



HUMAN
RIGHTS
CAMPAIGN

Written Statement of
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To the
Committee on the Judiciary
United States House of Representatives
Oversight Hearing on Policing Practices and Law Enforcement Accountability

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Chairman Nadler, Ranking Member Jordan, and Members of the Committee:

My name is Alphonso David, and I am the President of the Human Rights Campaign, the nation's largest civil rights organization working to achieve equality for lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. HRC strives to end discrimination against LGBTQ people and realize a nation that achieves fundamental fairness and equality for all. On behalf of our more than 3 million members and supporters, I am honored to submit testimony for this important hearing on policing practices and law enforcement accountability. I want to thank Chairman Nadler, Congresswoman Bass, and other members of this committee for their leadership on these issues.

The movement for LGBTQ equality locates its origins in resisting the discriminatory profiling and police violence used to enforce laws that prevented LGBTQ people from living fully liberated lives. Police departments across the country, particularly those in larger cities with significant populations of out transgender and lesbian, gay and bisexual people, routinely profiled, surveilled, and terrorized the spaces that our community created to exist freely and safely. The seminal events at Coopers Donuts, Compton's Cafeteria, and the Stonewall Inn are reflected in the demands for justice for Tony McDade, Breonna Taylor, and George Floyd. They are also reflected in the cries for justice for the long list of Black trans women whose murders remain unsolved and lives disregarded.

The history of criminalization of Black identity and communities, and the discriminatory policing practices used to maintain that criminalization, runs even deeper. Unchecked abuses of police power and state-sanctioned violence against Black people span our nation's history. In the early 18th century, "slave patrols", first established in South Carolina and Virginia, were granted the authority to stop, seize, and administer physical discipline to those suspected of escape or rebellion.¹ And in 2015, the United States Department of Justice, after an extensive investigation following the death of Michael Brown, determined that systemic racially discriminatory practices

¹ See Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 55 (1988).

by the Ferguson Police Department had undermined community trust and left Black residents less safe.²

Despite recent efforts to provide for increased federal oversight of local police departments who engage in discriminatory and abusive practices, the institution of policing remains deeply infected with racial bias. Today's historic demand for justice requires an historic response from our federal government. We must pass legislation that drives the systemic change necessary to address recent and repeated instances of police brutality and discriminatory profiling while also courageously embracing the deep fundamental change necessary to reimagine a new community-centered safety model that allows all Black people, including Black LGBTQ people, to live fully and freely.

The memory and legacy of Tony McDade, Breonna Taylor, George Floyd, and the countless others whose names we do not know requires nothing less.

Recommendations

Deeply entrenched racism can not be undone by a single act. Governments and individuals will have to profoundly shift their actions, beliefs, and reactions before true change is achievable. Yes, Congress can take decisive steps today to begin the hard work of dismantling policing systems that actively devalues the lives of Black people. The Justice in Policing Act of 2020 reflects many of the core priorities identified by HRC and more than 400 organizations. The legislation passed by Congress must adopt a multifaceted approach to the problem.

Demilitarize the police

Since the 1990s, the Pentagon's Defense Logistics Agency has transferred surplus military equipment to more than 8,000 federal and state law enforcement agencies through the 1033 program.³ Equipment provided to police departments includes armored vehicles, grenade launchers, bayonets, explosives, and battering rams. Militarization of police has fundamentally changed policing both for the officers themselves and the individuals they are supposed to serve. Public confidence in law enforcement declines with the presence of militarized units.⁴ Even more troublingly, the transfer of military weapons to police departments increases officer induced fatalities among civilians.⁵

² U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

³ *1033 Program FAQs*, DEF. LOGISTICS AGENCY <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement/ProgramFAQs.aspx> (last visited June 8, 2020).

⁴ Nsikan Akpan, *Police militarization fails to protect officers and targets black communities, study finds*, PBS NEWS (Aug. 21, 2018), <https://www.pbs.org/newshour/science/police-militarization-fails-to-protect-officers-and-targets-black-communities-study-finds>.

⁵ Casey Delehanty et al., *Militarization and police violence: The case of the 1033 program*, RES. & POL. (June 14, 2017), <https://journals.sagepub.com/doi/full/10.1177/2053168017712885>.

