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A Tale of Two Cities: Interpreting Racial Disparity in Enforcement of Stay-at-home Orders & Social Distancing Rules in New York, 55 UIC L. Rev. 485 (2022)

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A TALE OF TWO CITIES: INTERPRETING RACIAL DISPARITY IN ENFORCEMENT OF STAY-AT-HOME ORDERS & SOCIAL DISTANCING RULES IN NEW YORK

SARAH HOPKINS*

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I. INTRODUCTION

“We the People” no longer enslave, but the credit does not belong to the framers. It belongs to those who refused to acquiesce in outdated notions of “liberty,” “justice,” and “equality,” and who strived to better them.”

~ Thurgood Marshall¹

On May 2, 2020, New York Police Officers were at Avenue D and East Ninth Street in Lower East Manhattan, enforcing social distancing measures.² In the process of implementing social

*Sarah Hopkins, Juris Doctor Candidate 2022, UIC School of Law. Many thanks for all of the support and guidance I received from my family, friends, professors, and editors throughout this process.

1. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 5 (1987).

2. Meaghan McGoldrick, *Activists stand in solidarity with Minneapolis, draw parallels to recent city arrest*, AMNY (May 29, 2020), www.amny.com/news/activists-stand-in-solidarity-with-minneapolis-draw.

distancing directives, they determined Donni Wright, a thirty-three-year-old Black man from New York, was not following the state's social distancing guidelines.³ During the encounter, a struggle ensued, and a bystander captured a video (that went viral) that depicted a New York Police Officer pulling a stun gun on Mr. Wright.⁴ The officer proceeded to slap Mr. Wright in the face and punch him in the shoulder before yanking him to a sidewalk and kneeling on him in a similar technique that would lead to George Floyd's death in Minneapolis a little over twenty days later.⁵ The violent enforcement of social distancing violations in minority communities, as opposed to the enforcement in more affluent neighborhoods, raised an old question regarding New York Police Officers' tactics in the enforcement of racially neutral policies on people of color.⁶

The social media age has changed the perception of how many view law enforcement.⁷ This newfound perception through social media and technological advances has highlighted the failure of the United States to address "racially driven violence" perpetrated against minority communities by police officers.⁸ But overall, it has increased scrutiny into police interactions, especially amongst minority communities, creating greater accountability over police infractions that lead to the "serious injury or death of Black men and women."⁹ Amidst a changing social climate involving police interactions, the outbreak of Coronavirus exposed growing concerns of disparity in policing stay at home orders.¹⁰

parallels-to-recent-city-arrest/ [perma.cc/JDX7-BCRJ].

3. Michael R. Sisak, *Officers in violent arrest to face NYPD disciplinary charges*, AP NEWS (May 29, 2020), www.apnews.com/article/1fc5454c562105173c0fbd4910dd5f07.

4. *Id.*

5. *Id.*

6. *Id.*

7. Corinthia A. Carter, *Police Brutality, the Law & Today's Social Justice Movement: How the Lack of Police Accountability Has Fueled #hashtag Activism*, 20 CUNY L. REV. 521, 522-23 (2016). "In recent years, with the assistance of individuals recording officers as they engage in violence against Black citizens, social media has become the venue in which the world has begun to see the rights violations against Blacks." *Id.* This has created widespread concern over racial bias within the police force which has led to the "social justice movement" such as Black Lives Matter. *Id.* at 523.

8. *Id.*

9. *Id.* The social justice movement has created varying responses to police brutality such as "marches, boycotts, and protests." *Id.* Despite the increased scrutiny in police behavior, police misconduct and violence continue to be a matter of concern for minorities. *Id.*

10. Kim Bellware, *Violent arrest in New York raises questions about police enforcement of social distancing orders*, WASH. POST (May 5, 2020), www.washingtonpost.com/nation/2020/05/05/donni-wright-nyc-arrest/ [perma.cc/VMQ2-VPAU].

The 2019 Coronavirus Disease, or COVID-19, is a highly contagious respiratory illness that rapidly spread internationally.¹¹ Due to the rapid infection rates, government and health officials were tasked with reducing the novel virus's transmission rates.¹² Many states implemented social distancing regulations, required face masks in public areas, issued stay-at-home mandates and mandated quarantine periods of fourteen days or longer.¹³

New York was one of the first states to issue social distancing and stay-at-home mandates due to large infection rates between March and April 2020.¹⁴ The first case of COVID-19 in New York was confirmed on March 1, 2020.¹⁵ By April 10, New York state had approximately 161,807 confirmed COVID-19 cases, more than any country.¹⁶ Beginning in March 2020, in response to the rapid rise of confirmed COVID-19 cases, former New York Governor Andrew M. Cuomo announced a stay-at-home order which required non-essential businesses to reduce their workforce and prohibited all public gatherings.¹⁷

Cuomo then enacted another order which required all individuals over the age of two, if medically permitted, to wear a face mask in public.¹⁸ Former New York City Mayor Bill de Blasio

11. Dr. Emily Landon, *COVID-19: What we know so far about the 2019 novel coronavirus*, UNIV. OF CHICAGO MEDICINE (May 8, 2020), www.uchicagomedicine.org/forefront/prevention-and-screening-articles/wuhan-coronavirus [perma.cc/BZ3P-A3Z6].

12. *Id.* The infection rates of the virus are high because the virus can spread easily from individuals before someone develops symptoms. *Id.*

13. *Id.* Social distancing requires individuals to stay at least six feet away from other individuals when in large groups, as well as working from home. *Id.* Stay-at-home orders were state mandates that required individuals to remain in their home unless they were considered essential by their state, or if they were performing an essential task, such as going to the grocery store. *Id.*

14. Shalini Ramachandran et al., *How New York's Coronavirus Response Made the Pandemic Worse*, WALL ST. J. (June 11, 2020), www.wsj.com/articles/how-new-yorks-coronavirus-response-made-the-pandemic-worse-11591908426 [perma.cc/AB3S-5JLG].

15. Melanie Grayce West, *First Case of Coronavirus Confirmed in New York State*, WALL ST. J. (Mar. 1, 2020), www.wsj.com/articles/first-case-of-coronavirus-confirmed-in-new-york-state-11583111692 [perma.cc/39NK-S8RG].

16. Yelena Dzhanova, *New York state now has more coronavirus cases than any country outside the US*, CNBC (Apr. 10, 2020), www.cnn.com/2020/04/10/new-york-state-now-has-more-coronavirus-cases-than-any-country-outside-the-us.html [perma.cc/DV6U-Z3XJ]. By April 10, 2020, John Hopkins University believed New York City to be the epicenter of the coronavirus outbreak with at least 5,150 deaths. *Id.*

17. Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency, N.Y. Exec. Order No. 202.8 (Mar. 20, 2020).

18. N.Y. Exec. Order No. 202.17 (Apr. 15, 2020). Effective April 17, 2020, any individual over two years of age, if medically allowed, were required to cover

implemented Cuomo's executive orders and instructed the New York Police Department ("NYPD") and various other city government agencies to enforce them.¹⁹ Following the implementation of the stay-at-home orders, de Blasio enacted a curfew that barred all individuals from being in public after 11:00 p.m. with exceptions for police officers, emergency medical technicians, firefighters, and other individuals deemed to be essential.²⁰ The emergency order began on June 1, 2020, and concluded on June 2, 2020.²¹ Failure to comply with the curfew resulted in orders to disperse, and individuals who knowingly violated this order were guilty of a Class B misdemeanor.²² On June 7, 2020, de Blasio enacted an emergency executive order that ended another City-wide curfew imposed, and terminated the regulations related to the restriction of vehicles between certain hours.²³

Due to the continual spread of highly transmissible variants of COVID-19 despite social distancing regulations, New York imposed emergency executive order 225.²⁴ This order entitled the *Key to NYC* required proof of vaccination for indoor entertainment, recreation, dining, and fitness settings, for both workers and patrons.²⁵

their nose and mouth through a mask, when in a public place, or when unable to practice social distancing. *Id.*

19. N.Y.C. Emer. Exec. Order No. 108 (Apr. 19, 2020). Emergency Executive Order Number 108 was announced due to the rapid transmission of the coronavirus and because steps taken to reduce the spread have led to "property loss and damage." *Id.* Additionally, this order directs the Fire Department of the City of New York, the New York Police Department, the Department of Buildings, and the Sheriff, and other agencies to enforce social distancing mandates. *Id.*

20. N.Y.C. Emer. Exec. Order No. 117 (June 1, 2020). In response to the peaceful demonstrations in the City sparked by the death of George Floyd, the City issued a City-wide curfew from 11:00pm on June 1, 2020 until 5:00am on June 2, 2020 which prohibited vehicles or persons in public. *Id.* Large gatherings, such as the groups of protestors, can potentially increase the risk of spreading the novel virus, thus dispersing the crowd reduces the threat of COVID-19 to the health and safety of New York residents. *Id.* Furthermore, despite most of the demonstrations being conducted in a peaceful manner, some demonstration activities escalated, leading to "assault, vandalism, property damage, and/or looting," thus imposing a City-wide curfew attempted to protect residents from potential harm caused by the protests. *Id.*

21. *Id.*

22. *Id.*

23. N.Y.C. Emer. Exec. Order No. 122 (June 7, 2020). Emergency Executive Order Number 122 ended the City-wide curfew imposed by Emergency Executive Orders 119 and 121. *Id.* Additionally, it terminated the restrictions appointed by Emergency Executive Order 121 section 2, which related to restriction of vehicles between certain hours. *Id.*

24. Key to NYC: Requiring COVID-19 Vaccination for Indoor Entertainment, Recreation, Dining and Fitness Settings, N.Y.C. Emer. Exec. Order No. 225 (August 16, 2021).

