a system of oppression and social control in minority neighborhoods” that the advocates’ and academics’ “echo chamber” would make one believe exists.²⁴¹

1997-2016: of the 710,00 low-level marijuana arrests from 1997-2016, 85% of individuals arrested were black or Hispanic. Levine, March 21 Briefing Transcript at 327.

²³³ A DAT allows the arrestee to avoid being placed into custody until arraignment. See “Desk Appearance Ticket – General Procedure,” https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/dat-general-procedure.pdf.

²³⁴ *Desk Appearance Ticket Arrest Analysis Data*, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/dat.page>.

²³⁵ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 660 (S.D.N.Y. 2013).

²³⁶ Sean Gardiner, *Report Finds Stop-and-Frisk Focused on Black Youth*, WALL ST. J. (May 9, 2012), <https://blogs.wsj.com/metropolis/2012/05/09/report-finds-stop-and-frisk-focused-on-black-youth/?mod=e2tw>.

²³⁷ *Id.*

²³⁸ NYCLU, Stop-and-frisk Data, <https://www.nyclu.org/en/stop-and-frisk-data>; Raymond Kelly, *2011 Reasonable Suspicion Stops: Precinct Based Comparison by Stop and Suspect Description* at 4, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/2011_reasonable_suspicion_encounters.pdf.

²³⁹ United States Census Bureau, *supra* note 54.

²⁴⁰ 2017 Bi-Annual CCRB Report, *supra* note 153 at 14.

²⁴¹ Byrne, *supra* note 20.

Professor Stoudt has concluded that “broken windows” policing entails “by design, a punishment: forms of punitive social control designed to discipline and contain poor communities and communities of color.”²⁴² Lynn Lewis, former Executive Director of the non-profit Picture the Homeless, similarly testified that the NYPD enforces “broken windows” against NYC’s low-income and homeless population (which is disproportionately black and Hispanic) for the purpose of regulating their access to public spaces.²⁴³ Likewise, Kassandra Frederique, the New York State Director of the Drug Policy Alliance, testified that the NYPD enforces marijuana laws not because of the harmful effects of the substance, but rather as an indirect way of policing people who are associated with marijuana – primarily blacks.²⁴⁴ Mr. Gangi testified that “there is no question ‘broken windows’ policing as applied in New York City is racist.”²⁴⁵

According to Mr. Gangi, the NYPD historically has employed quotas for arrests and summonses for years, and those quotas help facilitate the targeting of communities of color.²⁴⁶ Mr. Gangi testified that quotas are only enforced in low-income communities of color, adding that police officers will arrest people “for no good reason” to meet their numbers.²⁴⁷ A recording played at the *Floyd* trial noted that when an NYPD Deputy Inspector urged officers to be active and make more stops in Mott Haven, a neighborhood which suffers from particularly high crime rates, he encouraged officers to stop “the right people.”²⁴⁸ When pressed to define the “right people,” the NYPD Deputy Inspector stated “male blacks 14 to 20, 21.”²⁴⁹ What’s more, Mr. Gangi testified, there is little that deters officers from making unsubstantiated arrests: officers receive “credit” for arrests made even if the arrest is later found to lack probable cause

²⁴² Stoudt, March 20 Briefing Transcript at 131.

²⁴³ Lewis, March 20 Briefing Transcript at 75-6; *see also* Coalition for The Homeless, Basic Facts about Homelessness: New York City, <http://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/>.

²⁴⁴ Frederique, March 21 Briefing Transcript at 254-5.

²⁴⁵ Gangi, March 20 Briefing Transcript at 35.

²⁴⁶ *Id.* at 37.

²⁴⁷ *Id.*

²⁴⁸ Joseph Goldstein, *Recording Points to Race Factor in Stops by New York Police*, N.Y. TIMES (Mar. 21, 2013), <http://www.nytimes.com/2013/03/22/nyregion/bronx-officers-recording-suggests-race-is-factor-in-stops.html>.

²⁴⁹ *Id.*

or otherwise be improper.²⁵⁰ According to Mr. Gangi, even if there is no mandatory minimum number of arrests or summonses, a de facto quota system is used internally by the NYPD as a way of enforcing “productivity goals” and as a “personnel management tool.”²⁵¹ And, according to Professor Levine, officers who fill out more summons forms are seen as more productive and as better candidates for promotions, vacations, and better assignments.²⁵²

The NYPD maintains that there is no quota policy driving NYPD police activity or officer performance evaluations.²⁵³ According to the NYPD, NYPD Commissioner O’Neill has made clear through a departmental directive, dated April 2017, that the NYPD “does not and will not use quotas for enforcement activity” and that any supervisory officer found to enforce a quota “will face discipline.”²⁵⁴ The NYPD also says that as of 2017, officers are no longer evaluated based on the number of their arrests or summonses, but instead on a number of qualitative criteria, including their ability to solve problems creatively, teamwork, and community connection, and that any rewarding or punishing of officers on the basis of quotas is now considered a serious offense.²⁵⁵ Peter Zimroth, the independent monitor (the “Independent Monitor”) appointed to oversee the NYPD’s stop-and-frisk reform process, noted in a recent report that the new NYPD performance evaluation system rolled out in 2017 no longer counts the number of stops as a metric for officer performance and that it focuses on the quality rather than the quantity of stops.²⁵⁶

Many critics argue that there is reason to believe that the NYPD continues to employ a de facto quota system, a contention the NYPD vehemently denies as “pure fantasy.”²⁵⁷ Darius

²⁵⁰ Gangi, March 20 Briefing Transcript at 39-40 and 103 (noting even the president of the Patrolmen’s Benevolent Association, Patrick Lynch, finds the quota system to be a dangerous tool that harms police-community relations).

²⁵¹ *Id.* at pp. 101-2.

²⁵² Levine, March 21 Briefing Transcript at 334-35, 341. Additionally, NYPD officers might make overtime pay for these arrests, via a so-called “collars for dollars” approach, and this monetary incentive makes officers less likely to want to stop making such low-level, discretionary arrests. *Id.* at 334.

²⁵³ Byrne, *supra* note 20.

²⁵⁴ See Andre Keshner & Thomas Tracy, *NYPD Chief James O’Neill Pledges Wrath Against Quota-chasing Cops*, N.Y. DAILY NEWS (May 12, 2017), <http://www.nydailynews.com/new-york/nypd-chief-james-o-neill-pledges-wrath-quota-chasing-cops-article-1.3159425>. Byrne, *supra* note 20.

²⁵⁵ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Terence Monahan, NYPD Chief of Patrol (now NYPD Chief of Department), in N.Y. (Feb. 15, 2017); Byrne Interview (Feb. 13, 2017), *supra* note 30; Byrne, *supra* note 20.

²⁵⁶ Zimroth, *supra* note 143 at 29.

²⁵⁷ Byrne, *supra* note 20.

Charney, a Senior Staff Attorney at the Center for Constitutional Rights, testified that the NYPD's updated officer evaluation system as of early 2017 still tracks the quantity of officers' arrest and summons activity.²⁵⁸ In addition, according to him, the NYPD compares individual officer's arrest and summons activity to the arrest and summons activity of other officers in the same unit, and rewards officers with "above average" activity levels.²⁵⁹ According to Mr. Charney, "whenever officers are encouraged to meet numerical arrest or summons or enforcement goals, it will likely result in stereotype-based policing."²⁶⁰ Hassan Aden, Senior Advisor at the Vera Institute of Justice, testified that the NYPD needs to ensure that raises and promotions are based on how proactive the officer has been and how well the officer has solved problems in his or her community, a recommendation the NYPD states it has adopted in its 2017 revamped evaluation system.²⁶¹

Even in the absence of a quota system and performance metrics based on arrest and summons activity, Professor Levine testified that officers are incentivized to make arrests or issue summonses solely for the purpose of creating a paper trail of their active participation on duty.²⁶² He noted that police lieutenants face the daily task of tracking their subordinate officers, and that officers may write summonses merely to demonstrate to their supervising officers that they were on the clock.²⁶³ Moreover, Professor Levine noted that officers will make arrests or write summonses near the end of their shifts in order to incur overtime pay.²⁶⁴ In his testimony, Professor Levine explained that this tactic, known colloquially to NYPD officers as "collars for dollars," "is only politically acceptable in certain communities. As a result, only certain people are targeted, mostly young people and especially young blacks and Latinos."²⁶⁵

²⁵⁸ Charney, March 21 Briefing Transcript at 31; *see also* Sarah Wallace, *I-Team: NYPD Lieutenant Latest Cop to Say Department Enforces Quota*, NBC NEW YORK (Apr. 1, 2016), <http://www.nbcnewyork.com/investigations/NYPD-Lieutenant-Says-There-Are-Quotas-I-Team-Wallace-374307721.html>.

²⁵⁹ Charney, March 21 Briefing Transcript at 31.

²⁶⁰ *Id.* at 30.

²⁶¹ Hassan Aden, March 21 Briefing Transcript at 90. Byrne, *supra* note 20.

²⁶² Harry Levine, March 21 Briefing Transcript at 340-41.

²⁶³ *Id.*

²⁶⁴ *Id.* at 334-35.

²⁶⁵ *See* Levine, *supra* note 232.

B. Impact on Communities of Color

The cumulative effect of the perceived disparate enforcement of “broken windows” policing exacerbates mistrust between the NYPD and communities of color, according to experts like Professor Stoudt.²⁶⁶ Jenn Rolnick Borchetta, Director of Impact Litigation at the Bronx Defenders, testified that the NYPD’s low-level enforcement tactics “sow vast and lasting damage in communities like the South Bronx” and others that are subject to aggressive “broken windows” enforcement.²⁶⁷ Professor Stoudt, who in 2012 (when the number of reported stops was dramatically higher than in 2016)²⁶⁸ surveyed New York City youth (aged 14-24) of color on their experiences with, and attitude towards, the NYPD, testified that the majority of respondents “reported fearing involvement with the criminal justice system every time they stepped foot outside their apartment.”²⁶⁹ Professor Stoudt further testified that his research demonstrated an intense police presence in all parts of the respondents’ lives: they feel they are being watched when they wake up and see police in their courtyards; they see police in their hallways at school; and they are constantly alerted to the NYPD’s presence through police standing on street corners.²⁷⁰ Over-aggressive police enforcement, according to Professor Stoudt, “has turned neighborhoods into symbolic and actual jails where the everyday experience of just living becomes criminalized because of the assumed potential to commit crime.”²⁷¹

Similarly, Mina Malik, Lecturer on Law at Harvard Law School, Senior Advisor to Harvard’s Fair Punishment Project and former executive director of the CCRB, testified that “broken windows” policing has long-lasting negative impacts on members of NYC’s youth because of the frequency with which police-youth encounters lead to incidents of police misconduct.²⁷² Ms. Malik, referring to a 2013 Vera Institute study of NYC youth, aged 15-25, experiences with the NYPD located in “hot spots” of police activity, noted that the majority of

²⁶⁶ Stoudt, March 20 Briefing Transcript at 150-51.

²⁶⁷ Borchetta, March 20 Briefing Transcript at 143-4.

²⁶⁸ According to the NYPD, reported stops have decreased from 2017 to 2016. Byrne, *supra* note 20. However, as of the date of this writing, the NYPD has not officially released 2017 stop statistics.

²⁶⁹ Stoudt, March 20 Briefing Transcript at 124-26.

²⁷⁰ *Id.* at 127-8.

²⁷¹ *Id.* at 131.

²⁷² Malik, March 21 Briefing Transcript at 118; *see also* Christina Carrega-Woodby & Graham Rayman, *CCRB Director Mina Malik Quits Over Power Struggle with City Hall*, N.Y. DAILY NEWS (Nov. 26, 2016), <http://www.nydailynews.com/new-york/ccrb-director-mina-malik-quits-power-struggle-city-hall-article-1.2887391>.

these youth respondents reported negative encounters with police: 70% reported being stopped by the police at least once; about half said they had been threatened by the police; and a quarter reported that the police had displayed a weapon during their encounter.²⁷³

Individuals subject to low-level enforcement, and their families, are also often forced to deal with the psychological costs of these arrests, according to Ms. Borchetta.²⁷⁴ She reported that she often sees evidence of excessive force used against individuals arrested for misdemeanors, and incidents like these can divide families by traumatizing children “after witnessing the violent arrest of their parents.”²⁷⁵

Apart from the psychological toll, Professor Fagan testified that “broken windows” policing, by forcing individuals facing summonses or arrests into frequent contact with the justice system, creates a tax against those subject to low-level enforcement.²⁷⁶ According to Professor Fagan, in addition to the stigma associated with being arrested, the enforcement of quality-of-life crimes leads to tangible, and often financial, consequences: individuals arrested often end up spending time in jail and are forced to make multiple court appearances.²⁷⁷ Dennis Flores, founder of El Grito de Sunset Park, testified that summonses represent financial sanctions – in the form of fees or fines – often inflicted on members of the poorest communities who cannot afford to pay them.²⁷⁸ When summonses require court dates or community service hours, they result in lost work hours, which become another form of financial sanction on poor communities, he testified.²⁷⁹ Professor Fagan further testified that “broken windows” enforcement disproportionately affects communities of color because the costs associated with low-level summonses and arrests creates a *racial* tax, costs that are disproportionately borne by

²⁷³ Malik, March 21 Briefing Transcript at 119-20; *see also* Vera Institute of Justice, *Coming of Age with Stop and Frisk*, (Sep. 2013), <https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications>.

²⁷⁴ Borchetta, March 20 Briefing Transcript at 142.

²⁷⁵ *Id.* at 142.

²⁷⁶ Fagan, March 21 Briefing Transcript at 104.

²⁷⁷ *Id.* at 101-04.

²⁷⁸ Flores, March 20 Briefing Transcript at 26.

²⁷⁹ *Id.* at 26-27.

communities of color.²⁸⁰ This racial tax reinforces the segregation of communities of color, according to Professor Fagan, and results in a “poverty trap” from which they cannot escape.²⁸¹

Mr. Flores testified that summonses “create a connection to the criminal justice system that is often hard to break.”²⁸² When individuals do not appear for a court date resulting from the issuance of a criminal summons, arrest warrants may be issued against the individual.²⁸³ In the past, according to Professor Levine, who has constructed estimated data from several sources since this information historically has not been published, between 40% and 50% of individuals who were issued summonses for these low-level, nonviolent offenses missed their court dates, resulting in an estimated 1.5 million open criminal arrest warrants in New York City in 2017 – a number which represents approximately one in every six New Yorkers.²⁸⁴

Professor Fagan testified that this racial tax is often inflicted upon individuals who have been issued meritless summonses or arrested without cause but simply have chosen to plead guilty.²⁸⁵ Professor Fagan noted that many people plead guilty to low-level misdemeanors to avoid the costs associated with being prosecuted, such as the length of the court process leading to adjudication.²⁸⁶ And, Professor Fagan stated, pleading guilty leads to a misdemeanor conviction, which, in turn, leads to public housing ineligibility.²⁸⁷ According to Professor Fagan, the racial tax is exacerbated by the court system’s failure to adjudicate cases – by allowing such a high percentage of individuals to plead guilty.²⁸⁸

Certain NYC officials have begun to craft policies intended to mitigate the financial costs associated with low-level offense enforcement. For example, on January 9, 2018, Manhattan

²⁸⁰ Fagan, March 21 Briefing Transcript at 105.

²⁸¹ *Id.* at 104.

²⁸² Flores, March 20 Briefing Transcript at 26.

²⁸³ Krever, March 20 Briefing Transcript at 56.

²⁸⁴ Levine, March 21 Briefing Transcript at 318 (noting that “there are more than 1.5 million open criminal arrest warrants for noncriminal offenses in New York City.”); N.Y. City Council, Criminal Justice Reform Act, <https://council.nyc.gov/legislation/criminal-justice-reform/> (“Between 40% and 50% of people with summonses for offenses like open container and parks violations missed their court dates and ended up with an open warrant.”). Note, however, that NYC has dismissed over 700,000 warrants that are over ten years old and were issued for failure to appear in court. *See* Chapter 1, Section C.1 for further explanation.

²⁸⁵ Fagan, March 21 Briefing Transcript at 106.

²⁸⁶ *Id.* at 108.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

District Attorney Cyrus Vance, Jr. announced that his office would no longer seek bail in misdemeanor and violation cases.²⁸⁹ District Attorney Vance stated that, “[w]hen non-violent New Yorkers are jailed as a function of their inability to pay, we perpetuate inequality and mass incarceration, and bring about unnecessary immigration, employment, and family consequences.”²⁹⁰ Brooklyn District Attorney Eric Gonzalez instituted a similar bail policy in April 2017.²⁹¹ District Attorney Vance stated during the January 9, 2018 joint press release regarding the new policies: “Bail shouldn’t be requested when we don’t intend to seek jail time and must never be used as leverage to obtain a guilty plea. The goal is not to punish poor defendants accused of crimes, nor to disrupt lives, or interfere with jobs or education, but rather to make bail decisions that are fair and consistent with public safety.”²⁹²

The Manhattan and Brooklyn District Attorney’s Offices bail policy default no bail rules have exceptions for violent cases with vulnerable victims; the Manhattan District Attorney’s policy specifically allows prosecutors to seek bail in misdemeanor cases involving violence, sex crimes, injuries to police officers, or when a defendant has previously been convicted of a violent felony, sex crime, or has multiple pending charges or is otherwise on parole, probation, or supervised release.²⁹³ The new Manhattan bail policy, according to the Manhattan District Attorney’s office, should result in approximately 1,700 cases this year in which bail will not be sought.²⁹⁴ And, as discussed further in Chapter 1, Section C.1, the New York City Council has

²⁸⁹ Press Release of District Attorney Cyrus R. Vance, Jr., Manhattan District Attorney, *Manhattan and Brooklyn District Attorney’s Offices End Requests for Bail in Most Misdemeanor Cases* (Jan. 9, 2018), <https://www.manhattanda.org/manhattan-and-brooklyn-district-attorneys-offices-end-requests-bail-most-misdemeanor/>. Note that District Attorney Gonzalez first implemented the policy of not seeking bail in misdemeanor cases in April 2017.

²⁹⁰ *Id.*

²⁹¹ James C. McKinley, Jr., *Some Prosecutors Stop Asking for Bail in Minor Cases*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/nyregion/bail-prosecutors-new-york.html>.

²⁹² Press Release of District Attorney Cyrus R. Vance, Jr., Manhattan District Attorney, *Manhattan and Brooklyn District Attorney’s Offices End Requests for Bail in Most Misdemeanor Cases* (Jan. 9, 2018), <https://www.manhattanda.org/manhattan-and-brooklyn-district-attorneys-offices-end-requests-bail-most-misdemeanor>.

²⁹³ Vance, *supra* note 292; McKinley, *supra* note 291.

²⁹⁴ Ramey, Corinne, *Manhattan District Attorney Won’t Seek Bail for Most Misdemeanors*, WALL ST. J. (Jan. 9, 2018), <https://www.wsj.com/articles/manhattan-district-attorney-wont-seek-bail-for-most-misdemeanors-1515526102>. Note, however, that bail is usually *not* required in New York City misdemeanor cases: in 2016, judges set bail in only 17.9% of misdemeanor cases. See Independent Commission on New York City Criminal Justice and Incarceration Reform, *A More Just New York City* (Apr. 2017), <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/595d48d1e6f2e1e5bcaa411a/1499285717652/Lipman+Commission+Report+FINAL+Singles.pdf>.

recently enacted the Criminal Justice Reform Act of 2016, which diverts certain low-level, nonviolent offenses from the criminal justice system.²⁹⁵ This legislative change is intended, among other things, to ease the financial burdens associated with low-level enforcement.²⁹⁶

C. NYPD Policing Tactics and Their Reforms

Critics of “broken windows” policing, such as Professor Stoudt, believe that the NYPD needs to completely reimagine the role of policing in NYC, and that NYC needs to divest from the NYPD responsibility for the City’s approach to low-level offenses, investing in programs aimed at improving the lives of New Yorkers.²⁹⁷ This type of reinvestment, some advocates argue, would solve problems at their source, in a proactive way, as opposed to investing in punitive methods of law enforcement.²⁹⁸ For example, Professor Stoudt argues, the NYPD could follow the recent lead of the Manhattan District Attorney’s Office and discontinue the practice of making arrests for turnstile jumping – a practice that continues to have a significant disparate impact on communities of color – and redirect funds away from police enforcing low-level crimes in the subways towards transportation subsidies to individuals who cannot afford subway fares.²⁹⁹ District Attorney Vance recently announced that his office will no longer prosecute the majority of people charged with theft of services – the official charge for turnstile jumping – unless there is a public safety reason to do so.³⁰⁰ In announcing the decriminalization of turnstile jumping, Manhattan District Attorney Cyrus R. Vance, Jr., said:

²⁹⁵ See Goodman, *supra* note 72; see also Gibson, March 20 Briefing Transcript at 450; see also N.Y. City Council, Criminal Justice Reform Act, <https://council.nyc.gov/legislation/criminal-justice-reform/>.

²⁹⁶ See N.Y. City Council, Criminal Justice Reform Act, <https://council.nyc.gov/legislation/criminal-justice-reform/>.

²⁹⁷ Stoudt, March 20 Briefing Transcript at 152-3.

²⁹⁸ *Id.*

²⁹⁹ See James C. McKinley, Jr., *For Manhattan Fare Beaters, One-Way Ticket to Court May Be Over*, N.Y. TIMES (June 30, 2017) <https://www.nytimes.com/2017/06/30/nyregion/subway-fare-beating-new-york.html> (describing the recent announcement by Manhattan District Attorney Cyrus Vance Jr. that his office will no longer prosecute most fare evasion cases); see also Rocco Parascandola & Graham Rayman, *NYPD Arrests Mostly People of Color for Fare Beating*, STATS SHOW, N.Y. DAILY NEWS (Feb. 12, 2016), <http://www.nydailynews.com/new-york/nypd-arrests-people-color-fare-beating-stats-article-1.2528320>. According to the Police Reform Organizing Project, at least 90% of those arrested for subway fare evasion are people of color. *NYPD Continues Racist Practices*, Police Reform Organizing Project (Nov. 3, 2017), <http://mailchi.mp/propnyc/nypd-continues-racist-practices-p3ppidpf40>.

³⁰⁰ Press Release of Cyrus R. Vance, Manhattan District Attorney, *District Attorney Vance to End Criminal Prosecution of Approximately 20,000 Low-Level, Nonviolent Misdemeanors Per Year* (June 30, 2017), <http://manhattanda.org/press-release/district-attorney-vance-end-criminal-prosecution-approximately-20000-low-level-non-vio>.

The criminal prosecution of these low-level, nonviolent offenses should not be a part of a reformed 21st-century justice system. Absent a demonstrated public safety risk, criminally prosecuting New Yorkers accused of these offenses does not make us safer. Today, by committing to divert these misdemeanor cases out of Criminal Court in Manhattan, we will further eliminate unnecessary incarceration, and reduce the risks of deportation, loss of housing, and loss of employment that often accompany a criminal prosecution.³⁰¹

According to Tina Luongo of the Legal Aid Society of New York, lost subway fares resulting from turnstile jumpers – who make up roughly 1% of subway riders – amount to less than what she claims is the \$24 million spent prosecuting turnstile jumpers annually.³⁰² District Attorney Vance instead plans to work with the NYPD and the Mayor’s Office of Criminal Justice to use a combination of summonses and pre-arraignment diversion program alternatives for individuals charged with theft of services.³⁰³

Certain activist groups, such as the Coalition to End Broken Windows, believe that the District Attorney’s civil summons alternative to prosecuting subway fare evasions is not a fix because it “still burden[s] communities of color.”³⁰⁴ According to the Coalition to End Broken Windows:

[T]he Manhattan DA’s announcement, which, like other half-hearted efforts to combat decades of racist policing, still upholds the notion that people should continue to be punished for being too poor to use public transportation.³⁰⁵

District attorneys in other boroughs are also beginning to change their policies on prosecuting fare evasion: Bronx District Attorney Darcel Clark plans to use panels of community members, outside of the court system, to hear theft of service cases and assign community service to those convicted, and Brooklyn District Attorney Gonzalez has said he

³⁰¹ *Id.*

³⁰² Ryan Kailath, *New York won’t arrest you for stealing a subway ride anymore*, MARKETPLACE (Aug. 31, 2017), <https://www.marketplace.org/2017/08/31/economy/new-york-wont-arrest-you-stealing-subway-ride-anymore>. The NYPD challenges Tina Luongo’s \$24 million claim, suggesting that very few cases (only nine in 2016) go to trial, and the cost savings calculus needs to include the deterrent effect that has lowered the cost in the first instance.

Byrne, *supra* note 20.

³⁰³ Vance, *supra* note 300.

³⁰⁴ Madina Toure, *Anti-Broken Windows Group to Manhattan DA: Pick ‘Non-Police’ Approach to Fare Beating*, Observer.com (July 3, 2017), <http://observer.com/2017/07/broken-windows-manhattan-district-attorney-turnstile-jumping>.

³⁰⁵ *Id.*

plans to implement a policy similar to District Attorney Vance's in Manhattan.³⁰⁶ In addition, more substantive change may be forthcoming from New York State: in March 2017, State Senator Jesse Hamilton and Assemblywoman Tremaine Wright introduced legislation that would decriminalize fare evasion under state law.³⁰⁷

The NYPD believes that the enforcement of fare evasion is neither aimed at the poor nor targeted at blacks or Hispanics.³⁰⁸ Noting that 89.9% of fare evader arrestees in 2017 were black or Hispanic, that 91.5% were male and that 60% were under 30, the NYPD argues that the fare evader arrestees are mostly repeat offenders (since there must be three summonses (and a lack of response) within the past two years for an arrest to be made) who are evading a responsibility that other NYC residents living in poverty accept.³⁰⁹ Absent fare evasion enforcement, it says, losses could exceed the \$200 million a year that would be today's equivalent of the 1990 peak evasion losses, and if the subway were offered free to all people living below the poverty line in NYC, the cost would be in the billions.³¹⁰

Beyond the reform efforts of the Manhattan and Brooklyn DA's offices, in the face of criticism and court-mandated reforms, the NYPD has implemented a series of reforms that seemingly are intended to recalibrate "broken windows" policing.³¹¹

Litigation over the lawfulness of stop-and-frisk has led to a number of court-mandated reforms that are intended to mitigate the disproportionate impact that NYPD policing practices have had on communities of color.³¹² In *Floyd*, Judge Shira A. Scheindlin (ret.) found the City of New York liable for violating the Fourth and Fourteenth Amendment rights of members of

³⁰⁶ Zolan Kanno-Youngs & Corrine Ramey, *Manhattan D.A. Aims to Stop Prosecuting Subway-Fare Evaders*, WALL ST. J. (Sept. 14, 2017), https://www.wsj.com/article_email/manhattan-d-a-aims-to-stop-prosecuting-subway-fare-evaders-1505403036-1MyQjAxMTA3MTE1NDcxNTQ1Wj/.

³⁰⁷ Senator Jesse Hamilton Sponsor Memorandum for New York Senate Bill S4841B, <https://www.nysenate.gov/legislation/bills/2017/s4841/amendment/b>; S. 4841-B, 2017-2018 Reg. Sess. (N.Y. 2017).

³⁰⁸ Byrne, *supra* note 20.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *See, e.g.*, Bratton, *supra* note 12, at 31 (discussing the recalibration of NYPD tactics to be more precise and focused).

³¹² *See Floyd*, 959 F. Supp. 2d 540.

New York City’s communities of color.³¹³ In particular, Judge Scheindlin concluded that the NYPD’s stop-and-frisk policy was tantamount to “indirect racial profiling” and that senior NYPD officials “acted with deliberate indifference to the NYPD’s practice of making unconstitutional stops and conducting unconstitutional frisks.”³¹⁴ As a result, Judge Scheindlin ordered a series of remedies in an opinion (the “Remedies Opinion”)³¹⁵ that mandated immediate changes to certain NYPD policies, a trial program for body-worn cameras, a process for receiving input on NYPD policies and practices from members of communities most affected by the policies (the “Joint Remedial Process”), and the appointment of the Independent Monitor to oversee “the City’s compliance with reforming the NYPD’s use of stop-and-frisk – although this will inevitably touch on issues of training, supervision, monitoring, and discipline.”³¹⁶

The *Floyd* reforms, laid out in the Remedies Opinion by Judge Scheindlin, included:

- Revising the NYPD’s policies and training materials relating to stop-and-frisk and racial profiling;³¹⁷
- Revamping the NYPD’s stop-and-frisk documentation via the development of a new UF-250, a form which requires officers to justify, in narrative form, the reasons that caused them to conduct a “level 3 stop” (also known as a *Terry* stop), as described immediately below;³¹⁸ and
- Transmitting an internal message to all NYPD personnel “summariz[ing] in simple and clear terms the basic constitutional standards governing stop-and-frisk, the constitutional standard prohibiting racial profiling, and the relation between these standards and New York state law.”³¹⁹

³¹³ *Id.* at 562; see also Joseph Goldstein, *Judge Rejects New York’s Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>.

³¹⁴ *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

³¹⁵ *Id.* at 668.

³¹⁶ *Id.* at 677. For the full list of the independent monitor’s role and functions, see *id.* at 677-78.

³¹⁷ *Id.* at 679.

³¹⁸ *Id.* at 683. As further described on the following page, the Patrol Guide section 212-11 describes three levels of stops that do not lead to an immediate arrest (an encounter which leads to an immediate arrest is known in the Patrol Guide as a “summary arrest”). See *Patrol Guide* Procedure No. 212-11. A UF-250 form is required only for level 3 stops, which occur when an officer “has an individualized reasonable suspicion that the person stopped has committed, is committing, or is about to commit a felony or misdemeanor”, or for level 1 or 2 stops that become level 3 encounters due to an officer obtaining reasonable suspicion during the stop. *Id.*

³¹⁹ *Id.* at 684. For the full NYPD FINEST message, see Memorandum from the Police Comm’r to All Commands (Mar. 2, 2015), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/20150302_fineest-message-stop-frisk-pursuant-to-floyd.pdf.

Judge Scheindlin also ordered the Independent Monitor to oversee a process whereby community stakeholders, including local officials and representatives from the NYPD, would work together to develop the remedial measures necessary to “bring the NYPD’s use of stop and frisk into compliance with the Fourth and Fourteenth Amendments.”³²⁰ In addition, Judge Scheindlin ordered the NYPD to establish a pilot program for the use of body-worn cameras.³²¹

Floyd ended the official unconstitutional stop-and-frisk practices that the NYPD began deploying during the 1970s and drastically increased between 2002 and 2013 under the administration of Mayor Michael Bloomberg.³²² Under NY law, as laid out in *People v. DeBour*³²³ – and as subsequently incorporated into the revised Patrol Guide – there are four levels of stops:

- **A level 1 stop (request for information)** can be made if the officer has an objective credible basis to approach an individual, even if that basis is not indicative of the criminality of the individual stopped. In a level 1 stop, the officer may ask for information, but may not stop, detain, search or frisk the individual, and the individual is free to leave;
- **A level 2 stop (common law right of inquiry)** can be made when an officer has a founded suspicion as to some level of criminal behavior of the individual stopped. The officer may request permission to search, but may not detain or pursue, the individual;
- **A level 3 stop (*Terry* stop)** authorizes an officer to forcibly stop, detain, and pursue an individual when the officer has a reasonable suspicion that the individual has committed, is committing a crime or is about to commit a crime. If the officer has a reasonable belief that the individual is armed, the officer can frisk the individual; and
- **A level 4 stop**, as defined in *People v. DeBour* (and labelled a “summary arrest” in the Patrol Guide), requires probable cause to arrest, which means that a reasonable person would believe that the individual has committed a crime, is committing a crime, or is about to commit a crime,

³²⁰ *Floyd*, 959 F. Supp. 2d at 680; see also Ctr. for Constitutional Rights, Summary of Remedial Opinion and Order in *Floyd v. City of New York*, 08-CV-1034 (SAS), <https://ccrjustice.org/sites/default/files/attach/2015/09/Floyd-Remedy-Decision-Summary-8-12-13.pdf>.

³²¹ *Floyd*, 959 F. Supp. 2d at 685-86.

³²² See Complaint at 23-24, *Floyd v. City of New York*, 959 F. Supp. 2d 540, (S.D.N.Y. 2013); NYCLU, *Stop-and-Frisk during the Bloomberg Administration 2002-2013* (Aug. 19, 2014), <https://www.nyclu.org/publications/report-stop-and-frisk-during-bloomberg-administration-2002-2013-2014>.

³²³ *People v. De Bour*, 40 N.Y.2d 210 (1976).

or that evidence of a crime can be found at a given location to be searched. A level 4 stop gives the officer the right to arrest the individual and search the individual following the arrest.³²⁴

As part of his oversight function, the Independent Monitor to date has reported the following significant developments as a result of *Floyd*:

- The NYPD has satisfied the requirement that it communicate to all NYPD personnel the constitutional standards for stops and frisks as well as the definition of reasonable suspicion.³²⁵
- The NYPD published and disseminated in 2015 a new Patrol Guide procedure governing stops and frisks.³²⁶ The updated NYPD policies on stop-and-frisk have been approved by the *Floyd* Court.³²⁷
- The NYPD published and disseminated in 2015 a new Patrol Guide procedure prohibiting racial profiling.³²⁸
- The NYPD launched a new UF-250 stop report form in 2016 that contains a narrative section for officers to explain the reasons for the level 3 (*Terry*) stops.³²⁹ As of January 2017, the NYPD is now using an electronic version of the form.³³⁰
- The NYPD, during the period of 2012-2015, reported a 95% decline in the number of overall stops made.³³¹ However, despite the decrease in the overall stops, the percentage of those stops that involve blacks and Hispanics remained consistent with prior years.³³²

³²⁴ See generally *People v. De Bour*, 40 N.Y.2d 210 (1976); see also *Patrol Guide* Procedure No. 212-11 (describing the encounters an officer can have with a person).

³²⁵ Zimroth, *supra* note 168.

³²⁶ *Id.* The revised Patrol Guide was approved by the court on August 24, 2015 and went into effect on September 21, 2015. *Id.* at 8.

³²⁷ Zimroth, *supra* note 150 at 8.

³²⁸ *Id.* “The new procedure states that police action, including stops, frisks, arrests or other law enforcement actions, may not be motivated, even in part, by the actual or perceived color, ethnicity or national origin of an individual . . .” *Id.* at 11–12.

³²⁹ Peter L. Zimroth, *Fourth Report of the Independent Monitor 1* (2016) at 2 <http://nypdmonitor.org/wp-content/uploads/2016/12/2016-11-18FourthReportoftheIndependentMonitor-1.pdf>.

³³⁰ Zimroth, *supra* note 143 at 7.

³³¹ Peter L. Zimroth, *Fifth Report of the Independent Monitor 1* (2017), <http://nypdmonitor.org/wp-content/uploads/2017/06/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf>.

³³² *Id.*

- Between 2013 and 2015, the NYPD reported a decrease in the disparities in stop outcomes for blacks and Hispanics as compared to whites, with the differences no longer statistically significant.³³³
- Between 2013 and 2015, the percentage of NYPD stops occurring as a result of suspicion of low-level crimes decreased, and, conversely, the percentage of stops occurring as a result of suspicion of more serious crimes increased.³³⁴
- Between 2013 and 2015, the NYPD reported that the percentage of stops that resulted in issuances of summonses decreased from 3.61% to 2.61%.³³⁵
- The NYPD has revamped its officer training programs, including by developing comprehensive stop-and-frisk training.³³⁶ The new training also includes updated supervisor training.³³⁷
- The NYPD has implemented a new officer evaluation system, and, as a policy, no longer evaluates officers on the number of stops they make.³³⁸
- The Independent Monitor “perceives some positive changes in organizational culture driven by the police commissioner and others in leadership roles.”³³⁹

Given the limited implementation period of the *Floyd* reforms, the extent of their effect on NYPD policing practices is still unclear. Whether unconstitutional stops continue to be utilized and at what rates is a subject of conjecture and debate.³⁴⁰ There is considerable disagreement between the NYPD and members of the public regarding the accuracy of officer-reported data on both (a) the number of stops made by the NYPD and (b) the frequency with which officers use force. The NYPD requires all officers making level 3 stops (or level 1 or level 2 stops which subsequently escalate to level 3 stops) to fill out a UF-250 form, which requires the officer to list “actions taken to stop and/or detain prior to arrests” that occurred

³³³ *Id.* at 23-26.

³³⁴ *Id.* at 11.

³³⁵ *Id.* at 12. According to the NYPD’s website, the percentage of stops in 2016 that resulted in issuances of summonses was 2.96%. NYPD, Stop, Question and Frisk Data <https://www1.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page>.

³³⁶ Zimroth, *supra* note 143.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.* at 4.

³⁴⁰ See Moore, March 21 Briefing Transcript at 270; see also Dunn, March 21 Briefing Transcript at 283.

during the stop and include a narrative description of the circumstances that led to the stop.³⁴¹ The listed options for “actions taken to stop and/or detain prior to arrests” include: verbal command/instruction, impact weapon, drawing/pointing firearm, physical force/restraint, handcuff suspect, O.C. spray, conducted electrical weapons and “other.”³⁴² NYPD Deputy Commissioner Byrne believes that compliance with UF-250 procedure – and thus the accurate reporting of stop and use-of-force data – is the norm, as officers are taught that they are always being filmed by the public (*i.e.*, from smartphones) and thus are motivated to comply with department policy, including the completion of UF-250 forms.³⁴³ However, Assistant Chief Matthew Pontillo, Commanding Officer of the Risk Management Bureau (the “RMB”), an NYPD unit formed for the purpose of collecting and aggregating disparate sources of data mandated by the *Floyd* reforms to monitor misbehavior at the NYPD, suggested that in 2016, the RMB saw a 60-90% non-compliance rate for preparing stop reports in the event a level 3 (*Terry*) stop occurs and is followed by an arrest, in which case an arrest form *and* a stop form are required to be filled out.³⁴⁴ The RMB audits and seeks to ensure the integrity of the NYPD’s stop and other statistics by performing weekly internal quality performance audits of the NYPD to correlate (a) individual stops noted in the NYPD dispatch system and from 911 calls to (b) stop reports.³⁴⁵ When the RMB finds a discrepancy, it tracks down the relevant officer or

³⁴¹ Byrne Interview (Feb. 13, 2017), *supra* note 30. Note, however, that “use of force” differs depending upon the type of stop made. For example, an officer using handcuffs is considered using force in a stop but it is not for an arrest. *Id.*; see also *Patrol Guide*, Procedure No. 212-11, Section 16(j), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg212-11-stop-frisk.pdf; Peter Zimroth, *Recommendation regarding Electronic Stop Report Form* (Nov. 2016), http://nypdmonitor.org/wp-content/uploads/2018/02/2016-11-22-Floyd-Ligon-Davis-Memo-Endorsed-Version-of-Monitor_s-Reco....pdf.

