

**APPENDIX A**

**WHITE PAPERS**



## The Interfaith Center of New York

March 13, 2017

Hon. Ariel E. Belen (Ret.)  
Facilitator, The Joint Remedial Process, JAMS  
620 Eighth Avenue, 34<sup>th</sup> Floor  
New York, New York 10018

Dear Judge Belen,

As New York religious leaders who have participated in the Joint Remedial Process we are writing both to commend changes that have been made at the NYPD since *Floyd v. City of New York* was filed and recommend additional reforms necessary to further repair the breach of trust between marginalized communities in this city and the NYPD officers who serve them.

We commend the NYPD for its new training curriculum addressing implicit bias as well as its efforts to increase collaborative policing by assigning more of the same police officers to a particular precinct division. In addition, we support the increased time allotted for foot patrols. The Ceasefire Program, buy-back programs and the Clergy Liaison programs, in certain precincts, have all engaged clergy and youth in a constructive way. Likewise, NYPD training programs in partnership with community and faith organizations on religious diversity and religious freedom will both improve training and build constructive community partnerships

As clergy and other religious leaders who serve in diverse communities of faith around New York City, however, we continue to witness first-hand that needless suffering is created by law enforcement based on racial and religious prejudice and occurs too often in certain neighborhoods inhabited by people whose racial, religious, or health profile make them vulnerable.

To that end, we endorse the following recommendations from the New York Civil Liberties Union and Communities United for Police Reform as they pertain to current policy:

--The need for greater transparency that allows police with discipline records to be searchable online.

--The need for better feedback loops so that a supervising officer whose police recruit makes a stop that is later ruled unconstitutional by a judge, can actually know that his or her report has made an unconstitutional stop and apply discipline accordingly.

--The need for greater community involvement in training and improved protocols for responding to people in need with mental health issues. In addition, collaborative input by diverse religious

leaders should be part of the curriculum in training cycles of the new NYPD recruits, Citizens Police Academy Programs and Civilian Police Training Programs at the Police Academy in College Point.

Better training and improved community relations are linked to improved police accountability. We believe that there has been an historical and systemic failure in this city to hold police officers who kill accountable for their crimes. Eric Garner, Mohammed Bah, Deborah Danner are just a few of the individuals who have died at the hands of the NYPD officers in recent years and to this day their families have not received justice.

Thus, the success of reforms recommended by this Joint Remedial Process in remedying the breakdown in trust between the NYPD and marginalized communities in New York, will also hinge on the NYPD's willingness to enforce the law fairly, without exempting itself from the same justice that the civilians it protects are subject to.

We are taught by the words of the Prophet Micah that God requires of us "to do justice, and to love kindness, and to walk humbly with your God" (Micah 6:8) We know that this work to create a more just, well-informed and accountable NYPD is for the safety and protection of ALL New Yorkers.

Sincerely,



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**The Legal Aid Society's Reform Proposals for the Joint  
Remedial Process: Documentation of All Police-Initiated  
Civilian Encounters and Discipline for Abuse**

**A White Paper Submitted by The Legal Aid Society of New York**

**To: Hon. Ariel E. Belen**

**Dated: January 9, 2017**

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In this white paper, The Legal Aid Society (“Legal Aid”) offers its proposals for “further reforms necessary to ending the constitutional violations described in the Liability Opinion.”<sup>1</sup> The Joint Remedial Process has focused on documenting and appraising community sentiment about NYPD policing through dozens of small focus groups, leadership meetings, and community forums. This paper is based on information and data culled from that process, combined with the collective experience of Legal Aid’s specialists in Public Housing, Criminal Defense, Juvenile Rights, and Civil Rights.

#### EXECUTIVE SUMMARY

The experiences elicited by the Joint Remedial Process reflect a stark contrast between the anticipated effects of the immediate reforms and the experience of the affected communities. While the volume of stops, frisks, and trespass arrests has been steadily declining for four years, and reduced to a small fraction of pre-litigation levels, the majority of process participants still express frustration towards police because of unjustified encounters with verbally and physically abusive officers.

The centerpiece of the immediate reforms ordered in *Floyd* is enhanced documentation: a revised Stop Form and a companion Patrol Guide Regulation, P.G. 212-11. These documents aim to produce a record of every “Level 3 Stop” and require regular supervisory review of those records. The purpose of the Stop Form is to curb temporary detentions or “stops” that are not based on suspicion of crime, and to curb limited weapons searches or “frisks” that are not based on suspicion of weapons possession.<sup>2</sup> However, limiting documentation of encounters to “Level 3” stops results in vast underreporting of stops happening on the street and therefore impairs oversight, auditing, and attempts to improve the quality of police-initiated encounters through disciplinary measures.

This problem also extends to the body-worn camera pilot project mandated by the immediate reform process. The Court required the NYPD to institute a one-year body-worn camera pilot to measure “the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks” and to evaluate “whether the benefits of the cameras outweigh their financial, administrative, and other costs.”<sup>3</sup> In March 2017, the NYPD will implement a 1,000-camera pilot project, which includes a requirement that the cameras be activated at the outset of all police-initiated investigatory encounters and all “interior patrols” of apartment buildings. Again, initiation of recording is only required after an encounter escalates to either a Level 2 or Level 3 stop. For the purposes of the

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<sup>1</sup> See *Floyd v. City of New York*, 959 F.Supp.2d 668, 687-88 (S.D.N.Y. 2013) (“Remedy Opinion”).

<sup>2</sup> The corresponding documents for the *Davis* and *Ligon* litigation are the Trespass Crimes Fact Sheet and companion regulations PG 212-59 and 212-60, which aim to curb suspicion-less detention and arrest without probable cause for trespassing in NYC Public Housing and other multiple-residence buildings.

<sup>3</sup> Remedy Opinion at 685.



pilot, we strongly recommend that body-camera recordings be initiated at all police-initiated encounters, including Level 1.

Audits of the initial record-keeping indicate a high proportion of police-initiated encounters that should have been recorded but were not. The root of the problem seems to be that police are not required to document investigations or searches that they consider consensual, or “Level 2” encounters, under New York law. Level 2 encounters and searches are those that are non-coercive during which the subject felt free, and indeed was free, to decline participation and walk away. Under NYPD Regulations, no Stop Form needs to be prepared if an encounter is categorized by the investigating officer as Level 2 or consensual — even if the consensual encounter entailed a search.

Documentation and data collection of *all* police-initiated interactions with members of the community is the critical first step toward improving police compliance with their duties and obligations, enhancing the effectiveness of police training, verifying the proper execution of police duties and obligations, and advancing the community's understanding of members' rights and obligations. Without this crucial step, the NYPD and the courts cannot identify necessary areas for improvement in training and supervision or determine whether adequate disciplinary measures are in place. Without sufficient documentation of all police-initiated encounters, the promise of the Joint Remedial Process is unattainable.

We urge the Facilitator to recommend a more effective disciplinary structure for officers who have repeatedly violated people's rights with intrusive, abusive, and unjustified stops. The NYPD should adopt a guideline that requires increasing disciplinary severity for repeated unlawful stops and frisks.

We also urge the Facilitator to condemn the profiling and targeted abuse of vulnerable communities by the NYPD. Because many of these encounters are not categorized as “Level 3” encounters and therefore not documented, the recommendation for broad documentation should help the NYPD identify when abusive profiling is taking place. The NYPD's auditing unit should look for patterns in timing, geographic location and officer participation which suggest that sweeps of vulnerable communities are being employed as substitutes for focused policing of criminal activity. Regular and routine training programs led by members of vulnerable communities should also be implemented to increase awareness and sensitivity.

To be sure, there are larger issues in police-community relations that lay beyond the scope of the *Floyd* remedial order. Constant police patrols of public housing and other buildings where poor people live, of their schools and at their subway stations, combine to produce an oppressive scrutiny that demoralizes and wears down law-abiding people. NYPD surveillance of social media in search of gang conspiracies has produced mass arrests based on tenuous online relationships with those suspected of unlawful activity. The NYPD, the NYC Housing Authority and the Department of Education must improve on-site building security to reduce the need for constant patrols. *See* Legal Aid's Preliminary Report, submitted to Judge Belen on October 31, 2016.

## I. Background

### A. Legal History

The opportunity to produce this White Paper stems from court-ordered remedial measures to the NYPD's Stop, Question, and Frisk ("SQF") practices. Three seminal cases led to the court's intervention in this police practice:

- *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013): *Floyd* is a class action lawsuit challenging the constitutionality of NYPD's stop-and-frisk practices, particularly as applied to communities of color.
- *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013): *Ligon* is another class action lawsuit challenging NYPD's stop-and-frisk practices focused on NYPD's criminal trespass enforcement in and around certain private multiple dwelling buildings enrolled in the Trespass Affidavit Program ("TAP"). TAP (also known as Operation Clean Halls) is a program in which building owners authorize the NYPD to conduct patrol activities inside and around their buildings, including, in some buildings, floor-to-floor inspections (known as interior or vertical patrols) to curb drug dealing and other criminal activity.
- *Davis v. City of New York*, 10 Civ. 0699, 2015 U.S. Dist. LEXIS 55536 (S.D.N.Y. Apr. 28, 2015): *Davis* challenged NYPD's enforcement of criminal trespass under TAP, specifically as applied in housing owned by the New York City Public Housing Authority ("NYCHA"). Plaintiffs and Defendants settled and on April 28, 2015, enforcement of the settlement was joined as related to *Floyd* and *Ligon* under S.D.N.Y. Local Rule 13 (a) ("related case rule") in order to consolidate its implementation into "one remedial process." *Id.* at \*3.

### B. The Joint Remedial Process

In the *Floyd* Liability Opinion<sup>4</sup> ("Liability Opinion"), Judge Shira A. Scheindlin found that the NYPD's use of SQF violated the Fourth and Fourteenth Amendments to the U.S. Constitution and New York state law. On the same day, in the *Floyd* Remedy Opinion<sup>5</sup> ("Remedy Opinion"), Judge Scheindlin ordered the following:

- The appointment of an independent monitor ("Monitor") "specifically and narrowly focused on the City's compliance with reforming the NYPD's use of stop and frisk."<sup>6</sup> The Monitor is tasked with developing, in

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<sup>4</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

<sup>5</sup> *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

<sup>6</sup> Remedy Opinion, p. 14.

consultation with other stakeholders, an initial set of reforms to the NYPD's policies, training, supervision, monitoring, and discipline regarding stop and frisk.

- The appointment of an independent facilitator (“Facilitator”) tasked with developing, in consultation with other stakeholders, a more thorough set of reforms (the “Joint Process Reforms”) to supplement, as necessary, the Immediate Reforms.<sup>7</sup> The court selected retired State Appellate Division Justice Ariel E. Belen to serve as Facilitator.
- A Joint Remedial Process (“JRP”) guided by the Facilitator. The JRP is meant to incorporate the “distinct perspective” of the communities “most affected by the NYPD’s use of stop and frisk.”<sup>8</sup> In this vein, the Facilitator is tasked with meeting with stakeholders throughout the city, including elected officials, community organizations, and residents. At the conclusion of the process, the Facilitator will prepare a report with recommendations for the consideration of the Monitor and Judge Analisa Torres of the Southern District of New York, who is overseeing the implementation of the *Floyd* remedies.

### **C. The Immediate Reforms**

The centerpiece of the Immediate Reforms is a new Stop Form and companion Patrol Guide Regulation, P.G. 212-11. Under this regulation, police are obligated to complete a Stop Form for Level 3 stops, or *Terry* stops<sup>9</sup>, in which the officer has a reasonable suspicion that the individual has committed, is committing, or is about to commit a felony or misdemeanor. However, there is no requirement for police officers to complete Stop Forms for what are known as Level 1 and Level 2 stops, which cover requests for information and consensual stops and searches. While the current framework under the monitorship allows Level 1 and 2 stops to remain undocumented, Legal Aid, based on its extensive experience in this area of law and engagement with members of the community, disagrees with this practice. Legal Aid maintains that the new Stop Form and companion Patrol Guide Regulation should mandate that all encounters be documented, regardless of whether a NYPD officer believes the stop was consensual or voluntary.

Indeed, the rate of compliance for preparing forms for persons stopped on suspicion of trespassing remains low. We believe that this poor rate of performance is attributable to underestimation of the number of encounters that constitute “stops” requiring documentation. In light of this problem, we propose, for the reasons set forth

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<sup>7</sup> Remedy Opinion, p. 30.

<sup>8</sup> Remedy Opinion, pp. 14, 29.

<sup>9</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (hereinafter “*Terry*”).

below, that all Level 1 and Level 2 encounters be documented, as documentation is the only way the Monitor and supervisors of the remedial process can determine whether these stops are indeed consensual and reasonable and are appropriately categorized as Level 1 or 2. Consensual searches should uniformly be documented on the Stop Form.

## II. Documentation

### A. Background

In *Terry*, the Supreme Court held that a police officer may stop and question an individual for purposes of investigating possible criminal behavior even when there is no probable cause to make an arrest.<sup>10</sup> The Court further explained that an officer can search an individual, even if the officer lacks probable cause, when the officer suspects that the individual is armed and dangerous.<sup>11</sup> The Court stated that the officer's suspicion must be based on "specific reasonable inferences" drawn from the facts and experience and that a mere "hunch" does not justify a stop or search of an individual.<sup>12</sup>

In *People v. De Bour*, the New York State Court of Appeals established a framework defining permissible police conduct during a stop.<sup>13</sup> In *De Bour*, the Court of Appeals specified four levels of justifiable police actions during stops conducted to investigate a possible crime.<sup>14</sup> In the first level ("Level 1"), an officer is allowed to approach a civilian and request information where an "objective credible reason" to do so exists.<sup>15</sup> The next level, a "common-law right to inquire" ("Level 2"), allows an officer to stop an individual when there is a "founded suspicion" that criminal activity is afoot.<sup>16</sup> At this level, an officer cannot detain the individual, but can "interfere" with the citizen to the "extent necessary to gain explanatory information."<sup>17</sup> "Level 3" stops, also referred to as "*Terry* stops," permit officers to forcibly stop and detain a person if the officer has a reasonable suspicion that the individual has committed, is committing, or is about to commit a felony or misdemeanor.<sup>18</sup> Under a Level 3 stop, an officer may frisk a civilian if she reasonably suspects that she is in danger of physical harm because of the

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<sup>10</sup> See *Terry* at 22.

<sup>11</sup> See *id.* at 27.

<sup>12</sup> See *id.*

<sup>13</sup> See *People v. De Bour*, 40 N.Y.2d 210 (1976) (hereinafter "*De Bour*").

<sup>14</sup> See *id.* at 223.

<sup>15</sup> See *id.* The objective credible reason need not be indicative of criminality.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

civilian detainee's possession of a weapon.<sup>19</sup> The final level, "Level 4," allows a police officer to arrest and take into custody a person the police officer has probable cause to believe has committed a crime or offense in her presence.<sup>20</sup>

*Terry* and *De Bour* set forth the parameters for conducting SQFs in accordance with an individual's Fourth Amendment right to protection from unreasonable searches and seizures. In *Floyd, Ligon* and *Davis* (collectively "the *Floyd* litigation"), the Court, after examining evidence regarding how the NYPD actually conducted SQFs, found that the NYPD was *not* carrying out SQFs in accordance with the constitutional requirements specified in *Terry* and *DeBour*.<sup>21</sup> The *Floyd* court reasoned that *any* police stop could represent a significant intrusion on an individual's liberty.<sup>22</sup> To remedy the NYPD's unlawful use of SQF, the Court ordered various reforms, including new documentation requirements.<sup>23</sup> This section of the white paper focuses on the NYPD's documentation policies, which the *Floyd* court stated are vital to reforming SQF practices.<sup>24</sup>

As is apparent from the discussion below, documentation forms the underlying basis for all of the reforms demanded by the *Floyd* litigation. Documentation is essential to understand how the NYPD interprets and implements the requirements for constitutional SQFs; whether the NYPD provides effective training and, if not, how and where that training can be improved to increase compliance with constitutional norms and improve the quality of relations between officers and the communities they protect; whether supervisors are properly trained and are providing adequate supervision to officers; whether disciplinary measures are adequate and effective and are being used appropriately to ensure compliance with the *Floyd* reforms; and whether communities are being educated to understand their rights and obligations with respect to SQFs, so as to help improve the quality of their interactions with police.

## **B. Documentation Requirements Prior to *Floyd***

Prior to *Floyd*, NYPD officers were only required to record *Terry* stops, or stops based on a reasonable suspicion that the person has committed, is committing, or is about to commit a felony or a Penal Law misdemeanor.<sup>25</sup> NYPD officers filled out a form called a "UF-250," that contained checkboxes and fields where officers were required to

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> Remedy Opinion.

<sup>22</sup> *Id.* at 672.

<sup>23</sup> *Id.*

<sup>24</sup> Liability Opinion at 10-11.

<sup>25</sup> NYPD Patrol Guide 212-11 (2013).

indicate the nature of the stop and the circumstances leading to the stop.<sup>26</sup> The checkboxes on the UF-250 included broad categories of circumstances for a stop such as “furtive movement” and “high crime area.”

The patrol guide used by NYPD officers prior to *Floyd* offered no guidance as to what constituted reasonable suspicion and did not distinguish between a Level 3 (*Terry*) stop, which required documentation, and lower Level 1 and 2 stops, which did not. Additional NYPD policies governing stops in and around public housing (Patrol Guide 212-60) and private buildings enrolled in the Trespass Affidavit Program (“TAP”) (Patrol Guide 212-59) also lacked instruction on legal standards and distinctions. The court in *Floyd* issued a set of “Immediate Reforms” to address these deficiencies.<sup>27</sup>

Under the relevant Immediate Reforms, the NYPD was ordered to revise the Patrol Guide to reflect (1) a clear definition on what constituted a stop, under any level, and when it should be conducted; (2) a revised Stop Form that incorporates a narrative section and eliminates overly broad categories like “furtive movement”; (3) clarification on who may be stopped, and for what reason (articulating the “objective credible reason” standard), in and around NYCHA and TAP buildings; and (4) implementation of a one-year pilot body-worn camera (“BWC”) program in the precincts with the highest number of SQFs in the year preceding the litigation (2012).<sup>28</sup>

### C. Documentation Requirements Following *Floyd*

A court-appointed Monitor, Peter L. Zimroth, has overseen the implementation and progress of these reforms. According to the most recent Monitor’s report, the NYPD has complied with many of the immediate reforms.<sup>29</sup> The current NYPD Patrol Guide reflects, for instance, a detailed description in Section 212-11 of the four *De Bour* stop levels and their corresponding legal standards.<sup>30</sup> In addition to using the new Stop Form, the NYPD has also promulgated an interim order revising Section 212-59 which now

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<sup>26</sup> Liability Opinion at 34.

<sup>27</sup> Remedy Opinion.

<sup>28</sup> *See id.* The Court has since revised the BWC order at the request of the Monitor and parties to the *Floyd* litigation. Peter L. Zimroth, *Submission of Second Report of the Independent Monitor*, 42 (Feb. 16, 2016). The NYPD is now required to use a randomized experimental design for the one-year pilot program. *Id.* The NYPD has just completed the procurement process for the pilot program cameras and intends to conduct outreach to internal and external stakeholders for input on BWC policy going forward. Laura Nahmias, *Winning bid for NYPD body camera contract comes under lobbying attack*, POLITICO (Oct. 6, 2016), <http://www.politico.com/states/new-york/city-hall/story/2016/10/the-lobbying-war-behind-the-nypds-body-camera-contract-106117>; *Second Report of the Independent Monitor*, 43.

<sup>29</sup> *Submission of Second Report of the Independent Monitor*, 8.

<sup>30</sup> NYPD Patrol Guide 212-11 (effective 6/27/2016).



aligns the policy for “interior patrols” of TAP buildings with those outlined in the revised 212-11 section of the patrol guide.<sup>31</sup>

Despite these efforts, however, many members of the communities most affected by SQF continue to feel unfairly targeted by police officers. In addition, both the *Floyd* court and Monitor reports reveal low levels of compliance with new documentation requirements. The NYPD has opposed reform legislation by the New York City Council,<sup>32</sup> and the administration continues to focus on the reduction in the number of stops rather than focusing on whether those stops that do take place are justified and consistent with constitutional requirements.<sup>33</sup> Additionally, a recent survey of police officers regarding BWCs revealed that many officers believe BWCs will have no effect on—or will worsen—police-community relations.<sup>34</sup>

#### **D. Inadequacy of Current Documentation Requirements**

The communities most affected by SQF continue to feel targeted by the NYPD. One member of the focus groups convened through the Joint Remedial Process (“JRP”) stated that he was stopped too many times to even give a rough estimate.<sup>35</sup> Community members’ experiences lead them to continue to believe police are still making stops to fulfill quotas:

“Right behind my building. They stop the young kids from my block. I went over there because they’re younger kids. I’m not going to let them be

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<sup>31</sup> Revision to Patrol Guide 212-59, “Interior Patrol” and Patrol Guide 208-03, Arrests – “General Processing” 11(a) (effective 5/20/16). The interim order also contains the following language aimed at addressing concerns expressed in the *Davis* litigation: “[m]ere presence in or near a building enrolled in the Trespass Affidavit Program does not provide a basis to approach and conduct an investigative encounter, nor does it establish reasonable suspicion for a stop. When approaching a person based only on an objective credible reason (Level 1 Request for Information), members are prohibited from requesting consent to search the person.”

<sup>32</sup> “*Right to Know Act*” Hearing Testimony, Commissioner Bratton at 2.

<sup>33</sup> Azi Paybarah, *De Blasio touts reductions in stop-and-frisk that occurred under Bloomberg*, POLITICO, Dec. 7, 2016, <http://www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-touts-reductions-in-stop-and-frisk-that-occurred-during-bloomberg-era-107875>. We will further discuss the quality of current stops in section E(1).

<sup>34</sup> Jonathan Stewart, NYU Marron Institute of Urban Management, *Report on the NYPD Officer Body-Worn Camera Questionnaire*, 5 (Sept. 6, 2016). In addition, when asked about their willingness to voluntarily wear BWCs, 56% of officers said that they were either somewhat likely, or definitely not willing to volunteer. *Id.* at 4. This response stands in stark contrast to the overwhelming community support for BWCs evidenced in a recent survey. Policing Project at New York University Law School, *Report to the NYPD Summarizing Public Feedback on its Proposed Body-Worn Camera Policy*, 12 (Fall, 2016). In this survey, 92% of respondents either agreed or strongly agreed that officers should wear BWCs, and 82% believed that BWCs would improve police-community relations, increase public trust, and improve public safety. *Id.*

<sup>35</sup> See 11.18.15 CVSOS Focus Group at 2:53:79–80.

violated like that. I went over there like, ‘Yo. What’s the situation? What they doing wrong?’ They like, ‘Nah Nah. We’re just trying to get a little dollar. You want to get searched too?’ They just being funny. That’s the type of stuff they do.”<sup>36</sup>

This feeling of constant harassment affects the way in which community members and communities as a whole view police officers, even when they are not being stopped:

“When I see a cop walking towards me, I get a cringe. Sometimes they just keep walking, but sometimes they stop you or say something smart to you that, if you say something back, it makes the situation worse. They act like street bullies most of the time.”<sup>37</sup>

Additionally, focus group participants described being disrespected,<sup>38</sup> harassed,<sup>39</sup> and physically assaulted<sup>40</sup> by police officers.

Community members have spoken about similar experiences with stop, question, and frisk in public, on-the-record legislative hearings. Djibril Toure, who spoke at a hearing on police reform legislation, stated that SQFs remained commonplace in his Brooklyn neighborhood.<sup>41</sup> Mike Austin, a homeless individual who testified at the same hearing, described a 2014 police encounter in which he was stopped, frisked, and given a summons for offenses he insists he did not commit.<sup>42</sup>

These types of experiences—post *Floyd*—collectively show that the damage done by SQF is corrosive and suggest that the NYPD must do more than the bare, court-ordered minimum to repair its relationship with the community. But rather than view this as an opportunity to correct a bad situation by going beyond court-ordered immediate reforms, the police department has resisted any further changes. The court in *Floyd*

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<sup>36</sup> *Id.* at 9:289–94; *see also* 11.17.15\_BHSS Focus Group (“But I feel like that’s unnecessary because you’re stopping and harassing people for no reason just because your boss told you to.”).

<sup>37</sup> *See* 03.29.16\_MLBK--40m33s Focus Group at 11.

<sup>38</sup> *See* 11.18.15\_CVSOS Focus Group at 1:10 (“Cops are disrespectful.”), 8:236 (“And how are we supposed to respect authority if they don’t respect us?”).

<sup>39</sup> *See* 04.19.16\_EXDS--30m31s Focus Group at 4 (“They’ve just got to be respectful. They can’t harass people. They need to stop assuming. They don’t got the evidence they need — then they shouldn’t harass anybody else — none of that. They’re trying to harass me for a crime I didn’t commit — or even if I did commit, they don’t got enough evidence.”).

<sup>40</sup> *See* 11.18.15\_CVSOS Focus Group at 2:46–50.

<sup>41</sup> *Right to Know Act Hearing Testimony* at 55.

<sup>42</sup> *See id.* at 64 (“I still don’t know why I received the summons or the officers involved in violating my rights as a citizen of New York other than to fulfill a quota and to give me a record unjustly. To them, this was and is a business as usual and to me I’m considered drunk in public and a trouble maker of which I’m neither.”).



recognized this resistance, noting that, unlike many municipalities confronted with evidence of police misconduct, the NYPD has refused to engage in a joint, non-court-ordered solution to the misconduct.<sup>43</sup> By contrast, in November of 2016, the Yonkers Police Department—located directly north of New York City—signed an agreement with the Civil Division of the Department of Justice and the U.S. Attorney’s Office for the Southern District of New York, outlining sweeping changes to its policing practices—including the documentation of *all* investigatory stops.<sup>44</sup> There, the Department of Justice noted that voluntary agreements, particularly between governmental agencies, “are to be encouraged.”<sup>45</sup>

This resistance to change may be reflected in the NYPD’s low compliance numbers with new documentation requirements. In *Floyd*, the court flagged the department’s systemic failure to document stop, question, and frisk data.<sup>46</sup> The Court noted that in the decade preceding the litigation, *every patrol borough failed every annual audit* of the activity log where stops were recorded.<sup>47</sup> Similarly, a 2013 survey conducted by the VERA Institute of Justice revealed a high proportion of undocumented stops—in the range of 70%—that involved a search for drugs.<sup>48</sup> This lack of documentation persists. In the precincts where the department has piloted the new, court-ordered Stop Forms, the Monitor reported a 20% reduction in reported stops.<sup>49</sup> The Monitor report also documented an analysis of 1,400 arrests made between November and December in 2015 in which 50 arrests were identified as *Terry* stops, yet only *six* Stop Forms were prepared.<sup>50</sup>

### E. Documenting Level 1 and Level 2 Stops

New York City Council Member Vanessa Gibson, Chair of the Council’s Public Safety Committee, asked former Police Commissioner Bill Bratton the following question during a hearing on police reform legislation:

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<sup>43</sup> Remedy Opinion at 675 n.22.

