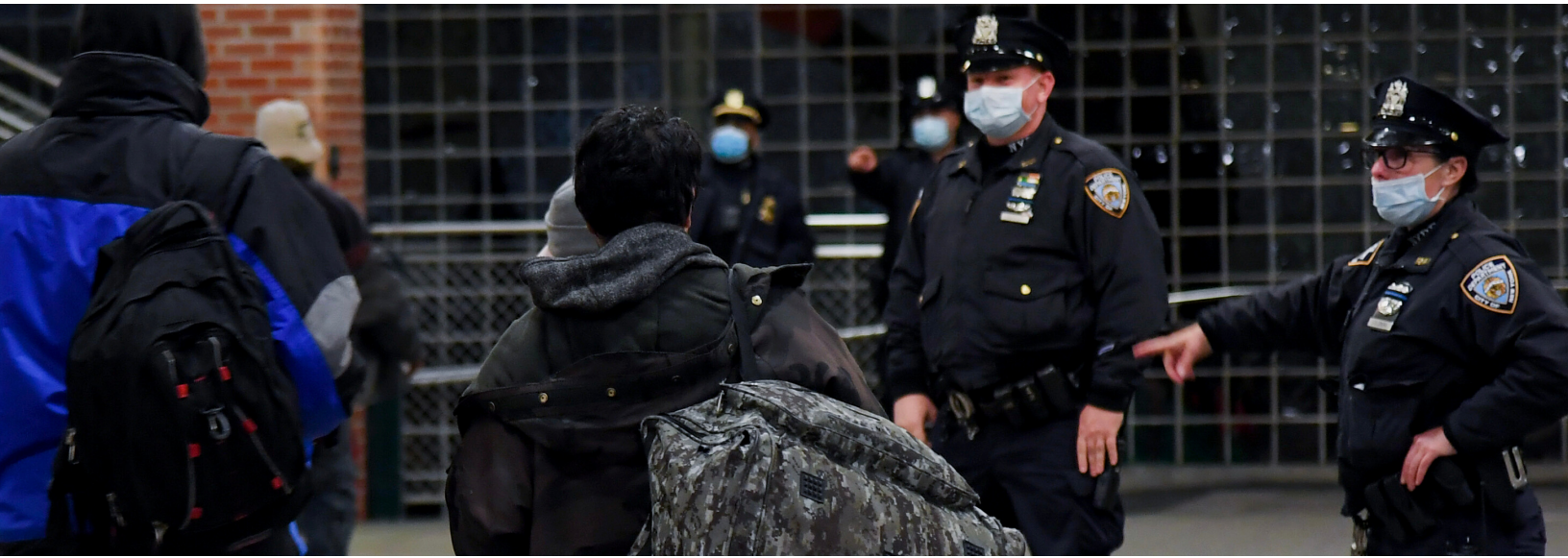


STAY-AT-HOME AND SOCIAL DISTANCING ENFORCEMENT

FOR COVID-19

In response to COVID-19, almost every state has issued some form of stay-at-home or social distancing order. Though police are responsible for enforcing these orders, the guidance on how to do so is often unclear, and in some cases, the rules themselves even conflict.

This document, vetted with community organizers, academic experts, and law enforcement officials, compiles best practices for state, municipal, and policing leaders as they draft and enforce these orders.



In response to COVID-19, almost every state has issued some form of stay-at-home or social distancing order. Governors and mayors are [relying on police for enforcement](#) of these orders. But guidance for police too often has been unclear. In some places, [state and local rules conflict](#). In others, official messages vary: [New York's Mayor instructed police](#) "to proceed immediately to summons or even arrest those who gather in large groups" while the [Brooklyn District Attorney recommended](#) that enforcement "consist of distributing masks, gloves, [and] sanitizers."

Enforcement is a double-edged sword. On the one hand, social distancing is essential to getting the pandemic under control. On the other hand, enforcement poses its own risks. It involves physical interactions that can spread the virus to the public and police; fines can be devastating, especially in an environment of mass unemployment; and there is already [evidence of arbitrary and discriminatory enforcement](#).

It's essential to get this right. The following is a compilation of best practices for state, municipal, and policing leaders as they draft and enforce these orders.

I. Drafting Public Health or Executive Orders

Act within Legal Authority: Orders lacking in legal authority are invalid; orders based on uncertain or dubious authority will [lead to litigation](#). Executives in most states have emergency powers or quarantine laws that apply to public health emergencies. Orders should identify their legal basis clearly. Preferably, legislative bodies should authorize such orders explicitly.

Rules Should Be Clear, and Use Specific, Consistent Language: Unclear laws may violate constitutional Due Process rights: they give neither the public nor the police who must enforce them sufficient notice about what the rules are exactly.¹ "Social distancing" is entirely new for most people. Rules are [changing rapidly](#) and vary widely across jurisdictions, [leading to real confusion](#). It is important that rules be written such that the police can enforce them equitably.

Social distancing rules should be *specific* about these things:

Who is covered: Who exactly is permitted to be out together, or must stay six feet apart? Can individuals who co-habit travel outside together, or just family members?

¹ See *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) ("[A] law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits."); *Connolly v. General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process . . .").

Who is exempted: Will there be exemptions, such as for displaced or unsheltered individuals who may not have the means to comply with such requirements as mask orders?

What is permitted/prohibited: Will shopping for essentials be the only permissible exception? What about exercise or enjoying public parks? [D.C.'s order defines this well](#), providing both that "[o]utdoor activities should not be conducted with persons other than those from one's own household" and including examples of the types of activities permitted, like walking, biking, golfing, and gardening.