³⁴² Peter Zimroth, *Recommendation regarding Electronic Stop Report Form* (Nov. 2016), http://nypdmonitor.org/wp-content/uploads/2018/02/2016-11-22-Floyd-Ligon-Davis-Memo-Endorsed-Version-of-Monitor_s-Reco....pdf. In the Independent Monitor’s Seventh Report, he notes that the Department began using the electronic stop report proposed in this recommendation in January 2017. Zimroth, *supra* note 143 at 7.

³⁴³ Byrne Interview (Feb. 13, 2017), *supra* note 30.

³⁴⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Assistant Chief Matthew Pontillo, Commanding Officer of the Risk Management Bureau, in N.Y. (Feb. 15, 2017). Note that officers are not required to fill out a UF-250 when an officer makes an arrest or issues a summons for an observed offense *unless* the arrestee was originally stopped under a level 3 stop. See *Patrol Guide*, Investigative Encounters: Requests for Information, Common Law Right of Inquiry and Level 3 Stops, https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/pg212-11-stop-frisk.pdf. Pontillo stated RMB was initially designed to work directly with Peter Zimroth for *Floyd* compliance, but the *Floyd* order created a process with plaintiff’s counsel’s 23 different lawyers instead. Now Zimroth makes a recommendation, all of the parties review it, and then Zimroth makes a recommendation to the judge on how to proceed based on the group’s agreement.

³⁴⁵ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Assistant Chief Matthew Pontillo, Commanding Officer of the Risk Management Bureau, in N.Y. (Feb. 15, 2017).

command to complete the report.³⁴⁶ While the number of reported stops has decreased dramatically since the *Floyd* reforms went into effect, certain community advocates like Jonathan Moore, a civil rights attorney at Beldock Levine & Hoffman, LLP and co-lead counsel for the *Floyd* plaintiffs, urged caution in accepting such officer-reported data, and suggested there remains a “huge problem” regarding whether officers have continued to document the stops they make.³⁴⁷ The Independent Monitor also noted in December 2017 that underreporting continues to be an issue; he noted that some officers making stops do not file the required stop forms documenting them, in part because of what appears to be an exaggerated fear of discipline and lawsuits.³⁴⁸ And, the OIG has made similar findings with respect to officers’ underreporting use-of-force incidents during arrests (*see* Chapter 3, Section A for a further discussion of the OIG’s findings).³⁴⁹

Although the NYPD Patrol Guide requires that supervisors assess the constitutionality of their subordinates’ stop-and-frisk activity, the Independent Monitor reported to the *Floyd* Court that an internal review of 600 stops in 2015 demonstrated that supervisors continued to sign off on stops made without reasonable suspicion, despite the constitutional violation.³⁵⁰ In reporting to the *Floyd* Court on the status of NYPD’s reforms, the Independent Monitor noted that the NYPD faces “a challenge of leadership, particularly for those who supervise officers engaged day-to-day in enforcement activities – sergeants, their immediate supervisors, and the precinct and unit commanders who set the tone for those under them.”³⁵¹ In his most recent (December 2017) report, the Independent Monitor noted that the monitor team has seen very few instances in which supervisors are noting on stop reports an insufficient basis for a stop, frisk, or search and that the role of supervisors will continue to be monitored for improvement.³⁵²

³⁴⁶ *Id.*

³⁴⁷ Moore, March 21 Briefing Transcript at 270.

³⁴⁸ Zimroth, *supra* note 143 at 4.

³⁴⁹ *See generally* Officer of the Inspector General for the NYPD, *An Investigation of NYPD’s New Force Reporting System* at 2, Feb. 2018, http://www1.nyc.gov/assets/doi/press-releases/2018/feb/08Use_of_Force_Report_020618.pdf.

³⁵⁰ Zimroth, *supra* note 150 at 4.

³⁵¹ *Id.*

³⁵² Zimroth, *supra* note 143 at 13.

Another reform recently made by the NYPD is the public reporting of the uses of force by NYPD patrol officers. The NYPD, on December 28, 2017, released the first annual Use of Force Report (the “Use of Force Report”) detailing for the first time statistics on the levels of force used by NYPD officers.³⁵³ According to the Use of Force Report, NYPD officers’ use of force has decreased over time, and officers use force in arrest situations less frequently than in years past.³⁵⁴ Specifically, the Use of Force Report notes that officers employed force in only 1.3% of arrests in 2016 – the lowest percentage since the NYPD began tracking this information. And, according to the Use of Force Report, officers’ firearms discharges have decreased by about 90% since the NYPD began tracking discharges in 1971, with 2015 and 2016 representing the years with the fewest officer discharges on record.³⁵⁵ The OIG has cast doubt on the completeness of these statistics in a report issued on February 6, 2018 (the “OIG Force Report”), noting that an analysis of resisting arrest reports from September – November 2016 shows that officers failed to document uses of force in accordance with NYPD policy in about one-third of arrests reviewed.³⁵⁶ According to the Use of Force Report, officers do not use disproportionate levels of force against blacks and Hispanics as compared to whites, noting that “the racial composition of the subjects of police force reflects the racial composition of the criminal population in the city,” and the races of subjects involved in police shootings reflects the racial composition of perpetrators of criminal shootings in NYC.³⁵⁷

The NYPD has implemented a number of additional policies that appear to be aimed at improving the rate of officer compliance with federal and New York law, as well as ameliorating some of the negative consequences of “broken windows” policing in NYC communities of color. One such policy grants officers discretion to enforce certain low-level crimes and violations through the issuance of a civil rather than criminal summons, which does not result in an

³⁵³ See generally NYPD Annual Use-of-Force Report 2016, <https://www1.nyc.gov/assets/nypd/downloads/pdf/use-of-force/use-of-force-2016.pdf>.

³⁵⁴ Use of Force Report, Introduction.

³⁵⁵ *Id.* at 15.

³⁵⁶ Officer of the Inspector General for the NYPD, *An Investigation of NYPD’s New Force Reporting System* at 10 (Feb. 2018), http://www1.nyc.gov/assets/doi/press-releases/2018/feb/08Use_of_Force_Report_020618.pdf (analyzing 847 resisting arrest reports and finding that 580 of such reports did have an accompanying use of force report. Of these, the OIG found narratives indicating the presence of officer force in 204 of the sample resisting arrest reports).

³⁵⁷ See Use of Force Report at 42 and at 22.

individual obtaining a criminal record.³⁵⁸ The NYPD has also deployed neighborhood policing through which the NYPD says officers focus on mediating quality-of-life issues, as opposed to acting solely in an enforcement or reactive capacity.³⁵⁹ The NYPD has also implemented new officer training techniques, providing de-escalation, and situational training to allow officers to better respond to issues in a community of diverse citizens.³⁶⁰ For example, the NYPD has expanded its training on interacting with members of the LGBTQ community and now provides specific training on interacting with individuals with mental illness and members of different ethnic and religious groups.³⁶¹ These types of improvements, the NYPD argues, allow officers to react in an informed and non-punitive capacity, respecting the particular sensibilities of individual New Yorkers.³⁶² These changes to NYPD practices are discussed in more detail in Sections 2-5 below.

1. Legislative Reforms: The Criminal Justice Reform Act and The Right to Know Act

In 2016, the New York City Council enacted the Criminal Justice Reform Act of 2016 (the “Criminal Justice Reform Act”) in an attempt to divert certain low-level, nonviolent offenses from the criminal justice system.³⁶³ The Criminal Justice Reform Act sends individuals accused of any of five low-level, quality-of-life offenses – possession of an open container of alcohol, violation of park rules, littering, public urination, and unreasonable noise – to civil, rather than criminal court.³⁶⁴ The Criminal Justice Reform Act represents a more extensive legislative enactment of certain then-current practices in NYC: on March 1, 2016, Manhattan District Attorney Vance and Mayor de Blasio announced that the Manhattan District Attorney’s office

³⁵⁸ Criminal Justice Reforms Act Brochure, Office of Administrative Trials and Hearings, http://www1.nyc.gov/assets/oath/downloads/pdf/CJRA_brochure.pdf.

³⁵⁹ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Deputy Comm’r Susan Herman, NYPD Deputy Comm’r of Collaborative Policing, in N.Y. (Feb. 15, 2017).

³⁶⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keese, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ Goodman, *supra* note 72; *see also* Gibson, March 20 Briefing Transcript at 450; *see also* N.Y. City Council, Criminal Justice Reform Act, <https://council.nyc.gov/legislation/criminal-justice-reform/>.

³⁶⁴ Local Law No. 68 (2016) of City of New York; Local Law No. 69 (2016) of City of New York; Local Law No. 70 (2016) of City of New York; Local Law No. 71 (2016) of City of New York; Local Law No. 72 (2016) of City of New York; Local Law No. 73 (2016) of City of New York; Local Law No. 74 (2016) of City of New York; Local Law No. 75 (2016) of City of New York; Gibson, March 20 Briefing Transcript at 450; *see also* Rules of The City of New York, Title 48 Chapter 7.02.

would no longer prosecute or arrest individuals who commit certain low-level violations such as littering, public consumption of alcohol, or taking more than one seat in a subway car.³⁶⁵ In 2015, the NYPD issued over 150,000 criminal summonses for quality-of-life offenses such as those covered by the Criminal Justice Reform Act, but expects to decrease the number of criminal summonses issued by issuing approximately 100,000 civil summonses annually as a result of the Criminal Justice Reform Act, according to New York City Council officials.³⁶⁶ In 2016, the most frequently charged criminal summons offense (over 80,000 issued) was consumption of alcohol in the street.³⁶⁷ The second-most frequent criminal summons charge was disorderly conduct (over 20,000) and the third-most frequent criminal summons charge was possession of marijuana (almost 20,000).³⁶⁸ Recent data from New York courts shows there was a 9.5% decrease in the number of criminal summonses issued between 2015 and 2016, some of which may have been attributable to the Criminal Justice Reform Act.³⁶⁹ In the recently released second quarterly NYPD report on summonses issued in NYC required by the Criminal Justice Reform Act, in the fourth quarter of 2017, the most frequently charged non-vehicular and non-administrative criminal summons offenses were marijuana use/possession (4,544) and consumption of alcohol (1,018).³⁷⁰ At the same time, in the fourth quarter of 2017, 7,752 civil summonses were issued in NYC for consumption of alcohol, with the second-most frequent civil summons issued being for public urination, at 1,708 civil summonses for the quarter, potentially illustrating the effect of the Criminal Justice Reform Act.³⁷¹ During the 2015-2016 period,

³⁶⁵ Press Release of Cyrus R. Vance, Manhattan District Attorney, *District Attorney Vance, Commissioner Bratton, Mayor de Blasio Announce New Structural Changes to Criminal Summonses Issued in Manhattan* (Mar. 1, 2016), <http://manhattanda.org/press-release/district-attorney-vance-commissioner-bratton-mayor-de-blasio-announce-new-structural-c>.

³⁶⁶ N.Y. City Council, Criminal Justice Reform Act, *supra* note 69. See Criminal Court of The City of New York, Annual Report (2016), <https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf>. For violation offenses, see http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/violation-offenses-2000-2016.pdf.

³⁶⁷ Lisa Lindsay, Esq., *Criminal Court of The City of New York Annual Report 2016*, <http://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf>.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 11.

³⁷⁰ NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49.

³⁷¹ *Id.*

however, the NYPD reported a 5% increase in violation offenses, primarily disorderly conduct, marijuana possession, and trespass, with 64,334 such offenses in 2015 and 67,599 in 2016.³⁷²

The Criminal Justice Reform Act creates a new system for handling low-level offenses that previously resulted in open warrants and the possibility of arrest for those who missed their court dates.³⁷³ Prior to the enactment of the Criminal Justice Reform Act, individuals seen engaging in one of the covered offenses could be issued a criminal summons, requiring them to attend court for an adjudication. If they missed their court date, the outstanding summons would turn into an arrest warrant.³⁷⁴ And, any person who is identified as having an outstanding arrest warrant is subject to arrest even if the activity they are engaged in would otherwise only result in a summons.³⁷⁵ Due to the volume of arrest warrants issued as a result of low-level offenses, NYC officials announced in 2016 that NYC would nullify 700,000 ten-years-or-older arrest warrants issued to individuals who failed to appear in court after being issued summonses for low-level offenses such as public urination and turnstile jumping.³⁷⁶

In addition, the Criminal Justice Reform Act provides a statutory basis for officers to issue civil summonses in lieu of criminal summonses in respect of the offenses covered by the legislation, and the NYPD has directed its officers to issue a civil summons, as opposed to a criminal summons, absent an aggravating factor or physical violence.³⁷⁷

For individuals accused of one of the five offenses covered by the Criminal Justice Reform Act, the difference between receiving a criminal and civil summons is significant. First, unlike criminal court summonses, civil court summonses cannot result in a permanent criminal record.³⁷⁸ Second, the fines for civil summonses can be paid online and appearances can be made by phone.³⁷⁹ The Criminal Justice Reform Act also grants the Office of Administrative

³⁷² New York City Chart of Violation Offenses, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/violation-offenses-2000-2016.pdf.

³⁷³ Gibson, March 20 Briefing Transcript at 450.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

³⁷⁶ Michael Gartland, Tina Moore, & Shawn Cohen, *NYC Is Tossing a Mountain of “Broken Windows” Warrants*, N.Y. POST (July 26, 2017), <http://nypost.com/2017/07/26/nyc-is-tossing-a-mountain-of-broken-windows-warrants/>.

³⁷⁷ Byrne Interview (Feb. 13, 2017), *supra* note 30; *Patrol Guide* Procedure No. 209-03.

³⁷⁸ N.Y. City Council, Criminal Justice Reform Act, *supra* note 69.

³⁷⁹ *Id.*

Trials and Hearings (“OATH”), NYC’s “central independent administrative law court,” the discretion to impose community service in lieu of fines for those without the financial means to pay fines.³⁸⁰ And third, warrants cannot be issued for a failure to appear in civil court for covered offenses.³⁸¹ The Criminal Justice Reform Act is also coupled with measures aimed at increasing the percentage of people who show up for their scheduled court date. For example, court hours have been extended so that individuals can appear at night or on weekends, and summons recipients now receive text-message reminders of court dates.³⁸²

The Criminal Justice Reform Act represents an important step towards keeping low-level offenders out of the criminal justice system, according to Councilwoman Gibson.³⁸³ Individuals will no longer be sent to jail for missing court dates resulting from offenses as minor as possession of an open container of alcohol – a practice that Councilwoman Gibson stated not only imposes punishments disproportionate to the severity of the corresponding offenses, but also one that disproportionately impacts young people from communities of color.³⁸⁴ The Criminal Justice Reform Act has support from senior NYPD officials who have characterized the new summons protocol as a mechanism for addressing the issue of legally insufficient summonses and reducing the NYPD’s criminal enforcement interactions with youth, particularly youth of color.³⁸⁵

The Criminal Justice Reform Act also aims to increase NYPD transparency; it requires the NYPD to provide the New York City Council and the Mayor, and post on its website, quarterly reports on the number of criminal and civil summonses issued in each borough, precinct, housing area, and transit district as well as the race, age, and gender of the recipients.³⁸⁶ The Criminal Justice Reform Act also mandates that the required information be provided in a format that facilitates automated processing and be accompanied by comparative data in prior

³⁸⁰ See *Mayor de Blasio Signs the Criminal Justice Reform Act* (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

³⁸¹ N.Y. City Council, *Criminal Justice Reform Act*, *supra* note 69.

³⁸² Gibson, March 20 Briefing Transcript at 455.

³⁸³ *Id.* at 451-52.

³⁸⁴ *Id.* at 450.

³⁸⁵ Byrne Interview (Feb. 13, 2017), *supra* note 30.

³⁸⁶ See *Mayor de Blasio Signs the Criminal Justice Reform Act* (June 13, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act>.

quarters.³⁸⁷ The first two quarterly reports have been issued by the NYPD, covering the third and fourth quarters of 2017.³⁸⁸

Some advocates and scholars believe that the Criminal Justice Reform Act does not go far enough to curb what they consider to be the disproportionate impact of “broken windows” policing on communities of color.³⁸⁹ Professor Levine testified that while the Criminal Justice Reform Act may decrease criminal summons activity, historically the NYPD has issued summonses to individuals of color at a disproportionately higher rate than to others, and, he testified, the disparate issuance of summonses is likely to continue.³⁹⁰ A study of summonses issued by neighborhood for 2008 to 2011, for example, reveals that the overwhelming majority of these summonses were issued in areas of the city with predominantly black and Hispanic residents.³⁹¹ These are unsubstantiated estimates; the exact number of arrests based on warrants for violations or summonses prior to the third quarter of 2017 has not been made available to the public, and there is no information about how these arrests break down in terms of the race, ethnicity, age, and gender of the people affected.³⁹² Moreover, although the New York State Division of Criminal Justice Services (“DCJS”) historically has collected and made available aggregate criminal offense data in New York State, it does not collect violations data because, according to Professor Levine, violations technically are not crimes, even though they have

³⁸⁷ *Id.*

³⁸⁸ See NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49; see also *supra* notes 227 and 228 and accompanying text.

³⁸⁹ See Written Comments of Youth Represent N.Y. City Council Hearing of the Comm. on Public Safety Re: Criminal Justice Reform Act of 2016 (Jan. 25, 2016), http://changethenypd.org/sites/default/files/docs/yr_crim_justice_reform_act_1.25.16_final.pdf (arguing that the Criminal Justice Reform Act does not adequately address the racial disparity in low-level enforcement nor the trust gap between the NYPD and communities of color in NYC).

³⁹⁰ Levine, March 21 Briefing Transcript at 321.

³⁹¹ Harry Levine & Loren Siegel, Criminal Court Summonses in New York City, THE MARIJUANA ARREST RESEARCH PROJECT (Apr. 24, 2014) <http://marijuana-arrests.com/docs/Criminal-Court-Summonses-in-NYC--CUNY-Law-School-April-24-2014.pdf>. According to the Police Reform Organizing Project, “a Brownsville resident is 150 x more likely to be arrested for marijuana possession than a resident of the Upper East Side.”; see also A PROP Fact Sheet, Police Reform Organizing Project, <http://www.policereformorganizingproject.org/prop-fact-sheet/> (noting that “a Brownsville resident is 150 x more likely to be arrested for marijuana possession than a resident of the Upper East Side”); see also Sarah Ryley, Laura Bult & Dareh Gregorian, *Exclusive: Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in ‘Broken Windows’ Policing*, N.Y. DAILY NEWS (Aug. 4, 2014), <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

³⁹² Levine, March 21 Briefing Transcript at 320-21; see also Levine, *supra* note 232 at Note 4. Going forward, the data is now available. See NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49.

produced more than one million criminal arrest warrants.³⁹³ According to the demographic breakdown of criminal and civil summonses released by the NYPD, during the fourth quarter of 2017, at least 61% of criminal summonses issued in NYC were issued to people who were either black or Hispanic and at least 67% of criminal summonses were issued to people of color, while only 11.2% of criminal summonses were issued to whites, with the remaining 21.6% being issued to persons of “unknown” race.³⁹⁴ At the same time, 69% of civil summonses were issued to people of color, while 19% were issued to whites, with the remaining 11.6% being issued to persons of “unknown” race.³⁹⁵ The NYPD maintains that any racial disparity reflected in these statistics is a result of the demographics of the populations committing these offenses and of the populations reporting those offenses through 311 and 911 calls.³⁹⁶

While granting NYPD patrol officers the discretion to issue civil rather than criminal summonses in certain cases is a potentially meaningful reform, Mr. Flores expressed concern that such discretion presents the potential for abuse and disproportionate enforcement against communities of color.³⁹⁷ The NYPD believes such discretion benefits NYC as a whole by (a) allowing officers to remain on the streets instead of escorting individuals to court and (b) relieving the court system of summonses that might otherwise be dismissed.³⁹⁸ Some advocates, such as Mr. Gangi, however, believe that discretion to issue summonses misses the mark and fails to solve the core problem with summonses, *i.e.*, that individuals receive summonses for non-criminal acts in the first place.³⁹⁹ According to Mr. Gangi, discretion is not the answer; the answer is ending punishment for noncriminal activities.⁴⁰⁰ Vincent Riggins, Chair of the Public Safety Committee of Community Board 5 in East New York, noted that since the Criminal Justice Reform Act does not technically decriminalize the five covered “quality-of-life” offenses,

³⁹³ Levine, March 21 Briefing Transcript at 320-21.

³⁹⁴ NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49 (data excludes summonses issued to businesses. Disclosure of this data was mandated by the Criminal Justice Reform Act of 2016.).

³⁹⁵ *Id.*

³⁹⁶ Byrne, *supra* note 20.

³⁹⁷ Flores, March 20 Briefing Transcript at 105.

³⁹⁸ Byrne Interview (Feb. 13, 2017), *supra* note 30.

³⁹⁹ Gangi, March 20 Briefing Transcript at 86.

⁴⁰⁰ *Id.*

these offenses will continue to serve as a basis for police officers to stop and, assuming “reasonable suspicion,” potentially search individuals.⁴⁰¹

Another piece of legislation aimed at minimizing the effects of historical over-policing is the Right to Know Act, two bills enacted into law by the New York City Council in December 2017, which takes effect ninth months after they became law.⁴⁰² The Right to Know Act (a) requires NYPD officers to provide their full name, rank, and command, as well as the specific reason for their police activity, when they stop, question, or search a member of the public for many types of stops and (b) requires that police officers convey to individuals subject to a “consent search”⁴⁰³ that they have the right to refuse consent and to prohibit the officer from conducting a search without a warrant.⁴⁰⁴ The Right to Know Act also mandates that officers obtaining consent to search, make a record of such consent, through the use of body-worn camera recordings if available, and record the race, ethnicity, and age of the person searched.⁴⁰⁵ Lastly, the Right to Know Act requires the NYPD to submit quarterly reports to the New York City Council regarding the aggregate number of stops made by race, ethnicity, gender, and age of the person stopped.⁴⁰⁶

According to the NYCLU and the Center for Constitutional Rights, the Right to Know Act provides important safeguards against unconstitutional policing.⁴⁰⁷ The original legislation

⁴⁰¹ Alex S. Vitale, *Criminal Justice Reform Act Is No Alternative to Broken Windows Policing*, GOTHAM GAZETTE (Jan. 25, 2016), <http://www.gothamgazette.com/city/130-opinion/6112-criminal-justice-reform-act-is-no-alternative-to-broken-windows-policing>; see also Frederique, March 21 Briefing Transcript at 248 (noting that marijuana should be decriminalized to remove marijuana crimes as pretext for police to forcibly enter homes).

⁴⁰² Goodman, *supra* note 77. The N.Y. City Council passed the two bills in December 2017 and sent the bills to the Mayor to sign. The Mayor returned the bills unsigned to the New York City Council in January 2018, which automatically allowed the bills to become law. *Id.*; Letter from the Council of The City of New York to Mayor de Blasio (Jan. 23, 2018), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1681129&GUID=F650527A-AA60-49DB-8A02-97E9C4A0CBDE>; N.Y. City Council, “Legislation,” <https://council.nyc.gov/legislation/>.

⁴⁰³ A consent search is a search which requires the consent of the person searched.

⁴⁰⁴ Goodman, *supra* note 77; see also Int. 0541-2014, 2014 N.Y. City Council (hereinafter cited as *0541-2014*), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2015555&GUID=652280A4-40A6-44C4-A6AF-8EF4717BD8D6> and Int. No. 541-C, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1681129&GUID=F650527A-AA60-49DB-8A02-97E9C4A0CBDE>.

⁴⁰⁵ See Int. 0541-2014 Sections (a)(2) and (b)(1).

⁴⁰⁶ See Int. 0541-2014 Section (f).

⁴⁰⁷ NYCLU, *Testimony in Support of the Right to Know Act*, (June 29, 2015), <https://www.nyclu.org/en/publications/testimony-support-right-know-act>. Center for Constitutional Rights, *Right to*

was supported by over 200 community advocacy organizations and a majority of the New York City Council.⁴⁰⁸ However, some advocates and New York City Council members have criticized the final version of the portion of the Right to Know Act requiring officers to provide identification and a specific reason for their police activity because it does not apply to many common street encounters in the absence of any reasonable suspicion of a crime.⁴⁰⁹ The Right to Know Act applies only to the following stops: (a) noncustodial questioning of individuals suspected of criminal activity; (b) pedestrian stops where an officer has an individualized, reasonable suspicion that the person stopped has committed, is committing, or is about to commit a crime and where a reasonable person would not feel free to end the encounter at will; (c) frisks; (d) searches of persons or property, including vehicles; (e) roadblock or checkpoint stops, but not including planned security checks of vehicles at sensitive locations or street closures for public events or emergencies; (f) home searches; and (g) investigatory questioning of victims of or witnesses to crimes.⁴¹⁰ The limitations on the types of stops to which the Right to Know Act requirements apply has led many to state that the power of the original legislation has been undermined.⁴¹¹

2. Neighborhood Policing

Another NYPD reform that has the potential to minimize the negative effects of low-level police enforcement, particularly in communities of color, is a neighborhood-based policing model, which is active in 56 of the 77 commands in NYC and all public housing police service areas, and is slowly being rolled out to all precincts.⁴¹² The NYPD aims to establish this model in every precinct, citywide, by 2019.⁴¹³ First implemented by the NYPD in 2015, the neighborhood policing model is considered by the NYPD a “sweeping restructuring” of police

Know Act in New York Is at Stake (July 15, 2016), <https://ccrjustice.org/home/blog/2016/07/15/right-know-act-new-york-stake>.

⁴⁰⁸ See Right to Know Act, <http://changethenypd.org/RightToKnowAct>.

⁴⁰⁹ Goodman, *supra* note 77.

⁴¹⁰ Int. No. 541-C (however, exceptions to the reporting requirements exist for certain activities such as undercover activity or when an officer is conducting a security search of a person or property, including a consent search or identification check where such search or identification check is predicated upon entrance to a public building).

⁴¹¹ Goodman, *supra* note 72.

⁴¹² See *More Than a Dozen Executive Promotions Announced, Including Chief of Department*, Press Release (Jan. 8, 2018), <http://www1.nyc.gov/site/nypd/news/p0108a/more-dozen-executive-promotions-announced-including-chief-department>.

⁴¹³ NYPD, *The Police Commissioner's Report* (Jan. 2018), at 86, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

patrol work in order to have officers work more cooperatively in communities they get to know better and to localize the NYPD's delivery of police services and crime fighting.⁴¹⁴ According to NYPD Commissioner O'Neill, "As never before, we are policing with the people of New York – rather than just for them."⁴¹⁵ Neighborhood policing revolves around locally based patrol officers and newly created Neighborhood Coordination Officers ("NCOs") who are assigned to different sectors within a precinct.⁴¹⁶ NCOs receive in-depth training on such topics as mediation, domestic violence, crisis intervention, and mental-health first aid.⁴¹⁷ Two NCOs and patrol officers are permanently assigned to each sector within a precinct, which roughly corresponds to the boundaries of a specific neighborhood.⁴¹⁸ The NCOs are tasked with "familiarizing themselves with the community to better respond to neighborhood-specific crime and other conditions."⁴¹⁹ This can involve meeting with community leaders, visiting schools, following up on previous incidents, and using "creative techniques and adaptive skills" to solve problems in particular sectors.⁴²⁰ The premise of the model is that officers who are permanently assigned to a sector can "work hand in hand" with community members over a sustained period to solve problems within the community rather than just working in a reactive capacity in response to 911 calls and suspected criminal activity, thereby building a deeper knowledge of the community and increasing trust between officers and the communities they serve.⁴²¹

Historically, NYPD patrol officers in a typical precinct have spent all of their time responding to 911 and 311 calls, interacting with community members primarily in an

⁴¹⁴ *Id.* at 86-87; Byrne, *supra* note 20.

⁴¹⁵ NYPD, *The Police Commissioner's Report* (Jan. 2018), at 7, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁴¹⁶ Comm'r William J. Bratton, *The NYPD Plan of Action and the Neighborhood Policing Plan*, <http://home.nyc.gov/html/nypd/html/home/POA/pdf/Plan-of-Action.pdf>; *see also* Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁴¹⁷ NYPD, *The Police Commissioner's Report* (Jan. 2018), at 63, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁴¹⁸ *Id.*; *see also* NYPD, *Neighborhood Policing* (2016), <http://www1.nyc.gov/site/nypd/bureaus/patrol/neighborhood-coordination-officers.page>.

⁴¹⁹ NYPD, *Neighborhood Policing*, <http://www1.nyc.gov/site/nypd/bureaus/patrol/neighborhood-coordination-officers.page>.

⁴²⁰ *Id.*

⁴²¹ Byrne Interview (Feb. 13, 2017), *supra* note 30; *see also* Ashley Southall, *Community Policing Expands in New York, But Some Question If It Works*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/nyregion/community-policing-expands-in-new-york-but-some-question-if-it-works.html>; Gibson, March 20 Briefing Transcript at 436.

enforcement capacity and moving from neighborhood to neighborhood depending on the day.⁴²² Under the neighborhood policing model, by contrast, patrol officers are assigned to a neighborhood they can get to know and spend approximately one-third of their patrol time interacting with community members rather than simply enforcing the law.⁴²³ Moreover, each sector officer is assigned the same shift and rarely leaves his or her assigned sector, and teams of officers working in three shifts provide 24/7 coverage of their sector.⁴²⁴ Sector officers are required to distribute their cell phone numbers and email addresses to community members in their respective sectors.⁴²⁵

Another aspect of recent community outreach by the NYPD in connection with its neighborhood policing model is the existence of designated LGBTQ, West Indian, and Asian liaisons that provide various New York City communities and groups with access to the Commissioner and the NYPD more generally. For example, liaisons meet with protest organizers to listen to their concerns, inform them of department responses and relay suggestions to the Police Commissioner.⁴²⁶ As another example of the NYPD's outreach program, the NYPD Transit Bureau began in 2014 to reach out to the homeless community by assigning homeless outreach teams of two officers from each district to engage with homeless people, offer services, and correct violations of the law.⁴²⁷

Another NYPD reform effort is aimed at increasing the diversity of the NYPD. According to NYPD Deputy Commissioner Keesee, the NYPD, recognizing the value of a diverse base of recruits, has attempted to leverage its diverse recruits – even going so far as recruiting diverse interns for situational awareness training – to increase officers' exposure to diverse communities.⁴²⁸ Some academics, such as Professor Fagan, have conducted studies showing that the incidence of police shootings decreases as the level of diversity within police

⁴²² Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁴²³ *Id.*

⁴²⁴ Comm'r William J. Bratton, *The NYPD Plan of Action and the Neighborhood Policing Plan*, <http://home.nyc.gov/html/nypd/html/home/POA/pdf/Plan-of-Action.pdf>.

⁴²⁵ *Id.*

⁴²⁶ NYPD, *The Police Commissioner's Report* (Jan. 2018), at 14, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁴²⁷ *Id.* at 116.

⁴²⁸ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm'r, Training, and now NYPD Deputy Comm'r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

departments increases.⁴²⁹ According to NYPD data, in 2016, approximately 50% of uniformed officers were white, 27% Hispanic, 15% black, and 7% Asian.⁴³⁰ The NYPD incoming class of cadets in 2016 was 80% individuals of color.⁴³¹ At the same time, NYC as a whole, according to 2016 estimated Census data, is 32% white, 29% Hispanic, 22% black, and 14% Asian.⁴³² In addition, on January 8, 2018, the NYPD announced the creation of the NYPD Office of Equity and Inclusion, a department which, according to NYPD Commissioner O’Neill, will “monitor diversity within bureaus, divisions and borough commands, and help develop strong women and minority candidates to assume positions of leadership throughout the department.”⁴³³ Proponents of the neighborhood policing model believe the program has already achieved certain benefits, such as making residents more comfortable talking to officers.⁴³⁴ Councilwoman Gibson has commended the neighborhood policing program for the bonds between the NYPD and NYC communities it facilitates.⁴³⁵ And, from a policing perspective, according to the NYPD, it allows officers to cultivate relationships and successfully solicit testimony.⁴³⁶ The NYPD notes that precinct commanders “have reported steadily improving relations with local residents, and residents themselves have come forward to offer many testimonials” regarding the positive effects of neighborhood policing on police-community relations.⁴³⁷

Some critics remain skeptical that the program will help to mitigate deeply embedded tensions between the NYPD and communities of color.⁴³⁸ Professor Stoudt, who has studied the attitudes of youth of color towards the NYPD, testified in March 2017 that neighborhood policing has not yet relieved the feelings of anxiety caused by the police presence in

⁴²⁹ Fagan, March 21 Briefing Transcript at 114.

⁴³⁰ See Crime and Enforcement Activity in New York City, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf.

⁴³¹ Tom O’Connor, *NYPD Welcomes Largest, Most Diverse Class of Cadets Ever*, N.Y. POST (June 10, 2016), <http://nypost.com/2016/06/10/nypd-welcomes-largest-most-diverse-class-of-cadets-ever/>.

⁴³² United States Census Bureau, *supra* note 54.

⁴³³ See *More Than a Dozen Executive Promotions Announced, Including Chief of Department*, Press Release (Jan. 8, 2018), <http://www1.nyc.gov/site/nypd/news/p0108a/more-dozen-executive-promotions-announced-including-chief-department>.

⁴³⁴ Gibson, March 20 Briefing Transcript at 436-38 and 459; see also Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Deputy Comm’r Susan Herman, NYPD Deputy Comm’r of Collaborative Policing, in N.Y. (Feb. 15, 2017).

⁴³⁵ Gibson, March 20 Briefing Transcript at 436.

⁴³⁶ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁴³⁷ Byrne, *supra* note 20.

⁴³⁸ Brotherton, March 21 Briefing Transcript at 352.

neighborhoods of color.⁴³⁹ Likewise, Ms. Borchetta noted in March 2017 that her clients have not yet reported a different attitude towards the NYPD as a result of neighborhood policing.⁴⁴⁰ Other critics, such as Joo Hyun-Kang, Director of Communities United for Police Reform, view neighborhood policing as merely a public relations tool for the NYPD.⁴⁴¹ Professor Brotherton likewise testified that neighborhood policing is “simply a token” or “a few olive branches” that the NYPD “throw[s] the liberals.”⁴⁴² In order to better assess the merits and effects of the new policing model, Councilwoman Gibson noted that her district is rolling out a “massive” community survey for residents who live in the neighborhood policing areas to analyze what everyday New Yorkers think of the program, where there may be areas of improvement, and where there are areas of “great challenge.”⁴⁴³

Even if neighborhood policing can successfully build relationships between the NYPD and local communities, some critics, such as Ms. Kang, argue that cultivating relationships will not affect over-policing and abuses of authority.⁴⁴⁴ Ms. Kang noted that Eric Garner knew the names of many of the officers that attacked and killed him.⁴⁴⁵ According to Ms. Kang and other advocates, abuses of authority will only stop once the NYPD becomes a transparent organization and undergoes a cultural shift that emphasizes officer accountability.⁴⁴⁶ See Chapter 3, Section A for a further discussion of the NYPD’s recent transparency initiatives.

3. Precision Policing

Another reform introduced by the NYPD is what one NYPD official termed a “revolutionary” approach – “precision policing.”⁴⁴⁷ Precision policing is a proactive policy aimed at tracking individual criminals and guns and attempting to lessen the impact of policing on communities, according to former NYPD Chief of Patrol and now NYPD Chief of

⁴³⁹ Stoudt, March 20 Briefing Transcript at 152.

⁴⁴⁰ Borchetta, March 20 Briefing Transcript at 159.

⁴⁴¹ Kang, March 20 Briefing Transcript at 98.

⁴⁴² Brotherton, March 21 Briefing Transcript at 352.

⁴⁴³ Gibson, March 20 Briefing Transcript at 438.

⁴⁴⁴ Kang, March 20 Briefing Transcript at 99.

⁴⁴⁵ *Id.* at 99-100.

⁴⁴⁶ *Id.*; see also Levine, March 21 Briefing Transcript at 320-21; Charney, March 21 Briefing Transcript at 26.

⁴⁴⁷ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Terence Monahan, then NYPD Chief of Patrol and now NYPD Chief of Department, in N.Y. (Feb. 15, 2017).

Department Terence Monahan.⁴⁴⁸ Through the precision-policing model, the NYPD integrates data from, and facilitates collaboration across, different internal groups at the NYPD in order to identify and address crime patterns, according to NYPD Chief Boyce.⁴⁴⁹ What precision-policing does, the NYPD says, is move away from the emphasis on stops toward a more targeted analytical and neighborhood-based investigative and crime-solving approach.⁴⁵⁰ Among other things, as part of precision policing, the NYPD has merged certain groups to improve coordination and communication and to better target serious criminals: in March 2016, the NYPD's Detective Bureau merged with the Organized Crime Control Bureau to bring together narcotics and gang investigators, on the one hand, and precinct investigators, on the other, to supplement strategic enforcement initiatives with the knowledge of local officers; in addition, the Detective Bureau established borough commands to mirror the patrol commands.⁴⁵¹ NYPD Chief Boyce explained that with precision policing, homicide detectives are paired with gang detectives for the purpose of identifying patterns of crimes, focusing on the "worst of the worst" criminals and deploying the most effective crime-fighting solutions.⁴⁵²

As an example of the ways in which the NYPD has tailored its policing strategies as a result of precision policing, NYPD Chief Shea noted that the NYPD is no longer focused on making "useless" low-level drug arrests, but is instead focused on connecting low-level offenders to more serious criminals, such as those selling drugs.⁴⁵³ He also noted that the NYPD is creating an integrated database with automated and organized information to allow officers to

⁴⁴⁸ *Id.*; see also *More Than a Dozen Executive Promotions Announced, Including Chief of Department*, Press Release (Jan. 8, 2018), <http://www1.nyc.gov/site/nypd/news/p0108a/more-dozen-executive-promotions-announced-including-chief-department> (noting the NYPD's announcement that Terence Monahan was promoted from NYPD Chief of Patrol to NYPD Chief of Department, the NYPD's highest uniformed rank, effective January 15, 2018).

⁴⁴⁹ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, and Chief Dermot Shea, Chief of Crime Control Strategies, in N.Y. (Feb. 13, 2017). For example, each week at Compstat, the Chief of Crime Control Strategies, the Chief of Department and other executive staff members meet with a different patrol borough command for intensive analysis and strategy sessions. The sessions use electronic mapping and other data-display technology and cover such topics as increases in shootings and violence, rises in robberies and property crime, the pursuit of wanted felons and more effective use of department technology. NYPD, *The Police Commissioner's Report* (Jan. 2018), at 18, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁴⁵⁰ Byrne, *supra* note 20.

