

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

**NEW YORK
CITY BAR**

**REPORT IN SUPPORT OF FEDERAL
POLICE REFORM EFFORTS:
THE GEORGE FLOYD JUSTICE IN
POLICING ACT AND
JUSTICE IN POLICING ACT**

**Federal Courts Committee
Civil Rights Committee
Corrections & Community Reentry Committee
Criminal Justice Operations Committee**

REISSUED FEBRUARY 2021

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036
212.382.6600 | www.nycbar.org

TABLE OF CONTENTS

I. POLICE ACCOUNTABILITY (TITLE I)..... 2

A. Holding Police Accountable In The Courts (Title I, Subtitle A)..... 2

 1. *Section 101: federal criminal police misconduct statute* 2

 2. *Section 102: qualified immunity reform* 3

 a. The Qualified Immunity Defense 4

 b. Impact of the Qualified Immunity Doctrine and Reasons for Reform 5

 3. *Sections 103 and 104: the role of state attorneys general* 7

II. POLICING TRANSPARENCY THROUGH DATA (TITLE II)..... 7

A. National Police Misconduct Registry (Title II, Subtitle A) 7

 1. *Section 201(b): contents of registry and disaggregation of complaints*..... 8

 2. *Section 201(b)(1): contents of registry and nature of complaints included* 9

 3. *Section 201(b)(5): contents of registry and records of lawsuits and settlements* 10

 4. *Section 201(e)(1): public availability of registry*..... 10

B. Police Reporting Information, Data, and Evidence Act of 2020 (“PRIDE Act”)(Title II, Subtitle B)..... 10

 1. *Section 223: Use of Force Reporting to the Attorney General* 10

 2. *Section 224: Technical Assistance Grants to Law Enforcement* 11

III. IMPROVING POLICE TRAINING AND POLICIES (TITLE III) 11

A. End Racial and Religious Profiling Act of 2020 (Title III, Subtitle A) 11

B. Additional Reforms Relating to Policing (Part IV, Subtitle B) 13

C. Law Enforcement Body Cameras (Part IV, Subtitle C)..... 14

IV. CLOSING THE LAW ENFORCEMENT LOOPHOLE (TITLE IV) 15

V. THE ROLE OF BRYCE JAG AND COPS GRANTS IN THE FLOYD ACT 15

VI. CONCLUSION 17

APPENDIX: RECOMMENDED REVISIONS TO THE FLOYD ACT..... 19



**REPORT ON LEGISLATION BY
THE FEDERAL COURTS COMMITTEE, CIVIL RIGHTS COMMITTEE,
CORRECTIONS & COMMUNITY REENTRY COMMITTEE, AND
CRIMINAL JUSTICE OPERATIONS COMMITTEE**

H.R. 1280

Rep. Bass

AN ACT to address a wide range of policies and issues regarding policing practices and law enforcement accountability. It includes measures to increase accountability for law enforcement misconduct, to enhance transparency and data collection, and to eliminate discriminatory policing practices (117th Congress (2021-2022)).

George Floyd Justice in Policing Act of 2021

S.3912

Sen. Booker

AN ACT to hold law enforcement accountable for misconduct in court, improve transparency through data collection, and reform police training and policies (116th Congress (2019-2020)).

Justice in Policing Act of 2020

THIS LEGISLATION IS SUPPORTED WITH RECOMMENDATIONS

I. INTRODUCTION

In the aftermath of the killing of George Floyd by Minneapolis police officers, a July 2020 Pew Research study found that over half of Americans support some kind of police reform.¹ The Black Lives Matter movement and the many public protests across the country have further demonstrated that reform is necessary in order to deter and punish unlawful police violence. In reaction to the emerging consensus that the status quo is unacceptable, members of the House of Representatives and Senate together introduced respective police reform bills on June 8, 2020.² The George Floyd Justice in Policing Act of 2020, H.R. 7120 (the “Floyd Act”) was amended and approved by the Judiciary Committee on June 19, 2020 and then passed by the full House of

¹ Pew Research Center, “Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct,” (July 9, 2020) (stating that more than 75% of Americans support reform proposals to create a police misconduct registry, require de-escalation training, and to make it a crime for police to use chokeholds; more than 65% support qualified immunity reform), <https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/> (All websites cited in this report were last visited on January 7, 2020.)

² Press Release: Senators Booker and Harris, CBC Chair Bass, House Judiciary Chair Nadler Introduce Sweeping Policing Bill, June 9, 2020, <https://www.booker.senate.gov/news/press/senators-booker-and-harris-cbc-chair-bass-house-judiciary-chair-nadler-introduce-sweeping-policing-bill>.

Representatives by a 236-181 vote on June 25, 2020. It has since been reintroduced as H.R. 1280.³ The Justice in Policing Act, S.3912 was referred to the Senate Judiciary Committee, where it was not advanced; it has not been reintroduced as of the issuance of this report.⁴

The New York City Bar Association (“the City Bar”) has previously published policy recommendations on law enforcement reform and now offers its recommendation on the Floyd Act.⁵ While we have not expressly addressed the Justice In Policing Act in this report, the bill contains many functionally identical provisions to the Floyd Act and insofar as the bill language is the same, our support and suggestions with respect to the Floyd Act apply equally to S.3912.

In this report, the City Bar recommends passage of the Floyd Act, with certain important revisions proposed below.⁶ An outline of our recommended revisions is appended to this report. In order to explain our support for the bill’s passage, we review and analyze the most notable aspects of the bill.

This report is divided into five sections. Section I describes how the Floyd Act would remove barriers to prosecution of law enforcement officers for civil rights violations, particularly by changing the relevant *mens rea* standard and reforming qualified immunity. Section II sets forth the Floyd Act’s proposal for a police misconduct registry, acknowledges the possible due process concerns associated with registries and explains how to avoid them. Section III deals with proposed measures to combat racial profiling, and Section IV discusses how sexual misconduct by law enforcement officers will be treated under the Floyd Act. Finally, Section V describes the distribution of federal grants as an incentive for state and local governments to comply with the various reporting and law enforcement reform proposals of the Floyd Act.

II. POLICE ACCOUNTABILITY (TITLE I)

A. Holding Police Accountable In The Courts (Title I, Subtitle A)

1. Section 101: federal criminal police misconduct statute

Section 101 of the Floyd Act amends 18 U.S.C. § 242, the criminal statute that allows the prosecution of law enforcement officers who deprive individuals of their civil rights under color of law on the basis of race. In particular, the Floyd Act amendment would change the *mens rea* standard required to succeed in these prosecutions from “willfully” to “knowingly or recklessly.” We support this statutory change—“willfulness” has been read to require proof that the official

³ A copy of H.R. 7120 (2020) is available at <https://www.congress.gov/bill/116th-congress/house-bill/7120>; a copy of H.R. 1280 (2021) is available at <https://www.congress.gov/bill/117th-congress/house-bill/1280>.

⁴ See <https://www.congress.gov/bill/116th-congress/senate-bill/3912>.

⁵ “Police Reform Efforts in New York State and New York City: More to Do,” New York City Bar Association Civil Rights Committee, Corrections and Community Reentry Committee, Criminal Courts Committee, Criminal Justice Operations Committee, New York City Affairs Committee and Pro Bono and Legal Services Committee, (Sept 29, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/additional-police-reform-efforts-ny-abuse-and-violence>.

