Comment on the Civilian Complaint Review Board's Proposed Rule Revisions

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Table of Contents

I. Introduction

The Legal Aid Society and NAACP Legal Defense and Education Fund, Inc. would like to thank the New York City Civilian Complaint Review Board (CCRB) for the opportunity to provide comments on proposed rule changes relating to the CCRB's authority, jurisdiction, policies, and procedures.

Since 1876, The Legal Aid Society (LAS) has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile offices in all five boroughs, our staff handles more than 300,000 cases for low-income families and individuals. By contract with the City of New York, the LAS serves as the primary defender of low-income people prosecuted in the state court system. The Cop Accountability Project, housed within the LAS's Law Reform and Special Litigation Unit, works to strengthen police accountability and transparency and challenge problematic policing through strategic litigation and advocacy.

Founded in 1940, under the leadership of Thurgood Marshall, NAACP Legal Defense and Education Fund (LDF) is America's legal counsel on issues of race. Through advocacy and litigation, LDF focuses on issues of education, voter protection, economic justice, and criminal justice. LDF pursues racial justice to move our nation toward a society that fulfills the promise of equality for all. Although initially affiliated with the National Association for the Advancement of Colored People, LDF has been an entirely separate organization since 1957.

Together, LAS and LDF serve as counsel for plaintiffs in *Davis et al v. New York et al*., No. 10-cv-699 (S.D.N.Y.), one of three federal class action lawsuits challenging the New York City Police Department's stop-and-frisk and trespass enforcement practices. As counsel for plaintiffs in a matter that is overseen by a court-appointed federal monitor, in addition to our routine work surrounding issues of policing, racial justice, and criminal justice, we are uniquely positioned to provide comments about the significance of the rule changes proposed by the CCRB. We support the strengthening of CCRB's authority and jurisdiction and provide more specific comments on the importance of these proposed rule changes.

II. Authority to Self-Initiate Complaints is Critical to the CCRB's Mission of Providing Thorough Accountability for Police Misconduct and Robust Civilian Oversight.

In January 2022, the City of New York passed Local Law No. 24, which amended the New York City Charter and Administrative Code to authorize the CCRB to self-initiate complaints alleging misconduct by NYPD officers. Local Law No. 24 was intended to increase public trust and confidence in the CCRB – and, by extension, the NYPD – by permitting the CCRB to investigate police misconduct even in instances where a complaint has not been filed by a member of the public. We support the proposed rule change codifying Local Law No. 24 of 2022 because it will bolster the CCRB's ability to respond to matters of community concern and provide those who have experienced misconduct expanded opportunities to pursue accountability and justice in ways often unavailable to them under the Board's current rules.

This authority will allow the CCRB to begin witness interviews and evidence collection closer in time to an incident, without having to wait for the filing of a complaint, improving their ability to gather and preserve relevant evidence even when victims of misconduct are unaware of the CCRB's process, slow to file, or unwilling to file. Individuals affected by police misconduct may be unwilling or unable to file complaints for several reasons. These include lack of awareness that a complaint process exists, deterrence based on burden or trauma, fear of retaliation, and lack of faith that the involved officers will be held to account.[1] In 2020 alone, more than half of the CCRB investigations were closed without full investigation due to complainants' unwillingness to participate in the process.[2] For this reason, a recent report by the National Association for Civilian

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[1] See, e.g., Coalition for Police Contracts Accountability, Barriers to Identifying Police Misconduct at 6, 8-10 (December 2019) https://static1.squarespace.com/static/59495d7f4c8b0371ef0e472d/t/5f11faf289cfac4c85f6a175/1595013874614/CPCA+Paper+1+-+Report+-+Identifying+Misconduct.pdf [last accessed Jul 3, 2022].