<sup>44</sup> *U.S. v. Yonkers Police Department Final Agreement*, Section V.D(58) (“Officers shall submit documentation of investigatory stops and any searches, including a complete and accurate inventory of all property or evidence seized....”).

<sup>45</sup> *See id.* at 1.

<sup>46</sup> *See* Liability Opinion at 94.

<sup>47</sup> *Id.*

<sup>48</sup> Jennifer Fratello *et al.*, *Coming of Age with Stop and Frisk: Experiences, Self-Perceptions, and Public Safety Implications* (Vera Institute 2013), 12, <https://www.vera.org/publications/coming-of-age-with-stop-and-frisk-experiences-self-perceptions-and-public-safety-implications>.

<sup>49</sup> *Submission of Second Report of the Independent Monitor*, 18 (Feb. 16, 2016).

<sup>50</sup> *See id.* 50-51.

“Commissioner, a quick question. We’ve talked about the decree since Stop-and-frisk cases. Are there factors that officers use in determining how we actually stop an individual and frisk them. *So for instance, those individuals that may be stopped and just simply asked for identification, and it doesn’t result in anything, is that also recorded in the Stop-and-frisk numbers?* So what factors are we using to determine the Stop-and-frisk data that we get?”<sup>51</sup> (emphasis added).

Council Member Gibson is, of course, describing a Level 1, “request for information” stop. The described inquiry might even occur during a Level 2 stop. Phrased differently, her question asks: “Commissioner, does the department document Level 1/2 stops?”

In response to the Chair’s question, Commissioner Bratton stated, “So, the—all that information is documented.”<sup>52</sup> However, that is not correct. Only Level 3 and 4 stops are required to be documented and as noted above, the rate of compliance, even for Level 3, stops is abysmal. Based on its experience in this area and reports from community members, Legal Aid believes that *every* stop conducted by NYPD officers should be documented because:

- (1) documentation of stops—even when consensual and conducted under less than reasonable suspicion—will allow for greater accountability;
- (2) documentation will allow patterns of police behavior to be tracked; and
- (3) the tracking of such patterns will inform the training and supervision of officers which, in turn, will allow for more efficient policing and greater community education regarding SQF policy and implementation.

#### *1. Documentation of Stops Will Provide for Greater Accountability*

As an initial matter, the NYPD does not and cannot dispute that expanding documentation will result in greater accountability. Currently, there is no way to determine whether an officer misclassified a Level 1 or 2 stop because these stops are not documented. There is also no way to discern the point at which a Level 1 or 2 stop escalates to a Level 3 stop.<sup>53</sup> Requiring documentation and supervisory review (as in Level 3 stops) will create a record of stops that can be analyzed for patterns and

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<sup>51</sup> *See Right to Know Hearing Transcript* at 92:25 – 93:2–6.

<sup>52</sup> *See id.*

<sup>53</sup> This is why the implementation of BWCs is critical. Not only would cameras provide a record of *every* encounter, regardless of level, it would give clarity to encounters that are often difficult to clarify after-the-fact. This clarity would help educate officers on the legal distinctions during these stops and help protect them from unfair accusations when the stop was conducted constitutionally. Community members will likewise feel secure knowing that potentially unconstitutional encounters are put on record.

discrepancies. Additionally, documenting all stops will incentivize NYPD officers to learn the distinctions between the various levels of stops. Indeed, officer confusion around what constitutes a proper stop has led to both the lack of proper documentation and the carrying out of illegitimate SQFs.<sup>54</sup>

An analysis of SQF data from 2015 speaks to the continued unconstitutionality of many stops and frisks—their reduction in sheer occurrence notwithstanding. In 2015, just 17.6% of all stops resulted in an arrest.<sup>55</sup> Taken alone, this might suggest that many stops are being conducted for non-criminal activity, but officers are permitted to make Level 1 and Level 2 stops *before* they believe a crime has been committed. If we examine the “top” suspected crimes (that is, the crimes most commonly cited as a basis for stops<sup>56</sup>), however, the rate at which individuals are *frisked* after the stop—an action that should only take place if the officer (1) suspects that a felony or misdemeanor is imminent or in progress and (2) that officer feels physically threatened—remains high at roughly 62%.<sup>57</sup> For some of these categories like Criminal Possession of a Weapon, frisks may be justified under certain circumstances. But in other categories, namely, “Criminal Possession of Marijuana” and “Misdemeanor,” a high frisk or arrest rate would suggest that rather than focusing police resources on the most serious crimes that threaten community safety, officers continue to use the suspicion of low-level crimes to improperly frisk and arrest individuals.

In 2015, those suspected of a “Misdemeanor” were frisked 65% of the time and were arrested at a 37% rate.<sup>58</sup> For “Criminal Possession of Marijuana,” 63% were frisked and 33% arrested.<sup>59</sup> It is difficult to imagine that in nearly two-thirds of the instances where an officer suspects that a civilian either possesses marijuana or is committing a misdemeanor, the officer fears for his physical safety due to a belief that the individual is armed. Indeed, even when an officer’s reason for a stop was Criminal Possession of a

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<sup>54</sup> *Submission of Second Report of the Independent Monitor*, 69–70 (Feb. 16, 2016).

<sup>55</sup> Officers made 22,563 stops and 3,968 resulted in arrests. *See NYPD Stop, Question and Frisk Report Database*, 2015, available at [http://www.nyc.gov/html/nypd/html/analysis\\_and\\_planning/stop\\_question\\_and\\_frisk\\_report.shtml](http://www.nyc.gov/html/nypd/html/analysis_and_planning/stop_question_and_frisk_report.shtml).

<sup>56</sup> *Id.* These include, as categorized by the NYPD: Assault, Criminal Possession of Marijuana, Criminal Possession of a Weapon, Felony, Misdemeanor, Grand Larceny, Grand Larceny Auto, Petit Larceny, and Robbery. In categorizing the data, Legal Aid included the numbers for all identifiable spelling variations of these crimes. For uniformity, Legal Aid did not include stops where more than one crime was cited as the basis for the stop, so these figures reflect only stops where the NYPD identified only one crime as the basis of suspicion.

<sup>57</sup> *Id.* The percentage of those stops resulting in arrest is approximately 17%. *See Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

Weapon, either alone or in combination with another crime, those individuals were frisked 86% of the time, but only 10% were arrested.<sup>60</sup>

These potential discrepancies are precisely why greater documentation is necessary. Although total stops are down, officers may be incentivized to improperly categorize their reasons for the stop in order to justify unconstitutional interactions. Officers may also be genuinely confused about the lawfulness of their interactions. Greater documentation will help clarify this confusion while also increasing accountability.

## 2. *Individuals Subject to SQF Do Not Feel Free to Refuse Consent*

Many members of the communities most affected by SQFs rarely feel free to end a police encounter. In fact, many individuals remain confused about their rights to consent or refuse a search, further discouraging the termination of the encounter. This sentiment was repeatedly expressed in the JRP focus groups.

“For me, I don’t actually feel comfortable walking away from a police officer because even though they’re saying, ‘You’re not being arrested or detained,’ I don’t know. Police have a certain authority against you. Like they have a higher authority. So I feel like nowadays they can just do what they want and change the story later—say you did something, say you resisted arrest. So I wouldn’t just interfere. I would just cooperate to the most.”<sup>61</sup>

Numerous participants also felt that all stops, not just Level 3, were interrogative:

“Essentially what they do, upon approaching anybody now, is that they just straight up and down interrogate you. Before they can find out what you’re in the wrong for, and then give you an involuntary search.”<sup>62</sup>

Indeed, many participants remain reticent to ask any questions during the stop: “Cops don’t ask any questions, and you can’t even ask them for their badge number.”<sup>63</sup>

These experiences comport with the experiences of Legal Aid’s clients. Individuals who are stopped, even under Level 1 where no search is conducted, rarely feel free to walk away. Accordingly, police officers should document these encounters,

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<sup>60</sup> *Id.*

<sup>61</sup> See 11.17.15 CHHS Focus Group at 6: 193-199; see also 11.17.15\_BHSS at 7:306–311, 8:399.

<sup>62</sup> See 03.08.16 SHLES Focus Group.

<sup>63</sup> See 04.19.16\_EXDS—30m31s Focus Group at 1.

regardless of whether the officer believed the stop to be a “request for information” or “common-law right to inquire.”

**F. Police Officers Should Inform Individuals Subject to SQF of their Right to Deny Consent to a Search**

Many individuals who are stopped by NYPD officers feel compelled to consent to searches. To that end, we also believe that NYPD officers should be required affirmatively to inform individuals subject to SQFs of their right to deny consent to *any* search if the officer does not have probable cause for that search. This informational requirement should apply to all stops where an officer is legally allowed to search an individual because the lines between Level 1, 2, and 3 stops can become blurry; human interactions are fluid and dynamic, and these interactions, in the context of investigatory behavior by an authority figure, can quickly escalate to a different level without much warning or notice.

Currently, an officer can conduct a search during a Level 1 or 2 stop without informing the individual who is stopped of his right to refuse consent to a search. Requiring notice of the right to deny consent and expanding the documentation requirement to *all* investigatory encounters would expand the reach of a pending legislative package<sup>64</sup> and protect the personal security of citizens during every level of stop.

An informational requirement such as this is not novel; the court in *Floyd* suggested a similar reform.<sup>65</sup> Community members most affected by stop, question, and frisk have also expressed a desire for greater information during police encounters:

“Having the officer let you know that you have an option or a choice. Most of the times when an officer searches, they use language to trick you. They’ll go like . . . they’ll sound like they’re accusing you of something. Like, ‘Do you have something in your vehicle that could be dangerous or illegal?’ And then the person will say no. And then they will be like, ‘So you don’t mind if I check it[?]’ And that’s kind of like tricking you into having the consent for a search because the person’s going to be like, ‘No, go ahead. Check it,’ trying to defend their case. And instead of trying to

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<sup>64</sup> The New York City Council’s pending “Right to Know Act” limits the affirmative requirement to Level 3 stops.

<sup>65</sup> *Remedy Opinion* at 679 n.38, “There could be a simple way to ensure that officers do not unintentionally violate the Fourth Amendment rights of pedestrians by approaching them without reasonable suspicion and then inadvertently treating them in such a way that a reasonable person would not feel free to leave. Officers could, for example, begin *De Bour* Level 1 and 2 encounters by informing the person that he or she is free to leave.”

trick to get consent, I feel like they should just give them an option. Like, ‘I would like to search your vehicle, but you have the right to say no.’”<sup>66</sup>

The receipt of this information during an inherently invasive process not only helps protect an individual’s rights, it shows respect, professionalism, and courtesy — ideals the police department should strive to achieve.<sup>67</sup>

### **III. Enforcing Disciplinary Measures Would Result in Better Compliance**

As the Remedy Opinion explains, documentation must be accompanied by changes in discipline methodology.<sup>68</sup> The NYPD’s disciplinary system should formalize a structure of progressively strict disciplinary measures for officers who repeatedly violate citizens’ rights with unjustified and abusive stops. The NYPD should also formally record incidents of misconduct that are recognized outside of the department, such as by the criminal courts.

#### **A. Formalizing Discipline For Progressive Violations**

The NYPD historically has resisted the creation of any sort of sentencing matrix or efforts to impose some rigor and predictability on supervising officers’ discretion when disciplining officers for improper actions. As a result, an officer who, without force,<sup>69</sup> has unlawfully detained, questioned, and searched a civilian may receive a mere “minor violation” mark<sup>70</sup>—a non-adversarial disciplinary measure—or a low-level command discipline action, which may be removed from the officer’s record after one year.<sup>71</sup> To combat this, internal policy should formally state that repeated instances of unlawful stops will result in the imposition of progressively severe penalties.<sup>72</sup>

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<sup>66</sup> See 11.17.15 CHHS Focus Group at 9:322–332.

<sup>67</sup> See 11.02.15 JAMS Focus Group at 26:16-22 (“I mean if I’m being searched for—I guess giving me the option in the first place. Like hello I’m Officer Bradley. I’m going to do a quick frisk and if you’re good then you’re free to go, letting me know that beforehand because there are those who don’t and letting me know that ahead of time. Giving that speech just like they read you your Miranda Rights. It makes you feel a little more comfortable.”).

<sup>68</sup> *Remedy Opinion* at 668, 683.

<sup>69</sup> Use of force cases are subject to different review and thus are not discussed here. NYPD Patrol Guide 221-01, Notes. The Legal Aid Society offers no opinion on this review process in this paper, and focuses only on the intrusive, unjustified, and abusive stops that are conducted without the NYPD’s definition of force.

<sup>70</sup> Peter L. Zimroth, *Submission of Fourth Report of the Independent Monitor*, 27 (Nov. 18, 2016).

<sup>71</sup> The Patrol Guide requires that records of Schedule “A” violations and Command Discipline Logs be removed and destroyed on the anniversary date of the entry. NYPD Patrol Guide 206-02: Command Discipline, Additional Data.

<sup>72</sup> Such recommendations are consistent with the NYPD’s own style of recommendations to promote accountability in the wake of *Floyd*. See, e.g., Peters, Mark & Philip Eure, *Body-Worn Cameras* (. . . .continued)



The most recent Monitor Report has noted that in a random audit<sup>73</sup> of officer encounters, the NYPD Quality Assurance Division found that several Level 3 *Terry* stops had occurred without the officer recognizing that the situation had escalated beyond a Level 2 encounter.<sup>74</sup> Two-thirds of these cases were handled with either no action or instructions to the officer—a non-punitive resolution for officers who misunderstand policy.<sup>75</sup> The rest resulted in either command discipline or a “minor violation” log entry.<sup>76</sup>

As background, police officer violations are handled with either instructions, command discipline, or charges and specifications.<sup>77</sup> Command discipline actions are “recommended for misconduct that is more problematic than training, but does not rise to the level of charges.”<sup>78</sup> They consist of “informal,” “non-adversarial,” and unrecorded interviews with the officer who has been charged of certain substantiated violations.<sup>79</sup> Actions are divided into Schedule “A” violations, which may be removed from the officer’s records and destroyed on the anniversary date of the violation’s entry into the Command Discipline Log, and Schedule “B” violations, which may not.<sup>80</sup> Schedule “A” offenses include minor violations such as “failure to make reports in a timely fashion,”<sup>81</sup>

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(continued. . .)

*in NYC: An Assessment of NYPD’s Pilot Program and Recommendations to Promote Accountability*, NEW YORK CITY DEP’T OF INVESTIGATION AND OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, v-vi (2015) (recommending that the NYPD “make it a clear violation of policy” for a supervisor to use body-camera footage for minor offenses, such as uniform violations).

<sup>73</sup> This is referred to as a RAND audit. For these audits, “[t]he NYPD used radio transmissions to identify instances in which stops appear to have been made but a stop was not recorded.” Peter L. Zimroth, *Submission of Fourth Report of the Independent Monitor*, 25 (Nov. 18, 2016).

<sup>74</sup> Zimroth, n.63, *supra*. In each these situations, the patrolling officer determined that it was unnecessary to fill out the required stop report necessary for Level 3 encounters.

<sup>75</sup> *Police Discipline*, NYC CIVIL COMPLAINT REVIEW BOARD, (last reviewed, Dec. 27, 2016) <https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page>. See also Zimroth, footnote 65, *supra*.

<sup>76</sup> *Id.* The specific violation designation was not provided in the report.

<sup>77</sup> NYPD Patrol Guide 206-02: Command Discipline; *id* at 206-05: Preparation of Charges and Specifications. See also *Police Discipline*, NYC CIVIL COMPLAINT REVIEW BOARD, (last reviewed, Dec. 27, 2016) <https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page>. See also *Police Discipline*, NYC CIVIL COMPLAINT REVIEW BOARD, (last reviewed, Dec. 27, 2016) <https://www1.nyc.gov/site/ccrb/prosecution/police-discipline.page>.

<sup>78</sup> *Id.* See also NYPD Patrol Guide 206-02, Purpose, Definition.

<sup>79</sup> NYPD Patrol Guide 206-02: Command Discipline, ¶¶ 3, 7. The Commanding Officer or Executive Officer has the discretion to determine whether command discipline is appropriate. *Id.* at ¶ 3.

<sup>80</sup> *Id.* at 206-02: Command Discipline, Additional Data.

<sup>81</sup> *Id.* at 206-03: Violations Subject to Command Discipline, Schedule “A” Violations, ¶ 7.

“unnecessary conversation [with civilians]”<sup>82</sup> and “any other minor violation that, in the opinion of the commanding/executive officer, is appropriate for a Schedule A command discipline procedure,”<sup>83</sup> and the violations mentioned in the most recent Monitor Report most likely fell into one of these categories.<sup>84</sup>

Level 3 encounters premised upon Level 2 observations should not be treated as minor violations, but rather as more serious, Schedule B violations that are not annually erased. Schedule A penalties are inadequate methods to alter officer behavior or end the recurrence of unjustified and abusive stops, largely because Schedule A violation penalties are limited to the following:

- forfeiture of up to five days’ vacation or accrued time;
- restricted out-of-command assignments, which pay “portal-to-portal” and overtime for a fixed period, not to exceed five such assignments;
- verbal and written warnings and admonishments; or
- assignment change.<sup>85</sup>

Moreover, there is no way to measure an officer’s cumulative misconduct regarding *Terry* stops if they are treated as minor violations because they are annually expunged from an officer’s record.<sup>86</sup> Further action is required to enable police departments to adequately monitor and discipline repeated violations.

The Facilitator should recommend a formalized, consistent system of foreseeable consequences that progressively increases in severity for officers who repeatedly conduct unlawful stops. For example, a minor violation mark may be an appropriate reaction for the first time an officer mistakenly mishandles a Level 3 interaction as a Level 2 encounter. However, the NYPD should adopt clear, formal guidelines to ensure that officers who repeatedly engage in coercive, Level 3 measures—such as frisking,

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<sup>82</sup> *Id.* at 206-03: Violations Subject to Command Discipline, Schedule “A” Violations, ¶ 10.

<sup>83</sup> *Id.* at 206-03: Violations Subject to Command Discipline, Schedule “A” Violations, ¶ 34 (emphasis in original). Importantly, Schedule B violations are not considered “minor” violations, like the ones mentioned in the most recent Monitor Report. *Cf. id.* at Schedule “B” violations, ¶ 9 (omitting the term “minor” to describe the catchall violation provision that is included under Schedule “A” violations).

<sup>84</sup> *Compare id.* at Schedule “A” Violations, ¶ 34, *with id.* at Schedule “B” violations, ¶ 9. The actions observed during the random audit did not fit the description of any Schedule B violation, but did broadly fit the three descriptions listed. More information is not publicly available. *See Shallwani, Pervaiz, NYPD’s Bratton: Disclosing Officer Discipline Was Against the Law*, WSJ.com, (Aug. 30, 2016) available at <http://www.wsj.com/articles/nypds-bratton-disclosing-officer-discipline-was-against-the-law-1472589506> (reporting on the NYPD’s new policy to keep private officer disciplinary reports).

<sup>85</sup> *Id.* at 206-04: Authorized Penalties Under Command Discipline.

<sup>86</sup> *See* NYPD Patrol Guide 206-02: Command Discipline.



manhandling, or blocking the path of subjects—based on Level 2 observations are subject to discipline of increasing severity.

**B. Incorporating Misconduct that is Recognized Outside of the Department**

Discipline should not be limited to instances where either a supervisor or a citizen reports an officer's misconduct. The NYPD should also create a formal feedback mechanism to recognize when evidence is suppressed or a case is dismissed due to an officer's unlawful stop. Currently, an officer may perform ten unlawful stops or searches, have all ten cases or arrests thrown out of court, yet face no material professional consequence because neither an officer's periodic evaluation nor the disciplinary actions taken against him consider how that officer's unconstitutional behavior has affected the judicial administration of justice. Rather, periodic evaluations primarily rely on review of an officer's self-reported interactions,<sup>87</sup> and neither command discipline adjudications or charges and specifications consider the officer's overall history of unconstitutional evidence-gathering.<sup>88</sup>

The current NYPD evaluation system does not acknowledge how officer misconduct affects judicial proceedings. Police officers are evaluated on a monthly, quarterly, and yearly basis.<sup>89</sup> A patrol officer's Monthly Reports are based on the officer's self-reported documentation of daily activity and cross-referenced with self-reported stop, question, and frisk reports.<sup>90</sup> Quarterly reports are based on these monthly activity logs, officer interviews, and additional comments by supervisors.<sup>91</sup> The annual evaluations, in turn, are primarily based on the "Police Officer's Monthly Performance Reports" and the "Monthly/Quarterly Performance Review" and "Rating System."<sup>92</sup>

While supervisors have the discretion to include ad hoc comments in an officer's evaluation, there is no formal mechanism that acknowledges when a judge or district attorney finds an officer's behavior to have been subpar. Similarly, Performance Evaluation Raters examine the Central Personnel Index and the Civilian Complaint Review Board records for entries pertaining to the rating period, as well as any other

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<sup>87</sup> See *id.*; nn .82-83, *infra*.

<sup>88</sup> See nn. 82–86, *infra*.

<sup>89</sup> NYPD Patrol Guide 205-57: Police Officer's Monthly/Quarterly Performance Review and Rating System, Purpose, Scope.

<sup>90</sup> *Id.* at 205-57: Police Officer's Monthly/Quarterly Performance Review and Rating System, Note. See also *id.* at 212-11, Investigative Encounters: Requests for Information, Common Law Right of Inquiry and Level 3 Stops, Required Documentation – Uniformed Member of Service, ¶ 24 (2016).

<sup>91</sup> *Id.* at 205-57 at ¶¶ 21-23.

<sup>92</sup> *Id.* at 205-56: Police Officer's Annual Evaluation Utilizing the Monthly/Quarterly Performance Review and Rating System, Note.

record of performance documentation (e.g., Command Discipline Log, Minor Violations Log, etc.),<sup>93</sup> but the Patrol Guide does not require review of court decisions where the officer was not a party to the case.

Officer disciplinary policies also fail to incorporate a feedback mechanism from the courts. Command Discipline adjudications consider only the Supervisor's Complaint Report, Command Discipline Election Report and the officer's prior twelve-month disciplinary history.<sup>94</sup> Similarly, while charges and specifications may be premised on "written documentation, files, investigative reports, and/or additional information supporting the bases" for the charge,<sup>95</sup> there is no formal method for referencing repeated judicial censures during the process. Thus, the Department is left unaware of the officer's performance in a key function of the job.<sup>96</sup>

To remedy this, the NYPD should create a formal system that records how often a judge or district attorney has either suppressed or refused to offer evidence in a criminal proceeding due to an officer's unconstitutional behavior.<sup>97</sup> Many jurisdictions already have similar systems in place to facilitate inter-agency feedback and monitor officer misconduct. For example, California Attorney General Kamala D. Harris issued an opinion that under California state law, the California Highway Patrol could lawfully release to district attorneys' offices information regarding officers found to have

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<sup>93</sup> *Id.* at 205-48: Evaluations – General –Members of Service, ¶ 3.

<sup>94</sup> *Id.* at 206-02: Command Discipline, ¶ 1.

<sup>95</sup> *Id.* at 206-05: Preparation of Charges and Specifications, ¶ 1(a).

<sup>96</sup> While the police department may not take notice of unconstitutional stops that lead to suppressions in evaluations or discipline, the problem exists throughout the five boroughs. *See, e.g., People v. Brock*, 2016 NY Slip Op 51213 (N.Y. Sup. Ct. Richmond Cty, July 25, 2016) (unconstitutional search); *People v. O'Neill*, 2016 NY Slip Op 05510 (N.Y. Sup. Ct. Queens Cty, July 13, 2016) (lack of officer credibility regarding evidence that led to a search); *People v. Coronado*, 2016 WL 2353598 (1st Dep't, May 5, 2016) (unconstitutional stop regarding a higher level encounter premised on a lower-level observation in New York County); *People v. Redacted 25*, under file with petition as *Redacted 23*, (2d Dep't, Apr. 14, 2015) (same in Kings County); *People v. Redacted 23*, under file with petition as *Redacted 25* (N.Y. Sup. Ct. Bronx Cty, March 31, 2016) (same).

<sup>97</sup> Discretionary comments by supervisors would be inadequate. The Police Union has recently sued the NYPD for its current evaluation process requiring police officers to document all enforcement activities for review because they claimed the additional information illegally changed the terms and conditions of employment without negotiating with the union. *See* Dan Prochilo, *Police Union Sues NYPD Over New Performance Evaluations*, LAW360, <http://www.law360.com/articles/505830/police-union-sues-nypd-over-new-performance-evaluations>. *See also Stopped, Seized, and Under Siege: U.S. Government Violations of the International Covenant on Civil and Political Rights Through Abusive Stop and Frisk Practices*, 5 (September 2013) (noting that "the NYPD and the City of New York have . . . made it clear that they are not open to outside oversight" by fighting the allegations throughout the *Floyd* trial and signaling its disagreement with the court's legal conclusions when it filed an appeal).

Allowing discretion to include or exclude this information by a supervisor would likely result in its uniform exclusion when the officer has no or few negative adjudications. This, in turn, will stymie the overall effectiveness of documenting these occurrences.

committed *Brady* violations that can be used by defendants as exculpatory evidence.<sup>98</sup> The city of Philadelphia also has a searchable SQF database that facilitates communication between the police department and the courts about officers' problematic stop practices.<sup>99</sup>

Police unions historically have opposed police department access to “*Brady* Lists,” even though officers are most often included on such lists for “sustained findings of misconduct, criminal convictions, and in-court testimony and findings,”<sup>100</sup> and claim that district attorneys have too much discretion to determine what constitutes “exculpatory evidence.”<sup>101</sup> However, in 2013, the Sacramento County Sheriff's office attested to the utility of both police departments and the public accessing and using *Brady* Lists when an officer has “violated [the public's] trust” in the police.<sup>102</sup> Moreover, the scope of feedback loops that monitor evidence suppression is limited to two specific types of evidence at issue: legal opinions that suppress unconstitutionally obtained evidence, and evidence that cannot be presented because it was unconstitutionally obtained.

The utility of such a feedback loop outweighs any hypothetical concern about its use. Like testifying against accused criminals, police agencies should not be “saddled” with officers who cannot do “a basic function of their job”—i.e., constitutionally patrol their assigned communities.<sup>103</sup> By tracking an officer's unlawful stops and searches, and by articulating foreseeable, material disciplinary measures in response to a pattern of unlawful conduct, the NYPD would demonstrate its commitment to correcting improper behavior, incentivizing greater compliance with current reforms, and earning the respect of the communities it polices.

