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IS THE "CURE" WORSE THAN THE "DISEASE"?

Dem's push the "George Floyd Justice in Policing Act."
Its consequences could be profound.

For Police Issues by Julius (Jay) Wachtel. On June 8, 2020, a mere twelve days after those punishing "nine minutes and twenty-nine seconds" took George Floyd's life, the 116th. Congress introduced the "George Floyd Justice in Policing Act of 2020." Seventeen days later, on June 25, the House approved the measure by a comfortable 236-181 margin. Only three Republicans, though, voted in its favor. And the Senate, then a province of the "Reds," simply refused to take it up.

Hoping for a better outcome, the Dem's reintroduced the legislation in the 117th. Congress. On March 3rd., reflecting their eroded standing, the "George Floyd Justice in Policing Act of 2021" passed the lower chamber on a far less decisive 220-212 vote. It now awaits action by the evenly-divided Senate. Here are some of its key provisions (for the text version click here; for a summary click here.)

- As Federal law (18 USC 242) presently stands, police officers can only be prosecuted for "willful" civil rights violations, meaning done on purpose and with bad intent. The George Floyd Act would relax this standard to include behavior that was "knowing" – meaning, not by accident – or "reckless." Should death result, present penalty enhancements would be extended to include situations where officer conduct was a "substantial" contributing factor to the fatality, not only its sole or primary cause.

- In *Harlow v. Fitzgerald* (457 U.S. 800, 1982) the Supreme Court ruled that "qualified immunity" protects government employees from lawsuits for deprivation of civil rights under 42 USC 1983 "insofar as their conduct does not violate 'clearly established' statutory or constitutional rights of which a reasonable person would have known." Under the Floyd Act, that "immunity" would become a historical footnote. Civil rights lawsuits against individual officers would be heard (and could ultimately succeed) no matter whether an officer "was acting in good faith" or believed that their conduct was "lawful."

- An extensive, highly detailed section of the Act regulates how Federal law enforcement officers (but read on) go about their business. No-knock warrants are prohibited. Officers must intervene when colleagues misbehave. Most importantly, the use of force, including deadly force, would be bound by standards that are far less forgiving than the present go-to, the Supreme Court ruling in Graham v. Connor. Here's a extract from that landmark decision:

  > The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.

  No more. If at all possible, de-escalation must be attempted. Force also appears restricted to making arrests, and then only when "the officer has probable cause to believe" (*correctly* so) that the person being taken into custody committed a crime. Moreover, the force used must be "necessary and proportional," and lethal force is only allowed "as a last resort" once "reasonable alternatives…have been exhausted" and there is "no substantial risk of injury to a third person." Chokeholds and carotid holds are banned outright.

- To keep getting Federal law enforcement funds, state and local governments would have to follow the same use-of-force standards as the Feds. They must also contribute to a "National Police Misconduct Registry" that will include information about every citizen complaint filed against a state or local law enforcement officer. Instances that allegedly involve racial profiling or excessive force would be indexed by officer name and appear on a public website. To keep those Federal bucks rolling in, agencies would also have to participate in a national effort to combat racial profiling and assure a "more respectful interaction with the public." They would be required to consistently detect "episodes of discriminatory policing" and sanction officers who engage in such

practices.

- The Act goes beyond George Floyd. To quell concerns that surplus military gear "could be used inappropriately during policing efforts in which people and taxpayers could be harmed," the measure prohibits its transfer to local law enforcement agencies except for counterterrorism purposes (no more using it for drugs or border security.) The Act bars the transfer of firearms, impact weapons, drones, and vehicles other than automobiles and utility trucks. There's a provision for exceptions, but its complexities seem befuddling.

After reintroducing the measure in the new Congress, its main House sponsor, Rep. Karen Bass (D-Calif., pictured above) evocatively summarized its purpose:

> Never again should an unarmed individual be murdered or brutalized by someone who is supposed to serve and protect them. Never again should a family have to watch the murder of their loved one over and over again on the TV. Never again should the world be subject to witnessing what we saw happen to George Floyd in the streets in Minnesota.

Representative Bass' partner in the effort, House Judiciary Committee Chairman Jerrold Nadler, also expressed intense views. But he did offer an olive branch to the authorities:

> We have not forgotten the terrifying words 'I can't breathe' spoken by George Floyd, Eric Garner, and the millions of Americans in the streets who have called out for change in the wake of the murders of George Floyd, Breonna Taylor and so many others…With this legislation, the federal government demonstrates its commitment to fully reexamining law enforcement practices and building better relationships between law enforcement and the communities they are sworn to protect and serve.

Were it that simple. A continued profusion of lethal encounters (i.e., Breonna Taylor, Ma'Khia Bryant, Adam Toledo, Daunte Wright) has led some "Blues" to criticize the Floyd Act as much too little, far too late. Sponsored by Representative Ayanna Presley (D-Mass.) and Rashida Tlaib (D-Mich.), the "BREATHE" Act would, among other things, "divest federal resources from incarceration and policing" and "invest in new, non-punitive, non-carceral approaches to community safety that lead states to shrink their criminal-legal systems…."

