

**NEW YORK ADVISORY COMMITTEE
U.S. COMMISSION ON CIVIL RIGHTS**

POLICE PRACTICES AND ACCOUNTABILITY IN NEW YORK CITY

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**Statement of Darius Charney, Senior Staff Attorney
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Good morning. My name is Darius Charney. I am a senior staff attorney with the Center for Constitutional Rights (CCR). I would like to thank the New York Advisory Committee for affording me the opportunity to offer my and my organization's perspective on one of the most critical but confounding pieces of the police reform puzzle in New York City and nationally: how to hold police departments and their officers accountable for practicing fair, unbiased, constitutional policing.

Founded in 1966 by attorneys representing civil rights activists in the American South, CCR is a national legal and educational organization dedicated to advancing and protecting rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. For the past two decades, CCR has worked closely with our many partners in the New York City police accountability movement to challenge abusive and discriminatory practices of the New York City Police Department (NYPD). For the past nine years, I have served as lead counsel in *Floyd v. City of New York*, a federal civil rights class action challenging the constitutionality of the NYPD's stop, question and frisk practices. In a landmark 2013 ruling, the United States

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District Court in Manhattan found the NYPD liable for a widespread practice of unconstitutional and racially discriminatory stop and frisks, ordered broad reforms to the Department's stop-and-frisk policies, training and accountability systems, and appointed a federal monitor to oversee the development and implementation of these reforms.¹ We are two-and-a-half years in to the *Floyd* monitorship, and while some real progress has been made, much work remains to be done, particularly in the area of accountability-related reforms.²

Through our *Floyd* remedial work, as well as five years of research on Department of Justice and other police reform litigation and advocacy efforts around the country³ and in-depth consultations with leading national police accountability experts,⁴ CCR has developed a wealth of institutional knowledge about the necessary elements of an effective internal accountability system for the NYPD, and it is on those elements that I will focus my remarks today. In doing so, I do not mean to ignore the role that accountability mechanisms external to the NYPD, such as the CCRB, the NYPD Inspector General, the City Council, the courts, and the police reform advocacy community, can and must play in ensuring fair, impartial and constitutional policing by the NYPD, and indeed the internal accountability measures I will discuss must work in tandem

¹ Learn more about *Floyd v. the City of New York* at www.ccrjustice.org/floyd. See also *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (“Liability Opinion”); *Floyd v. City of New York*, 959 F.Supp.2d 668 (S.D.N.Y. 2013) (“Remedial Order”).

² See, e.g., Second Report of the Independent Monitor in *Floyd v. City of New York*, 08 Civ. 1034, Dkt # 523 (Feb. 16, 2016); Fourth Report of the Independent Monitor in *Floyd v. City of New York*, 08 Civ. 1034, Dkt # 536 (Nov. 18, 2016).

³ See Center for Constitutional Rights, *Advocating for Justice: Case Studies in Combating Discriminatory Policing* (August 2011), available at http://ccrjustice.org/sites/default/files/assets/files/CCR_Racial_Profiling_White_Paper.pdf

⁴ These include Professor Samuel Walker of the University of Nebraska at Omaha, who served as a testifying expert in the *Floyd* litigation, Brian Buchner, former president of the National Association for Civilian Oversight of Law Enforcement (NACOLE), and Michael Gennaco, founder the OIR Group and former chief counsel for the Office of Independent Review for the Los Angeles County Sheriff's Department.

with these external sources to be truly effective. But you have heard and will hear other panelists speak on these external accountability components. I will instead talk about the changes that the NYPD itself can and must make to increase its and its officers' accountability to the residents of New York City.

ELEMENTS OF AN EFFECTIVE INTERNAL ACCOUNTABILITY SYSTEM FOR THE NYPD

The goal of an effective internal accountability system is to create an organizational culture, extending through all levels of the law enforcement agency, from senior management down to the line officers, which values and incentivizes fair, impartial and constitutional policing.⁵ No single, isolated reform measure can accomplish this goal. What is required instead is a comprehensive reform package that includes the following five elements, each of which supports and depends upon the other four: (1) effective front line supervision of the constitutionality and fairness of officer conduct on the street, (2) performance evaluation measures that prioritize and reward the legality and fairness of officer enforcement activity over quantity, (3) a comprehensive early warning system to identify those officers most at risk of engaging in unconstitutional and/or biased policing, (4) an effective system for disciplining officers found to have committed misconduct, and (5) robust and comprehensive data collection

⁵ See, e.g., U.S. Department of Justice, *Principles for Promoting Police Integrity: Examples of Promising Police Practices and Policies* (January 2001), available at <https://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>; Samuel Walker, *The New World of Police Accountability* 14-15 (Sage Publications: 2005); Trent Ikerd and Samuel Walker, *Making Police Reforms Endure: The Keys for Success* (U.S. Department of Justice, COPS 2010), available at <https://ric-zai-inc.com/Publications/cops-p176-pub.pdf>.

and analysis.⁶ Since other panelists will discuss data in some depth, I will focus on the first four elements. While the NYPD has taken some initial positive steps in the last few years on each of the four, there is much more the Department can and must do on each element before its internal accountability system can operate effectively.