[2] See, Civilian Complaint Review Board, 2020 Annual Report at 27 (63% of investigations were truncated) https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2020_Annual.pdf [last accessed Jul 5, 2022]; see also, e.g., Civilian Complaint Review Board, Semi Annual Report 2021 at 24-25 (showing a significant percentage of investigations are resolved as "Unable to Investigate, with 10% or more of investigations closed due "Complaint Withdrawn" or an average of about 10% of investigations resolved as "Closed – Pending Litigation") https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2021_semi-annual.pdf [last accessed Jul 3, 2022];

Oversight of Law Enforcement (NACOLE) considers the authority to self-initiate investigations a "best practice" that maximizes an oversight agency's ability to fulfill its stated mission.[3]

In some unfortunate cases, a victim of misconduct may be unable to file a complaint as a direct result of the subject officer's misconduct. This was the case, for example, following the tragic murder of Delrawn Smalls by off-duty NYPD officer Wayne Isaacs at a traffic light on July 5, 2016. Despite significant media coverage and public pressure for a CCRB investigation into this well-publicized incident, the CCRB was not able to initiate an investigation until Victoria Davis, Mr. Smalls's sister, first learned about the CCRB and formally filed with the Board in 2019.[4] This three-year delay into launching an independent investigation into the death of Mr. Smalls likely led to the spoilation of evidence, as well as the deterioration of witness memories, which could have further supported substantiating the allegations against Wayne Isaacs, as well as the recommendation for his termination in disciplinary proceedings. Had the CCRB been able to launch its investigation immediately after Mr. Smalls's murder, he, his family, and all of those affected by his death could have attained a more swift and certain justice.

Anecdotally, our clients often express fear and relay experiences of retaliation and harassment by police when discussing whether to participate in investigations into police misconduct. As counsel for people most impacted by over-policing, overcriminalization, and police misconduct, LAS has significant first-hand experience working with clients who, after being subjected to police violence, face trumped-up charges by officers seeking to justify or conceal their own misconduct. Public defenders regularly encounter clients in arraignments who have visible injuries sustained from an arresting officer. Often, those clients are charged with nothing more than Obstructing Governmental Administration and/or Disorderly Conduct, sometimes along with Assault in the Second Degree. These charges are so familiar to criminal defense and civil rights attorneys that they are often referred to as "contempt of cop" charges — charges often utilized by officers to obscure their own unjustified and excessive use of force or other misconduct.

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[3] National Association for Civilian Oversight of Law Enforcement, Civilian Oversight of Law Enforcement: Report on the State of the Field and Effective Practices (Jul 2021) https://cops.usdoj.gov/RIC/Publications/cops-w0952-pub.pdf at 78-79

[4] Noah Goldberg, *Families of Those Killed by Police Can Request an Independent Investigation. In Brooklyn, Most Have Not,* Brooklyn Eagle, Oct 7, 2019, https://brooklyneagle.com/articles/2019/10/07/ccrb-independent-investigations-police-killings/

In addition to the fear of retaliation that such patterns of officer misconduct have instilled in some communities, many individuals may be dissuaded from filing a complaint or completing an investigative interview due to the complications surrounding pending criminal charges related to the encounter that initially gave rise to an officer's misconduct. In such instances, notwithstanding obvious indicia of police misconduct, LAS is obligated to advise its clients of the potential risks of participating in a CCRB interview while their criminal cases are active. Many of those individuals understandably choose to decline an interview with the CCRB to protect their interests in court. Even after an individual's criminal case is resolved, however, their legal interests may still be better served by not participating in a CCRB investigation. Should an individual wish to pursue a civil rights action against an officer for violating their rights, we are similarly obligated to advise them of the risks of cooperating in a CCRB investigation while their civil cases remain active. This creates a perverse incentive structure: those individuals who have suffered more obvious injuries—and thus have higher-value legal claims and are more likely to sue—may be *less* likely to participate in a CCRB proceeding.

Criminal defendants and civil rights plaintiffs should not feel pressured to prejudice their own cases for the CCRB to serve its role as a watchdog for police misconduct. Similarly, officers engaging in misconduct should not be provided with any further incentive to levy weak or false charges in order to delay or escape scrutiny from an oversight investigation. Permitting the CCRB to self-initiate complaints would alleviate such pressures and incentives.

Furthermore, a requirement that a civilian complaint be filed for the CCRB to initiate action poses an unnecessarily high evidentiary burden on administrative proceedings that does not exist even in judicial fora. By way of analogy, criminal proceedings can often proceed without a complainant's sworn statement or participation if there is other sufficient evidence to support the charges. There is no reason for an administrative misconduct proceeding to operate under a more stringent standard than a criminal proceeding. The CCRB's power and authority as an oversight agency and a mechanism of individual officer accountability should not be hamstrung by the lack of a complainant in the many situations where misconduct is clearly established by other reliable sources.