As one might expect, such views have horrified the "Reds." But there are exceptions. Say, Senator Tim Scott (R-S.C.) One of the few Republicans to openly endorse some

aspects of the Floyd Act, he seeks "a substantive piece of legislation that is transformative for policing." But his views on what the final product should look like aren't what the measure's sponsors have in mind. For one thing, he'd like a re-do of the qualified immunity provision so that the burdens of litigation and unfavorable outcomes fall on agencies instead of individual cops. He also strongly opposes the notion of making it easier to prosecute officers for Federal civil rights violations:

> If you demonize and/or eliminate protections that they (police) have, chances are very low that you're going to have officers responding, so community safety goes down. Case in point: Portland, Cleveland, New York, Atlanta, Chicago. So we have to do something that strikes the right balance.

Were it that simple. While some tweaks might help get a few of Representative Scott's colleagues to vote "yea," influential civil rights groups that back the Floyd Act have steadfastly refused to water it down. Sherrilyn Ifill, President of the NAACP Legal Defense and Educational Fund, demands that the law pass exactly as written:

> The George Floyd Justice in Policing Act is a vital public safety measure. The core of the bill are measures that clear away barriers to holding law enforcement officers accountable for brutality and misconduct…We call on the Senate to do its part and immediately take up and pass the George Floyd Justice in Policing Act.

That's definitely a non-starter for the more stalwart Reds, say, the Heritage Foundation's Zack Smith. In his view, prohibiting the transfer of military gear and eliminating no-knock warrants would make policing far more dangerous, while tightening the rules on the use of deadly force "could cause officers to hesitate in critical situations."

Naturally, police union leaders are deeply invested in what the Act might bring. Patrick Yoes, the FOP's National President, feels that some of its measures "could have a positive impact." Yet he (and, assumedly, most of his membership) strongly opposes other aspects, such as abolishing qualified immunity. Mr. Yoes has also complained that despite the need for "genuine dialogue and engagement" the Act was sent "directly to the floor – without Committee consideration or any real debate on meaningful amendments."

That lack of consultation has troubled other influential law enforcement leaders. Cynthia Renaud, the retired police chief who leads the International Association of Chiefs of Police, issued a detailed, highly critical "letter" that strongly objects to the Act's key provisions. She warns, first, that ending qualified immunity "would have a profoundly chilling effect on police officers and would limit their ability and willingness

to respond to both critical incidents and routine calls for service without hesitation." Ms. Renaud also cautions that the Act's use-of-force rules, which go well beyond *Graham*, assume "a level of officer influence over circumstances that does not exist and strives to create a level of perfection that cannot possibly be obtained." In effect, cops would be encouraged to do nothing. Her objections extend to the National Police Misconduct Registry and to the prohibition on the transfer of military equipment, which she deems crucial for officer safety. Really, considering the penetrating power of firearms in the hands of the general public, the availability of armored vehicles does seem a no-brainer.

So what do *we* think? (Glad you asked!) We've taken a deep look at the proposal and are greatly concerned about its reach. In its enthusiasm to reflect today's sociopolitical climate, the Act seems to overlook the actual workplace of policing. As this retired law enforcement professional well remembers, it's an inherently messy space. When Louisville cops executed their infamous search warrant at the residence of Breonna Taylor, they didn't anticipate that a companion would be there, nor that he would be armed, nor that he would interpret their presence as a criminal assault and open fire. And when an officer fired back after a bullet struck his partner, his round missed its mark and tragically killed Ms. Taylor, who was standing alongside.

That episode likely spurred the Act's prohibition of lethal force unless there is "no substantial risk of injury to a third person." Yet officers often arrive at chaotic scenes knowing preciously little about the circumstances and nothing about its participants. Consider the recent tragic example of Ma'Khia Bryant. Within seconds of a cop's arrival at the disorderly scene, one angry teen tried to plunge a knife into the torso of another. In this example, the officer's shots struck their intended target. Had he not fired, as others were nearby, Ms. Bryant would have survived. But her intended victim could have been fatally stabbed.

It's for the reason that officers must occasionally make "split-second" decisions that the Supreme Court ruled as it did in *Graham*. As we mentioned in "Routinely Chaotic", lethal encounters typically occur in confused situations that teem with conflict and uncertainty. Throw in a lack of information, a shortage of human and material resources, and the inevitable "idiosyncrasies" of both cops and noncompliant citizens, and you have "A Recipe for Disaster."

What gets little play are the many successes (including more than a few miracles) that good cops pull off as a matter of course. As we recommended in our recent *Police Chief* piece, studying these could prove instructive. Yet the jargon-rich Act doesn't propose to craft organic solutions, and certainly not with any input from working cops. Instead, the Act's approach seems wholly regulatory, as though the infinitely complex

legislation can accomplish anything beyond guaranteeing long-term employment to legions of Federal and State overseers.

But reality *has* intervened. Major cities are experiencing a surge in violence and armed mayhem (click here for Chicago, here for Los Angeles, and here for New York City.) So it seems unlikely that the Act will pass in its current form. Hopefully, though, its sponsors will get the message and craft an approach that's attuned to the messy social environment that officers face each day. Cops *and* citizens deserve no less.