A. Supervision

There is wide consensus among police executives, researchers, and other policing experts that front line supervisors- sergeants, lieutenants, precinct commanders- are the key to institutionalizing unbiased and constitutional policing in the NYPD or any police department.⁷ Former NYPD Chief of Department Joseph Esposito testified during the Floyd trial in 2013 that he relied on these supervisors as the “‘main. . . way of determining’ whether NYPD officers were conducting stops-and-frisks in accordance with [the constitution and the department’s policy against racial profiling]”,⁸ while the *Floyd* federal monitor has emphasized in his recent public status reports that successful department-wide implementation of stop-and-frisk reforms is “[u]ltimately. . . a challenge of leadership, particularly for those who supervise officers engaged day-to-day in enforcement activities - sergeants, their immediate supervisors, and the precinct and unit commanders who set the tone for those under them.”⁹ As the only Department personnel who have daily direct contact with line officers, these supervisors are best positioned to communicate and reinforce the principles of constitutional and unbiased policing included in NYPD written policies and training materials, to assess whether line officers are applying those

⁶ See U.S Department of Justice, *Principles for Promoting Police Integrity*, *supra* note 5; Ikerd and Walker, *supra* note 5.

⁷ See Walker, *The New World of Police Accountability*, *supra* note 5, at 173.

⁸ See *Floyd* Liability Opinion, *supra* note 1, 959 F.Supp.2d at at 610 n. 329

⁹ See Second Report of the Independent Monitor, *supra* note 2, at 4.

principles in practice on the street, and to take action when those officers are not. Yet, as the *Floyd* Court found, NYPD supervisors largely failed for many years to perform these supervisory responsibilities, which was a primary cause of the Department's widespread and longstanding practice of suspicionless and racially discriminatory stops-and-frisks.¹⁰

As part of the court-ordered reforms in *Floyd*, the NYPD has written into its Patrol Guide an explicit requirement that supervisors assess the constitutionality of their subordinates' stop-and-frisk activity. Yet, more than two years into the remedial process, it still does not appear that NYPD supervisors are actually doing so. A recent internal audit of more than 500 stops recorded by NYPD officers found that more than 1 in 4 of the recorded stops lacked reasonable suspicion and that, in every one of those instances, the supervisor had nevertheless signed off and approved the officer's stop paperwork without noting any problems with the stops.¹¹

There are many possible explanations for these continued supervisory failures, which I am happy to discuss in the Q&A portion of this panel, but one thing is certain. Unless and until the NYPD's first line supervisors are willing and able to do their jobs properly, constitutional and unbiased policing will not be the norm on the streets of New York City. Thus, the NYPD must make improving the quality of its first-line supervision of officers a priority over the next several years.

B. Performance Evaluations

Reforming its officer performance evaluation systems to reward and incentivize fair, legal and respectful law enforcement activity is also critical to institutionalizing unbiased and constitutional policing throughout the NYPD. As the *Floyd* court found, the NYPD's prior

¹⁰ *Floyd* Liability Opinion, *supra* note 1, 959 F.Supp.2d at 611-13.

¹¹ See Second Report of the Independent Monitor, *supra* note 2, at 19.

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performance evaluation system, known as the Quest for Excellence, which assessed officers' performance largely on the quantity of their stop, arrest and summons activity -and even required supervisors to set quantitative "performance goals" for such activity- while giving no attention to the constitutionality of that activity, was part of a "predictable formula for producing unjustified stops."¹² In addition, Professor Philip Goff of John Jay College, one of the nation's leading experts on racial bias in policing, has noted that whenever officers are encouraged to meet numerical arrest goals, it will likely promote stereotype-based policing.¹³

Earlier this year, the NYPD launched the first component of its revamped officer evaluation system, which no longer tracks the number of stops-and-frisks that officers conduct but does examine whether and how often any of their stops lacked reasonable suspicion. While this is an important step in the right direction, the officer evaluation system still tracks the quantity of an officer's arrest and summons activity, compares that number to the quantity of arrests and summonses conducted by other officers in the same unit, and rewards officer with "above-average" activity, while at the same time making no specific mention of the legality of those arrests and summonses. Thus, NYPD officers are still being pushed to prioritize arrest and summons numbers without regard to legality in order to advance in the Department, which is further illustrated by the recent class action lawsuit filed by NYPD officers of color alleging the continued existence of summons and arrest quotas throughout the Department.¹⁴ Pressure to

¹² *Floyd Liability Opinion*, *supra* note 1, 959 F.Supp.2d at 600-02.

