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REPORT ON LEGISLATION BY THE
CIVIL RIGHTS COMMITTEE

Int. No. 1080-2013

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting bias-based profiling by law enforcement officers.

THIS BILL IS APPROVED

The Civil Rights Committee of the New York City Bar Association urges the New York City Council to pass Int. No. 1080 to address the impact of New York Police Department ("NYPD") practices on various communities in New York City, in particular, the impact that the NYPD's stop-and-frisk tactics have had on communities of color. The vast increase in the use of stop-and-frisk over the past ten years has led to justifiable concern that police officers may be stopping New Yorkers not due to individualized suspicion that a crime is afoot, but instead relying primarily on statistical profiles based on characteristics like race or sexual orientation.[1] According to the NYPD's own records, almost nine out of ten people stopped are neither arrested nor given summonses, and the overwhelming majority of searches yield no weapons or contraband.[2] Meanwhile, those stopped and frisked come almost exclusively from historically disfavored communities. For example, despite making up only about half of New York City's population, in 2012, approximately 85% of those stopped by the NYPD and almost 90% of those frisked were Black or Latino.[3]

Int. No. 1080 addresses these concerns in three ways. First, it amends section 14-151 of the Administrative Code of the City of New York by expanding the categories of bias-based profiling prohibited under this section. Whereas section 14-151 currently prohibits police officers from profiling based on an individual's race, ethnicity, or national origin, Int. No. 1080 broadens this protection to include age, sex, gender identity or expression, sexual orientation, immigration or citizenship status, language, disability (including HIV), and housing status. New

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[1] *See e.g.*, New York Civil Liberties Union, *NYPD Stop-and-Frisk Activity 2012* (2013), *available at* http://www.nyclu.org/files/publications/2012_Report_NYCLU_0.pdf; *see also* Center for Constitutional Rights, *Stop And Frisk: The Human Impact* (2012), at 11 (discussing profiling of lesbian, gay, and transgendered communities), *available at* http://stopandfrisk.org/the-human-impact-report.pdf (last visited June 26, 2013).

[2] *Floyd v. City of New York*, 283 F.R.D. 153, 167 (S.D.N.Y. 2012).

[3] *NYPD Stop-And-Frisk Activity 2012* at 2.

York City historically protects civil rights more robustly than federal law, and Int. No. 1080 follows in this commendable tradition.[4]

Second, Int. No. 1080 explicitly makes it unlawful for law enforcement officers to intentionally engage in bias-based profiling, as well as making unlawful law enforcement activities that result in a disparate impact on individuals based on any of the prohibited characteristics. While claims of intentional discrimination are notoriously difficult to prove, disparate impact claims have been widely used in other areas of the law to bring relief to communities that are disproportionately harmed by governmental policies. Moreover, today, many of the pressing racial justice issues involving law enforcement practices stem from race-neutral policies that nonetheless result in severe racial disparities, such as NYPD's expansion of stop-and-frisk or the racial disparity in marijuana arrests.[5] Further, as a recipient of federal funds, the NYPD is already prohibited by Title VI regulations from engaging in activities that have a disparate impact on individuals on account of their race or national origin;[6] this bill simply echoes those federal requirements.

Finally, Int. No. 1080 provides aggrieved individuals with a private right of action to enforce the prohibitions against intentional bias-based profiling and law enforcement activities resulting in a disparate impact on a prohibited basis. Aggrieved parties can pursue a claim in court or with the City's Commission on Human Rights. Successful plaintiffs can obtain an injunction prohibiting the challenged practice, but no damages. A private right of action is essential to holding the NYPD accountable for practices that have a disproportionate impact with no legitimate justification. Without it, these practices will remain largely immune from legal challenge, as the ability of individuals to sue to enforce rules against discrimination is often the only effective and practical method to enforce civil rights laws.