25. *Id.*

The enactment of emergency orders in New York created various concerns for individuals in minority communities.²⁶ Because minority communities already had heavy police presence prior to the social distancing regulations, the newly enacted mandates raised concerns about race-related enforcement.²⁷ Since the enactment of social distancing regulations, Black and Latinx New Yorkers have experienced a disparity in how NYPD enforced the emergency orders.²⁸ Comparisons were quickly drawn between the enforcement of social distancing mandates and stop-and-frisk practices that were ruled unconstitutional in *Floyd v. City of New York* (“*Floyd I*”).²⁹

In July 2020, a case arose in the Southern District of New York alleging that “NYPD [had] engaged in racially discriminatory enforcement of social distancing directives in violation of three of the Court’s prior orders related to unconstitutional race-based policing.”³⁰ The case, *Floyd v. City of New York* (“*Floyd II*”), cited racial disparities in arrests and the issuance of summons in its emergency motion.³¹ It also alleged that the NYPD utilized excessive force in enforcing social distancing regulations.³² To remedy these alleged injustices, Plaintiff’s requested four forms of relief.³³ First, they sought a declaration that NYPD’s enforcement of COVID-19 rules was a violation of the order in *Floyd I*.³⁴ Second, they asked the court to direct a monitor to investigate and report on the legality of NYPD’s social distancing regulations.³⁵ Third, Plaintiff’s requested an order to prohibit the NYPD from further social distancing enforcement pending a monitor report and the Court’s determination.³⁶ Fourth, they sought discovery from the City.³⁷

The distinct racial disparities in enforcing social distancing regulations were reminiscent of stop-and-frisk policies that New

26. Bill Hutchinson, *Blacks account for nearly half of all NYC arrests 6 years after end of stop-and-frisk: NYPD data*, ABC NEWS (Jun. 30, 2020), www.abcnews.go.com/US/blacks-account-half-nyc-arrests-years-end-stop/story?id=71412485 [perma.cc/YZ5M-S5QH].

27. *Id.*

28. *Id.*

29. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) [hereinafter *Floyd I*].

30. *Floyd v. City of N.Y.*, 2020 U.S. Dist. LEXIS 119864, at *15 (S.D.N.Y. July 8, 2020) [hereinafter *Floyd II*].

31. *Id.*

32. *Id.* at *16.

33. *Id.* at *17.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at *17-8.

York Courts held violated the Fourth and Fourteenth Amendments' Equal Protection Clause.³⁸ This Comment will focus on social distancing regulations and the impact on minority communities.

Part I will explore a historical analysis of the litigation involving racial disparity in New York's stop-and-frisk policies, the requirements imposed to ensure stop-and-frisk practices do not violate the Constitution, and a detailed analysis of the statistics regarding the enforcement of stay-at-home orders and the communities most affected. Part II will examine the enforcement of stay-at-home orders and social distancing rules in New York with former stop-and-frisk practices. The main focus will be on the constitutional analysis of disparate enforcement of race-neutral policies enacted during the pandemic and how arrests relating to social distancing violations have centered in predominantly black neighborhoods. Finally, this Comment will propose community-based enforcement of social distancing regulations and an investigation into NYPD's social distancing enforcement by a third-party.

II. BACKGROUND

Part II will explore the landmark case *Terry v. Ohio*, the history of stop-and-frisk practices utilized by the NYPD, and how it disproportionately impacted Black and Latinx individuals, the majority of whom were innocent of any wrongdoing. It will compare stop-and-frisk policies to social distancing mandates enforced during the COVID pandemic, and how NYPD policies resulted in both Fourth and Fourteenth Amendment violations. Lastly, it will discuss the legal standards imposed following *Floyd I*, which instituted guidelines for Fourth and Fourteenth Amendment violations in New York.

A. Stop and Frisk Practices

The stop-and-frisk system is the NYPD's operation of questioning, temporarily detaining, and searching New Yorkers on the street for illegal substances or weapons.³⁹ Under this

38. Hutchinson, *supra* note 26.

39. Dylan Matthews, *Here's what you need to know about stop and frisk – and why the courts shut it down*, WASH. POST (Aug. 13, 2013) www.washingtonpost.com/news/wonk/wp/2013/08/13/heres-what-you-need-to-know-about-stop-and-frisk-and-why-the-courts-shut-it-down/ [perma.cc/YGP7-EDE3]. Former New York Mayor Michael Bloomberg, and then avid defender of the stop-and-frisk policy, responded to a ruling that stop and frisk violates the Equal Protection Clause by noting that “nowhere in [Judge Shira Scheindlin’s] 195-page decision does she mention the historic cuts in crime or the number of lives that have been saved.” *Id.*

controversial policy, police can detain and potentially search individuals if there is reasonable suspicion that an individual “committed, is committing, or is about to commit a felony or a Penal Law misdemeanor.”⁴⁰ The landmark Supreme Court case *Terry v. Ohio* created the framework for stop-and-frisk practices across the country.⁴¹ *Terry* held police officers are permitted brief investigatory detainment if the police officer has reasonable suspicion of criminal activity.⁴² Police officers are also allowed to frisk the individual if there is a reason to believe that the individual is presently armed and dangerous and could harm the officer or the general public.⁴³ Additionally, *Terry* held that when a police officer stops an individual, it is considered a seizure; consistently, a frisk is regarded as a search.⁴⁴ However, the brief investigatory stop requires a lower standard than probable cause, making stop-and-frisks easier to uphold.⁴⁵

In *United States v. Brignoni-Ponce*, the Supreme Court expanded the circumstances under which a lower standard is required.⁴⁶ In *Brignoni-Ponce*, the Court held that based on *Terry*’s holding, border stops based on the lower standard of reasonable suspicion are permitted.⁴⁷ The United States Supreme Court in *Illinois v. Wardlow* expanded the circumstances by holding that presence in a high crime area . . . in combination with an

40. *Id.*

41. *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (holding that police officers have limited authority to search an individual for weapons for the protection of the police officer or the general public, when the officer has reason to believe that the individual is armed and dangerous, despite the police officer lacking probable cause to issue an arrest). The law does not require the police officer have absolute certainty that the individual is armed but imposes a reasonable man in the same circumstance’s standard. *Id.* The police officer must depend on reasonable inferences that would justify the actions taken, an “hunch” is not sufficient. *Id.*

42. *Id.*

43. *Id.*

44. Katherine A. MacFarlane, *Symposium Introduction: Terry v. Ohio at 50: The Past, Present, & Future of Stop and Frisk*, 54 IDAHO L. REV. 279, 279 (2018)

45. *Id.*

46. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that, except for the border, U.S. Border Patrol officers may stop vehicles based on specific articulable facts and rational inferences that give rise to reasonable suspicion that vehicles contain individuals who may be illegally in the country). Mexican ancestry is a relevant factor; however, it cannot be the sole factor to justify stopping all individuals of Mexican ancestry. *Id.* at 885-87. The Fourth Amendment forbids randomly stopping vehicles to inquire whether the car contains individuals who are illegal in the country; it also forbids detainment for questions on citizenship on a lower standard than reasonable suspicion that they may be illegal. *Id.* at 884.

47. *Id.* at 881-82.

unprovoked flight from the police is sufficient for the officer to have reasonable suspicion.⁴⁸ *Terry* has been subjected to criticism where it has been described as “granting the police excessively broad discretion that threatens the liberty of the innocent and which facilitates discrimination against minorities and others that the police are all too likely to view as suspicious.”⁴⁹

In 1968, New York encouraged expanding the circumstances warranting investigatory stops by passing a statute that expressly sanctioned police officers to utilize stop-and-frisk with less than probable cause.⁵⁰ Stop-and-frisk was outlined in New York’s Code of Criminal Procedure, which was based on the *Terry* holding.⁵¹

NYPD officers widely use stop-and-frisk practices to reduce crime and the number of weapons in New York; however, statistical evidence demonstrated that the NYPD employed stop-and-frisk techniques to engage in racial profiling.⁵² In *Floyd I*, the 2013

48. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). The Court held that the totality of the circumstances, such as the high narcotics crime rate in the area, as well as the unprovoked flight from the police satisfied reasonable suspicion permitting a *Terry* stop. *Id.*

49. Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case Against Terry v. Ohio*, 43 TEX. TECH. L. REV. 299, 300 (2010).

50. *Sibron v. New York*, 392 U.S. 43-44 (1968). The N.Y. Code Crim. Proc. § 180-a statute provides in full:

A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the offenses specified in section five hundred fifty-two of this chapter, and may demand of him his name, address, and an explanation of his actions. *Id.* When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. *Id.* If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Id.

51. N.Y. CODE CRIM. PROC. § 180-a; see BENJAMIN BOWSER & CHELLI DEVADUTT, RACIAL INEQUALITY IN NEW YORK SINCE 1965 241 (2019) (noting New York Criminal Procedure Law basically “codifies” the holding in *Terry*).