¹³ Ian Urbina, "Blacks are Singled Out for Marijuana Arrests, Federal Data Suggests," *The New York Times*, June 3, 2013, available at www.nytimes.com/2013/6/04/us/marijuana-arrests-four-times-as-likely-for-blacks.html.

¹⁴ Selim Algar and Josh Saul, "NYPD Set Arrest Quotas for Minority Officers in Their Own Communities: Suit," *The New York Post*, September 1, 2015, available at <http://nypost.com/2015/09/01/cop-suing-over-minority-arrest-quotas-says-he-faced-retaliation/>

increase summons numbers is very concerning, not only because of the well-documented racial disparities in the NYPD's quality of life enforcement efforts, but because, like stop-and-frisk, the constitutionality of the NYPD's summons practices was challenged in a recently settled federal class action lawsuit, *Stinson v. City of New York*.¹⁵

Accordingly, the NYPD should eliminate all numerical measures of enforcement activity from its officer performance evaluation system. To the extent there is some utility to maintaining these numerical measures, they must be coupled with assessments of the legality of all enforcement activity. In addition, the NYPD Inspector General should conduct an independent investigation into whether any commands, units, or individual NYPD supervisors are currently imposing numerical arrest, summons, and/or stop-and-frisk quotas or performance goals on their subordinate officers.

C. Early Warning System

There is emerging consensus among police accountability experts that a comprehensive early warning or early intervention system (EIS) that integrates data on a wide variety of officer performance indicators can be a powerful proactive accountability tool to identify and intervene with those NYPD officers most at risk of engaging in illegal, abusive, discriminatory policing.¹⁶

¹⁵ *Stinson v. City of New York*, 282 F.R.D. 360 (S.D.N.Y. 2012); Stephen Rex Brown, "City Agrees to Settle Class Action over Bogus Summonses for \$75 Million," The New York Daily News, Jan. 23, 2017, available at <http://www.nydailynews.com/new-york/city-agrees-settle-suit-bogus-summonses-75-million-article-1.2953546>

¹⁶ See, e.g., Samuel Walker, *Early Intervention Systems for Law Enforcement Agencies: A Planning and Management Guide* (U.S. Department of Justice, COPS 2003), available at https://cops.usdoj.gov/html/cd_rom/exec_strategies/pubs/1932582266.pdf; Samuel Walker, Geoffrey P. Alpert, and Dennis J. Kenney, *Early Warning Systems: Responding to the Problem Police Officer* (U.S. Department of Justice, National Institute of Justice July 2001), available at <https://www.ncjrs.gov/pdffiles1/nij/188565.pdf>

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Here again, while the NYPD has made some recent improvements, there are still major shortcomings in its early warning system that prevent it from effectively preventing or at least reducing unconstitutional and biased police conduct.

The NYPD has recently launched its RAILS electronic database, which integrates in one place data on several officer performance indicators that can then be reviewed by front line supervisors and the NYPD's Performance Analysis section to determine which officers are "at-risk" of bad performance or misconduct and should be placed in the Department's performance monitoring program.¹⁷ While this data integration is no doubt a step in the right direction, RAILS currently only includes six performance indicators: formal civilian misconduct complaints against an officer, lawsuits filed against an officer, use of force incidents, firearms discharges, bad performance evaluations and, prior disciplinary action taken against the officer. This list is much too narrow. Complaints and lawsuits are not an accurate measure of an officer's likelihood to commit misconduct because many civilians do not trust or understand the CCRB process enough to report misconduct, and they often lack the resources to file a lawsuit when an officer has violated their rights. Similarly, use of force and firearms discharges cover only the most serious forms of potentially unconstitutional and abusive police conduct, which can and more often includes false arrests, and illegal stops and searches.

Professor Samuel Walker of the University of Nebraska at Omaha, the leading national expert on police early warning systems, has found in his research that the more effective EIS systems include a much broader array of performance indicators, including but not limited to:

¹⁷ The Office of Inspector General for the NYPD, *Using Data from Lawsuits and Legal Claims to Improve Policing* at 15-16 (April 2015), available at <http://www1.nyc.gov/assets/oignypd/downloads/pdf/2015-04-20-litigation-data-report.pdf>

data on officer stop-and-frisk activity, data on an officer's disorderly conduct, resisting arrest and obstruction of government administration arrests and summonses, and data on adverse criminal court rulings against an officer on suppression and credibility issues.¹⁸ The NYPD can and should incorporate these additional indicators into its RAILS system immediately.