⁴⁵¹ *Id.*

⁴⁵² Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁴⁵³ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Dermot Shea, Chief of Crime Control Strategies, in N.Y. (Feb. 15, 2017).

make safe and effective decisions armed with better knowledge of individuals suspected of criminality.⁴⁵⁴ The improvements in collaboration and information through precision policing, according to NYPD Chief Shea, have led to a significant decrease in shootings and robberies in NYC because precision policing enables the NYPD to track the “small number of people” committing crimes in NYC.⁴⁵⁵

The NYPD’s precision policing model has drawn praise from certain quarters, such as Councilwoman Gibson, who testified that precision policing allows the NYPD to target repeat violent offenders and avoid targeting people “because of the color of their skin.”⁴⁵⁶ Councilwoman Gibson testified that the use of precision policing thus far has been successful in apprehending individuals that pose a danger to themselves and the larger NYC community.⁴⁵⁷ Moreover, according to the NYPD, precision policing addresses concerns of community advocates like Professor Fagan, who testified that the NYPD should make law enforcement more about “the management of crime” and less about “the management of people.”⁴⁵⁸

One aspect of precision policing that has engendered controversy is the NYPD’s evolving approach to gang violence, particularly the use of social media surveillance, which critics assert is another example of NYPD over-policing that disproportionately affects blacks and Hispanics.⁴⁵⁹ In 2016, gang-related shootings represented the largest portion of the 998 shootings in NYC.⁴⁶⁰ New York City’s youth gangs or “crews” function as informal peer groups

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ Gibson, March 20 Briefing Transcript at 458.

⁴⁵⁷ *Id.*

⁴⁵⁸ Byrne Interview (Feb. 13, 2017), *supra* note 30. Fagan, March 21 Briefing Transcript at 111; Brotherton, March 21 Briefing Transcript at 352 (echoing that “it’s not about fighting crime, it’s primarily about managing populations, certain populations who are still basically called the dangerous classes”).

⁴⁵⁹ Levine, March 21 Briefing Transcript at 337.

⁴⁶⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

organized around city blocks or housing projects.⁴⁶¹ According to the NYPD, the NYC gangs have moved beyond drug dealing to cybercrime and credit card fraud.⁴⁶²

In 2012, the NYPD launched “Operation Crew Cut,” to combat gang-related crimes.⁴⁶³ Beyond doubling the size of the NYPD gangs unit, Operation Crew Cut entailed the surveillance of suspected gang members’ social media activity to monitor groups of young people affiliated with violent gang-related conduct.⁴⁶⁴ Supporters of this approach to gang suppression point to a drop in NYC’s murder rate as evidence of its merits: in 2012, there were 419 reported murders in NYC and, in 2013, one year after the introduction of Operation Crew Cut, there were 333 murders reported in NYC.⁴⁶⁵ Supporters of Operation Crew Cut argue that the program reduced homicides and gun crime, noting that gang-related shootings dropped from 560 in 2015 to 412 in 2016, and gang-related killings dropped from 129 in 2015 to 79 in 2016.⁴⁶⁶ The NYPD recently supplanted Operation Crew Cut with both the restructured, precinct-based Detective Bureau approach and targeted and coordinated task forces which team specialty gang and narcotics investigators with precinct detectives and other anti-crime personnel, according to NYPD Deputy Commissioner Byrne.⁴⁶⁷

⁴⁶¹ Joseph Goldstein & J. David Goodman, *Frisking Tactic Yields to a Focus on Youth Gangs*, N.Y. TIMES (Sept. 18, 2013), <http://www.nytimes.com/2013/09/19/nyregion/frisking-tactic-yields-to-a-focus-on-youth-gangs.html>.

⁴⁶² Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017) (stating that New York City gangs are focusing less on drug-dealing and more on credit card fraud and cybercrime).

⁴⁶³ Citizens Crime Commission of New York City, *Crime Commission Statement on NYPD’s Operation Crew Cut*, (Oct. 2, 2012), <http://www.nycrimecommission.org/pdfs/ccc-10-02-12.pdf> (noting also the NYPD doubled the size of the NYPD’s gang division (from 150 to 300 detectives) and assigned a team of 12 officers to address “street conditions caused by” rival gangs).

⁴⁶⁴ *Id.*; see also Goldstein & Goodman, *supra* note 461; Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives in N.Y. (Feb. 13, 2017) (describing gang members’ tendency to promote themselves on social media and the NYPD’s practice of using this information to support pre-indictments in advance of gang raids).

⁴⁶⁵ NYPD, *Murder in New York City, 2012*, http://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/murder_in_nyc_2012.pdf; see also NYC Office of the Mayor, *Final Weekly Updated on Murders and Shootings in 2013*, (Dec. 30, 2013), <http://www1.nyc.gov/office-of-the-mayor/news/918-13/final-weekly-on-murders-shootings-2013/>.

⁴⁶⁶ See Benjamin Mueller & Al Baker, *Drop in Gang Violence Drove New York City Shootings Below 1,000 in 2016*, N.Y. TIMES (Jan. 3, 2017), <https://www.nytimes.com/2017/01/03/nyregion/new-york-city-shootings-gang-violence.html> (noting that gang-related shootings dropped from 560 in 2015 to 412 in 2016 and gang-related killings dropped from 129 in 2015 to 79 in 2016).

⁴⁶⁷ Byrne, *supra* note 20.

In addition, the NYPD has shifted its surveillance focus in response to social media activity, according to NYPD Chief Boyce.⁴⁶⁸ He noted that the NYPD no longer monitors street corner drug sales because social media provides a more abundant source of information about criminals and crime.⁴⁶⁹ NYPD Chief Boyce explained that gang members now frequently promote themselves on social media, often posting about past crimes and future violent encounters with rival gangs.⁴⁷⁰ Social media, the NYPD argues, has become an effective information-gathering tool.⁴⁷¹

Critics of the NYPD's social media surveillance of gangs argue that the NYPD's tactics cast too wide a net, surveilling individuals who have not committed any crime.⁴⁷² According to Nancy Ginsburg, Advocacy Director of the Legal Aid Society of New York, the NYPD often, through social media tracking of gang activity, tracks children as young as ten years old, who have associated with crews for protection purposes.⁴⁷³ Moreover, she asserted, individuals end up under NYPD surveillance simply because they joined a gang for social purposes.⁴⁷⁴ According to K. Babe Howell, Associate Professor of Law at CUNY School of Law, the NYPD monitors Twitter feeds, Facebook posts, and YouTube videos, collecting information about young people's gang affiliations.⁴⁷⁵ This strategy is effective, according to Mr. Goldstein, because "an online persona is a necessary component of social life for the young crew members"⁴⁷⁶ and much of teenage social life – for crew members and non-crew members alike – takes place online.⁴⁷⁷ More troubling, Ms. Howell asserts, is that the NYPD employs social media surveillance to populate and maintain a non-public database that tracks gang affiliation and provides a basis for broad conspiratorial liability that is then used to generate arrest

⁴⁶⁸ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² See Ginsburg, March 20 Briefing Transcript at 178.

⁴⁷³ *Id.* at 177-78.

⁴⁷⁴ *Id.* at 178.

⁴⁷⁵ Howell, *supra* note 37 at 21.

⁴⁷⁶ Goldstein & Goodman, *supra* note 461.

⁴⁷⁷ See James R. O'Connor, Note, *Asocial Media: Cops, Gangs and the Internet*, 42 Hofstra L. Rev. 647, 654 (2013).

warrants.⁴⁷⁸ This practice, she noted, has the effect of criminalizing innocent individuals who are associated with gangs for reasons unrelated to crime.⁴⁷⁹ Professor Brotherton testified that the threshold the NYPD uses to gauge an individual's connection to a gang is extremely low, and, as a result, the NYPD can monitor purported gang members for posting online about their intent to "kick" or "come after" another purported gang member.⁴⁸⁰

According to Ms. Howell, the NYPD's (and other police departments') social media strategy lacks procedural safeguards sufficient to protect against abuse, as the databases are secret and any guidelines for determining inclusion have not been made public.⁴⁸¹ Individuals are not notified when their names have been added to a database and there is no procedure to challenge one's inclusion in the database, Ms. Howell stated, adding that evidence of prior criminal conduct is not a prerequisite for inclusion in the database.⁴⁸² As a result, she stated, these surveillance tactics and the mass prosecutions under accessorial liability theories are over-inclusive.⁴⁸³ The approach, according to Ms. Howell, "tends to catch the suspected, the marginal, the former, or wannabe gang members together with the core members."⁴⁸⁴ Moreover, Ms. Howell noted, the practice threatens to perpetuate the profile-based policing strategy deemed untenable after *Floyd*.⁴⁸⁵ According to Ms. Howell, an undefined criteria for inclusion in a crew member database may permit profiling based on "race, place, and appearance" and function as an improper justification for more aggressive policing of youth of color.⁴⁸⁶ Further, the gathered information could be shared with immigration authorities or potential employers, causing "substantial collateral damages even in the absence of criminal convictions or arrests."⁴⁸⁷

The NYPD says that it does not share their crew member database with immigration officials or employers.⁴⁸⁸ Moreover, although the NYPD says that it obtains leads in its

⁴⁷⁸ Howell, *supra* note 39 at 4.

⁴⁷⁹ *Id.* at 29.

⁴⁸⁰ Brotherton, March 21 Briefing Transcript at 321.

⁴⁸¹ Howell, *supra* note 37 at 15.

⁴⁸² *Id.*

⁴⁸³ *Id.* at 29.

⁴⁸⁴ *Id.* at 29.

⁴⁸⁵ *Id.* at 4.

⁴⁸⁶ *Id.* at 15.

⁴⁸⁷ *Id.* at 21.

⁴⁸⁸ Byrne, *supra* note 20.

investigation of roughly 50% of shootings through social media and other surveillance techniques, according to NYPD Deputy Commissioner Byrne, there is no merit to the assertions that the NYPD social media gang surveillance is overbroad or that its use of social media leads to broad conspiratorial liability absent criminal conduct.⁴⁸⁹ The NYPD says that while it views public postings from time to time, especially in the wake of a violent event, it generally does not conduct continuous surveillance of a subject, except in established criminal investigations, and, absent a showing of probable cause that the private social media account will provide support of evidence of a crime, a showing that must be made to and supported by a judge, it does not access private social media accounts.⁴⁹⁰ Moreover, according to NYPD Deputy Commissioner Byrne, there is no basis for concern about broad conspiratorial liability from social media associations since proving conspiracy requires more than simply friending a gang member on Facebook; there must be specific intent to commit a crime and an overt act by the subject or one of his/her co-conspirators in furtherance of the conspiracy.⁴⁹¹ In addition, according to the NYPD, unlike many other police departments, the NYPD maintains a strict protocol governing which individuals are placed in the gang database, and which are removed.⁴⁹² According to NYPD Deputy Commissioner Byrne, the NYPD is currently in the process of removing more than 1,000 names from its database as a result of those individuals' having been dormant or "aged out" or because of a lack of negative interactions with police officers in the past three years.⁴⁹³ In addition, according to NYPD Deputy Commissioner Byrne, individuals who join gangs for social purposes very likely end up falling under the influence of the gangs and end up engaging in criminal conduct.⁴⁹⁴

Critics believe the threat posed by gang violence has been overstated by the NYPD, and that draconian surveillance measures are not required to fight the gang threat.⁴⁹⁵ Ms. Howell notes that while the NYPD in 2014 attributed 40% of shootings to loosely organized "crews,"

⁴⁸⁹ Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁴⁹⁰ Byrne, *supra* note 20.

⁴⁹¹ *Id.*; see also N.Y. Penal Law § 105.00-105.35. An overt act in furtherance of the conspiracy has been liberally interpreted by New York courts. See *People v. Menache*, 98 A.D.2d 335, 338 (1983) (holding that a telephone conversation discussing the ordering of implements of a crime satisfies the overt act requirement).

⁴⁹² Byrne, *supra* note 20.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

⁴⁹⁵ See Goldstein & Goodman, *supra* note 461 (stating the NYPD found that 30% of all New York City shootings in recent years were related to crews).

these attributions were at odds with the NYPD's statistics for crime, shootings, and homicides in New York City between the period of 1990 and 2014.⁴⁹⁶ Ms. Howell testified that less than 1% of all crime in New York City was "gang-related" in each year from 2005-2012 according to information received from a FOIL.⁴⁹⁷ Ms. Howell also noted that in 2012, 9% of a total of 419 homicides were attributed to gangs, according to NYPD published annual reports on murder in New York City.⁴⁹⁸ Moreover, critics argue that these tactics have a disparate impact on communities of color: according to Professor Brotherton, one outcome of the NYPD's gang enforcement tactics is the use of "para-militarized" gang raids, in which police conduct mass arrests, like the 2016 arrests of 120 individuals in the Bronx, in communities of color.⁴⁹⁹

The NYPD believes that critics mischaracterize their gang investigations. According to the NYPD, mass arrests, like those in the Bronx in 2016, are the product of careful, targeted investigations, backed by grand jury indictments of conspiracy or object crimes; 29 of the subjects received sentences of two years or more, 61 received sentences of five years or more and 25 received sentences of ten years or more; many others pled guilty.⁵⁰⁰

According to Ms. Howell, addressing gang violence through repressive gang policing, rather than social resources and programs, may encourage gang formation, harden gang identity, and increase gang delinquency.⁵⁰¹ In addition, researchers note that young people in targeted communities feel surveilled "in their own private technological space" and become insecure in public spaces and report traumatic thoughts.⁵⁰² Professor Brotherton questioned the effectiveness of the "increasingly repressive reactions" to gang violence, noting that surveillance and gang raids lead to collateral consequences, such as mass arrests and loss of family and friends, for communities "already under enormous stresses."⁵⁰³ More importantly, according to Professor Brotherton, the current NYPD gang enforcement tactics do not solve the underlying

⁴⁹⁶ Howell, *supra* note 37 at 7.

⁴⁹⁷ *Id.* at 8.

⁴⁹⁸ *Id.* at 9 (also noting that the NYPD stopped publishing these reports after 2012).

⁴⁹⁹ Brotherton, March 21 Briefing Transcript at 300; *see also* Gibson, March 20, 2017 Briefing Transcript at 458.

⁵⁰⁰ Byrne, *supra* note 20.

⁵⁰¹ Howell, *supra* note 37 at 4.

⁵⁰² Stoudt, March 20 Briefing Transcript at 150-51.

⁵⁰³ Brotherton, March 21 Briefing Transcript at 300, 313.

social issues that lead individuals to join gangs, such as poverty and lack of opportunity.⁵⁰⁴ Professor Brotherton testified that gang violence is not simply “a crime problem that require[s] surgical removal,” but rather “a social reaction to sustained poverty” or “the search for youthful identity among marginalized young people.”⁵⁰⁵ Other critics of NYPD gang tactics share Professor Brotherton’s views that the current practice has the wrong focus. Ms. Ginsburg testified that individuals identified as gang members should be referred for social service, not surveilled for criminal intelligence.⁵⁰⁶ According to Ms. Howell, a social-work model of gang intervention that enlists community-based organizations to defuse conflicts, provide mentorship to adolescents, and address underlying issues is more likely than current NYPD gang tactics to abate gang violence in the long run while building trust and cohesion within affected communities.⁵⁰⁷ A recent report from John Jay College showed that neighborhoods with Cure Violence programs had significantly greater gun violence reductions than similar neighborhoods without them.⁵⁰⁸ The Cure Violence programs use epidemic control methods to reduce violence. Selected members of the community – trusted insiders – are trained to anticipate where violence may occur and intervene before it erupts, while engaging the whole community to change norms of behavior.⁵⁰⁹ In addition, the NYPD refers gang members in 17 of its 76 precincts and a number of its Housing Bureau service areas to social services through Project Ceasefire, a program begun in December 2014, that brings together law enforcement officials and community leaders, including faith leaders, mothers of murdered children and ex-offenders, to implore at-risk youth not to join gangs and to offer assistance through social service programs.⁵¹⁰

⁵⁰⁴ *Id.* at 311-12.

⁵⁰⁵ *Id.* at 309.

⁵⁰⁶ Ginsburg, March 20 Briefing Transcript at 178.

⁵⁰⁷ Howell, *supra* note 37 at 30. The need to address underlying structural issues through a social-work model extends beyond the arena of gang violence. See Krever, March 20 Briefing Transcript at 46-57 (describing the disparate need to address the underlying structural issues relating to homelessness, economic opportunities, education, and health affecting LGBTQ youth of color in New York City).

⁵⁰⁸ Sarah A. Delgado et al., John Jay Evaluation and Research Center, *Denormalizing Violence: The Effects of Cure Violence in the South Bronx and East New York, Brooklyn*, (Oct. 2017), <https://johnjayrec.nyc/2017/10/02/cvinsobronxeastny/>.

⁵⁰⁹ See, e.g., Treating Violence as Infectious Disease, Cure Violence, <http://cureviolence.org/the-model/>.

⁵¹⁰ NYPD Deputy National Network for Safe Communities at John Jay College, <https://nnscommunities.org/impact/city/new-york-city>.

The NYPD states that they have narrowed the focus of their gang surveillance activities in recent years.⁵¹¹ As part of an overall shift towards precision policing, the NYPD states that it no longer seeks to simply identify individual members of a gang for surveillance purposes.⁵¹² Whereas previous NYPD tactics involved surveilling individuals suspected to be in gangs or in areas with high criminal activity, current NYPD practice has been reshaped to hone in on the most dangerous members of society and those likely to perpetrate violent crimes, according to NYPD Chief Boyce.⁵¹³ Moreover, the NYPD's information-gathering techniques have shifted from mere identification of crew members – many of whom may not have committed a crime – to identifying perpetrators of specific crimes.⁵¹⁴ NYPD Chief Boyce noted that detective units, often with the assistance of prosecutors, develop a theory and motive for each shooting and homicide.⁵¹⁵ He also noted that gathering sufficient evidence to get an arrest warrant for individuals suspected of a serious crime, many of whom are “alpha personalities” in gangs, usually requires 6–12 months of investigation.⁵¹⁶ NYPD Deputy Commissioner Byrne analogized the shift in NYPD surveillance strategy to a shift from carpet bombing to drone strikes: instead of surveilling general areas of purported criminal activity, he explained, the NYPD now uses specific evidence to focus on individual targets suspected of committing serious crimes.⁵¹⁷ And, he says that it is specious to suggest that gang enforcement engenders gang delinquency, pointing to the fact that the NYPD's aggressive gang enforcement tactics of the last two years has led to a 12% decline in shootings between 2015 and 2016, the “most salient” sign of gang delinquency.⁵¹⁸

⁵¹¹ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁵¹⁵ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Robert Boyce, Chief of Detectives, in N.Y. (Feb. 13, 2017).

⁵¹⁶ *Id.*

⁵¹⁷ Byrne Interview (Feb. 15, 2017), *supra* note 159.

⁵¹⁸ Byrne, *supra* note 20; Byrne Interview (Feb. 13, 2017), *supra* note 30; *see also* Rocco Parascandola & Thomas Tracy, *NYC Saw Historically Low Numbers of Shootings in 2016; Murders also Down*, N.Y. DAILY NEWS (Jan. 4, 2017), <http://www.nydailynews.com/new-york/nyc-crime/nyc-historically-number-shootings-2016-article-1.2933098>.

4. Marijuana Enforcement

Another potential policy change that could lessen the perceived disparate effect of law enforcement on communities of color in NYC is the approach the NYPD and NYC take to marijuana possession and smoking. While NYC saw an average of almost 40,000 marijuana arrests per year under Mayor Bloomberg (including a peak of 51,000 arrests in 2011), levels of marijuana enforcement have since dropped.⁵¹⁹ In 2017, the NYPD made 17,880 marijuana-related arrests, which amounted to approximately 1% fewer than in 2016, according to the New York State Division of Criminal Justice Services.⁵²⁰ According to the Legal Aid Society, the number of marijuana-related misdemeanors and violations handled by their lawyers was roughly the same in the first half of 2016 and 2017, decreasing from 6,180 cases to 5,934 cases.⁵²¹ Although marijuana arrests have decreased significantly in recent years while marijuana usage has remained steady, many community rights advocates believe the total number of marijuana arrests remains excessive and unnecessary.⁵²²

In November 2014, Mayor de Blasio and then-NYPD Commissioner Bratton announced that the NYPD would direct its officers to issue summonses to, instead of arresting, individuals in possession of less than 25 grams of marijuana, citing the disproportionate impact on black and Hispanic communities, and the drastic consequences stemming from being arrested.⁵²³ However, in announcing changes to the NYPD's marijuana enforcement policy, then-NYPD Commissioner Bratton noted that anyone smoking marijuana in the streets still would be subject to arrest.⁵²⁴

⁵¹⁹ Frederique, March 21 Briefing Transcript at 245.

⁵²⁰ Brendan Cheney, *Racial Disparities Persist in New York City Marijuana Arrests*, POLITICO (Feb. 13, 2018), <https://www.politico.com/states/new-york/city-hall/story/2018/02/13/racial-disparities-continue-in-new-york-city-marijuana-arrests-248896>; see also Brendan Cheney, *Marijuana Arrests in City Increased in 2016, with Large Racial Disparities*, POLITICO (Feb. 6, 2017), <http://www.politico.com/states/new-york/city-hall/story/2017/02/marijuana-arrests-in-nyc-increase-in-2016-still-large-racial-disparities-109306> (noting that there were 18,316 low-level marijuana arrests in 2016).

⁵²¹ Shayna Jacobs, *Pot Arrests Continue in NYC Despite City Hall Decriminalization Push: Lawyers*, N.Y. DAILY NEWS, <http://www.nydailynews.com/new-york/nyc-crime/nyc-pot-arrests-continue-decriminalization-push-lawyers-article-1.3428481>.

⁵²² See generally Drug Policy Alliance, *It's Time for the U.S. to Decriminalize Drug Use and Possession* (2017), http://www.drugpolicy.org/sites/default/files/documents/Drug_Policy_Alliance_Time_to_Decriminalize_Report_July_2017.pdf; Frederique, March 21 Briefing Transcript at 246.

⁵²³ See Transcript: Mayor de Blasio, Police Comm'r Bratton Announce Change in Marijuana Policy, <http://www1.nyc.gov/office-of-the-mayor/news/511-14/transcript-mayor-de-blasio-police-commissioner-bratton-change-marijuana-policy>.

⁵²⁴ *Id.*

According to the recently released first NYPD summons report under the Criminal Justice Reform Act, the number of criminal summonses issued in NYC in the third quarter of 2017 for marijuana possession was 5,069.⁵²⁵ The number of criminal summonses for marijuana possession decreased to 4,544 in the fourth quarter of 2017.⁵²⁶

According to Ms. Frederique, marijuana misdemeanor enforcement, which many believe has not been shown to reduce crime, continues to disproportionately impact communities of color without providing any benefit to public safety.⁵²⁷ She and Professor Levine testified that approximately 85% of the 700,000 individuals arrested for low-level possession of marijuana between 1997 and 2016 were black or Hispanic, and Professor Levine noted separately that 85% of individuals arrested for low-level marijuana crimes in 2016 were black or Hispanic.⁵²⁸ Moreover, Professor Levine testified that the geographic focus of marijuana enforcement is concentrated on communities of color: “The number of marijuana arrests in the Upper East Side and Upper West Side in Manhattan is low, it’s almost negligible. Forest Hills, Rego Park have almost none of these things. But in the South Bronx, in Washington Heights, in Bedford-Stuyvesant, they’re off the charts,” he stated.⁵²⁹ In his testimony, Professor Levine noted that in 2016, the NYPD made only two marijuana arrests of youth aged 16-20 in the Upper East Side, yet arrested 190 16-20 year olds in West Harlem, a neighborhood of color with a quarter of the population of the Upper East Side.⁵³⁰ These disparities exist at a time when numerous studies, including federal government research, have shown that whites use marijuana in equal or greater amounts than do individuals of color.⁵³¹

⁵²⁵ NYPD, *Criminal and Civil Court Summons Reports*, *supra* note 49.

⁵²⁶ *Id.*

⁵²⁷ Frederique, March 21 Briefing Transcript at 244; *see also* Drug Policy Alliance & Marijuana Arrest Research Project, *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio’s New York* (2017), http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.

⁵²⁸ Frederique, March 21 Briefing Transcript at 243-44; Levine, March 21 Briefing Transcript at 327.

⁵²⁹ Levine, March 21 Briefing Transcript at 346.

⁵³⁰ Harry Levine, Submitted Testimony of Harry Levine, The U.S. Comm’n on Civil Rights, New York State Advisory Board Public Briefing Event, “Police Practices and Accountability in New York City,” http://marijuana-arrests.com/docs/Testimony--NYC_1.5million_arrest_warrants--Harry_Levine--US_Civil_Rights_Commission_March2017.pdf.

⁵³¹ Harry Levine & Loren Siegel, *80 Marijuana Possession Arrests a Day Is More of the Same*, Marijuana Arrest Research Project (2014), <http://marijuana-arrests.com/docs/MORE-OF-THE-SAME--NYC-Marijuana-ArrestsJune2014.pdf>; *see also* Gangi, March 20 Briefing Transcript at 35; Frederique, March 21 Briefing Transcript at 244; Levine, March 21 Briefing Transcript at 326.

The NYPD says that because the New York legislature has not decriminalized marijuana, it has no choice but to enforce marijuana crimes.⁵³² Likewise, NYPD Chief Monahan noted that, while the NYPD is not advising officers to aggressively enforce marijuana laws, many 311 and 911 calls report marijuana violations, and the NYPD feels obligated to respond to those calls.⁵³³ Nevertheless, NYPD Deputy Commissioner Byrne, referring to the November 2014 announcement that the NYPD would issue summonses to, instead of arresting, individuals in possession of marijuana, noted the NYPD is encouraging its officers to use their discretion in not arresting individuals for personal marijuana possession.⁵³⁴

Professor Levine testified that he does not believe continued marijuana enforcement comes as a result of the NYPD's obligation to respond to 311 and 911 calls.⁵³⁵ Referring to anecdotal evidence of conversations with NYC public defenders, he testified that most of the individuals arrested for marijuana use are not using the drug openly in a way that would prompt a 311 call.⁵³⁶ According to Ms. Frederique, the NYPD continues to enforce marijuana crimes as a pretext to criminalize and control impoverished communities of color.⁵³⁷ Community advocates like Ms. Frederique argue that legalization of marijuana is required to remove the pretext of marijuana enforcement.⁵³⁸

5. Improved Training

In addition to changing the ways in which officers interact with citizens, the NYPD has also updated its training methods and curriculum as part of its reforms. The NYPD, according to NYPD Deputy Commissioner Tracie Keese, ⁵³⁹ has worked to update its training procedures to teach officers to recognize issues regarding implicit bias – involuntary perceptions to certain

⁵³² Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁵³³ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Chief Terence Monahan, then NYPD Chief of Patrol and now NYPD Chief of Department, in N.Y. (Feb. 15, 2017).

⁵³⁴ Byrne Interview (Feb. 15, 2017), *supra* note 159.

⁵³⁵ Levine, March 21 Briefing Transcript at 343-44.

⁵³⁶ *Id.* at 345.

⁵³⁷ Frederique, March 21 Briefing Transcript at 246.

⁵³⁸ *Id.* at 254.

⁵³⁹ *See More Than a Dozen Executive Promotions Announced, Including Chief of Department*, Press Release (Jan. 8, 2018), <http://www1.nyc.gov/site/nypd/news/p0108a/more-dozen-executive-promotions-announced-including-chief-department> (announcing that Tracie Keese would become NYPD Deputy Commissioner, Equity and Inclusion, effective January 15, 2018).

stimuli which affect human responses to those stimuli – and human rights.⁵⁴⁰ Recognizing that officers, like everyone else, are influenced by implicit racial bias, the NYPD has sought to discuss difficult but important issues such as race relations and racial history during its trainings to facilitate officers’ understanding of how these issues affect their everyday work as officers of the law.⁵⁴¹

The NYPD says that, in order to better serve the diverse set of communities in NYC, it has introduced specific training involving different populations so that officers can better understand the unique needs and challenges of interacting with different groups of NYC citizens.⁵⁴² For example, the NYPD provides LGBTQ-specific training, training around mental illness, and training on specific ethnic and religious groups.⁵⁴³ The NYPD has also started a training program on youth-specific issues.⁵⁴⁴ The training will allow officers to engage in de-escalation tactics armed with greater knowledge of different backgrounds and their unique challenges, according to NYPD Deputy Commissioner Keesee.⁵⁴⁵ In addition, the NYPD has implemented Crisis Intervention Training (“CIT”), “which trains police officers in how to interact with, and manage, people with mental illnesses” and has trained 7,500 in such techniques since June 2015.⁵⁴⁶ The NYPD’s CIT, developed in collaboration with mental health professionals and researchers from local universities, involves a four-day class that teaches active listening skills and a better understanding of mental illnesses.⁵⁴⁷ In a January 2017 report assessing the NYPD’s implementation of CIT, the OIG found that the NYPD’s CIT curriculum incorporates the core components of the CIT model in a manner that meets national standards,

⁵⁴⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017); see also *Understanding Implicit Bias*, Kirwin Institute for the Study of Race and Ethnicity, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/>.

⁵⁴¹ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Office, in N.Y. (Feb. 13, 2017).

⁵⁴² Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁵⁴³ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

⁵⁴⁶ Use of Force Report at 13; NYPD, *The Police Commissioner’s Report*, (Jan. 2018), at 64, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁵⁴⁷ *Id.*

and that the NYPD's CIT trainings are executed "very well" by NYPD trainers.⁵⁴⁸ However, the OIG CIT report concluded that the NYPD does not effectively deploy its CIT-trained officers to situations involving individuals in crisis situations, and no mechanism currently exists to ensure CIT-trained officers are called to scenes in which their training would be useful, and the NYPD has no official plans to create such a mechanism.⁵⁴⁹ The report also noted that the NYPD has not established a dedicated unit or group responsible for CIT training, and that the current forms used to document interactions with individuals in crisis situations do not contain fields specific to CIT techniques, and the NYPD therefore cannot adequately assess the efficacy of its CIT training in the field.⁵⁵⁰

The NYPD has also developed stop-and-frisk training, which it began testing on a pilot basis in June 2017. According to the Independent Monitor, materials for supervisor training were submitted to the *Floyd* Court and approved on December 5, 2017.⁵⁵¹ The Independent Monitor reported to the *Floyd* Court that the NYPD will now begin training supervisors on stop-and-frisk and then move onto officers and that he expects that it will take approximately 18 months to train all NYPD officers on the new stop-and-frisk policies that are embedded in the revised Patrol Guide.⁵⁵²

In 2015, the NYPD began to provide each of its 34,000 patrol officers with three days of training in de-escalation and on how to safely restrain individuals, if necessary.⁵⁵³ The NYPD has also implemented training on basic communication skills to facilitate better officer interactions with community members.⁵⁵⁴ Before this change was implemented, the only form of training officers received following their graduation from police academy was two days of

⁵⁴⁸ New York Police Department of Investigation, *Putting Training Into Practice*, (Jan. 2017), at 2, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/CIT_Report_01192017.pdf. For an elaboration of the national CIT standards, see <https://www.nami.org/Law-Enforcement-and-Mental-Health/What-Is-CIT>.

⁵⁴⁹ New York Police Department of Investigation, *Putting Training Into Practice*, (Jan. 2017), at 2, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/CIT_Report_01192017.pdf.

⁵⁵⁰ *Id.*

⁵⁵¹ Zimroth, *supra* note 143 at 3.

⁵⁵² *Id.*

⁵⁵³ Byrne Interview (Feb. 13, 2017), *supra* note 30; see also Kevin Fasick & Yoav Gonen, *NYPD launches court-ordered body camera program*, N.Y. POST (Apr. 27, 2017), <http://nypost.com/2017/04/27/nypd-launches-court-ordered-body-camera-program>.

⁵⁵⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Susan Herman, NYPD Deputy Comm'r of Collaborative Policing, in N.Y. (Feb. 15, 2017).

firearms training.⁵⁵⁵ Through the updated training, which is now all scenario-based, officers gain situational awareness and become familiar with what actions are permissible under the law, according to NYPD Deputy Commissioner Keese. ⁵⁵⁶ She noted that the training is specifically tailored to the most common encounters officers will face, and is intended to familiarize officers with counterintuitive issues that often lead to escalations.⁵⁵⁷

The NYPD has also revamped its firearms and use-of-force tactics training policies in line with its new Use-of-Force Policy.⁵⁵⁸ According to the Use of Force Report, the NYPD has modified its firearms training to train police officers “not to kill[,] but to stop the threat.”⁵⁵⁹ Moreover, according to NYPD Deputy Commissioner Keese, NYPD use-of-force training now encourages officers to de-escalate situations, instead of using force, to restrain members of the public.⁵⁶⁰ In addition, in November 2014, the NYPD implemented a “20K” training program with the goal of retraining 20,000 officers in the proper use of force in contentious interactions.⁵⁶¹ Officers in the 20K training program were trained, among other things, in physical tactics, conflict communication, controlling adrenaline, abuse of authority, recognition/identification of potential adversarial conflicts, de-escalation techniques, and empathizing with individuals in crisis situations.⁵⁶² The NYPD credits the decrease from 2006 to 2016 in officer shootings and use of force generally to these updated training programs.⁵⁶³

NYPD Deputy Commissioner Keese reported, however, that the NYPD’s updated training has not yet fully imparted to its officers the desired situational awareness and

⁵⁵⁵ Byrne Interview (Feb. 13, 2017), *supra* note 30.

⁵⁵⁶ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keese, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁵⁵⁷ *Id.*

⁵⁵⁸ Use of Force Report at 13.

⁵⁵⁹ *Id.*

⁵⁶⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keese, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁵⁶¹ *Id.*

⁵⁶² *Id.*

⁵⁶³ NYPD, *The Police Commissioner’s Report*, (Jan. 2018), at 7, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>. According to the Use of Force Report, officers intentionally discharged their firearms in confrontations with a subject 59 times in 2006, compared with 37 times in 2016. Use of Force Report at 17.

recognition of implicit bias.⁵⁶⁴ According to Hassan Aden, Senior Advisor at the Vera Institute of Justice, the NYPD should educate its officers in Crime Prevention Through Environmental Design (“CPTED”), which is a multi-disciplinary approach to enforcement and training that seeks to build an environment with less fear, less incidence of crime, and an overall improved quality of life.⁵⁶⁵

NYPD Deputy Commissioner Keesee stated that the NYPD faces resistance from officers who may never fully “buy in” to the updated training and policing strategies.⁵⁶⁶ Likewise, she noted, in order to integrate the new training and ensure it has an effect on rank-and-file officers, the NYPD’s senior management needs to constantly reinforce the message of the new training procedures.⁵⁶⁷ According to NYPD Deputy Commissioner Keesee, the NYPD is continuing to make progress under its new curriculum, and has enlisted the assistance of non-police individuals and community groups, such as Phillip Goff and the Center for Policing Equity, to craft updated training policies and curriculum.⁵⁶⁸ Mr. Moore testified that he believes there is “certainly” a better commitment to training at the NYPD today than in years past.⁵⁶⁹

Community advocates have commended the NYPD for its efforts in updating its training policies. Tom Kever, Chief Executive Officer of the Hetrick-Martin Institute, for example, applauded the NYPD’s introduction of adolescent health into its training two years ago and is now working with the NYPD to further expand its training.⁵⁷⁰

Despite such progress, Ms. Kang testified that any improvements in training will not improve relations with the community unless NYPD officers are held to the standards imparted upon them in training: the NYPD needs to couple its training with consequences for breaching protocols learned in training, and officers need to be held accountable for deviating from the

⁵⁶⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm’r, Training, and now NYPD Deputy Comm’r, Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁵⁶⁵ Aden, March 21 Briefing Transcript. See *CPTED Training*, National Institute of Crime Prevention, <http://www.cptedtraining.net>.

⁵⁶⁶ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with Tracie Keesee, then NYPD Deputy Comm’r for Training and now NYPD Deputy Comm’r for Equity and Inclusion Officer, in N.Y. (Feb. 13, 2017).

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ Moore, March 21 Briefing Transcript at 293.

⁵⁷⁰ Kever, March 20 Briefing Transcript at 58-59.

standards addressed in training.⁵⁷¹ According to Ms. Kang, officers need to witness the punishment of fellow officers for any breaches or else the NYPD will continue to be unaccountable to the people they serve.⁵⁷² Accountability and oversight of the NYPD are discussed in Chapter 3.

D. Recommendations

The recommendations of the Committee are:

- 1. The Commission should urge New York State, the New York City Mayor, the New York City Council, and the NYPD to completely abandon “broken windows” policing as a policy so that (a) the potential for discriminatory practices against individuals of color is reduced, (b) line officers are not incentivized to punish low-level, nonviolent offenses, and (c) the path to prison for individuals of color is reduced.**
 - *The Commission should recommend to NYC that they fully decriminalize the “quality-of-life” offenses covered by the Criminal Justice Reform Act of 2016 and increase the number of offenses that are covered by the Criminal Justice Reform Act of 2016.*
 - *The Commission should recommend to NYC that they abandon the use of summonses and arrests for first-time offenders of low-level, nonviolent crimes and violations.*
 - *The Commission should recommend to NYC that they use community service or restorative justice programs as alternatives to criminal and civil summonses for all low-level, nonviolent crimes and violations, particularly for youth and those who are not repeat offenders.*
 - *The alternative approaches should minimize interference with work schedules.*
 - *The Commission should recommend to NYC that no person under eighteen be arrested for low-level, nonviolent crimes or violations.*
 - *The Commission should recommend to NYC and the New York State Court System that it attempt to (a) divert low-level offense cases to alternative non-punitive forums for resolution, (b) increase the speed of trials, (c) compensate those who must repeatedly miss work to attend court due to prosecutor or court delay, (d) discourage plea agreements and work to*

⁵⁷¹ Kang, March 20 Briefing Transcript at 71-72; *see also* Agostini, March 21 Briefing Transcript at 227.

⁵⁷² Kang, March 20 Briefing Transcript at 71-72.

make adjudication a fairer alternative to plea bargaining, (e) use means tests for issuing fines, (f) eliminate bail in a wider range of low-level offense cases, and (g) provide legal assistance to those issued civil summonses.

- *The Commission should encourage the New York City Council to amend the Right to Know Act to apply to all stops.*
- *The Commission should encourage NYC and New York State to take steps so that the NYPD ceases to make arrests or issue summonses for possession and public display of small amounts of marijuana.*
- *If the NYPD's current quality-of-life policing is maintained, the Commission should recommend that the NYPD (a) perform the OIG's Requested Analyses (which include (i) an assessment of the relative effectiveness of quality-of-life summonses and misdemeanor arrests, as compared to other strategies, in reducing the rate of serious crime, (ii) an analysis to assess whether quality-of-life enforcement disproportionately impacts (1) black and Hispanic residents, (2) males aged 15-20, and (3) residents living in New York City public housing) and (b) release geographically coded incident data as requested in the OIG's Third Annual Report.*

2. The Commission should encourage the NYPD to ensure that its gang intervention policies are not over-inclusive.

- *The Commission should encourage the NYPD to create public, narrow, and fair criteria for inclusion in gang databases and develop fair procedures to challenge inclusion.*
- *The Commission should recommend to the New York City Council that they undertake a public review of NYPD gang policies.*
- *The Commission should urge the New York City Mayor to continue to invest in Cure Violence initiatives and other evidence-based alternatives to relying on police in order to reduce violence.*

3. The Commission should encourage the NYPD to continue to improve training with respect to police officer interactions with individuals of color, including by ensuring that field officers receive the same type and amount of implicit bias, de-escalation, and situational training that recruits currently receive.