52. Kaitlyn Fallon, *Stop and Frisk City: How the NYPD Can Police Itself and Improve a Troubled Policy*, 79 BROOK. L. REV. 321, 322 (2013). Addressing the need to update NYPD stop-and-frisk policies to give New Yorkers faith that their Fourth Amendment rights are respected. *Id.* at 322. “The need for setting clear standards within the [NYPD] is only heightened by the ambiguous standards set forth by the courts.” *Id.* The unclear standards established by the courts makes it difficult for NYPD to properly conduct themselves according to constitutional requirements. *Id.* “The consequences of this ambiguity spread throughout the entirety of the police force, for if the upper ranks of the NYPD are unclear as to how to apply discretion, then it is likely that officers implementing the procedures will also be unsure as to how to legally utilize stop

landmark case that revised New York's stop-and-frisk policy, Dr. Jeffrey Fagan conducted a detailed analytical analysis of statistical data of UF-250 forms, also known as the "Stop, Question and Frisk Report Worksheet."⁵³ The Worksheets, which NYPD must complete after every *Terry* stop, contained several checkboxes meant for law enforcement to explain the circumstances of the stop.⁵⁴ Dr. Fagan's analysis uncovered the following data: from January 2004 to June 2012, the NYPD conducted over 4.4 million *Terry* stops, fifty-two percent of all stops were followed by a frisk to search for a weapon, and a weapon was found after 1.5 percent of these frisks.⁵⁵ Twelve percent of stops resulted in an arrest or summons, the remaining eighty-eight percent of 4.4 million stops did not require further law enforcement action, prosecution, or sanctions.⁵⁶ In 2010, New York City's population was approximately twenty-three percent Black, twenty-nine percent Latinx, and thirty-three percent white; however, Black and Latinx individuals accounted for eighty-three percent of 4.4 million stops, whereas white people accounted for a mere ten percent of stops.⁵⁷ Weapons were seized in one percent of the stops of Black individuals, 1.1 percent of the stops of Latinx, and 1.4 percent of whites' stops.⁵⁸ From 2004 to 2009, the NYPD indicated that the reasons for a stop were typically "Furtive Movement" and "Area Has Incidence of Reported Offense of Type Under Investigation" ("High Crime Area"); "Furtive Movement" accounted for forty-two percent of reasons why a stop was made, and the "High Crime Area" accounted for fifty-five percent.⁵⁹ From 2004 to 2009, stop-and-frisks were twenty-two percent more likely to end in an arrest if "High Crime" was not indicated, and eighteen percent more likely to result in an arrest if "Furtive Movement" was not predicted.⁶⁰

In *Floyd I*, the court found that the stop-and-frisk policy employed by the NYPD was unconstitutional, as it permitted racial profiling and unconstitutional stops.⁶¹ Specifically, the court found that New York City violated the Fourth Amendment of the U.S. Constitution,⁶² which protects citizens from unreasonable search

and frisk discretion." *Id.*

53. *Floyd I*, 959 F. Supp. 2d at 572.

54. *Id.*

55. David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 120 (2013).

56. *Id.*

57. *Id.* at 121.

58. *Id.*

59. *Floyd I*, 959 F. Supp. 2d at 574.

60. *Id.* at 575.

61. *Id.* at 560.

62. *Id.* at 658-659.

and seizure, by employing stop-and-frisk.⁶³ Furthermore, New York violated the Fourteenth Amendment — which ensures the fundamental right of equal protection of all citizens under the law — by stopping Black and Latinx citizens based on racial profiling.⁶⁴

To safeguard against further violations of the Fourth and Fourteenth Amendments, the court employed several remedy mechanisms;⁶⁵ the remedies imposed were to assure that NYPD stop-and-frisk policies conformed with the Fourth and Fourteenth Amendments.⁶⁶ The court ordered the appointment of an independent monitor to oversee the reform process;⁶⁷ the monitor was focused on modernizing NYPD's stop-and-frisk, through supervision, monitoring, discipline, and training.⁶⁸ Additionally, a pilot program required police officers to wear body cameras, as an additional safeguard, to help determine individual stops' constitutionality.⁶⁹

Finally, in the *Floyd I Remedy* opinion, the court implemented a joint-remedial process for developing supplemental reforms.⁷⁰ The

63. U.S. CONST. amend. IV (stating that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.).

64. U.S. CONST. amend. XIV § 1 (stating that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.).

65. Edwar Estrada, *Regulating Stop and Frisk in New York City*, 28 J. CIV. RTS. & ECON. DEV. 345, 369 (2016).

66. *Floyd v. City of NY*, 959 F. Supp. 2d 668, 671 [hereinafter *Floyd I Remedy*]. The purpose of the Remedies Opinion was to establish “suitable remedies” that would be deemed appropriate to properly rectify the harm caused by the violation of Black and Latinx individuals Fourth and Fourteenth Amendment rights. *Id.* at 671. The Order does not require an end to stop-and-frisk, but requires the practices and policies are conducted in a way that protects the rights and liberties of New Yorkers, while ensuring police protection. *Id.*

67. *Id.* at 676.

68. Fallon, *supra* note 52, at 333.

69. *Floyd*, 959 F. Supp. 2d at 685. A pilot program where NYPD requires body cameras be worn for a one-year period by officers in one precinct per borough, specifically in the precinct with the highest discriminatory stops in 2012. *Id.*

70. Estrada, *supra* note 65, at 369-370.

joint-remedial process solicited solutions from New Yorkers within the community on policies or practices that conformed with the United States Constitution.⁷¹ The opinion noted:

community input is perhaps an even more vital part of a sustainable remedy in this case. The communities most affected by the NYPD's use of stop-and-frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety.⁷²

The joint-remedial process involves many individuals from the community.⁷³ The court noted that if the reformation of stop-and-frisk is not "perceived as legitimate" by those disenfranchised, the reformation will be unsuccessful, the community's ability to communicate about an appropriate remedy prevents discord and encourages positive police and community relations.⁷⁴

B. Social Distancing Mandates

New York drew global attention based on increasing COVID-19 infection rates, as well as the disparate impact of health and economic hardship on Black and Latinx New Yorkers.⁷⁵ In June 2020, according to New York City's Health Department data, thirty-four percent of fatalities due to COVID-19 were Latinx, but this community only accounted for twenty-nine percent of the city's

71. *Floyd*, 959 F. Supp. 2d at 686-87.

72. *Id.*

73. *Id.*

74. *Id.* The court noted that:

it is important that a wide array of stakeholders be offered the opportunity to be heard in the reform process: members of the communities where stops most often take place; representatives of religious, advocacy, and grassroots organizations; NYPD personnel and representatives of police organizations; the District Attorneys' offices; the CCRB; representatives of groups concerned with public schooling, public housing, and other local institutions; local elected officials and community leaders; representatives of the parties, such as the Mayor's office, the NYPD, and the lawyers in this case; and the non-parties that submitted briefs: the Civil Rights Division of the DOJ, Communities United for Police Reform, and the Black, Latino, and Asian Caucus of the New York City Council.

Id.

75. Jeffery C. Mays & Andy Newman, *Virus Is Twice as Deadly for Black and Latino People Than Whites in N.Y.C.*, N.Y. TIMES (June 26, 2020), www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html [perma.cc/4AWV-6GDJ].

population.⁷⁶ Likewise, twenty-eight percent of deaths from COVID-19 were Black New Yorkers but this community only accounted for twenty-two percent of the population.⁷⁷

Additionally, viral social media videos surfaced, displaying a stark difference between the enforcement of social distancing regulations against Black and Latinx individuals.⁷⁸ Videos and pictures on public forums showed NYPD officers doling out face masks to white residents in West Village and Central Park while on the other hand doling out threats, force, and violence against Black and Latinx individuals for failing to adhere to the social distancing requirements.⁷⁹

An analysis of the available data on NYPD's COVID-19 policing demonstrated disparate treatment based on the individual's race and their location.⁸⁰ According to NYPD data, from March 16 to May 4, 2020, 374 summonses for violating social distancing mandates were issued by the police.⁸¹ Of the 374 summonses issued during the dates in question, 304 were issued to Black and Latinx people.⁸² Additionally, a statistical analysis prepared by the Legal Aid Society indicated that "[eighteen] of the [twenty] precincts with the highest rates of known social distancing arrests or summonses per 10,000 people are in the majority Black and Latin[x] precincts," even though less than half (46.2 percent) of 311 social distancing complaints were in regards to violations in those neighborhoods.⁸³

The NYPD's social distancing practices raise serious concerns for minority New Yorkers.⁸⁴ Despite the Remedial orders imposed in *Floyd I* to change the NYPD's stop-and-frisk discriminatory

76. *Id.*

77. *Id.*

78. Christina Carrega & Aaron Katersky, *NYPD arrested more people of color for social distancing and other charges, data shows*, ABC NEWS (May 8, 2020), www.abcnews.go.com/US/nypd-arrested-people-color-social-distancing-charges-data/story?id=70573776 [perma.cc/6QR5-MCX6].

79. *Id.* An analysis showed that of forty people arrested for violating social distancing guidelines during that time, thirty-five were African American, four were Hispanic, and one was white. *Id.* The arrests were conducted in Brownsville, Bedford-Stuyvesant, Cypress Hills, and East New York neighborhoods were a large portion of the population are Black and Latinx. *Id.*

80. Josiah Bates, *Police Data Reveals Stark Racial Discrepancies in Social Distancing Enforcement Across New York City*, TIME (May 8, 2020), www.time.com/5834414/nypd-social-distancing-arrest-data/.

81. *Id.*

82. *Id.*

83. *Floyd II*, 2020 U.S. Dist. LEXIS 119864, at *16.