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<sup>98</sup> Published Opinion 12-401, OFFICE OF THE ATTORNEY GENERAL – STATE OF CALIFORNIA, 2 (Oct. 13, 2015).

<sup>99</sup> The Defender Association of Philadelphia received a searchable database which allows attorneys to confront officers at hearings and trials with an individualized history of their stop patterns, allowing for more opportunities for accountability. However, due to a confidentiality agreement, the Defender Association cannot disclose any data or specifics related to the information.

<sup>100</sup> Reimund, Mary E., *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officer's? A Need for Expansion and Uniformity*, 3 INT'L J. OF HUM. & S. SCIENCES 1, 2 (2013).

<sup>101</sup> *Id.* at 4.

<sup>102</sup> Gutierrez, Melody & Kim Minugh, *California police unions fight discipline of officers under prosecutors' lists*, MERCED SUN-STAR, available at <http://www.mercedsunstar.com/news/state/article/3278731.html>.

<sup>103</sup> *Id.* (quoting the president of the California Police Chiefs association, who endorsed police *Brady* Lists as a way of keeping departments free of officers who are no longer allowed to testify against accused criminals).

#### IV. Profiling and Targeted Abuse of Members of Vulnerable Communities

In this section, we provide a brief description of characteristics of certain communities that have historically been subjected to a large percentage of SQFs: the homeless, youth of color, LGBTQ individuals, and persons coping with drug addictions and substance abuse problems. We do so to show how members of these communities, many of whom are already vulnerable, are further victimized by undocumented SQFs.<sup>104</sup>

It should be noted that there is significant overlap among these vulnerable populations. For example, many homeless individuals may also be young and of color.<sup>105</sup> They may also be members of the LGBTQ community.<sup>106</sup> Consequently, because such individuals are members of different types of vulnerable populations, they are likely to be at a higher risk of being stopped and frisked or having other antagonistic encounters with police officers than individuals who are not members of these historically vulnerable groups.

First, requiring documentation of all police-initiated encounters would provide additional data concerning interactions between the NYPD and members of these populations.<sup>107</sup> Second, during the focus groups organized for the purpose of the Joint

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<sup>104</sup> “People who are members of multiple groups that are each targeted by NYPD for profiling and illegal stops and frisks can experience compounded prejudice and layers of harm. This reality is exacerbated by an environment permeated with police violence and a criminal legal system weighted against many of these same communities.” Center for Constitutional Rights, *Stop and Frisk: The Human Impact*, 14 (2012); see e.g., New York Civilian Complaint Review Board, *Pride, Prejudice and Policing: An Evaluation of LGBTQ-Related Complaints from January 2010 through December 2015*, 37 (2016) (hereinafter “*Pride, Prejudice and Policing*”) (noting that LGBTQ people of color are more likely to complain about police mistreatment than nonminority members of that community).

<sup>105</sup> See Coalition for the Homeless, *Basic Facts About Homelessness: New York City*, available at <http://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/> (2016) (noting that “approximately 58% of NYC homeless shelter residents are African-American” and “31% are Latino” with white individuals comprising only 7% of this population); see also Nikita Stewart, *Homeless Young People of New York, Overlooked and Underserved*, NEW YORK TIMES (Feb. 5, 2016), available at [http://www.nytimes.com/2016/02/06/nyregion/young-and-homeless-in-new-york-overlooked-and-underserved.html?\\_r=0](http://www.nytimes.com/2016/02/06/nyregion/young-and-homeless-in-new-york-overlooked-and-underserved.html?_r=0) (noting that there are higher than documented numbers of young homeless people in New York City).

<sup>106</sup> One fifth or 19% of the transgender people surveyed in a 2011 study conducted by the National Center for Transgender Equality and the National Gay and Lesbian Task Force reported “experiencing homelessness at some point in their lives.” Those who experienced homelessness also reported experiencing mistreatment in public, including from police. Furthermore, while 22% of survey respondents reported instances of harassment in their encounters with the police, 29-38% of respondents of color reported police harassment. See Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 4 (2011) (emphasis added) (This study involved 6,450 transgender participants from all 50 states in the United States) (hereinafter *Injustice at Every Turn*); see also Black and Pink, *Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Prisoner Survey*, 8 (2015) (mentioning bias of police against LGBTQ people of color).

<sup>107</sup> To be sure, Legal Aid’s recommendation is not to require NYPD officers to ask individuals whether they belong to particular vulnerable populations when they encounter them. Rather, Legal Aid (. . . .continued)

Remedial Process, many members of vulnerable communities, particularly people of color, called for better training for police officers.<sup>108</sup> In particular, they asked for sensitivity training and community based training.<sup>109</sup> To that end, while the Gay Officers Action League (“GOAL”)<sup>110</sup> trains officers on LGBTQ issues<sup>111</sup>, and the current police patrol guide also provides guidance to officers on the subject of LGBTQ interactions,<sup>112</sup> we further recommend fostering ongoing discussion between the NYPD and non-police officer members of the LGBTQ community to improve and formalize training processes for officers. For the reasons noted below, similar discussions between the NYPD and other vulnerable communities are also encouraged for the purpose of creating regular and routine training programs for police officers, led by non-police officer members of vulnerable communities that address the unique problems faced by those communities.

Our discussions below highlight a disturbing pattern of NYPD activity in relation to vulnerable communities: police conduct sweeps of homeless shelters, thus targeting homeless people for what appears to be “being homeless while in a City shelter”; police conduct sweeps of subway stations where students of color are likely to be found, thus apparently targeting them for “using the subway while young and Black”; police conduct sweeps of areas where transgender persons are congregating thus apparently targeting them for “Walking while Trans”; police conduct sweeps of areas around needle

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(continued. . . .)

recommends that the NYPD, working with community members, explore various methods by which third parties or arrestees themselves can provide information about their identities.

<sup>108</sup> See 03.14.16 OSBA\_Redacted Focus Group at 18 (noting that the police do not seem like they are trained correctly); 05.20.16 BSLY\_Redacted Focus Group at 6 (noting that officers police communities without [proper] training).

<sup>109</sup> See 11.02.15 CH\_Redacted Focus Group at 16 (“[T]hey should have sensitivity training . . . so they . . . are more compassionate”); 05.12.16 Focus Group STPN\_Redacted at 26 (“I think that the police could use sensitivity training, or better sensitivity training. And I think to hone in around communication skills”); 06.24.16 RHJC\_Redacted Focus Group at 22 (“Community people need to be doing the training, not NYPD doing the training for NYPD. That’s like kids teaching kids”); 05.20.16 BSLY\_Redacted Focus Group at 5 (“[T]he training [of the police] should be done by [the] community and activists.”).

<sup>110</sup> “The Gay Officers Action League (GOAL) was formed in 1982 to address the needs, issues and concerns of gay and lesbian law enforcement personnel. Originally a fraternal organization, GOAL has advocated for the rights of its members and assisted them on matters of discrimination, harassment and disparate treatment in the workplace. GOAL members include both active and retired uniformed and civilian personnel employed in criminal justice professions,” Gay Officers Action League, *About Us*, Gay Officers Action League Website (2016) <http://www.goalny.org/about-us>.

<sup>111</sup> GOAL conducts training on LGBTQ issues during the general training of officer recruits and as part of officers’ promotional classes. See *Pride, Prejudice and Policing* at 14.

<sup>112</sup> Police officers are prohibited from using “discourteous or disrespectful remarks regarding another person’s ethnicity, race, religion, gender, *gender identity/expression, sexual orientation* or disability.” Members are also encouraged to use titles of respect (including “preferred name and gender pronouns” for the individuals they encounter) See NYPD Patrol Guide, P.G. 203-10: Prohibited Public Conduct of Officers (2016) (emphasis added).



exchanges, thus targeting people struggling with drug abuse issues for taking advantage of a city service. A common tactic is that the NYPD systematically targets vulnerable individuals who are engaging in otherwise ordinary activities, often in places where they are encouraged to go. NYPD officers rarely stop members of non-minority communities found in these same or similar places who are engaged in the same or similar activities. This practice of targeting vulnerable persons in sweeps for stops is destructive and suggests a far greater interest by officers in fulfilling quotas than in focused community policing. These are exactly the types of patterns that could be more clearly identified by NYPD's auditing department and addressed with full documentation requirements.

### A. The Homeless

According to a 2016 report by the National Alliance to End Homelessness, New York has one of the nation's largest homeless populations.<sup>113</sup> Those who are homeless have consistently maintained that they are frequently and unjustifiably stopped and frisked by the NYPD.<sup>114</sup> For example, interviewees in a 2012 study conducted by the Center for Constitutional Rights described how police officers "wait[ed] outside of shelters and stopp[ed] [the] people . . . coming out."<sup>115</sup> In 2014, police officers conducted raids on homeless shelters in Manhattan that resulted in arrests.<sup>116</sup> As recently as May 2016, advocates for the homeless filed a complaint with the NYC Civil Rights Commission, accusing the NYPD of targeting people living on the street in violation of the Community Safety Act, which prohibits "bias-based profiling."<sup>117</sup>

NYPD officers also regularly conduct sweeps of encampments<sup>118</sup> of homeless people, throwing away belongings of homeless persons in violation of proper policy.<sup>119</sup>

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<sup>113</sup> See National Alliance to End Homelessness, *The State of Homelessness in America: An Examination of Trends in Homeless, Homeless Assistance, And At-Risk Populations at the National and State Levels*, 14 (2016).

<sup>114</sup> "I have been stopped, questioned and frisked four times," said Joseph Midgley, "*Now that I am homeless, the police harassment has only gotten worse. This form of discriminatory policing is an outrage and should be stopped now.*" New York Civil Liberties Union (NYCLU), *NYCLU Analysis Reveals NYPD Street Stops Soar 600% Over Course of Bloomberg Administration* (Feb. 14, 2012) (emphasis added), available at <http://www.nyclu.org/news/nyclu-analysis-reveals-nypd-street-stops-soar-600-over-course-of-bloomberg-administration>.

<sup>115</sup> Center for Constitutional Rights, *Stop and Frisk: The Human Impact*, 14 (2012).

<sup>116</sup> See Christopher Matthias and Inae Oh, *NYPD Raid on Homeless Shelter Draws Ire of Advocates*, HUFFINGTON POST (June 02, 2014) [http://www.huffingtonpost.com/2014/05/30/nypd-homeless-shelters\\_n\\_5413486.html](http://www.huffingtonpost.com/2014/05/30/nypd-homeless-shelters_n_5413486.html).

<sup>117</sup> Nikita Stewart, *New York Police Illegally Profiling Homeless People, Complaint Says*, NEW YORK TIMES (May 26, 2016) [http://www.nytimes.com/2016/05/27/nyregion/new-york-police-illegally-profiling-homeless-people-complaint-says.html?\\_r=0](http://www.nytimes.com/2016/05/27/nyregion/new-york-police-illegally-profiling-homeless-people-complaint-says.html?_r=0).

<sup>118</sup> An encampment, colloquially referred to as a "tent city" is a space where several homeless people congregate, sleep and store their belongings. See National Coalition for the Homeless, *Swept Away: Reporting on the Encampment Closure Crisis*, 2 (2016).

NYPD officers in “warrant squads” often conduct sweeps of homeless shelters to arrest individuals with open warrants. In one incident alone, NYPD officers arrested at least 125 people in nighttime raids across several shelters in the City.<sup>120</sup> As a result of these NYPD practices, many homeless people forego joining encampments or sleeping in homeless shelters, instead choosing to sleep in isolation in subway cars, bus stations, or fast food restaurants where they are put at great risk to their health and personal safety and are also likely to be stopped and frisked by police officers.

## B. Youth of Color

Youth of color face the highest risk of being stopped and frisked today; these individuals are more likely to be stopped by police officers even when they are engaging in ordinary, otherwise encouraged activities, such as attending school. Even since the implementation of the *Floyd* immediate reforms, young people have discerned no difference in the way that police interact with them.

Students of color in New York report being stopped by police on their way to and from school<sup>121</sup> and being searched during these encounters without consent.<sup>122</sup> Additionally, students have reported being frisked and asked for their IDs on their way to and back from school.<sup>123</sup> Students of color have also been stopped at subway stations for using their MetroCards, purportedly on suspicion that the MetroCards were stolen. During such stops, students are asked to produce their IDs, ostensibly because of the officers’ disbelief that they are students. One student in a focus group recounted:

“Coming from school last year, I was walking past a deli on my block. Usually over there nothing really happens. But the police were around there, so I had on my school uniform summertime, so they stopped me and asked me to see my ID.

(continued. . . .)

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<sup>119</sup> See Emma Whitford, *NYPD Destroyed Birth Certificates, Medication, IDs In East Harlem Homeless Raid*, GOTHAMIST (Oct 13, 2015) [http://gothamist.com/2015/10/13/harlem\\_homeless\\_raid.php](http://gothamist.com/2015/10/13/harlem_homeless_raid.php). (When vacating public property, police are required to record and provide vouchers for any property left behind by the homeless).

<sup>120</sup> See *NYPD Raid on Homeless Shelter Draws Ire of Advocates*; see also Nina Bernstein, *Police Arrest in 125 Nighttime Raids on Homeless Shelters*, NEW YORK TIMES, (Jan. 20, 2000) <http://www.nytimes.com/2000/01/20/nyregion/police-arrest-125-in-nighttime-raids-on-homeless-shelters.html>.

<sup>121</sup> See 11.17.15 BHSS Focus Group at 3–4; see also 11.18. 2015 CVSOS-Redacted Focus Group at 14–15.

<sup>122</sup> 11.18. 2015 CVSOS-Redacted Focus Group at 14 (“I had said, ‘I don’t consent to this search.’ And he was just like, ‘Nah.’ And they just kept searching. We had just c[o]me out of school.”).

<sup>123</sup> See 11.17. 2015 CHHS\_2\_Redacted Focus Group at 2; see also 11.17.15 BHSS Focus Group at 3–4; October 22, 2015 JAMS Focus Group Transcript at 4 (“And then on my way to school they would stop, frisk and search me. And it was like that for a little bit, so they got bored and moved on to someone else.”).

And I was, like, compliant with it because I was like, I guess they're looking for somebody. So I showed them my ID. And I only had my book bag, my dress shirt. And he decides to pat me down, and he was asking me do I have anything on me. And I was trying to explain to him that I just came from school I didn't have anything on me. My book bag was empty. And they ended up looking through my book bag. I emptied it out, but nothing was there except paper."<sup>124</sup>

This account, as well as many others, shows that students are stopped even while wearing their school uniforms.<sup>125</sup> The NYPD has also targeted certain train stops after school hours, primarily in areas where young people of color are using subway stations. There, police officers stop children whom the police believe look older than their actual ages, challenging their use of student MetroCards. To combat this practice, school principals have had to provide students with official letters verifying their age and enrollment in school. Some schools have resorted to sending staff members to train stations to vouch for students to police officers. As one young respondent in a focus group observed:

"I noticed there were so many more cops like out and around just like searching, hiding in little corners to kind of just wait . . . I seen a lot of profiling . . . [police would stop people with] hoodies . . . if they had dreads or if they had like, braids . . . ."<sup>126</sup>

Moreover, because police officers can stop any suspected "truant," a designation that includes anyone who appears to be under 17 during school hours (until 1 pm), they have extraordinary discretion to stop and frisk youths who, due to their age and immaturity, are less likely to understand their rights and are even less equipped to make a decision regarding their right to refuse consent to a search.

These frequent, invasive stops and searches conducted by the NYPD create a significant psychological toll on the young people who regularly experience them. In a 2012-2013 study conducted on 1,261 young men in New York City aged 18 to 26, researchers found that individuals who reported more police contact also reported more "trauma and anxiety . . . tied to how many stops they reported [and] the intrusiveness of the encounters."<sup>127</sup>

This psychological evidence is buttressed by the descriptions of young people's feelings about the experience of SQF in the community. Notably, young people of color report feeling isolated from the larger society that does not experience this level of police

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<sup>124</sup> 11.17. 2015 CHHS\_2\_Redacted Focus Group at 2.

<sup>125</sup> 11.17. 2015 Focus Group CHHS\_1\_Redacted at 8-9.

<sup>126</sup> 11.02.15 CH\_Redacted Focus Group at 5.

<sup>127</sup> Gellar et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 12 AMERICAN JOURNAL OF PUBLIC HEALTH 2321 (2014).



interaction. Many also have come to accept stop-and-frisk as part of their everyday lives; they see the police as an ‘occupying force’ or believe that they are constantly under siege by the NYPD.

This feeling of being “occupied” by the NYPD is reinforced by the presence of police in the *homes* and *schools* of young people of color. The NYPD’s Juvenile Robbery Intervention Program (“JRIP”) involves individual Housing Bureau detectives keeping a close watch on public housing residents, ages 14 - 21, who are charged with or suspected of participation in a robbery. JRIP detectives regularly visit program participants at home and at school, confer with their parents and teachers, and connect them to services.

While this program appears innocuous and even helpful, there are indications that the NYPD relies on it for more insidious purposes. In particular, it has become apparent that the program is used as a means to obtain intelligence on gang activity and more worrisome, as a means for NYPD officers to pressure children to become police informants or witnesses in active criminal investigations. This level of police interference and surveillance in the lives of young people of color raises significant constitutional concerns and further compounds the psychological damage and harassment experienced by these vulnerable individuals.

Again, the expansion of the current documentation requirements to cover all of the encounters between the youth and the NYPD, particularly those between school children and police officers, would ensure that there is proper oversight over officers’ actions and would mean that the unlawful, disruptive and psychologically harmful stops, surveillance and interference with young people can be identified and stopped.

### C. LGBTQ Communities

Recent evidence shows that LGBTQ individuals are more likely to be stopped by the police than their non-LGBTQ peers.<sup>128</sup> According to a 2012 study of Jackson Heights, Queens residents<sup>129</sup> conducted by Make the Road New York (“MRNY”), a New York based community advocacy organization, 28% of the non-LGBTQ respondents reported being stopped by the police as compared to 54% of the LGBTQ respondents and 59% of transgender respondents.<sup>130</sup> In addition, transgender individuals are often stopped by the NYPD and accused of engaging in sex work, not based upon any action taken by the transgendered person, but simply based on the person’s physical appearance and/or

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<sup>128</sup> See Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights* at 5 (hereinafter “*Transgressive Policing*”)(2012).

<sup>129</sup> To be sure, this type of asymmetric treatment by the police is not experienced by LGBTQ persons exclusively in Jackson Heights, but also in other parts of the city including Brooklyn, Chelsea and the West Village. See *Pride, Prejudice and Policing* at 5, 42.

<sup>130</sup>*Transgressive Policing* at 4.

congregation with other transgendered persons.<sup>131</sup> The commonly used descriptor “Walking while Trans” indicates the high level of risk of being accosted by police that transgender persons face.<sup>132</sup>

In its large-scale study of LGBTQ bias and the NYPD from 2010 to 2015, the NYC Civilian Complaint Review Board (“CCRB”) received 466 distinct complaints which contained several allegations that some police officers used LGBTQ-related slurs when interacting with the public.<sup>133</sup> According to MRNY’s 2012 report, some members of the LGBTQ community who have been stopped by police officers have also reported being subject to verbal and even physical abuse, including groping and being subjected to inappropriate touches during SQFs.<sup>134</sup> Until 2012, stop-question-and-frisk policies authorized police officers to stop transgender individuals for prostitution-related offenses and subsequently charge them if the officers found any condoms in the individual’s possession.<sup>135</sup> According to the MRNY report, 61% of transgender respondents reported being stopped and harassed by the police for prostitution-related offenses or for their IDs not matching their gender presentation.<sup>136</sup>

#### **D. Persons Addicted to Drugs or Coping with Substance Abuse Issues**

Substance abusers, especially those addicted to opioids, are also likely to face high levels of police stops. Targeting areas such as needle exchanges, police officers have begun approaching individuals who are leaving needle exchange centers and, after conducting a SQF, arresting them for drug possession based on trace amounts of drugs left in their needles. This type of activity suggests a far greater interest in achieving arrest quotas than in productive community policing designed to protect the safety and well-being of citizens. We maintain that condoning undocumented SQFs with respect to substance abusers further victimizes individuals who would be better served by access to social services.

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<sup>131</sup> *Id.* at 12.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 23.

<sup>134</sup> *Transgressive Policing* at 4–5, 12, 19, 23–24.

<sup>135</sup> *Id.* at 12.

<sup>136</sup> *Id.* at 18.

**V. Conclusion**

For the reasons set forth above, we respectfully submit this paper in support of our position that documentation of all stops should be required, some system of disciplinary consequences for unlawful stops should be developed and the profiling and abusive targeting of vulnerable communities must end.

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February 10, 2017

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Re: Joint Remedial Process Reform Recommendation Concerning the City of New York's Interpretation of 50-a

Dear Judge Belen,

I write to summarize why we believe the City of New York's interpretation of Civil Rights Law 50-a ("50-a"), and not the state statutory language, needs immediate reform. While it is true that 50-a grants police records more protection than almost every other public access exemption in the country, prior to May 2016, no administration before has interpreted it so broadly as to completely shield the New York Police Department from disclosing summaries of misconduct that had been substantiated through investigations either by the Internal Affairs Bureau or the Civilian Complaint Review Board. This interpretation allows no transparency of the NYPD accountability system and thwarts all efforts at advancing public trust of the NYPD. Many of the reforms sought by the community during the JRP process will not be feasible without first addressing the current administration's interpretation of 50-a.

(1) This administration's interpretation of 50-a is legally overly broad.

FOIL provides the people of New York a "means to access governmental records, to assure accountability and to thwart secrecy," by ensuring that "[a]ll records of a public agency are presumptively open to public inspection, without regard to need or purpose of the applicant." *Matter of Buffalo News, Inc. v. Buffalo Enter. Dev. Corp.*, 84 N.Y.2d 488, 492 (1994) (internal citation and quotations omitted). Therefore, "consistent with these laudable goals," the Court of Appeals "has firmly held that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government." *Id.*

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Because FOIL serves vital public interests, the burden is upon the government to demonstrate that the requested information falls “squarely within” the exemption. *Matter of Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145, 158-59 (1999). “[T]he standard of review on a CPLR article 78 proceeding challenging an agency's denial of a FOIL request is much more stringent than the lenient standard generally applicable to CPLR article 78 review of agency actions. A court is to presume that all records are open, and it must construe the statutory exemptions narrowly.” *Matter of Berger v. N.Y.C. Dep't of Health & Mental Hygiene*, 137 A.D.3d 904, 906 (2d Dep't 2016), *leave to appeal denied*, 27 N.Y.3d 910 (2016). And to invoke Section 50-a, under this standard, an agency cannot “with[old] all of the requested records on the basis of a blanket invocation of Civil Rights Law § 50-a” but must “offer[] a specific basis for the claimed exemption.” *Matter of Hearst Corp. v. N.Y. State Police*, 966 N.Y.S.2d 557, 560 (3d Dep't 2013). Further, “[c]onclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed.” *Matter of Dilworth v. Westchester Cty. Dept. of Corr.*, 93 A.D.3d 722, 724 (2d Dep't 2012).

Section 50-a, as relevant here, protects “personnel records” of police officers from compelled disclosure. Civil Rights Law § 50-a. The statute provides no definition for personnel records, except to say that to qualify, the records must be “used to evaluate performance toward continued employment or promotion.” *Id.* In this regard, it is firmly established that the focus is not merely on the nature of the information in the document, but also upon the actual use of that document in evaluating officers. The summaries of substantiated misconduct that are the subject of all four of Legal Aid's Article 78 petitions are not covered by 50-a.

(2) The Legal Aid Society's Litigation Series Regarding Summaries of Substantiated Misconduct

The current administration's position in its four cases against The Legal Aid Society on behalf of both the Civilian Complaint Review Board and the New York Police Department is contrary to the legislative intent and prior administration's interpretations of 50-a. In all our cases, we have requested summaries of substantiated misconduct, whether from the CCRB or NYPD. Summaries have never before been considered “personnel records” under 50-a, as former Commissioner Ray Kelly even admitted recently while saying he also wanted to remove media access to these summaries but his lawyers advised him that would be unlawful. *See* Rocco Parascandola and Graham Rayman, *Fmr. Police Commissioner Raymond Kelly likes Bill Bratton's decision to keep NYPD disciplinary records secret*, New York Daily News, Aug. 27, 2016, <http://www.nydailynews.com/news/politics/raymond-kelly-agrees-bill-bratton-decision-nypd-secrecy-article-1.2768433>.

Neither the summaries of substantiated misconduct from the CCRB nor the NYPD fall within the “narrowly specific” set of documents that the legislature intended to protect with Section 50-a. *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562 (1986). The purpose of the statute is “to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action.” *Id.* (internal citation and quotation marks omitted). Statements in the legislative history confirm that the bill was targeted at preventing “the indiscriminate perusal of police

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officers' personnel records by defense counsel in cases wherein the police officer is a witness," because "such records often contain raw, unverified information derogatory of the subject police officer, such as letters of complaint from members of the public." *See* Mem. Of Roger Hayes, State of New York Division of Criminal Justice Services, Bill Jacket L. 1976, Chapter 413. Complaints that have been substantiated either by the Civilian Complaint Review Board or the Internal Affairs Bureau are not "unverified information" the 1976 legislature was concerned with and summaries of them are certainly not "raw".