Finally, we note that the authority to self-initiate complaints in no way alters the standard by which the evidence is evaluated once an investigation has been completed. While the Board may turn to preliminary evidence to initially determine whether a full investigation without a

civilian complaint is warranted, the final disposition of each allegation is still based on the preponderance of the evidence standard used to evaluate *all* allegations investigated by the CCRB. As such, self-initiated complaints do not implicate an officer's due process rights or other charter-mandated requirements related to misconduct investigations or subsequent disciplinary proceedings.

III. The Proposed Language Regarding Case Dispositions Allows the Public to Better Understand Case Outcomes

The proposed revisions to the terminology used to describe case dispositions in § 1-33(e) achieve one simple, yet significant, goal: they allow the public to understand the outcomes of investigations into alleged misconduct more easily. Critically, this revised terminology does not alter the underlying meanings of these dispositions. They simply replace technical – and frequently misunderstood and misinterpreted – terms with plain language in a manner that embraces accessibility and transparency.

The terminology "unsubstantiated" and "exonerated" as currently used to describe dispositions is descriptively inaccurate and therefore prone to misinterpretation. Those descriptive inaccuracies have real-world consequences on how prosecutors and city attorneys treat complaints of misconduct in criminal and civil litigation.

Allegations currently described as "unsubstantiated" are not, contrary to the impression created by the name, found to lack any substantiating evidence following an investigation. Rather, the "unsubstantiated" disposition merely indicates that the evidence gathered through the investigative process — which may be incomplete for a variety of reasons, including NYPD obstruction[5] — was inconclusive. In practice, the term "unsubstantiated" often indicates a factual dispute about the officer's conduct that is unresolved due to an incomplete investigation, not a lack

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[5] *See*, e.g., David Cruz, *NYPD's Refusal to Comply With Misconduct Investigations Cost Months of Time and Effort,* Gothamist, Aug 6, 2020, https://gothamist.com/news/nypds-refusal-comply-misconduct-investigations-cost-months-time-and-effort; *see also*, e.g., Sydney Pereira, *Memo: NYPD Oversight Investigators' Job Has Become "Untenable" Because of Body Cam Backlog,* Gothamist*,* Jul 3, 2020, https://gothamist.com/news/memo-nypd-oversight-investigators-job-has-become-untenable-because-body-cam-backlog; *see also*, e.g., Eric Umansky, *A Police Car Hit a Kid on Halloween 2019. The NYPD Is Quashing a Move to Punish the Officer,* ProPublica, Feb 1 2022, https://www.propublica.org/article/a-police-car-hit-a-kid-on-halloween-2019-the-nypd-is-quashing-a-move-to-punish-the-officer

of any evidence to support the complainant's version of events or a larger quantum of evidence to support the officer's version.

Similarly, a disposition of "exonerated," despite the implication of innocence, does not mean that the officer did not engage in the conduct alleged. Nor does it mean that the officer did not violate an individual's rights under state or federal law. To the contrary, allegations that are "exonerated" often encompasses a conclusion by investigators that the conduct did take place but was found to be permitted under the NYPD's internal policies, procedures, and guidelines. Such a finding leaves open the question of whether the officer violated any state or federal law (and, by implication, whether the NYPD policies, procedures and guidelines violate the law). Thus, while the term "exonerated" erroneously evokes a comparison to an acquittal at trial, a finding of "exonerated" is not at all akin to an acquittal.[6] LAS has represented numerous individuals in civil rights claims involving police conduct that was arguably not prohibited by NYPD guidelines that ultimately resulted in significant settlements and revisions to NYPD policies and training. One such example involved an egregious case of NYPD officers shackling a pregnant woman during labor and after she gave birth to her newborn son.[7]

The confusion created by these terms shapes the conduct of prosecutors and city attorneys in ways that undermine truth and accountability. Following discovery reforms and the repeal of New York Civil Rights Law § 50-a, prosecutors' offices across New York insisted that "unsubstantiated" allegations lacked a "good faith basis" as potential impeachment material in discovery, arguing that a determination that a complaint was "unsubstantiated" rendered it irrelevant and "non-probative" as to an officer's prior bad acts, despite the inconclusive nature of the investigation.[8] In other cases, prosecutors have continued to argue that underlying records of unsubstantiated allegations are not required as part of their statutory or constitutional obligations

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[6] *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (Internal police administrative determinations are not tantamount to an acquittal at trial or to a dismissal on the merits.)