⁶ This memorandum does not purport to take a position on every aspect of the federal legislation. Rather, we highlight those provisions on which the City Bar committees have a consensus of support and which reflect the spirit of some (but not all) of the positions taken by the City Bar with respect to state and local reform efforts.

acted with a specific intent to deprive a person of their constitutional rights.⁷ Generally speaking, prosecutors are required to prove “willfulness” only with respect to certain regulatory offenses where the criminal nature of a particular act is not readily apparent.⁸ In other words, prosecutors ordinarily do not need to prove that a defendant knew that their conduct was illegal, in contrast to the current status of Section 242.

The “willfulness” requirement of Section 242 is a significant hurdle to prosecutors who might otherwise consider charges for police violence based on the statute.⁹ By changing this statutory *mens rea* requirement, prosecutors will be more readily able to charge police officers with criminal civil rights violations. It will also hold accountable any police officers who violate civil rights while maintaining a heightened *mens rea* requirement for successful prosecution, so that police officers can perform their duties with an appropriate level of protection. Simultaneously, the “knowingly or recklessly” standard maintains a heightened *mens rea* requirement, which will allow police officers to argue they are innocent of wrongdoing because their conduct was not knowing or reckless.¹⁰

2. *Section 102: qualified immunity reform*

Section 102 of Floyd Act amends 42 U.S.C. §1983 by adding language eliminating the doctrine of “qualified immunity” as a defense to civil actions brought against state and local law enforcement officers under Section 1983. The amendment to Section 1983 also would prohibit the qualified immunity defense from being invoked in a civil action brought “under any source of law against a federal investigator or law enforcement officer [.]”¹¹

In particular, the Floyd Act eliminates the following as a defense:

(1) [T]he defendant was acting in good faith or that the defendant believed, reasonably or otherwise, that his or her conduct was lawful at the time when the conduct was committed; or (2) the rights, privileges, or immunities secured by the Constitution and laws were not clearly established at the time of the deprivation by the defendant, or that at such time, the state of the law was otherwise such that the defendant could not reasonably have been expected to know whether his or her conduct was lawful.

⁷ *Screws v. United States*, 325 U.S. 91 (1945).

⁸ *E.g., Ratzlaf v. United States*, 510 U.S. 135 (1994).

⁹ Congressional Research Service, “Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242” (June 15, 2020), <https://crsreports.congress.gov/product/pdf/LSB/LSB10495>.

¹⁰ *Generally Rehaif v. United States*, 139 S. Ct. 2191, 2191 (2019) (describing how a requirement that an act be committed “knowingly” is important to “separat[e] wrongful from innocent acts”).

¹¹ *E.g., Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (providing an implied cause of action for persons whose Fourth Amendment rights were violated). We note that *Bivens* actions remain an implied right of action, subject to the limitations imposed by courts as they construe the individual’s right to enforce their constitutional rights through litigation. It would be preferable for Congress to enact a parallel statute to Section 1983 that establishes a civil remedy for those who today would initiate a *Bivens* action. If this is beyond the scope of the Floyd Act, we urge Congress to consider this in separate, future legislation.

Floyd Act Section 102 quotes language from precedent establishing and interpreting qualified immunity, and makes clear that this defense will no longer apply to lawsuits brought under Section 1983 against law enforcement officers.¹² For the reasons discussed below, we support this proposal.

a. The Qualified Immunity Defense

In order to understand the rationale for Section 102, some context is appropriate. Qualified immunity is not found in the text of Section 1983. Rather, the defense was conceived and refined in a series of U.S. Supreme Court cases beginning with *Harlow v. Fitzgerald*, where the Court envisioned a “defense” that would protect government officials “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known.”¹³ The Court viewed its judicial creation as essential to balance two competing interests: the need to hold officials accountable when they violate the rights of citizens, against the need to protect those officials from “harassment, distraction, and liability when they perform their duties reasonably.”¹⁴ According to the Court, “permitting damages suits against governmental officials can entail substantial social costs, including the risk that fears of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.”¹⁵

While sound in principle, the qualified immunity defense has been interpreted more and more rigidly by the Supreme Court. Because of this interpretation of the qualified immunity defense, it is practically impossible to hold a law enforcement officer accountable for violating the individual rights of a citizen unless a court has previously ruled that the specific actions in question were unconstitutional. If a court has not so ruled, the defense of qualified immunity often protects the law enforcement officer by default, even in some plainly egregious circumstances.¹⁶ Consider, for example, the extreme scenario in *Baxter v. Bracey*, which the Supreme Court recently refused to take up on *certiorari*, prompting a strong dissent from Justice Thomas.¹⁷ In *Baxter*, petitioner asserted that he was already surrendering when a law enforcement officer ordered a police dog to

¹² Unlike some other proposed legislation concerning qualified immunity, it leaves the doctrine in place for other government employees. Compare Floyd Act, Section 102 (referring to “local law enforcement officer” and “Federal investigative or law enforcement officer”) with H.R. 7085 (referring to any defendant in Section 1983 actions).

¹³ 457 U.S. 800, 818 (1982).

¹⁴ *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

¹⁵ *Zigler v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

¹⁶ E.g., *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019) (holding that it was not a clearly established violation of the Fourth Amendment for officers to exceed scope of homeowner’s consent to search by shooting tear gas canisters into the home, causing extensive damage; “it is not obvious, in the absence of a controlling precedent” that this violates the Fourth Amendment), *cert denied* 2020 WL 3146698 (U.S. Jun. 15, 2020); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019) (holding that a child’s right not to be accidentally shot in the leg was not clearly established), *cert. denied*, 2020 WL 3146693 (U.S. Jun. 15, 2020); *Mason v. Faul*, 929 F.3d 762 (5th Cir. 2019) (denying qualified immunity on summary judgment, but affirming trial verdict on qualified immunity where officer shot at individual before and after he fell down, after seeing individual make sudden movements toward a gun in waistband); *Brennan v. Dawson*, 752 Fed. Appx. 276 (6th Cir. 2018) (holding that deputy sheriff violated Fourth Amendment by entering curtilage of defendant’s home without warrant but upholding qualified immunity defense because the limited scope of an “implied license” to enter the curtilage was not clearly established), *cert. denied* 2020 WL 3146681 (U.S. Jun. 15, 2020).

¹⁷ *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (Thomas, J., dissenting). Justice Thomas explicitly wrote in his dissent: “I continue to have strong doubts about our §1983 qualified immunity doctrine.” *Id.* at 1865.

attack and apprehend him. The Circuit Court found that “even if the officers’ conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right.”¹⁸ The Circuit Court essentially demanded, and the Supreme Court did not dispute, that in order to hold this officer accountable under Section 1983 a court must have previously held that ordering a police dog to attack a surrendering suspect constituted excessive force under the Fourth Amendment. As should be apparent, the qualified immunity defense sets too high a bar for most plaintiffs to clear.¹⁹

b. Impact of the Qualified Immunity Doctrine and Reasons for Reform

Eliminating the qualified immunity defense is an important step towards ensuring accountability for police misconduct, promoting racial justice, and providing avenues of relief for civil rights litigants. While there are arguments in favor of retaining the qualified immunity defense, we submit that they are outweighed by the reasons to remove the defense. Indeed, arguments for removing the qualified immunity defense have received support across the ideological spectrum.²⁰

One of the rationales for upholding the qualified immunity defense is that law enforcement personnel will under-enforce the law if they believe that they will be sued for mistakes or even for lawful, appropriate conduct. Without this defense, proponents argue, police officers will be reluctant to enter dangerous situations in which they may need to use force, either in self-defense or to protect members of the public. Police unions and some commentators have claimed that without qualified immunity an officer will stay in his or her car (or not even leave the precinct house) and let a violent situation play out without law enforcement intervention. The Supreme Court took this position in *Harlow*, stating that the “fear of being sued will ‘dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.’”²¹

While this is theoretically a serious concern—no one wants police officers to sit back and allow violent crime due to fear of litigation—it remains a purely theoretical concern. This argument has been contradicted by empirical research. For example, some proponents suggest

¹⁸ *Id.* at 1862.