Many of the proceedings that are ultimately reflected in the summaries are already public. For example, the CCRB routinely prosecutes members of the NYPD in front of an administrative law judge, known as a Deputy Commissioner of Trials, at a trial room at NYPD headquarters. *See* CCRB, *APU Trials*, <https://www1.nyc.gov/site/ccrb/prosecution/apu-trials.page> (last visited Nov. 29, 2016). These trials are open to the public. *Id.* After the Police Commissioner makes the ultimate determination of discipline, the summary of the charge and the penalty are published along with any dispositions the NYPD has made for other officers in a list summary entitled "Personnel Orders." For at least 40 years, the NYPD routinely made these Orders publicly available to reporters by posting them on a clipboard at the Deputy Commissioner of Public Information's ("DCPI") office at NYPD headquarters. *See* Rocco Parascandola and Graham Rayman, *Exclusive: NYPD Suddenly Stops Sharing Records On Cop Discipline In Move Watchdogs Slam As Anti-Transparency*, New York Daily News, Aug. 24, 2016, <http://www.nydailynews.com/new-york/exclusive-nypd-stops-releasing-cops-disciplinary-records-article-1.2764145>. This was not the only place where the records were made available, however. They have also been available at the New York City Hall Library, including orders dated as recently as April 2016.<sup>1</sup>

Despite the NYPD's longtime disclosure of these records, on May 27, 2016, the NYPD denied my request for the records on behalf of The Legal Aid Society. The NYPD stated that it would no longer make these orders available to the press going forward, regardless of its past policy of public disclosure. The timing of the NYPD's abrupt reversal is more than a little suspicious. It comes at a time of increased public demand for police accountability, especially for the officers who caused the deaths of Ramarley Graham in 2012 and Eric Garner in 2014. And the public's increasing interest in the requested information is stronger and more justified than ever. In the past year, there have been public demonstrations calling for the NYPD to fire Officer Richard Haste, who shot Ramarley Graham, as well as Officer Daniel Pantaleo, who choked Eric Garner. *See, e.g.,* Chauncey Alcorn and Larry McShane, *Eric Garner's Mother Leads Brooklyn March Against Police Brutality With Al Sharpton On Eve Of His Death Anniversary*, New York Daily News, July 16, 2016, <http://www.nydailynews.com/new-york/al-sharpton-eric-garner-widow-esaw-lead-brooklyn-march-article-1.2714068>; Sameer Rao, *Ramarley Graham's Family, Activists Demand Accountability With #23Days4Ramarley Campaign*, Color Lines, Apr. 26, 2016, <http://www.colorlines.com/articles/ramarley-grahams-family-activists-demand-accountability-23days4ramarley-campaign>.

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<sup>1</sup> Because the Orders posted outside the DCPI office have since been taken down, *see* Parascandola and Rayman, *supra*, Petitioner could not confirm that the contents of the Orders posted by the DCPI were identical to those of the Orders still available at the City Hall Library.

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Contrary to the City's previous legal arguments that Section 50-a prevents the disclosure of officer disciplinary dispositions in all cases, in late January 2017, the City newly asserted that it can choose to release such information on a case-by-case basis to mollify demands by the family and supporters of Ramarley Graham following the well-attended administrative trial of Richard Haste, the officer who shot and killed the unarmed teen. NYPD Deputy Commissioner Kevin Richardson announced on January 25, 2017 the NYPD would work "collectively with the Law Department ... [to] figure out the parameters of how we can regularly disclose the information as regularly as possible, while 50-a exists." Ashley Southall, "City Moves to Reveal Some Punishment of Police Officers," *New York Times*, Jan. 25, 2017, <https://www.nytimes.com/2017/01/25/nyregion/ramarley-graham.html>. While this development goes in the right direction, the information should be made public regardless of whether the NYPD decides are particular case is within "the public interest".

### (3) Communities Demand Transparency

Public support for transparency with respect to the police has gained momentum over the past two years, particularly in recent months. Community organizations, The New York Times Editorial Board and elected officials have called for the NYPD to resume its former practice of releasing summaries of officer misconduct. *See, e.g.*, The Editorial Board, *Let the Public See Police Officers' Records*, *N.Y. Times*, Nov. 3, 2016, <http://www.nytimes.com/2016/11/03/opinion/let-the-public-see-police-officers-records.html?smprod=nytcore-ipad&smid=nytcore-ipad-share>. New York City Mayor Bill de Blasio and Governor Andrew Cuomo also have felt called upon to address the issue. *See* Office of the Mayor Press Release, *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>; Jillian Jorgensen, *Cuomo Says Releasing NYPD Records is a 'Decision for New York City'*, *Observer*, Sept. 8, 2016, <http://observer.com/2016/09/cuomo-says-releasing-nypd-records-is-a-decision-for-new-york-city/>.

Citizens have a right to know how the NYPD's police disciplinary system is functioning. If officers with a history of excessive force are not being adequately disciplined, it would necessarily inform ongoing public conversation regarding pertinent and systematic problems within the City's internal and civilian police oversight, accountability, and disciplinary systems—issues that the legislature has emphatically declared are "the public's business." *Id.* Indeed, the information is particularly critical at this time in light of the recent series of widely publicized deaths caused by police officers across the country, including the deaths of Ramarley Graham and Eric Garner in New York City. It cannot be the legislature's intent that such basic routine information be protected from public disclosure.



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## (4) The City Chooses to Withhold Summaries of Substantiated Misconduct

Finally, even if the City may choose not to disclose summaries under 50-a, its interpretation that 50-a leaves them no choice is certainly wrong. Mayor de Blasio has publicly stated that he believes the NYPD should release this information, but is prohibited from doing so under Section 50-a. *See* Greg B. Smith and Kenneth Lovett, *De Blasio Calls on Albany to Nix Law that Hides NYPD Officers' Disciplinary Records; Cop Unions Protest*, New York Daily News, Sept. 1, 2016, <http://www.nydailynews.com/new-york/de-blasio-albany-nix-law-hiding-nypd-disciplinary-records-article-1.2774161>. As he explained: "I believe we should change the state law and make these records public. . . . The current state law that we have to honor—that does not allow for transparency." *Id.* Thus, our FOIL Request Denial as well as the Mayor's own public assessment of the situation is based on the legal conclusion that Section 50-a prohibits the NYPD from releasing the Orders.

This is clearly an incorrect application of Section 50-a. New York courts have established that "the use of [personnel records] by a governmental entity, in furtherance of its official functions, is unrelated to the purpose of Civil Rights Law § 50-a." *Poughkeepsie Police Benevolent Ass'n, Inc. v. City of Poughkeepsie*, 184 A.D.2d 501, 501 (2d Dep't 1992); *see also Reale v. Kiepper*, 204 A.D.2d 72, 73 (1st Dep't 1994). No court has held that Section 50-a imposes any affirmative obligation on a state agency to keep records secret despite that agency's desire to publish such records. Indeed, multiple decisions have concluded just the opposite, permitting agencies to publish personnel records over the objections of police officers, and affirmed that officers have no private right of action to enforce Section 50-a. *Poughkeepsie*, 184 A.D.2d at 501 (holding that a police department was entitled to share documents concerning police discipline with the public, even if they were personnel records); *Schenectady*, 84 A.D.3d at 1457 (rejecting a challenge to public disciplinary hearings under Section 50-a and noting individual police officers possess no private right of action under Section 50-a); *Reale*, 204 A.D.2d at 72 (holding that the NYC Transit department could publish disciplinary information about NYC transit officers in departmental bulletins).

The City of New York has, therefore, greatly erred in its determination that it is *prohibited* from disclosing these records in response to the FOIL Request or otherwise sharing them with the public. The JRP recommendations should highlight the importance of interpreting 50-a narrowly, and should show how a narrow interpretation would allow for disclosure of summaries of substantiated misconduct, as they have for more than 40 years. This one recommendation will make many of the recommendations more likely to succeed in achieving trust, accountability and transparency between the police and the community.

Very sincerely,

Cynthia Conti-Cook  
Staff Attorney





MAY 2008

## CITIZENS UNION | ISSUE BRIEF AND POSITION STATEMENT

## Public Oversight of Police Misconduct

## INTRODUCTION

*Citizens Union of the City of New York is an independent, non-partisan civic organization of members dedicated to promoting good government and political reform in the city and state of New York. For more than a century, Citizens Union has served as a watchdog for the public interest and an advocate for the common good. Founded in 1897 to fight the corruption of Tammany Hall, Citizens Union currently works to ensure fair elections, clean campaigns, and open, effective government that is accountable to the citizens of New York. We do so by informing the policy debate and influencing the policy outcomes that affect the lives of all New Yorkers.*

*Believing that an informed citizenry is the cornerstone of a thriving local democracy, Citizens Union Foundation—the non-profit research, education, and advocacy organization affiliated with CU—publishes GothamGazette.com, a front row seat to New York City policies and issues.*

In the early 1990s, the city government took steps to address the issue of public oversight of police misconduct by establishing a more accountable process with the reconstitution of the Civilian Complaint Review Board (CCRB). Since then, there have been subsequent calls for further change that draw upon the thirty-five years of civic groups and fact-finding commissions that have called for reform in how the New York Police Department's (NYPD) disciplinary system responds to claims of police misconduct, and ensures that an effective and meaningful civilian oversight system exists.

Citizens Union historically has not taken a position on issues of police conduct, although it reviewed the issue on two occasions: first in the mid-1980s and again when the CCRB was being reestablished in the early 1990's. In consideration of the importance of this issue to the public, Citizens Union has reviewed the City's policies and procedures governing the handling of alleged misconduct of officers of the NYPD and the subsequent internal disciplinary action. Though some important changes have been made, many previous recommendations of the Knapp and Mollen commissions, and by Mayor Giuliani's Commission to Combat Police Corruption (the CCPC, sometimes referred to as the Davis Commission) have not been implemented. It is because of this lack of action and flaws in the current system of oversight that CU is stepping forward.

Citizens Union believes it can lend an important voice to discussions about the need for greater transparency, stronger procedures, and even-handed fairness in the accountability and oversight of the city's system of police discipline. How the NYPD handles these matters is critical to the effectiveness of the operations of the Department and the public's confidence in it. Both the officers and the public are entitled to have a clear, definitive and open system of rules and disciplinary consequences that is fair, measured and consistent with the violation. The Department is entitled to an oversight system that can, when appropriate, validate the policies and programs it has implemented. Moreover, the public is also entitled to a transparent and effective civilian oversight system that reports on important issues in a meaningful and timely manner.

## ISSUE OVERVIEW

Citizens Union believes that a healthy democratic society must have a citizenry that has confidence in, and actively supports, its police department if it is to be fully effective in providing public safety.

Citizens Union believes that the vast majority of police officers are honest, hard-working individuals who perform the vital and dangerous function of protecting our city. The city is safer from crime and terrorism because of how the force has been led as well as how the tens of thousands of New York City police officers have carried out their work courageously. And while the value and importance of its work and contributions are generally recognized, the Department has not yet achieved in

the many diverse communities throughout the city, the full confidence and cooperation it needs to maximize its effectiveness. Citizens Union believes this is due in significant measure to the NYPD and City's handling of police misconduct allegations.

**CITIZENS UNION BELIEVES**  
the best way to ensure greater support of the police is through providing a more transparent and independent system of oversight, prosecution, and adjudication when allegations of misconduct arise.

Citizens Union believes that the NYPD would garner additional public confidence and support if more transparent and different procedures were in place to swiftly and fairly investigate complaints of misconduct.

Citizens Union believes that even though the NYPD maintains it has improved its internal handling of allegations of police misconduct under its current leadership, a more independent system of oversight, prosecution and adjudication is required to maximize public trust and ensure integrity in the process.

Most organizations prefer to be self-regulating. The NYPD is no different. There is a culture within the Department of wanting to deal with alleged misconduct "in-house" rather than in view of the public. We believe that this approach has hindered the Department's ability to effectively perform its broader mission of providing a sense of safety and well-being for all citizens. It has also engendered, in some communities, an unnecessary atmosphere of mistrust and added to the perception that there is "a blue wall of secrecy." As a result, when incidents involving alleged misconduct by the police occur, they are not channeled through a system of justice in which the public has confidence, and instead disappear into a process where the disciplinary handling and outcome take place out of the public realm. This process, hidden from public view and scrutiny, results in little, if any, long-term structural reform to reduce future acts of misconduct and further alienates the NYPD from the public.

The recommendations that follow are not meant to be panaceas. Meaningful efforts to investigate, prosecute and punish those who engage in misconduct are key factors in deterring improper behavior, but prevention has the greatest ability to have a lasting impact. Increased oversight of the police disciplinary process is one step in a comprehensive effort to reduce incidents of police misconduct and improve community relations. Citizens Union is aware of, and applauds, the positive measures that are being implemented to ensure that cadets gain more community familiarization and are trained on innovative and proven ways to diffuse conflicts and build trust. To forge better trust and reduce incidents of misconduct, a paradigm shift in how the police officers interact with the public is imperative. Such a shift must focus not only on the training of cadets in the academy, but also reshaping the attitudes and skills of veterans on the force.

CU recognizes that the police are in a unique position in our society. Not only are they accorded the most power of any set of city employees, they are also often placed in circumstances where they are expected and required to enforce the law by using force, including stops, frisks, searches, arrests, and the potential use of deadly force. Citizens Union believes that precisely because of these circumstances, the best way to ensure greater support of the police is through providing a more transparent and independent system of oversight, prosecution, and adjudication when allegations of misconduct arise.

We believe that the measures set forth below, many of which have been previously proposed by non-partisan expert panels, are essential to maximizing public support and confidence in the police and strengthening the social fabric of our City.

## RECOMMENDATIONS TO ENSURE GREATER ACCOUNTABILITY AND PUBLIC CONFIDENCE IN THE NEW YORK POLICE DEPARTMENT

Citizens Union recommends the following measures to improve public confidence and support for the NYPD. These measures together seek to: a) improve public oversight of police conduct, b) strengthen the system of accountability, and c) ensure a more fair and independent procedure for handling complaints of misconduct.

### *1. Create a More Effective and Independent Civilian Complaint Review Board*

The Civilian Complaint Review Board (CCRB) is an autonomous civilian-oversight body of thirteen members appointed by the Mayor (five upon the recommendation of the City Council and three upon the recommendation of the Police Commissioner). It is empowered to investigate, issue findings, and recommend actions on complaints and allegations of the use of excessive or unnecessary force, abuse of authority, discourteous actions, or the use of offensive language against civilians by NYPD police officers. As such, it plays a key role in ensuring the public has confidence that civilian allegations of police misconduct will be handled fairly, judiciously, and most importantly, independently.

The CCRB currently needs more financial resources, greater independence, and stronger authority to live up to its mission. The Mayor and the City Council need to work together to create a more effective and independent CCRB. To accomplish the goals set forth for the CCRB, Citizens Union recommends the following legislative and administrative changes:

#### **a) Enable the CCRB to Try Cases It Substantiates**

CCRB lawyers, instead of NYPD lawyers from the Department Advocate's office, should file and handle the prosecution of complaints substantiated by the CCRB with the recommendations of charges and specifications. The CCRB should be given the authority and responsibility for developing its own team of qualified and experienced lawyers to litigate the substantiated cases.

This recommendation mirrors previous recommendations of Mayor Giuliani's Commission to Combat Police Corruption, and a Memorandum of Understanding (MOU) signed in April of 2001 between the NYPD and the CCRB during the Giuliani Administration which followed an investigation by the U.S. Attorney's office in Brooklyn and the Justice Department's Civil Rights Division in Washington, D.C. To date, these recommendations and agreements have not been implemented.

When several police unions challenged the 2001 MOU, the court ruled that these types of cases cannot be brought before the Office of Administrative Trials and Hearings (OATH), which is arguably the most preferable venue. But the court did affirm that the CCRB had the authority under the MOU to prosecute its cases if they were heard in front of an NYPD administrative judge. CCRB prosecutors should be granted customary powers of prosecutorial discretion, including the power to conduct plea negotiations and reach agreements with officers and their attorneys. As is the current practice and required by the City Charter, the Commissioner retains the authority and discretion to make final disciplinary determinations, including agreements reached through plea negotiation.

In order to ensure a greater level of independence and combat the perception that the NYPD may exercise a bias in the execution of substantiated cases by the CCRB, the City should without delay transfer prosecutorial function to the CCRB and provide the CCRB with sufficient funds to hire the necessary staff of prosecutors.

Citizens Union recognizes that in response to past criticism with regard to the internal handling of charges and specifications, the NYPD has recently made efforts toward professionalizing its staff by acquiring talent that comes from outside its ranks and creating a greater level of prosecutorial independence. These attorneys and prosecutors (as well as the Police Department Trial Room Administrative Law Judges), however, still ultimately serve within the institution of the NYPD and under the authority of the Police Commissioner, which is the basis for Citizens Union's concern.

In order to ensure a greater level of independence and combat the perception that the NYPD may exercise a bias in the execution of substantiated cases by the CCRB, the City should without delay transfer prosecutorial function to the CCRB and provide the CCRB with sufficient funds to hire the necessary staff of prosecutors.

Citizens Union believes that the transfer of prosecutorial power to the CCRB could be accomplished in one of three possible ways:

1. The current Mayor could order the implementation of the same MOU Mayor Giuliani authorized in 2001 affecting this change, or alternatively issue an Executive Order pursuant to City Charter § 11 a., or
2. The City Council could transfer the prosecutorial function to the CCRB as a legislatively-enacted Charter amendment<sup>1</sup>, or
3. A Charter Revision Commission, such as the one slated to be convened by Mayor Bloomberg to broadly examine the structure of City government, could submit this proposal as a referendum in 2009 to allow voters to determine whether to add it to the City Charter (though this would delay action until 2009).

Concurrently, the City and the State should explore ways through legislation or other means that would allow CCRB complaint hearings to go through OATH, or an alternative independent body, to create a needed level of independence and impartiality. One possible approach would be to enact legislation specifying that hearing officers be appointed for fixed terms, removable only for cause. At present, the hearing officers are a deputy commissioner and assistant commissioners who serve at the pleasure of the Commissioner.

Citizens Union also supports the argument put forward in July 2000 by the Commission to Combat Police Corruption that there should be a system in which the CCRB is given the responsibility and the power to prosecute cases because it would put greater onus on the CCRB to strengthen its cases. As the CCPC then wrote, "Such a system would provide an incentive to CCRB to substantiate only cases that can be successfully prosecuted and prevent the Department and CCRB from being able to blame each other for the failure of CCRB prosecutions. Increasing accountability and eliminating the reciprocal finger pointing which often takes place currently should also enhance public confidence in how these complaints are being addressed."<sup>2</sup> The finger pointing mentioned in that July 2000 report has unfortunately been played out time and again, most recently at a public hearing held in March 2007 held by the City Council Committee on Public Safety.

Citizens Union believes that in administering justice in cases of alleged police misconduct, too much authority currently resides in the Police Department to prosecute, hear, adjudicate, and decide penalties. Investing so much authority in a single entity to handle essentially four different, major parts of the police disciplinary process – the same entrusted with the right to use force to provide public safety and enforce the law – does not provide for an appropriate level of public oversight or separation of powers in a democratic society.

**b) Provide the CCRB with the Authority to Prosecute Officers Found Guilty of Lying During CCRB Investigations**

The City Council should pass and the Mayor should sign legislation clearly granting the CCRB the authority to file

<sup>1</sup> In upholding the legality of the Giuliani Administration's transfer of the prosecutorial function by MOU, *Lynch v. Giuliani*, 301 A.D.2d 351 (1st Dept. 2003), the Appellate Division said nothing that would preclude the transfer by a Council-enacted Charter amendment. As the Court observed, the transfer of the prosecutorial function simply "reallocate[s] the division of duties" between two Mayoral agencies (the NYPD and the CCRB), does not accord any new "substantive" powers to the CCRB, and preserves the Police Commissioner's authority "to make the final determinations as to the appropriate disciplinary sanctions." 351 A.D.2d at 358. Accordingly, Citizens Union believes that a Council-enacted Charter amendment on this subject does not have to be submitted to the voters as a referendum, because it is not a change that "abolishes, transfers or curtails" the powers of the Mayor in any respect (Charter Sec. 38 (5)).

<sup>2</sup> Commission to Combat Police Corruption July 2000 report, *The New York City Police Department's Prosecution of Disciplinary Cases*, [http://www.nyc.gov/html/ccpc/downloads/pdf/prosecution\\_study\\_july2000.pdf](http://www.nyc.gov/html/ccpc/downloads/pdf/prosecution_study_july2000.pdf)



charges and specifications against police officers who are believed to have made false statements to CCRB investigators during the course of their investigations. As noted in 1 (a) above, Citizens Union also believes that the CCRB should be the agency that prosecutes such cases before the hearing officers in NYPD disciplinary proceedings. At present, if a CCRB investigation finds that an officer intentionally provided a false statement to the CCRB, the incident is labeled as “other misconduct” that the NYPD deems not within the CCRB’s jurisdiction and board panels must merely “refer their determinations of other misconduct not only to the police commissioner but also to various other law enforcement entities.”<sup>3</sup> However, according to its 2003 annual status report, “the police commissioner has not notified the CCRB of the action it takes” with respect to willful false statements unless that complaint has been substantiated based on other allegations.<sup>4</sup>

In other words, independent of other findings, there is no publicly known action against officers who lie under oath to the CCRB. The failure to prosecute those officers who lie under oath, (CCRB interviews of police officers and witnesses are conducted under oath) has ramifications that extend beyond the isolated incident of a false statement. It sends a signal to members of the Department and the public that making false statements is tolerated and permissible. In 1999, 70 officers were determined to have made a false statement to the CCRB; this number has decreased since that time, with only 18 found to have lied each year from 2000 to 2003, 10 officers in 2003, 8 officers in 2005, and only 2 officers in 2006.<sup>5</sup> In many of these determinations, findings of false statements were absent other allegations, meaning that the Police Department would not take up the complaint and no known action was taken. While findings of false official statements have dropped, this could be illustrative of decreasing attention paid to false official statements. Furthermore, the lack of action by the CCRB and NYPD against this form of misconduct without the presence of other allegations of misconduct provides no deterrent to lying under oath. This serves to undermine the public’s confidence in the integrity of the system of police discipline and the NYPD.

#### **c) Maximize the Use of Mediation for Disputes between the Public and the NYPD**

To reduce the CCRB’s workload, and increase communication and understanding between the public and the NYPD, both bodies should increase their outreach and education efforts to make complainants aware that they can choose to go through mediation in lieu of going to trial to adjudicate their case. The total percentage of complaints referred to mediation averaged only 5.1% over the period of 1994 through 2005, with only about 3 to 4% referred each year from 2002 to 2005. <sup>6</sup> However, the CCRB reports that during 2006, its Mediation Unit closed more cases than ever before, with 130 cases closed due to successful mediation, representing an increase of 44% over the 90 successful mediations conducted in 2005 and a 78% increase over the 73 cases mediated in 2002.<sup>7</sup> We commend the CCRB and the NYPD for taking positive steps in this direction and encourage them to dedicate even more necessary resources to increase these efforts.

#### **d) Increase CCRB’s Resources and Expand Teams of Investigators and Support Staff**

With more than 8,000 cases to process per year, an increase of more than 65% between 2000 and 2005, and an additional 13% increase in 2006 over 2005, the CCRB cannot handle quickly or effectively its growing caseload, causing interminable delays and frustration for all parties involved.<sup>8</sup> More specifically, the lack of speedy attention (although improved in recent years), undermines public confidence in the proceedings and presents occurrences where the Board is not able to thoroughly conduct investigations. The City should provide the necessary resources for the CCRB to hire additional investigators and other staff as is necessary for the agency to carry out its currently mandated functions as effectively and efficiently as possible, and thereby improve public confidence in the system of police discipline.

<sup>3</sup> CCRB 2006 Annual Status Report, Pages 11 and 212. <http://www.nyc.gov/html/ccrb/pdf/ccrbann2006.pdf>

<sup>4</sup> CCRB 2003 Annual Status Report, Page 34. <http://www.nyc.gov/html/ccrb/pdf/ccrbann2003.pdf>

Also Cited in New York Civil Liberties Union report, *Mission Failure: Civilian Review of Policing in New York City, 1994- 2006*.

<sup>5</sup> CCRB 2003 and 2006 Annual Status Reports, Tables 33 and 34, respectively.

<sup>6</sup> New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City, 1994- 2006*, Appendix A.

<sup>7</sup> CCRB Website, <http://www.nyc.gov/html/ccrb/html/about.html>

<sup>8</sup> New York Civil Liberties Union, *Mission Failure: Civilian Review of Policing in New York City, 1994- 2006*, Page 1.

**e) The CCRB Should More Aggressively Exercise its Subpoena Power for Documents and Witnesses to Ensure Timely Investigations**

The City Charter explicitly requires the NYPD to provide the CCRB with records necessary for the CCRB's investigations and complaints, and to ensure that officers and employees of the NYPD appear before the CCRB and respond to inquiries by the CCRB.<sup>9</sup> Yet CCRB investigators report that “on any given day approximately half of all police officers scheduled for an interview at the CCRB—including witnesses and those named in a complaint—fail to appear, further compromising investigators’ ability to conduct timely investigations” and “it can take weeks—and often months—for the Police Department to produce records”<sup>10</sup> (if the complainant does not have a name or shield number, the paperwork is crucial in determining the identity of the officer or officers involved). The Department also has not been as cooperative as it should be in responding to information requests related to investigations conducted by the CCRB. Consequently, the NYPD has been criticized by the leadership of the CCRB for not cooperating fully and attempting to subvert the investigatory process. For the process to be effective, the NYPD must be more cooperative and forthcoming with informational and appearance requests from the CCRB.

To encourage the NYPD's cooperation, it is important that the CCRB be more persistent in its efforts to compel the appearance and testimony of police officers and the production of documents requested as part of its investigation by use of subpoena powers. The City Charter explicitly provides that “The Board, by majority vote of its members, may compel the attendance of witnesses and require the production of such records and materials as are necessary for the investigation of complaints submitted pursuant to this section.”<sup>11</sup> Without being subpoenaed, the NYPD historically has been slow or outright opposed to providing requested documents and compelling officers to show up in cases involving allegations of police misconduct.

**2. Expand the Range of Penalty Options for, and the Responsibilities of, the Police Commissioner in Handling Cases of Misconduct**

Pursuant to the City Charter, the Police Commissioner retains the final authority over discipline within the NYPD ranks. This is appropriate and necessary to manage effectively the department, and to promote accountability for dealing with misconduct and corruption within the Department. To exercise effectively this control, while fostering greater public confidence in the disciplinary system of the NYPD, Citizens Union recommends the following:

**a) The City Should Enact Legislation Providing the Police Commissioner with a Greater Range of Disciplinary Options for Dealing with Cases of Misconduct**

The current penalty structure if an officer is found guilty in department disciplinary proceedings provides for nothing between (i) a maximum of thirty days suspension without pay and one year termination probation, and (ii) discharge from the service (however, in practice, the Commissioner reports that he has sometimes reached other agreements as a result of plea negotiations for penalties that are between these two extremes). The Mollen Commission<sup>12</sup> in 1994 and the Knapp Commission<sup>13</sup> in 1972 called for a greater range of discipline options to promote a more effective disciplinary system and a stronger message that the Police Department is not permissive of misconduct. Indeed, the Knapp Commission observed thirty-six years ago (report, p. 229) that this was “the most troublesome issue in the disciplining of policemen.” Mayor Giuliani introduced an administration program bill before the City Council that would have implemented this recommendation<sup>14</sup>, and his Commission to Combat Police Corruption subsequently endorsed the proposal. Even though these recommendations have been endorsed by various police commissioners, including the present Commissioner, they have

<sup>9</sup> New York City Charter, Chapter 18-A, Sec. 440 (d) (1) and (2).

<sup>10</sup> Ibid, Page 6.

<sup>11</sup> New York City Charter, Chapter 18-A, Sec. 440 (c) (3)

<sup>12</sup> The Mollen Commission was formed in July 1992 and formally known as *The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*.