Militarization changes the day to day approach of police departments. SWAT team deployments are not isolated to significant incidents such as hostage situations, rather they are routinely used by police departments. An investigation by the ACLU found that 79% of SWAT team deployments were for executing search warrants.⁶ A lack of data and recordkeeping makes it difficult to statistically ascertain which communities are most affected by militarization. However, a review of police militarization in Maryland, which bucks the trend by maintaining reliable records, shows that SWAT teams are more likely to be deployed to Black neighborhoods regardless of crime levels consistent with anecdotal evidence across the country.⁷ Congress must end federal programs, including the 1033 program, that provide police with military equipment.

Redirect funds

The United States spends twice as much on policing, prisons, and courts as it does on direct welfare programs such as Temporary Assistance to Needy Families (TANF), Supplemental Nutrition Assistance Program (SNAP), and supplemental social security.⁸ Numerous studies show that access to frequent, sufficient direct supplemental funds reduce major crimes including burglary, theft, and robbery.⁹ Yet, our current social safety net is woefully underfunded. Looking at housing alone, only one quarter of eligible people are able to obtain federal Housing Choice vouchers.¹⁰ The average national wait time exceeds two years and approximately half of all housing authorities are not accepting new applicants.¹¹

Spending on preventative programs results also in savings in other areas. For example, every dollar spent on substance abuse treatment, the government saves 12 dollars in reduced crime and health care costs.¹² Congress, states, and local governments can reduce incidents of crime by redirecting funds to critical assistance programs as well as housing programs, mental health services, substance abuse treatment, and early intervention programs.

Create federal standards for acceptable use of force

⁶ *War Comes Home: The Excessive Militarization of American Policing*, AM. C.L. UNION 3 (2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police>.

⁷ Akpan, *supra* note 4.

⁸ Christopher Ingraham, *U.S. spends twice as much on law and order as it does on cash welfare, data show*, WASH. POST (June 4, 2020), <https://www.washingtonpost.com/business/2020/06/04/us-spends-twice-much-law-order-it-does-social-welfare-data-show/>.

⁹ C. Fritz Foley, *Welfare Payments and Crime*, 93 REV. ECON. & STAT. 97 (2011), available at https://dash.harvard.edu/bitstream/handle/1/32969786/rest_a_00068.pdf?sequence=1&isAllowed=y.

¹⁰ Aaron Schrank, *It's a long wait for Section 8 housing in U.S. cities*, MARKETPLACE (Jan. 3, 2018), <https://www.marketplace.org/2018/01/03/its-long-wait-section-8-housing-us-cities/>.

¹¹ *Id.*

¹² *Principles of Drug Addiction Treatment: A Research-Based Guide (Third Edition)*, NAT'L INST. ON DRUG ABUSE (last updated Jan. 2018), <https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/drug-addiction-treatment-worth-its-cost>.

Currently, there is no federal standard that clearly defines acceptable use of force during police-civilian interactions. Instead, state and local law enforcement agencies are tasked with implementing their own guidelines with vague constitutional direction.

In its 1989 decision in *Graham v. Connor*, the Supreme Court held that excessive force cases should be determined based on whether the officer's actions were reasonable at the time.¹³ However, the "objective reasonableness" standard articulated by the Court more than three decades ago was and remains mired in ambiguity. Having not concretely answered the question of what "reasonable" means, the Court's ruling provided police departments with considerable discretion in making that determination for themselves. Subsequent lower court rulings have followed suit. As a result, police use of force is insufficiently governed by a patchwork of state laws and administrative procedures that make it nearly impossible to convict an officer under excessive force claims.

The bar must be set higher, starting with a federal use of force standard that is both clear and comprehensive. At a minimum, it should permit use of force only when necessary and as a last resort when all reasonable options have been exhausted. It should also expressly prohibit maneuvers and restraints that restrict the flow of blood or oxygen to the brain, including neck holds and chokeholds. This type of force should expressly be deemed a civil rights violation. To further safeguard individual's civil rights, Congress should update the federal criminal civil rights statute - Deprivation of Rights Under Color of Law, 18 U.S.C. §242 - by adjusting the mens rea requirement from willfulness to recklessness, permitting prosecutors to successfully hold law enforcement accountable for the deprivation of civil rights and civil liberties. Additionally, a federal standard should ban use of force as a punitive or retaliatory measure and require law enforcement to use de-escalation tactics instead.

Police officers must also act when they observe fellow officer misconduct. When witnessing a colleague using excessive force or engaging in wrongdoing, police officers should have a duty to intervene and accurately report the incident to supervisors, making it clear to the community and to other officers that law enforcement's primary responsibility is to protect and serve the public.