¹⁹ *E.g.*, *Jamison v. McClendon*, No. 3:16-cv-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. 2020) (holding that “the officer who transformed a short traffic stop into an almost two-hour, life-altering ordeal is entitled to qualified immunity”). There is some variation in how the different federal circuits have interpreted this doctrine, in particular the requirement that the law be clearly established, and not all Circuits have been as restrictive as the decisions in the text could make it seem. *See, e.g.*, *Jones v. Treubig*, 963 F.3d 214, 225–26 (2d Cir. 2020) (holding that “[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury”) (quoting *Terebesi v. Torres*, 764 F.3d 217, 237 (2d Cir. 2014)); *Edrei v. Maguire*, 892 F.3d 525, 540 (2d Cir. 2018) (“But that is like saying police officers who run over people crossing the street illegally can claim immunity simply because we have never addressed a Fourteenth Amendment claim involving jaywalkers.”). That said, the Supreme Court recently denied cert in a series of cases involving qualified immunity, and the matter is too pressing to wait for the Court to decide to revisit the issue. In addition, it seems anomalous to leave this important matter to judges rather than to legislators.

²⁰ *E.g.*, Brief for the Cross Ideological Groups as Amicus Curiae for the Petitioner, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020).

²¹ *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle* 177 F.2d 579 (2d Cir. 1949)).

that, if not protected by qualified immunity, law enforcement officers would be financially responsible for litigation costs, settlements and judgments against them in Section 1983 cases.²² However, studies show that police officers are frequently indemnified by their employers and are not personally financially responsible. One empirical analysis concluded that during the relevant period of study, “governments paid approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement.”²³ This suggests that the primary rationale for qualified immunity does not hold true in practice.²⁴

Proponents of qualified immunity also argue that repeal of the doctrine will lead to a wave of unwarranted litigation against police officers and municipalities, and that the cost of defending against these allegations will be more expensive without the ability to move to dismiss based on qualified immunity. Police departments and officers will be swamped with discovery, having to take officers off the beat to sit for depositions and trial preparation. This argument is similarly unconvincing. Fear of being sued and engaging in discovery, or having officers sit for depositions in which they must justify their actions, will help increase accountability and deter police misconduct. Fear of litigation acts in much the same way in other contexts, such as professional malpractice liability. It also may lead police departments that now fear settlements or verdicts to increase training, improve recruiting and implement policies intended to reduce police violence. Further, those whose constitutional rights have been violated should have the ability to due process, and to seek recompense when they have been deprived of their constitutional rights. Lastly, it is worth noting that eliminating the qualified immunity defense does not mean that all claims against police officers will pass muster, entering discovery and potentially trial. Pleading requirements, proper process, appropriate causes of action—these are just a few of the defenses that exist at early stages of litigation in federal courts, which are well-suited to weed out meritless claims.²⁵ Police departments will not be left defenseless against overwhelming waves of litigation, they will simply have to substantiate their claims for dismissal rather than rely on qualified immunity as a catch-all, overly restrictive shield.

As it stands today, qualified immunity “sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.”²⁶ Qualified immunity exacerbates violations of constitutional rights by allowing officials to avoid accountability. It also removes a

²² *E.g.*, Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 1854 Notre Dame L. Rev. 93 (2018).

²³ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 885 (2014).

²⁴ To be sure, one might question whether the broad availability of indemnification means that removing qualified immunity would do little to disincentivize misconduct from individual officers. *See, e.g.*, Daniel Epps, “Abolishing Qualified Immunity Is Unlikely to Alter Police Behavior,” N.Y. Times (June 16, 2020) (“There are good arguments for getting rid of this immunity, or at least seriously restricting it. But abolishing it is unlikely to change police behavior all that much.”). But indemnification practices tether individual officer misconduct to departmental liability—opening individual officers to more significant liability for misconduct simultaneously means opening police departments to more significant liability. In this sense, indemnification practices can actually serve to incentivize police departments to hire, train, and terminate individual police officers in a manner that prevents civil rights violations. The presence of heightened, ubiquitous indemnification would not stifle the deterrent effect of eliminating the qualified immunity defense, but serve to enhance it.

²⁵ *E.g.*, Fed. R. Civ. P. 8(a), 12(b).

²⁶ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor J., dissenting).

key avenue of relief for civil rights litigants. The Floyd Act’s amendment to Section 1983 would resolve these problems without posing an undue risk of adverse consequences to the legitimate enforcement of the law. Accordingly, we welcome the proposed reform of qualified immunity in the Floyd Act.

3. *Sections 103 and 104: the role of state attorneys general*

We also endorse Sections 103 and 104 of the Floyd Act, which will make it easier for state attorneys general to investigate and curb police misconduct. Section 103 contains an important provision permitting state attorneys general to bring civil suits in federal courts to challenge a pattern of conduct that deprives persons of their constitutional rights. Creating this kind of power at the state level is necessary because, as we have seen in recent years, the Department of Justice (“DOJ”) changes its stance on pursuing police-reform litigation depending on the enforcement priorities of any particular administration. Section 103 also contains a provision that prohibits collective bargaining agreements with police unions that would prevent the state attorney general from pursuing a pattern or practice suit or that conflicts with a consent decree. While the right to bargain collectively should be ensured for all employees, it cannot be allowed to prevent state and local governments from ensuring that policing is fair for all members of the community. Section 104 would advance similar ends by providing federal grants to state attorneys general that conduct independent investigations for use of deadly force by police officers.

III. POLICING TRANSPARENCY THROUGH DATA (TITLE II)

A. National Police Misconduct Registry (Title II, Subtitle A)

Section 201 would create a mandate that the Attorney General establish a National Police Misconduct Registry (the “Registry”) to be compiled and maintained by the DOJ. While the City Bar recognizes that law enforcement personnel who engage in misconduct in one jurisdiction should not be permitted to move to a new jurisdiction and engage in the same practices there, we also express due process concerns, as we have in the past, about the use of registries.²⁷ The City Bar endorses the concept of a misconduct Registry as proposed in the Floyd Act, but we ask that Congress create the safeguards necessary to ensure that those who are included on the Registry are added only after being afforded an opportunity to contest the charges. Appropriate due process mechanisms are necessary to ensure that the Registry is accurate and useful to the public.

In addition to recommending careful attention to due process in creating and maintaining the proposed police misconduct Registry, we offer specific suggestions below for refining certain components of the Title II Registry in order to account for and address the danger of sexual misconduct by the police.