4. The Commission should recommend to the NYPD that it rigorously enforce its recent "no quotas" directive, and ensure that neither NYPD commands nor individual supervisors use numerical arrest/summons metrics in

performance evaluations. The Commission should also recommend to NYC that the NYC Office of Inspector General for the NYPD assess compliance.

Chapter 2: “Broken Windows” Policing in Schools

“Broken windows” policing is not confined to the streets of NYC. NYC public schools deploy both police officers and School Safety Officers (“SSOs”) who together monitor students while they attend school.⁵⁷³ SSOs are unarmed law enforcement employees who are supervised by the NYPD School Safety Division.⁵⁷⁴ As of January 2018, there were 5,383 SSOs in New York City public schools, 94% of whom are non-white and 68% of whom are female.⁵⁷⁵ They differ from police officers in that they are civilians – they are not sworn in as police officers – and they are not armed.⁵⁷⁶ In addition, in over 80 NYC public schools, students must pass through a metal detector and place personal belongings through an x-ray machine to enter the building.⁵⁷⁷ Although the precise location of school x-ray machines is not made available to the public, certain studies have found that black and Hispanic students are approximately three times more likely to walk through a metal detector than are white students.⁵⁷⁸ According to Professor Stoudt, “research demonstrates intense police presence in everyday intimate spaces” has a negative impact on students, particularly students of color:

For many young people of color they wake up and the police are in their hallways and in their courtyards. They walk to school and the police are in cars and are standing on street corners. They enter school and police or school safety agents greet them with metal detectors and are involved all day in school discipline.

⁵⁷³ Guest speakers who testified for the Committee used the term “School Safety Officers” to describe the civilian agents who patrol NYC public schools, while the NYPD referred to these patrolmen as “School Safety Agents.” The U.S. Department of Education, meanwhile, refers to such agents as “School Resource Officers” (“SROs”). This report uses the term “SSOs” for the sake of consistency with the testimony proffered before the Committee.

⁵⁷⁴ NYCLU, *Criminalization in the Classroom The Over-Policing of New York City Schools*, March 2007, at 6, http://www.nesri.org/sites/default/files/ACLU_NYCLU_Criminalizing_the_Classroom.pdf.

⁵⁷⁵ NYPD, *The Police Commissioner’s Report*, (Jan. 2018), at 124, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>; Byrne, *supra* note 20.

⁵⁷⁶ Randal C. Archibold, *New Era as Police Prepare to Run School Security*, N.Y. TIMES (Sept. 16, 1998), <http://www.nytimes.com/1998/09/16/nyregion/new-era-as-police-prepare-to-run-school-security.html>.

⁵⁷⁷ NYC Department of Education and NYPD, *Scanning in NYCDOE Schools*, July 21, 2016, http://schools.nyc.gov/NR/ronlyres/F176F019-7333-41D6-8458-16BD3B5FA22F/0/ScanningProtocolsinNYCDOESchools_20160721.pdf (hereinafter cited as *Scanning Report*). This report states that there were 88 “scanning sites” in the 2015-16 school year. Note, though, that certain independent studies have found that metal detectors are placed in over 200 NYC schools. See, e.g., Cecilia Reyes, *100,000 NYC School Children Face Airport-style Security Screening Every Day* (Jan.12, 2016), PROPUBLICA, <https://www.propublica.org/article/nyc-school-children-face-airport-style-security-screening-every-day>.

⁵⁷⁸ *Id.* Note that metal detectors are deployed in NYC schools in three ways: on a full time basis, on a part time basis, and unannounced at new locations. See *Scanning in NYCDOE Schools*, *supra* note 577, at 2. Any school, after consulting internally with school faculty, SSOs and other community stakeholders such as parents, may request full or part time scanning. *Id.* at 6-7.

[These constant interactions lead young people to report] traumatic symptoms, intrusive thoughts, removing [themselves] from a public space or feeling very wary, ontologically insecure in public spaces.⁵⁷⁹

Professor Stoudt concluded by saying that this level of insecurity was “just not good developmentally” for youth over time.⁵⁸⁰

Critics contend that the presence of metal detectors increases students’ fear of violence at school, rather than making them feel safer.⁵⁸¹ They also assert that that type of surveillance can harm students’ self-perception by branding them as untrustworthy and as potential criminals.⁵⁸² The NYPD claims that data from the past few years suggests that using metal detectors to screen for weapons helps keep weapons out of schools; during the three school years between 2012 and 2015, officials found an average of 645 weapons per year through screening in NYC public schools.⁵⁸³ And the number of weapons found has increased in the last two years: in the 2015-16 school year, officials found 733 weapons through screening, and found 1,760 weapons in the 2016-2017 school year.⁵⁸⁴ A September 27, 2017 fatal stabbing of a student in a Bronx high school has led to some parental demands that metal detectors be added to the school entrance.⁵⁸⁵

NYC school officials introduced zero tolerance of violence and weapons policies in schools as a reaction to concerns about school violence in the 1990s.⁵⁸⁶ An independent commission under then-Mayor Giuliani concluded that school safety was poorly managed under the NYC Board of Education and recommended transferring control of school safety to the

⁵⁷⁹ Stoudt, March 20 Briefing Transcript at 127, 150.

⁵⁸⁰ *Id.* at 151.

⁵⁸¹ A. Hankin, M. Hertz, & T. Simon, *Impacts of Metal Detector Use in Schools: Insights From 15 Years of Research*, 81 J. OF SCHOOL HEALTH 100 (2011).

⁵⁸² Jason P. Nance, *Student Surveillance, Racial Inequalities and Implicit Bias*, 66 EMORY L.J. 765, 786 (2017).

⁵⁸³ Byrne, *supra* note 20. Note also that the New York State Education Department collects school safety data from public and charter schools in New York City and across the State, and compiles that data into annual Violent and Disruptive Incidents Reports (“VADIR”), http://www.p12.nysed.gov/irs/school_safety/school_safety_data_reporting.html. Mayor de Blasio and others have criticized certain aspects of VADIR data as being flawed, arguing the data overstates the level of violence in schools. See Elizabeth A. Harris, *Crime in New York City Schools Is at a Record Low, City Says* (Aug. 1, 2017), N.Y. TIMES, <https://www.nytimes.com/2017/08/01/nyregion/crime-in-new-york-city-schools-is-at-a-record-low-city-says.html>.

⁵⁸⁴ Violent and Disruptive Incidents Reports (“VADIR”), http://www.p12.nysed.gov/irs/school_safety/school_safety_data_reporting.html (the 2016-17 data is the most recent available).

⁵⁸⁵ Al Bakker & Kate Taylor, *After School Stabbing, Parents Ask: Where Were the Metal Detector*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/nyregion/after-school-stabbing-parents-ask-where-were-metal-detectors.html?mcubz=1>.

⁵⁸⁶ Education Under Arrest, *supra* note 96 at 1.

NYPD, a recommendation supported by the NYC Board of Education despite significant community opposition.⁵⁸⁷ As a result, a new police division – the NYPD School Safety Division – was created that specifically monitors and polices New York City public schools with SSOs.⁵⁸⁸ Currently, the NYC Department of Education (the “DOE”) allocates approximately \$357 million to the NYPD School Safety Division to pay for the employment of the 5,383 SSOs and 87 full-time NYPD officers monitoring approximately 1.1 million students in the NYC school system.⁵⁸⁹ There is typically one SSO per NYC public elementary school, two to three SSOs per NYC junior high school, and eight to eighteen SSOs per high school.⁵⁹⁰ The primary role of SSOs, according to the NYPD, is to respond to immediate security concerns, help maintain discipline, control visitor access to the school, patrol areas within and around the school, and report serious incidents to the School Safety Division.⁵⁹¹ SSOs work with school administrators to provide guidance on a range of issues, including ongoing gang activity, joint safety training exercises, and other security concerns that are unique to schools.⁵⁹² According to the NYPD, SSOs often consult with school administrators on a case-by-case basis when safety

⁵⁸⁷ Randal C. Archibold, *New Era as Police Prepare to Run School Security*, N.Y. TIMES (Sept. 16, 1998), <http://www.nytimes.com/1998/09/16/nyregion/new-era-as-police-prepare-to-run-school-security.html>; NYCLU, *Secret Agreement Between NYPD and DOE Over Police in Schools Yet Another Symptom of Broken System* (June 17, 2009), <https://www.nyclu.org/en/press-releases/secret-agreement-between-nypd-and-doe-over-police-schools-yet-another-symptom-broken>.

⁵⁸⁸ *Id*; see also *Scanning in NYCDOE Schools*, *supra* note 577 (noting that the addition of metal detectors to schools, which began in the late 1980s, preceded the increase of SSOs).

⁵⁸⁹ Decataldo, March 20 Briefing Transcript at 420. For NYC public school statistics, see Ann Stockham, *Institutional Food Giants: Food Central: Schools* (Sept. 15, 1999) and NYC Department of Education, 2016-17 Attendance and Enrollment Statistics, <http://schools.nyc.gov/NR/rdonlyres/B7CC89D2-F7B0-4DFA-92A0-3AA5BBFB597D/207586/201617AttendanceEnrollmentUnauditedbyDistrictAsofD.pdf>. See Foster, March 20 Briefing Transcript at 301. In an April 2017 Report, the Center for Popular Democracy estimated the cost to New York City is as much as \$746.8 million a year, allocating an additional \$349.1 million in social costs including \$108 million in lost tax revenue to the total cost. *The \$746 Million a Year School-To-Prison Pipeline*, April 2017, at 9, <https://populardemocracy.org/news/publications/746-million-year-school-prison-pipeline>. See Byrne, *supra* note 20 (noting that NYPD Deputy Commissioner Byrne stated in a recent report that there are 5,189 SSOs, rather than 5,383 SSOs).

⁵⁹⁰ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with then NYPD Chief Joanne Jaffe, Chief of Community Affairs, and Assistant Chief Brian Conroy, Commanding Officer, School Safety Division, in N.Y. (Feb. 13, 2017).

⁵⁹¹ *Id*; see also NYC Department of Education, *Parent Guide to School Safety And Emergency Preparedness*, <http://schools.nyc.gov/NR/rdonlyres/DD9AA289-1986-4746-BA67-A4DC06D2A5EF/0/ParentGuidetotheSafetyPlan.pdf>.

⁵⁹² Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with former NYPD Chief Joanne Jaffe, Chief of Community Affairs, and Assistant Chief Brian Conroy, Commanding Officer, School Safety Division, in N.Y. (Feb. 13, 2017).

issues arise, but usually school administrators intervene to control such situations.⁵⁹³ Where there are major concerns, such as dangerous gang activity in NYC public schools, SSOs may take actions to prevent situations from deteriorating further, former NYPD Chief of Community Affairs Joanne Jaffe stated.⁵⁹⁴

A. The MOU and Authority of SSOs

The presence of SSOs and police officers in NYC schools is governed by a Memorandum of Understanding (“MOU”) that was originally adopted by the NYC Schools Chancellor, the DOE, the NYPD, and the NYC Mayor in 1998 and renewed in 2003.⁵⁹⁵ The MOU effectively transferred the responsibility over SSOs from the DOE to the NYPD, where it remains today.⁵⁹⁶

The MOU, which was first made public through court filings in 2009, established a joint committee to be staffed by appointees of the Mayor and the Schools Chancellor to “ensur[e] the effectiveness of school safety practices, [and] prepar[e] annual evaluations of school safety programs.”⁵⁹⁷ The original and renewed MOU authorizes the NYPD to enforce the DOE rules, regulations and procedures relating to school safety, while encouraging NYC public school administrators and staff to avail themselves of appropriate law enforcement assistance when students are believed to have committed a crime.⁵⁹⁸ Some experts believe that, in practice, the MOU encourages school administrators to rely excessively on SSOs for disciplining students

⁵⁹³ *Id.*

⁵⁹⁴ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with former NYPD Chief Joanne Jaffe, Chief of Community Affairs, in N.Y. (Feb. 13, 2017). Chief Jaffe’s retirement from the NYPD was announced on January 8, 2018. *See More Than a Dozen Executive Promotions Announced, Including Chief of Department*, Press Release (Jan. 8, 2018), <http://www1.nyc.gov/site/nypd/news/p0108a/more-dozen-executive-promotions-announced-including-chief-department>.

⁵⁹⁵ NYCLU, *Secret Agreement Between NYPD and DOE Over Police in Schools Yet Another Symptom of Broken System* (June 17, 2009), <https://www.nyclu.org/en/press-releases/secret-agreement-between-nypd-and-doe-over-police-schools-yet-another-symptom-broken>. It was not until 2009 that the NYCLU uncovered a document that showed that the NYPD’s role as defined in the 1998 MOU in NYC public schools continued long past the 2002 expiration: “NYPD and [DOE] officials have repeatedly stated that a 1998 legal agreement defining the NYPD’s role in city schools expired in 2002 and was never renewed. A recent inquiry by Assemblyman Karim Camara, however, revealed that Mayor Bloomberg and Schools Chancellor Joel Klein had in fact renewed the agreement in 2003.” The terms of the original MOU required an evaluation on whether to extend it beyond its original four-year term. There is no indication that such an evaluation occurred.

⁵⁹⁶ *Id.*

⁵⁹⁷ NYCLU, Letter to Mayor Michael Bloomberg and DOE Chancellor Joel Klein (June 16, 2009), <https://www.nyclu.org/sites/default/files/NYCLULetteronMOUextension.6.16.09.pdf>.

⁵⁹⁸ NYCLU, *Criminalization in the Classroom The Over-Policing of New York City Schools* (Mar. 2007), at 18, http://www.nesri.org/sites/default/files/ACLU_NYCLU_Criminalizing_the_Classroom.pdf.

who have engaged in “minor violations of school rules” such as “[f]ighting in the hallway” or “swiping a classmate’s pencil case” or “talking back to an [SSO]” or “being late to class.”⁵⁹⁹ According to Kathleen Decataldo, Executive Director of the NY State Permanent Judicial Commission on Justice for Children, the MOU is so vague and broad that it can be interpreted to require students to be arrested or issued summonses for all types of infractions committed on school premises:

Many of the incidents that occur in schools can be determined to be either a violation or a misdemeanor. . . . I can look at a discipline code and make just about anything on there a misdemeanor or a violation, so the question that we have to ask is, is that really how we want to treat our students?⁶⁰⁰

Advocates also claim that the MOU is vague in its description of the respective SSO and police officer duties, and the respective roles of law enforcement and administrators and other educators.⁶⁰¹ According to Ms. Ginsburg, there has been “an overuse” of SSOs carrying out the traditional roles of teachers and administrators – responding to normative student behavior – because of the lack of clarity in the respective roles of participants.⁶⁰²

Johanna Miller, the advocacy director at the NYCLU, testified that the MOU is too vague as to which behaviors qualify as criminal activity, and therefore the determination of criminality is mistakenly left to SSOs and police officers’ discretion.⁶⁰³ According to a Justice Policy Institute report, that type of discretion generally extends to actions such as overturning a desk in a classroom, verbal arguments with a teacher, engaging in minor schoolyard fights, unreasonable noise, use of obscene language, and other similar infractions.⁶⁰⁴

One issue with allowing SSOs to determine which behaviors qualify as criminal activity is that such discretion often leads to inconsistent outcomes for similar behaviors, according to Ms. Miller.⁶⁰⁵ For example, in some schools, writing on a desk could be considered activity that justifies police involvement, while in other schools that conduct would not be grounds to involve

⁵⁹⁹ *Id.*

⁶⁰⁰ Decataldo, March 20 Briefing Transcript at 374.

⁶⁰¹ Miller, March 20 Briefing Transcript at 243-45; *see also* Ginsburg, March 20 Briefing Transcript at 182.

⁶⁰² Ginsburg, March 20 Briefing at 182.

⁶⁰³ Miller, March 20 Briefing Transcript at 243-45.

⁶⁰⁴ Education Under Arrest, *supra* note 96 at 15.

⁶⁰⁵ Miller, March 20 Briefing Transcript at 247.

law enforcement, according to the Justice Policy Institute report.⁶⁰⁶ Inconsistent application by SSOs and police officers is problematic, according to advocates, because neither students nor their parents have a clear expectation of what behavioral transgressions require law enforcement involvement and what should be dealt with by a school's disciplinary process.⁶⁰⁷

The NYPD claims that while SSOs are the final arbiters of the criminality of a student's behavior, SSOs make it "standard practice to confer with school administration in the vast majority of incidents," and rarely make an arrest over the objection of school administrators.⁶⁰⁸ Moreover, it says, if anything, the level of criminality is treated more leniently in school than out of school.⁶⁰⁹ And SSOs, it says, do not arrest students for doing things like arguing, writing on desks, or using obscene language.⁶¹⁰ In fact, it says, the fact that there were 6,854 serious incidents the NYPD tracked in NYC schools during 2016-2017 as opposed to the over 30,000 incidents recorded by the NYS Department of Education shows that SSOs are actually more often than not de-escalating incidents.⁶¹¹

Clarity in the form of a new MOU that purportedly more clearly delineates the respective roles of law enforcement and educational staff is in the works.⁶¹² One of the key recommendations of Mayor de Blasio's Leadership Team on School Climate and Discipline is to rewrite the MOU "to clarify the role and authority of school safety staff, precinct officers and educators on safety and discipline matters."⁶¹³ According to the NYPD, the new MOU will be publicly available, will provide for administrative referrals or diversionary responses for minor misbehavior and criminal violations and will include a requirement that the NYPD officers receive the same training as SSOs.⁶¹⁴ The swift adoption of an updated MOU is, according to Ms. Ginsberg, an "imperative."⁶¹⁵ Cami Anderson, former Newark Schools Superintendent and

⁶⁰⁶ Education Under Arrest, *supra* note 96 at 15

⁶⁰⁷ *See id.* at 21-22.

⁶⁰⁸ Byrne, *supra* note 20.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.*

⁶¹¹ *Id.* See note 634 for a discussion on the changes to NYPD reporting of incidents in schools starting in the second half of 2016.

⁶¹² Ginsburg, March 20 Briefing Transcript at 182.

⁶¹³ SCLT Report, *supra* note 98, at 6.

⁶¹⁴ Byrne, *supra* note 20.

⁶¹⁵ Ginsburg, March 20 Briefing Transcript at 182.

Founder and Managing Partner of Third Way Solutions, endorsed the need for explicit MOUs that spell out when, how, and under what circumstances law enforcement will intervene during the school day.⁶¹⁶

B. The Impact of Criminalizing School Behaviors

Many advocates believe that even a revised MOU will not address the fundamental problem – that students should not be subject to criminal summonses for disciplinary infractions committed in school.⁶¹⁷ Rohini Singh, a staff attorney in the School Justice Project at Advocates for Children, testified:

The overreliance on police to address disciplinary matters in schools throughout the country has resulted in a disproportionate number of students of color and students with disabilities being pushed out of school. The use of harsh, punitive, and exclusionary discipline, including law enforcement, creates the potential for significant, negative educational and long-term outcomes.⁶¹⁸

Mr. Flores testified that the presence of police in schools is a “broken windows” approach to public education and should be eliminated.⁶¹⁹ Ms. Ginsberg testified that “normative adolescent behavior,” which forms the basis of most arrests made and summonses issued in schools, should not elicit criminal enforcement.⁶²⁰ Likewise, Ms. Miller testified:

So there should be a prohibition on police getting involved in student misbehavior. That needs to be very clear . . . that you won’t be arrested for running in the hallway, as one of our clients was, writing on a desk, as several of our clients have been. You know, all these small, dress code, insubordination violations that police should never be involved in.⁶²¹

Councilwoman Gibson underscored that “[i]f we allow this to happen in our schools[,] then we are reinforcing the pipeline to prison[,] and I do not believe in that and neither does [the current city] administration.”⁶²² According to Elizabeth Sullivan, Education Campaigns Director of the National Economic and Social Rights Initiative, police presence in NYC public schools

⁶¹⁶ See Anderson, March 20 Briefing Transcript at 289.

⁶¹⁷ Ginsburg, March 20 Briefing Transcript at 172.

⁶¹⁸ Singh, March 20 Briefing Transcript at 201.

⁶¹⁹ Flores, March 20 Briefing Transcript at 33.

⁶²⁰ Ginsburg, March 20 Briefing Transcript at 181-2.

⁶²¹ Miller, March 20 Briefing Transcript at 195.

⁶²² Gibson, March 20 Briefing Transcript at 442.

and the lack of specific training for strategies in the school context has led to many “incidents” between students and SSOs, without a demonstrable increase in safety.⁶²³ Councilwoman Gibson stated that her goal is to have both law enforcement and communities understand that “children do not deserve to be penalized, institutionalized, for issues that they may have, disabilities, or challenges that they may face.”⁶²⁴

Daniel Dromm, New York City Council Member representing the Queens 25th Council District, testified that the consequences of having large numbers of individuals trained in police tactics in NYC schools is illustrated by an incident at Park Slope Collegiate in 2015. As he recounted it, a student wearing glasses that needed repair was using a pin to hold the glasses together. SSOs stopped him and took his glasses. When the student reached to recover the glasses and the pin, he was pinned to the ground and handcuffed. While in the principal’s office, he was held in a room by the NYPD without school staff. He was later released.⁶²⁵ While the NYPD acknowledges some mistakes regarding the incident, they claim that the student in question did not merely reach for his glasses.⁶²⁶ Councilmember Dromm stated:

If public education is going to live up to the role it should play in our democracy as the great equalizer, then we have to examine the ways our schools reproduce and reinforce systems of oppression. The problem of over-policing is not going to be ultimately solved in the jails and prisons and courtrooms of our country, but instead in our homes and classrooms. The relevant questions then become: Are our school communities being equipped to promote justice, peace and resilience? Are restorative practices preferred over punitive models?⁶²⁷

The NYPD has made recent changes to policies in the School Safety Division. The 2016 school year marked the first year that the NYPD was required by the Student Safety Act (the “SSA”) to report quarterly on arrests, summonses, and other police-involved incidents in schools by all officers, including those outside the School Safety Division, allowing the public access to a more complete picture of how police personnel and SSOs operate in the school environment.⁶²⁸ The NYPD School Safety Division has also committed to training SSOs in collaborative

⁶²³ Sullivan, March 20 Briefing Transcript at 221.

⁶²⁴ Gibson, March 20 Briefing Transcript at 443.

⁶²⁵ Dromm, March 20 Briefing Transcript at 385.

⁶²⁶ Byrne, *supra* note 20.

⁶²⁷ Dromm, March 20 Briefing Transcript at 383.

⁶²⁸ 2016 Student Safety Act Report, *supra* note 85.

problem-solving, a method developed at Massachusetts General Hospital grounded in improving communication skills and reducing conflict.⁶²⁹ This new approach brings SSOs closer to fulfilling the DOE’s stated policy of using “progressive discipline,” which focuses on correction over punishment, and directs that “[e]very reasonable effort must be made to correct student behavior through counseling and other school-based interventions.”⁶³⁰ Both former NYPD Chief Jaffe and NYPD Assistant Chief Conroy stated that the role of SSOs was to develop a good, positive relationship with students, and that the School Safety Division continues to help end the cycle of primarily policing NYC public schools using old enforcement tactics.⁶³¹ Councilwoman Gibson testified that in two years of working with the DOE, there has been a “50% reduction in the number of black and [Hispanic] students and students with disabilities that have been arrested, given summonses and suspended in [the New York City] school system.”⁶³²

Incidents between police and students are broken down into six reported outcomes: arrests, summonses, juvenile reports,⁶³³ children in crisis,⁶³⁴ mitigations,⁶³⁵ and Persons in Need of Supervision (“PINS”).⁶³⁶ Overall in 2016, 3,660 incidents were reported to have transpired in NYC schools.⁶³⁷ Of those, 2,003 involved the use of handcuffs, and 1,379 ended in arrests.⁶³⁸

⁶²⁹ Ginsburg, March 20 Briefing Transcript at 180.

⁶³⁰ NYC Department of Education, *Citywide Behavioral Expectations to Support Student Learning, Grades 6-12*, <http://schools.nyc.gov/NR/rdonlyres/92F313F8-C164-4B64-B236-BFF55A812254/0/DisciplineCode612FINALforposting5417.pdf>.

⁶³¹ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with former NYPD Chief Joanne Jaffe, Chief of Community Affairs, and Assistant Chief Brian Conroy, Commanding Officer of School Safety Division, in N.Y. (Feb. 13, 2017).

⁶³² Gibson, March 20 Briefing Transcript at 441.

⁶³³ A juvenile report is defined as “a report for a student under 16 who allegedly committed an offense that, if they were an adult, would be considered criminal.” The report substitutes for an arrest or summons and students are detained during the time it takes to collect details. 2016 Student Safety Act Report, *supra* note 85 at 1.

⁶³⁴ Child in crisis is defined as “incidents where a student ‘displaying signs of emotional distress’ is removed from the classroom and taken to hospital for a psychological evaluation.” The NYPD reported only the instances in which handcuffs were used until the third quarter of 2016. 2016 Student Safety Act Report, *supra* note 85 at 1.

⁶³⁵ A mitigation is defined as “incidents where a student commits an offense but the NYPD releases the student to the school for discipline.” The NYPD reported only the instances in which handcuffs were used until the third quarter of 2016. 2016 Student Safety Act Report, *supra* note 85 at 1.

⁶³⁶ A PINS proceeding may result in the Family Court ordering the young person to return home, go into foster care or a social service facility for up to 18 months or live with a relative. The Family Court judge can also order a young person to pay for damage done to someone’s property or require the child to perform community service. New York City Family Court, *Persons in Need of Supervision (PINS) Frequently Asked Questions*, https://www.nycourts.gov/courts/nyc/family/faqs_pins.shtml.

⁶³⁷ 2016 Student Safety Act Report, *supra* note 85 at 3 (noting also that thirty-four percent (34%) of incidents involving black or Hispanic students resulted in handcuffing compared with 26% of those involving white students).

According to data from the NYCLU, NYPD officers, not SSOs, made 88% of these arrests.⁶³⁹ Sixty percent of those arrests were for misdemeanors, such as misdemeanor assault and battery, 39% for felonies, and 1% for violations.⁶⁴⁰ Approximately 19% of students arrested were below the age of 14, 67% were 15-18 years old, and 5.1% were 19-21 years old.⁶⁴¹ In addition, there were 938 summonses issued to students in NYC schools in 2016 for charges such as disorderly conduct (35%), possession of marijuana (27.6%), possession of a knife (17%), and possession of a box cutter (11%).⁶⁴² These numbers reflect a 65% decline since 2011. In the 2011-2012 school year alone, NYC saw an unprecedented 37% drop in violent crime in its schools.⁶⁴³ The likely cause of the drop in violent crime, according to the New York State Permanent Judicial Commission on Justice for Children, is the increased use of “evidence-based interventions like restorative justice, positive behavioral supports” and other tools to allow school administrators and teachers to handle school misbehavior and still reinforce a positive school climate where students can learn.⁶⁴⁴ Additionally, in 2015 the NYPD introduced a warning card program under which SSOs have the option to issue a warning card instead of a summons for disorderly conduct and drug possession for students 16 and older.⁶⁴⁵ According to former NYPD Chief Jaffe and NYPD Assistant Chief Conroy, in 2016, 49 warning cards were issued and the overall number of summonses issued has decreased.⁶⁴⁶ The most recent SSA report suggests that the number of school arrests continues to fall: in 2017, there were a total of

⁶³⁸ *Id.* at 1.

⁶³⁹ *Id.*

⁶⁴⁰ *Id.* at 2.

⁶⁴¹ *Id.*

⁶⁴² *Id.*

⁶⁴³ New York State Permanent Judicial Commission on Justice for Children, *New York City School-Justice Partnership Task Force: Report and Recommendations*, (May 2013), at 2, <https://www.nycourts.gov/IP/justiceforchildren/PDF/NYC-School-JusticeTaskForceReportAndRecommendations.pdf>.

⁶⁴⁴ *Id.* (such findings were reported in May 2013 after the New York City School-Justice Partnership Task Force examined NYC data on suspensions, arrests, and summonses for incidents based in schools and emerging research and reforms from across the country).

⁶⁴⁵ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Assistant Chief Brian Conroy, Commanding Officer of School Safety Division, in N.Y. (Feb. 13, 2017).

⁶⁴⁶ *Id.*

1,242 arrests made in schools, compared to 1,380 arrests made in schools in the same time period in 2016, representing a 10% decrease.⁶⁴⁷

While the number of arrests made and summonses given to NYC students seems small relative to the size of the NYC public school system and the number of arrests made and summonses issued six years ago, the effect of the arrests on the children involved and their communities cannot be underestimated, according to Ms. Ginsburg.⁶⁴⁸ If arrested, a student is held in police custody, transferred to family court or central booking or released to their parent(s), depending on their age and the charged crime; if they are held, they are usually arraigned by a judge 24 hours after being placed in custody.⁶⁴⁹ A criminal summons may require a student 16 years of age or older to appear in criminal court to respond to a criminal charge by law enforcement, since New York is one of only two states that continues to treat 16 year-olds as adults.⁶⁵⁰ Students are required to miss a day of school to attend a court proceeding for behavior that occurred in school, and any punishment meted out is disconnected from the school setting, according to Ms. Ginsburg.⁶⁵¹ Ms. Miller testified that in incidents such as these, if the student misses the court date, they may have a warrant issued for their arrest.⁶⁵² Students who have been charged may face adult criminal sanctions, permanent convictions, deportation, eviction, monetary fines, and a negative impact on financial aid and work opportunities, according to Ms. Ginsburg.⁶⁵³ In New York, it should be noted, juvenile delinquency proceedings in Family Court, and Criminal Court proceedings involving Youthful Offenders (aged 16-19) and Juvenile

⁶⁴⁷ See School Safety Data, <http://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page> (as of the date of this writing, data is available through the fourth quarter of 2017).

⁶⁴⁸ Ginsburg, March 20 Briefing Transcript at 169.

⁶⁴⁹ *Id.*; see also Byrne, *supra* note 20.

⁶⁵⁰ Ginsburg, March 20 Briefing Transcript at 169-70. A coalition of more than 100 organizations spearheaded a campaign to push legislation in New York that would raise the age for prosecuting an individual as an adult from sixteen to eighteen years old. See Raise the Age: New York, <http://raisetheageny.com>. In April 2017, Governor Cuomo signed a law that will gradually increase the age of criminal responsibility, such that on October 1, 2018, the age of delinquency will increase from 16 to 17 years old and on October 1, 2019, the age of delinquency will increase from 17 to 18 years old. The effect of raising the age of delinquency is that individuals under the age of delinquency will not automatically be charged as adults. *Id.*; see also Press Release, New York State Assembly, New York Raises the Age of Adult Criminal Responsibility (Apr. 7, 2017), <http://nyassembly.gov/Press/20170407c/>.

⁶⁵¹ Ginsburg, March 20 Briefing Transcript at 169-70.

⁶⁵² Miller, March 20 Briefing Transcript at 197.

⁶⁵³ Ginsburg, March 20 Briefing Transcript at 170.

Offenders (aged 13, 14 and 15) are sealed.⁶⁵⁴ According to the U.S. Department of Education, disciplinary policies that remove students from the classroom do not improve student behavior or improve school safety.⁶⁵⁵ According to Ms. Sullivan, there is no reliable research showing that a large police force in schools is an effective deterrent of crime in schools.⁶⁵⁶

Historically, studies nationwide have shown that as the presence of law enforcement and SSOs in schools has increased, arrests and referrals to the juvenile justice system have also increased.⁶⁵⁷ A study published in the *Journal of Criminal Justice* found a “high number of disorderly conduct incidents at SSO schools compared to non-SSO schools[, which] was consistent with the belief that SSOs contribute to criminalizing student behavior.”⁶⁵⁸ The study concluded that “[h]aving an [SSO] at school significantly increased the rate of arrest for this charge [of disorderly conduct] by over 100% even when controlling for school poverty.”⁶⁵⁹ Finding that disorderly conduct, which the study characterized as “the most subjective, situational, and circumstantial of the charges,” was the most common charge SSOs used to arrest students in school, the study concluded that heavy reliance on charges of disorderly conduct has “serious implications for schools, law enforcement agencies, and juvenile courts.”⁶⁶⁰ A 2016 nationwide study published in the *Washington University Law Review* found that having an SSO at school on at least a weekly basis increased the number of students referred to law enforcement for offenses like threats, fights, vandalism, and theft, even after controlling for other factors such as state laws that require schools to report issues, levels of criminal activity, and other

⁶⁵⁴ N.Y. Fam. Ct. Act § 375.3; *see also* N.Y. Crim. Proc. § 720.15; N.Y. Fam. Ct. Act §§ 375.1, 2.

⁶⁵⁵ U.S. Department of Education, *Rethink School Discipline: School District Leader Summit on Improving School Climate and Discipline, Resource Guide for Superintendent Action* (July 2015), <https://www2.ed.gov/policy/gen/guid/school-discipline/rethink-discipline-resource-guide-supt-action.pdf>.

⁶⁵⁶ Sullivan, March 20 Briefing Transcript at 221.

⁶⁵⁷ *See, e.g.*, Education Under Arrest, *supra* note 96, at 14-15. Judge Steven Teske found that with the placement of SSOs in schools in Georgia, the number of referrals directly to the juvenile justice system increased dramatically, from approximately 89 referrals per year in the 1990s to 1,400 per year in 2004. *Id.*

⁶⁵⁸ Matthew Theirot, *School Resource Officers And The Criminalization Of Student Behavior*, JOURNAL OF CRIMINAL JUSTICE 37 (2009), at 285, <http://youthjusticenc.org/download/education-justice/school-policing-security/School%20Resource%20Of%EF%AC%81cers%20and%20the%20Criminalization%20of%20Student%20Behavior.pdf>.

⁶⁵⁹ *Id.*

⁶⁶⁰ *Id.* (in contrast to charges which are objective such as the possession of a knife, marijuana, weapon, or other paraphernalia which is illegal).

demographic variables.⁶⁶¹ The same study found that the number of referrals for lower-level offenses, in particular, increased two-fold when a school had regular contact with an SSO.⁶⁶²

The NYPD says that the presence of SSOs in NYC schools tell a different story. It reports that for the 2016-2017 school year as compared to the 2011-2012 school year, offenses for the seven major crimes on which the NYPD reports were down 38%, other criminal offenses were down 39%, arrests were down 60%, and summonses were down 50%.⁶⁶³

Research shows that a first-time arrest doubles the odds that a student will drop out of high school, and a first-time court appearance quadruples those odds, independent of involvement in delinquency.⁶⁶⁴ The American Psychological Association, Council of State Governments Justice Center, and the Center for Disease Control and Prevention independently have found that extreme discipline, including arrests, predict grade repetition, dropping out of school, and future involvement in the juvenile and criminal justice systems.⁶⁶⁵ Furthermore, according to a study by the Justice Policy Institute and the American Bar Association – Criminal Justice Division, youths arrested or adjudicated in the juvenile justice system are often unable to get a job, go to college, join the military, or obtain/maintain their driver’s license.⁶⁶⁶ Professor Fagan testified that student-officer interactions in school and repeated stops outside of schools negatively affect test scores:

So the era of stops has come down quite a bit, but during that era we find that actually school test scores of kids in schools relative to the stop rates in and around those schools, we draw perimeters using mapping technology, the impact is extremely large and extremely negative. And it is also correlated with obviously the places where stops are the most common.⁶⁶⁷

⁶⁶¹ Jason P. Nance, *Students, Police, and the School-To-Prison Pipeline*, 93 WASH. U. L. REV. 919 (2016) (hereinafter cited as *School to Prison Pipeline*), http://openscholarship.wustl.edu/law_lawreview/vol93/iss4/6.

⁶⁶² *Id.*

⁶⁶³ Byrne, *supra* note 20.

⁶⁶⁴ School to Prison Pipeline, *supra* note 661; see also Advance Project, Alliance for Educational Justice, Dignity in Schools Campaign, and NAACP Legal Defense and Education Fund, Inc., *Police in Schools are Not the Answer to the Newtown Shooting* (hereinafter cited as *Police in Schools*), at 10, http://b3cdn.net/advancement/df16da132af1903e5b_zlm6bkclv.pdf.

⁶⁶⁵ *Id.*

⁶⁶⁶ Education Under Arrest, *supra* note 96 at 17.

⁶⁶⁷ Fagan, March 21 Briefing Transcript at 153-54.

Surveys from Darian Agostini, a Police Accountability Youth Organizer at Make the Road New York, also show that youths often become jaded and resentful of police and SSOs because of their interactions.⁶⁶⁸

C. The Impact on Students of Color

According to Ms. Singh, police incidents in NYC schools disproportionately involve black and Hispanic students.⁶⁶⁹ Generally, there is a greater police presence in schools that are under-resourced and in poorer neighborhoods according to the ACLU.⁶⁷⁰ In addition, SSOs and police seem more likely to use force and other traditional law enforcement tactics in schools that are made up of more black and Hispanic students, according to an annual report by the NYCLU on Student Safety Act Reporting in 2016.⁶⁷¹ Ms. Ginsburg stated that:

[i]t is well documented that the vast majority of police interactions in New York City are in our poorest neighborhoods and affect communities of color the most[, and] [t]his pattern continues in our schools as well, as black and brown students bear disproportionate exposure to a referral to the [criminal justice] system.⁶⁷²

Ms. Singh likewise noted that her data reflects:

the disturbing national trend that students of color, particularly black students, are disproportionately policed in school[, and] [t]he racial disparities are particularly troubling because they have not changed despite New York City's promising downward trend in school crime and the number of students arrested and issued summonses in school over the last five years.⁶⁷³

Data on suspensions by NYC school administrators shows that there was a small decrease in disparities across all races and ethnicities for the 2014 school year – a first in several years – but that black students still are nearly four times more likely to be suspended than their white counterparts.⁶⁷⁴ Hispanic students are suspended at half the rate of black students, yet the rate of suspensions for Hispanic students is still nearly twice the rate of white students and four times

⁶⁶⁸ Agostini, March 21 Briefing Transcript at 223.

⁶⁶⁹ Singh, March 20 Briefing Transcript at 202.

⁶⁷⁰ [Criminalizing the Classroom](#), *supra* note 85 at 20.

⁶⁷¹ 2016 Student Safety Act Report, *supra* note 85.