Transparency and accountability

Law enforcement agencies have an obligation to address the systemic and structural injustices in the criminal justice system, which include discriminatory policing practices and tactics that eroded community trust. Police departments must aim to become more transparent by making trainings and departmental procedures more available to the public. Additionally, there must be a generous data collection effort that includes information on types of police stops, instances of use of force, and the treatment of vulnerable populations, like those belonging to immigrant, LGBTQ, and Black and Brown communities. It is important that this collection of data provides separate and specific information that concerns all demographic characteristics and that is available in multiple languages.

¹³ *Graham v. Connor*, 490 U.S. 386 (1989), available at <https://supreme.justia.com/cases/federal/us/490/386/>.

Eliminate qualified immunity for police officers

Qualified immunity is a legal doctrine constructed by the federal courts to shield government officials from being personally held liable for violations of Constitutional rights. Recent evolution of the doctrine has effectively made it impossible for an average person to hold police accountable for brutality and discriminatory practices. Currently, a person must show that law enforcement violated “clearly established” law by pointing to a case arising in the same context that involves the same conduct.¹⁴ This standard deters courts from thoroughly assessing a claim which provides future claimants from having a comparable basis for their violations. Justice Sonia Sotomayor painted a bleak picture by noting that the current standard for 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.”¹⁵

The purpose of Section 1983 of the Civil Rights Act of 1871 is to create accountability for Constitutional rights violations. The courts extrapolated qualified immunity from common law rather than statute or an implied Constitutional right.¹⁶ This allows Congress to address the issue via legislation. In addition to addressing the actions of specific police officers, ending qualified immunity will incentivize cities to restructure police departments and change policies that permit an abuse of power. Ending qualified immunity does not guarantee that an individual will be successful in their claim against a police officer, but rather removes the barrier which currently prevents juries from hearing and deciding the case on the merits. Congress must end qualified immunity for police officers that engage in brutality or otherwise violate civil rights.

Creation of national public database for disciplined police officers

Tens of thousands of police disciplinary records are shielded from public view. Whether guided by state law or internal policies, police departments regularly refuse to disclose the contents of the files, arguing that doing so would constitute an invasion of officer privacy. But the professional history of a police officer whose personnel records are riddled with instances of misconduct and bad behavior should not be protected from public scrutiny.

Officer misconduct can vary widely, with offenses ranging from perjury to police brutality. Issues also arise when officers who are disciplined or fired are rehired in other jurisdictions by police executives who are unaware of their problematic professional histories. The creation of a searchable national public database for disciplined officers is necessary to ensure accountability and transparency exists in hiring decisions and safeguards members of the community who must engage with the police. Information contained therein would include, at a minimum, the names of officers who have been found to have engaged in misconduct and who have had their licenses revoked as a result.

¹⁴ *Qualified Immunity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/qualified_immunity.

¹⁵ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), <https://supreme.justia.com/cases/federal/us/584/17-467/#tab-opinion-3881475>.

¹⁶ David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 36 (1989), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2508&context=faculty_scholarship.

Require use of body cameras

When used correctly, body-worn cameras have the potential to increase transparency and provide an additional perspective to police-community encounters. Coupled with a consistent standard of use, body cameras can be used to promote both civilian and officer safety. An appropriate standard should emphasize public availability and regular reviewing of footage, except in instances where it is clear that doing so would harm a witness or compromise an active investigation.

Additional requirements should include clean reporting, with police officers providing personal accounts of police-civilian incidents before reviewing video. This helps ensure that officer narratives are not influenced by what they've observed on recorded footage. Standards should also consider the privacy rights of individuals being filmed during interactions with police. Body-worn cameras should never be used in conjunction with facial recognition software or to help officers engage in unnecessary surveilling of members from vulnerable communities, like people of color, immigrants, and the LGBTQ community.

End racial profiling

Profiling and discrimination in policing must be strictly prohibited. In particular, these dangerous practices disproportionately affect people of color and those from the LGBTQ community, who are at an increased risk of arrest and incarceration as a result of over-policing.¹⁷

The effects of discriminatory profiling also have a chilling effect on the reporting of crimes. Studies have shown that vulnerable communities are hesitant to call the police as a result of prior police mistreatment. A majority of respondents in the 2015 U.S. Transgender Survey revealed they would feel “uncomfortable asking the police for help”, even if they required it.¹⁸

To combat the rampant use of discriminatory profiling in policing, Congress should immediately pass the End Racial and Religious Profiling Act.

