

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Public Safety and Committee on Justice System
Joint Hearing re:
Oversight - Police Discipline
February 7, 2019
Written Testimony of The Bronx Defenders
By Jenn Rolnick Borchetta & Oded Oren**

Chairman Richards, Chairman Lancman, and members of the Committees, my name is Jenn Rolnick Borchetta and I am Deputy Director of Impact Litigation at The Bronx Defenders. I am here with my colleague Oded Oren who is a staff attorney in our Criminal Defense Practice.

The Bronx Defenders is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. The Bronx Defenders provides innovative holistic client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to low-income people in the Bronx. Our staff of over 300 represents approximately 28,000 individuals each year. In the Bronx and beyond, The Bronx Defenders works to transform how low-income people are represented, and to reform the system they face.

Police misconduct is a lived reality for many of our clients at The Bronx Defenders. Our clients are pushed and shoved, their faces scraped on walls and on the floors, their arms broken and their heads intentionally banged against cars and walls — even after they are handcuffed. Often, police misconduct is more psychologically scarring than it is physically. Such was the case for a client of ours, who, strolling down the street towards his bus stop, was stopped by two undercover officers — guns brandished — who proceeded to throw him to the ground and later strip search him at the precinct. By the time our client's case ended — with a dismissal — he had already been enrolled in therapy for months to address the trauma he had suffered from that encounter.

We are grateful for the opportunity to testify today about the impact of police misconduct on our clients, their families, and their communities, and to offer our insights on how the City

Council can help ensure meaningful accountability. We will speak specifically to the bills calling for a disciplinary matrix report, the repeal of 50-A of the New York Civil Rights Law, the publication of data by the prosecution offices, and police reporting about specific charges related to officer misconduct; we support these bills with modifications, as we discuss in more detail next.

LESSONS FROM THE BRONX DEFENDERS IMPACT LITIGATION PRACTICE

The Impact Litigation Practice at The Bronx Defenders brings affirmative lawsuits to advance civil rights for low-income people in the Bronx. The Impact Litigation Practice works closely with staff throughout The Bronx Defenders to identify widespread injustices affecting our clients. Through civil litigation in federal and state courts, we then secure long-lasting reforms. In recent years, our Impact Litigation Practice has challenged court delay and helped reduce the backlog of old misdemeanor cases in the Bronx from approximately 2,400 to under 400; forced prosecutors to implement a quick and seamless process for the public to retrieve property seized during arrests; and brought the number of unlawful trespass arrests in private buildings patrolled by the New York City Police Department (“NYPD”) from hundreds to almost none.

As part of this work, we represent the plaintiffs in the ongoing stop-and-frisk remedial process that is being overseen by a federal court monitor. We have represented the plaintiffs in two lawsuits within the stop-and-frisk remedial process: *Floyd v. City of New York* and *Ligon v. City of New York*. While our work with the court monitor in designing and implementing reforms pursuant to the court’s orders and the parties’ settlements in those cases is fairly well known, the stop-and-frisk remedial process also included a massive community input component that has received less attention. Relevant to the bills under consideration today is that thousands of community members who gave input in this process spoke with almost total unanimity in calling for more meaningful discipline of officer misconduct. We urge the Committees to consider this testimony in contemplating the package of discipline and transparency bills that have been introduced.

The stop-and-frisk community input process was conducted over a three year period, from 2014 to 2016. It relied on the collaboration of over twenty organizations. It included sixty-four focus groups comprised of the people most affected by stop-and-frisk and trespass enforcement practices¹ and twenty-eight community forums at which attendees were guided

¹ Final Report and Recommendations of the Hon. Ariel Belen, *et al. v. City of New York*, 08 Civ. 01034, Dkt # 597 (“Belen Report”) at 34-35. The Belen Report is also available at <https://ccrjustice.org/sites/default/files/attach/2018/05/Dkt%20593%20-%20JRP%20Final%20Report%205-15-18%20ECF.pdf>.