²⁷ E.g., “Report Opposing the Creation of a Registry for All Violent Felony Offenders in New York State,” (Feb. 9, 2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-opposing-the-creation-of-a-registry-for-all-violent-felony-offenders-in-new-york-state>; “Letter to Assemblyman Daniel O’Donnell in relation to sex offender registration and residency restrictions” (Jan. 11, 2016), <https://www2.nycbar.org/pdf/report/uploads/20073026-ODonnell-SexoffenderregistrationCORRECTCRICOURCRIJUSCRI1.11.16.pdf>.

1. *Section 201(b): contents of registry and disaggregation of complaints*

Section 201(b) proposes to disaggregate all complaints contained in the Registry with respect to whether the complaint involved (a) the use of force and/or (b) racial profiling. This would allow policymakers, advocates, and scholars to better understand the nature of police misconduct and to observe trends in the data. Better statistical analysis can, in turn, lead to impactful legislative and regulatory changes. That said, we propose that complaints also be disaggregated with respect to a third category: whether the complaint involves sexual misconduct of any kind.

Sexual assault and misconduct perpetrated by law enforcement officers is a widespread yet underreported phenomenon.²⁸ One national database compiled by the Buffalo News suggests that between 2005–2015, a law enforcement officer was accused of sexual assault or misconduct at least once every five days.²⁹ Andrea Ritchie of the Washington Post emphasized that “[r]esearch on ‘police sexual misconduct’—a term used to describe actions from sexual harassment and extortion to forcible rape by officers—overwhelmingly concludes that it is a systemic problem.”³⁰ But as with other forms of police violence and misconduct, real accountability for sexual offenses by police is hard to come by. Victims faced with the prospect of reporting an assault to their abuser’s employers or colleagues often choose to remain silent.³¹ Some may fear retaliation by law enforcement, mistrusting the system that perpetrated this grave wrong against them. As a result, the true scope of police sexual misconduct may well be more extensive than known data suggests.

For these reasons, the proposed Registry should disaggregate complaints with respect to whether they involve sexual assault, rape, or other sexual misconduct. The Floyd Act apparently envisions a searchable body of complaints that would promote public access to allegations against law enforcement officers, improve transparency, and incentivize better police training, discipline, and hiring practices. Disaggregating complaints with respect to sexual misconduct, in addition to use of force and racial profiling, will serve each of these laudable goals.

²⁸ Isidoro Rodriguez, “Predators Behind the Badge: Confronting Police Sexual Misconduct,” *The Crime Report* (March 12, 2020), <https://thecrimereport.org/2020/03/12/predators-behind-the-badge-confronting-hidden-police-sexual-misconduct/>; “Abusing the Law,” Buffalo News, <https://s3.amazonaws.com/bncore/projects/abusing-the-law/data.html>; Philip M. Stinson, John Liederbach, Steven L. Brewer, and Brooke E. Mathna, “Police Sexual Misconduct: A National scale study of arrested officers,” Bowling Green State Univ. Criminal Justice Faculty Publications (2014), <https://www.bwjp.org/assets/documents/pdfs/webinars/dhhs-police-sexual-misconduct-a-national-scale-study.pdf>.

²⁹ “Abusing the Law,” Buffalo News, available at <https://s3.amazonaws.com/bncore/projects/abusing-the-law/data.html>; see also Matthew Spina, “When A Protector Becomes A Predator,” Buffalo News (November 22, 2015), <https://s3.amazonaws.com/bncore/projects/abusing-the-law/index.html>.

³⁰ Andrea Ritchie, “How some cops use the badge to commit sex crimes,” *The Washington Post* (Jan. 12, 2018), https://www.washingtonpost.com/outlook/how-some-cops-use-the-badge-to-commit-sex-crimes/2018/01/11/5606fb26-eff3-11e7-b390-a36dc3fa2842_story.html.

³¹ Philip M. Stinson, Steven L. Brewer, Brooke E. Mathna, John Liederbach, and Christine M. Englebrecht, “Police Sexual Misconduct: Arrested Officers and Their Victims” (2014). *Criminal Justice Faculty Publications*. 38, https://scholarworks.bgsu.edu/cgi/viewcontent.cgi?article=1037&context=crim_just_pub (“Victims of sex crimes are often reluctant to report sexual abuse when the offender is a police officer.”).

2. *Section 201(b)(1): contents of registry and nature of complaints included*

Section 201(b)(1) sets forth which types of complaints against law enforcement officers the Registry will encompass. These include “complaints that were found to be credible or that resulted in disciplinary action against the law enforcement officer” under 201(b)(1)(A), “complaints that are pending review” under 201(b)(1)(B), and “complaints for which the law enforcement officer was exonerated or that were determined to be unfounded or not sustained” under 201(b)(1)(C). While we support the inclusion of these categories of complaints in the Registry for purposes of keeping track of claims of police misconduct, we once again stress due process concerns as to the use of, and public access to, two of the above categories: “complaints that are still being reviewed” under 201(b)(1)(B) and “complaints that have been determined to be unfounded” under 201(b)(1)(C). In the City Bar’s view, complaints still under review and those that have been deemed unfounded should not be included in a Registry available to the public, given that the Floyd Act provides no statutory mechanism for accused police officers to remove themselves from the Registry or appeal a determination they should be included in the Registry.³²

Some have argued that too many complaints against law enforcement are deemed unfounded, and that provisions for civilian review are either not robust or nonexistent.³³ We agree that civilian review of complaints against law enforcement is a vital part of any plan to deter and punish police misconduct. We also recognize that many complaints are deemed unfounded because police departments can “stonewall” underfunded investigators.³⁴ However, these significant problems need to be separately addressed through other reform mechanisms. Including unfounded complaints in the Registry does nothing to address, much less fix, underlying concerns about insufficient or faulty investigations into civilian complaints. Rather, affording the public access to unfounded complaints only compounds the problem by making the Registry less reliable; interested parties will not be able to determine which complaints were properly deemed unfounded and which fell victim to flawed review. The same concerns attach with respect to complaints that remain under review at the time of their inclusion.

Furthermore, we understand the phrase “found to be credible” in Section 201(b)(1)(A) as referring to complaint-specific determinations made by the relevant local law enforcement entities, not by the Attorney General or the DOJ in the process of collating data for the Registry. Assuming that understanding is accurate, we recommend that language be added to provide guidance with

³² However, the City Bar supports making these categories available to specific parties as-needed on a case-by-case basis. This may include, for example, police departments conducting background checks and attorneys handling criminal cases involving individual police officers. Safeguards would need to be in place and could include, for example, the use of a protective order.

³³ *E.g.*, David Cruz, “Why The Majority of NYPD Misconduct Complaints End Up ‘Unsubstantiated,’” Gothamist (Aug. 18, 2020), <https://gothamist.com/news/why-the-majority-of-nypd-misconduct-complaints-end-up-unsubstantiated>; *see also* Shaila Dewan and Serve F. Kovalski, “Thousands of Complaints Do Little to Change Police Ways,” <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> (“Even as outrage has mounted over deaths at the hands of police, it remains notoriously difficult in the United States to hold officers accountable. . . . Police departments themselves have often resisted civilian review or dragged their feet when it comes to overhauling officer disciplinary practices.”).