In addition, Professor Walker has noted that an EIS system can also identify when an officer may be engaging in racial profiling by comparing the data on the racial demographics of the persons that officer has stopped-and frisked with the racial demographics of the persons stopped by similarly-situated officers, a process known as internal benchmarking or peer officer analysis.¹⁹ The NYPD already collects this data on officer stop activity, and in 2007 the RAND Corporation provided the NYPD with software and a logarithm that enabled it to perform this sort of internal benchmarking analysis. However, after running the analysis twice and identifying 15 officers who appeared to have overstopped minorities in 2006 and 23 officers who appeared to have done so in 2007, the NYPD did not intervene at all with those officers, nor has it ever run the internal benchmarking again.²⁰ The NYPD can and should re-start its internal benchmarking analysis of its stop-and-frisk data to identify officers who may be engaging in biased policing.

D. Officer Discipline

Last but certainly not least is the NYPD's system for disciplining officers whom the CCRB has found have committed misconduct. While the CCRB has the authority to investigate all civilian complaints of officer misconduct involving force, abuse of authority, discourtesy or

¹⁸ Walker, *The New World of Police Accountability*, *supra* note 5, at 108-09; Walker *et al.*, *supra* note 16, at 27-28.

¹⁹ Walker, *The New World of Police Accountability*, *supra* note 5, at 112-14.

²⁰ See *Floyd Liability Opinion*, *supra* note 1, at 624 n. 429; Gregory Ridgeway and John MacDonald, *Analysis of Racial Disparities in the New York Police Department's Stop, Question, and Frisk Practices* 21-30, 46 (RAND Corp: 2007), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf

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offensive language (FADO), New York law gives the NYPD commissioner exclusive authority to discipline officers found by the CCRB to have committed one of these four types of misconduct.²¹ The CCRB itself can do no more than recommend disciplinary penalties and, in cases where the CCRB has recommended formal disciplinary charges against the subject officer, prosecute those charges in administrative NYPD disciplinary trials before the NYPD's Deputy Commissioner of Trials.²² Final decisions on whether and what disciplinary penalty to impose on an officer always lies with the Police Commissioner.

Thus, it is critical both in terms of officer accountability and the public's faith in the CCRB complaint process that the NYPD meaningfully discipline those officers who are the subject of a civilian misconduct complaint substantiated by the CCRB.²³ Unfortunately, however, as has been widely reported by the local media, the NYPD Inspector General, and the CCRB, the NYPD often either fails to discipline at all or departs downward from the penalty recommendations of the CCRB in substantiated cases.²⁴ Moreover, the federal court in *Floyd*

²¹ See N.Y.C. Admin. Code § 14-115; N.Y. City Charter §§ 434, 440; *Montella v. Bratton*, 93 N.Y.2d 424, 430 (1999).

²² See Memorandum of Understanding between the CCRB and NYPD Concerning the Processing of Substantiated Complaints, dated April 2, 2012, available at

http://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/apu_mou.pdf;

²³ See U.S. Department of Justice, *Principles for Promoting Police Integrity*, *supra* note 5, at 9

²⁴ See, e.g., Robert Lewis, "NYPD Disciplinary Problems Linked to a 'Failure of Accountability,'" *National Public Radio: Morning Edition*, January 16, 2015, available at

<http://www.npr.org/2015/01/16/369617159/nypd-disciplinary-problems-linked-to-a-failure-of-accountability>; Civilian Complaint Review Board, *2015 Annual Report* 32, 36-37, available at

http://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2015_annual.pdf;

Civilian Complaint Review Board, *2016 Semi-Annual Report: January-June* 23, 27-28, available at http://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2016_semi-annual.pdf;

Civilian Complaint Review Board, *A Mutated Rule: Lack of Enforcement in the Face of Persistent Chokehold Complaints in New York City* (Oct. 7, 2014), available at

http://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20141007_chokehold-study.pdf; Office of the Inspector General for the NYPD, *Observations on Accountability and Transparency in Ten*

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found that these disciplinary failures on the part of the NYPD were a significant contributor to the NYPD's widespread practice of unconstitutional and racially discriminatory stops-and-frisks,²⁵ and it ordered several changes to the NYPD's procedures for imposing officer discipline in substantiated CCRB cases, including (1) giving increased deference to the CCRB's credibility determinations, (2) using an evidentiary standard that does not automatically give more weight to the subject officer's claims than the complainant's, and (3) no automatic requirement that the complainant supply corroborating physical evidence.²⁶