through facilitated conversations about reforms.² Over five hundred people participated in the focus groups; almost two thousand people participated in the forums.³ The focus groups were comprised predominantly of black and latino people from the neighborhoods in New York that bore the brunt of the NYPD's unlawful stops and trespass arrests.⁴ Their voices should be heard here, as they are the ones whose daily lives are affected by the NYPD's persistent failure to hold officers accountable. While we do not have time this afternoon to share every relevant testimonial from the thousands of pages of focus group transcripts that were compiled, the following quotes make plain the urgent need for the NYPD to implement more meaningful and consistent discipline when officers engage in misconduct:

“There's no accountability. The police can just do anything.”⁵

“I'll lose my job if I have weed in my pocket. They can't lose their job if they shot somebody wrongfully?”⁶

“They kill people and get away with it.”⁷

“They have to be penalized for things they're doing . . . They need discipline . . . They're not equal. They're considered higher than us.”⁸

“I see all my life cops break the law and nothing happens to them. . . . there should be consequences.”⁹

“They act like they can get away with anything, which basically they can.”¹⁰

² Belen Report at 37.

³ Belen Report at 37.

⁴ Belen Report at 135-149.

⁵ 1/5/2016 *Floyd* Focus Group Tr., 8:16-17. The *Floyd* focus group transcripts are publicly available as an appendix to the Belen Report, *see Floyd et al. v. City of New York*, 08 Civ. 01034, Dkt # 598-8, Appendix H. They can also be accessed via the following link:

https://www.dropbox.com/sh/pc526qv7ni0foy9/AADG_t-ozI3pSYTnTobKsicca?dl=0. The focus group participants' names are confidential; the participants are ascribed pseudonyms in the transcripts.

⁶ 10/20/2015 *Floyd* Focus Group Tr., 23:13-14.

⁷ 10/28/2015 *Floyd* Focus Group Tr., 15:19.

⁸ 12/9/2015 *Floyd* Focus Group Tr., 10:39-11:3.

⁹ 1/26/2016 *Floyd* Focus Group Tr., 14:22-33

¹⁰ 10/28/2015 *Floyd* Focus Group Tr., 5:47.

“You gotta do some type of discipline. Because if [officers] see that their actions is not being disciplined they’re gonna keep doing what they’re doing now.”¹¹

“[Officers] should do their time for doing real criminal stuff, like beating on people for no reason.”¹²

“I can sit here, as a police officer, I could punch her in the fucking head, and I’m getting desk duty with pay.”¹³

“[T]hey do as they please, and . . . all they get is suspension or desk duty.”¹⁴

Officers who have engaged in misconduct “get leave and they’re still getting paid. You didn’t feel no consequences. . . . There’s no real affect in their life”¹⁵

“[I]t may be an officer with 50 complaints on him already. He’s still okay. He still has his job. He’s still out in the field, doing the same thing repetitively.”¹⁶

“When an officer gets in trouble, you know what they do? Desk work. They be at the desk. That’s all they do. That’s not a punishment.”¹⁷

“If you don’t pay a consequence, you’re not going to learn anything.”¹⁸

“[E]ven though they have evidence [of misconduct], the cop always wins the case”¹⁹

“[W]hen you start making noise . . . that’s the only time that I know for a fact they even get a talking to. They’re not really reprimanded or nothing like that.”²⁰

“We’ve made significant changes, but the new rules will only be as good as enforcement and accountability.”²¹

“There’s this culture in place where there’s no accountability from within. . . . no one is holding [officers] accountable within their own team.”²²

¹¹ 10/27/2015 *Floyd* Focus Group Tr., 18:9-11.

¹² 10/28/15 *Floyd* Focus Group Tr., 15:14-19.

¹³ 11/3/15 *Floyd* Focus Group Tr., 28.

¹⁴ 11/17/15 *Floyd* Focus Group Tr., 29:1283-1284.

¹⁵ 11/18/15 *Floyd* Focus Group Tr., 17:563-564.

¹⁶ 12/8/15 *Floyd* Focus Group Tr., 9:5-6.