³⁴ David Cruz, “Why The Majority of NYPD Misconduct Complaints End Up ‘Unsubstantiated,’” Gothamist (Aug. 18, 2020), https://gothamist.com/news/why-the-majority-of-nypd-misconduct-complaints-end-up-unsubstantiated?mc_cid=f61e0f0acf&mc_eid=1f2b70501e.

respect to credibility determinations, so that decisions made by local law enforcement entities can advance something approaching a uniform, national standard for “credibility.” The standard should include an opportunity for accused officers to contest the charges against them. The database would be useless if it contained non-credible allegations, and varying standards for credibility will also impair the database’s utility.

3. *Section 201(b)(5): contents of registry and records of lawsuits and settlements*

Section 201(b)(5) states that the Registry shall include “[r]ecords of lawsuits against law enforcement officers and settlements of such lawsuits.” This is already public information; what is proposed in the Floyd Act is only the aggregation of this information. We support including this information in the Registry, and further propose that the Registry also include whether a particular law enforcement officer involved in a settlement or lawsuit (1) was indemnified by their employer for any resulting money damages; and (2) had previously been involved in any settlements or lawsuits. These additions will promote transparency and better contextualize officer data. Legal scholars have considered how the indemnification of officers sued for civil rights violations impacts the twin goals of compensation and deterrence.³⁵ Collating this data will also enhance scholarship on this important topic.

4. *Section 201(e)(1): public availability of registry*

Section 201(e)(1) requires that the Attorney General make the Registry available to the public in a manner that allows members of the public to “search for an individual law enforcement officer’s records of misconduct.” We support making the Registry public, but as noted above, only confirmed and credible complaints should be disclosed to the public. We do not wish to deprive the public of necessary information, but providing information about unfounded or non-credible complaints does not advance the goal of holding wrongdoers accountable and is inconsistent with the need for due process.

There is also some ambiguity about how the database can be searched. The City Bar supports making the database searchable for incidents of racial profiling and use of force, which seems to be contemplated by the bill, as well as for sexual misconduct as outlined above. We further recommend that the Registry be searchable by specific information, including: (1) officer name and/or badge number; (2) date; (3) geographic location, including zone or precinct; and (4) type of offense; and (5) number of offenses, as well as relevant settlement information. Without this type of search function, the public will struggle to find relevant data, which will undermine the utility of the Registry.

B. *Police Reporting Information, Data, and Evidence Act of 2020 (“PRIDE Act”)(Title II, Subtitle B)*

1. *Section 223: Use of Force Reporting to the Attorney General*

Section 223 states that certain States and Indian Tribes shall report to the Attorney General information regarding, *inter alia*, “any incident involving the use of deadly force against a civilian”

³⁵ Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 952 (June 2014).

by certain law enforcement officers. We support the proposed reporting requirements, and additionally propose that States and Tribes be required to report any incident causing a civilian’s permanent disability. For purposes of reporting to the Attorney General, the use of force that causes a civilian’s permanent disability is profound, and warrants inclusion in Section 223’s reporting requirements. Permanent disability can cause tremendous emotional, psychological, social, financial, and logistical hardship for the victim as well as that victim’s family and community. A law enforcement official who permanently disables multiple individuals (but does not kill any) should not be permitted to continue in service, and in any event requires close monitoring by the Attorney General.

2. Section 224: Technical Assistance Grants to Law Enforcement

We also write to endorse the provision in Section 224(a) that would provide technical assistance grants to law enforcement. These grants would help law enforcement comply with the reporting requirements, conduct public awareness campaigns to gain information on the use of force, and provide use of force training to law enforcement personnel. Avoiding unfunded mandates on state and local governments, which are especially strapped for resources given the reduced tax base caused by the ongoing public health crisis, is essential to ensure that the principles embodied in the Floyd Act can actually be carried out. Without the resources to implement directives to law enforcement, the vital reform Congress is set to enact may remain aspirational.

IV. IMPROVING POLICE TRAINING AND POLICIES (TITLE III)

A. End Racial and Religious Profiling Act of 2020 (Title III, Subtitle A)

We recommend passing the End Racial and Religious Profiling Act of 2020 (“ERRPA”). The Supreme Court’s ruling in *Whren v. United States* has had the unfortunate result of countenancing racial profiling by instructing judges limit their analysis of the Fourth Amendment in criminal prosecutions to an “objective” assessment of police conduct.³⁶ Since *Whren*, Congress has repeatedly attempted to legislate an end to racial profiling without success.³⁷ Meanwhile, racial and religious profiling has only worsened in the past few decades, especially in the wake of the 9/11 attacks.

The tragic killings of George Floyd and others at the hands of law enforcement have underscored the urgent need to bring about a long overdue legislative reform to prohibit racial profiling. Adapted from prior legislative efforts, Section 302(4) of ERRPA defines “law enforcement agency” to include “any Federal, State, or local public agency engaged in the prevention, detection, or investigation of violations of criminal, immigration, or customs laws.” Further, Section 302(5) defines a “law enforcement agent” as “any Federal, State, or local official responsible for enforcing criminal, immigration, or custom laws, including police officers and other agents of a law enforcement agency.”

In Section 302(6)(A), “racial profiling” is broadly defined as “the practice of a law enforcement agent or agency relying, to any degree, on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation in selecting which individual to

³⁶ 517 U.S. 806 (1996).

³⁷ *E.g.*, Traffic Stops Statistics Act of 1997 (H.R. 118) (Congress’ first attempt).

subject to routine or spontaneous investigatory activities or in deciding upon on the scope and substance of law enforcement activity following the initial investigatory procedure.” This provision, however, includes a limited but appropriate exception that this type of information can still be used to “link [] a person with a particular characteristic . . . to an *identified* criminal incident or scheme.”

Part I of ERRPA, which includes Section 311, is the heart of this legislation. Section 311 simply and categorically prohibits racial profiling: “[n]o law enforcement agent or law enforcement agency shall engage in racial profiling.” In addition, Section 312 provides some necessary teeth to the prohibition by establishing the enforcement mechanism for a violation of Section 311, including a new cause of action in federal court. Finally, the remainder of ERRPA includes important requirements in Parts II and III, which demand training and guidance for law enforcement, and collecting and requiring public disclosure of potential profiling data on all investigatory activities. These requirements would be helpful in identifying any persistent problems and sustaining reform.

One area that ERRPA does not specifically address, however, is how racial profiling adversely affects new law enforcement technologies or practices, such as the “predictive police program” or facial-recognition and biometric software. These systems are increasingly used by police departments across the country, including the New York Police Department, to combat crime.³⁸ We propose the below clarifications to the legislation.

Predictive policing consists of artificially intelligence-driven algorithmic programs touted as having the ability to predict where future crimes may occur without engaging in impermissible profiling.³⁹ Predictive police programs, however, may reinforce racial biases and perpetuate impermissible profiling because “the algorithms really re-create police practices from the past rather than predict crime in the future.”⁴⁰ In other words, when the underlying data used to “teach” artificial intelligence predictive programs is likely a result of racial profiling, the predictions generated from this data will be equally discriminatory.⁴¹

Similarly, while Congress has recently introduced a separate bill to limit facial recognition and biometric software in surveillance or predicting criminality, ERRPA should also address that this type of technology is impacted by racial profiling.⁴² As one commentator explained, “[f]acial

³⁸ For more on the issue of facial recognition and biometric software see “Power, Pervasiveness and Potential: The Brave New World of Facial Recognition Through a Criminal Law Lens (and Beyond),” New York City Bar Association Criminal Courts Committee (Aug. 14, 2020), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/facial-recognition-through-a-criminal-law-lens>.