⁶⁷² Ginsburg, March 20 Briefing Transcript at 173.

⁶⁷³ Singh, March 20 Briefing Transcript at 202.

⁶⁷⁴ SCLT Report, *supra* note 98 at 17.

the rate of Asian students.⁶⁷⁵ The data on law enforcement activity in NYC schools, such as the use of handcuffs by SSOs and police officers, follows the same patterns.⁶⁷⁶ Black and Hispanic students were substantially more likely than white students to be handcuffed in mitigating incidents – where no further actions were taken besides the use of handcuffs, according to an annual report by the NYPD in 2017.⁶⁷⁷ Of the 4,260 mitigated incidents reported in 2017, black and Hispanic students accounted for 94.5% of mitigated incidents where handcuffs were used and 89.4% of the incidents where handcuffs were not used.⁶⁷⁸ According to Mr. Kesi Foster, Coordinator at the Urban Youth Collaborative, NYPD officers and SSOs disproportionately arrest black and Hispanic students compared to white and Asian students.⁶⁷⁹ Approximately 59% of students arrested in 2017 were black, while 5.2% of students arrested in 2017 were white and 2.3% of students arrested in 2017 were Asian.⁶⁸⁰ Of the NYC students issued summonses in 2017, 89.3% were black or Hispanic.⁶⁸¹ At the same time, based on the most recent audit of the NYC school enrollment, black students make up 27%, while Hispanic students make up 40%, Asian students make up 16%, and white students make up 15%, of the NYC school population.⁶⁸²

The data on juvenile reports – reports created instead of an arrest report or summons for children who are under the age of 16 and who allegedly committed an offense that would be criminal if the child were an adult – reflect similar disparities.⁶⁸³ Of the 923 juvenile reports issued in 2016, 91.4% were issued to black or Hispanic students.⁶⁸⁴ Of the 18.6% of students

⁶⁷⁵ *Id.*

⁶⁷⁶ See 2016 Student Safety Act Report, *supra* note 85.

⁶⁷⁷ School Safety Data, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>.

⁶⁷⁸ *Id.* Note that the data on enforcement shows a large increase in enforcement between 2016 and 2017. In 2016, for example, there were only 106 mitigated incidents reported (compared to 4,260 in 2017). The significant increase in reported incidents from 2016 to 2017 is likely due to changes in NYPD's reporting: until the third quarter of 2016, the NYPD reported on mitigations and child-in-crisis incidents only when handcuffs were used. Since the third quarter of 2016, the NYPD reports on all mitigations and child-in-crisis incidents, regardless of whether handcuffs were used. 2016 Student Safety Act Report, *supra* note 85 at 1.

⁶⁷⁹ Foster, March 20 Briefing Transcript at 310-11.

⁶⁸⁰ School Safety Data, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/school-safety.page>.

⁶⁸¹ *Id.*

⁶⁸² See 2016 Student Safety Act Report, *supra* note 85 at 3; see also NYC Department of Education, *NYC Data: Demographic Snapshots*, <http://schools.nyc.gov/Accountability/data/default.htm> (noting that the most recent annual enrollment figures are for the 2016-2017 school year).

⁶⁸³ 2016 Student Safety Act Report, *supra* note 85.

⁶⁸⁴ *Id.* at 3.

handcuffed during juvenile report investigations, 93.6% were black or Hispanic.⁶⁸⁵ Black and Hispanic students also accounted for 98.9% of child-in-crisis incidents – which is defined as students who were handcuffed by NYPD in school and then removed to a hospital for psychiatric evaluation – where handcuffs were used and 90.6% of child-in-crisis incidents where police were involved but handcuffs were not used.⁶⁸⁶

In 2016, the NYPD arrested 138 students 13 years old or younger and only one of those students was white, according to Mr. Foster.⁶⁸⁷ Police are more than eight times more likely to intervene in a disciplinary situation if a student is black and three times more likely to intervene if a student is Hispanic in NYC, Mr. Foster testified.⁶⁸⁸ He also stated that over two decades of research demonstrated that black and Hispanic youth neither misbehave more frequently than their white peers nor disrupt schools more frequently than white students.⁶⁸⁹

Advocates have scrutinized the treatment of students with disabilities in NYC public schools as well. There are procedural protections for students with disabilities in the NYC education system to make sure they are not forced out of their classrooms or subjected to restraints and seclusion, especially when their specific disability would make these punishments damaging to the student.⁶⁹⁰ However, according to Ms. Miller, these protections oftentimes are not considered when police and SSOs act in schools.⁶⁹¹ Ms. Miller testified that “probably most glaringly,” the issue with reporting and accountability is that “there [is] no record whatsoever of whether a student who was arrested in school has a disability.”⁶⁹² In school year 2011-2012, while 12% of the school population was disabled, roughly 25% of arrests and referrals of students were for those with disabilities, Ms. Sullivan reported.⁶⁹³ Ms. Ginsburg offered similar

⁶⁸⁵ *Id.*

⁶⁸⁶ *Id.*

⁶⁸⁷ Foster, March 20 Briefing Transcript at 299.

⁶⁸⁸ *Id.* at 300.

⁶⁸⁹ *Id.*; see also Rebecca Klein, *Black Students In The U.S. Get Criminalized While White Students Get Treatment*, HUFFINGTON POST (July 28, 2015), http://www.huffingtonpost.com/entry/racial-disparities-american-schools_us_55b67572e4b0074ba5a576c1.

⁶⁹⁰ Miller, March 20 Briefing Transcript at 188.

⁶⁹¹ *Id.* at 188-89.

⁶⁹² *Id.* at 186.

⁶⁹³ Sullivan, March 20 Briefing Transcript at 218-19. One illustrative example of the effects of policing in schools on students with disabilities is a situation described by Rohini Singh, in which a student became agitated and upset during lunch when another student bullied her. Even though the school knew the student had a significant mental

critiques of SSO and police treatment of students with disabilities, testifying that “assigning police officers to serve as quote/unquote social workers is not an appropriate service delivery system...[P]olice officers are not trained to detect and address mental illness, family fracture, substance abuse and special education needs, just to name some of the most significant issues with which court-involved youth often present.”⁶⁹⁴ According to the NYPD, SSOs receive 17 weeks of training, a training that includes units on adolescent and child development and responding to emotionally disturbed children.⁶⁹⁵ Under the revised MOU, NYPD officers working in schools purportedly will receive similar training to that received by SSOs.⁶⁹⁶

D. Accountability of Officers in Schools

Since responsibility for the SSO program was transferred from the DOE to the NYPD, critics have argued that there is a lack of accountability for SSOs.⁶⁹⁷ According to Ms. Miller, the SSO program lacks real oversight.⁶⁹⁸ She testified that because uniformed police officers and SSOs are overseen by the NYPD, neither school administrators nor the DOE have practical oversight authority over officers in schools.⁶⁹⁹ Ms. Miller stated that there is no clear mechanism to ensure accountability for individual misconduct on the part of the SSOs or police officers assigned to schools, and students can be arrested even if the principal or school administrators disagree with the officers’ decision to arrest a student, a scenario that rarely occurs according to the NYPD.⁷⁰⁰ In discussing steps to make policies in NYC public schools better, Ms. Miller testified that it is necessary to create a system that is transparent and that has some connection to the DOE so that the schools have a say in whether an officer should continue to be in school or

health history, they reached out to SSOs and NYPD officers assigned to the school who then restrained her with handcuffs, rather than deploying a trained mental health professional to de-escalate the situation during her emotional crisis. The NYPD officials then shot the student with a Taser gun when she became more agitated, even though she was already restrained. Finally, officers took her to a local precinct and gave her a juvenile report for disorderly conduct. Singh, March 20 Briefing Transcript at 203-04.

⁶⁹⁴ Ginsburg, March 20 Briefing Transcript at 177; *see also* Emily Morgan et al., The Council of State Governments Justice Center, *The School Discipline Report*, (2014), at 192, https://csgjusticecenter.org/wp-content/uploads/2014/06/The_School_Discipline_Consensus_Report.pdf (finding that LGBT students are generally more harshly punished than their peers).

⁶⁹⁵ Byrne, *supra* note 20.

⁶⁹⁶ *Id.*

⁶⁹⁷ *See, e.g.*, Fagan, March 21 Briefing Transcript at 150.

⁶⁹⁸ Miller, March 20 Briefing Transcript at 186.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.* at 199; Byrne, *supra* note 20.

whether they should be disciplined for misconduct.⁷⁰¹ The NYPD says that oversight exists because all SSOs are bound by the provisions in the NYPD Patrol Guide, which governs general police officer behavior, and thus subject to discipline by the NYPD for infractions.⁷⁰²

Advocates also have criticized the SSO complaints process. Complaints against SSOs and police officers in schools can be initiated by reporting the misconduct to the NYPD's internal affairs division, by calling 911 or 311, or by reporting the misconduct at a precinct or through a school principal.⁷⁰³ Once received, the School Safety Division investigative unit might investigate a minor complaint, but generally the Internal Affairs Bureau of the NYPD ("IAB") investigates serious complaints.⁷⁰⁴ NYPD Deputy Commissioner of Internal Affairs Joseph Reznick, stated that each SSO complaint is unique, and usually the complaints focus on SSOs fraternizing with students.⁷⁰⁵

Ms. Miller testified that because SSOs are not subject to oversight by the Civilian Complaint Review Board (the "CCRB") and are not in practice subject to oversight by the DOE, the only way to file a complaint about the conduct of an officer is by reaching out to the NYPD's IAB, with the knowledge that review of the complaint would be kept internal and not subjected to public scrutiny.⁷⁰⁶ This also presents a problem, according to Ms. Miller, because "in our experience, the IAB is extremely hostile, particularly to young people," a contention the NYPD categorically rebuts.⁷⁰⁷ Ms. Miller testified that she has represented students who have made complaints to the IAB and have had investigators show up at their homes unannounced

⁷⁰¹ Miller, March 20 Briefing Transcript at 199.

⁷⁰² Byrne, *supra* note 20.

⁷⁰³ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Assistant Chief Brian Conroy, Commanding Officer of School Safety Division, in N.Y. (Feb. 13, 2017).

⁷⁰⁴ Miller, March 20 Briefing Transcript at 193-94; *see also* Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Assistant Chief Brian Conroy, Commanding Officer of School Safety Division, in N.Y. (Feb. 13, 2017).

⁷⁰⁵ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Joseph Reznick, NYPD Deputy Comm'r of Internal Affairs, in N.Y. (Feb. 15, 2017).

⁷⁰⁶ *See* Miller, March 20 Briefing Transcript at 192.

⁷⁰⁷ *Id.* at 193; Byrne, *supra* note 20.

demanding responses to questions.⁷⁰⁸ Experiences like these prompted Ms. Miller to testify that she would like to see an alternative path for students to bring complaints against SSOs.⁷⁰⁹

E. Recommendations

The recommendations of the Committee are:

- 1. The Commission should recommend to the NYC Mayor, the NYPD, and the New York City Department of Education (“DOE”) the expeditious adoption of a new Memorandum of Understanding (“MOU”) governing police officers and School Safety Officers (“SSOs”) in schools that clearly outlines a list of disciplinary infractions and their consequences; that makes clear when SSOs or police officers, rather than school authorities, should be involved; and that provides school administrators the sole authority and discretion to address lower-level offenses and normative child and adolescent behavior without the student being arrested, issued a summons, or handcuffed.**
 - The MOU and any plan to operationalize the MOU should be publicly available and widely disseminated.*
 - The MOU should implement a means for institutionalizing periodic oversight of the effect of the presence of SSOs and police officers in NYC schools.*
- 2. The Commission should recommend to the NYC Mayor, the New York City Council, the NYPD, and the DOE that NYC move toward zero criminal enforcement in schools and focus instead on developing training curricula for school administrators, SSOs, and police officers that de-emphasize enforcement and emphasize preventative measures and restorative disciplinary practices, while developing alternative punishments for school-age children.**
 - NYC should make more substantial investments in school-based mental health professionals and evidence-based alternatives to policing and other punitive measures.*
 - SSOs and police officers should undergo more extensive training to better equip them to handle issues and challenges unique to school environments, such as juvenile de-escalation exercises with students of diverse backgrounds and special training addressing (a) students with disabilities, (b) children-in-crisis interventions, and (c) adolescent and child development.*

⁷⁰⁸ See Miller, March 20 Briefing Transcript at 193.

⁷⁰⁹ *Id.* at 194.

- *SSOs and police officers should not use handcuffs or other restraints in schools unless there is an immediate threat to their physical safety or the physical safety of others.*
- *The NYPD should eliminate the use of criminal summonses in all NYC public schools.*
- *The NYPD should avoid arresting any youth in school except in the most extreme cases.*
- *NYC should develop alternatives to criminal punishment for school-aged children.*
- *To the extent they are involved in any student disciplinary infractions, SSOs should be encouraged to increase their use of warning cards instead of taking punitive action.*

Chapter 3: Police Accountability

Effective policing requires community trust, which, in turn, requires effective accountability structures, according to experts.⁷¹⁰ They say that for the same reasons police officers and courts exist to enforce the law when it is violated, meaningful and substantive enforcement mechanisms are needed to enforce standards of good conduct by the police.⁷¹¹ Accountability structures to oversee and enforce standards of good conduct by the police can be either internal or external to the police force. Internal enforcement mechanisms include internal supervision and feedback, as well as internal guidelines that govern conduct and reporting to supervisors. External enforcement mechanisms include public access to data on police behavior and discipline for misbehavior, criminal and civil lawsuits against police officers, and independent agencies that oversee the police and investigate police misconduct. According to experts in the field, to ensure standards of good conduct by the NYPD, there must be an empowered entity independent of the NYPD that oversees conduct.⁷¹² Independent oversight increases effectiveness for two main reasons, according to scholars: (a) independent investigators are more likely to be free of institutional biases and allegiances that exist in internal investigations; and (b) independent investigations bolster public trust in the justice system.⁷¹³

The NYPD is subject to myriad levels of independent oversight. Among those are: the Independent Monitor with respect to stop-and-frisk; the NYPD Office of Inspector General (housed under the NYC Department of Investigation), which is responsible for examining NYPD policies, practices and procedures, and identifying patterns and trends in policing, and generates reports with respect to findings that the NYPD is required by law to respond to;⁷¹⁴ the NYC DOI which is charged with overseeing the NYPD and other NYC government agency corruption,

⁷¹⁰ See, e.g., W. Briggs, *Police Oversight: Civilian Oversight Boards and Lessons Learned from our Neighbors to the North*, 40 SUFFOLK TRANSNAT'L L. REV. 139, 152-53 (2017); see also Karimi Chavis, *Increasing Police Accountability: Restoring Trust and Legitimacy through the Appointment of Independent Prosecutors*, 49 Wash. U. J.L. & Pol'y (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2873832.

⁷¹¹ See Malik, March 21 Briefing Transcript at 137; see also, Samuel Walker, *New World of Police Accountability* (Sage Publications, Inc. 2005) at 49, https://www.sagepub.com/sites/default/files/upm-binaries/5200_Walker_Final_Pages_Chapter_3.pdf.

⁷¹² See, e.g., Siegel, March 21 Briefing Transcript at 44.

⁷¹³ Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 Harv. L. Rev. F. 235, 245 (2015), <https://harvardlawreview.org/2015/04/enhancing-accountability-and-trust-with-independent-investigations-of-police-lethal-force/>.

⁷¹⁴ See *supra* note 162.

misconduct, fraud, waste and abuse, and has the power to issue subpoenas conduct investigations; the Commission to Combat Police Corruption, created to monitor the anti-corruption systems of the NYPD, the Office of the Mayor, the City Council, five District Attorneys' offices overseeing NYPD criminal conduct, two U.S. Attorneys' Offices overseeing federal NYPD criminal conduct, the NYS Attorney General's Office as an independent special prosecutor in certain limited cases, and the CCRB, the primary "independent" entity charged with overseeing the NYPD. A civilian-run organization, the CCRB is tasked with investigating, mediating, and prosecuting complaints of misconduct by members of the NYPD.⁷¹⁵ While the CCRB is technically independent of the NYPD, some critics question its power and independence.⁷¹⁶ At the same time, critics also question the effectiveness of certain internal NYPD oversight mechanisms.⁷¹⁷ And, they say, traditional oversight mechanisms, such as the court system and legislature, have failed to ensure that the NYPD remains accountable to the communities it is intended to serve.⁷¹⁸ The NYPD, on the other hand, argues that the NYPD and its officers are subject to numerous different oversight structures that continue to expand, including the 2015 establishment of such organizations as the Force Investigations Division, responsible for investigating officers' firearms discharges and fatalities related to police action, and the RMB, which monitors the NYPD's force reporting and force investigations.⁷¹⁹

A. NYPD Data and General Transparency

One salient issue in NYC that affects police accountability or the perception of police accountability is transparency. While advocates praised the NYPD for their recent progress in compiling data for crucial, hot-button topics like firearms and taser discharges, they lamented that the NYPD historically has not been forthcoming about a number of other issues regarding police behavior and discipline for misbehavior, particularly regarding the use of force and officer disciplinary decisions.⁷²⁰ The NYPD says that they have become increasingly transparent over

⁷¹⁵ See N.Y. City Charter, ch. 18-A,

https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/nyc_ccrb_charter.pdf.

⁷¹⁶ Siegel, March 21 Briefing Transcript at 45-6.

⁷¹⁷ See *id.* at 83-84.

⁷¹⁸ Fagan, March 21 Briefing Transcript at 111-12; Charney, March 21 Briefing Transcript at 41.

⁷¹⁹ See Use of Force Report at 9.

⁷²⁰ See Dunn, March 21 Briefing Transcript at 232; *see also, e.g.*, Charney, March 21 Briefing Transcript at 60. Note also that the NYPD's administrative prosecutions are subject to some degree of independent oversight: the

the last few years and that the criticism that they are not transparent is outdated. They claim that they are now the most transparent municipal police department in the world.⁷²¹ They point as support to the fact that as of 2016, the NYPD Patrol Guide is posted on their website, with limited redactions, the fact that they respond to over 17,000 FOIL requests each year, the disclosure on their website that is responsive to 20 laws enacted by the City Council and NY State legislature since 2014, the availability on their website since February 2016 of CompStat, which maps major crime statistics by neighborhood, and the millions of data points contributed to the NYC Open Data Portal each year.⁷²² Currently, the NYPD posts, among other things, information on a variety of topics on their website, such as firearms discharges; the number of police officers who have had two or more cases substantiated by the CCRB in the last three years, the number of police officers who have been the subject of IAB investigations resulting in a suspension during the last five years; the number of police officers who have been found to have used excessive force in the last three years; raw data on the number of stop, question and frisk reports disaggregated by race, criminal and civil summons reporting; reporting on when DATs are used in lieu of custodial arrests for misdemeanors and violations, also disaggregated by race, sex and gender; and Student Safety Act reporting and subway fare evasion reporting, broken down by race, sex and age of the violator.⁷²³

In addition, on December 28, 2017, the NYPD published the Use of Force Report,⁷²⁴ detailing for the first time the number and type of uses of force by the NYPD, as well as demographic information about the subjects of police force and of officers using force.⁷²⁵ This comes on the heels of the NYPD's adoption in June, 2016 of a new Use-of-Force Policy (in

dispositions of the NYPD's administrative trials are reviewed by an independent oversight commission known as the Commission to Combat Police Corruption (the "CCPC"), established in 1995 by Mayoral executive order, to determine whether the NYPD's anti-corruption systems are working effectively. The CCPC lacks any independent investigatory authority, but reviews all of the closed disciplinary cases involving uniformed members of the NYPD that are prosecuted in the Trial Room to determine whether the NYPD appropriately addressed instances of misconduct for purposes of its anti-corruption monitoring. The CCPC publishes annual reports on its findings. See NYC Commission to Combat Police Corruption, *Eighteenth Annual Report of the Commission* (Aug. 2017), <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>.

⁷²¹ Byrne, *supra* note 20.

⁷²² *Id.*; see also, NYPD Statistics, <http://www1.nyc.gov/site/nypd/stats/stats.page>; NY Open Data, <https://opendata.cityofnewyork.us/>.

⁷²³ NYPD Reports and Statistical Analyses, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/reports-landing.page>.

⁷²⁴ See generally Use of Force Report.

⁷²⁵ *Id.*

response in part to the recommendations of the Department of Investigation in 2015)⁷²⁶ aimed, according to the NYPD, at bringing “improved oversight, enhanced training, comprehensive reporting, and thorough investigations to all uses of force.”⁷²⁷ Under the new Use-of-Force Policy, patrol officers are required to fill out Threat, Resistance or Injury Worksheets (“TRI Worksheets”) to document three levels of uses of force:

- **Level 1** refers to the use of low-level force, such as hand strikes, foot strikes, subduing of subjects and discharges of pepper spray or mesh restraining blankets and is investigated by the officer’s immediate supervisor.
- **Level 2** refers to more serious uses of force, including the intentional striking of a person with any object (e.g. a police baton), canine bites or the use of tasers, and are investigated by NYPD officers ranking as a captain or above.
- **Level 3** refers to the use of physical force that is readily capable of causing death or serious physical injury; those incidences involving the discharge of a firearm where the subject has died or is likely to die are investigated by the NYPD’s Force Investigation Division, while all other Level 3 incidents are handled by the IAB.⁷²⁸

The Use of Force Report defines force as firearms discharges, conducted electrical weapon discharges, and other general uses of force, including subduing subjects, using impact weapons, using pepper spray, and employing foot and hand strikes; however, the Use of Force Report notes that, when no injuries are reported, “reportable” levels of force do not include struggling or grappling with a subject, pointing a handgun at someone, pushing or forcible handcuffing.⁷²⁹

Before the release of the Use of Force Report, advocates testified that there had been no comprehensive data from the NYPD that provides the public with the means of evaluating how much force is being used and upon whom that force is being used.⁷³⁰ According to Christopher Dunn, Associate Legal Director of the New York Civil Liberties Union, the lack of transparency regarding use-of-force data created the perception that the NYPD uses more force than necessary on a regular basis:

⁷²⁶ See Office of the Inspector General for the NYPD, *Third Annual Report* (2017) at 28, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

⁷²⁷ See Use of Force Report at 7.

⁷²⁸ *Id.*

⁷²⁹ *Id.* at Introduction, 12.

⁷³⁰ Dunn, March 21 Briefing Transcript at 232, 237.

[I]f you ask most people in [New York City,] I think they would say there is a significant problem with NYPD's use of force, incidents like Eric Garner... cement[ed] in people's minds the belief that there are widespread problems with the department when it comes to use of force.⁷³¹

According to the Use of Force Report, both the number of firearms discharges and general uses of force have decreased substantially in recent years: officers used force in only 1.3% of all arrests in 2016.⁷³² Moreover, the Use of Force Report notes that the vast majority of use-of-force incidents involve the lowest levels of force – of the 4,087 reported general uses of force in arrest situations in 2016, 81.5%, or 3,300 incidents, involved hand strikes, foot strikes, and forcible subduing of arrest subjects.⁷³³ The Use of Force Report notes, however, that as the NYPD was adjusting to the new Use-of-Force Policy, reporting by officers may have been incomplete, acknowledging potential under-reporting, over-reporting, lack of documentation and misclassifications.⁷³⁴

In response to the Use of Force Report, the DOI on February 6, 2018 released its own report which noted that although NYPD officers largely were compliant with the requirement of filling out TRI Worksheets when they noted that force was used against an arrestee in an arrest report (the OIG found a 90% compliance rate in 2017, which was a marked improvement over a 63.8% compliance rate in 2016),⁷³⁵ NYPD officers were underreporting force on arrest reports and therefore failing to adhere to the requirements imposed by the TRI Worksheets and related procedures.⁷³⁶ Specifically, in a sample of resisting arrest reports between September and November 2016, the OIG found that 35% of the reports indicated the presence of officer force, yet no accompanying TRI Worksheet was filed.⁷³⁷ Based on these statistics, the OIG report found that the NYPD lacks sufficient controls to identify uses of force when officers fail to report the use of force on the arrest report.⁷³⁸

⁷³¹ *Id.* at 230-31.

⁷³² Use of Force Report at 3.

⁷³³ *Id.*

⁷³⁴ *Id.*

⁷³⁵ Officer of the Inspector General for the NYPD, *An Investigation of NYPD's New Force Reporting System* at 7-8, Feb. 2018, http://www1.nyc.gov/assets/doi/press-releases/2018/feb/08Use_of_Force_Report_020618.pdf.

⁷³⁶ *Id.* at 2.

⁷³⁷ *Id.* at 10-11.

⁷³⁸ *Id.*

The availability of use-of-force data, along with new reporting on stop-and-frisks (*see* Chapter 1, Section C.1), summonses (*see* Chapter 1, Section C.1) and school safety incidences (*see* Chapter 2, Section B) are all major advances towards NYPD transparency that have occurred in the last two years and address some of the major criticisms of advocates regarding NYPD transparency. However, critics testified that there is a complete lack of intersectional data – data collected and analyzed across different sources. According to Cynthia Conti-Cook, staff attorney of the Legal Aid Society’s special litigation unit, this intersectional data would aid in identifying patterns and trends of police misconduct, as well as identifying at-risk officers who may be in need of enhanced training or monitoring.⁷³⁹ For example, the NYC Comptroller, through a program called ClaimStat, collects data on claims filed against NYC, including personal injury and tort claims filed against the NYPD, but there has been no attempt to compare ClaimStat data to CCRB complaint data, according to Professor Fagan.⁷⁴⁰ Nor historically has there been a publicly available demographic breakdown of those arrested based on warrants stemming from criminal summonses, and the limited availability of information is insufficient to permit real accountability, according to Professor Levine.⁷⁴¹ The NYPD only began making such demographic information available in late 2017.⁷⁴²

Moreover, as noted by the OIG, the NYPD has rejected a number of its recommendations on greater transparency, including: (a) a recommendation that the NYPD assess the relative effectiveness of quality-of-life summonses, quality-of-life misdemeanor arrests, and other disorder reduction strategies in reducing felony crime; (b) a recommendation that the NYPD

⁷³⁹ See Cynthia Conti-Cook, *Testimony before the Council of The City of New York Committee on Oversight and Investigations on Proposed Int. No. 119-C*, Legal-Aid.org (June 28, 2016), http://www.legal-aid.org/media/204612/06282016_proposed_bill_119c.pdf; see also Michael Garofalo, *Bill Addresses NYPD Misconduct Data*, StrausMedia (Apr. 11, 2017), <http://www.nypress.com/local-news/20170411/bill-addresses-nypd-misconduct-data>.

⁷⁴⁰ Fagan, March 21 Briefing Transcript at 111; see also Benjamin Weiser, *Record Number of Claims Filed Against New York Police a Year Ago, a Report Says*, (Aug. 27, 2015), <https://www.nytimes.com/2015/08/28/nyregion/record-number-of-claims-filed-against-new-york-police-a-year-ago-report-says.html?mcubz=3>.

⁷⁴¹ Levine, March 21 Briefing Transcript at 320-21.

⁷⁴² After the passage of the Criminal Justice Reform Act, the NYPD was required to disclose the age, race, and gender of individuals receiving criminal and civil summonses. The first reports detailing this data were released in November 2017. See N.Y. City Council, *Criminal Justice Reform Act*, *supra* note 69; see also, Written Comments of Youth Represent New York City Council, *supra* note 73. The NYPD notes the reason they did not disclose demographic information for criminal summons previously is that until 2016 the New York State Office of Court Administration form the NYPD uses for criminal summons did not provide blanks for demographic information. Byrne, *supra* note 20.

conduct an analysis to determine whether quality-of-life enforcement disproportionately impacts black and Hispanic residents, males aged 15-20, and NYC Housing Authority residents; (c) a recommendation that the NYPD should expand its analysis of the consequences of low-level enforcement beyond its short-term effect on felony crimes, instead analyzing long-term impacts of quality-of-life enforcement and (d) a recommendation that the NYPD release incident-level and geographically-coded data on summonses and misdemeanor arrests.⁷⁴³ While its justifications for failing to respond to specific OIG recommendations vary, the NYPD says that it has already provided much of the information requested by the OIG through its Open Data Portal and conducts continuous evaluations of the “actual impact of quality-of-life enforcement.”⁷⁴⁴ Moreover, the NYPD says that its quality-of-life enforcement never focused on short-term conditions, highlighting its move toward neighborhood policing to address underlying problems within a community.⁷⁴⁵ And, the NYPD noted that any disproportionate impact of quality-of-life enforcement on communities of color is a direct result of the NYPD’s calls for service, which come disproportionately from minority neighborhoods.⁷⁴⁶

Researchers and community advocates encourage more robust data collection and transparency because there is evidence that suggests that it facilitates pattern tracking and leads to policy change, according to Mr. Dunn.⁷⁴⁷ Mr. Dunn testified in March 2017 that publicizing use-of-force data is paramount to promoting accountability at the NYPD: as with stop-and-frisk,

⁷⁴³ Office of the Inspector General for the NYPD, *Third Annual Report* (2017), at 9-11, http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

⁷⁴⁴ *Id.* at 11.

⁷⁴⁵ *Id.* at 10.

⁷⁴⁶ *Id.* at 9.

⁷⁴⁷ See Dunn, March 21 Briefing Transcript at 237-38; see also Frederique, March 21 Briefing Transcript at 254. Examples of cities in which data collection led to policy change include Durham, North Carolina, Austin, Texas and Kalamazoo, Michigan. In Durham, political activists used an analysis of state data from 2002 to 2013 that showed that the Durham police searched black male motorists at more than twice the rate of white males during stops, but that drugs and other illicit materials were found no more often on blacks. The city responded to the activists’ data by agreeing to require the police to obtain written consent to search vehicles when they do not have probable cause. In Austin, the independent police monitor reported in 2012 that whites stopped by the police were searched 1 in every 28 times, while blacks were searched 1 in 8 times. In response, the city began requiring written consent for searches without probable cause. In Kalamazoo, a city-funded study found that black drivers were nearly twice as likely to be stopped, and were subsequently “much more likely to be asked to exit their vehicle, to be handcuffed, searched and arrested.” The public safety chief imposed new rules requiring officers to explain their grounds for suspicion each time they sought a driver’s consent to a search. Traffic stops subsequently declined 42% amid a more than 7% drop in the crime rate. Richard Oppel, Jr., *Activists Wield Search Data to Challenge and Change Public Policy*, N.Y. TIMES (Nov. 20, 2014), <https://www.nytimes.com/2014/11/21/us/activists-wield-search-data-to-challenge-and-change-police-policy.html>.

which the public realized involved racially biased and unconstitutional practices only once relevant data was released, he stated, the presence or absence of a use-of-force problem at the NYPD will only become known and potentially corrected once reliable use-of-force data becomes publicly available.⁷⁴⁸ For instance, he opined, the NYPD has shown “significant restraint” with respect to firearms discharges as a result of transparency in NYPD weapons discharge data.⁷⁴⁹

Professor Levine, echoing the sentiment that the historical lack of transparency into NYPD practices creates a major barrier to effective policy, testified:

How can there be informed public discussion about government policy and practices of law enforcement if the essential data about those practices is hidden, secret, inaccessible and unavailable? How can there be informed discussion about law enforcement’s progress and problems in civil rights if basic racial, ethnic, gender and age data about the routine enforcement practices of police, prosecutors and courts is likewise hidden?⁷⁵⁰

By having access to data, experts argue, police, government, and communities are better equipped to address areas of concern with effective policy. For example, Ms. Frederique testified that one of the main reasons that marijuana arrests in New York were recently reduced is because of the availability of data on marijuana enforcement.⁷⁵¹

While experts and advocates agreed that balancing confidentiality and transparency can be difficult, according to Maria Ponomarenko, NYPD Deputy Director of the Policing Project at NYU School of Law:

[T]he need for confidentiality is not nearly as broad as to justify the lack of transparency that we see around policing today...we as a city and a society must find ways to reconcile the need for secrecy which at times is essential to our

⁷⁴⁸ Dunn, March 21 Briefing Transcript at 238-39.

⁷⁴⁹ *Id.* at 232-33. Based on the Use of Force Report, which includes the most recent firearm discharge report, there were 43 civilian shootings, with 90% of the persons shot being black, Hispanic or Asian. Use of Force Report at 19 and 22.

⁷⁵⁰ Levine, March 21 Briefing Transcript at 324-25.

⁷⁵¹ Kassandra Frederique, March 21 Briefing Transcript at 254. Unfortunately, Ms. Frederique explained, “Marijuana is the only category that is tracked by itself, all other drugs are [tracked] together.” *Id.*

public safety with the need for democratic governance which is paramount in our society.⁷⁵²

According to Mr. Agostini, the perception of a lack of transparency at the NYPD “is a major factor that contributes to the broken trust between police and communities.”⁷⁵³ Mr. Charney testified that the lack of public transparency about officer disciplinary issues leads to public mistrust and compounds the public’s perception that officers are beyond the reach of the law.⁷⁵⁴ As discussed further in Chapter 3, Section B below, officer disciplinary records and disciplinary proceeding dispositions are not available to the public. Noting that the mother of Ramarley Graham, who was shot by an NYPD officer on February 2, 2012, has yet to learn the outcome of the internal disciplinary trial of the officer who killed her son, Mr. Charney testified:

It goes without saying that this situation severely undermines the public’s trust and faith in the NYPD and the civilian complaint process generally, and makes it difficult, if not impossible, to know if the NYPD is, in fact, holding officers who have committed misconduct accountable.⁷⁵⁵

B. Disciplinary Transparency/New York Civil Rights Law 50-A

Beginning in 2016, the NYPD has posted on their website the total number and percentage of active police officers who have fallen into the following categories: those who have had two or more cases substantiated by the CCRB in the last three calendar years; those who were subject to an Internal Affairs investigation that resulted in the officer's suspension from employment within the last five calendar years; those who have been found by the NYPD to have used excessive force in the last three calendar years; and those who have been arrested as a result of actions taken while on duty or related to an officer’s job function, in the last ten calendar years.⁷⁵⁶ However, officer disciplinary records and disciplinary proceeding dispositions are not made public in NYC as a result of a NYC Law Department interpretation, upheld by New York’s First Judicial Department in 2017, that New York Civil Rights Law Section 50-A (“Section 50-A”) prohibits public disclosure of all police officer personnel records, including

⁷⁵² Ponomarenko, March 21 Briefing Transcript at 147-48.

⁷⁵³ Agostini, March 21 Briefing Transcript at 223.

⁷⁵⁴ Charney, March 21 Briefing Transcript at 39-41.

⁷⁵⁵ *Id.* at 39-40.

⁷⁵⁶ NYPD, Local Law 88 of 2016 – Deployment Law, <https://www1.nyc.gov/site/nypd/stats/reports-analysis/deployment.page>. For 2016, 0.9% of police officers fell into the listed disciplinary categories.

those related to an officer's discipline, despite what the court termed the "compelling interest" the public has in obtaining the disciplinary records requested.⁷⁵⁷ The court stated that "the remedy [to Section 50-A] must come not from [the] court[s], but from the legislature."⁷⁵⁸ According to experts, that ruling has made it difficult for the public to access information about individual officers who may have committed police misconduct or otherwise abused their authority.⁷⁵⁹

Section 50-A states:

All personnel records [of police officers] used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law and such personnel records under the control of a sheriff's department . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . except as may be mandated by lawful court order.⁷⁶⁰

Mr. Charney testified that, prior to the NYC Law Department's reinterpretation of Section 50-A that led to the litigation prohibiting disclosure of officer personnel records, the NYPD had a long-standing practice of making the outcome of officer disciplinary trials available to the public.⁷⁶¹ Such information was disclosed in so-called "personnel orders" that were routinely distributed around the department and posted in the deputy Commissioner's office, where they were made accessible to journalists and thus the public.⁷⁶² "Without this information," Mr. Charney testified, "it is impossible for the public or any external accountability forces to evaluate whether the NYPD is imposing meaningful discipline in substantiated cases of officer

⁷⁵⁷ *Luongo v. Civilian Complaint Review Bd.*, 51 N.Y.S. 3d 46 (N.Y. App. Div. 2017) and *New York Civil Liberties Union v. New York City Police Dep't*, 50 N.Y.S. 3d 365 (N.Y. App. Div. 2017); N.Y. CLS Civ. R. § 50-a (2017); see also, Alan Feuer, *Civil Rights Law Shields Police Personnel Files, Court Finds*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/nyregion/civil-rights-law-section-50-a-police-disciplinary-records.html>.

⁷⁵⁸ *New York Civil Liberties Union v. New York City Police Dep't*, 50 N.Y.S.3d 365 (N.Y. App. Div. 2017).

⁷⁵⁹ N.Y. CLS Civ. R. § 50-a (2017); see also Charney, March 21 Briefing Transcript at 40-41; see also Kang, March 20 Briefing Transcript at 74.

⁷⁶⁰ N.Y. CLS Civ. R. § 50-a (2017).

⁷⁶¹ Charney, March 21 Briefing Transcript at 40-41.

⁷⁶² Rick Rojas, *Suit Challenges Secrecy on New York Police Disciplinary Records*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/nyregion/nypd-disciplinary-records.html> (noting that, in particular, a personnel order typically contained an officer's name and precinct, the nature of the offense and the penalty).

misconduct.”⁷⁶³ Therefore, the court’s ruling has led many, like Ms. Malik, to call for a legislative amendment to, or repeal of, Section 50-A.⁷⁶⁴

One recent example of the NYPD’s lack of transparency and the public’s consequent questioning of police accountability is the NYPD’s refusal to provide any details about the officer or incident involved in the overturning by NYPD Commissioner O’Neill of an administrative law judge’s guilty verdict against an officer.⁷⁶⁵ The NYPD notes that their refusal stemmed from their need to comply with Section 50-A.⁷⁶⁶ Commenting on the incident, Mr. Dunn said, “In the wake of Eric Garner’s death and the fact the NYPD has a strict policy barring chokeholds, the city needs to come clean with an explanation about why the officer in this case was allowed to escape all discipline.”⁷⁶⁷ The CCRB subsequently sought to compel disclosure of the disciplinary records of Daniel Pantaleo, the officer alleged to have used the illegal chokehold on Eric Garner, but the CCRB’s request was denied.⁷⁶⁸ On December 19, 2017, the New York Court of Appeals denied a request to appeal the non-disclosure decision.⁷⁶⁹

The NYPD notes that they, together with the Mayor’s Office and Corporation Counsel, have called for amendments to Section 50-A to make certain disciplinary information about police officers and other uniformed personnel covered under Section 50-A subject to disclosure.⁷⁷⁰ The Mayor’s Office states that the legislation should remove confidentiality protections currently applicable to disciplinary records of administrative prosecutions handled by the NYPD’s Department Advocate’s Office (“DAO”) and CCRB-prosecuted cases, a move that would subject the disciplinary proceeding record and the final determination by the NYPD

⁷⁶³ Charney, March 21 Briefing at 41.