¹⁷ 12/14/15 *Floyd* Focus Group Tr., 10:30-31.

¹⁸ 12/16/15 *Floyd* Focus Group Tr., 12:23-34.

¹⁹ 12/21/15 *Floyd* Focus Group Tr., 17:19-20.

²⁰ 12/21/15 *Floyd* Focus Group Tr., 20:34-38.

²¹ 1/5/16 *Floyd* Focus Group Tr., 15:25-27.

²² 1/6/16 *Floyd* Focus Group Tr., 7:4-8.

“We have to start holding [the police] accountable because it’s basically like you said, what are you going to take from this? Nothing.”²³

“No matter how many people you get to justify and say that person was in the wrong, as long as he has a badge, he’s untouchable.”²⁴

“There’s no cops getting no type of type of repercussions for what they’re doing.”²⁵

“[W]hat really needs to happen . . . is accountability; not just from the Commissioner of the NYPD down to the lowest patrol car or patrol officer, but also with the City Council and Mayor’s office; because ultimately that Commissioner, NYPD, answers to them, the City Council . . . So we need accountability . . . and guidelines set in place for officer that violate [the rules].”²⁶

The stop-and-frisk community input process was overseen by retired judge Ariel Belen, who was appointed by the federal court to facilitate the proceedings and to develop additional reforms that reflected community input and that would be necessary to bring the NYPD’s practices into compliance with the Constitution. After amassing extensive community input, and following months of discussions among community stakeholders and the parties’ representatives, Judge Belen issued a report to the court in which he recommended additional reforms that the court should order the NYPD to implement.²⁷ In issuing his recommendations, the Facilitator found that “an overarching theme throughout the focus groups centered around accountability”²⁸ and a recurring theme at the community forums was “a perceived lack of accountability for misconduct at the NYPD.”²⁹ Judge Belen recommended, among other things, that the court order the NYPD to develop a disciplinary matrix and to periodically report on disciplinary action.³⁰

²³ 1/12/16 *Floyd* Focus Group Tr., 15:46-16:2.

²⁴ 1/21/2016 *Floyd* Focus Group Tr., 23:12-14.

²⁵ 2/3/2016 *Floyd* Focus Group Tr., 11:25-26.

²⁶ 11/5/2016 *Floyd* Focus Group Tr., 5:27-33.

²⁷ Belen Report, *supra* n.1.

²⁸ Belen Report at 153.

²⁹ Belen Report at 173.

³⁰ Judge Belen’s recommendation was as follows: “We therefore recommend that the NYPD be ordered to develop and publish progressive disciplinary standards to be used in cases arising from unconstitutional stops and trespass enforcement regarding excessive force, abuse of authority, discourtesy or offensive language, and racial profiling allegations.” Belen Report at 224. Notably, The NYPD’s Patrol Guide already lists violations that will ordinarily result in certain consequences. *See* NYPD Patrol Guide §§ 206-03, 206-04, 206-05, 206-07. The NYPD Patrol Guide is available for viewing and download at <https://www1.nyc.gov/site/nypd/about/about-nypd/patrol-guide.page>.

The plaintiffs supported these recommendations and asked the court to order the NYPD to implement them; the court has not yet ruled. Though beyond the purview of the court's jurisdiction, Judge Belen further suggested that--as a policy matter--the legislature should repeal 50-A and that the NYPD should support such repeal.³¹

The disciplinary matrix bill introduced by Chairman Richards (Int. No. 1309), is commendable as a step toward holding officers accountable in New York City, but we believe it should go further: The NYPD should be required to report on how--not whether--to implement a disciplinary matrix, and the Council should require an ancillary report that documents the need for a disciplinary matrix from the perspective of those who face the most policing in our city. This community input can be culled in part from the *Floyd* focus groups. Finally, the disciplinary matrix should be transparent to the public and informed by those most impacted by police abuses.