However, two-and-half years into the *Floyd* Remedial process, it is not yet clear that the NYPD has taken any steps to implement these changes. In December 2014, the NYPD and the CCRB agreed to establish a "reconsideration process" under which the NYPD can, for the first time, formally request that the CCRB reconsider and change a substantiated misconduct finding and/or a penalty recommendation with which the NYPD disagrees.²⁷ Thus far, neither the NYPD nor the CCRB has published any rules or formal standards governing when reconsideration may be granted,²⁸ but the CCRB has indicated in its most recent Annual Report that reconsideration may be granted when "there are matters of fact or law which are found to have been overlooked or misapprehended by the deciding [CCRB] panel," an extremely broad and vague standard that the CCRB and NYPD have interpreted to encompass cases where there are "differing views

Chokehold Cases (January 2015), available at http://www1.nyc.gov/assets/oignypd/downloads/pdf/chokehold_report_1-2015.pdf

²⁵ See *Floyd* Liability Opinion, *supra* note 1, 959 F.Supp.2d at 618-20

²⁶ See *Floyd* Remedial Order, *supra* note 1, 959 F.Supp.2d at 684.

²⁷ See CCRB 2015 Annual Report, *supra* note 24, at 37.

²⁸ Proposed regulations were released for public comment in the Spring of 2016, but the public comment period closed on June 10, 2016, and no final regulations have been published.

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between the CCRB and NYPD with respect to . . . witness credibility.”²⁹ Thus, rather than giving deference to the CCRB’s misconduct findings, the reconsideration process makes it easier for the NYPD to question and contest those findings, which not only decreases the likelihood that officers will be held accountable for unconstitutional and discriminatory policing, but severely undermines the CCRB’s independence from the NYPD and legitimacy in the eyes of the public. Accordingly, CCR calls for the immediate repeal of the reconsideration process.

Finally, compounding all of the aforementioned problems with the NYPD’s officer disciplinary system is the complete lack of transparency in the system itself. At present, the NYPD does not release its disciplinary determinations for officers who are the subjects of substantiated CCRB complaints to the public, not even to the complainants themselves. Thus, as has been recently reported in the media, the mother of Ramarley Graham, the unarmed black teenager who was shot and killed in his grandmother’s home in 2012 by NYPD Officer Richard Haste, has yet to learn and the outcome of the internal administrative disciplinary trial for the NYPD officer who killed her son, which concluded several months ago.³⁰ It goes without saying that this situation severely undermines the public’s trust and faith in the NYPD and the civilian complaint process and makes it difficult if not impossible to know if the NYPD is actually holding officers who have committed misconduct accountable.

This problem is caused both by New York State law and New York City’s overly-broad interpretation of state law. Section 50-a of the New York State Civil Rights law, which prohibits public disclosure without a court order of all police officer “personnel records used to evaluate

²⁹ See CCRB 2015 Annual Report, *supra* note 24 at 37.

³⁰ Robert Lewis, “NYPD Backtracks on Releasing Disciplinary Info,” *WNYC News*, January 25, 2017, available at <http://wnyc.org/story/nypd-backtracks-releasing-disciplinary-info/>

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performance,” which the New York Courts have ruled includes an officer’s disciplinary records, is among the most restrictive laws of its kind in the nation.³¹ It is long overdue for this statute to be repealed or at least significantly amended.

However, the New York City Law Department under the deBlasio administration has interpreted Section 50-A so broadly as to prohibit public disclosure of NYPD Personnel Orders, which simply summarize the outcomes of Departmental administrative disciplinary trials- even though the trials themselves are open to the public- reversing a four decade practice of publicly releasing such orders.³² Without this information, it is impossible for the public or any of the external accountability entities I mentioned earlier to evaluate whether the NYPD is imposing meaningful discipline in substantiated cases of officer misconduct. Accordingly, we recommend that New York City at a minimum return to its narrower, more reasonable interpretation of Section 50-A.

I would like to thank the committee again for affording me the opportunity to speak today, and I am happy to answer any questions you may have.

³¹ See N.Y. Civ. Rts Law § 50-A(1); Robert Lewis, “New York Leads in Shielding Police Misconduct,” *WNYC News*, October 15, 2015, available at <http://www.nyc.org/story/new-york-leads-shielding-police-misconduct/>

³² See Lewis, *supra* note 30; *Luongo v. Records Access Officer, NYPD*, Index No. 160232/2016 (N.Y. Co. Sup. Ct.) (pending)