[7] Sonia Moghe, *Woman Shackled by Police While in Labor Settles with New York City,* CNN, Apr 22, 2021, https://www.cnn.com/2021/04/21/us/new-york-pregnant-woman-shackled-by-police-settles/index.html

[8] *See, e.g.*, *supra* note 11, *Rouse*, 34 NY3d at 277.

under Brady for the same reasons.[9] This deprives defense attorneys of valid – and often critical – impeachment material under well-established criminal case law.[10]

In civil rights litigation, city attorneys regularly attempt to resist production of complaints deemed "unsubstantiated" or "exonerated," citing those findings as evidence that past complaints are not relevant or probative evidence, even though "an accusation against an individual need not be proven before the fact of that accusation can be disclosed pursuant to an otherwise valid discovery request."[11] While these arguments do not always succeed, some courts have expressed confusion about the nature of the terminology.[12]

Similarly, with regard to so-called "exonerated" complaints, in both criminal and civil cases, lawyers should be allowed to cross-examine an officer on potential prior bad acts even if those acts complied with existing NYPD guidelines, which may themselves be flawed. Evidence that an officer violated a statutory or constitutional right bears on the officer's credibility, regardless of whether their conduct also violated NYPD guidelines. And civil rights plaintiffs may be able to show that an officer's pattern of conduct violated the State or federal constitution even if it fell within NYPD's guidelines. But the lack of clarity in the current terminology gives prosecutors, police officers, and police officers' counsel grounds to argue otherwise, thus challenging effective criminal defense, slowing down civil rights cases, and delaying justice.

When even lawyers and judges find themselves misunderstanding and disagreeing about the plain meaning of the current terminology, it is no surprise that a lay person without any

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[9] *See People v. Perez*, 2021 N.Y. Slip Op. 21165, at *9 (Sup. Ct. Queens Cty. June 14, 2020) ("An unsubstantiated complaint does not provide a good faith basis to inquire and, thus, does not constitute discoverable impeachment material. A determination that there is insufficient evidence to establish that something happened does not support a reasonable basis to believe that it did."); *People v. Williams*, Ind. No. 4977/2019, at 4 (Sup. Ct. Kings Cty. Nov. 30, 2020) ("A plain reading of CPL 245 requires the People to disclose information pertaining to sustained findings of misconduct against any police witnesses.") (emphasis added)

[10] *People v. Rouse*, 34 N.Y.3d 269, 277 (2019) ("A 'good faith basis' [to cross-examine] requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask").

[11] *See, e.g.*, *Barrett v. City of New York*, 237 F.R.D. 39, 40 (E.D.N.Y. 2006).

[12] *See, e.g.*, *Barrett*, 237 F.R.D. at 41 (granting motion to compel production of exonerated and unsubstantiated allegations); *People v. Portillo*, 73 Misc. 3d 216, 219, 153 N.Y.S.3d 758, 762 (N.Y. Sup. Ct. 2021) (ordering disclosure of unsubstantiated complaints; *but see People v. Randolph* (69 Misc.3d 770, 772-3 (Sup. Ct. Suff. Co. 2020) (refusing to order disclosure of exonerated complaints).

expertise may be easily confused. Many individuals we represent, for example, are suspicious of the CCRB based on the connotations of its terminology. One client, for example, expressed shock when the CCRB deemed his complaint of an officer's unlawful use of force as "unsubstantiated" even after he provided video evidence of the beating, because the video did not capture the beginning of the encounter, and there existed only the complainant's and the officer's clashing testimony about the events preceding the use of force. He found it difficult to consider the CCRB's work meaningful and legitimate after that decision. Another client reported that they had little faith in the CCRB's ability to hold NYPD accountable after reporting an incident of officers' indiscriminate use of pepper spray at a protest was found to be "exonerated" because it did not contradict the NYPD's pepper spray policy. That incident was captured on video by several witnesses, which was critical evidence as body-worn cameras were not worn or used by the subject officers. There was no dispute that officers indiscriminately pepper sprayed and used force against a large crowd of people celebrating at the Queer Liberation March.[13] Indeed, this incident, along with many other incidents at protests during 2020, are the subject of current pending civil litigation, challenging the legality and constitutionality of NYPD's actions and use of excessive force, including pepper spray.[14]

The proposals to replace "unsubstantiated" with "unable to be determined" and "exonerated" with "within NYPD guidelines" help resolve this confusion. The newly proposed, plain-language terminology will help members of the public better understand CCRB investigations and NYPD guidelines themselves. Following the repeal of Civil Rights Law § 50-a, which shielded police misconduct records from public disclosure, New Yorkers now have an unprecedented opportunity to learn about the mechanisms of police accountability in their city. Amending the terms used to describe dispositions will ensure better communication with the public, in turn building trust and confidence in CCRB investigations.