Importantly, Int. No. 1080 will not hamper the NYPD in engaging in legitimate law enforcement activities and will not lead to a flood of frivolous lawsuits. The bill only prohibits practices that have a disparate impact that cannot be defended as advancing a significant law enforcement objective. And private rights of action to enforce such prohibitions are well-accepted in most areas of civil rights law.[7] The private right of action authorized by the bill

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[4] *See, e.g.*, *Williams v. NYCHA*, 61 AD3d 63, 66 (App. Div. 1st Dep't 2009) (recognizing that the New York City Human Rights Law has "uniquely broad and remedial purposes, which go beyond those of counterpart state or federal civil rights laws")

[5] *See, e.g.*, Urbina, "Blacks Are Singled Out for Marijuana Arrests, Federal Data Suggests," New York Times, June 3, at A12. According to the study upon which the article was based, the disparity in arrests in much of New York is even worse. *See* ACLU *The War on Marijuana in Black and White*, 33 (2013) *available at* http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf (last visited June 26, 2013).

[6] *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582, 584 (1983); 28 CFR § 42.104(b)(2)

[7] *See e.g.*, *New York Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995) (Title VI regulations); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII/Employment Discrimination); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.*), aff'd per curium*, 109 S. Ct. 276 (1988) (Fair Housing Act); *see also* Consumer Financial Protection Bureau Bulletin 2012-04 (Fair Lending) (Apr. 18, 2012), *available at* http://files.consumerfinance.gov/f/201404_cfpb_bulletin_lending_discrimination.pdf (confirming that the CFPB will

would be virtually identical to the one that was available under the disparate impact regulations under Title VI of the Civil Rights Act of 1964[8] until the Supreme Court withdrew it in 2001.[9] Moreover, as plaintiffs would not be entitled to damages, the bill does nothing to encourage frivolous lawsuits against the NYPD.

Equally importantly, under this bill, the mere fact that a law enforcement policy or practice results in a disproportionate impact on a prohibited basis will not automatically render it unlawful. Rather, the burden will shift to the government to demonstrate that "the policy or practice bears a significant relationship to a significant law enforcement objective."[10] If the government makes this showing, then the plaintiff needs to demonstrate that "an alternative policy or practice with less disparate impact is available," which the government can then rebut.[11] This familiar burden-shifting framework puts the government to its proof and is similar to the framework within which the NYPD's compliance with its obligations under Title VI's disparate impact regulations was evaluated for nearly 40 years. The NYPD maintains that the high percentage of people of color stopped reflect crime patterns. This legislation provides the NYPD ample opportunity to definitively make that case, with regard to its policies and practices, and actions by individual officers.

While the NYPD argues, in the context of stop-and-frisk tactics, that any disparate impact is justified by legitimate law enforcement concerns it has sought to avoid public disclosure of the data needed to analyze racial and ethnic disparities in stop-and-frisk practices, even as organizations (including the Association) have raised serious questions about their legitimacy.[12] The Committee continues to believe that in light of the core constitutional protections at stake, complete transparency with respect to stop-and-frisk is vital to build and maintain the trust and cooperation of the communities served by the NYPD. The merits of NYPD's law enforcement practices—both for and against—deserve to be litigated in a neutral forum and evaluated under well-established legal standards. Those aggrieved by the NYPD's law enforcement practices should have an opportunity to publicly raise their grievances and present an effective, less discriminatory alternative. Int. No. 1080's private right of action provides the means for such an evaluation.

Accordingly, we urge that Int. No. 1080 be adopted.

June 2013

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use disparate impact "effects test" in fair lending examinations and enforcement actions under the Equal Credit Opportunity Act and Regulation B promulgated thereunder) (last visited June 26, 2013).

[8] *Guardians Ass'n_*, 463 U.S. at 584 (holding that compensatory damages were unavailable under disparate impact regulations under Title VI regulations).

[9] *See Alexander v. Sandoval*, 532 U.S. 275 (2001).

[10] *See* Intro 800-A § 4(a)(2)(b).

[11] *Id*.

[12] *See*, *e.g.*, Statement of the New York City Bar Association Concerning the NYPD's Stop-and-Frisk Practices (April 30, 2009), *available at* http://www.nycbar.org/pdf/report/NYLit_2508504_1.pdf (last visited June 26, 2013).