84. Jake Offenhartz, *"Déjà Vu": Attorney Say De Blasio's Social Distancing Enforcement is Stop-and-Frisk All Over Again*, GOTHAMIST (May 26, 2020), www.gothamist.com/news/d%C3%A9j%C3%A0-vu-attorneys-say-de-blasios-social-distancing-enforcement-is-stop-and-frisk-all-over-again [perma.cc/LU78-8AF2] [hereinafter Offenhartz I].

policies, and the protections granted under the Fourth and Fourteenth Amendments, the NYPD continues displaying discriminatory practices and policies which directly impact people of color.⁸⁵ In an analysis report released by the Brooklyn's District Attorney's Office, the report stated that thirty-nine of the forty individuals arrested for violations of social distancing regulations were minorities.⁸⁶ The numbers reinforce allegations of racially disparate policing during the pandemic, coupled with viral videos revealing brutal police encounters in response to violations of social distancing regulations.⁸⁷

Public defenders at the Legal Aid Society noted the number of summonses and arrests likely minimizes the level of enforcement in black neighborhoods, emphasizing that "police have used alleged social distancing infractions as a pretext to arrest people of color for minor offenses, such as marijuana possession."⁸⁸ The data available on social distancing enforcement appears to be reminiscent of unconstitutional stop-and-frisk policies employed by the NYPD, with many individuals in minority communities complaining of the unequal police treatment.⁸⁹ de Blasio dismissed claims linking the enforcement of social distancing regulations to former stop-and-frisk policy's stating that "[he's] not going to sacrifice saving lives because people are fearful of something that loomed in the past."⁹⁰ In agreement, NYPD Commissioner Dermot Shea maintained that there was no evidence or pattern of disparate impact in social distancing regulations in communities of color, noting that "the common denominator here is starting with a lack of compliance."⁹¹

Despite the concerning available statistics on social distancing arrests, requests to the NYPD for complete "demographic and neighborhood data" have been ignored which limits the ability of minority communities to hold the NYPD accountable for disparate enforcement of social distancing regulations.⁹² Furthermore, the racial disparity in social distancing enforcement demonstrated by

85. *Id.*

86. Jake Offenhardt, *De Blasio Shrugs Off Leaked Data Showing Massive Racial Disparities in NYPD's Social Distancing Arrests*, GOTHAMIST (May 8, 2020), www.gothamist.com/news/de-blasio-shrugs-leaked-data-showing-massive-racial-disparities-nypds-social-distancing-arrests [perma.cc/V3VA-Z5C7] [hereinafter Offenhardt II].

87. *Id.*

88. *Id.*

89. Offenhardt I, *supra* note 84.

90. Offenhardt II, *supra* note 86 (explaining that the disparity in social distancing regulations demonstrated through race neutral policies highlighted preexisting issues between the police and the black community).

91. *Id.*

92. *Id.*

NYPD cannot adequately be justified by race-neutral causes.⁹³

C. Constitutional Rights Under the Fourth and Fourteenth Amendments

The Fourth Amendment ensures the “right of people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures.”⁹⁴ Historically, the Fourth Amendment was not ambiguously drafted towards protecting the freedom of minorities but was ingrained in anti-imperialist beliefs.⁹⁵ Early history indicates that the British subjected the colonist to unreasonable searches and seizures of their home.⁹⁶ After the United States Constitution was drafted, the Framers introduced an amendment that provided that each man’s home has protections under English law against unreasonable search and seizures.⁹⁷ The United States Supreme Court has recognized that “no right is held more sacred. . . than the right of every individual to be. . . free from the restraint or interference of others, unless by clear and unquestionable authority of law.”⁹⁸ It was the Framer’s specific intent “to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”⁹⁹

Prior to *Terry*, the Fourth Amendment framework was well-settled law.¹⁰⁰ The Fourth Amendment required probable cause to perform searches and seizures.¹⁰¹ The Supreme Court indicated in *Agnello v. United States* that a warrantless search would always be “unreasonable and abhorrent” under a Fourth Amendment analysis.¹⁰² However, the Supreme Court in *Terry v. Ohio* lowered

93. See Lonnae O’Neal, *A police expert explains why brothers get arrested for not social distancing*, ANDSCAPE (May 20, 2020), www.andscape.com/features/a-police-expert-explains-why-brothers-get-arrested-for-not-social-distancing/ [perma.cc/DB2U-SXYH].

94. U.S. CONST. amend. IV.

95. ANN FAGAN GINGER, *THE LAW, THE SUPREME COURT AND THE PEOPLE’S RIGHTS* 222-23 (Barron’s eds., 2nd ed. 1977).

96. *Id.*

97. *Id.*

98. *Union Pac. R.R. Ci. v. Botsford*, 141 U.S. 250, 251 (1891).

99. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

100. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386 (1988).

101. *Id.*

102. *Agnello v. United States*, 269 U.S. 20, 32 (1925). Citing *Boyd v. United States*, *Weeks v. United States*, *Silverthorne Lumber Co v. United States*, and *Gouled v. United States*, the Supreme Court noted that although the question had never been decided by the court, it had always been presumed that an individual’s home could not be legally searched absent a search warrant, except in situations as an “incident to a lawful arrest therein.” *Id.* The Fourth Amendment is equally applied to those suspected and the innocent. *Id.* Thus

the precedented standard that police officers were required to meet and permitted specific searches, such as stop-and-frisk.¹⁰³ The Court held in *Terry* that the Fourth Amendment legal framework allowed restricted warrantless searches and seizures if the police officer's reasonable suspicion, based on an articulable fact, led them to believe that a crime is being perpetrated and the individual is armed.¹⁰⁴ The Court balanced the governmental interest of officer safety and the need to investigate criminal acts against an individual's interest in the fundamental right to privacy.¹⁰⁵ Thus, the Supreme Court permitted police officers the ability to depend on their reasonable suspicions under limited circumstances.¹⁰⁶

The Supreme Court has permitted a greater degree of deference to police officers' assessments of potential criminal conduct.¹⁰⁷ The Supreme Court extended *Terry's* holding to allow the totality of all the circumstances together with the individual's actions in question to be measured to determine reasonable suspicion.¹⁰⁸ In *United States v. Sokolow*, the Court stated:

a court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a "profile" does not somehow detract from their evidentiary significance as seen by a trained agent.¹⁰⁹

Although the Supreme Court has held that conformance with aspects of a profile may not constitute reasonable suspicion that entails "independent judgment" by the courts, it stipulated that appellate courts should permit "due weight" to a trial court's finding that the police officer evoked "inferences based on his own experience," and thus was "credible" and "reasonable."¹¹⁰ *Terry's* expansion created considerable police discretion, resulting in race-based decisions, and arbitrary policies, by law enforcement.¹¹¹

searching an individual's home without a warrant is on its face "unreasonable and abhorrent." *Id.*

103. *Terry*, 392 U.S. at 16.

104. *Id.* at 21.

105. *Id.* at 20-1.

106. *Id.* at 22.

107. *United States v. Sokolow*, 490 U.S. 1, 8 (1989).

108. *Id.*

109. *Id.* at 10.

110. Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court's Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 615-16 (2012).

111. See Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1844-45 (2004) (noting in recent years, due to the discretion police officers are permitted to exercise, when a modicum of alleged suspicious circumstances are observed, it is often followed by a trivial offense that can be used to justify a stop).

Moreover, racial minorities are amongst those disadvantaged by expanding Fourth Amendment doctrines in relation to police searches and temporary detainments imposed through neutral policies.¹¹² Under the Equal Protection Clause of the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹¹³

Courts have interpreted the Equal Protection Clause to mean interpreted through the courts hold that all state actors' classifications based on race should be looked at under strict scrutiny, irrespective of whether minorities were aided or harmed by the classification.¹¹⁴ For example, in *Richmond v. J. A. Croson*, the Court noted:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹¹⁵

Under strict scrutiny, the statute or policy must directly advance a compelling government interest while achieving the least restrictive method of completing the requirement.¹¹⁶ The government must demonstrate that the racial classification was

112. *Id.*

113. U.S. CONST. amend. XIV, § 1.

114. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493-94 (1989). City Council adopted a plan that required contractors to subcontract at least thirty percent of the dollar amount to one or more Minority Business Enterprises. *Id.* The goal was to encourage participation of minority businesses in constructing public projects. *Id.* The Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment. Specifically finding that the City failed to demonstrate the need for remedial action in granting Minority Businesses Enterprises public construction contracts and failed to demonstrate a compelling governmental interest. *Id.*

115. *Id.* at 493.

116. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2001). The author discusses the current standards of reviews under the Equal Protection Clause, the problems posed by the standards of scrutiny imposed, and proposes a possible solution. *Id.*

utilized based on the government's actual purpose for adopting the classification.¹¹⁷ Courts will not allow "speculations of counsel" about plausible purposes when strict scrutiny is being applied.¹¹⁸ Furthermore, the compelling interest must be very strong; thus, most governmental interests are not compelling enough to satisfy this rigorous test.¹¹⁹

In *Grutter v. Bollinger*, the court noted:

When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied. Context matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.¹²⁰

Because inequalities can occur intentionally or unintentionally, the Supreme Court has held that the Equal Protection Clause does not forbid policies enacted by the government that unintentionally lead to racial disparity.¹²¹ In fact, other clauses of the Constitution may enable Congress the ability to address unintentional disparate impacts.¹²²

In *Personnel Administrator of Massachusetts v. Feeney*, the Court noted discriminatory purpose implies that the decisionmaker selected or reaffirmed a specific policy due to, not just despite, disparate effects on a protected group.¹²³ The Court analyzed the legislative purpose behind the veterans' hiring preference statute and found that since the aim was not to be "invidiously" discriminatory to women, the appellee needed to demonstrate more than a disparate impact to satisfy her claim.¹²⁴ Disparate impact might involve racial classifications in two primary ways.¹²⁵ First, disparate impact might be involved in the legislation's text, subject

117. Russel W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 134 (1989).

118. *Id.*

119. *Id.*

120. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

121. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 763-64 (2011).