LESSONS FROM THE BRONX DEFENDERS CRIMINAL DEFENSE PRACTICE

Transparency in police accountability and discipline, and the proper documentation and disclosure of police misconduct, are critical to both the effective representation of our clients in criminal court and to our clients' ability to receive some form of closure and justice in their cases. We recently represented a client who was stopped without justification, frisked, and charged with possession of controlled substance, in what was a blatantly racist application of the racist stop-and-frisk practices that continue to harm our clients and their communities. The arresting officer's misconduct records indicated a clear pattern of similar behavior. These records helped obtain a dismissal in that case, which was the first step in our client's path to find justice and closure.

As the above example demonstrates, the disclosure of police misconduct records provides some measure of accountability for unlawful behavior through the court system — even when other accountability systems, such as the IAB or the CCRB, fail to do more than give an anemic slap to the wrist of the offending officer.

The Role of Police Disciplinary Records in Litigation and the Need to Repeal 50-A

While records of police misconduct are vital to holding officers accountable and reaching a measure of justice, they are not freely available to defense attorneys: the state civil rights law, known as Section 50-a, forbids the public issuance or mention in court of an officer's personnel record without judicial approval. As these Committees are well aware, the *de facto* effect of this

³¹ Belen Report at 272.

section is that police disciplinary records are turned over to defense only on the eve of trial — and, lamentably, at times after the start of the trial. Thus Section 50-a, and the policy that upholds it, serve to minimize police accountability, hurt the most vulnerable communities in our city, and block the administration of justice from those who have been unlawfully injured by the State. Proposed resolution T2019-3709, by Committee Member Williams, calls on the State Legislature and the Governor to repeal section 50-A of the New York Civil Rights Law, the section that protects these records from the public eye. If this were to pass, and misconduct records were more easily accessible to lawyers and the public, more accountability and more protection against the abuse of power by law enforcement would immediately result.

For the time being, we have relied heavily on the misconduct records database created by Legal Aid. This database allows us to identify officers with misconduct records early in the process of each case, and to investigate better and deeper into the misconduct that may have occurred in the case. It allows us to find patterns of unlawful behavior and to demonstrate these to the judges and juries. This database has revolutionized our ability to hold law enforcement accountable for misconduct and to demonstrate their misconduct in open court. However, this database is still limited since it includes only a patchwork of records, relying almost entirely on the initiative and memory of independent attorneys in collecting and uploading these records to the system.

Faced with inaccessible misconduct records (and a failure discipline officers in the first place), defenders have turned to information mining in order to obtain more insight into patterns of misconduct and to find better signals and corroboration when such patterns exist. Yet these methods are limited due to the incomplete information that we have access to.

Just like public defenders, policy makers can use information in order to gain profound insight and understanding into the failure of the criminal justice system - and potential remedies for these failures. This approach depends on transparency; in this case, in the form of access to information.

The Role of Transparency in Effective Police Discipline

Transparency, in the form of accessible information, is a first and important step towards accountability. The issue of police discipline has come to the forefront of the public discourse in recent years, after police violence, use of force and misconduct were exposed to the public's eye. Police discipline is a factor in minimizing these incidents in the future, and restoring some of the public's lost faith in law enforcement. Transparency is therefore an instrumental part of transforming the system and addressing the public outcry.

Transparency works on two separate tracks. First, transparency allows policy makers, such as this Council, and other stakeholders to understand the factors and context that give rise to these incidents; it thus allows all stakeholders to debate and decide on better, more effective policy initiatives. Second, transparency sends a clear signal to law enforcement personnel that they are being monitored and that they could be held accountable if they were to act in an unlawful or unethical way. This signal incentivizes law enforcement to act according to the laws and rules laid out for them.

To be effective, transparency in this context must make accessible as much information as possible. Access to information allows stakeholders to comb through information for recurring patterns, signals and irregularities. Finding these will lead to a better understanding of the scope of police misconduct, where it arises, and how it is camouflaged, hidden and explained away.