⁷⁶⁴ Malik, March 21 Briefing at 129.

⁷⁶⁵ Jillian Jorgensen & Graham Rayman, *O’Neill Pardoned Cop Accused of Using Banned Chokehold: Sources*, N.Y. DAILY NEWS, (Aug. 28, 2017), <http://www.nydailynews.com/new-york/o-neill-pardoned-accused-banned-chokehold-sources-article-1.3450306>.

⁷⁶⁶ Byrne, *supra* note 20.

⁷⁶⁷ Jorgensen & Rayman, *supra* note 765.

⁷⁶⁸ *Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 51 N.Y.S.3d 46 (N.Y. App. Div.), *leave to appeal denied*, 30 N.Y.3d 908 (2017).

⁷⁶⁹ *Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 30 N.Y.3d 908 (2017).

⁷⁷⁰ Byrne, *supra* note 20; *see also* City Hall Press Office, *Mayor de Blasio Outlines Core Principles of Legislation to Make the Disciplinary Records of Law Enforcement and Other Uniformed Personnel Subject to Disclosure* (Oct. 14, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/820-16/mayor-de-blasio-outlines-core-principles-legislation-make-disciplinary-records-law>.

Commissioner to public disclosure.⁷⁷¹ The proposed amendments would also maintain current law restrictions on the use of covered personnel records in litigation, which require a finding that the records being disclosed are relevant to a specific case, and would add a requirement that the judge find that the probative value of the records outweighs the prejudicial effect of disclosure.⁷⁷² All other police personnel records related to performance evaluation would remain confidential.⁷⁷³

C. Shielding Officers from Personal Liability for Misconduct

In fiscal year 2017, NYC paid \$259.4 million in judgments and settlements in cases of police misconduct, which was more than double the amount it paid out in fiscal year 2013 (\$120.7 million).⁷⁷⁴ Moreover, the amount NYC paid in fiscal year 2017 for police misconduct settlements and judgments represented more than a third of the total amount paid out by the City for all judgments and claims.⁷⁷⁵ According to the Comptroller's Office, in fiscal year 2017, the NYPD was the NYC agency incurring the highest costs of settled tort claims and judgments at \$160.6 million.⁷⁷⁶

The amount of settlement payments paid by NYC has increased each year since 2013.⁷⁷⁷ This trend of steadily increasing payouts for claims relating to police misconduct has occurred as the number of complaints filed against the NYPD has declined.⁷⁷⁸ In fiscal year 2013, 5,455 complaints were brought to the CCRB⁷⁷⁹ and 3,997 lawsuits related to the NYPD were

⁷⁷¹ City Hall Press Office, *Mayor de Blasio Outlines Core Principles of Legislation to Make the Disciplinary Records of Law Enforcement and Other Uniformed Personnel Subject to Disclosure* (Oct. 14, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/820-16/mayor-de-blasio-outlines-core-principles-legislation-make-disciplinary-records-law>.

⁷⁷² *Id.*

⁷⁷³ *Id.*

⁷⁷⁴ *Mayor's Management Report*, The City of New York (Sept. 2017) at 65, http://www1.nyc.gov/assets/operations/downloads/pdf/mmr2017/2017_mmr.pdf (hereinafter cited as *Mayor's Management Report*).

⁷⁷⁵ *Id.* at 102.

⁷⁷⁶ *Annual Claims Report, Claims Report: Fiscal Year 2017*, Office of the New York City Comptroller, (Feb. 20 2018), <https://comptroller.nyc.gov/reports/annual-claims-report/>.

⁷⁷⁷ *Mayor's Management Report* at 65.

⁷⁷⁸ Bob Hennelly, *NYPD Payouts Up, But New Lawsuits Down*, CITY AND ST. N.Y. (Mar. 7, 2016), <https://www.cityandstateny.com/articles/politics/new-york-city/nypd-payouts-up%2C-but-new-lawsuits-down.html>; see also *Mayor's Management Report* at 65.

⁷⁷⁹ *Mayor's Management Report* at 65.

commenced against the City;⁷⁸⁰ in fiscal year 2017, 4,215 complaints were brought to the CCRB⁷⁸¹ and 2,115 lawsuits related to the NYPD were commenced against the City.⁷⁸² According to data from the Office of the Mayor, the number of lawsuits in fiscal year 2017 against the NYPD decreased by 10.5% from the prior year.⁷⁸³

NYPD officers, like most U.S. law enforcement officials, are usually indemnified for civil judgments and settlements that result from their on-the-job misconduct.⁷⁸⁴ In many municipalities, police officers are entitled to indemnification as a result of provisions in collective bargaining agreements.⁷⁸⁵ In New York, officers are indemnified by state law.⁷⁸⁶

New York law prohibits NYPD officer indemnification where (a) the offending conduct was not within the officer's scope of public employment or in the discharge of their duties or (b) the offending officer was "in violation of any rule or regulation of his agency at the time the alleged damages were sustained," as determined by NYC's Corporation Counsel, an organization tasked with defending lawsuits against NYC and its agencies.⁷⁸⁷ Professor Schwartz stated that

⁷⁸⁰ Hennelly, *supra* note 778.

⁷⁸¹ Mayor's Management Report at 65.

⁷⁸² *Id.*

⁷⁸³ *Id.* Note that the NYPD stated that in 2017, filings of new law suits against the NYPD or its members declined by over 24 percent. NYPD, *The Police Commissioner's Report* (Jan. 2018) at 38, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>. The discrepancy in data may be a result of the Mayor's Management Report's use of fiscal years. The Commissioner's Report does not disclose the basis of its calculation.

⁷⁸⁴ See Schwartz, *supra* note 139 at 890 (noting that "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over \$730 million spent by cities, counties, and states in these cases."); NYPD officers, like all officers in NY State are also provided defense counsel free of charge when sued under § 1983. See N.Y. PUB. OFF. LAW § 17 (providing that police officers employed in New York State are entitled to a legal defense for any claim arising under 42 U.S.C. § 1983).

⁷⁸⁵ See *Union Contract Review*, <http://www.checkthepolice.org/review> (detailing the collective bargaining agreements ("CBAs") of 81 of America's 100 largest cities). In fact, in a study of collective bargaining agreements between police unions and 80 major cities in the United States, 40 CBAs required the relevant city to pay for costs related to officer misconduct; Deray McKesson *et al.*, *Police Union Contracts and Police Bill of Rights Analysis*, Campaign Zero (June 29, 2016) at 4, <https://static1.squarespace.com/static/559fbf2be4b08ef197467542/t/5773f695f7e0abbdfe28a1f0/1467217560243/Campaign+Zero+Police+Union+Contract+Report.pdf>.

⁷⁸⁶ N.Y. Gen. Mun. Law § 50-k.

⁷⁸⁷ See N.Y. Gen. Mun. Law § 50-k(3) ("The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller . . ."); see also *Corporation Counsel's Message*, <http://www.nyc.gov/html/law/html/about/counsel-message.shtml>.

despite these and other statutory prohibitions on indemnification in indemnification statutes across the country, “officers almost never pay.”⁷⁸⁸ The data appears to bear that out in NYC: out of 6,887 civil cases between 2006 and 2011 arising from NYPD alleged misconduct in which the plaintiff received a payment, in only 34 cases (less than 0.5%) were NYPD officers not fully indemnified.⁷⁸⁹ Even in cases where NYPD officers were forced to pay some share of the judgment, less than 4% of the total amount paid to plaintiffs was satisfied directly by the NYPD officer.⁷⁹⁰ In total, between 2006 and 2011, less than .03% of the total financial judgments paid to plaintiffs in civil rights actions against NYPD officers were paid directly by the officer.⁷⁹¹ And even when punitive judgments are awarded in such cases, no NYPD officer has ever paid any amount to satisfy such awards.⁷⁹²

According to Professor Schwartz, widespread indemnification of police officer misconduct effectively eliminates the intended deterrent effect of lawsuits.⁷⁹³ This is compounded, according to Professor Schwartz, by the fact that few, if any, civilians who believe they were mistreated by law enforcement actually take any form of legal action against the offending officer(s).⁷⁹⁴ Proponents of police indemnification argue that indemnification is a necessary evil to attract qualified public servants, since public officials “cannot face financial ruin for every careless mistake that cause[s] someone damage.”⁷⁹⁵

It should be noted that plaintiffs cannot directly sue the NYPD or its precincts. Pursuant to section 396 of the New York City Charter, all claims must be brought against the City and not against any City agency.⁷⁹⁶ And any judgments against the NYPD do not come out of the NYPD

⁷⁸⁸ Schwartz, *supra* note 139 at 919.

⁷⁸⁹ *Id.* at 962.

⁷⁹⁰ *Id.* at 913 and 962.

⁷⁹¹ *Id.*

⁷⁹² *Id.* at 974; *see also* N.Y. Gen. Mun. Law § 50-k(3).

⁷⁹³ Schwartz, *supra* note 139 at 940.

⁷⁹⁴ *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863-64 (2012), <http://cardozolawreview.com/Joomla1.5/content/33-3/Schwartz.33-3.pdf> (citing a Bureau of Justice statistics report in support of the conclusion that people who believe they have been mistreated by the police sue only approximately 1% of the time, and offering reasons why this might be the case); *see also* Schwartz, *supra* note 139, at 940.

⁷⁹⁵ Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587, 592 (2000).

⁷⁹⁶ *Ford v. N.Y. City Police Dep’t*, No. 16-CV-2797 (MKB) at 2 (E.D.N.Y. June 28, 2016); N.Y. CITY CHARTER, chap. 17 § 396; *see also Jenkins v. City of N.Y.*, 478 F.3d 76, 93 n.19 (2d Cir. 2007) (“[T]he NYPD is a non-suable agency of the City.”).

budget, but out of NYC's general coffers.⁷⁹⁷ Such "double indemnification" of officer conduct eliminates any deterrent effect of money judgments against law enforcement for police misconduct, according to some commentators.⁷⁹⁸ Instituting a policy through which the NYPD would be financially responsible for its officers' conduct could create incentives for supervisors to more closely manage their subordinates' conduct, according to the Office of the NYC Comptroller: they observed in 2011, for example, that when the City's Health and Hospitals Corporation became financially responsible for claims against it, the Health and Hospitals Corporation instituted risk management efforts and reduced litigation costs.⁷⁹⁹

D. Criminal Cases Against Officers

New York State criminal law creates additional impediments to officer accountability. New York law provides a complete defense against improper use-of-force claims for police officers that can demonstrate that they acted "reasonably." As codified in the New York Penal Law, the reasonable officer standard excuses a police officer's use of "physical force":

...when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be use or imminent use of physical force.⁸⁰⁰

⁷⁹⁷ See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1047-48 (2010) (describing New York City's practice of satisfying settlements and judgments out of the city's general budget). Note that there is evidence that suggests holding individuals personally liable for money judgments incurred in civil duty corrects problematic behavior. During the Civil Rights Era, a similar incentive scheme imposing personal liability had a positive effect of getting obstinate southern probate judges in Alabama to put African-American candidates on the ballot when required by the Supreme Court, whereas previously they had refused. Norman Siegel, March 21 Briefing Transcript at 79; see also James T. Wooten, *Alabama Judge Is Found Guilty in Keeping Negroes off the Slate*, N.Y. TIMES (Jan. 8, 1971), <http://www.nytimes.com/1971/01/08/archives/alabama-judge-is-found-guilty-in-keeping-negroes-off-the-slate.html>.

⁷⁹⁸ Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988).

⁷⁹⁹ See John C. Liu, City of N.Y. Office of the Comptroller, Claims Report Fiscal Year 2011 (2012), at 8, https://comptroller.nyc.gov/wp-content/uploads/documents/2012_Claims_Report.pdf (noting that "the Comptroller's Office again recommends that the City implement a process whereby agencies bear some financial accountability for claim activity."); see also Joanna C. Schwartz, *Watching the Detectives*, N.Y. Times, June 16, 2011, at A35 ("[T]he city could require the Police Department to settle lawsuits out of its own budget, instead of the city's general coffers. Perhaps if the department held its own purse strings, it would find more to learn from litigation.")

⁸⁰⁰ N.Y. CLS PEN. § 35.30(1).

The law further shields an officer's use of "deadly physical force" when:

... he or she reasonably believes that...[r]egardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.⁸⁰¹

New York courts look to federal cases governing officers' use of force to inform their own analyses of the reasonableness of officers' use of force. Two seminal cases decided by the United States Supreme Court, *Tennessee v. Garner* and *Graham v. Connor*, define the instances in which police officers may use force against an individual.⁸⁰² In *Graham*, the Supreme Court held that an officer may constrain or compel an individual when it is "objectively reasonable" to do so, judged from the perspective of a reasonable officer present at the time such force is used.⁸⁰³ In *Garner*, the Supreme Court held that an officer may use deadly physical force when there is probable cause to believe that a suspect poses a threat of serious physical harm.⁸⁰⁴

These standards are colored by the fact that the reasonableness of officers' conduct may be informed by subjective perceptions of the subjects of force. In *Terry v. Ohio*,⁸⁰⁵ the Supreme Court held that in gauging the reasonableness of a search, the law allows an officer to draw "specific reasonable inferences...from the facts in light of his experience."⁸⁰⁶ This broad reasonableness standard subsequently has been applied in the context of other police conduct. According to Thomas McAfee, Professor of Law at the University of Nevada Las Vegas, an officer's perception of a possible threat or criminal action can be informed by racial biases, and the courts, in applying a standard that values this perception, gives credence to racial bias as

⁸⁰¹ N.Y. CLS PEN. § 35.30(1)(c). Note that NYPD internal policies governing officers' use of force may be viewed as more restrictive of an officer's ability to use force than New York state law. According to the NYPD Patrol Guide, general uses of force may be used "when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or when it is reasonable to place a person in custody or prevent escape from custody." *Patrol Guide* Procedure No. 221-01.

⁸⁰² 471 U.S. 1 (1985) and 490 U.S. 386 (1989).

⁸⁰³ *Graham v. Connor*, 490 U.S. 386, 397 (1989).

⁸⁰⁴ *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

⁸⁰⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁸⁰⁶ *Id.* at 27.

“reasonable.”⁸⁰⁷ “[P]rosecutors have accepted that the legal standard not only countenances mistakes, but also poor judgment by officers,” according to Mr. Goldstein.⁸⁰⁸

Recent U.S. Supreme Court decisions have also seemingly given significant deference to an officer’s perspective to decide that he or she acted reasonably.⁸⁰⁹ “Every significant use of force case heard by the U.S. Supreme Court in recent terms has found either that the conduct of the officer was objectively reasonable or that the officer was entitled to qualified immunity,”⁸¹⁰ according to Jonathan M. Smith, Associate Dean of Experiential and Clinical Programs of the UDC David A. Clarke School of Law and former Section Chief of the Special Litigation Section of the Civil Rights Division of the United States Department of Justice. These recent cases, like *Terry*, may institutionalize the legality of bias-laden subjective reasonableness, according to Mr. Goldstein.⁸¹¹

Ms. Ponomarenko testified that a subjective standard impedes efforts to hold police officers accountable for potentially criminal misconduct.⁸¹² She noted that “anyone who is a lawyer can understand precisely why it’s really hard to hold somebody accountable at the back end when the only rule is just reasonableness.”⁸¹³ Professor Zeidman noted “the failure of [New York’s] criminal court to police the police,” but that New York is not an outlier in this respect, as

⁸⁰⁷ Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 Nev. L.J. 609 (2012).

⁸⁰⁸ Joseph Goldstein, *Is a Police Shooting a Crime? It Depends on the Officer’s Point of View*, N.Y. TIMES (July 28, 2016), <https://www.nytimes.com/2016/07/29/nyregion/is-a-police-shooting-a-crime-it-depends-on-the-officers-point-of-view.html> (noting that the Justice Department’s report on its decision not to prosecute the officer who killed Michael Brown explained that mistake, panic, or even poor judgment were not prosecutable offenses).

⁸⁰⁹ See, e.g., *City & Cty. San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2912 (2014); *Scott v. Harris*, 550 U.S. 372 (2007).

⁸¹⁰ Jonathan M. Smith, *Closing the Gap between What Is Lawful and What Is Right in Police Use of Force Jurisprudence by Making Police Departments More Democratic Institutions*, 21 MICH. J. RACE & L. 315, 319, n.22 (2016) (citing, *inter alia*, *Mullenix v. Luna*, 136 S. Ct. 305, 306, 312 (finding a shooting reasonable even though less lethal strategies to stop the suspect were available)).

⁸¹¹ See Goldstein, *supra* note 808 (discussing NYPD Officer Richard Haste’s hearing before a Bronx grand jury for his shooting of an unarmed black teenager Ramarley Graham and noting that “[w]hat matters [in determining the reasonableness of an officer’s conduct] is the perspective of the officer, with an officer’s sense of danger given significant weight.”)

⁸¹² Ponomarenko, March 21 Briefing Transcript at 141.

⁸¹³ *Id.*

New York's approach largely tracks the development of the reasonable-officer doctrine established by the U.S. Supreme Court.⁸¹⁴

While the reasonable-officer defense generally shields police officers subject to criminal charges from liability, police officers face limited accountability through criminal prosecutions generally.⁸¹⁵ Professor Philip Stinson estimates that nationally about 1,000 times each year an on-duty police officer shoots and kills someone.⁸¹⁶ Yet, from 2005 to 2017, a total of only 82 officers nationwide were charged with murder or manslaughter in connection with an on-duty shooting, and, of those, only 19 have been convicted, with only one officer convicted of intentional murder and the rest receiving lesser convictions.⁸¹⁷ Nationwide, the number of police officer indictments has increased since the death of Michael Brown in 2014 in Ferguson, Missouri.⁸¹⁸ Convictions, nonetheless, continue to remain rare.⁸¹⁹

Even when police officers are charged and convicted, they may receive a lesser penalty than a non-law enforcement official would have received for the same crime.⁸²⁰ NYPD Officer Peter Liang, for example, was convicted of second-degree manslaughter – a crime which carries a maximum sentence of 15 years' imprisonment – for the killing of unarmed Akai Gurley in 2014, but a Brooklyn Supreme Court judge sentenced him to five years of probation and

⁸¹⁴ Zeidman, March 20 Briefing Transcript at 110. *See generally* Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L. J.* 101 (2004).

⁸¹⁵ Smith, *supra* note 810 at 330 (noting that “[d]espite the rise in prosecutions of police last year, only a small fraction of the thousands of uses of deadly force, even force against unarmed individuals, are ever charged.”); *see also* Henry Gass, *Police Facing Prosecution More Often, but it's Still Rare*, *CHRISTIAN SCIENCE MONITOR* (Oct. 28, 2015), <https://www.csmonitor.com/USA/Justice/2015/1028/Police-facing-prosecution-more-often-but-it-s-still-rare> (noting that about a dozen officers nationwide were charged in fatal shootings in 2015 while data suggested there were about 800 fatal police shootings that year).

⁸¹⁶ Philip M. Stinson, *Charging a Police Officer in Fatal Shooting Case is Rare, and a Conviction is Even Rarer*, *NY DAILY NEWS* (May 31, 2017), <http://www.nydailynews.com/new-york/convicting-fatal-shooting-case-rare-event-article-1.3210936>.

⁸¹⁷ *Id.*

⁸¹⁸ Roger Goldman, *Importance of State Law in Police Reform*, 60 *ST. LOUIS U. L.J.* 363, 377 (2016), [https://www.nlg-npap.org/system/files/Goldman%20Article%20\(1\)-2.pdf](https://www.nlg-npap.org/system/files/Goldman%20Article%20(1)-2.pdf).

⁸¹⁹ *Id.* at 378.

⁸²⁰ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, *WASHINGTON POST* (Apr. 11, 2015), http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.6134be1a426b.

800 hours of community service after downgrading the jury's finding on manslaughter to criminally negligent homicide.⁸²¹

Some experts believe that the limited punishment of crimes committed by police officers stems from the inherent conflict of interest between the district attorney and the police.⁸²² Local prosecutors rely on the police in their everyday course of work, and, according to one expert, therefore have “deep ties to law enforcement” and face “strong incentives to avoid strict accountability.”⁸²³ For example, a Staten Island grand jury's decision not to indict Officer Pantaleo in connection with the Eric Garner case may have been influenced by the District Attorney on the case, Daniel Donovan, Jr., according to then-*Gothamist* editor Christopher Robbins.⁸²⁴ Professor Fagan speculated that it would be “politically costly” for Donovan to indict a police officer and so he transferred the responsibility of bringing criminal charges to the Department of Justice.⁸²⁵ And Officer Liang's lax sentence in connection with the killing of Akai Gurley in 2014 has been attributed to District Attorney Ken Thompson's no-jail recommendation.⁸²⁶

Police reform activists have tried to counteract this phenomenon by calling for independent, special prosecutors in all cases of alleged police misconduct.⁸²⁷ In July 2015, Governor Cuomo attempted to address some of these concerns by signing Executive Order No. 147, which appoints the New York State Attorney General to act as a special prosecutor in the

⁸²¹ Sarah Maslin Nir, *Officer Peter Liang Convicted in Fatal Shooting of Akai Gurley in Brooklyn*, N.Y. TIMES (Feb. 11, 2016), <https://www.nytimes.com/2016/02/12/nyregion/officer-peter-liang-convicted-in-fatal-shooting-of-akai-gurley-in-brooklyn.html>; Emily Saul, Kevin Fasick & Kate Sheehy, *NYPD Cop Peter Liang Dodges Prison for Killing Akai Gurley*, N.Y. POST (Apr. 19, 2016), <http://nypost.com/2016/04/19/nypd-cop-peter-liang-gets-community-service-for-killing-akai-gurley/>. Second-degree manslaughter is a class C felony under New York law, carrying a potential penalty of up to 15 years of probation. N.Y. CLS PEN. § 125.15 (2017).

⁸²² Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts>.

⁸²³ Smith, *supra* note 810, at 332.

⁸²⁴ Christopher Robbins, *Legal Experts Say Eric Garner Grand Jury Did Exactly What DA Wanted: Nothing*, GOTHAMIST (Dec. 3, 2014), http://gothamist.com/2014/12/03/eric_garner_verdict_jury.php.

⁸²⁵ *Id.*; see also Moore, March 21 Briefing Transcript at 268 (“[W]e need a truly independent special prosecutor to investigate and, if necessary, prosecute, police misconduct. As the [Eric] Garner case so clearly demonstrated, relying on our current DAs to prosecute police officers for excessive force, has not and will not work.”)

⁸²⁶ Saul, Fasick & Sheehy, *supra* note 821.

⁸²⁷ See, e.g., Campaign Zero, <https://www.joincampaignzero.org/> (which calls for independent special prosecutors for the prosecution of all cases of police violence as these prosecutors will lack incentives to protect the officers and will not rely on the police department's own investigations).

investigation and prosecution of matters relating to the deaths of unarmed civilians caused by law enforcement officers.⁸²⁸ Mr. Moore cautioned, however, that the Governor’s order will not fully solve the problem of non-independent prosecutors. According to Mr. Moore, the legislation “omits the overwhelming majority of police misconduct cases from independent prosecutorial review” since the majority of police misconduct does not result in the death of a civilian.⁸²⁹

E. Civil Lawsuits Against Officers

Like criminal cases against police officers, civil lawsuits brought by individuals are another external means of holding police officers accountable but, according to U.S. Representative Hakeem Jeffries, individual civil suits do not carry adequate deterrence against police misconduct because “a lawsuit is settled providing monetary compensation and we move on....That’s not sufficient to break this vicious cycle that the country is now in as it relates to the tensions between the police and communities of color.”⁸³⁰

According to Norman Siegel, a civil rights attorney and former Executive Director of the NYCLU, civil penalties do not adequately supplement criminal sanctions – or the lack thereof – for two reasons. First, the deterrent effect of civil penalties is undermined by the fact that individual police officers, as well as the NYPD, escape direct financial liability for these allegations (*see* Chapter 3, Section C above).⁸³¹ Second, according to Mr. Siegel, civil lawsuits brought by individuals are ill-suited to influence policy or promote better practices generally because their remedies, such as large settlement costs, provide justice that is limited to the individual parties involved, and therefore have a limited impact on officers not party to the suit.⁸³² Moreover, according to Professor Schwartz, even when individuals bring civil cases against police officers, the suits have limited, if any, negative implications for the police officer’s

⁸²⁸ No. 147: A Special Prosecutor to Investigate and Prosecute Matters Relating to the Deaths of Civilians Caused by Law Enforcement Officers, governor.ny.gov (July 8, 2015), <http://www.governor.ny.gov/news/no-147-special-prosecutor-investigate-and-prosecute-matters-relating-deaths-civilians-caused>.

⁸²⁹ Moore, March 21 Briefing Transcript at 269; *see* Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Results in Charges*, FiveThirtyEight (Nov. 25, 2014), <https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/>.

⁸³⁰ Goldstein, *supra* note 808.

⁸³¹ *See* Siegel, March 21 Briefing Transcript at 78-80.

⁸³² *Id.*; *see also* The Ass’n of the Bar of The City of N.Y. Comm. on N.Y. City Affairs, *The Failure of Civil Damages Claims to Modify Police Practices and Recommendations for Change* (Mar. 2000), http://www2.nycbar.org/Publications/reports/show_html_new.php?rid=32.

employment.⁸³³ Studies have found that, at most, “law enforcement officers and administrators only worry moderately about work related lawsuits filed by citizens” and that “the prospect of civil liability does not have a major impact on field practices.”⁸³⁴ The NYPD contends that the reality at the NYPD is otherwise; that civil lawsuits can have many consequences for officers, including increased supervision, failures to be promoted and entries on officer’s permanent records.⁸³⁵ According to the NYPD, in an internal survey conducted in 2014 over 60% of officers said they declined to take lawful police action for fear of civil liability.⁸³⁶ Furthermore, the Independent Monitor noted in his most recent report to the *Floyd* Court that there appeared to be “an exaggerated fear of discipline and lawsuits” among NYPD patrol officers, while discussing the reasons for underreporting of stops.⁸³⁷

Mr. Charney noted that class action litigation, like that brought in *Floyd*, is one type of civil litigation that has the potential to affect policy and compensate large numbers of victims.⁸³⁸ He cautioned, though, that class actions may become less viable due to the Fairness in Class Action Litigation Act of 2017, which would, among other things, make naming a class representative more difficult, require plaintiffs and their lawyers to disclose conflicts of interest,

⁸³³ See Schwartz, *supra* note 797 at 1076-77 (describing evidence that police misconduct suits have limited negative effects on officers’ employment).

⁸³⁴ Schwartz, *supra* note 139 at 942 (quoting Carol A. Archbold & Edward R. Maguire, *Studying Civil Suits Against the Police: A Serendipitous Finding of Sample Selection Bias*, 5 POLICE Q. 222, 226 (2002)); see also Victor E. Kappeler, *Critical Issues In Police Civil Liability* 7 (4th ed. 2006) (citing several studies); Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 POLICE STUD. INT’L REV. POLICE DEV. 19, 26 (1995) (finding that 62% of a sample of fifty officers from state, municipal, and university law enforcement agencies in Pennsylvania believed that civil suits deter police officers, but 87% of state police officers surveyed, 95% of municipal police officers surveyed, and 100% of university police officers surveyed did not consider the threat of a lawsuit among their “top ten thoughts” when stopping a vehicle or engaging in a personal interaction); Daniel E. Hall et al., *Suing Cops and Corrections Officers: Officer Attitudes and Experiences About Civil Liability*, 26 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 529, 545 (2003) (surveying sheriff’s deputies, corrections officers, and municipal police officers in a southern state and concluding that “most public safety officers are not impacted on a day-to-day basis by the threat of civil liability”); Tom “Tad” Hughes, *Police Officers and Civil Liability: “The Ties that Bind”?*, 24 POLICING: INT’L J. POLICE STRATEGIES & MGMT. 240, 253 (2001) (reporting that a survey of Cincinnati police officers revealed that most officers “think civil liability impedes effective law enforcement” but that most do not “consider liability concerns when stopping a citizen”).

⁸³⁵ Byrne, *supra* note 20.

⁸³⁶ *Id.*

⁸³⁷ Zimroth, *supra* note 143 at 13.

⁸³⁸ Charney, March 21 Briefing Transcript at 80. For a further description of the effect of class actions, see Chapter 1, Section C for a discussion of *Floyd* and *supra* note 28 for a discussion of the *Ligon* and *Davis* cases.

and prohibit discovery during the initial stages of a case.⁸³⁹ Mr. Charney testified that the Fairness in Class Action Litigation Act of 2017 may “be a tremendous blow to civil rights enforcement,” because it would deter the kind of widely impactful class actions like *Floyd*.⁸⁴⁰ The NYPD notes that even though there may be few criminal suits against officers, the NYPD conducts many internal administrative prosecutions against officers they believe to have violated NYPD rules, some of which, as in the case of use of force rules, are much more extensive than those contained in the law.⁸⁴¹ Administrative prosecutions are handled by the DAO: its members prepare and prosecute internal NYPD trials and provide assistance to CCRB allegations amounting to charges sufficiently serious to merit a CCRB recommendation of “command discipline” with respect to the allegations (for a further discussion on the DAO and the CCRB, see Chapter 3, Section G below). According to the CCRB’s website, the DAO has administratively prosecuted approximately 400 cases, and taken pleas from approximately 180 members of the NYPD, since April 12, 2012.⁸⁴²

F. NYPD Policies and Internal Supervision and Feedback

The NYPD Patrol Guide,⁸⁴³ which establishes rules for officers, can also serve to promote accountability by clearly delineating officer conduct and by punishing those who fail to observe its rules. The NYPD Patrol Guide has recently been revised to reflect, among other things, (a) the procedures to be followed by NYPD officers in stop-and-frisk encounters, (b) the prohibition on racial profiling, and (c) the new Use-of-Force Policy.⁸⁴⁴ For example, according

⁸³⁹ *Id.*; see also Jenn Rolnick Borchetta, *A Critical Civil Rights Tool Is on the Chopping Block* (Mar. 8, 2017), <https://www.themarshallproject.org/2017/03/08/a-critical-civil-rights-tool-is-on-the-chopping-block>, H.R. 985, 115th Congress (2017); see also Brian Forbes, Joseph Wylie II, Molly McGinley, Jennifer Nagle & Matthew Low, *Proposed Fairness in Class Action Litigation Act of 2017 Seeks to Curb Attorney Abuses of Class Action Device and Expand Class Action Defendant Protections* (Mar. 1, 2017), <http://www.klgates.com/proposed-fairness-in-class-action-litigation-act-of-2017-seeks-to-curb-attorney-abuses-of-class-action-device-and-expand-class-action-defendant-protections-03-01-2017/>.

⁸⁴⁰ Charney, March 21 Briefing Transcript at 81; see also H.R. 985, 115th Congress (2017); see also *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) and Borchetta, *supra* note 839.

⁸⁴¹ Byrne, *supra* note 20.

⁸⁴² See *The Administrative Prosecution Unit (APU)*, Civilian Complaint Review Board, <https://www1.nyc.gov/site/ccrb/prosecution/administrative-prosecution-unit-apu.page>.

⁸⁴³ See generally, *Patrol Guide*.

⁸⁴⁴ See *Patrol Guide* Procedure No. 212-11 for stop-and-frisk and anti-discrimination policies, and *Patrol Guide* Procedure Nos. 221-01 and 221-03 for the Use of Force Policy. Specifically, Procedure No. 221-01 01 outlines the scope of acceptable use of force by NYPD members (*i.e.*, reasonable force may be used to ensure the safety of an officer or another person, or otherwise protect life, or when it is reasonable to place a person in custody or prevent

to NYPD Commissioner O'Neill, the 2016 Use-of-Force Policy has facilitated the decrease in use of force and firearms discharges in 2016 and 2017.⁸⁴⁵ Officers alleged to have violated the procedures laid out in the Patrol Guide are supposed to be disciplined by their commanding officers, unless the gravity of the allegations merits more serious disciplinary measures (*see* Chapter 3, Section G below).⁸⁴⁶ However, there is evidence to suggest that officers often escape supervisory scrutiny: both the Independent Monitor and several community advocates, such as Mr. Charney, have suggested that NYPD officers have learned to feel impervious to the strictures of the law as a result of a repeated failure of direct supervision by their senior NYPD officers.⁸⁴⁷ The Independent Monitor reported in his Second Report to the *Floyd* Court that one of the biggest obstacles impeding cultural change at the NYPD is “a challenge of leadership, particularly for those who supervise officers, engage in day-to-day enforcement activities, sergeants, their immediate supervisors, and the precinct and unit commanders who set the tone for those under them.”⁸⁴⁸ Institutionalizing fair and constitutional police practices, the Independent Monitor stated, will require “changes in policies, training, supervision, and all the ways the NYPD incentivizes good police behavior and discourages unacceptable behavior.”⁸⁴⁹

According to Mr. Charney, supervising officers provide the first line of defense against police misconduct.⁸⁵⁰ He testified that sergeants, lieutenants and precinct commanders are the key to institutionalizing unbiased and constitutional policing in a police department because they

escape from custody). Although members may discharge a firearm to prevent the unlawful use of force that may cause death or serious physical injury, Procedure No. 221-01 lists circumstances in which discharge of a firearm is prohibited, including to subdue a fleeing felon who presents no threat of imminent death or serious injury to another person, and generally prohibits the use of force against restrained subjects and the use of chokeholds. Members of the NYPD are directed to employ de-escalation techniques to reduce or eliminate the need to use force when appropriate and consistent with personal safety. Procedure No. 221-03 covers the reporting and investigation of force incidents, including use of force against subjects, injuries sustained by subjects during apprehension or while in the care and custody of the NYPD, injuries to any person as a result of police action, active resistance by subjects and force used against members of the NYPD. Officers are required to fill out a TRI Worksheet to record any physical injury of a member of the public in the care and custody of the NYPD, any physical injury sustained by a member of the NYPD while apprehending or controlling a subject and any subject actively resisting custody. Procedure No. 221-03 also outlines the responsibilities of immediate supervisors on scene to assess the level of force used and the role of investigating supervisors.

⁸⁴⁵ Use of Force Report, Foreword.

⁸⁴⁶ *See* NYPD, *The Police Commissioner's Report* (Jan. 2018) at 36,

<http://www1.nyc.gov/assets/nypd/reports/2018preport/index.html>.

⁸⁴⁷ Charney, March 21 Briefing Transcript at 26; *see also* Zimroth, *supra* note 168.

⁸⁴⁸ Zimroth, *supra* note 152.

⁸⁴⁹ *Id.*

⁸⁵⁰ Charney, March 21 Briefing Transcript at 26.

are “best positioned to communicate and reinforce the principles of constitutional and unbiased policing.”⁸⁵¹ Mr. Charney testified that supervisory officers should assess the legality and fairness of their subordinate officers’ conduct and promptly address any deviations from proper practice.⁸⁵²

The NYPD currently mandates supervisory review of subordinate officers.⁸⁵³ In addition, as part of *Floyd*’s court-ordered changes, the NYPD has amended the Patrol Guide to include an explicit requirement that supervisors assess the constitutionality of their subordinates’ stop-and-frisk activity.⁸⁵⁴ Nonetheless, in conducting a study of 600 stop-and-frisk encounters in 2015, the Independent Monitor found that supervisory officers approved and/or failed to reprimand their subordinate officers for deficiencies, such as failure to articulate reasonable suspicion in stopping individuals.⁸⁵⁵ He reported that in each instance of a stop-and-frisk that occurred without reasonable suspicion, the supervising officer nonetheless signed off on its subordinate officer’s stop report.⁸⁵⁶ In his most recent report to the court, the Independent Monitor noted that the Independent Monitor team has seen very few instances in which supervisors are noting on stop reports an insufficient basis for a stop, frisk or search and that the role of supervisors will continue to be monitored for improvement.⁸⁵⁷

Mr. Charney testified that reforming the supervisory scrutiny must be a first priority in reworking the culture at the NYPD.⁸⁵⁸ According to Mr. Charney, “unless and until the NYPD’s first-line supervisors are willing and able to do their jobs properly, constitutional and unbiased policing will not be the norm on the streets of New York City.”⁸⁵⁹ The Independent Monitor noted in his most recent report that he “perceives some positive changes in organizational culture driven by the police commissioner and others in leadership roles” and that “the monitor team has seen a number of commanders and executives implementing new protocols proactively to

⁸⁵¹ *Id.* at 27-28.

⁸⁵² *Id.* at 28.

⁸⁵³ *Patrol Guide* Procedure No. 202-08a.

⁸⁵⁴ Charney, March 21 Briefing Transcript at 28-29; *see also* Zimroth, *supra* note 168.

⁸⁵⁵ Zimroth, *supra* note 168.

⁸⁵⁶ *Id.*

⁸⁵⁷ Zimroth, *supra* note 143 at 13.

⁸⁵⁸ Charney, March 21 Briefing Transcript at 29-30.

⁸⁵⁹ *Id.*

address stop and frisk issues” and “no longer hears officers say that they feel pressure to make stops without regard for effectiveness or legality.”⁸⁶⁰

To better monitor officer activity, the NYPD recently changed the type of reporting required of officers; they must now record their daily activities in narrative form, which may be done on their smartphones.⁸⁶¹ The new narrative requirement allows officers to record things like “jumping in the water to help a child” or “find a missing person,” according to the NYPD, something that would have gone unnoticed in the past.⁸⁶² According to the NYPD, the new review system facilitates immediate supervisory review, and allows supervisors to request immediate changes to unsatisfactory behavior.⁸⁶³ NYPD Chief Monahan noted that officers’ quarterly reviews will now be based on the level of crime in their assigned neighborhoods, taking a holistic view of officers’ contributions to the community.⁸⁶⁴

In addition, among other things, the NYPD recently has instituted a more robust oversight infrastructure to investigate use-of-force incidents and increase officer accountability.⁸⁶⁵ As part of that oversight, the NYPD First NYPD Deputy Commissioner holds monthly meetings that assess, with the Risk Management Bureau and Borough adjutants, among others, the quality of the TRI Worksheets and the investigations of select use-of-force incidents.⁸⁶⁶ The Risk Management Bureau, an outgrowth of the *Floyd* litigation, not only

⁸⁶⁰ Zimroth, *supra* note 143 at 4.

⁸⁶¹ Trevor Kapp, *Neighborhood Policing Changing Attitudes and Reaping Benefits, NYPD Says*, DNA Info (Apr. 16, 2017), <https://www.dnainfo.com/new-york/20170406/central-harlem/nypd-neighborhood-policing-nci-community-police-department>; see also Byrne Interview (Feb. 13, 2017), *supra* note 30; see also NYPD, *The Police Commissioner’s Report* (Jan. 2018) at 31, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁸⁶² Kapp, *supra* note 861; see also Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Terence Monahan, then NYPD Chief of Patrol and now NYPD Chief of Department, in N.Y. (Feb. 15, 2017).