122. *Id.*

123. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

124. *Id.*

125. Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2009 CATO SUP. CT. REV. 53, 62 (2009).

to judicial review to under the strict scrutiny standard;¹²⁶ second, in public employees' actions in compliance with the enacted legislation.¹²⁷

Although disparate impact is subjected to racial classifications in two ways, the Constitution strictly forbids police officers from pursuing individuals for criminal investigation solely based on their race.¹²⁸ Citizens are entitled to Equal Protection at all times, and if law enforcement "adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."¹²⁹

D. Legal Standards Following Floyd v. City of New York

In *Floyd I*, the Southern District of New York found New York City liable for a practice of unconstitutional stop-and-frisks and racial profiling.¹³⁰ The court held that the city was liable under the Fourth Amendment for deliberate indifference and widespread practice.¹³¹ Deliberate indifference was demonstrated by the conduct of NYPD's senior officials' failure to change policies despite actual and constructive knowledge of Fourth Amendment violations.¹³² Also, NYPD's practice of stop-and-frisk that lacked reasonable suspicion was so common it was considered standard routine.¹³³

Additionally, the court found that the city violated the plaintiff's Fourteenth Amendment rights by enacting a policy that indirectly caused racial profiling and the NYPD had been deliberately indifferent to the intentional discriminatory

126. *Id.*

127. *Id.*

128. *United States v. Avery*, 137 F.3d 343, 353 (1997). *Avery* holds that police officers violate the Equal Protection Clause if they conduct a drug trafficking investigation solely on the basis of race. *Id.* at 353-54. Additionally, in *Brignoni-Ponce*, the Supreme Court held that Mexican ancestry alone is not sufficient to detain, and question, individuals while searching for undocumented individuals. *Brignoni-Ponce*, 422 U.S. at 885-86. The Court notes that Mexican ancestry is a relevant factor, but alone it does not justify questioning or detaining all Mexicans to determine if they are in the United States legally. *Id.*

129. *Avery*, 137 F.3d at 355. In this case, the officers were not solely depending on the defendant's race when they conducted a stop but based the stop on a totality of the circumstances. *Id.* at 357-58.

130. *Floyd I*, 959 F. Supp. 2d at 562.

131. *Id.*

132. *Id.* at 658-59.

133. *Id.* at 659-60.

application at supervisory levels.¹³⁴ NYPD violated the Fourteenth Amendment by approving a policy that conducted stops partially based on criminal suspect behavior, where race was the main factor.¹³⁵ Furthermore, the plaintiffs introduced evidence of senior officials' deliberate indifference to the disparate impact stop-and-frisk had on minority communities.¹³⁶ As a result of the holding in *Floyd I*, the court enacted remedies that included reforming policies, training, documentation, and an independent monitor to ensure compliance with the remedies to provide a violation of individual constitutional rights would repeatedly occur.¹³⁷

III. ANALYSIS

Whether the enforcement of stay-at-home orders and social distancing regulations has violated individuals' Fourth and Fourteenth Amendment rights has been a focal concern. Part III will examine the racial disparity in the enforcement of stay-at-home orders and social distancing rules in New York with former stop-and-frisk practices. This section will also provide a constitutional analysis of the disparate enforcement of race-neutral policies enacted during the pandemic and how arrests are centered in predominantly Black neighborhoods.

A. Comparing NYPD's Enforcement of Stay-At-Home Orders and Social Distancing Regulations

NYPD's stay-at-home orders and social distancing regulations are subject to the court's holding in *Floyd I*. In *Floyd I*, the court ordered NYPD to eliminate practices and policies that promote racial discrimination.¹³⁸ Specifically, the court noted that deliberate indifference and policies that indicated widespread practice and statistical data that supported the disparate impact on Black and Latinx communities were indicators that NYPD's use of stop-and-frisk was unconstitutional.¹³⁹ Likewise, the NYPD's

134. *Id.*

135. *Id.* at 660.

136. *Id.* at 658.

137. *Floyd I Remedy*, 959 F. Supp. 2d at 677.

138. *Floyd I*, 959 F. Supp. 2d at 562. The court noted that “[m]any police practices may be useful for fighting crime – preventive detention or coerced confessions, for example – but because they are unconstitutional, they cannot be used, no matter how effective. *Id.* at 556. “The enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Id.*

139. *Id.* at 562. When conducting a constitutional analysis on both the Fourth and Fourteenth Amendment claims, the individual must prove that the City has acted with “deliberate indifference” to fundamental constitutional

implementation of social distancing regulations grossly impacted Black and Latinx communities and the enforcement of social distancing regulations raised the argument that NYPD enforcement practices fail the constitutionally mandated standard employed by the *Floyd I* court.¹⁴⁰

Although the complete data needed to analyze the disparate impact social distancing regulations have had on minority communities has not been shared by the NYPD, the data that has been made available indicates that minority communities have been disproportionately impacted by social distancing regulations during the COVID-19 pandemic.¹⁴¹ Six weeks of data correlating to social distancing enforcement, following the executive order by Cuomo demonstrated significant racial disparity both in summonses and arrests.¹⁴² In *Floyd I*, when the court requested that the NYPD demonstrate a race neutral explanation for the statistical data that showed an unconstitutional racial bias, “[r]ather than revealing a valid race-neutral variable that explains the NYPD’s disproportionate stopping of [B]lacks and Hispanics, the correlation highlighted by the City’s experts suggests how the racial disparities identified by Dr. Fagan might have come about – namely, through a widespread practice of racial profiling.”¹⁴³ Similarly, the NYPD failed to demonstrate how race-neutral executive orders enforcing stay-at-home orders and social distancing regulations resulted in a disparate impact on Black and Latinx communities.¹⁴⁴ In a City Council meeting, the NYPD was unable to explain the method in which cops were “deployed” to neighborhoods to enforce social distancing mandates.¹⁴⁵

Furthermore, the City and NYPD leadership have demonstrated significant deliberate indifference to the concerns raised by the minority community, the statistical data involving the arrests and summonses within the community, and the viral videos broadcasted on social media displaying blatant police misconduct.¹⁴⁶ de Blasio has repeatedly defended the NYPD’s role

rights due to action or inaction by its employees (“NYPD”), the evidence must show that the City was put on notice, and despite having an awareness of this issue nothing was done in response. *Id.*

140. *Offenhartz II*, *supra* note 86.

141. *Bates*, *supra* note 80.

142. *Id.*

143. *Floyd I*, 959 F. Supp. 2d at 588.

144. *Bates*, *supra* note 80.

145. Amanda Eisenberg, *Civil rights advocates file motion to suspend NYPD’s social distancing enforcement*, POLITICO (May 26, 2020), www.politico.com/states/new-york/albany/story/2020/05/26/civil-rights-advocates-file-motion-to-suspend-nypds-social-distancing-enforcement-1286646 [perma.cc/DM2X-KRZ9].

146. *Bates*, *supra* note 80.

in social distancing enforcement, stating: “[w]hat happened with stop and frisk was a systematic, oppressive, unconstitutional strategy that created a new problem much bigger than anything it purported to solve . . . This is the farthest thing from that. This is addressing a pandemic.”¹⁴⁷ New York Police Commissioner Dermot F. Shea similarly pushed against assertions that the NYPD was participating in racially motivated social distancing enforcement.¹⁴⁸ He acknowledges that the incidents recorded were “incredibly disheartening” but not indicative of a department problem, and that each incident should be reviewed separately.¹⁴⁹ In *Floyd I*, the court addressed systemic evidence of deliberate indifference, noting “evidence regarding the actions or inactions of the NYPD – shows that the City has been deliberately indifferent to violations of the plaintiff class’s Fourth and Fourteenth Amendment rights.”¹⁵⁰ The opinion clarified that since no policies were implemented to ensure the constitutionality of the stops, despite the statistical evidence which overwhelming indicated a racial bias, the NYPD leaders and the City participated in deliberate indifference.¹⁵¹ Similarly, NYPD leaders and the City encourage social distancing regulations despite both statistical and empirical data of a racial bias in enforcement.¹⁵²

Floyd I also noted that deliberate indifference alone is not sufficient to establish practices and policies that promote racial discrimination, but that there must be evidence of widespread practice supported by statistical data to demonstrate the disparate impact on minority communities.¹⁵³ The court held that the party with the burden of proof must show that the unconstitutional action was pursuant to an “official municipal policy.”¹⁵⁴ “[O]fficial

147. *Id.*

148. Ashley Southall, *N.Y.C. Commissioner Denies Racial Bias in Social Distancing Policing*, N.Y. TIMES (Nov. 5, 2020), www.nytimes.com/2020/05/13/nyregion/nypd-social-distancing-race-coronavirus.html [perma.cc/Q94B-MYZ3]. Letitia James, the State Attorney General, noted that she recognized the disparity between the NYPD and communities of color. *Id.* She stated that “[i]t is inherently wrong to aggressively police one group of people yet ignore another group that commits the same infraction.” *Id.* The State Attorney General’s office has requested more data concerning the social distancing enforcement from the NYPD, that includes reviews of each precinct, the race and age of those given summonses or arrested for violation of social distancing mandates. *Id.* Additionally, they have joined many other elected officials and public defender groups, in requesting documentation on the NYPD’s overall training, and policies. *Id.*

149. *Id.*

150. *Floyd I*, 959 F. Supp. 2d at 590.