Orders should avoid using vague language like "reasonably" or "when possible," particularly for rules that are subject to immediate enforcement. Although this language does provide flexibility as conditions change, it also can mean vastly different things to different people and invite arbitrary or discriminatory enforcement. New York's mask order [requires face coverings](#) "when in a public place and unable to maintain, or when not maintaining, social distance," a standard which has led to many questions, including the clarification that people may be required to have masks at crosswalks but not less-busy sidewalks.

In contrast, San Bernardino County, CA, simply requires [all persons to wear face coverings](#) "when they leave their homes or places of residence." The clarity of the order makes it easier to explain to the public, and for the public to comply.

Avoid Encroaching on Protected Liberties: Stay-at-home orders can inhibit vital liberties, like assembling for a protest or a religious ceremony. Protests are an important and complicated issue; groups across the country are [organizing against](#) and [in support of](#) social distancing orders, and others are holding demonstrations for related issues from [prison conditions](#) to rent strikes. Stay-at-home orders and enforcement cannot treat protesters differently based on the content of their speech. At the same time, free speech rights are subject to reasonable and neutral "time, place, and manner" restrictions.²

Governments should work closely with public health officials and police to determine how best to permit people to assemble for events such as religious ceremonies or protests, and thoughtfully balance individual liberties with public health requirements. Permits should include clear social distancing requirements and details on how they will be enforced.

Police should avoid enforcement when protesters are making a good faith effort to stay within the bounds of the orders, for instance by [standing six feet apart](#) or by [protesting in vehicles](#). Willful violation of social distancing orders is different—large gatherings of people in close quarters without masks is the very conduct most likely to spread the virus. Even in those cases, however, police still should be cautious about enforcement that increases risks, such as mass custodial arrests.

II. Enforcing Social Distancing Orders

Give Police and the Public Clear Guidance about Social Distancing Enforcement: Agencies should provide officers with clear, specific guidance about what conduct constitutes a violation of social distancing laws, to whom these laws apply, and how the officer is expected to respond to various violations. For example, two people in a pharmacy failing to social distance may warrant a different response than a crowd of twelve individuals tailgating in a parking lot. Officers need clear guidance as to how to distinguish between violations and exceptions (e.g., how to determine if individuals in close proximity share a household). Agencies also should share clear guidance about enforcement with the public and [regularly address community questions](#).

Aim for Voluntary Compliance: Enforcement puts officers and the public at risk. Those flaunting lawful social distancing policies should be subject to enforcement, but police should assume good faith unless it is patently obvious something else is going on. Agencies are encouraged to avoid custodial arrests absent offenses that involve imminent public safety threats such as harm to others, and instead approach infractions through education and awareness.

² See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so.").

Even issuing citations should be considered carefully given the catastrophic financial impact of the pandemic on many individuals and families. Some jurisdictions are choosing to [hand out masks and brochures](#) rather than tickets. Officers should speak to people from a safe distance and lead with education, trying to achieve voluntary compliance.

Re-think Traditional Police Practices: Policing agencies should adjust priorities and practices based on the best available data. They should minimize non-essential activities that increase the risk of exposure to officers and the public. And they should ensure that limited resources are appropriately deployed. Crime trends across the country are changing, and prior patrol strategies may not be relevant now. For example, former “hot spots” may see lower crime rates now, but traditionally low crime areas may require increased presence for social distancing enforcement. Relying on past crime data and traditional deployment strategies will likely not be effective and may lead to discriminatory enforcement. Absent an imminent public safety threat, consider alternative responses to non-violent, non-emergency violations. For example, the Burlington, NC, Patrol Training Bulletin instructs officers [not to place themselves or others at risk](#) to make arrests for low-level crimes and misdemeanors, and cautions officers to consider the financial hardship of community members during this time before issuing a ticket.

Be Clear on What and How the Public Should Be Reporting: Many cities and states have encouraged people to [call the police](#) or a [dedicated line to report](#) people they see who are not social distancing, and some agencies are leveraging on-line reporting systems. Campaigns urging public reporting of violations should provide clear guidance and include examples of what to report and through what mechanism. Should people report neighbors having guests to their home? Someone not wearing a mask? Joggers running too closely to pedestrians? Encouraging public reports without explicit guidelines [risks discriminatory enforcement](#) and threatens to overwhelm 911 and the police.

Cities should refer complaints to public health departments rather than directly to police when appropriate. San Francisco’s guidance [differentiates between calls to 311](#), which are referred to city agencies, and calls to SFPD non-emergency dispatch, with examples of the conduct that should be reported to each. In contrast, New York State has encouraged broad reporting, including the [use of a form](#) that offers an open field to describe the violation. In more than half of over over [14,000 social distancing complaints](#) to 311, NYPD officers “either observed no violation, found that those responsible for the problem had gone or determined that no action was necessary.”

Avoid Discriminatory Enforcement: There is [evidence that enforcement](#) is falling more heavily on [people of color](#). Violations of distancing rules appear widespread, but when laws are broad, enforcement often [disproportionately impacts](#) people of color or low-income neighborhoods. All agencies should keep and make public relevant data and demographic information on stops and arrests, including for social distancing enforcement.

Mask orders present a real concern. Black men in particular [have been profiled](#) for wearing required face masks. Minorities, especially black people, also have been [subject to violent enforcement](#). Neither is acceptable. Agency guidance on mask orders should be clear and include information on the potential for bias with respect to masks. Any enforcement of mask requirements should be included in the data mentioned above, and prioritize education, mask distribution, and voluntary compliance.

Unsheltered individuals also have been [targeted disproportionately for enforcement](#), and many orders do not take into account the impossibility of asking unsheltered people to “stay at home.” Policing agencies should not be [clearing encampments](#) or [pushing people to crowded shelters](#) in a pandemic. Police should be working with public health agencies, social services, and municipalities to develop comprehensive strategies to ensure the safety of unsheltered individuals.