The End Racial and Religious Profiling Act prohibits law enforcement from targeting a person based on actual or perceived race, ethnicity, national origin, religion, gender, gender identity, or sexual orientation without trustworthy information that is relevant to linking a person to a crime.¹⁹ The Act also requires law enforcement to maintain adequate policies and procedures designed to eliminate profiling, including increased data collection in order to accurately assess the extent of the problem. Additionally, the Act compels law enforcement officials to receive training on issues of profiling and mandates the creation of procedures for receiving, investigating, and responding to complaints of alleged profiling.

¹⁷ CTR. FOR AM. PROGRESS, UNJUST: HOW THE BROKEN CRIMINAL JUSTICE SYSTEM FAILS LGBT PEOPLE OF COLOR 22 (Aug. 2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-poc.pdf>.

¹⁸ SANDY E. JAMES ET AL., NAT'L CTR. TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

¹⁹ S. 2355, 106th Cong. (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/2355/text>.

It is important, now more than ever, that Congress pass this important legislation and demonstrate a commitment to ending discriminatory profiling in policing.

Prohibit no-knock warrants

No-knock warrants authorize police to enter a premises without announcing their presence or their purpose. Intended to prevent the destruction of evidence or ensure police safety, no-knock warrants have instead led to the killing and injury of innocent people. An analysis of no-knock warrant raids conducted by the New York Police Department found that 10 percent were wrong-door raids.²⁰ Even in circumstances in which police correctly identify a premises, information that led to the identification of a suspect has come through false claims or unreliable confidential informants.²¹

Barriers to obtaining no-knock warrants are few. In an investigation into no-knock warrants in Little Rock, Arkansas, police successfully obtained no-knock warrants by using boiler-plate language alone regarding the supposed danger of the situation in 95 of 103 granted no-knock warrants.²² Congress, states, and local governments must prohibit the use of no-knock warrants to ensure the safety of the people.

Increase use of special prosecutors to investigate police misconduct and excessive use of force.

The mutualistic relationship between police officers and prosecutors threatens the equitable application of justice. Prosecutor's frequently work alongside local police departments to institute legal proceedings against potential and existing defendants. This close-knit relationship creates a serious conflict of interest when the alleged perpetrator of a crime is a police officer.

Consequently, police officers are rarely charged or convicted for police misconduct, even in the presence of overwhelming evidence that it has occurred. In the event that an officer is indicted, broad prosecutorial discretion ensures that only a small percentage are ever convicted. In the past year, over 1,000 people were fatally shot by police, while countless others were victims of uses of force that did not involve a gun.²³ Of the 10,000 people killed by police between 2005 to

²⁰ Dara Lind, *Cops do 20,000 no-knock raids a year. Civilians often pay the price when they go wrong.*, Vox (May 15, 2015), <https://www.vox.com/2014/10/29/7083371/swat-no-knock-raids-police-killed-civilians-dangerous-work-drugs>.

²¹ See e.g. Radley Balko, *Little Rock's dangerous and illegal drug war*, WASH. POST (Oct. 14, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/10/14/little-rocks-dangerous-and-illegal-drug-war/>.

²² *Id.*

²³ *Fatal Force: 1041 people have been shot and killed by police in the past year*, WASH. POST (updated June 8, 2020), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_9.

2014, only 153 officers were charged in their deaths.²⁴ These numbers represent a failing of the criminal justice system and erodes public trust in law enforcement.

Substantial criminal justice reform must include holding police officers accountable for the crimes they commit. To do so, state officials should appoint special prosecutors to independently review allegations of police misconduct and excessive use of force incidents. Shifting the responsibility of prosecuting officers from local prosecutor's offices onto the shoulders of external parties would build trust between law enforcement and the communities they are entrusted to protect and serve.

Conclusion

As hundreds of thousands of protestors march the streets to denounce police violence, we must acknowledge the role of law enforcement in perpetuating systems of oppression against our most vulnerable people. Many of the policy changes outlined above are addressed by the Justice in Policing Act, but that is only one step. The modern-day criminal justice system's preservation of white supremacy and traditional power imbalances have had devastating impacts on communities of color and members of the LGBTQ community. It is not enough that we reform the system. We must also dismantle the systemic and structural racism that lingers throughout our society.

²⁴ Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASH. POST (Apr. 11, 2015), https://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?itid=ik_interstitial_manual_13.