⁸⁶³ Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Chief Terence Monahan, then NYPD Chief of Patrol and now NYPD Chief of Department, in N.Y. (Feb. 15, 2017).

⁸⁶⁴ *Id.*

⁸⁶⁵ Use of Force Report at 9.

⁸⁶⁶ *Id.* at 12. The Use of Force Report also describes a multi-layered oversight structure of supervision for use of force incidents, starting with frontline supervisors, who are sergeants and/or patrol supervisors in charge of overseeing all police field operations within a command or precinct, and are responsible for investigating all Level 1 uses of force; followed by Duty Captains, who oversee all personnel in their commands and investigate Level 2 uses of force; and lastly, the Duty Chief, the “principal operations commander,” who acts as a representative of the Chief of Department and respond to all serious incidents within New York City. *Id.* at 9. In addition to these layers of direct oversight for use of force incidents, the NYPD describes several internal divisions with unique oversight responsibility: (1) Borough Investigations Units, who are charged with investigating instances of non-criminal

implements court-ordered stop-and-frisk reforms and acts as the liaison with the Independent Monitor, but also analyzes data, designs policy changes and oversees the NYPD's performance monitoring programs.⁸⁶⁷ The Risk Management Bureau also conducts command audits and reviews the effectiveness of command performance at the precinct level and otherwise.⁸⁶⁸ In 2018, it plans to introduce a new command evaluation system.⁸⁶⁹ In addition, the NYPD has a strict firearms oversight regime under which it reviews each firearms discharge for tactical errors and procedural violations, even when an officer's firearm discharge is deemed justified by a court of law.⁸⁷⁰ The NYPD notes that it is also subject to oversight by numerous other internal organizations, such as the Force Investigations Division, which is responsible for investigation of serious uses of force, the Borough Investigations Unit, which investigates non-criminal violations of NYPD regulations, the Use of Force Review Board, which oversees the integrity of the Use-of-Force Policy, and the IAB, which is responsible for detecting, deterring and prosecuting corruption and misconduct in the NYPD.⁸⁷¹

The IAB conducts proactive investigations and operates a command center, open at all times, that receives complaints from the public.⁸⁷² The IAB conducts approximately 1300 investigations a year, which may involve allegations of corruption or incidents such as misuse of NYPD computers or an officer's improper use of time while he or she is on duty.⁸⁷³ It also conducts integrity testing when it receives repeated allegations of misconduct or corruption for

violations of NYPD rules and certain criminal incidents involving police officers; (2) the Force Investigation Division (FID), a group staffed with 60 investigators, who is responsible for investigating Level 3 uses of force that involve firearms discharges, cases in which a subject is seriously injured, and cases in which a subject dies in police custody; (3) the Use of Force Review Board, an oversight mechanism tasked with "maintaining the integrity of the [NYPD's] use of force policy," who reviews the most serious cases of uses of force and making finding regarding the propriety of officer conduct in such cases; and (4) the Risk Management Bureau, whose role is described in the following paragraph. *Id.*

⁸⁶⁷ NYPD, *The Police Commissioner's Report* (Jan. 2018) at 67, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁸⁶⁸ *Id.*

⁸⁶⁹ *Id.*

⁸⁷⁰ Use of Force Report at 11.

⁸⁷¹ *Id.* at 9-11; *see also* Internal Affairs, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page>.

⁸⁷² Internal Affairs, NYPD, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page>. For a discussion of the concurrent jurisdiction of the CCRB, *see* Chapter 3, Section G.

⁸⁷³ Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Joseph Reznick, NYPD Deputy Comm'r of Internal Affairs, in N.Y. (Feb. 15, 2017).

officers in the same precinct.⁸⁷⁴ For example between 2014 and 2017, the IAB opened 37 case operations based on repeated complaints in the same command.⁸⁷⁵ The IAB also sets up certain cases for “programmatic review,” by which an investigation is automatically reopened for follow up.⁸⁷⁶ Among its more highly publicized investigations, in 2014 the IAB attempted to crack down on the “collars for dollars” practice that was then allegedly rampant.⁸⁷⁷ The IAB reports to the NYPD Commissioner monthly and yearly on the number and types of corruption and misconduct allegations it receives and investigates.⁸⁷⁸

One of the NYPD’s primary oversight bodies is the OIG, an independent unit within the NYPD responsible for investigating corruption, fraud, waste and abuse in the NYPD.⁸⁷⁹ The OIG’s mandate is to enhance the effectiveness of the NYPD and increase public safety while protecting civil liberties and civil rights and ensuring the public’s trust in the NYPD.⁸⁸⁰ The OIG has statutory authority to review, audit and make recommendations to the NYPD regarding the NYPD’s policies and procedures.⁸⁸¹ The NYPD must respond to the OIG’s recommendations within 90 days of its publishing recommendations to the NYPD. Several of the OIG’s reports are mentioned in this report (*see* Chapter 1 for the OIG Report on the efficacy of broken windows policing, Chapter 1, Section C5 for an analysis of the NYPD’s CIT training, and Chapter 3, Section A for a response to the NYPD’s Use of Force Report), and the OIG publishes reports on a variety of other topics, including the use of chokeholds⁸⁸² and the NYPD’s body-

⁸⁷⁴ *Id.*

⁸⁷⁵ *Id.*

⁸⁷⁶ *Id.*

⁸⁷⁷ Rocco Parascandola, *Exclusive: NYPD Internal Affairs Chief Sends Scathing Memo Warning Cops Against Making Arrests Just to Earn More Overtime*, N.Y. Daily News (April 15, 2014), <http://www.nydailynews.com/new-york/nyc-crime/nypd-internal-affairs-warns-cops-making-arrests-earn-overtime-article-1.1757248>.

⁸⁷⁸ *See* NYC Commission to Combat Police Corruption, *Eighteenth Annual Report of the Commission* (Aug. 2017), <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf>.

⁸⁷⁹ *See supra* note 162

⁸⁸⁰ *Id.*

⁸⁸¹ Local Law 70 (2013).

⁸⁸² *See* Mark G. Peters & Philip K. Eure, *Observations on Accountability and Transparency in Ten NYPD Chokehold Cases* (Jan. 2015) http://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-01-12-Comm-MGP-Chokehold-SIGNED-Letter-wReport_FINAL.pdf.

worn camera pilot program.⁸⁸³ The OIG also publishes annual reports with recommendations for the NYPD.⁸⁸⁴

In addition to improving the NYPD's oversight infrastructure and internal review metrics, and abandoning a performance evaluation structure at the NYPD that, Mr. Charney testified, incentivizes officers to increase their activity levels without incentivizing problem-solving techniques, the NYPD, according to Mr. Charney, should build a comprehensive early warning system to identify those officers most susceptible to "engaging in unconstitutional and biased policing."⁸⁸⁵ He testified that there is an emerging national consensus that an early warning system is an effective means of mitigating police misconduct.⁸⁸⁶ In 2018, the NYPD plans to embark on the implementation of its Risk Analysis Information Litigation System, RAILS, which will allow commanding officers to assess their subordinates and identify at-risk behavior early.⁸⁸⁷ According to Mr. Charney, the NYPD currently maintains a database containing early warning indicators – such as civilian complaints, lawsuits against an officer, uses of force, firearms discharges, bad performance evaluations and prior disciplinary action penalties – to identify at-risk officers.⁸⁸⁸ Mr. Charney testified that the RAILS system being developed represents an improvement to the NYPD's accountability tools, but the indicators that feed it are "woefully under-inclusive."⁸⁸⁹ He stated that the RAILS system fails to employ a large body of information that would increase the system's ability to identify bad actors, including information such as an officer's (a) level of arrest and summons activity, (b) number of resisting arrest arrests, (c) number of obstruction of governmental administration charges, (d) number of disorderly conduct charges, (e) number of adverse suppression rulings, and (f) number of adverse credibility rulings.⁸⁹⁰ Furthermore, Mr. Charney recommended that, in addition to internal monitoring done by the NYPD, an independent agency, such as the OIG, should assess whether

⁸⁸³ See Mark G. Peters & Philip K. Eure, *Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability* (July 2015)

http://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-07-30-Nypdbodycamerareport_final.pdf.

⁸⁸⁴ See *DOI Reports*, N.Y. City's Inspector General, <http://www1.nyc.gov/site/doi/newsroom/public-reports.page>.

⁸⁸⁵ Charney, March 21 Briefing Transcript at 26, 30-32.

⁸⁸⁶ *Id.* at 33.

⁸⁸⁷ NYPD, *The Police Commissioner's Report* (Jan. 2018) at 67, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁸⁸⁸ Charney, March 21 Briefing Transcript at 34; see also Zimroth, *supra* note 168.

⁸⁸⁹ Charney, March 21 Briefing Transcript at 34.

⁸⁹⁰ *Id.*

any commands, units or individual supervisors are enforcing numerical arrest/summons metrics against their officers, as these quota-type metrics can lead to racially motivated policing.⁸⁹¹ NYPD Deputy Commissioner Reznick noted that the NYPD seeks to weed out “bad apples” by analyzing the number of complaints made against officers.⁸⁹² Moreover, he stated that the NYPD looks at complaint data on a precinct level, and addresses problems with the precinct’s commanding officer if a pattern of misconduct is found.⁸⁹³ This allows the NYPD to address patterns of police misconduct where those problems exist, he stated.⁸⁹⁴

G. CCRB as an External Oversight Mechanism

Another external mechanism for police accountability is an independent review board comprised of civilians. In NYC, that entity is the CCRB, which was established in 1953 to provide oversight of police conduct and to investigate complaints made against NYPD officers.⁸⁹⁵ Originally comprised of NYPD personnel, in 1993 the composition of the CCRB was reconstituted to consist exclusively of civilians – there are now 13 members, five of whom are selected by the Mayor, five by the New York City Council, and three by the NYPD Commissioner.⁸⁹⁶ The CCRB has the authority to investigate all civilian complaints of officer misconduct involving the excessive use of force, abuse of authority, discourtesy and offensive language (collectively, “FADO”), but only has the authority to recommend disciplinary penalties: it lacks the express authority to discipline an officer.⁸⁹⁷ The CCRB has a \$16.5 million budget, and an authorized headcount of 185 full-time employees.⁸⁹⁸ By way of

⁸⁹¹ *Id.* at 33-34.

⁸⁹² Interview by the N.Y. Advisory Comm. to the U.S. Comm’n on Civil Rights with NYPD Deputy Comm’r Joseph Reznick, NYPD Deputy Comm’r of Internal Affairs, in N.Y. (Feb. 15, 2017).

⁸⁹³ *Id.*

⁸⁹⁴ *Id.*

⁸⁹⁵ *History*, Civilian Complaint Review Board, <http://www1.nyc.gov/site/ccrb/about/history.page>.

⁸⁹⁶ *Id.*

⁸⁹⁷ N.Y. City Charter, ch. 18-A § 440(c)(1), https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/nyc_ccrb_charter.pdf; see also Rules of the Civilian Complaint Review Board § 1-02(a); see also NYCLU, *Five Years of Civilian Review, A Mandate Unfulfilled*, 1998 at 4 (stating that the CCRB does not usurp power of the police commissioner because authority to discipline police officers remains with the commissioner), <https://www.nyclu.org/en/publications/report-five-years-civilian-review-mandate-unfulfilled-1998>.

⁸⁹⁸ N.Y. City Council, *Report of the Fiscal 2018 Preliminary Budget and the Fiscal 2017 Preliminary Mayor’s Management Report for the Civilian Complaint Review Board* (Mar. 14, 2017), <http://council.nyc.gov/budget/wp-content/uploads/sites/54/2017/03/054-CCRB.pdf>; see also Darche, March 21 Briefing Transcript at 202.

comparison, the NYPD's fiscal year 2018 budget is \$5.6 billion, which represents a \$417.2 million increase from the NYPD's 2017 budget.⁸⁹⁹

Cases appear before the CCRB when a person files a complaint with it or when the IAB refers a FADO complaint and related allegations to the CCRB.⁹⁰⁰ The CCRB investigates separately from the IAB, but the agencies collaborate in certain circumstances.⁹⁰¹ If a complaint alleges excessive force, both the CCRB and the IAB will investigate the complaint and will confer before the IAB closes its case.⁹⁰² Moreover, the IAB must inform the CCRB of the complaints it receives, although the CCRB need not inform the IAB about the complaints it receives.⁹⁰³

Complaints may be filed with the CCRB in person, by mail, by calling 311 or through the CCRB's hotline or website.⁹⁰⁴ In the first half of 2017, 72% of complaints alleged abuse of authority and 38% of complaints alleged improper use of force, the second most common complaint, with most of the force allegations involving physical force.⁹⁰⁵ Through the work of its investigative staff, the CCRB makes findings and, when appropriate, recommends disciplinary action against NYPD officers to the NYPD Commissioner in cases where the CCRB substantiates – meaning that an instance of misconduct is found to have occurred based on a

⁸⁹⁹ N.Y. City Council, *Report to the Committee on Finance and the Committee on Public Safety on the Fiscal 2018 Executive Budget for New York Police Department* (May 22, 2017), <http://council.nyc.gov/budget/wp-content/uploads/sites/54/2017/03/056-NYPD-exec-1.pdf>.

⁹⁰⁰ See *File a Complaint*, Civilian Complaint Review Board, <https://www1.nyc.gov/site/ccrb/complaints/file-complaint.page> (discussing the referral of complaints to the appropriate NYC agency); see also, Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Joseph Reznick, NYPD Deputy Comm'r of Internal Affairs, in N.Y. (Feb. 15, 2017).

⁹⁰¹ *Id.*; see also N.Y. City Charter, ch. 18-A § 440(d) (requiring police department to provide reasonable assistance and cooperate with investigations by the board), https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/nyc_ccrb_charter.pdf; see also *Investigations*, Civilian Complaint Review Board, <http://www1.nyc.gov/site/ccrb/investigations/investigations.page> (noting that the CCRB has access to police department records, such as roll calls, command logs, vehicle assignments, and stop-and-frisk forms. In addition, the NYPD Patrol Guide requires officers to appear at the CCRB to be interviewed if they are the subject of the complaint).

⁹⁰² Interview by the N.Y. Advisory Comm. to the U.S. Comm'n on Civil Rights with NYPD Deputy Comm'r Joseph Reznick, NYPD Deputy Comm'r of Internal Affairs, in N.Y. (Feb. 15, 2017).

⁹⁰³ *Id.*

⁹⁰⁴ See Civilian Complaint Review Board, *supra* note 900; see also Darche, March 21 Briefing Transcript at 173.

⁹⁰⁵ 2017 Bi-Annual CCRB Report, *supra* note 153 at 11.

preponderance of the evidence – at least one FADO allegation against an officer.⁹⁰⁶ According to the CCRB’s biannual report for 2015 (January-June 2015), the CCRB received 6,920 complaints and 8,897 total FADO allegations against police officers for the period from January 2014 through June 2015.⁹⁰⁷ According to the 2016 annual report, as of May 1, 2017, 42% of the 35,866 active NYPD officers had no complaints filed against them, while one officer had 52 complaints filed against him.⁹⁰⁸ Furthermore, of the NYPD officers active as of May 1, 2017, 90% had not had a substantiated CCRB complaint made against them, while two active NYPD officers each had seven substantiated complaints made against them.⁹⁰⁹

When the CCRB substantiates allegations of misconduct against a member of the NYPD, it has the authority to recommend various types of discipline, depending on the severity of misconduct involved.⁹¹⁰ The CCRB makes a recommendation of “Instructions or Formalized Training”⁹¹¹ if a violation appears to be based on a misunderstanding of the rules, or “Command Discipline”⁹¹² if the misconduct is more problematic than poor training but does not rise to the

⁹⁰⁶ *Id.* at 58; see also N.Y. City Charter, ch. 18-A § 440(c)(1) (“No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation”),

https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/nyc_ccrb_charter.pdf; see also New York City Department of Investigations, *Third Annual Report of the Office of the Inspector General for the NYPD (OIG-NYPD)* (Mar. 2017),

http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/DOI_OIGNYPD_Third_Annual_Report.pdf.

⁹⁰⁷ Civilian Complaint Review Board, Semi-Annual Report (January-June 2015),

https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2015_semi-annual.pdf.

⁹⁰⁸ Civilian Complaint Review Board, 2016 Annual Report (July 2017) at 21,

https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2016_annual.pdf.

⁹⁰⁹ *Id.*

⁹¹⁰ *Id.* at 7.

⁹¹¹ *Id.* at 31. This is often recommended for officers who misunderstand a policy. The aim is to reinstruct the officer on proper conduct and procedure with respect to the complaint filed. If Instructions or Formalized Training is imposed, the respective officer is required to participate in training at the command level (“Instructions”) or training at the Police Academy or NYPD Legal Bureau (“Formalized Training”).

⁹¹² *Id.* The NYPD defines “Command Discipline” as a “non-judicial punishment available to . . . correct deficiencies and maintain discipline within the command.” *Patrol Guide Procedure No. 206-02: Schedule “A” and Schedule “B” Command Disciplines* (Apr. 20, 2017),

http://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf. There are three different types of Command Disciplines: 1) “Schedule A,” which is reserved for “minor” violations such as reporting late for duty; 2) “Schedule B,” which is used for more serious violations such as failure to safeguard a prisoner; and 3) “Schedule C,” which is the most serious type of Command Discipline available and is reserved for violations reviewed and determined to be severe by the Department Advocate. “Schedule C” violations will only be adjudicated by the patrol borough/bureau adjutant. Pursuant to the NYPD Patrol Guide, the following types of penalties for Command Disciplines can be imposed: (a) Forfeiture of up to 5 days’ vacation or accrued time for Schedule A violations; (b) Forfeiture of up to 10 days’ vacation or accrued time for Schedule B violations; (c) Forfeiture of up to 20 days’ vacation or accrued time for Schedule C violations (as determined by the Department

level of the most serious misconduct.⁹¹³ The DAO is responsible for cases in which the CCRB has recommended Instructions or Formalized Training or Command Discipline.⁹¹⁴ When misconduct is serious and merits consequences beyond a Command Discipline recommendation, the CCRB will recommend that formal administrative “Charges and Specifications” be brought against the officer, which, if the NYPD concurs, leads (as of 2013) to an administrative prosecution by the CCRB’s Administrative Prosecution Unit (the “APU”).⁹¹⁵ While experts, such as Mina Malik, appreciate the potential role of the APU in increasing police accountability, they also point out that the APU lacks independence from the NYPD Commissioner in its present form.⁹¹⁶ The APU is governed by a 2012 Memorandum of Understanding that became effective in April 2013 (the “2012 MOU”) between the NYPD and the CCRB.⁹¹⁷ The 2012 MOU limits the APU’s authority and discretion to impose discipline.⁹¹⁸ Mina Malik argued that the best way for the APU to become an effective tool for police accountability was for the New York City Council to codify its existence and replace the 2012 MOU with its own grant of authority.⁹¹⁹

According to the 2012 MOU, in “limited” circumstances in which the NYPD Commissioner determines that the CCRB’s prosecution of recommended Charges and Specifications would be “detrimental to” the NYPD’s disciplinary processes, the NYPD

Advocate’s Office); (d) Revocation of permission to engage in outside employment for a fixed period of time, not to exceed 30 days, if the violation is related to the outside employment; (e) Restriction of out-of-command assignments, which pay “portal-to-portal” and overtime for a fixed period, not to exceed 5 such assignments.

⁹¹³ *Police Discipline*, NYPD, <https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page>.

⁹¹⁴ Civilian Complaint Review Board, Semi-Annual Report (January-June 2016) at 22, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2016_semi-annual.pdf (hereinafter cited as *2016 Bi-Annual CCRB Report*). There are exceptions when the Department initiates its own prosecution for the same conduct prior to the APU filing charges or when the Police Comm’r exercises his authority to retain cases under Section Two of the MOU.

⁹¹⁵ *Id.*; Memorandum of Understanding between CCRB and the NYPD concerning the Processing of Substantiated Complaints (Apr. 2, 2012), https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/apu_mou.pdf (hereinafter cited as the *CCRB MOU*); see also *Patrol Guide* Procedure No. 206-05: Preparation of Charges and Specifications or Schedule “C” Command Discipline (Apr. 20, 2017), http://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf. Recommended penalties can include termination from the NYPD, dismissal probation, suspension without pay, loss of vacation days or a warning and admonishment only.

⁹¹⁶ See Malik, March 21 Briefing Transcript at 133; José Luis Morin, *Latinos and Criminal Justice: An Encyclopedia* (Greenwood 2016) at 230-31.

⁹¹⁷ CCRB MOU.

⁹¹⁸ W. Briggs, *Police Oversight: Civilian Oversight Boards and Lessons Learned from Our Neighbors to the North*,

40 SUFFOLK TRANSNAT’L L. REV. 139, 152-53 (2017); See Morin, *supra* note 916 at 230-31; see also CCRB MOU.

⁹¹⁹ Malik, March 21 Briefing Transcript at 133-34.

Commissioner must notify the CCRB.⁹²⁰ The prosecution of Charges and Specifications against an NYPD officer is deemed to be detrimental to the NYPD’s disciplinary process when “there are parallel or related criminal investigations” underway or, “when, in the case of an officer with no disciplinary history or prior substantiated CCRB complaints, and based on the officer’s record and disciplinary history or prior substantiated CCRB complaints, the interests of justice would not be served.”⁹²¹ The CCRB may reject the NYPD Commissioner’s request not to prosecute an officer, and the NYPD Commissioner may, in turn, also reject the CCRB’s rejection.⁹²² In circumstances where the NYPD Commissioner rejects the CCRB’s rejection, the CCRB will drop the case.⁹²³ When the NYPD Commissioner chooses to deviate from the disciplinary recommendations of the CCRB, the NYPD Commissioner must provide the CCRB with a “detailed explanation” of his or her reasoning in writing and what discipline if any the NYPD Commissioner would pursue.⁹²⁴ Under the 2012 MOU, the exchanges between the NYPD Commissioner regarding discipline are confidential and deemed to fall within Section 50-A.⁹²⁵

In the first half of 2017, the CCRB substantiated 20% of the claims it fully investigated (against 190 police officers) and in the first half of 2016, it substantiated 26% of the claims it fully investigated (against 318 police officers).⁹²⁶ In the first half of 2017, the NYPD took some form of discipline against 76% of the substantiated claims not involving Charges and Specifications, and of those 49% were Command Discipline.⁹²⁷ When the CCRB substantiates a Charges and Specifications claim, and the NYPD Commissioner does not oppose it, the NYPD can either negotiate a plea or settlement with the officer subject to the allegation, or prosecute the case in the NYPD’s internal adjudicatory forum (the “Trial Room”).⁹²⁸ When the allegation is

⁹²⁰ [CCRB MOU](#), § 2.

⁹²¹ *Id.*

⁹²² *Id.*

⁹²³ *Id.*

⁹²⁴ *Id.*; Darche, March 21 Briefing Transcript at 178.

⁹²⁵ [CCRB MOU](#), § 25.

⁹²⁶ 2017 Bi-Annual CCRB Report at 26; *see also* Benjamin Mueller, *New York Police Challenging More of Review Board’s Findings, Study Shows*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/nyregion/new-york-police-challenging-more-of-review-boards-findings-study-shows.html>.

⁹²⁷ 2017 Bi-Annual CCRB Report at 27.

⁹²⁸ [CCRB MOU](#), § 2; David Kocieniewski, *The Trial Room: A Special Report; System of Disciplining Police Assailed From Inside and Out*, N.Y. TIMES (Dec. 19, 1997), <http://www.nytimes.com/1997/12/19/nyregion/trial-room-special-report-system-disciplining-police-assailed-inside.html>; *see also* Darche, March 21 Briefing Transcript at 177-78.

prosecuted, the APU assumes responsibility for the prosecution in the Trial Room.⁹²⁹ The Trial Room is overseen by the NYPD Deputy Commissioner of Trials who has jurisdiction over disciplinary matters adjudicated by the NYPD.⁹³⁰ Trial Room hearings are generally open to the public.⁹³¹ If there is a conviction, some form of retraining or punishment (transfer, loss of vacation days or termination) is required.⁹³²

After the Trial Room hearing, the NYPD Deputy Commissioner of Trials reviews the testimony and evidence, and prepares a Report and Recommendation that consists of a summary and analysis of the testimony, recommended findings of fact and conclusions of law, and recommendations on the disposition of the Charges and Specifications.⁹³³ The CCRB may comment on the NYPD Deputy Commissioner of Trials' Report and Recommendation in what is commonly known as a "Fogel" letter.⁹³⁴ The Report and Recommendation is forwarded to the NYPD Commissioner, who makes the final determination on any sanctions against a police officer.⁹³⁵ The NYPD Commissioner may approve the recommendation or modify the findings or the penalty, so long as the findings are consistent with the record created during the hearing.⁹³⁶

The ultimate penalty imposed by the NYPD Commissioner may – and often does – deviate from the CCRB's original recommendation in all substantiated cases.⁹³⁷ NYPD Commissioner O'Neill imposed no discipline in 27% of cases in which the CCRB found substantiated misconduct and less severe discipline than recommended by the CCRB in 25% of such cases in the first half of 2017.⁹³⁸ In the first half of 2016, NYPD Commissioner Bratton imposed no discipline in 17% of such cases and less severe discipline than recommended by the

⁹²⁹ Darche, March 21 Briefing Transcript at 178.

⁹³⁰ N.Y. City Police Dep't, *The Rules of The City of New York*, rules.cityofnewyork.us, § 15-02, https://rules.cityofnewyork.us/sites/default/files/adopted_rules_pdf/implementation_of_mou_regarding_prosecution_of_complaint_-_f_nypd_3_11_13_a.pdf.

⁹³¹ Darche, March 21 Briefing Transcript at 178.

⁹³² Byrne Interview (Feb. 15, 2017), *supra* note 169. NYPD Deputy Comm'r Byrne stated that unlike other penalties, re-training an officer should not go on that officer's personnel record.

⁹³³ N.Y. City Police Dep't, *supra* note 930, § 15-06 Report to Police Commissioner.

⁹³⁴ [CCRB MOU](#), § 23.

⁹³⁵ *Id.*, § 20.

⁹³⁶ N.Y. City Police Dep't, *supra* note 930, § 15-08(a) Final Review.

⁹³⁷ Charney, March 21 Briefing Transcript at 37-39; *see, e.g.*, Peters & Eure, *supra* note 875; *see also* NYCLU, Letter to CCRB re: 2016 Year-End Figures on Police Misconduct (Jan. 17, 2017), https://www.nyclu.org/sites/default/files/field_documents/letter-to-ccrb.pdf.

⁹³⁸ 2017 Bi-Annual CCRB Report, *supra* note 153 at 30-31.

CCRB in 21% of such cases.⁹³⁹ Even though the NYPD Commissioner has to explain in writing his reasoning for rejecting a CCRB recommendation, in practice, according to Mr. Charney, little information is furnished to explain what information persuaded the NYPD Commissioner to alter the punishment.⁹⁴⁰ “It’s just a literal black box,” he testified.⁹⁴¹

According to Mr. Charney, the fact that the CCRB’s disciplinary recommendations are reviewable by the NYPD Commissioner is problematic.⁹⁴² The oversight, according to him, results in the NYPD’s often either failing to discipline officers or departing downward from the penalty recommendations of the CCRB.⁹⁴³ This type of oversight was found wanting by the *Floyd* Court, which noted that such oversight helped facilitate the NYPD’s widespread practice of unconstitutional and racially discriminatory stops by reinforcing the idea that the NYPD is not subject to meaningful oversight.⁹⁴⁴ Among the changes mandated by the court in *Floyd* were that the NYPD had to “giv[e] increased deference to the CCRB’s credibility determinations” and employ “an evidentiary standard that does not automatically favor the subject officer’s testimony over the complainant.”⁹⁴⁵ According to Mr. Charney, it is not yet clear that the NYPD has implemented these changes more than four years after *Floyd*.⁹⁴⁶

Moreover, the CCRB’s reconsideration process, which was adopted in 2014 at the NYPD’s request, provides an alternate avenue to allow the NYPD to undermine the CCRB’s findings, according to Mr. Charney.⁹⁴⁷ The reconsideration process permits the NYPD’s DAO to request that the CCRB “reconsider its findings and/or discipline recommendations for a

⁹³⁹ *Id.*

⁹⁴⁰ Charney, March 21 Briefing Transcript at 82; Peters & Eure, *supra* note 882 at iv.

⁹⁴¹ Charney, March 21 Briefing Transcript at 82.

⁹⁴² *Id.* at 36.

⁹⁴³ *Id.*; see also *Floyd*, 959 F. Supp. 2d 540 at 659 (demanding that improved “procedures for imposing discipline in response to [CCRB] findings of substantiated misconduct during stops . . . must include increased deference to credibility determinations by the CCRB, an evidentiary standard that is neutral between the claims of complainants and officers, and no general requirement of corroborating physical evidence”); NYCLU, *CCRB Misconduct Findings Rise and Serious Discipline is Rarely Recommended* (Jan. 18, 2017), <https://www.nyclu.org/en/press-releases/nyclu-analysis-ccrb-misconduct-findings-rise-and-serious-discipline-rarely>.

⁹⁴⁴ *Floyd*, 959 F. Supp. 2d 540 at 659 (“[T]he need for better supervision, monitoring, training, and discipline to protect against constitutional violations was obvious, but senior officials at the NYPD ‘fail[ed] to make meaningful efforts to address the risk of harm.’”) (quoting *Cash v. Cnty of Erie*, 654 F.3d 324, 334 (2d Cir. 2011)).

⁹⁴⁵ Charney, Briefing Transcript, Mar. 21, 2017 at 36-37; see also *Floyd*, 959 F. Supp. 2d 540 at 659.

⁹⁴⁶ Charney, Briefing Transcript, Mar. 21, 2017 at 37; see also *Floyd*, 959 F. Supp. 2d 540 at 659.

⁹⁴⁷ *Id.*; see also Zamani, *supra* note 154.

previously-substantiated allegation.”⁹⁴⁸ According to Mr. Charney, no rules or formal standards governing when reconsideration may be requested or granted have been published.⁹⁴⁹ The CCRB says that it may reconsider a case only if “(a) the discipline recommended against any subject officer is determined upon reconsideration to be inappropriate or excessive; or (b) there are new facts or evidence that were not previously known to the Board panel, and such facts or evidence could reasonably lead to a different finding or recommendation in the case; or (c) there are matters of fact or law which are found to have been overlooked, misapprehended or incorrectly applied to a particular case by the deciding panel.”⁹⁵⁰ Mr. Charney testified that the CCRB has interpreted these “vague” standards to include cases in which there are differing views between the CCRB and the NYPD with respect to witness credibility.⁹⁵¹ The CCRB acknowledges that the reconsideration could include differing views between the CCRB and the NYPD regarding witness credibility, legal standards or appropriate discipline, but says that it “takes reconsideration requests very seriously and does not compromise the integrity of its independent investigative findings when deciding whether to reverse the disposition of a case.”⁹⁵² Mr. Charney testified that this approach is “exactly what the federal court in *Floyd* said the NYPD should not be doing,” which is to make it easier for the NYPD to contest CCRB credibility determinations.⁹⁵³

Reform advocates caution that reconsideration requests can be used to undermine any CCRB decision that the NYPD does not want to follow.⁹⁵⁴ Not only does the process decrease the likelihood that officers will be held accountable for misconduct, Mr. Charney testified, but it also “severely undermines the CCRB’s independence from the NYPD and its legitimacy in the

⁹⁴⁸ 2017 Bi-Annual CCRB Report at 39.

⁹⁴⁹ Charney, March 21 Briefing Transcript at 37.

⁹⁵⁰ 2017 Bi-Annual CCRB Report at 39.

⁹⁵¹ Charney, March 21 Briefing Transcript at 38 (quoting Civilian Complaint Review Board, Annual Report 2015 at 37, https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2015_annual.pdf).

⁹⁵² 2017 Bi-Annual CCRB Report at 39.

⁹⁵³ Charney, March 21 Briefing Transcript at 37-39.

⁹⁵⁴ *Id.* at 37; see also Benjamin Mueller, *New York Police Challenging More of Review Board’s Findings, Study Shows*, N.Y. Times (July 19, 2017), <https://www.nytimes.com/2017/07/19/nyregion/new-york-police-challenging-more-of-review-boards-findings-study-shows.html> (quoting Christopher Dunn, NYCLU associate legal director, as saying “These figures make clear the department is using reconsideration as a tool to thwart the disciplinary process We were very concerned this was going to undermine the independence of the C.C.R.B., and these figures show that’s exactly what has happened.”).

eyes of the public.”⁹⁵⁵ The CCRB’s data suggests that the reconsideration process had a substantial effect on disciplinary outcomes in 2015 and 2016 but a less substantial effect in the first half of 2017: the CCRB downgraded disciplinary recommendations or findings (e.g., from claims substantiated to exonerated) in 56% of reconsideration cases in 2015, 45% of reconsiderations in 2016,⁹⁵⁶ and 13% of reconsideration cases in the first half of 2017.⁹⁵⁷ Making matters worse, critics say, is the length of time the NYPD takes to challenge the CCRB findings.⁹⁵⁸ According to the latest CCRB report, the DAO took an average of 280 days to submit a reconsideration request in the first half of 2017, presenting “a significant difficulty” with respect to the reconsideration process.⁹⁵⁹ Moreover, the number of reconsideration requests is on the rise, having more than doubled from the first half of 2016 to the first half of 2017.⁹⁶⁰ Many activists, like Mr. Charney, have called for the immediate repeal of the reconsideration process.⁹⁶¹

In addition, the time it takes the CCRB to process a claim, whether or not it has been the subject of a reconsideration request, has also been criticized both by advocates and the NYPD.⁹⁶² While the CCRB’s current benchmark is to complete investigations in an average of 90 days, in reality, the process of closing a case – which is measured from the date the CCRB receives a complaint to the date the CCRB either (a) fully investigates and dismisses a case, (b) administratively dismisses a case (for reasons such as officers leaving the NYPD during a pending case) or (c) mediates a case or closes a case after attempted mediation – lasted an average of 156 days in the first half of 2017.⁹⁶³ For cases with at least one substantiated claim, the average resolution time was 175 days in the first half of 2017.⁹⁶⁴ And the CCRB’s claim substantiation is merely the first step in a long process of holding an officer accountable.

⁹⁵⁵ Charney, March 21 Briefing Transcript at 38-39.

⁹⁵⁶ 2016 CCRB Annual Report at 48.

⁹⁵⁷ 2017 Bi-Annual CCRB Report at 42.

⁹⁵⁸ Benjamin Mueller, *Long Delays Cloud Police Department Disciplinary Trials*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/nyregion/james-blake-nypd-excessive-force.html>.

⁹⁵⁹ 2017 CCRB Bi-Annual Report at 41.

⁹⁶⁰ *Id.* at 40. The CCRB reported that there were 38 distinct officers with a substantiated allegation reconsidered in the first half of 2016 and 79 distinct officers in the first half of 2017.

⁹⁶¹ Charney, March 21 Briefing Transcript at 39-40.

⁹⁶² Siegel, March 21 Briefing Transcript at 47; Byrne Interview (Feb. 15, 2017), *supra* note 169.

⁹⁶³ Darche, March 21 Briefing Transcript at 198; *see also* 2017 Bi-Annual CCRB Report at 17.

⁹⁶⁴ 2017 Bi-Annual CCRB Report at 17.

According to *The New York Times*, of the 43 trial cases that began as CCRB-substantiated claims and concluded in the first eight months of 2017, claimants waited an average of 454 days for lawyers to rest their cases at trial, and another 201 days for a departmental judge to issue a ruling and for the NYPD Commissioner to decide whether to abide by the verdict.⁹⁶⁵

Jonathan Darche, Executive Director of the NYC Civilian Complaint Review Board, testified that the CCRB is committed to reducing the time it takes to process claims.⁹⁶⁶ According to Mr. Siegel, the CCRB should act on complaints within four months of receiving them and the NYPD Commissioner should act on any CCRB decision within 30 days.⁹⁶⁷ Faster reconciliation of substantiated cases by an independent entity and a quick rendering of a final resolution are critical steps to establishing public trust and building confidence in the NYPD, according to Ms. Malik.⁹⁶⁸ She added:

Cases that languish over time do nothing but frustrate victims and witnesses who may lose interest in cooperating with the process . . . [q]uite frankly, those officers who should be exonerated, should be exonerated as quickly as possible[, while] those officers who have committed misconduct should be held accountable as quickly as possible.⁹⁶⁹

Critics contend that the NYPD's ultimate review of CCRB determinations and the reconsideration process make clear that the CCRB lacks the independence that is necessary for true accountability.⁹⁷⁰ According to Mr. Siegel, "the CCRB has largely failed," adding "when people say to me, what about that dream for a real CCRB, a real accountability, I answer, at best, the dream has been [deferred]. And at worst, the dream has now become a nightmare."⁹⁷¹

Moreover, many contend that the CCRB lacks sufficient power to deter officer misconduct.⁹⁷² According to Mr. Darche, the CCRB's power is limited by the fact that its

⁹⁶⁵ Mueller, *supra* note 154.

⁹⁶⁶ Darche, March 21 Briefing Transcript at 198-99.

⁹⁶⁷ Siegel, March 21 Briefing Transcript at 47.

⁹⁶⁸ Malik, March 21 Briefing Transcript at 126.

⁹⁶⁹ *Id.*

⁹⁷⁰ See, e.g., Siegel, March 21 Briefing Transcript at 45-46.

⁹⁷¹ *Id.* at 50.

⁹⁷² See, e.g., Ali Winston, *Is NYPD Oversight Just Spinning Its Wheels?*, City Limits (Sep. 17, 2007), <https://citylimits.org/2007/09/17/is-nypd-oversight-just-spinning-its-wheels/>.

disciplinary recommendations lack the force of criminal or civil sanctions.⁹⁷³ The worst penalty an NYPD officer faces as a result of a CCRB proceeding is losing his or her job.⁹⁷⁴ Mr. Darche noted that the deterrent effect of losing one's job pales in comparison to the threat of criminal punishment, as when a district attorney oversees charges.⁹⁷⁵

Critics also contend that the CCRB and its mission needs to be better understood by the community for it to be effective.⁹⁷⁶ Mr. Darche explained that while the CCRB Outreach Unit tries to reach youth who are particularly at risk, the “largest challenge” the CCRB faces in this regard is that the Outreach Unit has only five full-time employees.⁹⁷⁷

Experts testified that another problem for the CCRB is its limited budget.⁹⁷⁸ The CCRB's \$16 million budget represents only one-fifteenth of the amount NYC spent on settlements and judgments in police misconduct lawsuits in fiscal year 2016.⁹⁷⁹ The CCRB releases periodic reports on specific policing activities and also releases biannual reports based on observed trends in its investigations, but critics believe that additional funding could be used to hold hearings and investigations on specific patterns and practices of police misconduct.⁹⁸⁰

H. Body-Worn Camera Policy

Another oversight mechanism that could serve to increase police accountability are police body-worn cameras (“BWCs”). In the Remedies Opinion, Judge Scheindlin ordered the NYPD to institute a pilot project in which BWCs were worn for a one-year period by officers on patrol

⁹⁷³ Darche, March 21 Briefing Transcript at 214.