<sup>13</sup> The Knapp Commission was formed in April 1970 and formally known as *The Commission to Investigate Alleged Police Corruption*.

<sup>14</sup> Introduction No. 250. Introduced in the City Council on March 16, 1994.

never been actively treated as priorities. Whatever the reason, the time has come to enact them without further delay. The CCRB reports that in 2005 fewer than 5% of CCRB substantiations resulted in suspensions without pay of 11-30 days - down from nearly 20% in 2000.<sup>15</sup> In accordance with these numerous past recommendations, the City should amend the New York Administrative Code<sup>16</sup> to allow the Police Commissioner to impose the following penalties in addition to suspensions for up to thirty days or dismissal from the Department:

- i. suspension without pay for up to one year for officers who have been found guilty of or pleading guilty to charges and specifications;
- ii. a monetary fine of up to \$25,000 with no option to substitute vacation or compensatory days of equivalent work;
- iii. a demotion in grade, title or rank with a commensurate reduction in salary.

**b) Reinstate “Zero Tolerance” Penalty for False Official Statements**

Following the recommendation of the Commission to Combat Police Corruption (CCPC), former Police Commissioner Howard Safir enacted in 1996 a policy of zero tolerance towards officers found to have made false statements, requiring dismissal of any officer who makes a false official statement absent “exceptional circumstances.”<sup>17</sup> The Safir policy of zero tolerance covered all false statements without exception, and explicitly included “lying under oath during a civil, administrative or criminal proceeding,” which would include CCRB investigative interviews. Although it was a step in the right direction, the CCPC determined in an August 1999 review that it was not being enforced sufficiently in some cases.

Instead, the Safir policy was revised and weakened effective January 13, 2005. The revised § 2-308 of the Patrol Guide now specifies that the policy does not apply where the officer “merely ... denies a civil claim or an administrative charge of misconduct.” This exception is subject to misinterpretation, potentially allowing officers to deny with impunity misconduct in CCRB interviews. It should be narrowed to apply solely to pleas of not guilty in administrative proceedings or Answers in civil cases denying paragraphs of Complaints.

The revised policy also specifies that dismissal absent exceptional circumstances applies solely to false statements that are “intentional” and “material.” The change adding the words “intentional” and “material” arose from an agreement in *Latino Officers Association v. City of New York*, 99 CV 9568, ¶ 19 (SDNY Sept. 15, 2004), an employment discrimination lawsuit alleging that Latino officers had been discriminated against in the disciplinary process. On its face, this change was unexceptional.

However, application of the change is subject to varying interpretations and can easily be misused to avoid punishment. False statements about such matters as the physical layout of the site of the incident and the civilians and officers present could seriously thwart an investigation. The investigator questioning the officer is often in the best position to determine whether a false statement was made intentionally. It is for this reason that Citizens Union believes the CCRB must have jurisdiction to charge and prosecute where it believes that officers’ false statements were intentional and material in the context of its investigations (Recommendation (1) (b)).

Noting the link between tolerance of false statements and more egregious acts of impropriety, such as the use of excessive force, abuse of authority and outright corruption as the Mollen Commission and others described, reenactment of the zero tolerance policy for officers who lie, and strict adherence to it, is essential to instill community confidence in the integrity of the police force and prevent future transgressions.

Noting the link between tolerance of false statements and more egregious acts of impropriety, reenactment of the zero tolerance policy for officers who lie, and strict adherence to it, is essential to instill community confidence in the integrity of the police force and prevent future transgressions.

<sup>15</sup> CCRB Status Reports reproduced as figure 8 in NYCLU Report, n. 2 *supra*, at p. 21.

<sup>16</sup> Section 14-115

<sup>17</sup> Patrol Guide § 2-308.



### c) Require Full Explanation of Commissioner's Deviations from Trial Judge Recommendations

While the number of complaints and allegations filed per year has been on the rise recently, due to factors such as increased ease of reporting and filing made possible by the availability of 311, many citizens are left with the impression that even if they file complaints, little will be done to discipline officers or improve police conduct. Only a tiny percentage of complaints are substantiated by the CCRB — an average of 5.2% from 1994-2005.<sup>18</sup> Most of those are handled by the NYPD with little, if any, discipline or corrective action or explanation of the reason why no action was taken. In fact, historically the NYPD has taken no disciplinary action at all against approximately 20-30 % of all police officers named in “substantiated” CCRB complaints.

“Instructions” are the most minor of the available sanctions in which the officer is merely cautioned not to repeat the misconduct. Yet the NYPD has been using the sanction extensively in cases where the CCRB has substantiated complaints and recommended charges and specifications. The use of “instructions” has increased over the past several years and in many ways undermines the effectiveness of the disciplinary system. According to the CCRB’s 2006 annual report “instructions” were used in 73.8% of the cases substantiated by the CCRB in 2006, a substantial increase from 58.3% in 2005. And “command discipline,” the second most minor penalty, which also bypasses formal discipline and results in the loss of very few vacation days, accounted for approximately another 20% of CCRB substantiated cases in 2006. Fewer than 10% of all CCRB substantiated cases received more substantial discipline in 2006.<sup>19</sup>

As the ultimate supervisor and disciplinarian of all members of the Department, the Commissioner is understandably not required to abide strictly by the report and recommendations of the CCRB or NYPD trial judges. Given the critical nature of the judgments of the Commissioner as to the Department operations and public confidence, it is appropriate and necessary that when deviating from the findings or recommendations of either the CCRB or Police Department trial judges, the Commissioner should by formal written decision state plainly and in a timely manner the reasons for such deviations. Likewise, the authority the Commissioner exercises in this regard should also be subject to review and monitoring by an independent commission like the Commission on Police Corruption, which can then evaluate the systemic use of penalties by the Department and the Commissioner and report its findings and evaluations to the public.

### 3. Create a Stronger and More Effective Commission to Combat Police Corruption (CCPC)

The City should enact legislation recreating the Commission to Combat Police Corruption (it is currently conceived only through Executive Order) and expanding its mandate to serve as a permanent monitoring commission. The “reconstituted” CCPC should be granted the clear authority to monitor all aspects of the Police Department’s disciplinary system, including not only oversight of the NYPD Internal Affairs Bureau, but also all the policies and procedures which influence the culture of the Department as it affects misconduct. This should include reporting on all aspects of the disciplinary system. While it is important that the Commissioner maintain the final say on matters pertaining to internal discipline, how that authority is exercised should be subject to review and monitoring by an independent entity, such as the recreated CCPC, to instill greater public confidence.

The NYPD has not been as cooperative historically as it should be in responding to requests for information from the CCPC, primarily because the CCPC has no power to back up its requests by subpoena. To best accomplish the goals of an expanded mandate, the CCPC should be afforded greater resources and the power to issue subpoenas when appropriate.

<sup>18</sup> CCRB Status Reports reproduced as Table 2 in NYCLU Report at 52.

<sup>19</sup> CCRB Status Reports reproduced as Figure 8 in NYCLU 2006 Supplement, p. 4.

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## Issue Brief and Position on Reforming Stop, Question and Frisk

### I. INTRODUCTION

New York City in recent years has been deemed one of the safest big cities in America.<sup>1</sup> Twenty years ago this designation would have been inconceivable. New York City in 1990 recorded 2,251 murders, 100,280 robberies, and 68,891 aggravated assaults with a population of 7.3 million.<sup>2</sup> By 2012, a steep drop in crime occurred with 419 murders, 20,144 robberies, and 19,381 assaults occurring in the city even while the population grew to 8.3 million.<sup>3</sup>

During the past two decades, public support, mayoral leadership, and the New York Police Department (NYPD) and its policing strategies and tactics have substantially contributed to the city's record crime reduction. Other demographic and socioeconomic factors unrelated to police practices have also contributed to lower crime rates.

Notwithstanding the sharp reduction in the crime rate, the city's use of the legally permissible tactic of "stop, question, and frisk," better known as "stop and frisk" has been called into question, legally challenged and now declared unconstitutional. This criticism resulted in the City Council overwhelmingly passing two pieces of legislation and overriding a mayoral veto: prohibiting bias-based profiling by law enforcement officers and establishing an inspector general for the NYPD. A federal class-action lawsuit, *Floyd, et al. v. City of New York, et al.* also resulted in the determination that the city's overuse of the practice is unconstitutional, prompting the appointment of federal monitor.

Under study for a year, Citizens Union has come independently to the conclusion that stop, question and frisk should be used less frequently, employed more judiciously, and performed with the utmost professionalism given the intrusive nature of the tactic. As a matter of policy, we oppose the overuse of stop, question and frisk in its current and aggressive form, which has now also been ruled unconstitutional. We do so because, while it is uncertain how many stop and frisks need to occur in order to reduce crime, we believe there comes a point when its overuse brings diminished results and can be counterproductive. We also wish to see it used more appropriately by focusing on the quality

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<sup>1</sup> Lysiak, Matt and Kemp, Joe. "Murder Rates in New York City hit a record low with 414 homicides in 2012," The New York Daily News, December 28, 2012. Available at: <http://www.nydailynews.com/new-york/murders-fall-record-city-article-1.1229273>

<sup>2</sup> Citizens Crime Commission of New York City. Total Crime in New York City, by category 1980-2010. Available at: <http://www.nycrimecommission.org/initiative4.php>

<sup>3</sup> NYPD. Historical New York City Crime Data. Available at: [http://www.nyc.gov/html/nypd/html/analysis\\_and\\_planning/historical\\_nyc\\_crime\\_data.shtml](http://www.nyc.gov/html/nypd/html/analysis_and_planning/historical_nyc_crime_data.shtml)

of the stops and not quantity because it imposes a significant burden and personal infringement on the rights and lives of individuals who are mostly people of color.

The number of stop and frisks conducted by the NYPD has increased dramatically over the past decade – by 600 percent – from 97,296 in 2002<sup>4</sup> to a peak of 685,724 in 2011 before dropping by 22 percent to 533,042 in 2012.<sup>5</sup> Some of the increase could be attributed to better documenting of stop and frisks arising out of the Daniels, et al. v. the City of New York case. The legal settlement required the city to ensure that it does not engage in racial profiling and more specifically report “whether and to what extent the stop-and-frisks are based on reasonable suspicion and whether and to what extent the stop-and-frisks are being documented.”<sup>6</sup> The murder rate has steadily declined with some minor variation during that period but, on average, there were 531 murders a year, an average that is far lower than preceding periods of similar length. While stop and frisks declined 22 percent in 2012 and the number of murders decreased 20 percent, from 515 in 2011 to 414 in 2012<sup>7</sup>, the number of robberies rose from 19,717 in 2011 to 20,144 in 2012 and assaults rose from 18,482 in 2011 to 19,381 in 2012.

New York has prospered as a city over the past three decades in part because it has become a much safer city. To remain a city that is attractive to business, provides a solid education to its young people, and keeps our neighborhoods as places where people want to live and raise their families, it must remain a safe city. It must also be one that is free of the fear of both crime and the police.

The question has become where to draw the line and with the federal court decision, it is even clearer now that the line needs to be redrawn since its current use has been ruled unconstitutional and resulted in the appointment of a federal monitor.

As is the current legal standard, stop, question and frisk should only be used when an officer has reasonable suspicion that a person has been, is, or is about to be involved in criminal activity.<sup>8</sup> To ensure that the tactic is used most effectively to reduce crime, Citizens Union believes the emphasis should be based on the quality of the stops and not simply on the quantity alone. Enhancing training and instituting practices that incentivize greater professionalism in conducting stop, question and frisk can achieve the goal of fewer stops more directly contribute to reducing crime. With this issue brief and position statement, Citizens Union presents its analysis of the issue, its position on stop and frisk, and its policy recommendations.

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<sup>4</sup> NYCLU 2011 Stop and Frisk Report. Available at: [http://www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf)

<sup>5</sup> Schram, Jamie and Saul, Josh. “Major decline in NYPD stop-frisks,” The New York Post, February 9, 2012. Available at: [http://www.nypost.com/p/news/local/major\\_decline\\_in\\_nypd\\_stop\\_frisks\\_UH6jmAZBUhv8Hk1wZ2TycM](http://www.nypost.com/p/news/local/major_decline_in_nypd_stop_frisks_UH6jmAZBUhv8Hk1wZ2TycM)

<sup>6</sup> Daniels, et al. v. the City of New York case. Available at: [http://ccrjustice.org/files/Daniels\\_StipulationOfSettlement\\_12\\_03\\_0.pdf](http://ccrjustice.org/files/Daniels_StipulationOfSettlement_12_03_0.pdf)

<sup>7</sup> Chung, Jen. “NYC Hits Record Low Murder Rate In 2012, Bloomberg And Kelly Start Bragging,” The Gothamist, December 28, 2012. Available at: [http://gothamist.com/2012/12/28/nyc\\_hits\\_record\\_low\\_murder\\_rate\\_in.php](http://gothamist.com/2012/12/28/nyc_hits_record_low_murder_rate_in.php)

<sup>8</sup> *Terry v Ohio*, 392 U.S. 1 (1968).

## II. CITIZENS UNION'S PAST ENGAGEMENT ON POLICE ISSUES

Citizens Union serves as a watchdog for the public interest and an advocate for the common good in the City of New York by seeking to make democracy work for all New Yorkers. We advocate for fair and open elections, honest and efficient government, and a civically engaged public. We are New Yorkers from diverse backgrounds and political beliefs, connected to our communities and united in our commitment to put the city's long-term interest ahead of all special interests.

Principled and pragmatic, Citizens Union is an independent force for constructive reform, driving policy and educating the public to achieve effective government in the City and State of New York. We work to make government accountable to all the people it serves by advocating for effective and practical solutions.

In our 2008 Issue Brief and Position statement entitled, *Public Oversight of Police Misconduct*, Citizens Union made nine specific policy recommendations that would strengthen the system of police discipline and improve public confidence in and support for the New York Police Department. Chief among them was creating a more effective and independent Civilian Complaint Review Board (CCRB) by enabling the CCRB to prosecute the cases it substantiates and requiring explanations of the Commissioner's deviations from CCRB recommended discipline. Citizens Union also reviewed the issue of police conduct in the mid-1980s and again when the CCRB was being established in the early 1990s.

Over the past several years, Citizens Union advocated for this change before the City Council and the Mayor's Office, including releasing a report entitled *Diminished Accountability: How Discipline for Police Misconduct is Downgraded by the NYPD* detailing that in more than 9 of 10 instances, the NYPD downgraded recommendations of the CCRB for administering the most severe penalty to police officers for whom misconduct had been substantiated.<sup>9</sup> Our advocacy resulted in a Memorandum of Understanding in April 2012 that granted prosecutorial power to the CCRB and required the NYPD to explain its reason when it differs from CCRB recommended discipline.

It is with this historical experience and perspective that Citizens Union examines the controversial police tactic of Stop, Question and Frisk. Our intent in doing so is to inform New Yorkers on an important public policy issue that has attracted a strong range of views and challenge the next mayor and police commissioner to present specific steps on how the tactic might be used to greater effect with the least amount of offense to law-abiding New Yorkers.

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<sup>9</sup> Citizens Union. "[Diminished Accountability: How Discipline for Police Misconduct is Downgraded by the NYPD](http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport_AccountabilityPoliceMisconduct.pdf)." March 2012. Available at: [http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport\\_AccountabilityPoliceMisconduct.pdf](http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport_AccountabilityPoliceMisconduct.pdf)

### III. CITIZENS UNION'S VIEW ON POLICING

Citizens Union's involvement with the issue of stop and frisk is a natural extension of our earlier work on police conduct. Indeed, many complaints filed with the CCRB are allegations of inappropriate or unauthorized stop and frisks (under the category of "abuse of authority")<sup>10</sup>, and the independence and transparency as a result of recent reforms will undoubtedly help to address the reported misuse of the stop and frisk tactic.<sup>11</sup> Citizens Union also believes that our nonpartisan and pragmatic approach to addressing issues can positively contribute to the discussion around stop and frisk, a politically-charged weighty issue that invokes passion and emotion from many stakeholders.

There are several overarching beliefs informing Citizens Union's evaluation of police issues that act as a lens through which we examine the effectiveness of stop and frisk and make policy recommendations:

- Our democratic society is built on a foundation of personal liberty as enshrined in the Bill of Rights. Within the Bill of Rights, the Fourth Amendment protects our privacy and our persons from unreasonable governmental searches and seizures, and except in limited circumstances probable cause remains the constitutional standard for determining reasonableness.
- The relationship between the NYPD and the city's communities of color, and in particular the Black and Latino communities, has historically been strained. Recent efforts to mitigate that checkered history include a police force in which a majority of its officers are now people of color.
- A healthy democratic society must have a citizenry that has confidence in and actively supports its police department if it is to be fully effective in providing public safety.
- CU recognizes the police are in a unique position in our society. Not only are they accorded with the most significant power of any public servants, they are expected to be model representatives of the law and enforce it courteously, professionally and responsibly regardless of circumstances. They are empowered to use reasonable physical force against all who live in or visit New York and use intrusive tactics including stops, frisks, searches, arrests, and even deadly force when justified.
- Police officers perform a vital and dangerous function protecting our city. Most New York City residents, especially residents of high crime areas, are law-abiding residents who want and support the presence of good policing in their communities. Yet today, the NYPD does not receive the full public support it deserves or the full cooperation it needs to maximize effectiveness and optimize public safety due in part to hostility arising from some quarters over both the frequency and manner in which stop and frisk is utilized.

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<sup>10</sup> According to Citizens Union's report. "[Diminished Accountability: How Discipline for Police Misconduct is Downgraded by the NYPD](http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport_AccountabilityPoliceMisconduct.pdf)," between January and August 2011, the CCRB substantiated allegations of wrongdoing with recommendations for the most severe penalty (known as "charges and specifications") for 143 officers. Ninety-three of those officers were found by the CCRB to have abused their authority in relation to conducting stops, searches and frisks. Available at: [http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport\\_AccountabilityPoliceMisconduct.pdf](http://www.citizensunion.org/www/cu/site/hosting/Reports/CUReport_AccountabilityPoliceMisconduct.pdf)

<sup>11</sup> Ibid.

#### IV. BACKGROUND ON STOP, QUESTION and FRISK

##### Stop, Question and Frisk Explained

While often discussed as a single act, the activity of stop, question and frisk is actually composed of separate actions by police officers which are permissible in accordance with different legal standards as outlined by the New York State Court of Appeals in the *People vs. De Bour*.

1. A police officer may *question* a person even while not stopping him or her, asking questions as to his or her identity or reason for being in a particular place provided that the “request is supported by an objective, credible reason, not necessarily indicative of criminality.”<sup>12</sup>
2. A *stop* is a higher level of personal intrusion in which a police officer temporarily detains a person because the officer has “reasonable suspicion” the person being stopped is committing a crime or is about to commit a crime.<sup>13</sup>
3. A *frisk* is considered most intrusive as the officer conducts a pat down of the stopped person. This can only legally be done when the officer “reasonably suspects that he or she is in danger of physical injury by virtue of the detainee being armed.”<sup>14</sup>

Stop and frisk as a police tactic was validated with the United States Supreme Court’s establishment of a legal basis for officers to stop, question, and frisk citizens through its 1968 decision in the case of *Terry v. Ohio*. It ruled that guns found on a suspect’s person after a pat down were admissible evidence in court, even though the police officer had neither a warrant nor probable cause for arrest. The decision laid out some guidelines describing when and how a police officer may search a suspect without a warrant or probable cause, relying instead on a standard of reasonable suspicion. Stop and frisk procedures were first codified in New York in September 1971, through the New York State Criminal Procedure Law (CPL) § 140.5015.

If a police officer detains someone under the conditions of the Terry decision and its progeny, also known as a Terry or “reasonable suspicion stop, they must fill out an NYPD UF-250 form known as a “Stop, Question and Frisk Report Worksheet.” The officer must specify on this worksheet what compelled the officer to detain the suspect. The worksheet lists the following choices as reasons for the stop:

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<sup>12</sup> NYS Attorney General’s Report: The New York City Police Department’s Stop and Frisk Practices: A Report to the People of the State of New York from the Office of the Attorney General, New York: Civil Rights Bureau, December 1, 1999, p. 26. Available at: [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil\\_rights/stp\\_frsk.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frsk.pdf)

<sup>13</sup> Ibid, p. 28.

<sup>14</sup> Ibid.

<sup>15</sup> “Stop, Question & Frisk Policing Practices in New York City: A Primer.” Center on Race, Crime and Justice, John Jay School of Criminal Justice. March 2010. Available at: [http://www.jjay.cuny.edu/web\\_images/PRIMER\\_electronic\\_version.pdf](http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf)



- Carrying Suspicious Object in Plain View
- Fits Description
- Action Indicative of “Casing” Victim or Location
- Actions Indicative of Acting as a Lookout
- Suspicious Bulge or Object
- Actions Indicative of Engaging in Drug Transaction
- Furtive Movements
- Actions Indicative of Engaging in Violent Crimes
- Wearing Clothes or Disguise Commonly Used in Commission of Crime
- Other Basis for Reasonable Suspicion (in which case the officer needs to detail the reason)

### *Data on Stop, Question and Frisk*

The data from all Stop, Question and Frisk Report worksheets from January 2010 to June 2012 was analyzed by the Center for Constitutional Rights<sup>16</sup>, and yielded the following information:

- The most common reason cited for Terry Stops was “Furtive Movements” and the least common was “Carrying Suspicious Object in Plain View.”<sup>17</sup> Suspects can be stopped for more than one reason and most of the UF250 forms list more than one reason.
- Roughly half of all stops result in frisks or pat downs.
- 8% of all stops resulted in searches which are more invasive than a frisk.
- 6.74% of stops resulted in the police officer using physical force (including putting the suspect on the ground or against a wall or car, pointing a firearm at the suspect, handcuffing the suspect, drawing a firearm, use of baton, or use of pepper spray but excluding putting hands on the suspect).<sup>18</sup>
- 6.25% of stops resulted in the suspect being issued a summons.<sup>19</sup>
- 6.26% of stops resulted in the suspect being arrested.<sup>20</sup>
- 1.18% of stops resulted in the confiscation of any kind of weapon.<sup>21</sup>
- 0.12% of stops resulted in the confiscation of a firearm (while the proportion of stops resulting in the confiscation of a firearm is miniscule, the numerical value is not insignificant. For example, 780 guns were recovered in 2012).<sup>22</sup>

<sup>16</sup> Second supplemental report of Jeffrey Fagan, Ph.D. David Floyd et al vs. City of New York. United States District Court Southern District of New York. Available at: <http://www.ccrjustice.org/files/FaganSecondSupplementalReport.pdf>

<sup>17</sup> Ibid, p. 22.

<sup>18</sup> Ibid, p. 35.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. See [http://www.nypost.com/p/news/local/major\\_decline\\_in\\_nYPD\\_stop\\_frisks\\_UH6imAZBUhv8Hk1wZ2TycM](http://www.nypost.com/p/news/local/major_decline_in_nYPD_stop_frisks_UH6imAZBUhv8Hk1wZ2TycM)



Though the police must have a reasonable suspicion of a crime in order to make a stop, 87.51 percent of all stops did not result in an arrest or the issuance of a summons. The police use the tactic not just as a way to uncover a crime, but to address and prevent crime from occurring. Regardless, this is a disturbingly high figure given the number of stops made by the NYPD on far too many law-abiding New Yorkers.

As noted earlier, the number of stops conducted by the NYPD has increased dramatically over the past decade – from 97,296 in 2002<sup>23</sup> to a peak of 685,724 in 2011 before dropping by 22 percent in 2012.<sup>24</sup> Some of this increase may be the result of better reporting since this rise occurred at the same time the NYPD was required to report more accurately its number of stop and frisks, but there is little question that the police are using this tactic much more often than before and as a federal judge now has ruled - in an unconstitutional manner. It is also clear that a substantial majority of the stops – 87 percent in 2011 – involve African-Americans and Latinos, especially young men.<sup>25</sup>

### Stop and Frisk and People of Color

The dramatic increase in the use of stop and frisk and the heavy burden it places on persons of color has created resentment and alienation in communities of color since such stops for questioning and potential frisks are often conducted in public and in a manner that is perceived to be disrespectful. While proponents of stop and frisk have cast the practice as merely a personal annoyance worthy of the greater benefit of reducing crime, law-abiding New Yorkers who are stopped can feel offended and even humiliated. Indeed, The Supreme Court of the United States itself acknowledged in the *Terry v. Ohio* decision the personal intrusion of a stop even while establishing the policy as legal. In the opinion of the Court delivered by Chief Justice Earl Warren the Court acknowledged, “it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a ‘petty indignity.’ It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”

There is similar resentment about two other police practices that are also common. The first is “vertical patrols” of public housing projects, and so-called “clean halls” buildings where landlords have consented to such patrols that may result in arrests for criminal trespass if the persons stopped cannot prove to the satisfaction of the police that they are tenants or guests of tenants in the buildings or upon being asked to leave give evasive answers that cause suspicion. The second is frequent arrests of persons who, when stopped and asked to empty their pockets, produce amounts of marijuana which

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<sup>23</sup> NYCLU 2011 Stop and Frisk Report. Available at: [http://www.nyclu.org/files/publications/NYCLU\\_2011\\_Stop-and-Frisk\\_Report.pdf](http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf)

<sup>24</sup> Schram, Jamie and Saul, Josh. “Major decline in NYPD stop-frisks,” The New York Post, February 9, 2012. Available at: [http://www.nypost.com/p/news/local/major\\_decline\\_in\\_nYPD\\_stop\\_frisks\\_UH6jmAZBUhv8Hk1wZ2TycM](http://www.nypost.com/p/news/local/major_decline_in_nYPD_stop_frisks_UH6jmAZBUhv8Hk1wZ2TycM)

<sup>25</sup> Eligon, John. “Fighting stop and frisk tactic but hitting racial divide,” New York Post, March 22, 2012. Available at: <http://www.nytimes.com/2012/03/23/nyregion/fighting-stop-and-frisk-tactic-but-hitting-racial-divide.html>

would otherwise result in a summons and a fine if kept out of public view, but when brought into public view constitute a misdemeanor and could lead to an arrest. A record number 50,000 people were arrested for marijuana possession in New York City in 2011 which fell to 39,000 in 2012.<sup>26</sup> In a move widely applauded, Mayor Bloomberg in his 2012 State of the City Address announced further reforms that those arrested for marijuana possession in small amounts would not be held overnight in jails if they had proper identification and did not have any open warrants for their arrest.<sup>27</sup>

### Current Litigation

Recent litigation on this matter in federal court resulted in Judge Judge Shira Scheindlin ruling in *Floyd, et al. v. City of New York, et al* that New York's use of stop was unconstitutional. The plaintiffs alleged that the police were engaged in racial profiling.<sup>28</sup> This was based on the claim that police stops disproportionately affect African-Americans and Latinos in comparison to their percentage of the population. The police responded that the tactic is used most often in high crime neighborhoods, which have a high percentage of people of color, and that the percentages of African-Americans and Latinos stopped is lower than the percentages of crime committed by them and is therefore not disproportionate.<sup>29</sup> With her ruling, the judge essentially disagreed.