³⁹ Tim Lau, *Predictive Policing Explained*, Brennan Center for Justice (Apr. 1, 2020), <https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained>.

⁴⁰ Ben Green, *Can Predictive Policing Help Stamp Out Racial Profiling?*, Boston Globe (Apr. 17, 2019), <https://www.bostonglobe.com/magazine/2019/04/17/can-predictive-policing-help-stamp-out-racial-profiling/7GNajrScBYu0a5IUr0RaKP/story.html>.

⁴¹ *Id.* (“The data behind these algorithms can overestimate crime in minority neighborhoods and underestimate it in white neighborhoods”).

⁴² Democratic members of Congress have recently introduced a separate bicameral bill to prohibit the use of facial recognition technology by federal agencies or officials. *Facial Recognition and Biometric Technology Moratorium*

recognition systems can put anyone that is in a [law enforcement facial recognition] database on the chopping block An individual can be investigated for a crime he didn't commit only because his face may have resembled a suspect.”⁴³ Indeed, the Washington Post reported that a recent study by the National Institute of Standards and Technology found that “Asian and African American people were up to 100 times more likely to be misidentified than white men, depending on the particular algorithm and type of search.”⁴⁴ Thus, using such technologies “can supercharge bias and exacerbate the most profound flaws in our justice system.”⁴⁵

To eliminate impermissible profiling, Congress should be more specific in the Floyd Act and make clear that new law enforcement technology, or practices such as predictive policing or facial recognition, are within the ambit of the legislation.

B. Additional Reforms Relating to Policing (Part IV, Subtitle B)

Sections 361 through 366 contain reforms directly applicable to federal law enforcement officers. These include requiring the Attorney General to create a training program on racial bias and to establish a clear duty for an officer to intervene when another officer is using excessive force (Section 361); a ban on no-knock warrants in federal drug cases (Section 362);⁴⁶ subjecting federal, state, and local officers who use chokeholds to potential criminal liability under 18 U.S.C. § 242 (Section 363); banning deadly force except as a last resort and limiting the use of “less lethal force” to instances where it is necessary and proportional to make an arrest and where other alternatives have been exhausted (Section 364, the Police Exercising Absolute Care With Everyone Act, or “PEACE Act”); significantly limiting the transfer of federal military equipment to local police (Section 365, the “Stop Militarizing Law Enforcement Act”); and establishing a public safety innovation grant program (Section 366). In addition, similar to other parts of the Floyd Act, these sections sensibly create an incentive structure to encourage state and local law enforcement to adopt these reforms.⁴⁷

Imposing a duty to intervene (Section 361), banning chokeholds (Section 363), and requiring escalation before the use of deadly force (Section 364) are among the basic reform

Act, S 4084, H.R. 7356 (both introduced June 25, 2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4084> and <https://www.congress.gov/bill/116th-congress/house-bill/7356>.

⁴³ Safia Samee Ali, *Does Police Recognition Technology Racially Profile Blacks?* NBC News (Oct. 18, 2016), <https://www.nbcnews.com/news/us-news/does-police-face-recognition-technology-racially-profile-blacks-n668416>.

⁴⁴ Drew Harwell, *Federal Study Confirms Racial Bias of Many Facial-Recognition Systems, Casts Doubt On Their Expanding Use*, Washington Post (Dec. 19, 2019), <https://www.washingtonpost.com/technology/2019/12/19/federal-study-confirms-racial-bias-many-facial-recognition-systems-casts-doubt-their-expanding-use/>.

⁴⁵ Safia Samee Ali, *Does Police Recognition Technology Racially Profile Blacks?* NBC News (Oct. 18, 2016), <https://www.nbcnews.com/news/us-news/does-police-face-recognition-technology-racially-profile-blacks-n668416>.

⁴⁶ No-knock warrants are typically authorized as a matter of course in most search warrants relating to drug-related crimes, out of fear that evidence might be destroyed if the police were to identify themselves. While it is true that evidence may be destroyed without the use of no-knock warrants, the destruction of drugs, on its own, is an insufficient reason to risk the loss of life that can stem from no-knock warrants. While some believe that a complete ban on no-knock warrants goes too far, a better approach, and one that limits the risk of unwarranted violence, would be to limit no-knock warrants to only the most extreme circumstances involving unusual safety concerns.

⁴⁷ The details of the incentive structure are discussed in Part V, *infra*.

policies that have worked in cities across America. These reforms parallel those undertaken by state and local governments following George Floyd’s murder. During 2020, 41 states introduced, amended, or passed bills or instituted executive orders related to police reform, including regulating the use of force and banning chokeholds.⁴⁸ It is sensible for the Floyd Act to create an incentive structure that encourages all state and local law enforcement to adopt these reforms. The Stop Militarizing Law Enforcement Act (Section 365) is also a commonsense reform that recognizes that police officers are not soldiers in a war against their fellow citizens. Scholars have concluded the militarization of police forces can contribute to unnecessary civil deaths.⁴⁹ When one reviews the type of military-grade equipment provided by the Department of Defense to local law enforcement, this conclusion is not surprising.⁵⁰

C. Law Enforcement Body Cameras (Part IV, Subtitle C)

Sections 371 through 377 (together, the “Federal Police Camera and Accountability Act”) require uniformed federal law enforcement officers to wear body cameras and marked federal law enforcement vehicles to have dashboard cameras. These sections describe the circumstances under which body cameras must be activated, prescribe rules for the retention and dissemination of body camera footage, and describe ways in which video footage can be used to investigate misconduct and in criminal proceedings.⁵¹ As we have seen in the case of George Floyd, video of police wrongdoing is the most powerful form of evidence both for prosecutors and in demonstrating to the public the nature of the wrongdoing.

Notably, although Section 372(c) requires an officer to activate a body-worn camera whenever the officer responds to a call for service or initiates an investigative stop, Section 327(e) requires the officer to ask for permission to continue recording: (1) before entering a private residence without a warrant or in non-exigent circumstances; (2) when interacting with an apparent crime victim; and (3) when a person wishes to anonymously report a crime or assist in an ongoing investigation.⁵² These requirements, understandably aimed at protecting the privacy of crime victims and witnesses, may come into tension with the rights of criminal defendants. For instance,

⁴⁸ Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd> (Jun. 18, 2020). The nonpartisan National Conference of State Legislatures maintains a database of police reform legislation. See <https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx>.

⁴⁹ E.g., Edward Lawson, Jr., *TRENDS: Police Militarization and the Use of Lethal Force*, Political Research Quarterly, 72(1) (2019) (“Militarization has a positive and statistically significant ($p < .05$) association with the number of lethal force incidents[.]”)

⁵⁰ E.g., Shawn Musgrave et al., *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, The Marshall Project (Dec. 3, 2014), available at: <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway>; Stephen Ceasar, *L.A. schools police will return grenade launchers but keep rifles, armored vehicle*, Los Angeles Times (Sept. 17, 2014), <https://www.latimes.com/local/lanow/la-me-schools-weapons-20140917-story.html>.