151. *Id.*

152. Southall, *supra* note 148.

153. *Floyd I*, 959 F. Supp. 2d at 564.

154. *Id.* at 558.

municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law."¹⁵⁵ An analysis prepared by the Legal Aid Society discovered that while most of the 311 complaints about individuals violating social distancing rules came from residents of the city's predominately white neighborhoods, those that received summonses or were arrested for social distancing related complaints were from Black and Latinx communities.¹⁵⁶ The study suggests that the NYPD is participating in "selective enforcement" and is still policing minority communities in a widespread manner that promotes racial discrimination.¹⁵⁷

In *Floyd II*, plaintiffs filed an emergency motion alleging that the NYPD engaged in racially discriminatory enforcement of social distancing directives in violation of the Fourth and Fourteenth Amendments.¹⁵⁸ The court found that despite the plaintiffs showing that police officers have disproportionately arrested and used excessive force against Black and Latinx individuals in the enforcement of social distancing regulations, and the City and NYPD leaders being deliberately indifferent to this conduct, notwithstanding the merits of the claim, "they do not fall squarely within the scope of policies and practices adjudicated."¹⁵⁹ The court in *Floyd II* steered away from applying the same guidelines from *Floyd I*, finding that granting a "request for a blanket injunction barring the NYPD from COVID-19 enforcement . . . would interfere with a wide range of police conduct that is outside the bounds of this case, and would halt lawful enforcement."¹⁶⁰ Additionally, the *Floyd II* court noted that if Black and Latinx individuals were injured by racial bias in the NYPD's arrests or use of force in regards to social distancing regulations or stay-at-home mandates, they have the

155. *Id.* at 564.

156. Esha Ray et al., *NYPD social distancing enforcement shows racial divide targeting minorities: study*, N.Y. DAILY NEWS (May 20, 2020), www.nydailynews.com/coronavirus/ny-coronavirus-legal-aid-analysis-social-distancing-20200520-nuurekb5trhgvpmuoqlcpvqlqy-story.html. According to 311 data, the number that connects individuals to non-emergency city services, from March 28 until May 12, 2020, the Legal Aid discovered that of 32,313 calls concerning social distancing violations, 17,376 (fifty-four percent), came from white majority neighborhoods. *Id.* Astoria and Long Island City had 1,197 social distancing 311 calls, and the Upper East Side had 786. *Id.* However, despite most of the 311 calls being conducted in white majority neighborhoods, police overwhelmingly issued summonses for social distancing violations, or arrests that resulted from a social distancing encounter in Black and Latinx neighborhoods. *Id.*

157. *Id.*

158. *Floyd II*, 2020 U.S. Dist. LEXIS 119864, at *5.

159. *Id.* at *9.

160. *Id.*

ability to pursue those allegations is available in a “plenary action.”¹⁶¹ Despite the court’s hesitation in *Floyd II*, to draw similarities between the NYPD’s unconstitutional stop-and-frisk practices, and the disproportionate impact the social distancing regulations imposed on minority communities; unjustified targeting of Black and Latinx individuals in social distancing regulations also lead to violations of the Fourth and Fourteenth Amendment.

B. Fourth Amendment

One significant concern is the potential violation of Black and Latinx individuals’ Fourth Amendment rights due to the excessive enforcement of social distancing regulations in minority neighborhoods.¹⁶² The Fourth Amendment protects individuals from “unreasonable search and seizures” and arbitrary arrests conducted by the government.¹⁶³ The ultimate goal of this Amendment was to protect an individual’s freedom from intrusions by the government and to protect individuals’ right to privacy.¹⁶⁴ In *Floyd*, the intentional racial profiling of minorities, which led to unjustifiable arrests based on race closely resembles the enforcement of NYPD’s social distancing regulations.

Numerous instances garnered concern from the public when videos depicting the arrests of Black and Latinx individuals began surfacing with what appeared to be minor social distancing encounters which quickly escalated into violent arrests.¹⁶⁵ These instances mirrored a long-standing pattern within the NYPD of

161. *Id.*

162. Kathleen Culliton, *Black, Brown New Yorkers Get 80% of NYPD Social Distance Summons*, PATCH (May 8, 2020), www.patch.com/new-york/new-york-city/black-brown-new-yorkers-get-80-nypd-social-distance-summons [perma.cc/D9EZ-RW3Q]. Former Mayor de Blasio, a strong supporter of NYPD social distancing enforcement denied that social distancing is another form of stop-and-frisk, he tweets that “saving lives in this pandemic is job one. The NYPD uses summonses and arrests to do it.” *Id.*

163. U.S. CONST. amend. IV.

164. *Id.*

165. Alice Speri, *As Coronavirus Ravages New York, the NYPD is Detaining Kids for Selling Candy*, INTERCEPT (Apr. 15, 2020), www.theintercept.com/2020/04/15/nypd-coronavirus-social-distancing/ [perma.cc/PYB4-NGZS] [hereinafter Speri I]. Despite minority communities being significantly impacted by COVID-19, New York City government officials have not “modified or reassessed how the NYPD interacts with already vulnerable communities.” *Id.* “The number of arrests in the city has dropped in recent weeks as crime has plummeted.” *Id.* “But particularly in poorer neighborhoods that are home to many essential workers — the neighborhoods where the risk of contracting the virus is highest and where aggressive policing is most common — arrests over minor, nonviolent offenses and “quality of life” infractions have continued.” *Id.*

escalation based on low-level offenses.¹⁶⁶ In one such case, a young woman and her boyfriend were arrested by a group of unmasked NYPD officers who were enforcing social distancing regulations.¹⁶⁷ The encounter rapidly escalated and resulted in pepper spray being used on the young woman.¹⁶⁸ Subsequently, she was charged and spent over twenty-four hours in a crowded holding cell while waiting for arraignment.¹⁶⁹ Upon being released, her employer refused to allow her to return to work out of concerns about her being exposed to the virus while in detention.¹⁷⁰ Situations such as these indicate that NYPD's use of arbitrary arrests in violation of the Fourth Amendment holding in *Floyd I*, do not meet the constitutional requirements of the Fourth Amendment.¹⁷¹ The statistical evidence indicates the unequal enforcement of COVID-nineteen related arrests starkly resembling the numbers in *Floyd I*, which led to the dismantling of the former stop-and-frisk practice.¹⁷²

C. Fourteenth Amendment

The second significant concern is the potential violation of the Fourteenth Amendment of Black and Latinx New Yorkers, through social distancing regulations since NYPD's statistical analysis conducted found that ninety-three percent of COVID-19 related arrests were people of color.¹⁷³ In *Floyd I*, the Southern District

166. *Id.*

167. Alice Speri, *NYPD's Aggressive Policing Risks Spreading the Coronavirus*, INTERCEPT (Apr. 3, 2020), www.theintercept.com/2020/04/03/nypd-social-distancing-arrests-coronavirus/ [perma.cc/H2AR-HV5T] [hereinafter Speri II]. In a letter, Legal Aid attorneys request that city officials ban criminalization for failing to socially distance, stating that failing to socially distance from others is not a crime. Speri I, *supra* note 159. Additionally, they asked the City to discontinue making arrests since some police officers were still patrolling despite lacking personal protective gear, the NYPD officers were also failing to practice socially distancing themselves which resulted in as much as twenty percent of the force calling in sick. *Id.*

168. Speri II, *supra* note 167.

169. *Id.* "Violating social distancing is not a crime per se, but each of the individuals arrested [were] charged with obstructing governmental administration, unlawful assembly, and disorderly conduct." *Id.*

170. *Id.*

171. *Floyd I*, 959 F. Supp. 2d at 660.

172. Kevin Duggan, *NYPD stats find that 93% of COVID-19 related arrests are made up of people of color*, AMNY (May 14, 2020), www.amny.com/police-fire/nypd-stats-find-that-93-of-covid-19-related-arrests-are-made-up-of-people-of-color/ [perma.cc/B6ZH-DTSA].

173. *Id.* Between March 16 and May 10, 2020, NYPD conducted 125 citywide arrests that were in some related to COVID-19. *Id.* On May 12, 2020, according to released NYPD data: Bronx accounted for forty-six total arrests, all of which were people of color; in Brooklyn, thirty-nine individuals were arrested, of which

noted that intentional discrimination can be proven through (1) a facially neutral law or policy that was applied in an intentionally discriminatory manner, or (2) a law or policy that explicitly classifies individuals based on race, and the classification fails strict scrutiny.¹⁷⁴ Social distancing regulations imposed were facially neutral, imposing restrictions on all residents of New York; however, the implementation of the policy was dramatically imposed on Black and Latinx communities, in direct contradiction to *Floyd I.*¹⁷⁵ The manner in which the NYPD has been “arbitrarily” enforcing social distancing executive orders has contributed to a widespread practice of social distancing regulations that disparately impact minority communities in violation of the Fourteenth Amendment.¹⁷⁶

The NYPD’s enforcement of social distancing regulations constituted selective enforcement.¹⁷⁷ To bring a valid selective enforcement claim under the Equal Protection Clause, a “plaintiff must plausibly allege: (1) [Black or Latinx individuals] were treated differently than others similarly situated; and (2) the selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.”¹⁷⁸ New York courts have held that selective enforcement can be established when a “[party] who is a member of a protected group can show that that group has been singled out . . . to a statistically significant extent in comparison with other groups, this is sufficient to warrant further inquiry and discovery.”¹⁷⁹

thirty-six were people of color. *Id.* In Queens, there was a total of twenty-two arrests with nineteen being people of color; in Manhattan, seventeen individuals were arrested, fifteen of which were people of color. *Id.* During the departments release of information, the NYPD noted that not all the arrests were for “socially distancing violations per se” and refused to provide a detailed analysis of how many arrests were for non-violent versus violent crimes. *Id.*

174. *Floyd I.*, 959 F. Supp. 2d at 570-71.