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[13] Sydney Pereira and Aviva Stahl, *NYPD Officers Arrest And Pepper Spray Queer Liberation March Protesters,* Gothamist, (Jun 28, 2020), https://gothamist.com/news/nypd-officers-arrest-and-pepper-spray-queer-liberation-march-protesters

[14] *In Re: New York City Policing During Summer 2020 Demonstrations,* 1:20-cv-08924-CM

IV. The Proposed Rule Appropriately Recognizes that Off-Duty Conduct May Be Probative of Official Misconduct and Should Clarify That Off-Duty Conduct Can be Considered Evidence in Any Bias Investigation.

The proposed edits to § 1-02(b)(2) codify the expansion of the CCRB's jurisdiction to include investigations into an officer's past professional conduct and an officer's off-duty conduct. Specifically, the proposed edits would define the process for initiating an "investigation of past conduct in the course of performance of official duties" whenever an officer is found by a covered entity[15] to have engaged in any act of bias. Such an investigation will be mandatory if the officer is found to have committed a "severe act of bias," as defined in subchapter A. The proposed edits further provide that CCRB may initiate a past professional conduct investigation based on an officer's off-duty conduct when "the Police Department's interest in preventing actual or potential disruption outweighs the member's speech interest."[16]

It is now well-accepted that an officer's off-duty misconduct should be a basis for discipline if there is an adequate nexus between the off-duty conduct and their official duties. The Department of Justice, for example, has promulgated guidance specifically noting that federal law enforcement agents may be disciplined for any off-duty misconduct that bears on their performance of official duties, including racist or sexist remarks and racist or sexist conduct.[17] This reflects a recognition that racist or sexist statements or conduct by law enforcement agents is likely to bear on their execution of official duties—regardless of whether such conduct occurs on- or off-duty.

This is no less true for NYPD officers than it is for federal law enforcement. Indeed, a little over one year ago, a City Council investigation revealed that a deputy inspector within the NYPD

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[15] A "covered entity" is the NYPD, CCRB, the Commission on Human Rights, the Department of Investigation, a court of competent jurisdiction, the New York State Division of Human Rights, the New York State Office of the Attorney General, the United States Equal Employment Opportunity Commission, the United States Department of Justice, or any other officer or body designated by the Board.

[16] In order for off-duty conduct to serve as the basis for initiating an investigation, two other criteria must also be met: "(i) such conduct could have resulted in removal or discipline by the Police Department," and "(ii) the Board reasonably believes such conduct has had or could have had a disruptive effect on the mission of the Police Department." § 1-02(b)(2).

[17] U.S. Dep't of Justice, Ethics Handbook for On and Off Duty Conduct (2016), https://www.justice.gov/file/1047651/download [last visited Jul 11, 2022].

responsible for overseeing the department's response to workplace harassment had posted hundreds of racist, sexist, and homophobic screeds on the message board Law Enforcement Rant—posts that stood out "even by the website's vitriolic standards."[18] Those posts referred to Black and Latinx New Yorkers as "urban ghetto types" and claimed that "25,000 years of evolution continues to elude these poor unfortunate creatures." Another post described the family of Eric Garner, a Black man killed by NYPD, as a "grape soda drinkin', cheese doodle and chicken wing eatin' . . . family of bastard children and grandchildren." The officer's posts also discussed public housing residents, and NYPD's stop-and-frisk practices, in derogatory and inflammatory terms. In one post, the officer described public housing residents in East Harlem as "savages." In another, he suggested that City Council Speaker Corey Johnson deserved to be sexually assaulted for criticizing the NYPD's stop-and-frisk practices. In response to the public outcry over these horrific messages, the officer was fired.[19]