For example, police encounters that result in use of force often occur around subway entrances and places of congregation, such as neighborhood parties and festivals in the summer. As public defenders, we learn to identify these, even before speaking to our clients, by the trifecta of charges: resisting arrest; obstructing governmental administration; and disorderly conduct (in the context of outdoor encounters) or trespass/theft of services (in the context of subway encounters). Information about police charges at arrest, cross-referenced with locations, would yield more information about the prevalence of such occurrences; information about how these cases are resolved would help pinpoint those that involved misconduct and other case-handling patterns that are associated with misconduct. Ultimately, sifting through this information would lead to better, more effective and more targeted police discipline.

Another example that demonstrates the need for expanded transparency comes from a pattern comparing arrest charges by the police and the District Attorney's handling of these arrests. As a start, charges that do not involve a complaint which the District Attorney declines to prosecute serve as an initial indicator for a category of cases that should be examined. Focusing on the arrest charges in this group--perhaps cross-referenced to the specific charges of resisting arrest, obstructing governmental administration, and disorderly conduct--would yield a group of encounters that are suspect. Further narrowing such a group by cross-referencing specific officers involved could lead to even more insight into misconduct that is happening during police encounters.

Transparency, through access to information from both the police and the prosecution office, would send a message to officers that they are accountable for their actions, while promoting a deeper understanding of the issues and challenges we face in achieving accountability. Such information would be instrumental in formulating rules and policies that protect vulnerable communities and make the police accountable for its actions.

These Committees Must Expand Access to Non-Aggregate Information Regarding Police Action, From Initial Encounter To Final Disposition

If transparency is the key to achieving accountability, then the Committees' efforts, at least initially, must focus on making as much information accessible to stakeholders - including the public as a whole.

T2019-3707 and T2019-3708 make for a good first draft. They recognize the need to make accessible information about the identity of the person arrested, and focuses on some of the charges that are indeed indicative of foul play. Yet as noted above, these parameters alone are not enough. In order to understand what these numbers signify, they must be contextualized in tandem with more information, such as the arrest history of involved officer and the history of dispositions for cases that the officer was previously involved in. For example, a much more informative form of this bill for policy considerations would include a designation as to whether the officers involved in each of the incidents had been previously disciplined or sued for similarly unlawful conduct.

Similarly, T2019-3704, while making more information accessible, could go several steps further still. The bill would require prosecution offices to produce annual reports containing aggregate information about criminal charges and their severity, and the demographic information of the people prosecuted, among other parameters. Yet this bill stops short, too, of providing the information that would be truly informative for policy makers: it mandates reporting of aggregate information rather than reporting of individual encounters (as discussed below); and it leaves out much other information that would be instrumental in providing context and insight. For example, the bill focuses on information from prosecution offices, without requiring that similar information and parameters be reported by the NYPD - comparative information that would allow policy makers to draw much better inferences and conclusions about how to bring about more and better accountability.

In general, the above mentioned bills, along with the bills relating to police discipline and complaints (1105-2018 and T2019-3705), would further aid the goals of these Committees if they made accessible information about each individual officers, rather than aggregating whole encounters into statistical sums. Aggregation, while protecting the identity of both officer and citizen, also hides information relating to specific officers who may be acting unlawfully, and specific patterns of behavior. Reviewing information that is less aggregated will allow policy makers to make much more informed decisions - while putting officers and prosecutors on notice that they are accountable. For example, for each officer, the police and district attorney office could make accessible information relating to the specific encounters: charges, the resolution of

the case, the officer (precinct, past misconduct history, etc), the protected class details of the citizen involved, and so on. By hiding some identifying details, the confidentiality and privacy of the individuals arrested can be maintained. Access to this level of information would allow policy makers not only to address current issues, but to locate and flag issues that have not yet been identified by the people engaged with this work “on the ground.”

Police accountability is one of the most pressing issues facing our City. The first step in addressing this issue is transparency - not only of NYPD practices, discipline matrices, and disciplinary records, but also of information from both the NYPD and the prosecution offices. Making such information accessible to policy makers and the public as a whole will send a message to officers that they are being watched and that they can be held accountable, while at the same time allowing the public and policy makers to formulate better policy initiatives to bring about more, and better, accountability.