⁵¹ These sections appear to be based on a model act promulgated by the ACLU. See A Model Act for Regulating the Use of Wearable Body Cameras by Law Enforcement, (October 2020), <https://www.aclu.org/other/model-act-regulating-use-wearable-body-cameras-law-enforcement>.

⁵² See § 372(e)(1)–(3). The officer must record the offer to discontinue and any response to the offer. § 372(f). This would make it harder for the provision to be abused by police officers who might suggest that they received a request to turn off the camera when, in fact, no such request was received.

allowing apparent victims and witnesses to control what is and is not recorded could undermine the truth-seeking function of the criminal justice system by shutting off video cameras at the precise moment an officer learns key information. This could deprive defendants of the opportunity to review victim and witness statements made in real time, and to later fully and fairly test the credibility and reliability of those statements. Thus, this aspect of the statute could undermine the rights of the accused for the sake of protecting privacy. Of course, protecting the privacy interests of innocent persons in some way connected with crime is a familiar problem for the criminal justice system. Consideration should be given to other avenues of protecting privacy, including those already available under existing law—for example, protective orders⁵³—that may better balance the rights of criminal defendants against the need to protect victims and witnesses.

Sections 381 and 382 (the “Police CAMERA Act”) require states and localities to use at least five percent of existing federal funds to ensure that police officers wear and have policies for using body worn cameras. Many localities have already adopted this sensible reform, and the Floyd Act’s funding provisions may increase this trend.

V. CLOSING THE LAW ENFORCEMENT LOOPHOLE (TITLE IV)

The final portion of the Floyd Act makes it unlawful for a federal law enforcement officer to engage in a sexual act while acting under color of law or with an individual who is under arrest, in detention, or otherwise in custody. It also calls for state and local governments to enact similar laws as a condition of receiving funding under the DOJ’s Community Oriented Policing Services (“COPS”) program.

This aspect of the Floyd Act is, to say the least, long overdue. No person can provide meaningful consent to sexual activity while they are in police custody or in prison. Any such sexual act by a police officer is, and should be by definition, non-consensual and subject to prosecution. Sexual misconduct by police officers is a notable problem, and those who engage in it should be punished and deterred through the enactment of this provision.⁵⁴

VI. THE ROLE OF BRYCE JAG AND COPS GRANTS IN THE FLOYD ACT

Several provisions in the Floyd Act (including in Title II and Title III) condition the payment of grants under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program or the COPS program as an incentive for state and local governments to comply with various reporting and law reform proposals. The Byrne JAG program provides grants to state and local governments for personnel, equipment, training and other uses connected with certain criminal justice programs.⁵⁵ The COPS program is meant to advance the practice of community policing through information sharing and grant resources. It awards grants to hire community policing

⁵³ Fed. R. Crim. P. 16(d)(1).

⁵⁴ *E.g.*, Stinson, Philip M.; Liederbach, John; Brewer, Steven L.; and Mathna, Brooke E., “Police sexual misconduct: A national scale study of arrested officers” (2014), *Criminal Justice Faculty Publications*, Paper 30 at 24, available at: <https://www.bwjp.org/assets/documents/pdfs/webinars/dhhs-police-sexual-misconduct-a-national-scale-study.pdf> (identifying “an unprecedented 548 cases of police sex-related crime” that occurred between 2005 and 2007).

⁵⁵ 34 U.S.C. § 10152(a)(1); *see also City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020).

professionals and to provide training and technical assistance to law enforcement, local government leaders and community members.⁵⁶

The use of federal Byrne and COPS grants to persuade jurisdictions to comply with the non-mandatory aspects of the Floyd Act raises a threshold question of whether these sections violate the constitutional limitations on congressional exercise of the spending power. To comply with those limitations, the conditions attached to the receipt of federal funds must: (1) be unambiguously established by Congress; (2) be germane to the federal interest in the national programs to which the money is directed; (3) not violate a separate constitutional provision; and (4) not cross the line from enticement to coercion, such that recipients have no choice but to accept the funding.⁵⁷

The Floyd Act appears to satisfy these constitutional limitations. The Floyd Act's provisions clearly set forth conditions required for jurisdictions to continue receiving funding under the Byrne and COPS grant programs, the conditions are related to the federal interest in improving police training and policies, the conditions do not appear to violate any separate constitutional provision, and they do not seem coercive.⁵⁸

In the recent past, we have seen President Donald Trump's administration attempt to use the threat of withholding Byrne JAG grants to coerce state and local governments to assist the federal government in the enforcement of certain immigration-related laws (often referred to as "sanctuary cities" litigation). These efforts have been rejected by all but one of the Circuit Courts of Appeal to have considered the issue.⁵⁹

One might ask whether this line of authority is in tension with the Floyd Act's requirements. We perceive no tension. First, a central defect in the government's efforts to coerce sanctuary cities to enforce immigration laws is that the DOJ has only the authority prescribed by Congress.⁶⁰ As the First Circuit explained, "the DOJ took an impermissible shortcut when it

⁵⁶ Congressional Research Service, "Community Oriented Policing Services (COPS) Program" (May 21, 2019), available at: <https://fas.org/sgp/crs/misc/IF10922.pdf>.

⁵⁷ *South Dakota v. Dole*, 483 U.S. 201, 207–08, 211 (1987).

⁵⁸ Unlike *NFIB v. Sebelius*, 567 U.S. 519 (2012), where the Court held that the Medicaid expansion condition violated the Tenth Amendment because a state that did not expand Medicaid eligibility risked losing all existing Medicaid funding which, on average, made up approximately 10% of state budgets, here the potential loss of Byrne and COPS grants is unlikely to cause a state to suffer a budgetary impact near that magnitude. <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/FY20-State-JAG-Allocations.pdf> (listing Byrne grants awarded to each state for fiscal year 2020); https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Award_List.pdf?utm_medium=email&utm_source=govdelivery (listing COPS hiring program awards by state and locality for fiscal year 2020).

⁵⁹ *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Los Angeles v. Barr*, 941 F.3d 931 (9th Cir. 2019); *City of Philadelphia v. Attorney General of the United States*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018); but see *New York v. U.S. Department of Justice*, 951 F.3d 84 (2d Cir. 2020) (holding that the government was permitted to condition Byrne JAG grants on the state government's participation in immigration enforcement), *rehearing en banc denied* 964 F.3d 150, (2d Cir. 2020) (Lohier, J., concurring in denial) ("[I]f there is a single panel decision that the Supreme Court ought to review from this Circuit next term, it is this one.").

⁶⁰ *E.g.*, *City of Providence*, 954 F.3d at 31 ("Any action that an agency takes outside the bounds of its statutory authority is ultra vires[.]").

attempted to impose the challenged conditions on the [] Byrne JAG grants—conditions that Congress had not vested the DOJ with authority to impose.”⁶¹ By contrast, the Floyd Act is written to provide this specific authorization. Second, there is no reasonable relation between immigration enforcement and law enforcement. The Byrne JAG program “provides grants to state and local governments for personnel, equipment, training, and other uses connected with certain criminal justice programs.”⁶² For much of our history, and at least after the enactment of federal statutes regulating immigration in the nineteenth century, there has been a demarcation of spheres of responsibility between state and local criminal law enforcement, on the one hand, and federal immigration enforcement, on the other.⁶³ By contrast, it is difficult to fathom a closer connection than the one that can be drawn between the Byrne JAG program and the portions of the Floyd Act that relate to policing practices. In short, the sanctuary cities litigation arguably supports the Floyd Act’s constitutionality, or is, at worst, irrelevant to the question.