The proposed edits to § 1-02(b)(2) appropriately affirm and strengthen this principle by recognizing that off-duty conduct, including biased behavior, can and should trigger investigations into whether an officer's official duties were infected by the same bias. We urge the CCRB to go further, however, and make clear that biased behavior off-duty is not merely sufficient to *initiate* an investigation into an officer's past professional misconduct but is also probative evidence in any *ongoing* misconduct investigation. Particularly because individuals who discriminate are "unlikely to leave a smoking gun . . . attesting to discriminatory intent,"[20] circumstantial evidence about racial or gender animus is important to thoroughly investigating claims of discrimination. For example, to adequately investigate whether an officer engaged in racial profiling, the CCRB should consider whether they have demonstrated racial bias on- or off-duty — in social media posts, communications, interviews, or any other context — and weigh evidence of any such behavior appropriately when assigning dispositions to misconduct allegations.

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[18] William K. Rashbaum and Alan Feuer, *N.Y.P.D. Anti-Harassment Official Accused of Racist Rants,* New York Times*,* Nov 5, 2020, https://www.nytimes.com/2020/11/05/nyregion/james-kobel-nypd-racism.html

[19] *NYPD Office Fired Over Hateful Posts After Internal Trial*, NBC New York , Feb 4, 2021, https://www.nbcnewyork.com/news/local/nypd-official-fired-over-hateful-posts-after-internal-trial/2866546/

[20] *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) (internal quotation marks omitted).

V. The Inclusion of BWC-Related Misconduct Is Critical to Tackling the Endemic Problems of NYPD Officers Failing to Properly Record Encounters.

The proposed rule changes clarify the definition of "Abuse of Authority" to expressly include "improper use of body worn cameras." They further explain that "improper use of [body worn cameras]" refers to when a member of service fails to turn the camera on, turns it off prematurely, or fails to record an incident in violation of the NYPD Patrol Guide." This is a welcome step toward ensuring that officers properly record covered encounters. The NYPD's current failure ensure proper recording frustrates the rights of individuals in criminal and civil rights cases and prevents effective oversight and accountability, making CCRB oversight critical.

Failure to properly record encounters, including the crucial first moments of a police-civilian encounter, prejudices the rights of criminal defendants and civil rights plaintiffs to access all relevant evidence. Body-worn camera footage is routinely used as evidence in criminal cases, often providing a crucial account of the interaction that led up to an individual's arrest or summons. That purpose is only fulfilled, however, to the extent NYPD officers properly and completely record all encounters according to the NYPD Patrol Guide. When an officer fails to properly record an encounter leading up to an arrest, the only evidence presented to a court may well be the officer's testimony. No objective and accurate record of the arrest will be introduced, and the accused person cannot provide a differing account of the circumstances that precipitated the arrest without waiving their right to remain silent.

Assessing the constitutionality of officers' conduct also becomes nearly impossible without complete and contemporaneous recording. Following the finding of liability in the *Floyd* litigation, the Court ordered the NYPD to implement a city-wide body-worn camera program. The Court specifically noted that "body-worn cameras are uniquely situated to addressing" problems of racial profiling and biased policing.[21] Absent contemporaneous recording, "the difficulty of judging in hindsight what happened during an encounter between a civilian and the police" rendered oversight largely impossible.[22] Agencies investigating complaints of bias, racial profiling, or other official misconduct were often left with just the officer's word against the complainant's and no way to resolve the differences.

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[21] *Floyd v. City of New York*, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013) (*Floyd II*).

[22] *Floyd II*, 959 F. Supp. 2d at 685.

Despite the importance of complete BWC footage, in the absence of CCRB authority to investigate improper use of cameras NYPD officers have long struggled to properly record all required encounters. During the pilot phase of NYPD's BWC program, the City of New York's Department of Investigation Office of the Inspector General for the NYPD (OIG-NYPD) raised concerns about officers failing to properly record incidents. In a report published in 2015, OIG-NYPD found that officers regularly failed to begin recording interactions at the appropriate time and terminated recordings early.[23] These failures led to concrete breakdowns in oversight: As noted by OIG-NYPD in a separate report, missing or incomplete BWC footage was part of why NYPD's own internal investigations bureau failed to substantiate a *single* allegation of racial profiling from 2014 through 2018.[24]