For a police officer to detain a person requires that he or she have reasonable suspicion that criminal activity has occurred, is occurring, or is about to occur. For the police officer to conduct a frisk requires reasonable suspicion of imminent danger. The police are trained on these matters and have to fill out a form for each stop with boxes to check as to the reason. The boxes all refer to reasons that at least in some circumstances have been held by the courts to constitute sufficient justification. There is no way to know to what extent the forms are being filled out accurately or honestly. Moreover, the constitutionality of a stop will depend on all of the circumstances in each individual case about which there is really no complete information. In the federal litigation, dueling expert witnesses who have analyzed tens of thousands of forms and reached opposite conclusions. Judge Scheindlin determined the heavy use of stop and frisk presented a pattern of violations of the constitutional limits within which stop and frisk is permissible.

Somewhat different and additional legal issues arise in the context of stops and arrests for criminal trespass in Housing Authority and private buildings. As noted above, these are the subject of separate lawsuits. The District Attorney for Bronx County, Robert Johnson, has announced a policy of refusing

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<sup>26</sup> Toor, Mark. "Cuomo Wants Pot Weeded Out of Stop-and-Frisks," *The Chief*, June 15, 2012.

<sup>27</sup> Grynbaum, Michael M. and Barbaro, Michael. "From Bloomberg, a Warning of Life after Bloomberg," *The New York Times*, February 14, 2013. Available at: <http://www.nytimes.com/2013/02/15/nyregion/bloomberg-in-last-annual-address-cites-gains-and-goals.html?pagewanted=all& r=0>

<sup>28</sup> The primary case, which challenges the NYPD's stop and frisk practices for pedestrians, is *Floyd v. City of New York*, 08 Civ. 1034 (SDNY)(SAS). In addition, there are challenges to the stop and frisk practices in public housing projects and to trespass stops and arrests in an around private owned building enrolled in the "Trespass Affidavit Program". See *Davis v. City of New York*, 10 Civ. 0699 (SDNY)(SAS) and *Ligon v. City of New York*, 12 Civ. 2274 (SDNY)(SAS).

<sup>29</sup> MacDonald, Heather. "Fighting Crime Where the Criminals Are," *The New York Times*, June 25, 2010. Available at: <http://www.nytimes.com/2010/06/26/opinion/26macdonald.html>

to prosecute *Clean Halls* program cases unless the arresting officer is interviewed in order to determine that there was probable cause to believe that the person arrested had committed criminal trespass and was not a resident or invitee.

Distinct issues also arise in the context of arrests for marijuana possession made when the police stop persons on the street and ask them to empty their pockets. The Police Department announced *Operations Order 49: Charging Standards for Possession of Marijuana in a Public Place Open to Public View*<sup>30</sup> in September 2011 that marijuana possession in plain view as a result of a stop and frisk should be treated as a violation rather than a misdemeanor, resulting in part in a 14 percent decline in subsequent months.<sup>31</sup> Governor Cuomo has proposed changing the penal law to this effect.

#### *NYPD's Own Effort to Bring About Change*

Beyond changes to treatment of marijuana possession, the NYPD has put in motion additional reforms. In a May 2012 response to a February letter from Council Speaker Christine Quinn, Police Commissioner Ray Kelly detailed a number of reforms taken by the NYPD. Commissioner Kelly indicated the NYPD includes in its unit level training sessions an existing Department order specifically prohibiting racial profiling. The new training additionally provides clarity via video instruction as to when a stop and frisk should be conducted, and encourages the distribution of cards to those stopped citing the legal authority for stops in general and common reasons why stops occur. A new procedure provides for greater scrutiny of report worksheets at the local command level, with captains now responsible for auditing stop, question and frisk worksheets within their command to ensure compliance with guidelines established by the NYPD Quality Assurance Division. Precinct commanders will also be questioned by their superior officers before weekly Compstat meetings. The NYPD is also in the process of establishing a mechanism to compare the stop and frisks by police officers with similar assignments.

## **V. CITIZENS UNION POSITION ON STOP AND FRISK**

Beginning in the early 1990s, New York City steadily increased its funding for the NYPD and embarked on a wide range of law enforcement and criminal justice system reforms which have resulted in a dramatic drop in crime. These reforms have been expanded upon by each mayoral administration since then, with results that are unmatched elsewhere in the United States. These practice reforms are wide ranging, with strategies that include: the expansion of the patrol force under the "Safe Streets, Safe City" program in 1991; the development and refinement of data-driven crime fighting strategies (ranging from COMPSTAT, to the intensive use of DNA technology, to the development of robust data sharing and the Real Time Crime Center); strict consequences for violations of gun laws; an extensive investment in problem solving courts; and focusing police presence in neighborhoods where crime rates are highest. These innovations, in many cases leading criminal justice practice nationally and internationally, have driven the dramatic drop in crime in New York City over the past twenty years.

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<sup>30</sup> Available at: <http://www.wnyc.org/articles/wnyc-news/2011/sep/23/police-commissioner-calls-nypd-stop-improper-marijuana-arrests/>

<sup>31</sup> Toor, Mark. "Cuomo Wants Pot Weeded Out of Stop-and-Frisks," *The Chief*, June 15, 2012.

The practice of stop, question and frisk – when used legally and appropriately in specific and limited ways – is pro-active policing and arguably can be an effective police tactic to reduce crime. It is part of the NYPD's aggressive effort to reduce violence and crime by removing illegal guns from the streets, a laudable and desired goal. However, there is no clear evidence establishing the degree to which the reduction of crime is directly attributable to the tactic of stop, question and frisk. As shown on the chart below, in most individual years and overall there has been a correlation between an increased number of stop and frisks and lower crime rates. However, the data demonstrate an imbalance between the very large increase in the use of stop, question and frisk versus a more modest reduction in the crime rate. Moreover, one cannot conclude from this or any other evidence as to the extent to which aggressive use of stop and frisk has played a role apart from other police tactics in reducing crime rates.

Year	Major Felony Offenses <sup>32</sup>	Increase/Decrease from Previous Year	Number of Stop, Question and Frisks <sup>33</sup>	Increase/Decrease from Previous Year
2001	162,908		Unknown	
2002	154,809	-5%	97,296 <sup>34</sup>	N/A
2003	147,069	-5%	160,851	65%
2004	142,093	-3%	313,523	95%
2005	135,475	-5%	398,191	27%
2006	128,682	-5%	506,491	27%
2007	121,009	-6%	472,096	-7%
2008	117,956	-3%	540,320	14%
2009	106,730	-10%	575,996	7%
2010	105,115	-2%	600,601 <sup>35</sup>	4%
2011	106,669	1%	685,724 <sup>36</sup>	14%
2012	108,432 <sup>37</sup>	2%	533,042 <sup>38</sup>	-22%

<sup>32</sup> The seven major felony offenses include: 1) murder and non-negligent manslaughter; 2) rape; 3) robbery; 4) felony assault; 5) burglary; 6) grand larceny; and 7) grand larceny of a motor vehicle. See NYPD Historical Crime Data. Available at: [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/seven\\_major\\_felony\\_offenses\\_2000\\_2011.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/seven_major_felony_offenses_2000_2011.pdf)

<sup>33</sup> Stop and frisks data for 2003-2009 is from the following source: Trone, Jennifer, "The New York Police Department's Stop and Frisk Policies. Are they Effective? Fair? Appropriate? Summary of a New York City Bar Association Forum, Center on Race, Crime and Justice. John Jay College of Criminal Justice. March 9, 2010. Available at: [http://www.jjay.cuny.edu/forum/SQF\\_forum\\_summaryFINALJUNE28.pdf](http://www.jjay.cuny.edu/forum/SQF_forum_summaryFINALJUNE28.pdf)

<sup>34</sup> Weiss, Murray, "Stop-and-Frisks Have Done Little to Reduce Shootings, NYPD Data Show," DNAInfo, June 5, 2012. Available at: <http://www.dnainfo.com/new-york/20120605/new-york-city/stop-and-frisks-have-done-little-reduce-shootings-nypd-data-shows>

<sup>35</sup> Grynbaum, Michael M. "Crime is Up and Bloomberg Blames iPhone Thieves," December 28, 2012. Available at: <http://cityroom.blogs.nytimes.com/2012/12/28/crime-is-up-and-bloomberg-blames-iphone-thieves/>

<sup>36</sup> Iabone, Rande, "NYPD Report: Most of those 'stopped and frisked' are minorities," CNN, February 13, 2013. Available at: <http://www.cnn.com/2013/02/05/us/new-york-stop-and-frisk>

<sup>37</sup> "NYC mayor blames increase in crime on demand for Apple products," Apple Insider, December 28, 2012 Available at <http://forums.appleinsider.com/t/155233/nyc-mayor-blames-increase-in-crime-on-demand-for-apple-products>.

In 2007, for example, the number of stop and frisks declined by 7 percent from 2006 yet major felony offenses still decreased by 6 percent. The 6 percent decrease in 2007 was slightly more than the 5 percent decrease in 2006 and 2005, even though stop and frisks surged by 27 percent in each of those years. Similarly, stop and frisks increased by 14 percent in 2008 while major felonies dropped 3 percent. Yet in 2011, stop and frisks also increased by 14 percent and major crimes increased by 1 percent. Overall, major crimes have dropped 30 percent since 2002 while stop and frisks have increased by 448 percent.

Stop and frisk has occasionally resulted in the discovery of concealed weapons. It may also have discouraged persons from carrying them, as suggested by a U.S. Centers for Disease Control study that showed a 36 percent reduction in NYC teens carrying guns, from 3.6 to 2.3 percent since 2001.<sup>39</sup> However, in only 1.8 percent of stops was a weapon discovered.<sup>40</sup> However, in an overwhelming majority of stop and frisks – 87.51 percent – no arrests are made or summons are issued and in only 1.18 percent of stops was a weapon discovered.<sup>41</sup>

In sum, the evidence does not definitively establish the extent to which stop, question and frisk is a significant factor in reducing crime or that a more judicious application of the tactic would cause a reversal of the current crime reduction trend.

In addition, it is clear that the burden of stop, question and frisk falls most heavily on young men of color and that its increased and aggressive use has had the corrosive consequence of weakening public support and cooperation with the police in communities of color. Communities most in need of a strong police presence to prevent crime are also the same communities where resentment is greatest about stop and frisk because of its disproportionate application.<sup>42</sup>

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<sup>38</sup> Ruderman, Wendy. "Number of Frisks Fell in '12," The New York Times, February 8, 2013. Available at: <http://www.nytimes.com/2013/02/09/nyregion/number-of-frisks-fell-in-12-police-data-show.html>

<sup>39</sup> Seifman, David, "Worth the frisk as gun teens plummet: mayor," The New York Post, April 5, 2013. Available at: [http://www.nypost.com/p/news/local/worth\\_the\\_frisk\\_as\\_gun\\_teens\\_plummet\\_d9qTbUWQfaGnR5rSsLfJaL](http://www.nypost.com/p/news/local/worth_the_frisk_as_gun_teens_plummet_d9qTbUWQfaGnR5rSsLfJaL)

<sup>40</sup> Second supplemental report of Jeffrey Fagan, Ph.D. David Floyd et al vs. City of New York. United States District Court Southern District of New York. Available at: [http://www.ccrjustice.org/files/FaganSecondSupplementalReport.pdf#bid\\_p\\_35](http://www.ccrjustice.org/files/FaganSecondSupplementalReport.pdf#bid_p_35).

While the proportion of all stops that result in the confiscation of a weapon is miniscule, the numerical value is not insignificant. For example, 7,137 weapons were recovered in 2012. See [http://www.nypost.com/p/news/local/major\\_decline\\_in\\_nypd\\_stop\\_frisks\\_UH6jmAZBUhv8Hk1wZ2TycM](http://www.nypost.com/p/news/local/major_decline_in_nypd_stop_frisks_UH6jmAZBUhv8Hk1wZ2TycM).

<sup>41</sup> Ibid, p. 35. While the proportion of all stops that result in the confiscation of a weapon is miniscule, the numerical value is not insignificant. For example, 7,137 weapons were recovered in 2012. See [http://www.nypost.com/p/news/local/major\\_decline\\_in\\_nypd\\_stop\\_frisks\\_UH6jmAZBUhv8Hk1wZ2TycM](http://www.nypost.com/p/news/local/major_decline_in_nypd_stop_frisks_UH6jmAZBUhv8Hk1wZ2TycM). Seifman, David, "Worth the frisk as gun teens plummet: mayor," The New York Post, April 5, 2013. Available at: [http://www.nypost.com/p/news/local/worth\\_the\\_frisk\\_as\\_gun\\_teens\\_plummet\\_d9qTbUWQfaGnR5rSsLfJaL](http://www.nypost.com/p/news/local/worth_the_frisk_as_gun_teens_plummet_d9qTbUWQfaGnR5rSsLfJaL)

<sup>42</sup> A Quinnipiac University poll conducted February 20-25<sup>th</sup> of New York City voters found that only 39 percent of those polled supported the police practice of stop and frisk, and 76 percent of black respondents and 60 percent of Hispanic respondents opposed it. This was down from an August 2012 Quinnipiac poll, when 45 percent overall support the practice and a slim majority of Hispanics supported it.

Citizens Union opposes the overuse of stop, question and frisk. We believe that stop, question, and frisk should be employed less frequently, employed more judiciously and exercised with the utmost professionalism. It should be used only when an officer has reasonable suspicion that a person has been, is, or is about to be involved in criminal activity, which is the constitutional standard. In short, the emphasis should be on the quality of the stops rather than quantity alone.

If the police are to be given needed discretion in ensuring public safety, clearer guidelines must be developed and made publicly available in order for the public to trust that the police are using stop, question and frisk as judiciously as possible. A mechanism for reporting annually to the public on its adherence to these guidelines must then be established.

Citizens Union recognizes that judicious use of stop, question and frisk and other police tactics are only part of the fuller response that is needed to address the problem of criminal activity. Additional factors play an effective and significant role in creating safe and secure communities, such as making investments in youth development and education programs, violence prevention and conflict resolution programs as well as alternatives to incarceration focused on rehabilitation rather than punishment. Development of new strategic police-community partnerships especially concerning the city's young people of color may also result in a further reduction of crime as well as stabilization of police-community relations.

## **VI. CITIZENS UNION'S POLICY RECOMMENDATIONS**

In addition to our view that stop, question and frisk should be used less frequently and more judiciously, Citizens Union puts forward the following specific recommendations, which were developed prior to the federal judge's ruling and council legislation but which still hold applicability.

### **1. Enhance the Quality of the Stops and Reduce their Quantity**

#### **a. Improve Training and Accountability Systems**

The NYPD should provide to the public what steps it has taken to enhance its training and accountability systems as discussed in letters exchanged between Commissioner Kelly and Council Speaker Christine Quinn. As previously announced by Commissioner Kelly, enhanced training and accountability systems should include:

- i.** continued rigorous data collection from stops;
- ii.** reaffirming officers need to specifically designate the reason for the stop to ensure high-quality stops;
- iii.** better local supervision as well as precinct commander accountability;
- iv.** the creation of a streamlined system for lodging complaints of inappropriate stops by officers; and
- v.** the appropriate and consistent disciplining of police officers against whom complaints of improper stops are substantiated.

**b. Conduct More Professional and Productive Stops**

- i. The NYPD should place a premium on conducting stop and frisks with the professionalism that acknowledges even a well-executed stop is an indignity upon the person temporarily detained, particularly if they have not engaged in wrongdoing.
- ii. The NYPD should take even stronger steps to make clear to its officers that stop and frisks should be conducted in adherence with the legal standards for conducting a stop and question, and for conducting a frisk. We support the Department's efforts to make absolutely clear that racial or ethnic profiling is not acceptable as a rationale for conducting stop and frisks and urge that it takes all steps necessary to ensure that its efforts succeed.
- iii. The requirement that police officers offer a business card and inform the person who is the subject of a stop and frisk of the reasons for the activity, as outlined in City Council Intro No. 801, should be seriously considered for implementation to ensure that professionalism is given great emphasis.
- iv. The Police Commissioner should make it absolutely clear to its officers, as well as the general public, that there are no quotas in effect. While the NYPD contends there are no quotas to conduct stop, question and frisks public perception is such that it can only benefit the NYPD to unequivocally reiterate a "no quotas" policy, now also required by the federal court ruling. The Police Commissioner should also make it unequivocal that there should be no reason for officers to believe there are unofficial policies or expectations to conduct stops and frisks except when there is reasonable suspicion that a person has been, is, or is about to be involved in criminal activity. Nor should officers' performance be evaluated on the basis of the quantity rather than the quality of their stops.
- v. The NYPD should create a systematic method for obtaining, memorializing and utilizing for analytical, training, disciplinary and other related matters the results of civil court judgments and settlements involving allegations of police misconduct or civil rights violations.

**c. Furtive movements as a reason for conducting a stop should be clarified and scrutinized carefully.**

The current standard for conducting a stop is "reasonable suspicion" as per the rulings of the U.S. Supreme Court and subsequent federal and state case precedents. The category of furtive movements is the most commonly cited reason on the UF-250 form for conducting a stop and frisk. Yet there is little clarity as to what furtive movements are, with no standards indicating what qualifies as a furtive movement. It is therefore very subjective and susceptible to misuse as a rationale for conducting a stop. The NYPD issued a directive on March 5th requiring log



entries for UF250 forms standardized information about stops including an explanation of the suspicion and whether a frisk had occurred. The memo reads, “the circumstances or factors of suspicion must be elaborated on...i.e.; if the “Furtive Movements” caption is checked off, then a description of that movement must be specified.” **Accordingly, Citizens Union recommends that the NYPD, in its training for and supervision of, the implementation of this directive, take steps to ensure that the category of “furtive movements” is not used to circumvent the requirement of reasonable suspicion.**

2. **Change the Law Related to Marijuana Possession.** Marijuana possession that is revealed as a result of a person taking marijuana out of his/her pocket at the request or direction of a police officer should be considered the same level of offense for possession had the person not been required to place the marijuana in plain view. This is currently NYPD practice as a result of *Operations Order 49: Charging Standards for Possession of Marijuana in a Public Place Open to Public View* but should be codified in the state penal law.
3. **Provide Additional Public Oversight of Stop, Question and Frisk.**
  - a. **Citizens Union reiterates its existing positions related to the Civilian Complaint Review Board (CCRB) that pertain to stop, question and frisk.**
    - i. **The CCRB should make available data that clearly indicates for every complaint related to a stop, question and/or frisk, how the complaint was adjudicated so that it can be determined whether police officers improperly using the tactic are being instructed on the appropriate use or disciplined when necessary.** (Presumably this will now be addressed by the federal monitor.)
    - ii. **The CCRB should be able to use its recently granted prosecutorial authority to prosecute officers found guilty of lying during CCRB investigations.** CCRB investigations, which often involve complaints related to stop, question and frisk are conducted under oath and should result in ramifications for officers who are not truthful while making official statements.
  - b. **Citizens Union took no positions on City Council Int. No. 881 establishing an Inspector General in the New York City Department of Investigation and Int. No. 1080 that reaffirms the ban on racial profiling and allows citizens to file a private right of action in state supreme court alleging racial profiling,** because there was no consensus within the organization.
4. Candidates for mayor should make clear what specific steps they will take to reduce the use of stop, question and frisk so that it is used in adherence to the constitution while reducing crime and not imposing a burden on the very communities it is intended to protect.

These reforms are designed to ensure that stops are conducted judiciously, effectively and lawfully in a manner that keeps New Yorkers safe yet diminishes needless tension when it is overused on law-abiding New Yorkers. It also will promote good police-community relations and ensure the police department receives the recognition and support it deserves as it continues to keep New York City safe.



## **CITIZENS UNION**

# **Issue Brief and Policy Position Statement on Police Accountability August 2016**

### **Introduction**

In the past two years, public scrutiny of police practices has led to a national discussion about the relationship between police and the communities they serve, including policing methods, dynamics of power, and how police should be held accountable to the public they serve. New York City has been one center of this focus, with tension between police and certain communities due to policies like Stop, Question and Frisk, and incidents of police using physical force resulting in the deaths of civilian New Yorkers like Eric Garner. Recent events here and across the nation have shaken the public's confidence in police departments' ability to hold officers accountable for their actions and ensure that instances of officer misconduct are answered by appropriate prosecutorial and disciplinary action.

As a watchdog group for the public interest and an historic advocate of open and honest government in New York City, Citizens Union (CU) urges the enactment of laws and adoption of new rules and regulations that will strengthen the accountability of the New York Police Department to the public and consequently improve the relationship between the New York Police Department (NYPD) and the public. It is in this context that we also reexamine our past policy positions on police issues in the context of the current climate.

The primary responsibility of the police is to promote public safety. Police officers occupy a unique position in our society because they are given more power than any set of city employees, with the singular discretion to enforce the law using physical force. For this reason, Citizens Union believes that the best way to ensure the safe and democratic application of policing is to strengthen and streamline systems of oversight and accountability, both within the NYPD and among the independent entities that monitor police misconduct.

Greater trust, we believe, is necessary for the police to perform their duties safely and effectively. Citizens Union therefore urges city government to adopt policy reforms to create a more cohesive system of police oversight with enhanced accountability to the public, by standardizing and expanding the disciplinary powers within the NYPD, and strengthening independent oversight mechanisms. Moreover, CU's position aims to foster transparency regarding police misconduct and the use of force, and to engender public support of the police by facilitating the open exchange of information between the NYPD, other monitoring entities, and the public.

In 2008, Citizens Union released its policy position related to police oversight, with a focus on empowering the Civilian Complaint Review Board (CCRB) to ensure independent oversight of the NYPD. In 2012, the CCRB gained the right to prosecute the cases it substantiates, increasing its independence

and authority. Since that time, New York City has seen changes to its police oversight structures and bodies, including the establishment of the Office of Inspector General to the New York Police Department and the court appointment of a federal monitor and facilitator to review police procedures, training, and community relations. It also saw a major realignment on the use of the practice, Stop, Question, and Frisk that resulted in a significant drop in the number of such unnecessary interactions with New Yorkers, particularly in communities of color where the policy and strategy were used far more judiciously and far less frequently.

In our most recent deliberations updating our position, Citizens Union's Municipal Affairs Committee and its Public Safety Subcommittee led the review of the organization's policy positions by:

- examining the institutions, policies, and processes that address police misconduct;
- evaluating which of our prior recommendations were implemented and which require further advocacy; and
- speaking with the leadership at many of the governmental entities and community groups that have a particular stake in the police accountability system, such as the NYPD, CCRB, Offices of the Comptroller and Inspector General (IG), Brooklyn Movement Center, Communities United for Police Reform, and the New Jersey Civil Liberties Union.

We appreciated the opportunity to speak with these government and community groups. Each demonstrated dedication to the same objectives we held in developing this position: to issue policy recommendations committed to public safety, dignity, and respect for all New Yorkers; to ensure that police oversight mechanisms and processes are part of a balanced, coordinated, and effective system; and to effect government action which is transparent and accountable to the public, with consistent and understandable standards.

Citizens Union also recognizes that several governmental entities are individually and collectively in the process of reviewing and retooling the police oversight system and its components. We respect the ongoing work being conducted by the NYPD, CCRB, IG, and federal monitor and facilitator and the incremental changes emanating from this work. We also acknowledge that the New York City Council and Mayor have recently enacted certain reporting measures that Citizens Union supports and were part of our positions that we wanted to see enacted. As the process continues to unfold, we will continue to consider additional reforms to see which ones are still needed after progress is made in the new oversight system.

Please note, previously adopted positions of Citizens Union are demarcated by asterisks (\*).

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This document contains the following sections:

**2016 Policy Position on Police Accountability**

I. Establish Uniformity, Clarity, and Deliberative Planning Across the Police Oversight System.

II. Enhance Police Department's Internal Oversight of Officer Misconduct.

III. Bolster the Civilian Complaint Review Board's Investigative and Oversight Roles.

IV. Engage Additional Governmental Entities to Enhance Transparency, Independence, and Public Education in the Police Oversight System.

**Citizens Union's Past Positions on Police Issues**

I. 2008 Position on Public Oversight and Police Misconduct

II. 2013 Position on Reforming Stop, Question and Frisk

**2016 Citizens Union Policy Position on Police Accountability**

## I. ESTABLISH CLARITY AND CONSISTENCY ACROSS THE POLICE OVERSIGHT SYSTEM

New York City's current standards and definitions regarding officer conduct and misconduct are not always clear or uniformly applied throughout city government and the various components that deal with public oversight and accountability. This leads to confusion and inconsistency regarding practices, findings, and interpretations of the various overlapping network of police oversight entities, most notably the NYPD, CCRB, Commission to Combat Police Corruption (CCPC), Department of Investigation (DOI), IG, the federal monitor, and trial judges.

The recommendations in this section aim to: reduce disparities of findings of fact and disciplinary sanctions in complaints of police misconduct, and resulting inefficiencies; address the disparate misconduct standards and possible bureaucratic cohesion which may lead to the NYPD dismissing cases recommended by the CCRB; provide more heft to CCRB determinations, thus encouraging civilians to make formal complaints of officer wrongdoing; increase transparency as to how the NYPD makes determinations about claims of police misconduct; and promote rule of law, ensuring that practices are not changed without due consideration, and without public input and appropriate process. Citizens Union specifically recommends the following:

1. Require the NYPD to make its patrol guide and any other training manuals and rules governing officer conduct, public, free and accessible.
2. Require the Police Commissioner to explain divergence from NYPD trial judge and CCRB disciplinary recommendations via reporting to the issuing body and to the public.\* As part of the 2012 Agreement between the City Council, Mayor, and the NYPD granting the CCRB the new power to prosecute cases of police misconduct, originally held by the NYPD itself under the Advocate's office, the Police Commissioner is obligated to provide to the CCRB and the respondent the rationale when diverging from the disciplinary recommendations. Many interpret that the written agreement has not been followed specifically with regard to making such information publicly available, necessitating the need for additional legislation to require codification of this important component of effective public oversight of police misconduct (CU offers modified support for [Intro 138](#)).
3. Establish the CCRB as the primary finder of fact in cases which it investigates, except in cases of clear error. This is the logical outcome of an increased collaborative relationship between the CCRB and the NYPD.
  - a. If the CCRB finds wrongdoing as first finder of fact, the Police Commissioner would be required to issue a penalty, but would still retain discretion as to what the penalty would be.
4. Establish uniform guidelines for the Police Commissioner's disciplinary determinations and the CCRB's disciplinary recommendations. The Police Commissioner would still have independent discretion, but instances of discipline could then be measured against these shared guidelines for increased accountability.
  - a. Guidelines would enumerate ranges of penalties and ranges of misconduct, possibly taking into account type of force, degrees of justification, and mitigating and aggravating factors – but should not be overly complicated.