175. N.Y. Exec. Order No. 202.17 (Apr. 15, 2020). The executive order by former Governor Andrew Cuomo continuing the “temporary suspension and modification of laws relating to the disaster emergency.” *Id.* At 8 p.m. on April 17, 2020, all individuals over the age of two, and medically permitted, are required to wear a face-covering when in a public place, or when an individual is unable to maintain a social distance. *Id.*

176. Bates, *supra* note 80.

177. See *Emmerling v. Town of Richmond*, 434 F. Appx 10, 12 (2d Cir. 2011) (agreeing with the lower court that the petitioner failed to plausibly allege that he was similarly situated to any of the individuals he asserted received more favorable treatment).

178. *Id.*

179. *United States v. Lopez*, 415 F. Supp. 3d 422, 427 (S.D.N.Y. 2019). In *Lopez*, defendants were accused of crimes through a reverse sting operation by the DEA. *Id.* at 425. The defendants, who were all minorities, argued that the

Thus, even if police officers had reasonable suspicion or probable cause to issue summonses or to conduct an arrest, that does not negate constitutional concerns under the Equal Protection Clause.¹⁸⁰ Black and Latinx individuals have the constitutional right to be treated as those similarly situated.¹⁸¹ The Equal Protection Clause barring of selective enforcement by the NYPD means that Blacks and Latinx's that are considered suspicious may not be treated in a different manner than whites that are equally suspicious.¹⁸² All races are capable of engaging in suspicious behavior and breaking the law, Equal Protection guarantees that regardless of race, each person will be held equally accountable.¹⁸³ The proper adherence to the guidelines imposed under the Equal Protection Clause indicates that in the scenario where only Black and Latinx people were violating the social distancing mandates, the NYPD is still prohibited from targeting Black and Latinx individuals for stops or summonses.¹⁸⁴ The blatant unequal enforcement of the NYPD's social distancing enforcement is reminiscent of stop-and-frisk,¹⁸⁵ as it cannot be explained without

"DEA's use of a reverse sting against them was part of a practice by which the DEA limits such operations in the Southern District of New York to persons of color." *Id.* The defendant's asserted that the NYPD's use of a reverse sting only against minorities is engaging in selective enforcement in violation of the Equal Protection Act. *Id.*

180. See *Louis v. Metro. Transit Auth.*, 145 F. Supp. 3d 215, 226-227 (E.D.N.Y. 2015) (analyzing that actionable intentional discrimination by a state actor includes, among other things, "applying a neutral law or policy in an intentionally discriminatory way").

181. *Id.* The Second Circuit is split regarding the definition of "similarly situated." *Id.* "The more stringent standard requires proof that no rational person could regard the plaintiff and comparator as different enough to justify differential treatment 'on the basis of a legitimate government policy,' and that there is no possibility that the defendant acted 'on the basis of a mistake.'" *Id.* The lower standard requires evidence that the individuals in question are "similarly situated in all material respects." *Id.*

182. *Floyd I*, 959 F. Supp. 2d at 540.

183. *Id.* A police department such as the NYPD, that has demonstrated a practice of specifically selecting Black and Latinx individuals for stops and arrests cannot utilize a defense by asserting that the stopped individuals were suspicious. *Id.* at 667. "The targeting of certain races *within* the universe of suspicious individuals is especially insidious, because it will increase the likelihood of further enforcement actions against members of those races as compared to other races, which will then increase their representation in crime statistics." *Id.*

184. *Id.* NYPD cannot argue that 'racial profiling' cannot exist because a stop is based on reasonable suspicion or probable cause, this argument is not consistent with the Equal Protection Clause and shows a department's 'manifestation of indifference.' *Id.*

185. Estrada, *supra* note 65, at 363. The high volume of stops and arrests against Black and Latinx individuals in New York, requires the court to evaluate the policy of stop-and-frisk under the Fourteenth Amendment analysis. *Id.* Black and Latinx individuals are members of a protected class,

the likely occurrence of racial profiling.¹⁸⁶ When the percentage of Black and Latinx's stopped are significantly more than the percentage of Black and Latinx's living in New York it is hard to claim that racial profiling did not occur¹⁸⁷

The Equal Protection Clause was drafted to specifically address concerns in policing by requiring that states respect fundamental rights, such as those relating to life and security, and a guarantee of the "equal protection of the law" by establishing "one measure of justice" for all individuals.¹⁸⁸

IV. PROPOSAL

The NYPD's enforcement of social distancing regulations exposed the pattern of inadequate enforcement measures that significantly impacted Black and Latinx communities.¹⁸⁹ The authority of NYPD officers to regulate social distancing violations has resulted in detrimental harm and contributed to the fracture between police officers and minority communities.¹⁹⁰ Concerns regarding the enforcement of social distancing regulations can result in the prevention or delay of Black and Latinx communities getting groceries and medications, exercising, etc., which could result in worsening health outcomes, especially amongst undocumented people faced with the additional concern of deportation.¹⁹¹

Punitive measures, fines, and arrests unfairly impacted minority communities that have already been subjected to higher

that are treated differently, this fact has been proven due to statistical data. *Id.* In *Floyd*, the court found that Black and Latinxs were stopped "nine times more often than all other racial groups in New York City in 2011." *Id.* The disparity is a clear indication that some police officers were racially profiling. *Id.*

186. *Offenhartz II*, *supra* note 86.

187. *Id.*

188. David H. Gans, *The 14th Amendment Was Meant to Be a Protection Against State Violence*, ATLANTIC (July 19, 2020), www.theatlantic.com/ideas/archive/2020/07/14th-amendment-protection-against-state-violence/614317/. The Fourteenth Amendment was enacted to guarantee that violence against Black people would stop. *Id.* The framers recognized that unlimited police powers could be utilized as a "tool of racial oppression and violence." *Id.* True protection and freedom do not exist without limitation of police abuses. *Id.*

189. Dr. Brandon D.L. Marshall & Abdullah Shihipar, *We Can't Police Our Way Out of a Pandemic*, N.Y. TIMES (Apr. 27, 2020), www.nytimes.com/2020/04/27/opinion/coronavirus-police.html [perma.cc/A4VJ-47ZK].

190. *Id.*

191. *Id.*

rates of COVID infections and deaths.¹⁹² Cuomo increased the maximum fine for social distancing violations from \$500 to \$1,000 and de Blasio encouraged the Police Department to enforce these fines and issue arrests.¹⁹³ Additionally, imposing social distancing regulations significantly impacted those working in retail and service jobs, which tended to be Black and Latinx workers, who are not as likely to be able to practice social distancing by working from home.¹⁹⁴ These findings highlight the issues that result when the NYPD are tasked with enforcing activities that fall outside “traditional” law enforcement, and emphasize the continual pattern of racial discrimination.¹⁹⁵ Beyond the context of COVID-19, the use of law enforcement to address social problems or public health problems often results in “racialized criminalization” and increases “racialized health inequities.”¹⁹⁶

Imposing substitute measures that would limit or eliminate NYPD officers’ involvement in the enforcement of social distancing regulations, and in the future, all social or public health problems, will improve the health and safety of individuals of all communities while reducing the risk of disparate impact on racial minorities. This can be done in one of three ways.

First, the New York Courts should impose an independent monitor that works in conjugation with New York Cities minority communities¹⁹⁷ to investigate NYPD’s enforcement of social distancing regulations, including in-depth analysis of the statistics behind the number of patrol cars deployed in each borough, a complete analysis of the citations issued, and overall increasing transparency to the NYPD by unfettered access to the data available regarding social distancing enforcement or public health enforcement. This would work in conjugation with the Police Statistics and Transparency (“Police STAT”) Act which requires data collection and reporting requirements.¹⁹⁸ Additionally, there should be an immediate cessation of social distancing enforcement and future public health regulation by the NYPD, or significant

192. *Id.*

193. *Id.*

194. *Id.*

195. Emilie Bruzelius & Jessica Ho, *NYPD Enforcement of COVID Mandates Reproduced Familiar Pattern of Racial Disparities*, COLUMBIA, (Nov 12, 2021). www.publichealth.columbia.edu/public-health-now/news/nypd-enforcement-covid-mandates-reproduced-familiar-pattern-racial-disparities

196. *Id.*

197. Stop and Frisk Plaintiffs Ask Court to Make Changes to Monitorship to Include Community, CCRJUSTICE (July 29, 2021). www.ccrjustice.org/home/press-center/press-releases/stop-and-frisk-plaintiffs-ask-court-make-changes-monitorship.

198. *Legislative Memo: Police Statistics and Transparency Act*, NYCLU, www.nyclu.org/en/legislation/legislative-memo-police-statistics-and-transparency-act [perma.cc/F4KP-9D7E] (last visited Apr. 6, 2022).

monitoring of NYPD functions by an independent monitor with the involvement of community engagement to ensure the health and safety of each community.¹⁹⁹ Finally, New York City should implement a community-based approach²⁰⁰ to enforcement of social distancing regulations to reduce the tension between minority communities and law enforcement, as well as fostering trust to utilize individuals with whom those in the area are familiar.