⁹⁷⁴ *Id.*; *see also* 2016 CCRB Annual Report at 33-36.

⁹⁷⁵ Darche, March 21 Briefing Transcript at 214.

⁹⁷⁶ *Id.* at 194.

⁹⁷⁷ *Id.* at 194-5. Darche said in 2016 the Outreach Unit held 977 outreach presentations, compared to just 272 in 2015, which was a 259% increase. Many of these presentations occurred at schools and after-school centers; *see also* Maya Wiley, *Testimony Before the Public Safety Committee of the New York City Council* (Oct. 21, 2016), https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/news/speeches-and-testimonies/testimony/20161118_public-safety-testimony.pdf.

⁹⁷⁸ Moore, March 21 Briefing Transcript at 265-6.

⁹⁷⁹ *Id.* at 202; Mayor's Management Report at 96.

⁹⁸⁰ Siegel, March 21 Briefing Transcript at 48. For instance, beyond making recommendations about discipline for individual officers, the CCRB “should track systematic patterns of abuse and hold departments and Commissioners accountable for their actions and non-actions.” *Id.* Thus, if on analysis every year or every six months the CCRB observes a precinct with a spike in conduct such as Taser use, choke hold use, or other relevant indicators, it can and should hold hearings and focus investigatory efforts on that particular commanding officer to find out why the spike is happening. *Id.*

in one precinct per borough.⁹⁸¹ Judge Scheindlin required the Independent Monitor to work with the NYPD and oversee the implementation of the BWC pilot project and determine whether the benefits of body-worn cameras outweighed their costs.⁹⁸²

In December 2014, the NYPD launched a small-scale, 54-camera program implemented in five precincts and one Housing Police Service Area.⁹⁸³ Following the conclusion of the initial deployment, the Independent Monitor and the monitor team oversaw meetings between the NYPD and community stakeholders, including local elected officials, district attorneys' offices, defense bar organizations, victims' advocacy groups, civil liberties organizations, and police reform advocacy groups to discuss the next phase of the BWC program.⁹⁸⁴

In what Ms. Ponomarenko called a "remarkable" and "commendable" step, the NYPD reached out to the Policing Project at the NYU School of Law to help gather public input on its BWC policy.⁹⁸⁵ Working together, the NYPD and the Policing Project conducted an outreach campaign to solicit feedback from as many stakeholders as possible.⁹⁸⁶ This feedback on proposed NYPD rules reflects the type of front-end accountability that Ms. Ponomarenko testified would improve public trust of the police.⁹⁸⁷

On June 29, 2016, the NYPD posted its proposed BWC policy (the "Original Policy") online, along with two surveys to collect feedback on the proposed policy: the Policing Project created an online questionnaire to solicit public feedback (the "Public Survey") and the NYU Marron Institute launched a similar survey to solicit feedback from police officers (the "Officer Survey").⁹⁸⁸ There were over 25,000 responses to the Public Survey and over 50 organizations

⁹⁸¹ *Floyd*, 959 F. Supp. 2d at 685.

⁹⁸² *Id.*

⁹⁸³ Peter L. Zimroth, *Third Report of the Independent Monitor* (2016), Interim Briefing on Body-Worn Camera Pilot Program, <https://ccrjustice.org/sites/default/files/attach/2016/08/Monitor%27s%203rd%20Status%20Rpt%20%28on%20BWC%20Pilot%20Only%29.8%209%202016.pdf>.

⁹⁸⁴ *Id.*

⁹⁸⁵ Ponomarenko, March 21 Briefing Transcript at 144.

⁹⁸⁶ *Id.* at 145.

⁹⁸⁷ *Id.* at 142.

⁹⁸⁸ Peter L. Zimroth, Memorandum Regarding Approval of Policies for NYPD Body-Worn Camera Pilot Program (Apr. 11, 2017), <https://ccrjustice.org/sites/default/files/attach/2017/04/Monitor%204%2011%202017%20Memo%20to%20Court%20re%20Approval%20of%20BWC%20Op%20Order..pdf>.

gave comments.⁹⁸⁹ The public response was overwhelmingly in favor of BWCs: 73% of respondents believed that the cameras would improve police/community relations, public safety, officer safety, and the conduct of both officers and members of the public when they are interacting with each other, and 80% said they would feel comfortable reporting a crime to an officer wearing a body-worn camera.⁹⁹⁰ The Officer Survey collected responses from 5,419 officers, or approximately 15% of NYPD's uniformed members, as well.⁹⁹¹ The collective NYPD response was more ambivalent towards the use of BWCs than was the public's: while 44% of responding officers said they were either "very likely" or would "definitely" volunteer to wear a BWC and 27% said they would be "somewhat likely" to volunteer to wear one, 29% said they would not volunteer to wear a BWC.⁹⁹² In addition to normative views on BWC programs as a whole, the surveys also posed specific policy-based questions in order to facilitate public feedback on the NYPD BWC policy.⁹⁹³

Following receipt of the public feedback, the NYPD submitted to the Independent Monitor, and he approved, the NYPD's revised BWC policy (the "2017 BWC Policy") in April 2017. The 2017 BWC Policy will govern the BWCs that the NYPD recently began providing to its officers; all of the approximately 20,000 officers with patrol responsibilities are expected to have cameras by the end of 2018.⁹⁹⁴ The 2017 BWC Policy was publicized through a comprehensive report which summarized critics' concerns.⁹⁹⁵ The 2017 BWC Policy reflects some, but not all, of the core public comments received through the surveys. One key public

⁹⁸⁹ Ponomarenko, March 21 Briefing Transcript at 144.

⁹⁹⁰ NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 2. The NYPD Response noted that "respondents to the public questionnaire were disproportionately white" relative to the NYC population, but on key policy questions, race did not affect responses.

⁹⁹¹ *Id.*

⁹⁹² *Id.* at 3. The NYPD Response notes that officer surveys may have been affected by a letter from Patrick Lynch to members of the PBA, which, among other things, stated "BWCs will have an overall negative impact" on the rights and safety of PBA members." Patrick Lynch, PBA Update, <http://us7.campaign-archive1.com/?u=32027216b5955c36da689903e&id=8ec4d6fb6c&e=1ecec4b99d>.

⁹⁹³ See generally, NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

⁹⁹⁴ *Body-worn Cameras*, NYPD, <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>; see also NYPD, *The Police Commissioner's Report* (Jan. 2018) at 28, <http://www1.nyc.gov/assets/nypd/reports/2018pcreport/index.html>.

⁹⁹⁵ Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 5, <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/59ce7edfb0786914ba448d82/1506705121578/Report+to+the+NYPD+Summarizing+Public+Feedback+on+BWC+Policy.pdf>.

comment from a majority of respondents was that officers approaching individuals in a public place should be required to notify them that they are being recorded.⁹⁹⁶ In response, the NYPD altered the Original Policy, which merely encouraged officers to notify individuals that they were being recorded, to require officers to notify members of the public that an interaction is being recorded “unless notification could compromise the safety of any person or impede an investigation.”⁹⁹⁷ Moreover, officers are being trained that prompt notice is the rule, and that notice of recording should in most cases accompany their introduction.⁹⁹⁸ The 2017 BWC Policy also requires BWCs to be affixed to officers’ outermost garment in the center of the chest, which positions the BWC conspicuously and in plain view of subjects being recorded.⁹⁹⁹

The exceptions to the notification requirement embedded in the 2017 BWC Policy – namely, that officers need not notify when doing so would impede an investigation or compromise safety – closely track BWC policies adopted by other police departments in the United States.¹⁰⁰⁰ Additionally, as with BWC policies of other police departments reviewed by the NYPD, the notification provisions of the 2017 BWC Policy do not distinguish between recording in a public space and an individual’s home.¹⁰⁰¹ The NYPD response to public comments noted that:

officers entering a person’s home generally will be recording encounters that are enforcement actions or situations where they believe they are likely to take an enforcement action [and therefore] [o]fficers have the right to use their body-worn cameras in a private home as long as they have a legal right to be there.¹⁰⁰²

⁹⁹⁶ *Id.*

⁹⁹⁷ See Appendix B, Section 4, NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 2, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf; see also, Policing Project, *Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy*, <https://www.policingproject.org/s/Report-to-the-NYPD-Summarizing-Public-Feedback-on-BWC-Policy-9lws.pdf>.

⁹⁹⁸ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 6, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

⁹⁹⁹ See *id.* at Appendix B, Section 1(c).

¹⁰⁰⁰ See *id.* at Appendix B, Section 4.

¹⁰⁰¹ *Id.* at 8.

¹⁰⁰² *Id.*

According to the NYPD, a major challenge in crafting BWC policy was deciding which types of police interactions should be recorded.¹⁰⁰³ Continuous recording, according to the NYPD, is “impractical both because it would require a vast increase in long-term data storage and because it would represent an invasion of privacy to many people whom the police encounter.”¹⁰⁰⁴ Under the 2017 BWC Policy, officers must, in the absence of exigent circumstances, record the following interactions (these interactions prompt “mandatory activation”): traffic stops, pedestrian stops or frisks, uses of force, vertical patrols, searches on the street, searches in the home, or engaging in summons or arrests.¹⁰⁰⁵ Respondents to the Public Survey expressed broad support for mandatory activation of BWCs during these encounters.¹⁰⁰⁶

The 2017 BWC Policy departs from public feedback in that it does not require activation any time an officer approaches someone to ask a question.¹⁰⁰⁷ Rather, the 2017 BWC Policy requires activation upon questioning of “persons suspected of criminality.”¹⁰⁰⁸ As translated to the different types of stops made by officers, the 2017 BWC Policy mandates activation for Level 2, 3 and 4 stops.¹⁰⁰⁹ Officers are afforded discretion to record Level 1 stops, which do not require suspected criminal behavior, but are being trained to record Level 1 stops that are likely to elevate to Level 2 or Level 3 stops as a result of the encounter.¹⁰¹⁰

As is the case with mandatory activation, officer discretion to *deactivate* BWCs is a crucial point in crafting effective policy, according to Ms. Ponomarenko.¹⁰¹¹ The 2017 BWC

¹⁰⁰³ *Id.* at 11.

¹⁰⁰⁴ *Id.*

¹⁰⁰⁵ *See id.* at Appendix B, Section 7; *see also id.* at Appendix B, Section 5. The full list of mandatory activation triggers in the 2017 Policy includes arrests, summonses, vehicle stops, interactions with persons suspected of criminal activity, searches of an individual and/or his/her belongings, except for strip searches, interactions with an emotionally disturbed person, uses of force, public interactions that escalate and become adversarial, responding to the scene of crime-in-progress calls, and interior patrols of New York City Housing Authority buildings as well as any privately-owned building.

¹⁰⁰⁶ *See id.* at 10.

¹⁰⁰⁷ *Id.* at 11.

¹⁰⁰⁸ *See id.* at Appendix B, Section 5(d).

¹⁰⁰⁹ *Id.*; *see* Chapter 1 for a description of different stops under New York law.

¹⁰¹⁰ *Id.*

¹⁰¹¹ Ponomarenko, March 21 Briefing Transcript at 143; *see also* Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 19-20.

Policy prohibits deactivation during an arrest,¹⁰¹² but officers are afforded discretion to deactivate “upon the request of a member of the public if a suspect is not present, and it is safe and advisable to do so after considering all the circumstances, including the requester’s desire for privacy or confidentiality.”¹⁰¹³ The ACLU supports removing officer discretion to deactivate to ensure officers do not “evade detection while engaging in abuse.”¹⁰¹⁴ Likewise, Mr. Dunn of the NYCLU testified that he has “lots of concerns about police officers being able to turn on or turn off the cameras.”¹⁰¹⁵

According to Ms. Malik and the ACLU, however, continuous recording poses privacy issues in that many police-civilian encounters expose confidential details about individuals interacting with police.¹⁰¹⁶ Ms. Ponomarenko also expressed concern that continuous recording could transform BWCs from accountability tools to surveillance mechanisms, aggregating data from thousands of hours of footage to create a repository of data for future investigations.¹⁰¹⁷ The NYPD noted that mandating continuous recording would “require that an officer record, for example, someone asking for directions, a casual conversation with a member of the public, or situations where the officer is rendering aid, including performing CPR on someone who may not wish to be recorded and is not conscious to object to it.”¹⁰¹⁸

A central concern with BWCs is regulating officer access to footage, according to the NYPD.¹⁰¹⁹ More than two thirds of Public Survey respondents said that officers should not be permitted to review footage from their own BWCs until they have filled out a report describing filmed incidents – particularly when an officer is involved in a use-of-force incident.¹⁰²⁰ However, the 2017 BWC Policy allows officers to review recordings of their own encounters

¹⁰¹² See NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at Appendix B, Section 9, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰¹³ *Id.*

¹⁰¹⁴ Stanley, *supra* note 177.

¹⁰¹⁵ Dunn, March 21 Briefing Transcript at 289.

¹⁰¹⁶ Malik, March 21 Briefing Transcript at 163; *see also* Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 19; *see also* Stanley, *supra* note 177.

¹⁰¹⁷ Ponomarenko, March 21 Briefing Transcript at 164.

¹⁰¹⁸ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 11, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰¹⁹ Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 15-18.

¹⁰²⁰ *Id.* at 1.

before making an initial report or providing an official statement so long as the encounter did not involve an allegation of significant use of force or officer misconduct.¹⁰²¹ The NYPD believes the policy is in accord with nearly 30 police departments' BWC policies.¹⁰²² Professor Fagan, however, suggested an officer's ability to review footage before drafting a report might have an effect on the contents of the report, suggesting that officers who review footage may be inclined to tailor their written report to fit objective evidence seen in the video.¹⁰²³ The NYPD response to public comments noted that the 2017 BWC Policy strictly prohibits officers from attempting to tamper with or alter original recordings.¹⁰²⁴

The 2017 BWC Policy also governs supervisory access to footage and the actions that supervisors may take as a result of officer misconduct found in BWC footage.¹⁰²⁵ A majority of officers responding to the Officer Survey believed that supervisors should be allowed some access to their subordinates' footage and the 2017 BWC Policy permits discretionary supervisory review to address performance deficiencies as well as to make positive comments.¹⁰²⁶ The NYPD stated that although supervisory review of their subordinates' footage will not preclude disciplinary measures for violations observed on BWC footage, "supervisors should be trained to use their best judgment and bear in mind the goals of supervisory review."¹⁰²⁷ According to the NYPD, supervisory review is not intended to facilitate "routine nitpicking" of officer conduct, which would negatively impact officer acceptance of, and compliance with, the BWC program.¹⁰²⁸ To avoid the perception that BWCs will be used merely to scrutinize officer

¹⁰²¹ NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 16-17, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf; see also Press Release of NYCLU, *NYPD Body Camera Policy Ignores Community Demands for Police Accountability*, (Apr. 7, 2017), <https://www.nyclu.org/en/press-releases/nypd-body-camera-policy-ignores-community-demands-police-accountability>.

¹⁰²² NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 16, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰²³ Fagan, March 21 Briefing Transcript at 165-66.

¹⁰²⁴ NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 15, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰²⁵ *Id.* at 19-20.

¹⁰²⁶ *Id.* at 19. Supervisory access to footage was covered only in the Officer Survey. Of the officer respondents, "22% of all ranks said supervisors should be able to view any video they select, another 30% agreed, provided the reviews were tracked and were not conducted only to address performance deficiencies but also to provide positive comment, and 32% said that supervisors should only be able to review videos related to civilian complaints or uses of force."

¹⁰²⁷ *Id.* at 20.

¹⁰²⁸ *Id.*

behavior, the 2017 BWC Policy implements a 90-day training period during which an officer's violations of BWC and NYPD policy will be handled "as a training matter at the officer's precinct."¹⁰²⁹

Lastly, the 2017 BWC Policy covers the retention and release of BWC footage.¹⁰³⁰ Given the large number of BWCs to be deployed and the large size of video files, storing BWC footage creates logistical and financial hurdles to the implementation of the NYPD's BWC program, according to the NYPD.¹⁰³¹ Based on public feedback, the NYPD has adopted a one-year general default retention period, with automatic deletion of footage at the expiration of the retention period.¹⁰³² Certain footage will be retained for longer periods to enable prosecutions or if a lawsuit is filed or a complaint made.¹⁰³³ The NYPD stated that it anticipates developing additional criteria for retaining footage beyond the retention period, but has not yet developed the appropriate technology to "tag" the appropriate footage.¹⁰³⁴

The 2017 BWC Policy does not provide a seamless mechanism to compel disclosure of footage, even though respondents to the Public Survey urged the NYPD to establish a clear and streamlined process by which the subject of a recording could obtain footage of his or her own encounter with an officer, and favored releasing BWC footage of high-profile incidents involving officers and members of the public either immediately, or after an internal investigation is complete.¹⁰³⁵ The 2017 BWC Policy merely permits the subject of a recording to request footage through a FOIL request.¹⁰³⁶ Moreover, an individual arrested who has a pending criminal case may not request video footage of his or her arrest, because, according to the NYPD, allowing a subject of a recording access to footage would skirt the standard discovery rules in criminal court.¹⁰³⁷ The NYPD believes that FOIL requests for footage provide a process

¹⁰²⁹ *Id.*

¹⁰³⁰ *Id.* at 4, 21-25.

¹⁰³¹ *Id.* at 21.

¹⁰³² *Id.* at 22; *see also* Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 20.

¹⁰³³ Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy at 20.

¹⁰³⁴ *Id.* at 24.

¹⁰³⁵ *Id.*

¹⁰³⁶ *Id.*

¹⁰³⁷ NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy at 24, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

that complies with New York law and includes embedded privacy protections.¹⁰³⁸ In response to comments that FOIL requests do not represent the “streamlined” process the public urged, the NYPD stated that a pre-canned FOIL form on which to submit FOIL requests has been posted online for easy access.¹⁰³⁹

Ms. Malik testified that an important component of any BWC policy that promotes accountability is a mechanism to compel law enforcement to release BWC footage to the public upon request in a timely manner so the officers cannot hide footage in order to create a potentially false narrative.¹⁰⁴⁰ Ms. Malik encouraged disclosure of BWC footage so that individuals subjected to police misconduct can point to an objective record of their interactions when bringing a complaint.¹⁰⁴¹ Such an objective record, she noted, averts the he-said-she-said dynamic that can impede resolution of civilian complaints.¹⁰⁴² According to Mr. Darche, objective evidence of police-civilian encounters can improve the civilian complaint process by improving resolution time and reducing the civilian complaint “truncation rate” – the rate of complaints which cannot be resolved due to the inability to substantiate claims made against an officer.¹⁰⁴³

The 2017 BWC Policy does not include a mandatory process for the release of BWC footage that has captured high profile incidents, such as police shootings, to the media.¹⁰⁴⁴ Prior to releasing any BWC footage, the NYPD says that it must analyze whether the relevant footage is subject to an enumerated exception to the disclosure of public agency records.¹⁰⁴⁵ Under New

¹⁰³⁸ *Id.* The NYPD response notes that Public Officers Law § 87 bars disclosure of footage and therefore FOIL requests are a preferred route for disclosure.

¹⁰³⁹ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 24, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf; see NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy, Appendix C at 4, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰⁴⁰ Malik, March 21 Briefing Transcript at 134-35; see also Martin Kaste, *Should the Police Control Their Own Body Camera Footage?*, NPR (May 25, 2017), <http://www.npr.org/2017/05/25/529905669/should-the-police-control-their-own-body-camera-footage>.

¹⁰⁴¹ Malik, March 21 Briefing Transcript at 163.

¹⁰⁴² *Id.*

¹⁰⁴³ Darche, March 21 Briefing Transcript at 207; see also Malik, March 21 Briefing Transcript at 162-63.

¹⁰⁴⁴ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 25-26, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf (noting that “[t]he NYPD is studying the various approaches that other police departments take when releasing video of police shootings.”)

¹⁰⁴⁵ *Id.* at 24.

York law, although all public agencies “shall...make available for public inspection and copying all records,”¹⁰⁴⁶ agencies may deny access to records compiled for law enforcement purposes under various circumstances, including when disclosure would “interfere with law enforcement investigations” or “endanger the life or safety of any person.”¹⁰⁴⁷ The required NYPD analysis, and any associated delay in the release of footage, may impede the transparency that BWCs promise, according to experts like Ms. Malik.¹⁰⁴⁸

The NYPD, in its response to public comments, noted that “it may be appropriate in some cases to release a recording of an event [involving an officer’s use of deadly force] in an effort to be transparent, answer questions, and ease unrest.”¹⁰⁴⁹ As of the date of this writing, the NYPD has released three instances of police-involved shootings captured on a BWC – the deadly shooting of a 31-year-old in the Bronx in September, 2017, the shooting of a 27-year-old in Hamilton Heights and the deadly shooting of a 67-year-old at a Bronx homeless shelter.¹⁰⁵⁰ Chuck Wexler, the executive director of the Police Executive Research Forum, lauded the NYPD’s decision to release footage of the first incident, noting that the decision means that “the public’s right to know supersedes age-old resistance that argued against this transparency.”¹⁰⁵¹

While the release of BWC footage of high-profile incidents suggests the NYPD shares the view that the such footage can increase trust between the NYPD and the NYC community, the PBA, the NYPD’s union and collective bargaining representative, believes that the NYPD’s decision to release BWC footage does not comport with NY law.¹⁰⁵² The PBA has sought

¹⁰⁴⁶ N.Y. Pub. Off. Law § 87.

¹⁰⁴⁷ *Id.* Under Public Officers Law § 86, “agency” is defined as “any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature.” N.Y. Pub. Off. Law §§ 86, 87.

¹⁰⁴⁸ See Malik, March 21 Briefing Transcript at 135.

¹⁰⁴⁹ NYPD Response to Public and Officer Input on the Department’s Proposed Body-Worn Camera Policy at 26, https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf.

¹⁰⁵⁰ See Joseph Goldstein, *Police Likely to Release Body Camera Footage in Fatal Bronx Shooting*, *Commissioner Says*, N.Y. TIMES (Sept. 12, 2017), <https://www.nytimes.com/2017/09/12/nyregion/police-shooting-body-camera-bronx.html>; see also Southall & Goldstein, *supra* note 188; see also *NYPD Body Camera Footage Shows Officer Shoot Knife-Wielding Man*, NBC NEW YORK (Nov. 27, 2017), <https://www.nbcnewyork.com/news/local/NYPD-Body-Cam-Footage-Police-Shooting-NYC--460415943.html>; see also *Body Cam Footage Contradicts Witness Claims About Deadly NYPD Shooting*, CBS NEW YORK (Nov. 29, 2017), <http://newyork.cbslocal.com/2017/11/29/bronx-shelter-nypd-shooting-body-cam/>.

¹⁰⁵¹ Southall & Goldstein, *supra* note 188.

¹⁰⁵² Southall, *supra* note 190.

declaratory and injunctive relief against the Mayor de Blasio, NYPD Commissioner O'Neill and the NYPD with respect to the release of BWC footage in three separate instances in 2017, arguing that the NYPD's decision does not comply with the requirements of Section 50-A unless the filming officer consents to such release or the release is required by court order.¹⁰⁵³ The court is scheduled to hear the PBA's motion for a temporary restraining order on May 3, 2018.¹⁰⁵⁴

Because the BWC program is in its infancy, it is too early to evaluate its merits. Nonetheless, the NYPD's adoption of a BWC policy is, in itself, responsive to the calls of many policy advocates, like Ms. Malik, who testified that "it is imperative that the officers wear body cameras" because "[p]roperly used body cameras undoubtedly display and play a role in improving police accountability, improving the public trust and protecting those on both sides of the camera lens."¹⁰⁵⁵ Moreover, Ms. Ponomarenko noted that, in addition to improving officer accountability, BWCs tend to moderate the behavior of both officers filming and individuals being filmed and therefore act as a mechanical de-escalation tool.¹⁰⁵⁶ A 2015 University of South Florida study of the effects of BWCs on officer behavior found that officers who wear BWCs are less likely to be involved in use of force incidents and civilian complaints of misconduct.¹⁰⁵⁷ Officers participating in the study also found that the presence of BWCs improved citizen behavior and helped de-escalate confrontations.¹⁰⁵⁸ However, an 18-month Washington D.C. study released in October 2017 found that officers equipped with cameras used

¹⁰⁵³ See Complaint at 4, *Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. Bill de Blasio*, Index No. 2018-150181 (N.Y. Sup. Ct., January 9, 2018).

¹⁰⁵⁴ *Patrolmen's Benevolent Ass'n v. De Blasio, Bill*, Docket No. 150181/2018 (N.Y. Sup. Ct. Jan. 09, 2018), Court Docket.

¹⁰⁵⁵ Malik, March 21 Briefing Transcript at 134.

¹⁰⁵⁶ Ponomarenko, March 21 Briefing Transcript at 162.

¹⁰⁵⁷ Executive Summary, Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs): The Orlando Police Department (OPD) Experience, <http://media.cmgdigital.com/shared/news/documents/2015/10/09/OPD-Final-Report-Executive-Summary-10-6-15.pdf>.

¹⁰⁵⁸ See Nick Wing, *Study Shows Less Violence, Fewer Complaints When Cops Wear Body Cameras*, HUFFINGTON POST (Oct. 13, 2015), http://www.huffingtonpost.com/entry/police-body-camera-study_us_561d2eale4b028dd7ea53a56.

force and prompted civilian complaints at about the same rate as those who did not have them.¹⁰⁵⁹

I. Recommendations

The recommendations of the Committee are:

- 1. The Commission should recommend to the New York State legislature that it repeal or, at a minimum, amend New York Civil Rights Law Section 50-A so that the public can obtain information about police officers who have engaged in or have been alleged to have engaged in misconduct.**
 - *At a bare minimum, the New York State legislature should amend Section 50-A to (a) permit the disclosure of the full record and outcome of NYPD disciplinary trials, a position supported by Mayor De Blasio and the NYPD, (b) permit the disclosure of disciplinary records for officers who are repeat offenders, including those who have had two or more cases substantiated by the CCRB in the last three calendar years or have had numerous complaints filed against them, or have used “excessive force” as that term is used in the Patrol Guide,¹⁰⁶⁰ and (c) make clear that BWC footage is not “personnel records” under Section 50-A.*
- 2. The Commission should recommend to NYC and New York State that they create greater incentives for officers and their supervisors to abide by the laws and rules governing their behavior.**
 - *The NYPD should be required to bear at least some of the financial responsibility for litigation costs related to its officers’ misconduct.*
 - *New York State law prohibiting indemnification where the offending conduct is “in violation of any rule or regulation of his agency at the time the alleged damages were sustained” and where the misconduct constituted intentional wrongdoing should be strictly enforced.*
 - *New York’s Governor should expand the scope of Executive Order No. 147 so that the New York State Attorney General acts as a special prosecutor in the investigation and prosecution of all substantiated CCRB cases of serious police misconduct or when there has been an allegation of homicide, serious injury, or sexual assault by an officer.*

¹⁰⁵⁹ See Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior, Study Says*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/police-body-camera-study.html>.

¹⁰⁶⁰ “Excessive force” is defined as “[u]se of force deemed by the investigating supervisor as greater than that which a reasonable officer, in the same situation, would use under the circumstances that existed and were known to the [officer] at the time force was used.” *NYPD Patrol Guide*, NYPD, <http://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page> Procedure No. 221-01 (hereinafter cited as *Patrol Guide*).

- *The RAILS system (the early warning detection system for officers at risk of poor performance that the NYPD is currently in the process of finalizing for implementation) should incorporate, among other things, data on officers' (a) level of arrest and summons activity, (b) number of resisting arrest arrests, (c) number of obstruction of governmental administration charges, (d) number of disorderly conduct charges, (e) number of adverse suppression rulings and (f) number of adverse credibility rulings.*
 - *The NYPD should (a) incentivize supervising officers to accurately review their subordinates' performance and (b) create clear widely publicized (within the NYPD) punitive consequences for a supervising officers' failure to comply with their supervisory duties.*
 - *The NYPD should implement policies that impose clear and consistent punitive consequences for breaching protocols learned in training, and officers need should be held accountable for deviating from those protocols.*
- 3. The Commission should recommend to the New York State Office of Court Administration that judges be required to attend implicit and structural bias training periodically so that the judicial system, among other things, does not sanction bias when it enforces “reasonable suspicion standards” in cases of police misconduct.**
- 4. The Commission should recommend to NYC that the CCRB be granted increased authority and true independence.**
- *CCRB decisions should be final and not be reviewable by the NYPD.*
 - *If CCRB decisions continue to be reviewable by the NYPD, the NYPD Commissioner should explain to the public his or her decision not to follow the recommendation of the CCRB, the process he or she undertook to revise the recommendation, and the detailed rationale (required to be disclosed to the CCRB) for the decision.*
 - *The CCRB should continue to reduce the processing time for its cases and ensure that all cases are processed within four months of receiving the initial complaint.*
 - *The reconsideration process by which the NYPD can challenge the CCRB's findings should be eliminated.*
 - *The NYPD, the Mayor's Office, and the CCRB should continue to increase community awareness of the CCRB and the role it plays in ensuring the public can file complaints against police for misconduct.*

- *The New York City Council should codify the existence of the Administrative Prosecution Unit of the CCRB.*
- *The New York City Council should ensure that a revitalized CCRB be granted oversight of SSOs.*
- *The CCRB's budget should be sufficient for it to conduct its oversight mission.*

5. The Commission should recommend to the NYPD that the 2017 BWC Policy regarding body-worn cameras be altered in the following ways:

- *The 2017 BWC Policy should implement penalties following an initial grace period for officers who fail to activate their BWC during a mandatory activation event or who deactivate their BWC when deactivation is not permitted.*
- *The 2017 BWC Policy should allow individuals who have been subject to police misconduct to review footage of their interaction with the police officer alleged to have engaged in misconduct.*
- *The 2017 BWC Policy should prohibit officer review of footage prior to their having written their report.*
- *The 2017 BWC Policy should ensure that body camera footage is placed under the control of an independent agency to protect privacy, prevent misuse, and ensure streamlined access for those who appear in it.*
- *The 2017 BWC Policy should provide that any BWC footage the NYPD decides to release to the public should be unedited barring significant confidentiality concerns.*

Annex A

Speaker Chart

Name	Title	Response
Academics		
David Brotherton	Professor of Sociology, John Jay College of Criminal Justice	Attended
Jeffrey Fagan	Isidor and Seville Sulzbacher Professor of Law, Columbia Law School	Attended
Babe Howell	Professor, teaches Criminal Law, Criminal Trial Advocacy and Lawyering Skills	Submitted written testimony
Harry Levine	Professor of Sociology at Queens College and the Graduate Center, City University of New York	Attended
Mina Malik	Lecturer on Law, Senior Advisor to Fair Punishment Project, Harvard Law School	Attended
Maria Ponomarenko	Deputy Director, NYC Policing Project	Attended
Brett Stoudt	Professor, John Jay College of Criminal Justice	Attended
Steve Zeidman	CUNY Law School Professor, Director of the Criminal Defense Clinic	Attended
Michael Avery	Professor Emeritus, Suffolk Law School	Did not attend
I. Bennet Capers	Stanley A. August Professor of Law, Brooklyn Law School	Did not attend
Paul G. Chevigny	Anne and Joel Ehrenkranz Professor of Law Emeritus, New York University Law School	Did not attend
Judith Greene	Founder of Justice Strategies	Interviewed
Bernard Harcourt	Isidor and Seville Sulzbacher Professor of Law, Professor of Political Science, Columbia Law School	Did not attend
George L. Kelling	Manhattan Institute/Rutgers School of Criminal Justice; Center for Law and Justice of NJ	Did not attend
Aaron Krupchik	Professor of Sociology, University of Delaware	Did not attend
Daniel Losen	Director, The Center for Civil Rights Remedies, at UCLA, The Civil Rights Project	Did not attend
Cynthia Lum	George Mason University, Department of Criminology, Law & Society	Did not attend
Heather MacDonald	Thomas W. Smith Fellow Contributing Editor, City Journal	Did not attend
Tracy Meares	Walton Hale Hamilton Professor of Law at Yale Law School	Did not attend
Eugene O'Donnell	Lecturer, John Jay College	Did not attend
James O'Keefe	St Johns Ph.D., Vice Provost, Staten Island Campus, Professor, Criminal Justice Program, College of Professional Studies	Did not attend

Name	Title	Response
Russell Skiba	Indiana University, School of Psychology Program, School of Education, Center for Evaluation and Education Policy	Did not attend
Malcom Sparrow	Professor of Practice of Public Management Program in Criminal Justice Policy and Management at the Harvard Kennedy School	Did not attend
Advocates		
Hassan Aden	Senior Advisor, Policing, The Vera Institute	Attended
Darian Agostini	Youth Leader, Make the Road New York	Attended
Cami Anderson	Founder and Managing Partner, Third Way Solutions	Attended
Jenn Rolnick Borchetta	Director of Impact Litigation at the Bronx Defenders	Attended
Darius Charney	Senior Staff Attorney at Center for Constitutional Rights	Attended
Jonathan Darche	Executive Director, New York City Civilian Complaint Review Board	Attended
Chris Dunn	Associate Legal Director, New York Civil Liberties Union	Attended
Dennis Flores	Founder, El Grito de Sunset Park	Attended
Kesi Foster	Urban Youth, Collaborative	Attended
Kassandra Frederique	New York State Director at the Drug Policy Alliance	Attended
Robert Gangi	Executive Director, Police Reform Organizing Project	Attended
Nancy Ginsburg	Director of the Adolescent Intervention and Diversion Project, Legal Aid Society	Attended
Joo-Hyun Kang	Executive Director, Communities United for Police Reform	Attended
Maryanne Kiley	NY Executive Director, Educators for Excellence	Attended
Tom Krever	Executive Director of Hetrick Martin Institute	Attended
Lynn Lewis	Former Executive Director, Picture the Homeless	Attended
Johanna Miller	NYCLU, Advocacy Director	Attended
Jonathan Moore	Partner, Beldock Levine & Hoffman LLP	Attended
Taylornn Murphy	Parent and Advocate	Attended
Norman Siegel	Civil rights attorney, Siegel Teitelbaum & Evans, LLP	Attended
Rohini Singh	Project Director, School Justice Project, Advocates for Children	Attended
Elizabeth Sullivan	Education Director, National Economic and Social Rights Initiative (NESRI) and Dignity in Schools Campaign	Attended
Lumumba Akinwale-Bande	Senior Community Organizer, NAACP Legal Defense Fund	Did not attend

Name	Title	Response
Jonathan Blanks	Research Associate in Cato's Project on Criminal Justice and Managing Editor of PoliceMisconduct.net	Did not attend
Loyda Colon	Justice Committee	Did not attend
Arthur Eisenberg	Legal Director, NYCLU	Did not attend
Craig Futterman	Clinical Professor of Law, University of Chicago Law School	Did not attend
Phillip Goff	John Jay College of Criminal Justice	Did not attend
Delores Jones-Brown	John Jay College	Interviewed
Brigitt Keller	Executive Director, National Police Accountability Project	Did not attend
David Kennedy	Director of the National Network for Safe Communities, a project of John Jay College of Criminal Justice in New York City	Did not attend
Donna Lieberman	Executive Director, NYCLU	Interviewed
Rebecca Neusteter	Vera Institute of Justice's Director of Policing	Did not attend; was interviewed
Naomi Post	Executive Director of the Children's Defense Fund – New York	Did not attend
Katherine Rubin	Director of Policy & Strategic Initiatives, Youth Represent	Did not attend
Esmeralda Simmons	Executive Director, Center for Law and Social Justice, Medgar Evers College	Did not attend
Robin Steinberg	Founder and Executive Director, Bronx Defenders	Did not attend
Kim Sweet	Executive Director of Advocates for Children of New York	Did not attend
Opal Tometi	Executive Director, Black Alliance for Just Immigration and co-founder, Black Lives Matter	Did not attend
Irena Vidulovic	Special Assistant to Commissioner Debo Adegbile	Did not attend
Vincent Warren	Executive Director of the Center for Constitutional Rights	Did not attend
Dawn Yuster	Project Director, School Justice Project, Advocates for Children of New York	Did not attend
NYPD/Government Officials		
Lawrence Byrne	Deputy Commissioner, Legal Matters, NYPD	Interviewed
Robert Boyce	Chief of Detectives, NYPD	Interviewed
Brian Conroy	Commanding Officer, School Safety Division, NYPD	Interviewed
Kathleen DeCataldo	Executive Director, New York State Permanent Judicial Commission on Justice for Children	Attended
Daniel Dromm	Chair, Education Committee, NYC Council	Attended

Name	Title	Response
Susan Herman	Deputy Commissioner, Collaborative Policing, NYPD	Interviewed
Vanessa Gibson	New York City Council Member, District 16	Attended
Joanne Jaffe	Former Chief of Community Affairs, NYPD	Interviewed
Tracie Keese	Former Deputy Commissioner for Training and now Deputy Commissioner for Equity and Inclusion, NYPD	Interviewed
Eddie Lott	Inspector, Executive Officer, NYPD	Interviewed
Terence Monahan	Former Chief of Patrol and now Chief of Department, NYPD	Interviewed
Matthew Pontillo	Assistant Chief and Commanding Officer, Risk Management Bureau, NYPD	Interviewed
Joseph Reznick	Chief of Internal Affairs, NYPD	Interviewed
Kevin Richardson	Deputy Commissioner, Advocate's Office, NYPD	
Dermot Shea	Chief of Crime Control Strategies, NYPD	Interviewed
Raymond Spinella	Chief of Staff, NYPD	Interviewed
Thomas Taffe	Administrator, NYPD	Interviewed
Irena Vidulovic	Special Assistant to Commissioner Debo Adegbile	Attended
Claudia Whittingham	Special Education Liaison, NYC Department of Education	Attended
James O'Neill	Commissioner, NYPD	Did not attend
Antonio Reynoso	New York City Council, District 34	Did not attend
Eric Schneiderman	New York Attorney General	Did not attend
Ronald G. Spike	Chair, NYS Municipal Police Training Council	Did not attend
Scott Stringer	New York City Comptroller	Did not attend but members of his staff were interviewed
Chief Kerry Sweet	Deputy Chief, Commanding Officer, NYPD Legal Bureau	Did not attend
Ritchie Torres	New York City Council, District 15 and Chair, Committee on Public Housing	Did not attend
Benjamin Tucker	First Deputy Commissioner, NYPD	Interviewed
Jumaane Williams	New York City Council, District 45, Co-Chair of the Council's Task Force to Combat Gun Violence	Did not attend