## II. ENHANCE THE NYPD'S POLICE DEPARTMENT'S INTERNAL OVERSIGHT

## OF OFFICER MISCONDUCT.

Under the current police oversight system, the NYPD and its commissioner have extensive latitude and discretion in addressing alleged instances of officer misconduct, including: creating internal policies, conducting internal investigations, determining findings of fact and law, and disciplining officers. While the commissioner needs significant discretion in order to appropriately manage the police force, there must be both additional checks and supports to ensure that the NYPD is better positioned to perform internal oversight of officer misconduct, with public support and transparency.

The recommendations in this section aim to: provide for public and City Council input regarding the NYPD's operations, management, and policy development and implementation; give New Yorkers the tools to understand and assess the civilian-police relationship; ensure transparency regarding officers' use of force and sanctions; ensure that the commissioner is lawfully empowered to determine appropriate sanctions for misconduct with a greater range of possible penalties for misconduct; and encourage positive relationships between the police and communities they serve. Citizens Union recommends the following:

1. Expand the Police Commissioner's range of disciplinary options for cases of misconduct to include more intermediary levels of punishment, in line with disciplinary guidelines, if adopted.\*
2. Institute continuing education for more senior officers, with reformulated training for probationary officers and police officers, created pursuant to the *Floyd* federal monitor's participation.
3. Improve NYPD's website to consolidate and clearly organize information for the public:
  - a. Make quantitative data dynamic and enable it to be compared and searched, with consistent categories and not only in pdf form.
  - b. Make narrative data well-organized to ensure that New Yorkers can learn about police operations, oversight mechanisms, and rights and obligations of civilians and officers.
4. Develop well conceived body-worn cameras in a deliberative manner in advance of full-scale NYPD roll out.
  - a. Develop and publish internal NYPD body camera policy before expanding pilot program. (CU supports for [IG Eure's report recommendation](#).)
  - b. Establish an advisory task force to examine, report, and issue recommendations on NYPD use of body-worn cameras, addressing feasibility, cost, privacy implications, best practices regarding officer recordings and video storage, and evidentiary issues. This task force would be comprised of the following appointments: 3 from mayor, 3 from speaker of the Council, and 4 jointly from mayor and speaker. (CU supports [Intro 607](#).)
5. Continue to diversify the Police Department's recruitment and hiring practices, building off of internal NYPD efforts since 2013 to monitor demographic data of the police force and improve the pipeline for hiring officers reflecting the diverse city population.
6. Continue the practice of conducting regular systems evaluations in line with modern, pragmatic research, as is currently underway as a collaborative effort between the NYPD and the court-

appointed federal monitor and facilitator; and publish the reports, findings, data, and any changes resulting from such evaluation.

7. Two local laws were recently enacted that reflect CU's recommendation to expand reporting on incidents of police use of force against civilians, without publishing officers' names.
  - a. [Intro 606-A](#), supported by Citizens Union, now requires the NYPD to publish use of force reports quarterly on the NYPD website and to detail the number of use of force incidents by: (1) type of force used regarding arrests related to quality of life offenses; and (2) by geographic information of where the incident occurred, including precinct. This data should then be audited for accurate reporting by the Inspector General.
  - b. [Intro 539](#), supported by Citizens Union, now requires the NYPD to also publish use of force summary reporting within 30 days of an incident of force resulting in hospitalization or death, including: (1) type of force used; (2) officer's precinct; (3) whether officer was on duty; (4) officer's years of employment; (5) incident summary; (6) whether CCRB reviewed the incident, if so its findings, as well as NYPD findings and final decision regarding discipline; and (7) geographic information of where the incident occurred. Each data point should be updated as the information becomes available, though the provision should take into account that some of the data required may not be available within 30 days. The data should also be audited for accurate reporting by the Inspector General.

The legislation lacked language requiring the NYPD to provide important aggregate information about race, age, and gender. During the day the Council considered and passed the legislation, the Council explained that it was an unintentional error not to require reporting data on race. During the same day, the NYPD committed to including race data in their reporting, though because the law does not require it, it is strictly voluntarily. It is hard to believe that this was a simple error given the importance of race data specifically. It is very much hoped that such important data will accurately and consistently be provided to the public.

### III. Bolster Independent Oversight of the Police by Strengthening the Civilian Complaint Review Board

In recent years, the CCRB has further professionalized its work, including seeking to substantially reduce the time it takes to close open cases. Yet the potential for CCRB growth and effectiveness is hamstrung by structural and legal provisions. In order for the CCRB to fulfill its mandate to investigate and substantiate complaints of officer misconduct against civilians, and to prosecute substantiated complaints, it must be properly empowered.

The recommendations in this section aim to: furnish the CCRB with needed resources and powers; create protections to ensure the integrity of CCRB investigations; and increase reporting of complaints to the CCRB regarding officer misconduct.

1. Increase the CCRB budget to maintain and grow staff capacity, offering competitive compensation and comprehensive training for investigators so as to attract and keep experienced staff.\*

2. Safeguard the independence and integrity of CCRB investigations and standardize the effects of participation in an investigation for complainants, witnesses, and officers.
  - a. Require the CCRB to inform complainants, witnesses, and officers that their statements to the CCRB may be used against them in corresponding court cases, and of the associated risks.
  - b. Reinstate “zero tolerance” policy for false official statements.\*
    - i. Possibly include or clarify penalties for false statements, including being subjected to charges of perjury.
  - c. Grant the CCRB authority to prosecute officers who lie under oath during the course of their investigations.\*
    - i. Possibly include that civilian complainants and witnesses would also be subject to prosecution for perjury.
3. Expand CCRB’s data reporting, to:
  - a. Require the CCRB to provide the public with aggregate information about both the police officer and complainant involved in complaints, which could include: race, ethnicity, age, gender, and for officers, years on the force.
  - b. Build off of CCRB’s new transparency initiatives, such as increased online reporting and development of an early warning system, to require the CCRB to issue a report listing precincts or divisions of officers with the highest numbers of: (1) CCRB complaints; (2) CCRB substantiated complaints; and (3) incidents of being named defendants in civil lawsuits alleging police brutality. (CU offers modified support for [Intro 824](#), with one significant amendment, to require the CCRB to perform this reporting rather than the NYPD, as the CCRB is better positioned to report upon its own data.)

#### IV. Make Police Accountable to the Public Through Elevated Transparency, Independence, and Public Education in the Police Oversight System

The police oversight system has many components and parties, which are necessary to promote accountability: internal oversight within the NYPD, as well as the CCRB, CCPC, DOI, IG, and more. Yet, other entities also need to be included to ensure that there is proper coordination, information sharing, political independence and accountability, and civic awareness of the rights and obligations of police officers and civilians.

1. Enhance data-sharing regarding civil actions against police officers and related civil legal settlements.
  - a. Require the Law Department to issue quarterly reports to the Council, comptroller, and CCRB detailing the number and disposition of civil actions filed against the NYPD. (CU offers modified support for [Intro 119](#) with one significant amendment, to require the Law Department to issue this report rather than the Inspector General, as the information is held by the Law Department which litigates and settles civil cases against the police, and therefore is in the best position to accurately report on such cases.) [During the finalization of this position Citizens Union was informed that its recommendation for the required reports to be issued by the Law Department has in fact been included in the bill.]
  - b. Require the comptroller to submit information regarding civil legal settlements in all cases to relevant agencies, as the comptroller approves the payments and has the most up-to-date data on such settlements.



2. Establish public education programs and initiatives to ensure that New Yorkers are informed about the rights and obligations of civilians and police officers during civilian-officer interactions.
  - a. Develop a program through the Department of Education, potentially in conjunction with other modes of civics education, and potentially partnering with other agencies that conduct youth programming and social services, as well as civil society partnerships.
  - b. Support initiatives to educate New Yorkers of all ages and in all communities about the rights and obligations of civilians and police officers during their interactions.

## **Citizens Union's Past Positions on Police Issues**

### I. 2008 Position on Public Oversight and Police Misconduct

In 2008, Citizens Union sought to address public mistrust in the NYPD, which was largely influenced by its handling of police misconduct. To that end, we made recommendations for a more independent and transparent system of oversight, prosecution and adjudication of misconduct. Specifically, CU recommended that:

1. The CCRB be enabled to prosecute cases it substantiates.
2. The CCRB be given the authority to prosecute officers who make false statements to CCRB investigators during the course of investigations.
3. The CCRB's resources for investigation and staffing be expanded in order to handle its growing caseload and prevent delays in carrying out its important oversight function.
4. To ensure appropriate disciplinary responses to misconduct, Citizens Union also recommended expanding the responsibilities and disciplinary options of the Police Commissioner, to allow for more narrowly tailored punishment and better compliance with CCRB recommendations.
5. Finally, Citizens Union recommended that the City enact legislation that would recreate the Commission to Combat Police Corruption, which is currently established through Executive Order, thereby expanding its mandate to serve as a permanent monitoring commission.

In 2012, pursuant to a Memorandum of Understanding between the CCRB and NYPD, the CCRB was given the authority to prosecute cases it substantiates when the most serious discipline is recommended. While Citizens Union applauds this step as a measure that increases the level of independence across police oversight mechanisms, ensuring that police who engage in misconduct are more accountable to the public, it is concerned that the Police Commissioner is still not publicly releasing his rationale when he diverges from the disciplinary recommendations of the CCRB and

### II. 2013 Position on Reforming Stop, Question and Frisk

In 2013, Citizens Union conducted in-depth analysis of the NYPD's Stop, Question and Frisk policy and issued a [policy position on it](#), as well as policy recommendations. This built on the earlier work CU has undertaken on police conduct and accountability by addressing a policy that facilitates police misconduct and which federal courts have found to be employed unconstitutionally in New York City.

Citizens Union came independently to the conclusion that Stop, Question, and Frisk should be used less frequently, employed more judiciously, and performed with the utmost professionalism given the intrusive nature of the tactic with a disparate impact on communities of color. As a matter of policy, we opposed the overuse of Stop, Question and Frisk in its then aggressive form, which has now been ruled unconstitutional. We do so because, while it is uncertain how many stop and

frisks need to occur in order to reduce crime, we believe there comes a point when its overuse brings diminished results and can be counterproductive.

We also wish to see it used more appropriately by focusing on the quality of the stops and not quantity, because it imposes a significant burden and personal infringement on the rights and lives of individuals who are mostly people of color.

The then-recent rulings and the appointment of a federal monitor to oversee the use of Stop, Question and Frisk indicate that the policy should be applied in specific and limited ways if it is going to be effective in reducing crime. Citizens Union's analysis agreed that evidence relating to crime rates and the number of instances where Stop, Question and Frisk was used does not definitively establish the extent to which the policy is a significant factor in reducing crime.

Based on these findings, Citizens Union recommended shifting the emphasis of Stop, Question and Frisk from the quantity of police interactions to their quality. To this end, it advocated for:

1. Improved training and accountability systems within the NYPD.
2. The use of more productive and professional stops, with the understanding that any stop, whether justified or not, "is an indignity upon the person temporarily detained."
3. That City and governmental bodies clarify what appropriate instances of using Stop, Question and Frisk are.

CU's 2013 policy position also reiterated its existing positions related to the CCRB and independent monitoring of police misconduct.

Since the time of our recommendation, the court-appointed federal monitor has continued to work with the NYPD, CCRB, and other entities of the police oversight system to ensure that Stop, Question and Frisk is utilized judiciously. The number of instances where the practice was exercised has been decreasing annually since it reached a high point in 2011, with a dramatic drop between 2013 and 2014. Last year, the number of instances was the lowest it has been in over a decade, indicating that at least more consideration of whether a stop is warranted or necessary is being employed at a city-wide level.

At the same time, the federal monitor continues to make recommendations regarding the use of Stop, Question and Frisk, which aim to improve implementation. Citizens Union sees that reforms surrounding the Stop, Question and Frisk policy are taking place and appreciate the work that is being done by the various agencies involved in police oversight, both independently, and in collaboration with the federal monitor. We look forward to seeing continued reform in the area of this policy's overuse.

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12/10/2016

To: Reinaldo Rivera, Senior Advisor, Joint Remedial Process NYPD “Stop and Frisk” Settlement Case, 2<sup>nd</sup> District Court

I have reviewed the five confidential transcripts (from focus groups) forwarded to me by email as per your request. You asked for my observations on the impact of “stop and frisk” policing policies from a mental health point of view as suggested by the content of the transcripts. My area of expertise as a psychologist lies in working clinically with traumatized adults with a variety of mental disorders and exploration of the role of humiliation in behavioral problems. I have reviewed the transcripts from these perspectives. The transcripts raise a number of concerns which I have outlined below. I have included observations on the transcripts, concerns on which I would suggest attention be focused, and some suggestions.

By way of framing my observations, I have taken a systems perspective on the community and its police. Both groups matter, their interactions impact both, and both groups have been impacted by the stop and frisk policies. Improvement in life for both needs to be the objective. The transcripts make clear a number of the reactions community members have had to this approach to policing. They describe as well their perceptions of how officers acted and reacted in various situations; I have inferred, with caution, something of what it may have been like for the officers from their own point of view as well.

Both community members and officers appear to be at heightened risk of being caught up in particular kinds of dynamics by stop and frisk policies that make life more problematic for everyone involved, causing all the parties at the street level to have harder lives than any of them might want for themselves. Having worked with people steeped in experiences of threat to their dignity and to their lives, with people who have come to live with the neurobiology of alarm in the face of chronic danger, and having assisted them in the journeys they have made to discovering life can be much safer and easier than what they were used to, I would encourage reform efforts to keep a particular system-wide goal front and center for everyone involved, namely the goal of becoming communities who are making a safer life together, a life of mutual respect and dignity for all, a happier life, with the police seen not as outsiders but as members of the community along with everyone else.

What follows are considerations that I would like to foreground, knowing that extensive research has been done on such issues by experts in a variety of fields. I defer to their expertise and encourage a reaching out to them. I nonetheless stand by the concerns I have raised here.

1. Let me first comment on mental illness and the challenges it presents to policing, before turning to the main subject matter of this paper. Mental illness on the part of a community member has the potential for escalating the response of a police officer untrained in recognizing and understanding reactions on the part of a mentally ill person. For example, bipolar disorder causes a person's ability to think in ordinary ways to be swamped by the intensity of their moods, which can range from severe depression (non-responsiveness, sluggishness) to manic energy (which can also take the form of intense anger/rage). Bipolar patients typically feel better at some point, or feel manically "the best they've ever been," and go off their medications, which escalates the control their moods have over them. The inability of the person to control the rage or energy that has them in its grip can easily be misinterpreted as disrespect and a willful refusal to cooperate.

For the untrained officer who does not know what he or she is looking at, this apparent disrespect and non-cooperation can lead the officer to escalate – which will send the patient's emotions still further out of control. The mutual escalation of emotionality of the situation in place of calm, reasonable interaction can escalate to physical action and violence. A range of responses from the officer to de-escalate the situation and help all parties get back into the safe-and-stable zone is more likely to prove safe and to work better for both the officers and the mentally ill person alike.

Likewise, in schizophrenia ordinary logic gives way to bizarre thinking, delusions (including of being hunted by authorities, for example), inappropriate affect (emotion that makes no sense in the situation), etc. While the officer coming on the scene knows why he or she is there (to act in their role as an officer of the law), the schizophrenic who is decompensated may imagine the officer coming into the situation is any number of kinds of figures or forces conjured by their delusional and/or hallucinatory systems. For an untrained officer, the strangeness and inappropriateness of the subject's language, facial expressions or behavior can again be misinterpreted as a failure to cooperate and a manifestation of disrespect, when in fact the subject may not be able to understand what is taking place in terms at all like what is actually happening, or to respond in normally appropriate manner.

Training in the recognition and handling of various forms of mental illness should be an aid to officers enabling them to manage such situations more effectively and safely, minimizing danger for all involved, adding to officers' sense of their own skillfulness in addressing the range of things that can come up in policing a given community. Support for training programs should be a win-win situation.

The job of the police in addressing mentally ill subjects in a community will likely be easier if they are provided with information that a given person does have a mental illness and which illness that is. Getting to know the members of the community one is policing, including who has mental problems, should be an advantage when a situation develops involving such persons, as the officer(s) are

more likely to recognize those particular individuals as having those problems thanks to prior knowledge. Outreach to communities that alert its members to inform police coming into a situation that given individuals are mentally ill may serve a similar purpose, but this is less likely to be helpful to officers not trained in then assessing the situation for themselves and managing the interactions with mentally ill people. Cooperation between mental health programs and the Department in this regard might be helpful.

While these concerns by way of policing and mental illness are flagged in the transcripts, these concerns apply to this and any other community officers are called on to police. They are not unique to “stop and frisk” policing. What stop and frisk policing will do, however, is increase the frequency of interactions by the police with community members, raising the frequency with which they are interacting with mentally ill subjects as a result.

2. A review of the five confidential transcripts provided suggests that policing behavior can set in motion a number of side effects impacting the mental/emotional states of the immediate subjects of their interactions, as well as of those who witness the interactions, and of others in the community who are in turn impacted by hearing about what happened.

Based on the transcripts, stop and frisk policing has created a number of emotional attitudes on the part of community members, attitudes which officers might in fact regard as advantageous to their control over potentially volatile situations but which prove harmful for the members of the community and create problems for the police in the long run.

The transcripts further suggest a shared cultural view that sounds rather like the police playing the role of an occupying force in an unfriendly territory. Given that a relatively few officers must patrol a much larger community, if officers have an expectation that almost anyone in that community could become dangerous at any time, and that others might then join in, officers could come to the view that establishing an intimidating presence could help keep a threatening population under control. The more forceful and frightening their presence, the more hesitant the community’s members might be to “try to get away with anything.” To be viewed as dangerous by the community may subdue any inclinations in the community to disrespect or threaten officers. In such interactions, the conscious or unconscious intent is to reinforce subjects’ submission to authority, which can easily slip over into deliberately humiliating subjects or into subjects’ perceiving that they have been humiliated whether or not that was the officers’ intention. I will refer to this as a “commanding presence” style of policing. Whether “stop and frisk” policing was intended to foster that style, by its nature it appears to embody that style in its impact on community members. It is a style whose most likely impacts include undermining the mental health of the community’s members on whom it is exercised, undermining the

community's willingness to turn to officers for help or to provide useful information, and increasing the chances that sooner or later a difficult situation will turn dangerous.

Commanding-presence psychology may have developed in response to two factors: stop and frisk policing policy and broken-window policing policy. Both mandate frequent, random and intense intrusion into the ordinary life of community members, for whom the intrusions are sudden, unpredictable and hence often unexpected. Each intervention holds the potential of dire consequences for the subjects stopped. The transcripts show this has heightened the state of alarm in the community. That alarm can reasonably be expected to increase the unpredictability and potential volatility that police officers in turn are confronted with. They too likely have less sense of assurance as to what to expect next.

Use of quotas for stop-and-frisk to evaluate officers' performance and determine promotions and pay has likely been a major driver of the development of this psychology. However, the engagement of the country in a militarization of its psychology generally in the wake of 9/11, and the employment of police as part of the array of forces securing the country against terrorists, coupled with the militarization of equipment and tactics, including surveillance and monitoring equipment and tactics, has likely further driven the development of commanding-presence psychology: A good officer projects a commanding presence, a show of force is a good thing, etc. All of this has consequences for communities being policed and for the police officers themselves. This is a case of all parties suffering a decrease in their sense of the predictability of life and an increase in the sense of unpredictable danger in the wake of developments that have shifted life into what is now understood by researchers to be the neurobiology threat and alarm.

In the face of threat to safety, dignity and/or life, a lower center in the brain, the amygdala, causes an increase in the production of adrenalin and stress hormones while dramatically escalating the activation of the sympathetic nervous system, all in the service of creating a sudden surge of physical energy in case either fight or flight will prove necessary. Both the chemicals and the sympathetic nervous system cause a dramatic deepening and quickening of breathing (which increases the supply of oxygen to cells) and a release of glucose from the liver into the blood stream, thus releasing the supplies (oxygen and glucose) into the blood stream that will be needed by the long muscles of the legs and arms for fight or flight. The heart pounds harder and faster to move the blood with these supplies to those muscles as quickly as possible, reinforced by an increasing of the tension in the blood vessels (i.e., a heightening of blood pressure). This systemic response creates a surge of energy in the body that can be manifest in either a tensing up or shaking in the limbs. At the same time, the amygdala shuts down the lines of



contact in the brain to its thinking-centers, as thought may get in the way of survival: if the threat to life is immediate, the body and brain focus totally on emotionalizing the person into the actions that may save their life. Needless to say, in a situation in which police are trying to find out what's going on, a sudden burst of flight or aggression on the part of a subject is a less than ideal development, and yet if the subject's brain has sensed danger, it may well set in motion this override of the subject's ability to talk quietly, provide information, etc., and overwhelm them with an impetus in their bodies to run, to shake with anger, etc.

A second kind of neurobiology can also be triggered, one that equally shuts down the ability to think, to find words, and therefore to make sense at the very time an officer is most concerned to find out what's going on and how to make sense of it. Instead of sending the sympathetic nervous system into overdrive, the amygdala can send the contrasting system, the parasympathetic nervous system, into an extreme state. The two systems (sympathetic and parasympathetic) complement each other, with the sympathetic system upshifting the body into producing bursts of energy and the parasympathetic system downshifting the body into relaxing. The first increases heart rate, blood pressure, etc., while the parasympathetic dramatically lowers heart rate, blood pressure, breathing and the release of sugar into the blood stream. When the parasympathetic system is over-activated in the presence of perceived threat, the result is a collapse of energy. This state of demobilization renders a subject extremely passive, inert, with "brain freeze" (an inability to think or to think in a coherent fashion when being questioned).

In short, in the face of perceived threat, the amygdala takes over while the parts of the brain that think, reason and find language to express what's going on tend to be shut out of the loop, resulting either in a flooding of the individual with emotional energy (anger for fighting, fear for fleeing) or a collapse into passivity, coupled with a difficulty being articulate or relevant in comments.

It is worth noting that when individuals or a community have had a great deal of experience with such states, they can develop an ability to keep thinking and talking despite the intense activation of these emotional states within themselves. It may be a matter of survival or of honor to be able to contain the flooding from within (by anger or fear), to fend off any tendency to collapse, and to keep being able to talk and explain one's self and one's rights, etc., to deal with the situation. The development of that ability to be "cool" in the face of danger from without and emotion from within, the ability to shut out the emotionality within and stay cool and logical may be considered a mark of honor, not to mention a key to survival.

All of this can develop in response to actual danger from officers in a given situation, but they can also be responses to perceived or expected danger even though a given officer in a given situation may have no such intent. The fact of a history of interactions marked by danger, intimidation and/or humiliation by officers appears, from the transcripts, to have led to a generalized sense that all police officers are potential threats at all times. The very presence of police may have a triggering effect in activating these reactions. None of this is helpful to officers in any given situation, where they have to navigate against a backdrop of these many intense neurobiological reactions.

The policies that drive commanding-presence policing thus likely come with a price tag for the community's members and for the officers attempting to play their role in the community. Commanding-presence psychology, which stop and frisk seems to accentuate, appears to undermine community perceptions that police are part of the community, that police recognize that this is a community that values mutual respect and lawful behavior, and that the police are there to support the community in being what it actually wants to be. Instead the police are likely to be seen as raising the level of emotional alarm and reactivity in the community, which makes it harder for people in the community to maintain reasoned behavior. Alarmed people are more reactive than they otherwise would be.

The bottom line take-away is that no party emerges happier and more content in life as a result of these interacting dynamics. No one is getting to have the better life they'd wish for themselves (or others) thanks to these dynamics. The question that reform efforts are raising ultimately is whether all the parties have it within themselves to approach things differently and can thereby collectively come to be living a happier existence together.

From a neurobiological point of view, this is possible. The same brain that can send people into fight and flight has circuitry and chemistry that make it possible for people to establish attachment to each other and be cooperative in their endeavors, even to care for one another's well being in life. That shift is experienced emotionally as a shift out of feeling endangered (and pursuing a sense of control) to feeling a sense that "we're all safer because all of us are here," "we all do better thanks to everyone being part of our community's life." Our biology makes this an achievable goal. The question is whether the institution of policing at its various levels, plus the communities being aided by policing in their various constituencies, can want to make that change. It will involve a shift in tactics, psychology, neurobiology, interactions and relationships over time.

The second question is whether all involved can tolerate the time it will take to make those shifts and secure them in the face of stressful events. Those shifts involve not only changes in thinking and changes in procedures, they

also involve a rewiring of the brain and its neurochemistries, which takes time. Put another way, the building of trust (in both directions) takes many repeated experiences of trustworthiness, which can only happen over time. The brain changes through repeated experiences of thinking differently, acting differently, interpreting things differently -- and experiencing a growing consistency of different (better) outcomes.

2. A number of the members of the focus group expressed enormous fear of the police, a sense they could not, and would not, start to walk away from an officer after the completion of an interaction. Some would not leave without being told they could go, others would not walk away at all but would wait for the officers to leave, and still others would not walk away except by backing away, never turning their backs to the officers.

The intrusive commanding-presence style of policing embodied in stop and frisk interventions at unexpected and unprovoked times, combined with a history of use of excessive or deadly force by the police, has generated considerable fear. While this may be considered an asset by officers at times, it takes a toll on the community. Fear for one's safety, indeed for one's life, triggers autonomic nervous system responses that, if they happen frequently, generate a chronic overloading of the body with stress hormones, with an increased risk of hypertension and other metabolic syndrome disorders (diabetes, heart attack) over a course of years or decades. However, to the extent that officers also experience a chronically elevated state of being on guard against potential threat, they too may be subject to a heightened risk of developing those same disorders (hypertension, diabetes, coronary heart disease). If that has not already been investigated, it should be. No one should be paying that kind of price for having served the City.

In addition to the biology of alarm reactions, random, unexpected and unprovoked stopping, interrogating and frisking of individuals, apart from actual incidents of sexual groping of opposite sex and transgendered individuals, is humiliating. The sense that one is being humiliated but has no choice but to submit and be subservient can generate angry "talking back" to re-establish some sense of dignity (including the sense of manhood among males) or smoldering resentment that may surface at officers at some future time – but more likely will be discharged on other members of the community within hours or days. A chain of destructive emotions can ripple out from an incident through a web of relationships in the community, as the anger of being humiliated is vented on others, who then vent it on still others. Humiliation is a powerful disruptor of community relations, compromising the community's ability to be the best self it strives to be.