*A. Independent Monitor to Work in Conjugation with
Minority Communities to Investigate NYPD's Social
Distancing Regulations and Implementation of the
Police Statistics and Transparency ("Police STAT")
Act*

As in *Floyd I*, in order for NYPD officers and City Officials to be held accountable for practices and policies that are implemented that employ racial bias, an independent monitor must be established²⁰¹ to increase transparency and thoroughly investigate the NYPD social distancing enforcement. In *Floyd I*, the court ordered a federal monitor to regulate police reform, including a joint remedial process where various stakeholders collaborated to create a plan that would effectively eliminate the disparate impact on minority communities, and additionally employed the use of body-cams on some patrol officers in districts where stop-and-frisk was excessively utilized.²⁰²

199. Stop and Frisk Plaintiffs Ask Court to Make Changes to Monitorship to Include Community, *supra* note 197.

200. *Id.*

201. *Floyd I*, 959 F. Supp. 2d at 667. The appointment of an independent monitor was executed in order to ensure that the NYPD's stop-and-frisk practices met the Constitutional requirement, and to further monitor the compliance of NYPD with the Southern District Court's remedies. *Id.*

202. Jenn Rolnick Borchetta, *Floyd v. City of New York Joint Remedial Process FAQs*, DEMOS (Nov. 5, 2015), www.demos.org/sites/default/files/publications/JRP%20FAQs%20.pdf [perma.cc/SWY4-YHSN].

The joint remedial process for stop-and frisk has four main components: "(1) focus groups of those most affected by the NYD's unlawful stop-and-frisk practice; (2) an advisory committee for Judge Belen and his staff, comprised of community organizations, NYPD leadership, police union representatives, law enforcement officer of color organizations, religious leaders, and academics; (3) conversations between Judge Belen's team and several community leaders on police reform issues; and (4) structured community forums."

Id.

The joint remedial process that utilizes stakeholders from the community must ensure that those immediately impacted by discriminatory policing measures would be an integral part of the “training, supervision, discipline, and monitoring” of policies and practices implemented by the NYPD.²⁰³ The joint remedial process is not limited to stop-and-frisk but is granted broad deference to enhance reforms due to “failures in discipline, supervision, auditing, monitoring, and other aspects of NYPD’s operations.”²⁰⁴ Thus, under the joint remedial process for stop-and-frisk, the court permitted the implementation of policy changes such as “how the NYPD holds officers accountable for unlawful street encounters, how the NYPD documents stop and frisk activity, what criteria the NYPD uses to evaluate officer conduct, what information the NYPD provides to people who have been stopped, and how supervisors oversee officer behavior.”²⁰⁵ Despite promising to continue to employ community input in the remedial process, members of the community raised concerns that the monitorship’s engagement with the community concluded in Spring 2018 when the Joint Remedial Process concluded.²⁰⁶ The omission of “community perspective” in current police monitor reports requires the monitor to rely exclusively on NYPD’s data, without taking into account individuals in the community that are actually impacted.²⁰⁷ This failure to include the impacted community creates limited insight into whether NYPD current stop-and-frisk policies are still motivated by race.²⁰⁸

Today, to make certain that police monitorships remain effective, the independent monitor must have clear and open communications with members of the community most impacted. Involvement of stakeholders from the community must be utilized to thoroughly investigate NYPD’s social distancing regulations. The reluctance or inability to rectify the unconstitutional enforcement of social distancing regulations, or future public health concerns, requires a separate independent monitor together with minority communities to thoroughly investigate the enforcement of New York’s executive orders regarding public health concerns, and implement changes to current policies that would correct the way NYPD enforces public health mandates in the future.

Additionally, the enactment of the Police STAT Act which requires New York State to report the race, ethnicity, and sex of

203. *Id.*

204. *Id.*

205. *Id.*

206. Stop and Frisk Plaintiffs Ask Court to Make Changes to Monitorship to Include Community, *supra* note 197.

207. *Id.*

208. *Id.*

anyone arrested and charged, as well as disclosure of anyone who dies while in police custody, or during an attempt to establish custody, will be helpful in prohibiting systematic and discriminatory practices used to harm Black and Latinx New Yorkers.²⁰⁹ Police STAT Act discloses geographic and demographic information, reports, guidelines for enforcement, and training, which will promote transparency significantly, reducing the tension between minority communities and law enforcement.²¹⁰

B. Immediate Cessation of Social Distancing Enforcement and Future Public Health Regulations by the NYPD

Even if the New York were to implement an independent monitor that works in conjugation with minority communities to investigate NYPD's social distancing regulations and the imposition of the Police STAT Act, the immediate cessation of social distancing enforcement and future public health regulations by NYPD would be the best method of resolving the disparate impact and public health concerns imposed through social distancing regulations. NYPD officers, as previously noted, disparately impact minority communities through social distancing enforcement.²¹¹ Additionally, the excessive reliance on law enforcement to address public health concerns will only exacerbate the issues and not provide a substantive remedy.²¹²

Furthermore, NYPD allies such as the NYPD union have indicated that NYPD should cease regulating social distancing regulations.²¹³ Police Benevolent Association President Patrick Lynch indicated that the "situation is untenable: the NYPD needs to get cops out of the social distancing enforcement business altogether."²¹⁴ The Heritage Foundation and R Street Institute

209. Brad Hoylman, Senate Passes Hoylman's Police STAT Act, Requiring Public Reporting Of Deaths in Police Custody and Racial Disparities in Law Enforcement, NEW YORK STATE SENATE (June 8, 2020), www.nysenate.gov/newsroom/press-releases/brad-hoylman/senate-passes-hoylmans-police-stat-act-requiring-public. On June 8, 2020, New York State Senate voted to pass the Police Stat Act. *Id.* The data collected will be published monthly on the Division of Criminal Justice Services and Office of Court Administration public websites. *Id.*

210. *Id.*

211. Duggan, *supra* note 172.

212. Marshall & Shihpar, *supra* note 189.

213. Tina Moore, *NYPD union wants cops out of 'social distancing enforcement'*, N.Y. POST (May 4, 2020), www.nypost.com/2020/05/04/nypd-union-wants-cops-out-of-social-distancing-enforcement [perma.cc/P228-YP47].

214. *Id.*

noted in a letter to the International Association of Chief of Police, and the National Conference of Mayors, that substantially limiting non-essential contact between the NYPD officers and the public can reduce the spread amongst officers and protect their families.²¹⁵

Public health regulations, such as social distancing regulations, are important to reduce public harm, however, punitive measures such as the fines implemented by Cuomo, and the enforcement of the NYPD to carry out the fines and arrests by de Blasio, unfairly impact minority communities.²¹⁶ In the future, public health concerns should not be enforced by NYPD to better safeguard the unbiased enforcement of public health matters.

C. Implement Community Based Methods

Any recommendation to the public regarding the cessation of NYPD's role in enforcing social distancing guidelines should provide a feasible alternative. The Centers for Disease Control and Prevention suggested the use of community-based organizations ("CBOs") as an effective method of protecting individuals and communities from the spread of the virus, or other public health concerns, while encouraging cohesion through shared mitigation strategies and updating authorities on the needs within the community.²¹⁷

CBOs work locally to establish community needs, they include nonprofit organizations, both formal and informal community organizations, and social service agencies, etc.²¹⁸ Depending on the CBO, the stakeholders may be composed of volunteers, members, or supporters.²¹⁹ These programs supplement state and local health officials by encouraging healthy behaviors that lessen the transmission of viruses, promoting healthy environments, and creating health-based operations such as "community response committees" which collaborate with local authorities on serious matters such as the protection of those who are at a high risk of severe illness from COVID-19.²²⁰

215. Erik Larson, *Police Group Urged to Focus on Helping Needy not Parking Tickets*, BLOOMBERG (Apr. 7, 2020), www.bloomberg.com/news/articles/2020-04-07/police-group-urged-to-focus-on-helping-needy-not-parking-tickets [perma.cc/MC3R-LSAF].

216. Marshall & Shihpar, *supra* note 189.

217. *Considerations for community-based organizations*, CDC (Oct. 29, 2020), www.stacks.cdc.gov/view/cdc/96195 [perma.cc/7BN3-A5CG].

218. *Id.*

219. *Id.*

220. *Id.*

V. CONCLUSION

The NYPD's social distancing regulations continue to create a disparate impact and impose health and safety problems within Black and Latinx communities.²²¹ Increased tensions between minority communities and the NYPD due to past and present racially influenced policing procedures have reduced trust in the ability of law enforcement to appropriately conduct social distancing regulations.²²² The punitive method of enforcing social distancing regulations disparately impacted those in lower socioeconomic status, without effectively dealing with the public health problem currently being faced.²²³

The impact of COVID-19 revitalized the use of over-policing instead of dealing with the public health problem. Moving forward, New Yorkers would be better served through the implementation of an independent monitor in conjugation with the input of impacted parties, to address needs within the community, as well as the use of the Police STAT Act to encourage transparency.²²⁴ Immediate removal of the NYPD from social distancing measures and future public health regulations must be implemented and community-based methods deployed as an effective alternative to punitive enforcement. By utilizing a community based-approach and increasing transparency into NYPD's interactions, all communities within New York are better equipped to effectively combat future public health concerns without additional risks to health and safety.

221. Marshall & Shihpar, *supra* note 189.

222. *Id.*

223. *Id.*

224. Hoylman, *supra* note 209.