Likewise, across LAS's criminal defense practice, public defenders report that value of body-worn camera footage varies greatly because footage can be easily manipulated by late activation, early deactivation, and either intentional or unintentional obstruction of the camera. Both an internal survey and a series of body-worn camera-focused discussion groups conducted by LAS's Cop Accountability Project in 2021 found rampant complaints from public defenders that delayed activation was common in their review of body-worn camera video produced in criminal discovery. Some defenders reported that most of the body-worn camera video they reviewed showed our clients after being arrested and in handcuffs, clearly because body-worn cameras were activated too late in the encounter. Because audio is not preserved during the first thirty to sixty seconds of a recording,[25] the ability to meaningfully assess the crucial initial moments of a police encounter is severely limited when officers delay activation.

Many defenders reported a perception, grounded in this experience, that body-worn cameras are utilized by officers when most convenient and advantageous to them. For example,

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[23] Department of Investigation Office of the Inspector General for the NYPD, Body-Worn Cameras in NYC: An Assessment of NYPD's Pilot Program and Recommendations to Promote Accountability (Jul 2015) https://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-07-30-Nypdbodycamerareport_final.pdf

[24] Department of Investigation Office of the Inspector General for the NYPD, Complaints of Biased Policing in New York City: An Assessment of NYPD's Investigations, Policies, and Training (Jun 2019) https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf

[25] Axon Body Worn Camera Settings, https://my.axon.com/s/article/Body-Camera-Settings?language=en_US. [last accessed Jul 11, 2022].

some attorneys reported receiving body-worn camera footage for only a subset of the officers that were present or involved in the arrest of our clients. Others reported that cameras were abruptly cut off, only to be activated again later merely to record our clients invoking their right to an attorney or waiving their rights before being deactivated again. Similarly, some defenders reported that missing body-worn camera footage that started late in the encounter or were prematurely cut short were met with conflicting explanations.

Anecdotally, defenders noted that, when available, body-worn cameras can provide an objective account of the circumstances leading to an individual's arrest. Yet, they also expressed distrust in the ability to use them as an accountability tool when officers have wide discretion over their use and little repercussions for their misuse. While there may be innocuous situations where an officer's camera is not functioning properly, defenders report that courts rarely scrutinize this assertion, defenders rarely receive any other additional discovery confirming such a claim, and defenders are rarely successful in bringing challenges within criminal prosecutions for missing or insufficient body worn camera footage.[26]

The CCRB's ability to investigate officers' failure to appropriately use body-worn cameras is thus a critical step towards ensuring that officers' own accounts of interactions and arrest can be fairly tested against other evidence and that documentation of other abuses of authority is preserved. The CCRB is also well-poised to investigate these violations, as its investigators review thousands of hours of body worn camera footage during its investigations and are well trained on the NYPD's body-worn camera policy. While NYPD supervisory reviews of body-worn camera footage is required by policy,[27] supervisors may be unwilling or unable to assess the completeness of all their officers' recordings nor the timeliness of activation and deactivation without a complaint. As an external independent agency, CCRB is better positioned to lead investigations of and determine appropriate discipline for improper body-worn camera usage.

We also reiterate the importance of CCRB gaining full, direct and unfettered access to body-worn camera video. NYPD's sole control over body-worn camera footage and its history of

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[26] *See*, *e.g.*, Mary D. Fan, *Missing Police Body Camera Videos: Remedies, Evidentiary Fairness, and Automatic Activation,* 52 Ga. L. Rev. 57 (2017)

[27] Use of Body-Worn Cameras, NYPD Patrol Guide, 212-123

refusing to turn it over to oversight agencies diminishes its value as an accountability tool.[28] The CCRB should not be subject to arbitrary administrative delays to access and review crucial evidence in its investigations, nor be forced to depend on public outcry to prompt NYPD to timely provide videos.[29]

[28] Civilian Complaint Review Board, Strengthening Accountability: The Impact of the NYPD's Body-Worn Camera Program on CCRB Investigations (Feb 2020) https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/issue_based/20200227_BWCReport.pdf

[29] "However, after the CCRB raised concerns about the delays in obtaining BWC videos, the NYPD made significant progress…" Sixteenth Report of the Independent Monitor at 67, (May 6, 2022), available at https://www1.nyc.gov/assets/nypd/downloads/pdf/monitor-reports/federal-monitor-16th-report.pdf [last accessed Jul 11, 2022]