The stability of community relationships is further ruptured, as noted by some in the transcripts, when a subject is stopped, interrogated, frisked *and sees that other members of the community are witnessing this*. The subject

then worries what the others are thinking about him or her: Will the witnesses now think that maybe the police are stopping the subject for a good reason, that perhaps the subject has committed a criminal act and/or is dangerous, and that maybe the subject will be regarded with suspicion in the wake of the incident. Relationships that had been pretty good to that moment may now be tainted by suspicion directed at the subject. The witnesses may in fact have no such thoughts (though they may have); in either case the subject may now have suspicion of them as potentially mistrusting him or her, leading to an alteration of his/her behavior toward them to try and uncover or defuse any possible suspiciousness or bad reputation that may be circulating among neighbors, family and the community as a result of the “stop.” Interactions accordingly become distorted by mistrust in several ways. No one feels better because of this.

In reality, witnesses may instead feel sympathetic toward the subject, judging that the police are humiliating the subject for no good reason, perhaps remembering incidents they themselves have experienced or that friends or family members have experienced where that was the case. They may see the subject as a relatively innocent victim of humiliating tactics. They may in that case feel humiliated that they themselves cannot safely do anything to intervene, to assert the subject’s innocence (without drawing attention and suspicion to themselves, as they’d risk being seen as disrespectful or causing trouble to the officers who would then need to assert their control by exercising humiliating power over them as well).

In addition, both the subject and the witnesses are likely to tell the story of what was experienced or witnessed to their friends and family members, so that the story of “what police are like” spreads, creating expectations of how interactions with the police will go regardless of how they might actually go with a given officer on a given day. Expectations of humiliation, degradation, being hauled off, imprisoned, or even killed, degrade the readiness of community members to see officers as a welcome presence in their midst, an addition to the community they’re glad to have among them, resources they are glad to cooperate with or help out or back up should untoward situations arise that might overwhelm an officer and his/her partner before back up can arrive.

In short, the transcripts convey a sense of a style of policing that has degraded the community’s emotional well being *and* the potential for cooperative responses by community members toward the police. A sense of the police as a friend did not surface in the transcripts. Instead the seeds appear to have been sown for resenting the police and exploding into violence sooner or later, thus reinforcing any fears officers might have that motivates establishing themselves as a dangerous force to be respected in order to keep potential threats to their own safety at bay. If so, this likely involves little awareness of the role their own behavior over years has played

in building the level of humiliation, resentment and fear that could erupt in violence. Participants in systems-dynamics rarely are aware of the impact of their own behavior on keeping dynamics going that they do not like.

As with any system-dynamic, the beliefs of the commanding-presence style of policing can act as self-fulfilling prophecies, stimulating the community's emotional attitudes to be such that they become the kind of community police might rightly fear. A shift in policing style toward respectful treatment of the community's members (and respectful procedures, a number of which are suggested in the transcripts), cannot be expected to erase the effects of years of the prior style of policing in a matter of months. Trust does not spring into place except through experience, over time, that the old kinds of interactions are now mostly a thing of the past and that trust on the part of community members that they will be respected has been warranted for a matter of at least a year or more.

A very public rolling out of a change in policing policy and approach, with substantive implementation and follow-through, can help foster a sense that "maybe things really are changing" which can make life easier both for community members and officers. However, research on the effects of a stimulus on behavior indicates that even occasional incidents of the old kind of experience can operate on the brain to cause a resurgence of belief that the old way is still the reality in the present. "Nothing has really changed; they're still who they always were." The same dynamic can operate in the opposite direction, convincing police officers that nothing has really changed on the part of the communities they are policing. In reality, no institution or community should expect that no such occasions will happen; perfect change is hard to come by in this life. Reform efforts will be better served by making this explicit from the start. It's something everyone can understand, and it is better acknowledged all around at the beginning.

Change from commanding-presence policing will be easier to come by if the Department is perceived as working out the transition in ways that show respect for the officers as the people actually "on the ground" while also systematically rewarding new behavior with pay increases, promotions, etc. Refusal to change from old behaviors will have to be consistently confronted, along with consequences should the new approach prove unworkable from a given officer's point of view. Consideration will have to be given to shifts in duties plus training and evaluation of readiness to return to the beat with a renewed ability to approach the job differently. (To be taken seriously, this has to be backed up by lack of promotions, change in duties, suspensions and dismissals if the transition cannot be made.) At the same time, all of this can be experienced as humiliating to officers who confront very challenging situations daily in their work, and risks fostering a sense that the magnitude of the task before rank and file officers and the knowledge they have about life in the street is not being respected. Reward-and-punishment policies

risk fostering resistance to change unless they are the other side of the coin of listening to officers with respect for what they are encountering, how they see it, what they believe would be helpful, etc. Systems level change needs to be a path walked by all parties together, with clear vision of where all of this needs to go and with a clear sense of respect for life's immense complexity and difficulty.

A practical question is how the Department will encourage a shift toward a psychology of mutual respect on the one hand while the mission of preventing terrorism calls forth a high-threat psychology on the other hand. Consideration should be given to on-going discussion programs that support officers figuring out their way through the transition in what is being asked of them (rather than treating them as non-human automatons who can be re-programmed on command). Officers are human beings who have to process the dramatic shift in what's being asked of them, who it is they admire within their ranks and how those role models are handling the changed expectations, what they themselves are experiencing and have experienced and expect to experience, what is being put forward as the sense of what a respected or ideal officer actually does, how departmental mandates and changes in policy are perceived, how community members are responding to changes, etc. Treating officers like their thinking of their way through change, their feeling their way into it, their suggesting how to make this workable, must be the backbone of making this work and is part of extending to them the very dignity as human beings they are being called on to extend to the community. Reform should be understood as a collective journey toward relationships based on extending respect to everyone's dignity and wanting everyone involved to have a better experience of life together.

The goal of the Department and officers, and of community institutions and community members, collectively, should be to establish a shared culture of respect, where all sides act in respectful and trustworthy fashion, and in predictable fashion, so that all come to a sense that they can count on what to expect from each other. The goal of all "sides" should be to achieve a humiliation-free life together and a humiliation-free life as a community.

That undertaking would be strengthened the more institutions and natural groups within the community (including the police) undertake "humiliation-free-community" or something like it as their motto and their common goal, with programs and mentoring on the ground plus sharing of the experience of moving in that direction among all the people involved, including the officers and watch commanders, etc. who play their own vital roles in the life of the community. Everyone, police and community members, needs to be on the journey together, as best as that can be achieved.

In this respect, it appears paramount that police-community relations should cease being viewed as in any way like an occupying army in an unfriendly



territory, and should become instead a sense of all parties, police included, as members of one and the same community, all working together to make community life safe and happy for everyone, including the police. Everyone, from suspects to witnesses to police, needs to be supported in making a good life, supported by everyone else. This is a dramatic shift in the psychology on the ground, a shift that our biology makes possible and puts within reach of sustained and focused efforts and belief in the future. It's a choice for how things will unfold for the long run. Quality of life is changed and secured only in the long run. People have to invest in what life will be like in the future, and that investment involves what they do today.

Everyone needs to be aware that where community members experience humiliation at the hands of agencies (other than the police), institutions, organizations (including schools and the business community) and cultural attitudes (exhibited for instance in the media), the community may be suffering the impact of chronic disrespect and chronic undercutting of the needs to learn and exercise the skills of making a decent living that are foundational to self-respect. Police may then feel the ripple effect of the disrespect and tension running through a community (from other sources) trying to right itself and establish its own integrity, the value of its own culture, and the pride of handling life well. Police can feel part of the brunt of that unsettled state of life even though they, the police, cannot resolve those problems. Wanting life to be better, together, i.e. empathy for this larger reality, may prove helpful to police-community relationships. It's okay for the police to want life to be better for the community vis a vis the city and the country's other institutions. Improvements on other fronts can make life easier for both the community and its officers.

It appears that officers have been required to engage in problematic behaviors (stop and frisk, broken-window policing) over a period of years, with the exacerbation of stresses confronting them that this behavior has set in motion. This will tend to have undercut police officers' trust in the good will that should characterize life, their sense of what their own good will can create by way of cooperation and appreciation among community members, their sense of community members caring about police officers' safety and well being, and their sense of effectiveness. There may well have been an increase in the chronic level of stress hormones in their own bodies (and resultant metabolic disorders), damage sustained to any expectations early in their careers that they would be perceived as helpful agents in the communities they would serve, and a shift toward a greater level of aggressiveness-readiness. All of this could well be seen as part of their role, given all they have experienced over the years, what they have observed in other officers, what they have been told by their superiors, etc. The community itself has been severely stressed by these policies, but likely so also have officers. Everyone needs to arrive at a happier life, to feel the power of their own goodness, and to experience what it's like to know that

others appreciate and care about your welfare. Reform should want this for everyone involved.

3. Among community members *and* police, a heightened sense of danger appears to have developed, with a heightened sense of being at risk. In general, a heightened baseline of adrenalin and cortisol tends to create a decreased ability to unwind and relax which in turn impacts the experience of attachment in intimate, familial relationships. Attachment depends in part on a certain amount of liveliness shared together; but it more fundamentally rests on a capacity to “relax into one another,” to feel safe in each others’ embrace, in being close together, and in the conversations that take place. Attachment grows out of a sense of being safe and “at home” together, feelings that are hard to achieve when one’s body is in a state of chronic tension/alarm from the stressful life one encounters every day. An alarmed neurobiology has a harder time sustaining intimacy and attachment. The question is whether this is the case in these communities and among the officers that police them, given the levels of threat they all live with on a daily basis.

From a mental health point of view, the picture that emerges in the transcripts raises the question of how attachment is faring in both the lives of community members and in the lives of the officers policing the community. Research into the impact of stop and frisk and what I refer to as commanding-presence policing on both officers and community members is warranted, especially in terms of long-term impact on the ability to sustain close, loving relationships. Police serving in this kind of professional life, and their spouses and families, may suffer more stress, with intimate relationships harder to sustain, closeness harder to hold onto, as the years go by, with community members experiencing the very same thing, both suffering from the impact of a culture imposed on the officers and in turn by the officers on the community. This is what research suggests is *in general* a common reaction to living with chronically elevated states of threat/alarm. It may or may not be the case for the police or the community. To the extent that either the community or its police are suffering such effects, the change from stop and frisk to a less provocative policing style is likely to lessen the stress on attachment and love in the lives of all involved.

4. The picture I have been painting arises from a reading of the transcripts provided to me. In reality, many community members and many officers and Department members likely have achieved sustained closeness within their homes and a form of conduct on the streets that belies all of this. There are likely examples all around of doing better by way of each other, and just as importantly of wanting to do better, wishing for the possibility of doing better, than a focus on only the negative would suggest. Those who have done better and those who wish for the chance to do better, on both “sides,” are tremendously important resources, potential natural leaders, and models

to be looked to and learned from. Change as a real process grows naturally when those who do better are the models that officers and community members orient themselves to, the bearers of wisdom and good advice, the examples to be copied.

There are two cautionaries to be kept in mind. Everyone slips up at times. Heroes are human beings too. It's what people do overall that counts, and it's the direction in which people are changing that counts in the long run.

Secondly, there have been leaders in doing it the old ways, heroes looked up to for how well they established themselves in commanding-presence modes. This, as they understood it, was the best way to be officers, the best ways to do "what needed to be done," and they were respected as such. To now experience the tides of what is respected turning to something else can be taken as a bitter irony, a failure of the current state of affairs to recognize one's contribution, knowledge and skill. Yet such leaders can also take change as an opportunity to explore, something they want to embrace. They should recognize there is likely a widely felt need for exactly those leaders to say "We did what we knew all these years, what we understood would do the best job, and now we know more. You should learn the new ways, try them out, let them make things better, give them a chance." Who better can be a permission-giver, an encourager of transition, than the very people who most represented skill and belief in everyone's eyes in the old ways? Such officers can choose between two paths: lose the status of being a leader and be seen as one left behind, or maintain that invaluable state as a leader by becoming one of the permission-givers most likely to be believed.

5. In terms of recovering from this stressful state of affairs, in which neither the police nor the community are likely living out the kind of life they'd like to be living out together, carefully developed programs for community members to process their end of the experience and what it is they hope for in life for themselves should be matched as well by programs for officers to discuss what this has been like for them, what they'd hoped for in their lives, and how things could be made better from their point of view as well.

Professional consultants who share a common sense of their own humanness with all the parties, in addition to being experienced and skilled, are most likely to be able to develop programs that the police and the community will find meaningful and actually helpful over time, rather than bogus.

Professionals who regard themselves as superior to those they are helping, or who are advancing their careers by being skilled, etc., may at times be helpful as well. But professionals who experience themselves as on the same journey to becoming better at humanness are less likely to treat those they are being helpful to in disrespectful or disconnected ways. It is more valuable to be helped through change by people who are actually walking the

walk themselves. When it comes to becoming better as people together, we're all in on this journey together.

As their separate journeys (community members and police) toward realizing the kind of life each wants to have, as their shared journey into being a better community, a happier community, together develops, meetings of police and community to share their experiences of that journey and to find common ground, common hopes, and ways to make life better together may become something that can usefully take place. Any such programs have to ensure that sharing is safe on all levels and for all parties.

Change is not about short training programs alone. Change is about the building of long term trust and cooperation through small, practical steps, which in the long run convert mistrust into something more akin to mutual concern on the part of the police toward the community and the community toward its officers. The objective should be for all sides to realize that the police are part of the community along with the residents. The community consists of residents, shops, businesses, various organizations, and also police. Police are not not-part-of the community; they walk the same streets, and make a life among the others, playing their particular role. Determining what they themselves want that role to be, getting to air what their jobs are actually like without fear of reprisal or shaming, being taken seriously for what they hate about their jobs, what they like, and so on are all important matters. Developing programs in which officers are taken seriously as they think this together can become useful only if there is a multi-year building-of-trust among officers that this is not bogus; if the community needs experience to build trust, so too do its officers.

6. These then are observations, concerns and suggestions arising from reading the transcripts. These are the kinds of things I suspect may have been happening, the kinds of concerns I suspect are warranted, and the kinds of suggestions I suspect might be helpful. The subjects within the transcripts make a number of concrete suggestions of their own, and I am not intending to minimize the importance of those suggestions and the concerns that the subjects have raised. Their specific suggestions may or may not be of a form most likely to work well for the community and the police (though they may be), but even when they are not they should be regarded as on the trail of something that is extremely important to establishing a spirit of greater respect and mutual trust between the police and the community and therefore deserve a hearing that will turn them into viable steps forward in trust-building steps that will actually be implemented. Neighborhoods and communities need to know that, when asked what they think will make things better, their taking the time to offer suggestions will in fact produce real outcomes. This is part of how they can come into a feeling that they have some measure of control over their own lives and destinies as a neighborhood and as a community, both of which increase self-respect, the

sense of their standing being respected in the city, and therefore their readiness to work together with the Department and others to make life better together.

7. From a research point of view, this may be an opportune moment for going beyond the observations offered here to a thorough-going investigation of the impact of stop and frisk on the mental health and relationship-milieu of the community, as well as what effects it may have had on the well-being of the police. In what follows, I am assuming two conditions. First, those command-presence policies have been in effect until the very recent present: Therefore their effects likely linger on. Second, those policies are to a large degree ending: Whatever effects they have generated will likely dwindle away over the coming years. These two conditions, if true, suggest a possible research strategy.

There are teams of mental health research professionals who specialize in assessing mental health status in communities and are experienced with doing so in a wide-range of cultural backgrounds around the globe. Should such a team investigate the mental health/attachment conditions operating in the community today, and among those officers who have followed those mandates over the past years, their initial findings would register a composite of (a) mental health difficulties that originate independently of any policing, plus (b) an element of difficulties that originated from years of stop and frisk, still in evidence as the cessation of those practices is so new.

Should the study then be repeated in two years and five years, it would be reasonable to expect that effects of stop and frisk (no longer being practiced) will be dwindling away, leaving only those difficulties to manifest themselves that are independent of the policing. The mental health impacts that disappeared could reasonably be inferred to be the results of the stop and frisk policing that no longer is being practiced.

Any changes in mental health conditions for both the community and the police that are in a positive direction may be the results of removing stop and frisk policing *plus* the positive impact of any new policing approaches. Are improvements due to the disappearance of problematic practices? Are improvements due to the implementation of more positive practices? Professional teams skilled and experienced in *interviewing* communities and their officers in-depth provide exactly the expertise needed to sort out which variables are responsible for changes in mental health and attachment-relationship patterns that occur over time.

In my opinion as a psychologist, exploring these possibilities in timely fashion could provide to criminal justice knowledge a well-documented, empirically established, set of conclusions about the relationship between mental health and attachment conditions within both communities being

policed and the officers policing them in relation to policing policies that embody what I have called commanding-presence policing psychology (maximizing use of humiliation and intimidation with the intent of reinforcing control) as contrasted with mutual-respect policing psychology/policies.

If there is interest in exploring further what such a study might involve, I recommend contacting Dr. Helen Verdeli, Director of the Global Mental Health Lab, at Teachers' College, Columbia University: [gmh.lab@tc.columbia.edu](mailto:gmh.lab@tc.columbia.edu) She has experience directing, utilizing and partnering with teams from a number of universities, in on-site research in regard to mental health and the mental health impacts of a variety of interventions, in a variety of communities around the globe. It is my understanding that theirs is a range of expertise developed "on the ground" and that their assessments are reflections of what is actually happening, what it means to people, and what the people involved find helpful.



# **COMMUNITIES UNITED FOR POLICE REFORM**

## **SUBMISSION OF COMMENTS To NYPD & NYU Policing Project**

**Re NYPD Body Worn Camera (BWC) Pilot Program II & Policies  
August 7, 2016**

### **About Communities United for Police Reform (CPR)**

Communities United for Police Reform (CPR) is a multi-strategy and multi-sector campaign to end discriminatory and abusive policing in New York. We aim to build a lasting movement that promotes public safety and policing practices based on respect and accountability to communities – not discriminatory targeting and harassment. The members, supporters and partners in this campaign come from all 5 boroughs, from all walks of life and include many of those most unfairly targeted by the NYPD.

CPR publicly launched in February 2012, bringing together grassroots community organizing groups, policy organizations, legal organizations, research projects and others – all united to develop and implement a unified campaign to end discriminatory and abusive NYPD practices. CPR is rooted in an historical understanding and experience that truly addressing abusive NYPD policies and practices requires the prioritization of the perspectives and leadership of those most impacted by abusive policing, as well as long-term coordination of major efforts, across and within sectors throughout NYC.

### **Context for comments**

The systemic lack of accountability for police abuse of authority, excessive force and unjustified killings of civilians is now widely recognized as a crisis in New York City and across the nation. While some have pointed to the possibility that body worn cameras might increase police accountability, we understand this to be conditional on key aspects of a body worn camera program – specifically, whether the structure, policies and practices related to the program expressly serve the primary goal of police accountability and transparency. In fact, there has been increased scrutiny and attention to the fact that body worn camera programs of most departments across the country (including that of the NYPD's draft policies) fail to centralize concerns related to accountability and transparency<sup>1</sup>.

There are also serious concerns that should be discussed publicly regarding the cost of body worn cameras and related technology, and whether such costs are justified when compared to budgets for social goods, public infrastructure and social services.

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<sup>1</sup> See Scientific American, "Police Body Camera Use: Not a Pretty Picture", August 4, 2016

These comments are submitted regarding the NYPD's upcoming body worn camera pilot program that was mandated as part of the Floyd federal stop-and-frisk litigation<sup>2</sup> and should not be read to suggest that we support the current or any future potential expansion or extension of an NYPD body worn camera program – particularly without meaningful and structured oversight by community and police accountability organizations representing communities most impacted by discriminatory and abusive policing.

Communities most impacted by NYPD discriminatory and abusive policing such as stop-and-frisk abuses and other “broken windows” policing abuses include low-income communities of color, particularly those who are: youth; immigrants; people who are homeless; public housing residents; women; LGBT and gender non-conforming people; perceived to be Muslim; and people with cognitive or psychiatric disabilities. The perspectives of these communities must be considered in any meaningful evaluation of the pilot program, and should be centered in the development/finalization of any policies.

### **Comments on the NYPD Draft Policy for Body Worn Cameras (BWC)**

It is impossible to meaningfully discuss policies for the upcoming court-ordered BWC policy without contextualizing and commenting on the prospect of an overall NYPD BWC program. The NYPD's Pilot Police Body-Worn Camera (BWC) program should be used to reduce discriminatory and abusive NYPD practices and the constitutional violations found by the Court in *Floyd, Davis and Ligon* – particularly since the BWC pilot program was initiated as a result of the Floyd court order.

The following relate to the overall program and draft policy, and our strong recommendations (& objections) to what is currently planned:

#### 1. Principles that should guide the NYPD's BWC Pilot

NYPD's policies and practice related to the use of BWCs should promote implementation that will:

- Maximize NYPD transparency and accountability to the public – particularly

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<sup>2</sup> Communities United for Police Reform (CPR) was named as a key stakeholder in the Floyd court ruling and maintain a significant interest in the outcome of remedies in the Floyd, Davis and Ligon cases. CPR's members and partners submitted an amicus brief as part of the Floyd litigation, and CPR members were also amongst the named plaintiffs and witnesses in Floyd. In fact, *Floyd v. NYC*, litigated by the Center for Constitutional Rights, was possible because of the work of activists/organizations who had worked with CCR to bring the *Daniels v NYC* lawsuit (the pre-cursor to Floyd). CPR members such as the Justice Committee (formerly known as the National Congress for Puerto Rican Rights' Justice Committee) and Malcolm X Grassroots Movement served as the initial plaintiffs for Daniels after the 1999 killing of Amadou Diallo in a hail of 41 bullets. MXGM members and other CPR members were amongst the named plaintiffs and witnesses in the Floyd litigation and trial.

accountability to communities and individuals who are most likely to be subject to abusive policing and therefore be potential subjects of footage.

- Eliminate potential for footage to be used to further criminalize communities or to be used for unwarranted surveillance of communities or individuals. As a result, the retention, use and release of BWC footage from the pilot program should be limited to instances that advance NYPD accountability and transparency.

Consistent with the Court's remedial opinion and order in Floyd, the primary focus of the NYPD BWC pilot program should be to increase transparency and accountability during "stop and frisk" and other police interactions.

In order to ensure that the program achieves the goal of ensuring that police interactions comply with the mandates of the Constitution, BWC should not serve as or be perceived to be an additional tool of surveillance or evidence gathering for criminal prosecutions. While the experience of Eric Garner and countless other New Yorkers whose abuse at the hands of police was caught on videotape makes it clear that the presence of video footage or BWCs will not guarantee improved outcomes during law enforcement interactions, that should be their primary purpose.

2. Ownership, management and control of footage from police body-worn cameras

A third party government agency should be responsible for ownership, management and control of footage – not the NYPD or a corporate entity.

3. Structured and meaningful community input prior to finalizing the policies – There should be an opportunity for structured and meaningful community input after the NYU Policing Project has submitted its report to the NYPD and released it publicly, and before the NYPD finalizes policies for the pilot program. There should be public consultation, as well as consultation with law enforcement and policy advocates, on the purpose, nature, scope and policies governing BWC programs *before* BWC are deployed in the NYPD BWC Pilot II.

4. Full transparency related to the budget for the pilot BWC program – including equipment/software cost, storage, personnel to manage the footage, training, etc. These costs must be made transparent and public to enable the public to determine whether the financial costs of the BWC program are justified, when compared to critical public infrastructure, goods and services that are under-resourced.

The BWC pilot program should not divert resources away from programs meeting the needs of communities directly impacted by stop-and-frisk and other policing abuses.

5. There should be a reliable, evidence-based **evaluation** – that is independent of the

NYPD and overseen by an agency other than the NYPD - of the effectiveness of the BWC pilot program in capturing and addressing police misconduct **by members of the communities subject to surveillance, advocates**, incorporating feedback from communities directly impacted by discriminatory policing practices.<sup>3</sup> If the evaluation does not prove the program to be effective in reducing civil rights violations it should be discontinued.

6. Full transparency re deployment, prior to deployment - The Commissioner should make a public announcement regarding which officers, precincts, or squads will be assigned BWCs and under what circumstances.<sup>4</sup>

Officers at precincts and central booking facilities should be amongst those who are outfitted with body worn cameras in the pilot program, in order to document and prevent abuses.

7. BWC utilized by the NYPD should have **no** infrared/x-ray capabilities, biometric capabilities or automated analytics capacities.
8. There should be a clear and public process to file complaints around mis-use of BWC. This complaint process should include whistleblower protections, and enable anonymous complaints.
9. NYPD written BWC policy should clearly state the consequences for officers who fail to comply with any part of the BWC policy, and there should be disciplinary consequences.
10. Retention of footage – Footage should not be retained indefinitely. Footage with no evidentiary value should be deleted within less than 3 months – however this should be overseen and managed by an agency that is independent of the NYPD. Footage with evidentiary value should be kept no longer than required for complaints and claims to be filed and for video to be turned over to those filing complaints and claims(including litigation, CCRB complaints, Commission on Human Rights complaints, etc.).
11. Access to footage
  - NYPD policy should prohibit officers from reviewing BWC footage on any device or recording, before a written complaint and/or arrest report has been submitted to

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<sup>3</sup> PERF. PERF suggests that statistics be maintained on the use and outcomes of BWC use in criminal prosecutions and internal affairs and periodically released to the public.

<sup>4</sup> Miller, Lindsay, Jessica Toliver, and Police Executive Research Forum. 2014. *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*. Washington, D.C.: Office of Community Oriented Policing Services (hereinafter “PERF”).

the district attorney's office or relevant outside office independent of the NYPD. Pre-statement review by officers of BWC footage/recordings should be prohibited in all cases – including when an officer is the subject or witness related to internal or external investigations regarding officer misconduct -- until after an official statement has been provided by the officer(s). Following an official statement, officers should be prohibited from review of footage unless the subject of the footage (or their family or counsel) are granted access to the footage.

12. Officer discretion regarding when cameras are turned on. There should not be officer discretion or ability of individual officers to turn BWC on/off while they are on duty – with the exception of if a civilian who is part of being recorded requests that it be turned off. In such cases, the civilian's request should be recorded and if the civilian changes their mind, the camera should be immediately turned on.
13. Civilians should always be informed that they are being recorded. This should happen immediately.
14. Officers should not be permitted to use privately-owned BWC.<sup>5</sup>

Questions related to this public comment submission can be sent to [justice@changethenypd.org](mailto:justice@changethenypd.org). Thank you in advance for consideration of this submission.

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<sup>5</sup> PERF.