Nor is the tying of these grant funds to the Floyd Act coercive. Indeed, far from being coercive, we are concerned that the Floyd Act as written will not persuade state and local actors to take the steps suggested by the statute. Monetary incentives will encourage implementation of the reforms in the Act, but we are concerned that some of the incentives here are too minimal as to achieve the intended end. For example, withholding 10% of an annual Byrne Grant may not be enough to ensure these changes are made. For a state like Minnesota, for example, this withholding would result in a reduction of only \$247,313 in their Edward Byrne Memorial Justice Assistance Grant (JAG) Program.⁶⁴ Additionally, only 1,087 local units of government applied for JAG funds in 2015.⁶⁵ Given that the census bureau reported in 2012 that there are 89,004 local governments,⁶⁶ it seems likely that many local police forces do not receive Byrne JAG or COPS grant funding at all, and thus may not face penalties for failing to comply with the Floyd Act’s provisions. It may well be that Congress will need to make additional grants—as contemplated with respect to the use of force reporting database—or take other steps in order to create the necessary incentives for compliance with the Floyd Act.

VII. CONCLUSION

We urge Congress to enact the Floyd Act with the proposed amendments outlined above. Although the problem of police misconduct is a complicated one that will require deeper changes in police recruiting and law enforcement culture, the Floyd Act is an important corrective step to an urgent social problem.

⁶¹ *Id.* at 45.

⁶² *Id.* at 27.

⁶³ Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1719-21 (2008).

⁶⁴ Fiscal Year (FY) 2020 State Edward Byrne Memorial Justice Assistance Grant (JAG) Allocations, <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/FY20-State-JAG-Allocations.pdf>.

⁶⁵ Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet, Jan. 7, 2016, https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/JAG_Fact_Sheet.pdf.

⁶⁶ Census Bureau Reports There Are 89,004 Local Governments in the United States, (Aug 30, 2012), <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html#:~:text=Census%20Bureau%20Reports%20There%20Are%2089%2C004%20Local%20Governments%20in%20the%20United%20States,-The%20U.S.%20Census>.

Federal Courts Committee

Harry Sandick, Chair
Julia Livingston, Secretary

Subcommittee on Qualified Immunity and Police Reform

Emma Freeman, Chair
Olivia Gonzalez, Chair
Richard Hong
Michaela Manley
Roger Stavis
Michael Yetter

Civil Rights Committee

Zoey Chenitz, Co-Chair
Kevin Eli Jason, Co-Chair

Corrections and Community Reentry Committee

Gregory D. Morril, Chair

Criminal Justice Operations Committee

Tess M. Cohen, Chair

Reissued February 2021

Contact

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org
Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world. www.nycbar.org

APPENDIX: RECOMMENDED REVISIONS TO THE FLOYD ACT

NATIONAL POLICE MISCONDUCT REGISTRY (TITLE II, SUBTITLE A)

- Safeguards are necessary to ensure that those who are included on the Registry are added only after being afforded an opportunity to contest the charges. Appropriate due process mechanisms are necessary to ensure that the Registry is accurate and useful to the public (pg. 7).

Section 201(b): contents of registry and disaggregation of complaints

- The Registry should disaggregate complaints with respect to whether they involve sexual assault, rape, or other sexual misconduct (pg. 7).

Section 201(b)(1): contents of registry and nature of complaints included

- Complaints still under review and those that have been deemed unfounded should not be included in a Registry available to the public, given that the Floyd Act provides no statutory mechanism for accused police officers to remove themselves from the Registry or appeal a determination they should be included in the Registry (pgs. 9-10).
 - The City Bar supports making these categories available to specific parties as-needed on a case-by-case basis. This may include, for example, police departments conducting background checks and attorneys handling criminal cases involving individual police officers. Safeguards would need to be in place and could include, for example, the use of a protective order.
- We understand the phrase “found to be credible” in Section 201(b)(1)(A) as referring to complaint-specific determinations made by the relevant local law enforcement entities, not by the Attorney General or the DOJ in the process of collating data for the Registry. Assuming that understanding is accurate, language should be added to provide guidance with respect to credibility determinations, so that decisions made by local law enforcement entities can advance something approaching a uniform, national standard for “credibility.” The standard should include an opportunity for accused officers to contest the charges against them. The database would be useless if it contained non-credible allegations, and varying standards for credibility will also impair the database’s utility (pgs. 9-10).

Section 201(b)(5): contents of registry and records of lawsuits and settlements

- The Registry should include whether a particular law enforcement officer involved in a settlement or lawsuit (1) was indemnified by their employer for any resulting money damages; and (2) had previously been involved in any settlements or lawsuits. These additions will promote transparency and better contextualize officer data. Legal scholars have considered how the indemnification of officers sued for civil rights violations impacts the twin goals of compensation and deterrence. Collating this data will also enhance scholarship on this important topic (pg. 10).

Section 201(e)(1): public availability of registry

- Only confirmed and credible complaints should be disclosed to the public. Providing information about unfounded or non-credible complaints does not advance the goal of holding wrongdoers accountable and is inconsistent with the need for due process (pg. 10).
- There is some ambiguity about how the database can be searched. The City Bar supports making the database searchable for incidents of racial profiling and use of force, which seems to be contemplated by the bill, as well as for sexual misconduct as outlined above. We further recommend that the Registry be searchable by specific information, including: (1) officer name and/or badge number; (2) date; (3) geographic location, including zone or precinct; and (4) type of offense; and (5) number of offenses, as well as relevant settlement information. Without this type of search function, the public will struggle to find relevant data, which will undermine the utility of the Registry (pg. 10).

Police Reporting Information, Data, and Evidence Act of 2020 (“PRIDE Act”)(Title II, Subtitle B)

Section 223: Use of Force Reporting to the Attorney General

- Incidents causing a civilian’s permanent disability should be reported to the Attorney General. Permanent disability can cause tremendous emotional, psychological, social, financial, and logistical hardship for the victim as well as that victim’s family and community. A law enforcement official who permanently disables multiple individuals (but does not kill any) should not be permitted to continue in service, and in any event requires close monitoring by the Attorney General (pgs. 10-11).

IMPROVING POLICE TRAINING AND POLICIES (TITLE III)

End Racial and Religious Profiling Act of 2020 (Title III, Subtitle A)

- It should be made clear that new law enforcement technology, or practices such as predictive policing or facial recognition, are within the ambit of the legislation (pgs. 12-13).

Additional Reforms Relating to Policing (Part IV, Subtitle B)

- No-knock warrants should be limited to only the most extreme circumstances involving unusual safety concerns (Footnote 46, pg. 13).

Law Enforcement Body Cameras (Part IV, Subtitle C)

- Consideration should be given to other avenues of protecting privacy, including those already available under existing law—for example, protective orders—that may better balance the rights of criminal defendants against the need to protect victims and witnesses (pgs. 14-15).